Do indigenous peoples have the right to self-determination?

Introduction

Indigenous representatives have repeatedly stressed that they view the recognition of their right to self-determination as essential for their survival and development and ‘the key to the implementation of solutions for their problems’. Article 3 of the draft Declaration which currently recognises a right of self-determination has been referred to as ‘the heart of the Declaration’, its ‘cornerstone’, the pillar upon which all other provisions of the draft Declaration rest and the ‘prerequisite for the full enjoyment of all human rights’ of indigenous peoples. It is unfortunate that such a central claim to the indigenous movement is such a contested right in international law.

Self-determination is a thorny topic in international law with remarkable contradictions. While it has been liberally used as a slogan of universal application, its application always seems to be set with difficulties of considerable complexity. Falk notes that the successful creation of new states as a result of struggles for self-determination has ‘both strained conceptual boundaries and created an increasingly awkward gap between doctrinal and experiential accounts of self-determination, resulting, as might be expected, in controversy and confusion’. Indeed, currently there are no standard answers as to the modalities of the right. Although this creates confusion, it also encapsulates the richness and diversity of the ways self-determination can operate. It is this fluidity of the right that has allowed the development of some ‘dialogic spaces’ in which a discourse on indigenous claims can take place. The present chapter attempts to examine whether these spaces allow for indigenous self-determination. By reviewing the legal instruments on self-determination, I argue that...
although current international law does not give a positive answer to indigenous claims for self-determination, it does leave the door open for a positive next step.

**Are indigenous peoples beneficiaries of the right?**

*The issue*

One of the most powerful arguments for the recognition of indigenous self-determination is the ‘historical and rectificatory justice’ argument which puts the state’s authority over indigenous groups in doubt. Indigenous peoples perceive the recognition of their right to self-determination as a formal proclamation of denouncing the policies of destruction and assimilation that they have experienced in the past and an acknowledgment that they can determine their life without interference by states. As an indigenous representative stated in the 1995 Commission Working Group:

> The fourth principle is self-determination: it could be said that at the heart of all violations of human rights has been the failure to respect our integrity, defining our needs and controlling our lives.11

Another set of arguments focus more on the respect of indigenous identity. Indigenous identity, it is argued, can only be protected by indigenous control over the matters that affect them. Indigenous peoples have been excluded from participating in the formation and evolution of international law. Since the early 1980s, they have been pushing for their own interpretation of international law concepts. Notions of respect, freedom and autonomy are paramount in their understanding of self-determination; the inherent and inalienable nature of the right is also important; rather than providing self-determination, states can only recognise it.13 Related to this is the argument that all cultures are incommensurable; therefore, it is not appropriate for one culture, i.e. the dominant one, to evaluate the rules and norms of another culture, i.e. the indigenous culture.14

Legally, indigenous claims for self-determination are based on Article 1 of both International Covenants, a binding provision for most states. Paragraph 1 proclaims:

> All peoples have the right to self-determination. By virtue of that right, they can freely determine their political status and freely pursue their economic, social and cultural development.
Paragraph 2 establishes the free disposal by peoples of natural wealth and resources and states that ‘in no case may a people be deprived of its own means of substance’; paragraph 3 mandates states to promote and respect the right to self-determination in conformity with the UN Charter. The inclusion of the right in the first Article of the Covenants indicates its importance. It is noteworthy that the provision does not contain any reference to territorial integrity, although the principle is included in Article 5.1 of the Covenant.\(^\text{15}\)

During the drafting process of the International Covenants it was made clear that minorities are not included in the ‘peoples’ of Article 1;\(^\text{16}\) minority rights are dealt with in Article 27 of the ICCPR, whereas peoples’ rights are dealt with in Article 1 of both International Covenants.\(^\text{17}\) It is widely accepted in the legal literature that indigenous peoples are not mere minorities.\(^\text{18}\) Notwithstanding this, there is still an attempt to equate indigenous rights with minority rights by a few states, such as the USA, whose delegates have repeatedly asked for a minority language to be used in indigenous documents.\(^\text{19}\) Admittedly, ‘the relationship between minorities and the indigenous is one of fuzzy edges rather than bright lines’\(^\text{20}\) and indigenous peoples have repeatedly used instruments for the protection of minorities; yet, it is beyond doubt that the indigenous need additional protection in international law to address their particular characteristics that distinguish them from other groups.\(^\text{21}\)

**No clear recognition of indigenous as ‘peoples’ in international law**

Although the treatment of the indigenous as more than mere minorities is more or less settled, the question whether indigenous rights extend to those of ‘peoples’, including self-determination, is still very much open, as it involves substantial transfer of political and economic power from the centralised state to the indigenous communities. Several states argue that indigenous peoples cannot be perceived as ‘peoples’ for the purposes of Article 1 of the International Covenants, because there is no international instrument that explicitly recognises them as beneficiaries of Article 1.\(^\text{22}\) Recognition of indigenous self-determination, they claim, would be contrary to UN General Assembly Resolution 41/120, which prescribes that new standards should be compatible with existing international law and should attract broad international support.\(^\text{23}\) Argentina’s statement in the early meetings of the Commission Drafting Group is indicative:

[Argentina] believes that recognition of this right in favour of indigenous peoples simply because they are indigenous peoples is nowhere supported by the practice of the states or by current international law.\(^\text{24}\)
Early attempts to include indigenous peoples among the beneficiaries of self-determination were not successful. In the 1960s, the Belgian thesis saw self-determination beyond colonialism\(^{25}\) and was supportive of indigenous claims for self-determination on the basis that their treatment was comparable to that of colonised territories.\(^{26}\) However, the Blue thesis prevailed: its supporters perceived self-determination strictly within the parameters of overseas colonies,\(^{27}\) argued that indigenous peoples were fully integrated politically, noted that their problems were economic rather than political and stressed the principles of territorial integrity and state sovereignty. Since then, the question of whether indigenous peoples are 'peoples' for the purposes of Article 1 has been raised before the Human Rights Committee twice, but both communications were declared inadmissible on other grounds.\(^{28}\) McGoldrick has criticised the failure of the Committee to provide guidance, especially due to its 'unique position'.\(^{29}\) In 2000 when the issue was raised again in the *Apirana Mahuika* case, the Committee repeated that the examination of the right to self-determination is not within its mandate, but noted that 'the provisions of Article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular Article 27'.\(^{30}\) In this manner, the Committee recognised the link between the right of self-determination with the scope of Article 27 of the ICCPR. A stretched interpretation of the Committee’s comment could suggest an implicit recognition of the link between self-determination to *some beneficiaries* of Article 27, arguably indigenous peoples.

Another element that also advances the view that indigenous are beneficiaries of the right to self-determination is the growing trend of international documents to refer to indigenous as 'peoples'. The 1991 World Bank Operational Directive 4.20\(^{31}\) and the new draft Operational Policy 4.10 on 'Indigenous Peoples';\(^{32}\) the final documents of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance;\(^{33}\) the UNDP Indigenous Peoples Programme and its Draft Guidelines for Support to Indigenous Peoples;\(^{34}\) the IFAD Regional Programme in Support of Indigenous Peoples in the Amazon Basin;\(^{35}\) the 2003 UNESCO Public Meeting on Education Rights of Indigenous Peoples;\(^{36}\) all these refer to indigenous peoples. Unfortunately, these documents are not binding. The only binding document that includes the term ‘indigenous peoples’ is ILO Convention No. 169, which is, however, followed by the qualification that the use of the term ‘peoples’ should have no implication as regards the right of self-determination.\(^{37}\) The ILO has stated that their intention was to be neutral on the future
development of a right to self-determination for indigenous peoples in international law, as this does not fall within their mandate. The recognition of indigenous as ‘peoples’ in the international documents – even with the qualification – is an affirmation of their group identity and characteristics\(^{38}\) and an indication that the bodies which adopt these documents support indigenous claims. However, it is doubtful whether these documents can be perceived as evidence that international law has recognised indigenous as beneficiaries of the right to self-determination.

**Employment of the definition of ‘peoples’ in international law**

A second way of evaluating whether indigenous are ‘peoples’ for the purpose of self-determination is to assess whether they fall within the definition of ‘peoples’ given by international law. Unfortunately, no international instrument explicitly defines who is ‘a people’ for the purpose of self-determination. In 1956, Jennings expressed his frustration:

> Nearly forty years ago a Professor of Political Science who was also President of the United States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely accepted as a sensible proposition, the doctrine of self-determination. On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until someone decides who are the people.\(^{39}\)

Notwithstanding the confusion created by the lack of definition, such an exercise would be neither possible, nor necessarily desirable. Kamenca has rightly noted that ‘nations and peoples, like genetic populations, are recent, contingent and have also been formed and reformed constantly throughout history’.\(^{40}\) Definitions in international human rights law are restrictive and cannot include all relevant cases; rigid definitions result in excluding certain groups from the protection they should enjoy.

Stavenhagen advocates the establishment of specific criteria that would draw the balance between the ‘maximalist approach’ (allowing the right to all claimants) and the ‘minimalist approach’ (of a strict definition).\(^{41}\) Well-accepted descriptions provide such criteria. In his UN study,\(^{42}\) Espiel described a ‘people’ as ‘a specific type of human community sharing a common desire to establish an entity capable of functioning to ensure a common future’.\(^{43}\) Similar is the description of ‘a people’ in a subsequent UN study by Cristescu\(^{44}\) as a ‘social entity possessing a clear identity with its own characteristics including some relationship with the territory, even if the peoples in question have
been wrongfully expelled from it and artificially replaced by another population.\textsuperscript{45} According to Cristescu, ‘a people’ satisfies two of the classic elements of state character, an identifiable and distinct population and territory, but may lack political organisation and recognised capacity to engage in foreign relations.\textsuperscript{46} The descriptions reveal two sets of requirements for the notion of ‘a people’: objective ones which encompass factors such as common language, culture, religion, race or ethnicity, territory and history; and subjective requirements, which include consciousness as a distinct people and a collective will to exist as a distinct people.\textsuperscript{47} Taking Scheinin’s warning into account that being indigenous does not automatically qualify the group as ‘a people’,\textsuperscript{48} indigenous communities in general do satisfy the above criteria: all of them constitute groups distinct from the rest of the populations of the state in which they live; most, if not all, are aware of their distinctiveness and want to maintain it; and they share a common vision. In addition, most of them live in well-defined areas, often apart from the rest of the population and have a special bond with the lands they live in or the lands they have been expelled from.\textsuperscript{49}

However, there is a tendency to overlook the intellectual criteria and focus on the guidance international documents have given on the matter.\textsuperscript{50} States’ insistence that ‘indigenous are not peoples for the purposes of Article 1 of the International Covenants’ implies a distinction between ‘peoples’ in general and ‘peoples’ for the purpose of the right to self-determination. Who are ‘peoples’ in the latter category will depend on positive law.

\textit{Employment of international documents}

Unfortunately, positive law does not help either: international law documents have been really vague about the modalities of the right to self-determination, including who its beneficiaries are. Despite two references to self-determination in the UN Charter and its implementation through a system established for non-self-governing territories,\textsuperscript{51} no clarifications were given either about its beneficiaries, or its content. In the 1960s, several Declarations tried to advance decolonisation.\textsuperscript{52} Among them, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (Declaration against Colonialism)\textsuperscript{53} attempted to clarify the content and the beneficiaries of self-determination. The Declaration recognised for the first time that ‘all 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’ and identified the beneficiaries of the right as peoples under ‘alien subjugation, domination and exploitation’. Although the Declaration is a soft law instrument, it is of particular importance as a ‘form of an authoritative interpretation of the Charter, rather than a recommendation’. The strong language of the Declaration reflects its importance as well as the immediacy of the states’ obligation towards self-determination.

