

**A Counter Hegemonic Reconceptualisation of Free, Prior and Informed Consent in an Era of Development Aggression: Indigenous Peoples and Resistance**

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# Abstract

The right to free, prior and informed consent (FPIC) is a crucial manifestation of indigenous self-determination. In an era of unabated extractive development activity, indigenous peoples may be less focused on secession, compared to giving or withholding consent to such activity. Despite its recognition *inter alia* in the UN Declaration on the Rights of Indigenous Peoples, FPIC falls short conceptually, as it presently fails to provide adequate safeguards for indigenous peoples opposed to development activities on their lands. Responding to this broad problem, this thesis aims to reconceptualise FPIC so that it can embody a full right to veto. It must fundamentally contribute towards dismantling 'development aggression' in practice as well as the ideological preoccupations of states. This is achieved by framing the problem and finding solutions according to the terms of counter hegemonic resistance, using selected Third World Approaches to International Law (TWAIL). The use of 'insider-outsider' strategies are considered to shed light on development aggression in different contexts. 'Inside' institutional spaces, tactics are primarily based on sharper, counter hegemonic indigenous agendas, encouraging states to gradually adopt a new consensus against development aggression. 'Outside' tactics focus on indigenous activism that can reshape public perceptions on development aggression. Proposals include forging strategic alliances with other social movements and campaigning for greater indigenous inclusion in media and educational settings. Reconceptualising FPIC is imperative to challenge a major source of tension that often contravenes indigenous peoples' right to self-determination.

The use of a TWAIL framework forms the thesis' original contribution to literature, by offering indigenous peoples a unique theoretical grounding from which they can challenge previously settled aspects of human rights. In return, indigenous peoples could offer TWAIL an important practical 'case study' on how it might operate, as it is a perspective often neglected by mainstream international legal research and opinion.

# Chapter One - Introduction

## 1.1 - Purpose and Aim of the Thesis

The recognition of free, prior and informed consent (FPIC) in the texts of international documents, agreements and corporate standards[[1]](#footnote-1) suggests that effective participation is increasingly becoming accepted as a pivotal right in the safeguarding of indigenous peoples' lands, territories and natural resources ― aspects that are crucial to their collective well-being.[[2]](#footnote-2) Indeed, FPIC's normative significance is particularly highlighted in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Its adoption was widely hailed as a watershed moment for the global indigenous movement[[3]](#footnote-3). After two decades of drafting, which crucially included indigenous participants in the negotiation process[[4]](#footnote-4), the document's recognition of self-determination[[5]](#footnote-5) was particularly praised. Among the other provisions in the Declaration, FPIC is outlined several times. For the purposes of this thesis article 32(2) is of particular interest due to its focus on FPIC in the context of 'any project affecting [indigenous] lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.'[[6]](#footnote-6)

FPIC is deliberately being focused on, because of its intrinsic connection to indigenous self-determination.[[7]](#footnote-7) It is widely regarded to be a practical way for indigenous peoples to freely shape their political, economic and cultural destinies.[[8]](#footnote-8) Incursions by state or privately owned companies threaten the physical and cultural survival of various communities around the world. Activities such as mining of metal ores, coal, crude oil and natural gas, as well as logging of trees and the diversion of waterways for the construction of hydroelectric dams are common on indigenous lands and form multi-billion pound industries. Whereas self-determination in the colonial era was illustrated by the struggle for independence from imperial powers[[9]](#footnote-9), the same pursued by modern indigenous peoples is fought in the context of postcolonial states and/or neoliberal political economies that actively encourage development aggression.

Despite growing international understanding of FPIC, as seen by its clear inclusion in the UNDRIP, the primary problem addressed in this thesis is based on its flawed conceptualisation. It is contended that it does not embody a full and unconditional right to veto. The potential risk of this could result in FPIC's realisation severely falling short of indigenous expectations. As a result, this may deprive indigenous peoples of their self-determination in a contemporary context. A close examination of the Declaration's drafting history demonstrates an intention by state governments to not only dilute the extent of internal self-determination[[10]](#footnote-10), but also the meaning of FPIC[[11]](#footnote-11).

While this conceptualisation in UNDRIP reflected a cross-governmental consensus on the matter, occasional domestic conceptualisations ironically adopt expressions of FPIC that go beyond article 32(2). The problem with domestic approaches to FPIC is that strong conceptualisations are often contradicted by policy frameworks on mining and development projects. Elsewhere, selected decisions of regional human rights tribunals have, in a couple of instances, conceived FPIC in terms above that of UNDRIP, but even these are limited to certain circumstances. Hence, the mere recognition of a right to FPIC is not enough if it is subordinate to a development paradigm (in the case of domestic contexts) that deprives indigenous peoples from realising their right to self-determination.

The purpose of the thesis is therefore to offer a reconceptualised right to FPIC, in order to challenge this problem. In doing so, the ultimate aim of reconceptualising FPIC is the dismantling of development aggression. The practices synonymous with this process have had hugely negative effects on indigenous peoples on their traditional lands. In addition, this form of development has not produced the desired consequences for indigenous peoples, as the loss of lands and resources often leave them a lot poorer. The primary research question is as follows:

***How can Free, Prior and Informed Consent be reconceptualised with the view to dismantling development aggression?***

In answering this question and meeting the main aim of the thesis, it is imperative that an approach beyond the traditional human rights-based one is adopted. This is to initiate a challenge to the political and economic forces which prevent indigenous peoples from attaining their physical and cultural survival.

Now that these fundamental areas have been identified, it is important to explain the key definitions of FPIC and development aggression, which are used extensively in the thesis.

## 1.2 - Key Definitions

### 1.2.1 - What is Free, Prior and Informed Consent?

Free, prior and informed consent (FPIC) is an internationally recognised right which closely reflects indigenous modes of customary decision-making.[[12]](#footnote-12) It is widely regarded as a manifestation of self-determination[[13]](#footnote-13). In addition, it is pivotal to providing indigenous peoples with a practical conduit when dealing with external actors and exercising control over their political, economic, social and cultural lives without interference. FPIC relates to the ability of indigenous peoples to freely give or withhold approval to a proposal or plan of action put forward by third parties. Their consent (or lack thereof) must be allowed at the earliest possible time of a proposal, be subject to thorough and transparent information, be continually binding, offer communities a participatory role in any course of action and fundamentally be free of any external coercion. At an institutional level, one definition provided by the UN-REDD Programme highlights the main tenets of FPIC, as being a:

 [c]ollective right of indigenous peoples to *participate in*

*decision making* and to *give or withhold their consent*

to activities affecting their lands, territories and resources

or rights in general. Consent must be *freely given,*

*obtained prior to implementation of activities* and

be founded upon an understanding of the full range

of issues implicated by the activity or decision in

question.[[14]](#footnote-14)

FPIC has been applied to various contexts. These include the ability of indigenous peoples to directly negotiate with state or business actors vis-à-vis development projects,[[15]](#footnote-15) which is a primary concern of this thesis. Too frequently, environmental degradation (deforestation, air and water pollution) and social and cultural cleansing (forced evictions, displacement and uprooting of entire cultural systems)[[16]](#footnote-16) are attributable to the activities of large companies which, enabled by *laissez-faire*[[17]](#footnote-17) government policies on development and investment, pursue projects such as extractive mining, logging, hydroelectric damming and commercial-scale agriculture.[[18]](#footnote-18) Other related applications of FPIC include having a say in relevant legislative and administrative measures[[19]](#footnote-19) and the prevention of arbitrary removal or eviction from customary lands.[[20]](#footnote-20)

The purpose of FPIC is variable and at times there is conflict with regards to what it should achieve.[[21]](#footnote-21) It ranges from building consensus between indigenous peoples and governments and/or businesses[[22]](#footnote-22); and more controversially a right to veto.[[23]](#footnote-23) Although there is evidence to suggest that vetoing contentious development projects may be permitted in certain circumstances[[24]](#footnote-24), it is contended here that there must be an unconditional right to veto for indigenous peoples. Fundamentally, providing indigenous peoples with a range of options reflects the importance of fulfilling their right to self-determination without external interference. It is essential, therefore, to look beyond the Declaration in order to ensure that indigenous peoples are given the freedom to exercise their self-determination in ways that are conducive to their holistic survival. Additionally, indigenous peoples do not share identical economic aspirations and world views. While some indigenous peoples would indeed opt for refusing a development plan, others would not necessarily do this due to variations in approaches to economic development.[[25]](#footnote-25) What is essential is that an option to exercise a veto is available for indigenous peoples, regardless of their final decision.

In further establishing the context of this thesis, the next subsection focuses on the meaning of 'development aggression'.

### 1.2.2 - Development aggression: The underpinning predicament of postcolonial states and neoliberal economies

When talking about development, we are referring to a multi-layered process with various indicators to measure states of growth, change or progress.[[26]](#footnote-26) As seen by the lapsed UN Millennium Development Goals[[27]](#footnote-27) its meaning can intersect aspects of economic, social and human advancement. In the last 20-30 years, growing attention has also been placed on sustainable notions of development, in reconciling economic growth with social well-being and environmental protection[[28]](#footnote-28). Different cultures and languages interpret development in unique ways. For example the Finnish refer to development as *kehitys* which can be used interchangeably with evolution[[29]](#footnote-29) and the Swahili term *maendeleo* focuses on continuation.[[30]](#footnote-30)

Despite such a diversity of ideas, development is often reduced to a purely economic concept. In fact '[i]rresponsible economic growth ― superdevelopment ― can act as a force for underdevelopment in, and against many societies.'[[31]](#footnote-31) This manifestation of development has frequently been at odds with indigenous perspectives on development. Although individual communities vary in terms of the amount of market-oriented practices they may be willing to adopt, the same '[i]rresponsible economic growth'[[32]](#footnote-32) has clashed with their development aspirations which commonly emphasise 'self-realisation and self-determination'.[[33]](#footnote-33) Rather than enabling communities to better achieve self-determination, it has engendered new forms of domination where indigenous peoples are commonly at the mercy of developers who converge 'upon the resources incumbent in their ancestral homelands.'[[34]](#footnote-34)

This particular tension is known as development aggression, a pivotal context in considering the challenges surrounding FPIC's realisation. Victoria Tauli-Corpuz defines this as:

the imposition of so-called development projects and policies without the free, prior and informed consent of those affected, under the rubric of modernization or nation-building. This process can lead to destruction or loss of ancestral territories and resources, denigration of indigenous worldviews and values and of their political, economic and socio-cultural systems and institutions, ecosystem degradation, displacement, and violent conflicts.[[35]](#footnote-35)

Common conditions for development aggression come to the fore where the natural environment (including the territories of indigenous peoples) is viewed through the lens of market commodification. The abundance of natural resources are freely extracted with little regard for their non-economic values.[[36]](#footnote-36) The term first came to prominence in the Philippines to explain a then-emerging human rights violation[[37]](#footnote-37) associated with accelerated industrialisation of ancestral, often rural lands of indigenous peoples.[[38]](#footnote-38) Common practical conditions that go hand-in-hand with making development aggression a reality include increased drives for industrialisation, market consumerism and technological progress.[[39]](#footnote-39) While these conditions are considered for the creation of large extractive mining operations, for example, the dilemma for indigenous peoples is that they are disproportionately affected by such activities. Statistically, over 50% of unexplored natural resources lie on, within or below indigenous ancestral lands.[[40]](#footnote-40) Given their close connections to land, this gives rise to a common clash of world views and one where development aggression materialises. Tension is felt due to the very different expectations of what constitutes development or progress, between indigenous peoples on one hand, and state governments and extractive firms on the other.

Development aggression may be synonymous with the agendas of postcolonial states and neoliberal political economies. As a caveat, it is **not** the purpose of this thesis to critically explore these two ideas. Instead they are utilised in the thesis to show that practices and policies pertaining to development aggression are closely connected to both. Briefly, although postcolonial theories are often predicated on the enduring effects after the end of colonialism[[41]](#footnote-41), they are too heterogeneous in focus as well as experiences from which they derive.[[42]](#footnote-42) The most seminal works of postcolonialism, for example, by Frantz Fanon focus on the adverse psychological effects of European colonialism on black populations including its cultural impacts.[[43]](#footnote-43) Elsewhere, the likes of Edward Said's attention is on in-built Eurocentric expressions of superiority in comparison to the 'other' with regards to economic and cultural hegemony.[[44]](#footnote-44) However, for this thesis references are made to the 'postcolonial state'. Development aggression in practice is often, but not exclusively, confined to postcolonial states. Despite the formal end of colonialism, forms of colonial-like practices such as cultural subordination, economic dependency and infliction of poverty on the many have continued in countries which gained independence from imperial powers.[[45]](#footnote-45) Hence, while nationalism flourished in newly independent states, they also increasingly embraced typically Eurocentric practices and standards based on narrow versions of development and modernisation.[[46]](#footnote-46) Postcolonial states, in the globalised economy, commonly serve as conduits for development aggression at the expense of the powerless.[[47]](#footnote-47) But in extending the reach of development aggression, it has also impacted indigenous peoples in developing states without colonial pasts, as well as those which may be classified as settler colonial states (for example the United States, Canada, Australia and New Zealand).

An economic theory and practice synonymous with development aggression is neoliberalism. It has grown into a prevailing global paradigm since the 1970s and 80s, as a sweeping political and economic agenda to challenge the post-World War Two consensus on labour markets, industrial relations, tax regimes and social security.[[48]](#footnote-48) It is characterised by policies such as the deregulation of markets, retrenchment of the state in terms of its economic and social interventions and the privatisation of nationalised industries and services.[[49]](#footnote-49) The conditions created by neoliberalism, notably tax incentives and lack of regulation, have enabled transnational companies to develop and exploit natural resources unabated.

## 1.3 - Additional Terminology

### 1.3.1 - Indigenous Peoples in a Global Context

Indigenous peoples are thought to number over 370 million in the world.[[50]](#footnote-50) The meaning of 'indigeneity'[[51]](#footnote-51) has long been the attention of lawyers, social scientists and anthropologists. It is important to understand that there is no essentialist view as to who constitutes indigenous peoples.[[52]](#footnote-52) This is due to geographic distance as well as historical, political and social contrasts across different countries and continents.[[53]](#footnote-53) As this thesis is concerned with the reconceptualisation of free, prior and informed consent its purpose is not to delve substantively into these long-drawn out discussions. But a consideration of indigenous peoples in the global context is useful to understand at this early stage, when we later examine their participation within different international institutional spaces.

One of the most common features about indigenous peoples, based on an observation by Joshua Castellino, is that they are predominantly among the poorest and most vulnerable groups in terms of economic and social status.[[54]](#footnote-54) This is often irrespective of whether their traditional lands or nations are based in the West or the Global South. Their existence is constantly under threat from external interference, both by government and private actors [[55]](#footnote-55). Hence we could think of indigenous peoples in relation to the dominant groups of state populations who inevitably occupy the upper echelons of political, cultural and economic systems. Such systems disproportionately place indigenous peoples at an inherent disadvantage.[[56]](#footnote-56) This is a common vulnerability for indigenous peoples who have to face the consequences of development aggression.

Although the above considerations may essentialise indigenous peoples, it has proven expedient when placing indigenous peoples in the context of international law. For example, Sylvia Escárcega highlights that indigenous intellectuals and activists utilised essentialist criteria in *strategic terms*, in order to gain international legal recognition.[[57]](#footnote-57) In coalescing around ideas such as closeness to the natural world, cultural distinctiveness and historical oppression[[58]](#footnote-58), she argues that indigenous peoples have managed to forge a so-called 'politics of indigenousness'[[59]](#footnote-59) internationally. While indigenous peoples do not intend to simplify the significant differences between each other, using this criteria has allowed them to place their agenda onto the international legal table. Such a strategy has culminated in indigenous peoples' rights being framed in collective terms, thereby distinguishing them from other groups.[[60]](#footnote-60) Indeed, their entry into the international legal system is part and parcel in the formation of a global indigenous movement.

One of the main achievements of indigenous peoples in the global context is the tremendous growth in institutional presence, over the last few decades. These are places in which they have the chance to participate, giving their rights, grievances and agendas (despite the many limitations which are discussed in the thesis) a level of visibility, particularly in the international human rights arena. At the centre of early international mobilisations were the World Council of Indigenous Peoples (WCIP) and International Indian Treaty Council (IITC).[[61]](#footnote-61) In addition, various advocacy groups mushroomed thus further increasing the visibility of activity among the global indigenous movement.[[62]](#footnote-62)

As this global indigenous presence grew, the United Nations (UN) also began taking steps to recognise their rights. During the drafting of the International Human Rights Covenants in the 1950s and 60s, there was a marked indifference to indigenous peoples' rights within its remit.[[63]](#footnote-63) However a major turning point came in the UN in 1977 with the International Non-Governmental Conference, in Geneva. The event attracted over 100 indigenous participants hailing from various countries of the Americas.[[64]](#footnote-64) At the conclusion of the Conference, a number of salient recommendations were made. Notably, legal understanding of indigenous peoples' close relationship with their ancestral lands, and how this was intrinsic to their cultural and social identities.[[65]](#footnote-65) Coupled with this was a recommendation that indigenous rights to lands and natural resources could not be terminated 'without their full and informed consent'.[[66]](#footnote-66) Perhaps the biggest achievement was a recommendation to establish a UN working group, to operate under the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights.[[67]](#footnote-67) The Working Group on Indigenous Populations (UN WGIP) became characterised with a particular task of devising international standards on indigenous rights.[[68]](#footnote-68) This culminated in the adoption of a draft declaration on indigenous peoples' rights in 1993, a forerunner to the eventual UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The Working Group quickly established a reputation for encouraging wide participation of diverse indigenous participants and organisations.[[69]](#footnote-69) It became regarded as one of the most accessible UN bodies for indigenous participation.[[70]](#footnote-70)

Further developments that took place prior to and alongside this flurry of UN activity could be found in the International Labour Organisation (ILO). Its competence in the field of labour issues globally has included engagement with indigenous peoples as workers, from the 1920s.[[71]](#footnote-71) It has origins in the League of Nations, and was later subsumed into the UN as a specialised agency. The ILO was the first international agency to adopt a legally binding treaty related to indigenous peoples, in the form of the ILO Convention Number 107 in 1957.[[72]](#footnote-72) The trouble is that its design was woefully inadequate in meeting the sensitive needs of indigenous peoples. Its language was heavily predicted on derogatory assumptions of indigenous peoples being 'less advanced'.[[73]](#footnote-73) This is closely associated with a paradigm of assimilation of indigenous peoples into wider 'mainstream' societies.

By 1986, the ILO Meeting of Experts recommended that a revised version of the document be negotiated.[[74]](#footnote-74) A process took place over the next three years, which included a then-innovation where non-state indigenous participation (through non-governmental organisations) was permitted.[[75]](#footnote-75) They were offered a consultative role and their inputs were taken into account. The final text became known as ILO Convention Number 169, with a Conference vote that saw 328 votes in favour, 1 opposing and 49 abstentions.[[76]](#footnote-76) The Convention remained problematic, as will be discussed in chapter three, with regards to the conceptualisation of FPIC. But it did mark a progression from the overtly assimilationist rhetoric of its predecessor, with recognition of indigenous peoples' cultural distinctiveness.[[77]](#footnote-77) This crucially included the recognition of indigenous land and resource rights.[[78]](#footnote-78) To date, ILO Convention 169 has been ratified by 22 states.[[79]](#footnote-79)

The global indigenous movement provides a useful backdrop, particularly for the adoption of UNDRIP in 2007 (to be examined in detail in chapters two and three in the contexts of self-determination and FPIC, respectively). It is later discussed how the international human rights corpus, in particular, has placed ideological limits on indigenous peoples' rights, as reflected in the limits of UNDRIP. On the other hand, internationalisation of indigenous peoples' movements means that conceptualising appropriate changes to FPIC requires continued engagement with the international legal system, as one of the main aspects to seeking greater justice.

### 1.3.2 - A Note on Third World Approaches to International Law, Resistance, Hegemony and Counter hegemony

The framework utilised in forming an overall approach to the thesis draws on Third World Approaches to International Law (TWAIL). Briefly, TWAIL refers to a broadly anti-colonial school of perspectives, focused on building contemporary responses to the ongoing problems facing subordinated (Third World) populations after the official 'end of direct European colonial rule over non-Europeans'.[[80]](#footnote-80) One of TWAIL's key aims is 'the internal transformation of conditions in the Third World.’[[81]](#footnote-81) TWAIL is explained and discussed in greater depth in chapter four. But for clarity, this subsection seeks to highlight the specific focus of the framework, offering some early insights into the terminology used explicitly later in the thesis.

Firstly, through using this TWAIL framework, it is contended that one of the underpinning problems with FPIC's conceptualisation relates to the process of hegemony. Traditionally, this refers to the means by which a political system gains the consent of civil society[[82]](#footnote-82) thereby enabling its world views to predominate. Hegemony can manifest itself in political, economic and cultural ways. It is predicated on power imbalances and is mandated by elite actors over the subordinate and disempowered members of society.[[83]](#footnote-83) In an international context, hegemonic influence often permeates into the operation of the global economic order. It is capable of completely overshadowing alternative ideas by becoming the '"the only game in town".'[[84]](#footnote-84) One of the most prominent hegemonic models derives from neoliberalism, adhered to by powerful states (and indeed many postcolonial ones where indigenous peoples are present) the norms of which are commonly promoted by international organisations.[[85]](#footnote-85)

Threatening hegemony involves considering the role of counter hegemony. This may relate to construction of 'a new intellectual and moral order, and therefore a need to develop more universal concepts and decisive ideological weapons.’[[86]](#footnote-86) The theoretical force of counter hegemony perhaps goes best hand-in-hand with acts of resistance. When thinking of resistance generally, it refers to critical opposition, through the expression of opinions and actions, that questions the views, policies and ideologies of individuals, groups or institutions. Resistance tactics range from more ‘sanctioned’[[87]](#footnote-87) forms of opposition such as complaints to international/regional human rights tribunals or quasi-legal institutions to pursuing non-mainstream and unofficial strategies such as peaceful protests, sit-ins, online activism, education forums, performance pieces or literary writings in forming vital counter narratives against certain targets of resistance. Applied to the context of this thesis, indigenous peoples' resistance is commonly targeted at the physically, culturally and spiritually destructive megaprojects on their customary lands. This framework is presented explicitly in chapter four.

## 1.4 - Research Questions, Methodological Considerations and Chapter Outline

### 1.4.1 - Secondary Research Questions

In reaching a satisfactory answer to the primary research question outlined above, three sub-questions are addressed in the course of the thesis:

1. ***How far do existing conceptualisations and applications of FPIC give effect to indigenous peoples' efforts in overcoming development aggression?***
2. ***Underlying the flawed approaches to FPIC, how might Third World Approaches to International Law explain the hegemonic character of human rights and inform a more counter hegemonic approach?***
3. ***Using the counter hegemonic resistance framework, what strategies could be pursued in the realisation of FPIC?***

Answering these questions involve the adoption of a methodology that draws on relevant legal sources and literature, then grounding the problems and solutions within a germane theoretical framework.

### 1.4.2 - Statement on Methodology

A methodology relates to the overarching approach taken to answering a primary thesis question. It serves as the overall academic tool box, containing a number of legal research methods to address the problem and provide answers or solutions. Methodologies '[guide] our thinking or questioning of, or within, that field or both.'[[88]](#footnote-88)

In light of this definition, the thesis uses a normative methodology from which FPIC's conceptualisation can be firstly questioned, so as to inform the reader of the shortcomings in international lawmaking. During the early stages of the thesis, doctrinal and socio-legal methods are adopted. The doctrinal elements serve as a starting point from which to identify the most relevant sources of law before analysing it in a more abstract manner.[[89]](#footnote-89) This involves examining sources of FPIC derived from international instruments, regional and domestic jurisprudence and national legislation. Answering the first sub-question also involves critiquing these sources thereby giving rise to socio-legal aspects of the research. This helps to identify tangible problems in the operation of putatively neutral legal standards. Furthermore it engenders 'an interface with a context within which law exists, be that a sociological, historical, economic, geographical or other context.'[[90]](#footnote-90)

The theoretical TWAIL framework is critically explored to answer the second and third sub-questions. This is to shed light on the ideological fault lines between governmental interests (particularly Eurocentric ones) and those of indigenous peoples. Using TWAIL may reflect certain features of a critical legal studies (CLS) method. This denotes a way of looking at the law beyond face value to generate unique and necessary transformations.[[91]](#footnote-91) Drawing on a number of TWAIL-based literary sources, the thesis exposes these fault lines. This is to hypothesise the motivations of states that sought to deny indigenous peoples of a more befitting right to FPIC. As TWAIL encompasses more than a single perspective, the thesis specifically zones in on its insights on counter hegemonic resistance, applied to human rights. This is an area of international law that engenders both barriers and potential opportunities for indigenous peoples (reflecting TWAIL's own perspectives). Forming solutions also requires understanding the operation of selected UN human rights bodies wherein indigenous peoples currently participate. In terms of the methodology, widening the implications of FPIC's reconceptualisation gives us the impetus to question underlying political and economic rationales that hinder its full potential.

### 1.4.3 - Chapter Outline

To begin with, a fundamental, preliminary research consideration of FPIC requires an examination of self-determination. Chapter two explores the relationship between these two rights. Explaining the right to self-determination applied in general terms compared to that applied to indigenous peoples suggests that a double-standard exists. This is highlighted through a in-depth examination of articles 3, 4 and 46(1) of UNDRIP. Advocating for a more comprehensive right to self-determination for indigenous peoples may seem ideal after such an examination. However the thesis is mainly concerned with FPIC; so for legal and political certainty the focus is on how FPIC aligns with a stronger expression of internal self-determination. This relationship forms a central bedrock for FPIC's reconceptualisation and ultimately realisation in practice.

Chapter three then answers the first sub-question to the thesis. Drawing on a range of general and specific variables, a selected number of international, regional and domestic applications of FPIC are studied in detail. These are measured against the variables to suggest how effectively FPIC is conceptualised. In the case of domestic examples specifically, their viability within the state's overall development agenda is also measured. To further analyse the drawbacks of FPIC's conceptualisatons (and applications domestically) in these different contexts, we need to place the sources of law into a particular context. In this case, it is FPIC's relationship with development aggression (as reflected in the variables). In terms of this thesis, FPIC obviously does not function in a vacuum, but has been conceived and applied within certain political settings (for example, the intentions and motivations of states in drafting UNDRIP). The failure to fully realise FPIC could have a real and palpable impact on those who depend on it the most in helping them attain their right to self-determination.

Answering both second and third sub-questions gives rise to a theoretical grounding in forging an interface with FPIC, followed by a practical plan for its realisation. By framing FPIC in the context of counter hegemonic resistance, we are initiating a discussion about the potential dismantling of development aggression ― an ideological blind spot of international human rights.

Chapter four explicitly places this problem into the thesis' chosen theoretical framework of counter hegemonic resistance, as interpreted by Third World Approaches to International Law. This offers a unique, alternative slant on the inequities of international law. The field of human rights is of special interest here due to indigenous peoples' engagement with it, in various UN bodies. Despite the rhetoric of neutrality and universality that are used to illustrate the international human rights corpus, TWAIL critiques are based on the hegemonic and often Eurocentric biases built into their ideologies. Chapter four contends that these complement the shortcomings facing indigenous peoples' rights to FPIC and self-determination. But alongside these applied criticisms, another pertinent element of TWAIL scholarship recognises the merits of international human rights, by advocating internal transformations in offering greater inclusion to subjugated, subaltern voices. This paves the way for human rights practice to embody values of counter hegemony, thereby permitting resistance against ideologically blind perspectives as well as recognising less acknowledged human rights violations. Such violations could be attributed to development aggression, stemming from the priorities of state governments looking to protect the interests of private mining and extractive companies.

In consolidating this framework, chapter five puts forward a number of strategy proposals in hope of realising a reconceptualised right to FPIC. The chapter specifically utilises 'insider-outsider' strategies[[92]](#footnote-92), to demonstrate that indigenous peoples need to draw on tactics within the United Nations to push for a degree of internal reform. This is to ensure that their participation in certain human rights bodies targets sharper, more counter hegemonic agendas. This needs to be complemented by a consideration of outside, extralegal strategies which not only attempt to project a more definitive expression of FPIC, but also to help reshape perceptions about accepted narratives on development. These strategies are then considered in the institutional context. It is demonstrated that some of the proposals are more practically viable, compared to others. In giving credence to the TWAIL approach to counter hegemony it is important to acknowledge the range of possibilities it envisages, even if some proposals are not always realistic.

Finally, the concluding chapter demonstrates that the reconceptualisation of FPIC, in view of dismantling development aggression, does not simply involve a substantive reshaping of the right to embody an unconditional veto in capturing the widest possible outcomes for indigenous self-determination. To support this, it must also be borne in mind that FPIC is an internationally recognised right. This means that it falls within a remit that requires practical adjustments to relevant bodies in the UN that can facilitate greater understanding and ensure that indigenous peoples' agendas cannot always be confined to the terms of the UN Declaration on the Rights of Indigenous Peoples. In dismantling development aggression, a particular contribution of this approach is to instil important ideas in the mindsets of state actors. This needs to create a new settlement between governments and indigenous peoples which recognises that imposed development runs contrary to indigenous self-determination and actually upholds a form of quasi-colonial occupation of their traditional lands and territories. Furthermore, it is important to highlight that framing FPIC in this counter hegemonic context does not presuppose an outright moratorium on all industrial development plans. Instead, it could sometimes foster alternative opportunities for indigenous peoples to meet their self-determined development priorities, while satisfying state interests.

# Chapter Two ― Background to Self-Determination: General Insights, UNDRIP's Limits, and Relationship with FPIC

## 2.1 - Introduction

A preliminary and integral consideration in examining FPIC is its relationship with self-determination. The latter, from the perspective of indigenous peoples, is the foundation from which other rights can arise.[[93]](#footnote-93) In the context of development aggression, its connection to FPIC is essential to understand, due to parallel objectives.

At its most fundamental, self-determination relates to the ability of humans ― whether they act individually or collectively[[94]](#footnote-94)― to take control of their own futures, freely shaping their political, economic, social and cultural interests.[[95]](#footnote-95) But behind this basic understanding is a complex labyrinth of various meanings, which is termed by James Crawford as representing '*lex lata, lex obscura*'.[[96]](#footnote-96) It has been interpreted as both a principle and a right, in order to take on different meanings, owing to contrasting ideologies during the course of history.[[97]](#footnote-97) It is thus regarded as much legal as it is political.[[98]](#footnote-98) Different scholars have sought to define the meanings of principle and right. For example, Ronald Dworkin and Joseph Raz adopt very similar positions on the distinction between principles and rights. The former relates to abstract, aspirational ideas, but are indeterminate with respect to actual consequences.[[99]](#footnote-99) The latter gives rise to certainty and legal ramifications for non-compliance.[[100]](#footnote-100) For this chapter (and thesis overall), self-determination is articulated as a right. In spite of the political connotations, a number of tangible entitlements can nonetheless be derived from it, as is explained in the chapter. Self-determination might not be immediately justiciable like individual rights, but its framing as a human right demonstrates how it has transcended simply being a political principle.

The purpose of chapter two is to firstly provide an overview of self-determination and what it entails as a general human right. In contrast, it is important to explain how these general entitlements have been denied to indigenous peoples in international law. Secondly, the chapter lays the groundwork of this thesis by highlighting the relationship between FPIC and self-determination. Finally, it is concluded that this relationship must be at the heart of a new approach to reconceptualising FPIC according to a radical and transformative vision.

## 2.2 - General Overview of Self-Determination

### 2.2.1 - Historical Background and Development

Late eighteenth century approaches to self-determination in the French and American Revolutions regarded it as the basis for transfer of territory based on the popular will of the people, and governments should be primarily responsible to the people. Early twentieth century aspirations of Vladimir Lenin and Woodrow Wilson framed self-determination as the means to achieving their political agendas. Lenin construed self-determination as 'the political extension of [his] primarily economic analysis of imperialism'[[101]](#footnote-101) with a view to promoting socialism internationally.[[102]](#footnote-102) Wilson's vision of self-determination was an extension of 'popular sovereignty' synonymous with 'the right of peoples freely to choose their [own] government' without interference.[[103]](#footnote-103) In essence, the promotion of liberal democracy.

The inception of the League of Nations, during the inter-war period, was characterised by a degree of emphasis on minority rights[[104]](#footnote-104). But this was a heavily flawed system, as self-determination did not figure in the Covenant of the League of Nations. Fundamentally, state sovereignty (which has admittedly remained as a perennial barrier to self-determination claims) was heavily entrenched despite this focus on minorities.[[105]](#footnote-105) At the time, however, the most notable quasi-legal contribution to the matter was the *Åaland Islands case* which involved questions over self-determination of territory inhabited by a majority of Swedish speakers, but was officially part of Finland. The matter hinged on whether the Islands' Swedish speaking population could secede from Finland and integrate with Sweden. An appointed Commission of Rapporteurs recommended that the Åaland Islands must remain with Finland, but should be granted autonomy.[[106]](#footnote-106) Despite the self-evident differences between a Swedish speaking population and indigenous peoples, such a model of autonomy may be similar to the aspirations of the latter today, in realising their self-determination.

While self-determination may have an overtly political character, its crystallisation as a right was a key development from the inception of the United Nations system following the end of the Second World War. The right to self-determination is expressed in the UN Charter. Firstly in statist terms, in article 1(2) based on a need '[t]o develop friendly relations among nations'[[107]](#footnote-107), as well as in article 73 concerning Non-Self Governing Territories which was particularly pertinent in the context of decolonisation.[[108]](#footnote-108) These provisions somewhat reflect a morass over the exact meaning of self-determination. It is a reflection of competing geopolitical interests, which are variable and subject to change. For example, article 1(2) may be seen as satisfying the interests of Western states. This is because it is seemingly pitched as a principle that is aspirational and contains no tangible obligations. These attitudes have perhaps shifted owing to pressures from socialist and Third World states.[[109]](#footnote-109) Western states predominantly see self-determination as a choice of all peoples to freely select a preferred system of government ― a form of internal self-determination with particular emphasis on the protection of civil and political rights. For socialist states, their position was initially based on a right to exist as a state, later evolving into sovereign equality and non-intervention. Among third world states, great emphasis was placed on decolonisation to satisfy self-determination. This sentiment was expressly advocated at the 1955 Bandung Conference[[110]](#footnote-110), and was supported by socialist states.

Self-determination in the context of decolonisation found favour in the International Court of Justice which clarified the right in terms of colonial contexts.[[111]](#footnote-111) Through its litigation between 1949 and 1971, regarding the situation in *Namibia* *(South West Africa)*[[112]](#footnote-112) the Court delivered an overarching statement in favour of the peoples' right to self-determination. In recognising that South Africa, as a Mandatory Power, was illegally occupying Namibia and practicing apartheid over the territory, the Court argued that this represented a betrayal of the UN Charter's 'purposes and principles'.[[113]](#footnote-113) The Court further clarified the meaning of self-determination in its *Western Sahara* advisory opinion of 1975[[114]](#footnote-114). In this opinion, self-determination was held to represent the 'freely expressed will'[[115]](#footnote-115) of all peoples within that territory. Furthermore, Judge Nagendra Singh's declaration in *Western Sahara* highlighted that colonial peoples must be consulted as a means of articulating their freely expressed will.[[116]](#footnote-116) This, according to Judge Singh, signifies the 'very *sine qua non* of all decolonization.'[[117]](#footnote-117)

An increasingly 'humanised' stance on self-determination came to the foreground in the drafting of the International Human Rights Covenants. As with the UN Charter, its drafting was fraught with ideological tensions. Western states were resistant to its inclusion. But the Soviet Union's insistence on its presence won support from developing states.[[118]](#footnote-118) Western states were nonetheless able to push through some of its own interests[[119]](#footnote-119), for instance in article 1(2) which focuses on the right of peoples to 'freely dispose of their natural wealth and resources'.[[120]](#footnote-120) As a caveat, there are significant limits to participation under common article 1(2). These limitations are explicitly conveyed in a qualifying provision: 'without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.'[[121]](#footnote-121)

Despite the contested nature of competing political blocs in the world, self-determination has nonetheless emerged as a cornerstone of international human rights law. As a right, it has established certain guarantees for peoples in general. These are explained in the next subsection.

### 2.2.2 - What does self-determination mean for peoples in general?

Self-determination, as articulated in human rights law, encapsulates the values that all peoples have the right to '*freely* determine their political status' and '*freely* pursue their economic, social and cultural development'.[[122]](#footnote-122) A common link between colonial and non-colonial peoples is that self-determination relates to the ability to take control of their destinies, and to resist external 'oppression', 'domination and exploitation.'[[123]](#footnote-123) The question now is, what does it substantively confer upon all peoples? The situation for non-colonial peoples is elaborated in the 1975 Helsinki Final Act, Part VIII that self-determination pertains to an equal right of peoples 'acting at all times in conformity with the purposes and principles of the [UN Charter] and with the relevant norms of international law, *including those relating to territorial integrity of States*.'[[124]](#footnote-124) The latter part of this provision is critical to understanding what self-determination means in general for peoples in non-colonial contexts, indicating a presumption broadly against secession.[[125]](#footnote-125) The International Covenants themselves do not articulate how self-determination relates to all peoples, but as Hurst Hannum reminds us, it 'has never been considered an absolute right to be exercised'.[[126]](#footnote-126) Instead, the right to freely determine and freely pursue political, economic, social and cultural facets of life are generally predicated on democratic participation of all peoples within the state[[127]](#footnote-127). This includes having a stake in decision-making based on *inter alia* the popular will of all peoples[[128]](#footnote-128), choosing leaders democratically[[129]](#footnote-129) and the freedom from authoritarian regimes[[130]](#footnote-130).

To get a better idea of entitlements attached to the right, it is important to understand the distinction is between so-called internal and external forms of self-determination.[[131]](#footnote-131) Internal self-determination relates to the rights of peoples to collectively shape their political status (such as their choice of government and having a say on a number of policy areas) vis-à-vis the domestic situation within home states[[132]](#footnote-132). Internal self-determination could therefore be thought of as rebalancing domestic power, the nature of which is continuous (rather than constituting a one-off right).[[133]](#footnote-133) Specific forms of internal self-determination can take the form of autonomy or self-government. In contrast, external self-determination reflects the international/outward character of a state. The formation of a sovereign state is not the only option for external self-determination. General Assembly Resolution 1541 (XV) also stipulates that it may take the form of free association or integration with an independent state.[[134]](#footnote-134) These options were reaffirmed in the International Court of Justice's *Western Sahara* advisory opinion.[[135]](#footnote-135)

Although there is a presumption against the dismemberment or fragmentation of sovereign states via secession, the overarching notion of self-determination is about peoples exercising control, in the absence of interference from outside interference. Hence one of the permissible, general exercises of external self-determination could arise with respect to non-colonial, foreign domination or outside occupation.[[136]](#footnote-136) In such circumstances, peoples may invoke a right to external self-determination in order to actively oust invading or occupying forces, with the objective of restoring their independence.[[137]](#footnote-137)

A further category of self-determination may be activated in highly exceptional circumstances, where a state government commits large-scale and gross human rights violations against its population. Remedial secession could be a measure of last resort when, for example, religious or racial groups, are denied not only the most basic participatory rights relating to internal self-determination, [[138]](#footnote-138) but are subjected to the most fundamental human rights breaches. This would practically render any peaceful resolution impossible.[[139]](#footnote-139) The threshold to rely on this is expectedly very high.[[140]](#footnote-140) Remedial secession was raised in the ICJ's advisory opinion on *Kosovo*, following a unilateral declaration of independence by Serbia's ethnic Albanian population. The separate opinion of Judge Cançado Trindade highlights that a state cannot use the principle of territorial integrity to act 'like machines of destruction by human beings, of their lives and of their spirit.'[[141]](#footnote-141) In Judge Yusuf's separate opinion, attention is drawn to the Friendly Relations Declaration which clearly alludes, not only to the centrality of territorial integrity, but also to the obligation for states to adhere to *'the principle of equal rights and self-determination of peoples...without distinction as to race, creed or colour.*'[[142]](#footnote-142) Judge Yusuf elaborates that this 'saving clause'[[143]](#footnote-143) means that if state authorities fail to protect equal rights, there arises an opportunity for an 'ethnically or racially distinct group'[[144]](#footnote-144) to exceptionally seek external self-determination.[[145]](#footnote-145)

In providing a fuller understanding of the different strands of self-determination, it is useful to explain the presence of remedial secession particularly following the *Kosovo* advisory opinion. But as a caveat, great care must be taken, so as to not assume that this form of self-determination is anywhere near commonplace in international law. Despite the criteria highlighted, it still remains a hugely contentious area of international law and is not a formative aspect of this thesis.

It is clear that self-determination possesses a rights-based character with particular guarantees which peoples can demand. A more contentious matter relates to how far self-determination may extend to sub-state groups such as minorities. These are groups who traditionally fall outside the scope of 'all peoples' in common article 1 of the International Covenants. However, there have been attempts to clarify what self-determination might entail for them. These are explored in the following subsection.

