

2005

Self-Determination in International Mediation: Some Preliminary Reflections

Jacqueline Nolan-Haley

Fordham University School of Law, jnolanhaley@law.fordham.edu

Follow this and additional works at: http://ir.lawnet.fordham.edu/faculty_scholarship

 Part of the [Dispute Resolution and Arbitration Commons](#), [International Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Jacqueline Nolan-Haley, *Self-Determination in International Mediation: Some Preliminary Reflections*, 7 *Cardozo J. Conflict Resol.* 277 (2005-2006)

Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/284

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

SELF-DETERMINATION IN INTERNATIONAL MEDIATION: SOME PRELIMINARY REFLECTIONS

*By: Jacqueline Nolan-Haley**

I. INTRODUCTION¹

Few concepts have generated as much discussion in the post-war international legal system as that of “self-determination.” Scholars debate the proper identity of the “selves” endowed with this right, its boundaries and its normative relevance. When the focus turns to mediation, the discussion becomes murky because the concept of self-determination has both procedural and substantive components and is noticeably different in the private and public sectors.²

The generic concept of self-determination relates to ideas of democratic governance and the Enlightenment belief that legitimate government depends upon the consent of the governed. As adapted to private mediation theory, the right of self-determination allows parties to participate in decision-making and voluntarily determine the outcome of their disputes. This understanding of self-determination is rooted in the philosophical principle of personal autonomy and is expressed through the legal doctrine of informed consent. The simple version of the normative story states that those who are affected by a dispute should voluntarily consent to the outcome of that dispute. In short, “party” self-determination in mediation gives ownership of the conflict to the disputants.

The self-determination story becomes more complex under international law. In theory, as a substantive legal principle, self-determination is the foundational value of the sovereign state, broadly understood as a democratic principle that requires the consent of the governed. International law limits the legal privilege of

* Professor of Law, Director ADR and Conflict Resolution Program, Fordham University School of Law.

¹ I would like to thank my research assistant, Devin Tuohey, for his valuable assistance in the preparation of this Article.

² In this Article, the term “private sector mediation” refers to the mediation of disputes or conflicts between private parties. The term “public sector mediation” refers to the mediation of disputes or conflicts between states, ethnic groups and communities.

self-determination to nations and peoples, referring to “national” rather than “party” or “group” self-determination.³

In contrast to its honored status in private mediation, little attention is paid to the procedural aspects of self-determination in public mediation.⁴ This Article will focus on how we account for this missing process value in public mediation discourse, and why the discourse matters.⁵

II. SELF-DETERMINATION IN PRIVATE MEDIATION

The principle of self-determination in mediation offers procedural justice protections, providing parties with fairness and dignity.⁶ The inherent attraction of self-determination is its connection to self-governance and individual autonomy. In U.S. domestic practice, self-determination is widely accepted as the intrinsic value of mediation.⁷ The legal principle of informed consent provides the structure through which this value is measured.⁸ Informed consent promotes respect for human dignity through its emphasis on participatory, knowledgeable and consensual decision-making. Parties’ perceptions of procedural justice are enhanced when they actively participate in the mediation process and

³ See ANTONIO CASSESE, *INTERNATIONAL LAW* 108 (2001) [hereinafter CASSESE]; HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 151 (2000) [hereinafter CHARLESWORTH & CHINKIN]; Gregory H. Fox, *Book Review, Self-Determination in the Post-Cold War Era: A New Internal Focus?* 16 *MICH. J. INT’L L.* 733 (1995) (“The self endowed with the right to determine its future must coincide with the territorial state.”).

⁴ A recent notable exception is Eileen Babbitt, *Self-Determination as a Component of Conflict Intractability: Implications for Negotiation*, in *NEGOTIATING SELF-DETERMINATION* 115 (Hurst Hannum & Eileen F. Babbitt eds., 2006).

⁵ This is part of a larger project on the forms and limits of self-determination in mediation.

