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Globalization and Indigenous Peoples' Rights : An Analysis from a Latin American Perspective

José Aylwin

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DIALOG — Aboriginal Peoples Research and Knowledge Network — is a space for innovative discussion and exchange between First Peoples and academia. DIALOG is designed to enhance research, facilitate the co-production of knowledge and foster the development of just, egalitarian and equitable social relations. DIALOG is an interuniversity, inter-institutional and international network created in 2001 and based at Institut national de la recherche scientifique (an academic branch of Université du Québec), Québec, Canada. Funded by the Fonds québécois de recherche sur la société et la culture and the Social Sciences and Humanities Research Council of Canada, DIALOG brings together more than 150 people from various universities and Aboriginal organizations and communities. DIALOG works closely with many Aboriginal partners and universities.

DIALOG members come from a wide range of disciplinary backgrounds, pursue varied practices and research interests, and share the common objective of advancing knowledge in view of a more egalitarian society and the full recognition of the cultures, rights, values and visions of the world of the First Peoples. Through its scientific activities, its programs in support of collaborative and community-partnered research, training and publishing, its knowledge mobilization initiatives, its dissemination mechanisms and its interactive data banks, DIALOG is contributing to the democratization of knowledge relating to the Aboriginal world on both the national and international levels. In today's knowledge society, DIALOG is helping to promote cultural diversity and the recognition of such to encourage the harmonious living together of diverse peoples. DIALOG's mandate is fourfold:

- **Fostering** constructive, innovative and lasting dialogue between the academic milieu and Aboriginal organizations and communities in order to revitalize and promote interactive and collaborative research.

- **Contributing** to a better understanding of the historical and contemporary social, economic, cultural and political realities of Aboriginal peoples and the dynamics of their relations with non-Aboriginal people by emphasizing the co-production of knowledge and by helping to make research and public policies more responsive to Aboriginal needs, approaches and perspectives.

- **Supporting** university students' training, guidance and supervision, particularly for Aboriginal students, by associating them with the network's activities and achievements and offering them financial assistance programs and excellence grants.

- **Increasing** the scientific and social impact of research relating to Aboriginal peoples by developing new knowledge tools in order to promote and disseminate research findings in Québec, Canada and worldwide.

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Abstract

This paper analyzes, from a Latin American perspective, the implications that globalization is having on Indigenous peoples and their rights.

It refers to the different discourses of globalization which exist today, including that related to the transnationalization of the economy which is dominant today, as well as that related to the construction of a world consensus on human rights in general and on Indigenous peoples rights in particular.

It describes the process leading to the emergence of the "new" world order and the role that multilateral agencies, controlled by the world´s largest economies, have had on this process. It also refers to free trade and bilateral investment agreements that have been signed in the last few years between those economies and Third World states, as well as to their devastating consequences for Third World countries, and for Indigenous peoples.

This paper analyzes in particular the implications that the globalization of human rights is having on Indigenous peoples in Latin America, describing the process of constitutional and legal recognition of their differentiated status and rights that has taken place in recent years throughout the region. It also focuses on the contradictory policies implemented by Latin American states with regards to Indigenous peoples, due to these states' efforts to expand the global economy into Indigenous territories, and to the implementation gap which has characterized such policies.

Finally, it reflects on the way in which the globalization of human rights, expressed in the adoption of international conventions and declarations as well as in the jurisprudence of human rights treaty bodies, such as the Inter-American Human Rights Commission and the Inter-American Human Rights Court, is creating a new scenario for Indigenous peoples and their rights, bringing some optimism for their future.

Introduction

There is no doubt that peoples and communities throughout the globe, including those living in remote areas, are confronting complex and contradictory processes that are radically altering their lives.

On the one hand, after the fall of the real socialisms, a type of development, characterized by deregulation of the economies of the so called "nation states", privatization of social services, and liberalization of state borders enabling capital flows and investments, has given birth to a globalized economy controlled by transnational corporations (TNCs) dominantly based in the Northern hemisphere.

The imposition of this form of development by the World Trade Organization (WTO), the International Monetary Fund (IMF) and the World Bank, among other multilateral institutions, and the establishment of free trade agreements (FTAs) among the most powerful economies of the world (United States, the European Union, Japan) and impoverished Third World countries in Latin America, Asia, Africa and the Middle East, has resulted in the shrinking of public institutions, in the privatization of social services, as well as in the loss of sovereignty of these latter states at the hands of the emerging transnational conglomerates.

This phenomenon has also resulted in the impoverishment of urban and rural poor and in the growing concentration of wealth in a few hands, in the destruction of unique ecosystems, and in the loss of biodiversity to which local and Indigenous cultures and economies are closely interrelated to. Moreover, it has increased the exclusion of vast sectors of the population from decisions that affect their lives. Consequently, such decisions are now being made by distant entities, whose actions, on many occasions, are not justiciable.

Parallel to this, humanity has made important progress in the construction of a consensus concerning to the rights of individuals and of peoples. In effect, this consensus, which emerged after the Second World War giving birth to the creation of the United Nations and leading to the adoption of the Universal Declaration on Human Rights (1948) by its Member States, and later to the adoption of the International Conventions on Civil and Political Rights, and on Economic, Social and Cultural Rights (1966), has been deepened in the last decades with new agreements built by the international community on human rights. Those agreements have been manifested in international conventions and guidelines concerning new emerging realities, such as environmental degradation, cultural diversity, and crimes against humanity. Many have been related to sectors of the population traditionally excluded from the enjoyment of their individual rights, such as women or children, or related to groups whose collective rights, and in some occasions, whose existence, have been denied, such as Indigenous peoples.

The first phenomenon, namely the transnationalization of the economy, has been erroneously identified as a process of globalization, as if globalization was a new reality and not one that has been taking place for thousands of years, with conquests, empires, missions and crusades of which history talks to us, or as if other dimensions of globalization, such as those related to cultures, communications or rights, did not exist.

The identification made between the transnationalization of economies and globalization is not a coincidence. As Noam Chomsky explains, such identification has been built by power groups that deny other dimensions of globalization, such as that related to human rights, which has its best expression in the creation of a supra national criminal jurisdiction for the protection of human rights. Moreover, Chomsky states that globalization is also present in the emergence of social forums where civil societies from different parts of the world have gathered to strengthen their common struggle for a more inclusive world. It is not casual then—as Chomsky affirms—that those who promote an alternative globalization than that controlled by the market are labelled as anti-globalization groups.[1]

But those who defend economic globalization which is dominant in the world today, go beyond and even affirm that with the expansion of free trade, democracy, as well as human rights and fundamental freedoms are expanded too.[2] However, the experience of disempowered communities worldwide, and in particular in Third World states, tells a different story. Within many of these communities, economic globalization, or free market globalization, is far from being compatible with human rights and instead results in their systematic violation. As Vandana Shiva, an environmental leader from India, states, this phenomenon puts corporations' rights above those of states and citizens. She calls this phenomenon the "globalization of inhuman rights" (Shiva 2004: 97).

