# INDIGENOUS COMMUNITIES' RIGHT TO FREE, PRIOR AND INFORMED CONSENT (FPIC) IN OIL AND GAS DEVELOPMENTS IN KENYA: A THEORETICAL FOUNDATION

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## ABSTRACT

*This article seeks to explore the theoretical foundation upon which the principle of Free, Prior and Informed Consent as an international law concept is premised. This exploration is undertaken in the context of indigenous human rights discourse as a theoretical framework underpinning indigenous right to FPIC.*

*The exploration is significant in the sense that in order to appreciate the scope and content of FPIC processes, it is essential to consider their normative premises, especially rights to self-determination, lands, and resources. Indeed, FPIC obtains its legitimacy from these norms, and its application particularly in the context of oil and gas developments in Kenya is dependent upon the nature of the affected rights and impact the relevant decisions may have on those rights.*

*The exploration is necessary especially for Kenya in the context of the recent discoveries of oil and gas in the country and the exploration and exploitation activities being witnessed. These development activities are taking place in the areas occupied by the marginalized and indigenous communities in Turkana County, which is a poor and remote northern part of Kenya. The communities' have expressed a feeling of dissatisfaction and despair especially with the manner in which oil and gas development activities are being conducted. They have indeed made claims that there has been lack of consultation in the framework of FPIC, lack of*

*compensation, displacement, restrictions on access/use of their land, as well as lack of information sharing.*

*The Principle of Free, Prior and Informed Consent (FPIC) arose as a result of concerns especially from the indigenous communities, with regard to the threats to their rights, territories and livelihoods posed by the extractive industries' quest for natural resources. A widespread lack of respect of their cultures and rights has resulted in many communities being decimated, dispossessed of their lands and forcibly relocated. Thus, the fundamental aim of establishing the principle was to reverse the tendency and make the recognition of their rights and having the principle as a precondition for any activity that affects their ancestral lands, territories and natural resources, as well as equitable exploitation of resources. Indeed, development experts have recognized that FPIC is not only important for indigenous peoples but it is also good practice to undertake with local communities, as involving them in the decision making of any proposed development activity increases their sense of ownership and engagement and, moreover, helps guarantee their right to development as a basic human rights principle. It is against this background that this article seeks to explore the theoretical framework underpinning the concept of FPIC. This is done in the framework of indigenous human rights discourse, and especially closer examination is made in the context of right to self-determination.*

## 1.0 INTRODUCTION, CONTEXT AND BACKGROUND

This article seeks to explore the theoretical foundation upon which the principle of Free, Prior and Informed Consent as an international law concept is premised. This exploration is undertaken in the context of indigenous human rights discourse as a theoretical framework underpinning indigenous right to FPIC. The exploration has been informed by the claims of lack of consultation in the framework of FPIC and other claims like access to land and change in land use, as well as lack of compensation and other issues. These have led not only to a feeling of dissatisfaction and despair, but to violent protests in some instances.

Oil was discovered in Kenya in the year 2012.[i] The Lake Turkana Basin has as a result experienced continued exploration activities. The announcement has led to a change in perception of the people of Turkana County.[ii] At both the national and local level, oil exploration has engendered high expectations of new flows of revenue, employment and

business opportunities.[iii] For the marginalized northern parts of Kenya, in particular Turkana County, oil exploration is sometimes referred to as a potential 'game changer' that could bring in much-needed revenue for the delivery of basic services. At the same time, oil exploration has generated anxieties among local communities, about increased competition for (grazing) land and water, the distribution of jobs and resources, and the fact that there is a high risk of speculation and corruption.[iv]

These peoples have lived independently from the state, subsisting on arid or semi arid land considered of little value to the majority, their future now seems uncertain amidst both hopes and fears that those better endowed with wealth and opportunity will succeed in 'pulling the rug' from under their feet.[v]

According to International Monetary Fund (IMF),[vi] Kenya will be an oil producer by 2020. This gives the country several years to develop, prepare the policies, the institutions and the practice, which underpin successful natural resource management[vii]. At least in the African context, oil has been seen as a problem not a solution, with the exception perhaps of Ghana, for many, it has become a dirty byword for waste, degradation, mismanagement and even violence: "curse" its depressingly familiar epithet[viii]. The pillars underpinning natural resource management have long been understood, they are the same basic principles of good governance, accountable institutions, effective legislation, broad-based economic development, respect for the environment, international human rights standards and wide participation in policy and decision-making.[ix]

The growing extractive sector in Kenya means that there is need to give due attention to the social and economic dynamics of the sector[x]. For instance, when Kenya discovered oil in Turkana County in March 2012, the Government was faced with emergent issues such as environmental implications, community obligations and rights, a suitable governance framework, and effective utilization of resources generated from the sector.[xi]

