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Emerging issues in indigenous rights: transformative effects of the recognition of indigenous peoples

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Abstract :

The UN Declaration on the Rights of Indigenous Peoples (2007) marks a significant shift in the relations whereby indigenous peoples define themselves and their claims. They are now faced with the challenge of implementing international standards within national spaces. By adopting a global comparative perspective, our article aims to explore how this movement unfolds in a variety of local issues and strategies, building transnational links and differences. We first examine the acceptance of indigenous peoples' status across the globe before exploring the transformative effects of recognition around two major themes, indigenous rights to education and to land and natural resources. We argue that the recognition of indigenous peoples as subjects of international law has far-ranging implications for the global system as a whole, implicating other global or transnational agents, and potentially affecting the balance between economic and political powers.

Keywords: indigenous peoples; UNDRIP; education; natural resources; globalisation

“Emerging issues in indigenous rights: transformative effects of the recognition of indigenous peoples” (1)

The adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the General Assembly in 2007 has been the culmination of 25 years of negotiation within the UN system between states and indigenous peoples’ representatives (2). It empowers indigenous peoples’ representatives with new arguments to oppose detrimental state and corporate policies. Now the onus is on both parties to bring back the minimum standards set in the Declaration to implement effective change to the dire social, economic and political conditions of indigenous peoples in national spaces. This situation brings about new issues as international law needs to be translated into domestic law and policy to be of any efficiency beyond symbolic assertions.

This article examines how the recognition of indigenous peoples under international law transforms the relational field in which their claims are asserted and negotiated, focusing on the construction of rights as a means to sustain self-determined indigenous futures. Doing so, we seek to contribute to our understanding of issues surrounding indigenous rights, their implementation, and the underlying political, economic and anthropological dynamics at work.

We address the transformative power of the emergence of a new subject under international law, indigenous peoples, and how this feeds into localised struggles for autonomy, self-determination and the overcoming of poverty. First, we examine how the recognition of indigenous peoples status is accepted across the globe in order to outline different dynamics of indigenous human rights across states and continents. We then focus first on indigenous rights to education, then on indigenous rights to land and natural resources. We seek to bring forth the major tensions and issues that have become critical in a context where the implementation of indigenous human rights is not solely constrained by state policy and national constructs but also by the very global forces and dynamics that indigenous peoples have sought to harness, which participate in redefining the contours of state sovereignty.

Throughout the paper we mostly use Latin American and Australian examples because they represent qualitatively distinctive configurations and because the distance and similarities between these rarely compared regions highlight tensions, conflicts and issues that cut across indigenous situations worldwide. It is in this dynamic of juxtaposition and comparison that we find means to confront a global issue and think of its localised manifestations, thus offering an analysis of the relational situation engaged by UNDRIP.

Indigenous rights in a global perspective

The right of peoples

The recognition of indigenous peoples, whose autonomy is contested in most parts of the world, is pursued by the international adoption of UNDRIP (2007) which acknowledges their human individual and collective rights. The Declaration does not specify a definition of

these peoples. States retain their sovereignty and territorial integrity, which legitimates them as political actors internationally. But a new category of political actors, having emerged during the last quarter of the twentieth century, now has the capacity to influence governance processes and structures in matters that affect them. A new relational and political dynamic is engaged with the second paragraph of the UNDRIP Preamble: *'Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such.'*

The negotiation of the UNDRIP was based on the principle that indigenous peoples are peoples, collectively pursuing to live according to their own institutions, rather than a second-class category of citizens or a series of distinct populations. Indigenous leaders and lawyers repeatedly pointed out the differences that had to be addressed by the international community, between individual human rights, which apply to everyone, and collective human rights, which apply to situations indigenous peoples claim as characterising them. As a people and a group of indigenous peoples, they express at global levels their perception that their cultures, languages, forms of governance, systems of law and justice, etc., constitute an integral part of their identification and the source of their differentiation, not as ethnic groups seeking the implementation of minority policies, but as subjects of law capable of articulating alternative modes of relationship to the rest of world as well as alternative modes of development. The adoption of UNDRIP has a symbolic, yet powerful, effect as indigenous peoples acquire, with this instrument, the legal personality they need to be respected by states and within states. However, the exercise of indigenous peoples' foundational right to self-determination (UNDRIP art. 3) remains to be precisely addressed through the evolution of domestic policies and in the larger context of globalisation.

A global overview

With 15 states having ratified the International Labour Organisation (ILO) Convention 169 (1989)(3), active involvement in the UNDRIP process, and other institutional arrangements such as the Organization of American States (where a similar exercise as the UNDRIP is progressing) and the Inter-American Court of Justice (which hears indigenous cases), Central and South America potentially have an impact on indigenous issues developments worldwide (4). Indeed, three cycles of constitutional changes (between 1985 and 2009) led to important steps for the inclusion of indigenous peoples (5): first, the emergence of multiculturalism and the right to cultural diversity (1982–1988 – Guatemala, Nicaragua, Brazil); secondly, the emergence of the concept of a pluricultural nation-state and the recognition of legal pluralism (1989–2005 – Argentina, Columbia, Ecuador, Mexico, Panama, Paraguay, Peru, Venezuela); lastly, the formation of a plurinational state, including in its formation and apparatus indigenous nations and nationalities (since 2006) whose best expression is now given by Bolivia and Ecuador (6). Constitutional changes allowed for a fruitful germination of ideas and new practices, including: addressing land conflicts (with policies of territorial demarcation), opening the education system through bilingual education, adjusting systems of justice through decentralisation and the territorial recognition of indigenous sovereignties, with various forms of autonomies. Other countries – Chile, Honduras, Guyana, El Salvador, Costa Rica, Surinam, Belize – have passed indigenous laws, most of which are concerned with linguistic and cultural heritage protection. Although southern American states do not oppose the notion of collective human rights and recognise

indigenous groups as peoples or nations, the implementation of UNDRIP locally remains highly controversial.

