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„The Right to Self-Determination in the *United Nations Declaration on the Rights of Indigenous Peoples*:

A Common Law Perspective“

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Introduction

> '*Indigenous peoples, essentially as a matter of definition, find themselves subject to political orders that are not of their making and to which they did not consent.*
>
> *They have been deprived of vast landholdings and access to life-sustaining resources, and have suffered historical forces that have actively suppressed their political and cultural institutions.*
>
> *As a result, indigenous peoples have been crippled economically and socially, their cohesiveness as communities has been damaged or threatened, and the integrity of their cultures has been undermined.*'[1]
>
> S James Anaya

In 2007 the United Nations General Assembly, in an unprecedented reconciliatory effort, voted overwhelmingly to redefine the legal relationship between states and their Indigenous peoples. The *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*') sought to redress historic wrongs inflicted on Indigenous peoples by extending to them the right to self-determination. Of the *UNDRIP*'s 46 articles, this right to self-determination, enshrined in Article 3, was especially controversial owing to its vague and variable meaning, and its association with the secession of non-self-governing territories during decolonisation in the 20th Century. Whilst the *UNDRIP* enjoyed near universal approval from states, it attracted four noteworthy votes against it from the United States, Australia, Canada and New Zealand. Statements issued by each of these common law countries reflected their fundamental concern regarding the legal parameters of the right to self-determination.[2] Even among the states voting in favour of the *UNDRIP* certain statements endorsing the *UNDRIP* have been regarded as akin to reservations on the issue of self-determination, emphasising it as conditional to the territorial integrity states.[3]

Enshrining self-determination in an international instrument represents not only a positive symbolic step in the process of reconciliation for Indigenous peoples, it also has the potential to provide concrete socio-economic benefits for Indigenous communities. The Harvard Project on

[1] S James Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs, 2009) 184, 191.
[2] UN GAOR, 61st sess, 107th plen mtg, UN Doc A/61/PV.107 (13 September 2007) 11-15.
[3] Marc Weller, 'Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23, and 46(1)' in Jesse Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 115, 137, citing UN Doc A/61/PV.107 (n 2) 16 (Russian Federation), 19 (Argentina), 19-20 (Japan), 19-22 (United Kingdom), 22 (Norway), 23 (Jordan), 23 (Mexico), 24-5 (Sweden), 25 (Thailand), 25 (Brazil), 27-8 (Suriname), and UN GAOR, 61st sess, 108th plen mtg, UN Doc A/61/PV.108 (13 September 2007) 1 (Iran), 1 (India), 2 (Myanmar), 2-3 (Namibia), 2 (Nepal), 5 (Turkey), 5-6 (Philippines), 6 (Nigeria), 7 (Egypt), 8-9 (Guatemala), 10-11 (France).

American Indian Development, for instance, which collected research over a period of 30 years, found that 'the defining characteristic common to thriving North American Native nations is collective self-determination'.[4] This referred to Native American communities who had decision-making control over their internal affairs.[5] This finding was supported in Australia by the Australian National University's Indigenous Community Governance Project, which concurred that 'genuine decision-making powers' and 'legitimate leadership' provided the foundations for sustained socio-economic development in Indigenous communities.[6]

Aside from these studies, the right to self-determination may be viewed as a means of protecting Indigenous peoples against paternalist policies of settler governments which have caused trauma to Indigenous communities. One especially egregious, and in some respects very literal, manifestation of paternalism may be seen in the assimilationist policies, common to both Australia and the United States, as well as other common law countries. An aspect of these policies included the forcible removal of Indigenous children from their parents. In the United States government-backed boarding schools were used to separate Native American children from their parents between the 19th and early 20th Centuries, guided by the sentiment expressed by Richard Henry Pratt to 'kill the Indian in him, and save the man'.[7] Pratt's phrase encompassed the attitude of the United States government, in its attempts to erase Native American culture.[8] Almost identical policies have been enacted under different names against Indigenous Australians during the Stolen Generation, and Indigenous Canadians during the period of the Residential School System. In many respects these paternalist policies continue to the present day, such as in the recent case of Australia's Northern Territory Intervention.[9]

For these reasons self-determination was viewed as a right that was of the utmost importance to Indigenous peoples during the negotiation of the *UNDRIP*. As such, the longevity and future success of the *UNDRIP* to a large extent depends on resolving ambiguity surrounding self-determination in Article 3, clarifying what is expected of states, and allowing for workable

[4] Alison Vivian et al, 'Indigenous Self-Government in the Australian Federation' (2017) 20 *Australian Indigenous Law Review* 215, 221.
[5] Ibid.
[6] Vivian et al (n 4) 221-3, quoting Janet Hunt and Diane Smith, 'Understanding and Engaging with Indigenous Governance: Research Evidence and Possibilities for Engaging with Australian Governments' (2011) 14(2-3) *Journal of Australian Indigenous Issues* 30, 31.
[7] Becky Little, 'Boarding Schools Once Separated Native American Children Families', *History* (Web Page, 1 November 2018) <https://www.history.com/news/government-boarding-schools-separated-native-american-children-families>.
[8] Ibid.
[9] See Anna Cowan, 'UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Northern Territory of Australia' (2013) 22(2) *Pacific Rim Law & Policy Journal* 247.

solutions that will further social justice for Indigenous peoples. Whilst the aforementioned concerns of states regarding secession, may make states reluctant to accept self-determination, self-determination may also be interpreted so broadly that it becomes effectively meaningless. If self-determination cannot be associated with any concrete means of expression, which can be used to monitor states in their efforts to meet the standards set by the *UNDRIP*, Article 3 of the *UNDRIP* is likely to become dead letter law.

This thesis will seek to resolve the ambiguity around the meaning of self-determination, as contained in the *UNDRIP*. It will seek to assess the extent to which the United States and Australia have allowed for self-determination of their Indigenous peoples, and whether this meets the standard established in the *UNDRIP*. It will then suggest ways in which these two jurisdictions may meet the standards expected under the *UNDRIP*.

Chapter 1 will introduce the history of the *UNDRIP's* development and adoption by the United Nations General Assembly. It will address the underlying controversy in the inclusion of the right to self-determination and the mixed reaction it received from states. The legal status of the *UNDRIP* and the specific right to self-determination will also be analysed, particularly regarding the extent to which it can be regarded as a rule of customary international law. It will be contended that although the right to self-determination in general international law can be regarded as a rule of customary international law, it would be premature to establish that self-determination, as it applies to Indigenous peoples specifically, is part of customary international law.

Chapter 2 focuses on defining self-determination in the *UNDRIP* and will contend that the *UNDRIP* allows a degree of self-determination identical to that granted under general international law. Self-determination must be accepted as a variable legal rule, whose manifestation and exact legal content are defined according to its intended beneficiary. Therefore the *UNDRIP* has tailored the right to self-determination to the circumstances of Indigenous peoples, and as such it does not allow for a right to secession. Whilst the right to self-determination can be regarded more generally as an overarching legal principle relevant to the interpretation of all other rights contained in the *UNDRIP*, the *UNDRIP* seeks to establish Indigenous self-determination through certain salient and unique features which may be divided into two categories. The first category includes the right to self-government and autonomy. It will be shown that the most ideal articulations of these rights come in the form of inherent rights to sovereignty and self-government, which are not created through state legislation. The second

category includes the right of Indigenous peoples to be consulted in order to obtain their free, prior and informed consent ('FPIC'), regarding measures that affect them. This grants Indigenous peoples a substantive right to meaningful consultations, allowing an ability to impact the decisions reached. In certain instances, where the proposed measures carry potentially severe consequences for Indigenous peoples, this will also include a right to veto such measures.

Although the United States and Australia are states sharing a historical background as former British colonies, the development of Indigenous rights in both countries has been widely divergent. Chapter 3 will illustrate how the United States has in the past established jurisprudence conducive to achieving these rights established in the *UNDRIP*, especially the right to self-government and autonomy, by acknowledging the inherent sovereignty of Indian tribes. In spite of this, more recent judicial trends have also reduced substantially Indigenous self-government and autonomy, in a manner inconsistent with the *UNDRIP*. Concerning the right to consultation in order to obtain the FPIC of Indian tribes, it will be shown that the United Stated has allowed a general legal requirement for consultation with Indian tribes, by this does not reflect the full extent of rights granted under the *UNDRIP*.

By contrast Chapter 4 will show how Australian courts, whilst allowing for Indigenous land rights in the form of native title, have consistently denied Indigenous Australians meaningful self-government or autonomy. In its place the Australian legal system has preferred to enact the lesser right to self-administration and self-management, by which Indigenous communities are allocated certain powers by the Australian legislature. Whilst it will be shown that these lesser rights may play an important role in achieving Indigenous self-determination, allowing Indigenous people to exercise these rights, in the absence of right to inherent sovereignty and self-government, falls short of the standard expected by the *UNDRIP*. Australian jurisprudence has also been reluctant to acknowledge an Indigenous right to consultation in order to obtain FPIC regarding measures that affect them.

Chapter 5 will establish how, in meeting the standard set by the *UNDRIP*, comprehensive reform to the legal relationship of both countries to their Indigenous peoples is required. The United States must return to founding case precedents in reaffirming the inherent right of Indigenous sovereignty and self-government. This will require reinterpretation of the doctrine of United States guardianship over Indian tribes in a way which limits congressional capacity to unilaterally reduce the sovereignty of Indian tribes. Furthermore, the recent judicial doctrine of implicit divestiture, by which the courts of the United States have actively reduced Indian sovereignty,

must also be overturned. Australia requires more fundamental reshaping of its relationship to Indigenous Australians, whereby there is an acknowledgement of the inherent right of Indigenous sovereignty which is not dependent on legislative grant. Furthermore there is a need for a general legal requirement that consultation in order to achieve FPIC is conducted prior to the implementation of measures which affect Indigenous Australians. It will be suggested that in both jurisdictions the use of treaties between the settler governments and Indigenous peoples, in addition to a constitutional protection of such treaty rights, may provide a possible means of achieving the standards set by the *UNDRIP*.

Although a non-legally binding instrument, the *UNDRIP* sets a formidable benchmark for states to achieve. Its utility lies in guiding state legislatures and judiciaries in a direction that achieves justice and greater prosperity for Indigenous peoples.

Chapter 1: The *UNDRIP* and the Progressive Development of Indigenous Rights

1. The Drafting and Adoption of the *UNDRIP*

The *UNDRIP* was the product of 20 years of negotiation, and is to date the most successful effort to codify Indigenous rights at an international level. The *UNDRIP* continued from earlier efforts by the International Labour Organisation ('ILO') to draft legally binding conventions enshrining the rights of Indigenous peoples. However these efforts proved unsuccessful in garnering the widespread support of the international community which is enjoyed by the *UNDRIP*.

The ILO initiated its first convention on Indigenous rights in 1957 with the *ILO Convention 107 on Indigenous and Tribal Populations* ('*ILO Convention 107*'). This Convention created a framework to enable the integration of Indigenous populations into mainstream society.[10] When this Convention was revised to create the *ILO Convention 169 on Indigenous and Tribal Peoples* ('*ILO Convention 169*') in 1989, additional emphasis was placed on enabling greater Indigenous participation in the drafting process than had occurred with the *ILO Convention 107*.[11] Indigenous groups participating in the redrafting effort consequently demanded self-government and self-determination rights.[12]

Whilst the revision process produced a text with greater protection of land rights, the ILO refrained from allowing for self-determination and other ambitious political rights in the new *ILO Convention 169*.[13] During the drafting process the ILO deliberately left decisions regarding the more ambitious rights, such as self-determination, to the United Nations ('UN') in its own efforts to codify Indigenous rights.[14] In spite of its more modest scope, *ILO Convention 169* has not been ratified by the United States, Canada, Australia or New Zealand, and in total has only received 23 ratifications at the time of writing.[15] Relative to the universal acceptance of the

[10] Andrew Erueti, 'The International Labour Organization and the Internationalisation of the Concept of Indigenous Peoples' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 93, 102.
[11] Ibid 110.
[12] Ibid.
[13] International Labour Organisation, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No 107)*, 75th sess, Agenda Item 6, ILO Doc Report VI(1) (1988) 15.
[14] Ibid 30.
[15] International Labour Organisation, 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)', *International Labour Organisation* (Web Page) <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314>.

UNDRIP, the ILO's experience, to an extent, reflects the shortcomings of legally binding instruments as a means of enshrining Indigenous rights.

Within the UN momentum grew for the creation of the *UNDRIP* in 1982, when the Economic and Social Council authorised the establishment of a Working Group on Indigenous Populations ('WGIP'). Over the course of its work the WGIP 'encouraged broad and unified Indigenous input'.[16] This made the drafting process unique in UN practice, as Erica-Irene Daes, Chairperson-Rapporteur of the WGIP from 1984 until 2001, noted, 'no other United Nations human rights instrument has been elaborated with so much direct involvement and active participation by its intended beneficiaries.'[17] The *UNDRIP* was proclaimed by the General Assembly in *Resolution A/61/295* on 13 September 2007. 143 states gave affirmative votes, whilst there were 11 abstentions, and four votes against the Resolution by the United States, Australia, Canada and New Zealand.[18] 34 states were also absent from the vote.[19] Each of the countries that voted against the Resolution have since announced their support for the *UNDRIP*, with Australia the first to do so in April 2009, followed by New Zealand and Canada in April 2010 and finally the United States in December 2010.[20] Though it should be noted that some commentators have observed that the statements endorsing the *UNDRIP* from the United States and Australia showed little change regarding the core issues of contention with the *UNDRIP*, such as the right to self-determination.[21] Consequently their endorsement of the *UNDRIP* may reflect a more symbolic rather than substantive acceptance.

2. Inclusion of Self-Determination in the *UNDRIP*

The inclusion of the right to self-determination in the *UNDRIP* is arguably the most substantive contribution made by the *UNDRIP* to public international law. As established in Article 3 of *UNDRIP*:

[16] Erica-Irene Daes, 'The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 11, 38.
[17] Ibid.
[18] Ibid 36.
[19] Benedict Kingsbury, 'Indigenous Peoples' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online at 19 August 2019) [9].
[20] Ibid.
[21] Cowan (n 9) 271; Elvira Pulitano, 'Introduction' in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press, 2012) 1, 2.

> 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'[22]

The inclusion of self-determination was insisted upon at the outset by Indigenous peoples participating in the negotiations for the *UNDRIP*, as a condition for their support for the project.[23] This right had been included as the first principle in the 1984 Declaration of Principles, designed to form the template for the *UNDRIP*.[24] This insistence, according to Marc Weller, derives from the association that Indigenous peoples draw between themselves and those under colonial domination.[25] As with peoples belonging to non-self-governing territories, or colonies, Indigenous peoples had suffered at the hands of alien peoples who had occupied their lands, 'economically exploiting them and their resources'.[26] As a result, many insisted that drawing a distinction between themselves and peoples belonging to non-self-governing territories was superficial, that the process of decolonisation was in their case not yet completed, and that as a result they too ought to be extended a right to self-determination.[27]

The inclusion of self-determination also created a fundamental shift in international law concerning who could be considered 'peoples' possessing a right to self-determination. Each previous instance in which the right to self-determination had been mentioned, including the *UN Charter*,[28] the *International Covenant on Civil and Political Right* ('*ICCPR'*),[29] as well as the *International Covenant on Economic and Social Right* ('*ICESR*'),[30] gave this right exclusively to 'peoples'. Previously the only acknowledged 'peoples' in this respect, were those living within the colonial context as the entire populations of non-self-governing territories, and not Indigenous peoples. For instance when the *ILO Convention 169* changed its title from 'Indigenous and Tribal Populations Convention' under *ILO Convention 107*, to 'Indigenous and Tribal Peoples Convention', this change carried the caveat that 'the use of the term 'peoples' … shall not be construed as having any implications as regards the rights which may attach to the

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[22] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 21/265, UN GAOR, 61st sess, Agenda Item 68, UN Doc A/Res/21/265 (2 October 2007, adopted 13 September 2007) art 3 ('*UNDRIP*').
[23] Weller (n 3) 116.
[24] Erica-Irene Daes, *Report of the Working Group of Indigenous Populations on its Fourth Session*, UN ESCOR, 38th sess, Agenda Item 11, UN Doc E/CN.4/Sub.2/1985/22 (27 August 1985) annex III ('*Declaration of Principles*') 1.
[25] Weller (n 3) 146-7.
[26] Ibid.
[27] Ibid.
[28] *Charter of the United Nations* art 1.
[29] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1 ('*ICCPR*').
[30] *International Covenant on Economic and Social Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1 ('*ICESR*').

term in international law'.[31] This might be understood to exclude any rights to self-determination, which international law has traditionally only granted to 'peoples'. Therefore including Indigenous peoples as 'peoples' possessing a right to self-determination creates a significant change to the status quo of international law. As stated by Martin Scheinin and Mattias Åhrén, 'peoples' are no longer the 'aggregate populations of States and territories, but can in addition be defined in terms of common ethnicity and culture'.[32]

The inclusion of the right to self-determination prompted concerns from states that allowing this right would enable Indigenous peoples residing within their states to secede.[33] The United States, Australia, Canada and New Zealand asserted that the inclusion of the right was 'legally unworkable'.[34] Over the course of drafting, these states offered alternative drafting suggestions. Australia initially supported the inclusion of self-determination on the condition that it be understood as not granting the right to secession.[35] Following a change of government in 1996, Australia opposed the inclusion of self-determination instead preferring that 'self-management' be included.[36] The United States whilst stating that Indigenous peoples within the United States enjoyed a right of self-determination under United States federal law, disagreed with the use of the term as it is defined under general international law.[37] The United States instead insisted that Article 3 make it clear that it provides for 'internal self-determination', which grants a right to self-determination within the confines of the nation state.[38] To allay these concerns a safeguard clause was inserted by way of Article 46(1) stating:

> 'Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United

[31] *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991) art 1.
[32] Martin Scheinin and Mattias Åhrén, 'Relationship to Human Rights and Related International Instruments' in Jesse Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 63, 63.
[33] Helen Quane, 'The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 259, 262.
[34] Stephen M Young, 'The Self Divided: The Problems of Contradictory Claims to Indigenous Peoples' Self-Determination in Australia' (2019) 23(1-2) *The International Journal of Human Rights* 193, 194, citing UN Doc A/61/PV.107 (n 2) 11-15.
[35] Kirsty Gover, 'Settler–State Political Theory, "CANZUS" and the UN Declaration on the Rights of Indigenous Peoples Settler-State' (2015) 26(2) *European Journal of International Law* 245, 367, citing *Information Received from the Australian Government*, UN ESCOR, 52nd sess, UN ESCOR, UN Doc E/CN.4/1995/WG.15/2/Add.2 (30 November 1995) [19].
[36] Gover (n 35) 367.
[37] Ibid 368.
[38] Ibid 367.

Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.'[39]

Weller notes that 24 states made statements 'which would be reminiscent of reservations in the realm of treaties' emphasising that all articles of the *UNDRIP*, including those regarding self-determination, must be read as subject to the content of Article 46(1).[40]

3. Legal Status of the Right to Self-Determination in the *UNDRIP*

As a declaration of the UN General Assembly, the *UNDRIP* lacks binding legal effect on states, which would otherwise be created under a human rights treaty, as well as independent monitoring mechanisms.[41] Accordingly, states such as the United States emphasised that the *UNDRIP* was a mere policy document which states aspirations rather than legally binding rules.[42] Nonetheless various commentators have discussed the possibility that the principles behind articles, such as Article 3 on self-determination, have binding effect on states as rules of customary international law.

Regarding Article 3, there is certain disagreement over whether this reflects customary international law, or rather whether it is only self-determination more generally that amounts to customary international law. In the *Chagos Archipelago* advisory opinion of the International Court of Justice ('ICJ'), it was stated that the rule of self-determination crystalized as a rule of customary international law in 1960.[43] This came through the adoption of *General Assembly Resolution 1514 - Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960) ('*Resolution 1514*').[44] Certain commentators, such as S James Anaya, UN Special Rapporteur on the Rights of Indigenous Peoples from 2008 until 2014, have noted that the rule of self-determination as it applies to all peoples might also amount to a rule of *jus cogens*.[45]

[39] *UNDRIP*, UN Doc A/Res/21/265 (n 22) art 46(1).
[40] Weller (n 3) 137, citing UN Doc A/61/PV.107 (n 2) 16 (Russian Federation), 19 (Argentina), 19-20 (Japan), 19-22 (United Kingdom), 22 (Norway), 23 (Jordan), 23 (Mexico), 24-5 (Sweden), 25 (Thailand), 25 (Brazil), 27-8 (Suriname), and UN Doc A/61/PV.108 (n 3) 1 (Iran), 1 (India), 2 (Myanmar), 2-3 (Namibia), 2 (Nepal), 5 (Turkey), 5-6 (Philippines), 6 (Nigeria), 7 (Egypt), 8-9 (Guatemala), 10-11 (France).
[41] Julian Burger, 'The UN Declaration on the Rights of Indigenous Peoples: From Advocacy to Implementation' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 41, 55.
[42] UN Doc A/61/PV.107 (n 2) 12.
[43] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 25 February 2019) [150-3]. ('*Chagos Archipelago*')
[44] Ibid.
[45] S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 1st ed, 1996) 75 ('*Indigenous Peoples in International Law 1st ed*').

Regarding the right to self-determination as it applies to Indigenous peoples specifically, certain voices have lent their support to the proposition that this too reflects customary international law. The International Law Association noted that six rules of customary international law had emerged from the *UNDRIP*, including the right to self-determination for Indigenous peoples, as well as associated right to self-government and autonomy.[46] Furthermore, in the *Military and Paramilitary Activities in and Against Nicaragua* decision ('*Nicaragua*'), the ICJ also expressed the possibility that attitude of states, as expressed in UN General Assembly resolutions, may be considered as *opinio juris* for the purposes of forming customary international law.[47] Following this principle it may be considered that there was general acceptance of the *UNDRIP* by states, given that 143 states voted in its favour upon adoption, strongly suggesting the formation of *opinio juris*. Clive Baldwin and Cynthia Morel also state that the positive legal language used, and the fear expressed by objecting states regarding the legal consequences of accepting the *UNDRIP*, both support the conclusion that the *UNDRIP* represents customary international law.[48]

However other authors have expressed caution in this regard, reinforcing the need to respect the non-binding effect of the *UNDRIP*. Emmanuel Voyiakis points to criticism that has been made of the aforementioned principle from the *Nicaragua* decision, asserting that states may vote in favour of a resolution whilst holding different interpretations regarding its character as a rule of customary international law.[49] From a policy perspective they argue that there is a value in the 'softness' regarding votes on General Assembly resolutions, given that it allows states to announce support for standards of conduct without binding themselves to certain legal rule.[50] The International Law Association has acknowledged that the 'soft' character of General Assembly resolutions often enables delegations to give positive votes on matters.[51]

[46] International Law Association, *The Hague Conference (2010): Rights of Indigenous Peoples*, Interim Report (2010) 51.
[47] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 99-100.
[48] Clive Baldwin and Cynthia Morel, 'Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 121, 124.
[49] Emmanuel Voyiakis, 'Voting in the General Assembly as Evidence of Customary International Law?' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 209, 213.
[50] Ibid 211.
[51] International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law*, Report of the Sixty-Ninth Conference of the International Law Association (2000), 58.

Instead General Assembly resolutions may provide inspiration for the development of new customary international practices,[52] and may otherwise assist with the establishment of customary international practices.[53] This perspective of the legal effects of the *UNDRIP* is widely acknowledged in the secondary literature. Alexandra Xanthaki suggests that regarding 'substantial parts' of the *UNDRIP* as customary international law is 'premature'.[54] Stephen Allen also contends that such a finding of customary international law would contradict the intention of states who generally made it clear, through their statements, that the *UNDRIP* was not intended to be legally binding.[55] Anna Cowan also makes the compelling assertion that state practice and *opinio juris*, at present, are highly unlikely to meet the threshold needed for the formation of customary international law.[56] She notes that the adoption of the right to self-determination was subject to extensive debate, with the four countries who initially opposed the *UNDRIP* voicing serious concerns specifically regarding this right.[57] Furthermore, Indigenous peoples in general lack factual self-determination.[58] This can be observed given the persistent complaints made by Indigenous peoples to the Human Rights Council and regional human rights bodies.[59]

Although it appears that a general right of peoples to self-determination may exist as a rule of customary international law, it is unlikely that the *UNDRIP* crystalizes a customary rule of self-determination for Indigenous peoples specifically. This is primarily due to the lack of clear intention on the part of states to create a binding rule of law through the *UNDRIP*. Nonetheless, there is significant support for the proposition that the *UNDRIP* may prompt or encourage the future development of customary international law on the right of indigenous peoples to self-determination.

