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Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?

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1. Introduction

The right of self-determination of peoples has been described as ‘perhaps the most controversial and contested of the many controversial and contested terms in the vocabulary of international law.’¹ The difficulties in determining the exact meaning of self-determination, as well as promoting a coherent implementation thereof, stem from the combination of two elements: first, a certain ambiguity in the way international legal instruments have articulated this right,² and, secondly, the fact that political and moral considerations crucially influence its realisation.³

Against this unsettled background, the self-determination claims of sub-national groups have become particularly problematic for both the States concerned and the international community.⁴ It should be recalled that, during the process of decolonization, self-determination was generally equated with independence. More precisely, it was understood as the right of peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation to create their

¹ James Crawford, “The Right of Self-Determination in International Law: Its Development and Future”, in Philip Alston (ed.), *Peoples’ Rights* (2000) p. 7.

² For general discussions of self-determination, see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995), and James Summers, *Peoples and International Law: How the Right of Self-Determination and Nationalism Shape a Contemporary Law of Nations* (2007).

³ On this point, see, among others, Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2004), pp. 332-400; Richard Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (2000) pp. 98-125; Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (1990); Yash Ghai (ed.) *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States* (2000); Wolfgang Danspeckgruber, “Self-Determination, Self-Governance, and Security”, 15 *International Relations* (2000) pp. 11-21.

⁴ The term ‘sub-national groups’ is used to refer to national/ethnic, religious and linguistic groups who live within the border of a State and claim to be a ‘people’ for the purposes of self-determination. Crucially, the question of who is a ‘people’ has never found a definitive answer under international law. See, for example, Reference re Secession of Quebec, Supreme Court of Canada, [1998] 1 SCR 217, para. 123. For a discussion of the meaning of the term ‘people’, see the UNESCO report produced, in 1989, by an international meeting of experts. SHS-89/CONF.602/7.

own State.⁵ Crucially, the ‘whole peoples’, and not segments thereof, were entitled to exercise this right. With the end of colonization, however, self-determination began to acquire a different meaning. Recognizing the continuing character of the right, instruments such as the International Covenant on Civil and Political Rights (ICCPR) gradually extended the applicability of self-determination to *all* peoples.⁶ This led to the modern distinction between the internal and external aspects of self-determination, which, as a consequence, has ceased to be linked *exclusively* to the idea of independence.⁷ In this new context, the recognition of sub-national groups as beneficiaries of the right of (internal) self-determination has been increasingly supported both by academics⁸ and judicial and quasi-judicial bodies.⁹ According to this view, sub-national groups should have the right to freely pursue ‘their political, economic, social and cultural development *within the framework of an existing State*.’¹⁰ The majority of States, however, have been rather cautious in endorsing this view, fearing that secessionist groups living within their borders would understand this self-determination in accordance with the ‘secessionist overtones’¹¹ typical of the decolonisation period. Not surprisingly, international legal instruments have thus far refrained from expressly recognising a right of (internal) self-determination to segments of a population, indicating that the validity of sub-national groups’ claims

⁵ Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Kosovo Opinion), International Court of Justice, Advisory Opinion of 22 July 2010, para. 79. See, in particular, Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Resolution 1514 (XV), 14 December 1960. It should be noted, however, that independence was only one of the available options for the peoples concerned. See, Principles which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73(e) of the Charter, Annex, Principle VI, GA Resolution 1541 (XV), 15 December 1960.

⁶ Antonio Cassese, *supra* note 2, pp. 59-62.

⁷ *Ibid.*, pp. 52-65.

⁸ For example, Robert McCorquodale, “Self-Determination: A Human Rights Approach”, 43 *International and Comparative Law Quarterly* (1994) pp. 857-885; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1995) pp. 121-128; Thomas Musgrave, *Self-Determination and National Minorities* (2000) pp. 188-199 and 258; Allen Buchanan, *supra* note 3, pp. 332-400; Antonio Cassese, *supra* note 2, pp. 348-359; Gaetano Pentassuglia, “State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal View”, 9 *International Journal on Minority and Group Rights* (2002) pp. 303-324.

⁹ See, for example, General Comment No. 12: The right to Self-determination of Peoples (13 March 1984); Katangese Peoples’ Congress v. Zaire, African Commission on Human and Peoples’ Rights, Comm. No. 75/92 (1995); General Recommendation No. 21: Right of Self-Determination (23 August 1996), Committee on the Elimination of All Forms of Racial Discrimination, available at <http://www2.ohchr.org/english/bodies/cehd/comments.htm>; Reference re Secession of Quebec, Supreme Court of Canada, [1998] 1 SCR 217.

¹⁰ Emphasis mine. Reference re Secession of Quebec, Supreme Court of Canada, [1998] 1 SCR 217, para. 126.

¹¹ Thomas Franck, “The Emerging Right to Democratic Governance”, 86 *American Journal of International Law* (1992) p. 54.

for this right remains relatively uncertain under current international law.

A related, and, perhaps, more controversial issue, is that of remedial secession. International law does not recognise a right to independence to sub-national groups. If, however, one accepts that these groups have the right to internal self-determination, what would happen if they fell victim of serious injustices such as, for example, the systematic violation of their basic human rights? According to some authors, in such extreme circumstances these groups should be entitled to a right to independence as a last resort.¹² From a moral perspective, this would arguably represent the most sensible solution. In practical terms, however, this means that some secessionist claims could still be ultimately validated, in violation of the principle of territorial integrity jealously protected by both States and the international community. Not surprisingly, there is no evidence of clear support for this right under international law. On the one hand, States have different views on this critical issue,¹³ often succumbing to realpolitik when dealing with remedial secession claims;¹⁴ on the other hand, no international legal document has thus far expressly referred to the existence of this right.

Against this background, it has been argued that the adoption of the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP or the Declaration) constituted a major development in the international law of self-determination.¹⁵ The key provision of the UNDRIP concerning self-determination is found in Article 3, which affirms that:

‘indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’

¹² For example, Robert McCorquodale, Thomas Musgrave, and Allen Buchanan, *supra* note 8; Antonio Cassese, *supra* note 2, pp. 359-362

¹³ Kosovo Opinion, *supra* note 5, para. 82.

¹⁴ See, Christopher Borgen, “The Language and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia”, 10 *Chicago Journal of International Law* (2009) pp. 1-33; Richard Falk, “The Kosovo Advisory Opinion: Conflict Resolution and Precedent”, 105 *American Journal of International Law* (2011) pp. 50-59.

¹⁵ Quane, for one, has recently commented that ‘the Declaration may represent one of the most significant stages in the development of the right to self-determination since decolonisation.’ Helen Quane, “New Directions for Self-Determination and Participatory Rights?”, in Stephen Allen and Alexandra Xanthaki (eds.) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2011) p. 260.

This is a straightforward endorsement of the right of self-determination for indigenous peoples. Against the uncertainties that surround the scope of self-determination under international law, it becomes important to determine the exact meaning and implications of this provision. Does it confer on indigenous peoples a full right of self-determination, including a right to secession, or, at least, to remedial secession? Or does it simply refer to a right of ‘internal’ self-determination? And, in the latter case, what would this practically mean for indigenous peoples?

