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Participation Rights of Indigenous Peoples and Minorities:

The Expanding Scope of Self-Determination and Free, Prior and Informed Consent

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Group rights are sometimes referred to as the third generation of rights. While some theorists have predicted harsh conflicts between these rights and individual rights,¹ they have nevertheless developed in international law, particularly with regard to minorities and indigenous peoples. These groups are increasingly seen as having a right to participate in decisions that affect them, deriving from the right to self-determination and the related principle of free, prior and informed consent (FPI consent). These rights are critical for communities who fail to achieve recognition of their specific needs under majoritarian democratic governance. This letter traces the origin of both concepts in international law, and their current development by UN human rights committees and regional human rights bodies.

The right to self-determination was established under the International Covenants,² but was not intended to be applied to minorities.³ This right was initially invoked in order to ensure the independence of colonial territories, particularly in Africa and Asia. However, the process of decolonisation provided nothing for those colonised peoples who had become minorities within their own historic territories. These indigenous peoples struggled to achieve recognition for their special status. States objected to the extension of self-determination on the basis that it might enable the dismantling of States. However, participatory rights were granted to indigenous peoples in two ILO Conventions which require that these peoples must grant *free consent* before certain decisions are taken that affect them.⁴ This was also followed in the jurisprudence of UN Committees.⁵

¹ Tom Farer, 'The Hierarchy of Human Rights' (1992) 8(1) American University International Law Review 115, 119.

² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 1; International Covenant on Economic, Social and Cultural Rights (adopted 20 November 1966, entered into force 2 September 1990) 999 UNTS 3 (ICESCR) art 1.

³ UN General Assembly, Annotations on the Text of the Draft International Covenants on Human Rights (1955) UN Doc A/2929, chapter 4, para 9.

⁴ Indigenous and Tribal Populations Convention (adopted 26 June 1957, entered into force 2 June 1959) ILO C107, art 12.1; Convention Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 Jun 1989, entered into force 5 Sep 1991) ILO C169, art 16.2.

⁵ CESCR, Concluding Observations on Ecuador (2004) UN Doc E/C.12/1/Add.100, [12]; CERD, General Recommendation No 23: The Rights of Indigenous Peoples (1997), [4](d) and [5] in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (2004) UN Doc

The right to self-determination of indigenous peoples and the concept of *free, prior and informed consent* reached maturity in the Declaration on the Rights of Indigenous Peoples (the Declaration). Considering that preserving existing State boundaries is a priority in international law, it is now considered that the right to self-determination does not amount to a right to secession except in extreme cases. However, deriving from the right to self-determination, indigenous peoples have the right to determine their political status, pursue their own development, and manage their internal affairs.⁶ The Declaration also makes clear that FPI consent is required in a number of different contexts involving decisions that have an impact on indigenous land, culture and natural resources.⁷ Breaking this concept down, it requires that consultation must occur before plans are made for development, there must be effective transparency, and that they should be given adequate opportunity to accept or reject the plans. Despite the fact that the Declaration originates in the UN General Assembly and as such has no binding force, it has been very influential in the subsequent interpretation of human rights law. UN committees have frequently drawn on the Declaration to justify their opinion.⁸ They have also directly asserted the right of indigenous peoples to self-determination⁹ and FPI consent.¹⁰

The application of the right of self-determination has been extended further by regional human rights bodies in the Americas and Africa. The Inter-American Court of Human Rights has a mandate to consider the rights provided in the American Convention on Human Rights in the context of the legal obligations within other treaties which States have ratified. In the case of *Saramaka People v Suriname*, the Court considered the Convention right to collective property in the light of the right to self-determination found in the International Covenants. It found that this right required their FPI consent before any large-scale development which would have a

HRI/GEN/1/Rev.6, 212; CERD, Concluding Observations on Bolivia (Plurinational State of) (2003) UN Doc CERD/C/63/CO/2, [13]; CERD, Concluding Observations on Guatemala (2006) UN Doc CERD/C/GTM/CO/11, [17].

⁶ UN General Assembly, Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) arts 3 and 4.

⁷ *ibid* arts 10, 11.2, 19, 28.1, 29.2 and 32.2.

⁸ Some examples include: CESCR, Concluding Observations on El Salvador (2014) UN Doc E/C.12/SLV/CO/3–5, [27]; CRC, General Comment No 11: Indigenous children and their rights under the Convention (2009) UN Doc CRC/C/GC/11, [66] and [82]; CERD, Concluding Observations on Mongolia (2016) UN Doc CERD/C/MNG/CO/19–22, [27].

⁹ Some examples include: HRC, Concluding Observations on Venezuela (2015) UN Doc CCPR/C/VEN/CO/4, [21]; CESCR, Concluding Observations on El Salvador (2014) UN Doc E/C.12/SLV/CO/3–5, [7] and [27]; CERD, Concluding Observations on Costa Rica (2015) UN Doc CERD/C/CRI/CO/19–22, [25].