[52] Voyiakis (n 49) 209.
[53] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, [70]; See, eg, *Chagos Archipelago* (n 43) [150]-[153].
[54] Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10(1) *Melbourne Journal of International Law* 27, 36.
[55] Stephen Allen, 'The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 225, 229.
[56] Cowan (n 9) 270.
[57] Ibid.
[58] Ibid.
[59] Ibid.

Chapter 2: The Right to Self-Determination in the *UNDRIP*

1. Historical Practice of Self-Determination in General International Law

The right of self-determination is an especially enigmatic aspect of public international law. A preferable interpretation of this right is to regard it as context specific, whereby its manifestation will depend on the circumstances of its intended beneficiaries. As stated by Daniel Thürer and Thomas Burri, there is an intermingling of legal and extra legal aspects in the right of self-determination to an extent not seen in other rights and principles.[60] During the post-colonial period, immediately following 1945, self-determination became associated with a perceived right of former colonies to decolonise and gain independent statehood. As was observed during the negotiation of the *UNDRIP*, outside of the colonial context there have been consistent attempts to reign in this radical interpretation of the right of self-determination. In doing so there has been a preference to associate it with greater autonomy within the existing boundaries of nation states.

It may be argued that this presents two distinct definitions of the right to self-determination, and that the right has evolved so as not to include a right to secession. However Anaya presents a more nuanced view, regarding secession, autonomy and self-government as different expressions of the right to self-determination rather than inherent elements of the right itself.[61] As such the expression of this right may be prescribed according to the circumstances in which it is invoked. It will be suggested that this approach is preferable from a theoretical perspective, rather than asserting that self-determination has a fixed means of expression which has evolved over time, or that there have been two or more phases to the right to self-determination in practice.

a. From Principle to Legal Rule – Self-Determination during the Decolonisation Period

The inclusion of self-determination as one of the principles of the *UN Charter* represented a significant event in the development of the right in modern international law. Prior to this event self-determination had been growing in prominence as a political theory in the 19th and early 20th centuries.[62] Article 1 of the *UN Charter* acknowledged that:

[60] Daniel Thürer and Thomas Burri, 'Self-Determination' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online at 19 August 2019) [26].
[61] Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' (n 1) 189-90.
[62] See Thürer and Burri (n 60) [1]-[4].

> ‘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.’[63]

The legal effect of the inclusion of self-determination in the *UN Charter* is questionable. Thürer and Burri for instance suggest that at this stage in the development of self-determination, it held the status of a principle of high ‘moral and political force’, but as yet lacked the force of a legal rule.[64] Critically, the principle remained undefined and vague without any clear illustration of what it implied and to whom it applied.[65] As acknowledged by the ICJ in the aforementioned *Chagos Archipelago* advisory opinion, General Assembly resolutions were pivotal to the transformation of self-determination from a principle into a binding rule of international law.[66] *Resolution 1514* unambiguously stated the existence of a ‘right’ to self-determination, affirming that:

> ‘(2) *All peoples have a right to self-determination*; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’[67]

It continues to state that:

> ‘(5) Immediate steps shall be taken, in … Non-Self-Governing territories or all other territories which have not yet attained independence, to transfer all power to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race creed or colour, in order to enable them to enjoy complete independence and freedom.’[68]

Elsewhere *Resolution 1514* also expresses the existence of a ‘right to complete independence’ for such territories.[69] As is noted by Weller, a critical feature of *Resolution 1514* is that the rights contained within it were only designed to be exercised by peoples living under colonial domination, often within the context of European colonisation.[70] This has given rise to the so-

[63] *Charter of the United Nations* art 1 (emphasis added).
[64] Thürer and Burri (n 60) [8].
[65] Ibid.
[66] *Chagos Archipelago* (n 43) [150]-[153].
[67] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514, UNGAOR, 15th sess, 947th plen mtg, UN Doc A/RES/1514 (14 December 1960) (emphasis added) (‘*Resolution 1514*’).
[68] Ibid.
[69] Ibid.
[70] Weller (n 3) 118.

called ‘saltwater’ or ‘bluewater’ thesis, according to which those who possessed this right to independent statehood were dominated by an alien nation from which they were separated by sea.[71] More generally these theses might be regarded as acknowledging that there was geographic separation between such non-self-governing territories and the alien nation from which they were governed.

Also crucial was the existence of a defined territory for peoples having a right to independent statehood. This is reflected through the emphasis *Resolution 1514* places on the need to uphold the ‘national unity and territorial unity’ of such non-self-governing territories.[72] This was known as the doctrine of *uti possidetis*, whereby the old borders of non-self-governing territories, which had existed during colonisation, were to be maintained. This illustrates what Weller regards as another fundamental feature of *Resolution 1514* – it bestows a right to independence to territories rather than populations.[73] As such, the intention was not that ‘the ethnic kingdoms of old, or tribal communities, would be restored once the shadow of colonial division was lifted’.[74] Mauro Barelli expresses the same concept stating that ‘“whole peoples”, not segments thereof were entitled to this right’.[75]

In spite of the extraordinary entitlements which *Resolution 1514* allowed colonial peoples, Weller suggests this was contained by the qualifier that this right was only to be exercised once in order to decolonise.[76] This was in response to what he acknowledges as the consensus of the international community at the time, that extraordinary measures were required in order to bring a swift end to colonisation.[77]

As such, what becomes evident from this analysis is the highly particular nature of self-determination within the context of decolonisation. Rather than representing a broad definition of self-determination, the carefully chosen language in *Resolution 1514* creates several qualifiers designed to reign in this interpretation of self-determination. These included geographic separation from the alien colonising nation, that it would be exercised by whole peoples belonging to pre-exiting geographically defined territories, and that the right would only be

[71] Megan Davis, ‘To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On’ (2012) 19 *Australian International Law Journal* 17, 30.
[72] *Resolution 1514,* UN Doc A/RES/1514 (n 67).
[73] Weller (n 3) 118.
[74] Ibid.
[75] Mauro Barelli, ‘Shaping Indigenous Self-Determination: Promising or Unsatisfactory Conclusions?’ (2011) 13 *International Community Law Review* 413, 414 (‘Shaping Indigenous Self-Determination’).
[76] Weller (n 3) 118-9.
[77] Ibid 146.

exercised once. This has led certain commentators, such as Russell Miller, to conclude that the general right of self-determination, as it exists in general international law, contains no right to secession.[78]

b. Redefining Self-Determination Following Decolonisation

Self-determination, as it has been invoked outside the context of decolonisation, may be regarded as more widely applicable and distinct in its manifestation with the emergence of the idea of internal self-determination. The human rights treaties, the *ICCPR* and the *ICESR*, were key to this transformation, given that each of them acknowledge in their first articles the 'right of all peoples to self-determination'.[79] These treaties, which create a human right to self-determination for 'peoples', therefore necessitate a more manageable and workable solution, as opposed to granting the right to independence to all peoples. The *General Assembly Resolution 2625 - Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States* (1970) ('*Resolution 2625*') with its affirmation of the need for state territorial integrity,[80] was also fundamental to this new understanding.

With this new reading of self-determination, a consensus emerged that the right contained both internal and external elements.[81] Barelli notes that the *ICCPR* marked a turning point in this understanding of self-determination, since it recognised this as a right belonging to 'all' peoples.[82] The broad grant of this right meant that more expressions of the right to self-determination needed to be explored, such that it could apply to a broader range of peoples, rather than just peoples living under colonial domination. In acknowledging two elements to the right of self-determination, external self-determination would refer to the ability to define the international status of a people, which could be through forming an independent state.[83] By contrast, as Helen Quane suggests, internal self-determination might be described as the ability to 'the right of a people to choose their own system of government and develop their own policies'.[84] Expanding on this concept, Daes suggests that it includes the ability to 'choose their political allegiances, to influence the political order in which they live, and to preserve their

[78] Russell A Miller, 'Collective Discursive Democracy as the Indigenous Right to Self-Determination' (2007) 31(2) *American Indian Law Review* 341, 351.
[79] *ICCPR* (n 29) art 1; *ICESR* (n 30) art 1.
[80] *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res 2625, UNGAOR, 25th sess, UN Doc A/RES/2625 (24 October 1970) ('*Resolution 2625*').
[81] Quane (n 33) 260.
[82] Barelli, 'Shaping Indigenous Self-Determination' (n 75) 414, citing Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995) 59-62.
[83] Quane (n 33) 260.
[84] Ibid.

cultural, ethnic, historical and territorial identity'.[85] Fundamentally internal self-determination involves the preservation of existing territorial bounds of nation states.

The emergence of this different interpretation of self-determination has led certain authorities, such as the Canadian Supreme Court in *Reference Re Secession of Quebec*, to acknowledge internal self-determination as the dominant form of self-determination.[86] Similarly Cowan suggests that internal self-determination is the default manifestation of self-determination in the absence of the specific circumstances, namely 'colonial, foreign or alien domination',[87] this is a view shared by others such as Antonio Cassese.[88] This is supported *Resolution 2625* in its simultaneous assertion of two propositions, first at the outset:

> 'Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.'[89]

And second that:

> '[A]ll 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 in the Charter.'[90]

Reconciling these two provisions, *Resolution 2625* may be regarded as expressing the General Assembly's desire to continue the practice of self-determination outside the colonial context, so long as the territorial integrity of states was held as a critical precondition for its exercise.

c. Anaya's Approach to Self-Determination

This distinction creates the following problem for those seeking to interpret the right of peoples to self-determination - is the right external self-determination, as well as internal self-determination, still available to all peoples? Has the right evolved such that it no longer includes

[85] Erica-Irene Daes, *Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, UN ESCOR, 45th sess, UN Doc E/CN.4/Sub.2/1993/26/Add. 1 (19 July 1993) [19].
[86] *Reference Re Secession of Quebec* [1998] 2 SCR 217, [126] ('*Quebec Secession*').
[87] Cowan (n 9) 267.
[88] Ibid, citing Cassese (n 82) 334.
[89] *Resolution 2625*, UN Doc A/RES/2625 (n 67).
[90] Ibid.

external self-determination? Or is external self-determination still available, but only to certain specifically defined 'peoples'? Anaya resolves this problem favouring the last interpretation.

Anaya reaches this conclusion through the notion of self-determination as a human right, rather than a right of sovereigns.[91] Self-determination is said to inhere to human beings individually, but is expressed through collectives referred to as 'peoples'.[92] As a human right, the right to self-determination must be capable of having universal application.[93] This is particularly evident given the multiple divergent interpretations of the right since the beginning of the 20th Century, and therefore the need to reconcile these interpretations.[94] He asserts that associating self-determination with the right to secede, and form independent states, relegates self-determination to a right of 'sovereigns or putative sovereigns'.[95] It also:

> '[R]ests on a narrow state-centred vision of humanity and the world, that is, a vision of the world that considers the modern state—that institution of Western theoretical origin—as the most important and fundamental unit of human organisation.'[96]

From this perspective the substantive parameters of self-determination cannot be limited to the ability to form states. Rather the right must be given an interpretation that is applicable to all cultures and legal traditions.

After decoupling self-determination from the act of secession, Anaya explains the relationship between the right of self-determination and the notions of autonomy, self-government, and secession, as remedies to the violation of the right rather than substantive content of the right itself.[97] He regards the circumstances of the non-self-governing territories in the post-colonial world as 'rare' circumstances in which there was a need for secession and independence as an expression of self-determination.[98] However for most peoples independence could be ultimately counter-productive to achieving self-determination.[99] A violation of the right of self-determination entitles the abused to remedial measures tailored to their circumstances. In this regard, state sovereignty and territorial integrity limits the extent of the right of self-determination in the post-decolonisation period, but is not inconsistent with this right.[100] At its

[91] Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' (n 1) 186.
[92] Ibid 187.
[93] See ibid 188.
[94] Ibid.
[95] Ibid 186, 188.
[96] Ibid 188-9.
[97] See ibid 189.
[98] Ibid 188.
[99] Ibid 188.
[100] Ibid 196.

core however the substance of the right to self-determination amounts to the existence of representative governmental institutions for a people capable of reflecting their collective will.[101] It also includes an ongoing aspect by which enabling the people to make meaningful choices about their lives.[102]

Anaya's perspective provides a solid basis from which to assess the contents of Article 3 of the *UNDRIP*, and particularly the concerns of states that self-determination necessarily means secession. This perspective is popular among scholars on self-determination, including Davis who notes that Anaya's viewpoint is 'frequently cited by scholars'.[103] Cowan also recognizes Anaya's theory as compelling,[104] whilst others, such as Isabelle Schulte-Tenckhoff, put forward similar interpretations.[105]

2. Self-Determination within the Context of the *UNDRIP*

Accepting Anaya's perspective as the guiding theory on the right to self-determination as it exists in general public international law, self-determination in the *UNDRIP* must be understood as a right which has been tailored to the circumstances of Indigenous peoples. From this perspective self-determination under the *UNDRIP* is no different to that provided under general public international law. The right as it is contained within the *UNDRIP* is tailored to the circumstances of Indigenous peoples in two respects. Firstly, through the right to Indigenous self-government and autonomy. Secondly, through the right of Indigenous peoples to be consulted in order to obtain their FPIC regarding measures that affect them. As such self-determination, as it applies to Indigenous peoples, does not carry the right to secede from states. In spite of this Indigenous peoples may be entitled to a right to remedial secession which may exists in general public international law. However it must be noted that the existence of this right is highly contested among legal scholars. In any case this right is an entirely separate right, not belonging to the substantive content of self-determination.

a. Overarching Approach to Self-Determination

The right of self-determination is expressed in broad terms in the *UNDRIP*, this reflects the way in which it was perceived by Indigenous participants in the drafting process as a vital means of

[101] Davis (n 71) 31, citing S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004) 104 ('*Indigenous Peoples in International Law 2nd ed*').
[102] Ibid, citing Anaya, *Indigenous Peoples in International Law 2nd ed*,(n 101) 104.
[103] Ibid.
[104] Cowan (n 9) 268.
[105] Isabelle Schulte-Tenckhoff, 'Treaties, Peoplehood, and Self-Determination: Understanding the Language of Indigenous Rights' in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press, 2012) 65, 80-1.

interpreting and guaranteeing the integrity of the other articles of the *UNDRIP*.[106] Australian Indigenous activist Mick Dodson for example described self-determination as the 'river in which all other rights swim'.[107] Other Indigenous peoples referred to this right as the right to 'control their own destiny and preserve their way of life and identity'.[108] Rodolfo Stavenhagen, former UN Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples from 2001 until 2008, likened self-determination to an 'umbrella principle'.[109] In this respect self-determination, as contained in Article 3, is not a separate right but rather a means of assessing the implementation of all the other rights of the *UNDRIP*.[110] He also notes that due to the aforementioned lack of fixed meaning for self-determination, its implementation must be distinct for each Indigenous people, and take into account the different circumstances in which Indigenous peoples find themselves around the world.[111]

As recounted by Weller, over the course of the negotiations there were four main positions taken on the right to self-determination. First, the version advocated by Indigenous groups, that an unqualified right to self-determination be expressed, second, to qualify the right but exclude the right to secession, third, to qualify the right by giving it a specific meaning, and fourth, to reject the inclusion of the right entirely.[112] An earlier draft of the *UNDRIP* addressed self-determination in Draft Article 31 with a more elaborate and instructive list:

> 'Indigenous Peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including 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.'[113]

This however proved 'too controversial' for states to adopt.[114] At the same time, attempts by states to allow Indigenous peoples to have 'internal self-determination' specifically, was equally rejected by Indigenous peoples as unacceptable given the unqualified right to self-determination

[106] Daes, 'The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal' (n 16) 32.
[107] Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (Routledge, 1st ed, 2016) 24 ('*Seeking Justice in International Law*').
[108] Quane (n 33) 262.
[109] Rodolfo Stavenhagen, 'Making the Declaration on the Rights of Indigenous Peoples Work: The Challenge Ahead' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 147, 163.
[110] Ibid.
[111] Ibid.
[112] Weller (n 3) 133.
[113] Quane (n 33) 270.
[114] Ibid.

given to other peoples, and the overarching principle of equality which was intended to be embodied in the *UNDRIP*.[115] The eventual compromise was reached through the more loosely defined right in Article 3, which was to be immediately followed immediately by Article 4, which reads:

> 'Indigenous peoples, in exercising their right to self-determination, have the right to *autonomy* or *self-government* in matters relating to their internal or local affairs, as well as ways and means for financing their autonomous functions.'[116]

This structuring of the *UNDRIP* was intended such that Article 3 and 4 would be read together in order to contextualise and limit the application of the right to self-determination.[117] Other provisions provided added safeguards in order to garner the support of states, including Article 46(1), which borrows language from the *Resolution 2625*, as well as the preambular statement that:

> '[N]othing in this Declaration may be used to deny any peoples their right to self-determination, exercised in accordance with international law.'[118]

The reference to 'international law' in this statement was regarded as an indirect way of enshrining the principle of territorial integrity of states.[119] Furthermore, Weller notes that '[t]here is no reference to terra nullius being a defunct theory', thereby it does not overturn the theoretical foundation for state jurisdiction over Indigenous peoples, and therefore does not contemplate the revision or negotiation of Indigenous peoples' status within their respective states.[120] Nonetheless, it will later be argued that terra nullius doctrine is inconsistent with a holistic interpretation of the *UNDRIP*. Furthermore it should be noted that other commentators, such as Siegfried Weissner, interpret the *UNDRIP* preamble paragraph 4 as containing an implicit rejection of terra nullius,[121] through its statement that:

[115] Barelli, *Seeking Justice in International Law* (n 107) 24.
[116] *UNDRIP*, UN Doc A/Res/21/265 (n 22) art 4 (emphasis added).
[117] Barelli, 'Shaping Indigenous Self-Determination' (n 75) 420.
[118] *UNDRIP*, UN Doc A/Res/21/265 (n 22) Preamble para 17.
[119] Barelli, 'Shaping Indigenous Self-Determination' (n 75) 420.
[120] Weller (n 3) 136-7.
[121] Siegfried Weissner, 'Indigenous Self-Determination, Culture, and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples' in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press, 2012) 31, 41 ('Indigenous Self-Determination, Culture, and Land').

> 'All doctrines, policies and practices based on or advocating the superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.'[122]

However the lack of explicit renunciation of terra nullius may be regarded as more evidence of the lengths to which the drafters of the *UNDRIP* went in order to accommodate the concerns of states. On the whole the drafting of the *UNDRIP* shows clear attempts to contextualise self-determination such that it did not affect the territorial integrity of states.

Daes notes that another way in which the draft of the *UNDRIP* had intended to give effect to self-determination was through the principle of participation in the institutions of the state.[123] Quane also asserts that the provisions of *UNDRIP* concerning participation in decision-making were regarded by numerous states as part of the substantive content of the right to self-determination.[124] These participation rights are most clearly expressed in Article 18 and 19 of the *UNDRIP*. Article 18 guarantees Indigenous participation stating:

> 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.'[125]

Whilst Article 19 states the right to consultation in order to obtain FPIC, asserting:

> '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.'[126]

This discussion shows that there is a broad interpretation given to self-determination in the *UNDRIP*. Nonetheless, two salient features stand out, firstly self-government and autonomy mentioned in Article 4, secondly the consultation rights from Article 19 in particular. These two sets of features provide more tangible ways in which states may go about achieving self-determination for their Indigenous peoples. These two features combined, reflect the *UNDRIP*'s overall approach toward self-determination, Indigenous peoples are to be guaranteed a right to be autonomy from the state apparatus whilst also being able to participation within the state

[122] *UNDRIP*, UN Doc A/Res/21/265 (n 22) Preamble para 4.
[123] Daes, 'The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal' (n 16) 27.
[124] Quane (n 33) 272, citing Luis-Enrique Chávez, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session*, UN ESCOR, 62nd sess, UN Doc E/CN.4/2006/79 (22 March 2006) annex I, 22.
[125] *UNDRIP*, UN Doc A/Res/21/265 (n 22) art 18.
[126] Ibid art 19.

institutions on the measures affecting them. These twin elements of the *UNDRIP* right to self-determination are broadly recognised among scholars.[127]

Overall the approach taken by the *UNDRIP* might be described as among the first instances of a workable articulation of the right to self-determination. As Quane notes, the *UNDRIP* has assisted in articulating the concept of internal self-determination which had hereto been an 'abstract' concept.[128] By associating it with concepts such as autonomy and self-government over the internal matters of a people, and granting consultation rights, this forms concrete means by which states can enable self-determination for a people contained within their borders.

b. Salient and Unique Features of Indigenous Peoples' Right to Self-Determination

The purpose of the foregoing analysis is not to provide a comprehensive analysis of all facets of self-determination under the *UNDRIP*. In particular the aspects of self-determination which relate to land rights, cultural rights, economic rights including the right to resources located on Indigenous territories, will not be addressed.[129] Rather, analysis will focus on self-determination as it relates to enabling Indigenous institutions to facilitate Indigenous self-government and autonomy, as well as allowing for consultation in order to obtain FPIC. The manner in which the *UNDRIP* intended to enable these elements will be assessed.

i. Self-Government and Autonomy

Self-government and autonomy have consistently been considered essential for Indigenous self-determination. These concepts were included within the foundational 1985 Declaration of Principles for example.[130] These rights are unique to Indigenous people, as Weller states, these are rights 'not ordinarily granted to populations under general international law',[131] They were regarded as essential to the realisation of indigenous self-determination, given the inadequacy of a more general right to participation in the political life of the state.[132] As Scheinin and Åhrén state, the fact that Indigenous peoples are often minorities within states, means that a mere right to participate in the political life of states would have been 'meaningless', and would give

[127] Burger (n 41) 46; Anaya, *Indigenous Peoples in International Law 1st ed* (n 45) 110; Quane (n 33) 286.
[128] Quane (n 33) 286.
[129] See generally Alexandra Xanthaki, 'Culture: Articles 11(1), 12, 13(1), 15, and 34' in Jesse Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 273; Claire Charters, 'Indigenous Peoples' Rights to Lands, Territories, and Resources in the UNDRIP: Articles 10, 25, 26, and 27' in Jesse Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 395.
[130] See Daes, 'The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal' (n 16) 14.
[131] Weller (n 3) 148.
[132] Scheinin and Åhrén (n 32) 74.

Indigenous peoples little control over their destiny.[133] Instead, as stated in Article 5, the general right to participate was to be combined with the right to self-government and autonomy, which is to be achieved through the empowerment of Indigenous institutions.[134]

Self-government and autonomy may be considered as means of ensuring the integrity and survival of Indigenous cultures, as well as allowing them political authority. As stated by Anaya, a critical aspect of self-determination for Indigenous peoples is their ability to remain as distinct communities.[135] He asserts that Indigenous peoples have a unique perspective on freedom and equality, viewing these concepts 'not just in terms of individuals and states but also in terms of diverse cultural identities and co-existing political and social orders'.[136] Furthermore, Vine Deloria Jr has stated that Indigenous sovereignty, in the Native American context at least, primarily concerns 'continual cultural integrity' as opposed to 'political power', and that 'to the degree that a nation loses its sense of cultural identity, to that degree it suffers a loss of sovereignty.'[137] This shows the need for Indigenous self-government and autonomy, it also shows how these concepts, as well as self-determination more broadly, should not create a threat to state territorial integrity.

The *UNDRIP* gives little guidance on what is meant by 'self-government and autonomy', as such secondary materials need to be drawn upon to elaborate further on their meaning. Weissner views this ambiguity as a positive aspect of the *UNDRIP*, given the diverse circumstances of Indigenous peoples.[138] A useful starting point is Daes and Asbjorn Eide's description that this is the 'right to effective, democratic governance within states'.[139] Frederico Lenzerini refers to this as 'parallel' sovereignty for Indigenous institutions and the creation of pluralistic legal structure within states, whereby certain aspects of state sovereignty are shifted to Indigenous peoples.[140] Other scholars have noted a need to for such arrangements to not distance Indigenous peoples

[133] Ibid.

[134] *UNDRIP*, UN Doc A/Res/21/265 (n 22) art 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 in the political, economic, social and cultural life of the state.

[135] Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' (n 1) 188.

[136] Ibid.

[137] Vine Deloria Jr, 'Self-Determination and the Concept of Sovereignty' in John R Wunder (ed), *Native American Sovereignty* (Garland Publishing, 1996) 118, 123

[138] Siegfried Weissner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples' (2008) 41 *Vanderbilt Journal of Transnational Law* 1141, 1166.

[139] Asbjorn Eide and Erica-Irene Daes, *Working Paper on the Relationship and Distinction between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples*, UN ESCOR, 52nd sess, UN Doc E/CN.4/Sub.2/2000/10 (19 July 2000) [14].

[140] Frederico Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples' (2006) 42 *Texas International Law Journal* 155, 189.

from the existing state apparatus. For example Daes talks of the need for 'hybrid' autonomy wherein Indigenous have a high degree of control over their local affairs, however they are not left isolated from the rest of the state.[141] As such, this concept of autonomy must also ensure a high degree of participation in national politics.[142] This formulation of Indigenous self-government and autonomy complements Article 5, by ensuring that the exercise of these rights does not come at the cost of alienation from the state as a whole.

