

“Risk Mitigation & Corporate Social Responsibility (CSR) in Africa:
Striking a Balance” – MineAfrica Seminar
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**“International Human Rights Norms:
the fundamental standards against which transnational
CSR best practices are ultimately measured”**

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I wish to acknowledge and thank the organizers and co-sponsors of this event for inviting me to contribute to this important discussion today. It is an honour for me to do so.

In 1948, the Universal Declaration of Human Rights was adopted by the UNGA. In the words of the UN High Commissioner for Human Rights, the Universal Declaration was “drafted as ‘a common standard of achievement for all peoples and nations’, [and] the Declaration for the first time in human history spell out basic civil, political, economic, social and cultural rights that all human beings should enjoy. It has over time been widely accepted as the fundamental norms of human rights that everyone should respect and protect. The UDHR, together with the International Covenant on Civil and Political Rights and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights, form the International Bill of Human Rights.”

The International Bill of Rights has been elaborated upon through numerous declarations, treaties, covenants, guidelines and principles. By means of these many instruments, governments have become subject to a broad range of human rights obligations which they are bound to respect. They have also become obliged to take positive action to bring about the enjoyment of basic human rights.

The South Africans among us will never forget June 16, 1976, the day on which Soweto school-children were mowed down in their hundreds by the SA Police as they protested about the quality of their education under apartheid. I remember one image in particular: a group of young black students all marching with one hand held aloft carrying a small brown booklet. The document was the Universal Declaration of Human Rights issued by the UN for citizen use. The Declaration was at that time rejected by the apartheid regime as so much nonsense that did not apply in South Africa, but these youngsters were claiming it as their own and getting shot for doing so.

This point is well expressed by Professor Lorraine Weinrib of the University of Toronto, who notes that “We live in the era of human rights.” Or by former U.N. Secretary-General Boutros-Ghali who stated in 1993 that human rights are now a “common language of humanity”.

The international law of human rights has also engendered many regional declarations of human rights (for example in the Americas, Africa, and Europe) and numerous national human rights Charters, and laws in many individual states.

Peoples' ability to demand their human rights effectively varies greatly from state to state and region to region. But peoples' knowledge of their fundamental human rights is universal. It is now true to say that every adult, and every young adult, on every corner of the planet is now aware that he or she has a right to demand respect for his or fundamental and inherent universal human rights, in every imaginable area of civil, political, economic, social, cultural, and environmental concern.

If you search on Google using just two terms, "mining" and "human rights", you will get half a million documents. The extraction of minerals from the crust of the earth on the one hand, and the fundamental human rights concerns of humanity on the other, are clearly inextricably linked.

As noted in 2001 at the Experts Meeting on Human Rights Issues in the Mining and Minerals Sector convened in 2001 by the World Business Council for Sustainable Development and others, "[mining] companies today ignore the human rights issues and problems of

weak institutions at their peril, endangering the sector’s ‘social licence to operate’.”

While fundamental international human rights laws predominantly bind states, mining companies will not escape human rights scrutiny by virtue of that fact. Mining companies’ operations are mostly state-sponsored, state-licensed, state-financed, state-permitted, state-regulated or even state-operated to name a few key factors. There is a direct relationship, particularly in oppressive, weak, conflictual, or failing states in Africa and elsewhere, between the overall state of respect for human rights and the human rights challenges and risks facing companies engaged in mining. Fundamental human rights have become an essential component of the mining experience.

I was recently told by a prominent mining exec, “One can choose where best on the planet to site a manufacturing plant, but one can’t always choose where to site a mine.” In part, this is correct, mineral resources are often located in the damndest of places.

However, fundamental human rights are universal and indivisible. The human rights practices of multinational mining corporations are not always simply determined by the politics of the country where the minerals are found. They are sometimes regrettably a function of where a given body of minerals is the most profitable to extract. And regrettably again, there is often a relationship between profitability

and the externalization of social, environmental, worker safety, worker remuneration and other costs of mining. Such externalization often involves human rights violations, whether they are social, economic, political or environmental.

Amnesty International summarises the minerals industry's responsibilities to protect human rights as:

- “Protecting human rights within all of their areas of operation (including not only direct employees but also contractors, suppliers, family members, local communities and other parties affected by the company's activities)”, and
- “Supporting and promoting the protection of human rights in society.”

Amnesty has stated that mining companies have responsibilities in regard to fundamental human rights including freedom from discrimination; the right to life liberty and security of the person; freedom from slavery and torture; the right to property; freedom of association; the protection of labour standards; the right to fair and adequate compensation; protection from bribery and corruption; respect for national sovereignty; respect for communities; and protection of the environment and biosphere. Amnesty states that “these obligations apply not only directly to the activities of organisations but they also impose an obligation on companies to

ensure that they do not condone or promote the infringement of these rights by other parties.”

The increasing power of the transnational corporate sector (which now rivals the liquidity and power of many states) led inevitably to the emergence at the UN (in 2003) of *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regards to Human Rights*. This instrument contains certain minimum standards applicable to transnational corporations including those in the mining sector.

