The right to ongoing self-determination: creating a standard for mitigating the adverse effects of how international law distributes and authorises the exercise of sovereignty

The Right to Ongoing Self-Determination: creating a standard for mitigating the adverse effects of how international law distributes and authorises the exercise of sovereignty

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The author, John Dylan van Houcke, declares that the work presented in this thesis is his own.

In this thesis, I will provide an interpretation of the right to ongoing self-determination as a standard that can be used to mitigate the adverse effects of how international law both distributes sovereignty and authorises the exercise of sovereignty by states. From an examination of both the civil and political dimension and the economic, social and cultural dimension of the ongoing self-determination right of peoples to freely pursue their economic, social and cultural development, I will establish that *all peoples* have the right to 1) pursue their development by means of policies they choose in a manner that is free from external interference and manipulation or undue influence by their domestic states, and 2) through their participation in, contribution to, and enjoyment of development. I will base these findings on the argument that the ongoing self-determination right of peoples to freely pursue their development is best understood as a manifestation of the totality of civil, political, economic, social and cultural rights. Furthermore, I will establish that that the ongoing self-determination right of peoples to freely dispose of their natural wealth and resources provides that *all peoples* have the right to both benefit from the exploration, development and disposition of their territory's natural resources and exercise control of such exploration, development and disposition of their natural wealth and resources without external interference and manipulation or undue influence by their domestic states. I will examine the ongoing self-determination rights of both the 'entire populations' of sovereign states and non-self-governing territories and of 'subpopulation groups'. This will include an analysis of the method by which the ongoing self-determination rights of subpopulation groups whose status as peoples has been recognised by international law is balanced with the ongoing self-determination rights of the 'entire population' to which they belong.

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Introduction

"[A]t every stage of history our concern must be to dismantle those forms of authority and oppression that survive from an era when they might have been justified in terms for the security or survival or economic development, but now contribute – rather than alleviate – material and cultural deficit".[1]

In this thesis, I will analyse right to self-determination and its role within international law in general and human rights law in specific with the aim to establish a contemporary standard for mitigating the adverse effects of how international law distributes and authorises the exercise of sovereignty. In the first chapter, I will examine the development of self-determination as a legal right. Firstly, this will include with an analysis of 1) the principle of self-determination and equal rights as codified by the Charter of the United Nations of 1945 ("UN Charter"), 2) the development of self-determination as a rule of customary international law, 3) the codification of the right to self-determination of peoples in the International Covenant on Economic, Social and Cultural Rights of 1966 ("ICESCR") and its twin the International Covenant on Civil and Political Rights of 1966 ("ICCPR"), and 4) the codification of the right to self-determination of peoples in the African Charter on Human and Peoples' Rights ("African Charter"). Secondly, from my analysis, I will establish how the development of the right to self-determination passed through several phases with their own driving forces and that these phases all added their own characteristics to the right to self-determination as we know it today. This will show how the right to self-determination started as a right of sovereign member states of the United Nations and development into a right of *all* peoples, which came to include not just the population of sovereign states and non-self-governing territories as a whole ("entire populations") but also specific subsections of these populations ("subpopulation peoples"). Moreover, it will also show how this development shifted the emphasis away from the external dimension of the right – the relationship between peoples and foreign states – towards its internal dimension – the relationship between peoples and their own state. Finally, I will show how this development influenced the theoretical approaches to the right to self-determination. This will include an analysis of the internal-external dichotomy approach that divides self-determination into a 'right to internal self-determination' and a 'right to external self-determination' and the alternative approach that divides self-determination into a 'right to

[1] Noam Chomsky, *On Anarchism* (Penguin 2014) 2.

constitutive self-determination' – the right of peoples to freely determine their political status – and a 'right to ongoing self-determination' – the right of peoples to freely pursue their economic, social and cultural development and freely dispose of their natural wealth and resources. I will explain why I have chosen to adopt the latter approach for my thesis. Moreover, I will show how the relationship between the right to self-determination and sovereignty changed by the different phases that the development of the right went through. Finally, I explain that I have chosen to focus on the right to ongoing self-determination because 1) I believe that the right to ongoing self-determination is the more relevant of the two self-determination rights in the post-colonial context, and 2) because I believe that the different methods by which constitutive self-determination can be exercised are not a goal by themselves but a means to enable peoples to freely exercise their ongoing self-determination rights.

The thread throughout the second, third, fourth and fifth chapter of thesis will be an analysis of how to interpret the term 'freely' in the ongoing self-determination rights of peoples to 1) *freely pursue* their economic, social and cultural development, and 2) *freely dispose* of their natural wealth and resources. This will include both an examination of 1) the relevant treaty provisions according to the rules of treaty interpretation set out by the Vienna Convention on the Law of Treaties of 1969 ("Vienna Convention") and the way the interpretation of these provisions has changed over the years, and 2) the interpretation of the customary international legal right to self-determination. I will argue that the inclusion of 'freely' in the right to self-determination establishes that the pursuit of economic, social and cultural development of peoples should be free from 1) external interference by foreign states, 2) civil and political obstacles to the ability of peoples to pursue the development of their choice, and 3) economic, social and cultural obstacles to the ability of peoples to pursue the development of their choice. In other words, I will argue that the right to ongoing self-determination includes the right of peoples to freely pursue their economic, social and cultural development by freely participating in, contributing to, and enjoying all aspects of the civil, political, cultural, social, economic and public life of their state. In the second chapter, I will examine the civil and political dimension of the right to ongoing self-determination of entire populations. This chapter will build upon Antonio Cassese's view that internal self-determination is a manifestation of the totality of all rights included in the ICCPR.[2] In this chapter, I will argue that the civil and political dimension

[2] See, Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 52–66.

of the right to ongoing self-determination includes the right of entire populations to 1) pursue their development free from external interference, including the interference of foreign states, and 2) pursue their development in a manner that respects the will of the population by the policies of their choice. I will argue that this latter aspect of the civil and political dimension of the right to ongoing self-determination is the foundation of a right to a democratic system of governance that is both representative and participatory.

In the third chapter, I will analyse the civil and political dimension of the right to ongoing self-determination in relation to distinct subsections of the population of a state as a whole ("subpopulation groups"), including those whose status as 'peoples' have been provided by international law ("subpopulation peoples"). The starting point of this chapter will be the argument, made by the former president of the International Court of Justice ("ICJ") Judge Rosalyn Higgins in the last decade of the previous century, that it is no longer necessary to answer the difficult question of whether a particular subpopulation group is a people for purposes of the right to self-determination because all members of subpopulations groups are the holders of the right of self-determination as members of the entire population.[3] As I will establish, in time since Higgins made this argument, indigenous peoples have been acknowledged as subpopulation groups with the right to self-determination. In order to determine the validity of Higgins' argument in contemporary international law, I will juxtapose the ongoing political self-determination rights of indigenous peoples with those of other subpopulation groups whose status as peoples has not been recognised. I will establish that the civil and political dimension of the right to ongoing self-determination provides subpopulation peoples with a more extensive right to self-determination than other subpopulation groups. Whereas this dimension of the right to self-determination of entire populations provides *all subpopulation groups* with the right to freely participate in the exercise of the entire population to which they belong of its right to freely pursue its development, this civil and political dimension provides *subpopulation peoples* with another pillar on which their self-determination rights are build. Namely, subpopulation peoples also have the right to freely pursue their own economic, social and cultural development distinct from the entire population to which they belong. I will show that this right is not absolute and clarify the way by which the international human rights framework has balanced the civil and political dimension of the

[3] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995) 124.

right to ongoing self-determination of subpopulation peoples with this dimension of the right to ongoing self-determination of the entire peoples to which they belong.

In the fourth chapter, I will analyse the social, economic and cultural dimension of the right to self-determination. I will argue that, if it is accepted that the civil and political dimension of the right to ongoing self-determination is a manifestation of the totality of civil and political rights, it should equally be recognised that the socio-economic dimension of the right to ongoing self-determination is also a manifestation of the totality of economic, social and cultural rights. This argument is based upon the idea that in order for peoples to freely pursue their economic, social and cultural development they should not only be able to pursue their development according to the policy they have freely chosen but also be able to pursue such development by their participation in, contribution to, and enjoyment of such development. In relation to this issue, I will examine the relationship between the socio-economic dimension of the right to self-determination and the right to development. I will show that whereas it is generally accepted that the right to self-determination is a prerequisite for the right to development, an argument can be made that the right to development should not be viewed as a distinct right but instead a delineation of duties that correspond to the right to ongoing self-determination in general and its socio-economic dimension in specific. Interpreted in this manner, the right to development provides guidance on how states should fulfil their obligations in relation to the right to self-determination. Conversely, this establishes that the right to development should be interpreted in a manner that corresponds with the obligations of states in relation to the right to self-determination. I will examine how 1) the internal dimension of the right to development provides guidance on the actions that states should undertake in order to remove obstacles to the development of their own population, and 2) the external dimension of the right to development provides guidance on the actions states should take in order to exercise their obligation to promote the realisation of the right of self-determination of all peoples, which is provided for by the provisions on the right to self-determination of peoples in the Twin Covenants.

In the fifth and final chapter, I will analyse the second ongoing self-determination right of peoples to freely dispose of their natural wealth and resources and its relationship with the principle of permanent sovereignty over natural wealth and resources. Once again, this includes an examination of the interpretation of ‘freely’. I will argue that, as a consequence of the fact that this ongoing self-determination right should be interpreted in manner consistent with the

self-determination right of peoples to freely pursue their development, the inclusion of 'freely' in this second ongoing self-determination right provides peoples should be able to dispose of their natural wealth and resources 1) without external interference, 2) without obstacles put in place by an international economic order that restricts the ability of peoples to dispose of their natural wealth and resources in a manner of their choice, 3) through a free, informed and genuine democratic process, and 4) without being subjected to restrictions arising out of international economic co-operation and international law that have come into existence without such a free, informed and genuine democratic process. The last point relates to the 'limitation clause' that is included in the treaty provision on the right of peoples freely dispose of their natural resources, which establishes that this right should be exercised without prejudice to obligations arising out of international economic co-operation and international law. I will argue that this limiting clause only applies to obligations that have come into existence in a manner consistent with the civil and political dimension of the right to ongoing self-determination.

Chapter 1 – The development of the right to self-determination

In this chapter, I will provide an overview of the development of self-determination as customary rule of international law and a human right codified by treaty law. I examine whether the principle of equal rights and self-determination of peoples included in the UN Charter was the first time a right to self-determination of peoples was codified in international law or if it was solely intended to bestow a right of independence and equal rights of the already sovereign member states of the United Nations. I will analyse how the principle of equal rights and self-determination has developed by examining the relevant General Assembly resolutions, judgements and Advisory Opinions of the International Court of Justice and scholarship. This will include an analysis of the role the development of the human right to self-determination, which was codified in the ICESCR and the ICCPR, in the development of principle of equal rights and self-determination. Furthermore, I will analyse what the driving force behind these developments was and how this development passed through several phases that all added a distinct character to the right to self-determination. Firstly, the phase that was primarily influenced by the issue of decolonisation and added colonial peoples as the beneficiaries of the right to self-determination. Secondly, the phase that expanded the group of beneficiaries with the populations of sovereign states. Finally, the phase that was greatly influenced by the development of the right of indigenous peoples which added these peoples as beneficiaries of the right to self-determination. I will examine how these developments shifted the emphasis of scholarship, and other commentary, on the right to self-determination from its external dimension to its internal dimension. After the overview of the development of the right to self-determination, I will set out the theoretical framework that will provided the foundation of the interpretation of the right to self-determination that I will establish in this thesis. This will include an examination of the internal-external dichotomy approach that divides self-determination into a 'right to internal self-determination' and a 'right to external self-determination' and the alternative approach that divides self-determination into a 'right to constitutive self-determination' and a 'right to ongoing self-determination'. It will also include an examination of the changing relationship between the right to self-determination and state sovereignty under international law.

The principle of equal rights and self-determination in the UN Charter

The principle of self-determination was first codified in international law by the UN Charter. The idea to include a provision on the principle of self-determination in the UN Charter was suggested by the Soviet Union at the United Nations Conference on International Organization in San Francisco. This proposed provision stated that one of the goals of the United Nations was to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".[4] This provision was later adopted as Article 1(2) of the UN Charter.[5] There has been some debate on whether the principle of equal rights and self-determination of peoples provided by Article 1(2) was a legal right.[6] However, as mentioned by Judge Ammoun in his separate opinion in the *Barcelona Traction* case,[7] its status as a right was clearly presented in the French version of the text.[8] In the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations of 1970 ("Declaration on Friendly Relations"), the General Assembly stated that principle of equal rights and self-determination of peoples is of "paramount importance for the promotion of friendly relations among states, based on respect for the principle of sovereign equality".[9] It also stated that by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development".[10] This statements reflects the right to self-determination as we know it today.

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[4] Bill Bowring, *The Degradation of the International Legal Order?* (Routledge-Cavendish 2008) 31.

[5] Charter of the United Nations 1945, Article 1: 'The Purposes of the United Nations are: [...] 2] To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'.

[6] See, E Rodríguez-Santiago, 'The Evolution of Self-Determination of Peoples in International Law' in FR Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 217–218.

[7] *Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports 1970, p 3, Separate Opinion of Judge Ammoun, p 286*, p 311, para. 19.

[8] Charter of the United Nations 1945 (n 5) (French version), Article 1(2): Développer entre les nations des relations amicales fondées sur le respect du principe de l'égalité de droits des peuples et de leur droit à disposer d'eux-mêmes".

[9] UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV).

[10] ibid.

According to Rosalyn Higgins, the former president of the International Court of Justice, the right to self-determination as a right of all peoples to freely determine their political status and freely pursue their economic, social and cultural development was not provided for by the UN Charter and "[t]he common assumption that the UN Charter underwrites self-determination in the current sense of the term is in fact a retrospective rewriting of history".[11] She argued that in 1946 the focus was on the rights of sovereign member states. Higgins observed that the coupling of 'self-determination' and 'equal rights' in Article 1(2) cannot be ignored as it was the equal rights of states that the UN Charter provided for.[12] This argument was also put forward by Elizabeth Rodríguez-Santiago who stated that the principle of self-determination and equal rights was nothing more than a reference to the respect of the principle of state sovereignty and that the term peoples in Article 1(2) of the UN Charter should be understood as a synonym of states. To substantiate her argument, Rodríguez-Santiago observed that the French version of the text refers to the principle of equal rights of peoples and *their* right to self-determination. According to Rodríguez-Santiago this proves that Article 1(2) refers to the equal rights among the members states of the UN and the right of those member states to self-determination.[13] Furthermore, from his analysis of the preparatory works of the UN Charter, also Cassese concluded that the principle of self-determination in Article 1(2) was only intended for the member states of the UN and did not mean to provide 1) a right to secession of minority or ethnical or national groups, 2) a right to independence of colonial peoples, or 3) a right to freely choose the rules through elections.[14]

The development of the right to self-determination as a right of all peoples to freely determine their political status and freely pursue their economic, social and cultural development happened in the decades subsequent to the adoption of the UN Charter. The first phase in this development linked the right to self-determination to the framework on non-self-governing territories created by the UN Charter. Whereas the UN Charter did create the specific obligation for the administering powers of non-self-governing territories "to develop self-government and

[11] R Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1996) 111–112.
[12] ibid 112.
[13] Rodríguez-Santiago (n 6) 217–218.
[14] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 37–42.

to assist them in the progressive development of their free political institutions",[15] the UN Charter did not establish a relationship between the principle of equal rights and self-determination and non-self-governing territories. Indeed, there is no mention of the principle of self-determination in Chapters XI and XII of the UN Charter, which deal with non-self-governing territories and the international trustee system. Elizabeth Rodríguez-Santiago argued that "Chapter XI was never intended to recognize the self-determination right of the peoples of the non-self-governing territories".[16] Again, she substantiated this argument by pointing to the French version of the text, which refers to the inhabitants of non-self-governing territories as populations instead of as peoples.[17] The principle equal rights and self-determination included in Article 1(2) of the UN Charter did not create a right to self-determination for *all peoples* nor did it create such a right for the peoples of the non-self-governing territories. Instead, Article 1(2) only regulated the relationship between sovereign states.

The General Assembly Resolutions and the development of customary law

In 1952, the General Assembly adopted its resolution on 'the right of peoples and nations to self-determination' ("GA Resolution 637 (VII)"), in which it recommended that "[t]he States Members of the United Nations shall recognize and promote the realization of the right of self-determination of the peoples of Non-Self-Governing and Trust Territories who are under their administration".[18] In the years following the adoption of this resolution, the General Assembly adopted a number of resolutions recalling GA Resolution 637 (VII). This resulted in the reinterpretation of the principle of equal rights and self-determination set out in Article 1(2) of the UN Charter from a right of sovereign states to a right of peoples.[19] In 1960, the General

[15] Charter of the United Nations 1945 (n 5), Article 73(b): 'to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement'.
[16] Rodríguez-Santiago (n 6) 219.
[17] ibid 219–220.
[18] UN General Assembly, The right of peoples and nations to self-determination, 16 December 1952, A/RES/637, para. 2: 'The States Members of the United Nations shall recognize and promote the realization of the right of self-determination of the peoples of Non-Self-Governing and Trust Territories who are under their administration and shall facilitate the exercise of this right by the peoples of such Territories according to the principles and spirit of the Charter of the United Nations in regard to each Territory and to the freely expressed wishes of the peoples concerned, the wishes of the people being ascertained through plebiscites or other recognized democratic means, preferably under the auspices of the United Nations'.
[19] Rodríguez-Santiago (n 6) 222.

Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples ("Declaration on Decolonisation"), in which it declared that "[a]ll 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".[20] This expanded the beneficiaries of the right to self-determination to all colonial peoples that had not yet attained independence.[21] In the same year, the General Assembly adopted Resolution 1541 (XV) in which it established that non-self-governing territories could exercise their rights under the UN Charter by 1) emergence as a sovereign independent state, 2) free association with an independent state, and 3) the integration with an independent state.[22] Combined, the Declaration on Decolonisation and GA Resolution 1541 (XV) established a link between the principle of equal rights and self-determination and the right of colonial peoples to freely determine their political status by one of the three methods set out in the latter resolution.

As observed by Cassese, achieving political independence soon turned out to be only one step towards real independence for colonial countries. Within the United Nations, the issue arose how the rights claimed by these newly independent states related to their natural wealth and resources.[23] The General Assembly adopted a number of resolutions in relation to the natural resources of peoples, which resulted in the development of the principle of permanent sovereignty over natural wealth and resources. As observed by Antony Anghie, the idea of permanent sovereignty over natural wealth and resources "was closely tied to the concept of self-determination, which in itself suggests the close links between political sovereignty and economic sovereignty".[24] In GA Resolution 1314 (XIII) of 1958, the General Assembly established the Commission on Permanent Sovereignty over Natural Resources and instructed it to conduct a survey of the status of permanent sovereignty as a basic constituent of the right

[20] UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, A/RES/1514(XV), para. 2.
[21] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p 16*, p 31 para. 52.
[22] UN General Assembly, Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, 15 December 1960, A/RES/1541.
[23] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 99.
[24] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 211.

to self-determination.[25] As will be discussed in the fifth chapter of this thesis, the fact that both the principle of state sovereignty and the self-determination of peoples were promoted as the basis for the principle of permanent sovereignty created a certain ambiguity on who the beneficiaries of the right to permanent sovereignty are. However, in its Declaration on the Permanent Sovereignty over Natural Resources of 1962 ("Declaration on Permanent Sovereignty"), the General Assembly declared that the right to permanent sovereignty is a right of peoples that must be exercised in the interest of the national development and the well-being of the peoples.[26]

Gradually, the attention shifted away from the subject of decolonisation. In its Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States of 1970 ("Declaration on Friendly Relations"), the General Assembly reiterated the self-determination rights of colonial peoples established by the above discussed resolutions. However, the main object of the Declaration on Friendly Relations was the relations among sovereign states.[27] The General Assembly declared that all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations.[28] Therefore, it did not limit the beneficiaries of this self-determination right to colonial peoples but also included the peoples from sovereign states among its beneficiaries. The most important contribution the Declaration on Friendly Relations made to the development of self-determination as a rule of customary law is the statement by the General Assembly that nothing in the preceding paragraphs on the principle of self-determination

> "shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and

[25] UN General Assembly, Recommendations concerning international respect for the right of peoples and nations to self-determination, 12 December 1958, A/RES/1314 (XIII).
[26] UN General Assembly, Permanent sovereignty over natural resources, 14 December 1962, A/RES/1803 (XVII), para. 1: 'The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned'.
[27] Rodríguez-Santiago (n 6) 224.
[28] UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV) (n 9).

> independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour".[29]

This statement was included to establish a balance between the self-determination right of peoples and the territorial integrity of states. As I will examine in Chapter 3, Cassese has argued that the inclusion of the statement "without distinction as to race, creed or colour" means that these groups are peoples with a possible claim to self-determination if they are denied access to the government.[30] However, this statement could also be interpreted in a way that reflects the idea that the self-determination of 'the whole people belonging to the territory' is violated if a state is not possessed of a government that represents it without such distinction. Either way, the General Assembly acknowledged that the self-determination right of peoples includes obligations of states in relation to the people belonging to their own territory.

More recently, the General Assembly has drawn a connection between the right to self-determination and the rights of indigenous peoples. In the Declaration on the Rights of Indigenous Peoples of 2007 ("Declaration on Indigenous Peoples"), the General Assembly proclaimed that indigenous peoples have the right to self-determination by virtue of which they have the right to freely determine their political status and freely pursue their economic, social and cultural development.[31] However, as observed by Dorothée Cambou,[32] the General Assembly made it clear that this right is only to be exercised within the borders of an existing state by proclaiming that "[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions".[33] Whereas it had

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[29] ibid.
[30] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 108–120.
[31] UN General Assembly, Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295, Article 4: 'Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.
[32] Dorothée Cambou, 'The UNDRIP and the Legal Significance of the Right of Indigenous Peoples to Self-Determination: A Human Rights Approach with a Multidimensional Perspective' (2019) 23 The International Journal of Human Rights 34, 36.
[33] UN General Assembly, Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295 (n 31), Article 4.

already acknowledged that that the self-determination right of peoples includes obligations of states in relation to the people belonging to their own territory in the Declaration on Friendly Relations, the General Assembly now also acknowledged that that the self-determination right of peoples includes obligations of states in relation to specific subsections of the people belonging to their own territory. Thus far, indigenous peoples are the only subpopulation group whose status as peoples with the right to self-determination has been specifically acknowledged by the General Assembly.

General Assembly resolutions are not legally binding. The UN Charter does not grant the General Assembly the power to make legally binding decisions on anything other than the organisational matters included in Article 17.[34] Chapter IV of the UN Charter, in which the functions and powers of the General Assembly are set out, only grants the General Assembly the power to "discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter",[35] to make 'recommendations' on such matters,[36] and to "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations".[37] The ICJ has acknowledged that the 'persuasive force' of General Assembly resolutions is considerable but that they are not binding in law.[38] Yet, GA resolutions are an important factor in the emergence of customary rules of international law, which is included in Article 38 of the Statute of the International Court of Justice includes as one of the forms of international law that will be applied by the ICJ. In the second paragraph customary international law is described as "international custom, as evidence of a general practice accepted as law".[39] This includes two elements. Firstly, evidence

[34] Charter of the United Nations 1945 (n 5), Article 17: '1] The General Assembly shall consider and approve the budget of the Organization. 2) The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly. 3] The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.'
[35] ibid, Article 10.
[36] ibid, Article 10.
[37] ibid, Article 14.
[38] *South West Africa, Second Phase, Judgment, ICJ Reports 1966, p 6* [98]; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949, p 174*.
[39] Statute of the International Court of Justice 1945, Article 38(b).

of general practice, known as 'state practice' or *'usus',* Secondly, the acceptance that such practice is prescribed by law, known as *opinio juris*.

As explained by Cassese, General Assembly resolutions are neither state practice nor *opinio juris.* However, these resolutions relate to both of these elements of customary international law in two important ways. First, in the process of drafting General Assembly resolutions, states express their legal opinions on the matter at hand. Not only does this clarify the legal views of states it could also indicate whether states vote in favour of a particular resolution because they believe doing so is in line with their obligations under international law. Therefore, this establishes both *opinio juris* and state practise. Secondly, after the adoption of a resolution by the General Assembly, generally states gradually adopt attitudes consistent with the included provisions. Therefore, establishing state practise.[40] The importance of General Assembly resolutions for the emergence of customary rules was acknowledged by the ICJ in the Case Concerning Military and Paramilitary Activities in and against Nicaragua when it stated that *"opinio juris* may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of states towards certain General Assembly resolutions".[41] For the above named reasons, an analysis of the relevant GA resolutions should be an important aspect of any examination of self-determination as a customary rule of international law.

The development of the human right to self-determination

In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights ("UDHR"). Latin American states played a key role in debating the provision to be included in the UDHR. In his review of the UDHR, Johannes Morsink showed that John Humphrey – who was appointed to prepare the first draft of the UDHR – included large parts of the proposals by Chile and Panama in his own draft.[42] According to Glendon, Humphrey chose to do so because of the compatibility of these drafts with a broad range of cultures and philosophies represented in the United Nations.[43] Especially the inclusion of economic, social

[40] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 69–70.
[41] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, ICJ Reports 1986, p 14*, at pp. 99–100, para. 188.
[42] Johannes Morsink, *The Universal Declaration of Human Rights: Origins Drafting & Intent* (University of Pennsylvania Press 1999) 131.
[43] Mary Ann Glendon, 'The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea' (2003) 16 Harvard Human Rights Journal 27, 32.

and cultural rights resulted from the active role the Latin American states played in the drafting of the UDHR.[44] However, the influence of these states is also found in the adoption of certain civil and political rights. For instance, the provision in Article 8 on the right to an effective remedy was included after an amendment proposed by Mexico and supported by Chile, Cuba, Uruguay and Venezuela.[45] Even though the principle of self-determination is not specifically referred to in the UDHR, some of the features of the human right to self-determination were already present in Article 21. Firstly, Article 21 includes the statement that the "will of the people shall be the basis of the authority of government".[46] Secondly, it states the necessity of periodic and genuine elections to express the will of the people.[47] Thirdly, it includes a provision on the right of the members of these people to "take part in the government of his country, directly or through freely chosen representatives".[48] In Chapter 2, I will establish that these are now important features of the human right to self-determination.

The right to self-determination as it is understood today was first codified into international law in Article 1 of the ICESCR and its twin the ICCPR. The first paragraph of Common Article 1 replicated the clause on the right to self-determination from the Declaration on Decolonisation by providing that by virtue of their right of self-determination all peoples freely determine their political status and freely pursue their economic, social and cultural development.[49] However, as observed by Cassese, the drafters of Article 1 advanced a broad approach to self-determination that, unlike the doctrine that had developed after the adoption of the UN Charter, did not equate the achievement of independent status by colonial peoples as the final realisation of self-determination. The human right to self-determination does not end with independence and the issue of whether the actions of a government of a sovereign state comply with the rights and obligations established by Common Article 1(1) is a legitimate question.[50]

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[44] Morsink (n 42) 131.
[45] Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001) 162.
[46] Universal Declaration of Human Rights 1948, Article 21.
[47] ibid, Article 21.
[48] ibid, Article 21.
[49] International Covenant on Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights 1966, Article 1(1).
[50] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 55.

The Twin Covenants also adopted the link between the right to self-determination and the right to permanent sovereignty over natural resources that had been developed by the General Assembly in the above discussed resolutions on the issue. In Common Article 1(2), it is provided that all peoples, for their own ends, may freely dispose of their natural wealth and resources.[51] The inclusion of this provision resulted from the argument made by developing countries – especially those that had gained independence through decolonisation – that political independence alone was inadequate if the natural wealth and resources were still under the control of foreign states or entities from such foreign states. This was reflected by the statement by Léopold Sédar Senghor, the first President of the Republic of Senegal, during the negotiations of the Twin Covenants that "legal independence without economic independence is but a new form of dependency, worse than the first because it is less obvious".[52] One of the earliest references to permanent sovereignty over natural wealth and resources was put forward in Chile's proposal, during the eighth session of the Commission on Human Rights, to include permanent sovereignty over natural wealth and resources in the provisions on the right to self-determination of the Twin Covenants.[53] At first Chile's proposal to include a reference to the right to permanent sovereignty in Common Article 1 of the Twin Covenants failed as it "was considered dangerous in that it would sanction unwarranted expropriation or confiscation of foreign property and would subject international agreements and arrangements to unilateral renunciation".[54] However, from their review of the International Covenant on Economic, Social and Cultural Rights, Ben Saul, David Kinley and Jaqueline Mowbray found that the link between permanent sovereignty and the right of peoples to freely dispose of their natural wealth and resources was later revived by the Declaration on Permanent Sovereignty and the addition of Article 25 of the ICESCR and identical Article 47 of the ICCPR later in the drafting of these Twin Covenants.[55] This self-determination right of peoples to freely dispose of their natural

[51] International Covenant on Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights 1966 (n 49), Article 1(2).
[52] Official documents of the General Assembly, Plenary Meetings, 1961, Vol. II, p. 540.
[53] The proposal of Chile stated: 'The right of the peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources. In no case may people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by other states.' in UN Economic and Social Council, 16 April 1952, E/CN.4/L.24.
[54] UN General Assembly Official Records, Agenda Item 28 (Part II), Annexes Tenth Session, New York, 1955, A/2929 15.
[55] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 64.

resources under the provisions of the Twin Covenants and customary international law will be examined in the fifth chapter of this thesis.

The third and final paragraph of Common Article 1 provides for an obligation on state Parties to "promote the realization of the right of self-determination, and [to] respect that right, in conformity with the provisions of the Charter of the United Nations".[56] It includes a, now obsolete, reference to those states Parties that have responsibility for the administration of Non-Self-Governing and Trust Territories.[57] Consequently, the obligation to promote the right to self-determination provided by Common Article 1(3) is largely neglected in the contemporary discourse on the right to self-determination. However, as I will argue in Chapter 4, the obligation to promote the realisation of the right to self-determination itself is not obsolete. It provides an obligation to take positive actions to facilitate the realisation of and respect for the right to self-determination of peoples. Consequently, it provides a legal foundation of provisions included by the General Assembly in its Declaration on the Right to Development ("Declaration on Development"). Conversely, the Declaration on Development provides a framework for the positive actions that states have to take in order to abide by their obligation to facilitate the realisation of and respect for the right to self-determination of peoples.

As argued by Cassese, Common Article 1 of the Twin Covenants did not only codify the right to self-determination into human rights law but also constituted a powerful incentive to the crystallisation of customary rules in relation to self-determination in two ways. Firstly, in the process of negotiating these provisions, "Member States of the United Nations had a chance to voice their views and concerns as well as to react to the statements of other governments".[58] Secondly, when these provisions were adopted, contracting states were "increasingly amendable to the adoption of the course of action dictated by these rules".[59] Therefore, the examination of the right to self-determination under the Twin Covenants should also be an important aspect of any analysis of the principle of self-determination as a customary rule of international law. However, it is important to note that 1) the development of the principle of self-determination as a customary rule of international law did not stop with the codification

[56] International Covenant on Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights 1966 (n 49), Article 1(3).
[57] ibid, Article 1(3).
[58] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 67.
[59] ibid.

of the right to self-determination in the Twin Covenants and 2) the development of the human right to self-determination provided for by Common Article 1 has also continued after the adoption of the Twin Covenants.

An interpretation of the provisions on the right to self-determination in Common Article 1 should start with an analysis of the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose.[60] This should include an examination of the preparatory works of the Twin Covenants in order to confirm the ordinary meaning or to determine the meaning when the ordinary meaning leaves the provision 1) ambiguous or obscure or 2) manifestly absurd or unreasonable.[61] However, human rights treaties are living instruments and in order to interpreted a human rights provision in light of its object and purpose consideration should be provided to the context of the time in which it is interpreted. As observed by Daniel Moeckli and Nigel White, the supervisory bodies tasked with authoritatively interpreting the obligations imposed by human rights treaties have adopted this so-called 'living instrument' method to interpret provisions of these treaties.[62] This includes the Human Rights Committee ("HRC") tasked with the interpretation of the ICCPR, the Committee on the Elimination of Racial Discrimination ("CERD") tasked with the interpretation of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), the Committee on the Rights of the Child ("CRC") tasked with the interpretation of the Convention on the Rights of the Child ("UNCRC").[63] On a regional level, the Inter-American Court ("IACtHR") of Human Rights and the Inter-American Commission on Human Rights ("IACHR") have adopted the living instruments method in their interpretation of the American Declaration of Human Rights ("ADHR").[64] Moreover, the

[60] Vienna Convention on the Law of Treaties 1969, Article 31(1): 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.
[61] ibid, Article 32, Supplementary means of interpretation: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable'.
[62] Daniel Moeckli and Nigel White, 'Treaties as "Living Instruments"' in Michael Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018).
[63] See, ibid 152–154.
[64] ibid 150–152.

