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Right of peoples to self-determination

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Report of the Secretary-General

Summary

In its resolution 64/149, the General Assembly requested the Secretary-General to report to it at its sixty-fifth session on the question of the universal realization of the right of peoples to self-determination. The present report is submitted in accordance with that request.

The report outlines the relevant jurisprudence of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights on the treaty-based human rights norms relating to the realization of the right of peoples to self-determination and contains a summary of the developments relating to the consideration by the Human Rights Council of the subject matter. A reference to the recent advisory opinion of the International Court of Justice on the legality of the unilateral declaration of independence of Kosovo adopted on 17 February 2008 is also included.

* A/65/150.



I. Introduction

1. The General Assembly, in its resolution 64/149 adopted on 18 December 2009, reaffirmed that the universal realization of the right of all peoples, including those under colonial, foreign and alien domination, to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights. The Assembly requested the Human Rights Council to continue to give special attention to the violation of human rights, especially the right to self-determination, resulting from foreign military intervention, aggression or occupation, and requested the Secretary-General to report on this question to the Assembly at its sixty-fifth session. The present report is submitted in accordance with paragraph 6 of resolution 64/149.

2. The report summarizes the main developments relating to self-determination that have taken place in the context of the human rights mechanisms. This includes the recent concluding observations of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. These are based on their consideration of the periodic reports submitted by the States parties to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in respect of the implementation of the right to self-determination guaranteed in article 1 of the two Covenants. The report also summarizes recent developments relating to the considerations by the Human Rights Council of the question of the realization of the right to self-determination at its twelfth special session as well as at its twelfth, thirteenth and fourteenth regular sessions. In addition to this, as a development within the ambit of subject matters covered by resolution 64/169, reference is also made to the advisory opinion of the International Court of Justice delivered on 22 July 2010 on the lawfulness of the declaration of independence of Kosovo adopted on 17 February 2008.

II. The Human Rights Committee and the Committee on Economic, Social and Cultural Rights

3. The principle of self-determination is enshrined in Article 1, paragraph 2, of the Charter of the United Nations. Article 1, paragraph 1, of the International Covenant on Civil and Political Rights and article 1, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights affirm the right of all peoples to self-determination. Article 1, paragraph 3, of the International Covenant on Civil and Political Rights and article 1, paragraph 3, of the International Covenant on Economic, Social and Cultural Rights impose upon States parties, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, the obligation to promote the realization of that right and respect it, in conformity with the provisions of the Charter.

4. During the reporting period, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have addressed the issue of the right to self-determination in their consideration of States parties' periodic reports submitted respectively under article 40 of the International Covenant on Civil and Political Rights, and articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, with a focus on paragraph 2, article 1, of the two Covenants, which affirms a particular aspect of the economic content of the right to self-

determination, namely the right of peoples, for their own ends, to “freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence”. The relevant concluding observations are outlined below.

A. Concluding observations of the Human Rights Committee

5. During the reporting period, the Human Rights Committee addressed several issues related to the right to self-determination in its concluding observations on Argentina, Australia, New Zealand and the United Republic of Tanzania with respect to indigenous peoples.

6. In its concluding observations on Argentina adopted in March 2010, the Committee expressed concern about the information it had received indicating that indigenous groups have been the target of violence and have been forcibly evicted from their ancestral lands in a number of provinces for reasons relating to control over natural resources (articles 26 and 27 of the Covenant). The State party was called upon to adopt such measures as are necessary to put an end to evictions and safeguard the communal property of indigenous peoples as appropriate. The Committee urged the State party to redouble its efforts to implement the programme providing for a legal cadastral survey of indigenous community property, and to investigate and punish those responsible for the acts of violence (CCPR/C/ARG/CO/4, para. 25).

7. In its concluding observations on Australia adopted in May 2009, the Committee, while acknowledging the consultation process initiated by the State party to establish a national indigenous representative body to replace the Aboriginal and Torres Islander Commission abolished in 2004, expressed its ongoing concern that indigenous peoples are not sufficiently consulted in the decision-making process with respect to issues affecting their rights (articles 2, 25, 26 and 27). The Committee recommended that the State party increase its efforts towards arranging an effective consultation with indigenous peoples in decision-making in all areas having an impact on their rights and establish an adequately resourced national indigenous representative body (CCPR/C/AUS/CO/5, para. 13).