Indigenous peoples arguably satisfy the beneficiaries of self-determination given by the Declaration, as they have been victims of subjugation, domination and exploitation from the dominant populations that live in the state. Rather unclear is whether they are victims of ‘alien’ domination. If ‘alien’ is interpreted in cultural, rather than purely territorial terms, then they satisfy this criterion, as they have been oppressed by nations of a different culture. Recognising indigenous peoples as beneficiaries of the Declaration is also consistent with its preamble which prescribes that the impetus for self-determination is the denial of freedom and independence of the beneficiaries, their exploitation, the abuse of their human rights and the impeding of their social, economic and cultural development.

However, the basic hurdle for indigenous self-determination is considered to be the reference to territorial integrity. Article 6 provides that any attempt ‘aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter’; Article 7 reaffirms the principle of territorial integrity. Therefore, the exercise of the right of self-determination cannot be a threat to territorial integrity. At the time when the Declaration was adopted, self-determination was equated to decolonisation; therefore, this provision was interpreted as allowing only nations that constitute the whole population of the state to be considered as ‘peoples’. This so far has been a major obstacle to indigenous claims for self-determination, as they seldom constitute the whole population of the territory in which they live.

Resolution 1541 (XV), adopted the very next day after the Declaration against Colonialism also provided some guidance as to the beneficiaries of self-determination. The resolution recognised the right of self-determination to non-self-governing territories, i.e. ‘a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it’ and placed arbitrarily ‘in a position or status of subordination’ to the administering state. There are a few indigenous territories officially recognised by the United Nations as
non-self-governing territories; they would avoid the problems of Article 1.1 as they fall within Articles 1.3 and 73. Besides these though, most indigenous groups also satisfy the criteria set in Resolution 1541(XV): they suffer from arbitrary discrimination in their everyday life and are ethnically distinct from the rest of the population living within the state. In addition, as mentioned above, usually they are geographically separate from the administering state, living in a national federation or in partitioned – officially or de facto – lands, so, if ‘geographically separate’ is not interpreted to involve international borders, they satisfy this criterion too. Brownlie finds this interpretation consistent with the practice of the United Nations: he has noted that the argument of colonial powers that a colonised territory was part of France, Portugal or Spain did not stop the process of decolonisation: ‘The status of Algeria as part of France made no difference to the general assessment of Algeria as a unit of self-determination.’ Likewise, the states’ argument that indigenous territories are part of the states’ territories should arguably make no difference to the recognition of indigenous self-determination.

In 1970, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (Declaration on Friendly Relations) expanded the beneficiaries of the right to ‘peoples under colonial or racist regimes or other forms of alien domination’ (emphasis added). Even though the drafters of the Declaration had in mind specific exclusionary regimes, the provision again can be interpreted in favour of indigenous claims for self-determination: indigenous peoples have been living in states the structures and policies of which consistently discriminate against them on the basis of their race. Once again though, if self-determination is understood as independence, indigenous claims are hampered by the principle of territorial integrity, included in paragraph 7:

Nothing in the foregoing paragraphs shall be construed as authorising 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 by a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

This provision has been at the centre of the debate on secession, which will be analysed later. Suffice to say here that, on the one hand,
secession is prohibited since it would affect territorial integrity; on the other hand, the provision seems to leave the door open for secession, if the government of the state in which the people live does not represent them and continually discriminates against them.

In 1975, the Final Act of the Conference on Security and Cooperation in Europe (Helsinki Declaration) confirmed the expansion of the beneficiaries of self-determination beyond colonised peoples: the agreement of 35 independent states that they recognised the right of self-determination to their peoples implies that ‘peoples’ living in independent states are also entitled to the right; thus, the right is not only perceived within the colonial context. Yet, in the Declaration the right of self-determination remains overshadowed by the concepts of inviolability of frontiers, territorial integrity and non-interference: according to Principles III, IV and VI, self-determination is to be enjoyed by all the peoples of the existing state and not by particular groups within the state; these groups will enjoy the protection of human rights and protection given to minorities, affirmed in the Declaration in Principle VII.

Among the other regional instruments, only the African Charter on Human and Peoples’ Rights recognised self-determination for ‘all peoples’ (emphasis added). Thornberry and Hannum both agree that the Charter referred to ‘whole peoples’ of the states, rather than ethnic or other groups. The prevalence of territorial integrity over self-determination within the context of Africa was reaffirmed by the International Court of Justice in the Frontier Dispute case between Burkina Faso and Mali, where the Court affirmed that ‘the maintenance of the territorial status quo in Africa is often seen as the wisest course’. Nevertheless, recent commentators provide African examples with a looser interpretation of territorial integrity in favour of self-determination.

Another international judicial body, the Inter-American Commission on Human Rights specifically addressed indigenous self-determination. In the Miskito Indians case, the Commission held that present international law does not recognise the right of self-determination to any ethnic group:

The present status of international law does not recognise observance of the principle of self-determination of peoples, which it considers to be the right of a people to independently chose their form of political organisation and to freely establish the means it deems appropriate to bring about their economic, social, cultural development. This does not mean however, that it recognises the right of self-determination of any ethnic group as such.
The (1993) Vienna Declaration and Program of Action,\textsuperscript{72} emanating from the 1993 United Nations World Conference on Human Rights, referred to self-determination in Article 2. After a verbatim restatement of Article 1 of the International Covenants, the Declaration affirmed the right of peoples to take legitimate action, in accordance with the UN Charter, to realise their right of self-determination,\textsuperscript{73} but also included the usual restrictions of territorial integrity and political unity. Although its language echoes the 1970 Declaration on Principles of International Law concerning Friendly Relations, there is one significant change: the 1970 Declaration referred to a government representing the whole people without distinction as to race, creed or colour, whereas the Vienna Declaration expanded the disclaimer to a government representing the whole people without distinction of \textit{any kind}.\textsuperscript{74}

More recently, the 1996 General Recommendation XXI (48)\textsuperscript{75} adopted by the Committee against Racial Discrimination in 1996 concluded that:

\[\ldots\] international law has not recognised a general right to peoples unilaterally to declare secession from a State. In this respect, the Committee follows the views expressed in An Agenda for Peace (paras. 17 and following), namely that a fragmentation of States may be detrimental to the protection of human rights, as well as the preservation of peace and security. This does not however, exclude the possibility of arrangements reached by free agreements of all parties concerned.\textsuperscript{76}

The Declaration does not discuss whether secession could be possible in specific cases.

\textit{The hurdle of territorial integrity}

The above analysis demonstrates that the recognition of the right of a people to self-determination does not per se lead to the disintegration of the state. However, it is due to the fear that it could do so that most states have difficulties in giving it recognition, since indigenous communities constitute part of the state. Many states have stressed the incompatibility of indigenous self-determination with the principle of territorial integrity.\textsuperscript{77} As proof of their fears, they refer to the statement made by the Crees of Quebec:

We do not want to secede from Canada; but if Quebec becomes a separate state, we will insist on our right of self-determination, our right to choose which, if any, state we determine to associate ourselves with.\textsuperscript{78}

Academic opinion seems to agree that current international law does not explicitly recognise a right of sub-national groups to self-determination.
through secession. In 1992, Franck, Higgins, Pellet, Shaw and Tomuschat all reached the conclusion that self-determination allows for independence only to colonial peoples or to those whose territory is the subject of foreign occupation; outside this context the achievement of sovereignty in law is a matter of fact.\textsuperscript{79} Five years later, Abi-Saab, Franck, Pellet and Shaw noted though that neither does international law explicitly prohibit secession and stressed that the international community often recognises states formed by secession.\textsuperscript{80} Crawford agreed with the 1992 opinion: international practice has no example of a unilateral right to secede;\textsuperscript{81} thus, he concluded that the focus of the right to self-determination must be on the participation of peoples in the political system of the state.\textsuperscript{82} Hannum also supports this view: cases where a new state has been recognised are either cases of independence after agreement of the parties concerned (USSR, Ethiopia, Czechoslovakia) or cases where the state has stopped to exist (Yugoslavia). ‘State practice and the weight of authority’, he has concluded, ‘require that there is no right to secession’.\textsuperscript{83} Higgins has also used state practice and territorial integrity to reject the claim that minorities can be peoples with the right to secede,\textsuperscript{84} but not without criticism. In particular, Knop criticises Higgins’ approach as rigid and inconsistent with her understanding of international law as a process.\textsuperscript{85} Contrary to Higgins, Hannum and Crawford, Dinstein has used the same means to reach the opposite conclusion: to him, the Soviet, Yugoslav and Czechoslovak experiences show that ‘there is no reason to disallow \textit{in limine} the exercise of the right of self-determination when the desire to dismantle a multinational state is shared by a number of peoples living within its boundaries’.\textsuperscript{86} So it seems that indigenous communities would have great difficulties in gathering support for secessionist claims. Indigenous communities only form part of the state they live in, usually not even the majority of the population.

Yet, one can see a more positive reaction when it comes to secession as a final resort for remedial reasons.\textsuperscript{87} Even back in 1920, the Åland Islands judgment acknowledged such the possibility of remedial secession by stating that ‘the separation of a minority from the State of which it forms part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees’.\textsuperscript{88} United Nations instruments, including the 1970 Declaration on Friendly Relations and the Vienna Declaration, have left room for remedial secession. One could argue that these
instruments are not legally binding and recall the lack of state practice to support remedial secession. Yet, de Kirgis has argued that the United Nations Declarations purport to and probably reflect an *opinio juris*, strong evidence of which may overcome differences in state practice in human rights.\textsuperscript{89} According to him, there is a striking contrast between earlier and later (after 1970) formulations of the principles of territorial integrity that suggests that:

from about 1970 on, there could be a right of ‘peoples’ – still not well defined – to secede from an established State that does not have a fully representative government, or at least to secede from a State whose government excludes people of any race, creed or colour from political representation, when those people are the ones asserting the right and they have a claim to a defined territory.\textsuperscript{90}

Several authors accept the possibility of remedial secession under certain circumstances. Musgrave accepts it in cases of oppression and non-representation in government,\textsuperscript{91} whereas Shaw accepts it in ‘extremely exceptional circumstances’.\textsuperscript{92} After rejecting the right to secession for sub-national groups, Franck conditionally recognises the possibility of remedial secession, if ‘the people’ occupies a distinct territory and is persistently and egregiously denied political and social equality as well as the opportunity to retain its cultural identity.\textsuperscript{93} Schachter also stresses the territorial element: the community must inhabit a region that largely supports separation in the given circumstances.\textsuperscript{94} Espiel accepts it if ‘beneath the guise of ostensible national unity, colonial and alien domination does in fact exist, whatever legal formula may be used in an attempt to conceal it, the right of the subject people concerned cannot be disregarded’.\textsuperscript{95} Heraclides has gathered the specific conditions under which a remedial right to secession can be recognised: there must be systematic exploitation of or discrimination against a sizeable, well-defined minority; the minority must be a distinct self-defined community or society, compactly inhabiting a region which overwhelmingly supports separatism; secession must present a realistic prospect of conflict resolution and of peace within and between the new and the old state; and the central government must have rejected all compromise solutions.\textsuperscript{96}

Recent judgments have also acknowledged the growing consensus amongst international lawyers that even beyond colonialism, traditionally perceived alien domination and occupation, there is a possibility of a right to secession for remedial reasons. In the *Crime of Genocide* case,\textsuperscript{97} self-determination was raised in a non-colonial situation without
meeting the objection of the Court. More explicitly, in *Loizidou v. Turkey*, Judge Wildhaber commented:

Until recently in international practice the right of self-determination was in practical terms identical to and indeed restricted to, a right to decolonisation. In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way.

The African Commission on Human and Peoples’ Rights has also indirectly recognised the idea of remedial secession. In *Katangese Peoples Congress v. Zaire*, the Commission held that:

in the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called into question and in the absence of evidence that the people of Katanga are denied the right to participate in government . . ., the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.

In the national level, the Supreme Court of Canada ruled in 1998 that:

A right to secession only arises under the principle of self-determination of people at international law where ‘a people’ is governed as part of a colonial empire; where ‘a people’ is subject to alien subjugation, domination or exploitation; and possibly where ‘a people’ is denied any meaningful exercise of its right to self-determination within the state of which it forms a part.