### 2.2.3 - Self-determination as applied to sub-state groups

The overall legal position on self-determination vis-à-vis sub-state groups is not clear cut. While there may be a general sentiment against extending an overall peoples' right of self-determination to sub-state groups[[146]](#footnote-146) the position on internal self-determination (such as autonomy) is more ambiguous. On one hand there is no express right to internal self-determination in instruments such as the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[[147]](#footnote-147) or the Council of Europe's Framework Convention for the Protection of National Minorities.[[148]](#footnote-148) This could be attributed to governments' fears that recognition would encourage secessionist aspirations among sub-state groups.[[149]](#footnote-149) On the other hand, there exists a line of judicial and quasi-judicial reasoning which appears to take the view that sub-state groups could be entitled to a right to internal self-determination.[[150]](#footnote-150) Despite attempts within the United Nations and Council of Europe to raise the possibility of autonomy for sub-state groups[[151]](#footnote-151), these were ultimately rejected and are now arguably considered 'anathema' by the international community.[[152]](#footnote-152)

Perhaps the most settled aspect of this area is that sub-state groups should at least have the right to be consulted on government decisions that directly affect them.[[153]](#footnote-153) This does not amount to a right to veto such decisions, but instead that their voices 'should be heard and should be taken seriously.'[[154]](#footnote-154) Jan Klabbers' view is supported by articles 2(2) and (3) of the UN's Minorities Declaration, which address participation in government.

It is useful to raise these issues as a way to initiate an examination of groups who fall outside the definition of peoples, for the purposes of self-determination more generally. Moreover, we need to distinguish between sub-state groups broadly, and the distinctive position of indigenous peoples, vis-à-vis self-determination. Section 2.3 raises these matters, by drawing on selected indigenous peoples' perspectives as well as how it is conceived in the UN Declaration on the Rights of Indigenous Peoples.

## 2.3 - Indigenous Peoples and Self-Determination

### 2.3.1 - Evolving Indigenous Expectations and the International Response

Self-determination has been long regarded as one of the major pillars of indigenous peoples' rights.[[155]](#footnote-155) Among the political morass described in section 2.2, indigenous peoples have also contributed their own unique and dynamic slants on self-determination. Generally speaking, an indigenous right to self-determination encompasses the most typical components of their well-being. These include controlling their own destinies, preservation of their identities and world views, free disposal of wealth and natural resources and protection of ancestral lands and territories. Hence, there is an overall consensus about its centrality to indigenous peoples' physical and cultural survival. This was articulated by diverse indigenous voices during the drafting of the UN Declaration on the Rights of Indigenous Peoples ranging from the Saami of Northern Europe,[[156]](#footnote-156) to the Tupaj Amaru Indian Movement representing the Americas[[157]](#footnote-157).

In terms of what indigenous peoples demand in terms of self-determination, the position has perhaps evolved over time, though may be subject to some ambiguities. Indeed, indigenous peoples historically looked to independent statehood as one *particular* way of realising their right to self-determination.[[158]](#footnote-158) For instance, in the World Council of Indigenous Peoples' Declaration of Principles in 1984, self-determination was articulated in clear and unequivocal terms. That Declaration alluded to 'all' indigenous peoples having a right to self-determination[[159]](#footnote-159). As one of the earliest organisations within the global indigenous movement, such an explicit expression could have been seen as a fairly clear demand (at the time) for both external and internal rights to self-determination. Furthermore, the First Session of the UN Working Group on Indigenous Populations indicates how certain indigenous representatives believed that 'self-determination did not necessarily equate to separatism.'[[160]](#footnote-160) The use of the term 'not necessarily' suggests a position that did not absolutely close the door on secession. However, it is generally acknowledged that indigenous demands for secession have gradually diminished[[161]](#footnote-161), due to a plethora of impracticalities in the modern context[[162]](#footnote-162), a view expressed by a number of indigenous voices.[[163]](#footnote-163) Of course indigenous peoples largely welcomed the adoption of UNDRIP, despite the limits it placed on self-determination through the adoption of article 4. This mirrors diverse perspectives of many indigenous peoples for whom secession is no longer a strongly-held ambition.[[164]](#footnote-164) Aside from autonomy, other aspects of indigenous self-determination are based on the participation in a state's governance[[165]](#footnote-165), increased democratisation of institutions[[166]](#footnote-166) and even power sharing[[167]](#footnote-167). As it currently stands, indigenous peoples' perspectives entail a diverse range of viewpoints, drawing on self-determination as 'an on-going right...[which enables them] to determine the conditions of their existence on the basis of equality with other peoples, with their consent required in a manner determined by them'.[[168]](#footnote-168) This gives rise to an eclectic mixture of ideas such as flexibility[[169]](#footnote-169), continuity[[170]](#footnote-170) and the lack of secession[[171]](#footnote-171).

On the other hand, such an evolution in attitudes may not represent the entire picture at the time of drafting UNDRIP. Questions could be asked about whether the Declaration reflected a change in overall indigenous demands for self-determination, or if it was reluctantly accepted by indigenous representatives.[[172]](#footnote-172) Irrespective of what was actually asked (given the changes in attitudes to self-determination over time) it could be naive to conclude outright that indigenous peoples completely abandoned the idea of secession in principle or at a personal level.[[173]](#footnote-173) Especially when considering its historical relevance to indigenous struggles, of which they asserted from the time they began engaging with the international legal system. However for the purposes of FPIC, these certain ambiguities are not entirely relevant.

In any case, the indigenous right to self-determination has been subject to much contention in international law. One point of scepticism relates to whether or not they qualify as 'peoples' as contained in the International Covenants. A definition of peoples espoused by Aureliu Cristescu in a UN study defines them as 'a social entity possessing a clear identity with its own characteristics including some relationship with the territory, even if the peoples in question have been wrongfully expelled from it and artificially replaced by another population.'[[174]](#footnote-174) Indigenous peoples may prima facie meet this criteria as they are often distinctive and identifiable according to their defined territories, and are perhaps disempowered from engaging in appropriate international relations[[175]](#footnote-175). Indeed their status as 'peoples' is somewhat settled by the wording of UNDRIP (in spite of its deep flaws as will be discussed in chapter three, with reference to FPIC). With the adoption of UNDRIP, the explicit recognition of self-determination in article 3 was ultimately qualified immediately after that in article 4 limiting indigenous peoples' right to internal manifestations such as autonomy and self-government. While this itself is contentious, as is discussed below, such explicit recognition goes much further compared to other sub-state groups. Despite arguments that sub-state groups may be entitled to autonomy (as explained above), this position has not been explicitly recognised in international law. Possible reasoning for this could be that sub-state groups such as minorities 'were constituted by persons who had accepted to be incorporated within existing States.'[[176]](#footnote-176) Hence they may only be able to exercise self-determination as part of an entire peoples. Adding to this view, Castellino and Gilbert make a highly pertinent remark about a particular dimension, that distinguishes indigenous peoples from sub-state groups. Through the course of history, many indigenous peoples 'were deprived of their [ancestral] land through a process of subterfuge.'[[177]](#footnote-177) Indigenous peoples, therefore, assume a distinctive and collective character and from that, can derive their own right to self-determination. Moreover, minorities are believed to assume integration within a state, and are generally offered protection against discrimination or certain guarantees that protect their cultural identity.[[178]](#footnote-178) In contrast, indigenous peoples commonly wish to maintain a degree of separateness to the host state in recognition of their pre-colonial nations.[[179]](#footnote-179) This is not the equivalent of external self-determination, but is a desire to maintain a sense of distinctiveness within state boundaries, not only socially and culturally, but also politically and economically. Furthermore, while contemporary indigenous peoples are not *stricto sensu* colonised populations or form non-self governing territories[[180]](#footnote-180) arguments that discourage them from simply invoking the rhetoric of colonialism[[181]](#footnote-181) or pursuing claims based on historical sovereignty[[182]](#footnote-182) (without an aim to secede) could be argued to be somewhat insensitive to their historic backgrounds. Indigenous peoples are arguably living in quasi-colonial conditions in viz. postcolonial states that are pursuing aggressive development measures at their expense.

Although indigenous peoples have visibly gained more in international law compared to non-indigenous sub-state groups, their actual self-determination entitlements under UNDRIP is a contentious element of this debate. Exploring this allows us to build up the background towards an informed discussion regarding the problems and solutions vis-à-vis FPIC in later chapters. The next subsection thus explains what UNDRIP substantively offers indigenous peoples in terms of self-determination.

### 2.3.2 - UNDRIP's Approach to Indigenous Self-Determination

While indigenous peoples have been conferred more in terms of the right to self-determination than sub-state groups, an examination of articles 3, 4 and 46(1) of the UNDRIP indicates certain fundamental limits, compared to that espoused in the International Covenants.

An examination of the Declaration's drafting history reveals a series of major compromises attributable to state governments' unwillingness to recognise some of the most pivotal rights pertaining to, for example, FPIC and self-determination. A stark contrast is evident with the language used in a 1993 draft version of the Declaration by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[[183]](#footnote-183) Briefly, drafting of the Declaration took place over two decades in two distinct phases ― firstly, under the Sub-Commission on Human Rights' Working Group on Indigenous Populations between 1982 and 1994[[184]](#footnote-184); and then under the Commission on Human Rights' Working Group on the Draft Declaration from 1995 to 2006.[[185]](#footnote-185) It was during this latter phase that state governments were more deeply engaged in negotiations[[186]](#footnote-186) and thus increased levels of friction emerged on the precise wording of the Declaration. Article 3 in both the draft Declaration and UNDRIP unequivocally convey that indigenous peoples have a right to self determination. This enables them to 'freely determine their political status and freely pursue their economic, social and cultural development.'[[187]](#footnote-187) Both virtually replicate the wording of common article 1(1) of the International Covenants. Such an unequivocal expression of self-determination was a major issue of dispute in the adoption of the UNDRIP. Opposing sentiments came not only from the United States, Canada, Australia and New Zealand[[188]](#footnote-188) but other regional blocs. Notably a group of African states sought to delay its adoption in 2006, by arguing that nearly all of Africa's population is indigenous.[[189]](#footnote-189) For these African states, invoking self-determination still relates to a narrowly defined, single event of 'nations trying to free themselves from the yoke of colonialism.'[[190]](#footnote-190)

The 1993 draft Declaration outlined internal forms of self-determination in article 31 relating to:

culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.[[191]](#footnote-191)

This comprehensive set of examples, especially on economic activities as well as land and resources management, are inalienable considerations in the fight against development aggression (for which the presence of FPIC is essential). Additionally, article 31 underlined that these internal forms of self-determination (through autonomy or self-government) related to just 'a specific formof exercising their right to self-determination.'[[192]](#footnote-192) In UNDRIP, the equivalent provision is article 4. This specifically limits indigenous peoples to only exercising internal self-determination. In other words 'the right to autonomy or self-government in matters relating to their internal or local affairs, as well as ways and means for financing their autonomous functions.'[[193]](#footnote-193) Firstly it is placed immediately after article 3[[194]](#footnote-194), thus undermining a full indigenous right to self-determination. Secondly, and more importantly to FPIC, a clear weakness is that it neglects the specific policy areas outlined in article 31 of the draft Declaration. So as far as internal self-determination is concerned, article 4's construction is vague and open to subjective interpretations by state governments unwilling to grant indigenous peoples a right to self-determination. Thus adopting positions on self-determination such as the negotiation of political status[[195]](#footnote-195) or the right to be reflected in the institutions of government[[196]](#footnote-196) are unduly reductionist, with regards to situations where indigenous peoples wish to be empowered through their own, separate institutions and make decisions independently. One particularly critical indigenous voice of the General Assembly's final text is Charmaine White Face, an elder and activist of the Oglala Lakota Tribe (in South Dakota, United States) who participated in the Declaration's drafting. She contends that this vagueness potentially denies indigenous peoples their viability, and reduces their power to exercise self-determination, thereby limiting the potential attainment of their true physical and cultural survival.[[197]](#footnote-197)

Reinforcing the limits placed on self-determination, article 46(1) states that:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.[[198]](#footnote-198)

The insertion of this provision could be seen as a means of upholding state interests to override sensitive indigenous concerns. It represents something of an escape hatch for state governments, who may rely on it and abuse the terms of 'dismember' and 'impair' as a means to deny aspects of self-determination. What this reflects are the fundamental differences in power which are pervasive within the UN[[199]](#footnote-199), despite indigenous peoples' participation in policymaking within the institution. Article 46(1) effectively serves the needs of state governments by 'allowing each to take refuge in the interpretation that best reflects their interests.'[[200]](#footnote-200) In protecting the self-interests of states, the outcome 'makes it difficult to contend that it endorses anything but a limited right to internal self-determination for indigenous peoples.'[[201]](#footnote-201) Article 3 by itself would have been interpreted as a threat to territorial integrity by states.[[202]](#footnote-202)

In terms of the combined effect of these three provisions, article 3 is curtailed as far as providing a general right to self-determination for indigenous peoples. Critical indigenous perspectives see the overall formulation (of article 3, 4 and 46(1)) as subverting self-determination. Irene Watson and Sharon Venne argue that the combined outcome of the three provisions amount to little more than indigenous 'self-*management*.'[[203]](#footnote-203) This is similar to how ILO Convention 169 has been interpreted.[[204]](#footnote-204) Elsewhere, Ward Churchill asserts that it is 'consecrating in law the very structure of internal colonial domination and exploitation at the hands of state entities from which Indigenous nations have been struggling to free themselves.'[[205]](#footnote-205)

On the other hand, certain positive aspects of the combined effect of articles 3, 4 and 46(1) have been recognised. Mauro Barelli argues that despite UNDRIP's limited interpretation of self-determination, it is still innovative due to the fact that this is the first time indigenous peoples have been explicitly conferred any kind of right to self-determination.[[206]](#footnote-206) Consolidating this view, Will Kymlicka believes that the Declaration could potentially pave the way for non-indigenous sub-state groups to obtain certain, sharpened guarantees by way of 'targeted rights that address the path-dependent injustices that have arisen from their particular histories'.[[207]](#footnote-207) As an aside despite the presence of article 46(1), UNDRIP may have left the door open (indirectly) to the possibility for indigenous peoples to invoke remedial secession.[[208]](#footnote-208) But as was discussed above, remedial secession is only ever considered in the most extreme circumstances, and given the thesis' focus on FPIC this should not be taken further. Remedial secession is neither a formative aspect nor a practical avenue for realising FPIC.

It appears that UNDRIP engenders a two-tier approach to self-determination, when compared to the right outlined by the International Covenants. This demonstrates a double standard which has been raised by indigenous voices.[[209]](#footnote-209) On the other hand, the general appetite for secession has gradually declined[[210]](#footnote-210) as indigenous peoples may see more practicality in the recognition of 'their own organic social and political fabrics [or being treated as] full and equal participants at all levels in the construction and functioning of the governing institutions under which they live.'[[211]](#footnote-211)

With all these considerations in mind, it would seem very unfortunate that indigenous peoples are denied a full right to self-determination in UNDRIP. The presence of article 46(1) reflects state government priorities ensuring that indigenous peoples cannot be granted a right as definitive as the general one in the International Covenants. Perhaps it would be ideal to argue more strongly for indigenous peoples to be given an external right to self-determination. Indeed, chapter four places the curtailment of self-determination within a theoretical TWAIL framework in raising wider ideological concerns about indigenous peoples vis-à-vis international human rights. But for legal and political expediency, external self-determination is not relevant to the focus on FPIC. If anything, the limits placed on article 4 relating to internal self-determination is of greater concern, due to its direct connections with FPIC.

Taking this discussion forward, it is imperative to assert the link between self-determination and FPIC. This has to be an integral, preliminary consideration when thinking about reconceptualising FPIC. The interrelation between the two rights is vital in realising indigenous peoples' ability to give or withhold their permission to a plethora of policy areas. Section 2.4 thus explores this vital interface.

## 2.4 - Synergising Free, Prior and Informed Consent with Self-Determination

Asserting a relationship between self-determination and FPIC is fundamental to start building an alternative response to development aggression, within human rights practice. Attempts to separate self-determination from FPIC would, as rightly stressed by Cathal Doyle, 'place major constraints on its operationalisation and limit its potential as a facilitator for the realisation of the developmental and resource aspects of self-determination.'[[212]](#footnote-212) FPIC's inextricable links to self-determination are pivotal to its overall success[[213]](#footnote-213) and as 'a legal attribute of a self-determining people'[[214]](#footnote-214) as opposed to a mere form of 'civic participation'[[215]](#footnote-215). In reflecting the continuous nature of self-determination (as opposed to a one-off invocation), FPIC has been interpreted as both a manifestation of[[216]](#footnote-216) and a means to secure it in practice.[[217]](#footnote-217) In a sense both are mutually reinforcing. This cyclical relationship enables indigenous peoples to 'chart their own destiny'[[218]](#footnote-218) by (ideally) empowering them to explicitly block the approval of development projects if that reflects the genuine will of a peoples in question.[[219]](#footnote-219)

Although the ICJ's *Western Sahara* advisory opinion was delivered in the context of colonial occupation, it nonetheless offers an important insight to exercising self-determination. This is pertinent when understanding its relationship with indigenous peoples' right to free, prior and informed consent in the present era.[[220]](#footnote-220) The advisory opinion conveyed that self-determination is, firstly, a freedom from external interference, and secondly a genuinely expressed will of the peoples of a territory in question.[[221]](#footnote-221) Hence a major common denominator of this nexus is the notion of unconditional indigenous control, with a clear absence of external interference. This is presently limited by the scope of UNDRIP, an issue which must be tackled when it comes to reconceptualising FPIC. Of course in the present context, external interference does not correspond with a population looking to secede, but indigenous peoples expressing their free will against a very distinctive kind of external pressure.

Some of the major components of indigenous peoples' self-determination (much like self-determination in general) pertains to economic, social and cultural development. The right to FPIC presents the practical means to shape self-determined development for indigenous peoples by asserting an ongoing relationship with lands and natural resources[[222]](#footnote-222). In resisting development aggression, FPIC's concrete objectives are similar[[223]](#footnote-223) with the norms conveyed in article 3 of UNDRIP. Providing consent before developments such as resource extraction can even commence represents a robust way of preventing the most adverse encroachments from developers, a most contemporary manifestation of self-determination.[[224]](#footnote-224) Fundamentally, these different strands of self-determination are exercised within the territories of states. In this respect FPIC relates explicitly to internal self-determination. Ideally, indigenous peoples should be conferred essential decision-making powers and participatory rights vis-à-vis their dealings with state governments and other third parties, such as transnational mining firms.

The fact that FPIC should be conceptualised as a full veto right suggests that indigenous decision-making has to go significantly further than merely being consulted on government measures. In the case of large scale development projects, these are often framed according to putative public or national interests of states.[[225]](#footnote-225) The physical consequences of such activities invariably lead to a *sui generis* form of domination and/or subjugation of indigenous peoples on their own ancestral lands. Overall, the synergy between FPIC and self-determination is critical in affirming the importance of a full veto right to remediate contemporary conditions based on subjugation[[226]](#footnote-226) of indigenous peoples. This is how FPIC has to be reconceptualised in overcoming development aggression. The right could therefore be located between two approaches to self-determination. These are: the so-called relational approach, which maintains a constructive (but critical) and continuing relationship with a host state[[227]](#footnote-227); and another approach that takes account of the fact that indigenous peoples once occupied their own sovereign nations. This owes to an argument that indigenous peoples are subjected to conditions of quasi-colonisation[[228]](#footnote-228), the rationale being that they form '"entrapped nations" within existing sovereign states'[[229]](#footnote-229) that are still to be fully liberated. This is not the equivalent of a call for external self-determination. Instead, this is a postulation which seeks to maintain a state's territorial integrity, while arguing for indigenous peoples to keep a degree of distance and retain considerable political, economic, social and cultural autonomy. Ensuring that indigenous peoples have a right to FPIC which guarantees the use of a veto could facilitate this unique form of internal self-determination. At the core of this relationship is the need for indigenous peoples to control their destinies[[230]](#footnote-230), free from unaccountable interference.

Later in the thesis, the importance of this synergy between self-determination and FPIC becomes more apparent. Particularly in understanding why hegemonic international human rights norms reflect the limits placed on both of them. These are currently conceptualised in ways that circumvent any concrete efforts to confront development aggression. Such restrictions remind us why the relationship is vital, as they represent a potent counter hegemonic challenge against mainstream, universal human rights. These elements of indigenous self-determination must permeate through the operation of free, prior and informed consent, as major prerequisite that ensures it exists as a robust response to development aggression. Maintaining such a close connection is imperative to understanding why FPIC requires reconceptualisation.

We now turn to the conclusion, to tie up the main aspects of chapter two.

## 2.5 - Conclusion

Self-determination's place in international human rights is undeniable. Its development into a human right from just a political principle is evident. The contributions of the ICJ and selected Resolutions and Declarations have increasingly clarified what it entails. For indigenous peoples, self-determination once represented the emancipatory struggle against colonialism, whereas today it is mainly defined by their resistance against the quasi-colonial conditions often imposed by state governments. While actually gaining more than sub-state groups in international legal recognition, certain key limits were placed on their right to self-determination in UNDRIP by way of articles 4 and 46(1). Although this settlement is far from ideal, it is imperative to recall that FPIC's relationship with internal self-determination is far more critical. In fact, the limits placed on article 4 of the Declaration is a concern in itself when considering how comprehensively the right was articulated in article 31 of the 1993 draft Declaration.

While identifying a common bond between FPIC and self-determination is not an original argument *per se*, it is vital to clearly spell it out at this juncture. This needs to be the foundation for a new kind of opposition against development aggression. Besides the procedural and substantive understandings of this relationship[[231]](#footnote-231), it must be the basis for a much more radical right. Indigenous peoples' right to self-determination needs to transcend just being an aspirational goal[[232]](#footnote-232), but one that can manifest itself into a version of FPIC that defies certain sources of power and challenges the ideas that underpin development aggression. From an indigenous-centred perspective, the interface between FPIC and self-determination must be able to transform the lives of indigenous peoples who may live in constant fear or distrust of state governments. Endowing them with a full and unconditional veto right, alongside the removal of discriminatory curtailments to internal self-determination are imperative.

Human rights currently impose significant barriers to the scope and operation of FPIC, but nonetheless have a 'radical democratic potential'[[233]](#footnote-233) to address more than the archetypal human rights disputes. This could help towards a proper reconceptualisation of FPIC. This indicates that human rights have to offer more than just tokenistic concessions to indigenous peoples who might participate in a system where they are frequently forced to co-opt the reductionist terms of human rights. Therefore, the aims of FPIC (as a human right) need to go much further than securing improved indigenous participation within the neat parameters of development aggression, when questions of underlying, historic injustices are at stake.

Before presenting this reconceptualisation, chapter three gets to grips with some of the legal instruments and judicial and quasi-judicial decisions that serve as sources of tension for indigenous peoples. A set of variables are presented early in the next chapter, to measure a number of conceptualisations and applications of FPIC from the UN, as well as regional and domestic legal systems. FPIC is conceived primarily within the UNDRIP, as well as the International Labour Organisation's Convention Number 169. It has also been conceived in selected decisions of the regional Inter-American and African systems. In addition, FPIC has been conceived and applied in selected domestic legislation and judgments. These domestic examples are important to draw on, as the realisation of FPIC ultimately hinges on becoming a reality within indigenous peoples' home states.

# Chapter Three - International Conceptualisations and Domestic Applications of FPIC: The Preservation of Development Aggression

## 3.1 - Introduction

Reaffirming the connection between free, prior and informed consent and internal self-determination is essential both legally and spiritually. This is to ensure that FPIC can continuously secure indigenous self-determination to ultimately overcome development aggression. As with the limitations imposed on self-determination in the UN Declaration on the Rights of Indigenous Peoples (discussed in chapter two), FPIC has also been subject to limitations. UNDRIP forms part of a common pattern in international human rights which conceptualises FPIC in unduly limited terms.

The overall effect of the limited conceptualisation of FPIC is to deny indigenous peoples the ability to determine their own destinies when faced with unwanted development projects. Drawing on a network of legal standards and jurisprudential practices, it is contended that the overarching response to FPIC does not go far enough to ensure that indigenous peoples can make decisions free from interference. Despite indigenous peoples' engagement with international human rights (including direct participation in the drafting of UNDRIP[[234]](#footnote-234)) , they are permitted, at best, occasional concessions in the face of governmental interests in development projects.

In discussing these inadequacies, chapter three focuses on the international, regional and domestic layers of FPIC's conceptualisation and/or operation. To begin with, section 3.2 outlines a number of variables in order to establish a foundation from which the examples used in this chapter can be measured against. These variables are elaborated as questions in terms of the normative values FPIC need to espouse, when confronting instances of development aggression. Each variable is justified, in order to provide relevance to the examples discussed. Section 3.3 applies the general variables to UNDRIP and ILO Convention 169, which contain two of the clearest international expressions of FPIC. It is demonstrated that they both reduce consent requirements to actually constitute consultation. This has the effect of denying indigenous peoples a full and unconditional right to veto development measures. With regards to UNDRIP, significant compromises were made in order to satisfy the interests of intransigent state governments resistant to giving FPIC its full meaning. Reducing these provisions to predominantly embodying consultation also conveys an illusion of indigenous participation as a human rights priority. Section 3.4 is divided into three subsections. Firstly, indigenous participatory rights are examined with regards to its development in the Inter-American human rights system, with a specific focus on landmark *Saramaka People v Suriname* case which explicitly recognised FPIC in certain circumstances. The second subsection looks at the *CEMIRIDE v Kenya* decision of the African Commission on Human and Peoples' Rights, which takes an almost identical approach to FPIC as *Saramaka*. Both regional decisions are significant in the recognition of indigenous peoples' rights. The third subsection analyses both decisions, suggesting that when they are measured against the variables, they only represent very partial improvements to UNDRIP and ILO Convention 169. Next, section 3.5 considers domestic dimensions of FPIC. The variables consider not only FPIC's conceptualisation but also its viability vis-à-vis wider national development priorities. Specific focus is on the Indigenous Peoples' Rights Act 1997 of the Philippines and the Indian Supreme Court judgment of *Orissa Mining Corporation Ltd v Minister of Environment and Forest* which empowered local village assemblies to hold binding referendums on a controversial open-cast mine on sacred indigenous land. These examples are more heterogeneous when applying the variables. The legislation in the Philippines projects a progressive approach to FPIC on paper but is trumped by state interference in favour of foreign mining interests. The potential impact of the Indian judgment seems to be ambiguous, as the project was effectively vetoed, but its long-term value may be questionable when considering India's overall priorities that favour industrialised development. Finally, the conclusion determines that while these various strands of FPIC are not exactly uniform, the wider effect is a maintenance of development aggression. This somewhat undermines the optimism and high-minded rhetoric that instruments such as the UNDRIP represent the pinnacle of indigenous rights.[[235]](#footnote-235)

## 3.2 - FPIC and Development Aggression: Putting the Variables into Context

In order to ensure that FPIC is an effective right against development aggression, this section proposes certain variables that need to be fulfilled in its conceptualisation. These variables have been chosen in order to capture the substantive content of FPIC and how well self-determination can be secured. An unconditional right to self-determined FPIC should be an important safeguard against development aggression in this contemporary era. The examples used in this chapter are specifically selected in order to provide a cross-section of legal instruments as well as judicial and quasi-judicial decisions at different levels (international, regional and domestic). All of these examples are measured according to two general variables. A specific variable on regional decisions is also tested in ascertaining how effectively they might enhance our understanding of FPIC. Two specific variables for domestic examples draw on procedural fairness as well as FPIC's durability with regards to national policies on extractive mining and other development activities.

At its most basic, FPIC confers on indigenous peoples a right to give or withhold consent to certain courses of action. These commonly include development projects, or legislative and administrative measures proposed by governments which are of direct relevance to indigenous peoples. Thus the right should reasonably amount to a process that is culturally appropriate, non-coercive, conducted in representative institutions, involves the full participation of indigenous women, children and elders[[236]](#footnote-236) and incorporates the use of indigenous-led environmental and social impact assessments.[[237]](#footnote-237)

When specifically confronted with matters of development aggression, FPIC is not only facing up to the actual mining, logging or pipeline projects, but also a range of additional factors which enable these activities. These include official policies, where governments may implement favourable tax and regulatory conditions to attract potential investment from foreign companies. Besides these, there are certain 'unofficial' problems such as companies inducing indigenous leaders with monetary bribes and gifts to influence their decisions to approve projects. In other instances members of indigenous communities have been placed onto company payrolls.[[238]](#footnote-238) Companies have also reportedly sought to promote their agendas through national media in order to build favourable images and misrepresent the situations of indigenous peoples.[[239]](#footnote-239) Moreover, in developing countries particularly, development aggression is sometimes associated with conflict or violence between rebel groups and government military forces. Indigenous peoples have been reportedly subjected to harassment and even extrajudicial killings in certain cases.[[240]](#footnote-240)

These factors may cumulatively engender the contemporary context of development aggression. Thus FPIC has to espouse certain values in being a right that indigenous peoples can truly rely on. In meeting these challenges, the variables presented in this section are designed to address how FPIC ought to be conceptualised.

The first general variable (applicable to all examples), therefore, asks:

How far is a full and unequivocal veto internalised within this conceptualisation of free, prior and informed consent?

This must be at the heart of FPIC and has to apply universally. Permitting a veto as an absolute and explicit option (although this may not be exercised by every indigenous community in the world, owing to a diverse range of different world views) is essential in meeting the needs and aspirations of indigenous peoples with as little interference as possible. A component of FPIC's counter hegemonic core is the opportunity for indigenous peoples to exercise a right to veto, if that is the overwhelming view of a particular community. Although this has been accepted in exceptional circumstances,[[241]](#footnote-241) the general conceptualisation of FPIC encourages the continuation of a so-called '"drive-by consultation"'[[242]](#footnote-242) in which the views of indigenous communities are, in the best case scenario, simply taken into account by governments or companies. In reality, consultation for indigenous peoples represents an escape hatch for governments to avoid taking their views seriously. Even if indigenous peoples are asked for opinions on proposed development measures, there is no concrete obligation to implement them into an overall decision.[[243]](#footnote-243) For example a common practice in Canada has been the posting of letters to First Nation chiefs on planned legislative or administrative changes, with extremely limited time frames to adequately respond.[[244]](#footnote-244) These unjust attitudes have unfortunately been replicated and internalised by the major international documents of indigenous peoples' rights ― the UNDRIP and ILO Convention 169. These both eschew stronger expressions of indigenous participation, by compromising for less stringent conditions based on consultation. In the African context, consultations have been reportedly imposed on indigenous peoples who are often illiterate, so the participatory process is not only derisory but discriminatory.[[245]](#footnote-245) Further examples of woeful consultation experiences are explained in section 3.5, in reference to the Philippines.

Next, the second general variable asks:

Can it (the particular example) be seen to promote indigenous peoples' right to self-determination?

In recalling chapter two, FPIC gives rise to a form of internal self-determination that lies between critically maintaining a relationship with states and the need to overcome quasi-colonial situations. FPIC must therefore facilitate 'self-determined development'[[246]](#footnote-246) pathways. Indigenous peoples may no longer look at secession as a feasible option[[247]](#footnote-247), and external self-determination is, after all, not relevant here. Instead, FPIC engenders robust form of internal self-determination that has a certain emancipatory value when confronting contemporary development (for example, mining and logging) challenges. Self-determination of indigenous peoples is thus more pronounced than previous times in history. Traditional battles against colonial occupiers with their 'civilising' missions[[248]](#footnote-248) have been supplanted by new types of colonisers. This is often the result of a nexus between states and private mining enterprises who pursue a form of development that ignores the social, cultural and environmental costs and assume that projects will benefit all peoples.

Turning to specific conceptualisations of FPIC, the specific variable for the regional examples is as follows:

Does this decision significantly advance a greater conceptualisation of FPIC?

This specific variable is important in the context of decisions by the Inter-American Court and African Commission, because it relates to how far non-UN institutions are willing to go regarding FPIC, namely whether their conceptualisations go further than article 32(2) of UNDRIP. It is argued that regional tribunals take relatively open approaches to human rights.[[249]](#footnote-249) Despite taking influences from the UN, these legal orders are prima facie distinctive enough to potentially go much further. With indigenous peoples becoming increasingly well attuned to regional organisations, especially the Organisation of American States, there is an opportunity to build a progressive approach to FPIC. It is only just to expect these bodies to play an indirectly interventionist role through cases and communications where indigenous rights are at stake.

Finally, specific variables for the domestic conceptualisations and applications of FPIC are based on the following two benchmarks:

Does the judgment/legislation give rise to an inclusive decision-making process for indigenous peoples?

Is the judgment/legislation viable in the context of the state's overall development agenda?

The above are designed to ensure that FPIC is subject to clear practice standards that are more elaborate than the international normative framework. These, firstly, need to consider matters of procedure so that indigenous peoples are able to participate comprehensively in any process of FPIC. Secondly, as we are able to see the actual impacts of development aggression at state-level, this calls for a variable that places FPIC conceptualisations in the context of wider national development agendas. This goes beyond the purview of international human rights of the UN. The added dimension here may require a consideration of any relevant (perhaps contradictory) legislation. Domestically, there exists a concrete policy landscape so it is apt to examine FPIC's viability in such situations.

The chapter now proceeds to examining the main international conceptualisations of FPIC.

## 3.3 - The Failings of International Conceptualisations of FPIC

Participation of indigenous peoples in the decision-making processes surrounding development projects have been addressed, as a way of tackling injustices associated with problems such as forced evictions from land or the threats to a community's continued practice of their cultures.[[250]](#footnote-250) The trouble is that the main international conceptualisations in the UNDRIP and ILO Convention 169 are deceptive with regards to providing any meaningful change for indigenous peoples. Undermined by compromises to satisfy recalcitrant state governments, FPIC has been conceptualised to ensure that indigenous peoples capitulate to a system that subtly ensures uncritical conformity with mainstream legal and, by extension, economic structures. Canadian First Nations lawyer Sharon Venne poignantly highlights that:

[indigenous peoples] have experience with such participation in their system. In many instances, our people have become involved in the administrative framework of the government. The result has been that our own people become the tools of assimilation, and these assimilated indigenous persons promote the administrative and legislative changes among our people.[[251]](#footnote-251)

For indigenous peoples this could amount to a form of political co-option which conveys an impression of decentred decision-making, but actually preserves centralised government interests[[252]](#footnote-252) such as development aggression.

A close examination of the Declaration's drafting history demonstrates that there was much resistance to recognising an unconditional right to FPIC despite its importance in the realisation of indigenous peoples' self-determination. In terms of development projects on ancestral lands and territories, article 30 of the Sub-Commission's draft Declaration in 1993 outlines that indigenous peoples have a right to shape their development priorities as well as how lands, territories and resources may be utilised.[[253]](#footnote-253) Notably, this includes 'the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources.'[[254]](#footnote-254) Moreover, article 30 makes provision for 'just and fair compensation to mitigate adverse environmental, economic, social, cultural or spiritual impact'[[255]](#footnote-255) of development activities. In contrast, the General Assembly's final agreed version does not retain this definitive approach to FPIC in article 32. Firstly, the word 'right' is removed and is replaced with a duty on states to:

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.[[256]](#footnote-256)

Moreover, article 32(3) supplants compensation with the more vague requirement of 'just and fair redress'[[257]](#footnote-257). Clearly the states engaged with the Working Group on the Draft Declaration feared that the draft document could have been interpreted as providing indigenous peoples with a full right to veto[[258]](#footnote-258). Of course indigenous peoples do not subscribe to a single world view on development and how to exercise their economic self-determination[[259]](#footnote-259). Indigenous peoples' development priorities vary, thus some do not express a universal refusal on extractive mining projects for example.[[260]](#footnote-260) However when reading FPIC within the spirit of article 32(2) in UNDRIP, we may question whether this a genuinely just outcome for indigenous peoples, when considering the enormously damaging effects of development aggression.

Although adoption of the UNDRIP was generally met with approval by large numbers of indigenous representatives during the negotiation stage[[261]](#footnote-261), questions may be raised about whether these compromises in drafting were reluctantly accepted by indigenous representatives, despite some earlier pleas for stronger expressions of self-determination.[[262]](#footnote-262) Effectively, the construction of FPIC in article 32(2) undermines the requirements of article 32(1) on indigenous peoples having a right to 'determine and develop strategies for the development or use of their lands or territories and other resources'.[[263]](#footnote-263)

Underlying this unsatisfactory conceptualisation of FPIC was considerable state resistance to article 32(2). Most prominent in the refusal to endorse FPIC in definitive terms was a powerful bloc consisting of the United States, Canada, Australia and New Zealand. In a joint statement, the four states outlined that 'there can be no absolute right of free, prior and informed consent that is available uniquely to indigenous peoples and that would apply regardless of circumstance.'[[264]](#footnote-264) This is hardly a coincidence given the histories of these states vis-à-vis indigenous peoples as well as the fact they are home to a large share of the world's extractive mining operations which lie directly on traditional indigenous lands.[[265]](#footnote-265) It certainly calls into question the purpose of recognising free, prior and informed *consent* in article 32(2) if states want to place inherent limits on the extent to which indigenous peoples can exercise the right.

Although the bloc of four states eventually supported UNDRIP (subject to significant qualifications)[[266]](#footnote-266) they clarified their positions on FPIC, refusing to recognise its full potential. For instance, the United States adopted highly reductionist terms, stating that it would merely *consult* with tribal leaders without necessarily agreeing with all of their opinions.[[267]](#footnote-267) This falls short of the most basic requirements of FPIC. The official position of the Canadian government was also the non-recognition of FPIC.[[268]](#footnote-268) Aside from these four states, other governments were just as reluctant to give FPIC its full meaning. Sweden's position was to recognise it as a guarantee of consultation, but not as 'a right of veto' and would only be applicable to 'such lands or territories that are formally owned by indigenous peoples.'[[269]](#footnote-269) So not only was full consent denied, it could also be implied that the lack of formal land ownership could serve as a get-out clause by states who do not recognise indigenous systems of ownership and land titling.

The reasoning for state resistance to a stronger expression of FPIC may have been similarly deployed in the inclusion of article 46(1) in the Declaration regarding self-determination.[[270]](#footnote-270) While FPIC does not relate to matters of state sovereignty and territorial integrity, the idea of conceptualising it as a full and unconditional veto frequently clashes with major government policies that frame large-scale development projects as being in supposedly national or public interests.[[271]](#footnote-271) Given that FPIC pertains to how self-determination can be exercised internally, it is hardly surprising that state governments lobbied for a limitation built-in to the Declaration to preserve practices that give rise to development aggression.

It is therefore very visible to observe that UNDRIP fails to meet the expectations of the first general variable. State intervention in the original Draft Declaration's conceptualisation of FPIC reduced it to something less than a right to veto. With regards to the second general variable, UNDRIP recognises a right to internal self-determination of indigenous peoples. But this has not been given its proper meaning if such limitations are imposed on FPIC.

The failure to meet either variable is also reflected in the conceptualisation of FPIC in the earlier ILO Convention 169, adopted in 1989[[272]](#footnote-272). Article 6 outlines the conditions for consultation, where governments (of state parties) are obliged to 'consult the peoples concerned'[[273]](#footnote-273) making use of 'appropriate procedures'[[274]](#footnote-274) especially through indigenous peoples' 'representative institutions'[[275]](#footnote-275). Prima facie, this suggests that consultations have to be carried out with as wide a number of peoples as possible and it would not be sufficient for state governments to discuss proposals with a pre-determined or closed selection of indigenous peoples.[[276]](#footnote-276) The process must also take place in traditional or customary institutions such as village councils or meeting places, as well as with any 'tribal peoples' parliaments or locally-elected leaders who are recognized as true representatives by the community or people concerned.'[[277]](#footnote-277) The circumstances in which consultation could arise include relevant amendments to a nation's constitution[[278]](#footnote-278), the introduction of '[n]ew agrarian laws'[[279]](#footnote-279) and 'land rights decrees or procedures for obtaining land titles'[[280]](#footnote-280). Notably, before a government can pursue such amendments or policies, consultation has to take place in advance with affected peoples or communities.[[281]](#footnote-281) Article 6(2) of the Convention elaborates that consultations have to be conducted 'in good faith'[[282]](#footnote-282) with a goal of 'achieving agreement or consent to...proposed measures.'[[283]](#footnote-283)

These provisions have been clarified as meaning not only telling indigenous peoples about a proposed development project, but critically that they have a chance to genuinely influence decision-making[[284]](#footnote-284). Simply disseminating information to affected indigenous peoples does not suffice in the context of article 6 of ILO Convention 169[[285]](#footnote-285) Within its quasi-judicial competences[[286]](#footnote-286), the ILO has previously construed the imperative nature of prior consultation in Representations of non-observance, with regards *inter alia* to the construction of a hydroelectric dam affecting the Embera-Katío peoples in Colombia[[287]](#footnote-287), inadequate prior consultation in the context of logging concession in the Bolivian Amazon region[[288]](#footnote-288) and oil exploitation in Ecuador.[[289]](#footnote-289) The fundamental problem is that the consent requirement, in article 6(2), offers little discernible value to indigenous peoples, as the provision precludes them from exercising a veto right if a measure is ascertained to be in irreconcilable conflict with their interests.[[290]](#footnote-290) By not extending this possible option to indigenous peoples, the use of consent in the Convention is futile.