8. The Committee noted with satisfaction that the State party has implemented some of the recommendations of the Human Rights and Equal Opportunity Commission contained in its report entitled *Bringing them home*, and expressed regret that it has not granted reparation, including compensation, to the victims of the “Stolen Generation” policies (articles 2, 24, 26 and 27).

9. The Committee called on the State party to adopt a comprehensive national mechanism to ensure that adequate reparation, including compensation, is provided to the victims of the Stolen Generation policies (CCPR/C/AUS/CO/5, para. 15).

10. Moreover, while welcoming recent reforms, the Committee noted with concern the high cost, complexity and strict rules of evidence applying to claims under the Native Title Act, and regretted the lack of sufficient steps taken by the State party to implement the Committee’s recommendations adopted in 2000 (articles 2 and 27).

11. The Committee stated that “the State party should continue its efforts to improve the operation of the Native Title system, in consultation with Aboriginal and Torres Strait Islander Peoples” (CCPR/C/AUS/CO/5, para. 16).

12. In its concluding observations on New Zealand adopted in April 2010, the Committee acknowledged the negotiation process initiated with regard to a review or possible repeal of the Foreshore and Seabed Act 2004, while expressing concerns that the Act discriminates against the Maori, and extinguishes their customary title over the foreshore and seabed (articles 2, 26 and 27).

13. The Committee recommended that the State party increase its efforts for effective consultation of representatives of all Maori groups with regard to the current review of the Foreshore and Seabed Act 2004, with a view to amending or repealing it. In particular, the public consultation period should be sufficiently long, according to the Committee, so as to enable all Maori groups to have their views heard. Furthermore, in light of the Committee’s general comment No. 23 (1994) on article 27 of the International Covenant on Civil and Political Rights, the Committee recommended that special attention should be paid to the cultural and religious significance of access to the foreshore and seabed for the Maori (CCPR/C/NZL/CO/5, para. 19).

14. The Committee welcomed the initiative of the State party on constitutional reform that also aims to give greater effect to the Treaty of Waitangi. It noted, however, that the Treaty is currently not a formal part of domestic law, which makes it difficult for Maori to invoke it before the courts. The Committee also welcomed the efforts of the State party to settle historical Treaty claims, while expressing concern at reports that in one particular case, the State party had put an end to consultations despite the claim of some Maori groups that the settlements did not adequately reflect original tribal ownership (articles 2, 26 and 27).

15. The State party was called upon to continue its efforts to review the status of the Treaty of Waitangi within the domestic legal system, including the desirability of incorporating it into domestic law, in consultation with all Maori groups. Furthermore, the State party should ensure that the views expressed by different Maori groups during consultations in the context of the historical Treaty claims settlement process are duly taken into account (CCPR/C/NZL/CO/5, para. 20).

16. In its concluding observations on the United Republic of Tanzania adopted in August 2009, the Committee expressed concerns that the State party did not recognize the existence of indigenous peoples and minorities in its territory and that, according to reports, the traditional way of life of indigenous communities has been negatively affected by the establishment of game reserves and other projects (articles 26 and 27).

17. The Committee urged the State party to carry out a study regarding minorities and indigenous communities, and adopt specific legislation and special measures to protect, preserve and promote their cultural heritage and traditional way of life. The State party should also consult indigenous communities before establishing game reserves, granting licences for hunting, or undertaking other projects on “ancestral” or disputed lands (CCPR/C/TZA/CO/4, para. 26).

B. Concluding observations of the Committee on Economic, Social and Cultural Rights

18. The Committee on Economic, Social and Cultural Rights addressed relevant aspects of the right to self-determination in its concluding observations on Chad, the Democratic Republic of the Congo and Madagascar with respect to indigenous peoples.

19. In its concluding observations on Chad adopted in December 2009, the Committee expressed concern about the adverse effects of the exploitation of natural resources, particularly mining operations and oil exploration in indigenous territories, which is carried out in violation of the right of indigenous peoples with regard to their ancestral lands and natural resources.