⁶ A rich literature on procedural justice suggests that parties are more likely to believe that they have received distributive justice if they feel that they have been treated fairly. See, e.g., Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 *LAW & SOC. INQUIRY* 983 (2000); Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 *J. LEGAL EDUC.* 49 (2004) (discussing benefits of procedural justice in conflict resolution processes).

⁷ See *MODEL STANDARDS OF CONDUCT FOR MEDIATORS* (2005) Standard I (stating that a mediator shall conduct a mediation based on the principle of party self-determination); *MODEL STANDARDS OF CONDUCT FOR MEDIATORS*, Standard II (noting that the impartiality of a mediator reinforces self-determination); *MODEL STANDARDS OF CONDUCT FOR MEDIATORS*, Standard VI (explaining that the quality of the process directs the mediator to conduct the process in a manner that promotes party participation and self-determination).

⁸ Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 *NOTRE DAME L. REV.* 775 (1999).

voluntarily consent to an outcome that is free of any coercive influences. European mediation practice is similar in this regard. The proposed European Code of Conduct for Mediators advises mediators to give all parties adequate opportunity to be involved in the mediation process and to ensure that all agreements are reached through informed consent.⁹

Notwithstanding the strong emphasis on self-determination in private mediation, scholars have observed a disconnect between its theory and practice.¹⁰ While self-determination *appears* to be an explicit value in private mediation, in fact, much depends upon the “frame” in which mediation is conducted and the place and the culture in which mediation takes place. Expressions of self-determination may look very different depending upon whether mediation is labeled facilitative or evaluative,¹¹ transformative¹² or narrative,¹³ and whether it occurs in a court-based facility¹⁴ or with private providers.¹⁵ More importantly, the lens of culture is a criti-

⁹ See EUROPEAN CODE OF CONDUCT FOR MEDIATORS, Section 3.3, available at <http://www.adrgroup.co.uk> (“The mediator shall take all appropriate measures to ensure that any understanding is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement.”) (last visited April 3, 2005).

¹⁰ Empirical studies of civil court mediation in the U.S. suggest that practice does not follow theory and that party self-determination is of secondary importance to judges, lawyers and parties. Bobbi McAadoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399 (2004/2005) (finding that procedural justice goals are discounted in court mediation) [hereinafter McAadoo & Welsh].

¹¹ Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO THE HIGH COST OF LITIG. 111-114 (1994).

¹² Robert A. Baruch Bush & Sally Ganong Pope, *Transformative Mediation: Principles and Practice*, in DIVORCE MEDIATION IN DIVORCE AND FAMILY MEDIATION 53-71 (J. Folberg et al. eds., 2004).

¹³ JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2000).

¹⁴ Critical commentary and the limited empirical studies that we have suggest that in court mediation, for example, pro se parties may experience diminished forms of self-determination, and that for judges, lawyers, and some litigants, self-determination is less important than other values. McAadoo & Welsh, *supra* note 10 at 415-20; see also Jacqueline Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 27 (1996) (describing informed consent risks for pro se parties in court mediation programs); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1 (2001) (describing practices of some court mediators who engage in aggressive evaluations of parties' cases and settlement options with the goal of winning a settlement, rather than supporting parties in the exercise of self-determination).

¹⁵ For example, mediators have the power to make recommendations in the AAA International Dispute Resolution Procedures (2003), the Indian Arbitration and Conciliation Act of 1996 and the New Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law. See JACQUELINE NOLAN-HALEY, HAROLD ABRAM-

cal component in shaping and understanding party self-determination. Western, individualist cultures typically honor a form of self-determination that gives the disputing parties significant control over deciding the outcome. In contrast, more traditional, collectivist cultures value the interests of the community over those of the individual in deciding outcomes. Cultural considerations also influence mediator behavior. In Continental Europe, mediators' civil law orientation shapes their behaviors in influencing party decision-making.¹⁶ Likewise, in Islamic and some Arab cultures, the "wisely directive" mediator is expected to put pressure on the parties to reach an agreement.¹⁷ Thus, depending upon cultural contexts, moral persuasion and coercion can be justifiable practices in mediation.¹⁸

Despite the various and sometimes conflicting modes of expressing self-determination in private mediation practice, there is a significant public discourse and a recognition of it as an explicit process value. The following sections will illustrate how this discourse is notably absent in public sector mediation practice.