European Court of Human Rights ("ECtHR") has also acknowledged that human rights treaties are living instruments that must "be interpreted in the light of present-day conditions" in relation to their interpretation of the European Convention on Human Rights ("ECHR") in *Tyrer v the UK*.[65]

According to Moeckli and White, it seems that the living instrument method of treaty interpretation is covered and even required by these rules of the interpretation of treaties.[66] Article 31(3)(b) of the Vienna Convention on the Law of Treaties provides that, together with the context, there shall be taken into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".[67] According to Moeckli and White, such "subsequent practice may include state practice as well as the practice of supervisory bodies and may be used to establish original or changing intent".[68] This would include the state practice that can be extrapolated from the statements made by states in the process of drafting General Assembly resolutions and the embracing of attitudes and behaviour consistent with the provisions included in these resolutions. Furthermore, if human rights treaties were not treated as living instruments that have to be interpreted with the context of the developing political, economic, social and cultural in mind this would seriously undermine their ability to fulfil their object and purpose.[69]

Just as, as shown above, resolutions by the General Assembly have played a role in the change in how the principle of equal rights and self-determination provided by Article 1(2) of the UN Charter has been interpreted, General Assembly resolutions adopted after the adoption of the Twin Conventions have played a role in the interpretation of the right to self-determination under Common Article 1. Therefore, an examination of all the relevant General Assembly resolutions – both those adopted before and after the adoption of the Twin Covenants – is important for the analysis of both the human right to self-determination provided by the Twin Covenants and the principle of self-determination as a customary rule of international law. These two purposes overlap. In fact, there is no clear distinction between the human right to self-determination and the customary rule of international law. As Matthew Saul observed, this

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[65] *Tyrer v the UK Series A, Vol 26 (1987)* [15–16].
[66] See, Moeckli and White (n 62) 154–160.
[67] Vienna Convention on the Law of Treaties 1969 (n 60), Article 31(3)(b).
[68] Moeckli and White (n 62) 156.
[69] The object and purpose of the ICCPR and ICESCR will be examined in Chapter 1.

is why the HRC "has not attempted, in its pronouncements, to develop Article 1 of the ICCPR as a stand-alone, conventional right to self-determination".[70] Moreover, this is why "scholars and states alike have also made little effort to distinguish between customary and conventional rules of self-determination in their accounts of the law".[71]

The right to self-determination in the International Court of Justice

The International Court of Justice has played an important role in the recognition of self-determination and a principle of customary international law through its judgments in contentious cases and Advisory Opinions.[72] In fact, as observed by Higgins, the ICJ was the forerunner in the recognition of self-determination as a legal right.[73] In 1970, in its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* ("Namibia Opinion"), the ICJ resolved that the development of international law in regard to non-self-governing territories, as enshrined in the UN Charter, subsequent to the adoption of the UN Charter made the principle of self-determination applicable to all territories whose peoples have not yet attained a full measure of self-government.[74] The judges pointed to the adoption of the Declaration on Decolonisation of 1960 as an important stage in that development.[75] As Rodríguez-Santiago stated, "[w]ith this opinion the ICJ recognised the right to self-determination for all peoples, including colonial ones, as well as the normative value of the principles contained in [the Declaration on Decolonisation]".[76] In 1975, the ICJ reiterated their findings from the Namibia case in its Advisory Opinion on the Western Sahara.[77] The ICJ defined self-determination as "the need to pay regard to the freely expressed will of peoples".[78]

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[70] Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 Human Rights Law Review 609, 625.
[71] ibid 625–626.
[72] Rodríguez-Santiago (n 6) 225.
[73] R Higgins, 'The International Court of Justice and Human Rights' in Karel Wellens (ed), *International Law: Theory and Practice: Essays in honour of Eric Suy* (Martinus Nijhoff Publishers 1998) 694.
[74] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16.* (n 21), p 31 para. 52.
[75] *ibid, p 31 para. 52.*
[76] Rodríguez-Santiago (n 6) 226.
[77] *Western Sahara, Advisory Opinion, ICJ Reports 1975, p 12* [54]; See, Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press 2002) 110–167.
[78] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12.* (n 77), p 33, para. 59.

Moreover, it stated that "the application of the right of self-determination requires a *free* and *genuine* expression of the will of the peoples concerned [emphasis added]".[79] However, for the simple reason that it was limited by parameters set out in the questions of the General Assembly,[80] the Court only dealt with the right of peoples to freely determine their political status. Consequently, in both the *Namibia* as the *Western Sahara* advisory opinions and did nothing to clarify the other aspects of the right.

In 1995, the ICJ agreed with the assertion made by the applicant Portugal in the Case Concerning East Timor (Portugal v. Australia) ("East Timor case") that the principle of self-determination is one of the essential principles of contemporary international law and that the *erga omnes* character of the right of peoples to self-determination was beyond reproach.[81] In 2004, the ICJ followed its own jurisprudence on the *erga omnes* character of the right to self-determination in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ("Wall case").[82] Only a select group of obligations under international law have such an *erga omnes* character. In the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) ("Barcelona Traction case"), the ICJ explained that *erga omnes* obligations are those obligations that *by their very nature* are the concern of all states and that *in light of their importance* all states can be held to have a legal interest in their protection.[83] Consequently, a violation of the right to self-determination of any people could be brought before the ICJ by any state, without this state having a particular relationship to people in question.

In his separate opinion to the Barcelona Traction case, Judge Fouad Ammoun argued that that the right to self-determination not only as an *erga omnes* but also has a *jus cogens* character.[84]

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[79] ibid, p. 33, para. 55.
[80] See, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16.* (n 21) para 1; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12.* (n 77), p 14, para. 1.
[81] *East Timor (Portugal v Australia), Judgment, ICJ Reports 1995, p 90* [29].
[82] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p 136* [156].
[83] *Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports 1970, p 3* [33].
[84] See; *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 3, Separate Opinion of Judge Ammoun, p. 286* (n 7) 305; See also, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*

As explained by Ian Brownlie, rules of international law with a *jus cogens* character are peremptory norms of general international law that are hierarchically superior to other rules of international law.[85] In Article 53 of the Vienna Convention it is stated that

> "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[86]

If a treaty is entered into in violation of a *jus cogens* rule this treaty is null and void.[87] According to Saul, the question whether the right to self-determination is such a peremptory norm has yet to be settled.[88] The ICJ has not explicitly recognised the principle of self-determination as a *jus cogens.* However, in the separate opinion in the *Armed Activities on the Territory of the Congo case,* Judge Dugard named the *East Timor case* as an example of a case where the ICJ did not invoke a norm of *jus cogens* where it could have.[89] Moreover, as observed by Rodríguez-Santiago, some authors have argued that its status as *jus cogens* was implied in the ICJ's reference to the *erga omnes* right in the East Timor case and the Wall case.[90] Indeed, many scholars argue that the right to self-determination is in fact such a peremptory norm of international law.[91] However, as long as the ICJ has not explicitly declared the right to self-determination to be jus cogens, it will likely remain a topic of debate.

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notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p 16, Separate Opinion of Judge Ammoun, p 67 77–78.

[85] Ian Brownlie, *Principles of Public International Law* (Clarendon P 1966) 483–486.

[86] Vienna Convention on the Law of Treaties 1969 (n 60), Article 53.

[87] ibid, Article 53: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'.

[88] Saul (n 70) 634–641.

[89] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, p 6, Separate Opinion of Judge Ad Hoc Dugard, p 86* 90.

[90] See, Rodríguez-Santiago (n 6) 230; Brian Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press 2010) 38–29.

[91] See, Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 170–174; Héctor Gross-Espiell, 'Self-Determination and Jus Cogens' in Antonio Cassese (ed), *UN Law, Fundamental Rights: Two Topics in International Law* (Sijthoff & Noordhoff 1979) 167; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2006) 51; Vladyslav Lanovoy, 'Self-Determination in International Law: A Democratic Phenomenon or an Abuse of Right?' (2015) 4 Cambridge Journal of International & Comparative Law 388, 390; Glen Anderson, 'Unilateral Non-Colonial Secession and Internal

In 2010, the ICJ was once again called upon to reflect upon the principle of self-determination. In its Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* ("Kosovo case"), the ICJ was asked by the General Assembly if the unilateral declaration of independence of Kosovo was in accordance with international law.[92] The ICJ noted that a number of participants in the proceedings had claimed that the population of Kosovo had "the right to create an independent State either as a manifestation of a right to self-determination or pursuant to what they described as a right of 'remedial secession' in the face of the situation in Kosovo".[93] However, the ICJ did not find it necessary to address the question whether the declaration of independence was a legal exercise of the right to self-determination "outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation".[94] This decision has been criticised by scholars as a failed opportunity.[95] The reasoning of the ICJ was that the General Assembly had only requested its opinion on whether the declaration of independence was in accordance with international law. Their interpretation of this question was whether international law prohibits such a declaration instead of whether Kosovo had a right to make such a declaration.[96] It concluded that that general international law contains no prohibition of declarations of independence.[97] However, according to the ICJ, it is entirely possible for a particular act not to be in violation of international law "without necessarily constituting the exercise of a right conferred by it".[98] Therefore, the fact that it found that there is no such prohibition does not mean that it believes that the Kosovo had a right to secession.

Self-Determination: A Right of Newly Seceded Peoples to Democracy' [2017] Arizona Journal of International and Comparative Law 1, 18; Pau Bossacoma Busquets, *Morality and Legality of Secession: A Theory of National Self-Determination* (Palgrave Macmillan 2019) 149.

[92] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010, p 403* [1].

[93] ibid 82.

[94] ibid 83.

[95] See, Thomas Burry, 'Kosovo Opinion and Secession: The Sounds of Silence and Missing Links' (2010) 11 German Law Journal 881; Hurst Hannum, 'The Advisory Opinion on Kosovo: An Opportunity Lost or a Poisoned Chalise Refused?' (2011) 24 Leiden Journal of International Law 155.

[96] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403* (n 92) para 83.

[97] ibid 84.

[98] ibid 56.

The right to self-determination in the African Charter on Human and Peoples' Rights

On a regional level, the right to self-determination has also been included by the Organization of African Unity in the African Charter on Human and Peoples' RightsIn Article 20(1) of the African Charter the right to self-determination is linked to peoples' right to existence.[99] Additionally, it states that peoples "shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen",[100] which mirrors the provision on the right to self-determination in Common Article 1(1) of the Twin Covenants. In the second chapter, I will show that by including the phrase "according to the policy they have freely chosen" the right to self-determination in the African Charter does not deviate from Common Article 1 but instead makes explicit what the Twin Covenants implied. Article 20 of the African Charter includes that *"[c]olonized or oppressed peoples* shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community [emphasis added]".[101] Moreover, it states that "[a]ll peoples shall have the right to the assistance of the state Parties to the African Charter in their liberation struggle against foreign domination, be it *political, economic or cultural* [emphasis added]".[102] The phrasing of these provisions clarifies two important aspects of the right to self-determination codified by the African Charter. First, it establishes that self-determination is not confined to the realm of anti-colonial struggle as refers to colonised *or* oppressed peoples. Of course, all colonised peoples are oppressed peoples but conversely not all oppressed peoples are colonised peoples. Secondly, it is clear that the three forms of domination included do not have to exist cumulatively as it includes political, economic *or* cultural domination. Therefore, each of these forms of foreign domination individually amounts to a violation of the right to self-determination under the African Charter.

The unequivocal statement of the African Charter that not just political but also economic or cultural forms of foreign dominations violate the right to self-determination is a significant aspect of its provision on the right to self-determination. The inclusion of all three forms of domination is aligned with the statement in the preamble of the African Charter that it is conscious of the "undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism […] and all forms of discrimination, particularly those based on race, ethnic group, color, sex,

[99] African Charter on Human and Peoples' Rights 1981, Article 20(1).
[100] ibid, Article 20(1).
[101] ibid, Article 20(2).
[102] ibid, Article 20(3).

language, religion or political opinions".[103] The absence of political domination alone does not guarantee the self-determination of peoples. The African Charter shows an understanding of this by including political, economic and cultural natures of domination. Whereas Article 20 by itself already goes further than Common Article 1 of the Twin Covenants, the real expansion of the right came in Articles 21 and 22. In Article 21 the African Charter includes a more comprehensive provision on the right to permanent sovereignty over natural wealth and resources than any other international legal instrument.[104] The scope of this provision results from the understanding that political domination is not the only possible means of infringement of self-determination. Combating political domination alone is not enough to eliminate colonialism, neo-colonialism and all other forms of foreign subjugation. The African Charter also contains a provision on the right to development. This provision builds upon Article 20 by adding a positive obligation of states to aid peoples in their pursuit of economic, social and cultural development.[105] The African Charter provides peoples with the right to pursue economic, social and cultural development free from not just state interference but, to a certain extent, also from social and economic factors that might hinder such development.[106]

Theoretical approaches to the right to self-determination

As shown above, the development of self-determination as a right went through several phases. First, it was codified as a right of the sovereign members states of the UN by the principle of equal rights and self-determination in the UN Charter. Secondly, in the twenty years after the

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[103] Preamble of the African Charter on Human and Peoples' Rights 1981 (n 106).

[104] ibid, Article 21: "1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. 2) In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. 3) The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law. 4) States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. 5) States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources".

[105] ibid, Article 22: '(1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.'

[106] In the fourth chapter of this thesis, I will examine the relationship between the right to self-determination and economic, social and cultural rights.

adoption of the UN Charter, this principle was reinterpreted as a right to self-determination of colonial peoples in customary international law. Thirdly, the adoption of the Twin Covenants and further development of self-determination as a customary rule of international law established the right to self-determination as a human right of all peoples. These peoples came to include both the populations of sovereign states and non-self-governing territories and certain subpopulation groups – i.e. indigenous peoples. With this development, the emphasis shifted from the establishment of sovereign states by colonial peoples as an exercise of their self-determination to the relationship between sovereign states and their own population. The former is generally referred to as 'external self-determination' and the latter as 'internal self-determination'.[107] However, as will be discussed below, many commentators have adopted a theoretical approach that views external and internal self-determination as separate rights, often with distinct beneficiaries. James Anaya calls this the internal-external dichotomy as this approach presents these two aspects of the right to self-determination as separate rights.[108]

Internal self-determination, a term coined by the HRC,[109] is 1) the right of the entire population of sovereign states to determine their own economic, social and cultural development and to choose a representative government[110], and 2) the right of subpopulation peoples to participate in the political life of the state and the right to some degree of self-government or even autonomy.[111] External self-determination is said to be a right of certain peoples to determine their political status by 1) the establishment of a sovereign and independent state, 2) the free association or integration with an independent

[107] See, Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2); Abdulqawi Yusuf, 'The Role That Equal Rights and Self-Determination of Peoples Can Play in the Current World Community' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 375; Samuel Moyn, *The Last Utopia: Human Rights in History* (First Belknap Press of Harvard University Press 2012) 208; Anderson (n 91) 23.
[108] James Anaya, *Indigenous Peoples in International Law* (2nd edn, Oxford University Press 2004) 105.
[109] Douglas Sanders, 'Self-Determination and Indigenous Peoples' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff Publishers 1993) 80.
[110] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 111; Patrick Thornberry, 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff Publishers 1993) 101; Jean Salmon, 'Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?', *Modern Law of Self-Determination* (Martinus Nijhoff Publishers 1993) 273–282; Yusuf (n 107) 384.
[111] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 52–54; Sanders (n 109) 80; Yusuf (n 107) 384–388.

state.[112] International law does not recognise a right to secession as an exercise of self-determination.[113] Instead, secession is treated as a matter of fact, which may or may not be recognised by the international community.[114] Consequently, only those peoples subjected to colonisation and foreign oppression are said to be entitled to the right to external self-determination as this includes the right to sovereign and independent state.[115] Exercise of a right to external self-determination by peoples subjected by colonial domination or foreign oppression would not violate the territorial integrity of an existing state – and thus equate to the secession from a state – as the existing state that had colonised or oppressed them had no legitimate claim over the territory of these peoples.[116] Other peoples would only be allowed to exercise the right to internal self-determination as an exercise of external self-determination would violate the territorial integrity of their state.

According to Cassese, Vladimir Lenin was "the first to insist, to the international community, that the right of self-determination be established as a general criterion for the liberation of peoples".[117] Moreover, the current president of the International Court of Justice Abdulqawi Yusuf observed that that external self-determination is "based on Lenin's anti-colonialist principles. In 'The Socialist Revolution and the Right of Nations to Self-Determination', Lenin set out that a key objective for Socialism was the achievement of complete democracy and, consequently, the achievement of self-determination for oppressed nations.[118] He focussed on the right to independence in a political sense, including a nation's right to secession.[119] Most importantly, Lenin argued that the principle of self-determination acknowledges the right to unconditional and immediate liberation of the colonies without compensation.[120] However, as observed by Bill Bowring, the Soviet Union "gave crucial support for the anti-colonial

[112] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 71–100; Yusuf (n 107) 379–380.
[113] Yusuf (n 107) 380.
[114] ibid.
[115] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 71–100; Yusuf (n 107) 379–380.
[116] See, D Thürer and T Burri, 'Self-Determination', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2015) 15 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873>.
[117] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 14.
[118] See, the statement in VI Lenin, 'Lenin: The Socialist Revolution and the Right of Nations to Self-Determination' <https://www.marxists.org/archive/lenin/works/1916/jan/x01.htm> accessed 14 January 2016.
[119] See, ibid.
[120] See, ibid.

movement, while ruthlessly suppressing deviation within the Soviet camp".[121] This view is also adopted by James Anaya who stated the Soviet leaders used self-determination as a tool only where it served as a means to emancipate the proletariat in the pursuit of world Communism and was in no way a goal in itself.[122]

Internal self-determination is said to be based upon the Wilson's insistence on self-determination as "a right of a people to freely select its government".[123] Wilson's concept of self-determination was based upon the ideals of Western Liberalism.[124] This is demonstrated by his argument that the principle of self-determination meant that people should be free to choose their own form of government. This argument built upon the principle of self-determination found in the American Declaration of Independence that governments derive their power from the consent of those they govern. However, for Wilson self-determination was an issue for foreign states and he rejected the idea that the principle had a role in the internal politics of the United States itself. Furthermore, it never was Wilson's intention that the principle of self-determination would be used to liberate the people living in oppression under colonial regimes.[125]

An alternative theoretical approach to the internal-external dichotomy was put forward by James Anaya who divides the right to self-determination in a substantive and a remedial aspect.[126] The substantive aspect is itself divided in a 'constitutive' aspect and an 'ongoing' aspect.[127] The constitutive aspect is the right of peoples to freely determine their political status ("constitutive self-determination"), which is exhausted after "discrete episodes of institutional birth or change".[128] The ongoing aspect of self-determination is the right of peoples to freely

[121] Bowring (n 4) 9.
[122] Anaya (n 108) 98–99; See also, Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 18–19; Thürer and Burri (n 116) para 3.
[123] Yusuf (n 107) 375.
[124] Anaya (n 108) 98; J Oloka-Onyango, 'Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium' (1999) 15 American University of International Law Review 151, 160; Kristina Roepstorff, 'Lawanddevelopment.Org - Self-Determination of Indigenous Peoples within the Human Rights Context' <http://www.lawanddevelopment.org/articles/selfdetermination.html> accessed 19 January 2016.
[125] Oloka-Onyango (n 124), at pp. 160-161; Roepstorff (n 124).
[126] See, Anaya (n 108) 103–110.
[127] See, ibid 104–106.
[128] ibid 106.

pursue their economic, social and cultural development and, for their own ends, freely dispose of their natural wealth ("the right to ongoing self-determination"), which "continuously enjoins the form and functioning of the governing institutional order".[129] The dimension of the right to self-determination that proponents of the internal-external dichotomy view as a distinct right to external self-determination, Anaya does not view as a separate right but as a possible remedial solution in exceptional situations in which the substantive aspects of self-determination cannot be assured for a particular people.[130] According to Anaya the decolonisation procedures

> "do not themselves embody the substance of the norm of self-determination; rather they were measures to remedy a *sui generis* deviation from the norm that existed in the prior condition of colonialism."[131]

I have chosen to adopt Anaya's theoretical approach for the analysis of the right to self-determination in this thesis for a number of reasons. Firstly, Anaya's theoretical approach removes the need to artificial divide between peoples with the right to both external and internal self-determination and peoples with only the right to the latter. Secondly, I believe that his view, that what other commentators refer to as external self-determination is instead a remedial solution to certain grave violations of what these commentators refer to internal self-determination, fits better with the more recent development that certain grave violations of internal self-determination justify secession as an exercise of the right to external self-determination.[132] Thirdly, I believe that Anaya's approach better reflects the fact that the continuing aspects of the right to self-determination include, as I will examine in the other chapters of my thesis, both an external and internal dimension.

It has been argued that, outside of the colonial context, secession is a legitimate exercise of right to external self-determination as a remedy against forms of oppression.[133] The Canadian

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[129] ibid.
[130] ibid 106–110.
[131] ibid 103–104.
[132] Yusuf (n 107) 383; Rodríguez-Santiago (n 6) 236.
[133] See, Alexis Heraclides, *The Self-Determination of Minorities in International Politics* (Frank Cass and Company Limited 1991) 29–30; Brad Roth, 'The Relevance of Democratic Principles to the Self-Determination Norm' in Peter Hilpold (ed), *Autonomy and Self-determination: Between Legal Assertions and Utopian Aspirations* (Edward Elgar Publishing 2018) 67.

Supreme Court set out three situations in which peoples are entitled to the right to external self-determination: 1) in a situation dealing with colonial emancipation, 2) in a situation where are oppressed under foreign occupation, and 3) in a situation where peoples are denied access to the government to pursue their political, economic, social and cultural development in a meaningful manner. The Supreme Court of Canada argued that in these situations peoples are entitled to this right because they have been denied the ability to exercise their right to internal self-determination.[134] On a regional level, the African Commission on Human and Peoples' Rights ("African Commission") has implicitly acknowledged secession as a justified exercise of the right to self-determination in *Katangese Peoples' Congress v Zaire* in situations where there is concrete evidence of violations of human rights to the point that the territorial integrity of a state should be called to question or evidence that a people is denied the right to participate in government.[135] As observed by Frederic Kirgis Jr., there seemingly is an inverse relationship between the ability of a people to exercise its right to ongoing self-determination within the boundaries of the existing state and the level of autonomy the right to self-determination provides to this people.[136] The fewer restrictions on a people's ability to exercise its internal self-determination right within the existing state the less credence claims of self-determination that will have destabilising effects on the sovereign rights of states have.[137] In this approach, secession as an exercise of the right to external self-determination, would only be allowed as a response to severe violations of the seceding people's internal self-determination.[138] However, if secession is only a right for those peoples that are prevented from exercising their ongoing self-determination it makes more sense to view secession not as a method by which a right to external self-determination can be exercised but instead as a justified remedy of certain violations of the right to ongoing self-determination. Furthermore, this relationship clarifies that that exercises of the constitutive self-determination right of peoples to freely determine their political status is not the objective of the right to self-determination but instead a means to enable peoples to freely exercise their ongoing self-determination rights. Even recent scholarship has primarily focussed on the right of peoples to determine their own political

[134] *Reference re Secession of Quebec, [1998] 2 SCR 217* [138].
[135] *Katangese Peoples' Congress v Zaire, African Commission on Human and Peoples' Rights Communication No 75/92 (1995), (2000) AHRLR 72*.
[136] Frederic Kirgis Jr., 'The Degrees of Self-Determination in the United Nations Era' (1994) 88 American Journal of International Law 304, 306.
[137] ibid.
[138] For an in-depth analysis of the issue of 'remedial secession' see, Jure Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice' (2010) 6 St Antony's International Review 37.

status, often in relation to secession.[139] However, because 1) constitutive self-determination is not a goal by itself but a means to achieve ongoing self-determination, and 2) remedial secession would be justified in certain cases where the ongoing self-determination right of a subpopulation group is violated, I believe that the most important task is to come to a clear understanding of the ongoing self-determination rights of peoples.

The relationship between sovereignty and the right to self-determination

There are many different theoretical approaches to sovereignty.[140] The one that is relevant to this thesis is sovereignty as a construct of international law. As explained by Patrick Macklem, "[s]overeignty in international law refers to what the international legal order recognises as the aggregate of valid claims that States make in their relations with other States".[141] International law both regulates the exercise of sovereign power and determines who possesses sovereignty.[142] However, as observed by Anghie, "[t]he origins of sovereignty have always constituted a major problem for the discipline".[143] In the words of Martti Koskenniemi, who represents what is probably the most common approach, in international law, state sovereignty is at the same time the authority delegated to states by international law and the authority delegated to international law by states.[144] If this is the origin of sovereignty, the principle of state sovereignty is itself a product of the exercise of states of their sovereignty within the international sphere. Traditionally, international law regarded the sovereignty of states as an absolute sphere of power that was only limited by international law itself.[145] However,

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[139] See for instance, Anderson (n 91); Natalija Shikova, 'Practicing Internal Self-Determination Vis-a-Vis Vital Quests for Secession' (2016) 17 German Law Journal 237; Cop Burak and Doğan Eymirlioğlu, 'The Right of Self-Determination in International Law Towards the 40th Anniversary of the Adoption of ICCPR and ICESCR' (2005) 10 PERCEPTIONS: Journal of International Affairs 115; M Ya'kub Aiyub Kadir, 'Application of the Law of Self-Determination in a Postcolonial Context: A Guideline' (2016) 9 Journal of East Asia and International Law 7; Peter Hilpold, 'Self-Determination and Autonomy: Between Secession and Internal Self-Determination' in Peter Hilpold (ed), *Autonomy and Self-determination: Between Legal Assertions and Utopian Aspirations* (Edward Elgar Publishing 2018); Rein Müllerson, 'Self-Determination and Secession: Similarities and Differences' in Peter Hilpold (ed), *Autonomy and Self-determination: Between Legal Assertions and Utopian Aspirations* (Edward Elgar Publishing 2018); Busquets (n 91).

[140] For an examination of some of the key approaches to sovereignty see, Patrick Macklem, *The Sovereignty of Human Rights* (Oxford University Press 2015) 29–50.

[141] ibid 33.

[142] Anghie (n 27) 99.

[143] Anghie (n 24) 99.

[144] See, Macklem (n 140) 44.

[145] ibid 36–37.

gradually this absolute conception of state sovereignty has been replaced by a more conditional understanding of sovereignty.[146] The development of human rights law was the driving force behind this development. As stated by Macklem, "international human rights legally operate to mitigate some of the adverse consequences associated with the fact that international law entitles States to exercise sovereignty both internally […] and externally".[147] As I will show in this thesis, the right to self-determination is where state sovereignty and human rights intersect.

The relationship between the right to self-determination and the sovereignty of states has changed a lot since the principle of equal rights and self-determination of peoples was codified by the UN Charter. As established above, the drafters of the UN Charter included the principle of equal rights and self-determination to strengthen the rights of already sovereign states. Only through the subsequent development of international law self-determination developed into a right that established conditions for sovereignty. Macklem observed that because of this development, the new role of the right to self-determination in contemporary international law is to mitigate 1) the adverse effects associated with how international law distributes sovereignty around the globe and 2) the adverse effects associated with how international law authorises the exercise of sovereignty by sovereign states.[148] Anghie has explained that many these adverse effects are result from the fact that "because sovereignty was shaped by the colonial encounter, its exercise often reproduces the inequalities inherent in that encounter".[149] The right to self-determination has developed into a standard that can be used to reflect upon the illegitimacies of this system.

As observed by Matthew Saul, "it is also possible to identify a different type of relationship between the right to self-determination and sovereignty".[150] Namely, the right to self-determination "provides a basis for arguing that popular sovereignty has now been legalised".[151] The concept of popular sovereignty has long been used as rhetorical device to either legitimise governmental authority or conversely reflect on the illegitimacy of a state's claim of sovereignty over a people and the territory on which it resides. The idea that popular

[146] ibid 37.
[147] ibid 32–33.
[148] Patrick Macklem, 'Self-Determination in Three Movements' in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 96.
[149] Anghie (n 24) 114.
[150] Saul (n 70) 628.
[151] ibid 629.

sovereignty is the basis of the authority of the state can be traced back to the United States Declaration of Independence of 1776 ("US Declaration of Independence") and the Declaration of the Rights of Man and of the Citizen of 1789 ("Declaration of the Rights of Man"), which were influenced by the ideology of the Enlightenment.[152] In the preamble to the US Declaration of Independence stated that governments derive their just powers from the consent of the governed.[153] Similarly, the Article VI of the Declaration of the Rights of Man and of the Citizen of 1789 ("Declaration of the Rights of Man") provides that the "principle of any sovereignty resides essentially in the Nation",[154] and that law is the expression of the general will of the population.[155] Even though some scholars trace the genealogy of the principle of self-determination back even further,[156] these declarations are often pointed to as the origin of the principle of self-determination.[157] According to Eugene Kamenka, self-determination could perhaps even be viewed as the central and fundamental concept elevated by the Enlightenment and the French Revolution that gave birth to most modern ideologies including liberalism, socialism and nationalism.[158]

One of the commentators that promoted the reconceptualisation of the right to self-determination as the basis of the sovereign rights of states was the Tanzanian scholar Issa Shivji. He suggested that that the principles of state sovereignty, territorial integrity and non-intervention by one state in the internal affairs of another state are secondary or derivative

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[152] See Eugene Kamenka, 'Human Rights, Peoples' Rights' in James Crawford (ed), *The Rights of Peoples* (Clarendon Press 1988) *.

[153] The preamble of the United States Declaration of Independence 1776: 'That to secure [certain unalienable Rights among which Life, Liberty, and the pursuit of Happiness], Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.'

[154] Declaration of the Rights of Man and of the Citizen 1789, Article III: 'he principle of any sovereignty resides essentially in the Nation. No body, no individual may exercise any authority which does not proceed directly from the nation'.

[155] ibid, Article VI: 'The law is the expression of the general will. All the citizens have the right of contributing personally or through their representatives to its formation. It must be the same for all, either that it protects, or that it punishes. All the citizens, being equal in its eyes, are equally admissible to all public dignities, places, and employments, according to their capacity and without distinction other than that of their virtues and of their talents.'

[156] See, See, Oloka-Onyango (n 124) 177–193; Rodríguez-Santiago (n 6) 202–206.

[157] See, Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 11; Thürer and Burri (n 116).

[158] See Kamenka (n 152) *.

elements of the right to self-determination of peoples.[159] As explained by Saul, such a reconceptualisation "provides an ethically more convincing explanation for sovereignty, than the traditional explanation based on effective control of territory".[160] Furthermore, as Saul observed, scholars have used this type of relationship between the right to self-determination and sovereignty to identify or suggest changes in aspects of international law that currently still reflect the traditional conception of sovereignty.[161] Most importantly, Saul showed that, like Shivji, scholars have argued that the right to self-determination is the legal basis of the principle of non-intervention.[162] If the right to self-determination is indeed the basis of the principle of non-intervention, it could be argued that the right to self-determination provides a standard that measures the legitimacy of a state's intervention in the affairs of another state. For instance, such a link between the right to self-determination and the principle of non-intervention be used to try to justify humanitarian intervention in situations in which the right to self-determination of a people is violated by their domestic state. Instead of a violation of sovereignty, it could be argued that such an intervention is "as a means of furthering sovereignty in the sense of giving the people (eventually) the ability to exercise the continuing right of self-determination".[163] Similarly, if such a relationship between the right to self-determination and sovereignty exists, the right to self-determination also provides a standard that measures the legitimacy of deviations from the principle of territorial integrity. In other words, such a relationship would provide the legal foundation of remedial secession in situations in which the right to self-determination of a people is violated by their domestic state.

Conclusion

In this chapter, I have established that, even though it has often been pointed to as the first time to a right to self-determination of peoples was codified in international law, the principle of equal rights and self-determination of peoples provided in Article 1(2) of the UN Charter was only intended as a right of the sovereign member states of the UN. Overtime this principle has been reconceptualised as a right of peoples by subsequent developments in international law, including the development of the human right to self-determination. As I have established, this

[159] Issa Shivji, 'The Right of Peoples to Self-Determination: An African Perspective' in William Twinning (ed), *Issues of Self-Determination* (Aberdeen University Press 1991) 44–45.
[160] Saul (n 70) 629.
[161] ibid.
[162] ibid.
[163] ibid 629–630.

development has led to two interesting theoretical developments. Firstly, as the emphasis shifted from the establishment of sovereign states by colonial peoples as an exercise of their self-determination to the relationship between sovereign states and their own population, human rights treaty bodies and scholars adopted a framework that separated the right to self-determination into an 'internal' and an 'external' right. For a long time, it was believed that only colonial peoples had a 'right to external self-determination', which would allow them, if they so choose, to establish an independent state, and other peoples only possessed a 'right to internal self-determination', which would at most allow some degree of autonomy short of independence and the right to pursue their economic, social and cultural development within the framework of an existing state. More recently, arguments have been made that such a right to external self-determination can also exist as a remedy for non-colonial peoples whose exercise of their right to internal self-determination is denied by their state. As explained, I have chosen not to adopt this 'internal-external dichotomy' as the theoretical approach for my thesis. Instead, I have adopted the alternative approach that divides the right to self-determination into a 'right to constitutive self-determination' – the right of peoples to freely determine their political status – and a 'right to ongoing self-determination' – the right of peoples to freely pursue their economic, social and cultural development. I have provided a number of reasons for my decisions of which the most important is that I want to focus on the continuing aspects of the right to self-determination and believe that this alternative approach better reflects the fact that these aspects include both an external and an internal dimension.