The UN System has acknowledged the negative implications that economic globalization has for human rights. Its most relevant treaty bodies, including the UN Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Elimination of all Forms of Racial Discrimination, have expressed concerns about this interrelationship. In particular, these Committees have pointed to the role of TNCs in human rights violations, especially in Third Worlds countries.

In 2005, such concerns led to the appointment of a Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises. According to his mandate this Representative should identify TNC practices and their human rights implications and make recommendations on this matter (Naciones Unidas [Consejo de Derechos Humanos] 2007).

[1] Statement made by Noam Chomsky in a presentation to Mapuche leaders and university students made in Temuco, Chile, October 18th, 2006.

[2] An analysis of the literature that supports this argument is made by Julie Harrelson-Stephens, professor of Political Science at Stephen Austin University in a recent study. The author, coming from a liberal perspective, states that increased globalization, by which she means economic globalization, has facilitated improvements in states' human rights records. She also finds evidence that greater economic penetration leads to fewer human rights abuses (Harrelson-Stephens 2007). This analysis has many followers in Latin America, including right wing politicians and intellectuals.

Section 1: The Emergence of a "New" World Order

Although this article is not aimed at analyzing the technical and legal dimensions of economic globalization, which are extremely complex, but rather at identifying the implications that this process has on Indigenous peoples and their rights, it seems relevant to provide some general information regarding the creation of the so called "new" world order. This "new" world order has been built throughout the second half of the XXth century, under strong pressure from the United States.

The central institutions in the construction of this global economic order have been the International Monetary Fund (IMF), the World Bank and the World Trade Organization (WTO). The first two emerged from the Bretton Woods agreement undertaken by western allies in 1944, and the latter came out of the same agreement and more specifically from the General Agreement on Trade and Tariffs (GATT). This agreement established rules for the liberalization of trade, which for almost fifty years, until 1995 when the WTO was created, were voluntary. The WTO established a legally binding framework of rules for global commerce that all 148 member nations were obliged to follow.

Since its creation the WTO's central effort had been the promotion of trade. Its agreements have resulted in the reduction of the role of state governments in economic matters, consequently reducing national and popular sovereignty. WTO rules, which have emerged from approximately thirty separate agreements, deal with matters such as tax policy, food safety measures, natural resource management, as well as with others that are not strictly economic, such as health, environment and culture. Among its agreements, those that have had a stronger impact on Indigenous peoples and local communities worldwide include the following:

- The General Agreement on Tariffs and Trade (GATT) created in 1995 and enforced by the WTO, which sets out the core principles of trade that member states must follow. Among its main provisions are Article I concerning the "most favoured nation", according to which all member governments should treat goods imported from one WTO member nation "no less favourably" than goods imported from any other member nation. Under this provision, governments cannot restrict imports from countries on moral or ethical grounds, such as human rights violations or environmental degradation. Also relevant is Article III which requires governments to treat all imported good "no les favourably" than locally produced goods. This has the impact of preventing governments from favouring local industries, farmers or cultures, thus allowing TNCs to sell cheap imported goods, which makes local and Indigenous economies nonviable.

- The Agreement on Agriculture (AoA) which rules market access, gradually eliminating the ability of governments to set tariffs or taxes on imports, or quotas, or standards concerning quantity or quality of agricultural imports, strongly impacting Indigenous economies. The AoA also prevents governments from supporting local farmers, through the use of price supports, low cost credits, subsidies, etc., and prevents governments from subsidizing the export of food products. This agreement is designed to open foreign markets for large-scale export producers, offering great incentives for nations that support export

oriented agricultural production at the expense of local, traditional and Indigenous small-scale farmers.

- The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). This agreement, which is one of the most resisted by Indigenous peoples and rural communities worldwide, establishes the requirements for patent regimes that states must implement to protect intellectual property. It allows for the patenting or legal claim of ownership of plants, animals, and micro-organisms, but does not oblige patent applicants to declare the source of genetic resources, which largely come from Indigenous lands. TRIPS has allowed the implementation of what Indigenous peoples call "biopiracy", which in practice has resulted in the appropriation of biological or genetic resources that Indigenous peoples and communities have traditionally developed and owned. Under TRIPS, pharmaceutical companies can privatize genetic resources by obtaining patents that allow them to exercise control over their marketing. Also under TRIPS, patent holders are not required to compensate or to share benefits with those communities from which the genetic material originated. This has resulted in the appropriation of traditional knowledge that Indigenous communities have generated for thousands of years. The case of the ayahuasca, a plant Indigenous peoples of the Amazon have used for spiritual purposes for centuries, as well as of the quinoa of the Andean peoples, which have been patented by large corporations, are examples of this form of appropriation. Indigenous peoples' and small farmers' resistance has been strong, urging states to modify the TRIPS agreement in order to recognize their rights under the UN Convention on Biological Diversity (1992).

- The General Agreement on Trade in Services (GATS). This agreement sets the rules for how governments regulate services. GATS is currently being renegotiated to expand privatization of services such as water treatment delivery, education, health care and hospitals, broadcasting, advertising, culture and banking, among other activities. Attempts to privatize water services as a consequence of GATS guidelines was resisted by the local population in Cochabamba, Bolivia, in what became know as the water war (Menotti 2006).

The role of the World Bank and the IMF and the implications of their actions for the poor should also be noted. Although the World Bank's original objective was to help countries rebuild after war, and the IMF was created to stabilize currencies, soon after their creation both institutions made enormous loans unrelated to their original purposes. In 1980, when several third world countries announced they could not make their debt payments, the World Bank and IMF started working to make sure those debts were paid, no matter what the cost was to the country or its citizens.

It is also important to note that the World Bank and IMF are controlled by the seven richest countries in the world (the G-7), who hold almost half of the vote within these institutions. This stands in stark contrast to nations affected by their policies, who have little or no say in either institution.

For debt repayment these institutions have imposed strict measures called "Structural Adjustment Programs" (SAPs), according to which countries are forced to cut social expenditure, privatize public services, reduce labor and environmental standards, and open their borders to cheap imports which drive local farmers and entrepreneurs out of

business. Through SAPs, the World Bank and the IMF have attempted to ensure that the maximum amount of a country's budget goes toward debt repayment, while at the same time giving Northern corporations access to the country's markets, labor and resources.