III. SELF-DETERMINATION IN PUBLIC MEDIATION

The concept of self-determination in public international mediation must be understood in relationship to both international law and dispute resolution principles. As a substantive principle of international law, the historical roots of self-determination in the West have been traced to the exodus of the Hebrews from Egypt,¹⁹ while its modern engagement began at the Versailles Peace Conference. President Woodrow Wilson championed the ideal of self-determination and introduced it to the League of Nations in 1919 as "the right of every people to choose the sovereign under which they live, to be free of alien masters, and not be handed about from

SON & PAT K.CHEW, *INTERNATIONAL CONFLICT RESOLUTION: CONSENSUAL ADR PROCESSES* 129 (2005) [hereinafter *NOLAN-HALEY, ABRAMSON & CHEW*].

¹⁶ *NOLAN-HALEY, ABRAMSON & CHEW, supra* note 15, at 130-31 (discussing how in Germany and Italy mediators tend to be evaluative and directive, thus diminishing self-determination).

¹⁷ I credit Professor Harold Abramson for developing the notion of the "wisely directive" mediator.

¹⁸ *NOLAN-HALEY, ABRAMSON & CHEW, supra* note 15, at 133.

¹⁹ THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 92 (1995).

sovereign to sovereign as if they were property.”²⁰ Article I of the United Nations Charter continued the self-determination theme by describing the development of “. . . friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . .” as one of the purposes of the United Nations.²¹ Over the twenty years following adoption of the Charter, understandings of the substantive legal principle of self-determination evolved into recognition of it as a fundamental right. In 1966, two United Nations Covenants on Human Rights included acknowledgment of the right of self-determination for the contracting parties by connecting it to political, civil, economic, social and cultural rights. Article I of both Covenants on Human Rights states:

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”²²

The legal right to self-determination that allows people or groups to choose their own forms of political government is a well-established part of international law in the anti-colonialist context.²³ It also prohibits foreign military occupation and requires access to government for all racial groups.²⁴ Beyond these three areas, the boundaries of the right of self-determination as a substantive international legal principle are unclear.²⁵ Should it be limited to situations of colonial rule? To the claims of indigenous peoples? Who

²⁰ Eric M. Amberg, *Self-Determination in Hong Kong: A New Challenge to an Old Doctrine*, 22 SAN DIEGO L. REV. 839, 842 (1985) (quoting President Woodrow Wilson).

²¹ U.N. Charter art. 1, paragraph 2.

²² International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

²³ See Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21 (1992).

²⁴ Scholars distinguish between the concept of internal and external self-determination:

Peoples under colonial domination have the right to external self-determination, that is, to opt for the establishment of a sovereign State. The same right accrues to peoples subjected to foreign military occupation after their obtaining or recovering independence. Any racial group denied full access to government in a sovereign State is entitled to either external self-determination (independence, integration into an existing State, etc.) or even internal self-determination (the pursuit of its political, economic, social and cultural development within the framework of an existing State).

CASSESE, *supra* note 3 at 106.