It is therefore very difficult to see how article 6(2) might engender, in the words of Lee Swepston, 'an attitude of respect for the cultures and ways of life of indigenous and tribal peoples'[[291]](#footnote-291), when ILO Guidelines specifically note that the provision does not confer a full right to veto. Consultation effectively represents 'a license to ignore the will'[[292]](#footnote-292) of indigenous peoples. The drafting history of the Convention indicates that there was never any intention to allow consent to be the ultimate result of a participatory process.[[293]](#footnote-293) This tells us that the Convention's spirit is heavily weighted in favour of state governments who have the primary power to determine the fate of development projects, including those that directly affect indigenous peoples on their traditional lands and territories. This pays no credence to pre-colonial nationhood of indigenous peoples. With regards to meeting self-determination as per the second general variable, although ILO 169 utilises the language of 'peoples'[[294]](#footnote-294) in reference to indigenous peoples, it explicitly excludes them from being treated as the beneficiaries of that right.[[295]](#footnote-295) Although a vaguely articulated right (compared to article 31 in the draft Declaration) to internal self-determination was subsequently recognised in the UNDRIP, it is still very disappointing that the only legally binding international treaty on indigenous rights excluded this essential element from its remit. As FPIC is clearly aligned with internal self-determination there is no actual threat to territorial integrity. This renders the Convention virtually meaningless in addressing issues such as development aggression, as it ignores the centrality of self-determined pathways that are vital to overcoming external pressures. Its omission from the Convention implies that indigenous peoples cannot independently control and determine their own interests, free from state interference. In a sense, this perpetuates the quasi-colonial relationship between indigenous peoples and state governments, with the latter taking a lead role in matters such as development planning.

Section 3.4 focuses on FPIC in the context of the Inter-American and African human rights systems.

## 3.4 - A Regional Approach to FPIC: A Glass Half Full or Half Empty?

### 3.4.1 - The Saramaka case of the Inter-American Court of Human Rights

A small but pertinent body of decisions emanating from the Inter-American system (the Court and Commission) is often praised for building a progressive approach to indigenous peoples' rights, especially in the context of contentious development projects. Both the Commission and Court have adopted expansive interpretations of article 21 of the American Convention on Human Rights with respect to property rights. Decisions recognise communal property of indigenous peoples within the remit of article 21 which may have been drafted as only giving credence to private property rights. On the surface, this could signify an innovative approach in human rights practice, as indigenous communal property is intimately bound to their cultural survival. The development of Inter-American jurisprudence from 2001 was inspired by work on the UN Draft Declaration, which was particularly influential on its decisions in the Court and Commission.[[296]](#footnote-296) Emerging norms from the UN Draft Declaration complemented concerns in the Americas about invariable violations by state governments who fail to substantially protect indigenous peoples when granting natural resource concessions to private companies to undertake large-scale projects on ancestral lands. Communal notions of property and the inalienability of land to indigenous cultures[[297]](#footnote-297) should ordinarily engender an obligation on state governments to ensure that indigenous peoples are comprehensively engaged in the various stages of development plans. This must include the opportunity for indigenous peoples to flatly refuse their consent if proposed development projects compromise their physical and cultural survival.

The Inter-American system has cultivated jurisprudence that is often based on disputes surrounding resource licences granted by state governments to private companies. Recognition of participation started with consultation,[[298]](#footnote-298) which paved the way for the Court's most notable decision vis-à-vis indigenous peoples in 2007. *Saramaka People v Suriname*[[299]](#footnote-299)proved to be a landmark case in the Inter-American jurisprudence, as it was the first to explicitly refer to FPIC as an essential requirement, beyond just consultation. The timing of this decision was particularly apt, as the UNDRIP was formally adopted in the same year, suggesting how UN-level developments could influence and cross-pollinate the Inter-American Court's jurisprudence.[[300]](#footnote-300) The background to the case centred on logging and mining concessions granted to private enterprises by the national government in the Upper Suriname region, on territory of the Saramaka Maroon tribe.[[301]](#footnote-301) Article 21 was deemed to be applicable to certain natural resources that are imperative to the identity and sustenance of the Saramaka peoples, subject to certain qualifications.[[302]](#footnote-302) Hence there could be no absolute moratorium on the government granting licences to private companies wanting to extract minerals or log.[[303]](#footnote-303) However, in seeking a balance between conflicting interests, granting such concessions may have indirect but grave effects on the enjoyment of resources that are fundamental to the Saramaka way of life. For instance, accessing clean water and the ability to fish could be severely hindered by extraction of gold on the territory[[304]](#footnote-304) and logging could pose severe difficulties to hunt and gather.[[305]](#footnote-305) To address these problems, the Court devised several criteria to ensure that indigenous physical and cultural survival are not compromised ― firstly, the Saramaka must be provided with the right to participate. This includes consultation generally, but would have to be upgraded to free, prior and informed consent where a development project is assessed to have a 'major impact'[[306]](#footnote-306). In its analysis, the Court expressly invoked the language of FPIC in the case of 'large-scale development or investment projects that would have a major impact within Saramaka territory...according to their customs and traditions'[[307]](#footnote-307) hence raising the possibility that a more comprehensive level of participation is required where a development or investment plan has a potentially large magnitude on the extent which the community can exercise their customary rights and retain bonds with their ancestral lands.[[308]](#footnote-308) The Court ruled in favour of the Saramaka peoples, holding that article 21 had been violated by the government of Suriname in its granting of logging concessions.[[309]](#footnote-309) As part of the Court order, Suriname was required to demarcate, delimit and grant title to the Saramaka, in cooperation with the community.[[310]](#footnote-310) Until that stage, the government was required to refrain from any further activities unless FPIC is given by the Saramaka.[[311]](#footnote-311)

A very similar approach based on the magnitude of development projects was adopted in a decision of the African human rights system, considered in the next subsection.

### 3.4.2 - The Endorois Decision of the African Commission on Human and Peoples' Rights

Within the African Commission (and Africa more widely), recognition of indigenous peoples and their rights has been considerably slower compared to the Inter-American system. The Commission had previously overseen a complaint concerning evictions of the Ogoni peoples in Nigeria, in the midst of oil explorations.[[312]](#footnote-312) But at the time the Commission did not even use the term indigenous peoples in its communication. Progress has, however, been made at an institutional level, with encouraging moves towards greater recognition. The Commission established a Working Group of Experts on Indigenous Populations/Communities[[313]](#footnote-313) in 2001, as well as issuing an Advisory Opinion calling on Member States to support the adoption of UNDRIP before the UN.[[314]](#footnote-314) But in spite of these, even recognising the presence of indigenous peoples in the African context has long been problematic, as reflected in the actions of a bloc of African states who sought to delay the vote on UNDRIP in 2006[[315]](#footnote-315)

This juxtaposition of resistance and progress perhaps made the Commission's decision in *CEMIRIDE v Kenya[[316]](#footnote-316)* seem miraculous[[317]](#footnote-317). The complaint focused on the Endorois peoples, a pastoralist community, inhabiting an area around Lake Bogoria in Kenya's Rift Valley. They were faced with a number of external threats, most notably the construction of a Game Reserve directly on their ancestral lands.[[318]](#footnote-318) In addition, the Kenyan government issued concessions for ruby mining.[[319]](#footnote-319) This situation demonstrates a clear example of development aggression, compounded by the fact that Endorois peoples were facing eviction, as well as threats to their cultural survival. Development projects were alleged to have disproportionately harmed their distinctive way of life, including their use of land for grazing and access to vital resources such as water and salt licks, which are of medicinal value for their cattle.[[320]](#footnote-320) Having exhausted domestic remedies the Endorois, represented by the NGO Centre for Minority Rights Development (CEMIRIDE), made a complaint to the African Commission. It was alleged that violations were committed by Kenya, including that of article 22 of the African Charter which relates to a right of development.

The Commission found that article 22 had been violated by Kenya. Its approach to reaching this decision hinged on the importance of indigenous peoples having the ability to effectively participate in proposed development projects.[[321]](#footnote-321) Similar to the Inter-American Court's *Saramaka* decision, a test of proportionality was adopted, but unlike that one, this decision related to the right of development[[322]](#footnote-322), not property rights. The Kenyan government claimed, in its response, to have consulted with the Endorois on the Game Reserve. Replying to this, the Commission deemed this to be inadequate in the present situation. Due to the magnitude of such a project, eviction of the Endorois took place without their free, prior and informed consent. This lack of FPIC meant that the Endorois peoples were effectively deprived of access to land and resources central to their social development, for grazing and salt licks for their cattle. The Commission argued that there was a legitimate expectation to access lands 'for religious ceremonies and medicinal purposes.'[[323]](#footnote-323) Critically the Commission deemed that FPIC was an essential condition in this instance as the size and nature of this project had a 'major impact within the Endorois territory'.[[324]](#footnote-324) It was recommended that Kenya recognised Endorois' traditional ownership of land, including its restitution and unconditional access to Lake Bogoria.[[325]](#footnote-325)

### 3.4.3 - Assessing the Regional Response to FPIC

In examining the decisions more closely, it is evident that both tribunals adopted near identical approaches to FPIC. Both held that FPIC ought to be expected where the magnitude of certain undertakings (logging and Game Reserve, respectively) was significant enough. This includes projects that are ascertained to have an overwhelmingly detrimental effect on indigenous peoples' historical bonds with their lands and resources.

Applying these decisions to the variables they fail to meet the requirements of the first general variable. While it is laudable that they recognise a veto right, these are not full or unconditional. They only apply where projects are deemed as having a 'major impact'. However, when examining the specific variable on whether regional decisions enhance our understanding of FPIC, one line of argument is that while UNDRIP does not define when consent is applicable[[326]](#footnote-326), the decisions somewhat settle this uncertainty, filling an important 'legal gap.'[[327]](#footnote-327) The decisions may therefore be seen as providing a 'sliding scale approach to participatory rights'.[[328]](#footnote-328) Coupled with both tribunals' orders/recommendations to the respondent states with particular courses of action, it would prima facie appear that the specific regional criteria was at least fulfilled, by providing more authoritative conceptualisations of FPIC compared to UNDRIP and ILO Convention 169.

On the other hand, when considering the second general variable on whether self-determination is met, it is less important if the decisions partially fill a legal gap. A much wider moral gap remains from an indigenous perspective. If we consider that self-determined FPIC has to remediate against contemporary, quasi-colonial conditions (while maintaining a critical relationship with state governments[[329]](#footnote-329) ), these decisions clearly do not meet the second general variable. It may be unreasonable to criticise two decisions regarded as landmarks in indigenous peoples' rights, but this does not negate the fact that they fall short of recognising FPIC unconditionally. Also, by setting such an arbitrary, undefined benchmark ('major impact'), the decisions also fail to acknowledge the need for indigenous peoples to fundamentally control their own destinies, when faced with contemporary problems such as aggressive development measures. Thus at best, the decisions provide marginal improvements to article 32(2) of UNDRIP. The use of the phrase 'major impact' simply implies ways to better manage development aggression in selected circumstances.

Indeed the Inter-American Court somewhat regressed since *Saramaka*. Its interpretation of article 21 of the American Convention was raised by the Inter-American Court in *Sarayaku v Ecuador[[330]](#footnote-330)* in 2012. It focused on another scenario where indigenous participation is determined to be an integral part of the Kichwa peoples' right to ancestral territory that was subject to oil and hydrocarbon exploration licences.[[331]](#footnote-331) The decision attributed effective participation predominantly to the cultural identity of the Kichwa, arguing that it is a fundamental right where such actions 'affect or could affect their cultural and social life.'[[332]](#footnote-332) However, the Court did not take a more expansive approach of indigenous participation, maintaining that there was a requirement to only 'consult the Sarayaku People in a prior, adequate and effective manner.'[[333]](#footnote-333). A very recent decision concerned the Garifuna peoples of Honduras and focused on alleged violations of collective ownership rights by the government.[[334]](#footnote-334) The Court, once again, took a disappointingly limited approach to participation, by highlighting that *'consultation* must be applied prior to any exploration project that may affect the traditional lands of indigenous and tribal communities.'[[335]](#footnote-335) In terms of emerging developments in the OAS more widely, a draft American Declaration on the Rights of Indigenous Peoples has been in negotiations since the 1990s. Its finally agreed terms will be interesting to examine, in light of the jurisprudence on indigenous rights and whether it actually goes further on FPIC compared to article 32(2) of UNDRIP. In 2015, however, an indigenous caucus withdrew from negotiations which was attributed to certain state governments reportedly wanting to water down the draft document's wording and setting the bar lower than the rights agreed in UNDRIP.[[336]](#footnote-336) In a recent, more positive development, the relevant Working Group approved the draft Declaration to go before the OAS General Assembly for Member States to vote on.[[337]](#footnote-337) In the context of the African human rights system, there is currently a pending decision before the Court on Human and Peoples' Rights[[338]](#footnote-338). This will be its first judgment dealing with indigenous rights, so it is still to be seen what kind of approach (if any) the Court takes to FPIC.

Beyond the international and regional conceptualisations, the next section focuses on a further layer of discussion. Domestic approaches to FPIC need to be measured not only according to their conceptualisations, but also the extent of their procedural fairness and their viability within national development agendas.

## 3.5 - FPIC in the Domestic Context: Partial Progress and Pernicious Realities

In certain domestic jurisdictions, conceptualisations of FPIC may go above and beyond article 32(2) of UNDRIP. However these may prove to be deceptive as they possibly mask the real intentions of governments. In practice, FPIC is often heavily mandated by state governments that are keen to impose their interpretation of indigenous participation on communities. Fundamentally, when we discuss domestic conceptualisations of FPIC, it is incomplete to simply ask whether they espouse a full veto right. In determining whether they can secure self-determination, FPIC must also be examined in the overall context of a country's economic and political priorities. The devil is in the detail, so to speak. As we move away from looking purely at international norms in a vacuum, we are exposed to the realities of concrete national policies. Hence we can better identify how effectively FPIC can interact with overall development interests at a national level.

To illustrate these problems, this subsection draws on two domestic examples:

(1) The Indigenous Peoples' Rights Act 1997 (IPRA) of the Philippines which specifically contains provisions on free, prior and informed consent. This particular example is of relevance to the chapter, as the Draft Declaration is credited as being highly influential on the 1997 Act.[[339]](#footnote-339)

(2) A key judgment by the Supreme Court of India in April 2013 granting Dongria-Kondh village assemblies in Orissa the right to hold referenda on the bauxite mining activities of a transnational steel firm. Although the government of India does not formally recognise the term 'indigenous peoples'[[340]](#footnote-340), the Supreme Court highlighted the presence of both the UNDRIP and the ILO Convention 169[[341]](#footnote-341). This indicates the influence of such international legal standards on the development of domestic jurisprudence,[[342]](#footnote-342) through the use of *gram sabhas*[[343]](#footnote-343).

In both instances, the conceptualisation of FPIC is not so much of a problem compared to underlying policy pressures, when considering the specific variables. Moreover, unlike the other examples in previous sections, the approaches of the Philippines and India are not entirely uniform. In the Philippines, there is evidence of excessive tampering by the state. In India, the judgment gave rise to much greater procedural fairness, but its flaws are nuanced as participation of indigenous peoples was not as inclusive as it could have been. Furthermore, recent policy developments suggest that the judgment could have little precedential value.

In addition, both the Philippines and India are postcolonial states[[344]](#footnote-344) which, despite their histories overcoming colonial occupation, have adopted especially aggressive policies on development, frequently at the expense of indigenous peoples.[[345]](#footnote-345) Resource-intensive extractive industries invariably come into contact with the mineral rich ancestral lands of indigenous peoples who are frequently subjected to egregious violations of their customary rights, as well as facing displacement from their homes and heavy handed police tactics.[[346]](#footnote-346) In the postcolonial context, modern forms of domination blight the lives of indigenous peoples who are deprived of their distinctive world views which they rely on for continued survival.

### 3.5.1 - Indigenous Peoples' Rights Act 1997 of the Philippines

Recent estimates project that between 10-20% of the Philippines' population belong to indigenous communities.[[347]](#footnote-347) These communities predominantly inhabit remote areas of the country's northern (collectively known as the Igorot) and southern islands (holistically termed as Lumad)[[348]](#footnote-348) and are among the country's poorest regions, with few social services.[[349]](#footnote-349) The country's drive towards industrial development, following periods of foreign occupation, have threatened the well-being of indigenous populations coming face-to-face with developers of extractive industries wanting to exploit mineral, timber and water resources from traditional lands.[[350]](#footnote-350) But there have been attempts by successive Filipino governments to engage with the needs of indigenous peoples. A critical turning point was the adoption of the nation's 1987 Constitution which aimed to shift national policy towards indigenous peoples away from assimilation towards cultural pluralism.[[351]](#footnote-351)

A major milestone in the legal protection offered to indigenous Filipinos came ten years later with the Indigenous Peoples' Rights Act 1997 (IPRA 1997) coming into force. The Act was adopted as part of a 'common development agenda'[[352]](#footnote-352) spearheaded by then-President Fidel V Ramos. On paper, this version of development was a component of his Social Reform Agenda, a salient aspect of which emphasised enabling citizens 'to effectively participate in the decision-making process that affects their rights, interests and welfare.'[[353]](#footnote-353) This aim is conducive with the priorities of FPIC with a clear link to effective participation as it seeks to change the narrative on decision-making in the Philippines with focus away from state-centric powers to a more decentralised settlement.[[354]](#footnote-354)

The 1997 Act defines FPIC as:

 the consensus of all members of...ICCs/IPs [indigenous cultural communities/indigenous peoples] to be determined in accordance

 with their respective customary laws and practices, free from any

 external manipulation, interference and coercion, and obtained after

 fully disclosing the intent and scope of the activity, in a language and

 process understandable to the community.[[355]](#footnote-355)

On paper this definition captures the 'classic' requirements of FPIC, emphasising its collective and cooperative nature, cultural sensitivity and decisions that are undertaken in line with community conventions. There are also implied obligations on developers to conduct their plans transparently and to ensure that decisions by indigenous peoples are freely conducted ('free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity'[[356]](#footnote-356)).

The Act extends FPIC requirements to the safeguarding of 'ancestral domains'[[357]](#footnote-357) rather than simply lands, indicating an extensive appreciation of indigenous territory as it includes lands alongside inland waterways, coastal regions and natural resources.[[358]](#footnote-358) FPIC applies not just to territories but also religious, cultural and ceremonial sites[[359]](#footnote-359) and is conditional on the granting of concessions or licences to extractive industries. Prior to these being granted there is a practical obligation to 'explore, excavate or make diggings on archaeological sites'[[360]](#footnote-360) to determine whether such activities will adversely affect indigenous welfare. A government agency, the National Commission on Indigenous Peoples ('NCIP') oversees the independent implementation of FPIC.[[361]](#footnote-361) The NCIP is required to consult with indigenous communities as to how FPIC is to be arrived at in line with their customary norms.[[362]](#footnote-362)

Thus it could be determined that the conceptualisation of FPIC is prima facie more progressive than UNDRIP and appears to permit a veto with no visible limitations.

The 1997 Act offers a comprehensive legislative mandate to addressing the challenges facing postcolonial indigenous peoples, notably their ability to effectively participate in the frequently divisive activities of private companies in the extractive industries.

Unfortunately, the actual realisation has not matched Ramos' ambitions in this respect. Central to the Act's failures is the concentration of power in the hands of the NCIP. When considering the first specific variable on domestic examples, we must turn our attention to the major procedural inequities, which have arguably veered into government corruption. These actively discriminate against indigenous Filipinos. Fundamentally the NCIP does not truly empower indigenous peoples to actively engage and oversee compliance with FPIC by developers, because that power is confined to a government agency. Despite being assigned a non-partisan role, commissioners of NCIP are appointed by the President's office, not indigenous peoples.[[363]](#footnote-363) Widespread reports that commissioners bribe[[364]](#footnote-364) tribal leaders in order to allow the 'fast-tracking' of mining activities on native territories,[[365]](#footnote-365) decision-making processes are not carried out in accordance with customary requirements,[[366]](#footnote-366) and FPIC is frequently subverted by companies[[367]](#footnote-367) strongly discredit the intentions of the Act. In the words of one member of an indigenous community, FPIC has been 'debased and debauched by the self-serving interests of companies and the NCIP.'[[368]](#footnote-368) The regulatory process has effectively created a vacuum in which mining companies such as Rio Tinto and TVI do not adequately engage with indigenous peoples, making the granting of extraction licences much easier, at the expense of communities.[[369]](#footnote-369) Specific examples of unacceptable consultation practices include: inadequate information on development plans; excessively short notice periods to indigenous peoples to prepare for face-to-face meetings with mining company representatives; and meetings themselves have been known to take place in unfamiliar settings rather than indigenous peoples' own institutions.[[370]](#footnote-370) At its most pernicious, there have also been instances where recognised grassroots organisations of indigenous peoples are excluded from both negotiating and communicating their lack of consent to projects. In fast tracking certification for mining projects, the NCIP has tampered with certain processes by establishing community organisations to pass off as legitimate representatives of indigenous peoples, so as to offer consent to mining firms.[[371]](#footnote-371)

When approaching the second specific variable for domestic examples, we must be aware of the unwillingness to empower the 1997 Act in the face of powerful mining interests. In practice, obtaining of consent often gives rise to 'a paradoxical situation'[[372]](#footnote-372) where it is conceived as a prerequisite for engagement between government and corporate developers and indigenous communities. But in reality it does little to actually protect indigenous interests.[[373]](#footnote-373) This situation is described as 'bureaucratic terrorism'[[374]](#footnote-374) in which FPIC has become a 'technocratic tool designed to meet corporate exigencies.'[[375]](#footnote-375) It is therefore difficult to recognise the parallels between the 1997 Act and the Draft Declaration, which conveyed a stronger expression of FPIC at the time. This problem is exacerbated by the Philippines' explicit policy shift from the late 1990s which sought to pursue mining even more extensively.[[376]](#footnote-376) This includes policies to incentivise foreign mining companies with significant tax breaks.[[377]](#footnote-377) Such changes in policy directly disregard the spirit of FPIC.

Adding to these woes, a closer inspection of the Constitution's wording does little to protect indigenous peoples. First of all, it only recognises indigenous 'cultural communities within the framework of national unity and development.'[[378]](#footnote-378) One interpretation is that the Constitution of 1987 perpetuates the drive towards cultural assimilation and unaccountable development without consideration for the social, cultural and economic implications it could have on indigenous communities. The Constitution also obliges the state to protect indigenous ancestral lands as part of cultural and social well-being[[379]](#footnote-379) yet is subject to 'national development policies and programs.'[[380]](#footnote-380) The Constitution envisages norms that prima facie attempt to prevent the incursion of private companies from acquiring natural resources[[381]](#footnote-381), as seen in article XII, section 2 which vests in the state control of mineral and natural resources.[[382]](#footnote-382) But it could be argued that this is highly disadvantageous from the view of indigenous peoples, where resources are on their lands and domains. As explained in section 3.2, development aggression commonly gives rise to a nexus between state governments and private companies. If the Philippines government wields control over natural resources, they are surely at liberty to grant licences to firms as they wish. Furthermore, the adoption of the Mining Act 1995 affirms a certain mindset within the Philippines. For instance, the Mining Act was challenged over its constitutionality[[383]](#footnote-383). Initially this was accepted, but was subsequently overturned.[[384]](#footnote-384) The rationale used reveals the uphill struggle FPIC as per the 1997 Act faces when put in context of the country's development agenda. It was argued that the Constitution 'should not be used to strangulate economic growth or to serve narrow, parochial interests.'[[385]](#footnote-385) This in itself suggests that indigenous self-determination is being denied (and thus the second general variable has not been met), through an indirect implication that their self-determined needs constitute 'parochial interests'.

In contrast to these very clear shortcomings in IPRA's operation, a more distinctive set of issues have emerged in India following a landmark judgment of the Supreme Court. These are explored in the next subsection.

### 3.5.2 - Supreme Court of India's judgment concerning the Dongria-Kondh and Vedanta Resources

India's postcolonial history has not been favourable to over 600 indigenous groups, or *adivasis* who are mainly concentrated in the country's central and north eastern regions.[[386]](#footnote-386) Just over 400 of these *adivasi* communities are officially recognised as Scheduled Tribes ('STs') in India's Constitution.[[387]](#footnote-387) The Constitution of India defines Scheduled Tribes as those 'tribes or tribal communities'[[388]](#footnote-388) which are formally specified as such by the President in relation to the various states or Union Territories of India.[[389]](#footnote-389) In order to meet classification as a Scheduled Tribe a community needs to meet several criteria that indicate 'primitive traits, distinctive culture, geographical isolation, shyness of contact with the community at large, and backwardness.'[[390]](#footnote-390)

The government's significant economic reforms in 1991 to liberalise the markets[[391]](#footnote-391) encouraged greater foreign investment. Neoliberal policies sparked a major push towards economic development and intensified resource extraction at the expense of marginalised indigenous communities.[[392]](#footnote-392) Reports of land grabbing, forced evictions, police harassment and arbitrary arrests are common when development projects come into contact with indigenous peoples.[[393]](#footnote-393)

One of the most harrowing illustrations of the impacts of India's economic policies on indigenous peoples is in the decade long dispute between the Dongria-Kondh of Orissa (eastern India) and London-based steel firm Vedanta Resources plc. In 2003, Vedanta Resources applied for licences to construct an aluminium refinery in the Kalahandi district of Orissa.[[394]](#footnote-394) The company's activities caused severe social hardships on the Dongria-Kondh as well as air and water pollution.[[395]](#footnote-395) One of the company's main aims was to seek clearance for an open cast bauxite mine in the Niyamgiri Hills.[[396]](#footnote-396) This hill range is an inalienable tenet of the Dongria-Kondh belief system[[397]](#footnote-397) and the idea of it being excavated for commercial use was wholly unacceptable to the community. The community's campaign received international attention as well as support from non-governmental organisations[[398]](#footnote-398) thus mobilising a resistance movement from various quarters. In August 2010, India's Environment Ministry blocked Vedanta's attempt to mine from the Niyamgiri Hills, prompting an appeal to the Indian Supreme Court.

The Supreme Court's 2013 judgment is remarkable due to its acknowledgement of the integral role which indigenous communities such as the Dongria-Kondh play 'in...environmental management and development because of their knowledge and traditional practices.'[[399]](#footnote-399) Continuing this line of reasoning, the Court makes it clear that such a role can be fulfilled where communities have the opportunity to 'effectively participate in achieving sustainable development.'[[400]](#footnote-400) Vedanta's appeal was ultimately dismissed. Interpreting the Forest Rights Act 2006 alongside the Panchayats (Extension to Scheduled Areas) Act 1996 [[401]](#footnote-401), the Court ordered that the fate of Vedanta's mining ambitions would be subject to a dozen meetings of *gram sabhas* or village assemblies to carry out plebiscites on whether the plans would be approved.[[402]](#footnote-402) The Court's rationale for supporting the Dongria-Kondh and empowering the village councils to take such a step hinged on their religious and cultural rights[[403]](#footnote-403) as guaranteed by the Constitution of India.[[404]](#footnote-404) This extended to their closely entwined connection to the Niyamgiri Hills as the source of their faith, where they venerate the deity known as *Niyam Raja*.[[405]](#footnote-405) The resultant *gram sabha* meetings were met with unanimous rejection by the community.[[406]](#footnote-406) The judgment has been praised for giving rise to an 'environmental referendum'[[407]](#footnote-407) and its progressive position on indigenous well-being. The decision obviously delivered a positive outcome to the Dongria-Kondh by empowering local *gram sabhas* through its interpretation of the Forest Rights Act 2006 and the Panchayats (Extension to Scheduled Areas) Act 1996, to ultimately decide on the fate of Vedanta Resources' bauxite mining plans. Crucially, the indigenous Dongria-Kondh were permitted to exercise a right to veto. In this respect, the judgment meets the first general variable due to the clear and unconditional recognition of a veto, and an outcome that reflected the aspirations of the Dongria-Kondh.

When examining the case more closely and applying the first specific (domestic) variable to the case, its overall success in terms of FPIC becomes more ambiguous. On one hand, the Supreme Court ordered that a series of local referenda had to be conducted by Dongria-Kondh villages. Their withholding of consent was upheld so we see a process that appears to be much stronger than the one occurring in the Philippines. On the other hand, the Supreme Court only ordered referenda for a very limited range of village councils. Only 12 of them held meetings when over a hundred Dongria-Kondh villages exist.[[408]](#footnote-408) This denies extensive participation to the community as a whole. It is also imperative to remember that this decision came a decade after Vedanta's plans in Orissa were initiated. In that time, an aluminium refinery was constructed with no say from the Dongria-Kondh and a plethora of social and environmental problems were unleashed.[[409]](#footnote-409) Finally, even though the Supreme Court empowered various *gram sabhas* to conduct plebiscites, this was ultimately qualified by the fact that the final decision on granting 'a final decision on...clearance for the Bauxite Mining Project'[[410]](#footnote-410) would be taken by the Ministry of Environment. These referenda still needed to be approved by the central government, reflecting a concern discussed above that UNDRIP encourages the centralisation of power in the hands of the state, when it comes to implementing FPIC. So despite the fact that this specific mining project was successfully vetoed, that does not guarantee that India's Environment Ministry will respect indigenous opposition in other instances.

With regards to the second (domestic) variable, India's emerging political climate has placed a heavy emphasis on development. In this sense, the judgment risks being undermined in the context of subsequent policy agendas. This suggests that the decision may turn out to be *ad hoc* in natureas opposed to an important precedent. This already started to take shape soon after the judgment. Notably, the Indian government took steps to streamline the Forest Rights Act 2006, so that forest clearances may be exempted from consent processes,[[411]](#footnote-411) the implication of which endangers the aspirations of other indigenous peoples from exercising FPIC to resist contentious development plans. So even though the position of the Dongria-Kondh specifically may be secure[[412]](#footnote-412) there is no guarantee that such a rigorous FPIC process will be applied universally to other *adivasi* communities facing similar development-based threats.

Overall, the judgment engenders an application of FPIC surpassing those carried out under the guidance of IPRA 1997 in the Philippines. This decision seems to represent a positive legal development for indigenous peoples in India, due to its recognition of a full veto. Serious questions, however, still need to be asked of India's long-term commitments and how their emphasis on policies promoting greater development aggression affect indigenous peoples. This is made more problematic when considering the second general variable. In maintaining FPIC's connection to self-determination, we might be reminded of India's approach to the latter. Historically speaking, it should be noted that India issued a declaration on common article 1 of the International Covenants at the time of drafting.[[413]](#footnote-413) The government of the day argued that it only recognised self-determination in the contexts of foreign domination and decolonisation.[[414]](#footnote-414) This declaration still stands. Such a narrow approach potentially jeopardises the possibility of improving on the Dongria-Kondh judgment of 2013, in making FPIC more inclusive as well as recognising the importance of indigenous peoples' right to self-determination, thereby confronting development projects.

Chapter three now turns to the conclusion where the findings of each section are summarised before making a general statement.

## 3.6 - Conclusion

There has been great optimism by the likes of James Anaya that the UN Declaration would be a truly remedial mechanism for the betterment of indigenous peoples. [[415]](#footnote-415) But it is difficult to recognise this when FPIC, the most germane right in contesting development aggression, is conceptually curtailed. This, in turn, has adverse consequences on the extent to which self-determination can be realised in practice. Combined with the earlier ILO Convention 169, one particular conclusion is that the outcome of FPIC's flawed international conceptualisation is to preserve development aggression. In conceiving article 32(2) of the UNDRIP and article 6(2) of the ILO Convention 169 as little more than consultation rights, the overall human rights response to indigenous peoples appears to compromise their ability to secure a critical aspect of internal self-determination. The emphasis on participation in different areas of state life represents a red herring which cloaks the true intentions of states, perhaps in an attempt to placate concerns about the lack of accountability to indigenous peoples.

What this reveals about international instruments is that they simply repeat colonialist attitudes to indigenous peoples[[416]](#footnote-416) deploying at very best a rhetorical gloss that purports to recognise their distinctiveness in the world. More widely, this might suggest that the human rights approach to indigenous peoples has actually changed very little since the maligned ILO Convention Number 107 of 1957.[[417]](#footnote-417) This is especially true if we consider the compromises made not only to FPIC but also to self-determination. The preservation of development aggression reflects a new quasi-colonial mentality that has been repackaged in order to satisfy current hegemonic preoccupations[[418]](#footnote-418), which focus on the fetishisation of land and resource grabbing without any consideration of their non-monetary costs.

The conceptualisation of FPIC has been somewhat enhanced in regional human rights decisions. The *Saramaka* and *CEMIRIDE* decisions evidently go beyond UNDRIP and ILO Convention 169 by giving some degree of consideration to the immediate threats to indigenous ways of life, by development projects. However, the Inter-American Court and African Commission still limited the remit of FPIC, by using a sliding scale approach that arbitrarily stipulated the circumstances in which it can apply.

Domestic applications of FPIC are less clear cut. But the specific variables to measure their impact are designed to show that when development aggression is at the heart of national policymaking (in this chapter, the Philippines and India), we cannot just ask questions about how FPIC is conceptualised on paper. Both IPRA 1997 and the Indian Supreme Court judgment advance progressive readings of the right to FPIC. But their effectiveness in helping indigenous peoples overcome development aggression in the long-term, as well as commitments to non-traditional variants of self-determination suggest that great challenges lie ahead. The experiences of the Dongria-Kondh in India seem to be more positive compared to the bureaucratic hurdles and state corruption indigenous Filipinos face. In both instances, however, the development-based agendas of their state governments can hardly be seen as complementary to the operation of FPIC.

Overall, the cross-section of examples discussed in chapter three demonstrate clear variations in how FPIC is conceived on paper. But in all of them, the fundamental commonality (whether this is intentional or not) is that development aggression is inevitably kept intact. The regional human rights decisions offered subtle critiques, but were undermined by their conditional approaches to FPIC. For the domestic examples, a single positive judgment or sound legislation are certainly not enough when faced with government mindsets that have unabated development at the core of their political agendas. This threatens the realisation of indigenous peoples' self-determination.

Addressing these problems, FPIC must be able to confront state governments and private companies, that undertake the construction of contentious development plans on indigenous territories. The physical and cultural survival of contemporary indigenous peoples are undermined by the entry of market forces and new forms of domination. As indigenous peoples are already well engaged with human rights, the challenge is to ensure that their own counter hegemonic aspirations are internalised in practice to enable just outcomes, by attacking the sources of power that benefit the most from aggressive development activities. It is therefore no longer adequate for human rights to just espouse values such as liberty and equality. At present human rights, in practice and ideology, effectively deny the most vulnerable groups such as indigenous peoples an ability to exercise a full right to FPIC, as it is perceived to be incompatible with '"industrio-centric"'[[419]](#footnote-419) political economies. Reshaping FPIC involves going beyond UNDRIP's hegemonic expression of the right. It needs to challenge certain state interests that are harmful and discriminatory to indigenous peoples' holistic well-being.

Responding to this challenge, chapter four frames these problems in the theoretical context of Third World Approaches to International Law (TWAIL) with particular focus on the hegemonic character of human rights, and their counter hegemonic potential.

# Chapter Four ― The Hegemonic Character of Human Rights and Counter Hegemonic Alternatives

## 4.1 - Introduction

It is clear that the existing conceptualisation of free, prior and informed consent falls woefully short of the exigencies of indigenous peoples resisting development aggression. As discussed in chapter three, its articulation in the UN Declaration on the Rights of Indigenous Peoples and the ILO Convention 169 does not endorse an unconditional right to veto development projects, even though indigenous peoples will not always pursue such an option. This curtails the ability to realise their self-determination. In order to construct a strategy that ameliorates these conceptualisation problems, we must explore some of the possible underlying factors in international human rights which could have motivated the built-in limitations of FPIC as expressed in international texts. For the purpose of chapter four, this discussion is specifically framed with reference to Third World Approaches to International Law (or 'TWAIL'). Although indigenous peoples do not only reside in what might be classified as the Third World (or the Global South), TWAIL's emphasis on the colonial legacy of international law complements their contemporary struggles. Indigenous peoples are among the world's most impoverished[[420]](#footnote-420) and with whom international law did not fully engage with until the late 1970s[[421]](#footnote-421). The application of TWAIL to understanding these problems are pertinent today, as many former colonial states are repackaging oppressive practices in the form of *inter alia* development aggression to which indigenous peoples are often disproportionately harmed.

With these considerations in mind, the purpose of chapter four is twofold. Firstly, to identify possible underpinning ideological problems which could explain the weak international conceptualisation of FPIC. International human rights ― in their design and application ― arguably reflect the hegemonic interests of state governments, particularly the promotion of racially-coded objectives and neoliberal values. The former complements the limitations imposed on indigenous manifestations of self-determination in UNDRIP. The latter could explain why state governments do not endorse stronger expressions of FPIC (as a right to veto), as they are focused on protecting development and investment interests. Secondly, the chapter initiates the process of reconceptualising FPIC, by examining how TWAIL's focus on the counter hegemonic potential of human rights could enable indigenous peoples to resist the limitations imposed by UNDRIP and articulate their own expectations. This could be to radically enhance the way in which indigenous peoples engage with the international legal system. This needs to happen through a combination of appropriate institutional reforms, and also maintaining a sense of radicalism from 'outside' the system in order to maintain authentic indigenous expressions of FPIC.

The chapter is divided into three substantive parts. Section 4.2 draws on a selected number of TWAIL scholars in presenting a general overview of its approach to international law; followed by its interpretation of human rights' hegemonic capabilities. Particular focus is on their creation of racially-subjective narratives and willingness to preserve neoliberalism. Section 4.3 applies these hegemonic categories to the problems identified in chapters two and three. At very best, the human rights corpus offers indigenous peoples limited concessions which do not fundamentally disrupt that paradigm. Section 4.4 explores the counter hegemonic potential of human rights, contending that they should not be abandoned *per se* but must be engaged with in a critical manner. The section highlights the individual components of 'counter hegemony', 'resistance' and 'human rights'. These are applied to the problem at hand, complementing the concerns of indigenous peoples. Resistance strategies must give rise to an intersection of reformist and radical tendencies. TWAIL's main contribution to this thesis is to place FPIC and development aggression within a particularly germane critique of human rights and from there we can start to build a coherent strategy.

Finally, the conclusion conveys that human rights, as they are currently conceived, shape the hegemonic motivations of state governments in the creation of ideologies that favour state governments. This could explain why indigenous peoples' participation in the international legal system is often heavily compromised, most notably in the drafting process of UNDRIP. However, there is scope to orientate human rights in a counter hegemonic direction. This somewhat reflects the international indigenous movement's own resistance experiences, but the challenge going forward is to think about how concrete strategies can be formed in light of the TWAIL scholarship's ideas.

## 4.2 - TWAIL's Ideological Concerns with International Law

### 4.2.1 - International Law and TWAIL

Relevant theoretical parallels with FPIC's conceptualisation can be found in the perspectives of TWAIL scholarship[[422]](#footnote-422). With its roots in anti-colonialism, it should not be treated as a mere derivative of either New Approaches to International Law (NAIL) or Critical Legal Studies (CLS)[[423]](#footnote-423) but as a distinctive political and intellectual project[[424]](#footnote-424). Its emphasis on colonialism and its lasting impact on international law can frame our understanding of the discipline in a way that more predominant approaches do not recognise.[[425]](#footnote-425) Although there is no standard, homogenous perspective on TWAIL, scholars in this field are united in their deep-seated scepticism towards international law, historically and ideologically.

International law constitutes 'a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West.'[[426]](#footnote-426) TWAIL looks at the history of colonialism and critically argues that it is being reproduced in the contemporary context of international law[[427]](#footnote-427), as defined by hegemonic self-interests of powerful states.[[428]](#footnote-428) This is commonly reflected in the promotion of neoliberal values (hardly universal or neutral), the reaffirmation of unjust power structures and processes that hasten economic divisions between developed and developing states. In terms of the United Nations, some TWAIL scholars have been especially vocal against the activities of the Security Council which, they argue, undermines the principle of sovereign equality.[[429]](#footnote-429)

Such criticism of international law has led certain TWAIL scholars such as Joel Ngugi to argue about the futility of trying to reform the system with its entrenched focus on state sovereignty and territorial integrity[[430]](#footnote-430). But as will become clear in later sections, counter hegemonic resistance strategies using international human rights invariably become a necessity in the effort to reconceptualise free, prior and informed consent. Indeed, the diversity of TWAIL accommodates both 'radical and reformist' tendencies[[431]](#footnote-431) in a common quest to oppose the 'Eurocentricity'[[432]](#footnote-432) of international law as it currently operates.