20. The Committee urged the State party to carry out environmental and social impact assessments of economic activities, particularly mining and oil exploration, and to consult with the communities concerned, with a view to ensuring that these activities do not deprive indigenous peoples of the full enjoyment of their rights with regard to their ancestral lands and natural resources. In this respect, the Committee encouraged the State party to consider ratifying International Labour Organization (ILO) Convention No. 169 (of 1989) concerning Indigenous and Tribal Peoples in Independent Countries (E/C.12/TCD/CO/3, para. 13).

21. The Committee was also concerned about the system of exploitation of natural resources in the State party, which adversely affects the land and the way of life of indigenous peoples, depriving them of rights related to their ancestral land and cultural identity. In this regard, the Committee recommended that the State party adopt specific measures to protect the cultural identity and ancestral land of the indigenous peoples (E/C.12/TCD/CO/3, para. 35).

22. In its concluding observations on the Democratic Republic of the Congo adopted in November 2009, the Committee was concerned that, in spite of the adoption of a mining code in 2002 and a mining plan in 2004, as well as the current review of all mining contracts, the illegal exploitation and mismanagement of the State party's natural resources continue with the involvement of foreign companies. The Committee also noted with great concern that in the resource-rich province of Katanga, which is under effective Government control, its extensive mining industry continues to be exploited to the detriment of the rights of people of this province who remain extremely poor and deprived of the basic social services and infrastructures. The Committee was further concerned about the lack of transparency surrounding the current revision of mining contracts and the granting of new contracts to foreign companies, such as the exclusive concession granted in the field of uranium extraction (article 1.2).

23. The Committee urged the State party to take all appropriate measures to ensure that its natural resources were not subjected to illegal exploitation and mismanagement, to review without delay the mining contracts in a transparent and participatory way, to repeal all contracts that are detrimental to the Congolese people and to ensure that future contracts are concluded in a transparent and public way. The Committee also encouraged the State party to implement the Extractive Industries Transparency Initiative to which it has been a candidate country since 2008, in particular with regard to the regular disclosure of revenues received from oil, gas and mining to a wide audience in a publicly accessible, comprehensive and

comprehensible manner. The Committee called on the State party to adopt appropriate measures to control export of minerals and to impose drastic sanctions on those involved in illicit trade in natural resources. The Committee further called upon the State party to ensure that revenues derived from the mining sector are allocated for the development of the province of Katanga and that its inhabitants are provided with basic social services and infrastructures so that their living conditions may be improved (E/C.12/COD/CO/4, para. 13).

24. The Committee was also concerned that despite the adoption of the Forestry Code and a moratorium on concessions, illicit trade of wood and abusive exploitation of the country's forests continue to adversely affect the ecology and biodiversity and undermine the rights of indigenous peoples, especially pygmies, to live in their ancestral lands and manage their forests according to their traditional practices. The Committee also expressed concern that representatives of indigenous communities were not invited to take part in the second session of the inter-ministerial commission in charge of reviewing illicit logging contracts, even though the session was devoted to the signature of contracts between local authorities and logging companies (article 1.2).

25. The Committee urged the State party to enforce the moratorium on concessions until the mapping and zoning exercise is completed and to ensure that future forest concessions do not deprive the indigenous peoples of the full enjoyment of their rights to their ancestral lands and natural resources and that the benefits of the concessions contribute to the alleviation of their poverty. The State party should ensure that forestry projects are centred on advancing the rights of forest-dependent peoples and conducted only after comprehensive studies are carried out, with the participation of the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned activities. The Committee encouraged the State party to consider ratifying ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (E/C.12/COD/CO/4, para. 14).

26. The Committee was also concerned that land-related disputes that were at the heart of the Ituri conflict and continue to be the source of conflicts in many provinces, remained unresolved and may therefore lead to new inter-ethnic confrontation. The Committee was further concerned that the consultation process to revise the Land Law, although announced in the State party's report, had not yet formally begun and that no other initiative was foreseen to prevent future land dispute. Additional concerns were expressed in the numerous cases of peasants expelled from their land owing to mining operations in Kijiba, Kaposhi, Ngaleshi, Kifunga and Chimanga (Katanga) (article 1.2).

