The Case of *Ángela Poma Poma v. Peru* before the Human Rights Committee

The Concept of Free Prior and Informed Consent and the Application of the International Covenant on Civil and Political Rights to the Protection and Promotion of Indigenous Peoples' Rights

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I. Introduction

On 27 March 2009 the Human Rights Committee decided the case of *Ángela Poma Poma v. Peru*.[1] The case concerned a dispute over the exploitation of natural resources, more precisely the allocation of water. Due to the building of wells, water had been diverted from the Peruvian highlands to a coastal city as a result of which the indigenous Aymara people traditionally living in the highlands had been deprived of their access to underground springs. Since this water was essential for their traditional activity of grazing and raising llamas and alpacas – an activity on which their whole livelihood depended – the lack of water seriously affected their only means of subsistence.

Ultimately, the Human Rights Committee decided in favour of the complainant, Ms. Poma Poma, who is a member of the affected Aymara people. Yet the outcome of the case and the reasoning of the Human Rights Committee are not only of relevance to the state of Peru and the individuals directly affected by the diversion of water. The Committee's decision is also of immense importance to indigenous peoples worldwide and to all states having an indigenous population since it will most likely set the course for future decisions by the Human Rights Committee. On the one hand, the outcome of the complaint procedure seems to be advantageous for indigenous peoples since the Human Rights Committee – for the first time ever – expressly promoted and thus strengthened the principle of free, prior and informed consent in cases where indigenous peoples are affected by resource exploitation. Yet on the other hand, the Human Rights Committee adhered to its classification of indigenous peoples as "minorities" pursuant to article 27 of the International Covenant on Civil and Political Rights[2] (ICCPR) instead of treating them as "peoples" pursuant to article 1 ICCPR, thus making indigenous peoples suffer a setback in their long-standing struggle for the protection and promotion of their right to self-determination.

Hence, at first glance, the outcome of the decision seems ambivalent. Though the Human Rights Committee ultimately decided in favour of the complainant and endorsed the concept of free, prior and informed consent, the case failed, at the same time, to set a precedent regarding

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1 Human Rights Committee, Communication No. 1457/2006, Doc. CCPR/C/95/D/1457/2006 of 27 March 2009.

2 Adopted 16 December 1966, entered into force 23 March 1976, UNTS Vol. 999 No. 171.

the international recognition of indigenous peoples as peoples – a main objective of indigenous peoples worldwide. Therefore, in order to be able to assess the implications of the decision of *Ángela Poma Poma v. Peru*, and whether its outcome will ultimately promote or harm the indigenous peoples' struggle for the protection and promotion of their rights, the decision needs to be analysed in detail.

To this end, this article is structured as follows: first, the work of the Human Rights Committee will briefly be analysed (Part II.). Then the factual background of the case will be described in so far as it is necessary for understanding the issues dealt with in this article, and the decision of the Human Rights Committee will be presented in detail (Part III.). In a next step, the decision and its relevance for the protection and promotion of indigenous peoples' rights will be evaluated (Part IV.). Finally, a conclusion will be offered (Part V.).

II. The Human Rights Committee

The Human Rights Committee as a United Nations treaty body is responsible for the supervision of the Member States' compliance with their obligations laid down in the ICCPR.[3] The Human Rights Committee consists of 18 experts, who are nominated by the Member States but do not represent them.[4] During its four-week sessions taking place three times a year, the Human Rights Committee considers the reports submitted by the Member States on their compliance with the ICCPR.[5]

Yet, the Human Rights Committee also acts as a quasi-judicial organ. Besides receiving and reviewing periodical state reports, the Human Rights Committee is also mandated to receive and consider communications filed by individuals if the respective State Party has ratified the First Optional Protocol to the ICCPR (Optional Protocol I).[6]

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3 Currently 165 states are members to the ICCPR. The relevant list is available at: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

4 See arts 28-29 and 38 ICCPR.

5 See article 40 ICCPR. See also article 37 ICCPR in conjunction with Rule 2 of the Rules of Procedure of the Human Rights Committee, Doc. CCPR/C/3/Rev.6 of 24 April 2001.

6 Adopted 16 December 1966, entered into force 23 March 1976, UNTS Vol. 999 No. 302. The First Optional Protocol to the ICCPR currently has 113

However, since the Human Rights Committee is not an international court, its decisions are not binding but merely constitute recommendations. These recommendations can nevertheless develop a great persuasive power and put the respective state under pressure by the international community to comply with the recommendations of the Human Rights Committee. Furthermore, decisions of the Human Rights Committee can provide guidance for the decision of future national and international cases with a similar factual background; hence they can contribute to the development of customary international law.

In addition to reviewing state reports and giving recommendations on communications filed by individuals, the Human Rights Committee has also elaborated and issued several so-called General Comments specifying the individual rights and states' obligations under the ICCPR in respect of the implementation of the convention. These General Comments define the Human Right Committee's position and provide guidance for States Parties on their obligations under the ICCPR. Although the General Comments are not binding, neither for the Human Rights Committee itself nor for the States Parties, they are of high practical relevance and can be used as an additional means to clarify the contents of the obligations of states under public international law.

III. The Case of *Ángela Poma Poma v. Peru*

1. Factual Background of the Case

The communication in the case *Ángela Poma Poma v. Peru* was filed in December 2004 by Ms. Ángela Poma Poma via her counsel, Mr. Tomás Alarcón. Ms. Poma Poma is a Peruvian citizen and member of the Aymara, an indigenous people which has been living in the Andes and Altiplano regions of South America for over 2.000 years. An important aspect of their culture has always been the breeding and herding of alpacas and llamas in the Andean highlands.

Ms. Poma Poma and her children are owners of an alpaca farm covering 350 hectares of pastoral land, which is situated on the Andean Altiplano, an area of inland drainage in south-eastern Peru between the western and the eastern ranges (Cordillera Occidental and Oriental) at

States Parties. The relevant list is available at: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en>.

4.000 meters above sea level. The Andean Altiplano has always been supplied with water by underground springs thus creating the highland wetlands. Part of Ms. Poma Poma's farmland is constituted by such a wetland area. Ms. Poma Poma's family and ancestors have been using the area for raising and herding llamas and alpacas for thousands of years in accordance with the traditional customs of the Aymara people. To this day, this activity is their only means of subsistence. Besides Ms. Poma Poma and her family, eight more families of Aymara descent live in the respective wetland area.

During the 1950s, the government of Peru diverted the course of the river Uchusuma, which had originally run through the respective wetlands, thus depriving Ms. Poma Poma's farm of access to surface water that sustained the grasslands. However, the wetlands continued to receive groundwater from an area upstream of the farm.

Yet during the 1970s, the Peruvian government drilled wells (the so-called "Ayro Wells") in the area supplying the wetlands with underground water, thus significantly reducing the water supply to the pasture lands. Ever since then, water has been diverted from the Andes to the Pacific coast to provide water to the coastal city of Tacna. This has caused the slow but gradual drying out of the wetlands.

In the early 1990s, the government approved a new project – the Special Tacna Project – under the supervision of the National Institute for Development. This project envisaged the immediate construction of 12 new wells in the Ayro region and an additional 50 wells in the near future. The 12 wells were drilled without prior consultation of the Aymara people and without an investigation of the impact this project would have on the environment. Ultimately, the operation of the wells led to an acceleration of the degradation of the Aymaras' pastoral lands and caused the death of large quantities of livestock.