World Bank and IMF policies severely affect the lives of poor people throughout the world, increasing their displacement, poverty, disease, and other oppressive conditions. Indigenous peoples are among those most impacted by their policies. Not withstanding its operational policies for Indigenous peoples, World Bank sponsored projects and policies have displaced thousands of Indigenous peoples throughout the world, costing them land and livelihood. As the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Rodolfo Stavenhagen, states:

> Whereas the World Bank has developed operational directives concerning its own activities in relation to these issues […] and some national legislation specifically protects the interests of Indigenous communities in this respect, in numerous instances the rights and needs of Indigenous peoples are disregarded, making this one of the major human rights problems faced by them in recent decades. (Naciones Unidas [Comisión de Derechos Humanos] 2002: par. 56).

A recent study of the implications for Indigenous peoples of the IMF-World Bank structural adjustment programs in Third World countries, identifies among other impacts on their communities: the violation or the undermining of ancestral land rights; the displacement of Indigenous peoples from their lands to make way for foreign entry; transfer from the First World of highly polluting, energy-intensive industries to Third World or Indigenous peoples' territories; the inability to regulate corporate behaviour; the erosion or destruction of Indigenous subsistence economic systems in favour of cash-crop monocultural production; the massive extraction of natural resources for export; the loss of control of entire sectors of the economy to foreign TNCs; and the diminished enforcement of laws that promote local and Indigenous peoples' rights (Tauli-Corpuz 2006).

Economic globalization has also been facilitated by bilateral agreements on trade and investment, best known as free trade agreements (FTAs). Such agreements have been signed by different states in last decades, including the most powerful economies where TNCs are based, and Third World countries, where natural resources are predominantly located.

In the last two decades the US, members of the European Union and other industrialized powers have promoted the signing of bilateral free trade agreements (FTAs) and bilateral investment treaties (BITs). In general terms, FTAs commit countries not only to accelerated liberalization of trade in goods, such as agricultural products, but bring in new rules for trade in services, intellectual property rights and investment, among other matters. Negotiated outside the multilateral system, with little public participation and scrutiny, in practice these agreements provide alternatives for powerful economies to push developing countries, and smaller industrialized countries, to adopt policies in line with those agreed to by the WTO.

Despite their name, these agreements go beyond trade, providing TNCs with vast and legally enforceable rights in foreign markets. In essence, FTAs give corporations in one of the signatory countries a broad scope of rights in the other, such as rights to dictate the terms of their investments, to buy state industries, to deliver educational and heath services and to have access to natural resources and energy sources. They also provide the right to sue the government of the other country if it does not follow the agreement. FTAs are also geopolitical treaties, through which global powers build their political alliances. That is why, for example, FTAs with the US are closely linked to this country's military and national security interests, invariably requiring support for US foreign policy.

A common feature of these agreements are provisions granting TNCs the power to sue governments for any claimed acts or omissions which a corporation says is interfering with its rights as an investor. These rights include the right to "anticipate" a profit.[3] After more than a decade since NAFTA was signed, it is clear from different country experiences that FTAs do not benefit farmers or workers.

The experience of those countries where FTAs have been signed is that neither job security nor wages have improved as a result of FTAs. In Korea, for instance, a state which is often portrayed as a model of success in neoliberal reform, and has signed many FTAs, unemployment among the youth is overwhelming. Chile is not much different. The negative impact of FTAs on workers in Mexico is enormous. It is estimated that 1.5 million agricultural jobs have been lost because of NAFTA. In the case of Jordan, human trafficking into textile factories to take advantage of the US-Jordan FTA has been well documented. In Morocco, many companies have had to close down and people have lost their jobs because of the FTA with the US (Grain 2006).

In Latin America, economic globalization has expanded rapidly. Its abundant natural resources, its geographical proximity to the US, and the political and economic ties that link Latin American elites with the US have made Latin America an area of natural expansion for US trade and investment. Since the signature of the North America Free Trade Agreement (NAFTA) between the United States, Canada and Mexico in 1992 —which came into force in this last country in January of 2004 triggering the Zapatista revolt in Chiapas—, the US has signed FTAs with Chile (2003), Central American states and Dominican Republic (CAFTA, 2006), Peru (2005), Panama and Colombia (2006).

Aside from trade, the main contents of the US FTAs in Latin America have been migration and militarism, including within this last area the "war on drugs". Aside from those matters, such FTAs and related bilateral investment treaties are aimed at securing profit opportunities for US corporations, including access to cheap and compliant labour. These treaties not only do not contain provisions for the protection of Indigenous land and resource rights but include provisions on different matters, such as intellectual property rights, which constitute a clear threat to the rights of the Indigenous. Similarly, Canada has signed FTAs with three Latin American states[4], and has bilateral investment agreements

[3] Under bilateral investment treaties, Bolivia and Argentina have been sued by Bechtel and Azurix (a former Enron subsidiary) respectively for millions of dollars even though the Bolivian and Argentine people were denied proper or affordable water services by these companies. These cases are not litigated in national courts under domestic legislation, but through closed-door arbitration proceedings at the World Bank's International Centre for the Settlement of Investment Disputes (Grain 2006).

[4] Chile (1996), Costa Rica (2001) and Mexico (NAFTA 1992).

with eight other states in the region.[5] Up to this moment, Chile and Mexico have been the most active Latin American states in entering into FTA and bilateral trade agreements, having signed such treaties and agreements with the European Union and Japan, among others (Grain 2006).[6]

Given the intensity and history of these deals, social resistance to FTAs and BITs is nowhere stronger and deeper than in Latin America. As a consequence of the opposition from civil society, workers and Indigenous peoples throughout Latin America, the Free Trade Area of the Americas (FTAA) proposed by the George Bush Sr. in 1994, and which included 34 states, never became a reality. Such opposition has made FTAs with the US fail, is in the case of Ecuador. Indigenous peoples, as we will see later in this article, have played a central role in movements opposing such FTAs.

[5] Argentina (1993), Barbados (1997), Costa Rica (1999), Ecuador (1997), Panama (1997), Trinidad and Tobago (1996), Uruguay (1999) and Venezuela (1998).