Of particular utility in the interpretation of Article 4 is Shin Imai's four prescribed means through which self-determination might come into effect: Firstly, sovereignty and self-government, secondly, self-management and self-administration, thirdly, co-management and joint management, and fourthly, participation in public government.[143] Imai notes that these categories are not mutually exclusive, and multiple categories may exist simultaneously within the one jurisdiction.[144] The first category may be regarded as the option providing for the greatest degree of Indigenous autonomy.[145] This involves the state acknowledging 'inherent Indigenous authority to make laws over a defined territory'.[146] This 'inherent' nature means that it does not involve the need for the state to delegate law-making capacity to any given Indigenous people.[147] However, this first category often requires the existence of a land base, and may not be applicable to Indigenous peoples living outside of such communities. Within this context, the second category may be more applicable since it may be exercised on or off a land base.[148]

Under this second category Indigenous peoples rather than exercising inherent powers, may be delegated the capacity to make by-laws, Indigenous organisations may also be granted the capacity to administer government programs.[149] The need for such arrangements is acknowledged by other commentators, such as Åhrén, who suggests that effective Indigenous self-determination requires not simply the ability to govern territories, but also 'cultural autonomy', such that Indigenous people residing away from traditional territories can still

[141] Erica-Irene Daes, 'The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous' (2001) 14 *St Thomas Law Review* 259, 269 ('The Concepts of Self-Determination and Autonomy').
[142] Ibid.
[143] Shin Imai, 'Indigenous Self-Determination and the State' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 285, 292-3.
[144] Ibid 293.
[145] Ibid 292.
[146] Ibid 293.
[147] Ibid.
[148] Ibid 297.
[149] Ibid 297.

exercise self-determination.[150] The third category envisages Indigenous 'participation in the management of lands and resources', whilst the fourth category regards a general means of influencing the policies of the state at large 'through Indigenous-specific institutions'.[151]

It will be asserted that what Imai describes in his first category amounts to the minimum standard of what is required in order to give effect to Article 4, as well as Lenzerini's idea of 'parallel sovereignty' and Daes' related concept of 'hybrid autonomy'. Imai provides flexible conception of self-government and autonomy which is capable of rendering Article 4 applicable to the vastly different circumstances of Indigenous peoples around the world. Yet it is only through the recognition of an inherent right to sovereignty and self-government regarding their internal affairs, that Indigenous peoples can exercise what Stavenhagen describes as their '*permanent* collective right to self-determination'.[152] What Imai describes in his second, third and fourth categories may be regarded as useful means of enabling a deeper and more meaningful form of self-government and autonomy. However they are not adequate substitutes to the first category, in order to achieve the standard set by Article 4.[153]

ii. Consultation Rights

Consultation rights for Indigenous people constitutes a fundamental foundation of the *UNDRIP*'s approach to self-determination. Consultation rights derives from the more general right to participation within the state apparatus, which is embodied in the *UNDRIP*. The articles of the *UNDRIP* which relate to the right to participation might be grouped into two broad categories: External and internal participation. Cowan categorizes the right to external self-determination as the 'right to political participation' within the states where Indigenous peoples are situated.[154] This may include Article 5, with a general right to participate in the political life of the state.[155] Cowan categorizes the right to internal self-determination as encompassing the involvement in the decision-making that specifically effects Indigenous peoples.[156] This category may include articles 18, 30, 32 and 38 which express more general obligation on state to consult and cooperate with Indigenous peoples on articulated issues. It may also include articles 10, 19 and 29 which

[150] Matthias Åhrén, Indigenous Peoples' Status in International Law (Oxford University Press, 2016) 142.
[151] Imai (n 143) 293.
[152] Stavenhagen (n 109) 164 (emphasis added).
[153] See Jill Webb, 'Indigenous Peoples and the Right to Self-Determination' [2012] (13) *Journal of Indigenous Policy* 75, 98, citing Stephen Cornell, 'Nation-Building and the Treaty Process' (2002) 5(17) *Indigenous Law Bulletin* 7, 10; See Imai (n 143) 297-301.
[154] Cowan (n 9) 292.
[155] *UNDRIP*, UN Doc A/Res/21/265 (n 22) art 5.
[156] Cowan (n 9) 292.

address various formulations of a duty to consult in order to obtain FPIC. This latter obligation will be the subject of the most extensive analysis in this foregoing section.

Several authors have noted the strong connection drawn in the *UNDRIP* between the right to participation and the right to self-determination for Indigenous peoples.[157] Barelli noted that the link between participatory rights and the right to self-determination is 'nowhere clearer than in the *UNDRIP*'.[158] In particular he notes that there are more than 20 articles of the *UNDRIP* that relate to Indigenous participation.[159] Quane concurs on this point stating that this is one of the more 'innovative aspects of the [*UNDRIP*]'.[160] Jérémie Gilbert and Cathal Doyle note that this strong connection between self-determination and the right to participation, in part originates from the WGIP's use of the *Western Sahara* advisory opinion which placed importance on the 'freely expressed will and desire' of a people as an aspect of their right to self-determination.[161]

The duty upon states to consult in order to obtain FPIC is a particularly contentious duty which is open to a broad range of interpretations. 'Free' can be described as meaning absence of coercion and manipulation.[162] 'Prior' meaning allowing time to consider all relevant information and allowing for consensus to emerge among the Indigenous group.[163] Lastly, 'informed' may be regarded as providing such a group with all of the relevant materials in order to make their decision, Julian Burger notes that this should include various impact assessments where relevant.[164]

The phrase 'consult and coordinate … *in order to obtain* free, prior and informed consent' in Article 19, represents a particularly ambiguous expression.[165] It is not immediately clear as to which measures require mere consultations, and when there must instead be FPIC of Indigenous peoples, which might be considered tantamount to a right of veto. The United States, Australia, New Zealand and Canada made objections to the inclusion of the right to FPIC which may be

[157] Barelli, 'Shaping Indigenous Self-Determination' (n 75) 428; Quane (n 33) 263; Miller (n 78) 369.
[158] Barelli, 'Shaping Indigenous Self-Determination' (n 75) 428.
[159] Ibid, citing *Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, UN GAOR, 3rd sess, UN Doc A/HRC/EMRIP/2010/2 (17 May 2010) [8].
[160] Quane (n 33) 263.
[161] Jérémie Gilbert and Cathal Doyle, 'A New Dawn over the Land: Shedding Light on Collective Ownership and Consent' in in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 289, 305, citing *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, [59] ('*Western Sahara*').
[162] Burger (n 41) 49.
[163] Ibid.
[164] Ibid.
[165] *UNDRIP*, UN Doc A/Res/21/265 (n 22) art 19 (emphasis added).

considered as a right to veto.[166] It was noted that such inclusion would be contrary to the democratic principles of those states.[167]

The drafting process for the *UNDRIP* revealed that two alternatives proposals at polar opposites of the mere consultation to veto power spectrum, were rejected prior to the solution found in the current Article 19. During the drafting process, Indigenous peoples had consistently argued for the inclusion of the right to veto in the 1994 Draft Articles, which stated that:

> 'Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them. States shall *obtain* the free and informed consent of the peoples concerned before adopting and implementing such measures.'[168]

This received strong criticism from states, who ultimately succeeded in overturning this draft proposal to include the weaker and more ambiguous right contained within the current Article 19.[169] Barelli notes that several states have explicitly stated that the current Article 19 is not to be interpreted as granting the right to veto.[170] However a proposal by states that Article 19 should instead read that states 'shall seek the consent of Indigenous peoples' was similarly defeated.[171] This proposal appears to suggest that an attempt at receiving consent would have sufficed, appearing to reduce Article 19 to a procedural protection rather than a substantial protection. The rejection of this proposal implicitly means that Article 19 must amount to more than a mere procedural requirement for states to engage in consultations.

As such the correct interpretation of Article 19 must lie between these extremities which emerged during the drafting of the *UNDRIP*. This may be found in the 'sliding scale' approach favoured by some judicial bodies, such as the Inter-American Court of Human Right and the Human Rights Committee,[172] as well Barelli,[173] and former Special Rapporteur Anaya,[174] whereby certain decisions on matters which fundamentally affect Indigenous peoples carry the duty to obtain FPIC. By comparison decisions on other matters carry the lower burden of consulting Indigenous

[166] Gilbert and Doyle (n 161) 316.
[167] Ibid.
[168] Mauro Barelli, 'Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)' in Jesse Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 247, 252 ('Free, Prior, and Informed Consent in the UNDRIP').
[169] Barelli, 'Shaping Indigenous Self-Determination' (n 75) 432.
[170] Barelli, *Seeking Justice in International Law* (n 107) 37.
[171] Barelli, 'Free, Prior, and Informed Consent in the UNDRIP' (n 168) 252-3.
[172] Barelli, 'Shaping Indigenous Self-Determination' (n 75) 432.
[173] See Ibid.
[174] S James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN GAOR, 66th sess, UN Doc A/66/288 (10 August 2011) [82]-[83].

peoples and striving to achieve FPIC. Barelli justifies the need for this approach by stating that '[a]llowing states to implement projects which may have serious negative consequences on the lands, lives and, ultimately, existence of indigenous peoples, without their consent, appears to be incompatible with the both the spirit and the normative framework of the [*UNDRIP*].'[175] Therefore in circumstances where there is a high degree of impact on Indigenous communities, 'consult and coordinate … *in order to obtain* free, prior and informed consent' must convey a right of veto for Indigenous communities.

To an extent this 'sliding scale' approach is acknowledged in the text of the *UNDRIP* which makes FPIC a precondition in two instances deemed to have especially harsh impacts on Indigenous peoples' rights. Article 29(2),[176] regarding the 'storage or disposal of hazardous materials' on the lands of Indigenous peoples, as well as Article 10,[177] regarding the forcible removal of Indigenous peoples from their lands, state that such action shall only take place provided that there is FPIC from the Indigenous peoples concerned. This follows from the acknowledgement that these action are especially impactful on Indigenous peoples given their deep cultural connection to their lands. As stated by Daes, 'the alienation of Indigenous peoples from their lands can never be adequately compensated.'[178]

Opinio juris and secondary literature may provide assistance identifying other instances which will also carry this burden to receive FPIC, aside from articles 10 and 29(2). The Inter-American Court of Human Rights in the *Saramaka People v Suriname* ('*Saramaka People*') case, referring to the *UNDRIP*, suggested large scale developments carrying major impact on Indigenous peoples may trigger the need for FPIC, as well as smaller scale projects whose cumulative effects are equivalent of those of large scale projects.[179] Anaya has also suggested that there is an emerging international norm that natural resource extraction on Indigenous lands requires FPIC.[180] Akilah Jenga Kinnison agrees on this point, noting that there are 'strong arguments, based on both law and policy, that states should obtain full consent' in such situations, 'even if a norm has not yet crystallized', citing the detrimental impact that such unwanted projects might

[175] Barelli, *Seeking Justice in International Law* (n 107) 38.
[176] *UNDRIP*, UN Doc A/Res/21/265 (n 22) art 29(2).
[177] Ibid art 10.
[178] Daes, 'The Concepts of Self-Determination and Autonomy' (n 141) 265.
[179] *Saramaka People v Suriname (Judgment)* (Inter-American Court of Human Rights, Series C No 172, 28 November 2007) [134] ('*Saramaka People*').
[180] James Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22(1) *Arizona Journal of International & Comparative Law* 7, 17.

have on Indigenous communities.[181] Brant McGee notes that the effects of such projects which go ahead without FPIC amount to 'catastrophic' and 'zero-sum' situations for Indigenous peoples.[182] Faced with such consequences 'there is no such thing as partial consent', therefore granting Indigenous peoples something less than the ability to walk away from such a development proposal would give them a 'meaningless' right to participation.[183] Stavenhagen concurs on this point, suggesting that 'major development projects' which occur on Indigenous lands must be taken on the precondition that there is FPIC.[184] Such project include 'large scale exploitation of natural resources including subsoil resources.'[185]

Aside from these special circumstances, consulting 'in order to obtain' FPIC creates an obligation on states to engage in genuine consultations, amounting to more than a procedural right, regarding proposed measures having an impact on Indigenous communities. In light of the rejection of the softer proposal of states that they should merely seek the FPIC of Indigenous peoples, a more consequential process must be preferred. To this end, Barelli's idea that this includes 'meaningful consultations, aimed at reaching an agreement' is particularly noteworthy.[186] In this regard, states cannot view Article 19 as a mere procedural right, instead consultations must be effected as a substantive right by which Indigenous peoples can have an impact on the ultimate decision reached.

c. Relationship to Self-Determination in General International Law

It is clear that the eventual version of self-determination, which is embodied in the *UNDRIP*, is the result of compromise on both the part of Indigenous peoples and states. As such there has been a discussion over whether the version of self-determination which was agreed on in the *UNDRIP* accurately reflects self-determination, as it has been granted in general international law. Although the version of self-determination in the *UNDRIP* is qualified by the emphasis placed on self-government and autonomy, as well as the need for territorial integrity of states, at its essence, the right articulated is no different to the right as expressed in general international law. Key to this understanding is viewing the right to self-determination as a variable concept which must be tailored to the circumstances in which it is invoked. A common criticism of the

[181] Akilah Jenga Kinnison, 'Indigenous Consent: Rethinking US Consultation Policies in Light of the UN Declaration on the Rights of Indigenous Peoples' (2011) 53(4) *Arizona Law Review* 1301, 1328.
[182] Brant McGee, 'The Community Referendum: Participatory Democracy and the Right to Free, Prior, and Informed Consent to Development' (2009) 27(2) *Berkeley Journal of International Law* 570, 571-2.
[183] Ibid 594.
[184] Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN ESCOR, 59th sess, UN Doc E/CN.4/2003/90 (21 January 2003) [73].
[185] Ibid [6].
[186] Barelli, *Seeking Justice in International Law* (n 107) 37.

UNDRIP is that by restricting the right to self-determination with the concept of territorial integrity of states, and denying Indigenous peoples the right to secession, the *UNDRIP* has contorted the right to self-determination and provided a lesser form of this right to Indigenous peoples. However this interpretation ignores the fact that the right of secession was only ever intended as a possible expression of the right to self-determination in rare circumstances of decolonisation, rather than an integral and permanent feature of self-determination itself.

Particularly strong critics of the *UNDRIP*'s conception of the right to self-determination explain that the instrument only granted Indigenous peoples an internal right to self-determination rather than the full right under international law. Ward Churchill was particularly strong in his condemnation of the *UNDRIP*, suggesting that it 'consecrates in law the very internal colonial domination and exploitation at the hands of state entities from which Indigenous nations have been seeking to free themselves'.[187] This interpretation is based on an assertion similar to the idea that Indigenous peoples find themselves in a situation no different to that of colonised peoples belonging to non-self-governing territories.[188] Churchill is adamant that the right to self-determination, as it exists in general international law, includes the right to secession.[189] Therefore Indigenous peoples were discriminated against, in being denied a proper articulation of their right under general international law. This concern may be justified given the statements of some states who interpreted the *UNDRIP* as granting to Indigenous peoples a restricted right to self-determination, different to that existing under international law.[190]

However, a more preferable view regards the right to self-determination in the *UNDRIP* as a context-specific and variable right, as such, the *UNDRIP* merely continues the traditional practice of self-determination under international law. Quane notes that this view was supported by other states such as Canada, who regarded the right of self-determination in the *UNDRIP* as an adaptation of the right so as to fit the circumstances of groups living within existing states.[191] Anaya, whose perspective is outlined above, reaffirmed that equality is a consistent fixture throughout the *UNDRIP*, and that accordingly Indigenous peoples must be given the same right

[187] Ward Churchill, 'A Travesty of a Mockery of a Sham: Colonialism as Self-Determination in the UN Declaration on the Rights of Indigenous Peoples' (2011) 20(3) *Griffith Law Review* 526, 527.
[188] See Weller (n 3) 146-7.
[189] Churchill (n 187) 546.
[190] See Luis-Enrique Chávez, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, UN ESCOR, 56th sess, UN Doc E/CN.4/2000/84 (6 December 1999) [56] (Ecuador); See UN Doc A/61/PV.107 (n 2) 19-22 (United Kingdom).
[191] Quane (n 33) 268; citing José Urrutia, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, UN ESCOR, 53rd sess, UN Doc E/CN.4/1997/102 (10 December 1996) [332].

to self-determination which is granted under general international law.[192] This is affirmed under Article 2 of the *UNDRIP* which states that:

> 'Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights.'[193]

On this basis the *UNDRIP* is 'premised on the universal conception of the right to self-determination and, on that premise, it affirms the extension of that right to Indigenous peoples'.[194] The *UNDRIP* therefore cannot be regarded as discriminating against Indigenous peoples by affording lesser rights to those granted to other peoples, as is suggested by Churchill.

Anaya suggests that it was not 'readily justifiable or practical' to afford Indigenous peoples the right to secession.[195] In stating this, he added that in many cases secession would be detrimental to Indigenous peoples.[196] Furthermore, during the drafting of the *UNDRIP*, Indigenous participants had consistently denied any intent to pursue independence or secession.[197] Indigenous representatives from Australia, for instance, viewed the right to self-determination as increasing their autonomy within the existing state through self-management and self-government powers, rather than through secession.[198] Certain scholars such as Karen Knop have also alluded to the significant difference in circumstances between Indigenous peoples and colonial peoples who were granted the right to independence.[199] In particular it might be noted that the 'saltwater' or 'bluewater' theses, referenced above, does not adequately suit the circumstances of Indigenous peoples who are more often not geographically separated from their colonising alien nation, as was the case during the aforementioned decolonisation phase of self-determination. Instead, Anaya suggests that the *UNDRIP* addresses the historical violation of the right of Indigenous peoples to self-determination by providing a remedy that is contextualised to their circumstances.[200] This perspective enjoys support from several academic sources. Miller, for example, asserts that there is no right to secession in the general international law on the right to self-determination,[201] and, on this condition 'the [*UNDRIP*] does nothing more than usher

[192] Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' (n 1) 185.
[193] *UNDRIP*, UN Doc A/Res/21/265 (n 22) art 2.
[194] Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' (n 1) 185.
[195] Ibid.
[196] Erica-Irene Daes, *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN ESCOR, 45th sess, UN Doc E/CN.4/Sub.2/1993/29 (23 August 1993) [61].
[197] Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' (n 1) 185.
[198] Daes, 'The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal' (n 16) 32.
[199] Miller (n 78) 351, citing Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press, 2002).
[200] Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' (n 1) 194.
[201] Miller (n 78) 351-2.

Indigenous peoples into the general self-determination regime'.[202] Cowan similarly states that 'it is unacceptable and unnecessary to restrict [the right to self-determination as granted to Indigenous peoples] to a lesser form of self-determination than that recognized for 'all peoples' under international law'.[203] As with Anaya, Cowan states that a good faith interpretation of the *UNDRIP* inevitably leads to this view.[204] Furthermore, she suggests this is not a radical reinterpretation of the right to self-determination, rather referring to it as a 'natural evolution' in this right.[205]

In spite of Churchill's strong objection to the *UNDRIP*, this stands in contrast with efforts of the drafters of the *UNDRIP*, and the scholarship more broadly, to reconcile the right of self-determination with the circumstances of Indigenous peoples. Claims such as Churchill's, rest on the mistaken conception that secession is a fundamental and necessary element of self-determination. This denies the preferable view that the substance of self-determination is entirely dependent upon the circumstances in which it is invoked. In this case, independent statehood has been comprehensively rejected as the preferable expression of self-determination by states and Indigenous peoples alike.

d. The Right to Secession?

As established above the right to secession is not an integral aspect of the right to self-determination. Furthermore, the *UNDRIP*, as suggested unequivocally during its drafting phase, as well as its substantive content, contains no such right to secession for Indigenous peoples. However, this does not necessarily deny Indigenous peoples the ability to exercise their potential right to remedial secession, as it exists in general international law. Nonetheless, it must be noted that the existence of a right to remedial secession is far from certain, and is a highly debated within the scholarship. In any case such a right to remedial secession would not be an aspect of the right to self-determination.

The *UNDRIP* itself contains no reference that could be construed in and of itself as conferring a right to secession to Indigenous peoples. As noted by Knop, the *UNDRIP* was only able to gain the approval of states due to the specific 'decoupling' from the right to secession.[206] Multiple references in the *UNDRIP*, such as attempts to contextualise the right of self-determination in Article 4, as well as references, both explicit and implicit, to the principle of territorial integrity

[202] Ibid 351.
[203] Cowan (n 9) 252.
[204] Ibid 265.
[205] Ibid 259.
[206] Knop (n 199) 255-6.

of states in the preamble, as well as Article 46(1), make this clear. Nonetheless, acknowledging the existence of a right to secession, under extreme circumstances, in general international law could prove positive for Indigenous peoples, by allowing Indigenous peoples to maintain a certain 'bargaining power' with their respective states.[207]

In spite of this strong intent during the drafting of the *UNDRIP*, there are certain voices in the scholarship, such as Scheinin and Åhrén who suggest that Article 46(1) is controversial since it confers the duty to uphold the principle of territorial integrity on peoples, whereas under international law, this principle has only ever conferred this duty on states.[208] These authors thereby suggest that the obligation to abide by the principle of territorial integrity of states should therefore not extend to Indigenous peoples, given that it does not extend to other peoples who are to be unimpeded by such a principle in exercising their right to self-determination.[209] Rather they state that the inclusion of Article 46(1) in the *UNDRIP* is 'more symbolic than of real consequence', and cannot prevent Indigenous peoples from pursuing secession as a means of exercising their right to self-determination.[210] This is especially where secession is the only means by which they can exercise their right to self-determination.[211] However it is suggested that under a purposive reading of the *UNDRIP* it is untenable that secession would be entertained as a valid means of exercising the right to self-determination. The drafting of the *UNDRIP* showed overwhelming opposition among states to such a proposition, Article 46(1) must be regarded as an effective provision which addresses that concern.

A more persuasive interpretation would be to acknowledge that the *UNDRIP* does not preclude Indigenous peoples from exercising their right to remedial secession, as it exists in general international law, aside from the right to self-determination. As suggested by the ICJ's *Kosovo* advisory opinion, unilateral secession is not prohibited under general international law.[212] As noted by Ralph Wilde, the *Kosovo* advisory opinion suggested that the existence of a right to external self-determination 'makes little difference' concerning 'the international legal rights … of the acts of groups within States who aspire to independence'.[213] As such this might be regarded as a potential avenue through which Indigenous peoples could effect a right to remedial

[207] Dylan Lino, 'The Politics of Inclusion' (2010) 34(3) *Melbourne University Law Review* 839, 852.
[208] Scheinin and Åhrén (n 32) 71.
[209] Ibid 72.
[210] Ibid 85.
[211] Ibid 72.
[212] Weller (n 3) 148, citing *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, [80].
[213] Ralph Wilde, 'Kosovo (Advisory Opinion)' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online at 26 August 2019) [17].

secession.[214] Weller suggests 'the [*UNDRIP*] does not establish a new, positive entitlement to secession for Indigenous peoples',[215] nor does the *UNDRIP* 'diminish their potential entitlement, should one exist, in general international law to form a new state'.[216] He therefore supports potential for secession as part of general international law, in spite of the provisions guaranteeing the territorial integrity of states in the *UNDRIP*. Others in the scholarship have built upon this idea of non-prohibition on unilateral secession, to propose the theory of remedial secession. As Cassese describes, remedial secession might be regarded as a lawful response to situations where:

> 'The central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny the possibility of reaching a peaceful settlement within the framework of the State structure.'[217]

The Canadian Supreme Court's decision *Reference re Secession of Quebec* has been regarded as potential *opinio juris* for this proposition, explaining that there is a possible right to secession outside of the colonial context 'where "a people" is denied any meaningful exercise of its rights to self-determination within the state of which it forms part'.[218] In spite of this, Cassese still denied that this right to remedial secession had achieved status as customary international law,[219] alluding to the fact that the overwhelming majority of states remain opposed to secession.[220] This doubt over the status of such a right under customary international law is shared by Barelli, as well as Malcolm Shaw.[221] Barelli however notes that the issue has been increasingly referred to in international law.[222] Another basis for the remedial right to secession is found in the peculiarities of the *Resolution 2625* which ensures territorial integrity for 'states conducting themselves in compliance with the principles of equal rights and self-determination of peoples'.[223] Some commentators such as Schulte-Tenckhoff note that this is a conditional allowance for territorial integrity for certain states.[224] Shaw is however highly doubtful of this

[214] Weller (n 3) 148.
[215] Ibid.
[216] Ibid.
[217] Cassese (n 82) 119-20.
[218] *Quebec Secession* (n 86) 295.
[219] Miller (n 78) 349, citing Cassese (n 82) 121.
[220] Cassese (n 82) 122-4.
[221] Barelli, 'Shaping Indigenous Self-Determination' (n 75) 415, 423; Malcolm Shaw, *International Law* (Cambridge University Press, 8th ed, 2017) 203.
[222] Barelli, 'Shaping Indigenous Self-Determination' (n 75) 423.
[223] *Resolution 2625*, UN Doc A/RES/2625 (n 67).
[224] Schulte-Tenckhoff (n 105) 77.

interpretation,[225] he concludes that just as there is no right to secede under international law, there is also no duty not to secede.[226]

This discussion has shown that Indigenous peoples may maintain a right to remedial secession which is granted to all peoples under general international law. In this respect the *UNDRIP* has not altered the position of this right, since it lies outside the scope of the right to self-determination under the *UNDRIP*. Nonetheless asserting the existence of a right to remedial secession is a dubious proposition. At best, this right is still in its infancy and not yet supported by sufficient state practice and *opinio juris* to obtain the status of a right under customary international law.

e. The *UNDRIP* as a Yardstick for the United States and Australia

The standards set forth above, establish the UNDRIP as a yardstick from which to assess the United States and Australia's implementation of the right to self-determination in the *UNDRIP*. This discussion has shown that the *UNDRIP* grants Indigenous peoples a right to self-determination which is no different to the right that exists under general international law, and as such does not create or support any legal right of Indigenous peoples to secede from existing states. Any fear on the part of the United States and Australia that the right to secession may be created as a result of Article 3 of the *UNDRIP* should be considered legally incorrect, and as such should not stymie efforts to enable self-determination through the means contemplated in the *UNDRIP*. Instead these states should take concrete measures to allow for a right of Indigenous peoples to inherent sovereignty and self-government, as well as a right to consultation in order to obtain FPIC from Indigenous peoples concerning measures that affect them.