In response to protests of the affected Aymara people, six of the 12 new wells were shut down including well No. 6 which was supposed to be particularly harmful to the water supply of the Aymaras' pastoral lands but was later unilaterally re-opened by the public company in charge of the project (EPS Tacna). The subsequent criminal complaints filed by Ms. Poma Poma against the manager of EPS Tacna for an environmental offence, unlawful appropriation and damages were dismissed on procedural grounds. Ms. Poma Poma's complaints to the National Development Institute and to the Commission on Andean, Amazon and Afro-Peruvian Communities also remained unsuccessful: both institutions refrained from taking any action.

Ms. Poma Poma therefore alleged that her rights had been violated by the state of Peru. She *inter alia*[7] referred to the rights laid down in arts 1 (2) – the right of a people to freely dispose of its natural wealth and resources – and 17 ICCPR – the right to family life.

She argued that article 1 (2) ICCPR had been violated by the Peruvian state since the diversion of groundwater had destroyed the ecosystem of the Altiplano and led to the degradation of pastoral lands and the death of large quantities of livestock, thus depriving the Aymara people of their only means of subsistence. Ms. Poma Poma also alleged that the Peruvian government had unlawfully interfered with the life and activities of her family, thus violating 17 ICCPR. Her family's life consisted of their customs, social relations and culture, including the grazing and caring for animals according to their traditional customs. This way of family life had been affected by the lack of water.

The government of Peru, however, responded that the drilling and subsequent operation of the wells had been necessary to meet the domestic and agricultural water needs of the Tacna valley. It further stated that the alleged damage caused to the ecosystem had not been technically or legally substantiated.[8]

2. Decision of the Human Rights Committee

As usual, the Human Rights Committee first decided on the admissibility of the case. With regard to article 1 (2) ICCPR, the Human Rights Committee referred to its jurisprudence in previous decisions in which it had argued that article 1 ICCPR could – as a collective right – not be subject of proceedings under Optional Protocol I since this Protocol only provided for claims of "individuals" claiming "to be victims of

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7 In addition, Ms. Poma Poma also alleged a violation of arts 2 (3) lit. a (right to an effective remedy) and 14 (1) ICCPR (equality before courts and tribunals). Whereas the Human Rights Committee found that Ms. Poma Poma had indeed been deprived of her right to an effective remedy for the violation of her rights recognised in the ICCPR and hence found a violation of article 2 (3) lit. a ICCPR, it dismissed the complaint concerning the alleged violation of the rights laid down in article 14 (1) ICCPR as being inadmissible, since this alleged violation, i.e. a discrimination on the grounds of Ms. Poma Poma's indigenous descent, had not been sufficiently substantiated. See *Ángela Poma Poma v. Peru*, see note 1, paras 6.4 and 7.8.

8 For the factual background of this case and the parties' observations and comments, see *Ángela Poma Poma v. Peru*, see note 1, paras 2.1-5.3.

violations of any of the rights set forth in the Covenant." This jurisprudence was expressly upheld in this case.[9] So far as Ms. Poma Poma invoked article 17 ICCPR to establish a violation of her rights stemming from the operation of the wells, the Human Rights Committee stated that the facts presented by Ms. Poma Poma were not so much a case of a violation of article 17 ICCPR but rather raised issues related to article 27 ICCPR.[10] Hence, after admitting the case, the Human Rights Committee considered the merits only in respect of an alleged violation of article 27 ICCPR.

Investigating a potential violation of Ms. Poma Poma's rights under article 27 ICCPR, the Human Rights Committee first recalled its General Comment No. 23 regarding the Rights of Minorities, which clarifies the rights under article 27 ICCPR.[11] The Human Rights Committee stressed that article 27 ICCPR did not constitute a collective right but rather a particular individual right, "which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, the other rights which all persons are entitled to enjoy under the Covenant."[12] Hence article 27 ICCPR constituted a right of an individual belonging to a minority group to enjoy a particular culture within this group. Therefore, the complainant him- or herself had to be violated in his or her own right to enjoy a particular culture in order to be able to invoke a violation of article 27 ICCPR. The Human Rights Committee then further elaborated that especially in cases where the minority to which the individual belonged, was an indigenous community, the individual person's right to enjoy his or her culture, "may consist in a way of life which is closely associated with territory and use of its resources."[13]

As already stated in previous decisions, the Human Rights Committee emphasised that the rights protected under article 27 ICCPR included "the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the com-

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9 Ibid., para. 6.3 with further references.

10 Ibid.

11 Human Rights Committee, *General Comment No. 23: The Rights of Minorities (Article 27)*, Doc. CCPR/C/21/Rev.1/Add.5 of 8 April 1994.

12 See *Ángela Poma Poma v. Peru*, see note 1, para. 7.2, referring to General Comment No. 23, para. 1.

13 Ibid., para. 7.2, referring to General Comment No. 23, para. 3.2.

munity to which they belong."[14] It further stated that in the present case it was undisputed that Ms. Poma Poma belonged to an ethnic minority, whose culture was essentially based on raising llamas and that Ms. Poma Poma herself was engaged in this activity.[15]

In a next step, the Human Rights Committee declared that article 27 ICCPR did not constitute an absolute right. On the contrary, it expressly recognised a state's right to adopt measures in order to promote its economic development.[16] However, it stated that such measures had to be proportional compared to the negative effects suffered by the minorities.[17]

With regard to the present case, the Human Rights Committee stated that the construction and operation of the Ayro Wells significantly impaired the complainant's right to enjoy her culture and live according to her traditional way of life within her community. The diversion of the water had led to the degradation of 10.000 hectares of Aymara pasture land and the death of thousands of head of livestock thus ruining the complainant's way of life and the economy of the community as a result of which the members of the community had been forced to abandon their land and their traditional economic activity.[18]

In a next step, the Human Rights Committee pointed out that such severe inferences in a community's right to enjoy their own culture could only be justified in cases where the affected persons had the opportunity to effectively participate in the decision-making process prior to the execution of the measures in question. The Human Rights Committee expressly stated that such an effective participation did not merely require a prior consultation but rather the "free, prior and informed consent of the members of the community."[19] In addition, a measure had to be proportional so as "not to endanger the very survival of the community and its members."[20]

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14 Ibid., para. 7.3, referring to the Human Rights Committee, *Lubicon Lake Band v. Canada*, Communication No. 167/1984, Doc. CCPR/C/38/D/167/1984 of 26 March 1990, para. 32.2.

15 Ibid., para. 7.3.

16 Ibid., para. 7.4.

17 Ibid., para. 7.6.

18 Ibid., para. 7.5.

19 Ibid., para. 7.6.

20 Ibid., para. 7.6.

The Human Rights Committee asserted that in the present case neither the complainant nor other members of her community had been consulted prior to the drilling of the wells. Furthermore, the Peruvian state had not considered it necessary to require studies to be undertaken by an independent body in order to assess the economic impact of the wells. In addition, no measures had been adopted to minimise the negative effects of the project and to repair the harm done. Furthermore, the project had made it impossible for the complainant to continue benefitting from her traditional economic activity, thus substantially impairing her right to live according to her culture within her community. Taking all this together, the Human Rights Committee found that the state of Peru had violated Ms. Poma Poma's rights laid down in article 27 ICCPR.[21] In the light of this finding, the Human Rights Committee did not consider it necessary to deal with the alleged violation of article 17 ICCPR.[22]

As a result of its findings, the Human Rights Committee requested Peru to provide the complainant with an effective remedy and reparation measures that were commensurate with the harm sustained. In addition the Human Rights Committee ordered Peru to adopt all necessary measures to avoid the occurrence of similar violations in the future and to report to the Human Rights Committee within 180 days about the measures taken to give effect to the Human Right Committee's decision.[23]

IV. Evaluation

Two points are of particular relevance in this decision and thus will be analysed in detail: first, the redefinition of the complaint by the Human Rights Committee from an alleged violation of arts 1 (2) and 17 ICCPR to a violation of article 27 ICCPR and its implication on the status of indigenous peoples, and second, the express requirement of a free, prior and informed consent of the affected indigenous community by the Human Rights Committee.