¹⁰ HRC, Concluding Observations on Togo (2011) UN Doc CCPR/C/TGO/CO/4, [21]; CERD, Concluding Observations on El Salvador (2014) UN Doc CERD/C/SLV/CO/16–17, [18]; Concluding Observations on Honduras (2014) UN Doc CERD/C/HND/CO/1–5, [20].

major impact in their territory.¹¹ However, the unusual feature of this case is that the Saramaka people are of African origin and do not qualify as an indigenous people under the influential Cobo definition.¹² The Court found that because of their tribal structure and attachment to land over several generations, they are analogous to indigenous peoples under international law and have a right to self-determination under the International Covenants.¹³ The judgment has been criticised for not requiring consent except where a development may have a major impact, in contrast to the Declaration which requires it for any project that may affect land or territories.¹⁴ However, it does also indicate the extension of rights to non-indigenous minorities with an analogous tribal structure. The Court's finding that the Saramaka people have a right to self-determination has been endorsed by CERD.¹⁵

The African human rights system provides collective rights for peoples, including the right to self-determination. The African Commission on Human and Peoples' Rights has defined a people as communities who manifest 'numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook'.¹⁶ This definition covers indigenous peoples but Shelton has argued that it would also apply to other minorities such as those of Asian origin.¹⁷ There remains room therefore for further extension of self-determination in the African context.

Meanwhile, the concept of FPI consent is developing to apply independently from self-determination. In a number of cases the two concepts are explicitly linked, implying that FPI consent is derived from the explicit collective right to self-determination.¹⁸ On the other hand, the Human Rights Committee has found a requirement for FPI consent in the context of an

¹¹ *Saramaka People v Suriname*, Inter-American Court of Human Rights Series C No 172 (28 November 2007) [134].

¹² Jose R Martinez Cobo, Study of the Problem of Discrimination Against Indigenous Populations (1982) UN Doc E/CN.4/Sub.2/1982/2/Add.6, chapter 5.

¹³ *Saramaka People v Suriname* (n 11) [80], [85] and [93].

¹⁴ Jo M Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples' (2009–2010) 27 Wisconsin International Law Journal 51, 98.

¹⁵ CERD, Concluding Observations on Suriname (2009) UN Doc CERD/C/SUR/CO/12, [18].

¹⁶ African Commission of Human and People's Rights, *Kevin Mgwanga Gunme et al v Cameroon* (27 May 2009) 266/03, [178].

¹⁷ Dinah Shelton, 'Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon' (2011) 105 The American Journal of International Law 60, 69.

¹⁸ CESCR, Concluding Observations on New Zealand (2012) UN Doc E/C.12/NZL/CO/3, [11]; Concluding Observations on China (2014) UN Doc E/C.12/CHN/CO/2, [31].

individual complaint in *Poma Poma v Peru*.¹⁹ Considering that this opinion does not mention self-determination, and the Committee considers that the right to self-determination as a collective right cannot be considered in individual complaints,²⁰ it is clear that the Committee believes that the concept of FPI consent is an individual right of indigenous persons that is independent from their collective right to self-determination. In one complaint, the Human Rights Committee have stated that it applies both to indigenous peoples and minorities, although the complaint itself related to the former.²¹ In recent years, the CESCR have recommended the application of FPI consent where it unclear whether the affected communities have any collective ethnic identity.²² Where they recommend its application in the context of urban populations in China,²³ it appears unlikely that minority status is in question, and in other cases the Committee have recommended a general application of the principle to local communities in relation to the economic exploitation of land.²⁴ Although these are recommendations and are not asserted as a right, it appears that the Committee believes that the principle applies to communities whose land is being exploited irrespective of their status.

To summarise, the concepts of self-determination and FPI consent appear to be expanding in scope. A right to self-determination has been asserted for non-indigenous minorities who have tribal structures and a relationship with the land and may apply to further minorities under the African system. A right to FPI consent has been asserted for indigenous peoples, minorities, and even for communities who have no collective ethnic identity.

However, in order to be fully convincing, the relevant bodies need to establish their reasoning in more depth. It needs to be established what the legal justification is for allowing a right to self-determination to a non-indigenous tribal people. Either such a people must be included in a new expanded definition of an indigenous people and thus benefit from the rights contained in the Declaration, or they have an alternative source for the right, in which case it may apply to further non-indigenous minorities. While the concept of FPI consent can clearly be derived from the Declaration and can be related to the right to self-determination, it is unclear what justifications Committees have when they apply the principle outside these contexts. As it is expressed as a recommendation, rather than a right, in relation to non-minority communities, it

¹⁹ HRC, *Poma Poma v Peru* (Communication No 1457/06, 2009) UN Doc CCPR/C/95/D/1457/2006, [7.6].

²⁰ HRC, *Kitok v Sweden* (Communication No 197/85, 1988) UN Doc CCPR/C/33/D/197/1985, [7.6].

²¹ *Poma Poma v Peru* [7.6].

²² CESCR, Concluding Observations on Togo (2013) UN Doc E/C.12/TGO/CO/1, [26].

²³ CESCR, Concluding Observations on China (2014) UN Doc E/C.12/CHN/CO/2, [30].

²⁴ CESCR, Concluding Observations on Uganda (2015) UN Doc E/C.12/UGA/CO/1, [14].

could be interpreted as a good means (though not compulsory) of ensuring that the State's obligations are met. In order for the application of the two principles to become clearer, the Committees need to make their reasoning more explicit.

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