An inherent right of sovereignty and self-government should be considered indefeasible, and as such cannot be created by government statute. This should be considered as the optimum solution for granting Indigenous peoples their rights to self-government and autonomy under Article 4. Nonetheless this right to self-government and autonomy may be further supported through enabling self-management and self-administration by Indigenous peoples. This can be created through government statutes allowing Indigenous peoples control over how certain services, designed specifically for Indigenous peoples. Yet since these measures are created by statute and therefore subject to influence by states, they cannot be considered adequate substitutes for an inherent right to sovereignty and self-government.

[225] Shaw (n 220) 203.
[226] Ibid 389.

Indigenous peoples in the United States and Australia must also be allowed a right to consultation in order to obtain their FPIC regarding measures affecting them. This is to be understood as a substantive right operating on a 'sliding scale'. Therefore the extent of the obligation that is owed to Indigenous peoples will depend upon the degree of impact that the measure will have on the Indigenous peoples concerned. Under normal circumstances governments will bear an obligation to work to the best of their abilities to obtain FPIC from Indigenous peoples as part of consultations. However where the proposed measure has an especially profound, and perhaps irreversible impact, on Indigenous peoples, this obligation on governments will be extended to an obligation to obtain FPIC from the Indigenous peoples concerned. An example of such a measure having profound effects includes high impact development on Indigenous lands.

The jurisprudence regarding implementation of the *UNDRIP* is still emerging in the United States and Australia, at present there is a lack of case law in both of these jurisdictions that can be considered as implementing *UNDRIP*'s right to self-determination. As such the *UNDRIP* serves best as a yardstick with which to compare the historical development of the jurisprudence on self-determination until the present. This may in turn provoke revision of United States and Australian domestic law in this area, in order to meet this internationally accepted standard for Indigenous self-determination.

Chapter 3: Indian Self-Determination in the United States

When the Obama administration announced its support for the *UNDRIP*, the accompanying statement it issued in 2011 suggested that the United States was already fulfilling its commitments to Indigenous self-determination, through the United States' commitment to the inherent right to tribal self-government.[227] The statement also contained a reservation concerning Article 19, stating that it acknowledged the need for meaningful consultations with Indian tribes, but not necessarily the need to reach an agreement with them.[228] It will be proved that the historical jurisprudence of the United States Supreme Court, in precedents such as the *Worcester v Georgia* (1832) decision, sets a solid foundation for meeting the aforementioned requirement that governments ensure inherent right to sovereignty and self-government. Nonetheless, it will be noted that judicial precedents since the *Worcester* decision has reduced this right considerably. Two such doctrines that have contributed to this status quo will be analysed, namely the guardianship doctrine and the plenary power of Congress, as well as the implicit divestiture doctrine. The right to consultation as provided for under United States jurisprudence, executive policy, as well as legislation, might also be regarded as falling short of the standard set by the *UNDRIP*. Fundamentally, what is missing is an acknowledgement of the 'sliding scale' approach and the need to obtain FPIC under certain circumstance.

The analysis in this chapter will largely concern the evolving jurisprudence of the United States concerning the rights of Indian tribes, rather than the policies of the federal government toward Indian tribes. The analysis will also predominantly exclude the particularities of federal law as it relates to Indigenous Alaskans and Hawaiians. Jurisprudence on federal Indian law may be regarded as representing a relatively cohesive body of law compared to federal policy toward Indian tribes. Federal policy has varied considerably from removing Indians from traditional lands and segregating them on reservations in the early to mid-19th Century, to attempts to assimilate Indian tribes from around 1886 until 1934.[229] In more recent times tribal self-governance was ended during the termination period in the 1950s, and was later restored during the current phase of promoting self-determination.[230] This current phase of self-determination

[227] 'Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples', *US Department of State* (Press Release, 12 January 2011) <https://2009-2017.state.gov/s/srgia/154553.htm> ('Announcement of US Support of the UNDRIP').
[228] Ibid.
[229] Walter R Echo-Hawk, *In the Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples* (Fulcrum Publishing, 2013) 130.
[230] Ibid.

has lasted since the 1970s and has aimed to end federal paternalism over tribes and foster their self-governance, regarding this as fundamental to the development of Indian tribes.[231]

1. 'Domestic Dependent Nations' - Legal Foundations of Indian Tribe Status

The principles articulated by Chief Justice Marshall in *Johnson v. M'Intosh* (1823) ('*Johnson'*), *Cherokee Nation v. Georgia* (1831) ('*Cherokee Nation'*) and *Worcester v. Georgia* (1832) ('*Worcester'*) lay the foundations of Indian tribal sovereignty in the United States. These principles reflect a trend toward treating Indian tribes as existing within separate jurisdictions, in which state law of the United States does not apply. These seminal judgments provide a constant reference point for later judgments regarding Indian tribes' right to self-determination.

The *Johnson* case regarded a challenge to the validity of a grant of land from an Indian tribe. In his ruling, Chief Justice Marshall in effect provides the justification for the acquisition of territory by the United States, including where that territory is currently occupied by Indian tribes. This had the effect of de-legitimising any grant of land made by Indian tribes to settlers of the United States. In order to justify the United States' claim to title over land, the doctrine of discovery was used, and was outlined as follows:

> '[I]t was necessary, in order to avoid conflicting settlements, and consequent war [, for European powers] to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere.'[232]

The doctrine of discovery as articulated in *Johnson* carries profound consequences regarding the land rights of Indian tribes, granting them a mere right to occupancy whilst ultimate title would vest in the United States.[233] It also carries consequences regarding Indian tribal sovereignty by stating that the rights of the Indian occupants had been 'impaired' to a 'considerable extent' asserting that 'their right to complete sovereignty, as independent nations, was necessarily

[231] Ibid 184.
[232] *Johnson v M'Intosh*, 21 US 543, 573 (1823) (Marshall J for the Court) ('*Johnson*').
[233] Ibid 574.

diminished'.[234] The decision also established the notion of conquest as a legitimate grounds for extinguishing Indian title, in stating 'conquest gives a title which the courts of the conqueror cannot deny… It is not for the courts of this country to question the validity of this title, or to sustain one that is incompatible with it'.[235]

The status of the right to sovereignty for Indian tribes was further elaborated in the two later cases involving the Cherokee tribe, in *Cherokee Nation* and *Worcester*. Both cases concerned articulating the precise nature of Indian tribal sovereignty and the political relationship of Indian tribes to the United States. In *Cherokee Nation*, the Cherokee tribe filed for an injunction with Supreme Court of the United States under its original jurisdiction, in order to prevent the state of Georgia from executing its own laws on Cherokee territory.[236] The Cherokee claimed that they were a 'foreign nation', owning no allegiance to any state of the United States.[237] Based on this claim, the Cherokee argued that the Supreme Court was empowered to hear the claim under its original jurisdiction, owing to the Third Article of the *United States Constitution* which empowers the Court to hear controversies arising between a state of the United States and a 'foreign state'.[238]

The Supreme Court struck out the motion in finding that the Cherokee were not a 'foreign nation' according to the *Constitution*. Chief Justice Marshall however found a compromise in ruling that Indian tribes nonetheless had certain attributes associated with foreign nations. He determined that Indian tribes could not be foreign states, owing to, among other factors, treaties which were signed with Indian tribes acknowledging that they were under the protection of the United States. Furthermore they were 'considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed on our own citizens'.[239] Nonetheless, he describes the United States' relationship with Indian tribes as 'peculiar' and unique,[240] stating that the Cherokee are a 'distinct political society, separated from others, capable of managing its own affairs and governing itself',[241] and that Indian tribes could be best described as 'domestic dependent nations'.[242] In *Cherokee Nation* Chief Justice Marshall also created the doctrine of

[234] Ibid 574.
[235] Ibid 588.
[236] *Cherokee Nation v The State of Georgia,* [1831] US Lexis 337, 1 (1831).
[237] Ibid 2.
[238] Ibid 17.
[239] *Cherokee Nation v Georgia,* 30 US 1, 17 (1831) (Marshall J for the Court) ('*Cherokee Nation*').
[240] Ibid 16.
[241] Ibid.
[242] Ibid 17.

guardianship, which would become fundamental in future jurisprudence in federal Indian law, by asserting:

> '[The relations of Indian tribes] to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.'[243]

In the *Worcester* decision, Chief Justice Marshall delivered the most decisive ruling on the legal nature of Indian tribal sovereignty. In both *Johnson* and *Cherokee Nation* the Court had issued vague rulings on Indian tribal sovereignty, suggesting that Indian tribes were self-managing political entities, which retained some, but not all, of the attributes of independent statehood. In particular it was established that treaties signed with Indian tribes and the United States, as well as the doctrines of discovery and conquest, had impaired the full sovereign status of Indian tribes. By contrast in *Worcester* the Court was directly confronted with a dispute over whether the state laws of Georgia applied on Cherokee territory. The dispute arose when Samuel Worcester was convicted of living on Cherokee lands without a permit, as was required under Georgian law.[244] In overturning Worcester's conviction Chief Justice Marshall determined that:

> 'The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.'[245]

The interaction between the Indian tribes was instead to be managed exclusively by the federal government.[246] The doctrine of discovery was also further clarified. It was asserted that prior to colonisation the territory, now belonging to the United States, was 'inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws'[247]

Therefore the doctrine of discovery only had effect between the colonial European nations. It operated to give title to the 'discoverer' to the exclusion of all other European colonial powers.[248] To this extent the doctrine operated so as to 'shut out the right of competition' from other

[243] Ibid 17.
[244] Kent McNeil, 'Indigenous Land Rights and Self-Governance: Inseparable Elements' in Lisa Ford and Tim Rowse (eds), *Between Indigenous and Settler Governance* (Routledge, 2012) 135, 137.
[245] *Worcester v Georgia*, 31 U.S. 515, 561 (1832) (Marshall J for the Court) ('*Worcester*').
[246] Ibid.
[247] Ibid 542-3.
[248] Ibid 543-4.

European colonial powers, 'but could not affect the rights of those already in possession'.[249] To this extent the sole effect of the doctrine of discovery was that it gave the discoverer the exclusive right to purchase land from the original inhabitants.[250] By citing Emer de Vattel, Chief Justice Marshall also clarified the legal effects of treaties signed with the Cherokee, in stating:

> 'These articles [of treaties signed with Indian tribes] are associated with others, recognising their title to self-government. The very fact of repeated treaties with them recognises it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence – its right to self-government, by associating with a stronger [power] and taking its protection.'[251]

Fundamentally, Chief Justice Marshall interprets the intentions of the Indians, in entering into such treaty arrangements, as acting in order to gain the protection of the United States whilst retaining their 'national character'.[252] Kent McNeil summarizes the impacts of *Cherokee Nation* and *Worcester* as an acknowledgement that the incorporation of Indian tribes into the United States territory resulted in the loss of their external sovereignty to act as completely independent states.[253] This external sovereignty was lost given that they could not interact with foreign governments as independent states, and could only alienate their territory to the United States.[254] Instead they retained residual sovereignty 'retain[ing] their land rights and internal sovereignty to the extent that these were not ceded by treaty, diminished by conquest, or reduced by what later became known as the "plenary power of congress"'.[255] This concept of internal sovereignty was to include both territorial sovereignty and personal sovereignty over the members of the respective Indian tribes.[256] McNeil also notes the profound consequence that the ruling in *Worcester* had on the doctrine of discovery, proving that '[s]omething more than mere discovery was required to diminish the independence and the rights of Indian nations'.[257]

These seminal cases have provided the foundations for other precedents which have further entrenched the Indian inherent right to self-government. In *Ex Parte Crow Dog* (1883) affirmed that the United States had an obligation to ensure self-government of the Indian tribes, and that this self-government extends to 'regulation by [the Indian tribes] of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own

[249] Ibid 544.
[250] Ibid.
[251] Ibid 560-1.
[252] Ibid 552.
[253] McNeil, 'Indigenous Land Rights and Self-Governance' (n 242) 138.
[254] Ibid.
[255] Ibid.
[256] Ibid.
[257] Ibid 137.

laws and customs'.[258] *Williams v Lee* (1959) similarly reaffirmed the Indian tribes' capacity to 'make their own laws and be ruled by them', in allowing tribal jurisdiction for a civil claim arising between an Indian and a non-Indian concerning conduct which occurred on an Indian reservation.[259] *Santa Clara Pueblo v Martinez* (1978) ('*Santa Clara Pueblo*') also upheld tribal self-government and the ability of Indian tribes to determine their own membership, in spite of these practices contravening United States legislation in the *Indian Civil Rights Act (1968)*.[260]

These legal foundations of federal Indian law therefore provide a large amount of consistency with standards expected through self-determination in the *UNDRIP*. As Walter R Echo-Hawk acknowledges, the *Worcester* decision recognises that Indian tribes as have an 'inherent' right to self-government.[261] This has been limited, but not extinguished, by their inclusion within the territorial limits of the United States.[262] What is especially remarkable about these early cases is the acknowledgement that Indigenous self-government existed prior to colonisation, and that the legal basis for colonisation, the doctrine of discovery, did not affect this internal self-government. Indigenous self-government is therefore founded outside of the legal system of the United States, rather than by United States legislation or grant from the federal government. Echo-Hawk suggests that the 'protectorate' model, concerning guardianship, shows a high level of convergence between the standards set by the *UNDRIP*.[263] The *Worcester* precedent provides 'the most consistent, multinational political model for achieving self-determination for Indigenous peoples in the American setting.'[264] Therefore it should be used to reinterpret the guardianship arrangement that was created with a more paternalist overtone in the earlier *Cherokee Nation* decision.[265] This protectorate model creates a relationship whereby Indian tribes are regarded as 'dependent all[ies]' of the United States.[266] In this relationship, the United States may be obliged and empowered to protect Indian tribes, but not to subjugate and dispossess them.[267]

However, as will be shown, these positive aspects of the *Worcester* decision have had to compete with other aspects of these legal foundations, such as the doctrine of conquest, as shown in

[258] *Ex parte Crow Dog* 109 US 556, 568 (1883) (Matthews J for the Court).
[259] *Williams v Lee*, 358 US 217, 222 (1959) (Black J for the Court).
[260] See *Santa Clara Pueblo v Martinez*, 436 US 49 (1978) ('*Santa Clara Pueblo'*).
[261] Echo-Hawk (n 227) 158.
[262] Neil Jessup Newton (ed), *Cohen's Handbook of Federal Indian Law* (Lexis Nexis, 2005 ed) 205-6.
[263] Echo-Hawk (n 227) 124.
[264] Ibid 131.
[265] Ibid 122-3.
[266] *Worcester* (n 243) 552.
[267] Echo-Hawk (n 227) 122-3.

Johnson. Echo-Hawk argues that in *Johnson* there was a conflating of the doctrine of discovery with that of conquest. This was because the judgement treated land that was merely discovered by Europeans as though it were conquered, given that the act of discovery meant that legal title to land as well as sovereignty necessarily passed to the discoverer.[268] The *Worcester* precedent later restricted the application of the discovery doctrine, suggesting that it only gave the exclusive right to purchase land from the original inhabitants. Nonetheless, Echo-Hawk states that the doctrine of conquest, as it is conflated with discovery, is still valid law, and provides a basis for later judicial doctrines which have dispossessed Indian tribes of some of their inherent sovereignty, such as through the implicit divestiture doctrine.[269]

Other aspects of federal Indian law, such as the plenary powers of Congress doctrine, show that, in spite of Indian tribes having inherent sovereignty, this is not an 'inherent human rights' as is noted by Echo-Hawk.[270] As such Indian tribes do not hold an indefeasible interest in sovereignty which cannot be overturned by Congress. This reveals a tension within the legal foundations of federal Indian law between elements which are consistent and inconsistent with the *UNDRIP*'s right to self-determination.

2. Federal and Judicial Encroachment on Self-Governance

Whilst early jurisprudence in the United States firmly established that Indian tribes enjoy inherent sovereignty or self-government, this was only allowed insofar as these powers had not been divested from them. Until the present day, this concept of residual sovereignty has created an ever-smaller allowance for Indian tribal sovereignty. Two such categories of doctrines are particularly noteworthy in this respect. First are the related concepts of guardianship, which derive from the early judgement of *Cherokee Nation*, and the more recent concept of the plenary power of Congress, whereby the United States Congress retained an unfettered capacity to impose legislation affecting Indian tribes. The second is the concept of implicit divestiture. Consummated by the Supreme Court in the 1970s, this doctrine of implicit divestiture has been used by the judiciary to divest sovereign powers from Indian tribes, where those powers are deemed to be no longer essential to their functioning as sovereign entities. It will be submitted that the *UNDRIP* necessitates a re-examination of these two categories of doctrines, which have so far infringed upon the right to self-determination for Indian tribes.

[268] Ibid 107.
[269] Ibid 109-10.
[270] Ibid 176.

a. Guardianship Doctrine and the Plenary Power of Congress

The doctrines of guardianship of the United States over the Indian tribes, and the plenary power of congress, have been used by the Congress to create an ever-smaller scope of Indian tribal sovereignty. Guardianship owes its origins to the treaties signed between Indian tribes and the United States. Certain treaties made broad pronouncements that the United States would manage 'all the affairs' of the Indian tribes thereafter.[271] However judgements such as *Worcester* later restricted the application of such pronouncements to trade matters.[272] In *Cherokee Nation*, Chief Justice Marshall described the relationship as that of a 'ward to his guardian', and in *Worcester* he described this relationship as serving the purpose of protecting and preserving tribal self-government.[273] The jurisprudence since the Chief Justice Marshall decisions has favoured a more paternalistic, rather than protective, interpretation of guardianship.

In the latter half of the 19th Century this trust relationship formed the basis of the plenary power of Congress, granting the Congress 'absolute and unreviewable' power over Indian tribes, which was used to infringe upon self-government rights.[274] Whilst it has been noted that in more recent times the trust relationship has been used to hold federal agencies to a higher standard in their dealings with Indian tribes,[275] the plenary power of Congress presents a problematic doctrine in the effort to achieve self-determination. As suggested in Cohen's Handbook on Federal Indian Law, the trust relationship has only acted as a 'prudential limit [to] congressional action', and has so far not been used to mount a successful legal challenge to legislative action taken by Congress, which is deemed to interfere excessively in Indian tribal affairs.[276] In an early articulation of the plenary power of Congress doctrine in *Lone Wolf v Hitchcock* (1903) ('*Lone Wolf*'), the Supreme Court declared that 'Congress has always exercised plenary authority over the tribal relations of the Indians and the power has always been deemed a political one not subject to be controlled by the courts.'[277]

In this judgement the Court had to decide on a claim made by the confederated tribes of Kiowa, Comanche and Apache, that the federal government had violated their rights contained in a treaty signed between the tribes and the United States. The Supreme Court noted that a 'moral

[271] Neil Jessup Newton (ed), *Cohen's Handbook of Federal Indian Law* (Lexis Nexis, 2012 ed) 412 ('*Cohen's Handbook 2012 ed*').
[272] Ibid, citing *Worcester* (n 243) 553.
[273] *Cherokee Nation* (n 237) 17; *Worcester* (n 243) 560-1.
[274] *Cohen's Handbook 2012 ed* (n 269) 414.
[275] Ibid.
[276] Ibid.
[277] *Lone Wolf v Hitchcock* 187 U.S. 553, 565 (1903) (White J for the Court).

obligation rested upon Congress to act in good faith' in performing its duties under treaties made between the United States and the Indian tribes.[278] However, it stated that Congress retained 'the power … to abrogate the provisions on an Indian treaty'.[279] In *Lone Wolf* the Court referred to the earlier case of *United States v Kagama* (1886) ('*Kagama*'), which drew an explicit link between the trust relationship and plenary power of Congress. It reiterated that 'Indian tribes are wards of the nation' and that consequently 'there arises the duty of protection, and with it the power [of general government]'.[280] As noted by Gregory Ablavsky, the plenary powers of Congress doctrine has been used to 'authorize the government to take land without compensation … Or to expand, contract, or even abolish tribal sovereignty at will'.[281]

This doctrine of plenary power has become a controversial topic among commentators, with some doubting the legality of doctrine itself, and others questioning the doctrine's consistency with the inherent sovereignty of Indian tribes. The danger of the plenary power of Congress doctrine to Indian tribes is reflected in the Supreme Court ruling in *United States v Wheeler* (1978) ('*Wheeler*'), in which it was stated that Indian sovereignty 'exists only at the sufferance of Congress and is subject to complete defeasance'.[282] Matthew Fletcher notes that there are three components to the plenary power doctrine. First, the exclusion of the states in enacting laws affecting Indian tribes. Second, plenary power of Congress over Indian external affairs, namely the intercourse between the Indian tribes and the federal government and the state. Third, the plenary power of Congress over Indian internal affairs.[283] Whilst the first two aspects are relatively uncontroversial, having little to no impact on internal Indian sovereignty, the third category is clearly controversial.

The legal basis for this intrusion into the internal affairs of the Indian tribes has been subjected to scrutiny by Ablavsky, for instance, who doubts that there are legal grounds for the plenary power of Congress doctrine in the *United States Constitution*. Certain cases have established that the plenary power of Congress doctrine derives from the so-called 'Indian Commerce Clause' of the *Constitution*.[284] This clause grants Congress the ability to 'to regulate … [c]ommerce with the Indian tribes'.[285] Justice Thomas of the Supreme Court, in *Adoptive Couple v Baby Girl*

[278] Ibid 566.
[279] Ibid.
[280] Ibid, 567, quoting *United States v Kagama*, 118 U.S. 375, 383 (1885) (Miller J for the Court) ('*Kagama*').
[281] Gregory Ablavsky, 'Beyond the Indian Commerce Clause' (2015) 124 *Yale Law Journal* 1012, 1014 (citations omitted).
[282] *United States v Wheeler* 435 US 313, 323 (1978) (Stewart J for the Court) ('*Wheeler*').
[283] Matthew J M Fletcher, 'Tribal Consent' (2012) 8 *Stanford Journal of Civil Rights & Civil Liberties* 45, 75-6.
[284] Ablavsky (n 279) 1015.
[285] *United States Constitution* art I, section 8.

(2013) suggested that this clause should be interpreted narrowly such that it only allows Congress to regulate trade with Indian tribes.[286] Ablavsky supports this perspective suggesting that the history and the drafting of the Clause do not suggest that there was any intention of granting Congress plenary power over Indian tribes.[287] This clause was also rejected as a basis for the plenary powers of Congress doctrine in the earlier case of *Kagama*.[288] Instead the Court based this theory by referencing the guardianship doctrine, as mentioned above, and the broader territorial sovereignty of the United States, given that the Indian tribes fell within the territorial bounds of the United States.[289] This may be regarded as reflecting a certain indecision within the jurisprudence, regarding where the plenary powers of Congress doctrine is founded and what its limits should be.