African and Asian states offer a very contrasted picture, as indigeneity there confronts conceptions of autochthony to the point that, during the 25 years of the UNDRIP negotiation, they were quite absent. In their views, there were no indigenous issues since all African and Asian nationals were to be considered autochthonous to the place they live in. In Africa, indigenous peoples' organisations joined the international movement in the late 1990s. They have been supported by United Nations (UN) agencies and benefited from a series of changes at international levels with the formulation of indigenous policies within the UN system (UN Development Programme and Environment Programme, UN Educational, Scientific and Cultural Organisation, the World Bank, and so on). At the turn of the century, the African Commission of the Peoples and Human Rights set up a working group to identify which people were to be considered relevant for the UN approach of indigenous peoples' rights. They identified such groups with regard to processes of nomination, racial discrimination, living conditions, and sources of economic subsistence, rather than anteriority of territorial occupation (7). In 2006–2007, indigenous peoples and human rights organisations developed an active lobby to override the blockage of the African group at the General Assembly, explaining that UNDRIP does not create new rights but incorporates in a single document a set of international human rights provisions that they had already adopted (such as the 1966 International Covenants or the Convention on the Elimination of all forms of Racial Discrimination). This strategy allowed for the final adoption of UNDRIP in 2007 and, recently, for the ratification of ILO Convention 169 by the Republic of Central Africa (the first and unique African country to do so) (8). Limited constitutional and legal changes have occurred: in Burundi, the 2005 constitutional reform established three reserved seats for the Batwa in both parliament chambers; in the Congo Republic, a law on the promotion and protection of indigenous peoples' rights was adopted in February 2011.

In Asia, there is no international Human Rights Commission that could have created a particular working group for steering a political reflection on indigenous issues. However, no state of that region opposed the UNDRIP – even China, India and Indonesia voted yes – mostly on the basis that they already have active policies towards 'their' indigenous minorities, defined according to official State discourses as 'national minorities' (China and Viet Nam), 'racial minorities' or 'national races' (Burma), or 'scheduled tribes' (India). Evolutions are happening in two countries as a result of indigenous peoples' mobilisations and the lobbying of the state (Philippines) or of revolutionary changes (Nepal). The former adopted an indigenous law very close to UNDRIP, while the latter has recently ratified ILO Convention 169 (the first and unique Asian country to do so). The adoption of an indigenous law did not prevent the Philippines, however, from adopting a contradictory mining law.

In the Pacific region, the situation is quite complex as four states, that have actively opposed UN indigenous developments, have a leading influence on the region: Australia, New Zealand, the US (Hawai'i), and France (New Caledonia and Polynesia). The recent shift of the CANZUS group which announced support for the Declaration in the past two years reflects their 'over-compliant' position whereby they promote linguistic and cultural rights while resisting more politically challenging ones (e.g. self-determination and land rights) (9).

France does not support the concept of indigenous peoples (except for the Kanak people who are engaged through the Noumea Agreement in a process of decolonisation enabled by the concept of 'shared sovereignty'). It supports the UNDRIP with an understanding that the

Republic has overseas 'domestic' policies which address Indigenous Peoples situations. Regionally, a wider European paradigm of recognition dominates, which mostly relies on the Framework Convention for the Protection of National Minorities, with no provisions for collective political and human rights to address indigenous issues (10). The sole exception are the Saami people who enjoy political rights (with the recognition of Saami Parliaments in three countries) but still look forward to the adoption of the Nordic Saami Convention by Norway, Finland and Sweden. The adoption of the European Initiative for Democracy and Human Rights by the European Union – an instrument which includes some provisions for indigenous peoples' human rights in third countries – signals however some interest in indigenous issues as understood within the UN system.

In sum, many gaps can be observed between national and legal contexts regarding indigenous lives, across and within countries. The 'indigenous experience today' is well differentiated, particularly if one contrasts local and global sites, places of residence and places of political action (11). Nonetheless, significant shifts can be observed: at global levels with the internationalisation of indigenous movements and the mainstreaming of indigenous issues in the fabric of international norms; in the academic world through the work of indigenous studies departments in Anglo-Saxon and Latin American universities (including indigenous universities in South America) and, more recently, in Northern Europe (Norway), which re-examine the meanings of indigeneity and of ethnic/ethnic politics; and in the world of politics where indigenous peoples can now be considered, in some places, as subjects of rights rather than subjugated by laws. However, indigenous people, who in some states participated actively to the writing of new constitutions, remain under pressure, especially for their models of relationship to their land and territories: the condition of urban indigenous peoples and the situation of indigenous migrants emerge as issues of particular concern and, even more critically, the capacity to secure access and title to a land held as a collective resource, for the wellbeing of all those attached to it.

