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## **The UNDRIP and the legal significance of the right of indigenous peoples to self-determination: a human rights approach with a multidimensional perspective**

### Introduction

In 2007, the UN general Assembly adopted the landmark UN Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>1</sup> This declaration recognises the right of indigenous peoples to self-determination, by virtue of which they can freely determine their political status and freely pursue their economic, social and cultural development. The significance of this document for indigenous peoples and, more broadly, for the development of human rights cannot be underestimated. In effect, the declaration provides the first universal instrument to recognise and elaborate the content of the right to self-determination for indigenous peoples. It is also the first instrument to recognise the right of self-determination for peoples other than peoples territorially organised as states and colonies. Considering the contentious nature of recognising the right of self-determination for a segment of the population of a particular state, the recognition of the right of indigenous peoples to self-determination therefore constitutes a remarkable innovation under international law.

Yet, the adoption of the declaration has not solved all controversies and the implementation of the right to self-determination remains a contentious issue in practice. Ten years after the adoption of UNDRIP, there is still a lack of understanding as to what is really meant by the right of indigenous peoples to self-determination. For indigenous peoples, self-determination implies their right to control their own destiny and to maintain their distinct identity and livelihoods. This also includes their right to manage their traditional land and natural resources. Concurrently, many states remain suspicious of recognising the right of indigenous peoples to self-determination. In particular, they fear that the recognition of self-determination will jeopardise the political unity and territorial integrity of the state as well as challenge its sovereignty over natural resources, even though indigenous claims do not necessarily imply the need for sovereign statehood. In this regard, the question arises as to how the UNDRIP manages and accommodates these conflicting and paradoxical positions.

To answer this question, this study takes a human rights approach to the development of the law of self-determination and a multidimensional conceptual perspective to describe the content of the right in relation to indigenous peoples. From a doctrinal standpoint, this approach is linked to the development of self-determination as a basis for democratic governance,<sup>2</sup> but also goes beyond that in so far as it does not confine self-determination within the political governance of sovereign states. In this regard, this study challenges to some extent the internal/external dichotomy, as it has been well posited by Casese,<sup>3</sup> instead supporting a relational and human rights perspective, as

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<sup>1</sup> UN General Assembly, Resolution 61/295. United Nations Declaration on the Rights of Indigenous Peoples (hereinafter, the UNDRIP), 2007.

<sup>2</sup> Thomas M. Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law* 86, no. 1 (1992): 46–91.

<sup>3</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995).

posited by Young or Anaya in their writing.<sup>4</sup> On this basis, the objective of this study is therefore also to explain the significance of indigenous self-determination consistently with human rights law while questioning the limits of the orthodox interpretation of self-determination under international law.

For the purpose of this analysis, the argument is divided into two main parts. The first section focuses on recognition of the right of indigenous peoples to self-determination and situates the right within the contemporary development of international law on self-determination. Then, the second section examines the content of the right of indigenous peoples to self-determination while taking a multidimensional conceptual perspective to explain the significance of the right and examine more particularly its political, resource and external dimensions.

### 1. The Right of Indigenous Peoples to Self-Determination: a Human Rights Approach

In 2007, the UN General Assembly adopted the UNDRIP by a significant margin of 143 states being in favour of the declaration, 12 abstentions and four negative votes. Under Article 3, the declaration unambiguously stipulates that indigenous peoples, treated as a group of peoples rather than individual citizens, have the collective right to exercise the right to self-determination. While Article 3 does not stipulate any limitation for its exercise, the right of indigenous peoples to self-determination is however not absolute. According to Article 46 of the declaration, self-determination should be exercised in respect to the territorial integrity or political unity of sovereign and independent states. Thus, the UNDRIP does not recognise the right of indigenous peoples to create new states, thereby dissociating the right of indigenous peoples from an end-state approach, as asserted during the decolonisation period.

Yet, the UNDRIP should not be interpreted as preventing indigenous peoples' claim to secession. According to Scheinin and Åhren, such an approach would otherwise be discriminatory.<sup>5</sup> In their own words: 'why should Indigenous peoples, populations and groups not be entitled to pursue a quest for secession or far reaching autonomy within the state when this avenue is open to other peoples, communities and groups?'<sup>6</sup> Although it is questionable whether any peoples are entitled to secession under international law,<sup>7</sup> it is indeed arguable that in the absence of further developments at the international level on this topic, it would be problematic to prevent all indigenous

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<sup>4</sup> See, in particular, Iris Marion Young, 'Two Concepts of Self-Determination', in *Ethnicity, Nationalism, and Minority Rights*, ed. Stephen May, Tariq Modood, and Judith Squires (Cambridge: Cambridge University Press, 2004); James Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era', in *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, ed. Claire Charters and Rodolfo Stavenhagen (Copenhagen: IWGIA, 2009), 184–99.

<sup>5</sup> Martin Scheinin and Mattias Åhren, 'Relationship to Human Rights, and Related International Instruments', in *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Jessie Hohmann, Marc Weller, Oxford Commentaries on International Law (Oxford, New York: Oxford University Press, 2017), 72.

<sup>6</sup> Scheinin and Åhren, 72.

<sup>7</sup> On the doctrine of remedial session, see, e.g. Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination*, 2nd ed. (New Haven, Conn: Yale University Press, 1978). See also the icj Kosovo Case, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, i.c.j. Reports 2010, para. 82 and Reference Re secession of Quebec, 2 scr 217, 1998, Supreme Court of Canada, para. 134.

peoples from claiming the right to secession. Furthermore, it must also be stressed that indigenous peoples, who fall under the scope of international law on decolonisation, are still entitled to claim independence. This is, for instance, the case of self-governing territories such as Greenland or New Caledonia. However, it must equally be emphasised that the right to self-determination by indigenous peoples is not necessarily fulfilled by decolonisation of the broader territory in which they live alongside others.<sup>8</sup> Self-determination has many aspects beyond statehood and the formal independent status of any territory.<sup>9</sup> In this regard, for the purpose of the UNDRIP the relevance of the right of indigenous peoples to self-determination, while not preventing indigenous peoples' claim for statehood, is situated elsewhere.