### 4.2.2 - Human Rights: Hegemonic Ideologies

In order to provide the unsatisfactory conceptualisation of FPIC with an underlying rationale, TWAIL scholarship offers illuminating interpretations of human rights, as one of the most salient branches of international law. Although earlier generations of TWAIL scholars such as Keba M'Baye[[433]](#footnote-433) were optimistic about the potentially transformative effect of human rights in the third world[[434]](#footnote-434) the subsequent generation of TWAIL scholars have not followed suit. Narrow, ideological preoccupations of powerful state governments are illustrated by an overemphasis on civil and political rights. This has been detrimental to the very specific human struggles of non-dominant groups such as indigenous peoples whose world views are not fully accommodated in this highly Eurocentric vocabulary. Human rights might prima facie be regarded as conduits to rectify longstanding human struggles[[435]](#footnote-435), but once they are legally institutionalised they eventually 'become embedded in relations and structures of power.'[[436]](#footnote-436) This hegemonic corpus of human rights gives rise to ideas and designs which are commonly projected as adequate to addressing the struggles of all people. In effect, the hegemony of human rights are officially promoted as 'international law’s sole, approved discourse of resistance’.[[437]](#footnote-437) This seriously undermines oft-expressed proclamations that international human rights after World War Two are universal and neutral in character. Human rights as interpreted in the present world order are therefore not so much a rallying cry for marginalised groups such as indigenous peoples. Instead, they are used as a means to protect the power of states.[[438]](#footnote-438)

Hegemonic expressions of human rights are conveyed in a number of ways. A typical example is that they are manipulated by powerful states who use them as linguistic tools to preserve 'geopolitical hierarchies [or] politics from above.'[[439]](#footnote-439) TWAIL scholars excoriate the use of human rights to promote national self-interests on the international stage. For example, the United States' production of narratives on human rights and democracy were aggressively used to intervene in the affairs of socialist states in the past.[[440]](#footnote-440) A more recent example is the invasion of Iraq in 2003 which, in spite of wide opposition among civil society and even by other states, prominent Western human rights organisations such as Human Rights Watch and Amnesty International refused to articulate a position, rather calling for the adherence to international humanitarian law.[[441]](#footnote-441) This was a tangential approach to Iraq and it reflects a wider reduction of human rights discourse to simply matters of ‘freedom’[[442]](#footnote-442), which have ‘become the foundation for a hegemonic international law.’[[443]](#footnote-443)

With respect to the thesis' specific focus, the most germane hegemonic expressions of human rights are based on their production of racially-coded narratives and the promotion of neoliberalism. In terms of the former, Makau Wa Mutua has been at the forefront of TWAIL’s critical stance on human rights language. He believes that:

The main authors of the human rights discourse, including the United Nations, Western states, international non-governmental organizations (INGOs), and senior Western academics, constructed this three-dimensional prism. This rendering of the human rights corpus and its discourse is unidirectional and predictable, a black-and-white construction that pits good against evil.[[444]](#footnote-444)

This suggests that the primary actors in international law formulated human rights in a simplistic and racially skewed manner. This distinctly fails to accommodate the very nuanced facets of 'otherness' in non-Western societies. Mutua makes scathing criticisms of Western interpretations of human rights by utilising a metaphor of ‘savages, victims, and saviours’.[[445]](#footnote-445) He argues that this metaphor is central to a Western-biased, Eurocentric ‘grand narrative of human rights.’[[446]](#footnote-446) He considers the limitations of so-called universal human rights conceived in the post-War period. Mutua believes that ‘the corpus falls within the historical continuum of the Eurocentric colonial project, in which actors are cast into superior and subordinate positions. Precisely because of this cultural and historical context, the human rights movement’s basic claim of universality is undermined.’[[447]](#footnote-447) Further to this, the metaphor of savages, victims and saviours (SVS) precludes a universal system of human rights from actively accommodating non-Western traditions in its ‘grand narrative’[[448]](#footnote-448). Mutua stresses that:

 the SVS metaphor and narrative rejects the cross-contamination of

 cultures and instead promotes a Eurocentric ideal. The metaphor is

 premised on the transformation by Western cultures of non-Western

cultures into a Eurocentric prototype and not the fashioning of a

multicultural mosaic. … For example, Western political democracy

 is in effect an organic element of human rights. “Savage” cultures

and peoples are seen as lying outside the human rights orbit, and

by implication, outside the regime of political democracy.[[449]](#footnote-449)

He questions the assumption that human rights are based on neutrality and universality, arguing that they are deceptive and their true intentions are to 'universalize Eurocentrism and its norms and to ratify them under the umbrella of "universalism".'[[450]](#footnote-450)

At a concrete level, Mutua explains how the drafting process of the Universal Declaration of Human Rights reveals the true picture of international human rights. To proclaim that it espouses universal values is mendacious, as it was drafted with a view by western states to privilege civil and political rights.[[451]](#footnote-451) Although the Declaration contained economic, social and cultural rights, they were believed to be less important than civil and political rights.[[452]](#footnote-452) This was compounded by the fact that African and Asian states were still colonies so they could not participate. Additionally, socialist states abstained from voting.[[453]](#footnote-453) In essence, this conveys an impression that the Universal Declaration is a 'shamelessly ethnocentric'[[454]](#footnote-454) construction, as its true intention is the furtherance of liberal democracy.[[455]](#footnote-455) This selectiveness suggests an exclusionary approach to human rights with racist undertones.[[456]](#footnote-456)

This form of hegemony is plausible in explaining the limits placed on indigenous self-determination during the drafting of UNDRIP, which will be considered in the next section. Even though it was established in chapter two that the FPIC's relationship is with internal self-determination, this is nonetheless an important consideration in the current discussion. Only then can we appreciate the wider ideological limits placed on indigenous peoples' rights. Moreover, such hegemonic preoccupations potentially affect expressions of internal self-determination.

A form of 'policy hegemony'[[457]](#footnote-457) propounded in universal human rights relates to the advancement of neoliberal economic values.[[458]](#footnote-458) Despite the rhetoric of ideological neutrality, Upendra Baxi argues that human rights actually give rise to a 'trade-related, market-friendly, human rights paradigm.'[[459]](#footnote-459) This suggests that the current construction of international human rights is to surreptitiously safeguard 'corporate well-being and dignity over that of human persons.'[[460]](#footnote-460)

Neoliberalism is most visible in terms of the rights-based development discourse which reduces it to issues of living standards and official employment, to which the Third World supposedly needs to catch up with industrialised Western states.[[461]](#footnote-461) This implies that the only legitimate means of development is participating in 'mainstream' economic activities, whilst ignoring the role of informal sectors, for example[[462]](#footnote-462). Another way in which human rights promotes neoliberalism is their inability to address a particular form of violence.[[463]](#footnote-463) For example, Balakrishnan Rajagopal illustrates how millions of 'development refugees' have been created as a result of successive Indian governments, in their drive for large-scale industrial activities.[[464]](#footnote-464) These consequences are viewed merely as a '"social cost"...of development.'[[465]](#footnote-465) This represents a kind of 'development repression'[[466]](#footnote-466) which is not viewed as an important concern for universal standards of human rights. In other words the present hegemonic structure of human rights lacks a clear narrative to address violence perpetuated by the market.[[467]](#footnote-467) This particular type of hegemony is highly relevant in the context of indigenous peoples resisting development aggression, and the refusal of state governments to recognise a definitive conceptualisation of FPIC in the UNDRIP, for example.

These categories of hegemonic human rights are synergised with the problems identified in the previous chapters.

## 4.3 - Hegemonic Human Rights as Applied to Indigenous Peoples

### 4.3.1 - Indigenous Self-Determination and the Racial Biases of Human Rights

Broadly speaking, scepticism towards the human rights corpus by TWAIL scholars resonates with the historic conflict between western notions of human rights and indigenous world views. It strongly captures a wider sentiment about common indigenous struggles and provides an argument that Eurocentric human rights are unhelpful to FPIC. This is especially evident when considering that indigenous peoples prioritise *both* individual and collective identities[[468]](#footnote-468) rather than privileging the former over the latter:

"In the past, indigenous peoples were living peacefully in their homelands,

in harmony with nature. Then came "civilization" which wanted to conquer,

with a hunger for richness for only a few, the ambition of capital and power.

They conquered the land, we lost our homes, our sacred sites, our agricultural

areas, our hunting fields, our fishing waters. They called it development,

we called it destruction. They said it would raise living standards, we said

it brings humiliation. They earned money, we got poor. They founded big

companies, we became cheap labour. They ruined the biodiversity, we lost

our sources of traditional medicines. They spoke of equality, we saw

discrimination. They said infrastructure, we saw invasion. They thought

civilization, we lost our cultures, our language, our religion. They subjected us

to their laws, we saw them claiming our land. They brought illnesses,

weapons, drugs and alcohol, but not equal education and health care.

It has been going on for more than 500 years. And it still goes on."[[469]](#footnote-469)

Although it is important to remember that contemporary indigenous communities are not homogenous in character, as some of them have reconciled parts of their traditional world views with the external development from sectors such as extractive mining,[[470]](#footnote-470) this account nonetheless tells us that the unimpeded imposition of unfamiliar legal and economic traditions were highly problematic to develop the type of societies which indigenous peoples aspire towards. A 'universal' system of human rights, based on Western European experiences of struggle, is at odds with the types of societies developed in historic indigenous nations[[471]](#footnote-471) as it (the universal system of human rights) was not drafted with the intention of safeguarding their political and social orders. This universal system, as it is currently conceived, does not satisfactorily respect the values and customs that indigenous peoples have pursued since time immemorial.[[472]](#footnote-472) Such views are particularly important when considering the construction of indigenous peoples' right to self-determination (which is intimately connected to FPIC) in the UN Declaration on the Rights of Indigenous Peoples.

TWAIL's focus on the racially biased nature of human rights conveyed in Mutua's 'savages, victims, saviours' metaphor helps us to comprehend a particular mode of cultural hegemony that hinders indigenous self-determination in international law. While this type of hegemony was initiated by Western states, it has also been internalised by postcolonial states such as those in Africa that sought to delay the adoption of the UNDRIP over the presence of a right to self-determination.[[473]](#footnote-473) The final version of the Declaration effectively created a two-tier system of self-determination through the adoption of article 4 which limited indigenous claims to autonomy and/or self-government[[474]](#footnote-474). As a reminder, it is not the intention of the thesis to supplement a reconceptualised right to FPIC with a call for external self-determination. However, article 4's placement immediately after article 3 suggests a deliberate attempt to differentiate between general and indigenous rights to self-determination. This is in contrast to the placement of internal self-determination in article 31 of the 1993 draft Declaration. It is also worth remembering that the principle of territorial integrity generally precludes all peoples from exercising secession. However, such an explicit distinction is absent from the International Covenants for example. Furthermore the insertion of article 46(1)[[475]](#footnote-475) presents further evidence of possible racial hegemony operating within human rights. Despite general international norms against dismembering territorial boundaries, the presence of article 46(1) is paternalistic and incognisant of indigenous peoples' historic sovereignty. The lack of which today might render them as '"captive nations"'[[476]](#footnote-476) in some respects. In reality, indigenous peoples have generally abandoned secessionist efforts and for the purposes of FPIC, external self-determination is not directly relevant. Nonetheless this examination is still important in understanding wider ideological implications when UNDRIP was drafted. This certainly adds weight to TWAIL arguments that human rights are far from universal in reach.

The barriers placed before indigenous self-determination also reflect a hegemonic mindset that seeks to delegitimize certain non-mainstream practices. This is akin to Mutua's image of the 'savage' whose world views are rebuked by powerful political actors, who use the language of human rights to erase local customs and beliefs and replace them with 'universalised' ones.[[477]](#footnote-477) These non-dominant traditions are likened to savagery as they do not correspond with the promotion of liberal democracy and accompanying institutions.[[478]](#footnote-478) Mutua gives the example of how Western NGOs such as Human Rights Watch have a tendency to emphasise in their reporting of women's rights as almost always being a problem within the Third World alone.[[479]](#footnote-479) Applying this metaphor of savagery to indigenous peoples, we may also look at the way UNDRIP could even limit the operation of internal self-determination through the vague terms of article 4. A possible consequence is that state governments may condemn indigenous political and cultural traditions associated to their self-determination. Common exercises of indigenous (internal) self-determination include collective decision-making processes between community members and with outsiders[[480]](#footnote-480), dispute resolution based on consensus, and negotiation within communities.[[481]](#footnote-481) In some instances indigenous peoples have successfully reconciled their customary legal traditions with external sources of law.[[482]](#footnote-482) Such practices are reflected in indigenous peoples' non-coercive and collective societal values.[[483]](#footnote-483) A further example relates to distinctive legal systems which are adopted by indigenous peoples and often contrast with the highly adversarial nature of mainstream judicial practices.[[484]](#footnote-484) Certain governments may deem such systems as subversive to the state[[485]](#footnote-485) thus vilifying and denigrating indigenous political systems that are seen as challenging to the interests of elite state actors.[[486]](#footnote-486) Particularly if these customary practices and institutions do not actively promote liberal democracy. The effect is a process of hegemony that implicitly assigns a racialized label to indigenous self-determination, and is considered inferior to dominant, mainstream values.

### 4.3.2 - The Conceptualisation of FPIC and the Promotion of Neoliberalism

In chapter three a number of variables were formulated in terms of what should be expected from FPIC and to measure existing conceptualisations. Chapter three held that these variables were not satisfactorily met in the examples discussed. Adding a further dimension to this problem it is argued that, holistically, the weak international conceptualisation of FPIC has been designed to protect hegemonic, neoliberal policies of states.

The reluctance of governments to endorse an unconditional right to veto development projects is hardly a coincidence. By constructing article 32(2) of the UNDRIP and article 6 of the ILO Convention 169 as little more than consultation rights, state governments were conceivably more concerned in safeguarding their development and investment interests than with the potentially adverse effects on indigenous peoples. Rather than recognising the need for indigenous peoples to take a proactive role in decision-making that impacts their lives on ancestral lands, this conceptualisation simply pays communities lip service. This is supported by an argument that universal human rights, according to Rajagopal, lacks an explicit response to dealing with violence perpetrated by market forces.[[487]](#footnote-487) Development aggression represents a hegemonic practice in itself, therefore the absence of a coherent human rights narrative makes the specific types of suffering of indigenous peoples (who may constitute 'development refugees'[[488]](#footnote-488)) virtually invisible within a hegemonic paradigm that prioritises the well-being of trade and market-oriented interests.[[489]](#footnote-489) The 'extralegal effects'[[490]](#footnote-490) of development aggression are thus neglected.

With regards to the decisions of the Inter-American Court (*Saramaka*) and African Commission (*CEMIRIDE*) respectively, they might ostensibly represent progression from article 32(2) of UNDRIP. In reality, however, they merely reflect permissible deviations within the hegemonic framework of human rights. As argued in chapter three, these two regional human rights decisions do not go far enough in recognising stronger expressions of FPIC. The creation of a 'sliding scale'[[491]](#footnote-491) to indigenous participation does not actually question or rectify the deep rooted injustices perpetuated by aggressive development practices. These decisions did not usher in any substantive challenges to the kind of economic system which the universal human rights corpus promotes. Ultimately, neither *Saramaka* nor *CEMIRIDE* provided a coherent critique of neoliberalism on which development aggression thrives, and the communities in question were offered only a conditional veto right (FPIC was held to be applicable only when a project has a 'major impact'[[492]](#footnote-492)). This resonates with an argument in TWAIL about the *ad hoc* nature of 'legal victories' in international law.[[493]](#footnote-493) Ngugi contends that international law is generally against the interests of marginalised groups such as indigenous peoples, so occasional 'landmark' decisions in international tribunals are hardly indicative of a larger systemic shift.[[494]](#footnote-494) In his view these are ultimately hegemonic tools. In their present form, they are not designed to dismantle development aggression or promote alternatives to neoliberalism.

In terms of the Philippines' Indigenous Peoples' Rights Act 1997 and the Indian Supreme Court judgment, the substantive conceptualisations of FPIC are not actually problematic as with UNDRIP. IPRA 1997 was influenced by the 1993 Draft Declaration, which contained a more definitive right to FPIC. The Indian Supreme Court judgment stipulated the use of local plebiscites to determine the fate of open cast mining on a sacred religious site and the Dongria-Kondh's veto was upheld. The critical shortcomings in both instances appear to be based on their relationship with national development policies, in enabling the advancement of governmental agendas, while conveying an illusion of justice for indigenous peoples. This problem is particularly pronounced in the Philippines example. As discussed in chapter three, IPRA 1997 assigns primary decision-making power to the National Commission on Indigenous Peoples, which has been notorious in its circumvention of FPIC procedures through its preferential treatment of foreign mining companies and the fast tracking of licence certifications. The long-term impact of the Indian Supreme Court otherwise positive judgment is far from certain. If anything, it could ultimately turn out to be a token victory[[495]](#footnote-495) in domestic terms. Not only were the village plebiscites mandated by the relevant government department, its precedential value is questionable in light of the Indian government's pursuit of development projects with very little regard for the threats they pose. In complementing the hegemony of human rights, both examples reflect an attitude towards development (and by extension development aggression) which is myopic to the heavy costs facing indigenous peoples. A rights-based approach to development starts from a position which, according to Rajagopal, is strongly predicated on neoliberal standards of progress.[[496]](#footnote-496) For developing and/or former colonial states, the narrative of constantly catching up with Western states[[497]](#footnote-497) is germane when considering the political agendas of governments such as the Philippines and India. The right to FPIC is applicable to proposed activities on indigenous lands such as extractive mining, hydroelectric dams, commercial-scale agriculture. Such projects are assumed to fulfil United Nations notions of development as a human right[[498]](#footnote-498) for the general benefit of all peoples. However, they implicitly promote neoliberal standards of development using the language of human rights. This engenders a fundamental conflict in standards of human dignity, wherein an ideological clash on progress pits neoliberal growth (through development aggression) against indigenous world views that often emphasise the non-pecuniary value of land and natural resources.[[499]](#footnote-499) Conferring an absolute right to FPIC would therefore be perceived as impeding this form of human rights hegemony.

These hegemonic priorities of international human rights undermine the highly optimistic view of James Anaya. He argues that human rights are capable of advancing 'a multicultural model of political ordering and incorporation of indigenous peoples into the fabric of the state.’[[500]](#footnote-500) The inherent limits of the above examples in conceptualising and realising FPIC demonstrate that the existing human rights regime cannot advance such a multicultural model. Without an international consensus that explicitly recognises alternatives to the racial hierarchies and precedence of neoliberal economic models, such a regime cannot be fully relied on by peoples with distinctive identities. [[501]](#footnote-501) Above all, the existing human rights system offers no full or satisfactory ways of dismantling development aggression. A truly multicultural model of human rights would have to acknowledge the very real dangers that indigenous world views face due to the tacit acceptance of hegemonic world views (which in turn may facilitate the advancement of development aggression) as the ultimate outcome of universal human rights. The supposed values of universality and neutrality veil the hegemonic formulations of human rights. In reality the human rights corpus as it stands, displays little concern for 'unequal power relations'[[502]](#footnote-502) that operate. Hence the mere presence of FPIC in the UNDRIP or favourable legal and quasi-legal decisions are permissible deviations within the overall human rights paradigm that posits Western liberal democracy as its ultimate outcome.

## 4.4 - The Counter Hegemonic Potential of Human Rights, as Applied to Indigenous Peoples

The discussion so far suggests that there is little discernible value for indigenous peoples to engage with international human rights, in accordance to TWAIL perspectives. However, it is important to understand that TWAIL's criticisms of human rights do not largely advocate their wholesale rejection. Hence the second purpose of this chapter is to consider what counter hegemonic alternatives can be derived from human rights. Indeed indigenous peoples' engagement with human rights suggests that it would be more prudent to improve what already exists. This section examines TWAIL's alternatives within human rights, and how they could represent a form of counter hegemonic resistance. The individual components of counter hegemony, resistance and human rights are explained in the following subsections. These components are then applied to indigenous peoples and the right to FPIC.

### 4.4.1 - Counter hegemony

Counter hegemony in general pertains to the formation of an alternative framework or agenda that seeks to challenge mainstream paradigms.[[503]](#footnote-503) In classic Gramscian terms, counter hegemony relates to so-called wars of movement and position which take the form of direct opposition to the structures of state and civil society.[[504]](#footnote-504) In the context of TWAIL, counter hegemonic approaches to international law are not usually as drastic.[[505]](#footnote-505) Hence this version of counter hegemony is not a question of co-opting what already exists (considering the unequal power balance in operation), but aspires to a thorough 'internal reconstruction and genuine democratization'[[506]](#footnote-506) of the international legal system. Such transformations include removing the elitist stranglehold on international institutions[[507]](#footnote-507), full and genuine representation of a diverse array of voices[[508]](#footnote-508) and effective participation in governance by non-Eurocentric, subaltern actors.[[509]](#footnote-509) TWAIL's grand vision of counter hegemony is about the achievement of global justice[[510]](#footnote-510). This can be attained through converting the hegemonic languages of oppression into ones of emancipation. As a whole, it appears that TWAIL's position on counter hegemony in international law is borne out of a frustration about the limits of liberal democracy (as espoused by hegemonic human rights) being the only agent for change among the world's most marginalised populations. Smitu Kothari elucidates that:

It is not enough to espouse electoral democracy, and even affirmative policies for economically and socially underprivileged groups, in the absence of a basic restructuring of society toward greater egalitarianism. The challenge is neither distribution nor redistribution, but *restructuring such that there is greater equity and access and control over productive resources.* In the absence of this, democracy has little meaning.[[511]](#footnote-511)

In applying Kothari's ideas to indigenous peoples at a domestic level, for example, simply participating in mainstream electoral politics (including having selected Parliamentary seats reserved for them) is not enough. Indigenous peoples will still be participating according to the terms of a non-indigenous society, suggesting that some of their most fundamental world views will not be recognised. The challenge for indigenous peoples is to acquire a level of control over certain ideological narratives, both nationally and internationally. This is a more profound challenge than just being granted an official place within electoral democracy.

Therefore, the creation of spaces for counter hegemonic ideals to flourish is imperative. With regards to reconceptualising FPIC, we might start from a basic premise that indigenous peoples 'by their very existence...pose a major challenge to neoliberal capitalism on the ground, politically and ideologically.'[[512]](#footnote-512) At the core of this premise is the refusal of state governments to recognise a fuller indigenous right to self-determination (their most sacrosanct right), due to the perception that it would threaten liberal statehood.[[513]](#footnote-513) In preventing this human rights, in their most hegemonic form, promote neoliberalism while offering nominal commitments to protecting the physical and cultural survival of groups such as indigenous peoples.[[514]](#footnote-514) Ironically, indigenous peoples have increasingly abandoned secessionist aspirations[[515]](#footnote-515) prompting Hurst Hannum to identify one aspect of self-determination as 'a shield that protects a state...from secession'.[[516]](#footnote-516) On the other hand he regards it as 'a spear that pierces the governmental veil of sovereignty behind which undemocratic or discriminatory regimes attempt to hide.'[[517]](#footnote-517) The latter view resonates with Rodolfo Stavenhagen's formulation of self-determination as intersecting various concepts such as 'an idée force of powerful magnitude, a philosophical stance, *a social movement*, a potent ideology...[and] as a legal right in international law.'[[518]](#footnote-518)

The problems indigenous peoples face in recognition of their right to internal self-determination correspond with the refusal of states to endorse a definitive form of FPIC, as occurred during the second decade of UNDRIP's drafting process. FPIC is, however, an important byword in indigenous activism. Communities are increasingly using its terms to assert their physical and cultural survival, and defend themselves against ever-growing encroachments of customary lands.[[519]](#footnote-519) This means that indigenous peoples must play a prominent role in steering decentralised solutions to contentious development projects. In TWAIL's approach to human rights, the need to abandon the reliance on certain universalised norms[[520]](#footnote-520) provides impetus for a new approach to human rights which could serve FPIC well.

In the present discussion, there is a need for enhanced representation of certain indigenous ways of thinking, which sometimes have to defy the most basic assumptions about liberal democracies, for example. Emphasis on a stronger expression of FPIC itself gives rise to questions on the value of unlimited economic growth, that traditionally fails to measure the grave costs suffered by indigenous peoples.

As counter hegemony could be regarded as a fundamental alternative to dominant (international) world views, it would instinctively give rise to resistance, a twin pillar in the building of opposition to existing hegemonic structures.

### 4.4.2 - Resistance

If counter hegemony is about an overall framework of alternative ideas, resistance relates to the strategies which can articulate that opposition. To mirror the continued (albeit critical) commitment to international law, appropriate resistance needs to take the form of middle ground strategies which can critically co-exist with state actors in international institutions, but also maintain external pressure to ensure that activism can be expressed from grassroots voices. Bhupinder Chimni's analysis identifies that resistance is neither a question of 'liberal optimism' nor 'left-wing pessimism'[[521]](#footnote-521) The former assumes that the world order inevitably moves in a linear fashion towards greater justice and the latter views international law in a purely fatalistic manner and cannot be meaningfully accessed by the world's poorest and most oppressed peoples.[[522]](#footnote-522)

Writing resistance into international law[[523]](#footnote-523) is a vital objective of TWAIL as the system, with its associated institutions and decision-making processes, generally lacks a 'vocabulary for understanding and accommodating'[[524]](#footnote-524) resistance by non-state actors who do not have the power to influence change. A progressive international legal system can no longer be blind to the grievances of such groups.[[525]](#footnote-525) TWAIL's emphasis on the democratisation of international law entails the removal of what it sees as elitist barriers from institutions such as the UN. It is essential to effectively bridge a gap with 'outsiders' from international law, namely social movements.[[526]](#footnote-526) International institutions need to give legitimacy to the grievances of social movements by increasing the 'political space available for transformative' action.[[527]](#footnote-527) without co-opting their causes or minimising the authenticity of their struggles.

Responding to this, TWAIL often accommodates a dual approach that entails a commitment to international law, while simultaneously advocating transformations of the system.[[528]](#footnote-528) Eslava and Pahuja neatly analogise this by distinguishing between different categories of lawyers and scholars based on their attitude to international law and the extent to which they are willing to subvert it.[[529]](#footnote-529) While the conservative lawyer/scholar remains committed to the hegemonic norms of international law, essentially viewing the human rights corpus as a perfect form of resistance in the system[[530]](#footnote-530), the role of so-called reformist and revolutionary lawyers/scholars are most pertinent. Reformists operate within the system to seek solutions, call for amendments, usually view subversion of law as impermissible unless authorised to some extent and generally do not see a large disparity between the existing legal order and the pursuit of justice.[[531]](#footnote-531) In contrast, the revolutionary lawyer/scholar draws on international law (and human rights) to expose the system's inequities with an aim of overcoming it. They regard subversion as no barrier to gaining justice, as it is futile to comply with a legal order that engenders in-built inequalities.[[532]](#footnote-532) Locating a position in-between these two categories represents the most realistic (albeit imperfect) opportunity to enhance the conceptualisation of FPIC in contributing to the dismantlement of development aggression.

Resistance must therefore involve reframing the terms of discussion and internalising (without co-opting and minimising) values of counter hegemony from outside the institutional framework. For example, in the last two decades, some of the most notable resistance movements have taken the form of mass action against existing forms of globalisation.[[533]](#footnote-533) Demonstrations in Seattle during the World Trade Organisation's Ministerial Conference in 1999 and Genoa during the 2001 G8 Summit also paved the way for a diversity of non-institutional resistance strategies such as educational forums, amateur performance pieces, online activism and parallel conferences.[[534]](#footnote-534) More targeted resistance strategies against transnational corporations, for example, may range from campaigns to boycott their products to divestment campaigns, as ways to coerce changes in business practices.[[535]](#footnote-535) While some of these strategies may not be practicable within the UN's institutional structure, their critiques of hegemonic global policies must be taken seriously in order to accommodate oppositional, non-state voices within the system.

In terms of reform-oriented resistance, indigenous engagement with institutional mechanisms have given rise to unique opportunities. However these are not without flaws. Most notably, their participation in the drafting of UNDRIP is emblematic of how their historic resistance was curtailed by state actors. In terms of dismantling development aggression, one of the considerations in reconceptualising FPIC is a radical new approach to indigenous engagement across different bodies of the UN. It is a reminder that while engagement with the international legal system is a necessity, certain forms of external resistance have to be given recognition.[[536]](#footnote-536)

A number of indigenous peoples have also accessed United Nations bodies to subtly resist certain state government measures, such as Maori experiences in the Committee on the Elimination of Racial Discrimination (CERD). Claire Charters argues that ‘local issues influence indigenous peoples’ global movements and international law advanced at the UN.’[[537]](#footnote-537) In this instance, Maori participants made interventions in the CERD's related recommendations[[538]](#footnote-538) on a controversial New Zealand Act of Parliament.[[539]](#footnote-539) Although the dispute was far from resolved, concessions were made to Maori communities affected and the Act itself was repealed. But such an example may be a token concession[[540]](#footnote-540) which does not fundamentally change the relationship between the Maori and New Zealand government. Furthermore there may be fears about the co-opting of indigenous resistance by UN bodies. So one strategic element to pursue is making changes to UN institutional practice, in order to democratise them and provide representation on equal terms as state governments (in line with TWAIL concerns).

Despite the clear inequities yielded by the existing human rights corpus, it has nonetheless emerged as a branch of international law that indigenous peoples are well engaged with.[[541]](#footnote-541) This needs to be consolidated by improving the mechanisms that already exist in order to unlock the emancipatory potential of human rights. A future counter hegemonic consideration from within institutions must be a focus on sharpened priorities. This has to commence with questioning the merits of UNDRIP as a benchmark for FPIC and self-determination. This could ensure that indigenous peoples do not merely work within those accepted, hegemonic parameters.

The other strategic element in reconceptualising FPIC pertains to more radical measures which generally lie outside the legalistic UN framework. A counter hegemonic approach must give appropriate legitimacy to extralegal strategies in human rights practice. As argued by Rajagopal, human rights can serve as 'counter hegemonic [tools] of resistance'[[542]](#footnote-542) when they recognise human struggle outside the institutional structures, which might 'encompass...wars of movements, passive resistance, wars of manoeuvre'[[543]](#footnote-543) among others. Indigenous peoples themselves are no strangers to pursuing extra-institutional resistance strategies, adopting 'a panoply of alternatives'[[544]](#footnote-544). External tactics pursued by indigenous peoples reflect Rajagopal's view. In more recent years, online activism has been used such as the 'Idle No More' campaign among Canada's First Nations. This was in response to the neglect of their grievances by mainstream media outlets.[[545]](#footnote-545) Indigenous resistance has also taken the form of more traditional civil disobedience movements such as the Bolivian political uprising of 2003. Set to a backdrop of unpopular neoliberal reforms[[546]](#footnote-546) indigenous peoples sought alliances with non-indigenous workers, peasants, street vendors and the unemployed[[547]](#footnote-547) to oppose the retrenchment of erstwhile social democratic protections.[[548]](#footnote-548)

At its most drastic, violent forms of counter hegemonic resistance have been pursued by indigenous peoples in some cases. In Mexico, the rise of the Zapatista Liberation Army coincided in 1994 with the adoption of the controversial North American Free Trade Agreement (NAFTA) and concurrently highly controversial reforms to the country's Constitution[[549]](#footnote-549). This movement aims to create alternative societies for indigenous peoples in Mexico's Chiapas region. What began as an armed insurgency[[550]](#footnote-550) has culminated in the Zapatistas presently exercising *de facto* autonomy over defined areas in Chiapas known as *caracoles[[551]](#footnote-551)*. Elsewhere, an existing armed struggle is taking place in India involving sections of *adivasi* (indigenous) peoples who are systemically discriminated against within postcolonial Indian society. *Adivasis* have long been deemed to require 'modernising' or 'mainstreaming' based on the government's prevailing hegemonic world view that emphasises development aggression on indigenous peoples' lands[[552]](#footnote-552). As a consequence, some of their grievances have fallen into the hands of Maoist insurgents who seek to overthrow the state.[[553]](#footnote-553)

The dismantling of development aggression is a counter hegemonic objective in itself that requires radical elements of resistance to ensure that indigenous rights such as FPIC are not undermined by state governments. Although it is expressed by some TWAIL scholars that subversion of international law may be permissible[[554]](#footnote-554), this should not be interpreted as an endorsement of overtly belligerent forms of resistance (human rights bodies should, however, be uninhibited from attributing such resistance to the hegemonic practices of governments). On the other hand, it is imperative that bodies within the UN recognise the contributions made by non-violent, extralegal strategies to ensure that expressions of counter hegemonic human rights are properly represented.

In order to formulate an overall solution, counter hegemonic resistance has to clearly consolidate both radical and reformist ideas[[555]](#footnote-555). The chapter has so far underscored TWAIL's frustration that the human rights corpus does not properly represent the aspirations and grievances of non-Eurocentric, subaltern groups. However a vital component of the thesis is to think about how human rights can be reoriented so that FPIC can meet the variables as discussed in chapter three. The next subsection thus examines how human rights can potentially take the form of counter hegemonic mechanisms.

### 4.4.3 - A Counter Hegemonic Vision: Widening the Scope of Human Rights

The chapter ascertained earlier that the failure to conceptualise FPIC in definitive terms is underpinned by the hegemonic characteristics of human rights. The existing corpus' bias towards individual human rights[[556]](#footnote-556) leads to the neglect of distinctive world views of groups such as indigenous peoples. It could certainly explain why state governments redrafted FPIC in article 32(2) of UNDRIP, in order to make it compatible with an existing paradigm that favours neoliberalism. Thus it would appear to be very tempting to completely dismiss the utility of human rights. The struggles of indigenous peoples may seem difficult to reconcile with a corpus that is visibly unable and unwilling to address its most exigent needs.[[557]](#footnote-557) In particular, the concerns of indigenous peoples in contemporary societies pertain to fears over forced eviction from lands and unaccountable appropriation of natural resources thus driving communities into extreme poverty. However, allowing hegemonic, Eurocentric expressions of human rights to prevail is to miss useful opportunities that could release their 'radical democratic potential'.[[558]](#footnote-558)

In considering TWAIL's *overall* view on human rights, it is important to take into account their latent counter hegemonic capabilities, in order to inform the current discussion on how FPIC can embody the necessary transformations to dismantle development aggression and serve as a genuine expression of self-determination.

Despite highly critical attitudes towards hegemonic interpretations of human rights, scholars such as Mutua nevertheless express optimism about their potential utility. In this case, he argues for a more inclusive and culturally-sensitive human rights corpus that confronts 'the inequities of the international order.’[[559]](#footnote-559) Achieving this could compel a considerable change to the way non-western cultures are viewed by the international community, thereby calling time on the so-called ‘grand narrative of human rights’.[[560]](#footnote-560) If human rights are to be truly universal, ‘[t]he critiques of the corpus from Africans, Asians, Muslims, Hindus, and a host of critical thinkers from around the world are the one avenue through which human rights can be redeemed and truly universalized.’[[561]](#footnote-561) Elaborating on these considerations, human rights could serve as the platform from which to build counter hegemonic resistance both within and outside the official institutional framework. Dianne Otto argues that the 'legal imperialism'[[562]](#footnote-562) created by human rights after 1945 had the effect of deradicalizing the efforts of grassroots movements by eschewing the structural causes of human suffering and focusing on a very narrow range of rights violations.[[563]](#footnote-563) Counter hegemonic resistance, in this instance, demands that the basic assumptions of supposed universal human rights are denounced so that the perspectives of non-Eurocentric, non-neoliberal standards are given equal standing in the corpus.[[564]](#footnote-564)

A counter hegemonic version of human rights needs to emanate from the narratives of marginalised, subaltern groups.[[565]](#footnote-565) These have to militate against the 'hegemonic appropriation of human rights'[[566]](#footnote-566) by powerful actors who have designed them to maintain global status quos. Third World voices should be the story tellers and decision-makers in a properly democratised international legal order. This is to ensure that human rights are always inextricably bound with seeking justice for all peoples[[567]](#footnote-567), including for those whom neoliberal-oriented human rights have been detrimental. One area of consideration is to reframe the terms of human rights in appropriate UN bodies. While it is highly unlikely to involve the drafting of a wholly new version of UNDRIP, the key is to ensure that the meaning of FPIC can evolve in a way that provides succour to the counter hegemonic ideals of indigenous peoples.

Strategically, this vision requires engagement inside the relevant human rights institutions and maintaining strong external voices of resistance. In terms of the former, non-elite actors have to be empowered in their participation so as to set certain terms of discussion, in order to move away from the flawed notions of universality in human rights.[[568]](#footnote-568) It also means that the power of state actors in some cases has to be decentralised in order to shed light to give true legitimacy to the non-state voices. In essence, abandonment of hierarchies in human rights practice.[[569]](#footnote-569) For the latter, extralegal measures must be pursued in order to confer human rights with a more radical purpose. This may require the insertion of overtly political, social and economic narratives into the overall human rights discourse so as to ensure that a holistic sense of justice is sought.[[570]](#footnote-570) These ideas are elaborated in chapter five, in terms of indigenous peoples at UN-level, by proposing ways in which they can insert counter hegemonic values into certain human rights bodies. This is to encourage reforms into the ways they operate as well as the content they yield.

TWAIL's advocacy for an alternative vision of human rights attempts to intersect the realms of reformism and radicalism. It is this particular *groundwork* that we can apply when initiating the discussion on how this might help to understand the diversity within indigenous resistance movements.

### 4.4.4 - Some Practical Caveats In Using TWAIL

TWAIL's insights into the counter hegemonic capabilities of human rights create a sound *ideological* groundwork in relation to the enhancement of FPIC. The intersection between institutional and non-institutional activities provide important values when considering the formulation of a coherent strategy. However, TWAIL's main shortcoming has been its failure to cultivate practical examples of counter hegemonic resistance. These criticisms have been admitted within the TWAIL community itself. Chimni has attacked the lack of concrete alternatives against neoliberalism, as perpetuated by international law.[[571]](#footnote-571) Even though Rajagopal argues that human rights require contributions from non-legal mass action[[572]](#footnote-572), he concedes that there only exists very limited examples. Regional human rights systems in the Americas and Africa, while making some progress, are subordinate to the larger international legal order[[573]](#footnote-573). Groups of smaller states with non-state social movements may leverage some influence, but their power is highly limited to coerce the international legal system to make transformative changes.[[574]](#footnote-574) Rajagopal also highlights the place of domestic social movements such as grassroots women's organisations which may subtly challenge hegemonic understandings of human rights.[[575]](#footnote-575) But they ultimately fail to rupture the existing international legal order as they are too small-scale.[[576]](#footnote-576) Thus TWAIL has not yet reached the stage of producing concrete solutions,[[577]](#footnote-577) to consolidate its normative ideals. It is from this foundation of ideals that concrete solutions to the problems surrounding FPIC need to be created. Fortunately, the unique position of indigenous peoples in international law could potentially offer TWAIL with a meaningful and practical agenda.

Before discussing a proposed response to reconceptualising FPIC, the conclusion ties together the main arguments in this chapter.

## 4.5 - Conclusion

Third World Approaches to International Laws' most important contribution to the present thesis conundrum is hypothesising international human rights as a reflection of the hegemonic motivations of state governments. Although TWAIL scholars traditionally base their critiques on the Western states' domination of Third World states, their insights provide an invaluable understanding about the rationale for all states' (whether Western or non-Western) subjugation of indigenous peoples. When we think about why the universal human rights corpus is ideologically blind (even hostile) to indigenous peoples, we may ordinarily turn to the *travaux préparatoires* of the Universal Declaration and International Covenants. They provide written records about states' reasons for supporting or opposing certain provisions within those documents. But placing the present problem into the TWAIL framework offers more a profound understanding about why rights such as FPIC have been so heavily curtailed in the UN Declaration on the Rights of Indigenous Peoples.

TWAIL conveys an alternative vocabulary, relating to the limited nature of the current human rights corpus. One that is frequently absent from the narratives of mainstream international legal theories. For example, their insights on ‘antidemocratic and destructive developments’[[578]](#footnote-578) mirror indigenous peoples' experiences with development aggression. Activities such as mineral extraction, dam construction and commercial agriculture are based on state governments leniently granting licences to private developers. Indigenous peoples commonly lack the power to adequately respond to such projects.

On the other hand, TWAIL's critical optimism of international law paves the way for injecting counter hegemony into the human rights corpus. This indicates that we cannot close the door on international law.[[579]](#footnote-579) Hence in forming a groundwork to seek solutions, TWAIL perspectives on counter hegemonic resistance involve appropriate reconstruction of international law, including the legitimisation of extra-institutional activities to give recognition to political and social activism within human rights practice.[[580]](#footnote-580) The role of indigenous social movements outside the institutional framework are thus imperative in reconceptualising FPIC, so that it can be of genuine emancipatory value[[581]](#footnote-581) rather than a top-down administrative tool imposed by aloof government institutions.[[582]](#footnote-582)

Indigenous peoples are actually in a unique position vis-à-vis international human rights compared to non-indigenous sub-state groups. Organisations such as the World Council on Indigenous Populations, American Indian Movement and International Indian Treaty Council[[583]](#footnote-583) eventually took indigenous peoples to participating in the United Nations, with the formation of Working Group on Indigenous Populations.[[584]](#footnote-584) Since then, bodies such as the Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples have been created. Of course their direct participation in drafting UNDRIP sets them apart from other social movements. Indigenous peoples are well positioned to harness the normative ambitions of TWAIL scholars, and from there we must build tangible strategies to exercise counter hegemonic resistance. However, indigenous peoples' current levels of engagement with human rights at UN-level are still unsatisfactory due to the power imbalances embedded into the international legal system. Thus, a feasible response to FPIC's conceptualisation problems must go hand-in-hand with making appropriate changes to the functioning of certain bodies themselves as well as accommodating non-institutional interventions. These form the bedrock of issues to be discussed in chapter five, in searching for ways in which FPIC can be reconceptualised in order to dismantle development aggression.

# Chapter Five - Realising FPIC Through Counter Hegemony: 'Insider-Outsider' Resistance

## 5.1 - Introduction

It is clear that TWAIL perspectives, with their focus on the hegemonic nature and counter hegemonic potential of human rights, provide a unique groundwork from which FPIC's conceptualisation problems can be addressed. The task at hand is to discuss how indigenous peoples can channel their resistance in *practical* ways (an area which the TWAIL literature lacks) that ensures FPIC's full realisation.