[6] Chile is probably the most active Latin American country pursuing bilateral trade agreements. It has signed FTAs with 37 governments to date. This includes more or less comprehensive free trade agreements with the US, Canada, the European Union, EFTA, South Korea, Central America and Mexico. In June 2005, the Chilean government finalised a four-way deal with Pacific neighbours Brunei, New Zealand and Singapore (P4) and in June 2006, with Panama. Mexico follows Chile having signed FTAs with Canada and US (NAFTA, 1992), Colombia and Venezuela (1990), Bolivia (1994), Chile (1998), EFTA (2000), the EU (1995), Israel (2000), Japan (2004), Nicaragua (1992), the Northern Triangle (El Salvador, Guatemala and Honduras, 2000) and Uruguay (2003). It has also signed preferential trade agreements with Colombia and Venezuela (2004), Mercosur (2002), Brazil (2002), Panama (1985) and Uruguay (1999).

Section 2: Implications for Indigenous Peoples

Economic globalization, triggered by the imposition of this new "world order" and the inclusion of vast regions of the planet into FTAs that are dominated by the wealthiest states, without information for or consultation of large sectors of the populations of Third World states affected by these agreements, have had huge impacts on these countries, in particular on Indigenous peoples who live in them.

A report by the UN Working Group on Indigenous Populations published in 2003 examines the most relevant impacts on these peoples as a consequence of globalization. Among the impacts the UN Working Group identifies is the accelerated migration from rural communities to urban centers as a consequence of the industrialization of agriculture, pressure over Indigenous lands and erosion of Indigenous self-sufficient economies. The living conditions of Indigenous peoples in urban centers, far from being better, are characterized by exploitation, low wages, lack of access to social services such as education and housing, and discrimination, thus turning Indigenous peoples, on many occasions, into second class citizens. Another impact identified by the UN Working Group is that generated by communications technology, which on the one hand has enabled Indigenous peoples access to internet, global networks concerning their rights, and organizations that provide them with resources and opportunities. On the other hand, however, this technology has weakened Indigenous cultures and allowed for the appropriation of Indigenous traditional knowledge by others.

The UN Working Group report shows concern for the increase in poverty of Indigenous populations generated by the denial of Indigenous peoples' rights, the dispossession of their traditional territories, the degradation of their environment, and the lack of access to natural resources, phenomenon which are closely related with globalization. Finally, and related to this, the UN Working Group identifies development policies, in particular development projects, such as dams, natural resource exploitation, plantations, infrastructure initiatives and tourism implemented on Indigenous lands without the free, informed and prior consent of their communities as one of the most problematic impacts of globalization for Indigenous peoples (Naciones Unidas [Grupo de Trabajo sobre las Poblaciones Indígenas] 2003).

Probably the most documented impact of globalization on Indigenous peoples is that related to the expansion of extractive industries into their traditional territories, which are rich in natural resources. Indigenous communities, including those living in remote areas, such as the Amazon and the Andes in South America, or the jungles of South East Asia, are struggling with TNCs, which are intruding into their traditional territories in search of their resources, both natural and cultural.

As UN Special Rapporteur Rodolfo Stavenhagen states, Indigenous peoples insist that more attention should be paid to the fact that their resources frequently are extracted and/or developed by other interests (oil, mining, logging, fisheries, etc.) with little or no benefits for their communities (Naciones Unidas [Comisión de Derechos Humanos] 2002).

The UN Rapporteur adds in his Report on large developments and Indigenous peoples:

> In various United Nations and other forums, Indigenous organizations have signaled their concern about negative impacts of major development projects on their environments, livelihoods, lifestyles and survival. One of the recurrent issues is the loss of land and territories that Indigenous communities suffer. The lack of control over their natural resources has become a widespread worry. Very often these projects entail involuntary displacements and resettlement of Indigenous communities which happen to lie in the way of a dam, an airport, a game reserve, a tourist resort, a mining operation, a pipeline, a major highway, etc. As a result, violations of civil and political, economic, social and cultural rights occur with increasing frequency, prompting Indigenous peoples to launch major protests or resistance campaigns in order to bring public attention to their plight, besides engaging the judicial system or appealing for administrative redress, as well as lobbying the political system (United Nations [Commission on Human Rights] 2003: par.19).

On several of his country reports in Latin America (Guatemala, 2002; Mexico and Chile, 2003; Colombia, 2004 and Ecuador, 2006) the UN Special Rapporteur Stavenhagen has identified the imposition of large developments projects on Indigenous lands and territories as one of the main human rights problems that affects Indigenous peoples. Moreover, he has also called attention to the criminalization of Indigenous protests against large developments projects. By this, he refers to the persecution of people who take part in protests against these projects that threaten Indigenous peoples' rights to their land and resources.[7]

In his conclusions and recommendations on this matter the UN Rapporteur states that large developments projects involve a relationship between Indigenous peoples, governments and the private sector which must be based on the full recognition of Indigenous peoples' rights to their lands, territories and natural resources, which in turn implies the exercise of their right to self-determination (United Nations [Commission on Human Rights] 2003: par. 66).

In recent decades, Indigenous communities and leaders have mobilized in resistance to the imposition of this form of globalization. In fact, this resistance can be considered one of the most important factors that explain Indigenous peoples emergence as political actors in most regions of the world. Such resistance has been central in the struggles of Indigenous peoples in Latin America as we will see later on this paper.

[7] On his General Report on the situation of humans rights and fundamental freedoms of Indigenous peoples, Rapporteur Stavenhagen states on this matter: "In order to address this pattern of inequality and injustice that generates permanent human rights violations, Indigenous people resort to different forms of social mobilization that, in turn, often provoke the use of public force, and so incur further violations of their rights. This has given rise to patterns of criminalization of Indigenous social protest, making it harder to achieve a negotiated and democratic solution to their legitimate demands." (United Nations [Human Rights Council] 2007: par.90).

According to Jerry Mander, of the International Forum on Globalization, the irony in the fact that Indigenous peoples have become targets of global corporations lies in the fact that these peoples have been successful over millennia at maintaining cultures, economies, worldviews and practices that are not built on economic growth or short-term profit-seeking. This is why he affirms that conflicts between corporations and Indigenous peoples are more than resource wars. Instead, they are paradigm wars or worldview wars, based in opposite understandings of how human beings should live on earth (Mander 2006).

Section 3: Globalization and Indigenous Rights in Latin America

3.1 The Context

After a long period of domination and dispossession, Indigenous peoples have emerged as relevant political actors throughout the region.[8] This emergence has its expression in the proliferation of Indigenous organizations—including those of a local, national and international nature—throughout the region, and in the growing impact that Indigenous peoples have achieved on state politics. Although these impacts vary from case to case, depending on Indigenous peoples' demography, organizational processes, and the openness of the larger society to their claims, such peoples have had strong impact on the political life of many states, in particular in Bolivia, Ecuador, Colombia, Nicaragua and Mexico. The election in 2005 of Evo Morales, an Aymara, as the first Indigenous President in the history of Bolivia, a state where Indigenous peoples constitute the vast majority of the population, is a demonstration of the strength that Indigenous movements have achieved, in alliance with other sectors of society, in Latin American politics today.