In the remainder of this article we examine two key areas of indigenous peoples' rights struggles – education and control of resources –, examining how the UNDRIP and other international instruments and developments come to bear on these issues. Indigenous rights to education, language and culture: the future of diversity

Tensions within recognition

Education and associated issues of language and culture are core interests of nation-states and indigenous peoples as both seek to protect their collective specificities as societies. While culturally adapted education is central for sustaining autonomous and self-determining indigenous groups, education has historically been for states the privileged means to shape national communities. This is why specific collective rights were to be recognised: to ensure the survival of indigenous peoples as human groups. These present indigenous rights to education as a necessary although insufficient condition for both self-determination and sustainable development. Article 13 of the UNDRIP (12) provides with a general recognition and protection of indigenous rights to their lore and culture, while article 14 (13) affirms the right for Indigenous Peoples to control their educational systems and institutions, and article 15.1 (14) proposes to articulate indigenous peoples' cultures and knowledge with mainstream education. Other provisions in the Declaration, in the Preamble and article 8 for instance, explicitly link indigenous rights to education, language and culture to their rights over their lands and resources and sustainable development (that is, to

ecological and economic dimensions). Indeed, indigenous education cannot be considered separately from what makes indigenous lives possible, that is a holistic societal perspective integrated through networks of relationships – to land, kin, ancestors and spiritual beings – that have to be maintained.

Education for indigenous peoples cannot simply be addressed as education in a particular language but engages a particular work in didactic and pedagogy, done in association with well trained people, to use education as a tool for the development of the child in relation to those systems of relationships. This dimension creates a particular tension for those indigenous people who live outside of their territory which explains why indigenous rights to education, as they appear in the UNDRIP, maintain a fundamental tension, touching at the core of indigenous peoples' relationships to the state. Namely, indigenous peoples' rights to education are at odds with the general human right to education as the latter does not strictly equate with indigenous peoples' understanding of education in their language and culture and according to their specific values and practices. The very article in the Declaration that purports to protect indigenous peoples' right to their educational institutions (art. 14) actually entrenches this tension that is played out across political, cultural and socio-economic fields within national spaces. At stake here is the nature, content and purpose of an indigenous education.

Conflicting purposes

The indigenous experience of colonial and, later, state education, has overwhelmingly been one of assimilation at the hands of religious or state representatives, sometimes through massive displacement as in Australia and Canada (15). The indigenous critique of such policies is reflected in the Amerindian saying that the purpose of the white school is 'to educate the man and leave the Indian out'. Contemporary policies, which focus on 'closing the gap' in educational achievements, seek to bring indigenous people to the same standard as the rest of the national population. They remain assimilationist in purpose and nature as opposed to policies that would develop from indigenous knowledge, experiences and perspectives (16).

The historical processes of dispossession and exclusion of indigenous peoples resulting from colonisation and nation-state formation have for the most part installed them in situations of entrenched poverty and sociopolitical exclusion. Today, this very situation forms the ground on which states, as well as international organisations and institutions, argue for the necessity for indigenous peoples to wholly integrate the mainstream economy and, hence, participate in the mainstream education system. In Australia, for instance, the contestation and reduction of bilingual programmes within indigenous communities by governments was justified on the grounds that education in indigenous language in remote communities prevented economic integration – despite numerous studies showing that indigenous children benefiting from two-way models of education did perform better, including in English proficiency (17).

Two interrelated issues are at stake here that are transversal to the indigenous world. First, there is a continuing problem with the lack of access to the general education system for indigenous people, particularly for those who chose to live in communities away from the main job markets and where, furthermore, the training and recruitment of cross-culturally trained teachers is highly difficult. Generally speaking, if indigenous people want to achieve high education levels they have no choice but to move away from their communities, kin

networks and country, a highly problematic situation since the breakdown of social cohesion lies at the heart of many social and economic problems faced by indigenous people. Secondly, indigenous knowledge is rarely seen as an asset, either for the children, or for the development of sustainable or 'hybrid' economies where the traditional, market and state sectors are articulated at parity (18). This generally results in poor integration of indigenous concerns within education systems, a situation reflected in multiple ways, including: the segmentation of holistic knowledge requiring ongoing relationships with land and kin; the problematic displacement of 'traditional practices' to the school room; and the difficult accommodation of indigenous linguistic and cultural diversity, even in pluricultural situations, multicultural education being often merely a gloss for a dual education system where indigenous children are taught the mainstream language and culture.

In the light of UNDRIP, indigenous rights to education imply political processes of decentralisation and increased local control in order to encompass the diversity of indigenous peoples' languages and cultures and accommodate their teaching ways. Achieving indigenous peoples' control over their education not only requires a transformation of their relationship to the state but also of educational institutions themselves.