Pursuant to the drafting process and the provisions of the UNDRIP, the right of indigenous peoples to self-determination is grounded in human rights law. In accordance with Article 1 of the UN Human Rights Covenants, which equally proclaims the right of all peoples to self-determination, the right of indigenous peoples to self-determination is also more specifically connected with the regime of human rights law on self-determination. In fact, with the adoption of Article 1 of the UN Covenants, it became increasingly clear that self-determination was not only a right for colonised peoples, but also a right belonging to 'all peoples'. In this context, the Human Rights Committee (HRC), charged with providing authoritative interpretations of the norms contained in the International Covenant on Civil and Political Rights (ICCPR), has interpreted Article 1 as the right of peoples to choose the form of their constitution or government.<sup>10</sup> Contrary to the colonial variant of self-determination, this latter form of self-determination must therefore be exercised within the confines of existing states, while at the same time respecting the principle of the territorial integrity of sovereign states. International doctrine has labelled this interpretation of the right as 'internal self-determination'.<sup>11</sup> However, one caveat with respect to internal self-determination lies in its focus on individual rights and the fact that it was not intended to give rights at the level of only some groups residing in one state. Accordingly, the right for indigenous peoples contrasts with the post-colonial approach of self-determination in so far as it recognises and protects the collective identity of indigenous peoples as a polity, as opposed to merely protecting the right of indigenous peoples as individual citizens.

Yet, the rights of indigenous peoples remain closely intertwined with the human rights corpus on self-determination. More simply, as explained by Quane, the right of indigenous peoples to self-determination goes beyond the minimalist concept of internal self-determination, which has been expanded to include an internal right for a group living within a particular state.<sup>12</sup> In other words, it is possible to interpret the right of indigenous peoples to self-determination 'as a development of the existing right to internal self-determination, one that can help make it more responsive to the needs and

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<sup>8</sup> See, e.g. Report of the Special Rapporteur on the rights of indigenous and peoples, James Anaya, 'The Situation of Kanak People in New Caledonia, France UN Doc.A/HRC/18/35/Add.6', 2011, para. 14–17.

<sup>9</sup> Report of the Special Rapporteur on the rights of indigenous and peoples, James Anaya, para.16.

<sup>10</sup> See HRC, General Comment No. 25: Article 25 UN Doc. CCPR/C/21/Rev.1/Add.7, 1996, para 2.

<sup>11</sup> See for instance Cassese, *Self-Determination of Peoples*; Allan Rosas, 'Internal Self-Determination', in *Modern Law of Self-Determination Modern Law of Self-Determination*, ed. Christian Tomuschat (Dordrecht: Martinus Nijhoff Publishers, 1993), 225–52.

<sup>12</sup> Helen Quane, 'The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?', in *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, ed. Stephen Allen and Alexandra Xanthaki (Oxford: Hart Publishing, 2011), 262.

interests of indigenous groups'.<sup>13</sup> As such, the right of indigenous peoples serves to complement and substantiate the right of 'all' peoples to self-determination as proclaimed under Article 1 of the UN Human Rights Covenants. This is also the position argued by Anaya, former special rapporteur on the rights of indigenous peoples, who explained in a similar respect that the UNDRIP 'recognizes that indigenous peoples have the same right of self-determination enjoyed by other peoples.... premised on the conception of a universal right of self-determination and, on that premise, it affirms the extension of that universal right to indigenous peoples'.<sup>14</sup> From this perspective, the right of indigenous peoples to self-determination therefore constitutes a novelty under international law, but this novelty remains grounded within the contemporary regime of human rights law concerning the right of self-determination.

Although such an understanding of self-determination does not provide the right for indigenous peoples to 'full' self-determination in the traditional sense of the term, it does have several important merits. First, it is in line with indigenous peoples' claims, who 'themselves have almost uniformly denied aspirations to independent statehood in demanding self-determination'.<sup>15</sup> Second, it is also in compliance with the negotiation process surrounding the adoption of the declaration, during which time the human rights model of self-determination detracted from the decolonisation model and the historic sovereignty arguments of indigenous peoples as a basis for self-determination.<sup>16</sup> Such a conceptualisation of self-determination, introduced by Anaya and supported by Asian, African and Southern American delegations, does not limit self-determination to a state-end approach; rather, it is premised on the right of appeal to the universal right of equality between peoples.<sup>17</sup> Finally, this approach is not only consistent with internal self-determination, as enshrined under Article 1 of the UN Human Rights Covenants, but has also been endorsed by human right bodies when they recognised the application of Article 1 of the UN Covenants to the situation of indigenous peoples.<sup>18</sup>

In conclusion, this conception of self-determination arguably also provides a fuller right of self-determination than could be achieved through independent statehood. As explained by Anaya, 'such a notion, that full self-determination necessarily means a right to choose independent statehood, ultimately rests on a narrow state-centered vision of humanity and the world, ...(which) is blind to the contemporary realities of (...) a world in which the formal boundaries of statehood do not altogether determine the ordering of communities and authority'.<sup>19</sup> Hence, while such an interpretation of the right of indigenous peoples to self-determination challenges to some extent traditional typologies, it also constitutes a valuable enlargement of the human right norm, one that is more concordant with the contemporary social realities of indigenous peoples and society at large.

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<sup>13</sup> Quane, 262.

<sup>14</sup> Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era', 185.

<sup>15</sup> Anaya, 185.

<sup>16</sup> Andrew K Erueti, 'The Politics of International Indigenous Rights', *University of Toronto Law Journal* 67, no. 4 (2017): 584.