In recent decades, Indigenous movements in the region have made different claims on the states where they live, as well as to the non-Indigenous social sectors that generally control these states' governments. Among their central claims are claims for control over their lands, territories and resources, and for political participation and recognition of autonomy as an expression of their right to self-determination as peoples.

Responding to Indigenous claims, Latin American states have reformed their constitutional and legal orders giving growing recognition to Indigenous peoples as well as to their rights. Panama (1971), Nicaragua (1986), Brazil (1988), Colombia (1991), México (1992 and 2001), Guatemala (1985), Paraguay (1992), Peru (1993), Argentina (1994), Bolivia (1994), Ecuador (1994 and 1998) and Venezuela (1999) have reformed their constitutions to give some kind of recognition to Indigenous peoples (or people).

The collective nature of Indigenous peoples has been acknowledged in recent years by the constitutions of Argentina, Bolivia, Colombia, Ecuador, México, Paraguay and Venezuela. The fact that these peoples existed before the states in question were formed has been affirmed by Argentina and Paraguay.

Several constitutions have recognized the pluri-ethnic or multicultural nature of their states and societies (Colombia (1991), Peru (1993), Bolivia (1994), Ecuador (1998), Mexico (1992 and 2001)). Customary law, both within the state jurisdiction and Indigenous jurisdiction has been recognized by, among other states, Bolivia, Colombia, Ecuador, Peru, Paraguay and México. The right to special political representation has been included in the constitutions of Colombia (1991) and Venezuela (1999).

[8] Among the factors which triggered what has been called the Indigenous "emergence" in Latin America are the insufficiencies of state policies, including agrarian reforms and indigenist policies implemented by most states in the region throughout the XXth century; the threats to their traditional livelihoods and to their cultures imposed by large developments projects implemented with state support in their traditional territories, a growing connection among Indigenous peoples in other parts of the world; and their participation in international forums concerning Indigenous peoples, and the democratization of Latin American society in the last decades. An in depth analysis of the Indigenous emergence process has been made by Willem Assies (1999).

Rights to land, territories and/or natural resources have been included in the constitutions of Argentina, Bolivia, Brazil, Colombia, Ecuador, México, Paraguay, Peru and Venezuela. While most of these constitutions only provide protection to Indigenous property owners (both communal or private) over their lands, some of them—generally the most recent ones—acknowledge Indigenous peoples' rights to the protection and demarcation of their territories, as well as rights to natural resources existing within these territories (most notably the right to consultation and participation in benefits). Such is the case of Brazil, Bolivia, Colombia, Ecuador, Nicaragua and Panama. In relation to this last recognition, Indigenous right to autonomy or self-government within their territories has been acknowledged by the constitutions of Colombia (1991), México (2001) and of Nicaragua (1986).[9]

Aside from these constitutional reforms, most Latin American states, including those such as Chile, where no constitutional provisions refer to Indigenous peoples or their rights, have in recent years approved legislation and regulations referring to Indigenous rights, including rights to lands, territories and natural resources. In some states, such as Chile, Guatemala and Mexico, legislation promotes Indigenous communities' or individuals' access to lands when they lack it, thus establishing programs for this purpose. Other states, such as Bolivia, Brazil, Colombia, Nicaragua and Venezuela, have legislation aimed at the demarcation, regularization and/or land entitlement of Indigenous territories. In those same states, as well as in Costa Rica and México, legislation concerning natural resources (water, forestry, and protected area management) gives Indigenous peoples different rights to these resources (preference in state cessions, participation in benefits, management, etc.). However, in all Latin American countries, subsoil resources are defined as belonging to the state. According to these pieces of legislation, Indigenous peoples are to be consulted prior to the exploration and exploitation of these resources (Brazil, Colombia, Ecuador, Nicaragua, Venezuela).

Equally relevant, thirteen Latin American states have ratified the International Labour Organization Convention 169 on Indigenous and Tribal Peoples, which acknowledges Indigenous peoples' political rights, including rights to autonomy, to customary law, and to participation in state decisions that concern them, as well as important rights over lands, territories and natural resources.

3.2 Implementation Policies

Most states in the region have developed policies aimed at implementing the constitutional and legal provisions concerning Indigenous rights, in particular those concerning the rights to lands and territories. Among the most interesting cases to highlight are those of Bolivia, Brazil and Colombia.

In Bolivia, a state with 37 different Indigenous peoples, and an Indigenous population estimated at 4 to 6 million representing 60 to 80% of the total population, where an Aymara is the head of state, a policy aimed at the regularization of Indigenous lands or

[9] The same right has been acknowledged by law in Panama during the second half of the XXth century.

tierras comunitarias de origen (TCOs)[10] has been undertaken by different governments since the 1994 Constitution and the Agrarian Law of 1995.[11]

By 2005, different Indigenous groups in Bolivia made 228 claims for the regularization of 37 million hectares, one third of Bolivia's territory, as TCOs. 23 million hectares corresponded to claims in the lowlands, and 14 million corresponded to claims in the Andes (Romero 2006). Of those lands claimed by Indigenous peoples, only 7.4 million hectares have been granted to them as TCOs (Tamburini 2007). The slow pace of this process is a direct consequence of the lack of funding of this public policy which relies totally on international cooperation. Among other problems identified in the process of territorial regularization and entitlement for Indigenous peoples are its focus in the lowlands and not the highlands where most of the Indigenous population lives; land entitlement of non Indigenous third parties living within TCOs; and the failure to ensure natural resource rights for Indigenous communities due to the persistence of forest licenses granted to non Indigenous individuals or corporations (licenses estimated in 6 million hectares) as well as of mining concessions on the same lands (Romero 2006). Moreover, TCOs do not correspond with the administrative divisions of Bolivia, which were redefined in the nineties (Popular Participation Law of 1994 and municipal law of 1999, both of which encouraged Indigenous participation in local government), making Indigenous control over the territories entitled to them through this legal structure more complex.