Crawford, a strong advocate of the right to self-determination within the context of colonialism, has also discussed the possibility of secession in cases of *carence de souveraineté*. Although he insists that there is an exhaustive definition of the beneficiaries of the right to self-determination in the trust and mandated territories and territories treated as non-self-governing under chapter XI of the UN Charter, the beneficiaries of the principle of self-determination are subject to the discretion of the interpreter. Obviously Crawford perceives the principle of self-determination as ‘a reservoir from which apparent gaps in the corpus of international law may be filled’. The interpreter, Crawford maintains, may choose to accept as beneficiaries victims of *carence de souveraineté*, namely ‘territories forming distinct political-geographical areas, whose inhabitants do not share in the government either of the region or of the State to which the region belongs, with the result that the territory becomes in effect, with respect to the remainder of the State,
non-self-governing’.

Crawford names Bangladesh as the sole example for remedial secession. Bangladesh is also used by Kingsbury who concludes that:

... practice [suggests] that self-determination in the strong form as a right to establish a separate State may be an extraordinary remedy in distinct territories suffering massive human rights violations orchestrated by governing authorities based elsewhere in the state.

Could indigenous peoples be perceived as victims of carence de souveraineté? Anaya believes so, even though he notes that remedial secession can operate in various ways. I would adopt a different approach: I believe that the answer can only be given on an ad hoc basis. However, even for a group that fulfils the criteria one must keep in mind Crawford’s opinion that the interpreter may recognise the group’s right to self-determination including secession. Therefore, it is up to the interpreter to decide whether a right of indigenous peoples to self-determination as independence should be recognised.

Who would be the interpreter of the law of self-determination in this instance? Who will determine whether indigenous peoples are a case of carence de souveraineté, so they have a right of secession? In the first instance it will be the state in which they live. Thornberry highlights the problems: the right of secession could be granted, if the government is not representative. If the assessment whether this test has been met lies with the government, not many governments will accept that they have failed. Moreover, any reform of the state to make it more representative takes away the possibility of secession; thus, the test of representation is far too easy a test for governments to satisfy.

A more reliable interpreter of the law of self-determination is the international community, as represented by the United Nations General Assembly. Following the refusal of Portugal and Spain to voluntarily identify their non-self-governing territories, the General Assembly has become the body responsible for deciding which entities fall within non-self-governing territories by applying the criteria in Resolution 1541 (XV). In accordance with these criteria, the General Assembly has made several decisions that particular territories fall within Chapter XI. These concerned certain overseas territories of Spain and Portugal and subsequently certain French territories, of which the most recent is Caledonia. Unfortunately, so far, the General Assembly has not made a ruling in any case outside the colonial context.
In essence, recognising indigenous peoples as victims of carence de souveraineté involves a subjective judgment about the level of lack of representation of the indigenous community in the state. Even more challenging are the judgments involved in: the Heraclides test of secession as a means of conflict resolution; the Musgrave test of indigenous oppression; the Espiel test of colonial domination; the Shaw test of extremely exceptional circumstances; and the Wildhaber test of consistent and flagrant violation of human rights. All these tests involve subjective judgments to be made by the General Assembly, a highly political body comprised of states; obviously, they would be very reluctant to encourage the expansion of the right to secession to include sub-national groups, as it could prove suicidal for them. The recent example of Kosovo confirms this: even though it concerned a well-defined territory that overwhelmingly supported secession after years of well-reported oppression and gross violations of human rights and after a series of negotiations that were not successful, the international community did not recognise the right to remedial secession. If the right to secession was not recognised for the people of Kosovo, is it not improbable that it would be recognised in cases of indigenous communities? As Thornberry pragmatically notes, ‘even this cautious and careful account of criteria appears as a possibility rather than a probability in terms of a normative development of general international law’.

In short, international law seems to reluctantly allow a theoretical possibility for remedial secession to beneficiaries of self-determination. Even if this right exists – and state practice has not yet confirmed it does – claimants would have to fulfil a series of tests, before their case is even seriously considered. The principle of territorial integrity is a serious obstacle to the possibility of secession for any sub-national group, including indigenous communities.

Does this conclusion refute the claim for indigenous self-determination? Does ‘secession’ cover the scope of the right to self-determination? One should think so by reading selected United Nations documents, statements of state delegations and opinions of international lawyers, as ‘secession’ is often used interchangeably with ‘self-determination’. If this is the case, then indigenous communities will have to satisfy the different tests put forward for remedial secession in order to be recognised as beneficiaries of the right to self-determination; even then recognition of their right will be difficult in practice. If, however, the scope of self-determination is not wholly covered by secession, then the tests for secession need not be satisfied, as indigenous peoples can be
the beneficiaries of the right to self-determination, irrespective of whether this right reaches secession or stops short of it. Clearly, the question of who can be the beneficiaries of the right is very much dependent on the meaning of self-determination. Gilbert agrees, he has warned that ‘the error in the self-determination debate has been to focus on the beneficiaries . . . rather than the conditions justifying whatever form of self-determination is appropriate to the group’. Therefore, the discussion has to turn to the meaning of self-determination and the different forms it can take.

The scope of the right to self-determination

The minimalist approach: self-determination as independence

There are numerous understandings of the meaning of self-determination that cannot be easily grouped. Admittedly, for a long period the prevailing understanding of self-determination equated it with independence. States have repeatedly argued that the right has a fixed meaning in international law, namely independence, which does not allow for expansion. A few states, including Japan, have specifically placed this meaning within the context of decolonisation:

The concept of self-determination was set forth in the context of decolonisation, mainly for colonised people who requested independence from states.

The historical account of the international instruments on self-determination confirms that this understanding is too restrictive. Crawford clarifies that ‘as a matter of ordinary treaty interpretation, one cannot interpret Article 1 of the International Covenants as limited to the colonial case’. Article 1 paragraph 1 refers to ‘all peoples’, rather than some (colonised) peoples, since paragraph 3 specifies that the phrase ‘all peoples’ includes colonial peoples. Further, if paragraph 1 refers only to colonised peoples, so would paragraph 2, in which case we would be led to the illogical conclusion that only colonised peoples have the right of permanent sovereignty over natural resources.

Contrary to Article 1 of both International Covenants, it seems that the Declaration against Colonialism openly equated self-determination with decolonisation. Even though it defined self-determination in a broad manner as the right of peoples to ‘freely determine their political status and freely pursue their economic, social and political development’, the title of the Declaration, its recommendation in paragraph 5
for immediate steps for ‘independence’, the inclusion of the principle of territorial integrity and the description of the beneficiaries, limited to peoples under ‘alien subjugation, domination and exploitation’, point in this direction. Resolution 1541, adopted the very next day, was also in line with the major need of the time, decolonisation, as evident from a similar description of the beneficiaries and the explicit reference to territorial integrity. The 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty increased the ambiguity. The language of the Declaration was somewhat unfortunate: although it added peoples in racist regimes to the list of beneficiaries of self-determination, it confused human rights with states’ rights. The Declaration proclaimed that ‘every State has the inalienable right to self-determination’ (emphasis added) ignoring that self-determination is a people’s right, rather than a government’s right. The 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States also focused on liberation extending the right to peoples whose government does not represent ‘the whole people without distinction as to race, creed or colour’. The apartheid system of South Africa had become the focus of the international community at that time and again the meaning of self-determination accommodated this preoccupation. The Declaration obviously perceived self-determination in its external aspect as it listed the ways in which the right could be implemented, as: a) establishment of a sovereign and independent state; b) free association; c) integration with an independent state; or d) emergence into any other political status freely determined by a people. Thus, independence was the prevailing understanding of the right of self-determination in 1976, when the International Covenants were finally adopted, even though again its description of the right allowed space for a wider scope.

In the following years there was a gradual shift in international documents and legal literature towards an alternative meaning of the right to self-determination. One of the first instruments that recorded this shift was the 1975 Final Act of the Conference on Security and Cooperation in Europe (Helsinki Declaration). Principle VII reads:

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom to determine, when and as they wish, their internal and external status, without external interference, and to pursue as they wish their political, economic, social and cultural development.
The Declaration projected self-determination as an ongoing process that urges peoples to adapt to new structures, demands and needs; as the right of peoples to decide on a certain form of governance or an international status and/or re-evaluate their decisions. Moreover, the Declaration drew a clear connection between the exercise of self-determination and the existence of other human rights in a more forceful way than previous documents. Not only should peoples be free of any external interference, they should also be free of any internal interference. This new meaning corresponded to the international realities of the Cold War and Western states’ interest in emphasising the principles of democracy, free elections and participation.

In 1984, the Human Rights Committee reaffirmed the special relationship of the right to self-determination with all other human rights. In General Comment 12/27 the Committee noted that the right is placed ‘apart and before all of the other rights’ in the Covenant, is inalienable of all peoples and poses corresponding obligations. The Comment also highlighted the link between self-determination and economic development. In this manner, the Committee implied that self-determination is a much wider right than simple independence. The General Comment also refers to the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. Does the reference to the 1970 Declaration imply a restrictive understanding of self-determination? McGoldrick refutes such a possibility. He notes:

The mere reference by the HRC in its General Comment to the 1970 Declaration could not sensibly be taken to suggest either that the two instruments are of the same scope or that the scope of the ICCPR has been narrowed by the 1970 Declaration.\(^{132}\)

In the early 1990s, with the collapse of the former Soviet Union and Yugoslavia and the emergence of new states in Eastern Europe claims for independence resurfaced. However, this time it was different from the 1960s: it was clearly understood that self-determination was not only about independence. Several documents focused on participatory structures within the state,\(^{133}\) encouraged democracy by monitoring elections,\(^{134}\) referred to the possibility of autonomous regimes\(^{135}\) and stressed the link between the ongoing process of self-determination and human rights guarantees.\(^{136}\) And even though the (1993) Vienna Declaration and Program of Action\(^{137}\) and (CERD) General Recommendation XXI (48)\(^{138}\) issued the same year, both focused on
secession, the latter clearly recognised that minorities have the right to internal self-determination.

Nevertheless, some indigenous representatives, together with some commentators, insist on viewing self-determination within the context of colonialism. I appreciate Anghie’s position that the structures of colonialism continue to exist, although in other, more informal, but still persistent ways. However, colonialism as a political process that is formally recognised in international law (as opposed to its economic, cultural or other form) has more or less been completed. Therefore, as a strategy, I believe that insisting on the concept of colonisation for the purposes of indigenous self-determination is counter-productive. The process of decolonisation was about (re)-establishing an independent state; indigenous peoples ask for their right to determine their political status, which is a much broader concept than mere independence. Indigenous self-determination is about a process with various applications. Also, decolonisation has more or less been completed: in contrast, indigenous self-determination is a new concept that is dynamic and involves new ideas and nuances. On the practical level, the argument of decolonisation can easily be distorted and can lead to the denial of indigenous protection: in the Commission Drafting Group, the representative of Bangladesh has used the idea that ‘indigenous peoples have suffered under decolonisation’ to actually deny recognition of indigenous peoples living within Bangladesh. He argued that since colonialism is restricted to European colonies, Bangladesh does not have any indigenous peoples.

Knop makes the distinction between the right to self-determination as part of corrective justice and as a new right: colonial peoples ask for the restitution of their earlier right, whereas non-colonial peoples ask for a new right. Although this favours indigenous claims for restitution of their earlier sovereignty, it fails to recognise the need to accommodate the claims they have which derive from a new understanding of the right (for example, autonomy claims). Kingsbury calls this understanding of self-determination ‘a reductionist approach’; self-determination should not be understood in terms of the end result but also in terms of process and political legitimisation.

