

# Rooting Change: Indigeneity and Development

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## Abstract

International development, which took off after World War II, remained for 50 years the province of government officials and private experts bent on bringing “progress” to targeted areas. Later, as development practice spread globally, new actors emerged to contest both its goal and methods. The world’s indigenous peoples, for one, campaigned, starting in the ‘70s, for their right to participate alongside states in matters that affect them. The U.N. recognized this right in 2007 when it adopted the Declaration on the Rights of Indigenous Peoples. In sum, the instrument offers a normative basis for indigenous peoples, who typically experience

development as transgress more than progress, to move from a position of victimhood in this area to one of co-authorship. Indeed, the Declaration requires UN agencies and states to actualize the agency of indigenous communities, and also incorporate their cultural values, in the planning and execution of development projects.

**Keywords:** indigenous people; self-determination; territoriality; intellectual property; informed consent; ; agency; normativity; indigeneity

“Ua mau ke ea o ka aina i ka pono”

(“The life of the land is perpetuated in righteousness”)<sup>1</sup>

## **Introduction**

In their review of the history of development thought and practice at the United Nations, Richard Jolly, Louis Emmerij, Dharam Ghai, and Frédéric Lapeyre link the approaches that marked successive phases of that history to their corresponding contexts as constituted by, first, the positions that dominant states *du jour* asserted on the subject and, second, the perspectives that influential civil society agents brought to the development table.<sup>2</sup> Thus, even as the ideological antagonism between East and West broadly split the world into opposing camps at the end of World War II, the international reconstruction and development activities undertaken in the 1940s and '50s in the devastated heartland of Europe and the ravaged territories of the South proceeded smoothly enough because both public and private development actors of the period, East and West, generally subscribed to this cardinal article of faith on the subject: development = industrialization = progress. Debates of the time thus focused not on normative questions regarding the ultimate purpose of development, but on technical issues having to do

with, for example, what constitutes its better engine: the public or private sector; or, what would accelerate it quickest: the importation of manufactured goods, or the local production of their substitutes? Moreover, the question of agency, i.e., who should author development projects, was all but overlooked, as the assumed answer was: the experts, of course.

Today, however, half a century later, a far broader set of state and non-state actors are seized by the development syndrome—whether as agent, apologist, critic, beneficiary, or victim—significantly complicating the subject on all fronts: theory and practice, yes, but also normativity and agency. This chapter narrates the young but already significant imprint made in the development domain by a major stakeholder in its trajectory: the 370+ million persons in the world, comprising about 5,000 ethno-linguistic entities distributed through some ninety countries and all geographical regions, who are now broadly recognized as constituting its indigenous peoples.<sup>3</sup> As such, they figure among those shrinking human communities that are not yet irreversibly wrenched from their native spaces, i.e., not yet fully “de-indigenized” by development or other circumstances. An influential 1987 UN study describes indigenous peoples as follows:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>4</sup>

While reliable demographic data for indigenous peoples are singularly difficult to obtain for technical reasons like inaccessibility, as well as political ones like non-recognition in some states, a rough estimate based on figures supplied by the UN and other parties close to the subject provides the following profile of their geographical distribution: 259 million in Asia; 50 million in Africa; 45 million in Latin America; 5 million in North America; 1.25 million in Australia and Aotearoa/New Zealand; and the remaining 9.75 million in Europe, the Middle East, and the Pacific Islands.<sup>5</sup>

The UN took stock of the circumstances of indigenous peoples in its 2009 *State of the World's Indigenous Peoples*.<sup>6</sup> While the report describes conditions that vary significantly from region to

region, and indeed within regions, direct and indirect evidence of the concerned peoples' losses to the ever-advancing global economy abounds throughout. In Africa, for example, governments had, as early as the 1980s, signed with private corporations and/or northern governments more than 2,600 bilateral investment agreements that, constructed to protect foreign interests, increasingly restricted the region's public policy choices, constrained its environmental safeguards, undermined labor and human rights standards, and up-ended locally-based livelihoods.<sup>7</sup>

The 1980s also saw the emergence of a global trend to liberalize mining codes in favor of foreign mining companies. By 2003, 105 countries concentrated primarily in Asia and Latin America had succumbed to the trend, despite the devastating, and typically also irreversible, impacts of mining enterprises on local communities and ecologies.

In Arctic and Pacific regions, where scarcer or less accessible terrestrial resources draw fewer investors, it is climate change and sea-level rise that most confound indigenous livelihoods long tied to hunting, herding, and fishing. Traditional animal sources of food, stressed beyond sustainability by climate change, commercial exploitation, and polluted habitats, no longer meet the needs of local communities.

Finally, where indigenous peoples formerly relied on small-scale, diversified, and sustainable cropping systems that were paired with hunting-gathering practices in adjacent forests, agribusiness is now able to dump, world-wide, cheap monoculturally produced staples that undermine such systems and jeopardize the peoples' long-term food security. Add in the clear-cut logging that fells forests, and the roads and dams that economies of scale require even as they splice or submerge indigenous territories, and it becomes abundantly clear why indigenous peoples so often oppose development.