²⁵ See, e.g., Patrick Macklem, *Militant Democracy, Legal Pluralism and the Paradox of Self-Determination*, University of Toronto Legal Studies Research Paper No. 05-03, April 2005, available at <http://ssrn.com/abstract=702465> (last visited April 25, 2005).

are the “people” for whom the right attaches? Who belongs to the group and who decides?²⁶

IV. PROCEDURAL JUSTICE IN INTERNATIONAL MEDIATION

Customary international law and the United Nations Charter require states to seek peaceful resolution of their disputes. Article 33 of the UN Charter specifically recognizes mediation as one of the dispute resolution processes to be used when international peace and security is threatened.²⁷ In international law, very little attention is paid to how mediation should be conducted, and how parties should be treated in the process. This gap is a serious omission. Considering the prominence of mediation as an international dispute resolution process, greater attention must be paid to how the demands of self-determination and procedural justice can be satisfied so that parties experience fairness in the mediation process. In this regard, Professor Thomas Franck’s argument that the fairness of international law should be judged by the participant’s expectations of procedural, as well as substantive or distributive justice, is equally true of international mediation.²⁸ When states, ethnic groups and communities participate in mediation, their experiences of procedural justice affect their assessments of process fairness. Participation also affects the extent to which they commit to honor the outcome of mediation, as compliance typically follows consent; however, consent must be freely offered. Where mediators with significant resources pressure parties into concessions,²⁹ the result may be diminished forms of self-determination and non-sustainable agreements. On the other hand, parties who are informed about the mediation process, who are treated with dignity and actively participate in decision-making, and who reach non-coerced agreements, are more likely to honor the agreements that they reach.

Despite the importance of self-determination and informed consent in mediation, there exists little guidance on how these as-

²⁶ Some feminist scholars argue that in many cases the achievement of national self-determination has led to a regression in the position of women. “Apparently successful claims of self-determination fail to deliver the same level of personal freedom and autonomy for women as for men.” CHARLESWORTH & CHINKIN, *supra* note 2, at 154-55, n.184.

²⁷ U.N. Charter art. 33.

²⁸ FRANCK, *supra* note 19, at 4-9.

²⁹ See Marieke Kleiboer, *Great Power Mediation: Using Leverage to Make Peace?*, in *STUDIES IN INTERNATIONAL MEDIATION* (Jacob Bercovitch ed., 2002).

pects of procedural justice should be satisfied in public international mediation.³⁰ Unlike private mediation practice, there are no Model Standards of Conduct to guide mediators on the meaning of self-determination. Instead of a general discourse about the meaning of self-determination in the public mediation sphere, the literature on international mediation theory focuses largely on the role and functions of mediators and their use of power.³¹ Within the current theoretical framework, understandings of procedural justice and self-determination differ depending upon the type of intervention strategies employed by mediators, the formal or informal nature of mediation and conceptions of mediator power and leverage.³²

The absence of discourse, however, does not mean that self-determination is an unrecognizable concept in public mediation practice. In recent years, there have been several attempts to incorporate the procedural aspects of self-determination and informed consent practices into mediation. But, as illustrated in the following cases, these practices have been, at best, imperfect.

A. Self-Determination – Incomplete

The principle of self-determination, as expressed through informed consent procedures, is inclusive and requires that all stakeholders be identified and represented in mediated negotiations.³³

³⁰ The literature tends to focus on the mediator's behavior, not the mediation process. See generally STUDIES IN INTERNATIONAL MEDIATION 127 (Jacob Bercovitch ed., 2002) (describing theories and practices of international mediators in varied contexts); RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION (Jacob Bercovitch ed., 1996) (describing a range of mediator behaviors that impact on bias, neutrality, power, and culture).

³¹ See, e.g., Peter J. Carnevale, *Mediating from Strength*, in STUDIES IN INTERNATIONAL MEDIATION 25 (Jacob Bercovitch ed., 2002) (describing multiple sources of mediator power); Dean G. Pruitt, *Mediator Behavior and Success in Mediation*, in STUDIES IN INTERNATIONAL MEDIATION 41 (Jacob Bercovitch ed., 2002) (discussing disputant behavior during conflict resolution, mediator behavior, and the conditions that foster acceptance of and success in mediation).

³² Jacob Bercovitch, *Introduction: Putting Mediation in Context*, in STUDIES IN INTERNATIONAL MEDIATION 15 (Jacob Bercovitch ed., 2002).