Indeed, a focus on independence gives the state the central role on the international stage and ignores the dramatic changes that have occurred in the last few decades and their consequent challenges to territorial integrity and state sovereignty as principles that secure the existing status quo. The decline of the state is reflected in many
aspects of international law: two obvious examples are the widespread recognition that the international community can intervene in a state’s so called ‘internal affairs’ for human rights purposes and the gradual expansion of the bodies with international legal personality. Accordingly, the meaning of self-determination cannot continue to be centred on the state and the creation of a state. Rather, Kingsbury advocates a ‘relational approach’ to self-determination, an approach focusing on the constructive relationship between the state and the indigenous group. Using this approach, he gives another dimension to the position of the Crees that they would claim secession if Quebec seceded from Canada: since the Crees have an evolving relationship with the state of Canada, if Quebec seceded, the nature of this relationship would change; they could have the right to exercise their right of self-determination to determine their future, which might well entail a future within the State of Canada. Thus, the claim to self-determination is considered in practice as relational and remedial, triggered by the disruption in the relationship between them and the State in which they live. Young has also advocated understanding self-determination as ‘relational autonomy in the context of non-domination’. This approach is also very similar to the Daes explanation of indigenous self-determination. She defines it as:

...the right to negotiate freely [indigenous] peoples’ political status and representation in the states in which they live. This might be best described as a kind of ‘belated state-building’, through which indigenous peoples are able to join with all the other peoples that make up the state on mutually agreed and just terms, after many years of isolation and exclusion.

A UN seminar on Racism against Indigenous also recognised that ‘self-determination includes, inter alia, the right and the power of indigenous to negotiate with states on an equal basis the standards and mechanisms that will govern relationships between them.’

Apart from its state-centred nature, the restrictive understanding of self-determination has another drawback: equating self-determination with independence, an option recognised only with regard to populations of whole states, completely ignores the raison d’être of human rights; human rights are established to protect human beings, rather than states. As Falk suggests, ‘it is the underlying legitimacy of peoples, not the transient legitimacy of governments that constitutes the purpose and rationale for the instruments protecting human rights.’

Self-determination cannot be recognised – directly or indirectly – as
belonging to states; otherwise, as Crawford notes, the right could become a pretence for governments to abuse their populations in the name of self-determination.  

Several states have voiced their agreement with the broader understanding of the right. The delegate of Liechtenstein stated in 2001 that ‘the right to self-determination was exercised in many different ways, and it needed to be understood that self-determination was not synonymous with independent statehood’. Other states have stated that perceiving self-determination only within the colonial context:  

\[ \ldots \text{ would lead to freezing international law in time and inhibit progress.} \]

At the same time though, several states perceive this evolution in a negative light. For example, in 2002, Australia, Canada, New Zealand, the Russian Federation and the United Kingdom maintained that the meaning of the right is still unclear. The representative of the United States has also stated:  

Under contemporary international law, the term self-determination is open to varying interpretations depending on the specific context ... while current views among scholars and governments may be changing on the meaning of self-determination, there is not yet international consensus.  

Consequently, some states argue that they cannot grant the right of self-determination to indigenous peoples, as they cannot undertake obligations that are not predetermined and clear.  

It is my firm belief that the evolution of the right to self-determination must not only be recognised, but also welcomed. Clarity in international law cannot be used as a cover to what Bedjaoui calls ‘legal paganism’. If totally cut off from international life, international law would be a selective set of rules serving only to perpetuate one kind of reality. Higgins stresses the importance of law as a process where policy considerations are taken into account, rather than as a set of strict and clear-cut rules. Through this prism, international law is ‘the entire decision-making process and not just a reference to the trend of past decisions which are termed “rules”’. This flexibility should not of course be interpreted as allowing political concerns to determine the scope of every human right. Allowing the international community – rather than states unilaterally – to interpret each right in accordance with the current realities, albeit always within the contours set by the standards of
international law, is consistent with the dynamic character of international law.\textsuperscript{162} Especially the international law of human rights is ‘an open discourse, incorporating moral, theoretical and hortatory elements, rarely capable of precisely resolving disagreements, unlike idealised domestic, court-centred processes’.\textsuperscript{163} International human rights instruments set basic, general rules that are interpreted and applied ad hoc in any case. Notions like sovereignty, freedom, participation, and the right to expression all have a certain degree of generality which to the eyes of the sceptical can appear as vagueness. This generality allows them to evolve according to international realities and needs. For these reasons, understanding the right to self-determination to mean purely independence, either in the context of colonialism or beyond, is too limited.

\textit{The maximalist approach: self-determination as an umbrella right}

At the other end of the spectrum lie maximalist perceptions of the right to self-determination. Among the many different understandings and nuances that are given to self-determination, one identifiable trend is a very broad understanding of the right that usually includes an economic\textsuperscript{164} and/or a cultural aspect.\textsuperscript{165} This maximalist understanding is entrenched in claims made on the basis of self-determination: for democracy and political rights; distinct political and judicial systems; territorial integrity; political independence and non-intervention; or concerning the name of a country and border adjustments; religious freedom; and educational provisions. In its distorted form, nationalism, fundamentalism, racism and even ethnic cleansing have all been justified in the name of self-determination.\textsuperscript{166}

Many indigenous statements follow the maximalist approach. Although self-determination has rightly been understood by indigenous peoples as ‘the right to be in control of their lives and their own destiny’,\textsuperscript{167} this has been used by some as the basis of all indigenous claims. A 1987 Declaration of indigenous peoples stated:

The right of self-determination is fundamental to the enjoyment of all human rights. From the right of self-determination flow the right to permanent sovereignty over land – including aboriginal, ancestral and historic lands – and other natural resources, the right to develop and maintain governing institutions, the right to life and physical integrity, way of life and religion.\textsuperscript{168}

The preamble of the (1992) Indigenous Peoples Earth Charter proclaims:

We indigenous peoples maintain our inherent right to self-determination. We have always had the right to decide our own forms of government, to use
our own ways to raise and educate our children, to our own identity without interference.\textsuperscript{169}

Similar is the spirit of the (1993) Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples:

We declare that indigenous peoples of the world have the right to self-determination, and in exercising that right must be recognised as the exclusive owners of their cultural and intellectual property.\textsuperscript{170}

Commentators such as Spiry have confirmed the wide use of the right:

\ldots self-determination is used today to refer to a people’s control of its own destiny. As such it is used to refer to a wide range of rights, including: the right to use the native language; to develop the native culture; to use and own lands and resources; and to achieve political autonomy, self-government and ultimate independence, even where that may entail secession from an existing state.\textsuperscript{171}

The maximalist approach appears to be supported by the language of Common Article 1 of the International Covenants, which defines self-determination as the right of peoples ‘to pursue their economic, cultural and social development’. It is also in line with many instruments that call for attention to the connection between self-determination and human rights. Undoubtedly, this approach has important qualities: it views self-determination as an evolving concept and attempts to adjust its meaning according to current international needs; and it aims to restore global justice, the ultimate goal of human rights, by accommodating the claims of vulnerable groups.

However, it also has serious downsides. First, using self-determination as an umbrella right\textsuperscript{172} is a poor legislative method that runs the danger of distorting its meaning and scope. Higgins finds this ever-expanding method irresponsible:\textsuperscript{173} although she agrees with the flexibility of the approach, she believes that concepts should be used with care and rejects the idea that self-determination can be all things to all men. Stavenhagen takes a similar approach and warns that using self-determination as an umbrella right ‘will end up demeaning and devaluing the idea of self-determination itself, and will thereby only harm those collectivities who require it the most’.\textsuperscript{174} Peru’s statement on indigenous self-determination demonstrates the validity of this argument:

\ldots self-determination would not be national in character, rather it would have a cultural and social identity within a national formation. Government delegations would find this approach much more fruitful.\textsuperscript{175}
By seemingly accepting the right, Peru clearly avoided any recognition of the politically sensitive scope of self-determination. Peru thereby disregarded the real meaning of the right and contrary to how it appears, this statement works to the detriment of indigenous self-determination.

Linking the right to self-determination with a wide range of claims is also a poor tactic. Claims that are justified by loose links with established rights, and even more so with a right as controversial as self-determination, are not convincing. Very often, other human rights can serve as a legitimate basis for these claims, but the use of self-determination obscures this.

This is the case, for example, with the ‘cultural aspect’ of the right to self-determination: the right to language, education, religion and the generic right to a culture are usually more appropriate to use for claims related to cultural freedom and its various expressions, educational issues and religious practices. Other separate issues, for example cultural cooperation and assistance through international and bilateral channels, are also established firmly in UNESCO instruments. Adding a cultural aspect to the right of self-determination fails to provide a solid basis for culture-related claims and adds nothing to the human rights canon; on the contrary, it practically disempowers a series of cultural rights by drawing attention away from them and hinders their further interpretation and evolution.176

To summarise, there is currently a wide range of understandings of the right to self-determination, which leads to substantially different outcomes as to the use and beneficiaries of the right. These understandings vary from the minimalist one, which limits the scope and the beneficiaries of the right, to the maximalist one, which ferociously advocates a broad understanding of the right to self-determination. Both these extremes offer important advantages: the minimalist approach offers certainty and clarity to the right of self-determination, whereas the maximalist approach offers space for evolution and adjustment of the right to meet contemporary and future international realities. However, both approaches also have important limitations. The analysis so far has demonstrated that the right to self-determination cannot be seen as merely independence; neither can it be seen as an umbrella-right that accommodates all claims. A balance needs to be found that will use the advantages of both approaches and deal with their weaknesses.
Re-evaluating the meaning of the right

In finding such a balance it is necessary to re-evaluate the meaning of the right of self-determination. In what follows I aim to set out the main characteristics that constitute such a re-evaluated meaning.

Self-determination is a right and a principle

Positive law leaves little doubt that self-determination is a legal right, as confirmed by its inclusion as such in the International Covenants, its recognition as such in several United Nations resolutions, judgments of the International Court of Justice, statements by governments and other evidence of practice. Its vague meaning and inconsistent application cannot take away its legal status: legal rules are made to be general to allow for a wide spectrum of application. However, self-determination is also a principle of international law, a notion often neglected in the myriads of related statements.

The discussion between principles and rights or rather rules has mainly dominated the area of jurisprudence. Dworkin defines a principle as ‘a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality’. This is to be distinguished from a policy that is ‘that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community’. Self-determination is a standard to be observed in the name of justice and fairness. This makes it a principle. It is interesting that according to the UN Charter, self-determination is also a means to ensure friendly relations among nations. Therefore, it is also a policy. The question here is what is the function of a legal principle as opposed to a legal rule; in other words, what is the difference between self-determination as a principle and self-determination as a right.

According to Dworkin, the difference between legal principles and rules concerns a logical distinction. Both principles and rules point to particular decisions about legal obligations in particular circumstances, but they differ in the character of the direction they give. Dworkin believes that rules are applicable in an all-or-nothing fashion, whereas principles do not set out legal consequences that follow automatically when the conditions provided are met. Indeed, a right when applied would point towards the right decision concerning a claim, whereas a
principle would be one important factor to take into account when reaching a decision. Raz offers a similar understanding: rules prescribe relatively specific acts whereas principles relatively unspecific acts; an act ‘is highly unspecific if it can be performed on different occasions by the performance of a great many heterogeneous generic acts on each occasion’. Therefore, Raz takes out the restrictive definitiveness of Dworkin’s rules: he notes that principles and rules can conflict with one another. The logical distinction also leads to a further difference: principles have a dimension of weight or importance that rules do not have. Dworkin warns though that sometimes a rule and a principle can play much the same role and the difference between them is almost a matter of form alone.

In international law, Schachter follows a similar line of thought: he distinguishes between three types of legally relevant norms, namely rules, principles and ends. Rules are ‘norms that dictate a specific result’, even though the terms of the rules are open to different interpretations. Principles ‘lack this element of definiteness, because of their generality and their abstract nature’. Their terms have a wide range of applications and they leave room for varying interpretation in many situations. Schachter notes that particular situations can be covered by more than one principle, each pointing towards a different conclusion. In short, the difference between the principles and rules concerns, according to Schachter, their level of generality: principles are much more general than rules, are usually in a higher hierarchical order than rules, and are one of the criteria for deciding on a matter rather than the main reason. Crawford relates this to self-determination: he accepts that the concept is multifaceted: a political principle, a legal principle and a legal right. Further, he seems to recognise that the level of generality will determine in which categories the concept will fall on every occasion. Alston also recognises the dual application of self-determination as a right and as a principle. The multi-faceted nature of the concept is also supported by positive law: for example, the United Nations Charter refers to the principle; the International Covenants focus on the right; whereas the Helsinki Declaration recognizes both principle and right.