The case of Brazil, whose Indigenous population is estimated at 1 to 1.5 million of a total population of 150 million and grouped in 200 peoples (50 of them still not contacted by non Indigenous people or *isolados*) is also relevant. The process of Indigenous land demarcation was triggered by the 1988 Federal Constitution (1988).[12] The demarcation process has been implemented by the Fundacao Nacional do Indio (FUNAI) with international funding (World Bank, G 7, GTZ, among others). As in the case of Bolivia, the demarcation of Indigenous lands in Brazil has been too slow to respond to the needs of Indigenous peoples. By 2006, only 345 of the total 580 Indigenous lands claimed by Indigenous peoples, representing 87.5 million out of 108.5 million hectares claimed, had been demarcated and registered as Indigenous lands by FUNAI, while the rest of them were still in the process of being demarcated (Ricardo 2006).

[10] *Tierras comunitarias de origen* are communal lands of origin or TCOs, a concept which is equivalent to that of territory contained in Convention 169 of the ILO.

[11] The 1994 Constitution declares Bolivia a multiethnic and pluricultural Republic; affirms that the state does not recognize *latifundio,* but private and communal lands; recognizes the social, economic and cultural rights of Indigenous peoples, in particular those related to their *tierras comunitarias de origen* (Communal lands of origin or TCO), guaranteeing them rights to use and benefit from natural resources existing within these lands. The agrarian reform law (1996) defines TCOs as the geographic space that constitutes Indigenous habitat, where they have traditionally lived and maintain their own forms of organization; grants a ten-year period for the *saneamiento* (regularization) of lands in Bolivia.

[12] Although this constitution declares lands traditionally owned by Indigenous peoples as belonging to the Union, it acknowledges "Indians"' ancestral rights over lands traditionally occupied by them; considers lands permanently inhabited by Indigenous peoples as those used for productive purposes, and those needed for environmental preservation and physical and cultural reproduction. The Constitution declares that such lands are destined to Indigenous peoples´ permanent possession and are to be demarcated and protected by the state. According to the Constitution's provisions, Indians have exclusive usufruct rights of land resources, rivers and lakes. Water resources, as well as minerals, cannot be exploited without the authorization of Congress. The Constitution also establishes Indigenous right to benefit from natural resource exploitation. Contracts related to the possession and property of these lands and resource are null.

Due to international concern for the protection of the Amazon, demarcation has prioritized the Amazonia legal area (9 states in the Amazon area), where 86 million hectares, representing 98.63% of the total Indigenous lands in the country, have been registered as Indigenous lands by FUNAI (Ricardo 2006).

The pace of the demarcation process has been particularly slow in the Northeast and South of Brazil, where non-Indigenous property has been consolidated for centuries. Moreover, the demarcation process has not stopped the expansion of agricultural, forest, hydroelectric and mining activities into Indigenous lands, on many occasions with state support. By the year 2000, FUNAI recognized that 85% of those lands registered as Indigenous in accordance with the 1988 Federal Constitution had some kind of invasion by non-Indigenous people. Of particular relevance is the pressure of mining on Indigenous lands (by the year 2000, 7,203 petitions for mining exploration affecting 126 Indigenous lands had been made (Aylwin 2002). The expansion of agriculture into Indigenous lands and its devastating impacts on the biodiversity of these lands has been documented by the Instituto Socioambiental, the largest NGO working for Indigenous rights and the environment in Brazil (Instituto Socioambiental 2006).

Colombia, with an Indigenous population of 800,000 representing 2% of the total population (93% living in rural areas) and grouped in 82 peoples, has implemented in the last decades a policy of land entitlement which has resulted in the recognition of 28% of its territory as Indigenous lands. Most of these lands have been recognized as *resguardos*, an institution of colonial origin which was later recognized by the Colombian State. There are 647 *resguardos* which comprise 31 million hectares. A large percentage of these lands were recognized as such during the 1990s, when the government (INCORA Instituto Colombiano de Reforma Agraria) implemented a policy aimed at land regularization and at land acquisition of non-Indigenous settlers (colonos) on Indigenous traditional territories (Moreno 2006).

It should be mentioned that *resguardos* are an institution involving not only land but also jurisdiction. They are governed traditionally by the *cabildos* in accordance with the laws from 1890 (Law 89 of 1890) and its amendments (Decree 2164 of 1995 and Law 715 of 2001). According to legislation currently in effect, they are defined as sociopolitical entities, with a communal territory, governed by an autonomous organization ruled by the *fuero indígena* and its own norms. An amendment to the 1991 Constitution introduced in 2001 (Law 715) guarantees public funding for their operation, including economic resources for health, housing, drinking water and productive projects.

In accordance with the Colombian Constitution, *resguardos* may be conformed as Indigenous territorial entities (ETIs or *entidades territoriales indígenas*), an administrative division in Colombia where Indigenous people have political and cultural autonomy.[13] Not withstanding the fact that regulatory legislation on this matter has not been sanctioned (it has been approved by the Senate but is still in Congress), the Organización Nacional

[13] The 1991 Constitution protects the ethnic and cultural diversity of Colombia and recognizes Indigenous languages and rights to develop cultural identity. The Constitution acknowledges that within Indigenous territories Indigenous peoples are governed by their own authorities. Indigenous justicial systems are also recognized. The communal and inalienable nature of *resguardos* are affirmed. Natural resource exploitation will be performed in a way that does not harm the cultural, social and economic integrity of Indigenous communities. It also considers Indigenous participation in decisions concerning natural resource exploitation. According to this legislation, most Indigenous lands are recognized under the legal structure of *resguardos*.

Indigena de Colombia (ONIC) argues that the Colombian Constitution already recognizes Indigenous territories and that regulatory laws are not needed for them to exist (Roldan 2003).

Among the main problems that affect Indigenous territorial rights recognized under the *resguardo* system are the imprecise demarcation of these lands, thus generating conflicts with Indigenous and non-Indigenous neighbouring communities; their illegal occupation by *campesinos* (the state has to compensate non-Indigenous for Indigenous entitlement); their occupation by armed groups and by illegal (coca and poppy) plantations in the context of the armed conflict which has dominated Colombian politics in the last several decades; Indigenous displacement from their lands as a consequence of war; and natural resource exploration and exploitation on Indigenous lands (Roldan 2003; Moreno 2006).

Although the right to be consulted prior to the exploitation of natural resources is constitutionally and legally protected,[14] Indigenous peoples consider Colombian authorities have not protected this right (Moreno 2006).

3.3 State Policies Concerning Indigenous Peoples: Implementation Gap and Policy Contradictions in the Context of Economic Globalization

3.3.1 Implementation Gap

Although the cases of Bolivia, Brazil and Colombia referred to above are illustrative of the positive changes, both at the legal and political level, which have taken place in the region in recent years for the recognition of Indigenous peoples' rights to lands, territories and resources, they also clearly demonstrate the many problems that Indigenous peoples still confront.