Indeed, these discoveries and ongoing explorations have brought a new significance to the country's socio-economic and political discourse.[xii] On the one hand, the discoveries and ongoing explorations bear enormous economic growth potential if approached carefully, on the other hand there exists potential for irreparable negative social and environmental impacts if the exploration and development of the resources are not handled well.[xiii] Being a fairly new

industry in Kenya and a highly technical one, the upstream oil and gas industry found the host communities ill prepared to handle the intricacies of the industry, and the communities continue to grapple with issues of effective community participation; Free, Prior and Informed Consent (FPIC); compensation; social and environmental impacts; land rights; economic opportunities.[xiv]

Experience by most countries producing oil, such as Nigeria, reveals that the oil activities have caused destruction of delicate marine ecology, which is the main source of livelihood in the oil-bearing communities, leading to loss of fish catches, the exacerbation of poverty, social conflicts, population displacement, occupational disorientation, and the violation of human rights.[xv]

The discovery of commercially viable oil and gas in Kenya and especially in the Rift Basin, has opened conversation and consciousness on the extractive developments in Kenya. There is a feeling among the local communities that there has been lack of participation and ownership.

As Kenya begins the journey of becoming an oil producing country, civil society organizations and citizens alike have expressed worry at the haste with which the country is developing its frameworks for the sector.[xvi] There is also unease about the low level of public consultations, the potential for vested interests to be rooted in the frameworks, and the potential for oil to divide the people. Concerns have also been raised about the threat that oil poses to the environment, livelihoods of communities and security.

Already there are emerging conflicts between local communities and various extraction companies in areas where extractive industries operations are ongoing.[xvii] According to Standard Media Group Reporter,[xviii] the announcement of discovery of oil in Turkana, was received by residents, with joy, but the black gold is slowly turning into a curse, and that the locals are now engrossed in a fight with Tullow Oil over land and oil proceeds. The community says Tullow is operating without involving them. This has led to major conflicts, threatening to put the region into oil insurgency.[xix] The community demanded that Tullow Oil streamlines its operations by involving the community directly. The writer notes that the locals feel that they have been sidelined by the oil exploration companies since they started oil exploration in the region, and therefore they have lost hope in oil, that they have lost a chunk of grazing land

to oil exploration in the region, yet they have not been compensated, further, the locals claim that oil exploration activities have caused a lot of harm to the environment.[xx]

Almost all of Turkana's 77,000 square kilometers of land has been allocated for prospecting although in practice drilling is only taking place in a few specified areas.[xxi] In early 2016 Tullow had 32 viable wells in South Lokichar, each occupying around 13 acres.[xxii] However, these had already raised some objections from the surrounding communities who were fearful and angry when they found themselves barred without warning from areas of communally owned land.[xxiii] In May, 2013 Turkana communities demonstrated against an investor, burning and destroying property worth Kenya shillings six million, including huge tents and fencing poles, citing displacement and improper acquisition of their land.[xxiv] In terms of the environment, the familiar accounts of the Niger Delta demonstrate the potential risk of the extractive industry through oil spills, gas flaring, toxic wastes and effluent, and in Turkana, environmental impact assessments (EIAs) may be both inadequate and biased, being funded by the investor.[xxv]

There are fears that oil development will lead to both physical and economic displacement as a result of restrictions on land access and/or land use. Pastoralist communities in particular are concerned about how significant change in land access would disrupt their traditional pastoralist way of life, and how it could result in increased conflict between communities left to compete for limited land.[xxvi]

A final significant concern relates to the fact of not understanding the current regulatory framework and legislative policies on tenure and acquisition of community land.[xxvii] The Author further notes that, in the absence of effective information-sharing about community land rights, community members feel that oil companies did not properly obtain their rights to the land, and in combination with a general lack of trust in government's capability to manage resources responsibly, there is the perception that oil exploration is land-grabbing without consultation or compensation.

Indeed, opinion is divided between those who think the oil boom will provide Turkana in particular with an economic lifeline and those who fear production will exacerbate existing conflicts driven by competition over scarce pasture and water resources.[xxviii] It has been

witnessed over the recent past, communities saying that their animals have no access to pasture as a result of their grazing field having been taken or fenced off by the oil companies.

Therefore, their conclusion is that the exploration activities have brought nothing but a curse, that their goats are now dying and both the County and National governments have not come for their rescues.

The locals also lay blame on the oil companies whom they accuse of having failed to fully take into account local dynamics, for example South Lokichar Basin has long been used as a dry-season grazing reserve. Dry-season grazing areas are critical to pastoralist communities, and once they are fenced for oil exploration, the communities are left to access the wet-season grazing areas, which only generate pasture during the rainy season, or have to move to areas often marred with conflict.[xxix] The Paper further warns that, the stage is already set, if pastoralists feel they are losers from the exploration and will only carry the brunt of the aftermath of the project, while oil revenue benefits go to other people, it is a basis for conflict.[xxx] Already, violence has occurred on numerous occasions. For example, in June, 2017, Tullow Oil Company's attempts to truck oil to the port of Mombasa were suspended after staff were prevented from accessing drilling sites, and after workers from a separate oil company were attacked while upgrading a road leading to oil fields.

Indeed, there are claims by the locals that a head of the oil operations in the region, no one took an interest in informing them of what was happening, or understanding how they used the land and how the operations would affect them in the end.