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21 Ibid., para. 7.7.

22 Ibid., para. 7.9.

23 Ibid., paras 9-10.

1. Redefinition of the Complaint by the Human Rights Committee and Indigenous Peoples' Rights in the ICCPR in General

a. Indigenous Peoples as Minorities pursuant to Article 27 ICCPR?

When Ms. Poma Poma filed the complaint she expressly referred to violations of arts 1 (2) and 17 ICCPR and did not even mention article 27 ICCPR, although there have been several previous cases in which the Human Rights Committee had based a violation of indigenous peoples' rights on article 27 ICCPR. Ms. Poma Poma was represented by a lawyer, Mr. Tomás Alarcón, President of the Juridical Commission for Auto-Development of First Andean Peoples (CAPAJ) and an indigenous person himself, who had previously been Chairperson-Rapporteur of the Human Rights Commission's Report on the Expert Seminar on Indigenous Peoples and the Administration of Justice.[24] This experienced lawyer was certainly aware of previous decisions by the Human Rights Committee and the fact that article 27 ICCPR was the most likely provision on which a violation of an indigenous person's right could be successfully based. Therefore, it can be assumed that the alleged deprivation of water was deliberately not based on article 27 ICCPR but on arts 1 (2) and 17 ICCPR. Ms. Poma Poma did not want to succeed due to the fact that she was an individual member of a minority but because her people as a whole had been collectively deprived of its right to freely dispose of its natural resources and to continue to live according to their traditional way of life.

In this context, it needs to be mentioned that most indigenous peoples do not refer to themselves as minorities, although they generally fulfil all requirements attached to a minority. The most widely acknowledged definition of "minority", the so-called *Capotorti* definition, defines minorities as follows:

> "A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics

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[24] See United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *International Decade of the World's Indigenous People: Report on the Expert Seminar on Indigenous Peoples and the Administration of Justice* (Madrid 12-14 November 2003), Doc. E/CN.4/Sub.2/AC.4/2004/6 of 10 June 2004.

differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."[25]

Most indigenous peoples are in fact numerically inferior within their states, are in a non-dominant position, possess particular ethnic, religious and linguistic characteristics and want to preserve their culture and traditions. Yet, they do not want to be granted minority rights by their home states because they regard such a classification as inadequate and derogatory. Since indigenous peoples have lived on the land, which now makes up their states' territories, for thousands of years as independent peoples, they generally still regard themselves as nations – insofar they still possess a territorial basis – or at least as holders of a right to self-determination, which allows them to resume their pre-colonial position as sovereigns within the community of states.[26] Hence, they want to be regarded as equals with their own original rights, which have to be respected as a matter of sovereign equality, not as subordinates who are granted derivative rights.

But besides this emotional argument, there is also a very practical reason for indigenous peoples not wanting to be classified as minorities: whereas peoples have collective rights under public international law, e.g. the right to self-determination laid down in Article 1 (2) United Nations Charter and in article 1 (1) and (2) ICCPR and article 1 (1) and (2) International Covenant on Economic, Social and Cultural Rights (ICESCR),[27] minorities do not. Whereas peoples' rights are directly attached to the people, minority rights are attached to the members of the minority group, not to the minority itself.[28]

The reinterpretation of Ms. Poma Poma's communication by the Human Rights Committee has probably been made with good intentions. The Human Rights Committee wanted Ms. Poma Poma to succeed with her complaint and chose the provision, which was most likely

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25 F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, 1979, Doc. E/CN.4/Sub.2/384/Rev.1, para. 568.

26 G. Dahm/ J. Delbrück/ R. Wolfrum, *Völkerrecht I/2*, 2nd edition, 2002, 294.

27 Adopted on 16 December 1966, entered into force 3 January 1976, UNTS Vol. 993 No. 3.

28 Regarding the nature of minority rights, see e.g. G. Gilbert, "Individuals, Collectivities and Rights", in: N. Ghanea/ A. Xanthaki (eds), *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry*, 2005, 139 et seq.

to lead to the desired outcome. Yet, by substituting Ms. Poma Poma's complaint with its own interpretation, the Human Rights Committee did exactly what Ms. Poma Poma and her lawyer wanted to avoid: it reduced Ms. Poma Poma's people, the Aymara, to a minority and thus deprived the Aymara of their collective rights.

By doing this, the Human Rights Committee affirmed its view expressed in several previous cases, i.e. that an individual claimant was unable to claim a violation of the right to self-determination under article 1 ICCPR because this right was not conferred upon individuals but on peoples. Since Optional Protocol I only mandated the Human Rights Committee to receive and consider communications filed by "individuals" claiming "to be victims of violations of any of the rights set forth in the Covenant", and since individual rights were set out conclusively in Part III ICCPR, i.e. in arts 6-27 ICCPR, an individual claim could not be based on an alleged violation of article 1 ICCPR under the procedure provided in Optional Protocol I.[29] Therefore, since the ICCPR and its Protocols neither expressly provided a procedure enabling a group of persons to claim a violation of their collective group right, nor a procedure allowing an individual to file a claim on behalf of a group, a communication could – according to the Human Rights Committee – never be based on an alleged violation of article 1 ICCPR.

This, however, prompts the question why Mr. Alarcón, an experienced lawyer regarding indigenous peoples' rights issues, nevertheless based Ms. Poma Poma's complaint on article 1 ICCPR although he must have been aware of the previous decisions of the Human Rights Committee regarding the futility of basing an individual complaint on an alleged violation of article 1 (2) ICCPR. Yet, there is indeed one major difference between the previous cases in which the Human Rights Committee stated that an individual complaint could not be based on article 1 ICCPR and the present case: the adoption of the United Nations Declaration on the Rights of Indigenous Peoples[30] by the United Nations General Assembly on 13 September 2007.

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[29] Human Rights Committee, *Lubicon Lake Band v. Canada*, see note 14, para. 32.1; id., *Mikmaq Tribal Society v. Canada*, Communication No. 205/1986, Doc. CCPR/C/43/D/205/1986 of 4 November 1991, para. 5.1; id., *J.G.A. Diergaardt v. Namibia*, Communication No. 760/1997, Doc. CCPR/C/69/D/760/1997 of 25 July 2000, para. 10.3; id., *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, Doc. CCPR/C/70/D/547/1993 of 27 October 2000, para. 9.2.

[30] A/RES/61/295 of 13 September 2007.

b. The Adoption of the United Nations Declaration on the Rights of Indigenous Peoples and the International Recognition of Indigenous Peoples as "Peoples"

The United Nations Declaration on the Rights of Indigenous Peoples is a major step in the protection and promotion of indigenous peoples' rights. Although the Declaration is – as a General Assembly resolution – not legally binding, it nevertheless can be regarded as a strong and important statement due to its broad support among states,[31] and it may contribute to the development of customary international law.[32] One important development is the designation of indigenous groups as "peoples". Until the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, it had been highly disputed whether indigenous groups could be classified as peoples under international law and as a consequence could claim the rights attached to this term.

Yet, whereas article 1 (3) of the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169[33]) still contained the provision that "[t]he use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law"[34] and hence denied indigenous peoples a right to self-determination, the United Nations Declaration on the Rights of In-

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31 The vote in the General Assembly was 143 countries in favour, four against, and 11 abstaining. The four states voting against were Australia, Canada, New Zealand and the United States, see UNGA Department of Public Information, "General Assembly Adopts Declaration on Rights of Indigenous Peoples: 'Major Step Forward' towards Human Rights for All, Says President" (13 September 2007) available at: <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>. Australia, however, subsequently formally endorsed the Declaration on 3 April 2009, see UN News Centre, "Experts Hail Australia's Backing of UN Declaration of Indigenous Peoples' Rights" (3 April 2009) available at: <http://www.un.org/apps/news/story.asp?NewsID=30382>.