The present chapter addresses their attempt to turn stark opposition into difficult engagement. The first section traces the emergence of the indigenous voice in international circles. The second identifies the foundational international law principles or norms that indigenous groups regularly advance in various fora to support the specific collective rights that they assert, including the right to approve development projects that affect them. The third focuses on issues of normativity and agency to which, the author believes, indigenous communities want and need agents of development to pay particular heed.

## **Emergence of the indigenous voice**

### ***Prelude***

The 1950s, '60s and '70s were a prelude, albeit a highly relevant one, to indigenous peoples' own later contestation of development practice. The early post-war conviction—that development would deliver progress and reduce poverty—that animated the first fifteen years or so of international development activities began to falter when, at the close of the 1950s, statistics streaming into the UN and elsewhere revealed that a shocking chasm had been rapidly growing between the gross national products (GNPs) of the North and the South since the founding of the world organization. While these figures spelled trouble for the South, they also unnerved the capitalist West inasmuch as the socialist East could, and did, make political hay out of them. As the 1960s dawned, then, Washington felt compelled to act. It did so in 1961 by calling on the UN to launch a Development Decade aimed at reducing the GNP divide between North and South by, it proposed, coupling robust trade openings for the North with enticing aid packages for the South.<sup>8</sup>

As it happened, this developmental biped was launched at about the same time that a dynamic group of Southern economists gathered around the legendary figure of Raúl Prebisch, the then Secretary-General of the UN's Economic Commission for Latin America (ECLA), who was disseminating a trenchant critique of North-South, or rather centre-periphery, economic relations that, among other things, depicted the Northern-hawked aid-and-trade package as yet another permutation of the dependency-inducing and poverty-sustaining structure of those relations.<sup>9</sup> This “dependency” critique so captivated the imagination of political and intellectual circles in Third World countries in the ensuing decade that, as the 1970s dawned, their governments joined forces in the General Assembly to issue a historic call for the UN to establish a New International Economic Order (NIEO) dedicated to nothing less than the rectification of the unjust economy of horizontal inequality that colonialism had riveted in place over much of global space in the course of its virtual 500-year run.<sup>10</sup> Vertical inequality, not as extreme then as it is today, did not as such particularly figure on the NIEO agenda.

Western states, seeing in the NIEO a wrecking ball aimed not only at the economic legacy of colonialism but potentially also at the neo-liberal edifice they had been assembling since Bretton Woods to preserve their economic dominance in the South even as the latter transited to political independence, moved quickly to abort the proposed order by counter-advancing its very

antithesis which, in time, came to be known as the Washington Consensus (WC). At bottom, the WC imposed on an already aid-dependent South this formula for continuing to receive aid: 1) participate in the free trade regime (which covers manufactured goods and, increasingly, financial services, where the advantage lies with the North, but which largely excludes agriculture, where the advantage might lie with the South); and 2) undertake internal structural adjustments, i.e., privatize. In an uncannily short period of time, the “technocratic” elites in the South, who by the 1980s had all but replaced the “ideological” first generation of post-independence leaders, signed on to these neo-liberal prescriptions which then all but sealed their orthodoxy in development circles through the remainder of the twentieth century. Some ten years now into the new century, the social and ecological costs of the neo-liberal regime are piling high, especially in the South, even as the regime’s hitherto vaunted financial structures are also breeding havoc in the North.<sup>11</sup>

Interestingly, while the horizontal disparity spawned by colonialism was incorporated into neo-liberalism, it is in fact vertical inequality that has become the new regime’s signature by-product. For many, however—and indigenous peoples figure disproportionately among them—global neo-liberalism signals much more than inequality: it unleashes, as anthropologists have amply recorded, the ravage of their communities.<sup>12</sup> There matters might have remained but for the

efflorescence, beginning also in the 1970s, of rebellious ideas and actions incubated in the world's many civil societies that, unlike governments, see the shattering of communities and locales up close.

Outraged at the devastation wrought by the world's headlong rush to industrial and commercial formations that the privileged few were seen as imposing on the vulnerable many, these non-state actors, newly connected transnationally by the proletarianization of information technology, spontaneously sprung up in "blessed unrest."<sup>13</sup> Unfamiliar, unpredictable, and un-confined, they metamorphosed into a force that neither states nor the global neo-liberal establishment knew quite how to contain or engage.<sup>14</sup> Improvising, these have been offering responses ranging from confrontation through negotiation to co-optation. In this context, the world conferences convened since the early 1970s to address issues raised by transnational civil society may be seen as sites of negotiation writ large, the 1972 Stockholm World Conference on the Human Environment qualifying perhaps as the event that launched the genre. Many others followed: Copenhagen, Cairo, Mexico City, Nairobi, Vienna, Rio, Beijing, Seattle, Johannesburg, Durban, and so on. At some, as in Seattle, physical confrontation broke out; at most others, state and non-state actors willy nilly interfaced, argued, debated, learned, unlearned, co-opted, became co-opted, revised norms, re-tooled ideas, and modified practices. Betwixt and between this ferment, the

international indigenous movement was born, and is now growing up to centrally challenge neo-liberalism's development orthodoxy.