The validity of self-determination as a human right does not abolish its validity as a principle of international law. Notions such as the respect for human life and dignity or equality have been treated as both general principles and human rights. The same applies to self-determination. Stavenhagen maintains:
Self-determination is an idée force of powerful magnitude, a philosophical stance, a moral value, a social movement, a potent ideology, that also may be expressed, in one of its many guises, as a legal right in international law.\textsuperscript{193}

Cassese believes that a legal principle, such as self-determination, contributes to the interpretation of human rights and also ‘fills the gaps’ when there is no other right (rule) applicable.\textsuperscript{194} Hall also notes that the principles of law are ‘a reservoir from which apparent gaps in the corpus of international law may be filled’. In this manner, principles confirm the completeness and distinctiveness of international law as a system where ‘every international situation is capable of being determined as a matter of law’.\textsuperscript{195}

Indeed, as a principle, self-determination does not set out specific legal consequences for non-compliance, being more abstract and general. It is related to the freedom that peoples should have to determine their lives and destinies and as such, it incorporates political, economic, cultural and social claims of all kinds. It does not give a specific result, but is yet another factor that must be seriously considered, when reaching a decision, possibly together with other principles of international law including territorial integrity, national sovereignty and respect for the rights of others. In contrast, as a human right, self-determination is much more definite and clear, provides its beneficiaries with a specific claim and dictates a specific result.\textsuperscript{196} The principle of self-determination is related to a wide range of claims, which can be based on a range of other rights, such as the right to a culture, the right to education, the right to language; in contrast, claims based on the right to self-determination must be directly related to that concept and cannot be better accommodated by recourse to such other rights.

The political core of the right to self-determination

After reaffirming the inclusiveness of the principle and the constraints of the right, sorting out the meaning of the right to self-determination becomes easier. If one looks carefully at the usage of self-determination, it will be noted that the right has essentially been linked to political power. Indeed, most authors divide the meaning of the right in its external and its internal aspect, both relating to the political status of a ‘people’.\textsuperscript{197} Dinstein maintains:

Whereas it is explicitly enunciated in [Article 1 of the International Covenants] that the right of self-determination has certain economic, social and cultural ramifications, it is uncontroversible that the core of the right is political in
nature. The gist of self-determination is political control of the people’s destiny (accompanied by other forms of control).\(^\text{198}\)

Brownlie also gives a similar definition to the right as ‘the right of a community which has a distinct character to have this character reflected in the institutions of the government under which it lives’.\(^\text{199}\) The political substance of the right is also reflected in most writings on indigenous self-determination. Harhoff transposes this meaning to the indigenous context; he maintains that indigenous self-determination refers ‘to collective rights of indigenous peoples to political control of their future, and there is no reason to replace this by other labels.’\(^\text{200}\) Kingsbury focuses on the constructive relationship between the state and the indigenous group,\(^\text{201}\) whereas Daes views self-determination as the right to negotiate indigenous peoples’ political status and representation in the states where they live.\(^\text{202}\) Anaya, a prominent advocate of a wide interpretation of self-determination, also accepts that self-determination must be seen ‘in relation to the institutions of government under which they live’.\(^\text{203}\) The common thread in all these definitions is the political element.

An objection to the political focus of the right could derive from the description of the right in Article 1 of the International Covenants, as it refers to the right to pursue political but also economic, social and cultural development. Although this is a valid argument, a closer look at the language of the provisions reveals a focus on the process of pursuing development, rather than the type of development pursued, whether political, economic and cultural. Pursuing development essentially involves establishing policy priorities and trade-offs in policy allocations and benefits; this is political in nature. Political, but also economic and social policies can only be decided and implemented through a political process, where the state and its institutions are involved. As Held notes, ‘State institutions must be viewed as necessary devices for enacting legislation, promulgating new policies, containing inevitable conflicts between particular interests, and preventing civil society from falling victim to new forms of inequality and tyranny’.\(^\text{204}\) Of course, Held recognises that ‘a multiplicity of social spheres’ play a role in these decisions.\(^\text{205}\) Further, Held relates politics to the decision-making process and ‘those who press their claims upon it’.\(^\text{206}\) He maintains:

Politics is a phenomenon found in and between all groups, institutions and societies, involving all spheres of human endeavour, public and private. It is manifested in the activities of cooperation, negotiation and struggle over the
use, production and distribution of resources . . . Politics is about power; about the forces which influence and reflect its distribution and use; and about the effect of this on resource use and distribution . . . Where politics is regarded more narrowly as a sphere apart from economy or culture, that is, as governmental activity and institutions, a vast domain of what we would consider politics is excluded from view.\textsuperscript{207}

This understanding of politics makes clear that pursuing development is essentially a political process; accordingly, the right to take part in this process is also political.

The political core of the right to self-determination has been reflected in some, though by no means all, indigenous statements in the United Nations. The caucus of Australian indigenous peoples stated in 1997:

At the micro level, self-determination has to do with renewed legal and political relationships. These are already being negotiated in many of the countries represented in this working group. At a micro level, self-determination concerns decision-making structures and processes in relation to a range of rather non-exceptional matters.\textsuperscript{208}

It is commonly accepted that under this meaning, the right to self-determination incorporates two aspects, an external and an internal one. It is also commonly perceived that the forms of the external aspect are covered by the 1970 Declaration, namely establishment of a sovereign and independent state; free association; integration with an independent state; or emergence into any other political status freely determined by a people.\textsuperscript{209} On the other hand, the internal aspect is believed to refer to the right to democratic governance and the right to participation in the public affairs of the state. Anaya cautions that this distinction implies a restrictive and exclusive universe of ‘peoples’ and communities that are mutually exclusive spheres.\textsuperscript{210} Organising self-determination into compact internal versus external spheres is distorting in today’s world of multiple human associational patterns. Instead, he distinguishes between constitutive self-determination, which is relevant to the occasional procedures leading to the creation of or change in the institutions of government, and ongoing self-determination, relevant to the form and functioning of the governing constitutional order.\textsuperscript{211} This distinction by Anaya is helpful and takes the focus away from independence. Addressing Anaya’s criticisms, the following section addresses accepted applications of the right to self-determination, but also goes beyond the traditional boundaries of the right and explores additional applications of the right.
Internal aspect of indigenous self-determination

Although democracy has been reflected in several human rights provisions, it was not until the end of the Cold War that the right to democratic governance was elaborated. From a rather vague concept democracy was rapidly transformed to a system of rules, articulated in a series of documents and recognised in state practice and the practice of international organisations. In 1988, the UN General Assembly adopted for the first time a resolution on ‘Enhancing the effectiveness of the principle of periodic and genuine elections’; since then the General Assembly has adopted at least one resolution annually dealing with some aspect of democracy and the Commission on Human Rights and now the Human Rights Council have examined democracy increasingly from a human rights perspective. The importance of the concept has since been validated by its explicit proclamation in the OAS Inter-American Democratic Charter of the right to democracy; the inclusion in the Treaty of the European Union that the Union is founded on the principles of, inter alia, democracy; the CSCE Charter of Paris; and the 1991 Harare Declaration of the Commonwealth.

Democracy entails fair and periodic elections; the right to vote and be elected is included in Article 25 of the ICCPR and Article 3 of the ECHR. Even when they satisfy the multiple standards set by the international community, mere elections cannot fulfil the democratic element. The concept of electoral majority is inherently disadvantageous for minorities’ participation and their involvement in the political structures of the nation state. Being the non-dominant groups, indigenous groups would seldom ‘win’ in competitive elections; if elections are the only way of ensuring democracy, then minorities and indigenous peoples are left impotent. A formal model of democracy based on the idea that the state’s decisions are taken to please the majority of its population has been proven totally ineffective in Eastern Europe. Elections, referenda and other ways of reaching decisions are not always conducive, even within the context of deliberative or consensus models. The quest for consensus that these models advocate have been criticised as ineffective in conflicts based on race, as consensus is not always possible. International law has subscribed to an inclusive model, which requires that the government of a state be representative of all people rather than some people. Both the UN Declaration on Minorities, the UN Commission on Human Rights and the OSCE have concluded that the issue of minorities can be resolved only within...
a democratic framework. This entails that democracy is relevant not only to majorities, but also to minorities. This also applies to indigenous groups. The European Court on Human Rights has also pointed out that in a democracy the views of the majority will not always prevail: ‘a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position’.229

In their efforts to achieve such a balance, several states, including Norway, Fiji, the United States and New Zealand have taken measures to include indigenous voices in parliaments.230 Different arrangements suit different circumstances: designated parliamentary seats whose number is proportionate to the Maori electorate together with a system of mixed member proportional representation has been considered the best option in New Zealand. In contrast, designated seats would not work in the US state of Maine as indigenous would be elected to a parliament of what is considered a separate nation; there, a ‘tribal delegate’ of each of the two largest Indian First Nations in the state joins the state parliament; the delegates there are not elected and are not members of the parliament.231

Unfortunately the majority of states do not have special arrangements; some do not even include indigenous individuals on their electoral roll. In some cases, indigenous individuals cannot vote as they do not enjoy citizenship rights;232 even more often, the policies of extinction, exclusion and forced assimilation have led to anger and rejection of the state by indigenous peoples who do not want to take part in the process. In other cases, indigenous peoples do not have adequate knowledge of the electoral process, as it is alien to their political systems. In such cases, simple measures to improve the numbers of indigenous individuals in the electoral rolls and to enhance the indigenous understanding of the national democratic processes could go a long way. Other measures to improve indigenous participation in the democratic process were recently discussed by the Legislative Assembly of Queensland, Australia.233 They include: periodical reviews of the electoral system; the promotion of a more active indigenous role in political parties; more employment and training opportunities for indigenous peoples in political bodies; veto powers for indigenous communities; indigenous direct input in legislative and policy processes; the enhancement of indigenous participation in local government; and youth participation in political processes. The nature of the measures confirm that democracy and participation cannot be separated. This is also reflected in the structure of Article 25 of ICCPR: its first paragraph
establishes the right to participation, whereas the next paragraph focuses on elections.

It is interesting to note that although on the national level such measures are often not linked to the right to self-determination for fear of additional controversy, at the international level many states are really eager to ‘fill’ the meaning of the right to self-determination with democracy and participation, as an attempt to set the external aspect of the right – and secession – aside. In 1999, Canada defined self-determination as ‘the right which can continue to be enjoyed in a functioning democracy in which citizens participate in the political system and have the opportunity to have input in the political processes that affect them’. The same year Norway favoured a similar understanding of the right as ‘the right of peoples to participate at all levels of decision-making in legislative and administrative matters and the maintenance and development of their political and economic systems’. Politics aside, the connection between the right of self-determination and the right of political participation has also been recorded by the Human Rights Committee. The draft Declaration on indigenous rights includes several provisions on political participation including: Article 5, which follows the provision on self-determination, and Articles 18 and 19. The distance between these provisions in the text derives from the different clusters to which provisions belong – the right to self-determination to the general and fundamental principles, the participation articles to the more detailed parts of the Declaration.