This article will seek to answer the above questions by examining the drafting history of Article 3 of the UNDRIP and positioning it within the (broader) normative context of the Declaration. The next two sections will examine the different ways in which indigenous peoples and States approached the question of self-determination during the negotiation process. In doing so, they will discuss whether the UNDRIP is compatible with an expansive reading of self-determination which would also include a right to secession. Section four, instead, will focus specifically on remedial secession, seeking to assess the UNDRIP’s overall position on this contentious issue. After that, section five will explore the actual meaning of the indigenous right to self-determination, highlighting its ‘internal’ character and strong relationship with participatory rights. Finally, section six will seek to draw some final conclusions on the potential and limits of this understanding of self-determination for indigenous peoples.

2. The Right of Self-Determination in the 1993 UN Draft Declaration on the Rights of Indigenous Peoples

Despite the predictable difficulties in obtaining an express recognition of the right of self-determination, the indigenous peoples’ representatives who took part in the negotiations on the UNDRIP were not prepared to accept any compromise on this particular issue. Indeed, that self-determination was central to their claims became clear since the very beginning of the drafting process, which was initiated in the mid 1980s by the UN Working Group on Indigenous Populations (WGIP).¹⁶ As soon as the WGIP commenced considering the content of a declaration on indigenous rights, a

¹⁶ The WGIP was a subsidiary body of the (then) Sub-Commission on Prevention of Discrimination and Protection of Minorities. It was established pursuant UN Economic and Social Council Resolution 1982/34 of 7 May 1982.

number of indigenous organizations submitted two declarations of principles that, in their view, should constitute the basis for future discussions.¹⁷ Crucially, both declarations expressly affirmed, in their initial paragraphs, that indigenous peoples had the right of self-determination. The message for governmental delegates sitting at the negotiating table was clear: self-determination was the central pillar upon which the Declaration should be constructed, and could not be restricted in any meaningful way. This was so because for indigenous peoples any limitation to this right would amount to an infringement of the principle of equality. More precisely, to qualify the indigenous right of self-determination would be tantamount to creating two distinct rights of self-determination for two different kinds of peoples: all peoples, on the one hand, and indigenous peoples, on the other.

The members of the WGIP did their best to meet the demands of the indigenous delegates, convinced that the declaration should reflect, inasmuch as possible, the primary aspirations of these peoples.¹⁸ It is, therefore, not surprising that the text of the draft declaration produced by this group in 1993 accommodated the claims of indigenous peoples to a considerable extent. For the purposes of this article, it should be stressed that Article 3 of the draft declaration unequivocally affirmed that:

‘indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’

Whilst this provision was certainly in line with the aspirations of indigenous groups, it hardly reflected the views of the majority of States, which had strongly questioned the way in which the text addressed the issue of self-determination.¹⁹ In particular, they maintained that the strong language of Article 3, coupled with the absence of any other qualifying passages in the document, posed too significant a threat to their territorial integrity. Interestingly, States were concerned about their territorial unity

¹⁷ Reproduced in Erica-Irene Daes, “The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal”, in S. Allen and A. Xanthaki (eds.), *supra* note 15, pp. 11-40.

¹⁸ Erica-Irene Daes, “The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples”, in Claire Charters and Rodolfo Stavenhagen (eds.), *Making the Declaration Work: The UN Declaration on the Rights of Indigenous Peoples* (2009) p. 74.

¹⁹ *Ibid.*, p. 68.

despite the fact that, first, international law does not recognize a right of secession to sub-national groups, and, secondly, the vast majority of indigenous peoples do not seek to create their own State.²⁰ These concerns, however, are not difficult to explain in light of the considerations made in the previous section with regard to the relationship between internal and external self-determination, on the one hand, and remedial secession, on the other. Furthermore, the mere fact that most indigenous groups do not have a secessionist agenda could hardly justify, from a State perspective, the incorporation of a straightforward provision on self-determination in the Declaration. First, while it is true that the majority of indigenous peoples do not aim to create their own State, some of them actually do seek to become independent.²¹ Secondly, indigenous peoples have reluctantly spelled out their repudiation of secession as a means to exercise their right of self-determination. Instead, they have often, and more vaguely, observed that self-determination does not *necessarily* mean independence.²² Doubts as to the real aspirations of some indigenous groups, particularly from former British colonies, could also arise in light of the fact that these groups' initial demands were for full self-determination, including a right to statehood. It was only at a later stage that they gave up these original claims in favour of less controversial requests for 'internal' self-determination.²³ Whether this change reflects the actual aspirations of the groups concerned is a question that States needed to address carefully.

The final, important, reason why States feared the consequences of an unqualified endorsement of self-determination, despite the 'guarantee' that indigenous peoples would not use it to claim a right to independence, is that other sub-national groups could have exploited it in an attempt to validate their secessionist claims. Contrary to indigenous peoples, many sub-national groups have open secessionist aspirations and work towards their realization.²⁴ As they live in a large number of States, it is not surprising that previous attempts to confer on them not only a right to

²⁰ See, for one, James Anaya, "The Right of Indigenous Peoples to Self-determination in the Post-Declaration Era", in Claire Charters and Rodolfo Stavenhagen (eds.), *supra* note 18, p. 185.

²¹ John Henriksen, "Implementation of the Right of Self-Determination of Indigenous Peoples within the Framework of Human Security", at <http://www.iwgia.org/human-rights/self-determination> (visited 3 August 2011).

²² See, for example, Report of the WGIP on its first session, UN Doc. E/CN.4/Sub.2/1982/33 (25 August 1982), para. 72.

²³ Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (2010) pp. 151 and 152.

²⁴ See, for example, Geert Van Cleemput, "Clarifying Nationalism, Chauvinism, and Ethnic Imperialism", 12 *International Journal on World Peace*, (1995) pp. 59–97.

self-determination but also autonomy have been regularly rejected.²⁵ Against this background, the decision to endorse an indigenous right of self-determination, especially an unqualified one, could have had potentially destabilizing effects on the internal situations of a substantial number of States.

The above considerations highlight the evident conflict of interest between States' and indigenous peoples' representatives during the negotiating process. While indigenous peoples had strong reasons, both from a moral and historical perspective, to claim a full right of self-determination, States had legitimate concerns with regard to the potential implications of such claim. Following on the previous discussion, the next section will examine the way in which States, seeking a solution that could mitigate their concerns, approached the issue of self-determination during the second part of the drafting process of the UNDRIP.

3. The Gradual Restriction of the Indigenous Right of Self-Determination

After adopting it, in 1994, the UN Sub-Commission for Prevention of Discrimination and Protection of Minorities sent the text of the draft declaration produced by the WGIP to the Human Rights Commission (the Commission). Acknowledging that States had serious concerns about this text, the Commission decided to set up a subsidiary body, the Working Group on the Draft Declaration (WGDD), with the sole purpose of further elaborating the document produced by the WGIP. To be sure, self-determination was not the only critical issue.²⁶ The fact that the WGDD took more than a decade before submitting a final text to the Human Rights Council (which had in the meantime substituted the Human Rights Commission) indicates that States' and indigenous peoples' representatives disagreed on a larger number of issues. Among those, however, self-determination was the most controversial. In fact, as the WGDD began its annual meetings, it became clear that the draft declaration's approach to

²⁵ See Will Kymlicka, "Beyond the Indigenous/Minority Dichotomy?" in Stephen Allen and Alexandra Xanthaki (eds.), *supra* note 15, pp. 192-195. In this regard, it is also interesting to compare the progressive content of the UNDRIP with that of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by GA Resolution 47/135 of 18 December 1992.