Secondly, as the emphasis shifted from the external to the internal dimension of the right to self-determination, the relationship between the right to self-determination and sovereignty changed. When self-determination was first codified as the principle of equal rights and self-determination in the UN Charter it was nothing more than a reaffirmation of the sovereignty of states. However, as the right to self-determination developed into a right of peoples its role changed to a standard that mitigate both the adverse effects associated with how international law distributes sovereignty and the adverse effects associated with how international law authorises the exercise of sovereignty by sovereign states. However, as I established, some scholars have argued that the relationship between the right to self-determination and sovereignty is not just that the former mitigates the adverse effects of how international law distributes and authorises the exercise of the latter but that the right to self-determination acts as the foundation of the sovereignty of states. Understood in this way, the right to self-determination is basis for an argument that 'popular sovereignty' has now been legalised.

Whether you view self-determination as a right that merely mitigates the adverse effects of sovereignty or also as the legal foundation of the sovereignty of states, it is the premier standard that measures the legitimacy of a state's sovereignty over a people and its exercise of its sovereign rights. In the remaining chapters of this thesis, I will focus on the right to ongoing self-determination in order to establish a contemporary standard for mitigating the adverse effects of how international law distributes and authorises the exercise of sovereignty.

Chapter 2 – The civil and political dimension of the right to ongoing self-determination of 'entire populations'

As established in the previous chapter, the right to ongoing self-determination is the right of peoples to freely pursue their economic, social and cultural development.[164] Furthermore, I also established that the entire populations of states are peoples with the right to self-determination. In this chapter, I will analyse the civil and political dimension of the right to ongoing self-determination of these entire populations. This includes an examination whether the right to ongoing self-determination provides obligations on states in relation to the population of foreign states.[165] However, I will focus on the question whether this right also includes obligations of states in relation to their own population. Conversely, this is an examination of whether the right of peoples to freely pursue their economic, social and cultural development includes the right of entire populations to pursue such development free from both external interference and from manipulation or undue influence from their domestic authorities. I will argue that the right to self-determination provides obligations of states both in relation to foreign populations and in relation to their own population. Subsequently, through my analysis of the relevant scholarship and an examination of the relevant treaty provisions, General Assembly resolutions and comments and finding by the relevant treaty bodies, I will provide an argument that the civil and political dimension of the right to ongoing self-determination is 1) best explained as a manifestation of all civil and political rights, 2) the legal foundation of a democratic system of governance that is both representative and participatory.

The right to ongoing self-determination as a right of entire populations

Whereas during the drafting of the Twin Covenants on Human Rights it was a matter of debate whether the right to self-determination only applied to the process of decolonisation, it is now generally acknowledged that populations of sovereign states belong to the group of beneficiaries of the right to ongoing self-determination. According to the former President of

[164] International Covenant on Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights 1966 (n 49), Article 1(1): 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

[165] Chapter 3 will explore the civil and political dimension of the right to ongoing self-determination in relation to subpopulation groups – i.e. minority groups and indigenous peoples.

the International Court of Justice Rosalyn Higgins, there are two possible interpretations of the term peoples. Peoples either means the 'entire people' of a state – the population of a state as a whole – or alternatively "all persons comprising distinctive groupings on the basis of race, ethnicity and perhaps religion".[166] From her analysis of the relevant instruments and state practices she concluded that 'peoples' "is to be understood in the sense of *all* the peoples of a given territory [original emphasis]".[167] However, after Higgins wrote this in 1994, international law has acknowledged the status of indigenous groups as peoples. This does not mean that the entire population of states, or in the words of Higgins 'all the peoples of a given territory',[168] are not also peoples in relation to the right to self-determination. As Cassese observed, under customary international law both the populations of sovereign states and certain subpopulation groups are peoples.[169] The status as peoples of the populations of sovereign states has now been acknowledged by many scholars and some of the relevant treaty monitoring bodies.[170]

Since the entry into force of the Twin Covenants, it has been generally accepted that the right to self-determination includes corresponding obligations of states in relation to the peoples in foreign states. This is clear from the application of the general rule of treaty interpretation to Common Article 1. As stated in Chapter 1, this rule is set out in the Vienna Convention, which stipulates that treaties "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[171] This means that the starting point of the interpretation of a treaty provision consists of finding the current and ordinary meaning of the words used.[172] As stated by Nahuel Maisley "this empirical task can be covered by referring to regular, non-legal, dictionary definitions".[173]

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[166] Higgins, *Problems and Process* (n 3) 124.
[167] ibid.
[168] ibid.
[169] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 102–125.
[170] See for instance, James Crawford, 'The Right of Self-Determination in International Law: Its Development and Future' in Philip Alston (ed), *Peoples' Rights* (Oxford University Press 2001); Robert McCorquodale, 'Human Rights and Self-Determination' in Mortimer Sellers (ed), *The New World Order: Sovereignty, Human Rights and the Self-Determination of Peoples* (Berg 1996); Allan Rosas, 'Internal Self-Determination', *Modern Law of Self-Determination* (Martinus Nijhoff Publishers 1993); Thornberry (n 110).
[171] Vienna Convention on the Law of Treaties 1969 (n 60), Article 31(1).
[172] Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 426.
[173] Nahuel Maisley, 'The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making' (2017) 28 The European Journal of International Law 89, 96.

Following the to the ordinary meaning of the term 'freely',[174] the right to ongoing self-determination establishes that the pursuit of development by a people should not be under control of 'another'.[175] Obviously, foreign states are a prime example of the 'other' who the pursuit of development by a people should not be controlled by. This was acknowledged by Cassese who stated that one meaning of the word 'freely' in this provision is that it "requires that a State's domestic political institutions must be free from outside interference".[176] Indeed, as established in Chapter 1, the idea that peoples should be able to pursue their development free from foreign control or interference was at the heart of the development of the right to self-determination in its earlier phases.[177]

Slightly more controversial, than the question whether the right to self-determination provides obligations of states in relation to foreign peoples, is the question whether the right to self-determination also provides obligations of states in relation to their own peoples. As acknowledged by Higgins, after the Second World War "many of the new states regarded self-determination as a matter between them and their former colonial masters, but not as between them and their own population".[178] A good example of this is India's declaration in relation to Common Article 1 as an example.[179] This declaration states that the right to self-determination in Common Article 1 applies "only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation".[180] India's reservation to Article 1 has been objected to by several states. Whereas Pakistan seems to object solely to India's statement that the right to self-determination does not apply to sovereign state – thus accepting that it does not apply to 'a section of a people or nation'[181] –

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[174] Maurice Waite (ed), *Paperback Oxford English Dictionary* (7th edn, Oxford University Press 2012) 287.
[175] In the third chapter of this thesis it will be argued that this is not an exhaustive interpretation of the meaning of 'freely' in the right to ongoing self-determination.
[176] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 55.
[177] See, Roland Burke, *Decolonization and the Evolution of International Human Rights* (University of Pennsylvania Press 2010) 35–58; Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2).
[178] Higgins, *Problems and Process* (n 3) 116.
[179] ibid.
[180] 'Welcome to Permanent Mission of India in Geneva' <http://www.pmindiaun.org/pages.php?id=867> accessed 10 April 2018.
[181] See,
'Https://Treaties.Un.Org/Pages/ViewDetails.Aspx?Src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en': 'The Government of Islamic Republic of Pakistan objects to the declaration made by the Republic of India in respect of article 1 of the International Covenant

the governments of France, Germany and the Netherlands all objected to both aspects of India's reservation.[182] The Dutch statement argued that India's reservation does not only conflict with the provision of Common Article 1 but also with the Declaration on Friendly Relations, which it referred to as the most authoritative statement of the law on the right to self-determination.[183]

The HRC has clearly adopted the view that states have obligations concerning the right to self-determination of their own population. This is shown by the fact that, in its examination of reports by state parties to the ICCPR, the HRC does not only ask about dependent territories that the state party might be responsible for but also about the opportunities that its own population has to determine its own political and economic system. In its General Comment No. 12, the HRC stated that "[w]ith regard to paragraph 1 of article 1, States parties should describe the constitutional and political processes which in practice allow the exercise of this right".[184] According to the HRC most states, when exercising their obligation to "submit reports on the measures they have adopted which give effect to the rights recognized [in the

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on Civil and Political Rights. The right of Self-determination as enshrined in the Charter of the United Nations and as embodied in the Covenants applies to all peoples under foreign occupation and alien domination.'

[182] See, ibid; France: 'The Government of the Republic takes objection to the reservation entered by the Government of the Republic of India to article 1 of the International Covenant on Civil and Political Rights, as this reservation attaches conditions not provided for by the Charter of the United Nations to the exercise of the right of self-determination.'; Germany: 'The Government of the Federal Republic of Germany strongly objects, ... to the declaration made by the Republic of India in respect of article 1 of the International Covenant on Economic, Social and Cultural Rights and of article 1 of the International Covenant on Civil and Political Rights. The right of self-determination as enshrined in the Charter of the United Nations and as embodied in the Covenants applies to all peoples and not only to those under foreign domination. All peoples, therefore, have the inalienable right freely to determine their political status and freely to pursue their economic, social and cultural development.'

[183] ibid: 'The Government of the Kingdom of the Netherlands objects to the declaration made by the Government of the Republic of India in relation to article 1 of the International Covenant on Civil and Political Rights and article 1 of the International Covenant on Economic, Social and Cultural Rights, since the right of self-determination as embodied in the Covenants is conferred upon all peoples. This follows not only from the very language of article 1 common to the two Covenants but as well from the most authoritative statement of the law concerned, i.e., the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Any attempt to limit the scope of this right or to attach conditions not provided for in the relevant instruments would undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character.'

[184] 'UN Human Rights Committee (HRC), CCPR General Comment No. 12: Article 1 (Right to Self-Determination), The Right to Self-Determination of Peoples, 13 March 1984' para 4.

ICCPR] and on the progress made in the enjoyment of those rights",[185] either completely ignore Article 1 or provide inadequate information in regard to it. They often do so by confining themselves to a reference to the election laws of their state.[186] However, the fact that virtually no state refuses to respond to probing comments and questions on its compliance with its obligations in relation to the right to self-determination of their domestic population,[187] combined with the fact that many states provide a reference to their election laws shows there is an acceptance that the right includes obligations in relation to the peoples under their own jurisdiction.

In the first chapter, I established that initially the development of the human right to self-determination emphasised the process of decolonisation. However, as stated by Higgins, "[s]elf-determination has never meant independence [but] meant the free choice of people".[188] In the course of the second half of the 20th century, the attention shifted away from decolonisation and secession and towards the recognition that the right to self-determination provides obligations of states towards their own population. As recognised by Gillian Triggs, "if peoples' rights are to have any meaning beyond States' rights, they must include the right of a 'people' against its own government".[189] Moreover, as argued by Allan Rosas, to "say that the right of peoples to self-determination is exercised by the State and its government would seem to be a contradiction in terms".[190] The recognition that the right to self-determination establishes obligations in relation to domestic populations is in line with the context in which Common Article 1 should be interpreted. The mere fact that the right to self-determination is a human right should by itself discredit any interpretation that does not include obligations of states in relation to their own population.

As stated before, the general rule of treaty interpretation, as set out in the Vienna Convention, states that the meaning of the terms of a treaty should be interpreted in their context and in light

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[185] This right is included in International Covenant on Civil and Political Rights 1966, Article 40(1).
[186] 'UN Human Rights Committee (HRC), CCPR General Comment No. 12: Article 1 (Right to Self-Determination), The Right to Self-Determination of Peoples, 13 March 1984' (n 184) para 3.
[187] Higgins, *Problems and Process* (n 3) 117.
[188] ibid 119.
[189] Gillian Triggs, 'The Rights of "Peoples" and Individual Rights: Conflict or Harmony' in James Crawford (ed), *The Rights of Peoples* (Clarendon Press 1988) 142.
[190] Rosas (n 170) 229.

of the object and purpose of the treaty.[191] The object and purpose of a human rights treaty is to set out right of individuals or peoples and corresponding obligations of states in relation to these rights. In General Comment 24, the HRC established that the object and purpose of the ICCPR is to create legally binding standards for human rights and to place those standards in a framework of obligations that are also legally binding on states.[192] In this sense, human rights treaties are different from other international treaties that establish a set of legal rules concerning inter-state relations. Whereas these treaties create legally binding rights of states in relation to other states and corresponding obligations of states again in relation to those other states, human rights treaties also create obligations of states in relation to the rights of the individuals and peoples under their jurisdiction or control. Even though the HRC has rejected communications under Article 2 of the Optional Protocol to the International Covenant on Civil and Political Rights ("First Optional Protocol") concerning the right to self-determination provided by Article 1 of the ICCPR, it has acknowledged that the right to self-determination is "a provision of positive law".[193] In conclusion, interpreted in the context of a human rights provision, the right to ongoing self-determination establishes legally binding obligations of a state corresponding to the legal rights of both foreign populations and its domestic population.

The notion that the right to ongoing self-determination provides obligations of states in relation to their own population can be further substantiated by an analysis of the General Assembly's Declaration on Friendly Relations and the Helsinki Final Act of the Conference on Security and Co-operation in Europe held in 1975 ("Helsinki Final Act"). In the Helsinki Final Act, it is provided that

> "[b]y 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 political status, without external interference, and to pursue as they wish their political, economic, social and cultural development".[194]

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[191] Vienna Convention on the Law of Treaties 1969 (n 60), Article 31(1).
[192] 'UN Human Rights Committee (HRC), CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add.6' para 7.
[193] 'UN Human Rights Committee (HRC), CCPR General Comment No. 12: Article 1 (Right to Self-Determination), The Right to Self-Determination of Peoples, 13 March 1984' (n 184) para 1.
[194] Helsinki Final Act 1975, principle VIII.

Cassese argued that the inclusion of 'always' and the phrase 'when and as they wish' in the formulation of the right to self-determination in the Helsinki Final Act ensures that the right to self-determination "is considered a continuing right: it exists even after a people has chosen a certain form of government or a certain international status".[195] Moreover, he argues that the phrase 'in full freedom' has a "separate, distinct, and consequently broader meaning" than the phrase 'without external interference'.[196] However, Hurst Hannum argued that "the 1975 Helsinki formulation may be seen merely as a Cold War reaffirmation of the right of the people of a state to be free from external influence in choosing its own form of government".[197] An careful examination of the structure of the formulation of the right to self-determination in the Helsinki Final Act seems to substantiate Cassese's interpretation. The phrase 'without external interference' is included as a feature that is specific to the phrase 'to determine, when and as they wish, their internal and external political status'. Indeed, the subsequent phrase "to pursue as they wish their political, economic, social and cultural development" is not subjected to the same restriction. The Helsinki Final Act provides that by virtue of the principle of equal rights and self-determination, all peoples always have the right, in full freedom, 1) to determine, when and as they wish, their internal and external political status, without external interference, and 2) to pursue as they wish their political, economic, social and cultural development. This same distinction is included in the Declaration on Friendly Relations, which provides that all peoples have 1) "the right freely to determine, without external interference, their political status", and 2) the right "to pursue their economic, social and cultural development".[198] Therefore, it can be inferred that neither the drafters of the Declaration on Friendly Relations nor those of the Helsinki Final Act believed that the ongoing self-determination right of peoples to freely pursue their development only prohibits external interference with the exercise of this right but

[195] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 284–288.
[196] ibid.
[197] Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 Virginia Journal of International Law 1, 29.
[198] See the wording of the UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV) (n 9): 'By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.'

also prohibits behaviour of domestic authorities that restrict peoples' free pursuit of their development.

The civil and political dimension of the right to ongoing self-determination as the sum of all civil and political rights

Now that it has been established that populations of sovereign states fall within the definition of peoples and that their pursuit of economic, social and cultural development should not only be free from external interference but also from the manipulation or undue influence from their domestic authorities, the next step is to determine how a population exercises its right to freely pursue its development free from these domestic authorities. According to Cassese, Article 1(1) has "established a permanent link between self-determination and civil and political rights",[199] which means that the internal dimension of the right to self-determination "presupposes that all members of a population be allowed to exercise those rights and freedoms which permit the expression of the popular will".[200] Consequently, this dimension is "best explained as a manifestation of the totality of rights embodied in the [ICCPR]".[201] Cassese is not the only scholar that has found such a relationship between the right to self-determination and other human rights. For instance, Patrick Thornberry noted that the text and comments of the Twin Covenants suggest that "[t]here is a general relationship of reciprocity between self-determination and human rights".[202] Moreover, in line with the view of Cassese, Dominic McGoldrick argued that whenever the rights included in the ICCPR "are recognized for individuals, the people as a whole enjoy the right of [ongoing] self-determination; whenever these rights are trampled upon, the right […] to self-determination is infringed".[203] This relationship between the right to ongoing self-determination and individual rights has been acknowledged by the former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities Aureliu Cristescu. He stated that "the promotion and protection of human rights and fundamental freedoms contribute to the implementation of

[199] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 54.
[200] ibid 53.
[201] ibid.
[202] Thornberry (n 110) 113; See original in Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford University Press 1994) 263.
[203] As quoted in Thornberry (n 110) 135.

the right of peoples to self-determination".[204] Cristescu continued by explaining that individual rights contribute, each in the area of its exercise, to the realisation of different aspects – political, economic, social and cultural – of the right to self-determination.[205]

In his analysis of the influence the process of decolonisation had on the development of human rights, Burke has provided an extensive examination of the influence of the position of the non-Western states on the development of the right to self-determination in its earliest stages. He showed that even in the earliest stages of development the right to self-determination was portrayed as inherently linked to individual rights. States mainly emphasised the importance of the right to self-determination for the realisation of individual rights.[206] However, there were also states that claimed the relationship between the right to self-determination and individual rights goes even further. In their view, the right to self-determination is not only a prerequisite for the achievement of individual rights but conversely also the ability to exercise individual rights is a prerequisite for the exercise of the right to self-determination. Burke provided a number of examples to substantiate this claim. For instance, he quoted Adviser to the Iraqi Permanent Mission at the United Nations Bedia Afnan who represented Iraq in the UN General Assembly's Third Committee who represented Iraq in the UN General Assembly's Third Committee and who stated that self-determination was "the essence of all human rights".[207] Another example he used is the quote of the Mexican Delegate to the Third Committee who stated that "the right to self-determination of peoples was both the basis of, and derived from, individual rights".[208] However, when Yugoslavia proposed a phrasing of the right to self-determination that would include "the right of every person to participate in action to ensure or maintain the free exercise of that right by the people to which he belonged"[209] this was rejected

[204] 'The Right to Self-Determination: Historical and Current Developments on the Basis of United Nations Instruments, by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/404/Rev. 1' para 256.
[205] ibid 257.
[206] See, Burke (n 177) 41.
[207] ibid.
[208] As quoted in ibid 43.
[209] 'Commission on Human Rights, Report to the Economic and Social Council on the Eighth Session of the Commission, Held in New York, from 14 April to 14 June 1952' para 65.

by six votes to six, with six abstentions.[210] Consequently, as concluded by Burke,[211] initially the relationship between the right to self-determination and individual rights that the General Assembly adopted in its resolution on the right of peoples and nations to self-determination did not portray the right to self-determination as interdependent with individual rights but solely as "a prerequisite to the full enjoyment of all fundamental human rights".[212]

Over time acceptance has grown that the exercise of the right to self-determination is not only a prerequisite for the realisation of individual rights but itself also depends on the freedom to exercise individual rights. The Vienna Declaration and Programme of Action ("Vienna Declaration") recognises that "[a]ll human rights are universal, indivisible and interdependent and interrelated".[213] Therefore, the Vienna Declaration implicitly also acknowledged the indivisibility, interdependency and interrelatedness of the right of peoples to freely pursue their economic, social and cultural development, which it included as part of the second article of the declaration,[214] and the other included human rights. Moreover, when the General Assembly adopted the Declaration on the Granting of Independence in 1960 it included the provision that "[a]ll states shall observe faithfully and strictly the provisions of […] the Universal Declaration of Human Rights".[215] By the time that the negotiations on the Twin Covenants were concluded the link between the right to self-determination and individual rights had been fully established. This is evidenced by the fact that, in 1965 – one year before the adoption of the Twin Covenants – the General Assembly adopted the resolution on the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and

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[210] 'Commission on Human Rights, Report to the Economic and Social Council on the Eighth Session of the Commission, Held in New York, from 14 April to 14 June 1952' (n 209), Chile, Egypt, Lebanon, Pakistan, Uruguay, Yugoslavia had voted in favour, Australia, Belgium, Greece, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America has voted against, and China, France, India, Poland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics had abstained from voting.
[211] Burke (n 177) 43.
[212] UN General Assembly, The right of peoples and nations to self-determination, 16 December 1952, A/RES/637 637.
[213] Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna, 25 June 1993 para 5.
[214] Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna, 25 June 1993 (n 213), Article 2: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development'.
[215] UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, A/RES/1514(XV) (n 20), Article 7.

Sovereignty ("Declaration on Non-Intervention"), which stated that all states shall respect the right to self-determination "to be freely exercised without any foreign pressure, *and with absolute respect for human rights and fundamental freedoms* [emphasis added]".[216]

In its General Comment No. 12 of 1984, the HRC acknowledged the interdependence of the right to self-determination and the other rights included in the ICCPR.[217] On a regional level, even though the Helsinki Final Act does not include a statement on the indivisibility, interdependency and interrelatedness of the right to ongoing self-determination and individual rights, Cassese concluded from his analysis of its preparatory works that to the extent to which this formulation of the right to self-determination refers to its internal dimension "it substantially reflects the Western view and, in particular, the Dutch proposal".[218] The proposal of the Netherlands included the statement that

> "[t]he participating States recognise the inalienable right of the people of every State freely to choose, to develop, to adapt or to change its political, economic, social and cultural systems […] *with due respect to human rights and fundamental freedoms* [emphasis added]".[219]

This once again clearly linked the exercise of the ongoing self-determination right to freely pursue development with the exercise of individual rights. This link was also included in the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Commission on Security and Cooperation in Europe the participation states, which confirmed that "they will respect each other's right freely to choose and develop, *in accordance with international human rights standards,* their political, social, economic and cultural systems [emphasis added]".[220] Whereas this was framed as a right of states, the sovereign right to choose and develop political, social, economic and cultural systems is one side of the coin of

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[216] UN General Assembly, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 21 December 1965, A/RES/2131(XX).
[217] 'UN Human Rights Committee (HRC), CCPR General Comment No. 12: Article 1 (Right to Self-Determination), The Right to Self-Determination of Peoples, 13 March 1984' (n 184) para 2.
[218] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 285.
[219] Quoted in ibid 281.
[220] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Commission on Security and Cooperation in Europe.

which the other side is the obligation of states to fulfil the right to ongoing self-determination of its population.[221] The right to choose and develop such systems, and the obligation to fulfil the right to ongoing self-determination, with absolute respect for human rights establish a link between the right of the people as a group and the rights of the members of this people as individuals. The crux of the matter is that the peoples' right to self-determination is a human right. There is no valid reason to treat it differently from other human rights. Therefore, the right to self-determination is indivisible, interdependent and interrelated with all civil and political rights. However, this reflects only the civil and political dimension of the right to ongoing self-determination. Cassese's statement that the internal dimension of the right to self-determination is best explained as a manifestation of the totality of rights embodied in the ICCPR is incomplete. If the right to self-determination is indivisible, interdependent and interrelated with civil and political rights it is equally indivisible, interdependent and interrelated with other human rights. Therefore, it should be argued that not the internal dimension of the right to self-determination as a whole but instead only its civil and political dimension of the right to ongoing self-determination is such a manifestation of the totality of rights included in the ICCPR.[222]

The civil and political dimension of the right to ongoing self-determination as a right to representative democracy

I have argued that 1) the populations of sovereign states fall within the definition of peoples and thus possess the right to ongoing self-determination, 2) the pursuit of economic, social and cultural development should to be free from both external interference and the manipulation or undue influence from their domestic authorities, and 3) the civil and political dimension of the right to ongoing self-determination can best be explained as the manifestation of all civil and political rights. Now I will analyse what the significance of these findings are. According to James Crawford, the consequence of the view that the right to self-determination is essentially a summary of other rights is that the right to participate democratically in the political system to which a person belongs and to participate in decisions as to the future of this system is a key

[221] This issue will be further analysed in relation to the economic, social, and cultural dimension of the right to ongoing self-determination in Chapter 4.

[222] In Chapter 4, I will argue that the right to ongoing self-determination is not only a manifestation of all civil and political rights but the totality of all human rights, including the economic, social and cultural rights adopted in the ICESCR.

self-determination right.[223] Cassese called the right of the population of sovereign states to elect and keep the government of its choice as one of the important elements of the internal dimension self-determination.[224] He later added that this includes the right of peoples to "choose their legislators and political leaders [not only free from external interference by also free] from any manipulation or undue influence from the *domestic* authorities themselves [original emphasis]".[225] Recently Pau Bossacoma Busquets has observed that "[t]he internal side of the international principle of self-determination of peoples is closely related to the principle of democracy".[226]

A logical starting point for any argument that the right to ongoing self-determination includes a right to a representative democracy is the Declaration on Friendly Relations. Interestingly, the important part in relation to this issue is the savings clause at the end of the section on the principle of self-determination. This savings clause states that nothing in the preceding paragraphs on the principle of self-determination

> "shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent *States conducting themselves in compliance with the principle of equal rights and self-determination of peoples* as described above *and thus possessed of a government representing the whole people belonging to the territory* without distinction as to race, creed or colour [emphasis added]".[227]

In 1993, the World Conference on Human Rights adopted an almost identical statement in the Vienna Declaration. The only change the drafters adopted was that it substituted the phrase "without distinction as to race, creed or colour" with the phrase "without distinction of any

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[223] Crawford (n 170) 25.
[224] Antonio Cassese, 'Political Self-Determination: Old Concepts and New Developments', *UN Law/Fundamental Rights: Two Topics in International Law* (Sijthoff & Noordhoff 1979) 137. The other element Cassese named was the right of subpopulation peoples to not be oppressed by central governments, which will be analysed in the next chapter.
[225] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 53; See also, Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press 1996).
[226] Busquets (n 91) 149.
[227] UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV) (n 9).

kind".[228] The statements in the Declaration on Friendly Relations and the Vienna Declaration seem to imply that if a government does not represent the whole of the population it is violating its obligation to respect the right to ongoing self-determination of its population. To be represented *by* a government is not the same as to be represented *in* a government. At least theoretically, a government is able to represent its whole population without distinction of any kind without all possible groups being represented in this government. Nonetheless, as Thornberry argued, "representation should be representation in substance [which] may direct us from representation to participation".[229] The former Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Asbjørn Eide referred to the right of popular participation in the government of a state as "the most basic principle of self-determination".[230] Indeed, there is a good case to make that the ongoing right to political self-determination includes a right of populations to participate in the public affairs of their state both indirectly through freely chosen representatives and directly.

Shivji stated that the right to self-determination contains "the freedom of the 'people' to choose the form of their governance and government".[231] Furthermore, Rosas stated that the right to self-determination appears to contain "[t]he right of a people to *govern,* that is, to have a democratic system of government" as one of its elements.[232] According to Special Rapporteur Cristescu, the right of peoples to elect their government is an integral aspect of the right to ongoing self-determination.[233] Similarly, Yusuf has even argued that that the right of people to freely choose a genuinely representative government is the most important entitlement peoples have in relation to the internal dimension of their right to self-determination.[234] In General Comment No. 25, the HRC stated that peoples, in accordance with Article 1, "enjoy the right

[228] Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna, 25 June 1993 (n 213).
[229] Thornberry (n 110) 116.
[230] 'Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities. 2nd Progress Report: Prepared by Mr. Asbjorn Eide, E/CN.4/Sub.2/1992/37' para 165.
[231] Issa Shivji, *The Concept of Human Rights in Africa* (African Books Collective 1989) 78.
[232] Rosas (n 170) 230.
[233] 'The Right to Self-Determination: Historical and Current Developments on the Basis of United Nations Instruments, by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/404/Rev. 1' (n 204) para 319.
[234] Yusuf (n 107) 385.

to choose *the form* of their constitution or government [emphasis added]".[235] Moreover, the HCR specifically named Article 25 of the ICCPR as a right that is related to the right to self-determination.[236] Article 25 provides that individuals have the right to a) take part in the conduct, directly or through freely chosen representatives, b) vote and to be elected at genuine periodic elections, and c) have access to public service in their country.[237] According to the HRC, indirectly such participation is exercised through freely chosen representatives who exercise governmental power and are accountable through the electoral process for their exercise of that power.[238] Higgins has argued that the relationship between the two rights is such that the latter article is concerned with the detail of how the free choice necessarily implied in Common Article 1 is to be provided. She argued this is done through periodic elections on the basis of universal suffrage.[239] In relation to this issue Higgins once rhetorically asked how people could be free in pursuit of their economic, social and cultural development "if self-determination does not also provide for free choice not only as to [political] status but also as to government".[240] Furthermore, Higgins observed that,

> "[t]he Human Rights Committee has consistently told states appearing before it for examination of their periodic reports that the right of self-determination requires that a *free choice* be afforded to the peoples, *on a continuing basis, as to their system of government,* in order that they can determine their economic, social, and cultural development [emphasis added]".[241]

In its Concluding Observations on the Republic of the Congo, the HRC expressed its concern that the people of the Congo were unable to exercise their right to self-determination under Article 1 of the ICCPR because the general elections had been postponed and called upon the

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[235] 'UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7' para 2.
[236] ibid.
[237] International Covenant on Civil and Political Rights (n 185), Article 25.
[238] 'UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7' (n 235) para 7.
[239] Higgins, *Problems and Process* (n 3) 120–121.
[240] ibid 120.
[241] ibid.

Republic of the Congo to organise general elections as soon as possible in order to enable its citizens to exercise their right to self-determination.[242]

Following on her argument that the right to ongoing self-determination includes a right to a representative democracy, as it requires the free choice of peoples on a continuing basis as to their system of government, Higgins argued that one-party systems are in violation of the right to self-determination of the population. Her reasoning was that "[e]ven in one-party systems that allow some form of participatory democracy, the system itself is predetermined: the range of political, economic, and social choices is thereby already narrowed".[243] This argument not only promotes the idea that the right to ongoing self-determination includes the right of populations to freely elect the governments of their states but also sets criteria for the form of political system in which such elections are to be taken place. Higgins observed that according to the HRC it is virtually impossible for a one-party state to fulfil its obligations under the right to self-determination.[244] Similar to Higgins, Cassese argued that even though initially under the 'loose interpretation' of the rights concerning democratic process of the HRC single-party systems were "regarded as compatible with the concept of representative democracy",[245] the HRC came to insist that political pluralism is a necessary precondition of democracy as it increasingly turned its attention to the internal dimension of the right to self-determination. Consequentially, the HRC considered non-multi-party systems as "scarcely compatible with the democratic model outlined in the [ICCPR]".[246]

Not all commentators agree that the right to self-determination includes a right of the population to democratically elect the government of its state. Saul, Kinley and Mowbray argued that the right to self-determination *not yet* requires the "full democratic political governance of the state for the benefit of its people". They argued that instead the emphasis of

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[242] 'UN Human Rights Committee (HRC), UN Human Rights Committee: Concluding Observations: Republic of the Congo, 25 April 2000, CCPR/C/79/Add.118' para 20.
[243] Higgins, *Problems and Process* (n 3) 120.
[244] ibid.
[245] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 63.
[246] ibid 64. See, UN Human Rights Committee (HRC), UN Human Rights Committee: Comments: United Republic of Tanzania, 28 December 1992, CCPR/C/79/Add.12; UN Human Rights Committee (HRC), UN Human Rights Committee: Comments: Cameroon,18 April 1994, CCPR/C/79/Add.33; Report of the United Nations Human Rights Committee, Volume II, United Nations General Assembly Official Records, Supplement A/45/40, New York 1990 [542-546], [576-577]

the right to self-determination lies on 1) the freedom from foreign interference, 2) the sovereignty equality of states, and 3) "various rights of political participation which do not also presuppose a particular political system".[247] The same line of reasoning can be found in statements by the Committee on the Elimination of Racial Discrimination In its General Recommendation No. 21, the CERD acknowledged that there is link between the right to self-determination and the right of individuals to participate in the conduct of public affairs as referred to in Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination.[248] This statement left out the other rights under Article 5(c). Namely, the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, and the right to have equal access to public service.[249] However, if the self-determination of populations to freely pursue their development has to be exercised with respect for human rights this should include the full set of rights provided for in Article 25 of the ICCPR and 5(c) of the ICERD, including the right to vote in elections and stand for election.