### ***Engagement (1971-2011)***<sup>15</sup>

For indigenous peoples, the engendering transnational civil society event was, arguably, the 1971 conference organized in Barbados by the World Council of Churches' (WCC) Program to Combat Racism, which focused on the subject of ethnic strife in Latin America. Conference attendees, many of whom were anthropologists, drafted a *Declaration of Barbados* that condemned what it termed the internal and external colonialism remaining in the region which, it continued, could only be eliminated with the purposeful re-configuration of Latin American states into multi-ethnic entities.

It so happened that the WCC was, and remains, a long-standing and influential member of the dense community of non-governmental organizations (NGOs) that Geneva harbors alongside the several UN human rights bodies also sited there. Not surprisingly, then, in the same year that the Barbados Declaration was issued, one such UN body, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, successfully urged its parent Commission on

Human Rights to authorize a comprehensive study of the discrimination that indigenous peoples experience. The task was assigned to the Ecuadorean diplomat José R. Martínez Cobo, who, expertly assisted by the Panamanian anthropologist César A. Willemsen-Díaz, went on to produce a landmark study on the subject which contains the now classic description of indigenous peoples quoted earlier.<sup>16</sup>

The WCC followed up its first Barbados conference with a second one in 1977 where indigenous representatives explicitly denounced the development projects that violated their spaces and the assimilationist policies that states used to justify the violation. Later that year, the first ever pan-NGO Conference on the Indigenous Peoples of the Americas also met, in Geneva, with UN support. It issued a Declaration asking that indigenous peoples be recognized as nations and subjects of international law. While the following year's UN World Conference to Combat Racism and Racial Discrimination did not comply with this call, it did recognize the rights of indigenous peoples to, *inter alia*: 1) name themselves and express their cultures; 2) receive an official status; and 3) maintain their traditional economies. The General Assembly (GA) endorsed these principles later that year. Finally, in 1982, at the sustained urging of civil society and also because early installments of the Cobo study suggested as much, the GA requested the Commission on Human Rights to assemble a Working Group on Indigenous Populations (WGIP)

to do two things: monitor and report on the situation of indigenous populations, and recommend standards for state/indigenous relations.

Coincidentally, another UN entity, the International Labour Office (ILO), was already at work crafting a related set of standards to be encoded in an instrument designed to supersede the only treaty then extant on the subject of indigenous peoples: the ILO's own 1957 *Indigenous and Tribal Peoples Convention (107)*.<sup>17</sup> The successor *Indigenous and Tribal Peoples Convention (169)*, adopted in 1989, recites this reason for its genesis:<sup>18</sup>

The General Conference of the International Labour Organization . . .

Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and

Recognizing the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religion, within the framework of the states in which they live . . . adopts . . .

The clear anti-assimilationist stance laid out above went on to also undergird the work of the WGIP. A measure of rivalry ensued at this time between the ILO and the WGIP as to which would produce the earlier and more impactful imprint in the field.<sup>19</sup> As it turned out, the more cumbersome tripartite ILO completed and adopted its new treaty in 1989. The WGIP, composed of only five experts, took until 1994 to complete its admittedly more complex *Draft Declaration on the Rights of Indigenous Peoples*. The latter then languished in a states-composed committee of the Human Rights Council for another decade before being finally adopted by the GA in 2007 as the *Declaration on the Rights of Indigenous Peoples* (UNDRIP).

The GA, in the interim, has not stood still. Between 1982, when it called for the establishment of the WGIP, and the present, the GA has undertaken, at the prompting of a host of indigenous and non-indigenous groups and individuals (none more dedicated and resourceful than Greece's Erica-Irene Daes, the long-time chair of the WGIP), an unprecedented number of initiatives to

assist indigenous peoples in their quest for empowerment at the international level. These include: the 1985 establishment of a UN Voluntary Fund to support indigenous participation in UN fora; the designation of 1993 as the International Year of the World's Indigenous People; the proclamation of 1995–2004 and again 2005–2014 as the first and second International Decade of the World's Indigenous People; the 2000 creation of the Permanent Forum on Indigenous Issues (PFII); and, most important, the 2007 adoption of UNDRIP. More recently, the GA voted to convene a World Conference on Indigenous Peoples (WCIP) for the year 2014.

Taking its cue from the GA's adoption of UNDRIP, the Human Rights Council dismantled the WGIP and replaced it with an Expert Mechanism on the Rights of Indigenous Peoples charged with studying, and advising the Council on, issues arising under UNDRIP. A Special Rapporteur on the broader subject of the human rights and fundamental freedoms of indigenous peoples has been reporting to the Council since 2001. In the meantime the ILO, armed now with two binding Conventions on the rights of indigenous peoples, enforces their respective provisions vis-à-vis signatory countries, most of which are located in Latin America. Reviewing these initiatives, a UN study concludes: "Along with the movements for decolonization and human rights, as well as the women's and environmental movements, the indigenous movement has been one of the most active civil society interlocutors of the United Nations since 1945."<sup>20</sup>

## **Foundational principles**

UNDRIP provides an invaluable set of normative tools, or “weapons of the weak,” for indigenous peoples’ activism.<sup>21</sup> A handful of key principles underpin its forty-six articles. Because these norms figure in a non-binding Declaration rather than a binding Convention, their potency derives less from their normative compulsion than from the high visibility (read political capital) that the indigenous campaign has attracted worldwide in the last thirty years. Key to that visibility was the participatory process that indigenous peoples managed to extract from the ILO, UN human rights institutions, and UN headquarters. That ground-breaking process is reviewed here as it bears directly on the issue of their agency, which permeates UNDRIP.

