

# **What is the international legal experience with mining and human rights through the lens of the UN Declaration?**

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## **1. Introduction**

This expert paper will focus on the international legal experience relating to mining and Indigenous human rights post-adoption of the UNDRIP by the United Nations General Assembly. The proliferation of human rights inquiry into mining and human rights post-DRIP traverses both remedial issues relating to Indigenous peoples' rights during and after mining operations. It also focuses on Indigenous peoples' rights prior to mining activity and the rights afforded when mining occurs on Indigenous lands and territories. This post-UNDRIP period has also coincided with a mining boom in many parts of the world followed, inevitably, by a downturn in mining in some parts. In addition climate change has seen in many Indigenous lands changing environment which has opened their lands and waters up to new mining enterprises that has involved complex negotiations for Indigenous peoples including business opportunities as well as acute strain on Indigenous services as the influx of miners place pressure on Indigenous-specific services and businesses and towns and areas; meaning a disruption to social cohesion and in many respects increases in racist incidents and tensions. The extensive scholarly and research literature I consulted post-UNDRIP adoption and post-mining boom, reveals a limited inquiry into the economic and social impacts on Indigenous communities even less so with reference to the UN Declaration. And a paucity of inquiry entirely insofar as the gendered impact of mining booms and mining activity on Indigenous women. This paper will endeavour to traverse many of these issues.

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) contains several provisions relevant to Indigenous peoples and mining. The starting point for any such inquiry is the right to self-determination. Article 3 outlines the right to be freely determine one's economic, social and culture development. Internationally, there is a wealth of literature on mining and human rights. There is also a large body of work on the mining industry and Indigenous rights. This body of work primarily focuses on Indigenous peoples right to free, prior and informed consent (FPIC), as recognised in the United Nations Declaration on the Rights of Indigenous Peoples, and mining operations. This body of work focuses predominantly on FPIC as a procedural right and over time this right has become conflated with the right to self-determination.

First this paper will set out the relevant articles of the UNDRIP relating to Indigenous peoples rights and mining. Then this paper will survey several issues that exemplify the human rights concerns that have been ventilated internationally and in UN forums on Indigenous rights. These issues will highlight the challenges that arise insofar as mining and human rights for Indigenous peoples. I survey:

- a) FPIC and mining.
- b) Employment.
- c) Social impact.
- d) Indigenous decision-making mechanisms.

## **2. The relevant provisions of the UNDRIP**

There are many articles of the United Nations Declaration on the Rights of Indigenous Peoples relevant to mining and human rights insofar as Indigenous peoples are concerned. Article 3 recognises the right to self-determination; Article 8 the right to equal protection under the law and seeks to eliminate and prevent discrimination; Article 10 protects rights against removal from land. Article 25 stresses the importance of cultural and spiritual values that exist in the relationship with land, while article 26 pertains to the right to own and have access to land on the basis of traditional ownership. Article 28 outlines the right to compensation. Article 29 enshrines the right to use, manage and conserve resources and land, while article 32 sets out the right to have input into decisions where States retain ownership of minerals or subsurface resources. Article 33 pertains to the right to develop and determine identity and membership.

The provisions that mention free, prior and informed consent provisions of the Declaration are arts. 10, 11, 19, 28, 29 and 32.

Free, prior and informed consent is a human rights norm grounded in the fundamental rights to self-determination and to be free from racial discrimination guaranteed by the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *International Convention on the Elimination of All Forms of Racial Discrimination*. The provisions of the Declaration, including those referring to free, prior and informed consent, do not create new rights for indigenous peoples, but rather provide a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples (see A/HRC/9/9, para. 86), as shown in the following sections.