Aside from a perhaps dubious legal foundation of the plenary powers of Congress doctrine, the notion that Congress may have an absolute right to take away Indian sovereignty is at its core an affront to the *UNDRIP*'s commitment to a robust self-determination, as fulfilled by meaningful self-government and autonomy. In *United States v Lara* (2004) the Supreme Court had to decide upon whether Congressional legislation that restored aspects of criminal jurisdiction to Indian tribes, which had been taken away via implicit divestiture in a previous case of *Duro v Reina* (1989) ('*Duro*'), amounted to a lifting of a restriction that had been placed on tribal inherent jurisdiction, or rather a delegation of criminal jurisdiction by Congress. In this judgement, Justice Thomas criticizes the 'schizophrenic' inconsistency of federal Indian policy, which has in turn influenced federal Indian law jurisprudence.[290] He states that 'the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously'.[291] He points to the flaws in holding that Indian tribes are sovereigns existing under the spectre of Congress' plenary power, with the capacity to remove aspects of Indian tribes' sovereignty, given that '[t]he sovereign is, by definition, the entity "in which independent and supreme authority is vested." It is quite arguably the essence of sovereignty not to exist merely at the whim of an external government.'[292]

This inherent contradiction reflects the precarious nature of Indian sovereignty and self-government in the United States, and evidences why this cannot adequately reflect to standard of

[286] Ablavsky (n 279) 1016.
[287] Ibid 1017.
[288] *Kagama* (n 278) 378-9.
[289] Ibid 379.
[290] *United States v Lara*, 541 US 193, 219 (2004) (Thomas J, concurring) ('*Lara*').
[291] Ibid 215.
[292] Ibid 218 (citation omitted).

self-determination which is expected by the *UNDRIP*. Justice Thomas, for instance, used this contradiction to suggest that as of 1871, when Congress passed legislation prohibiting the making of further treaties with Indian tribes, as the point at which Indian tribes lost all sovereignty.[293] He deems that it was this action by Congress which potentially proves that it no longer treated the Indian tribes as sovereigns.[294] Whilst a development of this nature would be irreconcilable with the *UNDRIP*, it is not a completely unjustified conclusion, given the contradictions in federal Indian law's treatment of Indian tribal sovereignty.

b. Implicit Divestiture

Whereas guardianship and plenary powers of Congress doctrines have been used to divest Indian tribes of sovereignty at an executive level, implicit divestiture has been used for an equivalent purpose by the judiciary. The decision of *Oliphant v Suquamish Indian Tribe* (1978) ('*Oliphant*') is cited as the founding case for this doctrine.[295] It adds to the two previously acknowledged grounds for limiting the sovereignty of the Indian tribes – the plenary power of Congress and voluntary surrender of aspects of sovereignty through treaty. Echo-Hawk views this as a consequence of the judicial conception of conquest.[296] He summarizes this doctrine as the divestiture of certain sovereign powers, by the United States judiciary, which it considers a 'necessary result of their dependent status'.[297] It is exercised 'whenever a judge deems [certain sovereign powers] inconsistent with the interests of the United States'.[298] This doctrine has been criticized as an additional means of encroaching on tribal sovereignty. Scholars such as Lance F Sorenson have also suggested that this doctrine was conceived without consideration of the dubious legal grounds on which the Supreme Court could take such actions.[299]

The jurisprudence on implicit divestiture has created significant restrictions in the scope of tribal self-government, and has produced widely differing interpretations within the Supreme Court concerning which powers are inconsistent with the dependent status of Indian tribes. The cases of *Oliphant, Wheeler*, and *Santa Clara Pueblo*, each decided in 1978, constitute the founding jurisprudence on implicit divestiture. The case of *Oliphant* concerned a question over whether the Suquamish Indian Tribe held the jurisdiction to arrest and try a non-Indian resident on the

[293] Ibid 225.
[294] Ibid 119, 225.
[295] Echo-Hawk (n 227) 17.
[296] Ibid 110.
[297] Ibid 17.
[298] Ibid.
[299] Lance F Sorenson, 'Tribal Sovereignty and the Recognition Power' (2017) 42(1) *American Indian Law Review* 69, 84.

reservation for crimes committed on Suquamish territory.[300] The Court concluded that 'by submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.'[301]

This reasoning has the effect of shifting the burden of proving that an aspect of sovereignty have been divested. In the plenary powers of Congress doctrine, Indian tribes retain all sovereignty except that which is expressly divested from them by Congress. The burden of proof in this respect was on the Congress. Under implicit divestiture the burden shifts to the Indian tribes to prove that their 'dependent' status allows them to retain a certain aspect of sovereignty. As such this doctrine has an even more restricting effect on Indian tribes than the plenary powers of Congress doctrine.

The *Wheeler* case had the effect of solidifying the doctrine of implicit divestiture, unambiguously suggesting that, along with treaty concessions and the plenary power of Congress, this formed a third means of divesting sovereignty.[302] Although it ruled in favour of the retention of certain sovereign powers, stating that 'the power to prescribe and enforce criminal laws [were] not such powers as would necessarily be lost by virtue of the tribes dependent status'.[303] In *Santa Clara Pueblo* the Court also ruled in favour of the retention of certain sovereign powers concerning the determination of membership of Indian tribes.[304] By not implicitly divesting Indian tribes of sovereign powers in *Santa Clara Pueblo* and *Wheeler*, the Court demonstrated that it would apply the implicit divestiture doctrine cautiously.[305]

However, several subsequent cases have used implicit divestiture in order to limit Indian tribal sovereignty. *Duro* extended the principle in *Oliphant*, by suggesting that Indian tribes had no criminal jurisdiction over non-member Indians.[306] *Montana v United States* (1981) ('*Montana*') proved that Indian tribes cannot exercise civil authority over certain non-member Indians living within their territorial bounds.[307] *Nevada v Hicks* (2001) ('*Nevada*') also shows that Indian tribes had no jurisdiction over civil claims brought by members of an Indian tribe against state officers

[300] *Oliphant v Suquamish Tribe of Indians*, 435 US 191, 193-195 (1978) (Rehnquist J for the Court) ('*Oliphant*').
[301] Ibid 210.
[302] *Wheeler* (n 280) 323.
[303] Ibid 326.
[304] See *Santa Clara Pueblo* (n 258).
[305] Sorenson (n 297) 86.
[306] *Duro v. Reina*, 495 US 676, 693 (1990) (Kennedy J for the Court) ('*Duro*').
[307] *Montana v. United States*, 450 US 544, 566 (1981) (Stewart J for the Court) ('*Montana*').

concerning torts occurring on Indian territory.[308] Jacob T Levy notes that *Montana* in particular reformulated the previous assumption that tribes could exercise jurisdiction over non-members,[309] by stating that Indian tribes were implicitly divested of powers that were not 'necessary to protect or to control internal relations'.[310] The Court in *Montana* further elaborated, stating that Indian tribes could exercise civil authority over non-member in two narrow sets of circumstances. Firstly, where there were consensual relations between the non-member and Indian tribe, such as in a commercial context.[311] Secondly, where 'conduct [of the non-member] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'[312] As suggested by P G McHugh, the case of *Nevada* interpreted the ruling in *Oliphant* and *Montana* as evidence that the absence of tribal authority is a general rule, rather than an exception.[313] This is reflected in Justice Scalia's opinion in *Nevada* where he doubts the continued relevance of tribal sovereignty, stating:

> 'Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries".'[314]

Echo-Hawk suggests that this ruling advocates a 'pint-sized picture of tribal sovereignty – one that is no longer inherent'.[315] In effect what is alluded to is the erosion of the territorial conception of tribal sovereignty, refashioning it as a personal sovereignty exercised exclusively over members of the Indian tribe.

Implicit divestiture is a controversial doctrine in light of the consideration that previously only Congress had the capacity to limit Indian tribal sovereignty.[316] Sorenson holds that the doctrine may be unconstitutional, given that the capacity to recognise and de-recognise sovereigns is traditionally an executive power.[317] To an extent this has already been seen in the more recent case of *Lara*, which affirmed that Congressional acts reversing an instance of implicit divestiture

[308] *Nevada v* Hicks, 533 US 353, 364 (2001) (Scalia J for the Court) ('*Nevada'*).
[309] Jacob T Levy, 'Three Perversities of Indian Law' in Lisa Ford and Tim Rowse (eds), *Between Indigenous and Settler Governance* (Routledge, 2012) 148, 152.
[310] *Montana* (n 305) 564.
[311] Ibid 565.
[312] Ibid 566.
[313] P G McHugh, *Aboriginal Societies and the Common Law* (Oxford University Press, 2004) 457.
[314] *Nevada* (n 306) 361 (citation omitted).
[315] Echo-Hawk (n 227) 159.
[316] See Ibid 158.
[317] Sorenson (n 297) 73.

amounted to a mere removal of an impediment placed on the Indian inherent sovereignty, as opposed to a delegation of certain powers from Congress.[318] The latter assumption would have proved that there was judicial power to derecognise sovereignty.

Furthermore, the doctrine creates a highly imprecise means of marking the bounds of Indian sovereignty. Sorenson suggests that 'the Court has not articulated clear, determinate, and predictable rules upon which tribes, law enforcement, lower courts, and the populace in general may reliably operate'.[319] Instead he suggests that the Court should restrict itself to reviewing divestiture which has been performed by way of the plenary powers of Congress doctrine and treaty,[320] as was clearly preferred by the dissentients Justice Thurgood Marshall and Chief Justice Burger in *Oliphant*.[321] In this way, 'explicit' divestiture would be the only means of divesting Indian tribes of their sovereignty.[322] He suggests that this would not necessarily be a validation of the plenary powers of Congress doctrine, but would rather subject it to a level of scrutiny by way of legal challenges to the constitutionality of various acts of legislation purporting to divest Indian tribes of their sovereignty.[323]

An inherent theoretical problem with implicit divestiture, making the doctrine inconsistent the *UNDRIP*, is its reliance on the doctrine of conquest and discovery as its basis. Both Echo-Hawk and Sorenson consider the doctrine as an example of 'judicial conquest'.[324] As has been discussed above, the use of the term 'dependency' in federal Indian law goes back to the notions established by Chief Justice Marshall. This was that Indian tribes sought the protection of the United States, and that their external sovereignty in the process became limited, but that Indian tribes otherwise remained sovereign equals of the United States. By contrast, implicit divestiture views 'dependency' through the lens of the notions of conquest and discovery. 'Dependency' in this context means an inferior status to that of the United States, which, as conqueror and discoverer, is in a position to divest Indian tribes of certain sovereign powers. This is therefore viewed as enabling the judiciary to remove certain sovereign powers which are no longer compatible with this inferior status. As noted by Echo-Hawk, the inherent nature of Indian sovereignty is also

[318] *Lara* (n 288) 210 (Breyer J for the Court).
[319] Sorenson (n 297) 92.
[320] Ibid 75.
[321] *Oliphant* (n 298) 212 (Marshall and Burger JJ, dissenting).
[322] Sorenson (n 297) 75.
[323] Ibid 133.
[324] Ibid 74; See also Echo-Hawk (n 227) 110.

strained since Indian tribes have to prove that certain governmental functions are necessary as part of their dependent status, in order to retain such functions.[325]

Lastly, as has been shown, inherent sovereignty has been used to fashion a view of self-government that is personal rather than territorial. By contrast, the *UNDRIP* does not make such a distinction between which type of self-government Indigenous peoples are to be given. The case of *Duro* shows how these two elements cannot be easily separated. In this case Albert Duro, a non-member Indian was accused of murder on a Pima-Maricopa Indian tribe reservation. He was released from federal arrest to tribal custody, after the United States prosecutors declined to prosecute him. He was then charged with the misdemeanour offence of unlawful discharge of a firearm by the tribe given their limited criminal jurisdiction.[326] When Duro successfully appealed to the Supreme Court, the Court deemed that the *Oliphant* precedent meant that Indian tribes had been divested of their criminal jurisdiction over non-members.[327] As noted by Sorenson, this created a 'criminal jurisdiction vacuum within tribes'.[328] Levy similarly notes that the effects of this implicit divestiture on Indian judicial authority, was that it encouraged law breaking on Indian reservations.[329] In response Congress passed the '*Duro*-Fix' legislation to restore jurisdiction over cases such as Duro's to tribes,[330] reflecting Congress' concern that Court had overstepped its authority. This example shows how meaningful Indigenous self-government cannot merely be associated with personal sovereignty but must also be territorial. Robust criminal jurisdiction, as an aspect of self-government cannot simply be exercised personally if it is to be exercised effectively.

3. Indian Right to Consultation and Free, Prior and Informed Consent

The law and policy of the United States shows a certain level of commitment to the Indian tribes' right to consultation, but does not yet completely embrace their right to FPIC under certain circumstances. Presidential policy statements from successive administrations in the United States uphold a right of Indian tribes to be consulted. This would be expected under Article 18 of *UNDRIP* which gives Indigenous peoples the right to 'participate',[331] or the lesser right to substantial consultation within the 'sliding scale' approach to Article 19, outlined above. Various

[325] Echo-Hawk (n 227) 159.
[326] See *Duro* (304).
[327] Ibid 685.
[328] Sorenson (n 297) 120.
[329] Levy (n 307) 151.
[330] Sorenson (n 297) 120.
[331] *UNDRIP*, UN Doc A/Res/21/265 (n 22) art 18.

acts of legislation have reciprocated this policy.[332] By contrast however, FPIC has largely been denied to Indian tribes who reside on 'public' lands, particularly regarding high-impact mineral extraction which has occurred on Indian lands. It will be argued that the denial of the right to FPIC in this context amounts to a denial of the rights of Indian tribes under Article 19 of the *UNDRIP*. Given the 'sliding scale' approach to Article 19, outlined above, an activity having such a high impact on Indian tribes necessarily carries the obligation to obtain their FPIC. The rights to consultation in order to obtain FPIC under the *UNDRIP* also draws into question the consistency of the plenary power of Congress doctrine, which poses the threat of divesting Indian tribes of sovereign powers without consultation.

On a general and theoretical level, there are strong reasons to doubt that the framework of the United States' interactions with its Indigenous peoples conforms with *UNDRIP* Article 19. As Echo-Hawk suggests, the doctrine of plenary power of Congress, as it was developed in *Lone Wolf*, originated from the doctrines of discovery and conquest, and conveys the power on Congress to unilaterally impose legislation on Indian tribes without their FPIC.[333] The Committee on the Elimination of Racial Discrimination has expressed particular concern regarding the capacity of the United States to abrogate treaties made with Indian tribes, and take lands without compensation, as unilateral actions of the federal government.[334]

The United States' compliance with the right to give FPIC changes significantly depending on whether Indian tribes are located on 'private' lands, to which Indian tribes have title, or 'public' lands.[335] As stated by Carla F Fredericks, the legal control that Indian tribes have over their reservations grants a 'unique opportunity to harness the possibility of FPIC over individuals acting on its reservation'.[336] She cites the allowance for tribal civil jurisdiction under certain circumstances in the *Montana* judgement, as areas in which Indian tribes can develop their own FPIC policies.[337] The *Montana* judgment specifically allows for tribal civil jurisdiction in instances where 'non-members' have entered into 'consensual relationships with a tribe or its members' or they act in a way which threatens or '[has] some direct effect on the political

[332] See *National Historic Preservation Act*, 16 USC § 470 (1966); See *National Environmental Policy Act*, 42 USC § 4321 (1969).
[333] Echo-Hawk (n 227) 210.
[334] *Report of the Committee on the Elimination of Racial Discrimination: Fifty-Eighth Session (6-23 March 2001); Fifty-Ninth Session (30 July-17 August 2001)*, UN GAOR, 56th sess, Supp No 18, UN Doc A/56/18 (30 October 2001) [400].
[335] See Kinnison (n 181) 1305.
[336] Carla F Fredericks, 'Operationalizing Free, Prior, and Informed Consent' (2016/17) 80(2) *Albany Law Review* 429, 447.
[337] Ibid 447-52.

integrity, the economic security, or the health or welfare of [a] tribe'.[338] Although these exceptional situations of tribal civil jurisdiction have been construed narrowly in later cases,[339] they nonetheless provide room for the achievement of *UNDRIP* Article 19. However, this does not reflect the United States' overall policy toward Article 19, or the situation regarding the right to FPIC for Indian tribes residing on 'public' lands, away from reservations.

The United States consistently opposed the inclusion of a right to FPIC in the *UNDRIP*, instead acknowledging only the lesser right to consultation. The United States partially based its initial opposition to the *UNDRIP* on the potential for the rights contained within Article 19 to be interpreted as a right to veto legislative acts.[340] This opposition to a right to give FPIC did not change significantly upon the United States' acceptance of the *UNDRIP*. The United States instead stated that:

> '[T]he United States recognizes the significance of the Declaration's provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, *but not necessarily the agreement* of those leaders, before the actions addressed in those consultations are taken.'[341]

This statement instead reflects a support for the right to consultations which, as discussed above, represents an aspect, but not the entirety, of the right contained within Article 19. Early cases such as *Oglala Sioux Tribe of Indians v Andrus* (1979) stated that the right to consultations forms part of the trust relationship between the United States and Indian tribes.[342] The United States' executive branch of government, in recent times, has also consistently expressed its support for the right of Indian tribes to consultation regarding matters that affects them. This practice was made clear through *Executive Order 12875* on 'Enhancing the Intergovernmental Partnership' by President Clinton in 1993, that government agencies:

> '[E]stablish regular and meaningful consultation and collaboration with State, local, and tribal governments on Federal matters that significantly or uniquely affect their communities.'[343]

This policy of ensuring Indian tribes a right to consultation was reciprocated by Executive Order 13175, and by successive administrations under President George W Bush as well as President

[338] *Montana* (n 305) 566.
[339] See *Strate v A-1 Contractors*, 520 US 438 (1997).
[340] Kinnison (n 181) 1325.
[341] Announcement of US Support of the UNDRIP (n 225) (emphasis added).
[342] *Oglala Sioux Tribe of Indians v Andrus* 603 F 2d 707, 721 (8th Cir, 1979).
[343] Executive Order No. 12875, 'Enhancing the Intergovernmental Partnership', 58 Fed Reg 58,093 (26 October 1993).

Obama.[344] Certain pieces of federal legislation have also enshrined a right to consultation, including the *National Historic Preservation Act (1966)* and the *National Environmental Policy Act (1969)*.[345] Jurisprudence, such as *Comanche Nation v United States* (2008), also shows how courts have upheld the right to consultation, as contained under the *National Historic Preservation Act (1966)*, to prevent developments which potentially affect certain significant sites for Indian tribes, from proceeding without formal consultations with Indian tribes. In this case an injunction was approved regarding proposed development that would affect a site of religious significance to the Comanche Nation.[346] This was on the basis that the developers had failed to consult with the Comanche Nation on the development.[347] Furthermore, it had provided insufficient information to the tribe, from which it was not possible to ascertain the degree to which the development would impact the religious site.[348]

However, the United States' commitment to mere consultations reflects a weak standard of protection for Indian tribes' right to self-determination which, as explained above, was ultimately rejected during the drafting of the *UNDRIP*. As Colette Routel and Jeffrey Holth noted, 'consultation' is a variable term, and there has been a lack of direction from Congress or the executive on how 'consultation' should be implemented.[349] This in turn has led to a variety of interpretations of the term by different federal agencies, with certain federal authorities construing the right of consultation as no more than a right of notice, wherein provision of notice to Indian tribes of certain projects constitutes evidence of consultation.[350] As is suggested above, *UNDRIP* Article 19 requires more than a procedural consultation process. Rather, it requires genuine consultations, with the objective of reaching consent of indigenous. Routel and Holth instead stresses that there is a:

> '[F]undamental difference between the public participation process (notice and comment), which is an information-gathering exercise, and consultation, which is a government-to government process that requires greater involvement in decision making by Indian tribes.'[351]

Furthermore, a persistent problem with a consultation procedure enacted by way of federal agency policy, is what Routel and Holth describe as the lack of judicial review proceedings by

[344] Colette Routel and Jeffrey Holth, 'Toward Genuine Tribal Consultation in the 21st Century' (2013) 46(2) *University of Michigan Journal of Law Reform* 417, 443-4.
[345] Kinnison (n 181) 1302.
[346] Echo-Hawk (n 227) 172.
[347] Ibid 173-4.
[348] Ibid 174.
[349] Routel and Holth (n 342) 453-4.
[350] Ibid 454-5.
[351] Ibid 456.

which Indian tribes can challenge an agency's compliance with their own consultation guidelines.[352] Fredericks cites another problem associated with the right to consultation originating in the aforementioned executive orders. Firstly, she states that the executive orders only contain an encouragement to federal agencies to comply with the order.[353] Secondly, it does not contain any reference as to whether tribal consent is a 'defining element' of tribal consultations,[354] which is especially important given that *UNDRIP* Article 19 states that seeking FPIC shall be the underlying objective of consultations. Lastly, the executive orders, as with the legislation enacting consultation requirements, make consultations subject to practicability,[355] giving 'federal agencies an out if consultation becomes too onerous', as Fletcher describes.[356] Therefore, in spite of the allowance of consultation arrangements, the above discussion highlights certain shortcomings in creating meaningful consultations, especially where there is no overall objective of obtaining FPIC. Indian tribes are in effect allowed a mere procedural right to consultation, rather than something more substantive. This is a solution which proved unacceptable to Indigenous participants during the drafting of *UNDRIP*, who insisted that something more than a procedural right was required, as outlined above.

Ultimately, whilst the United States denies the possibility of giving a right to Indian tribes to give FPIC under certain circumstances, it cannot be regarded as meeting the standard of *UNDRIP* Article 19. As suggested by Fletcher, with a few limited exceptions '[t]he history of American Indian affairs demonstrates conclusively that the federal government's Indian affairs actions take almost no consideration of tribal consent.'[357] Kinnison stresses that there is a need to uphold the 'full spectrum of requirements' under the *UNDRIP* Article 19,[358] particularly in instances involving high-impact extractive activities on Indian tribal lands.[359]

As stated above, there are strong reasons for considering high-impact mineral extraction on Indigenous lands as an activity requiring FPIC from Indigenous groups who may be affected. Kinnison points to the example of the Western Shoshone as an instance where mere consultation can be considered as inadequate to create a semblance of self-determination under the *UNDRIP*. 90% of Western Shoshone territory is classified as 'public' land and therefore managed by the

[352] Ibid 452.
[353] Fredericks (n 334) 469.
[354] Ibid.
[355] Ibid 469-70.
[356] Ibid 470.
[357] Ibid 471.
[358] Kinnison (n 181) 1331.
[359] Ibid 1303.

federal government.[360] The Western Shoshone have opposed the construction of an 'open-pit cyanide heap-leach gold mine' at a location of specific spiritual importance.[361] Protection provided by way of a mere right to be consult has been of little assistance in this case, since state agencies have consistently been found to have met the standard of consultations that is expected of them.[362] Kinnison argues that in such situations federal legislation requiring consultations, which has been described by courts as 'stop, look and listen' legislation,[363] merely creates a delay to the approval process without providing meaningful safeguards for Indian interests.[364] As suggested by Echo-Hawk, this is at odds with the self-determination principles of the *UNDRIP* which requires that there is a sense that Indian tribes have control over such governmental decisions.[365]

The absence of allowance for FPIC in these situations may be regarded as inconsistent with the *UNDRIP*. The *UNDRIP* acknowledges the need to preserve the fundamental connection between Indigenous peoples and their land. It is for this reason that forced relocation of Indigenous groups, and the disposal of toxic materials on Indigenous lands,[366] as actions that have devastating consequences for Indigenous peoples' connection to their land, were acknowledged as the only two instances specifically mentioned in the *UNDRIP* where FPIC was required. It logically follows that high-impact mineral extraction on Indigenous lands, which carries the capacity to permanently change the land, creates a similar potential to threaten indigenous peoples' cultural survival.[367] As suggested by McGee, such situations represent 'zero-sum' scenarios for Indigenous peoples,[368] therefore according to the 'sliding-scale' approach to Article 19, FPIC must be achieved for such projects. As suggested above, the *Saramaka People* case can be regarded as setting a precedent for this approach.[369]

The foregoing discussion reflects the incomplete incorporation of the *UNDRIP's* right to consultation and FPIC in the United States. The plenary powers of Congress doctrine also reflects an overarching preference for unilateralism in federal-tribal relations. Whilst the commitment to consultations is a positive step in achieving the *UNDRIP* standards, in order to be fully compliant

[360] Ibid 1305, 1311-2.
[361] Ibid 1304.
[362] Ibid.
[363] Ibid 1310.
[364] Ibid 1311.
[365] Echo-Hawk (n 227) 211.
[366] *UNDRIP*, UN Doc A/Res/21/265 (n 22) art 10, 29(2).
[367] Kinnison (n 181) 1329.
[368] McGee (n 182) 571-2.
[369] See *Saramaka People* (n 179) [134].

there must also be acknowledgment that the ultimate purpose of these consultations must be achieving FPIC. There must also be an acknowledgement that certain proposals carrying high-impact on Indian tribes cannot proceed without their FPIC. To this extent the inherent tribal sovereignty system is of great benefit in providing a means through which Indian tribes can develop their own standards of FPIC, regarding actions of third parties on the lands to which they have title.