As UN Special Rapporteur on Indigenous Rights, Rodolfo Stavenhagen, states in his 2006 report, Indigenous peoples around the world face many obstacles that prevent them from fully enjoying at the domestic level those rights which have been internationally recognized, among them rights to lands, territories and natural resources. On the one hand, there are many states where the recognized rights of Indigenous peoples are limited, or subordinated to the interests of third parties, or the general interest of the nation. There are also contexts in which legislation concerning Indigenous peoples or human rights is inconsistent with other sectorial laws, in particular those related with mining or natural resource exploitation.

The UN Special Rapporteur affirms, however, that another central problem in this regard is the existence of what he identifies as the "implementation gap," or the gap existing among the legislation and the administrative, political or juridical practice of states. Such practice, according to Stavenhagen, is framed in an assimilationist legacy that is opposed to the recognition of Indigenous rights, and which is expressed in discriminatory, or even racist, attitudes towards Indigenous peoples within the public administration. This discrimination is visible in the administration of justice, or in social or land programs concerning these peoples (Stavenhagen 2007).

[14] In 1998, decree 1320 was passed, which regulates Indigenous participation on Environmental Impact Assessment Studies (EIA). This decree requires consultation on Indigenous languages, and agreement about the improvement and economic benefits of projects affecting Indigenous lands and resources.

In the cases referred to above as well as in others throughout the region we can clearly see expressions of the problems identified by Stavenhagen. The lack of regulation of constitutional provisions concerning territorial rights, as well as the lack of mechanisms to enforce these rights, is common in most Latin American states. On the other hand, the implementation gap is evidenced in the insufficiencies of state policies to demarcate, entitle and protect Indigenous land and resource rights as well as by the lack of funding devoted to this purpose. In two of the three cases analyzed, land demarcation processes rely on international cooperation rather than state funding.

3.3.2 Economic Globalization and Policy Contradictions

The contradiction of state policies that promote the expansion of the global economy into Indigenous territories with those aimed at the recognition of Indigenous rights to lands and resources is also common to most Latin American states. Such policies, promoted by structural adjustment programs and by FTAs with industrialized economies as explained earlier, have had strong impacts on Indigenous peoples throughout the continent. Some cases to be considered are the following:

- *Impacts of FTAs in Mexican Indigenous Rural Economy*

The strongest implications of economic globalization for Indigenous peoples in Mexico have been a consequence of FTAs entered into by the Mexican state with the US and Canada in 1993, and with the European Union in 1995.

NAFTA triggered the reform of the land tenure system which had been structured throughout the XXth century after the revolution. Laws were passed shortly after the signing of NAFTA, enabling the privatization of the *ejido*.[15] Due to these reforms, Indigenous peoples and campesinos who communally owned the *ejidos* have been slowly disenfranchised from their land and water rights, at the hands of outsiders, who have acquired them for agro-industrial activities. Consequently, small farmers have increasingly been forced to abandon production and to migrate to nearby cities or to emigrate out of the country. Water law reforms have made water a commodity valued as an economic good, with enormous social implications for impoverished urban residents and small farmers (Wilder 2005).

Aside from the privatization of the *ejido* and of water rights, another consequence of NAFTA is the increase in imports of agricultural products that were traditionally grown by Indigenous peoples and rural communities, which have destroyed rural economies. By 2003, Mexico was importing basic crops that had been traditionally grown by Indigenous peoples. More than a fifth of the corn, a third of the wheat, nine-tenths of rice, nine-tenths of the soybeans, and a third of the sorghum that was consumed in the country was imported, causing the ruin of millions of farmers (Arroyo Piccard 2003).

Corn should be highlighted here: Mexico has gone from being a major corn producer to a corn importer, with corn imports nearly tripling since NAFTA. Due to this agreement, Mexico has had to open its market to subsidized corn from the US and Canada. By 2008, Mexico will eliminate quotas on corn imports, which will have devastating effects for

[15] The *ejidos* are a consequence of the agrarian reform process undertaken after the Mexican Revolution (1910-1920). From 1930 to 1990, approximately 28,000 communally owned *ejidos* were created serving as both employment and residence for 3 million rural Mexicans, dominantly Indigenous (Wilder 2005).

Indigenous crop farmers. Another consequence of FTAs has been related to corn seeds. Traditionally, Indigenous peoples grew their own seeds. Now they have to buy seeds from TNCs, such as Monsanto, generating a dependency on corporations that have patented the seeds traditionally grown by communities (York 2006).

► *Oil and Gas Developments and Indigenous Peoples*

Pressure for oil and gas from industrialized states has boomed in the previous decades due to high prices and growing demand for these natural resources. As a consequence of this demand, large TNCs have intensified pressure over Indigenous territories in Latin America where the largest oil and gas reserves in the region are located.[16]

From the territories of the Maya in the Selva Lacandona in Chiapas, Mexico, to those of the Mapuche people in the South of Argentina, the intrusion of oil and gas corporations into traditional Indigenous lands has had a huge impact on Indigenous peoples' lives, cultures, and environments. The best known example is that of the Uwa people of Colombia's Amazon, the subsistence of whose communities have been threatened since the 1990s, when the government of that country granted Occidental Petroleum a license to develop and exploit oil in their traditional land. Resistance by this Indigenous people and by NGOs based in Colombia and the U.S. led shareholders of Occidental Petroleum to withdraw from the project. However, in 2002 Ecopetrol, a Colombian oil company, began drilling for oil in the site with support from the military (Tebtebba Foundation and the International Forum on Globalization 2006). Currently, REPSOL, a Spanish TNC, has initiated activities in the area with government support.

Another case of oil development is in Ecuador's northern Amazon, in the territory of the Cofan, Secoya and Siona people. Thirty years of oil extraction activities by different companies have had devastating effects on their communities, as well as on their environment. During its operations, Texaco, a large multinational company, pumped over 1.5 billion barrels of oil out of Ecuador spilling over 18.5 billion gallons of toxic waste over 2,000 square miles of Indigenous communities. Since Texaco left, Indigenous peoples who were affected have been fighting in U.S. and Ecuadorian courts to make the company pay for the health and environmental damages caused by its drilling practices. In the lawsuit, the corporation has stated that Petroecuador, the state oil company and partner in the project, should be held responsible for the tragedy.

The Indigenous federations of the Ecuatorian Amazon have claimed that wide-spread oil and toxic contamination has caused increased incidence of cancer and other illnesses among the local peoples who use the waters of the polluted rivers of the area. Weak environmental regulations have also led to extensive deforestation, loss of biodiversity and natural habitat destruction as a consequence of the opening of roads and the pipeline built in the rainforest. In addition, oil developments in the area have resulted in the large-scale displacement of Indigenous peoples and the dispossession of their land as migrants from other regions have moved in (Amazon Watch; Znet).