²⁶ Among the critical issues on which the negotiators most strongly disagreed one should mention the question of definition, the right to collectively own ancestral lands, and the right to control the resources pertaining to these lands. For a detailed analysis of the history of the Declaration, see Stefania Errico, "The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview" and "The UN Declaration on the Rights of Indigenous Peoples is Adopted: An Overview" 7 *Human Rights Law Review* (2007) pp. 741-759.

self-determination needed to be revised in order to safeguard the final adoption of the text.

As discussed in the previous section, the majority of States felt that Article 3 posed too serious a threat to their territorial integrity. A group of States, taking a more radical position, opposed the very idea of recognizing the right of self-determination to indigenous peoples.²⁷ Another group, larger in number, took a more progressive approach. Crucially, they were prepared to recognize that indigenous peoples had the right of self-determination. However, they were also concerned about the way in which the draft declaration dealt with this right. Accordingly, in order to preserve the strong language of Article 3, they requested that additional paragraphs aimed at clarifying the meaning of indigenous self-determination be included in the text.²⁸ In particular, they suggested the introduction of specific passages on the inviolable principle of territorial integrity, and the promotion of a combined reading of former Article 31 (now Article 4) on the right to autonomy and Article 3.²⁹ As a result of these changes, the indigenous right of self-determination would be essentially equated with ‘internal’ self-determination, despite Article 3’s literal endorsement of a full right.³⁰ Although many indigenous representatives were willing to discuss some of these proposals, a final agreement could not be reached. This is so because the proposed amendments would ultimately qualify, either directly or indirectly, the indigenous right of self-determination, something which indigenous peoples had always resisted.

As the positions of governmental and indigenous delegates remained substantially distant, the Chairman of the WGDD, Luis Enrique Chavez, presented his own proposal in a final attempt to promote a constructive dialogue between the parties.³¹ While sharing the indigenous peoples’ view that Article 3 should remain untouched, Luis Enrique Chavez introduced two amendments in connection with self-determination. The first change concerned one preambular paragraph of the draft

²⁷ See, for example, Report of the WGDD in its First Session, UN Doc. E/CN.4/1996/84, paras. 43 and 44.

²⁸ See, for example, Report of the WGDD in its First Session, UN Doc. E/CN.4/1996/84, paras. 45-48; and Report of the WGDD in its Fifth Session, UN Doc. E/CN.4/2000/84, para. 83.

²⁹ Article 4 of the UNDRIP reads: ‘indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.’

³⁰ See for example the statements of Mexico, Bangladesh, Norway, Spain, and Russia. Report of the WGDD in its Sixth Session, UN Doc. E/CN.4/2001/85, paras. 64, 69, 82, 83, and 90.

³¹ Report of the WGDD in its Eleventh Session, UN Doc. E/CN.4/2006/79, Annex I, Revised Chairman’s Summary and Proposal, Article 3.

declaration, which established that ‘nothing in this Declaration may be used to deny any peoples their right of self-determination.’ In the Chairman’s proposal, the passage ‘exercised in conformity with international law’ was added to the relevant paragraph. The intention of the Chairman was to introduce an *indirect* reference to the principle of territorial integrity. States, however, would have welcomed a direct and express reference to this principle.

The second, and more significant, change consisted of moving the provision on the right to autonomy, originally included in Article 31 of the draft declaration, directly after Article 3.³² The repositioning of this provision obviously aimed at promoting a combined reading of the two articles, suggesting that the indigenous right of self-determination should be read essentially as a right to autonomy. That said, it is not difficult to understand why this amendment alone could hardly satisfy the more diffident States. If indigenous self-determination really meant nothing more than autonomy, then the very existence of Article 3 would become superfluous. Instead, the co-existence of these two provisions could suggest that, although the indigenous right of self-determination should be substantially implemented by means of autonomous settings, it transcends the limited scope of autonomy.

Despite acknowledging that a number of States were not fully satisfied with his proposal, the Chairman of the WGDD decided to submit his revised version of the draft declaration to the Human Rights Council, which adopted it on its first session in June 2006.³³ Regrettably, the text could not be adopted by consensus.³⁴ It is telling that, in their explanations of the vote, several States made direct references to Article 3, either expressing their concern with this provision, or specifying the way in which they understood it. All this clearly indicated that the question of self-determination had yet to be fully resolved.

³² It should also be noted that, whereas the original version of the article used the expression ‘as a specific form of exercising their right to self-determination’, the final wording of Article 4 preferred the expression ‘in exercising their right to self-determination’, thus promoting a more restricted reading of the right.

³³ Human Rights Council Resolution 2006/2 of 29 June 2006.

³⁴ In favour: Netherlands, Pakistan, Peru, Poland, Republic of Korea, Romania, Saudi Arabia, South Africa, Sri Lanka, Switzerland, United Kingdom of Great Britain and Northern Ireland, Uruguay, Zambia, Azerbaijan, Brazil, Cameroon, China, Cuba, Czech Republic, Ecuador, Finland, France, Germany, Guatemala, India, Indonesia, Japan, Malaysia, Mauritius, Mexico; Against: Canada, Russian Federation; Abstentions: Algeria, Argentina, Bahrain, Bangladesh, Ghana, Jordan, Morocco, Nigeria, Philippines, Senegal, Tunisia, Ukraine. Other States that were against this text were not represented at the Human Rights Council.

3.1 The Solution: Article 46(1)

In view of the above considerations, it is clear that, when the text of the declaration reached the General Assembly, there existed a certain discrepancy between the way in which the majority of States understood the indigenous right of self-determination, and the way in which this right was articulated in the document. More precisely, whereas States had made it very clear during the sessions of the WGDD that they could only accept indigenous self-determination inasmuch as this meant ‘internal’ self-determination, the text of the declaration endorsed an unqualified version of the right that made no distinction between its internal and external dimensions.³⁵

Against this background, while the text was discussed at the Third Committee of the General Assembly, the African Group of States asked and obtained the re-opening of the negotiations.³⁶ The position of the African States was clear: their support for the declaration depended on the inclusion of an explicit reference to the principle of territorial integrity. In light of the discussion conducted above, it is evident that other States were at least sympathetic to this request. Indeed, it has been suggested that the US, Australia, Canada and New Zealand were behind the African opposition.³⁷ As a result of last-minute consultations, a crucial amendment was introduced in relation to the issue of self-determination. While Article 3 remained unchanged, the final version of Article 46(1) of the UNDRIP was altered to include the reference to territorial integrity that several States had repeatedly demanded. The final version of Article 46(1) now reads:

‘[n]othing in this Declaration may be interpreted as implying for any State, peoples, group or person any right to engage in any activities or to perform any act contrary to the Charter of the United Nations, *or construed as authorizing or encouraging any action which would dismember or impair totally or in*

³⁵ For this reason, it could be anticipated that some States would ask for the incorporation of additional amendments. See, Luis Enrique Chavez, “The Declaration on the Rights of Indigenous Peoples Breaking the Impasse: the Middle Ground”, in Claire Charters and Rodolfo Stavenhagen (eds.), *supra* note 18, p. 105.