³³ In his recent book, *The Moral Imagination*, John Paul Lederach emphasizes the importance of having all stakeholders involved in negotiations:

Tajikistan, as journalist Ahmed Rashid convincingly argues, is the only country in the region or the world for that matter to have ended a brutal civil war with the "creation of a coalition government that included Islamicists, neo-communists, and clan leaders.

He goes on to note: "Islamicists lost elections, but they were *represented* in the elections, and they accepted their loss." JOHN PAUL LEDERACH, *THE MORAL IMAGINATION: THE ART AND SOUL OF BUILDING PEACE* 17 (2005).

Examples of self-determination procedural mishaps can be found in the growing body of literature about the tensions between indigenous communities and national governments over ownership of genetic resources and traditional knowledge.³⁴ A case in point is a U.S. sponsored, bioprospecting³⁵ project in Chiapas, Mexico that failed to include all relevant stakeholders in the informed consent process.³⁶ The project was designed to produce drugs from plants and microfungi used by the Mayan community in Mexico. Mexican law required the “informed consent” of the owner or legal possessor of the land where the biotechnological material was located.³⁷ The communities whose consent was required included about eight thousand villages and about nine hundred thousand Mayan-speaking people. As part of its informed consent efforts, the research team conducted an extensive information campaign in Mayan communities. Despite the consent of the majority of communities to participate in the project, there was strong opposition from local NGOs who claimed that their voices had not been heard. As a result of their opposition, the project was doomed.³⁸

B. Self-Determination – Ignored

Voluntary consent, a necessary part of self-determination, is critical to the long-term sustainability of mediation agreements.³⁹ The ongoing conflict between China and Tibet over Chinese occupation of Tibet exemplifies the vulnerability of agreements where

³⁴ See, e.g., Sara A. Laird & Flavia Noejovich, *Building Equitable Research Relationships with Indigenous Peoples and Local Communities: Prior Informed Consent and Research Agreements*, in BIODIVERSITY AND TRADITIONAL KNOWLEDGE: EQUITABLE PARTNERSHIPS IN PRACTICE 187-88 (Sara A. Laird ed., 2002) (discussing informed consent protocols with indigenous peoples); Laurel A. Firestone, *You Say Yes, I Say No; Defining Community Prior Informed Consent Under the Convention on Biological Diversity*, 16 GEO. INT’L ENVTL. L. REV. 171 (2003) (discussing informed consent as a mechanism to insure community involvement, participation, decision-making and self-determination).

³⁵ The term “bioprospecting” refers to the collection of biological samples (plants, animals and micro-organisms) and indigenous knowledge to help in discovering genetic resources. The Convention on Biological Diversity (1992) requires that parties engaged in bioprospecting must obtain the informed consent of the source country. See Wikipedia, <http://en.wikipedia.org/wiki/Bioprospecting> (last visited April 6, 2006).

³⁶ Sabrina Safrin, *Hyperownership in a Time of Biotechnological Promise: The International Conflict to Control the Building Blocks of Life*, 98 AM. J. INT’L L. 641, 655-57 (2004).

³⁷ *Id.* at 656.

³⁸ *Id.* at 656.

³⁹ In the domestic context, when a court finds that valid consent is suspect or missing from a negotiated agreement, its life span is short-lived. Nolan-Haley, *supra* note 8. at 806-10.

true consent is missing. Despite an agreement negotiated between the Chinese government and Tibetan representatives in 1951, under which China asserted a claim to rule Tibet, conflict over self-determination of the Tibetan people still persists because a substantial segment of the Tibetan population believes that their representatives signed the agreement under coercion.⁴⁰