<sup>17</sup> Erueti, 583.

<sup>18</sup> See, e.g. HRC, Concluding Observation: Norway, UN Doc CCPR/C/79/Add/112 (1999), para. 10; Concluding Observation: Canada, UN Doc. CCPR/C/103/Add.5 (1999).

<sup>19</sup> James Anaya, 'A Contemporary Definition of the International Norm of Self-Determination', *Transnational Law & Contemporary Problems* 31 (1993): 143.

## 2. A Multidimensional Model of Self-Determination

While the right of indigenous peoples to self-determination should be understood consistently with the right to internal self-determination as enshrined under human rights law, its implementation nevertheless requires important changes, even for the governance of democratic states. Those changes are multidimensional. They include changes that are linked with the political, resource and external dimensions of the right to self-determination. The following analysis examines each of these dimensions and explores the relationship between the right of indigenous peoples to self-determination and the human rights corpus of self-determination.

### 2.1. *The political dimension of the right of indigenous peoples to self-determination*

In accordance with the UNDRIP, the political aspect of the right of indigenous peoples to self-determination is based on two main pillars: the right of indigenous peoples to autonomy and the right to participate in the decision-making process of the state. This interpretation stems from Articles 4 and 5 of the UNDRIP, which respectively state:

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.

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

From this perspective, the right of indigenous peoples to self-determination is based on a dual aspect: 'on the one hand, autonomous governance and, on the other, participatory engagement'.<sup>20</sup> As further explained by Anaya, this dual aspect reflects the position that indigenous peoples are distinct units but yet joined with and connected to larger political and social structures, such as the state and the global community itself.<sup>21</sup> Accordingly, the right to self-determination first entails the obligation for states to recognise indigenous representative institutions.<sup>22</sup> In this respect, Article 31 of the UNDRIP indicates that indigenous peoples should be free to establish their own institution, to determine, maintain and develop their structures in accordance with their own procedure and in compliance with human rights law.<sup>23</sup> However, as underlined by the former Rapporteur, Erica Daes, '[t]he true test of self-determination is not whether Indigenous Peoples have their own institutions of self-determination, legislative authorities, laws, police, or judges. The true test of self-determination is whether Indigenous peoples themselves actually feel that they have choices about their way of life'.<sup>24</sup>

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<sup>20</sup> Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era', 193.

<sup>21</sup> Ibid.

<sup>22</sup> UNDRIP, Articles 33, 34, 35.

<sup>23</sup> UNDRIP, Articles 33-34.

<sup>24</sup> Erica-Irene A Daes, 'Striving for Self-Determination for Indigenous Peoples', in *First International Conference on the Right to Self-Determination & the United States*, ed. Y.N. Kly and D. Kly (Geneva, 2001), 58.

In accordance with Article 4 of the UNDRIP, the right of indigenous peoples to self-determination requires that indigenous peoples autonomously govern their own internal and local affairs. In this regard, Wheatley also explains that autonomy in political affairs implies ‘the exercise of government functions by state institutions under the control of indigenous peoples’.<sup>25</sup> This is also in accordance with the view of Scheinin and Åhren, who indicate that the right of indigenous peoples to self-determination ‘requires a transfer of jurisdiction from state to political bodies to indigenous peoples’ representative institutions’.<sup>26</sup> In effect, this position is significant because it ‘shifts decision making power in some instances from the states to the indigenous peoples’, providing therefore public authority in some areas to indigenous representative institutions.<sup>27</sup> In this regard, Scheinin and Åhren are also right to underline that self-determination ‘must conceptually go beyond that of the right to consultation’,<sup>28</sup> though consultation is still an elemental aspect of indigenous self-determination.<sup>29</sup>

In practice, the tension in implementing indigenous self-determination lies in the defining of indigenous prerogatives and in the balancing of rights and duties between states and indigenous institutions, especially regarding the scope of indigenous self-government. Although the UNDRIP leaves a wide margin of interpretation as to the scope of the right to autonomy, it is generally agreed that ‘the content of indigenous affairs is broad and should not be restricted to cultural affairs only’.<sup>30</sup> According to the *travaux préparatoires* of the UNDRIP, it also includes ‘culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions’.<sup>31</sup> While the absence of consensus about the content of autonomy has prevented the adoption of a strict definition during the drafting process of the declaration, the absence of such a definition also provides a degree of flexibility, which guarantees that ‘the right can be adjusted to the particular circumstances of each case’.<sup>32</sup> There is indeed no one-size fits all model of autonomy for indigenous peoples, with each people requiring its own governance structure designed in accordance with its own needs and interests. However, Scheinin and Åhren are correct to underline that ‘in the absence of clearer instructions, there are fairly few signs of such jurisdiction having been transferred from states to indigenous peoples during the more than ten years that have passed since the adoption of the UNDRIP’,<sup>33</sup> and this in spite of the fact that the status of the principle of autonomy is widely ‘confirmed by state practice and by the evidence of the requisite *opinio juris*’.<sup>34</sup>

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<sup>25</sup> Steven Wheatley in International Law Association, ‘The Hague Conference (2010) Rights of Indigenous Peoples, Interim Report’ (London: International Law Association, 2010), 13.

<sup>26</sup> Scheinin and Åhren, ‘Relationship to Human Rights, and Related International Instruments’, 67.

<sup>27</sup> Scheinin and Åhren, 67.

<sup>28</sup> Scheinin and Åhren, 67.

<sup>29</sup> See, e.g. Michael A. Murphy, ‘Representing Indigenous Self-Determination’, *The University of Toronto Law Journal* 58, no. 2 (2008): 200.

<sup>30</sup> Erica-Irene A Daes, ‘Striving for Self-Determination for Indigenous Peoples’, in *First International Conference on the Right to Self-Determination & the United States*, Y.N. Kly, D. Kly (Geneva, 2001), 58.