### **3. The right to self-determination**

The right to self-determination is the fundamental human rights norm that underpins the UNDRIP. It is the norm that underpins the right to free, prior and informed consent also. Historically, the right to self-determination is rooted in the decolonization movement. It was conceived to ensure subjected nations and peoples could recover their autonomy, preside over their destinies, make decisions for themselves and control their resources.<sup>1</sup> Therefore the notion that people should have a say or control over the exploitation of lands and resources is deeply embedded in the right to self-determination.<sup>2</sup> FPIC is a way to operationalize the right to self-determination, “The international legal framework that conceptualized the right to self-determination paid particular attention to peoples and nations recovering control over their lands and natural resources as an important constituent element of the right to self-determination”.<sup>3</sup>

It is for this reason that free, prior and informed consent is of particular relevance to lands and resources and it is why it applies to mining and human rights. However, it has been increasingly dislocated from Art

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<sup>1</sup> See General Assembly resolution 1514 (XV).

<sup>2</sup> See General Assembly resolution 1803 (XVII); and Nicolaas Schrijver, “Self-determination of peoples and sovereignty over natural wealth and resources” in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations publication, Sales No. E.12.XIV.1).

<sup>3</sup> See Marion Mushkatt, “The process of decolonization: international legal aspects”, *University of Baltimore Law Review*, vol. 2, No. 1 (Winter 1972).

3 of the UNDRIP. The United Nations Expert Mechanism on the Rights of Indigenous Peoples (‘EMRIP’), stated in 2011 that this principle consists of four, interrelated elements<sup>4</sup>:

The element of ‘free’ implies no coercion, intimidation or manipulation; ‘prior’ implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow indigenous peoples to undertake their own decision-making processes; ‘informed’ implies that indigenous peoples have been provided all information relating to the activity and that that information is objective, accurate and presented in a manner and form understandable to indigenous peoples; ‘consent’ implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.

#### **4. General international legal issues pertaining to mining and human rights**

The dramatic rise in global mineral extraction globally coincided with the United Nations General Assembly’s adoption of the UNDRIP.<sup>5</sup> Also, since 2007, there was a discernable increase in land investment.

The world has seen a massive increase in land investment since 2007 (Borras et al. 2012), and considerable literature has been produced on the topic of land grabs to study the impacts of these land control changes in tropical countries (Edelman et al. 2013). The terms “land rush” and “land grabbing” refer here to “the largescale acquisition of land or land-related rights and resources by a corporate, nonprofit or public buyer for the purposes of resource extraction geared towards external consumers (whether external means simply off-site or foreign)” (White et al. 2012).<sup>6</sup>

This proliferation of the use of FPIC is shaping and or fencing-in Indigenous peoples’ rights relating to mining has occurred during a period of escalation in term of ‘land grabs’. In many ways these developments have shaped the way the UNDRIP has been used and deployed post-2007 because of the way Indigenous communities have had to manage the proliferation of global mining operations, and this has not always involved large-scale mining agreements. Even so the FPIC provisions of DRIP have been heavily drawn on

The latest global mining boom, which began in 2003 with a dramatic rise in mineral prices, saw private resource corporations extend their reach across the globe as large-scale mining operations became extremely profitable. The exhaustion of easily accessible deposits and the advancement of new technologies have led to the unprecedented expansion and intensification of extractive industries, often in previously isolated areas where Indigenous communities reside. The right to free, prior, and informed consent (FPIC), which is established in international conventions, notably the 1989 International Labour Organization’s (ILO) Convention 169 on Indigenous and Tribal Peoples and in non-binding or soft law, such as the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), has strengthened the legitimacy and capacity of Indigenous movements to contest extractive industry operations.<sup>7</sup>

While ILO 169 is relevant to those countries who have incorporated the Convention, the UNDRIP as a non-binding resolution of the UNGA has played a significant role in the management of mining by companies or the state. It is true that the UNDRIP has provided Indigenous communities with a tool in

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<sup>4</sup> Human Rights Council, *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/18/42 (17 August 2011) annex, [25] (‘*Expert Mechanism Advice No 2 (2011): Indigenous Peoples and the Right to Participate in Decision-Making*’).