Even though minorities do not have the right to unconditionally choose the modalities of their participation in the public life of the state, mere participation is not adequate: indigenous peoples have the expectation that their participation will be effective as specified in the UN Declaration on Minorities; the Declaration also highlights that minorities should be given a significant role in the formulation, passage and implementation of public policies. Effective participation is also required by the CSCE. The Flensburg Proposals also emphasise that decision makers must proactively consult members of minorities that are affected by their decisions and must also create opportunities for them to effectively participate in the decision-making process. Human rights bodies pay special attention to whether minorities have been included in decision making in matters that affect them and to whether any decisions have been taken after real public debate. Measures to ensure their effective participation are wide-ranging, as the ‘conduct of public affairs’ is ‘a broad concept which relates to the
exercise of legislative, executive and administrative powers . . . [covering] all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local level’. Some of these measures are mentioned in the (1999) Geneva Declaration of Experts on Minorities and include: advisory and decision-making bodies in which minorities are represented; elected bodies and assemblies of national minority affairs; local and autonomous administration; autonomy on a territorial basis, including the existence of consultative, legislative and executive bodies chosen through free and periodical elections; self-administration by a national minority in relation to aspects concerning its identity in situations where autonomy on a territorial basis does not apply; and decentralised or local forms of government. Unfortunately, the draft Declaration on indigenous rights does not include a reference to ‘effective’, but to ‘full’ participation (Article 5).

In all the documents on minority rights, the right to participation is recognised as an individual right. The Human Rights Committee has actually juxtaposed the individual nature of the right to participation and the collective nature of the right to self-determination. However, ILO Convention No. 169 recognizes participatory rights to indigenous as a group. Being one of the mean thrusts of the Convention, participation underlies many provisions, the most important of which is Article 6. Article 6 establishes the duty of states to create measures for the free participation of indigenous peoples to ‘at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programs which concern them’. It also requires the establishment of indigenous representative institutions and their consultation whenever legislative measures are considered which may affect the people directly. Consultations must be in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures. The Convention also gives the right to indigenous peoples to decide their own priorities for and to exercise control of the process of development. The draft Declaration on the rights of indigenous peoples also recognises the collective element of participation; according to it, indigenous peoples should ‘have the right to participate in decision-making in matters which affect their rights through representatives chosen by themselves’ (Article 18) and the right to ‘autonomy or self-government in matters relating to their internal or local affairs’ (Article 4). Scheinin applauds the inclusion of a
collective element in the right of participation. In his individual opinion in *Diergaardt et al. v. Namibia*, he notes that:

there are situations where Article 25 calls for special arrangements for rights of participation to be enjoyed by members of minorities and in particular indigenous peoples. When such a situation arises it is not sufficient under Article 25 to afford individual members of such communities the individual right to vote in general elections. Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation.

A particular form of participation that ‘allows minorities claiming a distinct identity to exercise direct control over affairs of special concern to them, while allowing the larger entity to exercise those powers which cover common interests’ is autonomy. It is the addition of ‘rules of self-rule or self-government, with own institutions and a vaguely defined independence of action’. States are reluctant to accept any obligation to provide autonomy, as evident in Chile’s statement in 1994 about the inclusion of the term in the draft Declaration:

in place of the phrase ‘right of self-determination’ and ‘autonomy’ of indigenous peoples, the most appropriate wording might be ‘the right to special political participation with regard to the specific affairs of those peoples or matters which may affect their development’

There is no recognised ‘right to autonomy’ in international law. Autonomy has so far been viewed as an application of the right to self-determination open to minorities, either through customary, statutory or constitutional law. In most instances, the state’s formal legal systems define the powers and scope of the autonomous regime. Indeed, neither the 1992 United Nations Declaration on Minorities nor the 1995 Framework Convention on National Minorities explicitly refer to autonomy; the need for autonomy can still be argued on the basis of the condition of ‘effective participation’. The (1990) Geneva Meeting of Experts on Minorities and the (1990) Copenhagen Document refer to autonomy as ‘one of the possible means’ to protect minority identity; whereas the (1993) Recommendation 1201 of the Parliamentary Assembly of the Council of Europe reluctantly suggests autonomy or special status ‘matching the specific historical and territorial situation and in accordance with the domestic legislation of the State’. Only the Lund Recommendations on Effective Participation by National Minorities in Political Life are somewhat more forthcoming on ‘self-government’ and discuss territorial and non-territorial arrangements.
Autonomy can take various forms.\textsuperscript{254} It ranges from group-based autonomy, when the members of a group are bound by different rules on certain matters, such as cultural or family issues, to territorial autonomy, where all inhabitants of the autonomous region are subject to a particular status, irrespective of their ethnic or linguistic identity; and can reach a ‘fully’ autonomous regime, when there is a locally elected legislative assembly, local administrative authorities and local independent courts.\textsuperscript{255}

Autonomy has several advantages. Experience has shown that it can be a means to respond successfully and in a flexible way to concerns about minority rights while maintaining the territorial integrity of existing states.\textsuperscript{256} It can also be a means to protect the group’s distinct identity. For some, it is the optimum solution for indigenous groups. The Human Rights Committee has positively commented on examples of devolution concerning indigenous communities.\textsuperscript{257} Alfredsson goes as far as saying that ‘the degree of autonomy of indigenous peoples within states becomes an indicator of the probability of their survival’.\textsuperscript{258} This view appears to be shared by the drafters of the Declaration on the rights of indigenous peoples. Article 31 provides indigenous peoples with a wide ‘right to autonomy or self-government’ in matters relating to their internal and local affairs.

Indeed, there are several indigenous autonomous regimes that work very well. The home rule of Greenland has long been viewed as a successful regime that has improved the situation of the Greenlanders. Under the Home Rule Act, Greenland decides on all areas of policy, including its vast raw material and its environment, apart from nationality, justice, monetary affairs, defence and foreign policy. The 1999 establishment of Nunavut in Canada,\textsuperscript{259} where the indigenous Inuit have won self-government as a territory within the federal system, has also been welcomed. The Sámi Parliament in Norway is a positive example of personal autonomy. Established in 1989, the Parliament has 39 indigenous representatives elected from 13 constituencies covering the whole of Norway. The Parliament deals with any matter that in its view particularly affects the Sámi, whereas the Sámediggi administration deals with issues such as Sámi education, culture, language, environment and cultural preservation, economic development and international cooperation. The Parliament and its administration is an effective political institution and an important advisory body to the Norwegian central authorities.\textsuperscript{260}

However, autonomy is not a panacea for indigenous problems around the world. It also has disadvantages, not least that it promotes...
segregation and separation and fails to encourage dialogue.\textsuperscript{261} As autonomous regimes protect historical differences, they can lead to a stagnated image of the group and can discourage the evolution of the group’s culture. Steiner notes that ‘a state composed of segregated autonomy regimes would resemble more a museum of social and cultural antiquities than any human rights ideal’.\textsuperscript{262} In such situations, autonomy can ‘dramatize grotesquely’ the particular characteristics of groups, foment inter-group dissent and can be used to promote a narrow view of ‘stability’.\textsuperscript{263}

Moreover, autonomy can be a way for the State to dispose of its obligations – financial and other – towards the group. The reference to autonomy in matters relating to ‘ways and means for financing their autonomous function’ in Article 4 of the draft Declaration can be used as an excuse by states to refuse any financial help to indigenous groups, even though Article 39 ensures that indigenous peoples have financial and technical support from states. The 1999 Federal Law on the Guarantees of the Rights of Indigenous Numerically Small Peoples of the Russian Federation allows indigenous peoples to establish ‘the territorial bodies of public self-government’ and enjoy the right ‘on a voluntary basis to organise [their] communities’. Although this could be an opportunity for greater control, unfortunately it has acted as a boomerang for indigenous communities in the Russian Federation. The autonomies that have been created are mostly self-supporting; as they do not have the means to operate,\textsuperscript{264} no significant progress has been noted; only this time the state cannot be blamed for not recognizing indigenous rights.\textsuperscript{265}

An interesting issue concerns cases when indigenous autonomous regimes violate standards of democratic governance. What happens, for example, when indigenous groups do not wish to select their leaders according to democratic principles, but their own principles? As discussed in the first chapter, these questions can only be solved on an ad hoc basis using the Lovelace criteria for guidance.

External aspect of indigenous self-determination

The external aspect of self-determination has so far focused on independence. The shortcomings of focusing on independence have been elaborated in depth in previous sections of this chapter. It has also been established that the right to secede is currently very limited in international law. Only remedial secession can potentially be recognised for indigenous groups, provided they have exhausted all other political and diplomatic avenues.
If the external aspect of self-determination is covered by independence and since independence is only a theoretical possibility, would it not be more realistic to accept that indigenous peoples have a qualified right to self-determination, especially as the recognition of an unqualified right to self-determination seems at the moment unlikely? Several states have suggested such a compromise. During the sessions of the Commission Drafting Group the USA accepted the recognition of internal self-determination, whereas Australia proposed self-management instead of self-determination. Other states also accepted the internal aspects of self-determination. Norway, Cuba and Spain supported the inclusion of the right of self-determination in the draft Declaration followed by a reference to the 1970 Declaration on Friendly Relations or to the principle of territorial integrity. Authors have also supported a qualified right to self-determination, either because they see claims for indigenous self-determination essentially as claims for autonomy (Eide) or because of the pandemonium secession would bring (Spiro, Nettheim); or as a better strategy for the improvement of the indigenous situation (Hannum). Any advantages in excluding the external aspect or secession would also have had significant negative consequences: first, such an exclusion would be discriminatory; second, it would be unnecessary; and third, it would set aside innovative and important ways of exercising self-determination.

Indeed, it has been repeatedly stressed that the recognition of a qualified right to self-determination would deny to indigenous peoples the rights that all other ‘peoples’ have and would thus maintain patterns of discrimination and injustice against them. Indigenous representatives have repeatedly noted:

The right of indigenous peoples to self-determination is equal to the right of non-indigenous peoples to self-determination. We should resist efforts to re-define or to dilute for indigenous peoples a right that has already been recognised for all others. The Declaration must carefully avoid establishing a category of second class rights for indigenous peoples.

A similar statement was made in 1992 by the representative of the Four Directions Council:

When speaking of the right to self-determination of indigenous peoples, we are not creating new law, but merely clarifying the applications of principles which are as old as the United Nations itself. Our purpose … is simply to ensure that indigenous peoples are not deprived of a fundamental right which is secured to all other peoples.
In 1996, Ted Moses on behalf of the Grand Council of the Crees warned:

There cannot be a double standard on the right of self-determination in international law. In particular, there cannot be a double standard based on race or our present status as dispossessed peoples residing in nation-states founded upon principles such as *terra nullius*, conquest and extinguishment.\(^{276}\)

Several authors support this argument. Daes and Spiry have referred to the UN treatment of peoples’ self-determination within the context of Eastern Europe and have concluded that a rejection of indigenous self-determination would be a strange and arguably racist UN policy.\(^{277}\) Scott also maintains that refusing the term ‘peoples’ to indigenous peoples ‘has at least the effect of creating discriminatory access to the special kind of freedom that other peoples enjoy, namely that of the human right to self-determination.’\(^{278}\)

Apart from discriminatory, the rejection of external self-determination is also unnecessary. Most indigenous representatives have emphasised that independence is neither a desirable nor a possible option:

Indigenous peoples are not geographically or economically situated in a way that makes independence particularly attractive. Most, if not all indigenous peoples are consequently seeking democratic reforms and power sharing within existing states.\(^{279}\)

In her explanatory report of the draft Declaration on indigenous rights, Daes has clarified the position of most indigenous groups:

Most indigenous peoples also acknowledge the benefits of a partnership with existing states, in view of their small size, limited resources and vulnerability. It is not realistic to fear indigenous peoples’ exercise of the right to self-determination. It is far more realistic to fear that the denial of indigenous’ rights to self-determination will leave the most marginalised and excluded of all the world’s peoples without a legal, peaceful weapon to press for genuine democracy in the states in which they live.\(^{280}\)

Authors that support the unqualified recognition of indigenous self-determination also agree that independence is not the solution. Kingsbury does not see separate statehood as the optimal outcome, but he views indigenous self-determination as an ongoing process whose arrangements need re-evaluation at frequent intervals.\(^{281}\) Anaya also notes the wide range of possibilities and emphasises that secession will rarely be a cure better than the disease.\(^{282}\)

Even for the small minority of indigenous communities striving for independence, secession can only possibly be contemplated when the
state grossly, continuously and irrevocably fails to fulfil the minimum of its obligations towards the group. Therefore, international law and practice already protect the states from secession, so that yet another reference to territorial integrity would be unnecessary, save for calming states’ fears. The draft Declaration has tried to find a compromise; in its current form, the text mentions autonomy, establishment of distinct institutions and participation (Articles 4 and 5), but without confining the right only to these applications.