32 Regarding the importance of the United Nations Declaration on the Rights of Indigenous Peoples for the protection and strengthening of indigenous rights, see also M. Barelli, "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples", *ICLQ* 58 (2009), 957 et seq. (966-968).

33 Adopted on 27 June 1989, entered into force 5 September 1991, *ILM* 28 (1989), 1382 et seq.

34 Article 1 (3) ILO Convention No. 169 (emphasis in the original).

digenous Peoples of 2007 does not try to explain or restrict the use of the term "peoples" with regard to indigenous groups, thereby implying that indigenous peoples are peoples within the meaning of the Charter of the United Nations[35] and thus enjoy the right to self-determination laid down in Article 1 (2) of the United Nations Charter, in article 1 (1) and (2) ICCPR and article 1 (1) and (2) ICESCR. An indigenous peoples' right to self-determination is also expressly acknowledged in the Declaration on the Rights of Indigenous Peoples.[36] Yet, in the Declaration it is also expressly stated that the right to self-determination does not comprise a right to secession.[37]

Another important development attached to the adoption of the United Nations Declaration on the Rights of Indigenous Peoples is that for the first time ever collective rights of indigenous peoples – such as the right to culture,[38] identity,[39] and language,[40] and the right to own land collectively[41] – are expressly recognised in a universal instrument of international law.[42] The fact that the rights of indigenous peoples cannot be protected by merely granting individual human rights to every single indigenous individual but that the recognition of collective rights is essential for the survival of indigenous peoples as distinct peoples and prerequisite for the exercise and enjoyment of the rights of indigenous individuals is also referred to in the Preamble of the United Nations Declaration on the Rights of Indigenous Peoples, which recognises and reaffirms "that indigenous individuals are entitled without discrimination to all human rights recognised in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples."

The United Nations has constantly supported the composition and adoption of the Declaration, e.g. the World Conference on Human Rights called on the Working Group on Indigenous Populations to

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35 Adopted 26 June 1945, entered into force 24 October 1945, 145 British and Foreign State Papers 805.

36 Arts 3-4 United Nations Declaration on the Rights of Indigenous Peoples.

37 Ibid., 46 (1).

38 Ibid., arts 8, 11, 14 (3), 15 and 31.

39 Ibid., article 33.

40 Ibid., arts 3-14 and 16.

41 Ibid., arts 25-27.

42 Barelli, see note 32, 963.

complete the drafting in 1993,[43] the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance called upon states to approve the text of the Declaration as soon as possible,[44] and the document adopted at the end of the 2005 World Summit, the largest gathering of world leaders in the history of the United Nations, reaffirmed the commitment of the international community "to continue making progress in the advancement of the human rights of the world's indigenous peoples […] and to present for adoption a final draft United Nations declaration on the rights of indigenous peoples as soon as possible."[45]

In addition, following the adoption of the Declaration, several United Nations institutions have reacted to this new development in international law. For example, the Committee on the Elimination of Racial Discrimination (CERD) recommended in its 2008 Concluding Observations on the United States "that the declaration be used as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples."[46] Not only did CERD refer to the Declaration on the Rights of Indigenous Peoples to interpret obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.[47] It also recommended that the United Nations Declaration on the Rights of Indigenous Peoples be applicable as a legally binding instrument to all United Nations Member States, even the ones which had voted against it. Likewise, the Committee on the Rights of the Child has also considered the United Nations Declaration on the Rights of Indigenous Peoples as a guide to interpret a state's obligation under the Convention on the Rights of the Child[48] by urging State Par-

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43 World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted on 25 June 1993, Part II, paras 28-29.

44 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Durban Declaration and Programme of Action,* adopted 8 September 2001, para. 206. Text available at: <http://www.un.org/WCAR/durban.pdf>.

45 2005 World Summit Outcome, A/RES/60/1 of 16 September 2005, para. 127.

46 Committee on the Elimination of Racial Discrimination, *Concluding Observations on the United States of America*, Doc. CERD/C/USA/CO/6 of 5 March 2008, para. 29.

47 Adopted 7 March 1966, entered into force 4 January 1969, UNTS Vol. 660 No. 195.

48 Adopted 20 November 1989, entered into force 2 September 1990, UNTS Vol. 1577 No. 3.

ties "to adopt a rights-based approach to indigenous children based on the Convention and other relevant international standards, such as ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples."[49] The Committee on Economic, Social and Cultural Rights has also taken note of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples and encouraged Nicaragua in its Concluding Observations "to continue with its efforts to promote and implement the principles of the United Nations Declaration on the Rights of Indigenous Peoples."[50] Likewise, the High Commissioner for Human Rights has confirmed that "[t]he OHCHR's work is to assist states and indigenous peoples in implementing the Declaration."[51]

c. Implications of the Adoption of the United Nations Declaration on the Rights of Indigenous Peoples for the Human Rights Committee

In contrast to other United Nations bodies and institutions, which have taken note of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples and acted accordingly, the Human Rights Committee did not even mention the Declaration in its decision, and by merely redefining the complaint and basing it on article 27 ICCPR instead of article 1 (2) ICCPR, the Human Rights Committee completely ignored the recent developments in international law regarding the strengthening of indigenous peoples' rights.

This comes as a surprise since in the past the Human Rights Committee had proven to be rather progressive in its interpretation. For example, the Human Rights Committee had declared in its General Comment No. 23 regarding the interpretation of article 27 ICCPR that the recognition and protection of certain indigenous rights was essential for the survival of indigenous peoples as peoples and requested the ICCPR Member States to act accordingly:

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49 Committee on the Rights of the Child, *General Comment No. 11: Indigenous Children and Their Rights under the Convention*, Doc. CRC/C/GC/11 of 30 January 2009, para. 82.

50 Committee on Economic, Social and Cultural Rights, *Concluding Observations on Nicaragua*, Doc. E/C.12/NIC/CO/4 of 20 November 2008, para. 35.

51 Human Rights Council, *Expert Mechanism on the Rights of Indigenous Peoples, Opening Statement by Ms. Kyung-wha Kang, Deputy High Commissioner for Human Rights*, First Session, Geneva, 1-3 October 2008.

> "[T]he Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. […] The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned […]. States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected […]."[52]

In addition, the Human Rights Committee had acknowledged that a group of individuals claiming to be similarly affected in the exercise of their individual rights by actions or omissions of a state may collectively submit a communication about alleged breaches of these rights,[53] and in recent years, it had also recognised in its concluding observations on state reports that indigenous peoples are indeed "peoples" within the meaning of article 1 ICCPR, hence the States Parties to the ICCPR are obliged to respect their right to self-determination and to freely dispose of their natural wealth and resources.[54] In addition, with regard to individual communications concerning indigenous peoples' rights, the Human Rights Committee had stated that article 1 ICCPR may be relevant in the interpretation of other rights in the ICCPR, in particular article 27 ICCPR.[55]

Therefore, Mr. Alarcón, the counsel of Ms. Poma Poma, had probably expected the Human Rights Committee to continue its progressive approach and to use the adoption of the United Nations Declaration on

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52 General Comment No. 23, see note 11, paras 7-9 (footnote omitted).

53 *Lubicon Lake Band v. Canada*, see note 14, para. 32.1; *Apirana Mahuika et al. v. New Zealand*, see note 29, para. 9.2.