Another argument of why the right to ongoing self-determination does not include a right to a representative democracy was put forward by according to Fabienne Peter. She argued that the rights included in Article 25

> "can be satisfied by political systems other than democratic self-government [and] clauses can thus be interpreted in ways that do not entail a democratic ideal of political equality. The right to political participation, understood in this way, neither presupposes democratic institutions nor does it demand that they be imposed where they are absent."[250]

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[247] Saul, Kinley and Mowbray (n 55) 28.
[248] UN Committee on the Elimination of Racial Discrimination (CERD), Report of the UN Committee on the Elimination of Racial Discrimination, 30 September 1996, A/51/18 para 4.
[249] International Convention on the Elimination of All Forms of Racial Discrimination 1965, Article 5: 'In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...] (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service'.
[250] Fabienne Peter, 'The Human Right to Political Participation' (2013) 7 Journal of Ethics & Social Philosophy 11.

The question is whether the right to participate in the conduct of public affairs amounts to the right to shape this conduct. Such an interpretation would be in line with the so-called 'restrictive interpretation of treaties', which contends that if a treaty provision could be interpreted in multiple ways the interpretation should be followed that binds states to the interpretation that provides the weakest set of obligations.[251] However, even if it were possible to interpreted the provision in Article 25(1) and Article 25(2) in a manner that does not presupposes the necessity of a democratic system governance, such an interpretation would lack good faith and a respect for the context in which they were included.[252] As explained by Hersch Lauterpacht, the 'restrictive interpretation of treaties' method goes against the principle of good faith. According to Lauterpacht, if a treaty could be interpreted in one or more ways the possible interpretation that gives most effect to the treaty should be followed.[253] This 'rule of effectiveness' was later adopted by the International Law Commission in its commentary on its Draft Articles on the Law of Treaties.[254] With this in mind, the right of individuals to participate in their state's conduct of its public affairs should be interpreted as a right of individuals to influence their state's conduct of its public affairs.[255] In the words of the HRC, "Article 25 lies at the core of democratic government based on the consent of the people".[256] The relationship between the right to ongoing self-determination established by Article 1 and Article 25 is that the provision in Article 25 establishes a minimum standard that ensures populations are able to shape their state's conduct of its public affairs, as part of its free pursuit of development, by exercising the right of individual members of the population to participate in this conduct. Although it is not yet clear whether the right to participate in the conduct of public affairs extends to the to the international sphere of decision making,[257] it has been accepted that this right is applicable to the domestic sphere of decision-making in matters

[251] For an extensive analysis of this rule see, Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' 26 British Yearbook of International Law 48.
[252] For an in-depth analysis of democracy as a right see Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 The American Journal of International Law 46.
[253] Lauterpacht (n 251) 52–53.
[254] International Law Commission, 'Draft Articles on the Law of Treaties with Commentaries' (1966) 2 International Law Commission Yearbook 177, 219.
[255] Annelies Verstichel, *Participation, Representation and Identity* (Intersentia 2009) 33.
[256] 'UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7' (n 235) para 1.
[257] For an analysis of this issue see, Maisley (n 173).

related to international law.[258] Therefore, individuals are free to participate in a states decision-making processes in matters relating to the creation and adoption of international legal rules. In relation to the right of peoples to freely pursue their development, this is especially important to the negotiation and adoption of trade agreement. Such treaties have an enormous impact on the pursuit of development by the populations of the states involved. Consequently, if states do not allow their population to participate in their conduct in relation to the negotiations and adoption of international legal treaties this severely restricts its freedom to pursue the economic, social, and cultural development of its choice.

The understanding that the right to ongoing self-determination provides populations with the right to shape their state's conduct of its public affairs as part of its free pursuit of development should not be viewed as a refutation of the argument made by Saul, Kinley and Mowbray that the right to self-determination does not presuppose a particular political system but instead focuses on various rights of political participation. Indeed, the right to self-determination could not possibly prescribe a particular form of political system as that would go against its own nature – a right that provides that peoples should be free to shape their own political system and economic, social and cultural development. Even though history has taught us that one-party systems are likely to become authoritarian and the right to self-determination includes a prohibition against authoritarian exercises of power, any suggestion that the one-party systems are by definition violations of the right to self-determination is ungrounded. At least in theory, it is possible that a one-party system complies with the full set of obligations included in the right to self-determination. States with one-party systems in which the population can freely pursue its development through the unrestricted participation in their state's conduct of public affairs are just as able to abide by their obligations under the right to self-determination as states with a two- or multi-party system. As recognised in the General Assembly resolution on enhancing the effectiveness of the principle of periodic and genuine elections, "there is no single political system or electoral method that is equally suited to all nations and their people".[259] The right to self-determination does not presuppose a particular political system. Instead, the right to self-determination establishes a minimum standard that ensures that

[258] See, *Human Rights Committee, Beydon and 19 Other Members of the Association 'DIH Mouvement de protestation civique' v France, UN Doc CCPR/C/85/D/1400/2005, 31 October 2005*.

[259] UN General Assembly, Enhancing the effectiveness of the principle of periodic and genuine elections: resolution/adopted by the General Assembly, 18 December 1992, A/RES/47/138.

populations are free to control their own pursuit of development. This minimum standard is the obligation of states to adopt a system of governance that is freely chosen by its population and allows this population to pursue the development of its choice.

The civil and political dimension of the right to ongoing self-determination as a right to participatory democracy

Essential to a population's exercise of the right of peoples to freely pursue their economic, social and cultural development is not the ability to elect its government but its ability to pursue its development in accordance with its freely chosen policies. The election of representatives through which populations indirectly shapes their state's conduct of its public affairs is by no means the 'be all and end all' of their right to freely pursue its development. As stated by Judith Butler,

> "[a]lthough elected officials are supposed to represent popular sovereignty (or the "popular will" more specifically) by virtue of having been elected by a majority of the population, it does not follow that popular sovereignty is in any way exhausted by the electoral process or that elections fully transfer sovereignty from the populace to its elected representatives".[260]

Even if a state's government is elected by its population this by no means ensures that its population is free to pursue its development.[261] The Committee on Economic, Social and Cultural Rights ("CESCR") recognised that free and fair elections are crucial components of the right to participate but are not enough to guarantee the enjoyment of this right by themselves.[262] In the link between the right to ongoing self-determination and, what Saul, Kinley and Mowbray refer to as, "various rights of political participation",[263] the emphasis

[260] Judith Butler, '"We, the People": Thoughts on Freedom of Assembly', *What is a People?* (Columbia University Press 2016) 50.
[261] This issue will be analysed in relation to subpopulation peoples in Chapter 3, and further in Chapter 6.
[262] UN Economic and Social Council, 10 May 2001, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights, E/C.12/2001/10 para 12.
[263] Saul, Kinley and Mowbray (n 55) 28.

should not be placed on the right to vote in elections but on their right to participate in the conduct of public affairs in a broader sense.

According to Knut Bourquain the provision on the right to participate in Article 25 ICCPR "solely stipulates the right to participation in general public affairs, and includes the right to vote, but does not provide for an individual right to participate in the concrete administrative processes".[264] However, the HRC has interpreted 'the conduct of public affairs' as a broad concept relating to the exercise of political power, and in particular the exercise of legislative, executive and administrative powers.[265] In its opinion this covers "all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels".[266] This suggest that, in contrast to the argument of Bourquain, it is the opinion of the HRC that individuals do in fact have the right to participate in concrete administrative processes. This interpretation of the right to participate was also adopted by the CESCR, which stated that "the international human rights normative framework includes the right of those affected by key decisions to participate in the relevant decision-making processes.[267] The participation of a population in its state's policymaking is a necessity for the exercise of its right to pursue the development of its choice. The link between the peoples' right to freely pursue development and the right to participation of individual members of these peoples established that populations have the right to shape the political, economic, social and cultural systems of their state, and to pursue their development according to the policies they have freely chosen, by deciding how their state should conduct its public affairs. This includes both the right to elect the government of a state and participate in the state's conduct of its public affairs.

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[264] Knut Bourquain, *Freshwater Access from a Human Rights Perspective: A Challenge to International Water and Human Rights Law* (Brill Nijhoff 2008) 183 <https://brill.com/view/title/15312> accessed 1 June 2018.

[265] 'UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7' (n 235) para 5.

[266] ibid.

[267] UN Economic and Social Council, 10 May 2001, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights, E/C.12/2001/10 (n 260) para 12.

This understanding of the link between the right of peoples to freely pursue their development and the right of individuals to participate in their state's public affairs is especially evident in the regional framework established by the African Charter. Article 20 of the African Charter provides that peoples "shall freely determine their political status and shall pursue their economic and social development *according to the policy they have freely chosen* [emphasis added]".[268] The inclusion of the statement that the economic and social development of peoples should be pursuit according to policy they have freely chosen reflects the idea that the right to self-determination includes a right to democratic participation. This relates to the Article 13(1) right of every citizen "to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law".[269] This relationship was acknowledged by the African Commission in the *Katanga* case of 1995. The African Commission found that in absence of evidence that a people is denied the right under Article 13(1) this people is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of the state.[270] Therefore, the right to ongoing self-determination is not violated to the extent that it calls for a remedial solution that impinges upon the sovereignty and territorial integrity of a state as long as the Article 13(1) right of the members of peoples is guaranteed. Conversely, the right to self-determination if the Article 13(1) right of members of a people is violated this could possibly amount to a violation of the right to self-determination. Whereas in the case of the Kantagese people the Commission dealt with a situation of a subpopulation people, it can be assumed that the African Commission would find the same violation of the right to self-determination in a situation where the members of the population of a state as a whole are deprived of their right under Article 13(1).

According to Shivji, the "hesitant and ambiguous formulation" of the provision in Article 13 at best "provides for a representative government rather than a democratic one".[271] Article 13(1) states that every citizen has "the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law".[272] Shivji compares this with the stronger and unambiguous statement in Article 7 of the Universal Declaration of the Rights of Peoples ("Algiers Declaration"),

[268] African Charter on Human and Peoples' Rights 1981 (n 99), Article 20(1).
[269] ibid, Article 13(1).
[270] *Katangese Peoples' Congress v Zaire, African Commission on Human and Peoples' Rights Communication No. 75/92 (1995), (2000) AHRLR 72* (n 135).
[271] Shivji (n 231) 100; Shivji (n 159) 40.
[272] African Charter on Human and Peoples' Rights 1981 (n 99), Article 13(1).

which is located in Section II under the right to political self-determination and states that all peoples have the right to "democratic government representing all the citizens without distinction as race, sex, belief or colour, and capable of ensuring effective respect for the human rights and fundamental freedoms for all".[273] If looked at in a vacuum, Article 13(1) seemingly provides for an obligation to possess a representative government but does not go as far as providing an obligation for a democratic government. In relation to this point, it is important to highlight the difference between the wording of Article 13(1) of the African Charter and Article 25(a) of the ICCPR. Whereas the provision in Article 25(a) established a right of individuals to participate directly or indirectly *in the conduct of public affairs,*[274] Article 13(1) establishes a right to participate directly or indirectly, through freely chosen representatives, *in the government itself.*[275] This could be interpreted to mean that individuals have the right to be part of the government or be represented in the government but not a right to participate in the policymaking of the government. However, if Article 13(1) of the African Charter is interpreted in combination with the provision of Article 20, which establishes that all peoples have the right to freely pursue their development *according to the policy they have freely chosen,* it should be concluded that populations have the right to shape the policies by which they will pursue their development through the participation in their government and its government's policymaking.

In order for entire populations to shape the policies by which they shall pursue their development, they should not only have the right to determine their state's conduct of public affairs indirectly through chosen representatives but also directly by shaping individual policies. Such participation in policymaking can for instance be exercised through referendums or other electoral processes in which individuals have a direct say over their state's exercise of legislative, executive and administrative powers.[276] As stated by the HRC, individuals can also take part in the conduct of public affairs though public debate, dialogue with their government, and their capacity to organise themselves. It also acknowledged that such exercises of

[273] Universal Declaration of the Rights of Peoples (Algiers Declaration) 1976, Article 7.
[274] International Covenant on Civil and Political Rights (n 185), Article 25(a).
[275] *Katangese Peoples' Congress v Zaire, African Commission on Human and Peoples' Rights Communication No. 75/92 (1995), (2000) AHRLR 72* (n 135).
[276] 'UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7' (n 235) para 6.

participation are supported by, in particular, their rights to freedom of expression, freedom of assembly and freedom of association.[277] This is not exclusive to such exercises of the right to participation but also applies to all forms of direct and indirect exercises of participation. The guarantee of the full set of civil and political rights is a necessity for populations to shape their state's conduct of public affairs in a genuine and effective way. The right of a population to freely pursue its development is meaningless without the right to freely develop a popular will. In this regard the rights to freedom of expression, freedom of assembly and freedom of association are indeed of special importance. The argument that the right to self-determination is best understood as a manifestation of the totality of civil and political rights is based upon the idea that the participation of peoples in the public affairs of their state can only be exercised in a genuine and meaningful manner if its members are not only free to exercise their rights under Article 25 but also all other rights included in the ICCPR.[278] The individual civil and political rights can be seen as minimum standards that ensure that a population can exercise its ongoing self-determination right to pursue its development, free from external interference, and by means of its' freely chosen policies.

Conclusion

In this chapter I have argued that, the development of self-determination as a human right of peoples, has had two important consequences. The first of these consequences is that it established that the right to ongoing self-determination provides obligations of states in relation to both the populations of foreign states and their own population. The second important consequence is that as a human right the right to ongoing self-determination is indivisible from, interdependent and interrelated with, all other human rights. Thus, the right to ongoing self-determination is best explained as a manifestation of the totality of human rights. In this chapter, I have focussed on the civil and political dimension of the right to ongoing self-determination of the entire population of a state. This dimension provides the right of such a population to freely pursue their economic, social and cultural development by participating in the civil and political life of their state. A population exercises such participation by the exercise of its individual members of their civil and political right. Therefore, whereas the right to ongoing self-determination is best explained as a manifestation of the totality of human

[277] ibid 8.

[278] In Chapter 4, I will argue that this not only applies to civil and political rights but to the full body of human rights, and thus also the economic, social and cultural rights set out in the ICESCR.

rights, the civil and political dimension of the right to ongoing self-determination is best explained as a manifestation of the totality of civil and political rights. This includes the right of individual to participate in the public life of their state, which is one of the key human rights that enables a population to freely pursue their economic, social and cultural development.

From my examination of the relationship between the right to ongoing self-determination of entire population and the right of the individual members of these populations to participate in the public life of their state, I first found that it can be argued that the civil and political dimension of the right to ongoing self-determination is the foundation of a right to a representative democratic system of governance. This includes the right of populations to both choose the form of their government and to indirectly participate in the decision-making processes of their government by freely electing its representatives. Subsequently, I also found that it could equally be argued that the civil and political dimension of the right to ongoing self-determination is the foundation of a right to a participatory democratic system of governance. I concluded that it is not the form of governance, and the means by which populations participate in the decision-making processes of their government, that is important. Instead, what is important is that populations control the policies implemented by their government which will affect their development by their participation in their government's decision-making processes in relation to these policies. In other words, peoples should have the right to pursue their development in accordance with policies they have freely chosen. I will examine the consequences of these findings in relation to 1) the civil and political dimension of the right to ongoing self-determination of subpopulation groups in the third chapter, 2) the socio-economic dimension of the right to ongoing self-determination in the fourth chapter, and 3) the self-determination right of peoples to permanent sovereignty over their natural wealth and resources in the fifth chapter.

Chapter 3 – The civil and political dimension of the right to ongoing self-determination of 'subpopulation groups'

The previous chapter has focussed on the civil and political dimension of the right to ongoing self-determination of the populations of sovereign states as a whole. This chapter will build upon that by analysing the ongoing self-determination rights of subpopulation groups, which are distinct subsections of the 'entire population' of a state. Since the entry into force of the Twin Covenants on Human Rights, the self-determination of subpopulation groups has become increasingly predominant in self-determination scholarship. Consequently, the interpretation of 'peoples' has become central to the discourse on the right to self-determination. In the previous chapter, I argued that the populations of states and non-self-governing territories are among the beneficiaries of the right to self-determination and that the civil and political dimension of ongoing self-determination is exercised through the ability of its members to freely exercise their civil and political rights. In the 90s, Higgins has argued that because all members of subpopulation groups are part of the population of the territory "they too, as individuals, are the holders of the right of self-determination".[279] According to Higgins, if the term peoples is interpreted as the 'entire peoples' – the entire population – of a state it is no longer necessary to answer the difficult question of whether a particular subpopulation group is a people for purposes of self-determination under Common Article 1 of the Twin Covenants.[280]

In this chapter, I will first analyse the ongoing right of political self-determination of subpopulation groups whose status as peoples has not yet been recognised – i.e. 'minority groups' – and juxtapose this against the ongoing self-determination rights of indigenous and tribal peoples, which are subpopulation groups whose status as peoples is generally recognised in international law. I will argue that even though Higgins' argument is valid – all subpopulation groups are indeed entitled to freely participate in the pursuit of development of the population to which they belong – her conclusion that it is no long necessary to establish what subpopulation groups are peoples is no longer correct now indigenous peoples are acknowledge as peoples with the right to self-determination. The rights provided to subpopulation peoples by the civil and political dimension of the right to ongoing self-

[279] Higgins, *Problems and Process* (n 3) 124.
[280] ibid 126.

determination are more extensive than the rights provided to other subpopulation groups. Whereas subpopulation peoples have both the right to participate in the civil and political life of the state and the right to their own internal civil and political life, other subpopulation groups only have the former right. I will analyse how that the international human rights framework has balanced the right to ongoing self-determination of subpopulation peoples with the right to ongoing self-determination of the population as a whole. As a final note on this chapter, as this thesis focusses on the right to ongoing self-determination, this chapter will not analyse the constitutive self-determination right of subpopulation peoples to freely determine their own political status. Therefore, it will also not examine whether subpopulation peoples have a right to secession under international law.

The right of subpopulation groups to freely participate in the civil and political life of the state

When the emphasis of the development of the right to self-determination shifted towards its internal dimension one of the important issues was whether this dimension applied exclusively to the entire population of states or also to certain subpopulation groups. A central feature of the discussion concerning this issue became the interpretation of the statements on the principle of equal rights and self-determination in the Declaration on Friendly Relations. As quoted in the previous chapters, in the savings clause included in the part on the principle of equal rights and self-determination of this declaration it is stated that

> "[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory *without distinction as to race, creed or colour* [emphasis added]."[281]

[281] UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV) (n 9).

Cassese interpreted the inclusion of the phrase 'without distinction as to race, creed or colour' to mean that the subpopulation groups that fit under one of these categories are recognised as peoples with a possible claim to the right to self-determination.[282] This led him to the examination of the drafter's intended meaning of race, creed and colour. He concluded that race and colour express the identical concept of 'race'.[283] In relation to the inclusion of the term 'creed', he examined whether it refers to a 'system of religious beliefs' or includes any 'set of principles or opinions on any subject' as suggested by the non-legal definition of the non-legal definition of the term.[284] Cassese argued that the drafters could not have indented for the term 'creed' to be interpreted as the latter – even though this is part of the ordinary meaning of the term – because "any political group not 'represented' by the government would have the right to self-determination, hence also – at least in exceptional cases – the right to secession".[285] Cassese thus concludes that the right to ongoing self-determination as embodied in the Declaration on Friendly Relations is only conferred on subpopulation groups that are defined by their race or religious beliefs.[286] Moreover, he concluded that by "limiting self-determination to racial and religious groups, the draftsmen made it clear that self-determination was not considered a right held by *the entire people* of an authoritarian State".[287]

Cassese's argument is based upon the idea that the drafters intended for the inclusion of the phrase "without distinction as to race, creed or colour" to be interpreted as bestowing the right to self-determination upon these types of subpopulation groups. As stated in the previous chapter, Higgins argued that there are two possible meanings of the term 'peoples' in relation to the right to self-determination.[288] The first is the meaning promoted by Cassese that 'peoples' means all persons comprising distinctive groupings on the basis of race, ethnicity, or religion. Alternatively, there is the possibility that 'peoples' means the entire people of a state – in other words the population of a state in its entirety. According to Higgins, "[t]he emphasis in all the relevant instruments, and in the state practice [...] on the importance of territorial integrity, means that 'peoples' is to be understood in the sense of *all* the peoples of a given

[282] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 108–120.
[283] ibid 112.
[284] ibid 112–120.
[285] ibid 113–114.
[286] ibid 114.
[287] ibid.
[288] Higgins, *Problems and Process* (n 3) 124.

territory [original emphasis]".[289] In line with Cassese, Thornberry acknowledged that a more flexible argument can be made in favour of interpreting the Declaration on Friendly Relations in a manner that bestows the right to self-determination on certain subpopulation groups. However, even so, he argued that

> "[t]he non-recognition of the existence of distinct peoples apart from the people of the State as a whole must be accounted for in any interpretation of the text [the Declaration on Friendly Relations]".[290]

Thornberry concluded this from the fact that "the text refers to 'the whole people', so it seems that self-determination benefits the people of the State as a unified group.[291] In other words, Thornberry argued that the drafters of Declaration on Friendly Relations viewed self-determination as a right belonging to the entire population of a state. If this interpretation is followed, the inclusion of the phrase "without distinction as to race, creed or colour" was not intended to bestow a right to self-determination on these categories of subpopulation groups. Instead, it was intended to convey the view that the right to self-determination of the population as a whole is infringed upon if a government represents this population with distinction as to race, creed, or colour. This interpretation is easier to reconcile with the savings clause included in the Vienna Declaration. The wording of this latter savings clause is almost identical to that in the Declaration on Friendly Relations. The only change that was made is that the Vienna Declaration replaced the phrase "without distinction as to race, creed or colour" by the phrase "without distinction of any kind".[292] If we apply Cassese's interpretation of the Declaration on Friendly Relations to the Vienna Declaration the latter declaration would convey the view that any kind of subpopulation group is a people with the right to self-determination. This was obviously not the intention of its drafters. Therefore, it should be concluded that the almost identical statements in the two declarations represent the view that 1) the right to self-determination is a right of the population of a state as a whole, 2) the government of the state is to represent its population without distinction, and 3) that if the government fails to do so it is not a right to self-determination of the subpopulation group that is not represented by its

[289] ibid.
[290] Thornberry (n 110) 115.
[291] ibid.
[292] Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna, 25 June 1993 (n 213), Article 3.

government that is violated but instead the right to self-determination of the population as a whole.

Higgins has argued that – if 'peoples' is interpreted as 'the entire peoples of a state' – it is no longer necessary to answer the difficult question whether a particular subpopulation group is a people for purposes of the right to self-determination.[293] This argument is based upon the idea that because all members of subpopulation groups are part of the entire people of the state "they too, as individuals, are the holders of the right of self-determination".[294] The members of all subpopulation groups have the right to participate in the free pursuit of development of the population of a state as a whole.[295] This includes the right to participate in their state's conduct of its public affairs. As argued in the previous chapter, this includes the state's decision-making processes. This right been recognised in a number of treaties, UN General Assembly resolutions and the findings of UN treaty bodies. For instance, the CESCR has acknowledged that "the international human rights normative framework includes the right of those affected by key decisions to participate in the relevant decision-making processes".[296] As the individual members of a subpopulation group have the right to participate in the decision-making processes in relation to decisions that concern them, the group as a whole is able to participate in decision-making process that concerns its development. In other words, subpopulation groups have the right to participate in such decision-making processes through the exercise of its members of their individual right to participate.

The right of subpopulation groups to 'effective participation'

Article 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities ("Declaration on the Rights of Minorities") provided that states shall take measures to ensure that individual members of minorities are able to exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.[297] In relation to the ongoing right to political self-determination,

[293] Higgins, *Problems and Process* (n 3) 126.
[294] ibid 124.
[295] ibid; A similar argument was made by Verstichel (n 255) 191.
[296] 'UN Economic and Social Council, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights, 10 May 2001, E/C.12/2001/10' para 12.
[297] UN Commission on Human Rights, Rights of persons belonging to national, ethnic, religious and linguistic minorities., 21 February 1992, E/CN.4/RES/1992/16, Article 4(1).

this means that minorities are entitled to develop their own popular will and participate in their state's public life on equal footing to all other individuals. As shown in the previous chapter, this entitlement is exercised through the enjoyment of all civil and political rights. This is reflected in the Lund Recommendations on the Effective Participation of National Minorities in Public Life ("Lund Recommendations") by the Organization for Security and Co-operation in Europe's High Commissioner on National Minorities ("HCNM"),[298] and its 'explanatory note'.[299] These principles are themselves not legally binding but are considered as authoritative explanations of existing legal rules.[300] In the words of the High Commissioner on National Minorities,

> "[The Lund Recommendations] build upon fundamental principles and rules of international law, such as respect for human dignity, equal rights, and nondiscrimination, as they affect the rights of national minorities to participate in public life and to enjoy other political rights."[301]

In General Principle 6 of the Lund Recommendations, it is included that that states "should ensure that opportunities exist for minorities to have an effective voice at the level of the central government".[302] The Declaration on the Rights of Minorities specifically includes that individual members of minorities have the right to participate effectively in decisions on the national and regional level *concerning the minority to which they belong or regions in which they live.*[303] According to the UN Sub-Commission on the Promotion and Protection of Human

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[298] For an extensive analysis of the Lund Recommendations in practice see, Krzysztof Drzewicki, 'OSCE Lund Recommendations in the Practice of the High Commissioner on National Minorities' in Marc Weller and Katherine Nobbs (eds), *Political Participation of Minorities: A Commentary on International Standards and Practice* (Oxford University Press 2010).

[299] See, OSCE High Commissioner on National Minorities, 'The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note' (1999).

[300] Francesco Palmero, 'When the Lund Recommendations Are Ignored. Effective Participation of National Minorities through Territorial Autonomy' (2009) 16 International Journal on Minority and Group Rights 653, 653; Stefan Wolff and Marc Weller, 'Self-Determination and Autonomy: A Conceptual Introduction' in Stefan Wolff and Marc Weller (eds), *Autonomy, Self-governance and Conflict Resolution: Innovative approaches to institutional design in divided societies* (Routledge 2005) 3.

[301] OSCE High Commissioner on National Minorities (n 299), General Principle 2.

[302] ibid, General Principle 6.

[303] UN Commission on Human Rights, Rights of persons belonging to national, ethnic, religious and linguistic minorities., 21 February 1992, E/CN.4/RES/1992/16 (n 297), Article 2(3).

Rights, the right to effective participation establishes that minorities as a minimum have the right to have their opinion heard and fully taken into account before the state decides upon the adoption of matters to their concern.[304] However, as stated by this Sub-Commission, "[t]he number of persons belonging to minorities is by definition too small for them to determine the outcome of decisions in majoritarian democracy".[305] This raises the question of how much influence the right to 'effective participation' really provides to minority groups. From her review of the UN standards and practice, Ilona Klímová-Alexander observed that the United Nations has not yet adopted a binding legal standard on the effective participation of minorities in the public affairs of their state.[306] As she explained, only through the interpretation of Article 27 of the ICCPR can states "be called upon to enact measures to ensure the effective participation of members of minority communities in decisions which affect them".[307]

As Verstichel argued, the right of minorities to participate in the conduct of their state's public affairs is an effect of applying the doctrine of non-discrimination to the provision of Article 27.[308] As Zdenka Machnyikova and Lanna Hollo explained, this doctrine is one of the key pillars of the system of protection of minorities.[309] In Article 2(1) of the ICCPR it is provided that

> "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[310]

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[304] 'UN Sub-Commission on the Promotion and Protection of Human Rights, Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 4 April 2005, E/CN.4/Sub.2/AC.5/2005/2' 42.
[305] ibid 42.
[306] Ilona Klímová-Alexander, 'Effective Participation by Minorities: United Nations Standards and Practice' in Marc Weller and Nobbs (eds), *Political Participation of Minorities: A Commentary on International Standards and Practice* (Oxford University Press 2010) 304.
[307] ibid.
[308] Verstichel (n 255) 190–191.
[309] Zdenka Machnyikova and Hollo Lanna, 'The Principles of Non-Discrimination and Full and Effective Equality and Political Participation' in Marc Weller and Katherine Nobbs (eds), *Political Participation of Minorities: A Commentary on International Standards and Practice* (Oxford University Press 2010) 96.
[310] International Covenant on Civil and Political Rights (n 185), Article 2(1).

Moreover, in Article 26 it is established that the law of the members states to the ICCPR "shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground".[311] The same argument as Verstichel made in relation to minorities can be made in relation to all subpopulation groups whose members' right to not be discriminated against for their membership of that group is provided by the human right prohibition against discrimination. Therefore, it should be accepted that all these subpopulation groups have the right to participate in the conduct of their state's public affairs as an effect of applying the doctrine of non-discrimination to the provision of Article 27.

In her analysis of the right of minorities to effective participation the public affairs of their state, Verstichel stated that the qualifier 'effective' in the right to effective participation "refers to the fact that the 'presence of minority representatives in the decision-making processes should be translated into 'influence' on the outcome of the decision-making".[312] She clarified that even though the presence of minority representation seemingly implies 'influence' this alone is often not enough to ensure the implementation of the right to effective participation of minorities.[313] From her review of the relevant international instrument, Verstichel concluded that in relation to this right most attention goes to the 'presence' of minorities in the decision-making bodies and processes and hardly any to the 'influence' of minorities on the outcome of it.[314] As explained by Yash Ghai, "representation without self-government would serve limited functions, [as] the group would remain a minority, whereas self-governance would give it the right to conduct its own affairs in areas that matter deeply to it".[315] In relation to this issue, it is important to note that international legal standards have not confirmed the existence of a right of minorities to autonomy or self-government.[316] Consequently, it is not possible to extrapolate such a right for subpopulation groups from the right to ongoing self-determination

[311] ibid, Article 25.
[312] Verstichel (n 255) 33; Annelies Verstichel, 'Understanding Minority Participation and Representation and the Issue of Citizenship' in Marc Weller and Katherine Nobbs (eds), *Political Participation of Minorities: A Commentary on International Standards and Practice* (Ofxord University Press 2010) 75.
[313] Verstichel (n 312) 75.
[314] ibid 76.
[315] Yash Ghai, 'Participation as Self-Governance' in Marc Weller and Katherine Nobbs (eds), *Political Participation of Minorities: A Commentary on International Standards and Practice* (Oxford University Press 2010) 617.
[316] Machnyikova and Lanna (n 309) 144; Ghai (n 315) 617.

of the population to which these groups belong. Nor is it possible to extrapolate this right from the right to constitutive self-determination as this right is a right exclusive to peoples.

As the right to effective participation is extrapolated from a combination of the right to participation of individuals and the doctrine of non-discrimination, not only minorities but the members all subpopulation groups protected by the doctrine of non-discrimination possess this right. This has been acknowledged in relation to several other subpopulation groups. For instance, in the Declaration on the Elimination of Discrimination against Women of 1979 ("CEDAW") it is provided that states shall take all appropriate measures to ensure that women, on equal terms with men, are provided with 1) the right to vote in all elections and be eligible for election to all publicly elected bodies, 2) the right to vote in all public referenda, and 3) the right to hold public office and to exercise all public functions.[317] As established in the previous chapter in relation to entire population, the right to vote and be elected, in free elections is not enough to ensure that a state respects the ongoing self-determination rights of all subpopulation groups. In relation to subpopulation groups such elections are even less of a guarantee that they are able to genuinely participate in the free pursuit of development of the population. The CESCR acknowledged that, in relation to people living in poverty, even though free and fair elections are crucial for the exercise of the right to participate in the public affairs of the state, they are by themselves not enough to ensure the enjoyment of the right to participate in key decisions affecting the life of an individual and thus also in relation to decisions that affect the subpopulation groups individual belongs to.[318] Just as the right of populations to shape their state's conduct of its public affairs goes further than a right to free elections and includes a right to participate in the decision-making processes of a state, the rights of subpopulation groups provided by the civil and political dimension of the right to ongoing self-determination of the population they are part of go beyond just a right to participate in free elections. The CEDAW provides that, apart from the right of women to "vote all elections and public referenda and to be eligible for election to all publicly elected bodies",[319] women also have the

[317] Convention on the Elimination of All Forms of Discrimination against Women 1979, Article 7.
[318] 'UN Economic and Social Council, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights, 10 May 2001, E/C.12/2001/10' (n 296) para 12.
[319] Convention on the Elimination of All Forms of Discrimination against Women 1979 (n 317), Article 7(a).

right to "participate in the formulation of government policy and the implementation thereof".[320] The right of subpopulation groups to have their opinion heard and fully considered as part of the process of formulation of government policy and the implementation thereof is an essential element of the right of the population as a whole to freely pursue its economic, social and cultural development. However, this right does not go as far as providing all subpopulation groups with the right to full autonomy or self-government over issues internal to these groups. Consequently, the influence of minorities and other subpopulation groups that are not recognised as peoples in the conduct of their state's public affairs is still limited, even in relation to decisions concerning the subpopulation groups or regions in which they live.