Decentralising indigenous education

To a large extent, indigenous peoples' capacity to sustain their specific educative institutions, systems of knowledge and languages has depended on the reach and orientation of (colonial and post-colonial) states, and now also of globalised economic actors. When considering indigenous rights to education, it appears that the institutional conditions for implementing these rights are linked to indigenous relationships to the state according to different variables. These include: the nature of the relationship to the state (formal/informal); the degree and nature of political integration to the nation-state (national, multicultural, plurinational); the indigenous proportion of the national population; and the state's capacity of governance (weight of international cooperation and transnational companies).

In Bolivia, where the UNDRIP has been integrated to the Constitution and ILO 169 has been ratified, indigenous people benefit from a range of educative possibilities integrating their languages and cultures up to the university level whereas in Australia – where no formal relationship links the diverse indigenous polity to the federal state (whether in a treaty or in the constitution) and where indigenous rights have limited legal recognition – while indigenous educational achievements have risen over the last decades and specific departments established in universities, the participation of indigenous people to the design and orientation of education remains marginal at best.

The constitutions of 11 Latin American countries (Argentina, Bolivia, Brazil, Colombia, Ecuador, Guatemala, Mexico, Nicaragua, Paraguay, Peru and Venezuela) acknowledge multicultural or multinational characteristics of the state, while a few others (such as Chile, El Salvador, Honduras and Panama'), with legal yet no constitutional provisions for indigenous peoples, accept the right to differential education. Multiple experiences of indigenous education have been developed since the 1980s – from local autonomy to indigenous universities and, in the wake of postcolonial and decolonisation studies, proposals for a 'pluriversity' (19) – which highlight the difficulties of implementing an agenda of decentralised education institutions.

Several problems pave the process of decentralisation and the creation of ‘third sector’ indigenous entities in charge of providing education as well as health services to their affiliated members. Some case studies demonstrate the crucial importance of the definition of the territorial frame of reference as well as the financial issue: what kind of budget is allocated to education and who is going to pay for indigenous children? In that domain, a top-down approach of decentralisation towards indigenous peoples without the corresponding financial transfer proves to be highly problematic, notwithstanding the problems raised by the difficulty for training the professors and establishing some kind of standards (20). Moreover, the use of neo-liberal forms of contractualisation may induce dramatic errors, such as for the Awa people in Colombia, a group of hunter-gatherers living in the Amazon forest. The Awa sent their proposal (a day after the deadline because the road was flooded) and the British Musical College won the call for tender explaining that English and music were two universal languages, that would well equip indigenous students for the job market. The Awa teachers being fired, a source of jobs was also lost, and Awa parents went on strike for a year before a solution was found. In many parts of the world, indigenous peoples have often little choice but to go to the independent or private sector if they want some degree of control over their educational institutions, contents and practices. Generally this is done with assistance from philanthropic and religious groups, which raises another significant set of issues regarding self-determination.

As under neo-liberal reforms education ceases to be institutionally treated as a public good the position of indigenous peoples seeking to maintain their singularities becomes strategic. Our discussion of indigenous rights to education in the wake of the UNDRIP has highlighted two significant factors bearing on the implementation of these rights: not only the relationship to the state – the traditional framework of analysis for Indigenous situations – but also the growing importance of an autonomous economic base as a condition for the realisation of self-determination in the globalised economy. We take these issues further in discussing indigenous peoples’ rights over their land and natural resources.

Negotiating sovereignties: indigenous rights over land and natural resources

Indigenous permanent sovereignty over land and natural resources

Relationships to land are foundational of indigenous polities and also of their modern political struggles as colonial and state powers have been built, politically and economically, on the dispossession of indigenous peoples’ territorial sovereignty and the exploitation of their natural resources. Extracting activities, particularly those that concern underground resources – and the violence that they entail for local communities and their environment (21) –, have historically been one of the factors for the emergence of indigenous political movements on the national and international scene insofar as these conflicts highlight indigenous peoples’ marginalisation and exclusion from citizenship and political processes, and their unique situation in terms of human rights.

International law recognises what special rapporteur Daes has defined as indigenous permanent sovereignty over their lands and natural resources (22), and rights that are entrenched in the UNDRIP at articles 25 and 26 (23). Importantly, indigenous peoples’ rights to land and resources are described as ‘permanent sovereignty’ and as a set of inherent and inalienable collective rights arising from indigenous polities themselves irrespective of colonial and contemporary state processes. They are wide ranging and include, among others, the right to own and to control their lands, the right to not be forcibly displaced from

their lands, to oversee development and/or conservation processes, to maintain traditional ecological knowledge and practices, and to be consulted in projects affecting their territories according to the principle of free, prior and informed consent.

In practice, however, the recognition, protection and implementation of these rights remain dependent on state law and policy, most particularly in the case of mineral and underground resources which are construed, in a discriminatory manner, as strategic resources belonging to the state by virtue of its sovereignty, irrespective of its historical acquisition thereof (24). Generally some form of recognition is accorded by states to indigenous peoples – when they accept the existence of such entities – through the recognition in domestic law of traditional occupancy (which in the Anglosphere is the legal basis of native title at common law), historical attachment to particular tracts of country, or formal agreements made in the colonial and contemporary period.