A second example of a failed self-determination process involves the long-standing conflict between Cyprus and Greece. Scholars have argued that the 1960 constitutional settlement in Cyprus was considered to have been imposed on the Greek and Turkish Cypriot communities by the British and other outsiders.⁴¹ The political process involved a series of agreements to create a constitutional system that would establish a balance of power between the two communities on Cyprus. Cypriot representatives did not participate in drafting the agreement⁴² and when invited to London to sign the final agreement, the Greek Cypriot leader signed under force and without authority.⁴³ The parties' lack of consent and the corresponding element of coerciveness contributed to the failure of the agreement during the implementation phase.⁴⁴

C. Self-Determination – Misused

If exported without regard to context, Western-style mediation with its “pure” form of party self-determination can result in disaster. As Melanie Greenberg has observed in the case of Rwanda and Bosnia, “[p]rocedural justice does not always lead to normative justice . . .”⁴⁵ Greenberg powerfully describes the tragedy that resulted when American/Western-style mediation was exported to areas of violent and intractable conflict. In Rwanda and Bosnia,

⁴⁰ See MICHAEL C. VAN WALT VAN PRAAG, *THE STATUS OF TIBET: HISTORY, RIGHTS, AND PROSPECTS IN INTERNATIONAL LAW* 154 (1987); Regina M. Clark, *China's Unlawful Control Over Tibet: The Tibetan People's Entitlement To Self-Determination*, 12 *IND. INT'L & COMP. L. REV.* 293 (2002).

⁴¹ See, e.g., Fen Osler Hampson, *Why Orphaned Peace Settlements Are More Prone to Failure*, in *MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT*, 533, 538 (Chester A. Crocker, Fen Osler Hampson & Pamela Aall eds., 1996) [hereinafter Fen Osler Hampson].

⁴² David Wippman, *International Law and Ethnic Conflict on Cyprus*, 31 *TEX. INT'L L.J.* 141, 145 (1996).

⁴³ *Id.*

⁴⁴ Fen Osler Hampson, *supra* note 41 at 538.

⁴⁵ Melanie Greenberg, *Mediating Massacres: When “Neutral, Low-Power” Models of Mediation Cannot and Should not Work*, 19 *OHIO ST. J. ON DISP. RESOL.* 185 (2003).

Western mediators practiced what she describes as a “neutral low-power” [NLP] mediation model where the mediator is expected to be neutral with no power beyond moral persuasion to coerce parties into action. Pure party self-determination in the NLP model, as noted by Greenberg, is not effective with spoilers⁴⁶ and its results in Rwanda and Bosnia were the massacres for which the international community still feels shame.⁴⁷

V. THE DILEMMA OF ETHNIC CONFLICT

As a matter of general principle, international law does not recognize a legal right of self-determination for ethnic groups whose claims have generated much of the conflict that calls for international mediation efforts today.⁴⁸ Many of the current contexts in which mediation occurs involve ethnic groups where the heart of the conflict concerns the fundamental right of self-determination.⁴⁹ Public discourse on ethnic conflict focuses primarily on competing ideologies about the boundaries of the substantive right of self-determination and group autonomy.⁵⁰ Little attention is paid to the procedural aspects of self-determination in mediation – concepts such as fairness, participatory decision-making and voluntary consent to the outcome. To the extent that the ethno-nationalist concern with self-determination as a substantive, fundamental right in international law has dulled interest in thinking about self-determination as a process value in mediation, the mediation of ethnic conflicts is likely to be flawed. Neither the substantive nor the procedural values of self-determination in international law are valuable as stand-alone concepts. Rather, they must be viewed as complementary. How viable is a right of national self-determination to a given ethnic group if it is denied the right to participate fully in mediation and decide the outcome of its conflict?

⁴⁶ Greenberg, *supra* note 45, at 188, 204.

⁴⁷ *Id.* at 194.

⁴⁸ CASSESE, *supra* note 3, at 108.

⁴⁹ See, e.g., Jerome Wilson, *Ethnic Groups and the Right to Self-Determination*, 11 *CONN. J. INT'L L.* 433 (1996) (describing growth of Zulu ethnic identity and its relationship to the breakup of the apartheid state); Timothy William Waters, *Contemplating Failure and Creating Alternatives in the Balkans: Bosnia's Peoples, Democracy, and the Shape of Self-Determination*, 29 *YALE J. INT'L L.* 423 (2004) (discussing how Bosnia's constituent nations had few grounds for a conventional self-determination claim).