At the drafting of ILO Convention 169, which centrally concerned indigenous peoples, their representatives found themselves in the anomalous position of being highly visible yet conspicuously silent inasmuch as the president of the proceedings accepted interventions only from the ILO’s own state, employer, and union constituents. Nevertheless, a strange thing happened on the way to ILO 169. To begin with, unionists there clearly sympathized with and

openly sought out the indigenous observer contingent which, for its part, zealously distributed position papers to the ILO members assembled. More creatively still, several unions had simply absorbed indigenous activists into their ranks even before setting out for Geneva, giving them free rein once they got there to voice indigenous, as opposed to strictly syndicalist, perspectives. The new Convention, then, which the employer bloc largely opposed, came into being because an “indigenized” worker bloc voted for it in concert with enough states that were willing to jettison the old Convention’s assimilationist stance.

While indigenous activists had to borrow the identity of workers in the ILO, the WGIP made it clear early on that it would advance, in its work, a genuine if still inchoate concept of state/indigenous partnership that it would moreover model with a path-breaking process for its own sessions. Thus, the WGIP dropped the usual UN credentialing requirement for non-state participants and, amazingly, allowed virtually any would-be participant to register, attend sessions, and offer testimony. In consequence, it regularly drew, during the time that it elaborated the Draft Declaration, contingents of 500 or more indigenous attendees to each of its annual sessions in Geneva. In turn, those contingents succeeded beyond all expectation in powerfully, even transformatively, educating the experts involved on the nature of the indigenous world and its needs. In contrast, one-tenth that number of states’ delegates showed up

at earlier WGIP sessions where, moreover, most remained silent until the last years of the drafting process, when the genie of a daringly imaginative state/indigenous partnership was already out of the bottle and, indeed, inflecting UN practice.

In truth, no international forum has since matched the WGIP's elevation of the indigenous voice, with the possible exception of the UN's PFII which, perforce, was created to project that voice. At the same time, few international fora since have been able to wholly withstand indigenous peoples' consistent demand that they honor the process launched in the WGIP.

Turning now to the explicitly normative, as opposed to processual, gains that indigenous peoples secured at the UN, these, by and large, are recorded in UNDRIP, an instrument that, by its own terms, sets out "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."<sup>22</sup> The analysis of the document offered here reviews not the many rule-like provisions contained in UNDRIP, but the foundational principles that animate them. Two of these have been mentioned: non-assimilation and state/indigenous partnership. Five others now follow.

## ***Self-determination***

More than anything else, indigenous peoples' insistence that the right of self-determination be included in UNDRIP delayed its drafting and adoption. The right vests agency in indigenous peoples for virtually all that touches them, thereby commensurately constraining states' agency in the matter. The right is set out in three articles:

**Article 3.** 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.

**Article 4.** Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

**Article 5.** Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining

their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State. . . .

As can be seen, Article 3 extends to indigenous peoples, *verbatim*, the right of self-determination consecrated in the common Articles 1 of the two 1966 International Human Rights Covenants. Because this same right was first memorialized in the 1960 Declaration on the Granting of Independence to Colonial Peoples and Countries which went on to underwrite Third World peoples' bids for independence, states in Geneva resisted extending the right to indigenous peoples lest, they said, it foment secessionist movements on their part. In response, indigenous participants and their civil society allies variously countered: that it would be discriminatory to carve indigenous peoples out of the generic "peoples" attached to the right; that in any event indigenous peoples could not technically "secede" from a state they had not freely joined; that they in fact sought to construct a novel partnership with enclosing states; and that, in the end, room must be made, between annihilation and separation, for the good faith practice of, and experimentation in, partnership.

Given this impasse, states in New York adopted a two-pronged strategy to resolve it. Article 3 was retained but a new Article 4 was unilaterally placed by them to suggest that the

“self-determination” status contemplated is autonomy. Textually, however, Article 4 can also be read to illustrate, rather than limit, self-determination’s outcomes. This was in fact the case with the original 1960 enunciation of the right, which was interpreted to authorize a range of outcomes ranging from incorporation into a state, through free association with it, to full independence.

In any event, it is the idea of partnership, more than anything else, that most indigenous representatives invoke today when they assert their right of self-determination. Article 5 anticipates this when it states that indigenous peoples have the right to their distinctive institutions, alongside the right to participate in those of the state “if they so choose.”

### ***Territoriality***

UNDRIP devotes six articles to the subject of lands, territories, and resources (LTR), including waters and coastal areas. As can be appreciated, the integrity of their LTR is key to the cultural and physical survival of indigenous peoples. At the same time, it is this very complex that infrastructural and extractive projects habitually threaten. Here, UNDRIP’s Article 26 unambiguously privileges the indigenous party:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Additionally, UNDRIP recognizes indigenous peoples' rights to return to their traditional LTR, and to redress when return is impossible.