<sup>31</sup> Draft Declaration on the Rights of Indigenous Peoples, UN Doc. E/CN.4/2005/WG.15/2 (2005), article 31.

<sup>32</sup> Natalia Loukacheva, ‘On Autonomy and Law’, *Working Paper Series, Institute on Globalization and the Human Condition* 5, no. 3 (2005): 3.

<sup>33</sup> Scheinin and Åhren, ‘Relationship to Human Rights, and Related International Instruments’, 67.

<sup>34</sup> International Law Association, ‘The Hague Conference (2010) Rights of Indigenous Peoples, Interim Report’, 16.

Besides the right to autonomy in internal and local matters, indigenous peoples also have the right to participate as a collective unit in the decision-making process affecting them. From this perspective, it means that while indigenous peoples have complete autonomy in some instances, in other cases they also have the right to full participation.<sup>35</sup> As explained by Wheatley, beyond the sphere of self-governance arrangements, the right to self-determination finds ‘expression in the participation and/or consultation in the rule-making of the State’, which guarantees indigenous peoples the ‘ability to influence the law- and decision-making processes’.<sup>36</sup> This understanding is grounded in a relational model of self-determination, which takes into account the interdependence of peoples and the embeddedness of their relationships rather than their supposed independence from one another.<sup>37</sup> This model ‘emphasizes the importance of self-government and the need for modes of shared decision making capable of governing the complex interdependence characteristic of state-indigenous relationships today’.<sup>38</sup> In effect, this conceptualisation is also exemplified in several provisions of the UNDRIP, such as Article 18, which states that ‘indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves’. It is additionally supported by Article 19, which stipulates the duty of the state to consult and cooperate with indigenous peoples based on the principle of Free, Prior and Informed Consent (FPIC). Hence, whereas the right of indigenous peoples to self-determination goes beyond consultation, a lack of adequate consultation undoubtedly undermines the ability of indigenous peoples to exercise their right to self-determination.

While such an approach to self-determination approach is in compliance with the view that indigenous peoples are distinct but connected polities, this interpretation also stands in contrast with the original interpretation of the right of participation, which has traditionally been considered as an individual right of each citizen. This position was reflected in the *Miqmaq* case, when the HRC concluded in 1991 that Article 25 of the Covenant could ‘not be understood as meaning that any directly affected group (of indigenous peoples), large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs’.<sup>39</sup> In this regard, the HRC did not provide any specification about the right of indigenous peoples to participation or self-government, leaving the process or modalities of participation entirely to the discretion of the state parties.<sup>40</sup> As rightly argued by Quane, the formulation of the UNDRIP provisions are therefore ‘generally groundbreaking’ because they suggest that ‘new structures or modalities of participation are required by virtue of international human rights standards, rather than as is the current position being dependent on the discretion of the State concerned’.<sup>41</sup>

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<sup>35</sup> See also Scheinin and Åhren, ‘Relationship to Human Rights, and Related International Instruments’, 67.

<sup>36</sup> International Law Association, ‘The Hague Conference (2010) Rights of Indigenous Peoples, Interim Report’, 12.

<sup>37</sup> Iris Marion Young, *Global Challenges: War, Self-Determination and Responsibility for Justice* (Cambridge: Polity, 2007), 50–51.

<sup>38</sup> Murphy, ‘Representing Indigenous Self-Determination’, 185.

<sup>39</sup> HRC, *Marshall et al. v. Canada* Communication No. 205/19864, UN Doc CCPR/C/43/D/205/1986, (1991), para. 5.5.

<sup>40</sup> *Ibid.*, para.5.4.

<sup>41</sup> Quane, ‘The UN Declaration on the Rights of Indigenous Peoples’, 273.

Although the UNDRIP does not impose any particular procedure to ensure the collective participation of indigenous peoples, it puts the obligation on the respective state to guarantee that this right is effectively guaranteed. In this regard, Wheatley is correct to indicate that for participation to be substantially effective, indigenous peoples must have ‘the capacity to influence the outcomes of decision-making processes’.<sup>42</sup> In this regard, the right of indigenous peoples to self-determination goes against a minimalist and instrumentalist conception of the duty to consult, but is concordant with a human rights approach to consultation, one which provides the ‘means of building trust that can lead to agreed-upon outcomes for the implementation of projects that are both beneficial to indigenous peoples and to the society at large’.<sup>43</sup> Thus, beyond mere autonomy, the right to self-determination for indigenous peoples also requires states to consult and include them as equal political entities in the governance process affecting them.

## 2.2. *The resource dimension of the right of indigenous peoples to self-determination*

Besides the political dimension, the right of indigenous peoples to self-determination also includes a resource component that lies in the rights of indigenous peoples to freely dispose of their natural wealth and resources. However, the definition of this dimension of self-determination remains controversial. Traditionally, the rights to control land and natural resources has been interpreted under international law as an aspect of the principle of permanent sovereignty over natural resources (PSNR).<sup>44</sup> In this respect, states have often opposed the recognition of indigenous rights to land and natural resources out of fear that those rights could impair their sovereignty over such lands and natural resources. By contrast, indigenous peoples have continuously emphasised the fact that land and natural resources’ rights were crucial elements of their right to self-determination.

In the light of this controversy, Erica Daes was appointed by the Economic and Social Council during the drafting process of the UNDRIP to conduct a ‘study on indigenous peoples’ permanent sovereignty over natural resources’.<sup>45</sup> Based on the comments made by governments and on the data received from indigenous representatives and NGOs, the rapporteur argues that the principle of PSNR applies to indigenous peoples, short of economic independence. In her words, PSNR for indigenous peoples ‘does not mean the supreme authority of an independent State’, and ‘use of the term in relation to indigenous peoples does not place them on the same level as States or place them in conflict with State sovereignty’.<sup>46</sup> Instead, what PSNR for indigenous peoples involves is ‘governmental control and authority over the resources in the exercise of self-determination’.<sup>47</sup> It is ‘a collective right by virtue of which States are obligated to respect, protect, and promote the governmental and property interests of indigenous

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<sup>42</sup> International Law Association, ‘The Hague Conference (2010) Rights of Indigenous Peoples, Interim Report’, 14.