Chapter 4: Acknowledgement of Indigenous Self-Determination in Australia

As stated by the Australian Human Rights Commission, Australia has acknowledged that its Indigenous peoples have a right to self-determination, and that this excludes the right to secede and form a separate state.[370] Australia also acknowledges that 'without self-determination it is not possible for Indigenous Australians to fully overcome the legacy of colonisation and dispossession'.[371] However, unlike in the United States, Australia lacks the extensive jurisprudence on Indigenous self-determination, and denies any inherent right to Indigenous sovereignty and self-government. Therefore, analysis in this Chapter will be focussed on Australia's preference for Indigenous self-administration and self-management as an alternative expression for self-determination. In particular, it will be argued that this is a lesser form of self-determination, which alone cannot reflect the standard enshrined in the *UNDRIP*. Similarly to the United States, Australia also has a problematic relationship with the rights embodied in *UNDRIP* Article 19, as shown in the lack of a general legal right to consultations in order to obtain FPIC concerning measures taken by the federal and state governments which affect Indigenous communities.

1. Denial of Self-Government and Autonomy

Unlike the United States, Canada and New Zealand, Australia has never had a treaty with its Indigenous peoples. Its jurisprudence has instead insisted upon an all-encompassing jurisdiction of the Crown. As such there is no acknowledgment of any inherent right to Indigenous sovereignty and self-government as would impede the Crown's monopoly on sovereignty over Australia. As stated above, these form crucial elements of Indigenous self-determination. In spite of this, there has been a notable concession in the form of land rights or native title, which were granted to Indigenous Australians through the historic *Mabo v Queensland (No.2)* (1992) ('*Mabo*') decision. As part of this decision, the High Court of Australia overturned the doctrine of terra nullius, in many ways equivalent to the doctrine of discovery as used in the United States, as it applied to native title. Nonetheless, this colonial doctrine was implicitly retained in the *Mabo* decision, insofar as it applied to Indigenous self-government.

[370] Weller (n 3) 142-3; citing Australian Human Rights Commission, 'Right to Self-Determination', *Australian Human Rights Commission* (Web Page, 30 April 2013) <https://www.humanrights.gov.au/our-work/rights-and-freedoms/right-self-determination#Native>.
[371] Australian Human Rights Commission (n 368).

In overturning the doctrine of terra nullius, the High Court in *Mabo* overturned what had been established law since the *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 ('*Milirrpum*') decision. *Milirrpum* decided that as a matter of law Australia had been 'empty land' at the time of colonisation.[372] However Justice Blackburn in *Milirrpum* had acknowledged that Indigenous Australians had developed a 'subtle and elaborate system' of local laws and customs.[373] In *Mabo* Justice Brennan recognized the occupation of terra nullius as one of the three forms of acquisition of sovereignty that had been recognized under international law, along with cession and conquest.[374] In spite of the factual presence of Indigenous peoples on the Australian continent, it was accepted that occupation of Australia, as opposed to conquest, would suffice to ground Crown sovereignty over Australia, given that it was occupied by 'backward peoples' supposedly lacking a sufficient level of sophistication.[375] This was what Justice Brennan, in summarizing the pre-*Mabo* understanding of Australian law, referred to as the 'enlarged notion of terra nullius'.[376] According to this understanding, terra nullius would apply even where there is no uninhabited lands, so long as there was no law present in the territory.[377] On this account he notes that:

> 'Thus the theory which underpins the application of English law to the Colony of New South Wales is that English settlers brought with them the law of England and that, as the indigenous inhabitants were regarded as barbarous or unsettled and without a settled law, the law of England including the common law became the law of the Colony (so far as it was locally applicable) as though New South Wales were "an uninhabited country . . . discovered and planted by English subjects".'[378]

This contradicted the finding by Justice Blackburn in *Milirrpum* that there were Indigenous laws and customs in existence. This demonstrated that the rationale that Indigenous Australians were lawless prior to colonisation was clearly a false assumption.[379]

Citing the rejection of terra nullius under international law in the *Western Sahara* Advisory Opinion, Justice Brennan in *Mabo* noted that the doctrine as it existed in the common law ought to be rejected as well.[380] He asserted:

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[372] Imai (n 143) 296.
[373] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267 *('Milirrpum')*.
[374] *Mabo v Queensland (No 2)* 175 CLR 1, 32 (Brennan J, Mason CJ and McHugh J agreeing) ('*Mabo*').
[375] Ibid.
[376] Ibid 36.
[377] Ibid.
[378] Ibid 37-38 (citations omitted).
[379] Ibid 38-9.
[380] Ibid 41.

> 'Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the Indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.'[381]

In spite of rejecting the doctrine of terra nullius, Justice Brennan unequivocally stated that the '[British] Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court'.[382] The entire High Court in *Mabo* was united in agreement that the Crown attaining full sovereignty over Australia was a non-justiciable matter.[383] Instead Justice Brennan suggested that in overturning terra nullius, this amounted to an acknowledgment of Indigenous absolute beneficial ownership over land which had existed prior to colonisation.[384] He states that '[w]hat the Crown acquired was a radical title to land and a sovereign political power over land, the sum of which is not tantamount to absolute ownership of land'.[385] Importantly, when and where native title existed must be 'ascertained according to the laws and customs of the Indigenous people who, by those laws and customs, have a connection with the land'.[386] Justice Brennan acknowledged that such law and customs would change over time, but stated that:

> '[S]o long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.'[387]

Therefore the *Mabo* decision creates problematic legal contradictions, by overturning terra nullius only insofar as it extended to absolute beneficial ownership of land, and implicitly denying Indigenous sovereignty whilst acknowledging that Indigenous culture had laws and therefore had law-making authority. As suggested by Zsofia Korosy, there is no explicit discussion over whether Indigenous sovereignty survived in *Mabo*,[388] however given Justice

[381] Ibid 42.
[382] Ibid 69.
[383] Zsofia Korosy, 'Native Title, Sovereignty and the Fragmented Recognition of Indigenous Law and Custom' (2008) 12(1) *Australian Indigenous Law Review* 81, 82, citing *Mabo* (n 372) 79 (Deane and Gaudron JJ), 130 (Dawson J, dissenting).
[384] *Mabo* (n 372) 57.
[385] Ibid 53.
[386] Ibid 70.
[387] Ibid 61.
[388] Korosy (n 380) 82.

Brennan's use of language, referring to the British Crown's 'acquisition of sovereignty',[389] and the 'change in sovereignty',[390] there is a heavy implication that Indigenous sovereignty has been extinguished.

This interpretation is consistent with earlier High Court jurisprudence, in the case of *Coe v Commonwealth* (1979) ('*Coe*'), which represents the current state of law in Australia. In that case, the plaintiff had argued that in 1770 Captain James Cook had wrongfully proclaimed sovereignty and dominion of the British Crown over the east coast of Australia under the doctrine of terra nullius.[391] In doing so, Indigenous peoples were denied their rights, privileges, interests, claims and entitlements, with the plaintiff asserting that the 'Aboriginal nation' had, until colonisation, exercised 'exclusive sovereignty' over Australia from 'time immemorial'.[392] On first instance, Justice Mason denied that the ICJ's renouncing of terra nullius in the *Western Sahara* advisory opinion applied to Australian domestic law.[393] Before the full court of the High Court of Australia, Justice Gibbs found that the contention that there is an Aboriginal nation in Australia exercising sovereignty, is 'impossible in law to maintain'.[394] He suggested that the 'domestic dependent nation' principle from *Cherokee Nation* did not apply, on account of the different historical relationship between the 'white settlers and Aboriginal peoples' in the United States and Australia.[395] Although the precise difference between such historical relationships was not elaborated on. Justice Gibbs asserted that:

> '[Indigenous Australians] have no executive, legislative or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers except such as the law of the Commonwealth, or of a State or Territory, might confer on them.'[396]

Instead, Justice Gibbs stated that '[t]he Aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside'.[397] The remaining justices of the High Court did not object to Justice Gibbs' statement that 'there is no Aboriginal nation … as a separate state or exercising any degree of sovereignty.'[398] Justice Jacobs concurred, stating that the High Court could not deny the sovereignty of the Commonwealth,

[389] *Mabo* (n 372) 44.
[390] Ibid 57.
[391] *Coe v Commonwealth of Australian and Another* (1979) 24 ALR 118, 128 ('*Coe*').
[392] Ibid 133
[393] *Coe v The Commonwealth and Another* (1978) 18 ALR 592, 596 (Mason J).
[394] *Coe* (n 388) 129 (Gibbs J, Aickin J agreeing).
[395] Ibid.
[396] Ibid.
[397] Ibid.
[398] Ibid 131. Murphy J, dissenting, at 137-8, however can be seen as strongly doubting the continued application of terra nullius.

given that the Commonwealth gave the Court its own jurisdiction.[399] The *Coe (on behalf of the Wirajuri) v Commonwealth* (1993) case, decided shortly after the *Mabo* decision, again unsuccessfully claimed the existence of a sovereign Aboriginal nation. In this second case, Chief Justice Mason confirmed that the *Mabo* decision, in spite of refuting the terra nullius doctrine, made no allowance for the sovereignty of any aboriginal nation.[400]

The case of *Walker v State of New South Wales* (1994), also decided shortly after *Mabo*, presented similar conclusions. The plaintiff alleged that the state of New South Wales lacked the power to legislate for Indigenous Australians, and that customary Indigenous criminal law survived colonisation of Australia, as had native title, as shown through the *Mabo* decision.[401] Chief Justice Mason rejected this claim as 'untenable', reiterating the finding in the first *Coe* case, that Indigenous Australians were subject to the law of the states and territories in which they reside.[402] It was asserted that nothing in the *Mabo* judgement suggested that the Commonwealth or States lost their power to legislate over Indigenous people, or that such ability to legislate over Indigenous peoples was conditional upon their acceptance or consent.[403] Regarding the status of Indigenous customary criminal law, it was found that this law was extinguished with the passage of criminal law that was of general application.[404] Whilst in *Mabo* the Court deemed that native title could exist alongside the common law, 'Australian criminal law does not … accept an alternative body of law existing alongside it.'[405]

Therefore, later cases conclusively prove that the *Mabo* judgement, in spite of its progressive approach to the land rights, serves as no basis for proclaiming Indigenous sovereignty along the lines of the model adopted by the United States. As Alison Vivian et al. states:

> '[A]part from limited and highly circumscribed opportunities created through native title, cultural heritage laws and some states' land rights systems, the Australian state neither acknowledges Aboriginal and Torres Strait Islander peoples' status as distinct political collectives (nations, societies, communities, or however else they prefer to describe themselves) nor recognises their inherent rights to self-governance.'[406]

[399] Ibid 132 (Jacobs J, dissenting).
[400] *Coe (on behalf of the Wiradjuri tribe) v Commonwealth of Australia and Another* (1993) 118 ALR 193, 200 (Mason CJ).
[401] *Walker v State of New South Wales* (1994) 126 ALR 321, 321 (Mason CJ) ('*Walker*').
[402] Ibid 322, citing *Coe* (n 388) 129.
[403] *Walker* (n 398) 322.
[404] Ibid 323.
[405] Ibid 323-4.
[406] Vivian et al (n 4) 216.

Consequently 'nation-to-nation and government-to-government relations have not become a part of Australian mainstream law'.[407] The fundamental contradiction in the *Mabo* judgement is Justice Brennan's acknowledgment that the nature and scope of native title derives from Indigenous laws and customs.[408] This continues a judicial recognition that Indigenous Australian have made and abided by their own laws, as can be seen in the *Milirrpum* decision. McNeil asserts that 'the land laws of any society are never constant – they must adapt to changing environmental conditions and evolving social values and needs'.[409] In order for land laws to change there must be form of self-government.[410] Consequently, he contends that a limited form of self-government, as it related to native title 'remained a possibility' after the *Mabo* decision.[411]

However the later decision of *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) ('*Yorta Yorta*') alters this principle. In Gleeson CJ, Gummow and Hayne JJ's joint judgement it was held that upon the British Crown's acquisition of sovereignty, the Indigenous 'normative or law-making system which then existed could not thereafter validly create new rights, duties or interests'.[412] Any laws relating to land which were created after the acquisition of sovereignty therefore could not be recognised,[413] aside from 'alteration' or 'development' of laws dating from before such acquisition of sovereignty.[414] In the aftermath of the *Yorta Yorta* decision, McNeil contends that Indigenous self-government in Australia merely extend to the modification of pre-colonisation laws relating to land.[415]

This approach of Australian law is manifestly problematic when compared to the *UNDRIP* and the right to self-determination. This strictly limited right to self-government clearly does not fulfil the requirement of giving Indigenous peoples a more general, all-encompassing right to 'self-government and autonomy' as part of their right to self-determination under articles 3 and 4. Furthermore Imai's suggestion of inherent sovereignty and self-government as the ideal manifestation of the right to self-determination, has been comprehensively rejected by the High Court on multiple instances. A fundamental issue with Australian jurisprudence lies in the fact that it rejects the doctrine of terra nullius only 'insofar as it had been applied to deny the land

[407] Ibid 217.
[408] *Mabo* (n 372) 70.
[409] McNeil, 'Indigenous Land Rights and Self-Governance' (n 242) 143.
[410] Ibid.
[411] Ibid 144.
[412] *Members of the Yorta Yorta Aboriginal Community v Victoria and Others* (2002) 194 ALR 538, 552 (Gleeson CJ, Gummow and Hayne JJ).
[413] Ibid.
[414] Ibid 144.
[415] McNeil, 'Indigenous Land Rights and Self-Governance' (n 242) 144.

rights of Indigenous Australians'.[416] Terra nullius still implicitly forms the necessary foundation upon which the sovereignty of the Crown, and by consequence the Commonwealth, was established, and aboriginal sovereignty was lost. This is reinforced given the dismissal of conquest or cession as the bases upon which the British Crown obtained sovereignty. This stands in contrast with the condemnation of terra nullius in the *Mabo* decision, under general international law in the ICJ's *Western Sahara* advisory opinion,[417] as well as what Weissner describes as the implicit renunciation of terra nullius in *UNDRIP* preamble paragraph 4.[418]

2. Self-Administration and Self-Management as an Alternative to Inherent Sovereignty and Self-Government?

In the absence of acknowledgement of a comprehensive inherent right of Indigenous peoples to self-government, the extent to which Indigenous Australians have self-administration and self-management rights can adequately achieve self-determination must be assessed. Imai cites several examples of Indigenous organisations in Australia, such as Indigenous Land Councils and the now defunct Aboriginal and Torres Strait Island Commission of Australia ('ATSIC'), as bodies that might fulfil this manifestation of self-determination. It will be argued that these organisations represent at times positive solutions to ensuring self-determination for Indigenous people living off a land-base, where the idea of inherent sovereignty and self-government might be seen as impractical. However in general, as has been noted by Imai,[419] these mechanisms alone do not provide an adequate means of achieving meaningful self-determination, and are prone to governmental interference which is antithetical to the *UNDRIP*'s conception of self-determination.

What makes self-administration and self-management by Indigenous organisations distinct from other bodies exercising inherent powers of self-government is that these organisations derive their powers from settler governments. ATSIC was created in 1990 by Commonwealth legislation in order to enable Indigenous self-determination.[420] Its functions consisted of acting as an advisory body to the government, general advocacy for the rights of Indigenous Australians, as well as providing for the delivery of various funding programs to Indigenous communities.[421] Imai notes that such organisations can be valuable in achieving self-

[416] Ibid 146.
[417] *Western Sahara* (n 161) 86 (Judge Ammoun).
[418] Weissner, 'Indigenous Self-Determination, Culture, and Land' (n 121) 41.
[419] Imai (n 143) 297.
[420] Ibid 299.
[421] Ibid.

determination for Indigenous peoples living in urban settings, providing them a decision-making entity through which they can govern the services used by Indigenous peoples in such settings. This may include services such as 'education, community centres, housing, employment training and child welfare'.[422] Bertus de Villiers also expresses the merits of this arrangement advocating for a decentralised version of self-determination, or 'cultural autonomy', which does not require a self-governed territory, noting that Australian Indigenous peoples are dispersed across Australia, rather that concentrated in certain territories.[423] In this respect ATSIC may have been regarded as a positive development as a decentralised agency.[424] Korosy also notes similar arrangements related to Indigenous peoples located on land-bases, including certain Aboriginal councils in Queensland and Western Australia that that may pass and enforce by-laws.[425] However, these arrangements are subject to the discretion of state legislatures and the consistency of such laws with Australian law.[426]

Critics of ATSIC noted its lack of independence from the Commonwealth government. For example, high positions within ATSIC were appointed by the Commonwealth government, it lacked the ability to hire employees directly, and the delivery of programmes was performed through guidelines made by Australian legislation.[427] Imai suggests that the ultimate demise of this authority in 2005, when the body was dissolved by the Commonwealth government at the time, and its powers distributed to other federal departments, reflects the vulnerabilities of such organisations which are formed through domestic legislation.[428] De Villiers also characterises ATSIC as a 'weak development and consultative agency with limited powers', which 'could not independently formulate laws and policies for Aboriginal People'.[429] The agencies that succeeded ATSIC - The National Indigenous Council, which was disbanded after four years of operation, and the Indigenous Advisory Council, could be described as even more inadequate, both possessing a mere advisory function.[430] The National Congress of Australia's First People, incorporated in 2010, owing to its structure as a private company, is at least protected from being

[422] Ibid 300.
[423] Bertus De Villiers, 'Self-Determination for Aboriginal and Torres Strait Islander Peoples: Is the Answer Outside the Territorial-Square?' (2014) 16 *University of Notre Dame Australia Law Review* 74, 76.
[424] Ibid 102.
[425] Korosy (n 380) 85.
[426] Ibid.
[427] Imai (n 143) 299.
[428] Ibid 300.
[429] De Villiers (n 420) 82.
[430] Ibid 82.

dissolved by the Commonwealth government.[431] However, it also lacks the ability to perform service delivery, which might be regarded as a fundamental aspect of self-determination.[432]

As suggested by De Villiers, at present 'Aboriginal People remain legally, politically, socially and practically without substantial political or policy making powers over those matters that affect their unique culture, languages, customs, laws and beliefs.'[433] Self-administration and self-management provides a productive means of ensuring self-determination for Indigenous people living outside Indigenous territories, however it does not provide an alternative to inherent sovereignty and self-government for Australia's Indigenous peoples. As shown in Australia, Indigenous organisations that perform these functions are vulnerable to interference by settler governments, or have had their functions restricted to the extent that they do not perform the level of decision-making needed for meaningful self-determination.

3. Relationship with the Right to Consultation and Free, Prior and Informed Consent

Unlike the examples of executive orders in the United States, there is a lack of overall obligation under Australian law to consult with Indigenous Australians and obtain their FPIC. This is reflected in the recent High Court decision of *Maloney v R* (2013) ('*Maloney*'), so far one of the few High Court judgements to have directly referenced the *UNDRIP*. In this case the High Court unanimously rejected a free standing duty to consult with Indigenous Australians regarding measures that affect them. The lack of overall commitment in Australian law to guarantee a right to consult Indigenous Peoples in order to obtain FPIC, represents a clear shortcoming of Australian law in achieving the commitment under Article 19 *UNDRIP*. Nonetheless certain measures, such as those affecting land held under native title, carry a requirement to obtain the FPIC of Indigenous peoples through Indigenous Land Use Agreements ('ILUAs') entered into between holders of native title and third parties.

Within the context of native title in Australia, there is a right of Indigenous Australians to be consulted in order to give FPIC with regard to measures affecting them, through ILUAs. Given that ILUAs may be entered into by native title claimants and private third parties, there is not necessarily a direct link to *UNDRIP* Article 19, which specifically refers to legislative and administrative measures by states. However there is a link to the general principle of consultation

[431] Sam Muir, 'The New Representative Body for Aboriginal and Torres Strait Islander Peoples: Just One Step' (2010) 14(1) *Australian Indigenous Law Review* 86, 92.
[432] Ibid 93
[433] De Villiers (n 420) 83.

in order to obtain FPIC. There is a controversy which has emerged between two divergent judicial decisions in *QGC Pty Ltd v Bygrave (No.2)* (2010) ('*Bygrave*'), which preconditioned the registration of ILUAs on obtaining the signatures of a majority of registered native title claimants, on the one hand, and *McGlade v Native Title Registrar* (2017) (*'McGlade'*), on the other hand, which suggested the signatures of all registered native title claimants.[434] The *McGlade* decision was later overturned in favour of the principle in *Bygrave* by Commonwealth legislation, with the Commonwealth Attorney-General citing the consistency with the *UNDRIP* principle of self-determination as one of the justifications for the legislation.[435] Certain Indigenous spokespeople have claimed that the legislative amendments contravened the same right to self-determination embodied in the *UNDRIP*.[436]

Whilst this legislation might be defended on the basis that it could make registering ILUAs more manageable and efficient, in could still contravene the *UNDRIP* in reducing the obligations of third parties to obtain FPIC from Indigenous people. Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples from 2014 until present, in response to Australia's legislative amendments stated that 'the principle of free, informed and prior consent does not require the consent of all'.[437] This seemed to suggest that the standards adopted in the *McGlade* decision were more burdensome than was required under the *UNDRIP* standards. However, as Stephen M Young asserts, there is an inherent problem from an Indigenous rights perspective in making amendments that are designed to make Indigenous land rights weaker.[438] Young also alludes to the problem that this amendment allowed the state to impose its own sovereignty by supporting the self-determination of the majority of native title claimants, at the expense of the minority of native title claimants.[439] This might also be regarded as problematic in light of the *UNDRIP*'s commitment to set the minimum standard for Indigenous rights,[440] and that the *UNDRIP* cannot be construed as 'diminishing or extinguishing the rights Indigenous peoples have now'.[441]

[434] Young (n 34) 197-8.
[435] Ibid 200.
[436] Ibid 201.
[437] 'End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia', *United Nations Human Rights Office of the High Commissioner* (3 April 2017) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21473&LangID=E>.
[438] Young (n 34) 204.
[439] Ibid 205.
[440] *UNDRIP*, UN Doc A/Res/21/265 (n 22) art 43.
[441] Ibid art 45.