Legal provisions for the recognition of indigenous peoples' land rights confront us with different problems. One is that, as many Latin American situations show, the titles obtained through legal action by indigenous groups are often inferior to any other type of property titles within domestic law and are subject to legal insecurity as they can be overridden by other rights or by acts of states. Hence, although land demarcation has been done in several countries since the 1970s, a wide range of conflicting situations remain and are in fact taking a new importance: from cases which oppose indigenous communities to family land owners to cases that oppose indigenous individuals, families or communities to multinational companies which use territories for developing extractive activities without consultation or consent (logging, mines, etc.), especially in Amazonia (25). The application of legal norms is therefore in question as well as the meaning of 'free prior and informed consent', particularly after the subtle shift produced by the World Bank in the second Manual of Operation regarding indigenous peoples, from 'consent' to 'consultation'. Similarly, in Australia, the jurisprudence of the Native Title Act 1993 (Cwth) has replaced a doctrine of terra nullius, which denied any legal and political legitimacy for indigenous peoples, by a doctrine of extinguishment through which Parliament and courts can legitimately put an end to indigenous' rights and interests to specific areas of land, a logic that is also pursued by Canadian policies that aims at extinguishing First Nations' Treaty rights. The length of procedures and a burden of proof mainly resting on the indigenous part without appropriate financial support are also common hindrances to indigenous claims.

This difficulty of obtaining state recognition of indigenous rights and interests to land and resources deriving from their own polities and histories through peaceful or legal action constitutes, as Special Rapporteur Daes emphasises, 'the overwhelming majority of human rights problems affecting indigenous peoples' as land is the basis of the social, cultural and economic integrity of indigenous polities' (26). Her conclusion is that judicial mechanisms to resolve indigenous land rights issues are, at best, 'risky' (27) – not the least because of the difficult articulation of different regimes of rights and competing interests – while exhibiting what anthropologist D.B. Rose has defined as 'deep colonizing' for Australia: '*conquest embedded within institutions and practices which are aimed toward reversing the effects of colonization*' (28). The same difficulty also explains why in different parts of the world, questions of access, control and occupation of land take a conflicting nature, rooted in the inapplicability or inadequacy of legal and political processes. In extreme cases, such as the Mapuche situation in southern Chile, state can react by criminalising indigenous forms of resistance to land spoliation or discrimination, in this case by the application of 'anti-terrorist

law', which delegitimises the indigenous character and criminalises their mobilisation as attacks against private properties.

However, as the recent campaign of the Dongria-Khond against the Vedanta company in India, and many other cases throughout the Indigenous world, illustrate, the question of Indigenous land rights and permanent sovereignty over natural resources is not constrained anymore by the sole operation of the indigenous peoples/state relationship but, as states undergo neo-liberal economic reforms, increasingly involves transnational companies as prominent actors in the debate. Given their ambiguous status under international law, to say the least, and their increasing economic and political power as the resource boom feeds international competition, they need to be considered in any discussion of indigenous land rights.

Contested sovereignties

While the UNDRIP and even the concept of 'permanent sovereignty' do not call into question the supremacy of state sovereignty as the cornerstone of the international order, the various phenomena gathered under the term of 'globalisation' – massive migrations and displacements, transnationalisation of capital and communities, social fragmentation and market homogenisation, land purchases by states and private sector agents (trust funds, companies, etc.) – impose a reconsideration of the Westphalian system of sovereignty and of how we think about the articulation of territory, authority and rights (29). The Special Rapporteur on Human Rights and Transnational Companies regularly highlights in his reports the fundamental 'misalignment between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other' (30).

Under international law, transnational companies have a responsibility to 'protect, respect and repair' human rights in the countries they operate. However, nothing in international treaties and conventions directly addresses their status while, on the other hand the International Centre for Settlement of Investment Disputes (ICSID, an institution created by the World Bank) has consistently worked towards the protection of investors rather than states or their population. The issue is all the more reinforced for indigenous peoples since states are often dependent on the exploitation of their natural resources for their economic development, particularly in the context of the globalised resource boom.

While transnational companies challenge state sovereignty at their level by the sheer power of their economic weight, indigenous peoples (and other social movements, including transnational minorities, refugees and illegalised migrants) challenge it from within, through the disjunction they create between the state and the national communities. However, while indigenous peoples have been recognised as subjects of rights (and responsibilities) under international law, elaborating effective similar standards for private sector agents has proven much more difficult, possibly because they do not need so much protection as constraints on their operations. Here again, the capacity of indigenous peoples to implement their rights is also related to the state's capacity of governance: where states are dependent on international cooperation and monitoring, indigenous peoples and minorities are, paradoxically, in a somewhat better position to see their rights protected and respected than those living in the first world (such as in CANZUS states) where their capacity for development and their control of land and resources is almost entirely determined by state action.