<sup>43</sup> James Anaya and Sergio Puig, ‘Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples’, *University of Toronto Law Journal* 67, no. 4 (2017): 462.

<sup>44</sup> For a general overview, see Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997).

<sup>45</sup> Daes, ‘Indigenous Peoples’ Permanent Sovereignty over Natural Resources’, UN Doc. E/CN.4/Sub.2/2004/30 (2004).

<sup>46</sup> *Ibid.*, para 18.

<sup>47</sup> *Ibid.*

peoples (as collectivities) in their natural resources'.<sup>48</sup> Hence, with respect to indigenous peoples, Daes argues that PSNR does not confer upon them absolute sovereignty over their traditional land and resources, but nevertheless implies their right to exercise self-determination in relation with their traditional lands and resources.<sup>49</sup>

From this standpoint, it is therefore more adequate to speak about the right of indigenous peoples to self-determination over their lands and resources rather than their right to PSNR. Such an approach is also in better compliance with the shift of emphasis from a decolonisation approach to a human rights approach to the right of self-determination, which occurred during the adoption process of the UNDRIP.<sup>50</sup> It is also supported by the HRC, which has confirmed in several concluding observations the application of Article 1.2 to the situation of indigenous peoples.<sup>51</sup> However, such a position is also novel under international law. Never before has a piece of human rights law required a state to recognise the distinct interests of one segment of its population. Traditionally, the right to economic self-determination had been recognised as a right of non-self-governing territories and, more recently, as a right of the population of the state to freely dispose of its natural wealth and resources.<sup>52</sup> Even the intra-state application of the right did not concern the differential application of the rights to one particular segment of the population. As a result, the assertion of the right of indigenous peoples to self-determination over their natural resources not only expands the reach of the democratic understanding of self-determination beyond its political realm. It also challenges the orthodox understanding of economic self-determination by providing specific entitlement for indigenous peoples over their lands and resources within the state in which they live.

Although the rights of indigenous peoples remain contested and the UNDRIP does not wholly clarify relevant international law, the legal implications of the resource dimension of the right of indigenous peoples to self-determination are outlined to some extent under several provisions. At the outset, the right of indigenous peoples to govern and manage land and resources necessarily includes the right to control their traditional land and resources as a basis for maintaining and developing their livelihoods. As underscored by Wheatley, 'indeed, control over traditional lands is the key feature of indigenous peoples' autonomy, conceived as an element of self-determination'.<sup>53</sup> Accordingly, Article 26 of the UNDRIP indicates that indigenous peoples' rights to land and resources include the right of indigenous peoples 'to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation' and the correlative duty for the state to recognise and

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<sup>48</sup> Ibid., para 40.

<sup>49</sup> UNDRIP, Article 26.

<sup>50</sup> Erueti, 'The Politics of International Indigenous Rights'.

<sup>51</sup> HRC, Concluding Observation: Canada, UN Doc. CCPR/C/79/Add.105 (1999), para.8; Concluding Observation: Australia, UN Doc. A/55/40, vol. I (2000), para. 506- 507; Concluding Observation: Sweden, UN Doc. CCPR/CO/74/SWE (2002), para.15; Concluding Observation: Mexico, UN Doc. CCPR/C/MEX/CO/5 (2010), para. 22;

<sup>52</sup> Alice Farmer, 'Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries', *New York University Journal of International Law and Politics* *New York University Journal of International Law and Politics* 39, no. 2 (2006): 417-73; Emeka Duruigbo, 'Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law', *George Washington International Law Review*. 38, no. 1 (2006): 33-100.

<sup>53</sup> International Law Association, 'The Hague Conference (2010) Rights of Indigenous Peoples, Interim Report', 13.

protect these lands, territories and resources.<sup>54</sup> Although some ambiguity remains as to the content of these rights, the adoption of the declaration has been instrumental in confirming that states must take action in recognising indigenous rights to land and resources at the domestic level. Furthermore, since the adoption of the declaration, an increasing body of human rights law has underlined the duty of states concerning the rights of indigenous peoples to land, while stressing the obligation of governments to demarcate indigenous lands,<sup>55</sup> to recognise their systems of land tenure,<sup>56</sup> or to ‘strengthen legislative and administrative measures in order to guarantee the rights of indigenous peoples to their land and to freely dispose of their natural wealth and resources’.<sup>57</sup> As already mentioned, several recommendations have also emphasised the rights of indigenous peoples to lands and resources under the scope of the right to self-determination, as enshrined under Article 1 of the Human rights Covenants.<sup>58</sup> Hence, this development not only expands and clarifies the content of indigenous peoples’ rights to land and natural resources, but also confirms that indigenous peoples have the rights to land and natural resources consistent with the human right of self-determination.

Given the important jurisdictional interdependences in the governance of indigenous lands and natural resources, the right of indigenous peoples to manage their lands and natural resources also entails their right to participate in decision-making processes affecting them, which extends their authority beyond self-government arrangements. From the participatory lens, the resource aspect of the right of indigenous peoples to self-determination includes more specifically the right of indigenous peoples to participate in the development of the resources located in their territories, including subsoil resources such as oil and gas. This interpretation is derived from Article 32 of the UNDRIP, which stipulates in the following, often quoted, paragraph:

indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources and that states have the duty to consult and cooperate in good faith with the indigenous peoples concerned (...) in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources.