The right of indigenous peoples to freely pursue their development and freely participate in the civil and political life of the state

In the previous subchapters, I established that 1) the self-determination rights of subpopulation groups provides them with a right to effectively participate in the free pursuit of economic, social and cultural development of the population to which they belong, and 2) these groups do not possess the right to freely pursue their own development separate from the rest of this population. However, commentators have acknowledged that indigenous peoples are the exception as they have strong claims to the right to self-determination.[321] Also the General Assembly has acknowledged indigenous peoples possess the right to self-determination in the Declaration on the Rights of Indigenous Peoples.[322] As established by Megan Davies in her review of the legal standards set by the UNDRIP, certain scholars have claimed that the articles in the UNDRIP already constitute emerging customary international law of indigenous

[320] ibid, Article 7(b).

[321] See for instance, Anaya (n 108) 110–128; Joshua Castellino, 'International Law and Self-Determination: Peoples, Indigenous Peoples, and Minorities' in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014); Macklem (n 140) 48; Garth Nettheim, 'Peoples and Populations – Indigenous Peoples and the Rights of Peoples' in James Crawford (ed), *The Rights of Peoples* (Clarendon Press 1988); Allen Patten, 'Self-Determination for National Minorities' in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 126; Ricardo Pereira and Orla Gough, 'Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law' (2013) 14 Melbourne Journal of International Law 451; Roepstorff (n 124).

[322] UN General Assembly, Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295 (n 31), Article 3.

peoples' rights before its adoption in 2007 but that this does not apply to the text as a whole.[323] In turn, in his review on the legal status of this UN declaration, Sylvanus Gbendazhi Barnabas concluded that even though it has not yet achieved the status of customary international law "it carries significant legal weight and far-reaching legal implications in international human rights law in relation to [Indigenous Peoples] and their rights".[324] The Human Rights Council, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have all acknowledged that indigenous peoples possess the right to self-determination.[325]

The Declaration on the Rights of Indigenous Peoples does itself not provide clarification of what subpopulation groups are considered indigenous peoples. One of the commonly referred to definitions of indigenous peoples is the 'working definition' drawn up by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. According to Cobo,

> [i]ndigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems".[326]

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[323] See, Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 Melbourne Journal of International Law 465.

[324] Sylvanus Gbendazhi Barnabas, 'The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law' (2017) 6 International Human Rights Law Review 242, 261.

[325] 'UN General Assembly, Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making, 23 August 2010, A/HRC/15/35' para 5; 'UN Human Rights Committee (HRC), UN Human Rights Committee: Concluding Observations: Mexico, 27 July 1999, CCPR/C/79/Add.109' para 19; 'UN Committee on Economic, Social and Cultural Rights (CESCR), Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia, 7 June 2010, E/C.12/COL/CO/5'.

[326] 'Study of the Problem of Discrimination against Indigenous Populations, Volume 5, Conclusions, Proposals and Recommendations, by José R. Martínez Cobo, Special Rapporteur

This definition was used in a joint publication of the Office of the United Nations High Commissioner for Human Rights and the Asia Pacific Forum of National Human Rights Institutions under the title 'The United Nations Declaration on the Right of Indigenous Peoples: A Manual for National Human Rights Institutions'.[327] Cobo's working definition shares several elements with the definition of 'indigenous peoples' set out in Article 1 of ILO Convention 169. In this article, the International Labour Organization has defined 'indigenous peoples' as

> "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions".[328]

Both this definition and Cobo's 'working definition' note that indigenous peoples have preserved some of their own social, cultural and political or legal institutions. Both definitions also include the notion that indigenous peoples have a link to the geographical region that predates its conquest and colonisation. Moreover, similar to the statement in Cobo's definition that indigenous peoples "consider themselves distinct from other sectors of the societies", the ILC included the statement that "[s]elf-identification as indigenous […] shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply".[329]

The legal framework set out by ILO Convention 169 does not only apply to indigenous peoples but also to tribal groups in independent countries as long as 1) "their social, cultural and economic conditions distinguish them from other sections of the national community", and 2) "whose status is regulated wholly or partially by their own customs or traditions or by special

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of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1986/7/Add.4' para 379.

[327] 'UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 33, Frequently Asked Questions on Economic, Social and Cultural Rights, December 2008, No. 33' 6.

[328] International Labour Organization (ILO), Convention concerning Indigenous and Tribal Peoples in Independent Countries, C169 1989, Article 1(1).

[329] ibid, Article 1(2).

laws or regulations".[330] However, ILO Convention 169 does not include a provision on the right to self-determination and even includes the statement that the "use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law [original emphasis]".[331] According to Macklem this statement was included to "foreclose the argument that its reference to 'peoples' links an indigenous population to the right of self-determination".[332] As Brad Roth observed, "[i]t was only in 2007, that, with near unanimity, the UN General Assembly finally ascribed to indigenous peoples this distinctive international legal personality".[333] This has linked the rights of indigenous peoples set out in ILO Convention 169 with the right to self-determination. In its observations the Committee on Economic, Social and Cultural Rights has repeatedly drawn from the framework set out by ILO Convention 169 in relation to the right to self-determination of indigenous peoples.[334] Even though the use of 'peoples' was not intended to bestow the right to self-determination on the groups that fall within the definition it provided, the provisions ILO Convention includes are now an important guide to the methods by which indigenous peoples can exercise their self-determination.

On a regional level, in *Moiwana Community v. Suriname* ("*Moiwana Community* case"), the Inter-American Court of Human Rights decided to apply its jurisprudence regarding indigenous peoples to the Moiwana tribal community, which members are descendant from African slaves forcibly taken to Suriname during the European colonization in the 17th century and, therefore, not indigenous to the region. The Inter-American Court established that the Moiwana community "possess an 'all-encompassing relationship' to their traditional lands, and their concept of ownership regarding that territory is not centred on the individual, but rather

[330] ibid, Article 1(1)(a).
[331] ibid, Article 1(3).
[332] Macklem (n 140) 150–151.
[333] Roth (n 133) 71.
[334] See, for instance: 'UN Committee on Economic, Social and Cultural Rights (CESCR), Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ecuador, 7 June 2004, E/C.12/1/Add.100'; 'UN Committee on Economic, Social and Cultural Rights (CESCR), Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia, 7 June 2010, E/C.12/COL/CO/5' (n 325); 'UN Committee on Economic, Social and Cultural Rights (CESCR), Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Philippines, 1 December 2008, E/C.12/PHL/CO/4' 5–6.

on the community as a whole".[335] In doing so, the Inter-American Court applied the characteristics of indigenous peoples that it had previously set out in *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua:*

> "Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that *ownership of the land is not centred on an individual but rather on the group and its community.* […] For indigenous communities, *relations to the land are not merely a matter of possession and production but a material and spiritual element* which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations. [emphasis added]"[336]

In *Saramaka People v Suriname* ("*Saramaka People* case"), the Inter-American Court of Human Rights followed its jurisprudence from the *Moiwana Community* case by reaffirming its applicability to the legal position of a people that was not indigenous to the region. The Court did so after concluding that the Saramaka people are

> "a tribal community whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs, and/or traditions".[337]

The *Moiwana Community* and *Saramaka People* cases show that in the opinion of the Inter-American Court the rights of indigenous peoples should apply to all groups that share the characteristics of indigenous peoples. These indigenous peoples' rights are also granted to groups that "at the time of conquest or colonisation or the establishment of present state boundaries"[338] were not yet inhabitants of their current state, or geographical region that is part

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[335] *Case of the Moiwana Community v Suriname, Preliminary Objections, Merits, Reparations and Costs, 15 June 2005, IACHR (Series C) No 124* [133].
[336] *The Mayagna (Sumo) Awas Tingni Community v Nicaragua, Merits, reparations and costs, IACHR, 31 August 2001, (Series C) No 79* [149].
[337] *Case of the Saramaka People v Suriname, Preliminary Objections, Merits, Reparations and Costs, 28 November 2007, IACHR (Series C) No 172* [84].
[338] International Labour Organization (ILO), Convention concerning Indigenous and Tribal Peoples in Independent Countries, C169 (n 328), Article 1(1)(b).

of their current state. However, only on the condition that the subpopulation group in question shares the special relationship indigenous peoples have with their territory. A relationship that goes beyond individual ownership and instead focusses on the connection between the territory and the community as a whole.

The African Commission on Human and Peoples' Rights has adopted a similar approach to their decisions on who to include under 'indigenous peoples'. In the case of *Endorois Welfare Council v Kenya* (*"Endorois* case"), the Commission noted that the Inter-American Commission on Human Rights has "not hesitated in granting the collective rights protection to groups beyond the 'narrow/aboriginal/pre-Colombian' understanding of indigenous peoples traditionally adopted in the Americas".[339] It continued by comparing the *Endorois* case to the Inter-American Commission's *Saramaka People* case.[340] In its Advisory Opinion on the Declaration on the Rights of Indigenous Peoples, the African Commission noted that it "considers that any African can legitimately consider him/herself as indigene to the Continent".[341] Like the Inter-American Commission, the African Commission grants the rights of indigenous peoples' to all groups that share the characteristics of indigenous peoples. The main characteristics the African Commission, in relation to indigenous peoples, has recognised are the self-identification of a group as an 'indigenous people' and a "special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples".[342]

A similar approach was taken by the UN Secretariat of the Permanent Forum on Indigenous Issues, which stated that "the terms 'indigenous' and 'tribal' are used as synonyms in the UN system".[343] In conclusion, it can be established that in order for a group to be protected by the framework on the rights of indigenous peoples its members do not have to descent from the

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[339] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, African Commission on Human and Peoples' Rights Communication No 276/2003, 2009 AHRLR 75, 4 February 2010* [159].
[340] See, ibid 159–162.
[341] *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the African Commission on Human and Peoples' Rights, 41st Ordinary Session, May 2007, Accra, Ghana* [13].
[342] *ibid 12.*
[343] 'UN Department of Economic and Social Affairs, Division for Social Policy and Development Secretariat of the Permanent Forum on Indigenous Issues, Workshop on Data Collection and Disaggregation for Indigenous Peoples, PFII/2004/WS.1/3' (2004) para 6.

population that inhabited the region at the time of conquest or colonisation or the establishment of the present state boundaries but the group must have 1) have distinctive economic, social and cultural conditions that set them apart from other sections of the population, 2) have distinctive customs, traditions, laws or regulations, 3) have a special relationship – often a relationship of a spiritual nature – with the territory in which they preside, and 4) identify themselves as a group that is distinct from other sectors of the population. For the purpose of this thesis, the term indigenous peoples will be used to refer to all groups protected under the international legal framework on indigenous rights.

The two pillars of indigenous peoples' ongoing political self-determination rights

An important feature of the framework established by ILO Convention 169 and the Declaration on Indigenous Peoples is that it is developed around the idea that indigenous peoples both a subpopulation group of the entire population to which they belong and a 'peoples' in their own right. Consequently, as observed by Cambou, an analysis of the rights of indigenous peoples shows that the right to ongoing self-determination of indigenous peoples has two pillars.[344] It is difficult to draw a clear boarder between the two different pillars. Instead, the two pillars work in harmony with each other. Firstly, as 'peoples' in their own right, and unlike other subpopulation groups, indigenous peoples have the right to self-determination. This right is not included in ILO Convention 169 but in Article 3 of the Declaration on Indigenous Peoples it is stated that by virtue of their right to self-determination indigenous peoples have the right to freely determine their political status and freely pursue their economic, social and cultural development.[345] The former right is the legal foundation of the establishment of autonomous or self-governing systems. The latter right is the legal foundation of the continued exercise of autonomy or self-government. This is reflected in Article 4 of the Declaration on the Rights of Indigenous Peoples, which links their right to "autonomy or self-government in matters relating to their internal and local affairs" to their exercise of their right to self-determination.[346] In the words of Heather Northcott, the "exercise of the right to autonomy enables indigenous peoples within a state to establish and implement governing structures without posing a threat to the

[344] Cambou (n 32) 38.
[345] UN General Assembly, Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295 (n 31), Article 3.
[346] ibid, Article 4.

territorial integrity of the state".[347] However, as the wording of Article 4 of the UNDRIP makes clear, the right to autonomy or self-government is limited to those matters relating to the internal and local affairs of indigenous peoples. As Cambou determined from her examination of the preparatory works of the Declaration on Indigenous Peoples, these internal affairs include those relating to "culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions".[348]

The second pillar of ongoing self-determination rights of indigenous peoples is based upon their status as part of the entire population of a state. Indigenous peoples, like other subpopulation groups, have the right to participate in the free pursuit of the development of the to which they belong.[349] As shown above, in relation to the participation of subpopulation groups in the free pursuit of development of the population as a whole, the key right is that of 'effective participation' in the public affairs of the state. In his review of the political participation systems that are applicable to indigenous peoples, Luis Rodríguez-Piñero Royo explained that the endorsement of self-government right is simultaneous to the affirmation of indigenous peoples' right to participate in the conduct of public affairs in the states in which they live.[350] Therefore, the autonomy of indigenous peoples over matters relating to their internal and local affairs does not replace their right to participate in the conduct of public affairs of their state but is an addition to this right.[351] Indeed, Article 5 of the Declaration on the Rights of Indigenous Peoples states that even though indigenous peoples have the right to maintain and strengthen their own political, legal, economic, social and cultural institutions they also retain their right to participate fully in the political, economic, social and cultural life of the state.[352] As clarified by Cambou, the Declaration on Indigenous Peoples "does not

[347] Heather Northcott, 'Realisation of the Right of Indigenous Peoples to Natural Resources under International Law through the Emerging Right to Autonomy' (2012) 16 The International Journal of Human Rights 73, 89.
[348] Cambou (n 32) 39.
[349] ibid.
[350] Luis Rodríguez-Piñero Royo, 'Political Participation Systems Applicable to Indigenous Peoples' in Marc Weller and Katherine Nobbs (eds), *Political Participation of Minorities: A Commentary on International Standards and Practice* (Oxford University Press 2010).
[351] Cambou (n 32) 39.
[352] UN General Assembly, Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295 (n 31), Article 5.

impose any particular procedure to ensure the collective participation of indigenous peoples, it puts the obligation on the respective state to guarantee that this right is effectively guaranteed".[353] Rodríguez-Piñero Royo observed that the right of indigenous peoples to effectively participate in the public affairs of their state overlaps significantly with the rights of effective participation of minorities.[354] As established above in relation to the right to effective participation of other subpopulation groups, the participation of indigenous peoples must have "the capacity to influence the outcomes of decision-making processes".[355] In ILO Convention 169 it is included that states are obligated to establish the "means by which [indigenous] peoples can freely participate […] at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them".[356] In both ILO Convention 169 and the Declaration on Indigenous Peoples, the right of indigenous peoples to participate fully in the political, economic, social and cultural life of the state is included as a corollary to the prohibition of discrimination against them on the grounds of their status as indigenous or tribal group.[357] During the drafting process of the Declaration on the Rights of Indigenous peoples, the representatives of indigenous and tribal peoples stated that these rights are closely connected to the right to self-determination,[358] and stressed their "fundamental importance" in order to ensure the effective and meaningful participation of indigenous and tribal peoples in the policy- and decision-making of states as an element of the right to self-determination.[359]

The right of indigenous peoples to be 'consulted'

As Cambou observed, even though the first pillar provides indigenous peoples with the right to autonomy or self-government in matters relating to the internal and local affairs, "there are fairly few signs of such jurisdiction having been transferred from states to indigenous peoples during the more than ten years that have passed since the adoption of the [Declaration on

[353] Cambou (n 32) 40.
[354] Luis Rodríguez-Piñero Royo (n 350) 340.
[355] Cambou (n 32) 40.
[356] International Labour Organization (ILO), Convention concerning Indigenous and Tribal Peoples in Independent Countries, C169 (n 328), Article 6(1)(b).
[357] See, ibid, Articles 2(2) and 3(1); UN General Assembly, Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295 (n 31), Article 1 and 2.
[358] 'UN Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, 4 January 1996, E/CN.4/1996/84' para 79.
[359] ibid 82.

Indigenous Peoples]".[360] Instead, another element of the international legal framework for the protection of indigenous peoples has been emphasised in order to balances the self-determination rights of indigenous peoples with that of the entire population to which they belong. This element is the obligation of states to consult indigenous peoples in these matters, and conversely the right of indigenous peoples to be consulted. This obligation is included in Article 6(1)(a) of the Indigenous and Tribal Peoples Convention, which states that governments shall "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly".[361] In their article 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples', James Anaya and Sergio Puig argue that as a creation of human rights law the duty to consult can restrict the power of states over individuals and subpopulation groups under their jurisdiction but it cannot eliminate state sovereignty. They base this argument on the argument that the obligation to consult with indigenous peoples is a corollary of the international human rights system, which creates rights of individuals and peoples in relation to their domestic state.[362] Instead of eliminating state sovereignty, "consultations serve a protective role for indigenous peoples within an international legal system in which power is distributed among sovereign independent states".[363]

Anaya and Puig summarised the minimum procedural and substantive requirements of states concerning the right of indigenous peoples to be consulted to legislative or administrative measures which may affect them. Firstly, consultations must be done in good faith with the objective of reaching an agreement on just terms. This obligation is included in Article 6(2) of the ILO Convention 169, which emphasises that the consultations carried out in application of this convention have to be undertaken in good faith and with the objective of achieving agreement or consent to the proposed measures.[364] These conditions were adopted by the

[360] Cambou (n 32) 39.
[361] International Labour Organization (ILO), Convention concerning Indigenous and Tribal Peoples in Independent Countries, C169 (n 328), Article 6.
[362] James Anaya and Sergio Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples' (2016) Discussion Paper No. 16-42 Arizona Legal Studies 18.
[363] ibid.
[364] International Labour Organization (ILO), Convention concerning Indigenous and Tribal Peoples in Independent Countries, C169 (n 328), Article 6(2).

Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, which stated that the concept of consulting

> "includes establishing *a genuine dialogue between both parties characterized by* communication and understanding, mutual respect, *good faith and the sincere wish to reach a common accord.* A simple information meeting cannot be considered as complying with the provisions of the Convention [emphasis added]".[365]

Barring certain exceptions, in order for a state to abide by its obligation to consult, the realisation of an agreement or consent is not a requirement as long as the state fulfilled its obligation to consult, in good faith, with the objective of achieving such agreement or consent.[366] Secondly, in the process of consulting the indigenous peoples the state has to engage with them directly and ultimately bears the responsibility for any inadequacy in the consultation or negotiation process.[367] Third, as the aim of the consultation is to mitigate the adverse effects of the international legal order on the situation of indigenous peoples, the state must ensure that any power imbalances between the different actors is mitigated.[368] Fourth, the consultation has to be undertaken in a transparent manner.[369] Therefore, indigenous peoples should enjoy full access to the necessary information including access to the information gathered in impact assessments that are done by state agencies or business enterprises. Fifth, consultations must start before the state adopts and implements legislative or administrative measures or authorises undertakings that may affect the indigenous people.[370]

The final requirement is that indigenous peoples should be consulted through their own representative decision-making institutions. As Anaya and Puig stated, the existence of indigenous institutions of representation and decision-making is a defining characteristic of indigenous peoples.[371] Indeed, as shown above, it is one of the characteristics included in the

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[365] *Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL)* [38].
[366] An exception to this rule will be analysed in Chapter 5.
[367] Anaya and Puig (n 362) 23–24.
[368] ibid 24.
[369] ibid.
[370] ibid.
[371] ibid.

relevant definitions of indigenous peoples. The fact that indigenous peoples should be consulted through their own representative decision-making institutions establishes that it is the interests and popular will of the indigenous peoples that is consulted with their representatives acting as intermediate between the peoples and the state. Just as the election of representatives of a population is not the be all and end all of their right to freely pursue their development, neither is the election of indigenous representatives that for indigenous peoples. This raises the what obligations states have to ensure that the representatives of indigenous peoples they are consulting do not go against the interests or popular will of the indigenous peoples and the whole population of the indigenous peoples is free in the participation of such popular will. In the Lund Recommendations it was included that "[i]stitutions of self-governance […] must be based on democratic principles to ensure that they genuinely reflect the views of the affected population".[372] In the explanatory note to the Lund Recommendations, the OSCE High Commissioner on National Minorities stated that the principle of democratic governance – articulated in Article 21 of the UN Declaration on Human Rights and Article 25 of the ICCPR – is applicable at all levels and for all elements of governance.[373] However, according to Anaya and Puig, if the institutions of indigenous peoples are perceived as illiberal or democratically deficient the indigenous peoples "should be encouraged to take steps to ensure the inclusion of different voices from within the community" but the state should not dictate or impose how indigenous institutions are composed or operated.[374]

From the requirements summarised by Anaya and Puig, all but the 'direct engagement' requirement are included in the obligation to consult as provided for by Article 19 of the Declaration on Indigenous Peoples. This article states that before adopting and implementing legislative or administrative measures that may affect indigenous peoples, are to consult and cooperate with the indigenous peoples concerned, through their own representative institutions, in good faith, in order to obtain their free, prior and informed consent.[375] This seemingly suggests that states must obtain the consent of the indigenous peoples on matters related to

[372] OSCE High Commissioner on National Minorities (n 299), General Principle 16.
[373] ibid 28–29.
[374] Anaya and Puig (n 362) 25.
[375] UN General Assembly, Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295 (n 31): 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.'

them, which goes much further than the obligation to consult as provided for by ILO Convention 169. Similar to the obligation to consult provided for in ILO Convention 169, the obligation to obtain free, prior and informed consent through consultation is only recognised in certain exceptional situations.[376] The extent of the required level of consultation is determined by the nature of the substantive rights of the indigenous peoples at risk.[377] In most instances there is no requirement to obtain such consent as long as the consultation was undertaken with respect for the requirements set out by Anaya and Puig.

The requirement to obtain prior consent of indigenous peoples through consultation arguably does exist in certain cases. For instance, when the measure adopted or implemented by a state affects the property rights of an indigenous peoples. As can be seen in the provided definitions provided above, indigenous peoples have a distinct relationship with their territory. It is therefore not surprising that, as mentioned by Luis Rodríguez-Piñero Royo, "[a] distinct characteristic of indigenous peoples' autonomy or self-government arrangements is their territorial base".[378] In combination with their right to ongoing self-determination, this characteristic of indigenous peoples' autonomy or self-government arrangements provides indigenous peoples with the right to permanent sovereignty over the natural wealth and resources pertaining to their territory.[379] In relation to the issue of permanent sovereignty, the self-determination rights of indigenous peoples are more extensive than those provided to other subpopulation groups. This right provides indigenous groups with a greater autonomy over the pursuit of their development. In the fifth chapter of this thesis, I will analyse the extent to which the right to permanent sovereignty over natural wealth and resources provides indigenous peoples a more extensive protection of their self-determination.

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[376] See, Pereira and Gough (n 321) 27–28; Fergus McKay, 'Indigenous People's Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review' (2004) 4 Sustainable Development Law & Policy 43, 56–57; Mauro Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (2012) 16 The International Journal of Human Rights 1, 6.

[377] James Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decision About Natural Resource Extraction: The More Fundamental Issues of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22 Arizona Journal of International & Comparative Law 7, 7.

[378] Luis Rodríguez-Piñero Royo (n 350) 329.

[379] The right of indigenous peoples to permanent sovereignty over their natural wealth and resources will be analysed in Chapter 5.

Conclusion

In this chapter, I examined whether the argument made by Higgins – that if the term 'peoples' is interpreted as the entire peoples of a state it is no longer necessary to answer the question if a certain subpopulation group is a people as its members will be able to participate in the exercise of the right to self-determination held by the population of the state they are part of – hold up when reflected upon by the contemporary understanding of the right to self-determination. I have done so by juxtaposing the ongoing political self-determination rights of minorities – as an example of a subpopulation group without the status of people – to those of indigenous peoples – whose status of peoples has since Higgins made that argument in the '90s been recognised. Even though this chapter has focussed on this right, the same legal foundation of this right – the doctrine of non-discrimination – applies to all civil and political rights. Moreover, in order for minorities and indigenous peoples to exercise their right to freely participate in the public affairs of their state they have to be able to freely exercise all other civil and political rights. Conversely, in order for a state to abide by its obligation to respect the ongoing right to political self-determination of its population, states are obligated to respect the exercise of all civil and political rights by minorities and the members of indigenous peoples. In the case of indigenous peoples, the same obligation applies in order to respect their right to political self-determination as a people distinct from the rest of the population. It should be possible to use the rights of minorities concerning the ongoing self-determination of the population they are part of as a blueprint for all other subpopulation groups protected by the doctrine of non-discrimination. Moreover, if other subpopulation groups are ever recognised as peoples, it should also be possible to use large parts of the framework on indigenous rights as a blueprint for these subpopulation peoples.

In the second chapter, I argued that the civil and political dimension of the right to ongoing self-determination should be understood as the manifestation of the totality of civil and political rights. Following this interpretation, it should be concluded that this right provides a more extensive protection to indigenous peoples than to minority groups. Both minorities and the members of indigenous peoples have the right to effectively participate in the public life of the population they are part of. This importantly includes the right to participate in the public affairs of the state. However, unlike minority groups whose ongoing self-determination rights only go as far as they can be extrapolated of the right to self-determination of the population they are part of, the right to ongoing self-determination of indigenous peoples has a second pillar. Namely, their right to pursue their own economic, social and cultural development as a

people distinct from the entire population of the state. As a means to balance the right ongoing self-determination of the population – the entire people of a state – with the right to ongoing self-determination of indigenous peoples – as a subpopulation peoples – the 'right to effective participation' includes the right to be consulted. This establishes the obligation on states to consult indigenous peoples on matters that might affect them, in good faith, through their own institutions. Even though concerning most issues this obligation only has to be exercised with the objective of achieving the agreement or consent of the indigenous peoples, on certain issues this right to be consulted includes an obligation of states to actually obtain consent of indigenous peoples. In Chapter 5, I will analyse how the right to permanent sovereignty over natural wealth and resources provides states with this latter obligation concerning the permanent sovereignty of indigenous peoples.

Chapter 4 – The socio-economic dimension of the right to ongoing self-determination

In the second chapter, I have argued that the civil and political dimension of the right to ongoing self-determination is a manifestation of the totality of civil and political rights. This provides populations with the right to freely participate in the civil and political life of their state as a means to freely pursue their economic, social and cultural development. In the third chapter, I built upon this understanding by setting out an argument that 1) all subpopulation groups have the right to freely participate in the exercise of this right to political ongoing self-determination held by the population they belong to, and 2) subpopulation peoples have both this right and the right to be consulted on matters that relates to them as a peoples in order to provide them with a greater degree of autonomy over their economic, social and cultural development. Just as the civil and political dimension of the right to ongoing self-determination provides peoples with the right to freely participate in the civil and political life of their state, the socio-economic dimension of the right to -economic ongoing self-determination provides peoples with the right to freely participate in the economic, social and cultural life of their state. However, most of the scholarship on the right to self-determination in its post-colonial conception relates to this civil and political dimension. Indeed, even students of human rights could easily be forgiven if they came to believe that that the right to self-determination is a political right. However, just as its civil and political dimension peoples with the right to freely participate in the civil and political life of their state, the socio-economic dimension of the right to ongoing self-determination provides peoples with the right to freely participate in the economic, social and cultural life of their state.

The civil and political and socio-economic dimensions are indivisible. Peoples cannot fully exercise their ongoing civil and political self-determination without the freedom to participate in the economic, social and cultural life of their state. Nor is it possible for peoples to fully exercise their socio-economic self-determination without participating in the civil and political life of their state. Civil and political self-determination and socio-economic self-determination are not distinct rights but two dimensions of the same right to freely pursue economic, social and cultural development. Like its civil and political dimension, the socio-economic dimension of ongoing self-determination embodies a process by which peoples freely pursue their economic, social and cultural development. In this chapter, I will argue that the first pillar of

this socio-economic dimension is a manifestation of the totality of economic, social and cultural rights. First, I will examine how the right of a people to freely pursue their development through the exercise by its members of their economic, social and cultural rights can be extrapolated from the provision on the right to self-determination in Common Article 1 of the Twin Covenants. Secondly, I will examine the socio-economic dimension of the right to ongoing self-determination in relation to subpopulation groups and subpopulation peoples. Finally, I will examine how the provisions in the Declaration on the Right to Development can be used to clarify the obligations of states in relation to the socio-economic dimension of self-determination. This will include an analysis of the two different theoretical approaches to the relationship between the right to development and the right to self-determination. Firstly, the approach that the right to self-determination and the right to development are parallel rights that are related because the former is a prerequisite of the latter. Alternatively, the approach that the right to self-determination is an aspect of the right to self-determination.

The socio-economic dimension of the right to ongoing self-determination as a manifestation of the totality of economic, social and cultural rights

The idea that the right to ongoing self-determination does not only include the civil and political dimension discussed in the second and third chapter of this thesis but also a socio-economic dimension has been recognised by several commentators. For instance, Yusuf argued that "the right of peoples freely to pursue their economic, social, and cultural development, and to participate; contribute to, and enjoy such development" is one of the normative strands of the right to self-determination.[380] Important to note is that, in his description of socio-economic self-determination, Yusuf links the ongoing self-determination right of peoples to "freely pursue their economic, social and cultural development" with the right to "to participate in, contribute to, and enjoy" such development. I will come back to this later. The Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Héctor Gros Espiell acknowledged the existence of non-political dimensions of the right to self-determination. In a report on the right to self-determination, he emphasises that it includes political, economic, social and cultural aspects that are "all interdependent and each of them can only be fully realized through the complete recognition and implementation of the

[380] Yusuf (n 107) 375.

others".[381] As observed by Saul, Kinley and Mowbray, "[d]espite the seemingly equal weighting of the political economic, social and cultural aspects of self-determination in Article 1 [of the Twin Covenants], in subsequent international practice and doctrine the political aspects of self-determination have received the most attention".[382] Consequently, the content of the socio-economic dimension of the right to ongoing self-determination has been far less well established than its civil and political counterpart.

The socio-economic dimension of the right ongoing self-determination reflects the fact that peoples do not only pursue their economic, social and cultural development through their participation in the civil and political life of their state but equally through their participation in their state's economic, social and cultural life. The freedom to participation in solely the civil and political life of a state would not guarantee a populations free pursuit of their development. In order for peoples to freely pursue their development their members should not only be able to freely exercise their civil and political rights but also their socio-economic rights. In her article 'Self-Determination and Cultural Rights', Ana Filipa Vrdoljak observed that from its earliest conceptions, self-determination has been inextricably tied to economic, social and cultural rights.[383] Indeed, in his 'Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights', Marc Bossuyt showed how this link between self-determination and economic, social and cultural rights was discussed during the negotiations of the Twin Covenants.[384] In his examination of these preparatory works he showed that, during the process of drafting the Twin Covenants, when the question was raised of the relationship between Article 1 and the other articles in the covenants it was pointed out that whereas under the ICCPR states would undertake to promote the 'rights of self-determination' immediately, under the ICESCR the obligations of states in relation to the right to self-determination were to be applied progressively.[385] As I will argue below, the obligation of states to progressively realise the economic, social and cultural rights of its population is one of the key aspects of the right to socio-economic self-determination.

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[381] 'The Right to Self-Determination: Implementation of United Nations Resolutions, by Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/405/Rev.1' 113.
[382] Saul, Kinley and Mowbray (n 55) 56.
[383] Ana Filipa Vrdoljak, 'Self-Determination and Cultural Rights' in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff Publishers 2008) 41.
[384] Marc Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers 1987).
[385] ibid 35.

In his explanation of the economic, social and cultural dimensions of the peoples' right to ongoing self-determination, Espiell acknowledged that the necessity that the members of a people have the full freedom to exercise the full breadth of their civil, political, economic, social and cultural rights in order for them to enjoy their socio-economic self-determination.[386] Furthermore, in its General Comment No. 21 on the right of everyone to take part in cultural life as provided by Article 15(1) of the ICESCR,[387] the Committee on Economic, Social and Cultural Rights acknowledged that the right to take part in cultural life is also interdependent with the right to self-determination.[388] This relationship between the right of peoples to freely pursue their economic, social and cultural development and the economic, social and cultural rights of their members was established by Article 1 of the ICESCR. In the first chapter, I established that – in line with the rules of treaty interpretation set out in the Vienna Convention – the right of peoples to freely pursue their development means that their pursuit of development should be free from both external interference and manipulation or undue influence from their domestic authorities. I argued that this is an undeniable result from the ordinary definition of the term freely, as in "not under control of another".[389] However, another definition of 'freely' is "without restriction".[390] If this definition is used the right to freely pursue development would include a much broader set of obligations. Indeed, as shown in the previous chapters, the freedom of peoples to pursue their development can be restricted by the actions of states. However, equally, restrictions on the freedom to pursue development can originate from a people's disadvantaged socio-economic status. For instance, a people's pursuit of development would without a doubt be restricted if its members are unable to exercise their right to education, their right to work or their right to take part in cultural life. Therefore, if it is accepted that the right to ongoing self-determination is a manifestation of the totality of civil and political rights – because the exercise of these rights is necessary for the pursuit of development – should it not also be accepted that the right to ongoing self-determination is equally a manifestation of the totality of economic, social and cultural rights?