Where there is low institutional capacity and where weak legal and governance frameworks fail to protect the rights and interests of affected communities, tensions between investors and communities are more likely to escalate.[xxxi] Therefore, the significance of legal and policy framework and institutional capacity to deal with the new oil finds in Kenya cannot be played down, if it is to meet the interests of the local and indigenous communities.

The Principle of Free, Prior and Informed Consent (FPIC) arose as a result of concerns especially from the indigenous communities, with regard to the threats to their rights, territories and livelihoods posed by the extractive industries' quest for natural resources. A widespread

lack of respect of their cultures and rights has resulted in many communities being decimated, dispossessed of their lands and forcibly relocated.[xxxii] Thus, the fundamental aim of establishing the principle was to reverse the tendency and make the recognition of their rights and having the principle as a precondition for any activity that affects their ancestral lands, territories and natural resources, as well as equitable exploitation of resources.

In the last two or three years, development experts have recognized that FPIC is not only important for indigenous peoples but it is also good practice to undertake with local communities, as involving them in the decision making of any proposed development activity increases their sense of ownership and engagement and, moreover, helps guarantee their right to development as a basic human rights principle.[xxxiii]

Modern entrepreneurship and new politics need to develop a culture of democratic dialogue, of full information, transparency in managing affairs and solidarity in all the initiatives proposed to all the inhabitants of their countries.[xxxiv] This is mainly momentous for local and indigenous communities in oil and gas exploration areas like Turkana given their conditions and fears as mentioned above herein.

## 2.0 THEORETICAL FOUNDATION ON THE CONCEPT OF FPIC

### *2.1 Indigenous Human Rights Discourse*

In order to appreciate the scope and content of FPIC processes, it is essential to consider their normative premises, specifically rights to self-determination, lands, and resources. Indeed, FPIC obtains its legitimacy from these norms, and its application is dependent upon the nature of the affected rights and impact the relevant decisions may have on those rights as been demonstrated in this chapter. Indeed, a right to self-determination is the fundamental claim indigenous communities make. It is however the case that for indigenous communities, self-determination typically does not involve independent statehood, but has to be realized within the framework of the state in which indigenous communities' dwell.

#### *2.1.1 Interpretations of Indigenous Peoples' Right to self-Determination*

Here, various explanations and theories of the right to self-determination for indigenous communities are analyzed. In the end, a model on indigenous self-determination is presented

that is also deemed useful in offering an explanation on the concept of FPIC later on in this article.

Anaya, [xxxv] asserts that one familiar line of argument, reasoning from a state –centered frame, is that indigenous peoples possess elements of sovereignty predating the existence of the larger political order in which they live. Indigenous Peoples are "peoples" subject to the right to self-determination, as explicitly stated in the UN Declaration[xxxvi]. "Peoples" can be equated with "nations" whereas the difference between the two would be that "nations" also possess some basic or more developed governing structures. Indigenous peoples often retained their own systems of government and decision-making, which are usually quite distinct from the governmental system of the larger political order. In this light, since indigenous peoples are distinct cultural groups within states, all these states are multi-nation states.[xxxvii]

Rombouts,[xxxviii] explains that in social contract theory, a nation's legitimacy is derived from a constitutive (hypothetical) moment, in which the nation is conceived with the consent of the governed. Indigenous peoples were excluded from this process as a rule. In other words, it is doubtful if the indigenous people concerned would have consented to the inclusion into the larger political structure[xxxix]. According to Daes,[xl] political values and systems foreign were often simply imposed on them, without their consent, and often through a practice of systematic inhuman treatment and forced assimilation. In general, indigenous peoples did not participate in state-building or shared in national decision-making.[xli]

This line of reasoning forms a justification for granting indigenous peoples the right to self-determination.[xlii] The author further asserts that it does not reject the possibility that other sub-state groups could also have claims to the same right. However, the trend in international law and politics is that indigenous peoples are more likely candidates for being subjects of the right to self-determination.[xliii] According to Anaya,[xliv] since the common opinion is that self-determination for indigenous peoples means "internal" self-determination, an extra dimension of sovereignty, or perhaps better, autonomy, is created within the framework of the State for the new self-determining entity. Sovereignty in this view, is no longer conceived in the absolute post Westphalian conception, but is a more dynamic notion applicable not only to the state. Other entities within the state itself (in this case indigenous) peoples may, to a certain extent, possess a form of sovereignty parallel to state sovereignty.[xlv]

Anaya,[xlvi] opines that internal self-determination for indigenous peoples is often equated with self-government, which again expresses the belief that government is to function according to the will of the people governed. Self –determination in this sense is a democratic right. Thomas Frank,[xlvii] argues that self-determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement. Further that, it has evolved into a more general notion of internationally validated political consultation.[xlviii]

