When Money Doesn't Matter

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The right to say no to mining at Jabiluka — a human rights approach.

This is our Country. The Mirrar have said no to this mine. It is our responsibility to protect this country and we will not allow this hole to be dug.

Yvonne Margarula[1]

The land containing both the Jabiluka lease and the Ranger uranium mine belongs to the Mirrar Gundjehmi people.The senior Traditional Owner is Yvonne Margarula who has responsibility for the Country of the Mirrar. Ms Margarula has stated that she has a duty to say no to uranium mining at Jabiluka because the royalties and general effects of mining have not been beneficial to her people or land. All the other parties involved — Energy Resources of Australia (ERA), the Northern Territory Government and the Federal Government — have rejected Yvonne Margarula's position explicitly or implicitly. This article explores the legal implications of her decision to say no and argues that if international human rights law is applied, then Ms Margarula's request would be upheld.

The most obvious international human rights remedy applicable to this case would be to pursue a complaint under the International Covenant on Civil and Political Rights (ICCPR). This is not the only international remedy that would be available: there are also complaint mechanisms under the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, the jurisprudence of the Human Rights Committee, the body with authority to consider complaints under the ICCPR, is the most well known. This is particularly so for the arguments that would be raised in this case, such as the rights of minorities vis a vis governments and private companies.

Procedural requirements

In international human rights law, as in domestic law, there are a number of procedural requirements to be satisfied before a complaint can be considered on its merits. These are referred to as admissibility requirements and are found in Articles 1, 2, 3 and 5 of the Optional Protocol to the ICCPR. The Optional Protocol is a treaty, which if ratified by a state party, allows individuals to bring complaints against their governments for alleged breaches of the ICCPR. The first and indeed most onerous of these admissibility requirements is the 'exhaustion of domestic remedies'. Article 5(2) states:

> The Committee shall not consider any communication from an individual unless it has ascertained that:
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> ...
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> (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.[2]

The purpose of Article 5(2) is to limit interference in domestic affairs and to allow the resolution of particular human rights issues by the

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sovereign state. It is, therefore, usually applied strictly; reflected in the fact that 45% of communications received by the Human Rights Committee under the Optional Protocol have been found inadmissible.[3] In the case of the Jabiluka communication it would appear that the exhaustion of domestic remedies requirement has been satisfied. However, the case does raise some interesting questions about the interpretation of Article 5(2)(b).

Essentially the Jabiluka communication could argue that, *in effect,* all remedies have been exhausted because ERA has, *in fact,* commenced mining-related activities. Furthermore, all arguments for an injunction or challenges to the validity of the mining lease have to date failed.[4] The state, on the other hand, would argue that there are still remedies to be pursued, for example, an appeal in the Full Federal Court arguing the validity of the Jabiluka lease, and appeals relating to the granting of export licenses or, alternatively, to the granting of the mining authorisation by the Resource Development Minister of the Northern Territory. These opposing arguments reflect both a substantive and a formalistic approach to the interpretation of what is meant by the 'exhaustion of available domestic remedies'. The Committee's jurisprudence on the interpretation of this requirement is dependent on the type of human rights that is being argued. Where the breach being complained about cannot be readily reinstated or compensated, the 'exhaustion of domestic remedies' is interpreted liberally. This was raised in the *Lubicon Lake Band* case,[5] in which the Chief of the Band was the author of a communication against Canada. He was contesting the granting of leases by the provincial Alberta Government to private companies for the exploration of oil and gas on traditional land.

Generally, in international human rights law, a federal government is responsible for the actions of its federal entities and private companies acting within its jurisdiction.[6] The state party argued strenuously in the *Lubicon Lake Band* case that domestic remedies had not been exhausted.