<sup>5</sup> Kröger, Markus, ‘The Global Land Rush and the Arctic’ in *The GlobalArctic Handbook* (Springer International Publishing, 2018) 27.

<sup>6</sup> Kröger, Markus, ‘The Global Land Rush and the Arctic’ in *The GlobalArctic Handbook* (Springer International Publishing, 2018) 27.

<sup>7</sup> Rice, Roberta, ‘The Politics of Free, Prior and Informed Consent: Indigenous Rights and Resource Governance in Ecuador and Yukon, Canada’ (2020) 2019(2) *International journal on minority and group rights* 336.

which to manage the many dimensions of increased mining activity, however this has tended to focus on procedural rights such as FPIC, rather than the social and cultural dimensions of the UNDRIP; and often to the exclusion of the right to self-determination. In 2008 the failure to contemplate human rights and mining beyond the right to self-determination in Art 3, was singled out by John Taylor insofar as the failure of GDP and other economic statistical indicators to capture Indigenous well-being in terms of mining operations

a mainstream measure of well-being (employment in mining) may have negative consequences for an Indigenous measure of well-being (carrying on traditional cultural ways). More to the point, it illustrates that a range of Indigenous views on the appropriateness of various indicators are likely to exist and that, in all probability, these will stand outside, and therefore be excluded from, more mainstream indicator frameworks.<sup>8</sup>

It is exhausting, time-consuming and expensive for many Indigenous peoples to keep up with this commercial mining activity and the way their land title and land rights are used by capital and governments to undermine Indigenous rights or to limit them. On the other hand, this period of mining activity has also led to innovations and positive developments for Indigenous communities

The relationships that have developed between resource extraction companies and local and indigenous people in the shadow of their operations have conventionally been cast as corporate social responsibility issues. However, several jurisdictions have developed statutory and regulatory regimes that have improved the status of indigenous people and local communities beyond that of mere stakeholder. These regimes include impact benefit negotiations and agreements for compensation for impacts and take various forms in different jurisdictions.

The following sections highlight the challenges and opportunities that arise from experiences in international law.

## **5. FPIC and mining**

The UNDRIP has five specific references to free, prior and informed consent (see arts. 10, 11, 19, 29 and 32), providing a non-exhaustive list of situations when such consent should apply. Free, prior and informed consent may be required for legislative or administrative measures and any project affecting indigenous peoples' lands, territories and other resources. It is also required in instances of relocation of indigenous peoples from their lands or territories and storage of hazardous materials on their lands or territories (arts. 10 and 29). The role of free, prior and informed consent in the realm of natural resource development is set out in article 32.<sup>9</sup> The general rule in the case of extractive industries' projects within the territories of indigenous peoples is that the free, prior and informed consent of indigenous peoples is required. Indigenous peoples' consent may also be required when extractive activities otherwise affect indigenous peoples (outside their territories), depending upon the nature of and potential impacts of the proposed activities on their rights.<sup>10</sup>

As to impact, consent is required if a measure or project is likely to have a significant, direct impact on indigenous peoples' lives or land, territories or resources.<sup>11</sup> This approach is known as the 'sliding scale

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<sup>8</sup> Taylor, J. Indigenous Peoples and Indicators of Well-being: Australian Perspectives on United Nations Global Frameworks. *Soc Indic Res* 87, 111–126 (2008).

<sup>9</sup> See, A/HRC/24/41, A/HRC/21/52 and A/HRC/21/55.

<sup>10</sup> See, A/HRC/24/41.

<sup>11</sup> See, A/HRC/12/34, para. 47.

approach' which means that the level of effective participation that must be guaranteed to indigenous peoples is essentially a function of the nature and content of the rights and activities in question.<sup>12</sup> This view is supported by the Human Rights Committee,<sup>13</sup> which uses the language "substantive negative impact", and the Committee on Economic, Social and Cultural Rights. Both have linked the issue of free, prior and informed consent to the nature and the effects that a proposed initiative will have on indigenous peoples' rights in the respective human rights treaty: an approach in line with the jurisprudence of the Inter-American Court of Human Rights<sup>14</sup> and the African Commission on Human and Peoples' Rights.<sup>15</sup> Assessment of the impact requires consideration of the nature, scale, duration and long-term impact of the action, such as damage to community lands or harm to the community's cultural integrity.