This article contends that claims derived largely from state-centered and human rights based approaches dominate the debate on indigenous self-determination, and indeed different authors have interpreted and elaborated on its content. One of the early key documents is former Chairperson and Special Rapporteur of the UN Working Group on Indigenous Populations, Erica-Irene A. Daes' 1993 paper.[xlix] Daes, asserts that it would be "inadmissible and discriminatory" to deny indigenous peoples the right to self-determination merely because they are indigenous. Besides the fact that this would imply that indigenous peoples would not have any rights to secession, this would mean that they are not in a position to demand full democratic partnership.[l] According to Daes,[li] self-determination has taken on a new meaning in the post-colonial era. She considers:

> *"Ordinarily it is the right of the citizens of an existing independent state to share power democratically. However, a state may sometimes abuse this right of its citizens so grievously and irreparably that the situation is tantamount to classic colonialism, and may have the same legal consequences".*

On the possibility of secession, she asserts:

> *"The international community discourages secession as a remedy for the abuses of fundamental rights, but as recent events around the world demonstrate, does not rule out this remedy completely in all cases. The preferred course of action, in every case but the most extreme, is to encourage the state in question to share power democratically with all groups, under a constitutional formula that guarantees that it is effectively representative."*[lii]

This articulation of self-determination seems to be the way the right is to be understood in the context of the UNDRIP.[liii] According to Daes, indigenous peoples were never part of state-

building, and did not have any opportunity to participate in the constitutional design of the sates in which they live.[liv] Indigenous peoples thus should be retroactively involved in the process of creating the institutions and governmental framework of the larger states in which they reside[lv]. In Daes' much cited words:

*"With regard to indigenous peoples, then, I believe that the right of self-determination should ordinarily be interpreted as the right of these peoples to negotiate freely their political status and representation in the states in which they live. This process might best be described as a kind of belated state-building, through which indigenous peoples are able to join with all the other peoples that make up the state on mutually –agreed upon terms, after many years of isolation and exclusion. This process does not require the assimilation of individuals, as citizens like all other, but the recognition and incorporation of distinct peoples in the fabric of the state, on agreed terms."*[lvi]

Rombouts,[lvii] argues that, Daes, combines lines of argumentation from both a statist and a human rights perspective to come to her understanding of indigenous self-determination., that the 'belated state-building' argument mentioned above denotes a form of retroactive consent to the governmental structures of the state in which indigenous peoples live. He contends that Daes' contractarian argument requires a renegotiation of the arrangements (constitutional or other) between indigenous peoples and states. It is noteworthy, to mention that in this study, it is argued that FPIC is about creating a framework in which such negotiations between indigenous communities and other state entities, not just states can be held.

According to Anaya,[lviii] self-determination is foundational for the contemporary normative regime that concerns indigenous peoples. The author conceives of self-determination as a "universe of human rights precepts concerned broadly with all peoples, including indigenous peoples, grounded in the idea that all are equally entitled to control their own destinies.[lix] As far as the author is concerned, self-determination is a human right, and should be interpreted together with other human rights norms.[lx]

As a configurative principle, it is to be complemented by more specific human rights norms in forming a holistic framework for the governing institutional order.[lxi] This article takes the position that FPIC is important for the implementation of those other norms, mainly those concerned with lands and other natural resources found in indigenous communities' territories.

This article holds the view that there is need to urgently do away with the explanation that depicts self-determination as being essentially linked up with statehood, as this would provide a possibility for a right to self-determination that would be significant for indigenous communities.

Anaya,[lxii] describes three types of dominant variants on the classic perspective on self-determination, all three of which are flawed.

According to Rombouts,[lxiii] the misconception that is present in these variants is that they perceive the world as divided in mutually exclusive "sovereign" territorial communities. According to Anaya, this view is based on the Western theoretical perspective of an international legal space composed of individuals and states. This model ignores the "multiple overlapping spheres of community, authority and interdependency that actually exist in the human experience."[lxiv] It is clear that Anaya emphasized that in the contemporary world, a conception of self-determination based on a division between individuals and states does not suffice, if it is to have real meaning for the multiple and overlapping spheres of human association that characterize humanity.[lxv]

Therefore, Anaya,[lxvi] contends that, the ideal or principle of self-determination, which is based on precepts of equality and freedom, ought to concern the constitution and functioning of all levels and forms of government. In the author's view, peoples should thus be understood to denote 'all those spheres of community, marked by elements of identity and collective consciousness, within which people's lives unfold – independently of considerations of historical or postulated sovereignty.[lxvii] Even though, Anaya's rebuffing of these features of sovereignty is rather clear and well thought through, this article holds that their argumentative value is consistent to human rights based arguments, and is useful in explaining the relevance of FPIC in oil and gas developments in Kenya.

Anaya's conceptualization of self-determination makes the concept applicable not only to whole populations of states and colonial peoples, but also to "other spheres of community that define human existence and place in the world.[lxviii] Indeed, this is according to the standpoint of this article and that is, the essence of self-determination has nothing to do with independent statehood. In as far as the indigenous communities are concerned statehood is not what they

desire. The misunderstanding has thwarted helpful discussion about indigenous communities' understanding of self-determination and how the principle should be implemented.