As already discussed by other speakers today, the corporate response to this global explosion of human rights instruments and norms has also seen the emergence of mostly-voluntary CSR initiatives at the individual company, industry, national, regional and international level. These include the *United Nations Global Compact* (which is “a framework for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, the environment and anti-corruption”) and the Business Leaders Initiative on Human Rights.

Reliance on voluntary approaches is increasingly coming under critical scrutiny. In 2007, a prominent UK NGO, War on Want, declared that “relying on voluntary codes of conduct and self-

regulation to police the extractives industry has been shown to be ineffective, and the [UK] government must now take action to make mining companies accountable both nationally and globally. War on Want calls on the UK government to introduce new rights of redress in the UK and to support binding standards for corporate accountability at the international level. Only through such action will we be able to tackle corporate complicity in conflict and human rights abuse.”

There is a filtering process that sometimes takes place – whether deliberately or by virtue of the corporate equivalent of the children’s game broken telephone – between the fundamental and binding international human rights laws and norms on the one hand, and the practices of mining corporations in the field. The original fundamental human rights norms are not mere expressions of idealistic hopes for a distant future. They represent minimum standards to which all human beings are fundamentally entitled right now -- and they mostly know it, whether it’s in the Americas or in Africa. However, many CSR codes mention respect for human rights, but do so in a voluntary and malleable manner. Then, after being filtered through disparate risk management processes, corporate hierarchies, local “advice” and field personnel, the resulting standards are lower still, even to the point of being harmful and counterproductive.

In my experience in a number of mining and analogous contexts, when things go wrong, which they frequently do, companies find their human rights practices being publicly measured (including in the international press) not against self-designed voluntary CSR values (such as they are), but against the original fundamental human rights norms.

So it is with human rights. When the African community, or tribe, or environment, or country, whose human rights are violated by, or because of, or in relation to, the activities of one or more mining companies, the human rights standards against which the reputation, sustainability and viability of the companies or their projects will ultimately be measured will be the undiluted norms contained in the original human rights instruments.

Allow me to illustrate “human rights filtering” in one important context. Article 23 of the UN Universal Declaration of Human Rights requires that:

- Everyone, without any discrimination, has the right to equal pay for equal work, and
- Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

However, the voluntary Ten Principles of the UN's Global Compact, which include two principles that concern corporate advancement of human rights, mention neither the right to freedom from discrimination nor the right to just and favourable remuneration. Any mining company active in Africa is aware of how critically important these two rights are in risk management terms. And yet the Global Compact Ten principles do not mention them explicitly.

Not long ago in a jurisdiction in which I have worked, a tribe was approached by a transnational mining company that wished to mine a precious metal in its traditional territory. The company's law firm and the local government concerned both indicated in writing that the tribe had no rights and thus no legal, environmental or other interest or claim. The mining company then sought specialized fundamental human rights law advice. It then wisely decided that notwithstanding the strict "no rights" approach it had been advised it could or should follow, a much higher standard of respect for the *inherent fundamental human rights* of the tribe was called for.

I have no doubt that this was a profitable decision. The mine, whose workforce is now approaching half indigenous workers, and which co-manages its environmental efforts not with the government but with the tribe, would actually never have succeeded in even establishing its mine had it heeded the advice it received first. The mining company's risk analysis was in my view far-sighted rather than

minimal; fully informed; and took an enlightened long view of its own self interest.

The same is not true at this very moment in an adjacent jurisdiction. A well-known mining company, presumably in keeping with an essentially “they have no rights” position of the government concerned, took legal steps that resulted in the imprisonment of entire respected indigenous leaderships. Tribes right across the country are inflamed, and in my view the company is needlessly experiencing the tarnishing its own reputation and serious impact on its own mining prospects in the region.

These two jurisdictions, by the way, are two Canadian provinces.

I’ll conclude now with what I will presumptuously call Orkin’s Five Fundamental CSR points:

1. CSR is a Good Thing; it is a (if not the) central component of both the responsible management of risk and the pursuit of sustainable and equitable profitability;
2. But this must be “real CSR”, based on best-possible adherence to universal fundamental human rights norms; CSR that constitutes blue-washing (the UN flag is blue) or green-washing may well eventually backfire;
3. Local laws and standards concerning human rights (such as they may be) are a floor not a ceiling; there is rarely a good

- reason that prevents a progressive mining company from exceeding local standards or applying universal human rights norms in a best-practices, principled, and sustainable manner;
4. Risk management is essential. But enhanced levels of security and insurance arrangements respond to risk and do not address its fundamental human rights causes -- even though some of these may be the mining activity itself. CSR begins to do so, but (in the recent words of a US-based human rights advocacy alliance) can also be “an unrelenting litany of postures and gesticulations that pretend to change [in order] to remain the same”;
 5. Whatever CSR standards a mining company imposes on itself, it should at least do so on a fully-informed basis about the fundamental human rights norms that apply in the context in which it is or will be operating. That’s what the company’s practices will ultimately be measured against anyway. So why not get some more far-sighted and comprehensive human rights advice, in advance? (Or in other words, don’t just get the advice you like or strike the balance you can easily live with. This may ultimately be a more expensive approach than also getting some advice you find harder to take.) In my view, the fundamental human rights approach is bound to be best in the long run – including for the bottom line.

Thank you very much for this opportunity.