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[386] 'The Right to Self-Determination: Implementation of United Nations Resolutions, by Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/405/Rev.1' (n 381) paras 135–158.
[387] International Covenant on Economic, Social and Cultural Rights 1966, Article 1351].
[388] 'UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 21, Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1a of the Covenant on Economic, Social and Cultural Rights), 21 December 2009, E/C.12/GC/21' para 2.
[389] Waite (n 174) 287.
[390] ibid.

The progressive realisation of socio-economic self-determination

Yusuf has argued that "socio-economic self-determination can provide the preconditions necessary to the fulfilment or individual human rights in the economic, social, and cultural sphere".[391] As shown above, during the drafting of the Twin Covenants it was pointed out that under the ICESCR the obligations of states in relation to the right to self-determination were to be applied progressively. This obligation results from an important feature of economic, social and cultural rights. Namely, the obligation of states not only to respect and protect these rights but also to fulfil them.[392] The obligation to fulfil is referenced in Article 2 of the ICESCR as the legal duty of states to:

> "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".[393]

Moreover, these states shall do so "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[394] In other words, the obligation to fulfil a right is an obligation to take the necessary steps with a view to achieve the progressive realisation of this right. However, the fact that the obligation to fulfil is linked to this concept of *progressive realisation* does not mean that states can justify their inability or unwillingness to guarantee the socio-economic rights of its population by pointing to a lack of sufficient resources. The Office of the United Nations High Commissioner for Human Rights, in Fact Sheet No. 33 entitled Frequently Asked Questions on Economic, Social and Cultural Rights, set out five areas in which members states of the ICESCR have to take immediate action irrespective of their available resources.[395] These areas

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[391] Yusuf (n 107) 388.
[392] The obligation to fulfil also exists in relation to civil and political rights but is of greater importance in relation to economic, social and cultural rights.
[393] International Covenant on Economic, Social and Cultural Rights (n 387), Article 2(1).
[394] ibid, Article 2(2).
[395] 'UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 33, Frequently Asked Questions on Economic, Social and Cultural Rights, December 2008, No. 33' (n 327).

are 1) the elimination of discrimination, 2) the economic, social and cultural rights not subject to progressive realisation, 3) the obligation to 'take steps', 4) non-retrogressive measures, and 5) certain minimum core obligations.[396]

Regarding the 'elimination of discrimination', Article 2 of the ICESCR provides that "States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind".[397] As such an undertaking would not necessitate the allocation of resources it is an area in which state parties can, and therefore also must, take immediate action. Regarding the 'economic, social and cultural rights not subject to progressive realisation', certain included rights that do not necessitate the allocation of resources and other included rights that, even though they do necessitate the allocation of resources, are worded in a manner in which they are not subject to such progressive realisation have to be implemented straight away or within a specified period of time. Provisions that revolve mainly around 'negative obligations' of the state parties like that on the right to form and join trade unions[398] and the right to take part in cultural life fall into the first category.[399] An example of a provision falling under the second category is the one stipulating that primary education shall be compulsory and freely available to all,[400] which clearly would necessitate the allocation of resources but gives states parties a "strict limit of two years to develop a plan of action to ensure the provision of free and compulsory primary education for all".[401] Regarding the obligation to 'take steps', even under the obligation of progressive realisation as part of the obligation to *fulfil,* states parties are obliged to take steps towards such progressive realisation a in a reasonably short time. States parties are, therefore, obliged to work towards improving the enjoyment of the relevant economic, social and cultural rights to the best of their abilities, which includes steps that can be taken without the allocation of resources.[402] Regarding the 'non-retrogressive measures', states are under the obligation to

[396] ibid, pp. 15-18.
[397] International Covenant on Economic, Social and Cultural Rights (n 387), Article 2(2).
[398] ibid, Article 8(1)(a).
[399] ibid, Article 15(1)(a).
[400] ibid, Article 13(2)(b).
[401] 'UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 33, Frequently Asked Questions on Economic, Social and Cultural Rights, December 2008, No. 33' (n 327) 15.
[402] 'UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 33, Frequently Asked Questions on Economic, Social and Cultural Rights, December 2008, No. 33' (n 327), pp. 15-18.

refrain from actions that would cause the existing protection of the rights included in the ICESCR to deteriorate. However, retrogressive measures could be justified if a state can prove that it is necessary to maintain a certain level of protection of either the affected right or other socio-economic rights.[403]

Regarding 'certain minimum core obligations', the Committee has stated that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party".[404] In assessing whether a member state has discharged its minimum core obligation resource constraints on the country concerned are taken into consideration. If a member state would fail to meet such a minimum core obligation it has to demonstrate that it undertook every effort and made use of all available resources in an effort to satisfy this minimum core obligation standard and the obligation to endeavour to achieve the greatest enjoyment of the relevant right possible remains.[405] These minimum core obligations are intrinsically linked to the minimum level of enjoyment of individual rights of members of a people that is necessary in order for this people to freely pursue economic, social and cultural development. Two examples of how such minimum core obligations are necessary for individual members of a people in order for the people to freely pursue economic, social and cultural development are the minimum core obligation to ensure free and compulsory primary education to all,[406] and the right of access to employment – especially for disadvantaged and marginalized individuals and groups.[407] Below, I will show how the obligation of states to fulfil the economic, social and cultural rights of its population, are related to and, can be used as the legal foundation of, several, if not all, obligations included in the Declaration on Development.

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[403] ibid, pp. 15-18.
[404] 'UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23' para 10.
[405] ibid 10–11.
[406] 'UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10' para 57.
[407] 'UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 6 February 2006, E/C.12/GC/18' para 31.

The socio-economic self-determination of subpopulation groups

In the third chapter, I argued that, as part of the 'entire population' of a state, all subpopulation groups have the right to participate in the civil and political dimension of the ongoing self-determination of the population to which they belong. Similarly, the doctrine of non-discrimination applied in relation to the socio-economic dimension of the right to ongoing self-determination provides that all subpopulation groups have the right to participate in the economic, social and cultural life of the state. As stated above, Article 2(2) of the ICESCR provides that states are obligated to "undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[408] Combined with the rights 'enunciated' in the ICESCR, this obligation provides that those subpopulation groups should be able to freely participate in all aspects of the economic, social and cultural life of the state by the exercise of their members of their economic, social and cultural rights. Concerning persons belong to minorities, this right has also been explicitly included in Article 2(2) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[409] Furthermore, concerning indigenous peoples, Article 5 of the Declaration on the Rights of Indigenous Peoples provides that indigenous peoples have the right to "participate fully, if they so choose, in the political, economic, social and cultural life of the State".[410]

Both the Declaration on Minorities and the Declaration on Indigenous Peoples contain a number of rights that are associated with the ability of members of these subpopulation groups to freely participate in the socio-economic life of the state. For instance, in the Declaration on Indigenous Peoples it is provided that indigenous individuals, and especially indigenous children, have the right to "all levels and forms of education of the State without discrimination".[411] This right relates to the obligations concerning the right to education, which have been discussed above in relation to the progressive realisation of socio-economic rights.

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[408] International Covenant on Economic, Social and Cultural Rights (n 387), Article 2(2).
[409] UN Commission on Human Rights, Rights of persons belonging to national, ethnic, religious and linguistic minorities., 21 February 1992, E/CN.4/RES/1992/16 (n 297), Article 2(2): 'Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.'
[410] UN General Assembly, Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295 (n 31), Article 5.
[411] ibid, 14(2).

Therefore, it establishes that the members of indigenous peoples have the right to primary education and states are obligated to progressively realise their right to other forms of education. Another example of a provision that rounds out the right of indigenous peoples to participate in the socio-economic life of the state is the provision in Article 21(1) on the right of indigenous individuals to the improvement of their economic and social conditions – this includes improvements in relation to their socio-economic rights to, for instance, education, employment, housing and health.[412] Moreover, Article 21(2) provides that states are obligated to take effective measures to ensure continuing improvement of their economic and social conditions,[413] which is derived from the obligation of states to fulfil the socio-economic rights of their population by means of progressive realisation. In the Report of the Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 it was included that during the drafting of the Declaration on Indigenous Peoples representatives of indigenous peoples stressed that these rights are closely connected with the right to self-determination.[414]

It is important to stress that the socio-economic dimension of the right to ongoing self-determination provides subpopulation peoples, and other subpopulation groups, with the right to both participate in the economic, social and cultural life of the 'entire population' of the state and to pursue their own economic, social and cultural development. In the third chapter, I discussed rights of subpopulation groups concerning their representation and participation in civil and political life and above I have discussed rights that concern the participation of subpopulation groups in socio-economic life. When analysing the right to self-determination most of the attention goes to such components of 'representation' and 'participation'. However, as observed by Vrdoljak, the right to self-determination also includes a third component that relates to 'identity'.[415] Whereas the civil and political dimension of ongoing self-determination

[412] ibid, Article 21(1): 'Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security'.
[413] ibid, Article 21(2): States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities".
[414] See, 'UN Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, 4 January 1996, E/CN.4/1996/84' (n 358).
[415] Vrdoljak (n 383) 41.

primarily relates to the former two components, ongoing socio-economic self-determination relates to not only representation and participation but also to identity.

A number of provisions concerning the identity of indigenous peoples should be highlighted. First, the right of indigenous peoples and individuals "not to be subjected to forced assimilation or destruction of their culture".[416] Secondly, the right of indigenous peoples "to practise and revitalize their cultural traditions and customs".[417] Third, their "to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains".[418] Fourth, their right to "revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons".[419] Finally, the right of indigenous peoples "to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals".[420] During the drafting of the Declaration on Indigenous Peoples, all indigenous organisations stressed the great importance of these rights in relation to the right to self-determination.[421]

Whereas its civil and political dimension only provides *subpopulation peoples* with two pillars of self-determination rights – the first pillar consisting of their self-determination rights as part of the entire population of a state and the other consisting of their self-determination rights distinct peoples distinct from the rest of the population – the socio-economic dimension of self-determination provides *all subpopulation groups* with two pillars of rights. The first pillar is the right of all subpopulation groups to participate in the economic, social and cultural life of the state. The second pillar is the right of subpopulation groups to maintain and develop their own identity distinct from the rest of the population. Both pillars are included in Article 5 of the Declaration on Indigenous Peoples. I have already shown above that this provision includes

[416] UN General Assembly, Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295 (n 31), Article 8(1).
[417] ibid, Article 11(1).
[418] ibid, Article 12(1).
[419] ibid, Article 13(1).
[420] ibid, Article 24(1).
[421] 'UN Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, 4 January 1996, E/CN.4/1996/84' (n 358) paras 60 and 87.

the statement that indigenous peoples have the right to fully participate in the economic, social and cultural life of their state. However, it also includes their right to maintain and strengthen their own distinct economic, social and cultural institutions.[422] Moreover, in article 20(1) it is provided that indigenous peoples have the right to maintain and develop their own economic and social systems or institutions.[423]

In relation to national or ethnic, religious and linguistic minorities, Article 2 of the Declaration on Minorities provides that persons belonging to minorities "have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination".[424] Similarly, Article 27 of the ICCPR provides that persons belonging to ethnic, religious or linguistic minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".[425] Moreover, the Declaration on Minorities provides that states are obligated to take measures 1) to "create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs",[426] and

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[422] UN General Assembly, Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295 (n 31), Article 5: 'Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State'.

[423] ibid, Article 20(1): Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities".

[424] UN Commission on Human Rights, Rights of persons belonging to national, ethnic, religious and linguistic minorities., 21 February 1992, E/CN.4/RES/1992/16 (n 297), Article 2(1): 'Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination'.

[425] International Covenant on Civil and Political Rights (n 185), Article 27: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.

[426] UN Commission on Human Rights, Rights of persons belonging to national, ethnic, religious and linguistic minorities., 21 February 1992, E/CN.4/RES/1992/16 (n 297), Article 4(2): 'States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards'.

2) “in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory”.[427] Again, these provisions relate to the obligation of states to fulfil the economic, social and cultural rights of their population by means of progressive realisation.

In the words of Vrdoljak, the Declaration on Minorities “reproduces the classic binary contained in minority protection [by covering] effective participation of members of the group within the relevant state; and maintenance and development of the group’s identity”.[428] Even though minority rights are phrased as individual right, minority rights by their nature relate to the collective. As observed by Vrdoljak, the HRC has “repeatedly affirmed that the right of enjoyment of culture, practice of religion, or use of language can only be realized meaningfully when exercised [as a group]”.[429] Minority rights are generally viewed as a hybrid between individual and collective rights.[430] The fact that Article 27 of the ICCPR provides that persons belonging to minorities exercise their right in community with the other members of their group shows that its drafters understood the fact that minority rights cannot be exercised by an individual in a vacuum. If the individual members of a minority group are able to enjoy their own culture the minority group as a whole is able to do so, and minority groups enjoy their own culture through the enjoyment of their individual members of their right to enjoy the culture of the minority group of which they are part. Conversely, if one person belonging to a minority is denied his or her minority rights this affects the ability for the other persons belong to that minority group to exercise their minority rights.

The right to development as an aspect of the socio-economic dimension of the right to ongoing self-determination

In 1986, the demands of developing countries “for better terms in the international market, greater aid and assistance and generally what has come to be known as the demand for the new international economic order” resulted in the General Assembly’s adoption of the Declaration

[427] ibid, Article 4(4): ‘States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole’.
[428] Vrdoljak (n 383) 65.
[429] ibid 60–61.
[430] Jelena Pejic, ‘Minority Rights in International Law’, (1997) 19 Human Rights Quarterly 666, 674.

on Development.[431] Even though there was some opposition among Western states, only the representative of the United States voted against the resolution and just nine states abstained from voting.[432] In the first article of the declaration, the right to development is described as

> "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized".[433]

On a regional level, the right to development had five years prior to the adoption of the General Assembly declaration already been included in the African Charter. In Article 22(1) it provides that "[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind".[434] Furthermore, in the second paragraph of the same article, it is provided that states "have the duty, individually or collectively, to ensure the exercise of the right to development".[435] As I will show below, the same obligation is extensively incorporated in the Declaration on Development.

Whereas the Declaration on Development primarily provides obligations of states, the right to development seemingly also provides some obligations of non-state actors. For instance, in Article 2(2) the declaration provides that "[a]ll human beings have a responsibility for development [...] and they should therefore promote and protect an appropriate political, social and economic order for development".[436] In her review of the right to development, Orford

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[431] Shivji (n 159) 44.
[432] The representatives from Denmark, Finland, Germany, Iceland, Israel, Japan, Norway, Sweden and the United Kingdom abstained from voting (UN General Assembly, 41st Session, Agenda item 101, 1 December 1986, A/41/925).
[433] UN General Assembly, Declaration on the Right to Development, 4 December 1986, A/RES/41/128, Article 1(1).
[434] African Charter on Human and Peoples' Rights 1981 (n 99), Article 22(1).
[435] ibid, Article 22(2).
[436] UN General Assembly, Declaration on the Right to Development, 4 December 1986, A/RES/41/128 (n 433), Article 2(2): 'All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development'.

argued that the focus of the declaration is boarder than that of traditional international human rights law that has been conceived as a means of constraining the power exercised by states.[437] Instead, the Declaration on Development recognises that non-state actors can be responsible for both the protection and violations of human rights.[438] Orford examined some of the criticism bestowed upon this feature of the declaration. For instance, in his article 'In Search of the Unicorn', Jack Donnelly has criticised this shift in responsibility from only states to both states and non-states actors "as a means of avoiding state responsibility for human rights violations".[439] Furthermore, she also referenced the criticism of Yash Ghai that this "shifts the focus from domestic arenas (where most violations of rights take place) to the international".[440] However, as Orford rightly argued, such criticism fails to address situations where individuals or peoples need protection from other powerful states, transnational corporations or international institutions. Nor does it address situations where decisions about the protection of economic, social and cultural rights are made by non-state actors.[441] From the provisions includes in the Declaration on Development, it is obvious that the obligations that it includes primarily rest on the shoulders of states. However, by including obligations of non-states actors, the General Assembly showed their recognition of the fact that the sovereignty of states has diminished through economic globalisation.

The question of who the beneficiaries of the right to development are has also been a matter of debate. From the description of the right to development included in the declaration, it is clear that both peoples and individuals are beneficiaries of the right to development. However, it has been argued that the Declaration on Development also refers to the right to development as a right of states.[442] In Article 2(3) it is stated that states have both the right and duty "to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals".[443] Moreover, in Article 3(2) it is stated

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[437] Anne Orford, 'Globalization and the Right to Development' in Philip Alston (ed), *Peoples' Rights* (Oxford University Press 2001) *.
[438] ibid.
[439] ibid.
[440] ibid.
[441] ibid.
[442] Shivji (n 159) 45; See, Orford (n 437) *.
[443] UN General Assembly, Declaration on the Right to Development, 4 December 1986, A/RES/41/128 (n 433), Article 2(3): 'States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom'.

that states should realise the rights and fulfil the duties the right to development includes "in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights".[444] Donnelly argued that if states hold the right to development they are placed in a position in which it can justify their violations of human rights by claiming to pursue the human right to development.[445] However, according to Orford, it is clear that states are holders of the right to development as an agent of the entire population and all its individuals.[446] Moreover, as Philip Alston argued, states act as "the medium through which the rights of individuals are able to be effectively asserted vis-à-vis the international community".[447] Therefore, the beneficiary of the provisions included in the Declaration on Development are peoples and individuals but in order for them to benefit states have to be able to assert certain aspects on behalf of their population. However, only in relation to external actors, including foreign states.

In Article 1(2) of the Declaration on Development, the General Assembly proclaimed that the human right to development implies the full realisation of the right to self-determination, including the right to permanent sovereignty over natural wealth and resources.[448] There are different theoretical approaches to the relationship between the right to self-determination and the right to development. The first approach is that the right to self-determination and the right to development are parallel rights that are related because the former is a prerequisite of the latter.[449] An alternative approach to the relationship between the right to development and the

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[444] UN General Assembly, Declaration on the Right to Development, 4 December 1986, A/RES/41/128 (n 426), Article 2(3): 'States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom'.
[445] Jack Donnelly, 'In Search of the Unicorn' (1985) 15 California Western International Law Journal 473, 499.
[446] Orford (n 437) *.
[447] As quoted in ibid.
[448] UN General Assembly, Declaration on the Right to Development, 4 December 1986, A/RES/41/128 (n 433), Article 1(2): 'The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.'
[449] See for instance, 'The Right to Self-Determination: Implementation of United Nations Resolutions, by Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/405/Rev.1' (n 381) para 144.

right to self-determination is the idea that the former is an aspect of the latter.[450] A prominent proponent of this approach is former ICJ judge Mohammed Bedjaoui who argued that the right to development is an 'inherent' and 'built-in' right that forms an inseparable part of the right to self-determination.[451] This approach reflects the emphasis of the Declaration on Development on 'participation' as the basis of the right to development.[452] As established in the previous chapters, the right to participation means that peoples should have a certain degree of control over the outcome of a decision. In relation to the right to development, participation means that they should have "control over the direction of the development process, rather than simply being consulted about projects or policies that have already been decided upon".[453] According to Orford, under Bedjaoui's approach to the relationship between the right to ongoing self-determination and the right to development, the most important aspect of the right to development is "the right of each people to choose freely its economic and social system without outside interference or constraint of any kind, and to determine, with equal freedom, its own model of development".[454]

In his examination of the right to development, Donnelly acknowledged that the provision on the right to self-determination in Common Article 1 of the Twin Covenants is a promising source of a right to development. However, he argued that if "the right to development means the right of peoples freely to pursue their development […] such a right to development is without interest [as] it is already firmly established as the right to self-determination".[455] Moreover, he argues that a broader right to development cannot be extracted from the right to self-determination as the right to self-determination is not a right to development but only a right to pursue such development. According to Donnelly, even if development is necessary for the enjoyment of the right to self-determination it does not follow that peoples have the right to development.[456] He claimed that the argument that the right to development is a human

[450] See, Arjun Sengupta, 'Conceptualizing the Right to Development for the Twenty-First Century', *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations Publication 2013) 76.
[451] Mohammed Bedjaoui, 'The Right to Development' in Mohammed Bedjaoui (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers 1991) 1188.
[452] Orford (n 437) *.
[453] Orford (n 437).
[454] ibid *.
[455] Donnelly (n 445) 484.
[456] ibid 484–485.

right because it is necessary for the exercise of the right to self-determination is an 'instrumental fallacy'. As an example, Donnelly argued that [a]lthough B cannot enjoy his right to life without a liver transplant, that does not entail that he has a right to a liver transplant, let alone a right to have a suitable liver implanted should one become available".[457] However, Donnelly does not provide sufficient recognition to the indivisibility and interdependency of human rights. To use his own example, because B has the right to life the human rights framework has also included the right to the highest attainable standard of health,[458] which could include the right to a liver transplant should a liver become available. His argument that the right to self-determination does not imply a right to development because the former is only a right of peoples and the latter is a right of both peoples and individuals lacks the same consideration for the indivisibility and interdependency of human rights. Peoples exercise both their the socio-economic dimension of their right to pursue development and their right to participate in, contribute to, and enjoy development through their members' exercise of their socio-economic rights. The right of peoples to ongoing self-determination is the foundation of the right to development not because participating in, contributing to, and enjoying development is necessary to freely pursue development. It does so because its socio-economic dimension is a manifestation of the totality of economic, social and cultural rights. This manifestation provides them will the ability to participate in, contribute to, and enjoy development. Every person that exercises his or her economic, social and cultural rights participates in, contributes to, and enjoys development. Therefore, people take part in pursuit of development of the peoples they belong to by participating in, contributing to, and enjoying development. Therefore, the right to development is not a new right but an affirmation of the indivisibility and interdependency of the right to ongoing self-determination and socio-economic rights.

The right to development as a system of duties relating to the socio-economic dimension of the right to ongoing self-determination

Instead of creating new obligations, the right to development sets out particular processes that are needed to fulfil existing obligations. In the words of Margot Salomon, the right to development is "less about establishing a new substantive right, and more about framing a

[457] ibid 485.

[458] International Covenant on Economic, Social and Cultural Rights (n 387), Article 12(1): The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

system of duties that might give better effect to existing rights".[459] Similarly, Arjun Sengupta described the right to development as a vector of all the different rights and freedoms.[460] Similar to the right to ongoing self-determination, the right to development has both an internal and external dimension.[461] Both the internal and external dimension of the right to development build upon the obligations set out by the right to self-determination. In the words of Margot Salomon, the "internal dimension of the right to development focuses on the duties of each state to ensure domestic policies that seek to contribute to the realization of the fundamental human rights of all its subjects".[462] This view was also adopted by the participants of 'The Expert Meeting on legal perspectives involved in implementing the right to development',[463] who in their concluding statement included that it was their view that the internal dimension of the right to development "referred to the duty of each country to ensure that its development policy is one in which all human rights and fundamental freedoms can be fully realized".[464] For instance, one of the key provisions in relation to the internal dimension of the right to development is the right and obligation of states to

> "formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom".[465]

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[459] Margot Salomon, 'Legal Cosmopolitanism and the Normative Contribution of the Right to Development' in Stephen Marks (ed), *Implementing the Right to Development: The Role of International Law* (Friedrich-Ebert-Stiftung 2008) 18.
[460] Sengupta (n 450) 79.
[461] See, Report of the Secretary-General, 'The Emergence of the Right to Development', *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations Publication 2013) 13.
[462] Salomon (n 459) 18.
[463] Georges Abi-Saab, Koen De Feyter, Asbjorn Eide, Shadrak Gutto, Emma Hannay, Daniela Hinze, Britt Kalla, Türkan Karakurt, Felix Kirchmeier, Stephen P. Marks, Susan Mathews, Christiana Mutiu, Dante Negro, Obiora Chinedu Okafor, Beate Rudolf, Ibrahim Salama, Margot Salomon, Sabine von Schorlemer, Nicolaas J. Schrijver, Margaret Sekaggya, Arjun K. Sengupta, Michael Stein, Wang Xigen and Abdulqawi A. Yusuf.
[464] See, Stephen Marks and others, 'The Role of International Law', *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations Publication 2013) 467.
[465] UN General Assembly, Declaration on the Right to Development, 4 December 1986, A/RES/41/128 (n 433), Article 2(3).

This obligation sets out a means by which states should exercise their obligation to fulfil the economic, social and cultural rights of their population. Such development policies are necessary for the progressive realisation of the socio-economic rights. If interpreted as an aspect of the right to ongoing self-determination, the obligations included in the Declaration on Development should be exercised in a manner that respects all dimensions of the right to self-determination. Consequently, national development policies should be freely chosen by the population of the state – through the exercise of their right to ongoing political self-determination. The fact that the provision in Article 2(3) is framed as both an obligation and a right of states should not be interpreted to mean that states hold this right in relation to their own population. In other words, states cannot ignore the will of their population by claiming that this right belongs to states and not to the populations of states. As argued above, states only act as the medium through which the rights of their population can effectively be asserted vis-à-vis the international community. The right of states to formulate these development policies only signifies that the exercise of their obligation to formulate them should be free from interference external interference. This reflects the right to ongoing self-determination – the right of peoples to pursue their economic, social and cultural development free from external interference.

In their review of the role of international law in the development of the right to development, Stephen P. Marks, Beate Rudolf, Koen De Feyter and Nicolaas Schrijver describe its external dimension as a set of "duties of all States to cooperate with a view to achieving the right to development".[466] According to Salomon, this external dimension "addresses disparities of the international political economy which evidence massive global inequities, and the consequent post-cold war growth in social and material inequality between states".[467] The primary goal of the external dimension of the right to development is to remove obstacles that restrict the freedom of peoples to pursue their economic, social and cultural development placed by the international economic order. The duties representing the external dimension of the right to development not only flow from the external dimension of the right to ongoing self-determination but also from the obligation of states to promote the realisation of the right to self-determination, which is included in the third paragraph of Common Article 1.[468] This

[466] Marks and others (n 464) 495.
[467] Salomon (n 459) 17.
[468] International Covenant on Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights 1966 (n 49), Article 1(3): 'The States Parties to the

section is often overlooked in scholarship, presumably because of a belief that its importance has been exhausted with decolonisation. However, the importance of this section goes beyond the right to constitutive self-determination and is relevant to the socio-economic dimension of ongoing self-determination. The HRC has argued that Common Article 1(3) of the Twin Covenants imposes a specific obligation to promote the realisation of self-determination on state parties and to take positive actions to facilitate the realisation of and respect for the right to self-determination of all peoples.[469] Furthermore, the duties that make up the external dimension of the right to development also reflect Articles 55 and 56 of the UN Charter in which the members pledged to take joint and separate action in co-operation with the United Nations for the achievement of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, which includes conditions of economic and social progress and development.[470]

The Declaration on Development provides a framework for the manner by which states should exercise the obligations of states under Common Article 1(3) of the Twin Covenants and Articles 55 and 56 of the UN Charter. The key provisions of this declaration in relation to the obligation set out in Article 1(3) common to the Twin Covenants are those included in the third and fourth article of the declaration. In Article 3(1) it is provided that states have the responsibility to not only create the national but also international conditions that are

present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations'.

[469] 'UN Human Rights Committee (HRC), CCPR General Comment No. 12: Article 1 (Right to Self-Determination), The Right to Self-Determination of Peoples, 13 March 1984' (n 184) para 6.

[470] Charter of the United Nations 1945 (n 5), Article 55: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". See also, Article 56: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55".

favourable to the realisation of the right to development.[471] Moreover, Article 3(3) provides that in doing so

> "States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights."[472]

Article 4(1) of the declaration doubles down on this duty by providing that states "have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development".[473] These provisions establish that the external dimension of the right to development goes beyond the negative obligation to refrain from placing obstacles on the realisation of the right to development and includes the positive obligation to work towards the elimination of any existing obstacles. This is especially of importance in relation to developing countries and, thus, "[s]ustained action is required to promote more rapid development of developing countries".[474] Without the national but also international conditions that are favourable to the realisation of the right to development the ability of peoples to pursue development is restricted by these unfavourable conditions. In other words, they would lack the freedom from these conditions in the pursuit of their development. Therefore, the obligations to create the conditions favourable to development and eliminate obstacles to development work towards providing peoples with greater freedom to pursue their development. By using the obligations included in the Declaration on Development as a guideline on how to exercise the obligations related to the right to self-determination, it can be established that a important feature of the obligations to promote the realisation of the right of self-determination is the obligation of states to co-operate with other states in the creation of an international political and economic order that is conducive to the ability of peoples to pursue the economic, social and cultural development of their choice.

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[471] See, UN General Assembly, Declaration on the Right to Development, 4 December 1986, A/RES/41/128 (n 433), Article 3(1).
[472] ibid, Article 3(3).
[473] ibid, Article 4(1).
[474] ibid, Article 4(2).

This brings me back to the above quoted statement by Yusuf that the socio-economic dimension of the right to ongoing self-determination is the right of to "freely to pursue their economic, social, and cultural development, and to participate, contribute to, and enjoy such development".[475] There are two things I would like to note in relation to Yusuf's statement on the socio-economic dimension of ongoing self-determination. Firstly, it does not include a reference to the right of peoples to freely dispose of their natural wealth and resources. However, in another statement in the same chapter he does refer to this right as another aspect of the socio-economic dimension of the right to self-determination.[476] Secondly, in relation to the former aspect, I think a more accurate way of phrasing this aspect is that *the socio-economic dimension of the right to ongoing self-determination is the pursuit of economic, social and cultural development through the participation in, contribution to, and enjoyment of such development.* In turn, peoples participate in, contribute to, and enjoy development by means of their members' exercise of their economic, social and cultural rights. In the Declaration on Development, the General Assembly has recognised both the importance of development for the realisation on other human rights and, conversely, the importance of other human rights on the realisation of development.[477] Yusuf has acknowledged that despite its inclusion in various international instruments, the socio-economic dimension of the right to self-determination has not moved as significantly as its civil and political dimension in promoting peoples' rights.[478] Approaching the right to development as a set of duties that give better effect to the right of ongoing self-determination can provide an impulse for the further development of the socio-economic dimension of the right to ongoing self-determination. Simultaneously, such an approach can provide the legal framework that the Declaration on Development lacks.

Conclusion

When the right to self-determination was codified in the Twin Covenants it not only tied self-determination to civil and political rights but equally to the so-called second generation economic, social and cultural rights. Because during the negotiations of the Twin Covenants,

[475] Yusuf (n 107) 375.
[476] See, ibid 388.
[477] See, UN General Assembly, Declaration on the Right to Development, 4 December 1986, A/RES/41/128 (n 433), Article 1, Article 2(2), Article 3(3), Article 5, Article 6(1) and Article 6(2).
[478] Yusuf (n 107) 388.

and the period directly following their adoption, the emphasis of the development of the right to self-determination was first on its constitutive aspect and later on the civil and political dimension of its ongoing aspect, the socio-economic dimension of the ongoing aspect of the right has been largely neglected. In this chapter, I have argued that the exercise of economic, social and cultural right is equally as important to the ability of peoples to freely pursue their development as the exercise of civil and political rights. The right to freely pursue development does not only mean that peoples should be able to pursue the economic, social and cultural development of their choice through the formulation of policies – by exercising their civil and political rights. Equally, they should be able to pursue the economic, social and cultural development of their choice by their participation in, contribution to, and enjoyment of such development. In turn, peoples participate in, contribute to, and enjoy development by their members' exercise of their economic, social and cultural right. In this socio-economic dimension of the right to ongoing self-determination, the role of the states is to aid its population by exercising their obligation to fulfil the economic, social and cultural rights of their population.

I have argued that the right to development should not be seen as a parallel right to the right to self-determination but instead as a delineation of duties that provide clarification of the role of states in their populations' exercise of the socio-economic dimension of their right to ongoing self-determination. Consequently, the legal foundation of these duties can be extrapolated from the obligations provided by the right to ongoing self-determination. The right to self-determination establishes that peoples and individuals have the right to participate in, contribute to, and enjoy development. The exercise of this right is a means by which peoples pursue their development. Peoples and individuals participate in, contribute to, and enjoy development by the exercise of economic, social and cultural rights. The duties included in the right to development are aimed at abolishing both internal and external obstacles to development. The fewer obstacles there are to development the freer peoples are in their pursuit of such development. The internal dimension of the right to development sets out the duties of states to work towards the abolishing of domestic obstacles to development by ensuring domestic policies that contribute to the realisation of their population's human rights. Equally, its external dimension sets out a set of duties that ensure the international cooperation of states to remove obstacles to development by addressing disparities of the international political economy. In the next chapter, I will examine how this relates to the self-determination right of peoples to freely dispose of their natural wealth and resources.