According to Anaya,[lxix] the substance of the norm of self-determination is to be distinguished from its remedial prescriptions. The author further states that, where the substantive content of the norm is applicable to all, the remedial prescriptions that follow from it differ and are necessarily only relevant to groups that have suffered from violation of substantive self-determination.[lxx] He observes that substantive self-determination is built up out of two normative strains: first, its constitutive aspect, which requires that the governing order is one under which people live and develop their lives in freedom on an ongoing, continuous basis.[lxxi] In his hypothesis of the framework, Anaya rejects the internal/external dichotomy, which according to him is premised on the rejected view of a "limited universe of peoples comprising mutually exclusive spheres of community."[lxxii] Indeed, it is contended in this article that, the internal-external distinction is vague, particularly the fact that "internal" self-determination for indigenous peoples essentially contains both internal and external elements. But the language is endorsed since it may be useful in justifying and clarifying the concept of FPIC. Moreover, according to Rombouts,[lxxiii] in order for self-determination and FPIC to become workable concepts, a degree of categorization and delineation is needed. Anaya,[lxxiv] is of the view that constitutive self-determination is linked with the provision's text that all peoples "freely determine their political status", thereby imposing variable standards of participation and consent that aim to guarantee that the political order reflects the will of the people or peoples concerned. Ongoing self-determination is coupled with the phrase "freely pursue their economic, social, and cultural development." It thus requires a political order in which all are free to make meaningful decisions about their own paths and pace of development on a continuous basis.[lxxv] Culturally differentiated groups, in exercising their ongoing right to self-determination, require a political order in which the group is able to retain its culturally distinct character, while at the same time having this character reflected in the governmental institutions.[lxxvi]

Anaya,[lxxvii] stresses that the remedial prescriptions, like secession in the colonial context, ought to be distinguished from its substantive groundings, where these prescriptions aim to remedy violations of the substantive right, and that the remedies may vary, and ought to be in accordance with the aspirations of the group concerned. For many indigenous peoples, Anaya agrees, secession may be a cure worse than the disease.[lxxviii]

Focusing on the variety of remedial measures that may be available seems an appropriate way to finding constructive solutions to the problems that many indigenous communities face.[lxxix]

While this standpoint is appealing, Kymlicka,[lxxx] takes a critical view towards Anaya's theoretical account and asserts that he leaves some fundamental questions unaddressed. The author states that Anaya's claim that substantive self-determination is applicable to all groups, does not reflect international legal reality and that the remedial aspect of self-determination does not fit easily within a permanent "rights" framework, since remedies are of a more temporal nature.[lxxxi]

Kymlicka's main arguments centre on the difficult legal distinction between indigenous peoples and other minority groups.[lxxxii] This distinction is difficult to uphold from a theoretical point of view, but is a factual reality in international conventions and documents.[lxxxiii] Kymlicka forcefully contends that the willingness to grant indigenous peoples a right to self-determination, where for national minorities this willingness is definitely absent, is based on security considerations, rather than on principle argument.[lxxxiv]

Nevertheless, Rombouts,[lxxxv] contends that Anaya provided some compelling argumentation that self-determination for indigenous peoples is based on precepts of freedom and equality, and that the remedies for specific violations of substantive self-determination may vary. This way, he emphasizes that self-determination can be and should be exercised in different ways, certainly not only by independence.[lxxxvi] For indigenous peoples this is most often not what they aspire and the focus should be more on the arrangements between them and the governments of the states in which they live.[lxxxvii] The available and appropriate remedies (like forms of self-government, land and resources rights, and autonomy) are to be found in a fair process of negotiations.[lxxxviii] Anaya stresses that indigenous peoples have the same right to self-determination that all other peoples have, but it is in the remedies of violations of this right, that a diverging approach is discernible and appropriate.[lxxxix] Anaya thus denoted self-determination as a human right and sees the reference to "peoples" as "designating rights that human beings hold and exercise collectively in relation to the bonds of community or solidarity that typify human existence."[xc] As a human right, self-determination "cannot be viewed in isolation from other human rights norms but rather must be reconciled with and understood as part of the broader universe of values and prescriptions that constitute the modern human rights regime."[xci] For Anaya, the essential content of self-determination, seen as a human right, is: "that human

beings, individually and as groups, are equally entitled to be in control of their own destinies, and to live within governing institutional orders that are devised accordingly."[xcii] Therefore, Anaya's conclusion is that:

*"Self-determination is an animating force for efforts toward reconciliation- or, perhaps more accurately, conciliation – with peoples that have suffered oppression at the hands of others. Self-determination requires confronting and reversing the legacies of empire, discrimination, and cultural suffocation. It does not do so to condone vengefulness or spite for past evils, or to foster divisiveness but rather to build a social and political order based on relations of mutual understanding and respect."*[xciii]

Kingsbury backs an additional "participatory" method to the principle of self-determination, and even though the author's position with regard to arguments integrating the principle of self-determination regime with the human rights discourse is critical[xciv], his position is very much in line with this article's standpoint. Demonstrably, Kingsbury's relational approach is useful in explaining the relations between indigenous self-determination and the principle of Free, Prior and Informed Consent (FPIC), given the fact that both principles are participatory and supportive in nature.