While the term "territoriality" does not figure in UNDRIP, it is used here to denote the jurisdictional or state-like powers of exclusion, and of dominion over territory, that UNDRIP

places in indigenous hands.<sup>23</sup> The only exemption made to this scheme is for the enclosing state's military activities. Even here, however, these are prohibited on indigenous territories "unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned."<sup>24</sup> Overall, then, the territoriality that UNDRIP constructs for indigenous peoples is, as a UN study observes, akin to the right of "permanent sovereignty over natural resources" that newly independent states asserted in the last century to preserve their resource base from the confiscatory power of overreaching foreign capital.<sup>25</sup>

### ***Free, prior, and informed consent (FPIC)***

UNDRIP is the first international instrument to formalize the right of a sub-state community to give or withhold consent for activities affecting it that issue from outside the community. Looked at another way, the FPIC norm operationalizes the right of self-determination. UNDRIP's first mention of the right to FPIC states:

**Article 10.** Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior, and informed

consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. . . .

The norm figures in five other articles. The first four mandate, respectively, that states: a) offer redress for “cultural, intellectual, religious and spiritual property taken” without FPIC; b) also offer redress for LTR taken without FPIC; c) obtain the FPIC of indigenous peoples for legislative and administrative measures that affect them; d) likewise obtain FPIC for the storage/disposal of hazardous materials on indigenous LTR.<sup>26</sup> The last mention of FPIC, in Article 32, zeroes in on the subject of development:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands

or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Clearly, difficult questions attend the application of the FPIC norm. For a start: how free is free, how prior is prior, and how informed is informed? Anticipating these problems, in 2005 the UN's PFII staff convened an exploratory workshop on the subject. The author proposed there that: a) "free" should mean without inducement or coercion of any kind, material or political; b) "prior" should mean before any activity begins that could manifestly influence the decision to proceed or not to proceed with a proposed project; c) "informed" should mean, *inter alia*, that indigenous peoples will have access, on a par with the developer counterpart, to the relevant knowledge base and domain of experts; and d) "consent" should mean the overwhelming approval of the community affected.

The author further pointed out that national and international institutions' current practice of requiring that the developer file an environmental impact statement (EIS) before a project can be authorized is wanting in at least one respect. A single stakeholder—the developer—controls the EIS process, as the agent that typically assembles the concerned document, hires its authors, frames its questions, and deploys its often impossibly technical language. Under the FPIC norm,

the developer should also be required to dedicate a sum of money, equal to what it spends on its EIS, to the affected community to enable it to commission its own EIS. Clearly, as in the judicial context, two briefs, better than one, expose the complexities of a contested matter.

### ***Intellectual property***

UNDRIP addresses this norm in a single article:

**Article 31.** Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions. . . . And develop their intellectual property over such. . . .

With this, UNDRIP simply references the domain (which the World Intellectual Property Organization [WIPO] now calls “Traditional Knowledge, Traditional Cultural Expressions, Genetic Resources, and Folklore”) over which indigenous peoples may assert intellectual property rights (IPR), leaving their elaboration to specialized bodies like WIPO. A clash of normativities, however, continues to stymie the latter’s effort to provide protection for indigenous peoples’ IPR. Simply put, the present world IPR regime remains embedded in a

Western paradigm that assigns intellectual value to identifiable moments, and items, of individual creativity or originality. Indigenous peoples, on the contrary, value traditional knowledge and cultural expressions for the very reason that they have been held and reproduced collectively from time immemorial. The two paradigms could not be more mutually alien. WIPO has been attempting to bridge this divide since 2001, when it empanelled an Inter-Governmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore to give it guidance. To date, that guidance remains at the work-in-progress stage.

UNESCO, for its part, adopted its Convention for the Safeguarding of Intangible Cultural Heritage in 2003 and its Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005, ahead of UNDRIP's adoption, which may explain the said Conventions' insufficient attention to the specific interests of indigenous peoples. Overall, however, UNESCO plays a pre-eminent role, particularly through its publications, in emphasizing the value of indigenous cultures to their bearers and to humanity in general. Additionally, since 2002 it has run a Local and Indigenous Knowledge Systems Program that places indigenous persons with traditional knowledge in environmental management roles where their knowledge may be applied and transmitted. Aware of indigenous participants' strong support, expressed at the 1992 Rio Conference on Environment and Development, for "a sustainable future rooted in the

knowledge and worldviews of their Elders,” which stance earned them the designation of “Major Group” entitled to an ongoing voice in the Rio process, UNESCO engaged indigenous participants in two events leading up to Rio 20+: its Planet Under Pressure conference in March 2012, and its UNESCO/ICSU Forum for Science, Technology and Innovation for Sustainable Development in June 2012. Notwithstanding the combined initiatives of its agencies, the UN reports that the piracy of indigenous peoples’ intellectual property surges on unabated, generally in the form of raids on indigenous peoples’ resources carried out by pharmaceutical, cosmetic, touristic, and other companies that states fail to control.<sup>27</sup>