The principle of FPIC, which is at the heart of Article 32, is also a cornerstone of the resource aspect of the right of indigenous peoples to self-determination. FPIC implies that it is not sufficient for the state to consult with indigenous peoples when a decision will affect their traditional territories. In addition, the principle requires that states fully engage with the concerned indigenous communities with the requirement to seek consent. Although the implementation of FPIC is still a controversial issue under international law, there is a growing corpus of decisions demonstrating the importance of the principle for the protection of indigenous peoples’ rights to land and resources. An important number of recommendations on state reports by the HRC and CESR have,

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<sup>54</sup> UNDRIP, Article 26.

<sup>55</sup> HRC, UN Doc. CCPR/C/VEN/CO/4 (2015).

<sup>56</sup> CESR, UN Doc E/C.12/GUY/CO/2-4 (2015).

<sup>57</sup> CESR, UN Doc E/C.12/AGO/CO/4-5 (2016).

<sup>58</sup> See HRC *supra* note 51 and CESCR, Concluding Observation: Finland, UN Doc. E/C.12/FIN/CO/6 (2014), para.9 (a); CESCR, Concluding Observation: Paraguay, UN Doc. E/C.12/PRY/CO/4 (2015), para.6.

for instance, emphasised that states should ‘ensure that prior consultations are held with a view to obtaining their free, prior and informed consent regarding decisions that affect them’,<sup>59</sup> and that the free, prior and informed consent of the indigenous peoples concerned should be obtained before granting licences to private companies. Additionally, the Expert Mechanism on the Rights of Indigenous Peoples has also stressed the importance of FPIC for the exercise of the right of indigenous peoples to self-determination, while at the same time emphasising that ‘States should also recognise that the right to self-determination of indigenous peoples constitutes a duty for States to obtain indigenous peoples’ free, prior and informed consent, not merely to be involved in decision-making processes, but a right to determine their outcomes’.<sup>60</sup> Thus, the regimes of consultation based on FPIC underlie an instrumental principle to operationalise self-determination in the context of developing traditional indigenous lands and territories.<sup>61</sup> This approach is based on a relational model of self-determination where ‘regimes of consultation play a crucial role in ensuring that indigenous peoples are provided with a meaningful opportunity to influence, and in some case to veto government policies that impact their rights and interests’.<sup>62</sup>

Although the role of FPIC and the duty to obtain consent remains disputed, it is increasingly agreed that projects significantly jeopardising indigenous livelihoods require their approval. For instance, actual consent, as opposed to consultation, is required by the UNDRIP in the case of relocation (Art. 10) as well as storage and disposal of hazardous materials on indigenous lands (Art. 29). In similar respects, both the HRC and the Inter-American Court of Human Rights have indicated that consultation is not sufficient in cases of large-scale development projects undertaken on traditional indigenous lands and territories that significantly affect their livelihoods.<sup>63</sup> Instead, FPIC is also required prior to initiating such projects, which indicates that the principle includes a qualified right to veto.<sup>64</sup> As such, the human rights application of FPIC utilises a ‘sliding scale approach to participatory rights’, one which recognises that the ‘level of effective participation is essentially a function of the nature and content of the rights and activities in question’.<sup>65</sup> This also means that the degree of participation of indigenous peoples and their right to object to a particular project will vary in accordance with the impact of the measure on their rights. The ramifications of FPIC are significant for the development of international law. This is especially the case since the application of the principle conflicts with ‘the ideas of democracy and political equality of citizens’, which emphasise ‘that no individual or group within the society should be provided with a veto over legislation with majority support’.<sup>66</sup> By contrast, the principle of FPIC corroborates the idea that the exercise of the right of indigenous peoples to self-determination requires the collective protection of their distinct

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<sup>59</sup> HRC, UN Doc CCPR/C/THA/CO/2 (2017).

<sup>60</sup> EMRIP, ‘Final Study on Indigenous Peoples and the Right to Participate in Decision Making’, para. 21–22.

<sup>61</sup> J  r  mie Gilbert, ‘The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right?’, *Netherlands Quarterly of Human Rights* 31, no. 3 (2013): 328.

<sup>62</sup> Murphy, ‘Representing Indigenous Self-Determination’, 200.

<sup>63</sup> HRC, *Poma Poma v. Peru*, Communication 1457/2006 of 27 March 2009, UN Doc. CCPR/C/95/D/1457/2006 (2009), para. 7.6; Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Judgment of 28 November 2007, IACtHR Series C, No. 172, para.134.

<sup>64</sup> *Ibid.*

<sup>65</sup> G. Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Leiden: Martinus Nijhoff Publishers, 2009), 113. + Barelli FPIC p 14

<sup>66</sup> International Law Association, ‘The Hague Conference (2010) Rights of Indigenous Peoples, Interim Report’, 14.

livelihoods, even when it is in conflict with the societal interests supported by the rest of the population. Hence, the application of FPIC supports a pluralist conception of democratic governance that finds application with the exercise of the right of indigenous peoples to self-determination without challenging the sovereignty of independent states.