Describing the law of self-determination as a "conceptual morass" he rightly concedes that claims of indigenous peoples to self-determination require some rethinking of the traditional meaning of self-determination in international law.[xcv] If self-determination is to be an important tool for indigenous peoples, the "end-state" approach is to be abandoned and a relational one is to be acquired, since, as has been stated, most indigenous groups expect to continue an enduring relationship with the state (s) in which they reside.[xcvi]

A relational approach may capture many of the aspirations indigenous peoples have and it is in line with the UNDRIP, which emphasizes that a spirit of cooperation and respect between indigenous peoples and states is to be promoted. Self-determination is about the relationship between host-state and communities, about legal principles concerned with creating, maintaining, or altering existing and enduring relationships between indigenous peoples and states.[xcvii] As described in this article, FPIC processes are important tools to build and maintain such relationships.

The UNDRIP specifies self-determination as entailing "self-government" and "autonomy" rights, but such rights are only to be captured through a fair process of negotiation and participation.[xcviii] The focus should thus be on the relations between the autonomous entities and their institutions. According to Kingsbury, these relations require complex governance structures that may require the consent of all affected peoples.[xcix] Autonomy in this sense is not just "freedom" but concerns a complex and continuous relationship. Kingsbury's relational conceptualization of self-determination embodies the aspiration to define the relationship between indigenous communities and states. What is vital in establishing such relations is that a central focus is on the terms and dynamics of the relational aspects.[c]

Therefore, this is an essential point that this article makes, thus: just process of communication and participation are the necessary requirements for establishing arrangements between indigenous groups and other entities that can be characterized as "free". Further, that autonomy can be found through participatory processes, and such processes may require additional consideration, as this article seeks to justify.

Kingsbury[ci], concedes that the relational approach to self-determination requires a crossing of boundaries between the self-determination and human rights discourses. Indeed, both Daes and Anaya, albeit in different ways, acknowledge that self-determination for indigenous peoples should be understood from a human rights perspective.[cii] The UNDRIP supports this view, in posing self-determination as an umbrella right which is specified by the subsequent provisions. Kingsbury,[ciii] concludes that a relational perspective on self-determination may be the best one for progressing towards reaching global agreement on political and legal issues connected with indigenous peoples.

Taking into account these views and more recent developments like the adoption of UNDRIP, it is possible to come to an informative understanding of self-determination for indigenous peoples.[civ] The different interpretations have in common that self-determination is a participatory concept, which is in line with the principles underlying the UNDRIP.[cv] One of the most important goals of the Declaration is to strengthen partnerships between indigenous peoples and states in a spirit of mutual respect and cooperation.[cvi] Just like self-determination, FPIC is also about building partnerships, about recognition and cooperation between entities that have decision-making powers in diverging areas.

This article holds the view that it is through control over land and resources indigenous communities are able to exercise their right to self-determination in a more convenient and significant way. Therefore, FPIC cannot be removed from the right to self-determination and right to lands and resources.

### *2.1.2 Self-Determination through Control over Land and Resources*

There are various ways through which the principle of self-determination could be implemented, however, as far as indigenous peoples are concerned, the principle of self-determination is linked to their lands, territories and resources. This article asserts that, control over land and resources by indigenous communities could only be acquired by way of effective participation. Therefore, the principle of Free, Prior and Informed Consent (FPIC) is developing into a fundamental principle and means for recognition of indigenous communities' right to participate in decision-making processes that concern their lands and resources.

Therefore, this article provides a short explanation as to why land and resources are vitally s ignificant for indigenous communities.

### *2.1.3 Indigenous Peoples' Special Relation to their Lands*

It is noted in this article that the principle of self-determination through control over land is of vital significance to indigenous communities, and this is for various reasons. Firstly, Indigenous communities require land for their subsistence; secondly, indigenous communities have a special spiritual relation to their traditionally occupied territories. Therefore, for both their physical and spiritual survival, rights to lands are essential for indigenous communities. This claim appears to require a large degree of control over decisions pertaining to these lands.[cvii]

According to Daes,[cviii] the gradual deterioration of indigenous societies can be traced to the non-recognition of their lands, and to a lack of understanding of how profound the relationship of indigenous peoples with their lands is. The author points out how negatively colonization of indigenous peoples' territories affected them in a number of ways: maltreatment, enslavement, punishment for resistance, warfare, diseases and outright extermination as some of those effects[cix]. Indigenous populations in some areas declined with 95% and they were generally perceived as inferior or uncivilized beings with no rights to the lands they occupied.[cx] Doctrines of dispossession, mainly the discovery doctrine and the concept of *terra nullius*, were

devised in international law to allow the colonizing powers to gain title to indigenous lands without having to pay any form of compensation.[cxi] Rombouts further, states that contemporary issues frustrating indigenous land rights are unfortunately also numerous, and that in the name of national development, indigenous territories are expropriated and indigenous communities are often relocated and resettled.[cxii] The integrity of the environment is often threatened by state supported projects and indigenous peoples often lack any form of legal protection.[cxiii]