## 6. Employment

One of the deceptively simple benefits of mining on Indigenous lands is the opportunity for employment. Employment is a fundamental aspiration of economic and social development. It is set out in Article 21 of the UNDRIP that '*Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security*'. There are generally employment opportunities that arise because of a mining boom, particularly for those who live on or near mining areas. One feature of the mining boom from ten years ago is the proliferation of the job market and the expanded opportunities for Indigenous peoples to train.

Employment can be a central part of the agreement with the treaty-state. Indeed, this boom can be characterized as featuring emerging best practice in relation to agreement-making, whereby mining companies are taking a more long-term approach that involves consideration of the well-being and socioeconomic disadvantage of indigenous peoples. This means that agreements cover not only distribution of revenue but also poverty, education, training, health and culture.

However, there is a negative side to this and that is the exclusion of Indigenous peoples from employment opportunities:

Studies of mining regions suggest that the marginal position of Aboriginal people in the wider community is reinforced by mining operations (Lockie et al.). Mining towns are generally characterised by low employment of Indigenous people because industrial relations policies tend to favour employment of people with previous mining industry experience and there are fewer opportunities for the Indigenous population to access required training for job opportunities. FIFO projects also tend to exclude Aboriginal communities from potential involvement, with pick-up points situated outside such communities (Petkova et al. 212).

## 7. Social impact

The social impact of mining has been acute in many jurisdictions around the world in an adverse way. Mining booms and expanded mining operations dramatically change the social cohesion of a town. The

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<sup>12</sup> Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective*, International Studies in Human Rights, vol. 102 (Brill/Nijhoff, 2009), p. 113.

<sup>13</sup> See *Länsman et al. v. Finland* (CCPR/C/52/D/511/1992) and *Poma Poma v. Peru*.

<sup>14</sup> See *Saramaka* case.

<sup>15</sup> See *Centre for Minority Rights Development v. Kenya*, 276/03 (the *Endorois* case).

social impact of the mining boom has been extensively documented in the Australian literature.<sup>16</sup> Mining has a huge impact on the local social fabric and indigenous communities in close proximity to mining operations can experience constant life insecurity.<sup>17</sup> This can manifest in a number of ways, especially the influx of visitors and residents, the presence of transient workers can be a problem particularly if they import discriminatory and intolerant attitudes, the influx of non-indigenous migration is a real risk and also, increased tourism place pressure on a community. One study of a large hydropower dam in Malaysia describes the impact in the following way

Large hydropower dams present immense social and environmental challenges for local communities, which can include resettlement of affected individuals and communities, psychological stress, loss or decline of livelihood and assets, changes to lifestyles and traditions, impacts on fishing, agriculture and food security, impacts on access to and quality of water and a wide range of environmental adverse effects.<sup>18</sup>

One other feature of the mining boom also is the gendered impact it has upon communities. There is very little attention paid to this issue.

There are several benefits of a mining boom and that includes an increased spend on public infrastructure. Benefits also include better roads, increased traffic and increased tourism and community conflict stemming from perceived and real opportunities for income, jobs and education. Moreover the mining boom does shed a light on the lack of government investment in services, facilities and infrastructure in mining regions and the declining economic status of Aboriginal peoples.