³⁶ Namibia, on behalf of the African Group of States, introduced a resolution to ‘defer consideration and action on the United Nations Declaration on the Rights of Indigenous Peoples to allow for further consultations thereon.’ Namibia: Amendments to Draft Resolution A/C.3/61/L.18/Rev.1, 21 November 2006, A/C.3/61/L.57/Rev.1, adopted by a vote of 82 in favour, 67 against with 25 abstentions.

³⁷ See, for example, Jennifer Preston, Report to FWCC 22nd Triennial, Quaker Work on the United Nations Declaration on the Rights of Indigenous Peoples, July 2007, available at <http://cfsc.quaker.ca/pages/documents/ReporttoFWCC.pdf> (visited 21 April 2011).

*part, the territorial integrity or political unity of sovereign and independent States.*³⁸

3.2 Assessing the Indigenous Right of Self-determination

It is clear that Article 46(1) has significantly restricted the scope of the right of self-determination in the UNDRIP. Borrowing Koivurova's words, '[while] the right to self-determination of indigenous peoples is recognized in Article 3 ... its outermost scope is limited in Article 46.'³⁹ Seen from a narrow perspective, this suggests that the UNDRIP has hardly 'revolutionized' the meaning of self-determination under international law. As discussed in section one, despite the uncertainties surrounding the scope of this right, one thing has always been fairly clear, namely that sub-national groups do not have a right to independence. In this respect, the UNDRIP has simply reaffirmed this basic principle. The wording of Article 46(1), the broader normative context of the Declaration, and, crucially, its preparatory works all indicate that indigenous peoples do not have a right to secession.

Having said that, the UNDRIP's approach to self-determination is obviously innovative in another important respect. This instrument has created an indigenous-specific right of self-determination.⁴⁰ The two key features of this right are that, first, it only applies to indigenous peoples, and, secondly, it does not include a right to independence. These restrictions clearly respond to the concerns of States that were highlighted in section two above. Whilst their significance should not be overlooked, the fact remains that the UNDRIP has broken new ground in the international law of self-determination. In fact, regardless of the limitations placed by Article 46(1), the UNDRIP is the first international legal instrument to have explicitly extended the right of (internal) self-determination to a sub-national group. As to the specificity of this right, it is apparent that the provisions of the UNDRIP are only meant to apply to a particular category of sub-national groups, that is, indigenous peoples. Consequently, it is difficult to anticipate whether, and, more importantly, to what extent, this normative development could influence the relationship between self-

³⁸ Emphasis mine.

³⁹ Timo Koivurova, "Sovereign States and Self-Determining Peoples: Caring Out a Place for Transnational Indigenous Peoples in a World of Sovereign States", 12 *International Community Law Review* (2010) p. 203.

⁴⁰ Patrick Thornberry, *Indigenous Peoples and Human Rights* (2002) p. 385.

determination and other sub-national groups. Despite these reservations, there is no doubt that the UNDRIP should be welcomed as a positive development by those who advocate the emergence of new, contemporary, and dynamic forms of self-determination.⁴¹

Once established that the indigenous right of self-determination has an internal dimension,⁴² it is important to shed some light on the actual meaning of this right. Before doing so, however, one final point remains to be considered. While it is fairly evident that the UNDRIP does not confer on indigenous peoples a right to independence under 'normal' conditions, could it be argued that it does so under 'special' circumstances? Section one above highlighted that the existence of a right to remedial secession under current international law is at best doubtful. By discussing the way in which the UNDRIP approaches this issue, the next section will also examine whether this instrument has made any significant contribution to the current debate concerning this controversial right.

4. The UNDRIP and Remedial Secession

There is considerable support among academics for a last measure right of remedial secession in case of serious violations of human rights.⁴³ A number of judicial and quasi-judicial pronouncements have also referred to this possibility, contributing to the perception that this right is gaining increasing recognition at the international level.⁴⁴ However, it can hardly be said that a right of remedial secession for sub-national groups exists under current international law. On the one hand, the normative foundations of this right are not well defined, while, on the other, States practice does not provide clear support for it.⁴⁵ With regard to the latter point, it should be noted

⁴¹ Gerry Simpson, "The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age", 32 *Stanford Journal of International Law* (1996) pp. 255-286.

⁴² For a discussion of forms of external self-determination other than independence (and, therefore, less controversial) see Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (2007) pp. 169-173.

⁴³ See the discussions in, Peter Hilpold, "The Kosovo Case and International Law: Looking for Applicable Theories", 8 *Chinese Journal of International Law* (2009), pp. 55-56; Helen Quane, *supra* note 15, p. 261. See also the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, p. 141, at <http://www.ceiig.ch/Report.html>. (visited 3 August 2011).

⁴⁴ *Katangese Peoples' Congress v. Zaire*, African Commission on Human and Peoples' Rights, Comm. No. 75/92 (1995), and *Reference re Secession of Quebec*, Supreme Court of Canada, [1998] 1 SCR 217. See also the Separate Opinions of Judges Yusuf, para. 11 and A.A. Cancado Trindade, paras. 178-181 in the Kosovo's Opinion, *supra* note 5.

⁴⁵ Kosovo's Opinion, *supra* note 5, para. 82.

that political considerations inevitably influence States' decisions in this complex area of international relations. This factor plays against the formation of a clear and coherent behavioural pattern, as confirmed by recent political developments.⁴⁶

As to the former point, it is often said that a right of remedial secession finds its legal basis in the so-called 'safeguard' clause inserted in the 1970 UN Declaration on Friendly Relations.⁴⁷ Paragraph 7 of principle V of this instrument establishes that:

'Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*'⁴⁸

This clause seems to provide only a *conditional* protection to the principle of territorial integrity of States. In practical terms, this means that if a government systematically oppressed a sub-national group living within its territory, the principle of territorial integrity could not be legitimately invoked. Accordingly, the sub-national group concerned would have, if it wished, a right to become independent and create its own State. However, it has been noted that the drafting history of this provision does not suggest that States intended to confer a right to remedial secession on sub-national groups.⁴⁹ This, coupled with the lack of coherence in State practice, suggests that a right to remedial secession as such has yet to materialize under international law. For the purposes of this article, it is important to establish whether the UNDIRIP takes an innovative approach to this issue, and whether, in doing so, it contributes in any meaningful way to the process of emergence of this right.

⁴⁶ Christopher Borgen, *supra* note 14.

⁴⁷ Among others, Robert McCorquodale, *supra* note 8, pp. 879-880; Antonio Cassese, *supra* note 8, pp. 118-120; James Crawford, *supra* note 1, pp. 56-57. See also the separate opinions of Judges Yusuf and A.A. Cancado Trindade in the Kosovo's Opinion, *supra* note 44.