On his study on the discriminatory problem against indigenous populations, Cobo,[cxiv]describes the special relation indigenous peoples have to their lands as thus:

> *"It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture."*

Furthermore:

> *"For such peoples, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely."*[cxv]

This article notes that Daes lays a very significant emphasis that even though to some extent one could be able to point out some elements of recognition of land rights, real control by way of meaningful participation in decision-making in the context of development, use of natural resources, management, and conservation measures, is largely lacking. This article contends that participation is essential for indigenous communities in realizing their right to self-determination and that FPIC processes are methods facilitating the realization of such control. Further, this article recognizes that indigenous communities make an essential claim in international law to control and have ownership of their territories.

According to Gilbert,[cxvi] even though indigenous peoples reflect the tremendous diversity of the world, living in some of the most remote parts of the globe, it is striking to realize how they all share the same attachment to their lands, which plays a central cultural, social and economic role within indigenous societies globally. Thus, the preamble to the UNDRIP states as follows:

> "Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs."[cxvii]

Rombouts,[cxviii] opines that the claim to control land is essentially also a claim to own property. But the author quickly points out the fact that Indigenous and Western conceptions of property may differ substantially, and ownership of the land in indigenous societies is often not centered on the individual, but is held by the community collectively.[cxix]

### *2.1.4 Sovereignty Over Natural Resources*

According to Daes,[cxx] indigenous peoples have the right to recognition of their property and ownership rights with respect to lands. The author restates that there is a growing trend in international law to extend the concept and principle of self-determination to peoples and groups within states.[cxxi] She concludes that in order for this to be meaningful for indigenous peoples, it must logically and legally carry with it the essential right of permanent sovereignty over natural resources[cxxii]. The author further suggests that international law has now reached the point where it recognizes this right for indigenous peoples. She articulates this right as: a collective right by virtue of which the state is obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources.[cxxiii]

This article notes that the idea of indigenous sovereignty is very contentious in contemporary international law, as Lenzerini,[cxxiv] contends, the doctrine remains primarily attached to statehood or the whole population (people) of a state. Further, Rombouts,[cxxv] explains that absolute sovereignty implies the need for full consent (in international law, the consent to be bound), but absolute state sovereignty is nowadays a fiction.

Tully, explains that absolute sovereignty, as a single locus of power is a false depiction of sovereignty today.[cxxvi] The author argues that this is as a result of the dependence of political power on the consent of the people, by all sorts of international relations and divided among a diverse number of representative bodies.[cxxvii] Tully clarifies that this non-absolute sovereignty could be defined as the authority of a culturally diverse people or association of peoples to govern themselves by their own laws and ways free from external subordination.[cxxviii] Banks,[cxxix]

contributes to this debate by explaining the extent to which indigenous peoples may also be beneficiaries to the doctrine of permanent sovereignty is contentious, since that doctrine explicitly makes use of the language of sovereignty, language that has typically been reserved by states for their own use. On his part, Schrijver, states that resource management will have to go hand in hand with protection of ecosystem.[cxxx] The author, according to Rombouts,[cxxxi] although a leading expert on sovereignty over natural resources, has taken a more modest position even though he acknowledges that, indigenous peoples' claims to natural resources may require more participatory approaches to resource management.

Daes,[cxxxii] gives an account of how indigenous peoples suffer from unfair and unequal economic arrangements, and explains that the natural resources that originally belonged to them were in most cases not freely and fairly given up and there is a need to level the unfair and oppressive economic decisions. The author concludes thus:

> *"The right of permanent sovereignty over natural resources is critical to the future well-being, the alleviation of poverty, the physical and cultural survival, and the social and economic development of indigenous peoples. Indigenous peoples, if deprived of the natural resources pertaining to their lands and territories, would be deprived of meaningful economic and political self-determination, self-development, and, in many situations, would be effectively deprived of their cultures and the enjoyment of other human rights by reason of extreme poverty and lack of access to their means of subsistence."*[cxxxiii]

From the foregoing, this article forms the view that even though control over natural resources is essential as far as indigenous communities are concerned, but relating resources with the doctrine of sovereignty is contentious in international law, if the arguments advanced by different authors are anything to go by. But again, it would be just to conclude that political self-determination would have no meaning whatsoever as far as indigenous communities are concerned, if the same did not contain economic self-determination, and that is having some control over natural resources within their traditionally occupied lands.

FPIC is seen by indigenous peoples as a requirement, prerequisite, and manifestation of the exercise of their right to self-determination.[cxxxiv] The Expert Mechanism identifies FPIC as of fundamental importance for indigenous peoples' right to effective participation since it establishes

the framework for all consultations relating to the acceptance of projects affecting them.[cxxxv] FPIC thus qualifies and specifies what a right to "effective participation" amounts to.