Emerging applications of the right to self-determination

The recognition of a qualified right to self-determination would leave out legitimate and innovative ways of exercising the right to self-determination in its external aspect. Indigenous peoples have reminded the international community that the list is not exhaustive. Away from the focus on a state-centred meaning and within the context of the evolution of the right to self-determination, new applications of the right are being added to already accepted ones. As Alfredsson has noted: ‘The tentative listing of suggested forms and expressions of self-determination is undoubtedly not exhaustive and definitely not final.’

The meaning of self-determination must remain open to new aspects. A reductionist approach where the right is only perceived as the addition of the prescribed applications is not uncommon among states. In its report to the Committee on Economic, Social and Cultural Rights, Greece divided self-determination into three aspects, an external, an internal and an economic one, and proposed an analysis whereby the external aspect contained only rights appropriate to peoples under a colonial or racist regime or under occupation or peoples who have been integrated by force. Similarly, the internal aspect involved the free choosing of the social system, the form of government and free elections. This, it is suggested, is a poor understanding of the right. The scope of the right is not exhausted by its already experienced applications. Accordingly, any claim must be considered in relation to the meaning of the right itself, namely the right to determine a people’s political status, rather than in relation to specific applications.

Anaya has rightly noted that self-determination is ‘capable of embracing much more nuanced interpretations and applications’. Other commentators including Daes, Falk and Thornberry, have talked about the need for flexibility in understanding indigenous self-determination. Harhoff has noted that indigenous self-determination ‘reflects new dimensions in international society and requires new thinking in
international law’, whereas Kingsbury has urged the reformulation of the right so that it opens the way to a ‘wider range of relations between an indigenous peoples and an existing state’.

States have not stayed indifferent to these arguments. Canada stated in 1996:

We must take into account the variety of circumstances in which both states and indigenous peoples find themselves world-wide. We must avoid any prescriptive solutions, as desirable as these may seem, but allow the right of self-determination to be implemented flexibly through negotiations between governments and indigenous groups.

In this context, the external aspect of the right of self-determination cannot be wholly covered by the applications set out in the Declaration against Colonialism. For example, indigenous representatives have repeatedly raised claims for their autonomous representation in the international arena. Indeed, the representative of the Grand Council of Crees attends United Nations fora as ‘ambassador’, whereas the delegations of some Nordic states in relevant United Nations fora always include indigenous representatives. More importantly, the indigenous movement has managed to be on an almost equal standing with the states in the three United Nations fora relevant to indigenous matters. Indigenous representatives attend official and unofficial meetings and have managed to limit the closed meetings solely for states. They take the floor on an equal basis with the states and have the right to reply. When indigenous peoples threatened to leave the Commission Drafting Group, because their participation was hindered by the chairperson, several governments took the floor to emphasise the importance of the indigenous participation in the process. Also, the Permanent Forum on Indigenous Issues is comprised of eight indigenous representatives chosen by indigenous peoples and eight experts chosen by states. This ensures that indigenous peoples have an input in decisions of the United Nations relevant to their future. Falk goes further and advocates the establishment of a special international tribunal or special procedures to determine conflicts between states and indigenous peoples outside the national system. These new procedures must recognise indigenous peoples as equals, rather than maintain the existing statist character of international arenas.

Similarly, the draft Declaration raises rights that expand the content of self-determination, such as developing transnational contacts, relations and cooperation across borders for political reasons (Article 36).
Over the last 25 years, cross-border activities between sub-national territorial entities have increased enormously, especially under the legal and political umbrella of the Council of Europe. In 1980, the member states of the Council of Europe decided on an Outline Convention on Cross-border Co-operation between Territorial Communities or Authorities, which aims “to facilitate and foster cross-border cooperation between territorial communities or authorities.” Cooperation between states and the subsequent creation of cross-country political institutions fall within the right of peoples to decide on the relations they wish to have as a collectivity with other groups and states, in other words, their right to self-determination.

The internal aspect of the right of self-determination also incorporates applications that have not yet been explored in depth. Such applications have been envisaged by Harhoff; he has supported a right of self-determination that would allow for the establishment of: a local legislative body with powers to regulate specific matters in its own name and immune from state interference; a local executive body with powers to administer and carry out the local acts; and a judiciary with executive authority to decide legal questions on the validity and interpretation of local acts and orders. The draft Declaration does not go that far, but it does establish the right of indigenous peoples to distinct political, legal, economic, social and cultural institutions (Article 5); indigenous political, economic and social systems or institutions (Article 20); indigenous educational systems and institutions (Article 14) and their representative institutions (Article 19).

In recognising the benefits of indigenous systems and institutions more states are gradually allowing for indigenous judicial institutions to coexist with the national judicial systems. In Australia, the Community Justice Group project allows Aboriginal mechanisms of justice and social control to coexist with the Anglo-Australian legal system. The indigenous Community Justice Group applies indigenous law and customary practices in family-related dispute settlement, crime prevention and community development projects in coordination with state agencies and bodies and offers information and advice to the judiciary, Community Corrections Boards and other state decision-making bodies. Together with other such projects in Australia, it has contributed to the decline in crime rate and level of violence, especially in juvenile crime and to the change in social patterns and indigenous perceptions about the justice system. In Greenland, the judicial system differs significantly from the Danish system. Citizens are called on to...
act as judges and counsel in disputes, including family and criminal cases, and local police handle the prosecuting function. In South Africa, the (2003) Traditional Courts Act authorised and established a hierarchy of customary courts whose jurisdiction extends to criminal and civil cases; the courts will be operated by members of the community and decisions will be based on the customary laws of the community in line with the constitutional values of democracy and equality. Other states that recognise the distinct legal systems of indigenous peoples include Guatemala and Ecuador.

An argument could be put forward that the recognition of indigenous judicial institutions forms part of ‘cultural self-determination’, an aspect rejected earlier in this chapter. Judicial systems are indeed part of the culture of indigenous peoples, but the formation of such institutions falls within the political sphere of self-determination. Therefore, such claims are based on the right to self-determination in conjunction with the right to a culture, rather than on a right to cultural self-determination. Claims based on two rights are not uncommon in international human rights. Similar would be the answer of international law to claims for cultural autonomy and the establishment of other indigenous cultural institutions.

Self-determination is often used interchangeably with secession. If the right to self-determination is covered by secession, then subnational groups, including indigenous peoples, cannot have this right, as it conflicts with the principle of territorial integrity. This section has shown that this is not the case. Reading self-determination as secession echoes an earlier period of international history, where state sovereignty reigned and decolonisation was an urgent need. Since then, self-determination has evolved considerably. The scope of the right is in the political realm, but the right of peoples to decide on their political status includes a wide range of possibilities. International law has already acknowledged some of them in international instruments: at the early stage, independence, integration or association with another state were identified; later, democratic governance and political participation, which sometimes takes the form of autonomy, were elevated to be the main applications of the right. There are other normative formulations of the right, which have not yet been explored. The indigenous debate has revealed some new possibilities, including gathering of autonomous international personality, the creation of distinct legal and political systems, and the possibility of indigenous citizenship. This understanding of the right to self-determination is
consistent with its past, but is also able to address important issues of the present and is open to future possibilities.

Concluding comments
As secession occupies a small part of the scope of the right to self-determination and since territorial integrity does not conflict with any other exercise of the right, sub-national groups can be recognised as beneficiaries of the right to self-determination as included in Article 1 of both International Covenants, albeit prima facie not secession. Therefore, if indigenous peoples are recognised as beneficiaries of the right to self-determination, they will not automatically have the right to secede. Just as ‘all peoples’ of Article 1 of the International Covenants, they would have to satisfy a number of difficult tests before their claim for secession gained any international support. After the obstacle of territorial integrity is removed, the road to indigenous recognition seems open: indigenous peoples in general satisfy the logical and intellectual criteria of ‘peoples’. Also, difficulties posed by international instruments can be overcome by innovative interpretations that would be consistent with the spirit of international law and correspond to current international realities.

Indeed, there is a move towards recognising indigenous self-determination, evident in the international literature as much as the political scene. As the experts consulted by Canada noted, current international law increasingly guarantees indigenous peoples greater territorial rights, the exact substance and extent of which are at present difficult to ascertain. Gradually, more states recognise at the national level that justice requires some form of territorial autonomy for sub-national groups. In its concluding observations, the Human Rights Committee has repeatedly linked indigenous peoples to the right to self-determination; and states have gradually started analysing indigenous issues within Article 1 of the International Covenants: for example, Finland discussed in its report to the Human Rights Committee in 2004 Sámi issues within the realm of Article 1, while Denmark stated in 2002 that the right of peoples to self-determination is applicable to indigenous peoples. During the informal debates of the working group on the draft Declaration a number of states from various parts of the world, including Colombia, Bolivia, Fiji, Switzerland, Pakistan, Finland, Norway, Cuba, Guatemala and Mexico, all agreed with the inclusion of the right to self-determination in the draft
Declaration on the rights of indigenous peoples. More importantly, 30 out of the 47 states members of the Human Rights Council, including the United Kingdom, France and Japan, voted in favour of the adoption of a draft Declaration that includes an indigenous right to self-determination.

These developments cannot conceal how difficult the road ahead is, as is evident from the recent delay to take action at General Assembly level. A partly tactical argument that attempts to sideline all political considerations views indigenous peoples as a special case, a suggestion that has recently been gathering momentum. Falk explains why indigenous should be perceived as a special case:

[Indigenous peoples] have overwhelmingly been marginalised as outside the framework of normal political behaviour. The promises associated with the mainstream right of self-determination have almost no relevance to them: this creates a high degree of normative confusion as a fundamental aspiration of these peoples is inevitably some form of self-determination, but not the prevailing one. In other words, the semantic confusion that is implicit in statist views of self-determination has been used to avoid confronting the actual situations of either captive nations and even more insistently, the various lamentable situations of indigenous peoples.315

Kingsbury also asserts the special status of indigenous peoples.316 According to this approach, the way forward would be the recognition of ‘a special’ right to self-determination, related, but different to the traditional understanding of the right. This seems to be in accordance with Anaya’s argument: he explains the need for indigenous self-determination on the basis of injustice and oppression that indigenous peoples have suffered; these can only be erased by recognising their right to determine their future, namely their right to self-determination.317 He adds:

... once diverse cultural groupings are acknowledged and valued, their associational patterns and community aspirations become factors that must be reflected in the governing institutional order if self-determination notions are to prevail.318

Pentassuglia also agrees that the question of indigenous self-determination is a sui generis one. He maintains that although the ramifications of ILO Convention No. 169 on self-determination and the draft Declaration are still being debated in the United Nations and even though important states appear united in rejecting full independence, overall the term ‘peoples’ associated with indigenous serves the general purpose of conceptualising a demand for protection through guarantees appropriate to the specific characteristics of indigenous peoples.319
Two decades ago suggesting that indigenous peoples can be perceived as a special case for the purposes of international law would be unrealistic. However, the international community has shown evidence of endorsing this view; the most notable example being the establishment of the Permanent Forum, a body largely comprised of indigenous representatives. Such a body in such a high position in the hierarchy of the United Nations can only be explained in terms of indigenous ‘special circumstances’. No other vulnerable group has received such treatment from the United Nations or any other international organisation; this can be taken as proof that the international community is willing to accept the special status of indigenous peoples, which could possibly expand into a ‘special’ right of self-determination.