However, for Indigenous peoples a mining boom has led to housing shortages and increased rent, placing added stress on already difficult and strained housing stock for indigenous peoples. In addition, the fly-in/fly-out practice has rendered social housing less accessible. The UN PFII study on the mining boom in Australia describes the social impact in the following way

In addition, medical issues such as whooping cough or gastroenteritis have been known to spread more easily in fly-in/fly-out camps. The impact of any medical crisis upon such camps means that local health services are stretched even further. There are also concerns about substance abuse, including high levels of alcohol consumption and drug-taking, as mining employees inundate towns. The corollary of such inflows is the antisocial and violent behaviour that occurs with, in particular, high consumption of alcohol. The high cost of living frequently found in mining regions entails high food prices, which will affect the nutrition of indigenous families and the selection of fresh fruit and vegetables. Lastly, an issue raised by many indigenous peoples is the impact of the mining boom on their culture, with elders noting the diminution of leadership. Mining employment can affect the maintenance of cultural knowledge.<sup>19</sup>

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<sup>16</sup> John Taylor, "Measuring indigenous outcomes from mining agreements in Australia", in *Community Futures, Legal Architecture*, Langton and Longbottom, eds., p. 60; Kerry Carrington, Russell Hogg and Alison McIntosh, "The resource boom's underbelly: criminological impacts of mining development", *Australian & New Zealand Journal of Criminology*, vol. 34, No. 3 (2011), pp. 335 and 340.

<sup>17</sup> Kerry Carrington, Russell Hogg and Alison McIntosh, "The resource boom's underbelly: criminological impacts of mining development", *Australian & New Zealand Journal of Criminology*, vol. 34, No. 3 (2011), pp. 335 and 340.

<sup>18</sup> Cooke, F. M., Nordensvard, J., Saat, G. B., Urban, F., and Siciliano, G. (2017) The Limits of Social Protection: The Case of Hydropower Dams and Indigenous Peoples' Land. *Asia & the Pacific Policy Studies*, 4: 437–450.

<sup>19</sup> 'Study on the impact of the mining boom on indigenous communities in Australia' (E/C.19/2013/20).

Even so, the attitude of some in the mining industry toward Aboriginal people has been such that ‘although benefits are available from resource development, the negative social and cultural impacts of development are their own doing’.<sup>20</sup>

While it has been noted that mining companies have contributed to infrastructure and service delivery in indigenous communities, including by providing resources for health services, many health concerns have arisen in relation to the boom:

if we add to this the fact of relatively high Indigenous morbidity rates commencing in young adulthood and rising throughout the prime working ages, then a pattern emerges of severe physical constraints on the ability of many in the community to engage in meaningful and sustained economic activity.

Ironically, the current indigenous health crisis in Australia already poses an obstacle to full participation in the labour market, as does the vastly under-resourced health infrastructure that some mining companies have targeted in their agreements with indigenous communities.

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## **8. Decision-making mechanisms**

In some instances, the mining boom has put significant pressure on public institutions created to represent Indigenous peoples. This can be done in a number of ways. The balancing process that occurs when managing the influx of non-Indigenous peoples as well as possible financial benefits as a consequence of stretched resources can impede the functioning of Indigenous representative bodies. Another impact is where large numbers of non-indigenous peoples move into indigenous areas and seek representation under an Indigenous entity, because they believe they should have a voice in Indigenous politics and in deciding the distribution of resources.

Despite the relatively good position of the Sámi parliaments in three Nordic countries, it has recently been demonstrated that the real abilities of the Sámi Parliaments to affect national decision-making processes are rather limited,

One of the most recent examples in Finland is the negotiation process of the agreement concerning fishing rights in the River Teno, in which the Sámi Parliament was not properly consulted. Despite strong Sámi opposition, the Finnish and Norwegian states ratified the agreement. According to the statement of the Sámi Parliament in Finland (12.8.2016) the

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<sup>20</sup> Caine KJ, Krogman N. Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada’s North. *Organization & Environment*. 2010;23(1):76-98.

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agreement violated the Sámi people's rights to cultural and property protection, and self-determination (Sámi Parliament in Finland).<sup>21</sup>

## **9. Conclusion**

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<sup>21</sup> Sámi People at Different Levels of Decision-Making Processes in the Global Arctic Laura Olsén.