### 2.3. *The international dimension of the right of indigenous peoples to self-determination*

The livelihoods of indigenous peoples are not inescapably confined to the territories of sovereign states. In this regard, it appears logical to include an external or international dimension to the right of indigenous peoples to self-determination.<sup>67</sup> However, as far as this dimension of self-determination is concerned, it does not necessarily entail the right to secession for indigenous peoples. Instead, what this dimension of self-determination includes is the right of indigenous peoples to protect their collective integrity while participating in and influencing development processes in accordance with their own viewpoints. Given overlapping interests among indigenous and other communities and ‘the extension of political power and political activities across the boundaries of the modern-states’,<sup>68</sup> self-determination need not only apply within the state, but should be extended to other governance spheres of society as well.<sup>69</sup> As also eloquently explained by Anaya, ‘any model of self-determination that does not take into account the larger context of multiple patterns of human association and interdependency is at best incomplete (and is more likely distorted) ... appropriately understood, therefore, self-determination concerns human beings in regard to the constitution and functioning of all levels and forms of government under which they live’.<sup>70</sup> This approach is also grounded in a relational model of self-determination that speaks both about local autonomy and the need to govern the complex interdependent relationship between indigenous peoples and non-indigenous groups at the national, transnational and international levels.<sup>71</sup> Furthermore, this understanding is also in agreement with the principle of global democracy, ‘where the demos is not limited to a conception of a people resident in a given territory (although it applies there) but pertains to all institutional contexts of decision-making’.<sup>72</sup> Thus, from this perspective self-determination is not a mere appendage of territorial sovereignty, but benefits individuals and groups in regard to all forms of governance processes under which they live.

From a legal standpoint, the right to self-determination in its international dimension is still incompletely enshrined under current international legal instruments. Nevertheless, several provisions of the UNDRIP allude to this dimension in relation to the rights of indigenous peoples. Article 36, for instance, stipulates that indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation (...) with their own members as well as other

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<sup>67</sup> For a general overview, see Dorothee Cambou, ‘Enhancing the Participation of Indigenous Peoples at the Intergovernmental Level to Strengthen Self-Determination: Lessons from the Arctic’, *Nordic Journal of International Law*, no. 87 (2018): 1–30.

<sup>68</sup> David Goldblatt et al., *Global Transformations: Politics, Economics, Culture*, 1st ed. (Cambridge: Polity Press, 1999), 49.

<sup>69</sup> Goldblatt et al., *Global Transformations*, 212.

<sup>70</sup> Anaya, ‘A Contemporary Definition of the International Norm of Self-Determination’, 143.

<sup>71</sup> Young, ‘Two Concepts of Self-Determination’; Murphy, ‘Representing Indigenous Self-Determination’.

<sup>72</sup> Carol C. Gould, *Interactive Democracy: The Social Roots of Global Justice* (Cambridge University Press, 2014), 232.

peoples across borders. As explained by Wheatley, this provision is ‘aimed at avoiding the deleterious consequences that the establishment of State boundaries has on the life of indigenous people belonging to the same cultural community that are divided by international borders’.<sup>73</sup> In this regard, States are required to facilitate the contacts between indigenous peoples across borders through recognising their right to maintain and develop cross-border contacts with other peoples. An example of the application of such rights is the institutional arrangement developed by the Sami people across the borders of Finland, Norway, Russia and Sweden.<sup>74</sup> Despite the borders that separate them, the Sami people are involved in different institutional arrangements, more specifically the Sami Parliamentary Council, which allows for their transnational institutional representation.<sup>75</sup> Although these arrangements are still far from making self-determination concrete for the Sami as a transnational people, this experience epitomises the idea of a model of self-determination exercised through autonomous representation, with the possible transfer of jurisdiction of public authority in some domains from states to indigenous peoples at the transnational level.<sup>76</sup>

Besides, the rights of indigenous peoples also includes an international participatory aspect that provides them with the right to representation and participation in decision-making processes at the international level. As indicated by Murphy, while local autonomy is the most obvious route to indigenous empowerment, ‘indigenous representatives may also need an effective ... voice in select transnational institutions such as United Nations forums’.<sup>77</sup> Although the right is not clearly stated by the UNDRIP, it is nonetheless supported by several provisions in the declaration. For example, Article 18 states that indigenous peoples have the right to participate in decision-making in matters which would affect their rights. An expansive interpretation of this provision provides a basis for applying the right of indigenous peoples to participate not only at the state level, but also at the international level, in governance process affecting them. This interpretation, which is in fact supported by the *travaux préparatoires of the UNDRIP*,<sup>78</sup> is also concordant with Article 41 of the declaration, which enjoins the organs and specialised agencies of the United Nations to establish ways and means for ensuring the participation of indigenous peoples on issues affecting them. In effect, the latter provision has given rise to the development of a UN inquiry about the means to enable indigenous peoples’ effective participation in relevant meetings of United Nations bodies on issues affecting them through their representative institutions.<sup>79</sup> In 2017, the UN general Assembly adopted a draft resolution proposing participation and modalities arrangements for the participation of indigenous

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<sup>73</sup> International Law Association, ‘The Hague Conference (2010) Rights of Indigenous Peoples, Interim Report’, 15.

<sup>74</sup> Cambou, ‘Enhancing the Participation of Indigenous Peoples at the Intergovernmental Level to Strengthen Self-Determination: Lessons from the Arctic’.

<sup>75</sup> *Ibid.*, 21-28.

<sup>76</sup> See 2005 Draft Nordic Sami Convention, Article 20.

<sup>77</sup> Murphy, ‘Representing Indigenous Self-Determination’, 200.

<sup>78</sup> Originally, the draft UNDRIP stipulated that “indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights’. Draft Declaration on the Rights of Indigenous Peoples, UN Doc. e/cn.4/Sub.2/1994/2/ Add.1 (1994), Article 19.