Transnational companies are the subject of growing international attention, which is unfolding into a range of non-constraining instruments that inform their action with regard to indigenous peoples' rights (31). These instruments have severe limitations, not only in terms of their softness but also in terms of their accountability, transparency and assessment procedures by independent parties, but they point towards a growing practice of tripartite agreement-making between indigenous peoples, transnational companies and states which do result in the formal acknowledgement of indigenous rights and interests over their land and natural resources. These agreements not only include royalties (benefit sharing) but also employment, training, cross-cultural awareness programmes, investment in local businesses and organisations and even the provision of basic services such as housing or transport in replacement of the state. Although sustainability and positive long-term impacts have yet to be proven as far as local communities are concerned, they are nonetheless an important vehicle for the recognition of indigenous peoples' status and implementation of their right to self-determination (32). Increasingly, also, non-government and civil society organisations play a part in these negotiations, both at the level of national space and international institutions. If national jurisdictions, their attitudes towards international instruments and their capacity of governance largely determine indigenous peoples' capacity to mobilise different regimes to implement their rights, the implication of international support organisations has also, for instance, contributed to re-encode the struggle for indigenous land rights into a more general environmental issue, thus garnering wider support across the local or international civil society.

These organisations constitute a fourth meaningful agent (with indigenous peoples, states and companies) taking part in negotiations and standard setting but also in the development of local programmes and policies. While indigenous peoples were firstly determined by their relation to the state, this is no longer the case, mainly because of their reaching for a 'higher authority' in global institutions where they have developed a range of new alliances and networks (33). As the relational field in which indigenous peoples define themselves, their objectives and strategies, has changed so has the field of their action.

Indigenous development

It becomes increasingly evident that indigenous peoples are not opposed to development but rather seek to exert their right to self-determination within development initiatives, especially through defining their own criteria of what constitutes sustainable development, generally integrating social and cultural objectives alongside economic equality and environmental sustainability. This raises questions about the exact meaning and pragmatic conditions for the realisation of the principle of 'free, prior and informed consent', not the least because of the current lack of consensus over the meaning of 'consent' in international instruments and according to the different agents involved (although indigenous peoples themselves do have quite a clear idea of what they mean by consent and demand the right to say NO). While consultation has long been a feature of governance instruments, indigenous peoples seek to exercise a right to negotiation, although their political and economic fragility often complicates and constrains their capacity to oppose major development projects. Nonetheless there has been growing attention to these issues by mining companies in the last decade – although it could also be seen as a willingness on the part of major companies to buy off the social peace through their affirmed 'social

responsibility', all the more so since long-term social and cultural impacts are difficult to evaluate.

Further, indigenous peoples' attitudes towards land rights and development are far from homogenous, building on differing conceptions of self-determination and autonomy. In Latin America, some scholars subordinate self-determination to political and economic emancipation while others consider that cultural autonomy primarily provides the right conditions for self-determination (34). Regarding the rights to use natural resources, the former have been influenced by the fight for agrarian reforms in the sixties, the latter by demands for cultural recognition in relation to ancestral land (35). These two approaches differentiate highlands and lowlands movements, and correspond to a historic differentiation of struggles. But this differentiation is also found across other indigenous fields, for instance in Australia where the same opposition appears between those groups who argue primarily for economic development as a means out of poverty or 'welfare dependency' as opposed to those that pursue a rights-based approach to self-determination through demands for formal recognition of Indigenous sovereignty, land rights and cultural autonomy. No simple cultural or historical dichotomy, for example between urban and traditional elites, can account for the strategies chosen by these different agents. In Latin America as in Australia, however, both strategies for self-determination are related to the right for a free-determined development, in correspondence with the re-articulation at international levels of the concept of development with identity, or with culture and identity, and the formulation of the concept of a human rights-based approach to development (36). In Australia this is manifested through a general strategy, adopted by indigenous groups who have secured some rights and interests to traditional lands, to develop 'caring for country' programmes and activities and invest in natural and cultural resources management. These programmes seek to develop what has been described as a 'hybrid economy' combining traditional subsistence activities with the market economy, or what Mashall Sahlins described as 'develop-man', where the product of economic activity is reinvested into local social and cultural institutions and values (37). Such programmes, however, particularly where the focus is on economic empowerment through environmental services and the exploitation of resources can also contradict strategies of conservation promoted by ecological groups and lobbies, with breakdowns in former alliances resulting as contradictory perceptions of what constitutes good natural and cultural resources management practices collide.

Conclusion

In the Preamble of the UNDRIP, the General Assembly affirms that the recognition, respect and protection of indigenous peoples' human rights – rights to self-determination; rights to language and culture; sovereignty over their land and resources and of their right to development – is a condition for sustainable development, perhaps all the more so since indigenous peoples tend to live in areas of high biodiversity. However, this vision is constrained by a number of factors – political relationships, economic imbalance – over which indigenous peoples, in national contexts and through global institutions, have limited influence.

Nevertheless, with the adoption of the UNDRIP by 149 member states of the UN (38), the paradigm has significantly shifted from a struggle for the recognition of indigenous peoples' human rights – a global movement which goes back to the early 1920s with Haudenosaunee

leader Deskaheh going to the League of Nations in Geneva – to one for the concrete exercise and implementation of those rights entrenched in international law.

In our review of current and emergent issues, one sees that it is in those states that are transforming their own internal fabric through constitutional reforms, and, significantly, those countries that have ratified the only constraining convention on these issues (ILO 169), that indigenous peoples have been in a position to enter self-determining reforms to their political environment, albeit confronting strong resistances from conservative politicians and magistrates. Some significant changes in law and policy have also emerged from countries which entertain formal relationships with their indigenous peoples, such as New Zealand through the work of the Waitangi tribunal, thanks to the nomination of a (maybe unique) Maori magistrate at the High Court.