Chapter 5 – The peoples' right to freely dispose of their natural wealth and resources

In the previous chapters, I have analysed on the ongoing self-determination right of peoples to freely pursue their development. However, the right to ongoing self-determination also includes the right of peoples to freely dispose of their natural wealth and resources, which some scholars have referred to as the right to economic self-determination.[479] As established in the first chapter, the right of peoples to freely dispose of their natural wealth and resources is at the core of the principle of permanent sovereignty over natural wealth and resources. That is why in this thesis I refer to it as the right to permanent sovereignty. Even though it has received less attention than the constitutive aspect of the right to self-determination and the civil and political dimension of its ongoing aspect, there is a larger body of work on right to freely dispose of natural wealth and resources than on the socio-economic dimension of the right to ongoing self-determination analysed in the previous chapter. This was acknowledged by Saul, Kinley and Mowbray, who stated that "[i]f the political aspects of self-determination have overshadowed its economic aspects, in turn its economic aspects have overshadowed its social and cultural dimensions".[480] For instance, even though Cassese in his seminal work 'Self-Determination of Peoples' focussed on the civil and political dimension of the right to self-determination and completely ignored the socio-economic dimension discussed in the previous chapter, he did include a section on the right to freely dispose of their natural wealth and resources.[481] However, the fact that this section was only two pages longs is emblematic of how little attention this aspect of the right to self-determination is given compared to the constitutive self-determination right of peoples to freely determine their political status and the civil and political dimension of the ongoing self-determination right of peoples to freely pursue their economic, social and cultural development.

In this chapter, I will analyse the ongoing self-determination right of peoples to freely dispose of their natural wealth and resources. This will include an examination of 1) the provision on

[479] See, Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 99–100; Alice Farmer, 'Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries' (2006) 39 New York University Journal of International Law and Politics 417; Saul, Kinley and Mowbray (n 55) 62–80.
[480] Saul, Kinley and Mowbray (n 55) 60.
[481] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 99–100.

the right to freely dispose of natural wealth and resources in Common Article 1(2) of the Twin Covenants, 2) the relationship between this right and the principle of permanent sovereignty over natural wealth and resources, 3) whether, as is the case with right to freely pursue development, the right to freely dispose of natural wealth and resources has both an external and an internal dimension, 4) the right to freely dispose of natural wealth in relation to both the entire population of states and the subpopulation peoples possess, 5) how peoples exercise this latter right, and 6) the relationship between the so-called 'limiting clause' in Common Article 1(2) of the Twin Covenants – which establishes that the right to freely dispose of natural wealth and resources should be exercised without prejudice to any obligations arising out of international economic co-operation and international law – and the right to ongoing self-determination.

The principle of permanent sovereignty over their natural wealth and resources

As stated in the previous chapter, during the negotiations of the provision on the right to self-determination that was adopted as Common Article 1 of the Twin Covenants, there was a clear understanding among the representatives of newly independent states and developing states that political independence alone was insufficient as long as the natural wealth and resources remained under the control of foreign states or private entities from such foreign states. This understanding was the driving force behind the development of the right to permanent sovereignty over natural wealth and resources.[482] In his examination of the development of the principle of permanent sovereignty, Nico Schrijver showed that its origin can be traced back to both the development of the right to self-determination and the principle of state sovereignty.[483] Chekera and Nmehielle observed that this has resulted in three different views of who the beneficiaries of the right to permanent sovereignty are: 1) the view that right to permanent sovereignty is exclusively a right of states, 2) the view that the right to permanent sovereignty is exclusively a right of peoples, and 3) the view that the right to permanent sovereignty is a right shared jointly by states and peoples.[484] Initially, the right to permanent sovereignty was seen exclusively a right of states. This approach to permanent sovereignty

[482] For an examination of the object to which the right to permanent sovereignty applies see, Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997) 10–19.
[483] See, ibid 32–75.
[484] Yolanda Chekera and Vincent Nmehielle, 'The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds' (2013) 6 African Journal of Legal Studies 69, 76–79.

resulted from the post-World War II struggle for political and economic emancipation of developing countries.[485]

As observed by Schrijver, "[t]he circle of subjects [of international law] entitled to dispose of natural resources has changed considerably over the years.".[486] During the 1950s and 1960s, the General Assembly's promotion of the self-determination of peoples and development of 'underdeveloped' countries led to the addition of peoples, nations and underdeveloped countries to the list of subjects of international law with the right to permanent sovereignty.[487] Schrijver explained that "reference to 'nations' as subjects of the right to permanent sovereignty was probably meant to reinforce the right of peoples to economic self-determination, both prior to and after the exercise of their right to political self-determination".[488] Moreover, as argued by Alice Farmer, even though the discourse on the right to permanent sovereignty in the period immediately following the Second World War showed some ambiguity as to whether this was a right of states or peoples – because the General Assembly resolutions from this period used 'peoples' and 'states' interchangeably – by the 1960s this right was clearly labelled as a right of peoples.[489] Indeed, even though the General Assembly in the Declaration on Permanent Sovereignty of 1962 first reiterated the sovereign rights of states to dispose of their natural wealth and resources, it subsequently provided that the right to permanent sovereignty is a right of peoples, which must be exercised in the interests of the national development and well-being of those peoples.[490] As stablished in Chapter 1, this was subsequently codified by Common Article 1(2) of the Twin Covenants.

As observed by Schrijver, "once most of the formerly colonial peoples had gained independence, emphasis shifted back to States as the main subjects invested with the right to permanent sovereignty".[491] In the 1970s and 1980s a tendency re-emerged to confine the circle of permanent sovereignty subjects solely to states. Firstly, in its GA resolution 3171 (XXVIII) of 1973 titled *permanent sovereignty over natural resources,* the General Assembly reaffirmed

[485] Schrijver (n 482) 371.
[486] ibid 7.
[487] ibid 9.
[488] ibid 7.
[489] Farmer (n 479) 499.
[490] UN General Assembly, Permanent sovereignty over natural resources, 14 December 1962, A/RES/1803 (XVII) (n 26).
[491] Schrijver (n 482) 19.

"the inalienable rights of States to permanent sovereignty over all their natural resources".[492] One year later the General Assembly adopted resolution 3281 (XXIX) containing the "Charter of Economic Rights and Duties of States" adopted in 1974. In the first chapter of the Charter of Economic Rights and Duties of States ("CERDS"), the General Assembly included the principle of equal rights and self-determination of peoples as one of the principles that shall govern economic as well as political and other relations among states.[493] However, in Article 2(1) it stated that *"[e]very State* has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities [emphasis added]".[494] Moreover, in Article 2(2) the CERDS sets out a number of rights of states relating to their right to permanent sovereignty.[495] Furthermore, the sovereign rights of states over their natural wealth and resources was also included in the UN Convention on the Law of the Sea of 1982 ("UNCLOS"). In Article 56 of UNCLOS it is provided that coastal states have "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources [in their exclusive economic zone]".[496] Moreover, in Article 193 it is provided that "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment".[497] None of these important General Assembly resolutions or treaties during the 1970s and 1980s reaffirmed the right of *peoples* to permanent sovereignty of their natural wealth and resources.

More recently, the General Assembly has adopted several resolutions that reaffirm the right to permanent sovereignty as a right of peoples. For instance, as I will discuss below, the Declaration on the Rights of Indigenous Peoples of 2007 includes provisions on the rights of

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[492] UN General Assembly, Permanent sovereignty over natural resources, 17 December 1973, A/RES/3171.
[493] UN General Assembly, Charter of Economic Rights and Duties of States: resolution/adopted by the General Assembly, 17 December 1984, A/RES/39/163, Chapter 1.
[494] ibid, Article 2(1).
[495] These rights will be discussed below.
[496] United Nations Convention on the Law of the Sea 1982, Article 56(1): 'In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds'.
[497] ibid, Article 193: 'States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment'.

indigenous peoples over natural wealth and resources pertaining to their lands. The recognition of indigenous peoples as peoples with the right to self-determination – including the ongoing self-determination right to freely dispose of their natural wealth and resources – has added another dimension to the discussion on the right to permanent sovereignty. Furthermore, in the Declaration on the Right to Development, the General Assembly 1) recalled the right of peoples to exercise full and complete sovereignty over all their natural wealth and resources,[498] and 2) provided in Article 1(2) that the right to development "also implies the full realization of the right of peoples to self-determination, which includes […] the exercise of their inalienable right to full sovereignty over all their natural wealth and resources".[499]

The question of permanent sovereignty over natural wealth and resources has also been raised before the International Court of Justice in the *Case Concerning East Timor.*[500] The Court did not address the status of permanent sovereignty in international law as it found that it lacked jurisdiction to decide the case on the merits.[501] However, in their dissenting opinions, judges Skubiszewski and Weeramantry argued that the principle of permanent sovereignty was a rule of customary international law with an *erga omnes* character.[502] Even though Judge Weeramantry referred to the principle of permanent sovereignty as an ancillary of the principle of self-determination, in his review of the principle he referred to the sovereign rights over natural wealth and resources of both peoples and states.[503] In turn, Judge Skubiszewski only referred to the right to permanent sovereignty of the people of East Timor.[504] However, as he does not review the relevant General Assembly resolutions and East Timor at the time was a non-self-governing territory only the permanent sovereignty of peoples was relevant to his argument.[505] In the *Case Concerning Armed Activities on the Territory of the Congo* the

[498] UN General Assembly, Declaration on the Right to Development, 4 December 1986, A/RES/41/128 (n 433).
[499] ibid, Article 1(2): 'The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources'.
[500] *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 90* (n 81) paras 19–33.
[501] ibid 35.
[502] *East Timor (Portugal v Australia), Judgment, Dissenting opinion of Judge Weeramantry, ICJ Reports 1995, p 139* 221.
[503] ibid 197–199.
[504] *East Timor (Portugal v Australia), Judgment, Dissenting opinion of Judge Skubiszewski, ICJ Reports 1995, p 244* 276.
[505] ibid 264–276.

International Court of Justice stated that the principle of permanent sovereignty is as principle of customary international law.[506] Again, the ICJ did not explicitly clarify their position on who the beneficiary of the right to permanent sovereignty is. However, it did recall that the principle is expressed in the Declaration on Permanent Sovereignty and further elaborated in the Declaration on the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties of States. As showed above, whereas the General Assembly declared that the right to permanent sovereignty is a right of peoples in the first of those resolutions, it portrayed the right to permanent sovereignty as a right of states in the latter two resolutions. From the fact that the ICJ used all three these resolutions as evidence that the principle of permanent sovereignty is a principle of customary international law, it can be inferred that in its view the right to permanent sovereignty belongs to both peoples and states.

As observed by Ricardo Pereira and Orla Gough in their journal article 'Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law', the reliance of the ICJ on the resolutions of the General Assembly "has been criticised because UNGA lacks the power to make legally binding resolutions".[507] Even so, prominent scholars have argued that the principle of permanent sovereignty is a rule of customary international law. For instance, Cassese argued that, even though it should be stressed that the Declaration on Permanent Sovereignty of 1962 can neither as whole be regarded as declaratory of customary international law nor can it be argued that this declaration as a whole has turned into customary international law subsequent to its adoption, "some of the general principles laid down in the Declaration have gradually led to the formation of corresponding legal rules or principles".[508] According to Cassese, only those general principles included in the Declaration on Permanent Sovereignty that concern the rights of peoples could at that time be regarded as sanctioning general international law, as they are specifications of, and corollary to, the right to self-determination.[509] More recently, Pereira and Gough observed that "today it is generally accepted that permanent sovereignty over natural resources is […] a fundamental principle of

[506] 'UN Committee on Economic, Social and Cultural Rights (CESCR), Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights - Democratic Republic of the Congo, 16 December 2009, E/C.12/COD/CO/4' para 244.
[507] Pereira and Gough (n 321) 13.
[508] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 100.
[509] ibid.

contemporary international law".[510] However, they also observed that "most commentators do not consider that the Charter of Economic Rights and Duties has transitioned into a rule of customary international law".[511] This seems to imply that their interpretation of the principle of permanent sovereignty that has developed into a customary rule of international law is the one set out in the Declaration of Permanent Sovereignty in which the General Assembly declared that peoples are the beneficiary of the right to permanent sovereignty. However, as I will argue below, even if Cassese's claim is still true today and only the right to permanent sovereignty of peoples has attained the status of customary international law, certain right of states in relation to the right to permanent sovereignty can be derived from their obligation to protect and fulfil the right of permanent sovereignty of their peoples.

The right to permanent sovereignty of entire populations

As a basic constituent of the right to self-determination, the permanent sovereignty right of peoples to, for their own ends, freely dispose of their natural wealth and resources should be interpreted in a manner consistent with the other self-determination rights. Firstly, this means that the same peoples that are the beneficiaries of the self-determination right to freely determine their political status and freely pursue their economic, social and cultural development are the beneficiaries of the self-determination right to freely dispose of their natural wealth and resources. Therefore, both entire populations and subpopulation peoples have the right to permanent sovereignty. Secondly, the word 'freely' should be interpreted in manner that is consistent with the interpretation of 'freely' in the self-determination right of peoples to freely pursue their development. In the previous chapters, I have argued that in relation to the first paragraph of Common Article 1, the right of peoples to freely pursue their development should be understood to mean that peoples have the right to pursue their development 1) free from external interference by foreign states and non-state actors, 2) according to the policy they have freely chosen, and 3) free from economic, social and cultural obstacles to their pursuit of development. Furthermore, I have shown that states have the corresponding obligations to respect, protect and fulfil these rights and that these include both an external and internal dimension. As I will establish in this Chapter, all these observations are relevant to the permanent sovereignty right of peoples to freely dispose of their natural resources.

[510] Pereira and Gough (n 321) 12.
[511] ibid 11.

The right to permanent sovereignty has both an external and internal dimension. According to Cassese, the internal dimension of the provision in Common Article 1(2) of the Twin Covenants on the right to feely dispose of natural wealth and resources "provides that the right to *control and benefit* from a territory's natural resources lies with the inhabitants of that territory [emphasis added]".[512] He argued that "[t]his right, and the corresponding duty of the central government to use the resources in a manner which coincides with the interests of the people, is the natural consequence of the right to political self-determination".[513] According to Cassese, states would be in violation of their population's right to permanent sovereignty if it 1) "is exploiting the natural resources in the exclusive interests of a small segment of the population and is thereby disregarding the needs of the vast majority of its nationals", or 2) "has surrendered control over its natural resources to another State or to foreign private corporations without ensuring that people will be the primary beneficiaries of such an arrangement".[514] The right of peoples to benefit from their natural wealth and resources is stipulated in several General Assembly resolutions. For instance, in the Declaration on Permanent Sovereignty, the General Assembly declared that the right to permanent sovereignty must be "exercised in the interest of their national development and of the well-being of the people of the state concerned".[515] However, the right of peoples to control their natural wealth and resources goes beyond merely the right to have those resources disposed of in a manner that benefits them.

In the second chapter, I argued that the internal dimension of the ongoing self-determination right of peoples to freely pursue their development includes the right of peoples to pursue their development according to the policies they have freely chosen. Similarly, the right of peoples to freely dispose of their natural resources includes the right of peoples to dispose of their natural wealth and resources in a manner they have freely chosen. As Cassese himself acknowledged, Common Article 1(2) not only provide peoples with the right to benefit from their natural wealth and resources but also to control these resources. Just as the right of peoples to freely pursue their development provides peoples with the right to control the direction of

[512] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 55.
[513] ibid.
[514] ibid 56.
[515] UN General Assembly, Permanent sovereignty over natural resources, 14 December 1962, A/RES/1803 (XVII) (n 26).

their development, the right of peoples to freely dispose of their natural resources provides them with the right to control the disposal of their resources. This is reflected in the second paragraph of the Declaration on Permanent Sovereignty, which provides that

> "[t]he exploration, development and disposition of [natural wealth and resources], as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities".[516]

The right to permanent sovereignty provides peoples with both the right to benefit from the disposal of their natural resources and the right to decide the rules and conditions for the disposal of these resources. This does not only include the right to decide who can dispose of their natural wealth and resources but also under what circumstances the disposal of these resources should take place – i.e. regulatory rules that should be applied. As stated by Yusuf, this raises the question whether an unrepresentative and non-democratic government can fulfil the requirements set by the right to permanent sovereignty.[517] Alice Farmer even goes as far as to claim that the right to permanent sovereignty is the right of peoples "to dispose of natural resources in accordance with democratically-taken decisions".[518] This includes the right of the population of a state to participate in the decision-making processes concerning the exploration, development and disposition of natural wealth and resources.

As observed by Saul, Kinley and Mowbray, the principle of public participation in decision-making about public resources and development emerged in the 1970s.[519] Both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have acknowledged the existence of the right of those effected by a decision of their state or local authority on certain important matters to participate the process leading to that decision.[520]

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[516] ibid, Article 2.
[517] Yusuf (n 107) 389.
[518] Farmer (n 479) 418.
[519] Saul, Kinley and Mowbray (n 55) 67–69.
[520] 'UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7' (n 235); UN Economic and Social Council, 10 May 2001, Substantive Issues Arising in the Implementation of the International Covenant on Economic,

Moreover, the CESCR has acknowledged that the 'general public' – the population of a state – has the self-determination right to freely dispose of their natural wealth and resources.[521] In one of its Concluding Observations, the CESCR connected the right to participation and the right to self-determination with the decision by Azerbaijan to privatize its natural oil resources:

> "With respect to specific provisions of the Covenant, the Committee calls attention to article 1 on the right of self-determination. The Committee regrets that, due to lack of information, it is unable to assess to what extent the general public is able to participate in the privatization process. It stresses the importance of managing this process in a way that is sufficiently transparent to ensure fairness and accountability."[522]

Moreover, it stressed the importance that "the privatization process should be conducted in an open and transparent manner and that the conditions under which oil concessions are granted should always be made public".[523] The importance of such transparency is a recurring feature in the Committee's communications relating to the right of peoples to freely dispose of their natural wealth and resources.[524]

On a regional level, also African Commission acknowledged that, in order for 'participation' to guarantee the freedom of peoples to dispose of their natural wealth and resources, it is important that states are transparent in relation to the decision-making process that affect this freedom.[525] Without such transparency peoples would not be able to participate in a substantive

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Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights, E/C.12/2001/10 (n 262) para 12.

[521] See, Saul, Kinley and Mowbray (n 55) 52.

[522] 'UN Committee on Economic, Social and Cultural Rights (CESCR), UN Committee on Economic, Social and Cultural Rights: Concluding Observations, Azerbaijan, 22 December 1997, E/C.12/1/Add.20' para 16.

[523] ibid 29.

[524] See, 'UN Committee on Economic, Social and Cultural Rights (CESCR), Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights - Democratic Republic of the Congo, 16 December 2009, E/C.12/COD/CO/4' (n 506); 'UN Committee on Economic, Social and Cultural Rights (CESCR), UN Committee on Economic, Social and Cultural Rights: Concluding Observations: Madagascar, 16 December 2009, E/C.12/MDG/CO/2'.

[525] *Social and Economic Rights Action Centre and the Center for Economic and Social Rights v Nigeria, African Commission on Human and Peoples' Rights Communication No 155/96, (2001) AHRLR 60, 27 October 2001* [55].

manner in the decision-making process on the disposing of their natural wealth and resources. From the statements by the CESCR and the African Commission, it can be concluded that the privatisation of such natural wealth and resources requires 1) the participation of the general public in the decision-making on such privatisation and 2) transparency to the general public, which includes the provision of relevant public information. Both the obligation to respect the right of their peoples to freely dispose of their natural resources and the obligation to fulfil this right can be deduced from these requirements as states have the obligation to take active steps towards providing their peoples with the required means to participate in an informed and genuine manner. The right of peoples to participate in these decision-making processes show the truth of the words by Saul, Kinley and Mowbray that "the political and economic aspects of self-determination are indivisible".[526] The primary method by which peoples exercise their right to freely dispose of their natural wealth and resources is by exercising the rights associated with the civil and political dimension of the right to ongoing self-determination.[527]

According to Saul, Kinley and Mowbray, one aspect of the internal dimension of the right to permanent sovereignty is the obligations of states to protect their peoples against the exploitative conduct of foreign states and non-state actors.[528] In order to exercise this obligation, the principle of permanent sovereignty provides states with the right to regulate, through domestic legislation and policies, 1) the admission and activities of foreign investors, 2) the methods of exploitation, 3) the conduct of the entities engaged in the exploitation, and 4) the distribution of profits obtained from the exploitation.[529] These rights are derived from the, above discussed, right of peoples to dispose of their natural wealth and resources in a manner that conforms to the rules and conditions which they consider to be necessary or desirable with regard to the authorization, restriction or prohibition of the exploration, development and disposition of their natural resources, as well as the import of the foreign capital required for such exploration, development and disposition. This exemplifies what Yusuf calls the interplay between internal and external factors in matters of the right of peoples to freely dispose of their natural resources.[530] In the first chapter, I discussed Shivji's view that the principles of state sovereignty, territorial integrity and non-intervention by one state in the

[526] Saul, Kinley and Mowbray (n 55) 59.
[527] This right has been examined in chapters 2 and 3.
[528] Saul, Kinley and Mowbray (n 55) 66.
[529] Chekera and Nmehielle (n 484) 84.
[530] Yusuf (n 107) 388.

international affairs of another state are secondary or derivative elements of the self-determination rights of peoples to feely decide their political status and freely pursue their economic, social and cultural development.[531] Furthermore, in the previous chapter, I discussed the argument by Alston that the beneficiaries of the right to development are individuals and peoples and that states are holders of certain right derived from the right to development so that they can act as the medium through which the right to development is effectively asserted vis-à-vis the international community by its beneficiaries.[532] Similarly, in relation to the right to permanent sovereignty, Chekera and Vincent Nmehielle argued that in states merely act "as the medium through which the peoples could exercise their rights under international law".[533] This view is also promoted by Yusuf who argued that "the state acts as an intermediary in dealings with external interests on behalf of the people as well as a trustee of the people in the management of the national wealth and resources".[534] This clearly relates to the civil and political dimension of the right to ongoing self-determination discussed in Chapter 1.

On a regional level, Article 21 of the African Charter both provides that 1) peoples have the right to freely dispose of their wealth and natural resources,[535] and 2) that "State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity".[536] James Crawford argued that what Article 21(1) of the African Charter "originally treated as a right of peoples is [in Article 21(4)] treated as a right of States, thus casting doubt upon the legitimacy of the assertion that peoples have a right to permanent sovereignty over their natural resources".[537] However, as I will show below, statements by the African Commission in relation to the right of indigenous peoples to freely dispose of their natural resources have clarified that the right provided for in Article 21(1) is a right of peoples and not states. Indeed, the role of states is to protect and fulfil this right on behalf of its peoples. The sovereign rights of states are secondary to, or even derived from, the self-determination right of peoples to

[531] Shivji (n 159) 42.
[532] As quoted in Orford (n 437) *.
[533] Chekera and Nmehielle (n 484) 78.
[534] Yusuf (n 107) 388.
[535] African Charter on Human and Peoples' Rights 1981 (n 99), Article 21(1): 'All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it'.
[536] ibid, Article 21(4).
[537] James Crawford, 'The Rights of Peoples: "Peoples" or "Governments"?' in James Crawford (ed), *The Rights of Peoples* (Clarendon Press 1988) *.

permanent sovereignty over their natural wealth and resources. Therefore, these rights have to be exercised in a manner that confirms to their obligation to respect the right to permanent sovereignty of their peoples. As established above, these obligations have to come into existence by means of a democratic decision-making process and states cannot assert these rights vis-à-vis their entire population or subpopulation peoples.

In its General Comment No.12, the HRC observed that the right of peoples to freely dispose of their natural wealth and resources "entails corresponding duties for all states and the international community as a whole".[538] Corresponding with the external dimension of the right to permanent sovereignty, the primary duty of states is to respect the right of peoples in foreign jurisdictions to freely dispose of their natural wealth and resources. Therefore, as the HRC observed, the right of to freely dispose of their natural resources includes the duty of states to refrain from interfering in the disposal of such resources by peoples in foreign jurisdictions.[539] As observed by Saul, Kinley and Mowbray this aspect of the right to permanent sovereignty "crosses with other long-established principles of international law".[540] The two most relevant principles in relation to the right to permanent sovereignty are the prohibition on the use of force by states in their international affairs and the principle of non-intervention in the internal affairs of another state. As Saul, Kinley and Mowbray argued, the former principle prohibits the use of military force to acquire the economic resources of another state and the latter principle prohibits the use of economic coercion aiming to acquire such resources.[541] This was acknowledged by the General Assembly in its Declaration on Friendly Relations, which provided that states are prohibited from using "economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind".[542] Violations of these principles would indisputably amount to an violation of the right of peoples of such a coerced state to be free from external interference by foreign states in their disposal of their natural wealth and resources.

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[538] 'UN Human Rights Committee (HRC), CCPR General Comment No. 12: Article 1 (Right to Self-Determination), The Right to Self-Determination of Peoples, 13 March 1984' (n 184) para 5.
[539] ibid.
[540] Saul, Kinley and Mowbray (n 55) 105.
[541] ibid.
[542] UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV) (n 9).

A more contentious issue is whether, apart from their obligation to respect the right of peoples in foreign jurisdictions to freely dispose of their natural wealth and resources, states also have the obligation to protect this right. If it were to be accepted that the right of peoples to permanent sovereignty includes an obligation on states to protect this right of peoples outside their own jurisdiction, it should be emphasised that these obligations would have to be exercised in a manner that does not obstruct the ability of the domestic states of those peoples to fulfil its obligations in relation to that right. As argued above, the obligations to protect the right to permanent sovereignty primarily rests with the domestic state. However, other states have a vital role in the protection and fulfilment of this right as well. As observed by Robert McCorquodale and Penelope Simons, developing countries are often unable or unwilling to impose stricter regulations or to hold transnational corporations ("TNCs") accountable for their violations of the regulations they have imposed.[543] This is especially problematic as the increasing privatisation of functions that traditionally belonged to the state means that corporations increasingly engage in state-like activity".[544] The home states of TNCs would be able to provide support to the developing states in which these TNCs operate. As observed by Christen Broecker, international law allows states to regulate the extraterritorial conduct if the entity being regulated is a national of the state.[545] Therefore, states have the right to protect foreign peoples from violations of their right to freely dispose their natural resources perpetrated by TNCs. However, even though it provides states with this right, international law does not impose an obligation to exercise jurisdiction by regulating the extraterritorial conduct of corporate nationals in order to protect international human rights law.[546] As McCorquodale and Simons recognised, this is problematic as there is not only a reluctance among states to regulate the extraterritorial conduct of their corporate nationals but most governments of industrialised states even "explicitly or implicitly acknowledge that one of their key foreign relations priorities is to assist their own corporations to 'win contracts in foreign markets and

[543] Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 Modern Law Review 598, 599–600.
[544] Ronald Slye, 'Corporations, Veils, and International Criminal Liability' (2008) 33 Brooklyn Journal of International Law 955, 961.
[545] Christen Broecker, 'Better the Devil You Know' (2008) 41 New York University Journal of International Law and Politics 159, 178–179.
[546] Olivier De Schutter, 'Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations' 18.

lobby against regulatory and political barriers' in other states".[547] Luckily, as Olivier De Schutter observed, there is a growing recognition that the growing interdependency of states necessitates the imposition of "an obligation on all States to act jointly in face of collective action problems faced by the international community of States".[548] For instance, in its General Comment No. 14, the CESCR has acknowledged that states have the duty to prevent third parties from violating the right to health of individuals under the jurisdiction of foreign states "if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law".[549] If it were to be accepted that the right of peoples to freely dispose of their natural resources includes an obligation of states to protect this freedom of peoples in foreign jurisdictions, the right to self-determination could provide both the moral and legal foundation of an obligation of states to regulate the conduct of their nationals – including the conduct of TNCs – in order to protect these peoples from violations of their right to permanent sovereignty by the nationals of the home state.

Apart from an obligation to respect and protect the right to permanent sovereignty of foreign peoples, there is an argument to be made that states also have a duty to contribute to the fulfilment of the right of foreign peoples to freely dispose of their natural resources. Just as with the obligation to protect this right, the obligation to fulfil it primarily rests with the domestic state. However, developing countries often lack the technological, scientific or financial means to exploit their natural resources. In the previous chapter, I discussed how the external dimension of the right to development is a set of duties of all states to cooperate with each other in order to addresses disparities of the international political economy and the growth in inequality between states. Moreover, I argued that the primary goal of the external dimension of the right to development is to remove obstacles to the freedom of peoples to pursue their development placed by the international economic order. It could be argued that the duty of states, included in Article 3(3) of the Declaration on the Right to Development,[550]

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[547] McCorquodale and Simons (n 543) 598.
[548] De Schutter (n 546) 19.
[549] 'UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4' para 39.
[550] UN General Assembly, Declaration on the Right to Development, 4 December 1986, A/RES/41/128 (n 433) Article 3(3): '3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic

to cooperate with each other in ensuring development and eliminating obstacles to development includes the duty to cooperate to alleviate technological, scientific or financial obstacles to such development. This would include such obstacles to the exploitation of natural resources as the right to development implies the full realisation of the right of peoples to self-determination, including the right to full sovereignty over all their natural wealth and resources.[551] However, for now, this might be a bridge to far as the duty of states to cooperate with each other in ensuring development and eliminating obstacles to development would first have to find widespread application and enforcement at the international level.

The right to permanent sovereignty of subpopulation peoples

In the third chapter, I established that international law has recognised indigenous peoples as beneficiaries of the right to self-determination. This right is particularly relevant to their ongoing self-determination right to freely dispose of their natural wealth and resources as, in the words of Martin Scheinin, "for most indigenous peoples what self-determination is really about is their right to freely dispose of their natural wealth and resources".[552] During the negotiations of the Declaration on Indigenous Peoples, all the indigenous organisations that participated emphasised the critical importance of this right "for the survival of indigenous peoples because of the spiritual relationship indigenous peoples have with their land".[553] Even though the General Assembly did not explicitly include the right to permanent sovereignty in the provision on the right to self-determination in its Declaration on Indigenous Peoples, it did include the provision that that indigenous peoples have the right to own, use, develop and control the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.[554] Moreover, it also provided that "[i]ndigenous peoples have the

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order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.'

[551] ibid, Article 1(2): 'The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.'

[552] Martin Scheinin, 'The Right to Self-Determination under the Covenant on Civil and Political Rights', *Operationalizing the Right of Indigenous Peoples to Self-determination* (Institute for Human Rights Åbo Akademi University 2000) 198.

[553] 'UN Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, 4 January 1996, E/CN.4/1996/84' (n 358) para 84.

[554] UN General Assembly, Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295 (n 31), Article 26.

right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources".[555] Combined these provisions clearly reflect the idea that indigenous peoples have a right to permanent sovereignty over their natural wealth and resources.

All the relevant human rights treaty bodies have acknowledged that indigenous peoples have the right to freely dispose of their natural resources in pursuance with their right to self-determination. For instance, in its Concluding Observations on Norway, the HRC included the expectation that Norway would report on "the Sami people's right to self-determination under article 1 of the [ICCPR], including paragraph 2 of that article".[556] Moreover, in its Concluding Observations on Canada, while discussing the situation of the aboriginal peoples, the HRC emphasised that "the right to self-determination requires, *inter alia,* that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence [original emphasis]".[557] Furthermore, in its Concluding Observations on Australia, the HRC stated that Article 1(2) includes the duty of states to "take the necessary steps in order to secure for the indigenous inhabitants, a stronger role in decision-making over their traditional lands and natural resources".[558] Similarly, the Committee on Economic, Social and Cultural Rights has implicitly recognised the right of indigenous peoples to freely dispose of their natural resources in a series of concluding observations.[559] On a

[555] ibid, Article 31(1).
[556] 'UN Human Rights Committee (HRC), UN Human Rights Committee: Concluding Observations: Norway, 26 October 1999, CCPR/C/79/Add.112' para 17.
[557] 'UN Human Rights Committee (HRC), UN Human Rights Committee: Concluding Observations: Canada, 7 April 1999, CCPR/C/79/Add.105' para 8.
[558] 'UN Human Rights Committee (HRC), Report of the UN Human Rights Committee (Volume I), 10 October 2000, A/55/40' 507.
[559] See, 'UN Committee on Economic, Social and Cultural Rights (CESCR), Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Cambodia, 12 June 2009, E/C.12/KHM/CO/1' paras 15–16; 'UN Committee on Economic, Social and Cultural Rights (CESCR), Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Brazil, 12 June 2009, E/C.12/BRA/CO/2' para 9; 'UN Committee on Economic, Social and Cultural Rights (CESCR), Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia, 7 June 2010, E/C.12/COL/CO/5' (n 325) para 9; 'UN Committee on Economic, Social and Cultural Rights (CESCR), Concluding Observations on the Combined Fifth and Sixth Periodic Reports of the Philippines, 26 October 2016, E/C.12/PHL/CO/5-6' para 16; 'UN Committee on Economic, Social and Cultural Rights (CESCR), Consideration of Reports Submitted by States Parties

regional level, the African Commission has acknowledged that indigenous peoples have the right to freely dispose of their natural resources under Article 21 of the African Charter.[560] Furthermore, also the Inter-American Court acknowledged that, by virtue of their right to self-determination, indigenous peoples have the right to freely dispose their natural wealth and resources.[561]

In the third chapter, I established that the ongoing self-determination right of indigenous to freely pursue their economic, social and cultural development has two pillars. The first pillar is based upon their status as peoples with the right to self-determination and provides them with the right to autonomy or self-government over matters relating to their internal and local affairs. The other pillar is based upon their status as part of the entire population of a state and provides them with the right to participate in the public affairs of the state. I established that, in order to balance the right of the indigenous peoples and the entire population of a state, the international legal framework on indigenous rights provides indigenous peoples with the right to be consulted on relation to matters concerning them as an aspect of their right to effectively participate in the public affairs of their state. This two-pillar framework is applicable to the right of indigenous peoples to freely dispose of their natural wealth and resources. Just as it attempts to balance the right of indigenous peoples to freely pursue their development with the right of entire population to freely pursue their development, the international legal framework on indigenous rights attempts to balance the right of indigenous peoples to freely dispose of their natural resources with the right of the entire population to freely dispose of their natural wealth and resources.