54 See, for example, Human Rights Committee, *Concluding Observations on Mexico*, Doc. CCPR/C/79/Add.109 of 22-23 July 1999, para. 19; id., *Concluding Observations on Norway*, Doc. CCPR/C/79/Add.112 of 26 October 1999, para. 17; and id., *Concluding Observations on Sweden*, Doc. CCPR/CO/74/SWE of 1 April 2002, para. 15.

55 See *Apirana Mahuika et al. v. New Zealand*, see note 29, para. 9.2, and *J.G.A. Diergaardt v. Namibia*, see note 29, para. 10.3.

the Rights of Indigenous Peoples as an opportunity to base an indigenous individual's claim on article 1 ICCPR.

Such a step would have been in accordance with recent developments in international law regarding the rights and legal status of indigenous peoples and it would have been covered by the wording of Optional Protocol I. According to article 1 Optional Protocol I, the States Parties to Optional Protocol I recognise "the competence of the Committee to receive and consider communications from individuals […] who claim to be victims of a violation […] of any of the rights set forth in the Covenant." And according to article 2 Optional Protocol I, individuals may submit communications to the Human Rights Committee claiming "that any of their rights enumerated in the Covenant have been violated." Hence, according to the wording, an individual claim can be based on any right laid down in the ICCPR and not only on arts 6-27 ICCPR as stated by the Human Rights Committee. The argument that an individual complaint could not be based on article 1 ICCPR since the ICCPR and its Protocols did not provide a procedure enabling a group of persons to claim a violation of their collective group right or a procedure allowing an individual to file a claim on behalf of a group, is also not convincing since the protection of an indigenous peoples' right is often a prerequisite for indigenous individuals to exercise their individual rights.

Yet for political reasons, the Human Rights Committee is still reluctant to take the final step and to allow the members of an indigenous people to base a communication on an alleged violation of article 1 ICCPR. In fact, the decision in the case of *Ángela Poma Poma v. Peru* can even be regarded as a step backwards in the protection of indigenous peoples' rights since the Human Rights Committee did not even refer to article 1 ICCPR to interpret the content of article 27 ICCPR – as it had done in previous decisions[56] – but rather saw article 27 ICCPR as a stand-alone provision. By doing this, the Human Rights Committee failed to recognise the importance the protection of collective rights has for the protection of an individual indigenous person's right. Furthermore, by failing to even refer to article 1 ICCPR when interpreting article 27 ICCPR regarding an indigenous person's complaint, the Human Rights Committee indirectly denied indigenous peoples the status as peoples and the right to self-determination. Instead, the Human Rights Committee expressly stated that article 27 ICCPR "establishes

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[56] See *Apirana Mahuika et al. v. New Zealand*, see note 29, para. 9.2, and *J.G.A. Diergaardt v. Namibia*, see note 29, para. 10.3.

and recognises a right which is conferred on individuals belonging to minority groups"[57] and that "[i]n the present case, it is undisputed that the author is a member of an ethnic minority and that raising llamas is an essential element of the culture of the Aymara community."[58] Hence, indigenous peoples were once again classified as being merely a minority – a particular minority indeed but still a minority and not a people.

However, although the Human Rights Committee regarded the Aymara as an ethnic minority – "a community" – and not a people, it still recognised the collective dimension of the right to access to water, e.g. it stated that "the rights protected by article 27 include the rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong",[59] and that "measures whose impact amounts to a denial of the right of the community to enjoy its own culture are incompatible with article 27."[60] Yet, ultimately, the Human Rights Committee insisted that an individual violation of the claimant had to be shown even if it was evident that the indigenous people as a group were collectively affected by an act or omission of a state. For example, in the case of *Ángela Poma Poma*, the proceedings lasted almost four and a half years because the members of the Human Rights Committee insisted on a proof that the diversion of water was of direct and individual concern to Ms. Poma Poma. The complaint could only be decided after a staff member of the Human Rights Committee had travelled to the remote area of the Aymara people, found Ms. Poma Poma and had seen for himself that Ms. Poma Poma had indeed been engaged in breeding and herding llamas and alpacas. Meanwhile, probably all the alpacas and llamas had died of thirst and the Aymara traditional way of living had been irrevocably destroyed.

Therefore, although Ms. Poma Poma finally succeeded with her complaint, the adherence of the Human Rights Committee to its previous decisions, i.e. the refusal to allow an individual communication to be based on article 1 ICCPR and the classification of an indigenous group as ethnic minority instead of people in spite of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples

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57 See *Ángela Poma Poma v. Peru*, see note 1, para. 7.2 referring to General Comment No. 23, para. 1.

58 Ibid., para. 7.3.

59 Ibid., para. 7.3.

60 Ibid., para. 7.4.

has to be regarded as a bitter disappointment for indigenous peoples in their struggle to protect their right to self-determination.

2. The Concept of Free, Prior and Informed Consent

Although the Human Rights Committee decided very conservatively regarding the judiciability of article 1 ICCPR in an individual complaint, it has proven to be open to a new development in international law regarding the protection and promotion of indigenous peoples' rights: the concept of free, prior and informed consent. For the first time ever, the Human Rights Committee stated in its decision in *Ángela Poma Poma v. Peru* that "the free, prior and informed consent of the members of the community" affected by "measures which substantially compromise or interfere with the culturally significant activities of a minority or indigenous community" was necessary in order to make such a measure admissible. "[M]ere consultation" – on the other hand – was not regarded as being sufficient to ensure the required effective participation in the decision-making process.[61]

This statement stands in contrast to the Human Rights Committee's previous decisions regarding individual complaints based on article 27 ICCPR, in which it held that consultations during the proceedings were sufficient in order to ensure an effective participation of the affected indigenous group as long as the state takes the indigenous group's interests into consideration when deciding on the measures.[62]

Although the Human Rights Committee had already departed from this point of view in its 2006 Concluding Observations on Canada, in which it stressed "the obligation of the State party to seek the informed consent of indigenous peoples before adopting decisions affecting them",[63] it was not until *Ángela Poma Poma v. Peru* that it expressly stated for the first time that the mere attempt to gain such a consent was not enough but that the actual grant of a free, prior and informed con-

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61 Ibid., para. 7.6.

62 Human Rights Committee, *Ilmari Länsman et al. v. Finland*, Communication No. 511/1992, Doc. CCPR/C/52/D/511/1992 of 26 October 1994, para. 9.6; id., *Jouni E. Länsman et al. v. Finland*, Communication No. 671/1995, Doc. CCPR/C/58/D/671/1995 of 30 October 1996, para. 10.5; id., *Apirana Mahuika et al. v. New Zealand*, see note 29, paras 9.6-9.8.

63 Human Rights Committee, *Concluding Observations on Canada*, Doc. CCPR/C/CAN/CO/5 of 27-28 October 2005, para. 22.

sent by the affected community was necessary in all cases where measures substantially compromise or interfere with culturally significant activities. Hence the Human Rights Committee awarded indigenous groups a veto power if the measure in question had substantial negative impacts on the cultural life of the indigenous group.

Yet, it is doubtful whether the requirement of a free, prior and informed consent by an affected indigenous people in this decision can be regarded as a progressive and decisive step taken by the Human Rights Committee to protect and promote indigenous peoples' rights. The concept of free, prior and informed consent is not a new development in international law. In fact, this concept has been applied by a number of international, regional and domestic bodies and institutions for several years. Hence, in order to be able to determine whether the decision of the Human Rights Committee in *Ángela Poma Poma v. Peru* can be regarded as an important step in the protection and promotion of indigenous peoples' rights due to the recognition of a state's obligation to obtain an affected indigenous peoples' free, prior and informed consent, the application, content and extent of this concept by these other bodies and institutions needs to be analysed and compared to the Human Rights Committee's approach.

a. The Development of the Concept of Free, Prior and Informed Consent on the International, Regional and State Level

aa. The International Level

When addressing the rights of indigenous peoples under international law, the first reference is generally the ILO Convention No. 169 of 1989. Besides ILO Convention No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries,[64] ILO Convention No. 169 remains the only international binding instrument exclusively dealing with the rights of indigenous peoples. Yet ILO Convention No. 107 is nowadays regarded as outdated due to its assimilative approach and is no longer referred to. Although it remains binding on those 17 states which have ratified it,[65] it had been declared closed for ratification after the adop-

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[64] Adopted 26 June 1957, entered into force 2 June 1959, UNTS Vol. 328 No. 247.