Through their engagement in domestic and international movements, indigenous representatives have acquired significant skills and expertise and established important networks both with domestic and international institutions. However, their sole existence cannot guarantee the kind of national transformations that the principle of self-determination calls for: strong support from civil society organisations and international non-governmental organisations, as well as domestic majorities and elites oriented towards the achievement of substantial equality are needed – in this area, the concepts, practices and institutions flowing from the notions of pluriversalism and plurinationalism in Latin America seem all the more interesting that they are articulated to other changes in the world system at large where the contours of governance and sovereignty are being redefined.

Indeed, another important emergent trend concerning the implementation of indigenous human rights is the growing implication of transnational actors within the indigenous field and, more generally, the accrued importance of third parties in the relationship between states and indigenous peoples. The associated issue with this change is the absence of a clear status both in international and domestic law for these emergent agents, whether transnational companies or migrants, although for different reasons. The international recognition of the global indigenous movements is thus simultaneously a manifestation of globalisation processes as well as a development that may impact significantly on its orientation. It signals a shift in the relational field of governance and human rights, indigenous peoples being the only rights bearer to have negotiated themselves the minimum standards by which state actions should be appreciated. The implementation of indigenous human rights implies effective actions and international cooperation on global issues such as climate change, biodiversity loss, resource predation and water management. In this sense, indigenous peoples' struggle for the implementation of their human rights has a global impact not only on their own situation but also on the global society as it is emerging and as a whole.

Notes

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2. The United Nations Declaration on the Rights of Indigenous Peoples, 2007, <http://www.un.org/esa/socdev/unpfii/en/drip.html> (accessed 30 May 2011).
3. Actual signatories of ILO Convention 169 are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, Venezuela. Also signatories to the Convention are 4 European States (Denmark, the Netherlands Norway and Spain); 1 Pacific State (Fiji); 1 Asian State (Nepal); and 1 African State (Central African Republic).
4. Irène Bellier, 'Le projet de déclaration des droits des Peuples autochtones et les Etats américains: avancées et clivages', in *Etre indien dans les Amériques*, ed. Christian Gros and Marie-Claude Strigler (Paris: Institut des Amériques, 2006), 27–41; Claire Charters and Rodolfo Stavenhagen, eds, *El desafío de la declaración: Historia y futuro de la Declaración de la ONU sobre los Pueblos Indígenas* (Copenhagen: IWGIA, 2010).
5. Leslie Cloud, personal communication.
6. Raquel Yrigoyen, ed., *Pueblos Indígenas. Constituciones y reformas políticas en América Latina* (Lima: IIDS, 2010).
7. African Commission on Human and People's Rights, *Advisory Opinion of the African Commission on Human and People's Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (Banjul: ACHPR, 2007), http://www.achpr.org/english/Special%20Mechanisms/Indigenous/Advisory%20opinion_eng.pdf (accessed 30 May 2011).
8. Some states abstained from voting the UNDRIP (Kenya and Nigeria), others being absentees (Chad, Ivory Coast, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea-Bissau, Mauritania, Morocco, Sao Tome and Principe, Togo, Uganda).
9. Sheryl Lightfoot, 'Emerging International Indigenous Rights Norms and "Over-Compliance" in New Zealand and Canada', *Political Science* 62, no. 1 (2010): 84–104. Australia announced its support for UNDRIP in April 2009, followed by New Zealand (April 2010), Canada (November 2010) and the USA (December 2010).
10. Rainer Grote, 'On the Fringes of Europe: Europe's Largely Forgotten Indigenous Peoples', *American Indian Law Review* 31, no. 2 (2006/2007): 425–43.
11. Marisol de la Cadena and Orin Starn, eds, *Indigenous Experience Today* (Oxford, New York: Berg, 2007).
12. '1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons; 2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.'
13. '1. Indigenous peoples have the right to establish their educational systems and institutions providing education in their own language, in a manner appropriate to their cultural methods of teaching and learning; 2. Indigenous individuals, particularly children, have the right to all levels of education of the State without discrimination. 3. States shall, in conjunction with Indigenous peoples, take effective measures in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and in their own language.'
14. '1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.'
15. Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Canberra: HREOC, 1997); Assembly of First Nations, *Breaking the Silence: An Interpretive Study of Residential School Impact and Healing, as Illustrated by the Stories of First Nation Individuals* (Ottawa: Assembly of First Nations, 1994).
16. Canadian Council on Learning, *The State of Aboriginal Learning in Canada: A Holistic Approach to Measuring Success* (Ottawa, ON: Canadian Council on Learning, 2009), http://www.ccl-cca.ca/pdfs/StateAboriginalLearning/SAL-FINALReport_EN.PDF (accessed 30 May 2011). The report indicates a change in such direction, outlining new curricula based on First Nations, Inuit and Métis models of successful learning.