Chapter five proposes that a counter hegemonic approach to realising FPIC requires indigenous peoples to critically sharpen their resistance both within selected human rights bodies of the United Nations, as well as outside the institutional framework. Indigenous peoples are no strangers to deploying so-called 'insider-outsider' strategies[[585]](#footnote-585). This refers to the synergy of different tactics, in building a level of cohesion between institutional reforms and the pursuit of extra-institutional, extralegal activism (common examples are protests and campaigns). One hope is that certain outside strategies are internalised within appropriately reformed institutional spaces.[[586]](#footnote-586) There is no guarantee that these can always yield transformative results, particularly as 'outsider' aspects risk being undermined. Participation within institutions may sometimes be seen from the outside as giving licence to illegitimate institutional processes[[587]](#footnote-587). But due to the unique position of indigenous peoples in international law (and in keeping with TWAIL concerns[[588]](#footnote-588)) there is, ironically, a sense of inevitability to rely on and push for appropriate changes to a system which currently poses great obstacles. This same system still provides them with spaces to participate as quasi-lawmakers despite the many challenges.[[589]](#footnote-589) Thus it is imperative to ensure that indigenous peoples' needs can be met by: 1. Internalising certain counter hegemonic ideals within selected human rights bodies; and 2. Ensuring that salient 'outsider' strategies can materialise in the decisions of regional and domestic courts. The hope is to initiate a challenge to the *hegemonic psyche* that dictates statist attitudes. The substance of indigenous peoples' resistance is based on culturally aware expressions of FPIC (and self-determination).

To begin with section 5.2 lays out the substance of this counter hegemonic effort which seeks to recognise an enhanced conceptualisation of FPIC. The purpose of this construction is to undermine the hegemonic ideologies of human rights alluded to in chapter four which reflect their flawed construction in the UN Declaration on the Rights of Indigenous Peoples. Next, section 5.3 considers a number of strategies that indigenous peoples could pursue within the UN. In keeping with the thesis' focus on human rights, as well as acknowledging the practical limits within the UN, emphasis is placed on the UN Human Rights Council and its subsidiary Expert Mechanism on the Rights of Indigenous Peoples. The latter in particular is quite accessible to indigenous peoples with regards to human rights architecture in the UN. Hence, it would seem germane for indigenous peoples to use their position in order to initiate resistance. Proposals are made which give rise to eclectic strategies including reforms, appropriate engagement as well as a consideration of selected subversive actions, to draw attention to the need for recognition of a counter hegemonic version of FPIC. Section 5.4 looks at how effective use of resistance in non-institutional contexts can be tapped into, so as to confront institutional actors about their hegemonic preoccupations, viz. development policies based on narrow measures of economic growth.[[590]](#footnote-590) The hope is to create a new form of consciousness among state actors and even the general public. Section 5.5 considers how 'outsider' strategies can materialise in international, regional and domestic institutional settings. Within the UN, outside strategies can be consolidated with inside proposals in ensuring that a stronger expression of FPIC is projected and associated thematic issues are properly prioritised. For regional and domestic applications we draw, to some extent, on the examples used in chapter three. In meeting the variables examined earlier, outside strategies could be well served through pursuing appropriate legal and political avenues which have potential to facilitate the ideas they espouse. Finally, a conclusion in section 5.6 conveys that realising FPIC in accordance with an improved conceptualisation must be the basis of a fresh settlement between indigenous peoples and state governments. Human rights alone might not fully dismantle the practices of development aggression (this is explored in the main Conclusion in chapter six), but framing them in counter hegemonic terms could engender a vital new consensus on a contemporary issue that the corpus has eluded for too long. In addition, the proposed strategies are assessed and the most realistic ones are prioritised in terms of their most immediate potential to benefit indigenous peoples.

## 5.2 - Identifying The Substance of Resistance at Stake: A Post-UNDRIP Agenda for FPIC

When thinking about the role of indigenous peoples in setting agendas in human rights, we might be drawn to the words of the UN Secretary-General who, as recently as 2014, stressed that they 'are central to [the] discourse of human rights and global development.'[[591]](#footnote-591) This conveys an impression that the international community at least recognises the normative significance of indigenous peoples' role in international law and policymaking. However, what is required is a fundamental reconsideration of pivotal rights such as FPIC. This entails questioning certain hegemonic content in the UN. There is a need to internalise aspects of indigenous peoples' rights (in this instance, FPIC) which have either been blunted to meet the interests of states or ignored altogether. Blind spots of the system have to be brought to the foreground, otherwise the Secretary-General's words will remain as mere platitudes.

An assertion that indigenous peoples provide legitimacy to the way human rights are interpreted[[592]](#footnote-592) is problematic if we consider the hegemonic prism in which some of their key rights have been drafted in the UN. In this sense, any value-added diversity in human rights remains superficial.[[593]](#footnote-593) Critiquing this approach requires the rejection of the hegemonic human rights values which underpin the construction of FPIC and indigenous self-determination (considered in chapter four) as they implicitly uphold neoliberalism and racial biases. To achieve this, we need to 'unsettle' supposedly settled aspects of UNDRIP, thus giving rise to an important creative tension within the human rights corpus.[[594]](#footnote-594) As a caveat, this should **not** be confused as a call to forgo UNDRIP in absolute terms. It will be highlighted in section 5.4 that there can be value derived from articles 14, 15 and 16 with regards to indigenous representation in media and education institutions. But as a soft law instrument, FPIC in the context of development measures needs to evolve, in better securing indigenous peoples' chances of physical and cultural vitality.

In the United Nations, contentious aspects of UNDRIP such as FPIC have not yet been questioned in the years following its adoption, as to the inherent limits they place on indigenous peoples. Instead, emphasis has been placed on the need to clarify, monitor or implement existing provisions. In one highly notable example, the General Assembly decided to arrange a high level plenary meeting of state governments in 2014, known as the World Conference on Indigenous Peoples. A Resolution adopted in 2010 stated that its goals were 'to share perspectives and best practices on the realization of the rights of indigenous peoples, including to pursue the objectives of [UNDRIP] .'[[595]](#footnote-595) The Conference consisted of two plenary meetings, three roundtable discussions and culminated in the adoption of an Outcome Document[[596]](#footnote-596) which primarily reaffirmed state commitments to the UNDRIP. This supports the continuation of the hegemonic standards in operation, despite being projected as 'action-oriented'.[[597]](#footnote-597) While indigenous peoples attended and participated in the discussions, they were not offered an official role in drafting the Outcome Document. Their views were considered, from a document adopted at a preparatory conference in Alta, Norway in 2013.[[598]](#footnote-598) Substance wise, the Outcome Document merely perpetuates state dominance and disregards some of the most fundamental (perhaps counter hegemonic) indigenous concerns from the preparatory Alta Outcome Document.[[599]](#footnote-599) For example, the Alta Outcome Document's emphasis of state domination[[600]](#footnote-600) was completely omitted from the World Conference document. Indeed self-determination did not feature either. With respect to FPIC, paragraph 20 of the Document does little more than reiterate the terms of UNDRIP's deeply flawed article 32(2). As a reminder, this key provision places a duty on states to:

consult and cooperate in good faith with the indigenous peoples concerned...in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and others resources...in connection with the development, utilization or exploration of mineral, water or other resources.[[601]](#footnote-601)

Reframing this conceptualisation of FPIC needs to disrupt the preservation of hegemonic ideas in the UNDRIP. This is to acknowledge that indigenous peoples are still subjected to quasi-colonial situations which give rise to contemporary forms of domination and exploitation.[[602]](#footnote-602)

In postulating a reconceptualised right to FPIC, we must recall the importance of its connection to self-determination. Indigenous peoples have continued to assert that this connection is imperative when considering their wishes to fully refuse 'mining and other forms of resource extraction, "development" and technologies deemed as degrading to their human, cultural reproductive and ecosystem health.'[[603]](#footnote-603) To reconceptualise FPIC is to break with some of the most detrimental, hegemonic standards of human rights. In other words there is a need to 'repudiate all efforts to associate otherness with evil, and resist tendencies to demonize particular peoples, religions, approaches, and individuals.'[[604]](#footnote-604) This vitally requires accommodating the interests of 'others' such as indigenous peoples who, despite their place in human rights practice, remain on the peripheries of society. FPIC should therefore encapsulate indigenous peoples' traditions and world views where relevant.[[605]](#footnote-605) This necessitates the need for ‘a cross-cultural philosophical approach’[[606]](#footnote-606) that enables the practical operation of alternative expressions of human rights while rebuking the perpetuation of indigenous peoples being subjected to state dominance, an unsaid implication of the limits placed on internal self-determination in UNDRIP. This applies to two vital observations regarding self-determination previously explained in the thesis. At a concrete level, we might recall the synergy between FPIC and internal self-determination from chapter two. The common denominator here is for indigenous peoples to exercise a self-determined form of control over lands and resources. In more abstract terms, we are reminded of the theorisation of indigenous self-determination analysed in chapter four in reference to a particular TWAIL perspective on human rights. It was argued that curbing their right to internal self-determination reflected an in-built racial bias in the human rights corpus. FPIC thus has to provide indigenous peoples with a real opportunity to assert their own development priorities free from external interference.

Chapter three's general variables on what should be expected from FPIC were as follows:

How far is a full and unequivocal veto internalised within this conceptualisation of free, prior and informed consent?

Can it be seen to promote indigenous peoples' right to self-determination?

Chapter three argued that neither UNDRIP nor ILO Convention 169 came anywhere near to fulfilling these variables. In order to meet them, this section proposes that indigenous peoples must sharpen their resistance based on the following conditions:

1. A definitive conceptualisation of FPIC which categorically rejects the minimised version of article 32(2) in UNDRIP. There is a need to frame it explicitly as a right (as opposed to a duty) and offer a full and unconditional veto if necessary. This expression forms a centrepiece of this counter hegemonic project. Indigenous peoples could recall the terms of article 30 of the 1993 Draft Declaration, which assigns indigenous peoples with 'the right to require that States obtain their free and informed consent prior to the approval of any project'[[607]](#footnote-607) to forcefully argue that it constitutes the most legitimate expression of FPIC. The objective is to denounce the hegemonic, neoliberal underpinning as examined in chapter four.
2. As a supplementary condition, there could be greater clarification of the way in which indigenous peoples can exercise their right to internal self-determination. It must be ensured that the spirit of article 4 (which currently grants indigenous peoples a vague 'right to autonomy or self-government in matters relating to their internal and local affairs'[[608]](#footnote-608)) is expanded so that it captures a wider range of internal expressions of the right. We may look at the various criteria contained in article 31 of the 1993 draft Declaration for specific examples of internal self-determination. This gives credence to the colonial-like conditions still felt by indigenous peoples in many parts of the world.[[609]](#footnote-609) In drawing on the practicalities discussed in chapter two, this is not about arguing for external self-determination. Instead, it is based on true equality and recognition for indigenous sovereignty (as opposed to statehood), in order to shed light on aspects of UNDRIP which implicitly uphold racial undertones through a double standard.[[610]](#footnote-610) An argument is that this reduces indigenous self-determination to self-management in the Declaration.[[611]](#footnote-611) Improving the terms of internal self-determination could therefore assist a better understanding of FPIC.

These two conditions form the bedrock of counter hegemonic resistance, demanded within the UN and underpinning the objectives of strategies deployed in extralegal settings. These need to be targeted in creating a change in state consciousness.

While this is not a call to abandon UNDRIP completely, it should be remembered that, as a soft law instrument, it must be subject to evolution and not set in stone to be accepted uncritically. The literal construction article 32(2) must not be the final word on indigenous peoples' right to FPIC internationally. Space is required for them to progress as attitudes to development aggression become better informed. Hence realising indigenous peoples' rights warrants a new grounding with respect to FPIC. These need to be a part of building a counter hegemonic substance to challenge the accepted notion that UNDRIP represents the 'minimum standards'[[612]](#footnote-612) in international law (as far as FPIC and self-determination are concerned). Moreover, a worrying feature in the rhetoric of international documents is an emphasis on indigenous peoples and state governments working together. While this would seem perfectly innocuous and something which many indigenous peoples would welcome, the problem is that it seemingly perpetuates the unequal position of both sides by reinforcing state hegemony. The effect is to surreptitiously quell the natural spirit of indigenous resistance. Until indigenous peoples are conferred with stronger expressions of FPIC and no longer subject to limitations on their internal self-determination, such partnerships are not wholly viable.

Now that these essential conditions of resistance have been set out, we turn to a consideration of institutional strategies which indigenous peoples might wish to pursue in order to make their resistance effective in selected human rights arenas.

## 5.3 - Resistance Within the United Nations: Reform, Critical Engagement and Subversion

### 5.3.1 - General overview

In being granted spaces to participate in the UN, indigenous peoples have, to their credit, reaped the benefits of what has been offered no matter the limitations. Indigenous voices themselves have acknowledged that participating in various UN spaces (bodies, document drafting and conferences) have equipped them with valuable skills to lobby their governments and initiate certain agendas.[[613]](#footnote-613) Innovative features of the UN such as the Voluntary Fund for Indigenous Peoples[[614]](#footnote-614) have opened up opportunities for indigenous movements and organisations that lack sufficient funding notably those from regions of the world who are traditionally less represented.[[615]](#footnote-615) Moreover, compared to other non-governmental organisations[[616]](#footnote-616) the barriers for indigenous peoples' participation are comparatively less stringent.[[617]](#footnote-617) This allows peoples with limited resources to develop lobbying skills when dealing with their governments, media and even professionalising the internal structures of their own organisations.[[618]](#footnote-618)

On the question of whether indigenous peoples might be exercising their own kind of counter hegemony within the UN, it has been argued by some scholars that their unique position as activists internationally and domestically make them resilient against being fully co-opted into the system.[[619]](#footnote-619) As stated in chapter four, indigenous peoples exercise a range of different resistance strategies. This has been described as ' "polycephalous" ' in nature[[620]](#footnote-620), as the many different layers of indigenous resistance shield their causes from being de-radicalised in order to suit the interests of Member States. While this may indeed apply to indigenous peoples themselves, the underlying barrier to more robust counter hegemony is that human rights practice is still predominantly interpreted through the liberal-individual prism. So although the growth in institutional spaces for indigenous peoples to participate in the UN are laudable, the fatal flaw is that UNDRIP remains the overriding normative framework and reference point for various activities such as regular sessions of relevant bodies, studies and conferences. While this is perfectly fine in terms of aspects related to media and education for example (as will be shown in section 5.4), the most contentious provisions on FPIC and self-determination should not be treated in absolute terms. Article 32(2) constitutes a kind of bulwark to protect state governments from indigenous demands for greater recognition. While indigenous peoples may not be fully co-opted, this provision certainly attempts to do this at an institutional level, by ensuring that proceedings are based on accepting quasi-colonial, hegemonic restrictions which preserve practices such as development aggression.

Thus, institutional strategies should be seen as an important aspect of reconceptualising FPIC. Appropriate changes to the functioning and composition of selected bodies must be critically considered including a degree of subversion within institutional spaces. To begin with, we turn our attention to the Expert Mechanism on the Rights of Indigenous Peoples.

### 5.3.2 - Installing Counter Hegemony in the Operation of the Expert Mechanism: Considering the Mandate Review

The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) is the successor to the Working Group on Indigenous Populations. Its purpose, as the name suggests, is to satisfy a specialist and erudite role by providing 'expertise to the Council'[[621]](#footnote-621). It is composed of five experts who are elected cyclically and are drawn from indigenous communities representing different geographic regions of the world. The Mechanism meets once annually for a session of approximately five days[[622]](#footnote-622) and allows wide attendance from indigenous-centric organisations, non-governmental organisations with observer status, other UN mechanisms/agencies, regional organisations and national human rights institutions (NHRIs).[[623]](#footnote-623)

In possibly addressing some of the issues with EMRIP, an interesting opportunity arose in the World Conference's Outcome Document. Despite the Document's clear shortcomings on addressing FPIC and self-determination, paragraph 28 called for a review of EMRIP's mandate.[[624]](#footnote-624) Responses were requested from both state governments and indigenous peoples. A review of findings was recently undertaken (April 2016), but here we can use part of this subsection to put forward hypothetical proposals.

*A. The Substance at Hand*

A specific problem is that EMRIP is heavily centred on working according to the terms of FPIC as conceived in UNDRIP, as if it is a settled issue. There is a need to begin disrupting this status quo. Indigenous peoples must use their position in EMRIP from which they can sharpen their resistance and demand that *inter alia* FPIC's current conceptualisation is disconnected from the hegemonic commitments to maintaining neoliberalism.

Indigenous peoples and their representative organisations could begin by arranging informal or parallel sessions which confront these fundamental conceptualisation problems. It would be an opportunity to share information and adopt an authentic counter hegemonic consensus on how FPIC could be conceptualised.

One of the questions in the Mandate Review's questionnaire asks: 'how can [EMRIP's] role in assisting states to monitor, evaluate and improve the achievement of the ends of the Declaration be strengthened?'[[625]](#footnote-625) The very implication of this question is problematic as it presumes that the substance of UNDRIP is settled. This question could be answered by expressing written resistance, before even considering procedural and technical matters. EMRIP's assistance in monitoring the implementation of article 32(2) of UNDRIP is meaningless because the provision implicitly subordinates indigenous peoples' will to the development and investment interests of states. EMRIP cannot be oblivious to an ideology that undermines the physical and cultural survival of indigenous peoples. In answering such a question, the primary instrument which forms a pivotal aspect of EMRIP's mandate must be shown up for its conceptual flaws. Provisions pertaining to FPIC and self-determination have to be scrutinised for their shortcomings. Only after that can helpful views on enhanced monitoring[[626]](#footnote-626) or facilitating national implementation[[627]](#footnote-627) be looked into.

*B. Thematic Studies*

With regards to procedural matters, there may be a cause for concern with the current mandate stipulating that expertise is to be provided 'in the manner and form requested by the Council.'[[628]](#footnote-628) This is mainly delivered through research studies.[[629]](#footnote-629) One proposal to enhance the operation of EMRIP, to assist indigenous peoples in sharpening their resistance priorities and bringing more counter hegemony into the system, could be an ability to set their own study agendas. In particular giving rise to themes and ideas espoused may challenge settled views. In the Summary Report to the Mandate Review, a useful view expressed by Arctic Indigenous Peoples' organisations criticises thematic studies as having little impact on indigenous peoples nationally or locally.[[630]](#footnote-630) This suggests the need for much greater freedom for the EMRIP (led by indigenous participants) to set their study agendas, rather than being imposed 'from above' by the Human Rights Council.

One possible idea for a thematic study could focus in-depth on development aggression itself[[631]](#footnote-631) and how it relates to the shortcomings of UNDRIP.[[632]](#footnote-632) Such a study must not hesitate to make statements that identify how the drafting history of the Declaration was subject to ideological tensions between state and indigenous representatives. In asserting sharper resistance-based agendas, a study of this nature, through questioning the construction of article 32(2) of UNDRIP, could lift the veil from non-legal controversies such as vested political interests of governments (drawing on specific examples compiled from independently verified findings) in extractive and fossil fuel industries. This could shed light on how aggressive development policies drive the growth of mining, logging, gas and oil pipeline projects on indigenous lands as well as openly shame governments receiving financial inducements directly from these industries.

Elsewhere, future studies could also openly discuss how hegemonic ideologies hinder indigenous peoples' abilities to realise a more comprehensive right to internal self-determination. This could make use of terminology relating to modern day forms of colonialism and occupation but without arguing for secession. While such study suggestions would not change the position of indigenous peoples in the UN instantly, it could be a way to critically focus their agenda-setting abilities by looking at broad themes which have been ignored or censured within the UN. Softening the language and tone of thematic studies to suit the interests of states, by discussing matters such as consultations and working partnerships, do not address the hegemony underlying the limits imposed on indigenous peoples.

*C. Going Further on EMRIP's Composition, and More*

With regards to the composition of EMRIP, both state and indigenous respondents to the Mandate Review made suggestions on the need for better qualified experts[[633]](#footnote-633). These kinds of suggestions do not address the deficit in counter hegemonic ideas if officially qualified experts do not question the motives of instruments such as UNDRIP and state actors. An admittedly more contentious way to address this shortcoming is a composition based on ideology. This could be facilitated by doubling the number of experts, and dividing representation based on the ideologies of experts from each geographic region, ranging from ideologically 'moderate' experts and ideologically 'radical' experts. The purpose of this proposal is to give credence to the fact that indigenous peoples do not speak with a single, monolithic voice. In terms of what constitutes 'radical', we may look at the nature of activism (including resistance) of those involved in traditionally left-wing movements such as national trade unions like those who participated in the Bolivian Uprising.[[634]](#footnote-634) Controversially, nominations could also go to indigenous peoples who were previously involved in armed struggles, but have renounced those activities, such as individuals involved in the Zapatista movement in Mexico[[635]](#footnote-635). To be clear, this proposal is not an endorsement of armed activities, but is to ensure that indigenous experiences are better represented in the UN. On one level, the current composition of EMRIP may satisfy TWAIL concerns regarding representation of the Global South in international law[[636]](#footnote-636) due to the geographic distribution of existing Experts. However the proposal here might also complement deeper TWAIL aspirations on how the operation of international human rights need to be less elitist[[637]](#footnote-637) as well as give rise to the local knowledge of indigenous peoples. Radical experts could espouse such knowledge in order to break with vacuous rhetoric of universal human rights.[[638]](#footnote-638) Due to the barriers in making this proposal a reality, it could, in the more immediate future, be the subject of informal or parallel EMRIP sessions. A closer examination of the UN Human Rights Council mandate outlines stringent criteria for the appointment of mandate holders.[[639]](#footnote-639) While a range of non-governmental actors have a right to nominate mandate holders,[[640]](#footnote-640) criteria currently depends on appropriate levels expertise, experience, independence, impartiality, personal integrity and objectivity.[[641]](#footnote-641) Furthermore, the mandate stipulates that mandate-holders such as Experts have to be 'highly qualified'[[642]](#footnote-642). This itself could be an example of elitism operating in international law as critiqued by TWAIL perspectives. Impartiality and objectivity could also be construed as conformity with hegemonic UN norms. These represent major barriers for such a change in the Council's mandate.

Elsewhere, other aspirations of indigenous peoples could hinge on expanding EMRIP's mandate to issue General Comments. This suggestion has support by both the Citizen Potawatomi Nation and Indian Law Resource Center.[[643]](#footnote-643) Finally, the number of sessions per year could either be expanded or remain at one, but held for a longer period. One interesting suggestion by both the Indigenous World Association and Shiprock Community Development Corporation[[644]](#footnote-644) is to hold informal sessions in other parts of the world outside of the main UN premises. This is where future expansion of the Voluntary Fund's mandate could be targeted, and financial contributions towards its existence need to be framed as a vital investment in building more humane global objectives.

Strategically, counter hegemonic resistance needs to begin taking shape lower down the UN's human rights hierarchy, as it might be relatively easier to challenge hegemonic practices. From there we can start forming an alternative vision. EMRIP is deliberately examined in this subsection, because it is strategically well-positioned from the perspective of indigenous peoples. Also its subsidiary status to the UN Human Right Council keeps the thesis' focus appropriately streamlined. While the Special Rapporteur on the Rights of Indigenous Peoples also reports to the Human Rights Council and undoubtedly plays a valuable role, the office holder is just one individual, whereas EMRIP has more scope to install counter hegemonic reforms. The Permanent Forum on Indigenous Issues is a subsidiary body to the UN Economic and Social Council, so is not exclusively focused on human rights.

Indigenous peoples do, however, need to access EMRIP's parent body, the Human Rights Council (UNHRC). It would therefore be useful to examine how indigenous resistance can challenge the UNHRC, ensuring that this most important body in the UN human rights roster can pay heed to their aspirations. The next subsection looks at one way in which indigenous peoples could appropriately harness its existing position.

### 5.3.3 - Making A Move Within the UN Human Rights Council

The Human Rights Council (UNHRC) is regarded as the most important body for human rights in the UN.[[645]](#footnote-645) It is Charter-based, as a subsidiary to the General Assembly. Its broad purpose is the promotion and protection of human rights, and is universally applicable to all states.[[646]](#footnote-646) The UNHRC is the successor to the Commission on Human Rights, which was widely maligned for its growing selectiveness and politicisation[[647]](#footnote-647) rendering it increasingly irrelevant to the world's evolving human rights needs. The body was converted into a Council with the view to place human rights on an equal footing alongside security and development matters.[[648]](#footnote-648) The Council consists of 47 members and runs three regular annual sessions.

A potential opportunity exists for indigenous peoples to make a clearer mark on the activities of the Council, thereby putting forward a more challenging agenda. During one of the regular annual sessions, a half day discussion is dedicated to the rights of indigenous peoples. To the UNHRC's credit, the themes of discussion panels have touched upon interdisciplinary and contemporary issues affecting indigenous peoples, such as a half day on the topic of 'disaster, risk reduction, and prevention and preparedness initiatives'.[[649]](#footnote-649) In consolidating a stronger agenda setting focus in the EMRIP (as suggested above) indigenous peoples[[650]](#footnote-650) could push for even more challenging discussion themes. Building on ideas proposed for studies in EMRIP, this ought to coordinate with lobbying for greater recognition within the Council. Notably to confront Council members with the fundamental flaws of UNDRIP, vis-à-vis FPIC. The purpose of this should not be to replicate studies undertaken by the Expert Mechanism, rather to ensure that these counter hegemonic themes are taken seriously, if the UN wants to provide indigenous peoples' rights with real legitimacy. This proposal could go hand-in-hand with extending the current half day discussion to at least a full day in order to give more consideration to these important ideas.

The section now examines how indigenous peoples can pursue resistance tactics in other aspects of UN activity.

### 5.3.4 - Additional Insider Strategies: Maintaining Engagement and Exercising Subversion

*A. Raising Indigenous Expectations Through the Human Rights Committee*

Beyond the Charter-based human rights bodies, indigenous peoples also need to consider other institutional avenues where they can exercise counter hegemonic resistance. This could include strategies that seek engagement in areas that potentially benefit their own interests, as well as instances where they may exert greater levels of defiance.

A good example of continued engagement could be with certain human rights treaty-monitoring bodies such as the Human Rights Committee which oversees the operation of the International Covenant on Civil and Political Rights (ICCPR).[[651]](#footnote-651) One of its main functions is to receive and consider written communications, alleging violations of Covenant rights, from individuals in those states that have signed and ratified the First Optional Protocol to the ICCPR. These states accept the Committee's competence to consider complaints.[[652]](#footnote-652) Individuals must exhaust every possible domestic remedy, before filing a complaint to the Committee.[[653]](#footnote-653) Despite a lack of provision for indigenous peoples, the Committee has shown a willingness to interpret aspects of the Covenant. It has previously made decisions pertaining to indigenous peoples on alleged violations, based on a number of provisions. In particular, article 27 stands out as it relates to minority rights.[[654]](#footnote-654) The Human Rights Committee has recognised the scope for indigenous peoples to invoke this article.[[655]](#footnote-655) One such example considered the preservation of indigenous peoples' cultural integrity, through individual complaints on matters such as the interference of Sami reindeer husbandry in Finland by stone quarrying activities.[[656]](#footnote-656)

The Committee has notably recognised a limited right to FPIC in the *Ángela Poma Poma v Peru*[[657]](#footnote-657)communication, which involved a dispute over diversion of water from indigenous Aymara farmland to various well-drilling projects. The decision used a proportionality test, stipulating that FPIC could only apply where development activities or other measures ‘substantially compromise or interfere with the culturally significant economic activities of [an] ... indigenous community.'[[658]](#footnote-658) Similar communications in the future filed under the Optional Protocol must go further than this. As Committee representatives are entitled to attend sessions of the Expert Mechanism on the Rights of Indigenous Peoples, sharpened agenda setting initiatives relating to the themes considered in subsection 5.3.2 should serve as a means to inform them of how FPIC ought to be expressed in future decisions more unequivocally. In meeting the counter hegemonic concerns of indigenous peoples, FPIC must not be subject to a proportionality test which confines its applicability to situations where indigenous life is 'substantially'[[659]](#footnote-659) harmed. A self-determined right to FPIC needs to recognise that indigenous peoples have to chart their own destinies and make decisions free from any interference. In addition, decisions must look at the non-economic value of indigenous lands, territories and resources.[[660]](#footnote-660) FPIC cannot simply be reduced to questions of economic growth, in complementing a particular TWAIL criticism of human rights which predicates progress on a perpetual need for marginalised groups to 'catch up' economically.[[661]](#footnote-661) Although such decisions are non-binding, they serve as important normative developments in human rights. After all, the Committee has already shown some level of receptiveness to indigenous rights so there exists an opportunity for indigenous peoples, through EMRIP, to lobby representatives to adopt a broader approach to FPIC in the future.

*B. Consideration of Boycotts*

In thinking about how radical elements of resistance may take shape, indigenous peoples could be more open to exercising overtly subversive tactics in response to UN-based activities. In particular, conferences which are ostensibly of direct relevance to them. When it becomes apparent that indigenous peoples have to capitulate too much ground to states and conferences yield little benefit, they must strongly consider not giving licence to such events. Certain indigenous groups or caucuses have previously used this kind of tactic. Most recently in 2014, the North American Indigenous Peoples Caucus withdrew from the World Conference on Indigenous Peoples and called for its cancellation. This was primarily because indigenous peoples were not permitted to take part in drafting the Outcome Document.[[662]](#footnote-662) In 1988, a radical section of Aboriginal participants withdrew from the ILO Conference, accusing the organisation of showing no desire to take indigenous rights seriously.[[663]](#footnote-663)

In future scenarios, indigenous peoples could consider holding informal sessions within EMRIP to determine the potential value of major UN conferences. They must review the overall objectives, the permitted level of indigenous participation and the intentions of any draft documents or resolutions to be adopted. Therefore, if a conference agenda fails to meet these standards, indigenous peoples with their representative organisations should not rule out the possibility of outright boycotts. This could convey a message that indigenous peoples were unwilling to lend their voices to harmful conferences which ultimately produced hegemonic outcomes.

This section has argued that indigenous peoples could leverage their existing position in the UN, by making short to medium term changes. They need to begin exerting pressure and pushing for recognition of counter hegemonic expressions of FPIC, using strategies considered above. This is to show that indigenous agenda-setting actually counts for something substantial and cannot be subjected to ideological erasure by state governments. There is an exigency to stop states from imposing their approaches on FPIC and this could be better achieved by more innovative use of existing institutional spaces. Using these changes, it is necessary to show that UNDRIP-conceived rights to FPIC and self-determination cannot be treated as minimum standards.[[664]](#footnote-664) This entails reformative measures and at least a consideration of radical defiance.[[665]](#footnote-665)

Clearly, however, these proposals do not provide an entire solution to the problem. It is still vital to remember the perennial reality that international law is largely state-centric.[[666]](#footnote-666) Hence there exists a clear challenge to coordinate 'insider' strategies with resistance in external, non-institutional settings. This is necessary in order to directly urge states to look more introspectively at their positions on FPIC and development aggression. Section 5.4 confronts this challenge of consciousness at state-level, going beyond simply campaigning for certain legislative or constitutional recognition. Inevitably this will be a long and arduous task, but it is imperative in the overall realisation of FPIC and dismantling of development aggression. It is evident that much more needs to be done to convince governments because human rights, even in their existing hegemonic formats, are generally overshadowed by other interests.[[667]](#footnote-667) Consequently this places indigenous peoples at a handicap in UN lawmaking.[[668]](#footnote-668)

## 5.4 - Resistance Strategies from the Outside

### 5.4.1 - Overview

The traditional battleground of resistance is synonymous with the actions of grassroots social movements who pursue various strategies in the hope of achieving certain outcomes. Building a movement using the language of human rights is what Falk refers to as 'rights work' that gives rise to a type of subaltern resistance.[[669]](#footnote-669) This extralegal, less sanctioned application of human rights attempts to harness their counter hegemonic potential.[[670]](#footnote-670) In fact, the need for non-institutional resistance strategies are often viewed as a necessity by indigenous peoples themselves[[671]](#footnote-671). Outside resistance efforts must help influence a more robust form of agenda-setting internationally, showing that indigenous peoples' rights are neither defined strictly by institutional participation nor the hegemonic terms of FPIC as conceived by UNDRIP. The following subsections consider selected 'outsider' strategies, with a focus on FPIC protocol mechanisms, strategic coalitions with other movements, and using education and media institutions to challenge public perceptions, raising nuanced awareness on indigenous peoples and development aggression.

### 5.4.2 - Unilateral FPIC Protocols

In realising the importance of a right to FPIC, it must become an important and pervasive byword for indigenous activism around the world[[672]](#footnote-672). An aspiration towards forging an unconditional right to refuse or veto a development defines the most pressing needs of indigenous peoples wanting a continuous stake in divisive projects. In the case of FPIC, the opportunity to effectively participate in a plan of action and gain a real measure of power[[673]](#footnote-673) against state and business interests represents a *sui generis[[674]](#footnote-674)* approach to resistance that is predicated on highly targeted priorities.

FPIC protocols represent a possible way of achieving this. While nomenclature varies from FPIC protocols, biocultural community protocols and manifestos, they may be defined as ‘charters of rules and responsibilities in which communities set out their customary rights to natural resources and land, as recognized customary, national and international laws.’ [[675]](#footnote-675)

Where states and private enterprises impose extractive mining or logging activities upon indigenous peoples, there are often few opportunities for communities to effectively participate and secure their most inalienable assets[[676]](#footnote-676). Even within states that recognise either rights of consultation[[677]](#footnote-677) or FPIC[[678]](#footnote-678), these are often inadequate as participatory processes are skewed towards the interests of governments[[679]](#footnote-679) and are not conducted in a satisfactory manner[[680]](#footnote-680). The problem is that very often, the judicial and administrative options to enforce participation are limited in terms of what they can offer to indigenous peoples. This is particularly the case when it comes to questioning or challenging 'hegemonic models, vested interests and political power, as exemplified by projects associated with the increased exploitation of natural resources.'[[681]](#footnote-681)

In one specific example, a community adopted a protocol in addition to asserting a 'no means no' campaign.[[682]](#footnote-682) While the Kitchenuhmaykoosib Inninuwug (KI) First Nation in Ontario, Canada[[683]](#footnote-683) created a protocol mechanism that defined their customary rights, it was more subversive actions that culminated in their gaining of a *de facto* power of FPIC. In defending ancestral lands from the mining threats of two private sector companies, between 2006 and 2009, the community devised:

an enhanced consultation and consent protocol, which served as a means of *resistance* against any repetition of the Platinex experience. The protocol asserts KI law...and their ownership over resources. The protocol was, as a result, developed in the context of an immediate threat to the KI territorial and governance rights, and has been described as constituting a key tactical decision in the resistance of mining projects and the assertion of KI jurisdiction on the land.[[684]](#footnote-684)

In the process of this struggle over a period between 2006 and 2009, several members of the KI First Nation were prosecuted and served prison sentences for six months each, after being held in contempt of court for actively circumventing orders.[[685]](#footnote-685) Even before the dispute was reluctantly settled, the KI First Nation became increasingly disenfranchised with attempts to negotiate a settlement with the Ontario government authorities and one of the mining companies when their wish for recognition of an absolute right to veto was ignored, and subjected to much lower standards based on consultation.[[686]](#footnote-686) The use of FPIC protocol mechanisms have also been developed by indigenous peoples in Ghana[[687]](#footnote-687) and Malaysia[[688]](#footnote-688). The communities' specific grievances entailed the need for FPIC to be recognised in addition to concerns about official demarcation of customary lands as well as ownership of natural resources at risk from external developers. Later, section 5.5 considers how FPIC protocols may materialise in relevant institutional settings.

### 5.4.3 - Coalitional Strategies with Non-Indigenous Actors

Challenging development aggression, as an overarching political and economic agenda, should focus on some of the most fundamental assumptions about perceived benefits of megaprojects such as hydroelectric dams or mining operations. The possibilities of forming broader partnerships are imperative to question the underlying tenets which support development aggression, such as industrialised growth as well as language that frames contentious projects of being of national or public significance. This form of counter hegemonic resistance from outside is paramount in formulating a response that is visible, defiant and may gain the attention of national courts.

This resonates with an interesting proposition by Mutua and Anghie, that TWAIL scholars need to form coalitions with other intellectual movements in order to find 'deliberate conspiracies and cross-fertilize in their struggles against [for example] entrenched Eurocentric power structures both at the national and the international levels.'[[689]](#footnote-689) This idea could be applied to indigenous peoples at the domestic level, to seek important ideological common ground. These would be strategic coalitions that could be explored in shedding light on the ideological blind spots of existing human rights practice. In this respect, indigenous peoples could further demonstrate how the 'power of rights'[[690]](#footnote-690) enables counter hegemonic resistance to take shape.

Indigenous peoples have of course formed coalitions in the past with actors such as non-governmental organisations when building opposition to development projects. One problem is that previous experiences are criticised as being too shallow and fragmented. For instance a high profile dispute emerged in the 1990s between the company Occidental Petroleum and the indigenous U'wa peoples in Colombia, over proposed oil exploration on the latter's traditional land.[[691]](#footnote-691) The movement caught the attention of various American NGOs and advocacy groups. The company eventually decided to withdraw operations from the U'wa peoples' lands. While this was prima facie a positive outcome, it masks the complex divergence of expectations between indigenous and non-indigenous actors. For the NGOs and advocacy groups, the result was unequivocally successful. In contrast the U'wa remained sceptical about the Colombian government's long-term intentions, in the event of a similar situation occurring. Building a counter hegemonic movement requires sustained action, as *ad hoc* campaigns (which may prove successful in their own right) against development aggression do not thoroughly critique and challenge the *hegemonic psyche* that underpins ongoing threats to indigeneity. This complements Falk's plea for growth of a 'much stronger global civil society than currently exists.'[[692]](#footnote-692) Coalitions, in this sense, have to be more sophisticated than before.[[693]](#footnote-693)

In the context of FPIC, indigenous peoples may seek coalitions in order to create counter hegemonic human rights narratives that expose the costs that land and resource-intensive projects have on their lives. This would be particularly useful in targeting states that are so far unwilling to recognise FPIC. It also corresponds with a concern by Rajagopal, with regards to the myopia built into the universal human rights corpus, vis-à-vis the violence of market-based actors.[[694]](#footnote-694)

Indigenous peoples could form coalitions with environmental and civil liberties organisations. The former complement indigenous struggles in terms of the environmental degradation (stripping of fertile agricultural land, contamination of waterways, air pollution and deforestation) associated with development aggression. The latter adds an important dimension to situations where indigenous peoples are subjected to disproportionate and discriminatory treatment by police and military[[695]](#footnote-695) in their resistance against megaprojects.[[696]](#footnote-696) In return, indigenous peoples could offer a 'human face' to these causes. Finding common ground could create new forms of solidarity and increased visibility to each others' causes. While results may not be achieved immediately, these types of coalitions are critical in challenging the narrow hegemonic ideologies of state governments. In section 5.5, specific rationales are considered which civil liberties and environmental organisations could use in national courts to possibly shape judicial attitudes to development aggression.

A third proposal for 'outsider' strategies considers how indigenous peoples could target their resistance more creatively, based on improved representation within the media and education systems.

### 5.4.4 - Strengthening Engagement Legitimacy Through Education and Media

An important aspect of reconceptualising FPIC from the 'outside' may focus on how indigenous peoples can convey their message to civil society. In other words, the bulk of the non-indigenous population. This requires demystifying perceptions about indigenous peoples so that public consciousness is raised about their unique ways of life and how development policies are not always implemented in public or national interests.[[697]](#footnote-697) This is in order to build what Claire Charters terms as 'engagement legitimacy', which occurs due to increased interactions between indigenous peoples and wider civil society. This is to ensure that indigenous rights become accepted and normalised within public circles.[[698]](#footnote-698) It is important to seek ways that raise awareness meaningfully, so that civil society can hold their governments to account and be more critical to policies on indigenous peoples.

When considering wider literature on hegemony and counter hegemony, Gramscian theory espouses that hegemony is a process by which civil society lends their consent to the activities of governments (or ruling classes). This is manufactured through institutions such as the education system and the media in terms of the content they provide. [[699]](#footnote-699) Taken together, these two institutions could be regarded as the most relevant arenas for the production of intellectual and ideological narratives.

Up until now, the thesis has been critical of UNDRIP's approach to FPIC and self-determination. But there is an area of the Declaration that encourages genuinely progressive changes, with respect to indigenous participation in education systems and media institutions. In addition to conferring rights to indigenous peoples to establish and have control over their own distinctive education systems[[700]](#footnote-700) and media outlets[[701]](#footnote-701), two further provisions offer scope for enhancing engagement legitimacy. Firstly, article 15(1) of UNDRIP recognises that indigenous 'cultures, traditions, histories and aspirations' need to be 'appropriately reflected in education and public information'.[[702]](#footnote-702) Secondly, article 16(2) of UNDRIP recommends that states 'take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity' as well as encouraging 'privately owned media to adequately reflect indigenous cultural diversity.'[[703]](#footnote-703) Despite the hegemonic limits imposed on FPIC, these provisions actually create an opportunity for indigenous peoples to exercise counter hegemony. This could be achieved by pushing for recognition in these circles, thereby initiating a process where non-indigenous civil society can engage with information and content that is ordinarily out of reach. In this context, these particular UNDRIP provisions may satisfy the notions of minimum standards for indigenous peoples around the world.[[704]](#footnote-704) It also reflects a plea by James Anaya for indigenous peoples to become more recognised in day-to-day settings, by rebutting colonial distortions of history in the education system, for example.[[705]](#footnote-705)

Consolidating these rights, indigenous peoples need to consider ways to 'decolonise' public narratives. This is essential for wider society to appreciate the perspectives that indigenous peoples bring, most notably their views on economic self-determination and the costs of large scale development projects.