The first method by which the framework on indigenous peoples attempts to strike a balance between the permanent sovereignty rights of indigenous peoples and those of the entire

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under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights - Democratic Republic of the Congo, 16 December 2009, E/C.12/COD/CO/4' (n 506) paras 14–16.

[560] *Social and Economic Rights Action Centre and the Center for Economic and Social Rights v Nigeria, African Commission on Human and Peoples' Rights Communication No. 155/96, (2001) AHRLR 60, 27 October 2001* (n 525) paras 56–58; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, African Commission on Human and Peoples' Rights Communication No. 276/2003, 2009 AHRLR 75, 4 February 2010* (n 339) paras 255–268.

[561] *Case of the Saramaka People v Suriname, Preliminary Objections, Merits, Reparations and Costs, 28 November 2007, IACHR (Series C) No. 172* (n 337) para 93.

population to which they belong is by providing that indigenous peoples shall wherever possible participate in the benefits of the exploitation of these resources and shall receive fair compensation for damages which they may have sustained as a result of the exploitation of these resources. [562] However, I want to focus on the second method. As observed by Cambou, the resource aspect of the right of indigenous peoples to self-determination includes "specifically the right of indigenous peoples to participate in the development of the resources located in their territories, including subsoil resources such as oil and gas".[563] This right can be found in Article 32(2), which provides that states "shall consult and cooperate […] with the indigenous peoples concerned […] particularly in connection with the development, utilization or exploitation of mineral, water or other resources".[564] Just as the international legal framework on indigenous rights attempts to balance the self-determination rights of indigenous peoples with those of the entire population by including an obligation of states to consult its indigenous peoples on matters concerning their development, it also attempts to balance the permanent sovereignty rights of indigenous peoples with that of the entire population by including an obligation of states to consult indigenous peoples on matters concerning the natural wealth and resources pertaining to their lands. This is an element of their right to participate in the decision-making processes relating to the disposing of natural wealth and resources.

The right of indigenous peoples to participate in the decision-making processes relating to the disposing of natural wealth and resources has also been included in both ILO Convention 169 and the Declaration on Indigenous Peoples.[565] The importance of this right has been stressed by the relevant human rights treaty bodies. For instance, in relation to the Sami people in

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[562] International Labour Organization (ILO), Convention concerning Indigenous and Tribal Peoples in Independent Countries, C169 (n 328), Article 15(2).
[563] Cambou (n 32) 42.
[564] UN General Assembly, Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295 (n 31), Article 32(2): 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources'.
[565] International Labour Organization (ILO), Convention concerning Indigenous and Tribal Peoples in Independent Countries, C169 (n 328) Article 15(1): The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. UN General Assembly, Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295 (n 31), Article 18.

Sweden, the HRC has expressed concern at "the limited extent to which the Sami Parliament can have a significant role in the decision-making process on issues affecting the traditional lands and economic activities of the indigenous Sami people".[566] Also the CESCR has stressed the importance of the participation of indigenous peoples in such decision-making processes.[567] On a regional level, the African Commission has acknowledged the importance of the participation of the affected indigenous peoples in the decision-making process regarding the disposing of natural wealth and resources. In a case regarding the failure of the Nigerian government to protect the Ogoni people against the destruction of their lands by foreign oil companies, the African Commission found that the failure of the Nigerian government to involve, in all their dealings with the oil consortiums, the Ogoni communities in the decisions that affected the development of Ogoniland was in violation of the right of the Ogoni people to freely dispose their natural wealth and resources under Article 21 of the African Charter.[568] Furthermore, the Inter-American Court has determined that if states issue concessions over natural resources pertaining to the lands of indigenous peoples they "must ensure the effective participation of the members of the [affected indigenous peoples]".[569]

The extent of the right of indigenous peoples to participate in the decision-making processes concerning the disposal of natural resources pertaining to their lands is still rather vague. In Article 32(2) of the Declaration on Indigenous Peoples, the General Assembly provided that, in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources, states have the duty to consult and cooperate in good faith with the indigenous peoples concerned through their own

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566 'UN Human Rights Committee (HRC), UN Human Rights Committee: Concluding Observations: Sweden, 24 April 2002, CCPR/CO/74/SWE' para 15.
567 'UN Committee on Economic, Social and Cultural Rights (CESCR), UN Committee on Economic, Social and Cultural Rights: Concluding Observations: Norway, 23 June 2005, E/C.12/1/Add.109' para 26; 'UN Committee on Economic, Social and Cultural Rights (CESCR), Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ecuador, 7 June 2004, E/C.12/1/Add.100' (n 334) paras 12, 34.
568 *Social and Economic Rights Action Centre and the Center for Economic and Social Rights v Nigeria, African Commission on Human and Peoples' Rights Communication No. 155/96, (2001) AHRLR 60, 27 October 2001* (n 525) para 55.
569 *Case of the Saramaka People v Suriname, Preliminary Objections, Merits, Reparations and Costs, 28 November 2007, IACHR (Series C) No. 172* (n 337) para 129.

representative institutions.[570] In his examination of the meaning of this obligation, Mauro Barelli explained that the ambiguity of whether this provision provides an obligation of states to obtain such consent or only to seek to obtain such consent was included on purpose to bridge the gap between the conflicting views of the states and indigenous peoples that participated in its drafting.[571] Yet, Barelli argued that "it would be wrong to conclude that the [Declaration on Indigenous Peoples] has recognised a mere right of participation and consultation to indigenous peoples".[572] Instead he argued for a 'flexible approach' that does not provide indigenous peoples with a right to veto in relation to all matters affecting their lands but does affirm that "when a development project is likely to have a serious (negative) impact on the cultures and lives of indigenous peoples, states must obtain their consent before implementing it".[573] Similarly to the Declaration on Indigenous Peoples, ILO Convention 169 provides that

> "[i]n cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall *consult* [indigenous] peoples, *with a view to ascertaining whether and to what degree their interests would be prejudiced,* before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands [emphasis added]".[574]

As observed by Saul, Kinley and Mowbray, the CESCR has often invoked ILO Convention 169 on "as a 'best practice' normative standard relevant to the exercise of indigenous self-determination under Article 1, even though that Convention does not specifically mention self-determination".[575] Moreover, also in relation to the situation described in Article 15(2) of ILO Convention 169 the condition applies that in no case peoples may be deprived of their own means of subsistence.[576] On a regional level, the African Commission declared that indigenous

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[570] UN General Assembly, Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295 (n 31), Article 32(2).
[571] Barelli (n 376) 10–11.
[572] ibid 11.
[573] ibid.
[574] International Labour Organization (ILO), Convention concerning Indigenous and Tribal Peoples in Independent Countries, C169 (n 328), Article 15(2).
[575] Saul, Kinley and Mowbray (n 55) 81.
[576] Common Article 1(2) of International Covenant on Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights 1966 (n 49).

peoples have the right to dispose their natural resources in consultation with the state.[577] Furthermore, even though Surinam had not ratified ILO Convention 169, the Inter-American Court used the provisions in this convention to interpret the obligations of Surinam under Common Article 1 of the Twin Covenants. Consequently, the Inter-American Court declared that "in ensuring the effective participation of members of the [affected indigenous peoples], the State has the duty to actively consult with said community according to their customs and traditions".[578]

As discussed in Chapter 3, Article 6(2) of ILO Convention 169 emphasises that such consultations must be carried out in good faith and with the objective of achieving agreement or consent to the proposed measures.[579] From his review of relevant statements made by ILO supervisory bodies, Anaya concluded that "in addition to the procedural safeguards that apply, and whether or not agreement is to be achieved, the consultations should lead to decisions that are consistent with indigenous peoples' substantive rights".[580] According to Anaya, the burden is on the state to justify a decision that goes against the preferences of the affected indigenous people in a manner that is consistent with the full range of applicable international norms concerning indigenous peoples.[581] In relation to the failure of ILO Convention 169 to uphold indigenous peoples' rights to mineral or subsurface resources in cases in which the state generally retains ownership of those resources, Anaya notes that pursuant to the above mentioned norm of non-discrimination "indigenous peoples must not be denied subsurface and mineral rights where such rights are otherwise accorded landowners".[582] In relation to this, Pereira and Gough observed that "given that under general international law the unilateral expropriation of surface rights is generally prohibited, the same argument logically appears to apply in the case of a state's concession for the extraction of subsoil resources in indigenous lands".[583] Therefore, even though ILO Convention 169 does not provide indigenous peoples

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[577] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, African Commission on Human and Peoples' Rights Communication No. 276/2003, 2009 AHRLR 75, 4 February 2010* (n 339) para 268.
[578] *Case of the Saramaka People v Suriname, Preliminary Objections, Merits, Reparations and Costs, 28 November 2007, IACHR (Series C) No. 172* (n 337) para 133.
[579] International Labour Organization (ILO), Convention concerning Indigenous and Tribal Peoples in Independent Countries, C169 (n 328), Article 6(2).
[580] Anaya (n 108) 154–155.
[581] ibid 155.
[582] Anaya (n 377) 10.
[583] Pereira and Gough (n 321) 26.

with the rights over the subsurface resources pertaining to their territory states should provide them with these rights if such rights are accorded to non-indigenous landowners and should refrain from the unilateral expropriation of surface rights if they have been afforded to indigenous peoples.

In the Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen claimed that "[f]ree, prior, informed consent is essential for the human rights of indigenous peoples in relation to major development".[584] As observed by Cambou, even though the implementation of the obligation to obtain free, prior, and informed consent "is still a controversial issue under international law, there is a growing corpus of decisions demonstrating the importance of the principle for the protection of indigenous peoples' rights to land and resources".[585] For instance, in a Concluding Observations on Thailand, the HRC "should ensure that prior consultations are held with a view to obtaining their free, prior and informed consent regarding decisions that affect [indigenous peoples], in particular with regard to their land rights.[586] The existence of such an obligation has also been acknowledged by the Committee on the Elimination of Racial Discrimination in two separate Concluding Observations on Ecuador.[587] In one of these observations, the CERD explicitly stated that in relation to the exploitation of the subsoil resources of the traditional lands of indigenous communities "merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples".[588] The Inter-American Court adopted this approach in the *Saramaka case* by stating that when dealing

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[584] 'UN Commission on Human Rights, Report on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Addendum Mission to Guatemala, 24 February 2003, E/CN.4/2003/90/Add.2', at para. 66.
[585] Cambou (n 32) 42.
[586] 'UN Human Rights Committee (HRC), Concluding Observations on the Second Periodic Report of Thailand, 25 April 2017, CCPR/C/THA/CO/2' para 44.
[587] 'UN Committee on the Elimination of Racial Discrimination (CERD), UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Ecuador, 2 June 2003, CERD/C/62/CO/2' para 16; 'UN Committee on the Elimination of Racial Discrimination (CERD), Consideration of Reports Submitted by States Parties under Article 9 of the Convention: International Convention on the Elimination of All Forms of Racial Discrimination: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ecuador, 22 September 2008, CERD/C/ECU/CO/19' para 16.
[588] 'UN Committee on the Elimination of Racial Discrimination (CERD), UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Ecuador, 2 June 2003, CERD/C/62/CO/2' (n 587) para 16.

with major development or investment plans that may have a profound impact the lands of an indigenous people the safeguard of effective participation must be understood to require the free, prior, and informed consent of the indigenous people, in accordance with their traditions and customs *in addition to* the consultation that is always required when planning development or investment projects within the territory of indigenous peoples.[589] Furthermore, also the African Commission has stated that it is of the view that states have the duty to not only consult with indigenous peoples but also to obtain their free, prior and informed consent, according to their customs and traditions, to any development or investment projects that would have a major impact within their territory.[590] Therefore, it seems that the international legal framework on indigenous rights has adopted, or is at least in the process of adopting, the above discussed flexible approach promoted by Barelli by which indigenous peoples lack the right to veto any matters affecting their lands but do possess that right in relation to developmental projects that are likely to have a serious impact on the indigenous peoples or their territory.

The 'limiting clause'

The right of peoples to freely dispose of their natural wealth and resources is not absolute. This is demonstrated by the limiting clause in Common Article 1(2) of the Twin Covenants, which states that the free disposition of natural resources has to be exercised "without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law".[591] Also the African Charter has included such a limiting clause in its provision on the permanent sovereignty over natural wealth and resources, which states that this right "shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law".[592] The wording of these provisions is to the effect that obligations either arising out of international co-operation, based upon the principle of mutual benefit, or out of international law limits the peoples' right to freely dispose of their natural

[589] *Case of the Saramaka People v Suriname, Preliminary Objections, Merits, Reparations and Costs, 28 November 2007, IACHR (Series C) No. 172* (n 337) para 137.
[590] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, African Commission on Human and Peoples' Rights Communication No. 276/2003, 2009 AHRLR 75, 4 February 2010* (n 331) para 291.
[591] International Covenant on Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights 1966 (n 49), Common Article 1(2).
[592] African Charter on Human and Peoples' Rights 1981 (n 99), Article 21(3).

wealth and resources. As the objective of the right to permanent sovereignty is not to frighten off foreign investment in the exploitation of natural wealth and resources,[593] but to prevent foreign exploitation the drafters of the Twin Covenants included a limiting clause as

> "a concession to developed states concerned during the drafting to preserve their favoured international economic order, namely a climate conducive to free and competitive international trade (as opposed to cartelization or economic isolationism or self-sufficiency) and protective of foreign investment and the free flow of capital".[594]

To preserve this international economic order, the limiting clause was included in Common Article 1(2) in order to restrict the possibility that states would use the right to permanent sovereignty of their peoples as a legal justification to break their obligations regarding international trade and investment. The limiting clause does not prohibit the nationalisation, expropriation or requisitioning of natural wealth and resources but instead restricts it to situations "based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign".[595] As stated by Saul, Kinley and Mowbray, this 'public purpose' test has "found acceptance in international law".[596] Moreover, it establishes that if such nationalisation, expropriation or requisitioning of natural wealth and resources takes place the owner shall be paid appropriate compensation.[597] How such appropriate compensation determined has been a matter of dispute.[598] However, I want to focus on the question which obligations are protected by this limiting clause.

Saul, Kinley and Mowbray argued that, while treaties can limit economic freedom, entry into "treaty arrangements is itself an exercise of economic sovereignty and self-determination, signified by voluntary acceptance of treaty commitments".[599] The validity of this argument is dubious to say the least. The voluntary entry into international trade agreements by a state is

[593] Saul, Kinley and Mowbray (n 55) 64.
[594] ibid 108–109.
[595] UN General Assembly, Permanent sovereignty over natural resources, 14 December 1962, A/RES/1803 (XVII) (n 26), para. 4.
[596] Saul, Kinley and Mowbray (n 55) 109.
[597] UN General Assembly, Permanent sovereignty over natural resources, 14 December 1962, A/RES/1803 (XVII) (n 26), para. 4.
[598] For an in-depth examination of this issue see, Anghie (n 24) 211–223.
[599] Saul, Kinley and Mowbray (n 55) 115.

not always an exercise of the right to self-determination of the peoples of this state. Just because a state has voluntarily entered into such an agreement that does not mean that its decision to do so was in conformity with its obligations corresponding to the permanent sovereignty right of their peoples to freely dispose of their natural resources. Saul, Kinley and Mowbray themselves acknowledged that the economic freedom of states to enter into treaties is limited by the right to self-determination of its peoples.[600] Precisely for this reason, the limiting clause in Common Article 1(2) has been qualified by identical Articles 47 of the ICCPR and 25 of the ICESCR ("Article 47/25") by providing that "[n]othing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources".[601] Cassese observed that "[t]hese provisions were inserted in the Covenants much later than Article 1(2) and were aimed at 'rectifying' Article 1(2) in in order to meet new demands in the wake of the evolution of international politics and law that had taken place in the meantime".[602]

As argued by Saul, Kinley and Mowbray, the right to permanent sovereignty of peoples provided by Article 47/25 trumps obligations arising out of international economic co-operation.[603] Therefore, the effect of the provision included in Article 47/25 is that the limiting clause in Common Article 1(2) has to be interpreted in a in a manner that is consistent with the right of all peoples to enjoy and utilize fully and freely their natural wealth and resources. I would argue that in order to do so, this provision has to be understood as establishing a rule that the obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law must have come into existence in accordance with the right of peoples to enjoy and utilise fully and freely their natural wealth and resources in order for them to limit a people's freedom to dispose of the natural wealth and resources that form the subject of these obligations. Such an interpretation would ensure that such obligations arising out of international economic co-operation and international law do not take away the right to permanent sovereignty of peoples. Indeed, if states enter into treaty obligations in a manner that is consistent with the ongoing self-determination rights of the peoples under their jurisdiction, the act of entering into obligations that are protected by the limiting clause in

[600] ibid 79.
[601] International Covenant on Civil and Political Rights (n 185), Article 47; International Covenant on Economic, Social and Cultural Rights (n 387), Article 25.
[602] Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 2) 57.
[603] Saul, Kinley and Mowbray (n 55) 110.

Common Article 1(2) would be an exercise of a state's obligations corresponding the right to ongoing self-determination of its peoples. In such a way, the permanent sovereignty over the natural wealth and resources would be retained by the peoples but they would be restricted in using this right as a legal justification to break obligations arising out of international economic co-operation and international law. The right to permanent sovereignty of peoples would only provide such a justification in relation to obligations that have come into existence in a manner that is inconsistent with their right to enjoy and utilize fully and freely their natural wealth and resources. Interpreted in this manner, the limiting clause ensures that states cannot use the right to permanent sovereignty of its peoples as a justification to escape certain obligations under international law as long as the obligations concerning these resources have come into existence in a manner consistent with the right to permanent sovereignty. In conclusion, in order to interpret the limiting clause from Common Article 1(2) of the Twin Convention in a manner that does not impair the right of all peoples to enjoy and utilise fully and freely their natural wealth and resources, only those obligations should be understood to be protected by this clause that 1) arise out of international economic co-operation and international law, and 2) were entered into in a manner consistent with the right to self-determination of the affected peoples.

If obligations arising from violations of the right to ongoing self-determination are not protected by the limiting clause included in Common Article 1(2), the question is whether the right to self-determination can be used as a legal justification to break such an obligation. The answer to this question depends on the status of the right to permanent sovereignty in international law. The general rule is that there is no hierarchy of sources or rules in international law. As explained by Cassese, as a result of this lack of hierarchy,

> "the relations between rules generated by [treaties and customary international law] were governed by the three general principles which in all legal orders regulate the relations between norms deriving from the *same* source (a later law repeals, or may derogate from, and earlier one; a later law, general in character, does not derogate from an earlier one, which is special in character; a special law prevails over a general law) [original emphasis]".[604]

[604] Antonio Cassese, *International Law* (Oxford University Press) 198.

Following these principles, Saul, Kinley and Mowbray argued that if there is a conflict between the right to permanent sovereignty and treaties imposing economic obligations inconsistent with it, the right to permanent sovereignty may be invoked as 1) a 'later in time' provision for treaty obligations assumed prior to those under the Twin Covenants and 2) as *lex specialis,* which takes precedence over general obligations of economic cooperation under other treaties, also those assumed later in time.[605] As discussed in the first chapter, peremptory norms of general international law are the exception to the rule that there is no hierarchy of sources or rules in international law.[606] According to Jochen Frowein, as a peremptory norm, the right to self-determination can be used as a limit to other international legal obligations.[607] Similarly, specifically in relation to the right to permanent sovereignty, Saul, Kinley and Mowbray argued that *jus cogens* the right to permanent sovereignty may be invoked when there is a conflict this right and treaties imposing economic obligations inconsistent with it.[608] Therefore, such treaties would be null and void. This would incentivise states to refrain from entering into an agreement with another state if they are aware that such an agreement would violate the self-determination of the peoples of the other state. Moreover, it would incentivise states to abide by the above discussed obligations in relation to the self-determination of foreign peoples. However, as stated in the first chapter, even though many scholars have argued that the right to self-determination is a peremptory norm of international law, the question whether the right to self-determination is in fact *jus cogens* still has to be settled.

Conclusion

In this chapter, I have argued that the self-determination right of peoples to, for their own ends, freely dispose of their natural wealth and resources lies at the heart of the principle of permanent sovereignty over natural wealth and resources. Therefore, the beneficiaries of the right to permanent are peoples and states only possess rights that are secondary to, or derived from, the right to permanent sovereignty of the peoples under their jurisdiction. The fact that the permanent sovereignty right of peoples to freely dispose of their natural resources is a constituent of the right to self-determination has two important consequences. Firstly, it means that the same peoples that are the beneficiaries of the self-determination right to freely

[605] Saul, Kinley and Mowbray (n 55) 111–112.
[606] Brownlie (n 85) 483–486.
[607] Jochen Frowein, 'Self-Determination as a Limit to Obligations', *Modern Law of Self-Determination* (Martinus Nijhoff Publishers 1993) 218–221.
[608] Saul, Kinley and Mowbray (n 55) 112.

determine their political status and freely pursue their development are the beneficiaries the right to freely dispose of their natural wealth and resources. Therefore, both entire populations and subpopulation peoples have the right to permanent sovereignty. Secondly, it means that the word 'freely' in the right of peoples to freely dispose of the natural resources should be interpreted in manner that is consistent with the interpretation of 'freely' in the self-determination right of peoples to freely pursue their development.

In my examination of the interpretation of 'freely' in the context of the right to permanent sovereignty, I establish that, just as the right of peoples to freely pursue their development, the right to permanent sovereignty has both an internal and an external dimension. The internal dimension provides the right of peoples to both benefit from, and control, the exploration, development and disposition of their territory's natural resources. This right includes the right of peoples to participate in their state's decision-making processes concerning such exploration, development and disposition. In relation to the rights of subpopulation groups, I found that 1) all subpopulation groups have the right to participate in their state's decision-making processes relating to the exploration, development and disposition of the natural resources pertaining to the territory of the entire population to which they belong, and 2) indigenous peoples also have the right to be consulted by the state on matters concerning the natural wealth and resources pertaining to their lands with the view to obtain their free, prior and informed consent.

The external dimension provides the right of peoples to dispose of their natural resources without interference by foreign states and non-state actors. Consequently, the right to permanent sovereignty provides states with both the right and obligation to regulate the admission and activities of foreign investors, the methods of exploitation of natural resources, the conduct of the entities engaged in the exploitation of natural resources, and the distribution of profits obtained from the exploitation of natural resources. As rights derived from the right of their peoples to freely dispose of their natural resources, such regulation should be decided by decision-making possesses in which the affected peoples have participated freely. Therefore, states act as the medium through which the peoples exercise permanent sovereignty over their natural resources. In relation to this conclusion I examined the 'limiting clause' that provides that the right of peoples to freely dispose of their natural resources has to be exercised without prejudice to obligations arising out of international economic co-operation and international law. I provided an interpretation of this clause that provides that such obligations

only restrict the free disposal of its natural wealth and resources if these obligations were created in a manner that was consistent with the ongoing self-determination rights of the affected peoples.

Conclusion

In the first chapter, I established that the right to ongoing self-determination has developed into a standard that that can be used to mitigate the adverse effects of how international law both distributes sovereignty and authorises the exercise of sovereignty by sovereign states. This right provides the right of peoples to 1) freely pursue their economic, social and cultural development, and 2) freely dispose of their natural wealth and resources. I found that both these rights include an external and an internal dimension, which means that these rights both regulate the relationship between peoples and foreign states and between peoples and their domestic authorities. Furthermore, I found that the ongoing right to self-determination of peoples to freely pursue their development includes both a civil and political dimension and an economic, social and cultural dimension. The civil and political dimension of the right to ongoing self-determination of entire population provides that these populations have the right to pursue their economic, social and cultural development according to the policies they have freely chosen. This includes the right to choose these policies without either external inference by other states, with the corresponding obligation of states to respect the right of foreign peoples to freely pursue their development, or by internal manipulation or undue influence from their domestic authorities, with the corresponding obligation of states to respect this right of their population themselves and protect it from the interference by foreign states and non-state actors. The method by which peoples exercise the internal dimension of civil and political dimension of the right to pursue their economic, social and cultural development by the exercise of its members of their civil and political rights in order for the population to both develop a popular will and convert this popular will policies they have freely chosen. Consequently, the civil and political dimension is best understood as a manifestation of the totality of civil and political rights. I have argued that the consequence of this view is that the right to participate both indirectly, through chosen representatives, and directly in the decision-making processes of the state are essential self-determination rights. Therefore, the civil and political dimension of the right to ongoing self-determination provides the foundation of an argument on the right to a democratic system of governance that is both representative and participatory. The external dimension of the civil and political dimension of the right of peoples to freely pursue their development establishes the state as the medium through which peoples are able to be effectively exercise their ongoing self-determination within the international community.

The economic, social and cultural dimension of the right to ongoing self-determination of entire populations provides that these populations have the right to pursue their economic, social and cultural development free from economic, social or cultural obstacles. This right is exercised by the exercise of the individual members of these populations of their economic, social and cultural rights. I have argued that if it is accepted that if its civil and political dimension is best understood as a manifestation of the totality of civil and political rights, the socio-economic dimension of the right to ongoing self-determination is best understood as a manifestation of the totality of economic, social and cultural rights. As socio-economic rights include the corresponding obligation of states to fulfil them by taking steps, to the maximum of their available resources, with a view to achieving progressively the full realisation of these right, the obligations of states in relation to the right socio-economic dimension of the right to ongoing self-determination are to be applied progressively. This provides peoples with the right to pursue their economic, social and cultural development through the participation in, contribution to, and enjoyment of such development. This was the basis of my argument that the right to development is not a parallel right to right to self-determination but instead a delineation of duties that provide clarification of the methods by which states have to exercise their obligations concerning the socio-economic dimension of the right to ongoing self-determination. Such an understanding of the relationship between the right to self-determination and the right to development does not only provide clarification of the obligations of states in relation to this dimension of the right to ongoing self-determination but also establishes the right to self-determination as the legal foundation of the obligations included in the right to development.

Following my interpretation of the civil and political and socio-economic dimensions of the right to ongoing self-determination, I argued that the ongoing self-determination right of peoples to freely dispose of their natural wealth and resources should be interpreted in a manner that is consistent with the ongoing self-determination right of peoples to freely pursue their development. Therefore, this right that lies at the core of the principle of permanent sovereignty over natural wealth and resources, has both an internal and an external dimension. The internal dimension provides the right of peoples to both benefit from, and control, the exploration, development and disposition of their territory's natural resources. In order to exercise this right, peoples have to be free to exercise the rights associated with both the civil and political and socio-economic dimensions of the right to ongoing self-determination. Especially important is the right of peoples to participate in their state's decision-making processes concerning the

exploration, development and disposition of their natural resources, which clearly overlaps with the civil and political dimension of the right ongoing self-determination. The external dimension provides the right of peoples to dispose of their natural resources without interference by foreign states and non-state actors. This provides states with both the right and obligation to regulate the admission and activities of foreign investors, the methods of exploitation of natural resources, the conduct of the entities engaged in the exploitation of natural resources, and the distribution of profits obtained from the exploitation of natural resources. As a right derived from the right of their peoples to freely dispose of their natural resources, the decision-making processes concerning the exercise of this right should be exercised in a manner consistent with the full breath of rights established by the right to ongoing self-determination. In essence, the state acts as the medium through which the peoples exercise the permanent sovereignty over their natural resources.

In my examination of the ongoing self-determination rights of subpopulation groups, which I defined as all groups whose rights are protected by the prohibition against discrimination in international law, I juxtaposed the ongoing self-determination rights of all subpopulation groups and those of indigenous peoples, as the primary example of subpopulation groups whose status as 'peoples' have been recognised in international law. Apart from establishing what standard the right to ongoing self-determination provides in relation to subpopulation groups, the goal of this juxtaposition was to examine whether it is still necessary to answer the difficult question whether a certain subpopulation group is a people for purposes of the right to self-determination if it is excepted that the entire population of states have the right to self-determination. Firstly, I established that the civil and political dimension of the right to ongoing self-determination provides that all subpopulation groups have the right to freely participate in the right of the entire population to which they belong to freely pursue its development. Similar to how entire populations exercise their right to ongoing self-determination, this right is exercised by subpopulation groups through the participation in the political, economic, social and cultural life of their state through the exercise of the individual members of these subpopulation groups of the totality of their human rights. In relation to the civil and political dimension of the right to ongoing self-determination, this includes the right of their members to effectively participate in the public life of their state. In relation to the decision-making processes concerning issues that are of their specific affect them, this right does not just include a right to have their representatives present in the decision-making bodies but should translate into influence over the outcome of the decision-making processes. The of subpopulation groups

influence such decision-making processes does not amount to an obligation of states to seek to obtain the consent of subpopulation groups before adopting and implementing legislative or administrative measures that may affect, let alone provide them with a veto over such measures.

In relation to the ongoing self-determination rights of indigenous peoples, I established that the rights provided to those subpopulation groups that are themselves peoples is based on two pillars. Firstly, as subpopulation groups they have the same right, to freely participate in the right of the entire population to which they belong to freely pursue its development, as other subpopulation groups. Secondly, as peoples, subpopulation peoples have the right to freely pursue their own development. The civil and political dimension of this right provides subpopulation peoples with a greater degree of control over the pursuit of their development and the socio-economic dimension of this right provides them with a greater degree of control over the disposal of their natural wealth and resources. However, even though the international legal framework on indigenous rights provides them with the right to autonomy over matters relating to the internal and local affairs, this right is not absolute. Instead, the civil and political dimension of the right to ongoing self-determination balances the rights of indigenous peoples with those of the entire population to which they belong. This balance is mainly established by the obligation of states to consult, and cooperate with, indigenous peoples, through their own representative institutions, in good faith, with the objective to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect indigenous peoples. This obligation does not provide an absolute right of indigenous peoples to be consulted in order to obtain their consent. Therefore, this obligation does not provide them with an veto on all matters relating to their internal and local affairs. Instead, an obligation on states to obtain their consent seemingly only exists in relation to specific issues that relate to their ongoing self-determination right to freely dispose of their natural wealth and resources. Namely, when a proposed development project on their territory is likely to have serious negative impacts on the indigenous peoples or their territory. However, the fact that states have the obligation to consult indigenous peoples with the objective to obtain their consent to legislative or administrative measures that may affect them, which in certain situations amounts to an obligation to obtain this consent, provides indigenous peoples with a greater degree of control over their pursuit of their development and disposal of their natural resources than subpopulation groups without the status of ‘peoples’. Therefore, it is still necessary to answer the difficult question whether a certain subpopulation group is a people for purposes of the right to self-determination.

In summary, I have established that the right to ongoing self-determination is a standard that can be used to mitigate the adverse effects of how international law both distributes sovereignty and authorises the exercise of sovereignty by sovereign states. I have established that the ongoing self-determination right of peoples to freely pursue their economic, social and cultural development provides that *all peoples* have the right to 1) pursue their development by means of policies they have chosen free from external interference and manipulation or undue influence by their domestic states, and 2) through their participation in, contribution to, and enjoyment of development. Furthermore, I have established that that the ongoing self-determination right of peoples to freely dispose of their natural wealth and resources provides that *all peoples* have the right to benefit from, and control, the exploration, development and disposition of their territory's natural resources without external interference and manipulation or undue influence by their domestic states. The question that follows is what the effects of a state's violation of this standard are. Two especially interesting questions that warrant further research are 1) whether subpopulation peoples can legitimately secede from a state as a remedy to this state's violation of this standard and to what degree this standard needs to be violated for secession to become a legitimate remedy, and 2) what the effect of this standard is on international legal obligations that have been entered into by states in a manner that violates it. This latter question is especially relevant concerning the obligations of states provided by international trade and investment treaties as these are often negotiated by states with little to none participation of their populations.

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***Due to the fact that the libraries were closed because of the Coronavirus pandemic, there are a number of citations from these book chapters that are missing the relevant page numbers.**