Recognition of indigenous self-determination based on their distinct past may attract more positive responses from the states, mainly because recognising the right on such basis avoids opening the floodgates for other groups’ claims to self-determination. However, another element of this approach – also attractive to some states – is the vague nature of what is offered. It is not clear what this ‘special’ right would entail. Would it add to the existing status of indigenous peoples or would it be just a gesture of goodwill with no real substance? Would this right allow for more participation and indigenous control over matters that affect them? When indigenous peoples invoke such a general right as self-determination, ‘they inevitably take on board its non-indigenous dimensions’.\(^{320}\) The concept cannot have one meaning for all peoples and another for indigenous peoples. Also, this tactic would again isolate indigenous peoples from the ‘peoples’ of Article 1 of the International Covenants. However, indigenous peoples partly ask for indigenous self-determination as a recognition that they are ‘peoples’ like all other beneficiaries of Article 1 of the International Covenants, as a matter of equality. Recognising them as ‘a special case’ goes against this. Brownlie on the other hand makes the opposite argument: he maintains that this approach ‘smacks of nominalism and a sort of snobbery’.\(^{321}\)

If the current provisions on self-determination do not get eventual support in the General Assembly, the only other realistic option would be the inclusion in the text of guarantees that indigenous self-determination will not lead to secession. Canada stated in 2001 that they ‘accepted a right of self-determination for indigenous peoples which respected the political, constitutional and territorial integrity of democratic states’\(^{322}\) and the Russian Federation noted that ‘his delegation had no difficulties in accepting the right of self-determination, although
exercise of that right must be subject to the territorial integrity of states. In 2003, several states also indicated that they would agree with the inclusion of the right to self-determination in the draft Declaration provided there was an explicit reference to territorial integrity. Such an inclusion might speed the adoption of the Declaration by the General Assembly. Even though international standards can be interpreted as allowing indigenous self-determination, there is no doubt that the adoption of the draft Declaration with the inclusion of a provision on indigenous self-determination will be a major step towards the realisation of indigenous self-determination both at the domestic and the international level.

Notes

2. Ibid., para. 72.

15. Article 5.1 of the ICCPR reads:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.


25. The Belgian delegate stated in the Fourth Committee that ‘similar problems’ to the overseas colonies ‘existed wherever there are under-developed ethnic groups... in America as well as in Asia or Africa.’ He observed that
'more than half the sixty members of the United Nations had backward indigenous peoples in their territories', although only eight had admitted to be administering states under chapter eleven. See 7 UNGAO C.4 (253rd meeting), UN Doc. A/2361 (1952), 22–3.

26. The Belgian view could be interpreted as a means to protect Belgium’s interests in the Belgian Congo. It was a response to the criticisms by the developing states about the exploitation of the natural resources of the colonies. Belgium at the time was exploiting Congo’s natural resources, mainly the copper of Katanga. If Belgium enabled Katanga to secede from a possibly independent Congo, then, they could still exploit the copper of Katanga. See P. Thornberry, ‘Self-Determination, Minorities, Human Rights: A Review of International Instruments’ (1989) 38 International and Comparative Law Quarterly 867–89 at 874.

27. See UN GAOR, Official Record of the General Assembly, 7th session, 4th Committee, 55.


38. S. J. Anaya, ‘Canada’s Fiduciary Obligations Toward Indigenous Peoples in Quebec under International Law in General’ in S. J. Anaya, R. Falk and D. Pharand (eds.), Canada’s Fiduciary Obligation to Aboriginal Peoples in the Comment of Accession to Sovereignty to Quebec, Papers prepared as part of the Research Program of the Royal Commission on Aboriginal Peoples, (Canada: Minister of Supply and Services Canada, 1995), p. 22.
43. Para 56.
44. UN ESCOR, 137 UN Doc E/CN.4/Sub.2/404, (vol. 1).
45. Ibid., para. 279.
52. Such as UNGA Resolutions 421 (V) of 4 December 1950, Res. 545 (VI) of 5 February 1952, Res. 637 (VII) of 16 December 1952, Res. 567 (VI) of 18


63. Paragraph 7 of the chapter on ‘The Principle of Equal Rights and Self-Determination of Peoples’. Other similar Declarations followed, such as UNGA resolution 3103 (XXVIII), adopted on 12 December 1973, entitled ‘Basic Principles of the Legal Status of the Combatants struggling Against Colonial and Alien Domination and Racist Regimes’.

64. Spiry, ‘From Self-Determination’, 135.

65. Conference on Security and Cooperation, Final Act, 1 August 1975, 14 ILM 1292.


71. Ibid., pp. 78–9.

72. The Vienna Declaration and Program of Action was the outcome of the (1993) Second World Conference on Human Rights, where 180 States participated and hundreds of non-governmental organisations attended. The Vienna Declaration and Programme of Action has been published by the United Nations Department of Public Information, Doc. DPI/1394–39399, August 1993.

73. The Declaration recognised:

the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realise their inalienable right of self-determination. The World Conference on Human Rights considers the denial of self-determination as a violation of human rights and underlines the importance of the effective realisation of this right.
74. Article 1.3 reads:

In accordance with the 1970 Declaration on principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, this [the right to self-determination] shall not be construed as authorising or encouraging any action which could 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 peoples belonging to the territory without distinction of any kind.

75. The General Recommendation was adopted by the Committee at the 1147th meeting, on March 1996, CERD/C/49/CRP.2/Add.7 (1996).

76. Ibid.


80. ‘Expert opinions accompanying the Amicus Curiae’s Factum’ in Bayevsky, Quebec and Lessons Learned, pp. 69–50; especially G. Abi-Saab at p. 74; T. M. Franck at p. 83; A. Pellet at pp. 91, 122; M. N. Shaw at pp. 138, 144.

81. Except Bangladesh, see below.

82. Crawford, ‘State Practice and International Law’.


87. Rather than based on a majority vote of the population of a given subdivision or territory.


90. Ibid.


107. Scheinin, ‘What are Indigenous Peoples?’.


110. Ibid.


112. Pentassuglia uses the example of Kosovo and the uncertainty of the use of remedial secession in the case of Bangladesh to conclude that the right of secession does not exist, even in its remedial form. However, he does refer to indigenous self-determination as a special case. G. Pentassuglia, *Minorities in International Law* (Strasbourg: Council of Europe, 2002), pp. 165–6.


116. See Draft Report of Commission Working Group, UN Doc. E/CN.4/1995/WG.15/CRP.4 (1995), para. 13, where it is stated that ‘many governments were of the view that article 3 went beyond existing international and national law and practice in that self-determination had to be placed in the historical context of decolonisation’.


Three years earlier, in 1962, the General Assembly had established a Special Committee on the Situation with regards to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, charged mainly with reporting and making recommendations but also with visiting areas of concern. GA Resolution 1541, UN GAOR, 15th Session, Supplement no. 16, at 29, UN Doc. A/4651 (1960).

Resolution 2131 (XX) of 21 December 1965.


GA Res. 2526, UN GAOR, 25th Sess., Supp. 28 (1971), 9 ILM 1292. Also see the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, which was in the same spirit.

Principle VIII of the Principles Guiding Relations between Participating States.


137. The Vienna Declaration and Program of Action was the outcome of the (1993) Second World Conference on Human Rights, where 180 states participated and hundreds of non-governmental organisations attended.

138. CERD/C/49/CRP.2/Add.7, General Recommendation, adopted by the Committee at the 1147th meeting, on March 1996.


142. Ibid.

143. Ibid, 69–73.


148. Ibid.


158. Thornberry, ‘Self-Determination and Indigenous Peoples’, p. 49. States including Bangladesh, Japan and India have therefore asked for the definition of the right to self-determination.


162. Thornberry, Indigenous Peoples, p. 133.


172. As used by Alfredsson, ‘Different Forms of Self-Determination’.


175. Statement made on 8 December 1998 by the Peruvian representative to the fourth session of the United Nations working group on the draft Declaration on the rights of indigenous peoples (on file with the author).


181. Ibid.

182. Ibid., p. 25.

184. Ibid., p. 829.
186. Ibid., p. 27.
188. Ibid.
189. Ibid.
192. Section VIII of the Declaration.
197. See, for example, Tomuschat, Modern Law of Self-Determination.
205. Ibid.
206. Ibid., p. 243.
207. Ibid., p. 247.
209. Ibid., para. 4.
211. Ibid., pp. 106–7.
212. The trend of the 1980s and 90s moved 81 states to democratise, yet, only 47 are now considered fully democracies: Human Development Report 2002.


215. Article 6 (1). Article 7 TEU sets out a procedure for dealing with any serious and persistent breach by the member state of the principles of Article 6.

216. According to the Charter of Paris, the participating states have agreed to ‘build, consolidate and strengthen democracy as the only system of government of our nations’ and to ‘co-operate and support each other with the aim of making democratic gains irreversible’: CSCE Charter of Paris for a New Europe (1990) 30 ILM (1991) 190.

217. Among several references to democracy, paragraph 9 of the Harare Declaration pledges the states and the Commonwealth to concentrate on the protection and promotion of democracy and democratic processes.


222. Habermas understands democracy as a free association of equal citizens who engage in a rational discussion on political issues, presenting options and seeking a consensus on what is to be done: J. Habermas, Between Facts and Norms (Cambridge, Mass: MIT Press, 1996).


225. UN Declaration on Friendly Relations, GA Res. 2625 (XXV) 24 October 1970.


227. The UN Commission on Human Rights has concluded that the creation of the conditions for a democratic system of government are ‘essential for the prevention of discrimination and the protection of minorities’: ‘Ways and means of overcoming obstacles to the establishment of a democratic society and requirements for the maintenance of democracy’, adopted 7 March 1995, E/CN.4/RES/1995/60, Preamble.
228. See the OSCE Guidelines to assist national minority participation in the electoral process, www.osce.org/odihr/documents/guidelines/gl_nmpa_eng.pdf. See also the CSCE Copenhagen document, which provides that ‘questions relating to national minorities can only be satisfactorily resolved in a democratic political framework’: Copenhagen Meeting of the Human Dimension (1990) 29 ILM 1318, para. 30


236. Ibid.

237. HRC General Comment on Article 25 (1999).


240. Article 2(3) of the United Nations Declaration on the Rights of Members belonging to National or Ethnic, Religious and Linguistic Minorities.


244. Article 6(a) states:

In applying the provisions of the Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative measures which may affect them directly.
245. Article 7.
247. Ibid.
252. Paragraph 35.
258. As quoted in Heintze, ‘International Law and Indigenous Peoples’, 47.
259. For more information on Nunavut see: J. Dahl, J. Hicks and P. Jull (eds.), Nunavut – Inuit Regain Control of their Lands and their Lives (Copenhagen: IWGIA, 2000).


279. See Statement of the Four Directions Council distributed during the 1995 Commission Working Group, on file with the author.

280. Daes in Explanatory Note concerning the draft Declaration, para. 28.


289. Ambassador Ted Moses has been representing the Grand Council of the Cree, see www.gcc.ca/gcc/intrelations.php.
294. Article 1. In 1995, an important additional protocol was added to the Madrid Convention. For cross-border cooperation, see F. Palermo and J. Woelk, ‘Cross-border Cooperation as an Indicator for Institutional Evolution of Autonomy: The case of Trentino–South Tyrol’, in Skurbaty, One-Dimensional State, pp. 277–304.
297. Ibid.
300. Bayefsky, Quebec and Lessons Learned.
302. Concluding Observations of the Human Rights Committee, Canada, UN Doc. CCPR/C/79/Add.105(1999), paras 4, 7 and 8; also Norway, UN Doc.
CCPR/C/79/Add.112 (1999), paras. 16 and 17; also Mexico, UN Doc. CCPR/C/79/Add.109, para. 19; and Australia, UN Doc. CCPR/CO/69/AUS (2000), para. 506.


306. Ibid., para. 317.


309. Ibid., para. 67.

310. Ibid., para. 70.


312. Ibid., para. 70.


317. Ibid., 162–3.


323. Ibid., para. 61.