The normative "roots" of self-determination and effective participation are thus expected to be specified by reference to FPIC. The report concludes that:

The right of indigenous peoples to FPIC forms an integral part of their right to self-determination. As the right to FPIC is rooted in self-determination, it follows that it is a right of indigenous peoples to effectively determine the outcome of decision-making processes impacting on them, not a mere right to be involved in such processes.[cxxxvi] As has been stated in this article, FPIC is especially important in relation to the struggle of indigenous peoples to gain control over their lands and resources. Not surprisingly, the Expert Mechanism report emphasizes the need for clarity concerning the implementation of FPIC in relation to projects affecting indigenous livelihoods. It is stressed that "pro forma consultations" are not enough, and that effective participation and FPIC implies real influence in the decision making process.[cxxxvii] Unfortunately, many decisions relating to development projects like oil and gas in Kenya on indigenous territories are taken without respecting FPIC or without any form of effective participation. These decisions often drastically affect indigenous communities and may have profound effects on indigenous peoples' social and economic structures, both in the short and the long term. It is therefore not strange that FPIC is seen as most needed in these situations.

## 2.2 CONCLUSION

This article has given a historical explanation on the difficulties concerning the right to self-determination and has established that self-determination is a developing and flexible concept useful in understanding contemporary societal issues, needs, and ideologies.

Accordingly, this article has established that self-determination did develop from a political principle,[cxxxviii] into a genuine legal standard within contemporary international law.[cxxxix] It should be mentioned, that the fundamental foundations of the principle of self-determination are greatly fixed in the liberal democratic principle that government should be justified by the consent of the people governed.

Self-determination is a democratic claim that requires consent and free expression of the will of a people, and its content was created by nationalist view that peoples and nations should be self-governing.

It is the case that the principle of self-determination did not become apparent in the context of international law until the UNDRIP was adopted. But, as Rombouts, puts it, in temporary international law, a slow but certain move away from the State-centered Post-Westphalian model can be distinguished.[cxl]

For indigenous peoples, self-determination at least entails the right to internal self-determination, which is best conceived as a participatory model that aims to secure respectful cooperation and equal participation.[cxli] The author has further demonstrated that self-determination lies at the heart of indigenous peoples' protection, by itself and by granting legitimacy to the other provisions in the UNDRIP.[cxlii] Cobo,[cxliii] argues that it serves as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their future. According to Kymlicka,[cxliv] the provisions in the UNDRIP are a first step in according indigenous peoples substantive rights of autonomy and self-determination that work within the framework of the state. Further, Rombouts' clarification is quite helpful for this study. The author contends that, since indigenous peoples, as collective entities, are included in the framework of the state, or any other larger political order, there are two spheres or dimensions that need to be distinguished; internally, within the indigenous nation itself and externally, between the indigenous nation as a collective entity and the larger political order in which it is situated. These dimensions are necessarily at least partially overlapping and interwoven.[cxlv]

One set of legal arguments assumes that indigenous peoples should exercise self-determination since they possess attributes of sovereignty that pre-date and parallel state sovereignty. A complementary set of arguments is articulated within a human rights frame, which emphasizes that self-determination is essentially a human right – an umbrella right needed for the protection of often vulnerable indigenous communities.[cxlvi] Although both lines of argument are important, within international law a human rights based approach is becoming the more important one, and is often the one with the best prospects for effective protection of indigenous Peoples.[cxlvii] He contends that both lines confront public international law with some of its defects, and challenge it to overcome these.[cxlviii]

According to Cobo,[cxlix] internal self-determination for indigenous peoples appears to entail at least a right to autonomy; i.e. the possession of separate and distinct administrative structures and judicial systems, determined by and intrinsic to the people or community concerned. However, for autonomy arrangements to become real, this should include the possibility for indigenous

peoples to participate, in a position of equality, in the decision-making procedures of the state.[cl] Internal self-determination, in its external conception is therefore a dual right, aiming at autonomy on the one hand and participation in the larger political order on the other. Internally, it requires fair participatory standard in line with internationally recognized human rights.[cli]

Self-determination for indigenous peoples requires control over their lands and resources. Indigenous peoples not only require protection of their lands and resources for their subsistence, but also have a special spiritual and cultural attachment to their lands. This way, self-determination for indigenous peoples has important political, cultural and economic elements.

Although the different views on self-determination examined here diverge to some degree, they have in common that they stress the participatory nature of self-determination for indigenous peoples. Self-determination for indigenous peoples should be understood as types and degrees of participation and autonomy based on the ideals of freedom and equality. This is in line with the spirit of UNDRIP. Through its framework of substantive and participatory rights, the Declaration indicates how indigenous peoples can exercise their right to self-determination.

Within the UNDRIP's context, FPIC is the most comprehensive of these participatory provisions and it is becoming one of the essential principles for defending indigenous rights worldwide. This article argues that FPIC is one of the most significant tools to recognize self-determination.

Indeed, self-determination affords indigenous communities an opportunity to articulate their desire to choose their own pace and path of development.

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We also see the principle of self-deetrmination emerging during the 1815 Vienna Congress whose aim was the restoration of territories to their former dynastic rulers and create buffer states between the Great powers.

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