Indigenous peoples must direct their resistance, at one level, to the media corporations. The increased presence of mass media is capable of influencing major agendas[[706]](#footnote-706). For governments, media narratives may be seen as complementary to shaping outward perceptions of their states, a type of soft power to advance their own interests.[[707]](#footnote-707) This implies that mass media is a significant tool in facilitating hegemonic narratives for the benefit of powerful actors. Indigenous peoples must therefore seek as many ways as possible to ensure that their voices are included and impartially represented within both print and broadcast media. Strategies could include systematic complaints to corporations about the lack of recognition given to indigenous voices in the mainstream media. This could extend to written and online petitioning in order to capture as much support as possible to ensure fairer representation. The use of new media could also be of benefit, not only to raise awareness of the immediate need for greater representation but also as a means to convey invaluable knowledge about FPIC and its importance to indigenous peoples' physical and cultural survival. More concerted efforts may entail organised, peaceful demonstrations outside the headquarters of major media outlets to create a visible presence of indigenous resistance.

With regards to education systems, indigenous peoples must lobby schools, universities and relevant government departments. Given the intellectual rigour associated with education institutions, it is apt that indigenous social movements also focus their attention on places of learning. It has been argued that curriculums may uphold neo-imperial and neoliberal forms of education, including limited models of economic development.[[708]](#footnote-708) Similar tactics could be deployed as the ones above, but objectives should be on ways in which school and university syllabuses could be rewritten for subjects such as history and economics.

Overall, the purpose of 'outsider' strategies is to engage with different actors and in certain pertinent arenas, in building new forms of consciousness. To ensure that some of these proposals can materialise, desired outcomes require institutions internationally, regionally and domestically to internalise these aspects where appropriate.

## 5.5 - Giving Effect to 'Outsider' Strategies in Institutional Settings

### 5.5.1 - General Remarks

In considering how outside resistance strategies can materialise, we need to examine how the proposals in section 5.4 can be appropriately internalised in international, regional and domestic institutions and tribunals. Collectively, the proposals could form an implied demand for states to slowly disown the most detrimental aspects of their national interests from the perspective of indigenous peoples. Exerting pressure on states to understand that the conceptualisation in article 32(2) is not a settled issue allows for evolution of FPIC beyond the confines of UNDRIP. Ceding aspects of sovereignty should not be confused with a call for indigenous peoples to pursue secessionist movements, wherever they reside. Instead, it requires more sophisticated undertakings in which the state becomes increasingly decentred in the way it conducts itself .[[709]](#footnote-709) This is because hegemonic rights connected to sovereign states often represent veils that protect governments from being questioned by external actors in their undertaking of contentious national activities such as the 'right to construct nuclear energy facilities that pose high safety risks or to destroy tropical rainforests in a manner that jeopardizes biodiversity.'[[710]](#footnote-710) Applying this logic to the current study, there needs to be a clear understanding by states that they ought to abandon the continued preservation of contemporary policy areas which make the realisation of FPIC (and by extension, self-determination) extremely difficult for indigenous peoples to attain.

The following subsection attempts to translate some of these ideas in accordance with some of the reforms to the UN-level suggested in section 5.3.

### 5.5.2 - Consolidating Outside Strategies with Reformed UN Priorities

As UNDRIP emanated from the UN, it is apt that long-term resistance in lobbying for a reconceptualised understanding of FPIC further targets the institution itself. Section 5.3 proposed ways in which indigenous peoples could instil certain counter hegemonic ideals. In applying counter hegemonic resistance internationally, proposed reforms to the EMRIP and UNHRC need to be combined with some of the outsider proposals so that they can become part of a more defiant agenda.

One hope is that as state governments become increasingly receptive to shifting consciousness (attributable to domestic resistance) over indigenous rights, this can help create a sound international consensus based on indigenous counter hegemonic interests. While it is not realistic to negotiate a revised version of UNDRIP[[711]](#footnote-711), it could be more pragmatic to develop improvements to articles 4 and 32(2) using certain ideas suggested above.

A good starting point to enhance the substance of resistance, considering the value of FPIC protocols could be useful. With state governments currently unlikely to adopt more robust standards towards FPIC, a more realistic priority could bring it within the agenda of a reformed EMRIP. Protocols need to be promoted as constituting good practice. An early materialisation of FPIC protocols could take place in the shape of a thematic study. This could allow the EMRIP to focus on the experiences of certain communities who have constructed such mechanisms, beyond the purview of state assistance, to resist the incursion of developers onto their ancestral lands. Studies could involve inviting communities such as the KI First Nation of Canada to give evidence. This could help disseminate clear awareness of their experiences organising and drawing up plans for the protocol and how it worked in practice when dealing with the Ontario government as well as mining firms. This could provide practical awareness to other indigenous peoples who face similar problems and are looking at ways of resisting large extractive projects.

Furthermore, expanding EMRIP's mandate to issue General Comments in the future could enable the drafting of more progressive FPIC standards. A relevant General Comment could draw on the unilateral expressions of FPIC of indigenous peoples, demonstrating that it ought to be an evolving norm. In turn, this could be strongly taken into account by treaty-monitoring bodies such as the UN Human Rights Committee considering prospective communications by indigenous individuals faced with acts of development aggression. A General Comment on an updated view of FPIC could build on the Committee's approach in the *Poma Poma v Peru* decision.

With respect to the Human Rights Council, the proposal made in section 5.3 focused on how its annual half-day discussion on indigenous peoples could become a a full day. Given the unique, interdisciplinary focus of previous session topics, this could facilitate more counter hegemonic priorities. For example, it could review articles 14 to 16 of UNDRIP on questions of representation, inclusion, negative stereotypes and alternative economic systems in education and media settings. Such a discussion panel could offer insights on the importance of increasing engagement legitimacy with the wider public. The aim would be to ensure that they acquire more sophisticated and well informed knowledge[[712]](#footnote-712) about indigenous peoples and their grievances. Given the centrality of FPIC in overcoming unwanted development projects, future media and education priorities need to encompass the worrying implications for indigenous peoples.

In terms of content, participants could raise a number of issues, offering innovative interpretations of the Declaration, thereby espousing counter hegemonic ideas. For example, there could be a focus on how indigenous representatives might be permitted to participate in critical news discussions. This would give them an opportunity to articulate their world views in examining political, social, environmental and business related affairs. Regular coverage on economic and business segments could present important counter hegemonic analyses on industrial development activities. Indigenous peoples could use their time to discuss the hidden costs and damage caused by development policies, effectively exposing a major blind spot in mainstream coverage on extractive mining, oil and gas extraction and infrastructure projects. The consequences of, for instance, uranium mining operations on the Lakota tribe of Pine Ridge Reservation in South Dakota, United States[[713]](#footnote-713) is an example of a real life issue that could be disseminated clearly and unequivocally. This could add a significant dimension to media reporting on extractive and infrastructure projects, beyond mainstream analyses of their economic benefits. This could also engender an important application of how article 16(2) of UNDRIP could be used to meet counter hegemonic ends.

In terms of clarifying article 15(1) of UNDRIP, discussion panels could also draw on the need for culturally diverse education systems that do not frame intellectual discourse purely in terms of western knowledge. For example, indigenous economic systems could be focused on in economics and business courses at various academic levels, to offer students the opportunity to critically question the merits of large scale development projects. Another subject area that requires more extensive narratives is history, an area that is often selective and limited in terms of indigenous peoples. This is to ensure that students are exposed to alternative historical accounts which do not just originate from the works of European scholars.[[714]](#footnote-714)

These related ideas could hopefully pave the way, in the long term, for adoption of a Resolution by the Human Rights Council on FPIC. While this would not be binding, it would convey a clear message that international human rights practice is increasingly willing to transcend the terms of UNDRIP on such a pivotal right. This has to be subject to reform, if one is to take development aggression seriously.

The next subsection returns to two of the examples in chapter three, in considering what could be done in regional tribunals in better realising FPIC.

### 5.5.3 - Regional Responses

A specific variable tested in chapter three related to the extent regional human rights decisions, which invoke the terms of FPIC, add to our understanding of the international conceptualisation of article 32(2) of UNDRIP. Although the *Saramaka* andEndorois decisions went further with FPIC than that espoused in article 32(2), the use of a sliding scale approach does not go far enough. Rajagopal tentatively refers to the counter hegemonic potential of regional human rights tribunals such as the Inter-American Court of Human Rights but is ultimately subordinate to the will of states.[[715]](#footnote-715) In essence, these decisions only addressed the symptoms of aggressive development agendas which permitted clearance for logging and mining projects (*Saramaka*) and construction of a Game Reserve (the Endorois case).

However, in light of the counter hegemonic action proposed in the chapter, it could gradually influence regional human rights tribunals to take a more indirectly interventionist approach to matters of national development policy. Particularly if the desired reconceptualisation of FPIC takes longer to recognise in the United Nations. The Inter-American Court as well as the African Commission and Court[[716]](#footnote-716) ought to pay attention to some of the resistance-based challenges by indigenous peoples seriously. Despite the deficiencies of decisions in the *Saramaka* and Endorois cases, the tribunals remain relatively open to internalising counter hegemonic ideas.

Prospective cases and communications on indigenous peoples' grievances vis-à-vis development aggression need to take full consideration of evidence from third parties conveying certain counter hegemonic ideas based on FPIC protocols, for instance. This could inform judges or decision-makers on how to go further and interpret provisions such as property[[717]](#footnote-717) or development[[718]](#footnote-718) rights in even more counter hegemonic terms. This could help provide a definitive view on FPIC, and indirectly reflect the spirit of grassroots resistance such as that pursued through FPIC protocols. One pivotal way judicial and quasi-judicial bodies could be targeted is through creative use of *amicus curiae* briefs. Its purpose has gradually evolved from a neutral standpoint to one of advocacy, with *amici curiae* offering their expertise that transcends simply interpreting the law. They increasingly provide social, economic and cultural arguments of the law's impacts, as a question of public interest.[[719]](#footnote-719) This evolution of *amicus curiae* briefs is pertinent in the current context. It potentially gives light to the aspirations of TWAIL, where both conciliatory and more outspoken ideas can be effectively conveyed. Briefs have been used in regional tribunals in the past, such as that submitted by Canada's Assembly of First Nations (AFN) for the Inter-American Court decision of *Awas Tingni v Nicaragua*.[[720]](#footnote-720) The AFN's interest in the case (which related to a dispute over logging concessions) was to offer guidance based on First Nation experiences of negotiating with logging companies. The intention was to assist the Court to reach a decision that would benefit the community in question. In addition to providing information about the interfaces between international human rights standards and Canadian domestic law,[[721]](#footnote-721) AFN's brief uniquely drew on the issue of co-management. This refers to a mode of 'power sharing'[[722]](#footnote-722) based on the notions of consultation and negotiation.[[723]](#footnote-723) It gave rise to a number of successful examples in Canada where individual indigenous communities made agreements with the government in sharing the benefits of development activities, prevent conflict and preserve traditional title rights.[[724]](#footnote-724) The AFN espoused that co-management could represent a viable working model in the Nicaraguan context.[[725]](#footnote-725)

Indeed future *amicus curiae* briefs from interested parties could discuss the relevance of specific economic models that benefit indigenous peoples in cases of logging or tourism, for example.[[726]](#footnote-726) This would be apt in the context of those indigenous communities willing to adopt more conciliatory approaches with developers. But in the context of more overt counter hegemonic resistance, appropriate *amici curiae* such as (potentially) members of the KI First Nation in Canada need to express interests in matters of development aggression by sharing experiences of using FPIC protocols. Submitting briefs on individual experiences of such mechanisms are significant in giving regional tribunals a clearer understanding of non-state approaches to FPIC. They could also capture the will of indigenous peoples, which is often a desire to refuse consent thereby exercising a form of self-determination over lands and natural resources. The spirit envisaged by protocols could be a way to challenge regional tribunals to take their approaches to FPIC further than before. In this case, FPIC cannot be conditional on the potential impact or magnitude of a development project.

Regional bodies have proven to be relatively receptive to taking in external legal influences. This needs to be exploited in order to ensure that future decisions on indigenous peoples in development projects reflect a full right to FPIC.

### 5.5.4 - Meeting Domestic Challenges: Legal Mechanisms and Creative Uses of Coalitional Strategies

In thinking about ways in which 'outsider' resistance such as the work of coalitional strategies may materialise, we need to consider how to enjoin them with existing domestic legal mechanisms. This could give effect to important elements of judicial activism, exposing some of the tensions associated with the failure by state governments to recognise FPIC in more comprehensive terms. Recalling one of the domestic variables discussed in chapter three, there are important questions about the overall viability of FPIC when it is placed in the context of a state's overall development agenda. There could be serious implications on the extent to which FPIC functions when, for example, simultaneous policies aggressively promote large scale development operations. By harnessing available legal avenues, indigenous peoples and their allies such as environmental activists and civil liberties campaigners could demystify associated issues surrounding development aggression.

Depending on their availability within different jurisdictions, there are several routes to assert judicial activism when confronting development aggression. Options for indigenous peoples and their coalitional partners could include class action lawsuits, judicial reviews and even public interest litigation. In each of these examples, claimants generally need to have *locus standi* in order to gain access to the court in question. Standing could ordinarily be granted to indigenous organisations or individuals, with coalitional partners providing *amicus curiae* briefs where relevant. In some cases, standing may even be granted to non-indigenous organisations themselves where it is ascertained that they have a sufficient level of interest in a particular grievance.

In terms of litigation that targets the environmental harm caused by development aggression, pursuing class action lawsuits could be a pertinent option. This is particularly useful in the context of large groups of aggrieved parties seeking legal redress against extractive mining firms, for instance. The circumstances of such suits usually involve severe environmental damage caused by poorly regulated and unaccountable development activities. Such a claim could be pursued by one member of an indigenous community (or organisation) acting on behalf of a wider class of peoples affected by environmental damage.

With regards to a role for interested environmental activists, the use of *amicus curiae* briefs may form part of the reasoning against a mining company in a class action suit. In domestic courts, briefs often provide opportunities for interested parties to engage with the law and project counter hegemonic ideals in adding a significant degree of non-legal reasoning to the issues in question.[[727]](#footnote-727)

The innovations of *amicus curiae* in domestic litigation potentially open the door for creative interventions by environmental activists. The use of rationale that raises issues surrounding environmental damage offers a degree of attention to the dangers of development aggression. One particular line of reasoning could be based on the fact that FPIC has been framed as an effective tool for risk management among business actors. For example, the NGO Amazon Watch issued recommendations for companies to 'adopt and implement a meaningful FPIC policy at the level of the company's board of directors'[[728]](#footnote-728), and highlight the responsibility of shareholders to demand more from companies regarding FPIC, as well as greater compliance and monitoring performance.[[729]](#footnote-729) Amazon Watch alludes to the fact that in the present era, protection of indigenous peoples' rights is not only a question of moral obligation, but one that is of utmost importance for business practices, so as to avoid heavy financial losses.[[730]](#footnote-730) This suggests that there is also strong impetus for private companies to devise their own FPIC initiatives as a means to militate against these factors, particularly in the absence of regulatory conditions mandated by the state to enter such processes by law.

Environmental risks are often burning issues in development activities impacting indigenous lands. These problems, including significant clean up costs, could be sharply expressed by environmental activists in *amicus curiae* briefs. This is pertinent in an era where corporate actors are increasingly keen to showcase social and environmental responsibilities to local communities.[[731]](#footnote-731) Environmental activists could formulate a response that cites specific evidence on heavy reputational costs facing business actors who fail to adhere to high standards of environmental stewardship.

With respect to one of the domestic examples used in chapter three, indigenous peoples, in partnership with environmental organisations in the Philippines, may alternatively wish to consider judicial review proceedings.[[732]](#footnote-732) This could be of use in highlighting possible ecological damage inflicted as a consequence of the 1995 Mining Act, with its seeming incompatibility with the Indigenous Peoples' Rights Act 1997. While a previous challenge to its constitutionality failed[[733]](#footnote-733), tapping into the disproportionate environmental effects that such legislation has on indigenous ancestral lands could form an important source of reasoning using a judicial review.

A further way in which judicial activism could help give rise to the arguments of coalitional strategies is the use of public interest litigation. This relates to a type of legal action that provides access to justice to vulnerable and disadvantaged groups or individuals. Highlighting areas of law that are in public interests to promote legal and social change could be an avenue for indigenous peoples to explore. In the case of India (as discussed in chapter three) its government's overall development policies are still highly contentious, despite the favourable judgment concerning the Dongria-Kondh. Hence it is likely that major challenges stemming from development aggression remain for India's other indigenous peoples. The constitution of India recognises public interest litigation[[734]](#footnote-734) as a way of 'providing access to justice to all societal constituents.'[[735]](#footnote-735) *Locus standi* in Indian public interest litigation has been noted for being inclusive, with relatively few barriers.[[736]](#footnote-736) Perhaps most encouragingly, standing can also be granted to interested non-governmental organisations.[[737]](#footnote-737) These favourable conditions could be harnessed for prospective claims, where civil liberties violations might play a prominent role.

In the context of India, a frequent concern has been the heavy handed tactics by police and military forces, used against indigenous peoples resisting megaprojects.[[738]](#footnote-738) Actions have often included arbitrary arrests and detention, violence and harassment. A prospective public interest litigation claim could shed light on this highly pernicious aspect of development aggression. Indigenous peoples, or even civil liberties NGOs (whoever acquires *locus standi*) could shed light on grave situations such as the physical displacement from ancestral lands due to extractive mining projects. Where security forces have intervened, it has sometimes led to criminalising indigenous peoples' opposition to megaprojects, and at worst classifying them as terroristic threats.[[739]](#footnote-739) These could provide strong impetus for public interest litigation claims by taking into account violations of fundamental rights such as freedom of expression[[740]](#footnote-740), peaceful assembly[[741]](#footnote-741), personal liberty[[742]](#footnote-742) and freedom from arbitrary arrest or detention.[[743]](#footnote-743)

Further arguments about the public interest nature of such a claim could draw on international human rights standards such as article 9 of the ICCPR which elucidates that individuals have the 'right to liberty and security'.[[744]](#footnote-744) In a more specific context, there could be an opportunity for prospective litigants to use existing legislation and interpret it expansively, in a way that could benefit indigenous peoples. A positive legislative development recently arose when the government passed the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act 2015. The legislation sets out a list of criminal offences committed against *inter alia* India's Scheduled Tribes.[[745]](#footnote-745) Perhaps the most pertinent areas of the legislation prohibits the wrongful occupation or cultivation of lands 'owned by, or in the possession of or allotted to...a member of...a Scheduled Tribe'.[[746]](#footnote-746) A further new offence is created in preventing the wrongful dispossession of 'a member of a...Scheduled Tribe from his land or premises or interferes with the enjoyment of his rights, including forest rights'.[[747]](#footnote-747) These provisions could be creatively interpreted by arguing that they ought to encompass the disproportionate tactics of law and security enforcement agencies in disputes where aggressive development is the primary source of tension for indigenous peoples. Furthermore by interpreting these sections in a way that encompasses violations of civil rights, credence could be given to TWAIL perspectives on human rights that criticise their traditional lack of regard for violations attributable to neoliberal market forces.[[748]](#footnote-748) In this respect, the actions of private companies could have a more visible presence in human rights narratives.

Supplementing this public interest litigation could be an *amicus curiae* (perhaps another civil liberties organisation) to articulate a further dimension about the risks of social conflict being created by aggressive development.[[749]](#footnote-749) Such a brief could cite emerging research which indicates that lenders face risks where development projects they have invested in are met by active indigenous resistance.[[750]](#footnote-750) Increased delays and reputational damage are increasingly connected with the incurring of further costs to lenders.[[751]](#footnote-751) Further research conducted in 2014 highlights that conflict between companies and communities over large scale development activities can result in losses of up to $20 million per week for businesses.[[752]](#footnote-752) Conflict is associated with financial burdens for increased security costs, delays due to project modifications, higher insurance premiums, lost productivity due to temporary closures of factories and greater public relations costs from reputational harm and divestment threats.[[753]](#footnote-753)

On the surface, framing FPIC in terms of risk management for business[[754]](#footnote-754) seems hardly counter hegemonic. However it actually represents a pragmatic tactic in order to inform courts of the wider costs related to the failure of implementing comprehensive safety protocols, especially where vulnerable communities such as indigenous peoples are present. After all, extractive industries pose one of the biggest threats to the sanctity of indigenous communities in sustaining their physical and cultural survival on traditional lands.[[755]](#footnote-755) This is especially true in many developing and/or postcolonial states where governments are dependent on foreign direct investment. Transnational corporations are able to leverage considerable influence while providing a source of tax revenue for governments.[[756]](#footnote-756)

These proposals may prima facie have little to say about a reconceptualised right to FPIC. But they offer important insights that could shape a better judicial understanding of how divisive development projects foster environmental damage to ancestral lands and violations to the civil rights of indigenous peoples.

The conclusion offers some final thoughts on these proposals, including a short assessment on how realistically they can be pursued.

## 5.6 - Conclusion

In considering how FPIC could be realised using a counter hegemonic resistance framework, it must be remembered that it invariably involves a very long road towards the stated aim of dismantling development aggression. But its realisation could be achieved through persistent use of coordinated strategies. Appropriate TWAIL-inspired counter hegemonic resistance has to be conducted across the international, regional and domestic institutions considered, ensuring that FPIC is taken seriously at each level.

On the question of enhancing the substance of counter hegemonic resistance, it needs to be underscored that while UNDRIP provides some valuable insights on areas such as education and media, it should not be viewed as constituting the final word on FPIC. As a soft law instrument, this suggests that there is room for evolution so that future conceptualisations of FPIC can embody more counter hegemonic values such as the right to an unconditional veto. Challenging this aspect of UNDRIP should not be about indigenous peoples abusing their position in the UN. Instead, there is a need to put forward proposals to suggest that indigenous peoples need not settle for state-imposed versions of their own rights.

The chapter has utilised the notion of 'insider-outsider' strategies to give light to counter hegemonic resistance. Its purpose in meeting the reconceptualisation of FPIC involves finding cohesiveness between different proposals for change. The examination of more radical ideas have a place here in acknowledging, on paper, the diversity of resistance envisaged by Third World Approaches to International Law. But practically speaking, it is imperative that priority is given to those proposals that appear to be more workable in the immediate future, and exhibit potential to genuinely advance the counter hegemonic interests of indigenous peoples. 'Insider-outsider' strategies can operate particularly well when both aspects can meet in the middle without compromising one another. TWAIL, after all, does not generally seek to close the door on international law and human rights, but seeks constructive solutions. In distinguishing between the proposed strategies in this chapter, some of them may materialise effectively in certain bodies or tribunals; other strategies are more aspirational at this stage; while another group of proposals would be so ambitious to the point that they could either do little to advance indigenous causes or, at worst, prove to be counterproductive.

In terms of areas that could require early attention, pushing for greater control over the content of EMRIP thematic studies and allotting a full day for the UNHRC's annual indigenous discussion need to be priorities within the UN. This is because there is potential to sharpen agenda-setting with more counter hegemonic focuses, as well as further raising the visibility of indigenous peoples' rights in the EMRIP's parent body. The need for more challenging study themes in both instances are important to convey the evolving problems facing indigenous peoples.

The proposal on granting EMRIP the competence to issue General Comments may not be achievable so quickly, due to likely state opposition to giving it a similar function to treaty-monitoring bodies.

Giving effect to FPIC protocols institutionally could be subject to mixed fortunes. As explained in section 5.5, it could form the subject matter of a potential EMRIP study. Moreover, they could be raised as part of *amicus curiae* briefs in regional tribunals, to possibly encourage decision-makers in the Inter-American and African systems to embrace more definitive conceptualisations of FPIC. But with regards to materialising domestically, such measures are likely to be met with opposition from state and corporate actors. Despite the Canadian example being successful, a similar outcome is not always guaranteed. Protocols constructed by indigenous peoples in other parts of the world have yielded either limited success[[757]](#footnote-757) or problems went unresolved.[[758]](#footnote-758)

The place of media and education strategies, in building greater engagement legitimacy, would be better placed for future discussions within the UNHRC, for example. There are likely to be a number of obstacles at national levels to give effect to such ideas. Within the UN, broad normative topics need to be raised in espousing the counter hegemonic potential by creatively interpreting articles 14 to 16 of UNDRIP.

In domestic courts, a most viable route forward relates to innovative usage of coalitional strategies. Organisations with interests in environmental protection or civil liberties could offer support for indigenous peoples resisting development aggression through the courts, whether it involves gaining *locus standi* in public interest litigation, a class action lawsuit, or even assuming the role as *amicus curiae*. They could build nuanced connections between FPIC and risk management. This serves as a way to indirectly critique either the absence of FPIC, or in countries where it is legislated on, to present some of the consequences of unabated development activities on indigenous peoples and their lands. Litigation that raises issues on environmental harm and violations of civil liberties could be essential in building judicial activism to support indigenous peoples. These could convey the various risks associated with development aggression.

Finally, although we have identified a wide range of possible strategies as per TWAIL perspectives, some of the most radical suggestions may not be appropriate in the immediate future. In this chapter, ideas were raised about the composition of EMRIP and the organising of outright boycotts. These may not be immediately realistic or even sensible. The former is likely to be met with heavy opposition due existing to the barriers in place on the quality and expertise required of mandate holders. Hence more 'radical' nominees for Experts could fall foul of the strict terms of UNHRC's mandate. For the latter, it is difficult to imagine what positive benefits can emerge. State representatives in key UN conferences or negotiations are not compelled to give in to indigenous boycotts. Perhaps a detrimental effect could arise wherein indigenous peoples are viewed as troublemakers, so entire caucuses may risk being excluded from future proceedings.

Overall, the most ideal 'insider-outsider' strategies entail critical engagement with appropriate institutional channels that offer most potential to exercise counter hegemonic resistance. This could enable gradual development and acceptance of a reconceptualised FPIC. Reconciling these different strands of resistance encourage indigenous peoples' continued engagement with institutional mechanisms, but not so much so that sharper demands are blunted or co-opted. Of all the politically marginalised communities in the world, they are perhaps the most well-positioned to demand greater recognition from the human rights corpus.

Applying counter hegemonic resistance to human rights provides a major perspective to the specific problem at hand. Evidently the practice of development aggression requires wider, cross-disciplinary links to international economic and trade law, with a focus on relevant UN agencies as well as lending policies of institutions such as the World Bank. However, framing the present enquiry within human rights represents a vital component in challenging the corpus' blind spots thereby building an argument against development aggression. It is also a useful place from which international consensus can gradually form. The UN may not have been intended to be a democratic institution initially[[759]](#footnote-759); however the fact that it gives indigenous peoples a space to commence their own discussions (currently in a limited manner) should provide the impetus to take this further, without jeopardising their place in the international system.

Ultimately, the dismantling of development aggression needs to signal a fresh start between indigenous peoples and states, so that true partnerships and cooperation can flourish. In doing this, FPIC and self-determination need to undergo an intangible process of *decolonisation* of thought and perception on the part of state governments.

The concluding chapter will tie up the main arguments in order to answer the primary thesis question, examine some of the implications of the chosen framework and consider potential future research considerations in law and politics.

# Chapter Six - Concluding Remarks

In setting out the concluding remarks, chapter six is divided into three sections.

Section 6.1 provides a summary of the main findings in chapters 2 to 5. Answering the sub-questions was undertaken by identifying and problematising the overarching status of free prior and informed consent. The problem was then theorised according to the terms of TWAIL to draw specific attention to the ideological tensions facing FPIC in the context of international human rights. This theorisation further paved the way for a set of solutions using 'insider-outsider' strategies.

Consolidating the above components inform an answer to the main question, which is presented in section 6.2. In general, FPIC has to be reconceptualised with a significant counter hegemonic element that specifically challenges development aggression. Otherwise it is meaningless to have a right in its current form such as article 32(2) of the UN Declaration on the Rights of Indigenous Peoples. The chapter then considers several further implications of using this framework, based on counter hegemony beyond FPIC and potential opportunities for wider 'insider-outsider' strategies. The latter of which suggests an ongoing relevance to indigenous peoples in exercising an important aspect of resistance.

Section 6.3 draws the thesis to an end with a consideration of its original contribution, and focuses on future legal and political research agendas.

## 6.1 - Summary of Chapters

Before proceeding to the main body of the conclusion, this section summarises the most salient findings of previous chapters.

***Chapter two*** highlighted the relationship between FPIC and self-determination, as a preliminary and integral consideration of this thesis. International legal recognition of indigenous peoples' right to self-determination goes further than that of non-indigenous, sub-state groups, although it is confined to autonomy or self-government,[[760]](#footnote-760) which itself is expressed in vague terms in UNDRIP. While it might be unjust to exclude external self-determination as an option[[761]](#footnote-761), there is little practicality to advocate it in the context of this thesis. FPIC is fundamentally aligned with internal self-determination, based on a common spirit of comprehensive participation in decision-making. In place of historic indigenous aspirations for secession is now a desire to maintain their unique connection with lands, in order to overcome incursions from quasi-colonial threats.

In answering the thesis' first sub-question, ***chapter three*** measured a number of conceptualisations and applications of FPIC against a set of general and specific variables. While these examples do not reflect an absolutely homogenous conceptualisation of FPIC, they all generally fail to challenge the underlying rationale of development aggression. The 'net effect' could be an unsaid presumption favouring development projects on indigenous lands, with FPIC generally perceived as a bureaucratic hurdle. However, there are notable variations between, firstly, the conceptualisation of FPIC internationally and regional human rights decisions. While UNDRIP article 32(2) and ILO Convention 169 article 6(2) fall short of offering a full and unconditional veto, the *Saramaka* and Endorois decisions of the Inter-American Court and African Commission respectively apply a test based on the impact of projects. These nonetheless do not satisfy the need for a much wider veto right. At best, they merely treat some of the symptoms of development aggression. The use of the phrase 'major impact'[[762]](#footnote-762) possibly debases indigenous peoples' struggles for control over lands and resources. The examples from the Philippines and India prima facie meet the desired conceptualisation due to the lack of limits placed on FPIC. The trouble is that in domestic jurisdictions, the conceptualisation of FPIC cannot be entirely measured according to the same standards of international and regional law. State executives and legislatures wield much greater leverage on sovereign matters. So placing these otherwise sound paper examples of FPIC[[763]](#footnote-763) in the context of domestic development agendas suggest that their overall impact may be called into question, due to government enthusiasm for mining activities, regardless of the consequences. A further 'net effect' appears to be the denial of indigenous self-determination considering these various limitations.

While Third World Approaches to International Law (TWAIL) informed the position taken in the thesis, ***chapter four*** explicitly framed the problems within these terms. This provides our enquiry with pertinent theoretical rigour from which we can critically explain the shortcomings identified in the previous chapter. TWAIL's critique of international human rights debunks the notion that they are somehow universal. When conceived in the post World War Two period, the human rights corpus gave rise to a narrow and hegemonic set of concerns. In essence, they are predominantly Eurocentric in nature despite rhetoric that they are neutral standards. Applying this framework to the thesis problem, it was ascertained that the limits placed on FPIC signified an intention of state governments to protect their development and investment interests. Ideologically, this reflects the preservation of neoliberalism at the expense of indigenous peoples' holistic relationship with lands and resources which are not simply economic assets, but the lifeblood of their physical and cultural survival. Additionally, the failure to explicitly articulate a more comprehensive right of internal self-determination to indigenous peoples may encourage continued state subordination of indigenous peoples. In identifying a theoretical prognosis, the TWAIL framework nonetheless recognises the value in continued engagement with human rights. Repositioning the practice and ideology of human rights, so that they are more closely aligned with counter hegemonic ideals, could potentially foster appropriate reforms in international law to empower oft-neglected subaltern voices. Embracing non-institutional, extralegal avenues as well as non-Eurocentric narratives on human dignity are important to this. The vehicle to drive this counter hegemonic reorientation of human rights is the practice of resistance. This is something which indigenous peoples are familiar with exercising historically and in the present day. Therefore, counter hegemonic resistance strategies need to be pursued in presenting more overtly political critiques against development aggression, in compensating for the myopic approach taken by the hegemonic human rights corpus. This includes a continued but critical commitment to the international legal system. Indigenous peoples are at a particularly distinctive advantage over non-indigenous sub-state groups in this respect, given the presence of UNDRIP[[764]](#footnote-764) and the growth of specific institutional spaces over the years in which to potentially initiate their resistance.

***Chapter five*** sought to realise FPIC through a variety of proposals, drawing on the above theoretical framework. Clearly, the hope is to gradually agree on a fresh, counter hegemonic understanding of FPIC. In order to achieve this, indigenous peoples need to target their resistance in creative ways, that could build more equitable participation within selected UN institutional spaces and pursue non-institutional priorities that could encourage engagement with non-indigenous actors. Utilising 'inside' and 'outside' forms of resistance was an attempt to capture an apt range of proposals in the context of FPIC's reconceptualisation. This included a consideration of ways that both types of strategy could work interactively, so that counter hegemonic ideas may better materialise in certain institutions. At an international level, the chapter included ways to make adjustments to the mandates of UN bodies such as the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and Human Rights Council (UNHRC). Widening the institutional spaces already available to indigenous peoples not only conveys a continued commitment to the international legal system, but also a means to challenge the UN's agenda setting priorities for indigenous peoples. An important point is that the terms of UNDRIP, with regards to FPIC and internal self-determination, are inadequate as reference points when considering the hegemonic limits built into them. In regional tribunals, creative use of *amicus curiae* briefs could help articulate grassroots insights about FPIC (through protocols). In domestic courts indigenous peoples, alongside potential coalitional partners, could seek judicial review or public interest litigation claims, in order to articulate some of the associated problems with development aggression. As a caveat, it was assessed that indigenous peoples would be best prioritising proposals with most potential to yield constructive outcomes for themselves. Discussion of more radical proposals was to give credence to TWAIL's approach to counter hegemonic resistance. This, however, was tempered with a sense of pragmatism, as advocating a more 'radical' composition of EMRIP may not be currently feasible. Outright boycotts of conferences could be counterproductive. Overall, the realisation of FPIC needs to form the basis of a new settlement between indigenous peoples and state governments. The adoption of sharper and even defiant agendas may be risky, but are essential to ensure that indigenous grievances are neither minimised nor de-radicalised according to hegemonic state interests. Raising greater consciousness about development aggression must be connected to FPIC and self-determination, thereby exposing some of the ideological limits that indigenous peoples need to overcome.

Taken together, these chapters have discussed the existing position of indigenous peoples vis-à-vis international law and where they need to be in order to ensure that a better articulation of FPIC can be recognised. Using a TWAIL framework has suggested that indigenous peoples might be in a rather ambiguous position. On one hand, their rights are subject to a number of hegemonic restrictions, but on the other, their unique place in the UN, coupled with years of resistance, imply that there is scope to achieve more in terms of FPIC. This is particularly important when confronting a very modern quasi-colonialism, in the form of imposed, aggressive development activities. The global indigenous movement has been in existence for four decades[[765]](#footnote-765) and has admittedly made major strides. But this movement need not absolutely accept all the terms of international law where injustices are still not fully rectified on the ground. In light of these observations, we now proceed to answering the thesis' main question.

## 6.2 - Addressing the Main Research Question

To recap, the primary question is as follows:

***How can Free, Prior and Informed Consent be reconceptualised with the view to dismantling development aggression?***

In tackling this question, the section is divided into two distinctive components. Firstly, reconceptualisation itself and secondly, what it means to dismantle development aggression.

### 6.2.1 - The Actual Reconceptualisation

When the purpose of a thesis is based on a reconceptualisation, the implication is to present new or alternative ways of thinking about a particular concept. In the present context, we are concerned with FPIC of indigenous peoples. Its most visible conceptualisation is found in article 32(2) of UNDRIP, a duty (not even an explicit right) for states to 'consult and cooperate in good faith with indigenous peoples concerned...in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources'.[[766]](#footnote-766) The thesis has ascertained that this existing conceptualisation constitutes something that is less than a full veto right for indigenous peoples.

With regards to the substance of FPIC the thesis has, at every stage, advocated that its reconceptualisation must accommodate an unconditional veto. This is in order to capture the widest spectrum of indigenous peoples' self-determined priorities.[[767]](#footnote-767) This is a formative condition in assigning FPIC necessary counter hegemonic qualities. In essence, FPIC is a right that becomes part of indigenous peoples' arsenals to protect and defend their customary lands and resources from external domination. This is in contrast to an almost bureaucratic version of FPIC, that may be sparingly acknowledged by state government agencies, with a general presumption in favour of approving development projects.

A TWAIL framework not only offers ways to think about enhancing the purpose of FPIC, but how counter hegemonic resistance can be applied to the way subaltern actors can engage with international institutions. The second dimension of reconceptualisation hence corresponds to ways in which this can actually be attained. This hinges on transformations to how indigenous peoples participate in different institutional settings, especially in the United Nations. What emerges is a prima facie dual mentality that promotes continued engagement and defiance of the international legal system. It is important to tap into these process-related changes to show that the global indigenous movement should not be absolutely bound by the conditions that are offered to them, but simultaneously they should not turn their back on a system that still has potential to grow and facilitate their sharpened priorities. While bodies such as EMRIP and UNHRC remain important forums for indigenous participation, using these platforms require renewed, critical engagement that helps to demystify certain blind spots of UNDRIP, so the issues surrounding FPIC's ultimate realisation are no longer evaded.

 The immediate consequences of questioning article 32(2) of the UNDRIP will not be met with universal agreement, and indeed will invariably be subject to much opposition from state governments. One way to get around this dilemma is to push for the initiation of meaningful new discussions about the ideological concerns of provisions such as articles 4 and 32(2). While it is purported that these provisions offer a type of remedial justice for indigenous peoples[[768]](#footnote-768) they impose restrictions based on a contemporary form of domination often caused by top-down development activities on ancestral lands. This has the effect of denying indigenous peoples their self-determination, within state boundaries. Therefore, raising such counter hegemonic issues above the parapet, through thematic studies for example, represents a formative component that the fight for indigenous justice. Issues that are not satisfactorily addressed at present. Even if state governments do not immediately heed such a demand, they could be steadily persuaded to make incremental legislative and constitutional amendments in development processes.

In essence the way FPIC can be reconceptualised, using TWAIL's approach of counter hegemonic resistance, engenders a hybrid of restructuring both the international substance at hand and institutional conditions. These are important in shedding new light on the needs of the global indigenous movement. Reconceptualisation should be about creating the foundations of a new understanding between indigenous peoples and state governments based on more nuanced expressions of development and how this may impact the former's human rights concerns. This should not be confused as amounting to the jettisoning of UNDRIP, but acknowledging that at least two of its key provisions were subject to considerable hegemonic limitations. Perhaps this may result in taking a somewhat more ambiguous position on UNDRIP. On one hand, we cannot be completely dismissive of its obvious merits. After all, its handling of education and media issues in article 14 to 16 and development priorities in article 23 are fairly commendable. However, the flaws in FPIC and self-determination have to be exposed as part of indigenous peoples' counter hegemonic opposition which is, in part, based on continued, critical engagement with international law.

We now move to addressing the second fundamental pillar to answering the main thesis question.

### 6.2.2 - The Implications of Dismantling Development Aggression

When we talk about FPIC as a counter hegemonic human right, it needs to represent a vital component in indigenous peoples' legal weaponry to protect their lands and resources. Attached to this is the main objective of the thesis: dismantling development aggression. Literally speaking, this is about taking apart an idea or structure. With regards to development aggression, we are referring to a set of practices and policies concentrated on a narrow set of views of development, commonly imposed on local populations. Using the noun 'aggression' symbolises the coercive manner and corrosive impacts of extractive projects that are implemented with a paucity of concern for the spiritual costs, as well as subsequent displacement of human life.[[769]](#footnote-769) The imposed nature of these kinds of policies and practices effectively work counter to indigenous self-determination.

The contribution of the approach considered by this thesis ought be better understood for its potential psychosocial aspects than the literal abandonment of the practices and policies associated with development aggression, for which approaches beyond human rights would need to be discussed. Hence dismantling development aggression may go hand-in-hand with ways to build engagement legitimacy, as examined in chapter five, when considering the use of media and education. By forcefully presenting non-indigenous actors with non-Eurocentric narratives, progress could be eventually made in understanding the hidden costs of development projects. Hegemony is, after all, maintained by the consent of civil society[[770]](#footnote-770) (whether directly or indirectly), so thinking about the use of media and education spaces to remould perceptions could offer alternative expressions to predominantly neoliberal interpretations of development, which are primarily focused on its benefits.

With regards to counter hegemony in human rights, one hope is to instil a new consensus among state governments. The psychosocial aspect of this consensus could ideally pave the way for future UN resolutions which display a cognisance towards the harmful effects of development aggression. Hence the spectre of human rights violations (including violence[[771]](#footnote-771)) perpetuated by policies attributable to a state-corporate nexus are understood and condemned. Overall, dismantling development aggression must start from openly discussing the need to reset understandings about the merits of unabated development and how neoliberal policies promote human rights violations. This is an area that has been treated too myopically by the universal human rights corpus.