⁴⁸ Emphasis mine. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of United Nations, GA Resolution 2625 (XXV).

⁴⁹ On this point see, among others, Tamara Jaber, "A Case for Kosovo? Self-determination and secession in the 21st Century", 15 *The International Journal of Human Rights* (2011) pp. 936-937; Peter Hilpold, *supra* note 43, p. 56; James Summers, "The Right of Self-Determination and Nationalism in International Law", 12 *International Journal on Minority and Group Rights* (2005) pp. 335-336.

The first point that needs to be made is that the UNDRIP makes no express reference to remedial secession. Nevertheless, there are a number of passages within the text that may help to shed light on the Declaration's approach to this controversial issue. Article 46(1) offers some initial guidance in this respect. It should be recalled that this provision establishes that:

‘[n]othing in this Declaration may be interpreted as implying for any State, peoples, group or person any right to engage in any activities or to perform any act contrary to the Charter of the United Nations, or construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States.’

As one can note, this passage resembles the safeguard clause contained in the 1970 Declaration on Friendly Relations that was discussed above. However, contrary to the latter, Article 46(1) provides for no exception to the protection of the principle of territorial integrity. Crucially, the reference to the obligation of a government to ‘represent the whole people of the territory’ is absent. Accordingly, it could be argued that Article 46(1) *de facto* rules out the possibility that indigenous peoples have a right to remedial secession.⁵⁰ This conclusion, however, is not fully convincing.

A first complication derives from a reference found in the preamble to the Declaration. More precisely, preambular paragraph sixteenth acknowledges that, in accordance with, *inter alia*, the 1993 Vienna Declaration and Programme of Action (Vienna Declaration), all peoples have the right to self-determination.⁵¹ Crucially, the Vienna Declaration includes and expands the safeguard clause found in the 1970 Declaration on Friendly Relations. After recognizing that all peoples have the right to self-determination, it establishes that:

⁵⁰ One could also argue that if, as noted above, the safeguard clause included in the 1970 Declaration on Friendly Relations cannot be taken to indicate the existence of a right to remedial secession for sub-national groups, in the same way the lack of a reference thereto cannot be taken to indicate the exclusion of such right. However, since this safeguard clause is widely regarded as the legal basis for the right to remedial secession, it is appropriate to discuss it in the context of a potential right to remedial secession for indigenous peoples.

⁵¹ ‘Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.’ A/CONF.157/24(Part I) Chapter III.

‘In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.*’⁵²

In other words, the safeguard clause that was not directly included in Article 46(1) has been brought within the normative context of the UNDRIP by means of a preambular paragraph. The co-existence of Article 46(1) and preambular paragraph sixteenth sheds some doubts as to the UNDRIP’s overall position with respect to a right to remedial secession. While it could be argued that the wording of Article 46(1) carries more weight than the indirect reference found in preambular paragraph sixteenth, it should be remembered that preambles form integral part of their respective instruments for interpretation purposes.⁵³ Furthermore, it should be stressed that Article 46(1) does not *explicitly* exclude remedial secession.

Another consideration that needs to be made is that the right of self-determination is part of the international human rights framework. While the denial of a right to secession under ‘normal’ circumstances may be regarded as an acceptable limitation to the right, it is more difficult to argue the same point with regard to ‘special’ circumstances. A human rights approach to this question would suggest that sub-national groups should have a right to remedial secession when this may serve the purpose of preventing or putting an end to widespread human suffering.

In conclusion, the presumption, based on the language of Article 46(1), that the UNDRIP categorically excludes a right to remedial secession is open to question. At the same time, it is relatively clear that the Declaration does not make any positive contribution to the process of emergence of this right under international law. In a sense, it can be argued that the UNDRIP eschews any direct engagement with this

⁵² Emphasis mine. Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 2(3).

⁵³ Vienna Convention on the Law of Treaties (23 May 1969), United Nations, Treaty Series, vol. 1155, p. 331, Article 31. This is a rule of the so-called law of treaties. Arguably, it can also be applied to other instruments, especially when they display a number of features typical of treaties.

right, leaving practically unchanged its status under current international law.

5. The Internal Dimension of the Indigenous Right of Self-Determination

Once established that indigenous peoples have the right to internal self-determination, the next, difficult, step consists of implementing this right. It is generally recognized that courts and court-like bodies can importantly contribute to the process of implementation of international human rights norms and standards.⁵⁴ This process can be substantially facilitated by the existence of identifiable yardsticks against which to measure the level of compliance with a human rights provision. In this sense, the way in which self-determination is understood bears important consequences for its overall effectiveness.

Having said that, to identify the exact, and practical, meaning of the indigenous right of self-determination is no easy task. This right has been defined, among others, as the right of indigenous peoples to ‘freely pursue their political, economic, and social developments within the frameworks of their respective States.’⁵⁵ Evidently, the scope and implications of such a broadly defined right can be extensive and particularly difficult to spell out. In addition, a certain degree of flexibility is required in light of the heterogeneous category of indigenous peoples. Realistically, the way in which self-determination is exercised by the various indigenous groups of the world will have to take into account the important historical, political, and socio-economic differences that exist among them.⁵⁶ Indeed, it has even been suggested that the implementation and application of Article 3 of the UNDRIP not only cannot but also *should not* be uniform.⁵⁷ The need to approach the indigenous right of self-determination with a certain degree of flexibility does not necessarily have negative consequences on its effectiveness, provided that a common

⁵⁴ Rodolfo Stavenhagen, “Making the Declaration on the Rights of Indigenous Peoples Work: The Challenge Ahead”, in Stephen Allen and Alexandra Xanthaki (eds) *supra* note 15, p. 168; On the importance of courts and quasi-courts in the process of articulation of indigenous land rights, see Gaetano Pentassuglia, “Towards a Jurisprudential Articulation of Indigenous Land Rights”, 22 *European Journal of International Law* (2011) pp. 165-202.

⁵⁵ Reference re Secession of Quebec, Supreme Court of Canada, [1998] 1 SCR 217, para. 126. The right of internal self-determination has also been described as ‘the right of a people to choose its own government and determine its own political, social and economic policies.’ Helen Quane, *supra* note 15, p. 267.

⁵⁶ Rodolfo Stavenhagen, *supra* note 54, p. 163.

⁵⁷ Jon Van Dyke, “Self-Determination”, International Law Association’s Draft Interim Report on the UN Declaration on the Rights of Indigenous Peoples, p. 11. At <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> (visited 3 August 2011).

strategy underpins its implementation. In light of the all above, recognizing the important relationship between internal self-determination and participatory rights may represent a promising solution.