<sup>79</sup> Draft Resolution by the General Assembly on enabling the participation of indigenous peoples ‘representative institutions in meetings of relevant United Nations bodies on issues affecting them (2017), available at <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2016/02/CLEAN-FINAL-ZERO-DRAFT-21-APRIL-2017-RESOLUTION-ON-IP-PARTICIPATION.pdf> (last accessed 1 September 2018)

representatives that would allow for their engagement in decision-making processes, without challenging the primacy of the states in the conduct of international affairs at the UN level.<sup>80</sup> While discussions on the issue are still ongoing, this development is certainly noteworthy in so far as it supports the idea that indigenous peoples have the right to distinct representation and effective participation in the international decision-making processes affecting them. On that account, even though this right remains in practice inadequately recognised and implemented, as indicated by Special Rapporteur Claire Charters, ‘it appears to be a clear consensus that Indigenous peoples have the right to participation at the UN level, consistently with the right to self-determination’.<sup>81</sup>

## Conclusion

The UNDRIP is a remarkable international legal instrument actualising a universal framework of minimum standards for the survival, dignity, well-being and rights of the world's indigenous peoples. One of the most important aspects of the declaration is the recognition of the right of indigenous peoples to self-determination. With the adoption of the UNDRIP, this analysis demonstrates that international law has taken a new step in the re-conceptualisation of self-determination. Although this development could have serious ramifications well beyond the case of indigenous peoples, the declaration nonetheless limits the recognition of self-determination to indigenous peoples in so far as it does not recognise their right to independent statehood. In this regard, the rights of indigenous peoples to self-determination, as enshrined under the UNDRIP, must be implemented in accordance with the principle of territorial integrity and political unity of sovereign states. However, this fact alone should not eclipse the true relevance of the UNDRIP. In contrast with an orthodox understanding of self-determination, this analysis also argues that the significance of the UNDRIP lies beyond the question of self-determination exercised in its sovereign form. This understanding, which is in compliance with most indigenous claims that do not foresee the need for sovereign statehood to exercise full self-determination, is based on a human rights approach to the right to self-determination.

From a human rights perspective, the right to self-determination is embedded in democratic governance. However, because the principle of democratic governance based on the equality of citizens does not support the collective right of indigenous peoples, this analysis has also provided evidence of the fact that the right of indigenous peoples to self-determination challenges to some extent the traditional conceptualisation of ‘internal self-determination’ by requiring changes in order to protect the distinct identity of indigenous peoples. For this purpose, the UNDRIP contributes to forging a more substantive democratic conception of self-determination where diverse collective units with different identities can equally participate in the governing institutions under which they live. In this regard, the UNDRIP, while going beyond standards that have been ascertained under human rights law, still relies on them to inform an interpretation of the democratic understanding of self-determination. Hence, the right of indigenous peoples to self-determination represents a novelty under international law, but at the same time remains a constitutive part of the human rights corpus of law that underlies the right for all peoples to self-determination.

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<sup>80</sup> Ibid., para. OP6

<sup>81</sup> Claire Charters, speaking at UN General Assembly, Informal consultations, 71st Session, UN Web TV, 14 December 2016.

Ten years after the adoption of the declaration, and the reaffirmed support for the instrument, limited progress has nevertheless been evident with respect to the implementation of self-determination.<sup>82</sup> This lack of progress does not, however, undermine the legal significance of the UNDRIP, which establishes a solid basis for implementing the necessary changes.<sup>83</sup> As described in this analysis, the changes required by the recognition of indigenous self-determination in accordance with the UNDRIP are multidimensional. At the outset, indigenous self-determination requires recognition of the distinct political identity of indigenous peoples and their right to control their local and internal affairs. However, the right to self-determination is not merely an instrument for indigenous peoples to maintain their distinct identity and livelihoods. From a human rights perspective, self-determination also implies their equal participation as a separate collective unit in the decision-making processes that affect them to allow their self-determined development. Accordingly, indigenous peoples have the right to govern their own affairs at the local level while retaining their right to participate in the decision-making processes that affect them. Although the UNDRIP leaves a wide margin of appreciation as to how to operationalise this right in practice, the declaration ultimately requires that states adopt new modalities for allowing indigenous peoples to control their internal and local affairs and to effectively participate in the governance processes that affect them.

Additionally, this study argues that the right of indigenous peoples to self-determination goes beyond political rights and includes a resource dimension. This dimension of the right of indigenous peoples to self-determination requires both the recognition of the rights of indigenous people to govern their land and resources at the local level and the duty of the state to consult with indigenous representatives in order to obtain their FPIC before undertaking development projects that may affect them. In this context, this study also puts emphasis on the principle of FPIC, which requires the right for indigenous peoples to be able to effectively influence the outcome of decision-making processes affecting them, as opposed to merely being consulted. Whereas the implication of the principle remains contested, the importance of FPIC is primordial for the exercise of self-determination in so far as it provides indigenous peoples with the possibility to determine how their land and resources are developed. Although the principle does not provide an absolute veto right to indigenous peoples, FPIC provides a contextual framework of negotiation to ascertain indigenous needs and interests on par with those of the rest of society, also granting them a right to oppose development projects in cases where such projects would have a significant impact on their rights.

Finally, the present analysis also suggests that the exercise of the right of indigenous peoples to self-determination is not confined to state borders. Given the interdependency of indigenous peoples' livelihoods with transnational and global events, the right of indigenous peoples to self-determination must also apply at the international and transnational levels. With respect to the principle of territorial integrity, the application of the right to self-determination in this context does not necessarily entail independent statehood. Rather, self-determination requires the ability for indigenous peoples to establish and develop their influence in decision-making processes affecting them across and beyond states boundaries. Although this interpretation of the right to indigenous self-determination permeates and challenges the traditional internal/external conception of the right, it is nevertheless more in tune with

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<sup>82</sup> UN Doc. A/72/186, para 86

<sup>83</sup> *Ibid.*, para 25.

contemporary developments and the global arrangements of society, which transcend states boundaries. Furthermore, this interpretation remains rooted in a democratic understanding of self-determination to the extent that it does not seek to challenge the primacy of democratic states in the conduct of state affairs, but purports instead to ascertain a more diverse and inclusive governance of society. Thus, although much progress still needs to occur in order to actualise such a model of self-determination, this approach to self-determination is novel but consistent with the modern development of international law. Currently, it is therefore wherein lies the legal significance of the right of indigenous peoples to self-determination as enshrined by the UNDRIP, as a right capable of fostering democratic unity, but through diversity.