[65] The relevant list is available at: <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C107>.

tion of ILO Convention No. 169. Yet when looking at ILO Convention No. 169, which was meant to replace ILO Convention No. 107 and which is based on respect for the cultures and ways of life of indigenous peoples,[66] it has to be borne in mind that so far, it has only been ratified by 20 states.[67] Therefore, it cannot in itself be regarded as a strong statement of international law.[68] But since it is often referred to by international bodies, its contribution goes beyond the limited number of ratifications and therefore it is an appropriate starting point for investigations on recognised indigenous peoples' rights.[69] Regarding the concept of free, prior and informed consent, four articles are of importance: arts 2, 6, 7 and 15 of Convention No. 169. According to article 2 (1) states have a duty to systematically protect indigenous peoples' rights "with the participation of the peoples concerned." Pursuant to article 6 (1) lit. a the governments shall, as a general principle, "*consult* the peoples concerned […] whenever consideration is being given to legislative or administrative measures which may affect them directly"[70] and according to article 6 (2) these consultations "shall be undertaken, in good faith, […] *with the objective of achieving* agreement or consent to the proposed measures."[71] Article 7 of ILO Convention No. 169 also stipulates the duty of cooperation and recognises the indigenous peoples' "right to decide their own priorities for the process of development" and "to exercise control, to the extent possible, over their own economic, social and cultural development." Article 15 of Convention No. 169 protecting the indigenous peoples' right to participate in the use, management and conservation of the resources on their traditional lands obliges states to "establish or maintain procedures through which

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66 See, for example, article 5 ILO Convention No. 169.

67 The relevant list is available at: <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?(C169)>.

68 See Barelli, see note 32, 958; J. Gilbert, "Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples", *International Journal on Minority and Group Rights* 14 (2007), 207 et seq. (209); S.M. Stevenson, "Indigenous Land Rights and the Declaration on the Rights of Indigenous Peoples: Implications for Maori Land Claims in New Zealand", *Fordham Int'l L. J.* 32 (2008-2009), 298 et seq. (319).

69 See J. Anaya, "International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State", *Arizona Journal of International and Comparative Law* 21 (2004), 13 et seq. (57-60); Barelli, see note 32, 958.

70 Emphasis added by author.

71 Emphasis added by author.

they shall *consult* these peoples […] before undertaking or permitting any programmes for the exploration or exploitation of such resources."[72] Hence, ILO Convention No. 169 stipulates the duty of states to involve indigenous peoples in all decisions affecting them. Yet, this duty only amounts to a duty of consultation, which has to be undertaken with the objective of achieving consent. An actual consent is, however, not required for a measure to be admissible. Therefore, ILO Convention No. 169 does not recognise the principle of free, prior and informed consent.

In contrast, the 2007 United Nations Declaration on the Rights of Indigenous Peoples expressly recognises the duty of states to obtain the free prior and informed consent of indigenous peoples with regard to "any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources" (article 32 (2); see also arts 10, 11, 28 and 29). In addition, as a general principle, article 19 stipulates that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions *in order to obtain their free, prior and informed consent* before adopting and implementing legislative or administrative measures that may affect them."[73]

Hence, according to the United Nations Declaration on the Rights of Indigenous Peoples, a mere consultation and the objective to obtain an indigenous peoples' consent are not sufficient but an actual consent needs to be obtained before any measure affecting indigenous peoples' lands, cultures and ways of life can be undertaken. If a state undertakes a measure without having obtained such consent the measure is inadmissible and if it is carried out nevertheless the state will be liable to pay damages (see arts 11 and 28). Although the Declaration is – as stated above – not binding on states, its requirement of a free, prior and informed consent seems to reflect the view of the international community, not only because the Declaration has been endorsed by a broad majority of states but also due to the fact that the idea of a duty to obtain an indigenous peoples' free and informed consent prior to taking any measures affecting them has – since the initial drafting of the Declaration – been taken up and supported by several international bodies and institutions.

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72 Emphasis added by author.

73 Emphasis added by author.

For example, in its General Recommendation XXIII on Indigenous Peoples of August 1997,[74] CERD called upon states to "[e]nsure […] that no decisions directly relating to [indigenous peoples'] rights and interests are taken without their informed consent" (para. 4 lit. d) and to take steps to return those lands and territories indigenous peoples have traditionally owned or otherwise inhabited or used and of which they have been deprived without their free and informed consent (para. 5). CERD has subsequently drawn the attention of states to this General Recommendation and reiterated in its Concluding Observations on States Parties that with regard to decisions affecting indigenous peoples' land rights, the affected peoples' informed consent should be secured prior to undertaking any measures.[75]

Likewise, the United Nations Committee on Economic, Social and Cultural Rights has expressed its deep concern that traditional lands have been occupied or reduced and resources pertaining to traditional lands exploited without the full consent of the affected communities and urged States Parties to obtain an indigenous people's consent prior to undertaking any such activities.[76]

The World Bank, in its Operational Policy 4.10 of 2005,[77] requires borrowers "to engage in a process of free, prior, and informed consultation" (para. 1) whereby it clarifies in a footnote that this term "refers to a culturally appropriate and collective decision making process subsequent to meaningful and good faith consultation and informed participation regarding the preparation and implementation of the project" but "does not constitute a veto right for individuals or groups". Yet, the

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74 Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII: Indigenous Peoples*, GAOR 52nd Sess., Suppl. No. 18, Doc. A/52/18, Annex V at 122 of 18 August 1997.

75 See, for example, Committee on the Elimination of Racial Discrimination, *Concluding Observations on Australia*, Doc. CERD/C/304/Add.101 of 24 March 2000, para. 9. See also id., *Concluding Observations on the United States of America*, Doc. CERD/C/59/Misc.17/Rev.3 of 13 August 2001, para. 21; id., *Concluding Observations on Australia*, Doc. CERD/C/AUS/CO/14 of 10 March 2005, para. 11; id., *Concluding Observations on India*, Doc. CERD/C/IND/CO/19 of 6 March 2007, para. 19.

76 See, for example, Committee on Economic, Social and Cultural Rights, *Concluding Observations on Ecuador*, Doc. E/C.12/1/Add.100 of 14 May 2004, para. 12; id., *Concluding Observations on Colombia*, Doc. E/C.12/1/Add.74 of 29 November 2001, paras 12 and 33, referring to ILO Convention No. 169.

77 World Bank, *Operational Policy 4.10: Indigenous Peoples*, July 2005.

World Bank also states in its Operational Policy that it "does not proceed further with project processing if it is unable to ascertain that [broad] support [by the affected indigenous peoples] exists" (para. 11). Therefore, although the World Bank does not use the term "free, prior and informed consent" and expressly denies indigenous peoples a power of veto, the fact that it requires prior and informed consultation carried out in good faith and does not proceed with a project if the project does not have the broad support of the community implies that the required consultation amounts – in fact – to a consent, with the difference being that this "consent" does not necessarily have to be obtained from the affected indigenous people by the state but is ascertained by the World Bank on behalf of the indigenous people.