More generally, the *Maloney* case shows the lack of any generally applicable right to consultation in order to obtain FPIC in Australia. This case involved an Indigenous appellant charged with possession of an amount of alcohol in excess of the statutory limit on the 'restricted area' of Palm Island in North Queensland.[442] Palm Island is a community 'composed almost entirely of Indigenous people' and is subject to special liquor restrictions as a 'restricted area', which are higher than those applied elsewhere in Queensland.[443] These especially high restrictions made it a criminal offense to be in possession of anything more than 'one carton of light or mid-strength beer'.[444] The appellant challenged the legislation as contrary to the *Racial Discrimination Act 1975* (Cth), which had been enacted in order to fulfil Australia's obligations under *International Convention on the Elimination of All Forms of Racial Discrimination* ('*ICERD*').[445] However this legislation allowed for so-called 'special measures', functioning as affirmative discriminatory actions, for the purpose 'securing adequate advancement of certain racial or ethnic groups'.[446] The appellant submitted that international jurisprudence had emerged so as to require that such 'special measures' require the consultation with, and FPIC from, the affected community before they are implemented.[447] The appellant made specific reference to Article 19 of *UNDRIP* as evidence of such emerging jurisprudence.[448]

The appellant argued that there had been no genuine consultations with, and that FPIC had been obtained from, the Indigenous community in order to impose this liquor restriction.[449] Of particular relevance is that this legislation was imposed unilaterally by the Queensland government.[450] Although Indigenous representative organisations for Palm Island had agreed that there was a need to curb alcohol related violence within the community, no agreement had been reached on the precise form that these restrictions should take.[451] In implementing the legislation, the Queensland government had admitted that its measures differed from those recommended by the representative organisations.[452] As Rachel Gear claims, although there were

[442] *Maloney v R* (2013) 298 ALR 308, 309.
[443] Ibid 308-9.
[444] Rachel Gear, 'Alcohol Restrictions and Indigenous Australians: The Social and Policy Implications of Maloney v the Queen' (2014-5) 21 *James Cook University Law Review* 41, 45.
[445] *Racial Discrimination Act 1975* (Cth) Preamble.
[446] Ibid s 8(1), citing *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1(1), 1(4).
[447] *Maloney* (n 439) 317.
[448] Ibid 370.
[449] Patrick Wall, 'Case Note: The High Court of Australia's Approach to the Interpretation of International Law and its Use of International Legal Materials in Maloney v R [2013] HCA 28' (2014) 15(1) *Melbourne Journal of International Law* 228, 244.
[450] Gear (n 441) 45.
[451] Ibid 44.
[452] Maloney (n 439) 368-9.

efforts made to consult with the Indigenous representative organisations, these had fallen short of consultation with the aim of securing FPIC.[453] The appellant contended that with further consultation with the community on Palm Island, a level of consensus could have been reached.[454]

In the appellant's submission, as well as the submission of third parties, there was a certain effort to prove that a general right to consultation in order to obtain FPIC had emerged in international as well as Australian law. In its submissions in *Maloney* the Parliamentary Joint Committee on Human Rights acknowledged that the obligation to consult with Indigenous peoples, regarding actions that affected them, represented customary international law.[455] Yet the same could not be said regarding the obligation to obtain their FPIC.[456] At a domestic level, in the case of *Gerhardy v Brown* (1985), Justice Brennan had also noted that consultation with Indigenous groups, who are the intended beneficiary of a special measure, is important, and 'perhaps essential'.[457] This was for the purpose of determining whether the measure was a legitimate special measure, within the context of Australian anti-racial discrimination law.[458]

In its ruling, the High Court acknowledged the general practical and policy advantages of consulting and obtaining the FPIC from Indigenous people regarding measures that affect them, whilst clearly stating that no such legal obligation in this respect exists.[459] The Court based its verdict on a positivist interpretation of the *Racial Discrimination Act* and the *ICERD*, which both omitted reference to the need to consult in order to obtain FPIC.[460] Consequently this obviated the need to imply obligations contained in extraneous international law materials such as the *UNDRIP*.[461] Chief Justice French noted that there was practical benefit to be found in consulting with, and obtaining the consent of, the affected community.[462] Justice Crennan found that there was no such need for consultation or FPIC in response to routine measures to limit the harms associated with alcohol use.[463] Furthermore the democratic mechanisms of Australia meant that consultation or FPIC could not be a 'precondition to the legality of a statute', 'however

[453] Gear (n 441) 59.
[454] *Maloney* (n 439) 372.
[455] Wall (n 446) 246.
[456] Ibid.
[457] *Gerhardy v Brown* (1985) 159 CLR 70, 139 (Brennan J).
[458] Ibid.
[459] Gear (n 441) 51, citing *Maloney* (n 439) [24] (French CJ), [91] (Hayne J), [128]-[136] (Crennan J), [186] (Kiefel J), [240] (Bell J), [357] (Gageler J).
[460] Simon Rice, 'Case Note: *Joan Monica Maloney v The Queen* [2013] HCA 28' (2013) 8(7) *Indigenous Law Bulletin* 28, 30.
[461] See *Maloney* (n 439) 370 (Bell J).
[462] Ibid 317 (French CJ).
[463] Ibid 343 (Crennan J).

precautionary or desirable' it may be.[464] By contrast, Justice Bell noted that '[f]oisting a perceived benefit on a group that neither seeks nor wants the benefit does not sit well with respect for the *autonomy* and dignity of the members of the group.'[465]

This correctly acknowledges the limited self-determination given to the Palm Island community in this instance, whose community structures were in effect overruled by the Queensland government. Justice Bell concluded that the Commonwealth has an obligation to ensure the 'adequate development and protection' of Indigenous communities, and that this could be compromised where consent is required from a community that is divided on the issue.[466] In suggesting this, she cites a submission by the Western Australian government contending '[h]ow … is the consent of adults who are addicted to alcohol to be obtained?'[467] In the circumstances it was therefore sufficient that the Indigenous representative organisations of Palm Island had accepted a general need for an Alcohol Management Plan, prior to the actions taken by the Queensland government.[468]

The decision shows certain deficiencies in Australia's implementation of *UNDRIP* Article 19. Justice Bell clearly acknowledges the importance of consultation and consent to achieving self-determination, by invoking the language of 'autonomy'. Her statement regarded the difficulty of obtaining consent from the Palm Island community does not completely reflect the standard expected by the *UNDRIP*. As shown above, according to the 'sliding scale' approach, it is arguable whether the measures implemented by the Queensland government reached the level of severity that was required in order to necessitate obtaining the FPIC of the Indigenous community. Regardless of the conclusion on this point, Article 19 ought to not be conflated with a duty to obtain FPIC from the affected Indigenous community for all measures, regardless of the degree to which they affect the community. Western Australia's intervention, which is referenced, reflects a degree of paternalism that is highly problematic in light of the overall requirement of self-determination. Moreover Article 19 requires that consent be obtained through the representative organisations of Indigenous peoples, rather than the community as a whole.

Justice Crennan's suggestion that a right to consultation in order to obtain FPIC could be met through the democratic system, is also inconsistent with the self-determination principle. As explained above, Indigenous peoples often represent minorities within states, therefore the

[464] Ibid 345.
[465] Ibid 371 (Bell J) (emphasis added).
[466] Ibid.
[467] Ibid.
[468] Ibid 374.

provision of self-government, autonomy and Article 19 rights in the *UNDRIP*, were regarded as crucial to Indigenous self-determination, given their lack of influence by way of mere participation in the political life of states. This is clearly articulated by Gear who expresses scepticism on the ability of the Palm Island community to alter the legislation, stating '[h]ow exactly the Island's marginalised population of approximately 2000 residents can accomplish this feat remains to be seen'.[469] What is perhaps missing for the Court's judgment is an acknowledgment that consultation under the *UNDRIP* is a substantive right, and as such could not be met as a mere procedural requirement. As such this could have been met through genuine attempts by the Queensland government to resolve the differences that had emerged in the Palm Island community.

By taking a strictly positivist view on Australian and international law, the High Court's decision in *Maloney* may also be criticized as being out of step with the progressive developments made in international law. As stated above, The High Court had based its judgment on the fact that, as a matter of positive law, neither the *Racial Discrimination Act* nor the *ICERD*, at the time they were drafted, explicitly required consultations in order for the enactment of 'special measures' against certain racial groups.[470] The appellant had argued that under a contemporary understanding of international law, consultations with, and FPIC of, intended beneficiaries were a necessary prior to the implementation of special measures.[471] Among other sources, *UNDRIP* Article 19, as well material of the United Nation's Committee on the Elimination of Racial Discrimination, state that consultations and even consent from intended beneficiary was a precondition to enacting 'special measures'.[472] Nonetheless, as stated above, the High Court determined that these subsequent developments did not alter the meaning of the *Racial Discrimination Act* or the *ICERD*. This has led to criticism by commentators such as Gear, that the High Court's interpretation of domestic and international law was frozen in time, ignoring the developments in international law which have occurred in the 40 years since Australia ratified the *ICERD*.[473] Patrick Wall concurs by stating that the Court unnecessarily limited its

[469] Gear (n 441) 62.
[470] Rice (n 457) 30.
[471] *Maloney* (n 439) 317.
[472] *UNDRIP*, UN Doc A/Res/21/265 (n 22) art 19; Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination,* UN GAOR, 52nd sess, UN Doc A/52/18 (1997) annex V [4(d)]; Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination,* UN GAOR, 64th sess, UN Doc A/64/18 (2009) annex VIII [18].
[473] Gear (n 441) 62-4.

interpretation, and, in doing so, inadequately considered the effect of customary international law and other supplementary materials, which have emerged over time.[474]

The *Maloney* decision reflects a general lack of a free-standing, legally-binding right to consultation in order to obtain FPIC for Australia's Indigenous peoples.[475] As stated by Gear, the decision concords with other rulings that have been made in several Australian lower court decisions.[476] This shows that Australian law does not yet meet the standard expected under *UNDRIP* Article 19. However, within the field of native title there is a unique adherence to its principle, yet this too might be weakened by actions such as the Commonwealth's legislative amendment to take away the need to obtain unanimous support for ILUAs for registered native title claimants.

[474] Wall (n 446) 250-1.
[475] Shireen Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples when Making Laws for Indigenous Affairs' (2015) 26(3) *Public Law Review* 166, 177.
[476] Gear (n 441) 52, citing *Morton v Queensland Police Service* [2010] QCA 160, [31] (McMurdo P), [114] (Chesterman J, Holmes J agreeing), and *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37, [81] (McMurdo P).

Chapter 5: Meeting the Standards Set by the UNDRIP

The *UNDRIP* provides the necessary foundations for reforming the law in the United States and Australia in order to better protect Indigenous self-determination. It will also be argued that treaties entered into between these countries and their Indigenous peoples could provide the best means of protecting Indigenous self-determination. Treaties could be instrumental in overturning the colonial doctrines of discovery, conquest and terra nullius, which have dominated the jurisprudence on Indigenous rights in both countries. It has been established that these doctrines are the bases upon which continual government interference, contrary to the right of self-determination, has been perpetrated. Both the United States and Australia conceive treaties as one of the legitimate bases upon which their sovereignty may be based. When considered alongside these colonial doctrines, treaties would establish a consensual power sharing arrangement which is contemplated in the *UNDRIP*.

The United States has an extensive jurisprudence on federal Indian law which, as shown in Chapter 3, has at times respected a high level of Indigenous self-determination. Nonetheless, over the course of almost 200 years since Chief Justice Marshall's decisions, this jurisprudence has proved highly inconsistent and contradictory. Part of this lies in the resurgence of the use of conquest and discovery in order to establish the United States' absolute jurisdiction over Indian tribes. Part of the solution to meeting the standards of self-determination set by the *UNDRIP* lies in using the established principles from earlier cases, such as the protectorate principle, and reinterpreting them in a manner consistent with self-determination, rather than paternalism. Furthermore, a more robust protection of the rights contained within the many treaties signed between the United States and Indian tribes is also required.

Australia, on the other hand, lacks this extensive jurisprudence and has instead shown a consistent denial of Indigenous self-determination. Unlike the United States, which acknowledges the potential for multiple sovereigns outside the bounds of the *United States Constitution* yet within its territorial borders, Australia is firmly rooted in the notion of the British Crown's exclusive sovereignty over Australia. What is required in this instance in a more fundamental revision of the legal relationship with its Indigenous peoples, potentially at a constitutional level, in order to address the denial of Indigenous self-determination by the Australian judiciary. The *UNDRIP*'s right to self-determination cannot co-exist alongside sovereignty which is based on terra nullius, as such treaty may provide a preferable means of portioning sovereignty.

1. United States

The *UNDRIP* requires that the judicial doctrines of the plenary power of Congress and implicit divestiture are revised in light of the protectorate principle which respects self-determination. In addition to a revision of the right to consultation in order to provide for FPIC under certain circumstances. As explained by Imai, Indian tribes in United States are granted the 'most explicit recognition of their autonomy' compared to other common law countries.[477] Using Imai's four categories of self-determination, Indian powers of self-determination is derived both from inherent sovereignty and self-government, as well as self-administration and self-management, having been assigned management of federal service and programs.[478] This represents a positive foundation for the realisation of Indigenous self-determination. Commentators, such as Echo-Hawk, have noted that most of the standards of self-determination expected by the *UNDRIP* can be met by returning to the principles established in *Worcester*.[479] The inherent nature of their sovereignty, and their status as nations under the protection of the United States, should therefore require that plenary powers of Congress ought to be exercised in a way which respects this autonomy rather than disempowers it, and is enacted on the condition of Indigenous FPIC under certain circumstances.

As they have been historically exercised, the plenary powers of Congress and implicit divestiture doctrines runs counter to the *UNDRIP* principles of self-determination. Echo-Hawk explains that, in order for the standards of the *UNDRIP* to be met, the precedent of *Lone Wolf*, as it confers an unfettered right on Congress to limit Indian self-determination, must be rejected.[480] He suggests that the use of the plenary powers doctrine, as a doctrine that historically has been used to divest Indian tribes of sovereign powers from the *Lone Wolf* precedent onward, reflects two fundamental flaws in federal Indian law. Firstly, it shows that Indian self-determination is not interpreted as an inherent human right.[481] Consequently the right has been subjected to 'modification, limitation and termination by Congress'.[482] He regards Indian self-determination as largely conforming to the right as it is embodied in the *UNDRIP*, except insofar as the

[477] Imai (n 143) 293.
[478] Benjamin J Richardson, 'The Dyadic Character of US Indian Law' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 51, 73.
[479] Echo-Hawk (n 227) 159.
[480] Ibid 186.
[481] Ibid 184-5.
[482] Ibid 185.

UNDRIP regards self-determination as an inherent human right, and federal Indian law does not.[483]

Importing this inherent human right characteristic to Indian self-determination would drastically limit the 'plenary' power of Congress, in the same manner that Congress has no plenary capacity to limit human rights against 'discrimination, torture, genocide, slavery, or piracy'.[484] This mirrors Ablavsky's assertion that the preferable interpretation of the Chief Justice Marshall decisions is that they guarantee 'inviolable sovereignty' to Indian tribes.[485] It would also stress the need to revisit the *Oliphant* precedent insofar as it allows that United States judiciary to infringe on this 'inviolable sovereignty'. In order to create such an inherent right, a partial solution, suggested by McNeil, could include a constitutional amendment similar to Section 35(1) of the *Canadian Constitution*. This section of the *Canadian Constitution* recognizes and affirms the treaty rights of Indigenous peoples,[486] effectively removing the Canadian Government's plenary powers over its Indigenous peoples.[487] This approach also clearly conforms to *UNDRIP* Article 37(1), which states that Indigenous peoples have a rights to 'observance and enforcement of treaties' which they have entered into with settler governments.[488] Treaties are clearly acknowledged in United States jurisprudence as one of the three means through which Indian tribes may lose sovereignty.[489] Alongside the plenary power doctrine and implicit divestiture, treaties are the only means of apportioning sovereignty in a way that is truly consistent with self-determination and *UNDRIP* Article 19. As such a constitutional recognition of treaty rights could be a positive way of resetting the bounds of Indian sovereignty in a manner consistent with the *UNDRIP*.

The second fundamental flaw in Indian self-determination, according to Echo-Hawk, is that the protectorate and guardianship principle has not been interpreted as it was originally formulated in *Worcester*. Instead, these principles have been used to erode the inherent human right to self-determination, as embodied in the *UNDRIP*. Rather than respecting Indian tribes as separate nations in need of protection, they have been used to show the inferiority and dependency of Indian tribes for the purposes of legitimising a domineering legislative approach from Congress.

[483] Ibid 184-5.
[484] Ibid 185.
[485] Ablavsky (n 279) 1087.
[486] *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*') s 35(1).
[487] Kent McNeil, 'Judicial Treatment of Indigenous Land Rights in the Common Law World' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 257, 282.
[488] *UNDRIP*, UN Doc A/Res/21/265 (n 22) art 37(1).
[489] Echo-Hawk (n 227) 17.

In *Worcester* Chief Justice Marshall conceived of the protectorate principle as a means of the United States protecting the 'integrity of self-governing Indian nations', rather than a means of oppressing them.[490] This sentiment is reciprocated by Sorenson who states that 'if sovereignty is to mean anything, it ought not to be extinguishable at the legislative whim of another sovereign',[491] reflecting similar reasoning used by Justice Thomas in *Lara*, outlined above. The *UNDRIP* instead requires that Congress should use its guardian and protector position to protect Indian self-determination, rather than diminish it. More recent cases, such as *Kandra v United States* (2001) have already shown some preference in the United States judiciary for this interpretation. In this instance it was stated that the United States 'as a trustee for the Tribes, is obligated to protect the Tribes' rights and resources'.[492]

The *UNDRIP* also seeks to reset the relationship between settler states and their Indigenous peoples through the introduction of rights contained in Article 19. Practices which are specifically targeted through this article include paternalism and the unfettered power of governments over Indigenous people. To this extent, Echo-Hawk suggests that this is further reason that the plenary power of Congress doctrine, as established in *Lone Wolf*, and the implicit divestiture doctrine must be overturned.[493] These two doctrines are designed to profoundly affect the self-determination of Indian tribes without consulting them or obtaining their FPIC. Furthermore, the general executive and legislative approach to measures that affect Indian tribes needs to be transformed from one requiring meaningful consultation, to one that creates more of a substantive right by requiring that the aim of such consultations is that FPIC is achieved. Moreover in certain cases, such as high-impact mineral extraction, FPIC must be a precondition for such measures. This may be achieved by future Executive Orders building upon *Executive Order 13175* in order to better reflect *UNDRIP* Article 19. Legislation must also generally recognise certain instances which have such profound effect on Indigenous communities that FPIC must first be obtained.

2. Australia

The lack of acknowledgement of any meaningful Indigenous self-determination in Australian jurisprudence suggests that there is a need for fundamental restructuring of the relationship between Indigenous Australians and the Commonwealth, by way of constitutional reform or

[490] Ibid 186.
[491] Sorenson (n 297) 131.
[492] *Kandra v United States*, 145 F. Supp. 2d 1192, 1204 (D Or, 2001) (Aicken J).
[493] Echo-Hawk (n 227) 210-1.

treaty. These means could be used in order to create an inviolable right to self-determination. They could reassert an inherent right to self-government and autonomy, similar to what was established in *Cherokee Nation*, but denied to Indigenous Australians, without adequate explanation, in the *Coe* decision. This would ensure that Indigenous Australians have a right to self-government which is not dependent on statute, and that extends beyond the narrow limits placed on self-government in the *Mabo* and *Yorta Yorta* decisions. Such reforms could also be fundamental in creating a general legal obligation equivalent to UNDRIP Article 19, in response to the general lack of willingness of the judiciary to recognise such an obligation in *Maloney*.

The persistence of the doctrine of terra nullius, insofar as it relates to the self-government of Indigenous Australians, may be explained by the persistence of colonialism in the Australian legal system. As McNeil describes, 'Australian law is … firmly anchored in the British tradition of a single sovereign entity – the Crown – from which all law-making authority emanates'.[494] When compared to Canada and the United States, it is the only country to uphold such a doctrine.[495] As such, this adherence to feudalism denied any inherent right to Indigenous self-government. This system was unlike the United States, which had effectively overthrown Crown authority and feudalism during the American Revolution.[496] The reluctance of Australian courts to acknowledge Indigenous self-government could also result from Justice Brennan's ruling in *Mabo*, which establishes the bounds of native title according to Indigenous laws and customs, rather than through continuous occupation.[497] The result means that greater acknowledgement of Indigenous law-making and self-government could endanger the rights of third parties and the Crown by continual changes to such laws.[498] By consequence this would understandably make the Australian judiciary reluctant to recognise more inherent Indigenous law-making authority.

Yet this status quo in Australia, along with being clearly at odds with the *UNDRIP* and Indigenous self-determination, is both factually inaccurate and legally unnecessary. This is acknowledged by McNeil, who asserts that Indigenous self-government had to exist as a matter of fact following colonisation, given the absence of any occupation or control over the interior of the Australian continent for over a century after colonisation.[499] Legally, the United States' example shows that Indigenous self-government can exist underneath the overarching

[494] McNeil, 'Indigenous Land Rights and Self-Governance' (n 242) 145.
[495] Ibid 146.
[496] Ibid 145.
[497] Ibid.
[498] Ibid.
[499] Ibid 145-6.

sovereignty of the settler state. Furthermore, this does not reflect legal power sharing arrangements within contemporary Australia. Commentators such as Vivian et al and Dylan Lino have noted that Australia already exists as a federal power-sharing arrangement between different political communities known as states,[500] and that Indigenous self-determination is not 'anti-thetical' to this current arrangement.[501] Moreover, Norfolk Island was granted self-determination within the Commonwealth of Australia in 1979. Lino suggests that Indigenous self-determination may be achieved through the concept of federalism.[502] He suggests that federalism as a concept amounts to 'self-rule combined with shared rule', therefore combining what Indigenous Australians seek through self-determination, as well as the *UNDRIP*'s conception of self-determination as respecting the territorial integrity of states.[503]

In order to grant Indigenous Australians self-determination through an inherent right to self-government, constitutional reform or treaty will be required, rather than the delegation of administrative authority by the Australian Government. As stated above, the *Mabo* decision contained an acknowledgement of cession as one of the valid forms of acquisition of sovereignty alongside conquest and terra nullius. Australian jurisprudence has consistently rejected conquest as the basis on which the British Crown obtained sovereignty,[504] similarly the theoretical basis of terra nullius has been comprehensively rejected. It logically follows that treaty is the only remaining way in which Indigenous and Commonwealth sovereignty can both be accommodated. Lino describes 'treaty federalism' as a model that could be pursued,[505] this involves political recognition of Indigenous self-governance and the 'consensual distribution of powers between Indigenous and settler peoples'.[506] Accepting Lino's definition of 'federalism' described above, the aspects of the treaty dealing with 'self-rule' of Indigenous Australians could include recognition of 'Indigenous jurisdiction over such issues as the use of land and natural resources, education, family arrangements, language, cultural heritage, health, law and order, taxation, private enterprise [among others]'.[507] Aspects regarding 'shared rule' could outline the limits to the jurisdiction of settler states regarding Indigenous communities, as well as the limits

[500] See Vivian et al (n 4); See Dylan Lino, 'Toward Indigenous-Settler Federalism' (2017) 28(2) *Public Law Review* 118.
[501] Vivian et al (n 4) 218.
[502] See Lino, 'Toward Indigenous-Settler Federalism' (n 497).
[503] Ibid 125.
[504] See *Coe* (n 388) 129 (Gibbs J).
[505] Lino, 'Toward Indigenous-Settler Federalism' (n 497) 126.
[506] Ibid, quoting Russel Lawrence Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (University of California Press, 1980) 270.
[507] Lino, 'Toward Indigenous-Settler Federalism' (n 497) 131.

on Indigenous communities to conduct external affairs.[508] McNeil's comment regarding the benefits of constitutionally enshrining treaty rights would also be highly useful in the Australian context after such a treaty comes into existence.

A treaty would also be a potential way of creating a general legal obligation on the Commonwealth and states to consult with Indigenous peoples in order to obtain their FPIC regarding the measures which affect them. Such a general statement of law could function in a similar way as executive orders have been used in the United States to set standards in this regard. This would also serve the purpose of updating Australia's understanding of 'special measures', in a manner that is consistent with contemporary international law. *Maloney* clearly shows that at present the High Court takes a positivist approach to domestic and international law, and is reluctant to reinterpret domestic law in light of non-legally binding texts such as the *UNDRIP*, as well as emerging customary international law. What is therefore required is an unambiguous statement of positive law from the legislature guaranteeing Indigenous Australians this right under *UNDRIP* Article 19. Scholars such as Shireen Morris have also argued for constitutional procedures to ensure consultation with Indigenous peoples occur prior to implementing measures affecting them.[509]

3. Comparing Approaches from Australia and the United States

Australia and the United States share similar colonial history, as well as justification for their sovereignty, however they owe their differences in the levels of self-determination given to their Indigenous peoples to the particularities in their colonial experience. The conflation of conquest and discovery, which emerged in *Johnson* on the one hand, and terra nullius on the other hand, reflect highly similar doctrines. Justice Brennan in *Mabo* for instance treats these doctrines as one and the same.[510] Both involve the conception that European 'discoverers' of North America and Australia found lands inhabited by Indigenous peoples whom they considered backward and without any form of sophisticated society. As such, occupation of these lands was considered sufficient in order to found the sovereignty of Europeans over Indigenous peoples in both instances, without the need for conquest.[511] Similarly, both doctrines continue to dispossess Indigenous peoples of their self-determination to the present day.

[508] Ibid.
[509] See Morris, (n 427).
[510] *Mabo* (n 372) 32 (Brennan J).
[511] Ibid.

Where the United States differs is in its allowance of indigenous sovereignty in its early jurisprudence, as well as the intricacies of the historical interaction between the Indian tribes and the United States. As explained by McNeil, this may partially be due to the American Revolution and the associated overturning of the feudal structure based on Crown sovereignty. Furthermore, the *United States Constitution*, through clauses such as the Indian Commerce Clause, clearly considered the Indian as separate from the rest of the United States and akin to foreign countries. Others, such as Echo-Hawk, explain the doctrine established in the *Worcester* decision as an attempt by Chief Justice Marshall to protect Indian tribes against the contemporary abuses by federal authorities.[512] This historical foundation for the relationship between Indian tribes and the United States has enabled a development of federal Indian law which grants a degree of self-determination which, to a large extent, reflects the *UNDRIP* standards.

By contrast, Australia shows a greater reliance of colonial doctrines and lacks the same recognition of Indigenous self-determination. The *Australian Constitution* lacks any recognition of Indigenous Australians. As stated by McNeil, Australia experienced no equivalent to the American Revolution and there is still an enduring legacy of colonialism given the British Crown's role the constitutional monarchy system of government which is established in the *Constitution*. During the 19th Century, in which the Chief Justice Marshall's decisions were handed down, Australian jurisprudence, as set by the United Kingdom Privy Council decision in *Cooper v Stuart* (1889), still firmly established that the British Crown's sovereignty over Australia was established by terra nullius. This was justified on a finding that Australia was not inhabited by 'settled' people with established legal systems.[513]

Therefore, although the United States, through its jurisprudence, has continually removed aspects of Indian tribal sovereignty, and the doctrines of discovery and conquest continue to influence federal Indian law, this aspect of the historical relationship has still provided a basis for permitting Indian tribes a relatively high degree of self-determination. Australia by contrast, still requires a decolonisation of its jurisprudence concerning Indigenous rights, as was commenced but not completed in the *Mabo* decision.