27. The Committee called upon the State party to urgently launch a consultation process with a view to revising the current Land Law and securing land tenure. Until such a law is adopted and implemented, the State party should take all the necessary measures in consultation with local and regional authorities to solve the actual land conflicts and prevent further disputes. As part of its efforts, the State party should envisage financially supporting the sensitization and mediation activities of the Land Commission established in February 2008 in the province of Ituri and creating community-based land commissions in the other provinces. The State party should also inquire into the expulsion of farmers in Katanga and provide them with compensation and alternative agriculture sites (E/C.12/COD/CO/4, para. 15).

28. The Committee was deeply concerned that the systematic and abusive exploitation of forest resources in the State party has negatively affected the lands and the way of life of numerous indigenous peoples, especially the pygmies living in the Province of Equateur, impeding the enjoyment of their rights as well as their material and spiritual relationship with nature and, ultimately, their own cultural identity. The Committee recommended that the State party adopt legislation and measures to recognize the status of its pygmies and other indigenous peoples, in order to protect their ancestral lands as well as their own cultural identity (E/C.12/COD/CO/4, para. 36).

29. In its concluding observations on Madagascar adopted in November 2009, the Committee expressed concern that Law No. 2007-036 of 14 January 2008 relating to investment law that allows land acquisition by foreign investors, including for agricultural purposes, had adverse impact on access of peasants and people living in rural areas to cultivatable lands and to their natural resources. The Committee was also concerned that such land acquisition has an adverse effect on the realization by the Malagasy population of the right to food (article 1).

30. The Committee recommended that the State party revise Law No. 2007-036 and facilitate the acquisition of lands by peasants and persons living in rural areas as well as their access to natural resources. It also recommended that the State party carry out a national debate on investment in agriculture and seek, prior to any contracts with foreign companies, the free and informed consent of the persons concerned (E/C.12/MDG/CO/2, para. 12).

31. The Committee was also concerned about the systematic exploitation of land and natural resources that affects the standard of living of the Magalasy population and its different ethnic groups, thus preventing them from maintaining their cultural and social link with their natural environment and their ancestral lands (article 15).

32. The Committee recommended that the State party adopt specific measures and appropriate legislation to protect the ancestral lands and cultural identity of its different ethnic groups (E/C.12/MDG/CO/2, para. 33).

III. Consideration of the question of realization of the right of peoples to self-determination by the Human Rights Council

33. At its twelfth, thirteenth and fourteenth regular sessions as well as its twelfth special session, the Council addressed issues relating to the right of peoples to self-determination. Below is a summary of these developments in chronological order.

34. The Human Rights Council held its twelfth regular session from 14 September to 2 October 2009. On 29 September 2009, Justice Richard J. Goldstone presented the report of the United Nations Fact-Finding Mission on the Gaza Conflict¹ on behalf of the members of the United Nations Mission, pursuant to Council resolution S-9/1.

35. The Mission fully recognized the Palestinian people's right to self-determination in accordance with the Charter of the United Nations and international human rights conventions, noting the erga omnes character of this right

¹ A/HRC/12/48.

whereby all States have the duty to promote its realization. Self-determination has special prominence in the context of the recent events and military hostilities in the region, according to the Mission, because they represent an episode in the long occupation of the Palestinian territory.²

36. The Mission also addressed the right to self-determination from the perspective of its application to the definition of combatant status and its impact on the principle of distinction. In this regard, the Mission stressed that under international law, notably Additional Protocol I to the Geneva Conventions, any action of resistance against colonialism and occupation pursuant to the right to self-determination should be exercised with full respect for other human rights and international humanitarian law.³

37. In its concluding observations, the Fact-Finding Mission recognized that movement and access restrictions, the settlements and their infrastructure, demographic policies with regards to Jerusalem and Area C, and the separation of Gaza from the West Bank prevented a viable, contiguous and sovereign Palestinian State from being created, and were in violation of the *jus cogens* right to self-determination.⁴ The Mission further underscored the right of the people of Palestine to freely determine their own political and economic system, including the right to resist forcible deprivation of their right to self-determination and the right to live, in peace and freedom, in their own State.⁵

38. Also at the same session, the Council reaffirmed the right of all peoples to self-determination, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development (resolution 12/22).