Considerable support exists in academic writing for associating internal self-determination with the ‘democratic entitlement’.⁵⁸ Within this context, more specific suggestions have been made to understand the right of internal self-determination as the right of peoples to take part in decisions affecting their lives. Klabbers, for one, has pointed out that self-determination should be understood as a procedural right by virtue of which the ‘decisions affecting groups of people should be taken, at the very least, with those groups having being consulted.’⁵⁹ This, in his view, does not mean that these groups should have an overriding right to veto, but, rather, that they ‘should be heard and ... taken seriously.’⁶⁰

The tendency to connect internal self-determination with participatory rights is also visible in the various components of the indigenous rights regime. The UN Expert Mechanism on the Rights of Indigenous Peoples,⁶¹ for example, has recently observed that ‘the principle of participation in decision-making ... has a clear relationship with the right of indigenous peoples to self-determination.’⁶² More specifically, it also pointed out that self-determination is the normative framework for the indigenous collective right to participation.⁶³ The UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, has also recognized the important link between the two principles. Among other things, he regularly seeks to promote the participatory rights of indigenous peoples by reference to their right of self-determination. Thus, relying on the self-determination framework, he has called upon States to promote broader cooperation with indigenous peoples in relation to extractive industries,⁶⁴ to encourage indigenous self-governance at the local level,⁶⁵ and to guarantee the indigenous right to participate in State decision-making on a

⁵⁸ Thomas Franck, *supra* note 11; Gaetano Pentassuglia, *supra* note 8; Alexandra Xanthaki, *supra* note 42, pp. 160-169.

⁵⁹ Jan Klabbbers, “The Right to be Taken Seriously: Self-Determination in International Law”, 28 *Human Rights Quarterly* (2006) p. 203.

⁶⁰ *Ibid.*

⁶¹ Established, in 2007, pursuant to Human Rights Council, Resolution 6/36.

⁶² Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making, Report of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/EMRIP/2010/2, 17 May 2010, para. 5.

⁶³ *Ibid.*, paras. 30-33.

⁶⁴ Situation of Indigenous Peoples in the Russian Federation, UN Doc. A/HRC/15/37/Add.5 (23 June 2010), para. 46.

⁶⁵ Situation of Indigenous Peoples in Australia, UN Doc. A/HRC/15/37/Add.4 (1 June 2010) para. 91

footing equal to that of all others.⁶⁶

The connection between self-determination and participatory rights is nowhere clearer than in the UNDRIP, which, as noted by Burger, ‘is focused emphatically on the application of the right of indigenous peoples to participate.’⁶⁷ More specifically, Quane has observed that the close relationship between self-determination and participation represents ‘one of the most interesting and innovative aspects of the UNDRIP.’⁶⁸ In fact, more than twenty articles of the Declaration can be generally related to the idea of participation in decision-making.⁶⁹ Among those articles, two are particularly significant in light of their general scope of application: Article 18, which establishes the right of indigenous peoples to participate in decision-making in matters which would affect them, and Article 19, which requires States to consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. Another important provision is contained in Article 4, which describes autonomy as a specific way of exercising the indigenous right of self-determination.⁷⁰ Autonomy can be in itself a complicated concept to define. In fact, as suggested by Heintze, its concrete content should be determined in every special case.⁷¹ However, the important point is that autonomy also represents a special form of participation, namely one that allows sub-national groups, in this case indigenous peoples, to exercise direct control over affairs that specifically affect them.⁷²

The UNDRIP is not the only instrument concerning indigenous rights that recognizes a central position to the right of participation. Article 6 of International Labour Organization (ILO) Convention No. 169⁷³, notably the only international

⁶⁶ Report of the Situation of Indigenous Peoples in Nepal, UN Doc. A/HRC/12/34/Add.3 (20 July 2009), para. 65.

⁶⁷ Julian Burger, “The UN Declaration on the Rights of Indigenous Peoples: From Advocacy to Implementation”, in Stephen Allen and Alexandra Xanthaki (eds.), *supra* note 15, p. 47.

⁶⁸ Helen Quane, *supra* note 15, p. 263.

⁶⁹ Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making, *supra* note 62, para. 8.

⁷⁰ For a more detail discussion, see Zelim Skurbaty (ed.), *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* (2005).

⁷¹ According to Heintze, autonomy should be defined as ‘an indefinite and general legal term that has to be given a concrete content in every special case.’ Hurst Heintze, “On the Legal Understanding of Autonomy”, in Markku Suksi (ed.), *Autonomy: Applications and Implications* (1998) p. 13.

⁷² Yash Ghai, *Public Participation, Autonomy and Minorities* (2011) p. 38.

⁷³ ILO Convention No 169 of 1989 Concerning Indigenous and Tribal Peoples in Independent Countries, text available at <<http://www.ilo.org/public/english/indigenous/>>.

binding instrument dealing specifically with indigenous rights, requires that indigenous peoples be consulted with regard to legislative or administrative measures that directly concern them. In a similar vein, Article 7 establishes, *inter alia*, that indigenous peoples shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly. It is telling that the supervisory bodies of the ILO have described the rights to consultation and participation spelled out in these articles as the cornerstone of Convention No. 169 upon which all the other provisions of the instrument are based.⁷⁴

International human rights bodies that deal regularly with indigenous rights have also recognized the importance of participation for the effective protection of indigenous peoples' rights. The Human Rights Committee has observed that the enjoyment of the right to culture included in Article 27 of the ICCPR may require positive legal measures of protection and measures to ensure the effective participation of indigenous communities in decisions affecting them.⁷⁵ Similarly, the Committee on the Elimination of Racial Discrimination has urged States parties to ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.⁷⁶

Having said all that, it should be noted that, when approached from a different angle, the equation of internal self-determination with participatory rights appears less satisfactory.⁷⁷ First, by focusing exclusively on participation, this solution ultimately validates the distinction between the right of self-determination of all peoples, on the one hand, and that of indigenous peoples, on the other. As was highlighted in section two, indigenous peoples' representatives fought tirelessly at the negotiation table to

⁷⁴ Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederacion Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), para. 31.

⁷⁵ General Comment No. 23: The Rights of Minorities (Art. 27), UN Doc. CCPR/C/21/Rev.1/Add.5 (4 August 1994) para. 7.

⁷⁶ General Recommendation No. 23: Indigenous Peoples, UN Doc. A/52/18, Annex V (18 August 1997) para. 4(d).

⁷⁷ A more general criticism to strategies that invoke existing human rights norms and seek the recognition of self-determination solely in political and legal terms has been advanced by Jeff Corntassel, who has argued that only a holistic approach to self-determination, framed in the context of sustainability, can guarantee the survival of future generations of indigenous peoples. Jeff Corntassel, "Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse", 33 *Alternatives* (2008) pp. 105–132.

preserve the full recognition of their right of self-determination. An understanding of self-determination that not only fails to recognize their right to secession, but, also, downplays the relevance of their right to remedial secession may, therefore, be considered unfair.⁷⁸ Secondly, and, perhaps, more importantly, some doubts may arise as to whether the connection between self-determination and participation effectively contributes to protect the rights of indigenous peoples and guarantee that their development will take place in accordance with their aspirations and needs. In other words, it is unclear whether indigenous peoples will be able to exercise these rights in any meaningful and fruitful way.