### ***Cultural identity***

As with “territoriality,” UNDRIP does not advance a norm of “cultural identity” as such but amply fills out its content throughout the text.<sup>28</sup> The norm underlies spelled-out rights to membership in a cultural community, to tradition and custom, spirituality and religion, ceremonial artifacts and practices, transmission of legacies and language, and so on. In the end, it is the collective cultural identity of indigenous peoples that enables them to exercise their right of self-determination. That is, while the right of self-determination recognizes and secures agency for indigenous peoples, it is the norm of cultural identity that safeguards their ability to

knowledgeably and meaningfully exercise that agency in common into the future. This, because culture is, finally, nothing less than the historically derived complex of shared knowledge, norms, symbols, behavior, and social ties on which every community, indigenous or not, relies to claim, modify, and reproduce its particular vision of selfhood and well-being. The complex may be relatively thin in metropolitan communities shared by the rooted and the transient; it is uniquely thick in indigenous communities attached to traditional territories.

## **Rooting change**

The previous section reviewed the agency that international society now vests in indigenous peoples over a range of subjects. This section discusses the deployment of that agency, and of indigenous communities' own normativities, constructed locally and now also transnationally, in development and other contexts. That is, while indigenous communities remain attached first and foremost to the distinctive normativities of their particular cultures, they are also synthesizing, as a result of similar encounters with modernity, a shared set of norms displayed in but not limited to UNDRIP that may be called "indigeneity."<sup>29</sup>

## ***Agency***

Operationalizing the rights of self-determination and of FPIC in the development context will undoubtedly prove daunting. For example, where proposed projects potentially affect several communities and peoples in different ways, who is the rights holder? Two postulates could offer a degree of initial guidance here, to be checked of course against the cumulative wisdom of practice. The first, ethnographic in nature, recognizes that human beings today live and participate in several interactive “grids” of belonging. Akhil Gupta’s comment on “citizenship” in his work on identities makes the point:

Citizenship ought to be theorized as one of the multiple subject positions occupied by people as members of diversely spatialized, partially overlapping or non-overlapping collectivities. The structure of feeling that constitutes nationalisms needs to be set in the context of other forms of imagining community, other means of endowing significance to space in the production of location and “home.”<sup>30</sup>

The second postulate, normative in nature, asserts that any community or “grid” of belonging, large or small, that is potentially impacted by a development project must have agency over it commensurate with the anticipated degree of impact. In the case of indigenous communities rooted to ancestral lands and ways, that impact will likely be substantial. For this reason, UNDRIP makes the agency rights of self-determination and FPIC maximally available to them. This does not mean, however, that an indigenous community exercising that agency will do so in isolation from all other communities or normativities, for, as the first postulate indicates, even rooted indigenous peoples today navigate between several social and ideological grids. Consequently, while they will likely foreground their community’s own normativity in the situation, they will also inevitably be considering other normativities. The space where parallel normativities are considered and assessed, then, is also the space where rooted change emerges.

### ***Normativity***

UNDRIP states that its standards are vital to the “survival, dignity and well-being” of indigenous peoples. Today, perhaps as a dividend of the UNDRIP campaign, some indigenous communities have moved beyond survival issues to contest visions of “well-being”, an open-ended term now happily replacing the unilinear rubric of “progress” in development parlance. In the process, a

common indigenous normativity is coalescing. Its foundational theme was sounded by President Evo Morales in 2007 on his first trip to the GA as Bolivia's head of state. He said, "We are opposed to development; we do not want to live better, we only want to live well." This *vivir bien* theme encapsulates a veritable domain of values, for what President Morales did, in that moment, was to announce the fundamental divide that separates the normativity of modernity from that of indigeneity. Admittedly oversimplifying both, the first may be said to prize rationalism, individualism, competition, disaggregation, accumulation, the mastery of nature, and the present generation. The second espouses meaning, communalism, collaboration, connection, sufficiency, the stewardship of nature, ancestors, and the unborn. The first excels at change, the second at sustainability. Clearly, development thinking in the twenty-first century must mine both.

### ***Practice***

Drawing on a handful of recent examples, this section discusses a sample set of practices that, in the author's opinion, assist or hinder indigenous peoples' reach for well-being. Starting with the positive, indigenous peoples' achievement, however fledgling still, of agency in international fora outranks all their other gains. It gives them a potent two-way advantage: the ability to

influence decisions made supra-nationally that play out locally and, conversely, the opportunity to bring supranational influence to bear on lower-level decisions. Either way, it strengthens their position vis-à-vis states.

It was indigenous agency exercised in the PFII that made the UN create an Inter-Agency Support Group on Indigenous Issues to coordinate the organization's several projects in aid of indigenous well-being. Under the same impetus, the UN today also requires its agencies to disaggregate the data they collect so as to highlight the particular circumstances of indigenous peoples. UNESCO has elevated the status of traditional knowledge from a local good to a global one benefitting communities at both levels in a world re-awakened to the virtue of sustainable economies. Significantly, a committee of the World Bank itself issued an *Extractive Industries Review in 2003* that urged that body to end its funding of mining industries given their destructive effect on local communities and the environment. Furthermore, the *Review* urged the Bank to embrace the FPIC norm for projects impacting indigenous and similarly situated peoples.