Likewise, Member States to the Convention on Biological Diversity of 1992 (CBD)[78] are obliged to obtain the free, prior and informed consent of an affected indigenous people. Article 8 lit. j CBD calls on states to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities […] and promote their wider application with [their] approval and involvement". That such a duty to involve indigenous peoples amounts to a right of free, prior and informed consent has been specified in Decision V/16 of the Fifth Conference of Parties to the CBD according to which "[a]ccess to traditional knowledge, innovations and practices of indigenous and local communities should be subject to [their] prior informed consent or prior informed approval."[79]

During the United Nations Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights, held in Geneva from 5-7 December 2001, the participants recognised the need to have a universal definition of the concept of free, prior and informed consent, and reached a basic common understanding of the contents and extent of this concept. According to them, this concept comprises "the right to say 'no'" thus giving indigenous peoples a veto power.[80]

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78 Adopted 5 June 1992, entered into force 29 December 1993, UNTS Vol. 1760 No. 79.

79 Fifth Conference of Parties, *COP 5 Decision V/16: Article 8 (j) and Related Provisions*, May 2000, available at: <http://www.cbd.int/decision/cop/?id=7158>. I. General Principles, No. 5. See also ibid., II. Tasks of the First Phase of the Programme of Work, Task 1.

80 United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human

When the United Nations Permanent Forum on Indigenous Issues in preparation of its third session surveyed a questionnaire distributed to United Nations bodies, funds, programmes and specialised agencies in order to gather information about "how the principle of free, prior and informed consent is understood and applied" by them,[81] the report showed that UNDP, UNFPA, FAO, ILO, UNITAR, the Office of the United Nations High Commissioner for Human Rights and the WHO have implemented the concept of free, prior and informed consent in their policies and practices and regard this concept as being embedded in the human rights framework.

bb. The Regional Level

Not only on the international but also on the regional level the obligation of states to obtain an affected indigenous people's free and informed consent prior to taking any measures having an adverse impact on its lands, cultures, or ways of life has now been widely recognised.

In the Americas, the concept of free, prior and informed consent is laid down in article XVIII of the Draft American Declaration on the Rights of Indigenous Peoples of the Organization of American States.[82] With regard to land rights, article XVIII (3) (ii) states that a traditional title to land "may only be changed by mutual consent between the state and the respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property". Regarding subsoil surfaces located on traditional lands but belonging to the state, article XVIII (5) stipulates a state's duty to "establish or maintain procedures for the participation of the peoples concerned in determining whether the interests of these people would be adversely affected

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Rights, *International Decade of the World's Indigenous People, Including Information relating to the Voluntary Fund for the International Decade of the World's Indigenous People and Report of the Advisory Group: Report of the Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights*, Doc. E/CN.4/Sub.2/AC.4/2002/3 of 17 June 2002, para. 52.

81 United Nations Economic and Social Council, Permanent Forum on Indigenous Issues, *Inter-Agency Support Group on Indigenous Issues, Report on Free, Prior and Informed Consent*, Doc. E/C.19/2004/11 of 12 March 2004, para. 3.

82 Approved by the Inter-American Commission on Human Rights on 26 February 1997, at its 95th Regular Sess., 1333rd Mtg., OAS Doc. OEA/Ser/L/V./II.95 Doc. 6 (1997).

and to what extent, before undertaking or authorizing any program for planning, prospecting, or exploiting existing resources on their lands." As regards relocation, article XVIII (6) lays down that "states shall not transfer or relocate indigenous peoples without the free, genuine, public and informed consent of those peoples." Although the American Declaration on the Rights of Indigenous Peoples has not yet entered into force, the Inter-American Commission on Human Rights has in its decisions repeatedly demanded a "fully informed consent" regarding the occupation and use of traditional lands and resources and the endorsed right not to be deprived of this interest whereby the Inter-American Commission on Human Rights based these obligations on the American Declaration of the Rights and Duties of Man.[83] Likewise, the Inter-American Developmental Bank (IDB)'s Strategies and Procedures on Sociocultural Issues as Related to the Environment of June 1990 provide that "in general the IDB will not support projects that involve unnecessary or avoidable encroachment onto territories used or occupied by tribal groups or projects affecting tribal lands, unless the tribal society is in agreement."[84]

Regarding the recognition of the concept of free prior and informed consent within Europe, the Resolution of the Council of the European Union of 30 November 1998 on Indigenous Peoples within the Framework of the Development Cooperation of the Community and the Member States needs to be mentioned, which stipulates that "indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their traditional areas,"[85] thus awarding indigenous peoples a power of veto. The principle of free, prior and informed consent has been confirmed

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83 Inter-American Commission on Human Rights, *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02 of 27 December 2002, para. 131; id., *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Report No. 40/04 of 12 October 2004, paras 117 and 142. See also id., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Case 11.577, Report No. 27/98 of 3 March 1998, para. 142, cited in Inter-American Court of Human Right, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR Series C No. 79 of 31 August 2001, para. 25.

84 Inter-American Development Bank, Environmental Committee, *Strategies and Procedures on Sociocultural Issues as Related to the Environment* (June 1990), 3.

85 Council of the European Union, Resolution of 30 November 1998 on Indigenous Peoples within the Framework of the Development Cooperation of the Community and the Member States, para. 5.

and expressly recognised in the 2005 Joint Statement on EU Development Policy stipulating that "[t]he key principle for safeguarding indigenous peoples' rights in development cooperation is to ensure their full participation and the free and prior informed consent of the communities concerned"[86] and the European Commission's Programming Fiche on Indigenous Peoples stating that the indigenous peoples' "right and capacity to achieve 'self-development' and to permit their free prior and informed consent" constitutes a basic principle of cooperation with indigenous peoples.[87]

cc. The State Level

Not only have international and regional bodies and institutions implemented the concept of free, prior and informed consent but it has also been implemented in several domestic legal instruments and is endorsed by numerous national courts.

The concept of free, prior and informed consent has been codified by several states in their constitutions and national legislation. For example, the Philippines in their Indigenous Peoples Rights Act of 1997 stipulate that an indigenous people's free, prior and informed consent is necessary for all activities affecting their lands and territories including relocation (sec. 7 lit. c and sec. 58), the taking of their cultural, intellectual, religious, and spiritual property (sec. 32), archaeological explorations (sec. 33 lit. a), access to biological and genetic resources (sec. 35), exploitation of natural resources (sec. 46 lit. a and sec. 59), delineation (sec. 52 lit. b), and environment protection and conservation measures (sec. 58).[88]

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[86] Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the Commission on European Union Development Policy: The European Consensus, Official Journal C 46/01 of 24 February 2006, para. 103.

[87] European Commission, Programming Guide for Strategy Papers: Programming Fiche: Indigenous Peoples of December 2008.

[88] Republic Act No. 8371: An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for other Purposes (The Indigenous Peoples' Rights Act of 1997, enacted 28 July 1997).

Likewise, New Zealand in its Crown Minerals Act of 1991[89] lays down that "[n]o person may, without the consent of the owners of the land, enter Maori land for the purpose of carrying out a minimum impact activity where the land is regarded as waahi tapu [(sacred area)]" (sec. 51 (2)). Regarding activities other that those with minimum impact, the obligation to obtain consent is stipulated in arts 53-54.