In terms of what this dismantled development aggression may look like as an overall outcome, it is important to note that the reality could be far more diverse and nuanced than meets the eye. It does not, therefore, spell the end of all industrial development. Despite the need to confront hegemonic ideologies and practices, counter hegemony does not always stand in absolute, diametric opposition to every prevailing idea in the world.[[772]](#footnote-772) In actuality, the outcome of many counter hegemonic projects may amount to the reshaping of hegemonic practices[[773]](#footnote-773) to deliver greater justice. When considering the traditional Gramscian position, counter hegemony is commonly about 'renovating and making "critical" an already existing activity.'[[774]](#footnote-774) In this instance, it is the rejection and condemnation of an approach to development that gives excessive deference to the standpoint of transnational corporations, where promises of inward investment and job creation[[775]](#footnote-775) trumps any other concern.[[776]](#footnote-776)

As explained in chapter one, indigenous peoples strategically essentialised their identity as a way of participating in international institutions.[[777]](#footnote-777) But when they disaggregate back into their individual communities, it is their particular world views that shape what may happen nationally. At this stage, it is important to recall that indigenous perspectives on development are not monolithic. This may be reflected in article 23 of UNDRIP which gives indigenous peoples the right to 'determine and develop priorities and strategies for exercising their right to development.'[[778]](#footnote-778) Coupled with a reconceptualised right to FPIC, indigenous peoples could exercise much greater control over their own interests. Article 23 does not adopt a single indigenous world view. It is important to note that indigenous world views are not always '"preordained"'[[779]](#footnote-779). So while indigenous peoples' affinity to preserving lands remains a pre-eminent feature of an overall collective identity,[[780]](#footnote-780) this should not suggest that they merely exist as 'living museums of peoples'.[[781]](#footnote-781) As indigenous cultures change[[782]](#footnote-782), this may be accompanied by increased influences from non-indigenous ways of life. The Saami of Northern Europe are one such indigenous peoples who have harnessed modern technology in aiding their changing cultural and economic practices. Snowmobiles are used for traditional occupations such as reindeer herding, for example. The Saami have also moved into non-traditional sectors such as tourism, relying on means of transport such as trucks and helicopters to facilitate operating their own businesses.[[783]](#footnote-783)

With regards to extractive mining, it is stated by James Anaya that where business models are compatible with indigenous world views, projects may be approved in certain circumstances. More appropriate business arrangements such as favouring indigenous-owned mining operations[[784]](#footnote-784) or workers' cooperatives bidding for resource concessions could be implemented. This resonates with the view of Stella Tamang, an indigenous advocate and writer from Nepal, who underlines that indigenous peoples are often wrongly 'accused of being anti-development', when the reality is that they simply want to have a say and participate on equal terms.[[785]](#footnote-785) Of course in other instances, we must not lose sight of the fact that an unconditional veto in FPIC will still be a preference for many other indigenous peoples. This has to be decisive and respected by states and private companies. These considerations are just some of the possible outcomes that could be yielded by a reconceptualised right to FPIC. They are in line with indigenous peoples' contemporary self-determination priorities based on remaining within existing states, but pursuing a destiny that can distinguish them from non-indigenous sections of society.

Essentially, reconceptualising FPIC should start from a position that fosters a fresh perspective on indigenous peoples' rights. The practical and psychosocial elements needed to meet this challenge have to transcend merely treating the symptoms of development aggression, but to explicitly recognise it as a fundamental human rights violation and an affront to indigenous self-determination. The dismantlement of development aggression is not necessarily the polar opposite of development as a whole, but should be seen as an opportunity to explore creative and culturally sensitive ideas on what constitutes progress.

### 6.2.3 - Further Implications of Using the Framework

Answering the main question should be complemented with some of the wider potential implications that could arise. The use of a counter hegemonic resistance framework as well as 'insider-outsider' strategies provided the thesis with an ambitious theorisation and set of solutions. Framing it in the context of TWAIL is particularly unique, as it is a perspective that commonly goes against many mainstream interpretations of international law. This subsection explores the wider connotations of counter hegemony in policy terms as well as additional ways indigenous peoples may wish to exercise 'insider-outsider' strategies.

*A - A Wider Perspective on Counter Hegemony*

The framework used offers important insights on human rights by emphasising an international system that behaves like a '"civilizing mission"'[[786]](#footnote-786) towards the world's most vulnerable groups. This resonates with the preservation of practices (surreptitiously or otherwise) such as development aggression. A significant layer of discussion relates to a particular consideration of one of the research methods applied to the thesis. The model of reconceptualisation suggested is hypothetical, but the adoption of such a critical research method (if we think of TWAIL as a critical in character) offers a useful point here. Fundamentally, we as researchers need to demonstrate 'a commitment to democratic and egalitarian values...in the creation of a more just society.'[[787]](#footnote-787) In this respect, an overriding point is that uncomfortable questions concerning FPIC and development aggression demand alternative narratives. A greater fight for justice chimes with an argument by Richard Falk that:

A decisive test of humane governance is the treatment accorded to those people who have suffered most in the past, as targets of genocide and ethnocide or objects of neglect and contempt. For this reason, in part, the fate of indigenous peoples are...a special concern. All major civilizations have in common the taint of severe abuse toward indigenous peoples.[[788]](#footnote-788)

A resistance movement based on improving the content of FPIC needs to commence from somewhere, just as existing counter hegemonic movements on unilateral nuclear disarmament[[789]](#footnote-789) or intellectual calls for global wealth taxes in addressing income inequality[[790]](#footnote-790) were initiated. Such counter hegemonic narratives serve as heuristic starting points in encouraging other people to acquire knowledge about these ideas. We may, after all, look at how certain government policies began life as grassroots labour struggles only to be internalised, such as the adoption of minimum wage legislation in a number of industrialised countries.

The point about renewed agenda setting is also vital if there is an opportunity for international institutions to at least begin critiquing hegemonic ideas. For example, a recent study of the International Monetary Fund went as far as admitting that neoliberalism has accelerated global inequalities.[[791]](#footnote-791) This may amount to very little in terms of immediate concrete transformations, but symbolically it represents a vindication of the many counter hegemonic critiques of neoliberalism. While the challenges surrounding FPIC are much more specific, this perhaps reminds us about the importance of promoting counter hegemonic resistance using more critical agendas to draw attention to the ideological blind spots of existing institutional activities. Change may not happen overnight, but persistent targeting of the rationale that hinders a better conceptualisation of FPIC may accommodate incremental improvements. As public and political perceptions gradually become more informed, FPIC could start being interpreted as amounting to at least a mandatory process of consensus building. While this would still be less than an absolute veto, it could serve as a transitional step towards recognising the importance of safeguarding indigenous peoples' lands. It could also shed light on the fact that development interpreted by states and mining companies are usually not compatible with indigenous perspectives.

*B - Other Opportunities for Using 'Insider-Outsider' Strategies*

Taking this discussion further, there may be future opportunities that could suitably find a place in the TWAIL framework in order to make FPIC a reality. For instance there are emerging niche areas which need to be explored more fully, in convincing states to act on indigenous grievances. In this case, we could once more turn to 'insider-outsider' strategies in further providing resistance with a multidimensional character. In terms of 'outsider' strategies, one such area could be to forge closer links with business actors, where possible. According to some TWAIL scholars, this suggests that the framework itself possess pragmatic qualities, particularly in not closing the door on the global economy. This engenders an opportunity to build a particularly pronounced strategic coalition.[[792]](#footnote-792) In the words of Bhupinder Chimni, a counter hegemonic approach to international law '*would not exclude reliance on market institutions*'[[793]](#footnote-793). With respect to FPIC, there could be scope to convince governments to review their own position on the right. A small but growing number of mining companies are gradually moving towards a view that takes engagement with indigenous peoples increasingly seriously. For example, a spokesperson for BHP Billiton highlights that although governments may adopt strategies in favour of extractive mining, the 'company would be unlikely to proceed in the face of widespread opposition from indigenous landowners.'[[794]](#footnote-794) In Canada, industry figures such as Dave Porter, CEO of the BC First Nations Energy and Mining Council acknowledge that failure to work alongside indigenous communities and obtain their explicit consent to an extractive mining project will realistically result in its failure to take effect.[[795]](#footnote-795) These are ideas that need to be seized upon by indigenous peoples and taken up seriously with mining firms, particularly where governments are unwilling to pay attention to their rights.

In extending 'insider' strategies, indigenous peoples remain committed to certain aspects of the UN. Beyond human rights practice, indigenous peoples are involved in other policy areas, notably in the field of sustainable development. For instance, the UN's 2030 Agenda agreed on last year is built on the adoption of 17 Sustainable Development Goals and 169 targets, for member states to meet in the coming 15 years.[[796]](#footnote-796) Their objectives are based on 'the three dimensions of sustainable development: the economic, social and environmental'[[797]](#footnote-797) in ensuring that 'no one will be left behind.'[[798]](#footnote-798) Indigenous participants recently sought to commit themselves to these Sustainable Development Goals. As part of the 15th annual session of the Permanent Forum on Indigenous Issues, there was a desire to engage with the 2030 Agenda. This is in spite of the great levels of poverty continuing to face indigenous peoples, and a view that the predecessor Millennium Development Goals did not assist in their development needs.[[799]](#footnote-799) In the Permanent Forum, it was stressed that engagement with the Sustainable Development Goals require a precise focus on indigenous-centred progress. This included ideas such as the gathering of 'disaggregated data on indigenous peoples'[[800]](#footnote-800) as well as formulating 'indigenous-specific indicators for parallel efforts...to measure progress in indigenous peoples' own development priorities.'[[801]](#footnote-801) Adding to these, a novel idea could be to use non-Eurocentric, non-neoliberal measurements that transcend individualised, market-based notions of progress, sustainable or otherwise.[[802]](#footnote-802)

Such considerations could offer further legitimacy and productive succour to indigenous peoples' overall resistance to development aggression.

## 6.3 - Original Contribution and Future Research Considerations in Law and Politics

The main contribution of this thesis lies in the interface between a reconceptualised right of FPIC and TWAIL's perspective on counter hegemonic resistance. This interface may offer mutual benefits, either way. Firstly focusing on TWAIL perspectives to counter hegemonic resistance provides indigenous peoples with an important theoretical grounding to target some of the underlying sources of power that uphold development aggression. This framework reminds us about the importance of reconnecting FPIC with the bottom-up roots of human rights.[[803]](#footnote-803) This includes the significance of extralegal elements in fighting for greater recognition in a hegemonic corpus that nonetheless offers room for counter hegemonic expressions of human rights. In the process, this could sometimes require adopting an ambiguous approach to mainstream human rights, in order to discern between areas of human rights that could benefit indigenous peoples and those areas which perpetuate hegemonic state interests. This aspect of the interface contributes an idea that FPIC needs to be thought of in radical terms, when addressing the systemic and entrenched policies and practices of development aggression. It is important to take this step, in moving away from overly top-down, technocratic parlance with which FPIC has become too commonly associated.[[804]](#footnote-804)

In return, the problem of FPIC's conceptualisation combined with the thesis' proposed strategies and indigenous peoples' position in international law, could help bridge a particular gap. It was explained in chapter four that TWAIL lacks concrete examples of how their perspectives might work in practice. Placing a counter hegemonic resistance framework around FPIC offers a visible example that suggests how TWAIL ideas could materialise in practical terms. Within this is a consideration of radicalism combined with pragmatism in international, regional and domestic circles. This could also help overcome the neglect TWAIL perspectives have generally suffered from within mainstream international legal circles.[[805]](#footnote-805)

With regards to the thesis' implications for research in the future, they could act as a starting point for two different types of FPIC-related studies. For instance, legal research on FPIC more generally could be explicitly extended to the field of conservation within National Parks and nature reserves. On the face of it, conservation is often seen as an inherently virtuous practice, due to its commitment to preserving the natural environment. However, indigenous advocacy groups and NGOs have actually warned about how conservation, in practice, has very similar impacts on indigenous peoples to extractive mining. This is a form of land grabbing that not only leaves indigenous peoples dispossessed of their lands[[806]](#footnote-806), but within certain countries conservation practices often have colonial origins.[[807]](#footnote-807) It would be appropriate to challenge such issues which may fall out of the traditional remit of development aggression, by persuading policymakers that free, prior and informed consent should be extended to this area in safeguarding indigenous peoples from such threats.

Using the counter hegemonic resistance framework more explicitly, a very timely area of concern that deserves greater research is that of transnational and/or regional free trade agreements. This represents another major frontier for indigenous peoples' resistance, as it risks exacerbating development aggression. A current area of political controversy relates to the proposed Trans Pacific Partnership (TPP) agreement between the United States, Canada and a number of Pacific Rim states.[[808]](#footnote-808) There exists a layer of discussion that needs addressing more coherently, and utilising ideas about FPIC and the counter hegemonic resistance framework. The clandestine nature of the way free trade agreements are negotiated[[809]](#footnote-809) often gives rise to a number of concerns such as the rights offered to corporations which make suing governments easier, the effects of which could directly affect taxpayers[[810]](#footnote-810). We as researchers interested in indigenous rights in the contemporary world could extend our work here, by studying the potentially disastrous consequences for indigenous peoples. The nature of such agreements could encourage corporate actors to run roughshod over already poorly conceptualised indigenous rights. Granting of more privileges to private companies risks undermining even these rights,[[811]](#footnote-811) thereby creating greater disparities in power. In terms of research considerations, TWAIL's counter hegemonic resistance framework could engender advocacy for the creation of exception clauses within such agreements. Normally this could mean that indigenous lands are exempted from any potential lawsuits.[[812]](#footnote-812) Alternatively, in pushing for a sharper resistance agenda, we could revisit the opportunities for indigenous peoples to work alongside wider social movements or coalitional partners. In the context of trade agreements, there exists vocal grassroots movements opposing TPP in varying degrees. These stem from trade unions critical of the risks to workers' rights and environmentalists concerned about the prospect of environmental standards being minimised.[[813]](#footnote-813) This 'big tent' of social movements could allow indigenous peoples to convey their own counter hegemonic response, a part of which would invariably relate to the right to free, prior and informed consent. A TWAIL framework could therefore be versatile enough to be applied to the debates surrounding free trade agreements.

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131. A distinction is explained in clear, general terms in *Reference Re Secession of Quebec* [1998] 2 SCR 217, para 126 [↑](#footnote-ref-131)
132. McCorquodale (n 31) 864; P Thornberry, 'The Democratic or Internal Aspect of Self-determination with Some Remarks on Federalism' in C Tomuschat (ed), *Modern Law of Self-determination* (Martinus Nijhoff 1993) 101; see also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, p 420. Separate opinion of Judge Yusef, para 9 [↑](#footnote-ref-132)
133. See generally: Statement by the United Kingdom Representative to Third Committee of the General Assembly (12 October 1984), reprinted in (1984) 55 BYIL 432 [↑](#footnote-ref-133)
134. UN General Assembly, *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called under Article 73e of the Charter*, Resolution 1541 (XV) (15 December 1960) Principle VI; reaffirmed in UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, A/RES/25/2625 (24 October 1970) [↑](#footnote-ref-134)
135. *Western Sahara* (n 22) para 57 [↑](#footnote-ref-135)
136. UN General Assembly, *Universal realization of the right of peoples to self-determination*, A/RES/44/80 (8 December 1989) [↑](#footnote-ref-136)
137. Hannum (n 34) 34; McCorquodale (n 31) 883 [↑](#footnote-ref-137)
138. Cassese (n 5) 119-120 [↑](#footnote-ref-138)
139. ibid 119- 120 [↑](#footnote-ref-139)
140. See generally for a possible criteria to invoke remedial secession: C Ryngaert and C Griffioen, ‘The Relevance of the Right to Self-determination in the Kosovo Matter: In Partial Response to the Agora Papers’ (2009) 8(3) Chinese JIL 573, 576 [↑](#footnote-ref-140)
141. *Kosovo* (n 40) separate opinion of Judge Trindade, para 208 [↑](#footnote-ref-141)
142. Friendly Relations Declaration (n 42) para 1 (emphasis added) [↑](#footnote-ref-142)
143. *Kosovo* (n 40) separate opinion of Judge Yusuf, para 11 [↑](#footnote-ref-143)
144. ibid para 12 [↑](#footnote-ref-144)
145. ibid [↑](#footnote-ref-145)
146. S J Anaya, *Indigenous Peoples In International Law* (2nd edition, Oxford University Press 2004) 100 [↑](#footnote-ref-146)
147. UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, A/RES/47/135 (18 December 1992) [↑](#footnote-ref-147)
148. Council of Europe, *Framework Convention for the Protection of National Minorities*, ETS 157 (1 February 1995) [↑](#footnote-ref-148)
149. M Barelli, 'Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?' (2011) 13 ICLR 413, 415 [↑](#footnote-ref-149)
150. It 'seems natural and obvious' to confer internal self-determination upon sub-state groups, as per W Kymlicka, 'Beyond the Indigenous/Minority Dichotomy?' in S Allen and A Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 192; See generally *Re Secession of Quebec* (n 39); *Katangese* *Peoples' Congress v Zaire, African Commission on Human and Peoples' Rights*, Comm No 75/92 (1995) para 6 [↑](#footnote-ref-150)
151. An intervention by Lichtenstein can be found in UN Doc A/C.3/48/L.17; In the Council of Europe, there was a recommendation to extend a degree of autonomy for sub-state groups such as minorities. Council of Europe Parliamentary Assembly, *Additional protocol on the rights of minorities to the European Convention on Human Rights*, Recommendation 1201 (1993) art 11 [↑](#footnote-ref-151)
152. Kymlicka (n 58) 195 [↑](#footnote-ref-152)
153. J Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law' (2006) 28(1) HRQ 186, 203 [↑](#footnote-ref-153)
154. ibid [↑](#footnote-ref-154)
155. R Morgan, 'On Political Institutions and Social Movement Dynamics: The Case of the United Nations and the Global Indigenous Movement' (2007) 28(3) Int Polit Sci Rev 273, 282-283 [↑](#footnote-ref-155)
156. E/CN.4/2001/85, para 104 [↑](#footnote-ref-156)
157. E/CN.4/1999/82, para 20 [↑](#footnote-ref-157)
158. K Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22(1) EJIL 141, 151-152 [↑](#footnote-ref-158)
159. General Assembly of the World Council of Indigenous Peoples, *World Council on Indigenous Peoples Declaration of Principles* (1984) principle 2 [↑](#footnote-ref-159)
160. UN Economic and Social Council, *Study of the Problem of Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations on its first session*, E/CN.4/Sub.2/1982/33 (25 August 1982) para 72 [↑](#footnote-ref-160)
161. A Eide, 'Rights of Indigenous Peoples - Achievements in International Law during the last Quarter of a Century' (2006) 37 NYIL 155, 199 [↑](#footnote-ref-161)
162. Morgan (n 63) 283 [↑](#footnote-ref-162)
163. For example, the Inuit lawyer Dalee Sambo argues that 'the political, demographic and economic realities do not point to political independence as a viable option for the vast majority of indigenous peoples.' D Sambo, 'Indigenous Peoples and the Right to Self-Determination: The Need for Equality: An Indigenous Perspective' Paper presented at the Rights and Democracy International Seminar on the Right to Self-Determination of Indigenous Peoples (New York, 2003) 47 [↑](#footnote-ref-163)
164. D Sanders, 'The UN Working Group on Indigenous Populations' (1989) 11 HRQ 406, 429; UN Doc E/CN.4/2004/81, para 73 [↑](#footnote-ref-164)
165. UN Economic and Social Council, *Indigenous peoples' permanent sovereignty over natural resources: Final Report of the Special Rapporteur, Erica-Irene A Daes*, E/CN.4/Sub.2/2004/30 (13 July 2004) para 17 [↑](#footnote-ref-165)
166. UN Doc E/CN.4/1997/102, para 203 [↑](#footnote-ref-166)
167. Xanthaki (n 5) 168 [↑](#footnote-ref-167)
168. C M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent* (Routledge 2015)125 [↑](#footnote-ref-168)
169. F Harhoff, 'Constitutional and International Legal Aspects of Aboriginal Rights' (1988) 57(3) Nordic JIL 289, 294 [↑](#footnote-ref-169)
170. B Kingsbury, 'Self-Determination and Indigenous Peoples' (1992) 86 ASIL Proceedings 383, 393 [↑](#footnote-ref-170)
171. S J Anaya, 'A Contemporary Definition of the International Norm of Self-Determination' (1993) 3 Transnat'l L & Contemp Probs 131, 163 [↑](#footnote-ref-171)
172. Engle (n 66) 147; R L Barsh, 'Indigenous Peoples: An Emerging Object of International Law' (1986) 80(2) AJIL 369, 376 [↑](#footnote-ref-172)
173. International Law Association, *The Hague Conference (2010): Rights of Indigenous Peoples*, 10; Anaya (n 3) 188 [↑](#footnote-ref-173)
174. UN ESCOR, 137 UN Doc E/CN.4/Sub.2/ 404, (vol 1) para 279 [↑](#footnote-ref-174)
175. Xanthaki (n 5) 136 [↑](#footnote-ref-175)
176. *Working Group on Indigenous Populations, 1st session* (n 68) para 82 [↑](#footnote-ref-176)
177. J Castellino and J Gilbert, ‘Self-Determination, Indigenous Peoples and Minorities’ (2003) 3 *Mq Law Jl* 155,174 [↑](#footnote-ref-177)
178. B Maiguashca, *The Role of Ideas in a Changing World Order: The International Indigenous Movement. 1975-1990* (CERLAC Occasional Paper Series, June 1994) 42 [↑](#footnote-ref-178)
179. ibid [↑](#footnote-ref-179)
180. United Nations General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, Resolution 1514 (XV) (14 December 1960) [↑](#footnote-ref-180)
181. Xanthaki (n 5) 149; Indigenous "nationhood" was clearly articulated in point 1 of the Working Group on Indigenous Populations' 1977 Draft Declaration of Principles. Reproduced in R Dunbar-Ortiz, *Indians of the Americas: Human Rights and Self-Determination* (Zed Books 1984) 31-32 [↑](#footnote-ref-181)
182. B Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' in Alston (ed) (n 4) 100-102 [↑](#footnote-ref-182)
183. UN Commission on Human Rights, *Discrimination against Indigenous Peoples: Report of the Working Group on Indigenous Populations on its Eleventh Session*, E/CN.4/Sub.2/1993/29/Annex I (23 August 1993) [↑](#footnote-ref-183)
184. Doyle (n 76) 108 [↑](#footnote-ref-184)
185. ibid 109 [↑](#footnote-ref-185)
186. ibid 109-110 [↑](#footnote-ref-186)
187. UNDRIP art 3 [↑](#footnote-ref-187)
188. S Allen, 'The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project' in Allen and Xanthaki (eds) (n 58) 227-228 [↑](#footnote-ref-188)
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193. UNDRIP art 4 [↑](#footnote-ref-193)
194. Barelli (n 57) 420 [↑](#footnote-ref-194)
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197. C White Face, *Indigenous Nations' Rights in the Balance: An Analysis of the Declaration on the Rights of Indigenous Peoples* (Amazon Kindle Edition, Living Justice Press 2013); HUmanity Uniting, 'UNDRIP: A Scholarly Analysis and Discussion' (Blog Talk Radio, 13 November 2013) <http://hosts.blogtalkradio.com/humanity-uniting/2013/11/13/undrip-a-scholarly-analysis-and-discussion> accessed 21 December 2015 [↑](#footnote-ref-197)
198. UNDRIP art 46(1) [↑](#footnote-ref-198)
199. I Watson and S Venne, 'Talking up Indigenous Peoples' original Intent in a space dominated by state interventions' in E Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press 2012) 99 [↑](#footnote-ref-199)
200. H Quane, 'The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?' in Allen and Xanthaki (eds) (n 58) 267 [↑](#footnote-ref-200)
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202. Barelli (n 57) 419 [↑](#footnote-ref-202)
203. Watson and Venne (n 107) 88 [↑](#footnote-ref-203)
204. L Swepston, 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention no 169 of 1989' (1990) 15(3) Okla City U L Rev 677, 713 [↑](#footnote-ref-204)
205. W Churchill, 'A Travesty of a Mockery of a Sham: Colonialism as "Self-Determination" in the UN Declaration on the Rights of Indigenous Peoples' (2011) 20(3) Griffith L Rev 526, 527 [↑](#footnote-ref-205)
206. Barelli (n 57) 422; Kymlicka (n 58) 195 [↑](#footnote-ref-206)
207. Kymlicka ibid [↑](#footnote-ref-207)
208. See generally: Barelli (n 57) 426; This is also referred to as *carence de souveraineté*, 'in distinct territories suffering massive human rights violations orchestrated by governing authorities based elsewhere in the state.' B Kingsbury, 'Reconstructing Self-Determination: A Relational Approach' in P Aikio and M Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Åbo Akademi University Institute for Human Rights 2000) 24; In terms of UNDRIP, article 46(1) places a duty on states to adhere to the principles of equal rights and self-determination, ensuring that they act as fully representative government of all peoples. This may be read in conjunction with a Preambular paragraph which outlines that provisions in the Declaration cannot be used to deny peoples their self-determination, as 'exercised in conformity with international law'. [↑](#footnote-ref-208)
209. This idea is illuminated by Ted Moses, in a statement on behalf of the North American Indigenous Caucus: 'The International Covenants state that "all peoples" have the right of self-determination. ...These International Covenants were drafted to protect peoples, all peoples, without exception. There is no provision whereby these protections may be applied selectively to certain peoples and denied to other peoples.' Found at: Grand Council of the Crees, 'Ted Moses Speaks to the World Conference on Human Rights, Vienna: Statement by Ambassador Ted Moses on behalf of the indigenous peoples of the North American Region to the World Conference on Human Rights, Vienna, June 14-25, 1993' <http://www.gcc.ca/archive/article.php?id=69> accessed 17 April 2016 [↑](#footnote-ref-209)
210. Barelli (n 57) 418 [↑](#footnote-ref-210)
211. Anaya (n 3) 188 [↑](#footnote-ref-211)
212. Doyle (n 76) 5 [↑](#footnote-ref-212)
213. T Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law (2011) 10 Nw U J Int'l Hum Rts 54, 55 [↑](#footnote-ref-213)
214. B Clavero, 'The Indigenous Rights of Participation and International Development Policies' (2005) 22(1) Ariz J Int'l & Comp L 41, 42 [↑](#footnote-ref-214)
215. ibid [↑](#footnote-ref-215)
216. C E Foster, 'Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples' (2001) 12(1) EJIL 141, 148, 151, 153-154 [↑](#footnote-ref-216)
217. M E Turpel, 'Indigenous People's Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition' (1992) 25(3) Cornell Int'l LJ 579, 593 [↑](#footnote-ref-217)
218. J Gilbert and C Doyle, 'A New Dawn over the Land: Shedding Light on Collective Ownership and Consent' in Allen and Xanthaki (eds) (n 58) 312; See also: UN Human Rights Council, 'Progress report on the study on indigenous peoples and the right to participate in decision-making. Report of the Expert Mechanism on the Rights of Indigenous Peoples', UN Doc A/HRC/EMPRIP/2010/2 (17 May 2010) para 34; Permanent Forum on Indigenous Issues, 'Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent, and Indigenous Peoples' (17-19 January 2005) UN Doc E/C.19/2005/3, para 41; P Tamang, 'An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices', PFII Workshop on FPIC, UN Doc PFII/2004.WS.2/8 (2005) [↑](#footnote-ref-218)
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220. UN Commission on Human Rights, *Standard-Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent* E/CN.4/Sub.2/AC.4/2005/WP.1 (14 July 2005) para 10; Indigenous peoples in the contemporary context may arguably be subject to conditions of quasi or neo-colonialism in relation to the states in which their ancestral lands or pre-colonial nations are located. [↑](#footnote-ref-220)
221. *Western Sahara* (n 22) [↑](#footnote-ref-221)
222. C Doyle and J Cariño, *Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector* (Indigenous Peoples Links, Middlesex University School of Law, The Ecumenical Council for Corporate Responsibility 2013) <www.piplinks.org/makingfpicareality> accessed 20 October 2015, 11 [↑](#footnote-ref-222)
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224. Doyle and Cariño (n 130) 3 [↑](#footnote-ref-224)
225. Doyle (n 76) 168 [↑](#footnote-ref-225)
226. Maiguashca (n 86) [↑](#footnote-ref-226)
227. Kingsbury (n 90) 92 ; Anaya (n 54) 104 [↑](#footnote-ref-227)
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270. See: H Quane, 'The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?' in Allen and Xanthaki (eds) (n 1) 267 [↑](#footnote-ref-270)
271. Development undertaken using the vague terms of national or public interests often mask extraneous factors such as favourable tax incentives for mining companies, as well as its huge knock-on effects on other sectors such as tourism, fishing and agriculture. In fact, the overall benefits of development activities framed in terms of public interests have also been called into question, notably in developing countries. C M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent* (Routledge 2015) 168-172; D Beyleveld and R Brownsword, *Consent in the Law* (Hart Publishing 2007) 272, in reference to R Brownsword (ed) *Law and the Public Interest* (Franz Steiner 1993); J D Sachs and A M Warner, 'The Curse of Natural Resources' (2001) 45 Eur Econ Rev 827 [↑](#footnote-ref-271)
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277. ibid [↑](#footnote-ref-277)
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482. K Benda-Beckmann and F von Benda-Beckmann, ‘Residence in a Minangkabau Nagari’(1978) 6(15) *Indonesia Circle. School of Oriental and African Studies Newsletter* 6, 6 [↑](#footnote-ref-482)
483. P R Sanday, ‘Matriarchal Values and World Peace: The Case of the Minangkabau’ (Societies of Peace, 2nd World Congress on Matriarchal Studies) <<http://www.second-congress-matriarchal-studies.com/sanday.html>> accessed on 8 January 2016 [↑](#footnote-ref-483)
484. J V Fenelon and T D Hall, 'Revitalization and Indigenous Resistance to Globalization and Neoliberalism' (2008) 51(12) Am Behav Sci 1867, 1879 [↑](#footnote-ref-484)
485. ibid 1876 [↑](#footnote-ref-485)
486. J Rouse, 'Power/Knowledge' in G Gutting (ed), *The Cambridge Companion to Foucault* (Cambridge University Press 2005) 103-104 [↑](#footnote-ref-486)
487. Rajagopal (n 42) 194 [↑](#footnote-ref-487)
488. ibid 195 [↑](#footnote-ref-488)
489. Baxi (n 40) 163 [↑](#footnote-ref-489)
490. Sunter (n 4) 488 [↑](#footnote-ref-490)
491. G Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Martinus Nijhoff 2009) 113 [↑](#footnote-ref-491)
492. *Saramaka People v Suriname*, para 134; *CEMIRIDE v Kenya*, para 291 [↑](#footnote-ref-492)
493. Ngugi (n 11) 106; Sandra Lightfoot argues that there exists an overemphasis on so-called "soft" rights such as cultural or linguistic entitlements. Focusing on these particular indigenous rights allows bodies such as the Human Rights Committee to avoid addressing "hard" rights which centre on land and self-determination claims. They are perceived as threatening to 'the liberal framework and the sovereignty status quo'. S R Lightfoot, 'Emerging International Indigenous Rights Norms and "Over-Compliance" in New Zealand and Canada' (2010) 62 Polit Sci 84, 104 [↑](#footnote-ref-493)
494. Ngugi ibid [↑](#footnote-ref-494)
495. ibid [↑](#footnote-ref-495)
496. Rajagopal (n 42) [↑](#footnote-ref-496)
497. ibid [↑](#footnote-ref-497)
498. UN General Assembly, *Declaration on the Right to Development*, Resolution 41/128 (4 December 1986); UN General Assembly, *United Nations Millennium Declaration*, GA Res 55/2, UN Doc A/RES/55/2 (18 September 2000) [↑](#footnote-ref-498)
499. E.g. D Vinding (ed), *Indigenous Peoples and the Millennium Development Goals: Perspectives from Communities in Bolivia, Cambodia, Cameroon, Guatemala and Nepal* (International Labour Organization 2006) [↑](#footnote-ref-499)
500. J Anaya, ‘International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State’ (2004) 21(1) Ariz J Int'l & Comp L 13, 15 [↑](#footnote-ref-500)
501. If anything, it could be argued that the agenda of the post-war universal human rights systems has parallels with "Rawlsian liberalism" in which his Two Principles of Justice are 'arranged in a serial order with the first principle prior to the second. This ordering means that a departure from the institutions of equal liberty required by the first principle cannot be justified by, or compensated for, by greater social and economic advantages. The distribution of wealth and income, and the hierarchies of authority, must be consistent with both the liberties of equal citizenship and equality of opportunity.' J Rawls, *A Theory of Justice* (Oxford University Press 1973) 61 [↑](#footnote-ref-501)
502. Falk (n 19) 29 [↑](#footnote-ref-502)
503. T H Cohn, *Global Political Economy: Theory and Practice* (Longman 2004) 131 [↑](#footnote-ref-503)
504. R W Cox, 'Gramsci, hegemony and international relations: An essay in method' S Gill (ed), *Gramsci, Historical Materialism and International Relations* (Cambridge University Press, 1993) 49-66 [↑](#footnote-ref-504)
505. Chimni (n 39) 19 [↑](#footnote-ref-505)
506. Mutua and Anghie (n 3) 37 [↑](#footnote-ref-506)
507. R Buchanan, 'Writing Resistance Into International Law' (2008) 10 ICLR 445, 448 [↑](#footnote-ref-507)
508. Mutua and Anghie (n 3) 37 [↑](#footnote-ref-508)
509. D Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5(3) Soc Leg Stud 337, 348-359 [↑](#footnote-ref-509)
510. Anghie and Chimni (n 15) 79 [↑](#footnote-ref-510)
511. S Kothari, 'Damming the Narmada and the Politics of Development' in W F Fisher (ed), *Toward Sustainable Development? Struggling over India's Narmada River* (M E Sharpe 1995) 448 (emphasis added) [↑](#footnote-ref-511)
512. Fenelon and Hall (n 65) 1872 [↑](#footnote-ref-512)
513. S Sargent and G Melling, 'Indigenous Self-Determination: The Root of State Resistance' (2012) 24(1) Denning L J 117, 117-118 [↑](#footnote-ref-513)
514. For example, the recognition of cultural integrity in a number of communications before the UN Human Rights Committee. See generally *Länsman et al v Finland*, Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 (1994) [↑](#footnote-ref-514)
515. A position which is now increasingly taken up by internal self-determination. FPIC is closely connected to this, as discussed previously. [↑](#footnote-ref-515)
516. H Hannum, 'Rethinking Self-Determination' (1993-1994) 34 Va J Int'l L 1, 68 [↑](#footnote-ref-516)
517. ibid [↑](#footnote-ref-517)
518. R Stavenhagen, 'Self-Determination: Right or Demon?' in D Clark and R Williamson (eds), *Self-Determination: International Perspectives* (Macmillan Press 1996) 12 (emphasis added) [↑](#footnote-ref-518)
519. As seen by the initiatives taken by the Kitchenuhmaykooshib Inninuwug First Nation in Canada. D Peerla, *No Means No* (Cognitariat Publishing 2012) [↑](#footnote-ref-519)
520. D Otto, 'Rethinking the "Universality" of Human Rights Law' (1997-1998) 29(1) Colum Hum Rts L Rev 1, 43 [↑](#footnote-ref-520)
521. Chimni (n 39) 19 [↑](#footnote-ref-521)
522. ibid [↑](#footnote-ref-522)
523. ibid [↑](#footnote-ref-523)
524. Rajagopal (n 18) 418 [↑](#footnote-ref-524)
525. ibid 429 [↑](#footnote-ref-525)
526. Chimni (n 39) 20-22; 25 [↑](#footnote-ref-526)
527. Rajagopal (n 18) 432 [↑](#footnote-ref-527)
528. L Eslava and S Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3(1) Trade L & Dev 103, 110 [↑](#footnote-ref-528)
529. ibid 111 [↑](#footnote-ref-529)
530. ibid 114 [↑](#footnote-ref-530)
531. ibid [↑](#footnote-ref-531)
532. ibid [↑](#footnote-ref-532)
533. M Hardt and A Negri, ‘What the Protesters in Genoa Want’ (The New York Times, 20 July 2001) [↑](#footnote-ref-533)
534. J Conway, ‘Civil Resistance and the “Diversity of Tactics” in the Anti-Globalization Movement: Problems of Violence, Silence and Solidarity in Activist Politics’ (2003) 41 Osgoode Hall L J 505, 506; J Smith, ‘Globalizing Resistance: The Battle of Seattle and the Future of Social Movements’ (2001) 6(1) Mobilization 1, 10 and 19 [↑](#footnote-ref-534)
535. Rajagopal (n 18) 429 [↑](#footnote-ref-535)
536. Gathii (n 8) 40-41 [↑](#footnote-ref-536)
537. C Charters, ‘Maori and the United Nations’, in M Bargh (ed), *Resistance: An Indigenous Response to Neoliberalism* (Huia 2007) 147 [↑](#footnote-ref-537)
538. UN Committee on the Elimination of Racial Discrimination, *Decision* *on Foreshore and Seabed Act 2004*, Decision 1 (66): New Zealand CERD/C/DEC/NZL/1 (2005) [↑](#footnote-ref-538)
539. ibid [↑](#footnote-ref-539)
540. Ngugi (n 11) 106 [↑](#footnote-ref-540)
541. L A Miranda, 'Indigenous Peoples As International Lawmakers' (2010) 32(1) U Pa J Int'l L 203; K A Carpenter and A R Riley, 'Indigenous Peoples and the Jurisgenerative Moment in Human Rights' (2014) 102 Cal L Rev 173 [↑](#footnote-ref-541)
542. Rajagopal (n 22) 68 [↑](#footnote-ref-542)
543. ibid 68 [↑](#footnote-ref-543)
544. T D Hall and J V Fenelon, 'The Futures of Indigenous Peoples: 9-11 and the Trajectory of Indigenous Survival and Resistance' (2004) 10(1) J World Syst Res 153, 184 [↑](#footnote-ref-544)
545. J Barrera and K Jackson, 'Chiefs take fight to House of Commons' doorstep' (Aboriginal Peoples Television Network, 4 December 2012) <http://aptn.ca/news/2012/12/04/chiefs-take-fight-to-house-of-commons-doorstep-2/> accessed 13 January 2016; M Woons, 'The "Idle No More" Movement and Global Indifference to Indigenous Nationalism' (2013) 9(2) AlterNative 172, 173-174; L J McMillan, J Young and M Peters, 'The "Idle No More" Movement in Eastern Canada' (2013) 28(3) Can J Law Soc 429, 430; A J Barker, ' "A Direct Act of Resurgence, a Direct Act of Sovereignty": Reflections on Idle No More, Indigenous Activism, and Canadian Settler Colonialism' (2015) 12(1) Globalizations 43, 49-50; S Allooloo, ' "I have waited 40 years for this. Keeping it going and don't stop!": An interview with Siku Allooloo. Interviewed by Leanne Betasamosake Simpson' in The Kino-nda-niimi Collective (ed), *The Winter We Danced: Voices from the Past, the Future, and the Idle No More Movement* (Arbeiter Ring Publishing 2014) [↑](#footnote-ref-545)
546. N Postero, 'Indigenous Responses to Neoliberalism: A Look at the Bolivian Uprising of 2003' (2005) 28(1) PoLAR 73 [↑](#footnote-ref-546)
547. J Petras, 'Bolivia: Between Colonization and Revolution' (Canadian Dimension, 2 January 2004) <https://canadiandimension.com/articles/view/bolivia-between-colonization-and-revolution-james-petras> accessed 13 January 2016 [↑](#footnote-ref-547)
548. P Oxhorn, 'Social Inequality, Civil Society, and the Limits of Citizenship in Latin America' in S E Eckstein and T Wickham-Crawley (eds), *What Justice? Whose Justice? Fighting for Fairness in Latin America* (University of California Press 2003) 52-53 [↑](#footnote-ref-548)
549. North American Free Trade Agreement, 32 ILM 289 and 605 (1993); Art 27 of the country's Constitution was widely upheld as a crowning achievement of the Mexican Revolution, enshrining collective and community owned lands. Political *Constitution of the United Mexican States* (5 February 1917) art 27; A D Morton, 'Mexico, Neoliberal Restructuring and the EZLN' in Gills (ed) (n 38) 263 [↑](#footnote-ref-549)
550. H Veltmeyer, 'The Dynamics of Social Change and Mexico's EZLN' (2000) 27(5) Lat Am Perspect 88 [↑](#footnote-ref-550)
551. R Stahler-Sholk, 'Resisting Neoliberal Homgenization: The Zapatista Autonomy Movement' (2007) 34(2) Lat Am Perspect 48, 55 [↑](#footnote-ref-551)
552. R Guha, 'Adivasis, Naxalites and Indian Democracy' (2007) 42(32) Econ Polit Wkly 3305 [↑](#footnote-ref-552)
553. India's Maoist movement is also known the Naxalites, deriving from the name of town called Naxalbari which was the site of a peasant uprising in 1967. It has origins in India's Communist movement. India's Home Ministry view their insurgencies as one of the country's biggest internal security threats. S Giri, 'The Maoist "Problem" and the Democratic Left in India' (2009) 39(3) J Contemp Asia 463, 464 [↑](#footnote-ref-553)
554. Eslava and Pahuja (n 109) [↑](#footnote-ref-554)
555. Rajagopal (n 18) 421 [↑](#footnote-ref-555)
556. The implication of this, according to Baxi, is that it better protects the interests of the market and business actors. Applying Baxi's argument to the thesis, state actors veto stronger expressions of FPIC in an attempt to safeguard the interests of the market. Baxi (n 40) [↑](#footnote-ref-556)
557. Traditional human rights discourses are (often justifiably) accused of neglecting alternative expressions of human dignity. In some respects they 'silence other languages - of needs, obligations, community empowerment, ethics, economic justice and material equity.' Otto (n 101) 43 [↑](#footnote-ref-557)
558. Rajagopal (n 22) 64 [↑](#footnote-ref-558)
559. Mutua (n 25) 243 [↑](#footnote-ref-559)
560. ibid [↑](#footnote-ref-560)
561. ibid [↑](#footnote-ref-561)
562. Otto (n 101) 42 [↑](#footnote-ref-562)
563. ibid 42-43 [↑](#footnote-ref-563)
564. ibid 37 [↑](#footnote-ref-564)
565. Falk (n 19) 35-36; U Baxi, 'From Human Rights to the Right to be Human: Some Heresies' in S Kothari and H Sheth (eds), Rethinking Human Rights (Lokayan 1989) [↑](#footnote-ref-565)
566. Falk ibid 35 [↑](#footnote-ref-566)
567. ibid 9 [↑](#footnote-ref-567)
568. Otto (n 101) 37-38 [↑](#footnote-ref-568)
569. ibid 38 [↑](#footnote-ref-569)
570. P J Williams, *The Alchemy of Race and Rights* (Harvard University Press 1991) [↑](#footnote-ref-570)
571. Chimni (n 39) 3 [↑](#footnote-ref-571)
572. Rajagopal (n 22) 76 [↑](#footnote-ref-572)
573. ibid 76-77 [↑](#footnote-ref-573)
574. ibid 77 [↑](#footnote-ref-574)
575. Rajagopal's research in this particular case focuses on the Working Women's Forum in South India - serving multiple roles as a co-operative society to provide credit to women working in diverse employment sectors (including the informal sector); trade union functions; and is registered as a non-governmental organisation for advocacy purposes. Human rights challenge based on the operationalisation of economic, social and cultural rights, as opposed to dominant paradigm on civil and political rights. Rajagopal (n 42) 272-287 [↑](#footnote-ref-575)
576. ibid 284-285 [↑](#footnote-ref-576)
577. O A Badaru, 'Examining the Utility of Third World Approaches to International Law for International Human Rights' (2008) 10 ICLR 379, 385; Buchanan (n 88) 454 [↑](#footnote-ref-577)
578. Rajagopal (n 18) 420 [↑](#footnote-ref-578)
579. 'In short, [the] law can play its ideal role in limiting and resisting power. At the very least, I believe that the Third World cannot abandon international law because law now plays such a vital role in the public realm in the interpretation of virtually all international events.' A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 318 [↑](#footnote-ref-579)
580. Rajagopal (n 18) 420 [↑](#footnote-ref-580)
581. W K Carroll, 'Hegemony, Counter-hegemony, Anti-hegemony' (Keynote Address to the Annual Meeting of the Society for Socialist Studies, York University, Toronto. June 2006) accessed at <https://ejournals.library.ualberta.ca/index.php/sss/article/viewFile/23790/17675> accessed 8 January 2016 [↑](#footnote-ref-581)
582. T Moses, 'Renewal of the Nation' in E-I A Daes, G Alfredsson and M Stavropoulou (eds) *Justice Pending: Indigenous Peoples and Other Good Causes: Essays in Honour of Erica-Irene A Daes* (Martinus Nijhoff Publishers 2002) 65 [↑](#footnote-ref-582)
583. B Maiguashca, *The Role of Ideas in a Changing World Order: The International Indigenous Movement. 1975-1990* (CERLAC Occasional Paper Series, June 1994) 22-23 [↑](#footnote-ref-583)
584. UN Economic and Social Council, *Study of the problem of discrimination against indigenous populations*, ECOSOC Resolution 1982/24 (7 May 1982) para 1 [↑](#footnote-ref-584)
585. N Stammers, *Human Rights and Social Movements* (Pluto Press 2009) 230; A good example can be found involving a dispute regard oil exploration licences in Columbia. This took place between the indigenous U'Wa peoples, the government and oil companies. C A Rodríguez-Garavito and L C Arenas, 'Indigenous Rights, Transnational Activism, and Legal Mobilization: The Struggle of the U'Wa People in Colombia' in B de Sousa Santos and C A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005); U'wa Traditional Authorities, 'Indigenous: The Money King Is Only An Illusion' in D Solnit (ed), *Globalize Liberation: How to Uproot the System and Build a Better World* (City Lights Books 2004) [↑](#footnote-ref-585)
586. A Carbert, 'Learning from Experience: Activist Reflections on "Insider-Outsider" Strategies' (Association for Women' Rights in Development, Spotlight Number 4, 2004) 11 [↑](#footnote-ref-586)
587. These experiences can be illustrated by examples of women's rights activists engaged in institutional settings, ibid 3 [↑](#footnote-ref-587)
588. A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 318 [↑](#footnote-ref-588)
589. L A Miranda, 'Indigenous Peoples As International Lawmakers' (2010) 32(1) U Pa J Int'l L 203 [↑](#footnote-ref-589)
590. See generally: H-J Chang (ed), *Joseph Stiglitz and the World Bank: The Rebel Within* (Anthem Press 2001) 58 [↑](#footnote-ref-590)
591. United Nations, 'Secretary-General's remarks at the Opening of World Conference on Indigenous Peoples' (United Nations, 22 September 2014) <http://www.un.org/sg/statements/index.asp?nid=8015> accessed 27 April 2016 [↑](#footnote-ref-591)
592. In this context, Claire Charter's definition of legitimacy is most pertinent. It relates to 'the legal, political, and social influence of norms and institutions' and is the quality by which states can 'internalize the pull to voluntarily and habitually obey these norms even when it might not be in their interest.' C Charters, 'The Legitimising Effect of Coordination Between Relevant International Institutions and the Harmonisation of the Rights of Indigenous Peoples' (2015) 32(1) Ariz J Int'l & Comp L 169, 170-171 [↑](#footnote-ref-592)
593. D Otto, 'Rethinking the "Universality" of Human Rights Law' (1997-1998) 29(1) Colum Hum Rts L Rev 1, 37 [↑](#footnote-ref-593)
594. ibid [↑](#footnote-ref-594)
595. UN General Assembly, *Indigenous Issues*, A/RES/65/198 (21 December 2010), para 8 [↑](#footnote-ref-595)
596. UN General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, A/RES/69/2 (22 September 2014) [↑](#footnote-ref-596)
597. United Nations, 'The World Conference on Indigenous Peoples: Background' <http://www.un.org/en/ga/69/meetings/indigenous/background.shtml> accessed 25 April 2016 [↑](#footnote-ref-597)
598. UN World Conference on Indigenous Peoples*, Alta Outcome Document* (10-12 June 2013) [↑](#footnote-ref-598)
599. D Gilio-Whitaker, 'What Did Indigenous Peoples Get Out of the World Conference?' (Indian Country Today Media Network, 25 September 2014) <[http://indiancountrytodaymedianetwork.com/2014/09/25/what-did-indigenous-peoples-get-out-world-conference-157042>](http://indiancountrytodaymedianetwork.com/2014/09/25/what-did-indigenous-peoples-get-out-world-conference-157042) accessed 25 April 2016 (emphasis added) [↑](#footnote-ref-599)
600. Alta Outcome Document (n 14) Preamble [↑](#footnote-ref-600)
601. UNDRIP art 32(2) [↑](#footnote-ref-601)
602. Alta Outcome Document (n 14) [↑](#footnote-ref-602)
603. ibid theme 1, para 6 [↑](#footnote-ref-603)
604. R Falk, *On Humane Governance: Toward A New Global Politics* (The Pennsylvania State University Press 1995) 4; See also: M Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42 Harv Int'l L J 201. Please see chapter four for a discussion of this. [↑](#footnote-ref-604)
605. See generally: R Panikkar, ‘Is the Notion of Human Rights a Western Concept?’ (1982) 30 *Diogenes* 75, 101 [↑](#footnote-ref-605)
606. ibid [↑](#footnote-ref-606)
607. Draft Declaration art 30 [↑](#footnote-ref-607)
608. UNDRIP art 4 [↑](#footnote-ref-608)
609. 'States [should] fully honour and in conjunction with Indigenous Peoples create conditions for the right of self-determination of Indigenous Peoples including through formal decolonization processes to those Indigenous Peoples who seek it'. Alta Outcome Document (n 14) theme 3, para 10; J Castellino, 'Territorial Integrity and the "Right" to Self-Determination: An Examination of the Conceptual Tools' (2007-2008) 33(2) Brook J Int'l Law 503, 556 [↑](#footnote-ref-609)
610. As an aside, in the case of self-determination of Quebec in Canada, Ted Moses, Grand Chief of the Grand Council of the Crees asked how it is 'possible for a mixed population of European origin to demand and exercise a right to self-determination [while denying] that the Indigenous peoples have at least the same rights.' T Moses, 'Invoking International Law' in M Battiste (ed), Reclaiming Indigenous Voice and Vision (UBC Press 2000) 177 [↑](#footnote-ref-610)
611. I Watson and S Venne, 'Talking up Indigenous Peoples' original Intent in a space dominated by state interventions' in E Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press 2012) 88 [↑](#footnote-ref-611)
612. UNDRIP art 43; J B Henriksen, 'The UN Declaration on the Rights of Indigenous Peoples: Some Key Issues and Event in the Process' in C Charters and R Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs 2009) 83 [↑](#footnote-ref-612)
613. JSY Henderson, 'Postcolonial Ledger Drawing: Legal Reform' in Battiste (ed) (n 26) 168-169 [↑](#footnote-ref-613)
614. The mandate of the Fund has evolved over the decades. It began life in the 1980s known as the UN Voluntary Fund for Indigenous Populations and was designed to provide financial support for indigenous peoples and their organisations to participate in the UN Working Group on Indigenous Populations (UN General Assembly, Resolution 40/131 of 13 December 1985). The mandates were expanded in 2001 and 2008 so as to finance organisations to travel and contribute in the (then) newly created Permanent Forum on Indigenous Issues and Expert Mechanism on the Rights of Indigenous Peoples, respectively (UN General Assembly, 56/140 of 19 December 2001; UN General Assembly, Resolution 63/161 of 18 December 2008). This was further expanded into the Human Rights Council (UN General Assembly, Resolution 65/198 of 21 December 2010). Most recently the mandate further widened into assistance for representatives to participate in meetings of UN bodies of direct significance to them (Resolution A/70/486) [↑](#footnote-ref-614)
615. See generally: <https://vimeo.com/129579278> accessed 4 May 2016 [↑](#footnote-ref-615)
616. Consultative status of NGOs was granted in: UN Economic and Social Council, *Consultative relationship between the United Nations and non-governmental organizations*, Resolution 1996/31 ( 25 July 1996) [↑](#footnote-ref-616)
617. R Morgan, 'On Political Institutions and Social Movement Dynamics: The Case of the United Nations and the Global Indigenous Movement' (2007) 28(3) Int Polit Sci Rev 273, 279 [↑](#footnote-ref-617)
618. ibid 280 [↑](#footnote-ref-618)
619. ibid 276 [↑](#footnote-ref-619)
620. B Maiguashca, *The Role of Ideas in a Changing World Order: The International Indigenous Movement. 1975-1990* (CERLAC Occasional Paper Series, June 1994) 29 [↑](#footnote-ref-620)
621. UN Human Right Council, *Expert mechanism on the rights of indigenous peoples*, Resolution 6/36 (14 December 2007) para 1 [↑](#footnote-ref-621)
622. ibid para 8 [↑](#footnote-ref-622)
623. ibid para 9 [↑](#footnote-ref-623)
624. WCIP Outcome Document (n 12) para 28 [↑](#footnote-ref-624)
625. UN Office of the High Commissioner for Human Rights, *Summary of responses to the questionnaire on the review of the mandate of the Expert Mechanism on the Rights of Indigenous Peoples* (4-5 April 2016) 5 [↑](#footnote-ref-625)
626. ibid para 24 [↑](#footnote-ref-626)
627. ibid para 27 [↑](#footnote-ref-627)
628. UNHRC Resolution 6/36 (n 37) para 1 [↑](#footnote-ref-628)
629. ibid para 1(a) [↑](#footnote-ref-629)
630. Mandate review (n 41) para 11 [↑](#footnote-ref-630)
631. UN Economic and Social Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr Rodolfo Stavenhagen, submitted in accordance with Commission on Human Rights resolution 2002/65*, E/CN.4/2003/90/Add.3 (5 March 2003) 2 [↑](#footnote-ref-631)
632. E.g. UN Office of the High Commissioner for Human Rights, 'Study on the right to participate in decision making' (United Nations) <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/StudyDecisionMaking.aspx> accessed 4 May 2016 [↑](#footnote-ref-632)
633. Mandate Review summary (n 41) paras 46 and 47 [↑](#footnote-ref-633)
634. Please see chapter four for a brief overview [↑](#footnote-ref-634)
635. See chapter four on these examples [↑](#footnote-ref-635)
636. M Mutua and A Anghie, ‘What is TWAIL?’ (2000) 94 ASIL Proc 31, 37 [↑](#footnote-ref-636)
637. R Buchanan, 'Writing Resistance Into International Law' (2008) 10 ICLR 445, 448 [↑](#footnote-ref-637)
638. Otto (n 9) 37 [↑](#footnote-ref-638)
639. UN Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Resolution 5/1 (18 June 2007) paras 39-53 [↑](#footnote-ref-639)
640. ibid para 42 [↑](#footnote-ref-640)
641. ibid para 39 [↑](#footnote-ref-641)
642. ibid para 41 [↑](#footnote-ref-642)
643. Mandate Review summary (n 41) para 21; this is in contrast with the position of the United States who opposed such a move, para 18 [↑](#footnote-ref-643)
644. ibid para 56 [↑](#footnote-ref-644)
645. N Schrijver, 'The UN Human Rights Council: A New "Society of the Committed" or Just Old Wine in New Bottles?' (2007) 20(4) LJIL 809, 822 [↑](#footnote-ref-645)
646. UN General Assembly, *Human Rights Council*, Resolution 60/251 (15 March 2006) [↑](#footnote-ref-646)
647. UN General Assembly, *In Larger Freedom: Towards Development, Security and Human Rights for All*: *Report of the Secretary-General*, A/59/2005 (21 March 2005) [↑](#footnote-ref-647)
648. L Rahmani-Ocora, 'Giving the Emperor Real Clothes: The UN Human Rights Council' (2006) 12(1) Global Governance 15, 16; Moreover, the Commission on Human Rights was a subsidiary of the UN Economic and Social Council [↑](#footnote-ref-648)
649. This took place during the 27th Regular Session of the UNHRC [↑](#footnote-ref-649)
650. Indigenous peoples currently enjoy consultative status in the UNHRC through their representative organisations [↑](#footnote-ref-650)
651. ICCPR art 28 [↑](#footnote-ref-651)
652. UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 59, UN Doc A/6316 (1999), 999 UNTS 302, entered into force 23 March 1976, arts 1 and 2 [↑](#footnote-ref-652)
653. ibid art 2 [↑](#footnote-ref-653)
654. 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.' ICCPR art 27 [↑](#footnote-ref-654)
655. E.g. UN Human Rights Committee, *CCPR General Comment No 23: Article 27 (Rights of Minorities)*, CCPR/C/21/Rev.1/Add/5 (8 April 1994), para 7 [↑](#footnote-ref-655)
656. *Länsman et al v Finland*, Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 (1994) para 9.8 [↑](#footnote-ref-656)
657. *Ángela Poma Poma v Peru*, Communication No 1457/2006,CCPR/C/95/D/1457/2006 (24 April 2009) [↑](#footnote-ref-657)
658. ibid para 7.6 [↑](#footnote-ref-658)
659. ibid [↑](#footnote-ref-659)
660. ibid; it also appears to limit FPIC to 'economic activities' [↑](#footnote-ref-660)
661. B Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003) 201 [↑](#footnote-ref-661)
662. G C Toensing, 'NAIPC Says UN Indigenous Conference Insults Indigenous Peoples' (Indian Country Today, 12 March 2014) <http://indiancountrytodaymedianetwork.com/2014/03/12/naipc-says-un-indigenous-conference-insults-indigenous-peoples-153946> accessed 2 May 2016 [↑](#footnote-ref-662)
663. Maiguashca (n 36) 29 [↑](#footnote-ref-663)
664. UNDRIP art 43 [↑](#footnote-ref-664)
665. L Eslava and S Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3(1) Trade L & Dev 103, 114 [↑](#footnote-ref-665)
666. J E Krasno, 'Democratizing and Reforming the United Nations' (1996) 3(3) Democratization 328, 332-333; In international legal theory, this state-centric model is best reflected in the realist school of thought. States maintain 'a balance of power' in the world, 'essentially a non-evolving, circular and repetitious view of history.' N D White, *The Law of International Organisations* (2nd edition, Manchester University Press 2005) 4 [↑](#footnote-ref-666)
667. T Rathgeber, *UN Human Rights Council: Challenges for its Next Presidency* (Friedrich-Ebert-Stiftung, Global Policy and Development, 2014) 2; S Hopgood, *The Endtimes of Human Rights* (Cornell University Press 2013) [↑](#footnote-ref-667)
668. Miranda (n 5) 260 [↑](#footnote-ref-668)
669. R Falk, *Achieving Human Rights* (Routledge 2009) 26; In other words a kind of 'globalisation from below'. N Aziz, 'The Human Rights Debate in an Era of Globalization: Hegemony of Discourse' (1995) 27(4) Bull Concern Asian Sch 9, 10 and 12 [↑](#footnote-ref-669)
670. B Rajagopal, ‘Counter-hegemonic International Law: rethinking human rights and development as a Third World strategy’ in R Falk, B Rajagopal and J Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge-Cavendish 2008) 68 [↑](#footnote-ref-670)
671. W B Bolinget, 'Our Problems Will Not Be Resolved Just Within the UN System' (2014) 38(4) CSQ <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/windel-b-bolinget-our-problems-will-not-be-resolved-just> accessed 27 October 2015 [↑](#footnote-ref-671)
672. A point reaffirmed during the General Assembly's World Conference on Indigenous Peoples, in spite of its many shortcomings [↑](#footnote-ref-672)
673. ibid [↑](#footnote-ref-673)
674. FPIC fundamentally represents a unique and distinctive category of resistance which is not like other examples [↑](#footnote-ref-674)
675. K Swiderska and others, 'Community Protocols and Free, Prior and Informed Consent – Overview and Lessons Learnt' in K Swiderska and others (eds), *Biodiversity and Culture: Exploring Community Protocols , Rights and Consent* (65 Participatory Learning and Action, The International Institute for Environment and Development 2012) 26 [↑](#footnote-ref-675)
676. ibid [↑](#footnote-ref-676)
677. For example, Bolivia's 2009 Constitution guarantees the right of indigenous peoples 'the right to prior obligatory consultation by the State with respect to the exploitation of nonrenewable natural resources in the territory they inhabit [which] shall be respected...in good faith and upon agreement.' Constitution of Bolivia (2009) Chapter IV, art 30(II) para 15. Found at: <https://www.constituteproject.org/constitution/Bolivia\_2009.pdf> accessed 19 May 2016;