Canada cited the fact that there had been only arguments for injunctions, and that challenges on the merits still remained to be pursued through the Canadian judicial system. The Human Rights Committee rejected this argument. The Committee accepted that '[the] exhaustion of domestic remedies can be required only to the extent that these remedies are *effective and available*'[7] (emphasis added). The Committee cited the submission of the applicant, and accepted that the only effective remedy was an interim injunction because 'without the preservation of the status quo, a final judgment on the merits, even if favourable to the Band, would be rendered ineffectual' in so far as 'any final judgement recognizing aboriginal rights, or alternatively treaty rights [could] never restore the way of life, livelihood and means of subsistence of the Band'.[8] These arguments could be applicable to the Jabiluka case, as the type of rights being considered are minority, cultural and religious rights. As the substance of the claim is that these rights are inextricably linked to the preservation of the land, the exhaustion of effective remedies is really in relation to injunctive relief only.

The same arguments that support a liberal interpretation of exhaustion of domestic remedies also supports the Committee making an interim measures order pursuant to Rule 86 of the Rules of Procedure of the Human Rights Committee. These orders, similar to injunctions, are made in urgent cases, classically to stay a deportation or an execution. However, an interim measures order was made in the *Lubicon Lake Band* case on the basis that the mining would affect a culture that was already on the brink of collapse. It may be that such an argument could be made in the Jabiluka case, as there is concern about the survival of the clan itself and related clans. 'Many of the clans and family groups mapped and identified in the Fox uranium inquiry in 1978 have since died and others, including whole language groups, have probably passed the point of no return.'[9] This would be considered within the larger context of Aboriginal human rights within Australia, including statistics on health and infant mortality that tragically creates a compelling and analogous situation to the *Lubicon Lake Band* case, as a group seriously under threat. The remaining procedural requirements would appear to be capable of being met depending on who lodged the communication and how it was framed.[10]

The merits

With Indigenous rights being under scrutiny and attack domestically, it is timely to consider Australia's international obligations. The main Indigenous rights in the ICCPR are found in Article 27, which states:

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

I use the term Indigenous rights, loosely because a breach of Article 27 can only be complained of by an individual not a group. Until the Human Rights Committee reinterprets its stand on the right to self-determination contained in Article 1 of the ICCPR, which it has held to be incapable of being considered under the Optional Protocol to the ICCPR, then Indigenous peoples are primarily left with Article 27. The jurisprudence on this Article can be found in general comments and decisions by the Committee.

As yet no complaint has been considered on its merits against Australia in relation to Article 27. The Committee has understood the objectives of Article 27 to be to ensure the 'survival and continued development of the cultural, religious and social identity of the minorities concerned thus enriching the fabric of society as a whole'.[11] This means that Article 27 issues are quite often counter to the dominant culture. In the case of Jabiluka, the Traditional Owner has rejected the objective of wealth creation; she does not want financial compensation and has refused royalty payments by ERA. This is based on the fact that what is of value cannot be compensated in purely money terms, and as Traditional Owner she has a duty to uphold what is best for her community.

> In the 1970s a large chunk of Mirrar country was taken from them for the Ranger open-cut uranium mine. This huge scar on the landscape has brought nothing but misery for the Aboriginal population. Despite the claims of the NT Government and Energy Resources of Australia the royalty payments have achieved little for the Mirrar ... Whilst Jabiluka is proposed as an underground mine ... it will similarly destroy the Country ... Once Mirrar's Country is destroyed, the Mirrar is destroyed.[12]

The question is to what extent should this view be accommodated by the Australian Government pursuant to its obligations under Article 27 of the ICCPR?

The leading case on the scope of Article 27 is *Lansmann v Finland.*[13] In this case Sami reindeer breeders claimed that quarrying, which the Finnish Central Forestry Board had

authorised, interfered with reindeer herding and thus was a breach of Article 27. The reindeer herding was a manifestation of the traditional culture of the Sami people and necessary for the economic survival of the group. The Committee found that the Government of Finland was in fact not in breach of Article 27. However, in coming to this conclusion the Committee indicated the issues to be considered.