Several states in Latin America have also endorsed the principle of free, prior and informed consent in their national legislations and constitutions, see e.g. Peru regarding the use of traditional knowledge,[90] bioprospection[91] and the establishment of protected areas,[92] Ecuador regarding research exploitation,[93] Paraguay regarding relocation,[94] and Bolivia, which has adopted the entire United Nations Declaration on the Rights of Indigenous Peoples including the provisions on free, prior and informed consent, as national law,[95] and incorporated some of the provisions into its new constitution.[96]

Besides the implementation of the concept of free, prior and informed consent in national legislation and constitutions, this principle has also been endorsed by numerous national courts, e.g. the Columbian Constitutional Court,[97] the Supreme Court of Belize,[98] and the Canadian Supreme Court.[99]

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89 Crown Minerals Act 1991 No. 70, enacted 22 July 1991, as of 6 November 2008.

90 Propuesta de Régimen de Protección de los Conocimientos Colectivos de los Pueblos y Comunidades Indígenas Vinculados a los Recursos Biológicos (Law Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources), Law No. 27811, enacted 10 August 2002, arts 5 lit. d, 6 and 42.

91 Decreto Supremo (Supreme Decree) No. 038-2001-AG of 22 June 2001, amended to Ley de Áreas Naturales Protegidas (Law of Natural Protected Areas), Law No. 26834, enacted 30 June 1997, article 166.3.

92 Ibid, article 43.2.

93 Constitution of Ecuador of 2008, article 57 (7).

94 Constitution of Paraguay of 1992, article 64.

95 Law No. 3760, enacted 7 November 2007.

96 Constitution of Bolivia of 2009.

97 Constitutional Court of Columbia, *The U'wa Case*, Ruling SU-039/97 of 3 February 1997, section 3.3.

98 Supreme Court of Belize, *Aurelio Cal et al. v. The Attorney-General of Belize and the Minister of Natural Resources and Environment/ Manuel Coy et al. v. the Attorney-General of Belize and the Minister of Natural Re-*

b. The Application of the Principle of Free, Prior and Informed Consent by the Human Rights Committee

Looking at this recent development in national and international law, the concept of free, prior and informed consent can be identified as a principle of international law which has gained wide support throughout the international community and might even amount to customary international law.[100] Therefore, it is evident that the Human Rights Committee's requirement of a free, prior and informed consent in the case *Ángela Poma Poma v. Peru* cannot be regarded as a new and innovative development but merely reflects an existing and widely recognised concept of public international law. Nevertheless the explicit adoption of this principle by the Human Rights Committee must be appreciated as an affirmation and promotion of this concept and as a welcome step towards unification of public international law norms.

Yet, the overall impact of this decision on the protection and promotion of indigenous peoples' rights suffers from its ambiguity and contradiction as to the extent of the obligation to obtain free, prior and informed consent. On the one hand, the Human Rights Committee explained that the rights under article 27 ICCPR are no absolute rights but that "a State may legitimately take steps to promote its economic development", that it has a "leeway" in this area, and that only "measures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact […] would not necessarily amount to a denial of rights under article 27."[101] Furthermore, it added that the opportunity to participate in the decision-making process would merely be necessary if the intended measures "substantially compromise or in-

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sources and Environment, Consolidated Claims, Claim Nos 171 & 172 of 18 October 2007, para. 136 lit. d.

99 Supreme Court of Canada, *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 of 11 December 1997, para. 168; *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511, 2004 SCC 73 of 18 November 2004, paras 24, 30, 40-51.

100 See also J. Anaya, "Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources", *Arizona Journal of International and Comparative Law* 22 (2005), 7 et seq. (17); Barelli, see note 32, 972-977.

101 See *Ángela Poma Poma v. Peru*, see note 1, para. 7.4.

terfere with the culturally significant economic activities."[102] This statement seems to imply that proportionality and the obligation to obtain free, prior and informed consent exist alternatively: if a measure was proportionate it would be admissible and no consent by the affected indigenous group would be necessary. If the intended measure was disproportionate, it would be inadmissible unless a free, prior and informed consent be given by the affected group. Thus the free prior and informed consent would merely serve as a means of justification for disproportionate measures. Yet such an interpretation would completely undermine the importance of an effective participation of an affected indigenous group for the preservation of their traditional way of life. In addition, it would offer even less protection than the amount of protection granted by the Human Rights Committee in previous cases, in which it held that also with regard to measures not amounting to a complete denial of rights under article 27 ICCPR, the affected group needed at least to be consulted.[103] Hence, such an interpretation cannot have been the intention of the Human Rights Committee, especially since it also stated – on the other hand – that "[i]n addition" to the free, prior and informed consent "the measure must respect the principle of proportionality so as not to endanger the very survival of the community and its members."[104] In stark contrast to its previous explanations, this statement seems to imply that proportionality and free prior and informed consent are always cumulative requirements for a measure to be admissible and therefore that a free prior and informed consent would have to be obtained in all cases where a measure adversely affected an indigenous community, even if the measure in question only had a proportionate impact on an indigenous people.

Therefore, although in general the Human Rights Committee's explicit adoption of the concept of free, prior and informed consent has to be regarded as an important step in the international protection of indigenous peoples' rights, this aspect of the decision cannot be welcomed without reservations as it remains doubtful what exactly the Human Rights Committee wanted to express by obliging states to obtain the free, prior and informed consent of the indigenous group affected by an intended measure.

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[102] Ibid., para. 7.6.

[103] *Ilmari Länsman et al. v. Finland*, see note 62, para. 9.6; *Jouni E. Länsman et al. v. Finland*, see note 62, para. 10.5; *Apirana Mahuika et al. v. New Zealand*, see note 29, paras 9.6-9.8.

[104] See *Ángela Poma Poma v. Peru*, see note 1, para. 7.6.

V. Conclusion

The decision in the case *Ángela Poma Poma v. Peru* leaves the reader with an ambivalent feeling. On the one hand, the case is very disappointing for the indigenous peoples' struggle for recognition, promotion and protection of their right to self-determination since it completely ignores the adoption of the United Nations Declaration on the Rights of Indigenous Peoples and adheres to the qualification of indigenous peoples as ethnic minorities pursuant to article 27 ICCPR. The affirmation of its previous jurisdiction regarding the inadmissibility of basing an individual complaint on article 1 ICCPR deprives indigenous peoples of the chance to collectively protect their rights as peoples. Yet, on the other hand, the Human Rights Committee, for the first time ever, explicitly endorsed the principle of free, prior and informed consent – a principle which indirectly protects the right of indigenous peoples to self-determination and to freely dispose of their natural wealth and resources laid down in article 1 ICCPR and which is bestowed on peoples only and not on minorities. This development in the Human Rights Committees jurisdiction is to be hailed since the concept of free, prior and informed consent fundamentally strengthens an indigenous peoples' position.

Yet, the ambivalence in the Human Rights Committee's decision significantly reduces the positive impact of the endorsement of this concept. In addition, the concept of free, prior and informed consent is merely mentioned without having an actual impact on the ruling. Rather, the ruling regarding the unacceptability of the measure is almost entirely based on the disproportionally of the measure, not the lack of free, prior and informed consent. Hence, the prominent aspect of this decision is not the first-time-ever recognition of the concept of free, prior and informed consent by the Human Rights Committee but its continuous denial to recognise indigenous peoples as peoples pursuant to article 1 ICCPR, which stands in discrepancy to recent developments in international law, in particular, the adoption of the United Nations Declaration on the Rights of Indigenous Peoples. Therefore, although ultimately the Human Rights Committee decided in favour of Ms. Poma Poma, the decision and its consequences have to be regarded as rather disappointing for the indigenous peoples' movement. One can only hope that in future cases the Human Rights Committee will eventually abandon its position on the inadmissibility of basing individual complaints on alleged violations of article 1 ICCPR while at the same time adhering to and clarifying the concept of free, prior and informed

consent. Such a development in the jurisprudence of the Human Rights Committee would constitute a major and long overdue step in the indigenous peoples' long-standing struggle for the protection and promotion of their right to self-determination.