The above concerns are legitimate and cannot be simply dismissed. However, focusing on participatory rights seems to represent a valuable option within those *realistically* available. As discussed in section three, ways of exercising the right of self-determination that impair the political unity and territorial integrity of States are prohibited by Article 46(1) of the UNDRIP. However, it was also noted that the UNDRIP cannot be read as excluding a right to remedial secession altogether. Furthermore, the participatory rights recognized to indigenous peoples are different from those enshrined in other international human rights instruments. Firstly, they are more extensive, and, secondly, they are accepted as collective rights.⁷⁹ These features crucially enhance the overall value of these rights. The legal regime that regulates the land rights of indigenous peoples offers a good example of how indigenous participatory rights, embedded in the self-determination discourse, can effectively work in practice. The next section will discuss this in relation to States' obligations to engage in a constructive dialogue with indigenous peoples before launching or implementing development projects on their lands.

5.1 The Principle of Free, Prior and Informed Consent in the Context of Participatory Rights

Indigenous peoples have a distinctive and profound relationship with their lands, territories and resources. This special relationship, aptly recognized under current international human rights law, must be specially protected in order to guarantee the

⁷⁸ On this point, see also Joshua Castellino and Jeremie Gilbert, "Self-Determination, Indigenous Peoples and Minorities", 3 *Macquarie Law Journal* (2003) pp. 173-174.

⁷⁹ Helen Quane, *supra* note 15, pp. 259-287.

continued survival and vitality of these peoples.⁸⁰ Acknowledging the importance of land rights, a number of provisions of the UNDRIP deal directly with this issue, including Article 25 which establishes that indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their ancestral lands, and Article 26 which recognizes their right to own, use, develop and control their lands, territories and resources.⁸¹ These provisions are vital, for, as indigenous peoples have repeatedly stressed, they need to control their lands in order to control their destiny.⁸²

These provisions alone, however, leave a number of important questions partially unanswered, with potentially negative consequences for indigenous peoples. In particular, a conflict of interest emerges when States plan to exploit these lands and resources within the framework of national development programmes. In these situations, participatory rights represent an important tool at indigenous peoples' disposal to resist States' unduly interferences in their affairs.

Central to this question is the principle of free, prior, and informed consent (FPIC), which is virtually invoked by all bodies dealing with indigenous rights. FPIC may have significantly different implications depending on the way in which it is read and applied.⁸³ At a minimum, it requires that, before implementing development projects on indigenous lands, States should consult the indigenous peoples concerned. At a maximum, it could mean that States should always obtain the consent of the group concerned before taking any action. It is, therefore, not difficult to understand the reason why indigenous peoples see FPIC as a vital manifestation of the exercise of their right to self-determination.⁸⁴ As highlighted by Gilbert and Doyle, FPIC enables indigenous peoples to exercise control not only over their lands but also over their

⁸⁰ 'Indigenous Peoples and their Relationship to Land', Final Working Paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes, UN Doc. E/CN.4/Sub.2/2001/21 (11 June 2001), para. 12.

⁸¹ '(1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. (2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.'

⁸² See, for example, the statements of several indigenous organizations at the First Session of the WGDD, UN Doc. E/CN.4/1996/84, para. 84, and the Report of the WGDD in its Eight Session, UN Doc. E/CN.4/2003/92, para. 35.

⁸³ For a 'common practical understanding' of FPIC, see Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17-19 January 2005), UN Doc. E/C.19/2005/3, para. 45.

⁸⁴ Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making, *supra* note 62, para. 34.

destiny, a key component of the right of self-determination.⁸⁵

The scope of FPIC, however, needs to be clearly defined in order for this principle to become operational. The UNDRIP contains a specific provision on the issue of land rights and State development projects. Applying the generic right of participation and consultation included in Article 19 to this particular situation, Article 32 of the UNDRIP establishes that:

‘State shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions *in order to obtain* their free and informed consent prior to the approval of any project affecting their lands or territories and other resources.’⁸⁶

The language of this article does little to elucidate the meaning of FPIC. Obviously, the rather elusive expression ‘consult in order to obtain’ lies at the core of the problem. Only an analysis of the drafting history of this provision, and its contextualization within the normative framework of the UNDRIP, can shed some light on the significance and value of this principle.

On the one hand, the possibility that FPIC confers on indigenous peoples an unqualified right to veto over any project affecting their lands should be excluded. During the negotiations on the UNDRIP, indigenous peoples’ representatives repeatedly stressed that they should be entitled to oppose unwanted development projects on their lands. Their view was reflected in the original version of Article 32 included in the 1993 draft declaration, which affirmed that indigenous peoples had ‘the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources.’⁸⁷ States strongly opposed this provision during the second stage of the negotiations, succeeding to amend its content. As noted above, the final version of Article 32 does not require that States obtain the consent of indigenous peoples, but, rather, that they consult them in order to obtain their consent.⁸⁸

⁸⁵ Jeremie Gilbert and Cathal Doyle, “A New Dawn over the Land: Shedding Light on Indigenous Peoples’ Land Rights”, in Stephen Allen and Alexandra Xanthaki (eds.), *supra* note 15, p. 312.

⁸⁶ Emphasis mine.

⁸⁷ Original Article 30.

⁸⁸ That FPIC should be not read as conferring on indigenous peoples an unqualified right to veto is further confirmed by the statements made by several States on occasion of the adoption of the UNDRIP. For example, Canada noted that ‘the establishment of complete veto power over legislative

On the other hand, overly restrictive interpretations of FPIC should also be ruled out. One reason for this is that the requests advanced by a number of States to soften their obligations by, for example, using the expression ‘seek the consent’ as opposed to ‘obtain the consent’ were also dismissed. The language of Article 32 is clearly the result of a difficult compromise, and should, therefore, be read in accordance with its nature. Most importantly, however, too restrictive interpretations of FPIC would be incompatible with, generally, the normative framework of the UNDRIP, and, specifically, the content of Article 3. On the basis of the right of self-determination, indigenous peoples have the right to freely pursue their economic, social and cultural development. It seems difficult to reconcile this right with the fact that development projects could take place on indigenous lands without the consent of the indigenous peoples concerned, and regardless of the consequences that these activities could have on their cultures and lives. In this sense, as noted above, FPIC becomes both a requirement and a manifestation of the indigenous right of self-determination. Accordingly, it must be read in such a way that prevents States’ interests from systematically and indiscriminately trumping the rights of indigenous peoples.

Importantly, a dynamic understanding of FPIC, which takes into account the interests and rights of indigenous peoples, is gaining increasing recognition at the international level. This understanding has its normative foundations in Article 32 of the UNDRIP, and has been further articulated by judicial and quasi-judicial bodies, particularly the Inter-American Court of Human Rights and Human Rights Committee.⁸⁹ These bodies have promoted a ‘sliding scale approach’ to the question of indigenous participatory rights.⁹⁰ Crucially, this approach is based on the key assumption that the ‘level of effective participation [that must be guaranteed to

action for a particular group would be fundamentally incompatible with Canada’s parliamentary system.’ New Zealand noted that indigenous peoples could not enjoy a right that other groups or individuals did not have, that is, the right to veto, because this would create different classes of citizenship. Australia highlighted that it ‘could not accept a right that allowed a particular sub-group of the population to be able to veto legitimate decisions of a democratic and representative Government.’ Available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>. [visited 3 August 2011]

⁸⁹ In particular, *Ilmari Länsman et al. v. Finland*, Communication No. 511/1992, CCPR/C/52/D/511/1992 (HRC 1994); *Poma Poma v. Peru*, Comm. 1457/2006, UN Doc. CCPR/C/95/D/1457/2006 (HRC 2009); *Saramaka People v. Suriname*, Inter-American Court of Human Rights, Series C 172 (2007). For a more detailed discussion, see Mauro Barelli, “Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead”, 16 *The International Journal of Human Rights* (2012 forthcoming).