There is also evidence, albeit circumstantial, that international gains percolate down to regional and national levels. Thus, because UNDRIP characterizes its standards as minimal, the Organization of American States has been constrained by its indigenous interlocutors from

introducing lower standards into its own Draft Declaration of their rights. It is probably not coincidental either that, during the four decades that the indigenous *gestalt* was coalescing transnationally, indigenous parties scored landmark victories against over-reaching states on issues involving the former's rights to self-determination and territoriality in international, regional, and national courts.<sup>31</sup> While Bolivia alone has incorporated UNDRIP wholesale into its national legislation, other Latin American countries' executive and legislative branches have also been moved to respond, as never before, to the demands of their indigenous communities, albeit with mixed motives and results.<sup>32</sup>

International indigenous agency has also stimulated indigenous peoples to organize themselves on a more ambitious scale. The Sami Council jointly formed by the Sami of Norway, Sweden, Finland, and Russia is a case in point. Others include the several large transnational assemblies of the last decades where indigenous peoples, reaching across a range of cultures, formulated common norms, strategies, and demands.<sup>33</sup> These efforts in turn attract a widening circle of allies so that a veritable network of indigenous and non-indigenous parties now mounts weighty challenges to the orthodox development view that economic growth equals, or must precede, well-being. Thus, Joseph E. Stiglitz has famously declared that growth is unsustainable, adding that GNP and GDP, which obsessively search for it, "mis-measure" our lives.<sup>34</sup> He and other

experts increasingly urge the use of additional indices of human development: human security,<sup>35</sup> food security, capacity,<sup>36</sup> democratic institutions,<sup>37</sup> the “bottom billion,”<sup>38</sup> status of women, literacy, health, education, the state of infrastructural stock, and so on. However, few development specialists yet tend to the foundational questions that communities more harmed than helped by development continue to ask: What is the goal of development? Who decides? Applying what norms? Indigenous peoples answer, *grosso modo*: Well-being, not growth, should be its goal; we decide, if it affects us; and we do so guided by our own values, which states must respect.

Because these responses fly in the face of established conceptions of the state, and of mainstream development paradigms, they encounter serious resistance in the UN as elsewhere. The UN, as is well known, veers in different directions depending on which “UN” leads at any given time or on any given topic: the member-states’, the Secretariat’s, the “Third UN” of associated experts, or the latest UN of civil society agents. While the organization played an extraordinarily supportive role in elevating the indigenous cause to the international status that it now enjoys, the UN’s subsequent institutionalization of the indigenous agenda is predictably subjecting it to the downside of success. Thus, the UNDG-issued *UNDG Guidelines on Indigenous Peoples’ Issues* states that, conform with the UN’s desire to “mainstream and integrate” indigenous concerns,

UNDG advocates “a human rights based and culturally sensitive approach to development.” As can be seen, UNDRIP’s powerful and controversial discourse of collective self-determination and of FPIC is being transmuted here into the tamer discourse of individual human rights and “development with identity.”

Likewise, the growth of UN mechanisms dedicated to indigenous matters may scatter, rather than concentrate, indigenous peoples’ energy. Already, the PFII, the Expert Mechanism on the Rights of Indigenous Peoples, and the Special Rapporteur, notwithstanding their important contributions, appear to be settling into the UN pattern of issuing studies and reports rather than frontally challenging unacceptable state and corporate practices. Finally, while as many as 1,500 indigenous persons attend the PFII’s yearly sessions, a strikingly small contingent of indigenous individuals tends to show up again and again as spokespersons of indigenous peoples in international fora, regardless of topic or task. The disjunction between any such small contingent and the far-flung, highly diverse, and locally stressed communities where the world’s 370 million indigenous peoples live raises serious issues of representativeness that will have to be addressed by indigenous peoples themselves.<sup>39</sup>

## Conclusion

If, as indicated at the start of this chapter, development thought and practice evolve through the countervailing, but also cross-fertilizing, pushes and pulls of public and private actors in the field driven by their singular complexes of values and interests, then that evolution has embarked on a new phase with the entry of indigenous peoples into the fray. As with previously marginalized groups like the colonized, and women, who also managed—relying on an array of political alliances and normative maneuvers analogous to those described here for indigenous peoples—to significantly bend to their advantage prior paradigms of agency and normativity, indigenous peoples are taking their rightful place in national and international discourses on development.

For real cross-fertilization to occur in those discourses, however, the grip of certain dominant narratives of modernity will have to be loosened. First, there is the simplistic vaunting of the market as the pre-eminent device for the exchange of goods and services, notwithstanding Karl Polanyi's long-standing warning that it also figures as the unraveler *extraordinaire* of social relationships.<sup>40</sup>

Second, there is the associated trope of the market as engine of flexibility and creativity that, before 1989, sounded plausible in contrast to the Soviet Union's centralized command economy. Today, however, the combined power of the International Monetary Fund (IMF), the World Bank, and the World Trade Organization (WTO)—which commands not a mere national space but a global one—is outdoing the Soviet planned economy in its ability to homogenize space and suppress local agency.