⁵⁰ See, e.g., RUTH LAPIDOTH, *AUTONOMY: FLEXIBLE SOLUTIONS TO ETHNIC CONFLICTS* (1997) (describing factors that contribute to successful autonomy regimes).

VI. CONCLUSION

The current, haphazard understanding of the procedural aspects of self-determination in international mediation has netted mixed results. While in some cases, lip service is paid to informed consent procedures, overall lack of regard for procedural self-determination threatens the long-term durability of mediated agreements. If, as Professor Thomas Franck has suggested, we are witnessing the transformation of the substantive right of self-determination into a commitment to democratic government,⁵¹ then we need to develop a complementary account that advances the principles of procedural self-determination in the same direction.

On a hopeful note, recent scholarship on the democratic character of dispute resolution processes suggests that values such as party participation, accountability and transparency have powerful potential to enhance understanding of self-determination in mediation.⁵² Party participation in democratic processes, such as the public peace process, offers one way of thinking about how to integrate the procedural aspects of self-determination into the mediation process. The public peace process engages citizens from conflicting groups in systematic dialogue in an effort to change the fundamental relationships between them.⁵³ To the extent that the public peace process allows citizens to become involved with their representatives in public discourse and to deliberate with them to reach reasoned judgments about the issues affecting their lives, the process can be considered a form of deliberative democracy⁵⁴ that bolsters both the substantive and procedural aspects of self-deter-

⁵¹ See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

⁵² See, e.g., Symposium, *Raising the Bar What Deliberative Democracy Means for Dispute Resolution*, DISP. RESOL. MAG., 5-27 (Winter 2006); Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11 (2005) (discussing how principles of democracy may be applied in the non-union corporate dispute resolution context); Richard Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279 (Winter/Spring 2004) (exploring the relationship between democracy and arbitration in the context of mandatory arbitration programs); Carrie Menkel-Meadow, *The Lawyers's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347 (2004-05) (exploring the idea of a "neutral" lawyer without conventional clients or advocacy responsibilities who still functions as a lawyer by facilitating resolution of disputes).

⁵³ See Gennady I. Chufirin & Harold M. Saunders, *A Public Peace Process*, 9 NEGOTIATION J. 155-56 (April 1993).

⁵⁴ There is extensive literature on deliberative democracy. See, e.g., JOHN S. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS* (2000) (exploring tensions between social choice theory and deliberative democracy and arguing that social choice theory suggests that democracy must have a deliberative aspect); DELIBERATIVE DEMOCRACY

mination. Tajikistan's example of a successful public peace process and the resulting mediated peace agreement suggests that citizen participation in conflict resolution efforts can produce positive and sustainable outcomes – whether it appears under the label of deliberative democracy or procedural self-determination.⁵⁵

Given the realities of international and inter-ethnic conflict and the potential for disastrous, global, spillover effects, the need to focus on self-determination in international mediation is more acute than ever. Mediation efforts will not succeed in the long run without a level of procedural justice that supports authentic self-determination and true consent, whether the parties are ethnic groups, communities, or states.

(Jon Elster ed., 1998) (discussing conceptual background of deliberative democracy and comparing deliberative democracy with other modes of collective decision making).

⁵⁵ See Harold H. Saunders, *Sustained Dialogue in Managing Intractable Conflict*, 19 *NEGOTIATION J.* 85-91 (Jan. 2003). A peace agreement was negotiated in 1997 under the guidance of a U.N. mediator. HAROLD H.SAUNDERS, *A PUBLIC PEACE PROCESS: SUSTAINED DIALOGUE TO TRANSFORM RACIAL AND ETHNIC CONFLICTS* 152 (1999).