The first is that 'the right to enjoy one's culture cannot be considered *in abstracto* but has to be placed in context'.[14] The context of the Jabiluka case begins in the late 1970s with the Fox Inquiry into Uranium Mining. This inquiry recommended that mining be conducted at the Ranger site, yet no traditional owner's consent was sought or given for this mine.[15] The Jabiluka lease negotiated in1982 was subject to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and, pursuant to this Act, traditional owner's consent was sought. This consent was given by Mr Toby Gangale, the Father of Yvonne Margarula, and resulted in the 1982 Jabiluka lease. The nature of this consent has been contested by the Mirrar people, who allege it was obtained under duress. Nevertheless the 1982 Jabiluka lease was to lay dormant, because a change in government prohibited uranium mining (the three-mine policy).

Sixteen years later a reversal in policy on uranium mining has meant that ERA wants to commence mining under the authority of the 1982 Jabiluka lease. ERA initially proposed a variation to the original 1982 Jabiluka lease, suggesting it would mine at Jabiluka and mill the uranium at its Ranger plant. Ms Margarula rejected this option.[16] ERA was, therefore, required to return to the context of the original 1982 Jabiluka lease to mill and mine at Jabiluka. ERA has conducted an Environmental Impact Statement, and is currently in the process of conducting a Public Environment Report required due to the change in plans in relation to milling. There has also been a separate social impact study considering the social effects of mining in the Kakadu region — *The 1997 Kakadu Region Social Impact Study.* ERA in consultation with the Northern Land Council, has made undertakings to pick up recommendations from this study including strategies to improve employment, support external business activities, and promote educational opportunities.[17]

Having stated the context of the case, there are four other considerations isolated by the Committee in *Lansmann* to determine if there has been a breach of Article 27:

- the impact of the activity,
- the ability of the activity to accommodate the culture,
- the duration and extent of the activity, and
- evidence of any consultation with indigenous groups.[18]

In the case of the Jabiluka mine all of these factors tend towards the state party being in breach.

The impact of the mining would be analysed in the context of the last 16 years in which mining has occurred on the land of the Mirrar. On a benign reading of the events, mining has not improved the position of the Mirrar people and as stated by ERA: 'mining activity in the last 16 years is seen as only one of the impacts that may have adversely affected Aboriginal society in the region'.[19] This is taken a step further by the 1997 Social Impact Study[20] which found that:

> ... however some of the worst fears of Aboriginal people of the 1970s have come to pass ... Key social indicators like education, health and employment are as bad as any community in Australia. Alcohol misuse is chronically debilitating to individuals and social interaction ... Competition among Aboriginal factions in the Region over access to royalty money has been quite destructive.'[21]

Yet despite payment of royalty money it was found that 'the living conditions of some of the Aboriginal communities are acceptable, but others are as of the third world'.[22] It should be noted that this social impact study was a co-operative study with ERA, the Federal Government and the Northern Land Council, all of whom supported mining. The Traditional Owner would argue that mining has threatened their very existence as a cultural entity. Therefore, from any perspective, mining has not been beneficial and in fact has had adverse consequences.

The Government is placed in a different and, indeed, more difficult position than the Government of Finland in *Lansmann.* The burden rests with them to demonstrate how authorising mining and related activities for a further 17 years under the Jabiluka lease will not adversely affect an already vulnerable culture. Furthermore, in *Lansmann* the reindeer husbandry was seasonal and could, therefore, be accommodated by restricting quarrying to certain amounts and times of the year. At Jabiluka, the mining is ongoing, has been claimed to be potentially one of the largest deposits in the world, and the nature of the activity and the extent of it are less able to be reconciled with Indigenous interests than was the case in *Lansmann.*

Consultation is another consideration of state compliance with Article 27. The state party's central argument would be that the mine occurred with the authority of the Traditional Owner (the 1982 Jabiluka lease). Allegations of duress in relation to the 1982 lease would be open to consideration by the Committee. However, there may be hesitation in considering this aspect of the case, as the Traditional Owner's consent was given before Australia's ratification of the Optional Protocol in December 1991. Although clearly the 'effects' of the 1982 Jabiluka lease are continuing post-ratification, and, therefore, are technically able to be considered by the Committee, the Committee would be hesitant to concentrate on the validity of the lease. Rather, it would consider whether in the last 16 years, and, particularly in the time immediately before mining activity, there has been effective consultation. The consultation with the Northern Land Council would not, in this case, indicate consultation with the Traditional Owners. In complaints to the Human Rights Committee, in cases where there have been competing and differing views by other indigenous peoples or groups, the Committee has been quite consistent in separating out the entities. In this case it has been consistently maintained by the Traditional Owner and implicitly accepted by the Northern Land Council that they had different opinions. Indeed, Justice Toohey found:

> Mirrar are a local descent group who have common spiritual affiliations to sites on the land that place the group under a primary spiritual responsibility for the sites and the land. There is no dispute that members of the group are entitled by Aboriginal tradition to forage, as of right, over that land.[23]

All of these arguments will depend on facts submitted to the Human Rights Committee and on who actually lodges the complaint. The purpose of the above discussion is to indicate the type of balancing considerations the Committee engages in. There are many variations to the arguments that could occur if a communication was lodged. For example, if an Aboriginal person were arrested for trespass on traditional land, or an Aboriginal person damaged ERA property

while protesting, and was subject to mandatory imprisonment, then acute issues in relation to Article 27 would arise.

There are other articles of the ICCPR that could be alleged to have been breached. However, one must remember that extensive claims in the *Lubicon Lake Band* case were rejected as unsubstantiated. Primarily, the strongest claims besides Article 27, may be Article 18 (freedom of religion). The 1998 report by the United Nations Special Rapporteur on Religious Intolerance dealt extensively with the linkage between Aboriginal land and religion and this would add considerable weight to any arguments that are raised under Article 18.

Domestic application

However, regardless of whether a complaint is made to the Human Rights Committee, it may be that the jurisprudence on Article 27 will have domestic application. The status of international law domestically is that it can be used to develop the common law and to aid in the interpretation of ambiguous legislation.[24] So, for example, it was reported that Justice Bailey stated in the Northern Territory Supreme Court, when an injunction was sought to stop mining at Jabiluka: 'on balance ... Energy Resources of Australia (ERA) would suffer greater losses than the Taditional Owners if the work was delayed'.[25] It could be argued that spiritual and cultural threats should be considered as 'losses', and given considerable weight to be consistent with Australia's obligation under Article 27. For, as stated in *Lansmann:*

> A state may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to its obligations it has undertaken in Article 27.[26]

Conclusion

'Culturally surviving clans are struggling to hold on to their cultural traditions and pass them on to new generations in the face of the establishment of mines in sensitive and culturally important areas'.[27]

Despite this finding, the spiritual and cultural rights of the Mirrar people and, in particular, Yvonne Margarlua have not been given prominence in any of the domestic legal challenges to date. What international human rights law does is allow cultural and spiritual rights to be explicitly recognised and considered on their own terms, in an attempt to respect, understand and protect them.