In Ecuador, the Constitution grants indigenous peoples a collective right to 'free prior informed consultation, within a reasonable period of time, on the plans and programs for prospecting, producing and marketing nonrenewable resources located on their lands and which could have an environmental or cultural impact on them'. Constitution of the Republic of Ecuador (2008) Chapter Four, art 57(7). Found at: <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> accessed 19 May 2016 [↑](#footnote-ref-677)
678. Such as the Philippines, as discussed chapter three [↑](#footnote-ref-678)
679. A Buxton , 'The spirit of FPIC: lessons from Canada and the Philippines' in Swiderska and others (n 91) 68 [↑](#footnote-ref-679)
680. ibid [↑](#footnote-ref-680)
681. C Losekann and R Oliveira, 'Deciding how to decide: the Munduruku Indigenous Group and political participation in Brazil' (openDemocracy, 2 June 2015) <https://www.opendemocracy.net/cristiana-losekann-rodrigo-oliveira/deciding-how-to-decide-munduruku-indigenous-group-and-political-> accessed 20 October 2015 [↑](#footnote-ref-681)
682. D Peerla, *No Means No: The Kitchenuhmaykoosib Inninuwug and the Right for Indigenous Resource Sovereignty* (Cognitariat Publishing 2012) [↑](#footnote-ref-682)
683. ibid [↑](#footnote-ref-683)
684. C Doyle and J Cariño, *Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector* (Indigenous Peoples Links, Middlesex University School of Law, The Ecumenical Council for Corporate Responsibility 2013) <www.piplinks.org/makingfpicareality> accessed 20 October 2015, 34 (emphasis added) [↑](#footnote-ref-684)
685. Peerla (n 98) 4 [↑](#footnote-ref-685)
686. ibid 2-3 [↑](#footnote-ref-686)
687. B G Yangmaadome and others, 'Sacred groves versus gold mines: biocultural community protocols in Ghana' in Swiderska and others (n 91) 120-127 [↑](#footnote-ref-687)
688. T John and others, 'Creating the Ulu Papar Biocultural Community Protocol' in Swiderska and others ibid 141-146 [↑](#footnote-ref-688)
689. Mutua and Anghie (n 52) 38 [↑](#footnote-ref-689)
690. Falk (n 85) 35-38 [↑](#footnote-ref-690)
691. Rodríguez-Garavito and Arenas (n 1) 251-254, 259; U'Wa Traditional Authorities (n 1) [↑](#footnote-ref-691)
692. Falk (n 20) 35 [↑](#footnote-ref-692)
693. E.g. Mass movements and civil demonstrations much like those witnessed in Seattle and Genoa may be accused of being too disparate and lacking targeted objectives. [↑](#footnote-ref-693)
694. Rajagopal (n 77) 194-195 [↑](#footnote-ref-694)
695. See generally: M Jensen (ed), *Militarization*, Indigenous Affairs 2/01 (International Work Group for Indigenous Affairs 2001); UN Department of Economic and Social Affairs, *State of the World's Indigenous Peoples*, ST/ESA/328 (United Nations 2009) 225-7 [↑](#footnote-ref-695)
696. C A Wijaya, 'Criminalization, discrimination against indigenous people worsening: AMAN' (The Jakarta Post, 27 January 2016) <http://www.thejakartapost.com/news/2016/01/27/criminalization-discrimination-against-indigenous-people-worsening-aman.html> accessed 26 April 2016 [↑](#footnote-ref-696)
697. C M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent* (Routledge 2015) 168-172 [↑](#footnote-ref-697)
698. Charters (n 8) 181 [↑](#footnote-ref-698)
699. R W Cox, 'Gramsci, hegemony and international relations: An essay in method' in S Gill (ed), *Gramsci, Historical Materialism and International Relations* (Cambridge University Press 1993) 49-66 [↑](#footnote-ref-699)
700. UNDRIP art 14(1) [↑](#footnote-ref-700)
701. UNDRIP art 16(1) [↑](#footnote-ref-701)
702. UNDRIP art 15(1) [↑](#footnote-ref-702)
703. UNDRIP art 16(2) [↑](#footnote-ref-703)
704. UNDRIP art 43 [↑](#footnote-ref-704)
705. United Nations Web TV, 'Roundtable 2: Implementation of the rights of indigenous peoples at the national and local level, World Conference of Indigenous Peoples' (United Nations Web TV, 22 September 2014) <http://webtv.un.org/search/implementation-of-the-rights-of-indigenous-peoples-at-the-national-and-local-level-world-conference-on-indigenous-peoples-roundtable-2/3801115076001> accessed 10 June 2015 [↑](#footnote-ref-705)
706. M McCombs and D Shaw, 'The agenda-setting function of mass media' (1972) 36(2) Public Opin Q 176 [↑](#footnote-ref-706)
707. J S Nye Jr, 'Public Diplomacy and Soft Power' in D K Thussu (ed), *International Communication: A Reader* (Routledge 2010) [↑](#footnote-ref-707)
708. L Tikly, 'Education and the New Imperialism' (2004) 40(2) Comp Educ 173 [↑](#footnote-ref-708)
709. Otto (n 9) 40 [↑](#footnote-ref-709)
710. Falk (n 20) 90-91 [↑](#footnote-ref-710)
711. Indeed, we have already identified that there are areas of the Declaration that are potentially very beneficial to indigenous peoples' counter hegemonic resistance efforts, such as article 14 to 16 on participation in media and education [↑](#footnote-ref-711)
712. Hence there exists an opportunity to reframe the narrative of certain debates. This was the case in adopting Ottawa Treaty, which sought to prohibit the use of anti-personnel landmines. Support was generated through grassroots efforts. Significant public support preceded the Treaty's adoption as the discourse was transformed into a humanitarian one, from questions relating to military security. M A Cameron, 'Global civil society and the Ottawa process: Lessons from the movement to ban anti-personnel mines' (1999) 7(1) Can Foreign Pol J 85, 87 [↑](#footnote-ref-712)
713. L J Jarding, 'Uranium Activities' Impacts On Lakota Territory' (2011) 22(2) IPJ 1 [↑](#footnote-ref-713)
714. A useful, recent starting point for history curriculums can be found in R Dunbar-Ortiz, *An Indigenous Peoples' History of the United States (ReVisioning American History)* (Beacon Press 2015) [↑](#footnote-ref-714)
715. Rajagopal (n 86) 76-77 [↑](#footnote-ref-715)
716. One pending decision before the African Court involves the indigenous Ogiek peoples in Kenya's Right Valley. The first indigenous-related case to go before the Court. It is to be seen if a more robust approach is taken. in terms of FPIC. *African Commission on Human and Peoples' Rights v Republic of Kenya*, Application No 006/2012 (African Court on Human and Peoples' Rights) [↑](#footnote-ref-716)
717. American Convention on Human Rights art 21 [↑](#footnote-ref-717)
718. African Charter on Human and Peoples' Rights art 22 [↑](#footnote-ref-718)
719. S Krislov, 'The Amicus Curiae Brief: From Friendship to Advocacy' (1963) 72(4) Yale L J 694, 697 and 703 [↑](#footnote-ref-719)
720. P Macklem and E Morgan, 'Indigenous Rights in the Inter-American System: The Amicus Brief of the Assembly of First Nations in Awas Tingni v Republic of Nicaragua' (2000) 22 HRQ 569 [↑](#footnote-ref-720)
721. ibid 574 [↑](#footnote-ref-721)
722. ibid 592 [↑](#footnote-ref-722)
723. ibid [↑](#footnote-ref-723)
724. ibid 593 [↑](#footnote-ref-724)
725. ibid 602 [↑](#footnote-ref-725)
726. See generally: C Johnson and B Johnson, 'Menominee Forest Keepers' (American Forests, Spring 2012) <http://www.americanforests.org/magazine/article/menominee-forest-keepers/> accessed 20 May 2016; S G Snow, 'The Kuna General Congress and the Statute on Tourism' (2000) 24(4) (Intellectual Property Rights: Culture as Commodity) Cultural Survival Quarterly <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/panama/kuna-general-congress-and-statute-tourism> accessed 20 May 2016 [↑](#footnote-ref-726)
727. For a good example of this, please refer to the *amici curiae* briefs used in the *Doe v Kamehameha* litigation. *Doe v Kamehameha Sch*, 470 F3d 827 (9th Cir 2006) (en banc); S K Serrano and others, 'Restorative Justice for Hawai'i's First People: Selected Amicus Curiae Briefs in *Doe v Kamehameha Schools*' (2007) 14 AALJ 205 [↑](#footnote-ref-727)
728. Amazon Watch, *The Right to Decide: The Importance of Respecting Free, Prior and Informed Consent* (Briefing Paper, Amazon Watch 2011) [↑](#footnote-ref-728)
729. ibid [↑](#footnote-ref-729)
730. ibid [↑](#footnote-ref-730)
731. Or a 'gold standard in terms of extractive industry community engagement practices'. Oxfam, *Community Consent Index 2015: Oil, gas, and mining company public positions on Free, Prior and Informed Consent* (207 Oxfam Briefing Paper 2015) 3 [↑](#footnote-ref-731)
732. Philippines Constitution art VIII, s 1 [↑](#footnote-ref-732)
733. *La Bugal-B’laan Tribal Association v Ramos* (December 2004) [↑](#footnote-ref-733)
734. Constitution of India art 39A [↑](#footnote-ref-734)
735. S Deva, 'Public Interest Litigation in India: A Critical Review' (2009) 28(1) CJQ 19, 21 [↑](#footnote-ref-735)
736. ibid 24 [↑](#footnote-ref-736)
737. ibid 27 [↑](#footnote-ref-737)
738. This was very much the case among members of the Dongria-Kondh community in its fight against Vedanta. See chapter three for more information. [↑](#footnote-ref-738)
739. See generally: U K Singh, *The State, Democracy and Anti-Terror Laws in India* (Sage Publications 2007); A Roy, 'Do turkeys enjoy thanksgiving?' (The Hindu, 18 January 2004) <http://www.thehindu.com/2004/01/18/stories/2004011800181400.htm> accessed 5 May 2016; S Saikia, '9/11 of India: A Critical Review on Armed Forces Special Power Act (Afspa) and Human Rights Violations in North East India (2014) 2(1) JSWHR 265 [↑](#footnote-ref-739)
740. Constitution of India art 19(1)(a) [↑](#footnote-ref-740)
741. Constitution of India art 19(1)(b) [↑](#footnote-ref-741)
742. Constitution of India art 21 [↑](#footnote-ref-742)
743. Constitution of India art 22 [↑](#footnote-ref-743)
744. ICCPR art 9 [↑](#footnote-ref-744)
745. A definition of which can be found in chapter three [↑](#footnote-ref-745)
746. Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities)

Amendment Act 2015, s 4(f) [↑](#footnote-ref-746)
747. ibid s 4(g) [↑](#footnote-ref-747)
748. Rajagopal (n 77) 196; U Baxi, 'Voices of Suffering and the Future of Human Rights' (1998) 8 Transnat'l L & Contemp Probs 125, 163-164 [↑](#footnote-ref-748)
749. See generally: I Izeze, 'Nigeria Loses N2.732 billion to Ogoni Crisis' (Daily Sunray, 3 February 1994) [↑](#footnote-ref-749)
750. K Herbertson and others, *Breaking Ground: Engaging Communities in Extractive and Infrastructure Projects* (World Resources Institute 2009) ; Amazon Watch (n 144) [↑](#footnote-ref-750)
751. Amazon Watch ibid [↑](#footnote-ref-751)
752. R Davis and D Franks, *Costs of Company-Community Conflict in the Extractive Sector* (Report No 66, Corporate Social Responsibility Initiative, Harvard Kennedy School 2014) 8 [↑](#footnote-ref-752)
753. ibid 15-16 [↑](#footnote-ref-753)
754. Oxfam (n 147) 7 [↑](#footnote-ref-754)
755. S B Twiss, 'History, Human Rights, and Globalization' (2004) 32(1) J Relig Ethics 39, 54; Thus attempting to meet Rajagopal's concerns from a TWAIL perspective. [↑](#footnote-ref-755)
756. C I Obi, 'Globalization and Local Resistance: The Case of Shell versus the Ogoni' in B K Gills (ed), *Globalization and the Politics of Resistance* (Palgrave 2000) 284-285 [↑](#footnote-ref-756)
757. Yangmaadome and others (n 103) [↑](#footnote-ref-757)
758. J Leong, '"Govt Knows Best" Attitude May Prevail in Kaiduan Dam Battle' (The Ant Daily, 25 April 2014) [↑](#footnote-ref-758)
759. Krasno (n 82) 333 [↑](#footnote-ref-759)
760. UNDRIP art 4 [↑](#footnote-ref-760)
761. As discussed in chapter four, in reference to the racially coded biases regarding self-determination, according to TWAIL. [↑](#footnote-ref-761)
762. *Saramaka v Suriname* para 134; *CEMIRIDE v Kenya* para 291 [↑](#footnote-ref-762)
763. In the case of India, it was possibly *ad hoc* when considering the political storm surrounding the Dongria-Kondh, compared to other indigenous peoples. [↑](#footnote-ref-763)
764. Despite the shortcomings of provisions on FPIC and self-determination. [↑](#footnote-ref-764)
765. Please see chapter one for more. [↑](#footnote-ref-765)
766. UNDRIP art 32(2) [↑](#footnote-ref-766)
767. It is discussed below that, in practice, this could give rise to a variety of outcomes between different indigenous peoples. Thus there is no essentialist indigenous world view on development. The important point is that the top-down manner of development aggression ceases to exist. [↑](#footnote-ref-767)
768. S J Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in C Charters and R Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs 2009) 190 [↑](#footnote-ref-768)
769. V Tauli-Corpuz, 'Indigenous Peoples and the Millennium Development Goals' in V Tauli-Corpuz, L Enkiwe-Abayao and R de Chavez (eds), *Towards an Alternative Development Paradigm: Indigenous People's Self-Determined Development* (Tebtebba Foundation 2010) 514 [↑](#footnote-ref-769)
770. See generally: Q Hoare and G N Smith (eds and trans), *Selections from the Prison Notebooks of Antonio Gramsci* [↑](#footnote-ref-770)
771. B Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003) 194 [↑](#footnote-ref-771)
772. A Hunt, 'Rights and Social Movements: Counter-Hegemonic Strategies' (1990) 17(3) J Law & Soc 309, 313 [↑](#footnote-ref-772)
773. ibid [↑](#footnote-ref-773)
774. J Larrain, *Marxism and Ideology* (Macmillan 1983) 84 [↑](#footnote-ref-774)
775. J Castellino, 'Indigenous Rights and the Right to Development: Emerging Synergies or Collusion?' in S Allen and A Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 382 [↑](#footnote-ref-775)
776. From indigenous perspectives, the implication of such development policies is one of aggression, due to the dispossession, lack of control and associated social, cultural and environmental costs. At all turns their own fundamental world views are circumvented, and in practice this often means that development projects are imposed on communities in the absence of a comprehensive participatory process. C Doyle and J Gilbert, 'Indigenous Peoples and Globalization: From "Development Aggression" to "Self-Determined Development"' (2009) 8 EYMI 219, 225 [↑](#footnote-ref-776)
777. S Escárcega, 'Authenticating Strategic Essentialisms: The Politics of Indigenousness at the United Nations' (2010) 22(1) Cultural Dynamics 3, 21 [↑](#footnote-ref-777)
778. UNDRIP art 23 [↑](#footnote-ref-778)
779. T Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford University Press 1999) 20-21; C L Holder and J J Corntassel, 'Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights' (2002) 24(1) HRQ 126, 143 [↑](#footnote-ref-779)
780. 'Indigenous people and their communities have a historical relationship with their lands'; Here, indigenous peoples formulate 'holistic traditional scientific knowledge of their lands, natural resources, and environment.' UN Conference on Environment and Development, *Agenda 21: Programme of Action for Sustainable Development*, UN GAOR, 46th Session, UN Doc A/Conf 151/26 (1992) chapter 26, para 1 [↑](#footnote-ref-780)
781. S Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22(1) EJIL 121, 140 [↑](#footnote-ref-781)
782. ibid [↑](#footnote-ref-782)
783. R Pettersson and A Viken, 'Sami perspectives on indigenous tourism in northern Europe: commerce or cultural development?' in R Butler and T Hinch (eds), *Tourism and Indigenous Peoples: Issues and Implications* (Routledge 2007) 177 [↑](#footnote-ref-783)
784. UN Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples*, A/HRC/24/41 (1 July 2013) 4-6 [↑](#footnote-ref-784)
785. A Portalewska, ‘Free, Prior and Informed Consent: Protecting Indigenous Peoples’ rights to self-determination, participation, and decision-making’ (2012) 36 CSQ <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/free-prior-and-informed-consent-protecting-indigenous> accessed 21 January 2016 [↑](#footnote-ref-785)
786. J E Alvarez, 'My Summer Vacation (Part III): Revisiting TWAIL in Paris' (Opinio Juris, 28 September 2010) <http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/> accessed 26 May 2016 [↑](#footnote-ref-786)
787. D Kennedy and K E Klare, 'A Bibliography of Critical Legal Studies' (1984) 94 Yale L J 461, 462 [↑](#footnote-ref-787)
788. R Falk, *On Humane Governance: Toward A New Global Politics* (The Pennsylvania State University Press 1995) 5 [↑](#footnote-ref-788)
789. Campaign for Nuclear Disarmament, 'About Us' <http://www.cnduk.org/about> accessed 21 January 2016 [↑](#footnote-ref-789)
790. E.g. T Piketty, *Capital in the Twenty-First Century* (The Belknap Press of Harvard University Press 2014) [↑](#footnote-ref-790)
791. J D Ostry, P Loungani and D Furceri, 'Neoliberalism: Oversold?' (2016) 53(2) Finance and Development (International Monetary Fund) [↑](#footnote-ref-791)
792. This was discussed as an 'outsider' proposal in chapter five, with possible opportunities to convey through legal mechanisms. [↑](#footnote-ref-792)
793. B S Chimni, ‘Third World Approaches to International Law: A Manifesto’ (2006) 8 Int'l Comm L Rev 3, 21 [↑](#footnote-ref-793)
794. Oxfam, *Community Consent Index 2015: Oil, gas, and mining company public positions on Free, Prior and Informed Consent* (207 Oxfam Briefing Paper 2015) 16 ; This sentiment echoes an argument by Anaya: 'If consent is not achieved, there is a strong presumption that the project should not go forward. If it proceeds, the state bears a heavy burden of justification to ensure the indigenous peoples share in the benefits of the project, and must take measures to mitigate its negative effects.' J Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22(1) Ariz J Int'l & Comp L 7, 17 [↑](#footnote-ref-794)
795. T Khandaker, 'Energy and Forestry Firms Say Indigenous People Should Have Power to Nix Projects in Canada' (VICE News, 21 September 2015) <https://news.vice.com/article/energy-and-forestry-firms-say-indigenous-people-should-have-power-to-nix-projects-in-canada> accessed 26 October 2015 [↑](#footnote-ref-795)
796. UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 70/1, UN Doc A/RES/70/1 (21 October 2015) Preamble [↑](#footnote-ref-796)
797. ibid [↑](#footnote-ref-797)
798. ibid [↑](#footnote-ref-798)
799. C Doyle, 'Indigenous peoples and the Millennium Development Goals: "sacrificial lambs" or equal beneficiaries?' (2009) 13(1) Int'l J HR 44, 47; D Vinding (ed), *Indigenous Peoples and the Millennium Development Goals: Perspectives from Communities in Bolivia, Cambodia, Cameroon, Guatemala and Nepal* (International Labour Organisation 2006)12-13; For further a perspective on the MDGs in terms of indigenous peoples, see generally: J Castellino, 'The MDGs and international human rights law: a view from the perspective of minorities and vulnerable groups' (2009) 13(1) Int'l J HR 10 [↑](#footnote-ref-799)
800. UN Economic and Social Council, *Report of the Expert Group Meeting on Indigenous Peoples and the 2030 Agenda*, Permanent Forum on Indigenous Issues 15th session, E/C.19/2016/2 (18 February 2016) para 24 [↑](#footnote-ref-800)
801. ibid para 30 [↑](#footnote-ref-801)
802. See generally: U Baxi, *The Future of Human Rights* (3rd edition, Oxford University Press 2008) ch 9; D Groenfeldt, ‘The future of indigenous values: cultural relativism in the face of economic development’ (2003) 35 Futures 917 926-927; Falk considers 'people-centred criteria of success, as measured by declines in poverty, violence, and pollution and by increasing adherence to human rights and constitutional practices, especially in relation to vulnerable segments of society, as well as by axiological shifts away from materialist/consumerist and patriarchal conceptions of human fulfilment.' Falk (n 29) 14 [↑](#footnote-ref-802)
803. See generally: N Stammers, *Human Rights and Social Movements* (Pluto Press 2009) [↑](#footnote-ref-803)
804. C M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent* (Routledge 2015) 252; T Moses, 'Renewal of the Nation' in E-I A Daes, G Alfredsson and M Stavropoulou (eds) *Justice Pending: Indigenous Peoples and Other Good Causes: Essays in Honour of Erica-Irene A Daes* (Martinus Nijhoff Publishers 2002) 65 [↑](#footnote-ref-804)
805. A F Sunter, 'TWAIL as Naturalized Epistemological Inquiry' (2007) 20(2) Can J L & Jurisprudence 475, 477 [↑](#footnote-ref-805)
806. Survival International, *Parks Need Peoples* (Survival International Report 2014) [↑](#footnote-ref-806)
807. S Corry, 'The Colonial Origins of Conservation: The Disturbing History Behind US National Parks' (Truthout, 25 August 2015) <http://www.truth-out.org/opinion/item/32487-the-colonial-origins-of-conservation-the-disturbing-history-behind-us-national-parks> accessed 4 June 2016 [↑](#footnote-ref-807)
808. Office of the United States Trade Representative, 'TPP Full Text' <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> accessed 4 June 2016 [↑](#footnote-ref-808)
809. UN General Assembly, *Rights of indigenous peoples: Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples on the impact of international investment and free trade on the human rights of indigenous peoples*, A/70/301 (7 August 2015) para 53 [↑](#footnote-ref-809)
810. ibid para 50 [↑](#footnote-ref-810)
811. ibid para 45 [↑](#footnote-ref-811)
812. ibid para 68 [↑](#footnote-ref-812)
813. See generally: K Zeese and M Flowers, 'Civil Society, Environmentalists Firmly Opposed to Trans-Pacific Partnership (TPP)' (Global Research, 8 April 2015) <http://www.globalresearch.ca/civil-society-environmentalists-firmly-opposed-to-trans-pacific-partnership-tpp/5441486> accessed 4 June 2016 [↑](#footnote-ref-813)