Third, as the world searches for models of sustainability, the view that traditional knowledge is pre-scientific needs to be replaced with the recognition that it in fact embodies a trove of information painstakingly acquired through generations of observation and trial-and-error.

Fourth, the narrative of the rescue of the South (where most indigenous peoples live) from purportedly self-inflicted disasters like poverty, internal displacements, and civil strife needs to yield to a discourse of prevention that equally exposes Northern and Southern vectors of human and ecological degradation, be these neo-liberal prescriptions, mega-projects, the arms trade, or other culprits. Of course, a simplistic grand narrative of indigeneity would be as misleading as the reigning modernist ones. Instead, a gentle rain of small narratives, supported by

ethnographic-level accounts of well-being—how it is sought and found—might provide welcome relief, and perhaps also insight.

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<sup>1</sup> This statement attributed to Hawai'i's King Kamehameha III (1813–54) remains the principle most invoked by *kanaka maoli* (indigenous Hawaiians) as they contest the ongoing expansion of U.S. military bases, and hotel and housing complexes, in their formerly independent country which the U.S. annexed in 1898.

<sup>2</sup> Jolly et al. 2004.

<sup>3</sup> See UN 2009: 1.

<sup>4</sup> Cobo 1987, paragraph 379.

<sup>5</sup> Some sources consulted include the UN PFII, IWGIA, and IFAD.

<sup>6</sup> The data set out in this paragraph are culled from that report.

<sup>7</sup> UN 2009: 17.

<sup>8</sup> Toye and Toye (2004) have richly narrated the complex UN response to the new developmental focus on trade.

<sup>9</sup> For an insider account of ECLA's extraordinarily influential years, see Berthelot 2004: 168–232.

<sup>10</sup> For an eloquent treatise promoting the NIEO at the time, see Bedjaoui 1979. But see Escobar 1995 for a current critical perspective on the associated construct of “Third World.”

<sup>11</sup> See Sundaram (2011) on the connection between the defective financial system and development.

<sup>12</sup> Anthropologists, long before economists, recognised this ravage. See Bardhan and Ray 2008; Bodley 1988; Boggs 2011; Ferguson and Whitehead 1992; Oliver-Smith 2010; Perry 1996.

<sup>13</sup> A term coined by the environmentalist writer Paul Hawken (see Hawken 2007).

<sup>14</sup> See Alston 2005 on the NGO challenge of neoliberal excesses on human rights grounds.

<sup>15</sup> For a fuller account of this engagement, see L 2000.

<sup>16</sup> Cobo 1987.

<sup>17</sup> Its formal name is Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries. However, both it and the later Convention 169 are generally referred to in the abbreviated fashion used in the text.

<sup>18</sup> Rodríguez-Piñero's account (2005) of the geneses of both Conventions presents far more complex reasons.

<sup>19</sup> Rodríguez-Piñero 2005.

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<sup>20</sup> UN 2009: 1. UN instruments and mechanisms dedicated to indigenous peoples, for example, outstrip those devoted to minorities. See L 2009.

<sup>21</sup> A term and concept James Scott made justly indispensable (see Scott 2003).

<sup>22</sup> Art. 43.

<sup>23</sup> For a fuller account of the territoriality dimension, see L 2004.

<sup>24</sup> Art. 30.

<sup>25</sup> Daes 2003.

<sup>26</sup> Articles 11, 19, 28, 29.

<sup>27</sup> Articles 68–77.

<sup>28</sup> Primarily Articles 8, 9, 11–16, 31. UNESCO’s 1981 *Declaration of San José* uses the term explicitly when it says that ethnocide “involves an extreme form of massive violation of human rights and, in particular, the right of ethnic groups to respect for their *cultural identity*” [emphasis added].

<sup>29</sup> For an extended discussion of this concept, see Fabricant and Gustafson 2011.

<sup>30</sup> Gupta 1992: 73.

<sup>31</sup> See: *Western Sahara Advisory Opinion* (ICJ, 1975); *Mabo v. Queensland* (Australian High Court, 1993); *Case of the Mayagna (Sumo) Community of Awas Tingni v. Nicaragua* (Inter-American Court of Human Rights, 2001); *Alexkor Limited v. the Rickersveld Community* (South Africa, 2003); *Sagong Bin Tasim v. Keajaan Negeri Selangor* (Malaysia, 2005); *Serana v. Botswana* (Botswana, 2006); *Case 366 of 2008* (Supreme Court of Belize, 2010); and *Case of the Kichwa People of Sarayaku v. Ecuador* (Inter-American Court of Human Rights, 2012).

<sup>32</sup> See the excellent articles on this in Fabricant and Gustafson 2011. But see also: Brysk 2000; Engle 2010; Martin 2003; Young 1995.

<sup>33</sup> See, for example, the Declarations of Quito and Cochabamba, respectively.

<sup>34</sup> Stiglitz, Sen, and Fitoussi 2010.

<sup>35</sup> MacFarlane and Foong Khong 2006.

<sup>36</sup> Sen 1999.

<sup>37</sup> Acemoglu and Robinson 2012.

<sup>38</sup> Collier 2007.

<sup>39</sup> See Shah 2010.

<sup>40</sup> Polanyi 2001.

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