References

1. Gundjehmi Aboriginal Corporation, Media Release, 19 May 1998.
2. This requirement to exhaust remedies is repeated in Article 2 of the Optional Protocol.
3. Charlesworth, Hilary, 'Individual Complaints: An Overview and Admissibility Requirements', in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights,* Federation Press, 1998, p.75.
4. *Yvonne Margarula v Minister for Resources and Energy and Others* [1998] 48 FCA (11 February 1998).
5. *Ominayak v Canada,* Communication No. 167/1984, Human Rights Committee, *Report of the Human Rights Committee,* UN Doc A/45/50, 1990 (*Lubicon Lake Band* case).
6. This does require some qualification. It may be that a state is not always responsible for a private company's activities; nevertheless in this case Australia as the Federal Government would be responsible for State or Territory activity. Refer to Article 50 of the ICCPR, and also would be responsible for activity by a private company in relation to alleged breaches of Article 27. Refer to *Lubicon Lake Band* case, ref. 5 above.
7. *Lubicon Lake Band* case, 13.2.
8. *Lubicon Lake Band* case, 13.2.
9. Gundjehmi Aboriginal Corporation, *The Facts,* 'Who Are the Traditional Owners?', 1997, p.1.
10. The remaining requirements are: the communication must allege a violation of Human Rights contained in the ICCPR by the state party, must be in writing, lodged by an identifiable individual and victim, not an abuse of rights submission, not incompatible with the ICCPR, and not under examination by another international investigation. This last requirement is interpreted as another human rights type committee and would not include the world heritage investigation.
11. General Comment No. 23, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev 2 (29 March 1996) para. 9.
12. Gundjehmi Aboriginal Corporation, *The Facts,* 'Stop Jabiluka', 1997, p.2.
13. *Lansmann v Finland,* Communication No. 511/1992, UN Doc ICCPR/C/52/D/511, 1992.
14. *Lansmann v Finland,* above, p.84, para. 9.3.
15. Gundjehmi Aboriginal Corporation, *The Facts,* 'World Heritage In Danger', 1997, p.1 stating that subsection 40(1) of the *Northern Territory Aboriginal Land Rights Act* did not apply to the Ranger mine, p.1.
16. When ERA purchased the lease from Pancontinental Mining in 1992 an agreement was reached with the Northern Land Council (NLC) that required consent to be given by the NLC in accordance with the wishes of the Traditional Owners if Jabiluka uranium was to be milled at the Ranger mine. Gundjehmi Aboriginal Corporation, *The Facts,* 1997.
17. The way in which these recommendations have been enforced is via the procedure established under the original 1982 Jabiluka lease. Under this lease if there were to be any changes to the operation of the lease — what is referred to as a 'change in concept' — then a committee was to be established, with two tiers consisting of a working group and a second committee referred to as the 3.2(h) committee. The recommendations from this committee are final and binding on the parties to the lease, in this case ERA and NLC. The Taditional Owners have not been a part of these 3.2(h) negotiations because they argued that they could not affect the outcome of the committee.
18. These principles are drawn from paras 9.8, 9.6 of the case.
19. *The Jabiluka Mill Alternative Public Environment Report,* 1998, p.7.
20. *The Kakadu Region Social Impact Study,* July 1997.
21. *The Kakadu Region Social Impact Study,* July 1997, p.ix.
22. The Kakadu Region Social Impact Study, July 1997, p.ix.
23. Aboriginal Land Commissioner, Mr Justice Toohey as reported in *The Facts,* Gundjehmi Aboriginal Corporation, 'Who Are The Traditional Owners?'.
24. *Mabo v Queensland (No. 2),* (1992) 183 CLR 1.
25. ABC news report, 'Court Refuses to Delay Jabiluka Start', 12 June 1998.
26. *Lansmann v Finland,* above, para. 9.4.
27. Gundjehmi Aboriginal Corporation, *The Facts,* 'Who Are The Traditional Owners?', 1997, p.1.

On-line resources in the tax debate

1. Treasury Tax Reform <http://www.taxreform.gov.au>
2. *Pocket Brief to the Australian Tax System* (Treasury, <http://www.treasury.gov.au/Publications/Taxation/Pocket/Default.asp>
3. ACOSS *Tax Reform Pack,* September 1997, <http://www.acoss.org.au/documnts.htm>
4. *Sydney Morning Herald* Tax Debate, <http://www.smh.com.au/news/content/tax/index.html>
5. *The Age* Tax Update, <http://www.theage.com.au/tax98/index.html>
6. The CPA, <http://www.cpaonline.com.au/library/fs_taxreform.htm>
7. Australians for Fairer Tax, <http://www.fairertax.com.au/index2.htm>
8. Australian Taxation Index, <http://www.law.flinders.edu.au/tax>
9. Committee for Economic Development of Australia, <http://www.abol.net/ceda>
10. The Democrats, <http://www.democrats.org.au/democratsstatements/1998/taxreform/index.html>
11. ABC Tax Files, <http://www.abc.net.au/news/special/default.htm>
12. ALP, <http://www.alp.org.au[centre]/speeches/kb98tax.htm>