[512] Echo-Hawk (n 227) 118.
[513] *Cooper v Stuart* (1889) 14 App Cas 286, 291 (Lord Watson).

Conclusion

The right to self-determination in international law has historically suffered from a lack of a clear definition, and the tendency for it to be interpreted so broadly that it in effect becomes meaningless. Weller suggests that this has also been true for the domestic implementation of self-determination under the *UNDRIP*, which has been officially used by states 'to legitimize the solutions that have been adopted, instead of fundamentally questioning them.'[514] In this respect this thesis sought to answer three central questions regarding self-determination in the *UNDRIP*. First, how is the self-determination defined in the *UNDRIP*? Second, have the United States and Australia met the standard expected in the *UNDRIP*? And third, what can these states do to conform themselves to these standards?

In answering the first question it is clear that the *UNDRIP* has in fact provided the first workable definition of self-determination. This right to self-determination is the same as the right as it exists under general international law, and explicitly does not contain a right to secession. Self-determination in the *UNDRIP* is by no means limited to ensuring inherent self-government, autonomy and the right to consultation in order to obtain FPIC, yet these are clear ways in which it can be achieved. States, when implementing the *UNDRIP*, must ensure that they grant an inherent right to sovereignty and self-government which exists outside the limitation of government statute. They must also allow a general right of Indigenous people to be consulted, in order to obtain their FPIC, regarding the measures that affect them. In certain instances this will be the right to consult, in which indigenous people have a meaningful say in the final decision. On other measures bearing profound consequences on Indigenous peoples, such as high impact developments on their territory, their FPIC must first be obtained.

Concerning the second question it is clear that, at present, neither the United States, nor Australia, meet the standard expected by the UNDRIP. The examples of these states reflect the challenges posed by *UNDRIP* in countries which have historically based their legally relationship with their Indigenous peoples on the outdated colonial doctrines of conquest, discovery and terra nullius. In spite of clear efforts in decisions such as *Worcester* and *Mabo* to reduce the effects of these factually and legally erroneous doctrines, they nonetheless continue to shape Indigenous rights in both countries. Problematic notions such as the plenary power of Congress, implicit divestiture, exclusive sovereignty of the British Crown, as well as denying rights similar to those in *UNDRIP* Article 19, each imply that the European discovery and colonisation of the respective

[514] Weller (n 3) 149.

counties had the effect of terminating the sovereign rights of their Indigenous peoples against their will. Accordingly, there have been efforts to clearly denounce these colonial doctrines during the international development of Indigenous rights,[515] and this is implicitly acknowledged in paragraph 4 of the *UNDRIP* preamble, outlined above.

Finally regarding the third question, treaties are a means acknowledged by the law of both countries, as well as the *UNDRIP*, as a way of apportioning sovereignty between Indigenous peoples and the state in a manner that is consensual and therefore respectful of their self-determination. Such treaties should allow Indigenous peoples in both countries an inherent right to sovereignty and self-government over certain matters. They should also allow for a general right of Indigenous peoples to be consulted in order to obtain their FPIC regarding measures affecting them. The United States has a long history of entering into treaties with its Indigenous peoples. However this was formally ended by Congress in 1871. Furthermore, there is a lack of constitutional mechanism through which Indigenous peoples can enforce these treaty rights. Australia on the other hand, has never formally entered into a treaty with its Indigenous people. However there are signs that this will soon change with both Victorian and South Australian state governments currently undergoing treaty negotiations with their respective Indigenous peoples.[516]

The *UNDRIP* shows the potential for international instruments, even where non-binding, to be crucial means of questioning and progressively developing domestic law. Although there is only, at best, limited implementation of the *UNDRIP* in Australia and the United States, it nonetheless serves as a yardstick for the purpose of critiquing domestic law. It also serves as a positive example of the way that the framework of international law may be used by peoples who have been denied fundamental rights, such as the right to self-determination, in their own jurisdiction, to appeal to the international community to rectify injustices perpetrated and ignored over centuries.

[515] *Declaration of Principles*, UN Doc E/CN.4/Sub.2/1985/22 (n 24) annex IV, 1.
[516] Lino, 'Toward Indigenous-Settler Federalism' (n 497) 130.

English Abstract

Arguably the most controversial right contain with the 2007 *United Nations Declaration of the Rights of Indigenous Rights* (‘*UNDRIP*’) is the right to self-determination for Indigenous peoples. The inclusion of this right was controversial for several reasons, including the general association of the right with a right to secession and its lack of a firm definition. This creates uncertainty regarding how states should go about implementing the right to self-determination.

This thesis seeks to resolve the ambiguity surrounding the implementation of the right to self-determination in Australia and the United States, by answering three central questions. Firstly what does the right to self-determination, as it is included in the *UNDRIP*, consists of, and how can states enable a right of Indigenous peoples to self-determination? Secondly, does the status of Indigenous rights in Australia and the United States currently meets the standards of the *UNDRIP* concerning self-determination? Thirdly, should these states not meet the standard of self-determination expected in the *UNDRIP*, how can they change their jurisprudence in order to conform to this standard?

In answering the first question it will be argued that the right to self-determination in the *UNDRIP* is identical to the right to self-determination as it exists in general international law. Under general international law, the right to self-determination does not consist of a right to secession, nor does the right as it exists under the *UNDRIP*. In implementing the *UNDRIP*’s right to self-determination, states must firstly allow for inherent sovereignty and self-government for Indigenous peoples, this must exist as a right outside the limitations of government statute. Secondly they must allow a right to Indigenous peoples to be consulted in order to obtain their free, prior and informed consent regarding measures affecting them. This right will under certain circumstances give Indigenous peoples a right to veto such measures.

Regarding the second and third questions, Australia and the United States at present do not meet the standards expected by the *UNDRIP* through the right to self-determination. The jurisprudence regarding Indigenous rights in both countries relies on colonial doctrines such as conquest, discovery and terra nullius, which have denied their Indigenous peoples a full expression of the two aforementioned aspects of the *UNDRIP* right to self-determination. It will be suggested that one way in which both countries can achieve the standard expected by the *UNDRIP*, is by using treaties as a consensual means of dividing sovereignty between these states and their Indigenous peoples. Furthermore, these rights contained within such treaties should be constitutionally protected to ensure against infringement by states.

German Abstract

Das wohl umstrittenste Recht der 2007 erschienenen Deklaration der Rechte von indigenen Bevölkerungsgruppen der Vereinten Nationen (*UNDRIP*) ist das Recht auf Selbstbestimmung jener Bevölkerungsgruppen. Das Miteinbeziehen dieses Rechtes war aufgrund mehrerer Gründe umstritten, z.B. wegen dem generellen Zusammenhang dieses Rechtes mit dem Recht auf Abspaltung oder das Fehlen einer klaren Definition. Dies führt zu Unsicherheit im Bezug darauf, wie Staaten das Recht auf Selbstbestimmung anwenden sollen.

Diese Masterarbeit hat das Ziel die Unklarheit über die Anwendung des Rechts auf Selbstbestimmung in Australien und Nordamerika zu klären. Dabei werden drei zentrale Fragen beantwortet. Erstens, woraus das Recht der Selbstbestimmung, wie in der *UNDRIP* definiert, besteht und wie Staaten den indigene Bevölkerungsgruppen das Recht auf Selbstbestimmung ermöglichen können. Zweitens, inwiefern der aktuelle Status der Rechte von indigenen Bevölkerungsgruppen in Australien und Nordamerika die Standards der in der *UNDRIP* festgelegten Selbstbestimmung erfüllt. Drittens, sollten diese Staaten diese Standards nicht erfüllen, wie sie ihre Rechtsprechung ändern könnten, um mit diesen Standards übereinzustimmen.

Um die erste Frage zu beantworten, wird argumentiert, dass das Recht auf Selbstbestimmung in der *UNDRIP* identisch ist mit dem Recht auf Selbstbestimmung, welche im allgemeinen internationalen Recht existiert. Im allgemeinen internationalen Recht besteht das Recht auf Selbstbestimmung nicht aus dem Recht auf Abspaltung. Das Gleiche gilt für das Recht, welches im Zusammenhang mit der *UNDRIP* existiert. Um das Recht auf Selbstbestimmung der *UNDRIP* umzusetzen, müssen Staaten eine angeborene Eigenständigkeit und Selbstregulierung für Ureinwohner zuerst erlauben. Dies muss als Recht außerhalb der Limitationen des Regierungsgesetzes existieren. Zweitens, müssen sie ein Recht erlauben, bei dem die Ureinwohner herangezogen werden, um ihre freie, vorherige und informierte Zustimmung im Bezug auf sie betreffende Maßnahmen zu gewährleisten. Unter gewissen Umständen wird dieses Recht indigenen Bevölkerungsgruppen das Recht geben, Einspruch bei solchen Maßnahmen zu erheben.

Bezugnehmend auf die zweite und dritte Frage erfüllen Australien und Nordamerika die Standards, welche von der *UNDRIP* in Form des Rechts auf Selbstbestimmung festgelegt

wurden, gegenwärtig nicht. Die Rechtsprechung im Bezug auf indigene Rechte in beiden Ländern, basierend auf kolonialen Grundsätzen wie Unterwerfung, Entdeckung und „Terra nullius“, haben ihren indigenen Bevölkerungsgruppen die vollständige Erfüllung der zwei oben genannten Aspekte der *UNDRIP* Rechts auf Selbstbestimmung verwehrt. Eine Möglichkeit, bei der beide Länder die Standards des *UNDRIP* erfüllen, könnte die sein, Verträge als ein einvernehmliches Mittel zu verwenden, um die Eigenständigkeit zwischen diesen Staaten und ihren indigenen Bevölkerungsgruppen aufzuteilen. Außerdem sollten diese in den Verträgen enthaltenen Rechte konstitutionell geschützt werden, um eine Rechtsverletzung durch Staaten zu vermeiden.

Bibliography

A *Articles/Books/Reports*

Ablavsky, Gregory, 'Beyond the Indian Commerce Clause' (2015) 124 *Yale Law Journal* 1012

Åhrén, Matthias, *Indigenous Peoples' Status in International Law* (Oxford University Press, 2016)

Allen, Stephen, 'The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 225

Anaya, S James, *Indigenous Peoples in International Law* (Oxford University Press, 1st ed, 1996)

Anaya, S James, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004)

Anaya, James, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22(1) *Arizona Journal of International & Comparative Law* 7

Anaya, S James, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs, 2009) 184

Australian Human Rights Commission, 'Right to Self-Determination', *Australian Human Rights Commission* (Web Page, 30 April 2013) <https://www.humanrights.gov.au/our-work/rights-and-freedoms/right-self-determination#Native>

Baldwin, Clive, and Cynthia Morel, 'Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 121

Barelli, Mauro, 'Shaping Indigenous Self-Determination: Promising or Unsatisfactory Conclusions?' (2011) 13 *International Community Law Review* 413

Barelli, Mauro, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (Routledge, 1st ed, 2016)

Barelli, Mauro, 'Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)' in Jesse Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 247

Barsh, Russel Lawrence, and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (University of California Press, 1980)

Burger, Julian, 'The UN Declaration on the Rights of Indigenous Peoples: From Advocacy to Implementation' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 41

Cassese, Antonio, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995)

Charters, Claire, 'Indigenous Peoples' Rights to Lands, Territories, and Resources in the UNDRIP: Articles 10, 25, 26, and 27' in Jesse Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 395

Churchill, Ward, 'A Travesty of a Mockery of a Sham: Colonialism as Self-Determination in the UN Declaration on the Rights of Indigenous Peoples' (2011) 20(3) *Griffith Law Review* 526

Cornell, Stephen, 'Nation-Building and the Treaty Process' (2002) 5(17) *Indigenous Law Bulletin* 7

Cowan, Anna, 'UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Northern Territory of Australia' (2013) 22(2) *Pacific Rim Law & Policy Journal* 247

Davis, Megan, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17

Daes, Erica-Irene, 'The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous' (2001) 14 *St Thomas Law Review* 259

Daes, Erica-Irene, 'The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 11

Deloria Jr, Vine, 'Self-Determination and the Concept of Sovereignty' in John R Wunder (ed), *Native American Sovereignty* (Garland Publishing, 1996) 118

De Villiers, Bertus, 'Self-Determination for Aboriginal and Torres Strait Islander Peoples: Is the Answer Outside the Territorial-Square?' (2014) 16 *University of Notre Dame Australia Law Review* 74

Echo-Hawk, Walter R, *In the Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples* (Fulcrum Publishing, 2013)

Erueti, Andrew, 'The International Labour Organization and the Internationalisation of the Concept of Indigenous Peoples' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 93

Fletcher, Matthew J M, 'Tribal Consent' (2012) 8 *Stanford Journal of Civil Rights & Civil Liberties* 45

Fredericks, Carla F, 'Operationalizing Free, Prior, and Informed Consent' (2016/17) 80(2) *Albany Law Review* 429

Gear, Rachel, 'Alcohol Restrictions and Indigenous Australians: The Social and Policy Implications of Maloney v the Queen' (2014-5) 21 *James Cook University Law Review* 41

Gilbert, Jérémie, and Cathal Doyle, 'A New Dawn over the Land: Shedding Light on Collective Ownership and Consent' in in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 289

Gover, Kirsty, 'Settler–State Political Theory, "CANZUS" and the UN Declaration on the Rights of Indigenous Peoples Settler-State' (2015) 26(2) *European Journal of International Law* 245

Hunt, Janet, and Diane Smith, 'Understanding and Engaging with Indigenous Governance: Research Evidence and Possibilities for Engaging with Australian Governments' (2011) 14(2-3) *Journal of Australian Indigenous Issues* 30

Imai, Shin, 'Indigenous Self-Determination and the State' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 285

Kingsbury, Benedict, 'Indigenous Peoples' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online at 19 August 2019)

Kinnison, Akilah Jenga, 'Indigenous Consent: Rethinking US Consultation Policies in Light of the UN Declaration on the Rights of Indigenous Peoples' (2011) 53(4) *Arizona Law Review* 1301

Knop, Karen, *Diversity and Self-Determination in International Law* (Cambridge University Press, 2002)

Korosy, Zsofia, 'Native Title, Sovereignty and the Fragmented Recognition of Indigenous Law and Custom' (2008) 12(1) *Australian Indigenous Law Review* 81

Lenzerini, Frederico, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples' (2006) 42 *Texas International Law Journal* 155

Lino, Dylan, 'The Politics of Inclusion' (2010) 34(3) *Melbourne University Law Review* 839

Lino, Dylan, 'Toward Indigenous-Settler Federalism' (2017) 28(2) *Public Law Review* 118

Little, Becky, 'Boarding Schools Once Separated Native American Children Families', *History* (Web Page, 1 November 2018) <https://www.history.com/news/government-boarding-schools-separated-native-american-children-families>

McGee, Brant, 'The Community Referendum: Participatory Democracy and the Right to Free, Prior, and Informed Consent to Development' (2009) 27(2) *Berkeley Journal of International Law* 570

McHugh, P G, *Aboriginal Societies and the Common Law* (Oxford University Press, 2004)

McNeil, Kent, 'Judicial Treatment of Indigenous Land Rights in the Common Law World' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 257

McNeil, Kent, 'Indigenous Land Rights and Self-Governance: Inseparable Elements' in Lisa Ford and Tim Rowse (eds), *Between Indigenous and Settler Governance* (Routledge, 2012) 135

Miller, Russell A, 'Collective Discursive Democracy as the Indigenous Right to Self-Determination' (2007) 31(2) *American Indian Law Review* 341

Morris, Shireen, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples when Making Laws for Indigenous Affairs' (2015) 26(3) *Public Law Review* 166

Muir, Sam, 'The New Representative Body for Aboriginal and Torres Strait Islander Peoples: Just One Step' (2010) 14(1) *Australian Indigenous Law Review* 86

Newton, Neil Jessup (ed), *Cohen's Handbook of Federal Indian Law* (Lexis Nexis, 2005 ed)

Newton, Neil Jessup (ed), *Cohen's Handbook of Federal Indian Law* (Lexis Nexis, 2012 ed)

Pulitano, Elvira, 'Introduction' in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press, 2012) 1

Quane, Helen, 'The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 259

Rice, Simon, 'Case Note: Joan Monica Maloney v The Queen [2013] HCA 28' (2013) 8(7) *Indigenous Law Bulletin* 28

Richardson, Benjamin J, 'The Dyadic Character of US Indian Law' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 51

Routel, Colette, and Jeffrey Holth, 'Toward Genuine Tribal Consultation in the 21st Century' (2013) 46(2) *University of Michigan Journal of Law Reform* 417

Scheinin, Martin, and Mattias Åhrén, 'Relationship to Human Rights and Related International Instruments' in Jesse Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 63

Schulte-Tenckhoff, Isabelle, 'Treaties, Peoplehood, and Self-Determination: Understanding the Language of Indigenous Rights' in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press, 2012) 65

Shaw, Malcolm, *International Law* (Cambridge University Press, 8th ed, 2017)

Sorenson, Lance F, 'Tribal Sovereignty and the Recognition Power' (2017) 42(1) *American Indian Law Review* 69

Stavenhagen, Rodolfo, 'Making the Declaration on the Rights of Indigenous Peoples Work: The Challenge Ahead' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 147

Thürer, Daniel, and Thomas Burri, 'Self-Determination' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online at 19 August 2019)

Vivian, Alison, et al, 'Indigenous Self-Government in the Australian Federation' (2017) 20 *Australian Indigenous Law Review* 215

Wall, Patrick, 'Case Note: The High Court of Australia's Approach to the Interpretation of International Law and its Use of International Legal Materials in Maloney v R [2013] HCA 28' (2014) 15(1) *Melbourne Journal of International Law* 228

Webb, Jill, 'Indigenous Peoples and the Right to Self-Determination' [2012] (13) *Journal of Indigenous Policy* 75

Weissner, Siegfried, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples' (2008) 41 *Vanderbilt Journal of Transnational Law* 1141

Weissner, Siegfried, 'Indigenous Self-Determination, Culture, and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples' in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press, 2012) 31

Weller, Marc, 'Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23, and 46(1)' in Jesse Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 115

Wilde, Ralph, 'Kosovo (Advisory Opinion)' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online at 26 August 2019)

Xanthaki, Alexandra, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10(1) *Melbourne Journal of International Law* 27

Xanthaki, Alexandra, 'Culture: Articles 11(1), 12, 13(1), 15, and 34' in Jesse Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 273

Young, Stephen M 'The Self Divided: The Problems of Contradictory Claims to Indigenous Peoples' Self-Determination in Australia' (2019) 23(1-2) *The International Journal of Human Rights* 193

B *Cases*

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) [2010] ICJ Rep 403

Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury [2010] QCA 37

Cherokee Nation v Georgia, 30 US 1 (1831)

Cherokee Nation v Georgia, [1831] US Lexis 337 (1831)

Coe v Commonwealth of Australian and Another (1979) 24 ALR 118

Coe v The Commonwealth and Another (1978) 18 ALR 592

Coe (on behalf of the Wiradjuri tribe) v Commonwealth of Australia and Another (1993) 118 ALR 193

Cooper v Stuart (1889) 14 App Cas 286

Duro v Reina, 495 US 676 (1990)

Ex parte Crow Dog 109 US 556 (1883)

Gerhardy v Brown (1985) 159 CLR 70

Johnson v M'Intosh, 21 US 543 (1823)

Kandra v United States, 145 F. Supp. 2d 1192 (D Or, 2001)

Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) (International Court of Justice, General List No 169, 25 February 2019)

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226

Lone Wolf v Hitchcock 187 U.S. 553 (1903)

Mabo v Queensland (No 2) 175 CLR 1

Members of the Yorta Yorta Aboriginal Community v Victoria and Others (2002) 194 ALR 538

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14

Montana v United States, 450 US 544 (1981)

Morton v Queensland Police Service [2010] QCA 160

Nevada v Hicks, 533 US 353 (2001)

Oglala Sioux Tribe of Indians v Andrus, 603 F 2d 707 (8th Cir, 1979)

Oliphant v Suquamish Tribe of Indians, 435 US 191 (1978)

Reference Re Secession of Quebec [1998] 2 SCR 217

United States v Kagama, 118 U.S. 375 (1885)

United States v Lara, 541 US 193 (2004)

United States v Wheeler, 435 US 313 (1978)

Santa Clara Pueblo v Martinez, 436 US 49 (1978)

Saramaka People v Suriname (Judgment) (Inter-American Court of Human Rights, Series C No 172, 28 November 2007)

Strate v A-1 Contractors, 520 US 438 (1997)

Walker v State of New South Wales (1994) 126 ALR 321

Western Sahara (Advisory Opinion) [1975] ICJ Rep 12

Williams v Lee, 358 US 217 (1959)

Worcester v Georgia, 31 US 515 (1832)

C *Legislation*

Canada Act 1982 (UK) c 11, sch B (*'Constitution Act 1982'*)

National Environmental Policy Act, 42 USC § 4321 (1969)

National Historic Preservation Act, 16 USC § 470 (1966)

Racial Discrimination Act 1975 (Cth)

United States Constitution

D *Treaties*

Charter of the United Nations

Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991)

International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

International Covenant on Economic and Social Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)

International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)

E *Other Primary Materials*

Anaya, S James *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN GAOR, 66th sess, UN Doc A/66/288 (10 August 2011)

'Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples', *US Department of State* (Press Release, 12 January 2011) <https://2009-2017.state.gov/s/srgia/154553.htm>.

Chávez, Luis-Enrique, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, UN ESCOR, 56th sess, UN Doc E/CN.4/2000/84 (6 December 1999)

Chávez, Luis-Enrique, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session*, UN ESCOR, 62nd sess, UN Doc E/CN.4/2006/79 (22 March 2006) annex I

Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination,* UN GAOR, 52nd sess, UN Doc A/52/18 (1997) annex IV

Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination,* UN GAOR, 64th sess, UN Doc A/64/18 (2009) annex VIII

Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res 2625, UN GAOR, 25th sess, UN Doc A/RES/2625 (24 October 1970)

Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514, UNGAOR, 15th sess, 947th plen mtg, UN Doc A/RES/1514 (14 December 1960)

Daes, Erica-Irene, *Report of the Working Group of Indigenous Populations on its Fourth Session*, UNESCOR, 38th sess, Agenda Item 11, UN Doc E/CN.4/Sub.2/1985/22 (27 August 1985) annex III ('*Declaration of Principles*')

Daes, Erica-Irene, *Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, UNESCOR, 45th sess, UN Doc E/CN.4/Sub.2/1993/26/Add. 1 (19 July 1993)

Daes, Erica-Irene, *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN ESCOR, 45th sess, UN Doc E/CN.4/Sub.2/1993/29 (23 August 1993)

Eide, Asbjorn, and Erica-Irene Daes, *Working Paper on the Relationship and Distinction between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples*, UN ESCOR, 52nd sess, UN Doc E/CN.4/Sub.2/2000/10 (19 July 2000)

'End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia', *United Nations Human Rights Office of the High Commissioner* (3 April 2017) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21473&LangID=E>.

Executive Order No. 12875, 'Enhancing the Intergovernmental Partnership', 58 Fed Reg 58,093 (26 October 1993).

Information Received from the Australian Government, UN ESCOR, 52nd sess, UN ESCOR, UN Doc E/CN.4/1995/WG.15/2/Add.2 (30 November 1995)

International Labour Organisation, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No 107)*, 75th sess, Agenda Item 6, ILO Doc Report VI(1) (1988)

International Labour Organisation, 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)', *International Labour Organisation* (Web Page) <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314>

International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law*, Report of the Sixty-Ninth Conference of the International Law Association (2000),

International Law Association, Interim Report, *The Hague Conference (2010): Rights of Indigenous Peoples* (2010)

Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making, UN GAOR, 3rd sess, UN Doc A/HRC/EMRIP/2010/2 (17 May 2010)

Report of the Committee on the Elimination of Racial Discrimination: Fifty-Eighth Session (6-23 March 2001); Fifty-Ninth Session (30 July-17 August 2001), UN GAOR, 56th sess, Supp No 18, UN Doc A/56/18 (30 October 2001)

Stavenhagen, Rodolfo, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN ESCOR, 59th sess, UN Doc E/CN.4/2003/90 (21 January 2003)

UN GAOR, 61st sess, 107th plen mtg, UN Doc A/61/PV.107 (13 September 2007)

UN GAOR, 61st sess, 108th plen mtg, UN Doc A/61/PV.108 (13 September 2007)

United Nations Declaration on the Rights of Indigenous Peoples, GA Res 21/265, UN GAOR, 61st sess, Agenda Item 68, UN Doc A/Res/21/265 (2 October 2007, adopted 13 September 2007)

Urrutia, José, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, UN ESCOR, 53rd sess, UN Doc E/CN.4/1997/102 (10 December 1996)