39. The twelfth special session of the Human Rights Council was held on 15 and 16 October 2009 to discuss “the human rights situation in the Occupied Palestinian Territory and East Jerusalem”. At the conclusion of the special session, the Council adopted resolution S-12/1, entitled “The human rights situation in the Occupied Palestinian Territory, including East Jerusalem”. Section A of the resolution requested the United Nations High Commissioner for Human Rights, pursuant to resolution S-9/1 and in the context of her periodic reports, to monitor, document and report on the state of implementation by Israel, the occupying Power, of its human rights obligations, including on the right of peoples to self-determination, in and around East Jerusalem.

40. While endorsing the recommendations contained in the report of the Fact-Finding Mission,¹ the Council called upon all concerned parties including United Nations bodies, to ensure their implementation in accordance with their respective mandates and recommended that the General Assembly consider the report of the Fact-Finding Mission during the main part of its sixty-fourth session. Moreover, the Secretary-General was requested to submit to the Council, at its thirteenth session, a report on the status of implementation of these recommendations. In the same resolution, the Council further endorsed the recommendations contained in the first periodic report of the High Commissioner for Human Rights on the implementation

² Ibid., paras. 269-1842.

³ Ibid., para. 308.

⁴ Ibid., para. 1549.

⁵ Ibid., paras. 1875 and 1908.

of its resolution S-9/1⁶ and called upon all concerned parties including United Nations bodies to ensure their implementation in accordance with their respective mandates. Furthermore, the High Commissioner for Human Rights was requested to submit to the Council, at its thirteenth session, a report on the status of implementation of the resolution.

41. At its thirteenth session held from 1 to 26 March 2010, the Human Rights Council considered the question of realization of the right of peoples to self-determination under agenda item 7 and adopted resolution 13/6 on the right of the Palestinian people to self-determination.⁷ It reaffirmed the inalienable, permanent and unqualified right of the Palestinian people to self-determination, urging all Member States and relevant bodies of the United Nations system to support and assist the Palestinian people in the early realization of this right.

42. Agenda item 7 (Human rights situation in Palestine and other occupied Arab territories) was considered by the Human Rights Council on 14 June 2010. During the interactive dialogue following the introduction of his report, the Special Rapporteur emphasized that the prolonged Israeli occupation of Palestinian territories has seriously impacted the right to self-determination of the Palestinian people, and that the occupation would constitute de facto the annexation of Palestinian territories. Under the section entitled “The Israeli national regional priorities plan”, the Special Rapporteur emphasized his grave concern about the implications of the above-mentioned regional priorities plan for the realization of the Palestinian peoples right to self-determination.⁸

IV. Advisory opinion of the International Court of Justice on the accordance with international law of the unilateral declaration of independence in respect of Kosovo

43. The International Court of Justice in several decisions and advisory opinions has clarified certain aspects of the right to self-determination. Most recently, on 22 July 2010, the Court issued an advisory opinion on the legality of Kosovo’s unilaterally declared independence. The Court was of the opinion that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework adopted under the regulations promulgated by the United Nations Interim Administration Mission in Kosovo.

44. At the instance of Serbia, the General Assembly had requested an advisory opinion from the International Court of Justice on the question whether or not the 17 February 2008 unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo was in accordance with international law. The Court noted that the question was specific and that the Court was not asked to pronounce on the legal consequences of that declaration. The Court noted, in particular, that the question did not engage the issue of whether or not Kosovo has achieved statehood as a result; nor did the question engage the issue of the validity

⁶ A/HRC/12/37.

⁷ A/HRC/RES/13/6.

⁸ A/HRC/13/53/Rev.1, para. 25.

or legal effects of recognition of Kosovo by the States that have recognized it as an independent State.

45. In its deliberations, the Court observed that there were instances of declarations of independence outside the context of realization of “the right to independence” developed under international law “for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation”, and considered that “[t]he practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases”.⁹

V. Conclusion

46. The right to self-determination is enshrined in article 1 of the International Covenant on Civil and Political Rights and article 1 of the International Covenant on Economic, Social and Cultural Rights. The Human Rights Council as well as the human rights treaty bodies have been working on the implementation of this right. In several advisory opinions, the International Court of Justice has been clarifying the contours of this right.

⁹ A/64/881, para. 79.