17. Department of Employment, Education and Training, Northern Territory, *Indigenous Languages and Culture in Northern Territory Schools; Report 2004–2005* (Darwin: DEET, 2005), http://www.det.nt.gov.au/_data/assets/pdf_file/0009/5130/ILCreport.pdf (accessed 30 May 2011).
18. Jon Altman, 'Sustainable Development Options on Aboriginal Land: The Hybrid Economy in the Twenty-first Century', *CAEPR Discussion Paper no. 226* (Canberra: Australia National University, 2001), http://caepr.anu.edu.au/system/files/Publications/DP/2001_DP226.pdf (accessed 30 May 2011).
19. Robert A. Rhoads and Carlos Alberto Torres, *The University, State and Market, the Political Economy of Globalization in the America* (Stanford, CA: Stanford University Press, 2006).
20. Bruno Baronnet and Nadège Mazars, 'Los pueblos indígenas de Colombia frente a los servicios públicos de salud y educación: Las experiencias de gestión propia de la política social', in *Desarrollo con identidad? Gobernanza económica indígena; siete estudios de caso*, ed. Christian Gros and Jean Foyer (Lima: IFEA, 2010), 121–84.
21. See for instance the Barbados Declaration 1971, <http://www.nativeweb.org/papers/statements/state/barbados1.php> (accessed 30 May 2011).
22. Erica-Irene Daes, *Indigenous Peoples' Permanent Sovereignty Over Natural Resources. Final Report of the Special Rapporteur*, E/CN.4/Sub.2/2004/30 (United Nations: Economic and Social Council, 2004). See also the report of the Expert Seminar on Indigenous Peoples' Permanent Sovereignty Over Natural Resources and their Relationship to Land, E/CN.4/ Sub.2/AC.4/2006/3, and the statement on 'Territories, Lands and Natural Resources' by Mrs Erica-Irene Daes, Representative of Greece, Before the United Nations Permanent Forum on Indigenous Issues – Sixth Session, United Nations, New York City, 14 May 2007.
23. Art. 25: 'Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.' Art. 26: '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.'
24. Daes, *Indigenous Peoples' Permanent Sovereignty Over Natural Resources*, §43.
25. Guillaume Fontaine, *Gaz et pétrole en Amazonie. Conflits en territoires autochtones* (Paris: L'Harmattan, 2011).
26. Daes, *Indigenous Peoples' Permanent Sovereignty Over Natural Resources*, §38.
27. *Ibid.*, §93.
28. Deborah Bird Rose, 'Land Rights and Deep Colonizing: the Erasure of Women', *Aboriginal Law Bulletin* 28, no. 3 (1996): 6–13.
29. Saskia Sassen, *Territory, Authority and Rights: From Medieval to Global Assemblages*. (Princeton, NJ: Princeton University Press, 2006).
30. John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, A/HRC/4/35 (United Nations: Human Rights Council, 2007), §3.
31. These include formal guidelines such as the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, OECD Guidelines, or the World Bank Manual of Procedures regarding Indigenous Lands and Consultation; standards of performance and other instruments of procedures for increased transparency and accountability such as the International Finance Corporation's performance standards; and multi-stakeholder agreements such as the UN Voluntary Principles on Security and Human Rights.
32. Gail Whiteman and Katy Mamen, 'Examining Justice and Conflict between Mining Companies and Indigenous Peoples: Cerro Colorado and the Nga"be-Bugle"', *Journal of Business and Management* 8 (2002): 293–330; Marcia Langton, 'The Resource Curse', *Griffith Review* 28 (2010), http://www.griffithreview.com/images/stories/edition_articles/ed28_pdfs/langton_ed28.pdf (accessed 30 May 2011).
33. Ravi da Costa, *A Higher Authority: Indigenous Transnationalism and Australia* (Sydney: UNSW Press, 2006).
34. Rodolfo Stavenhagen, *The Ethnic Question. Conflicts, Development and Human Rights* (Tokyo: United Nations University Press, 1990); Stefano Varese, 'The New Environmentalist Movement of Latin American

Indigenous People', in *Valuing Knowledge, Indigenous People and Intellectual Property Rights*, ed. Stephen B. Brush and Doreen Stabinsky (Washington, DC: Island Press, 2006), 122–42.

35. Guillaume Fontaine, *El Precio del petróleo. Conflictos socio-ambientales y gobernabilidad en la region amazonica* (Quito: FLACSO-IFEA, 2003), 199–248.

36. Victoria Tauli Corpuz, Leah Enkiwe-Abayao and Raymond de Chavez, eds, *Towards an Alternative Development Paradigm, Indigenous People's Self Determined Development* (Baguio: Tebtebba, 2010); see also Irène Bellier, 'Le Développement et les Peuples Autochtones; conflits de savoirs et enjeux de nouvelles pratiques politiques', in *Savoirs et politiques de développement. Questions en débat à l'aube du XXI^e siècle*, ed. Vincent Geronimi, Irène Bellier, Jean-Jacques Gabas, Michel Vernières and Yves Viltard (Paris: Karthala, 2008), 119–39.

37. Altman, *Sustainable Development*; Marshall Sahlins, 'The Economics of Development in the Pacific', *Res* 21 (1992): 13–25.

38. 143 states originally supported the Declaration in 2007. Since then the four states that had voted against it announced their formal support as well as two states, Colombia and Samoa, that had originally abstained.