⁹⁰ Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (2009) p. 113.

indigenous peoples] is essentially a function of the nature and content of the rights and activities in question.’⁹¹ In other words, as observed by the Special Rapporteur on the Rights of Indigenous Peoples:

‘the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples’ consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.’⁹²

This means that when a project is likely to have a major (negative) impact on the territories, lives, or cultures of indigenous peoples, States have a duty not only to consult them, but, also, to obtain their free, prior, and informed consent.’⁹³ Thus, States may legitimately take steps to promote their economic development, but they must do so taking into account the rights of indigenous peoples,⁹⁴ and particularly their right to self-determination, to own their lands, and to participate in the relevant decision making process.

In this sense, the principle of FPIC becomes a vital component of the indigenous right of self-determination, suggesting that strong participatory rights, operating within a solid indigenous rights regime, can bring important benefits to indigenous peoples. This is especially true considering the significance of land rights for these peoples, and the fact that, in the past, economic and industrial development took place without recognition of and respect for indigenous peoples’ cultural attachment to their lands.⁹⁵

⁹¹ Ibid., p.116.

⁹² Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, UN Doc. A/HRC/12/34 (15 July 2009), para. 47.

⁹³ *Saramaka People v. Suriname*, Inter-American Court of Human Rights, Series C 172 (2007) para. 134.

⁹⁴ *Poma Poma v. Peru*, Communication1457/2006, UN Doc. CCPR/C/95/D/1457/2006 (HRC 2009) para. 7.4

⁹⁵ “Indigenous Peoples and their Relationship to Land”, *supra* note 80, para. 132.

6. Conclusions

The right of peoples to self-determination is commonly described as one of the most controversial norms of international law. Two questions have traditionally dominated the intense debate concerning the scope and meaning of this right: first, who constitutes a 'people' for the purposes of self-determination, and, secondly, what does this right actually imply for its legitimate holders. These two questions become particularly relevant in the context of sub-national groups' claims for self-determination. Are these groups 'peoples' entitled to the right of self-determination? And, if so, do they have a right to secession? In the colonial context, this right certainly implied the possibility that specific categories of peoples, namely those of non-self-governing territories and those subject to alien subjugation, domination and exploitation, could become independent. This, however, never meant that segments of a population were entitled to the same right. In the postcolonial period, the right to self-determination has been gradually recognized to *all* peoples, with a crucial distinction being introduced between an internal and external form of exercising such right. While self-determination continued to remain linked to independence, it also acquired a continuing character, so that peoples could exercise this right even within the existing borders of a State. This new development contributed, in part, to make the sub-national groups' claims for self-determination more acceptable to States. However, States' concerns about their territorial integrity have prevented a clear and definitive endorsement of self-determination for these specific groups.

Against this background, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) breaks new ground in the international law of self-determination. It is the first international legal instrument that expressly recognizes that one particular sub-national group, i.e. indigenous peoples, have the right of self-determination. In accordance with traditional international law, the UNDRIP does not confer on these peoples a right to independence, although it leaves open the possibility that they may enjoy a right to remedial secession under extreme circumstances. Contrary to other sub-national groups, however, indigenous peoples are now entitled to a right of internal self-determination. This normative development suggests that new, contemporary, and dynamic forms of self-determination can emerge in response to the changing needs of the time, although it should be stressed that whether the UNDRIP will have significant implications for other sub-national groups remains to be seen.

If one focuses on the sphere of indigenous peoples, a number of conclusions can be drawn. The UNDRIP, in line with other instruments and bodies dealing with indigenous rights, promotes a vision of (internal) self-determination essentially connected with the principle of participation in the decision-making process. In other words, it empowers indigenous peoples by conferring on them a strong set of participatory rights that can be used, in a spirit of partnership and mutual respect, to engage in constructive dialogue with each respective State. This solution is promising in two main respects. First, it provides a fairly clear meaning of indigenous self-determination. In this sense, courts and court-like bodies will find it easier to determine whether States comply with their legal obligations. Secondly, it guarantees that, when dealing with indigenous issues, States take into account the needs and interests of indigenous peoples. That said, it is not difficult to appreciate that the equation of self-determination with participatory rights may appear unsatisfactory in other respects. First, it creates a specific-indigenous right of self-determination that is different from the classic right of self-determination enjoyed by all (non-indigenous) peoples. This is so because indigenous self-determination has been clearly construed as a right that does not imply a right to independence. Secondly, doubts may arise as to the effectiveness of participatory rights, and particularly whether they can guarantee that the dialogue between indigenous peoples and States will be on an equal footing.

All considered, there are reasons to believe that indigenous participatory rights, as understood in the UNDRIP in the context of self-determination, can produce some positive results. Firstly, the focus on participation does not necessarily imply the exclusion of other forms of exercising self-determination under special circumstances. More precisely, the text of the UNDRIP does not categorically rule out the possibility that indigenous peoples may enjoy a right to remedial secession. Thus, when participation cannot secure the respect of indigenous rights, more radical options can be explored. Secondly, participation can take different forms, including autonomy, which can offer valuable solutions to the problems of some indigenous groups. Thirdly, the participatory rights enshrined in the UNDRIP are different from those traditionally recognized in other human rights instruments. The former are more extensive and are accepted as collective rights. In this important sense, the separating

line between participation and (internal) self-determination tends to dissolve.⁹⁶

One specific area in which these rights have been particularly effective is that of land rights, which represent a fundamental aspect of the indigenous rights regime and of indigenous peoples' lives. When States intend to launch development projects on indigenous lands, the UNDRIP requires them to consult the indigenous group concerned. More specifically, Article 32 refers to the principle of free, prior and informed consent (FPIC), by virtue of which States should consult the group affected by the project in order to obtain its consent before taking any action. The principle of FPIC has been increasingly interpreted, by judicial and quasi-judicial bodies, as requesting that projects should not go ahead without the consent of the indigenous peoples concerned if they are likely to have a significant negative impact on their territories, lives and cultures. This means that States will have to respect the decisions of indigenous peoples in those cases in which the enjoyment of their rights could be seriously undermined by a development project. Considering the importance of ancestral lands for indigenous peoples, this represents a particularly positive development.

In conclusion, although self-determination as participation has some limits, one should recognize its potential in protecting and empowering indigenous peoples. While there is already evidence that this solution may bring some benefits to indigenous peoples, it is vital to monitor the future implementation of this right, both with respect to land rights and other areas of the indigenous rights regime, in order to preserve and further promote the continuation of this positive trend.

⁹⁶ On this point, see Helen Quane, *supra* note 15, pp. 272-284.