Oil developments have also impacted the Mapuche people of the province of Neuquen, Argentina. Several TNCs, including Pioneer Natural Resources from the U.S., British

[16] For a detailed analysis of oil and gas developments on Indigenous lands and territories in Latin America, and as well as of Indigenous resistance to those activities see Martínez (2006).

Petroleum, Repsol from Spain, and Perez Companc from Argentina, are currently operating in the traditional territory of this Indigenous people. The best-known case is that of Loma de la Lata where Repsol YPF has been drilling for oil during the last decade, which has contaminated the community's soil, air and water. The 25 families living in the community have had to live with 65 open pits. According to an EIA undertaken in 2001, the metals levels found in the area were 700 times higher than those allowed by Argentine law. This case has been brought to domestic and international courts (Inter-American Commission on Human Rights), but has not been settled to date (Indymedia Argentina n.d.).

- *Mining in the Territory of the Andean Peoples*

Latin America is the region of the world where the largest mining exploration and exploitation investments are located. According to Latin American constitutions, subsoil rights belong to the state, regardless of the surface owner, and supersede surface rights. This means that even Indigenous communities that have been entitled to their traditional land normally veto mining concessions or activities. Mining activities in local communities provoke serious environmental, cultural and social damages, which drastically alter Indigenous way of life (Crain n.d.).

A large percentage of mining investments in Latin America are in the Andean region, from Venezuela to Chile. There are many cases that exemplify the impacts of mining on Indigenous territories. A recent case, which is emblematic, is that of the Pascua Lama-Veladero mine, a mine project operated by the subsidiaries of the Canadian transnational company Barrick Gold Corporation, the Compañía Minera Nevada Ltda (Chile) and Barrick Exploraciones Argentina S.A. The company's plan is to set up a gold, silver and copper mine in the semi-desert region of the Andes, on the Chilean-Argentinean border.

In Chile, Pascua Lama is located in the ancestral territory of the Diaguita people, while in Argentina, the mine lies within the San Guillermo Biosphere Reserve territories (UNESCO 1981) in the province of San Juan. In 1996, Barrick acquired land rights in Chile and proceeded to set up gates blocking public pathways. This blocked Diaguita shepherds from moving their livestock to their traditional mountain grazing grounds. The lands acquired were part of the Diaguita people's traditional territory, a territory which was acknowledged as belonging to their ancestors during the era of Spanish rule, but which was later usurped by a private landowner. Pascua Lama-Veladero disrupts the ecology of a region known for its agricultural and pastoral activities including the production of grapes for export, olive oil, brandy, pisco, fruits, vegetables, goat cheese, etc.

Considering its overall impacts, the activities of Pascua Lama-Veladero endanger the natural and cultural balance of these valleys, affecting around 100,000 people (70,000 in Chile and 24,000 in Argentina). Pascua Lama mining directly affects mountain glaciers that are essential water sources for these regions and poses a serious threat to biodiversity. Mining operations require a large amount of water—370 liters per second—an additional pressure for this area where water is scarce. According to current arrangements, Barrick Gold will get this vital resource for free, since in accordance to Chilean law this company owns the water rights and can decide how to use them.

Territorial appropriation by Barrick Gold includes the construction of a 6 km tunnel through the Chilean-Argentinean border to allow the transport of resources. The tunnel will also provide the means to move mineral products to the Pacific coast where they can enter the international market. The operation of this tunnel does not include a customs system or a border checkpoint, as required by the present local laws. This is a consequence of the Mining Integration Treaty between Argentina and Chile, signed in 1997, which was promoted by Barrick Gold Corporation. The mining company will generate enormous profits from this project, thanks, in part, to the low cost of the royalties it will have to pay (5 percent in the case of Chile, 3 percent in Argentina).

The Pascua Lama-Veladero project was approved in 2006 by the Chilean and Argentinean governments and construction of the mine is expected to begin in September 2007. After a long legal battle in Chilean Courts, the case was taken to the Interamerican Commission on Human Rights by the Diaguita people on the grounds of the violation of the right to life, as well as the right to due process under provisions of the Inter-American Convention on Human Rights. (CorpWatch 2007).

3.4 The Case of Chile

Chile serves as an especially interesting case to analyze. It has been portrayed as a model of free trade and economic liberalization in Latin America, and its legislation is one of the weakest in the region in terms of the protection of Indigenous rights in general, and land and resource rights in particular. As a consequence of the transformations introduced in the 1980s, under the military regime of General Pinochet, Chile opened its economy to international markets, encouraging foreign investment and exports, both of which depended mainly on natural resource exploitation. Paradoxically, this policy was strengthened and legitimized after 1990 with the return to democracy. It has been under the governments of the Concertación, the coalition of center-leaning political parties that has ruled the country since its return to democracy to the current moment, that Chile entered into FTAs with the world's economic leaders. These FTAs have deepened the liberalization of the country's economy and attracted foreign capital, which has been invested in Chile largely due to its political stability and its low environmental and labor standards.

As a consequence of this policy, connections to the global economy have expanded throughout the country, in particular in those areas where natural resources are located, which generally coincide with Indigenous peoples' territories (subsoil resources in the North of Chile in the territory of the Andean peoples, which include the Aymara, the Lickanantia, the Quechua, the Coya and the Diaguita; and water and forest resources in the South, in Mapuche peoples' territory). This has resulted in the installation of large development projects—both public and private, national and international—on Indigenous lands, or on lands claimed by Indigenous communities.

The traditional territory of the Mapuche, the largest group of Indigenous people in the country,[17] has been under pressure by the forest industry, fishing and salmon farming, as well as by the building of highways and of hydro-electric dams. Most of these projects have been implemented without providing sufficient information to the affected communities, and without their consent.

The expansion of the forest industry into Mapuche ancestral territory, for example, began in the 1970s when the Pinochet regime endorsed a strategy to promote large-scale forestry in the country.[18] As a result of this strategy, large corporations acquired vast tracts of lands, planting them with fast-growth exotic species (radiata pine and eucalyptus) for the production of timber and cellulose. A significant portion of these plantations, estimated at more than 2 million hectares, are located in Mapuche peoples' territory [19] (Catalan n.d.).

Mapuche communities and NGOs supporting them have documented the serious environmental impacts caused by exotic plantations on Mapuche lands or on adjacent lands claimed by Mapuche people. Loss of flora, fauna and the overall biodiversity on which the Mapuche culture is based, erosion, and decreased water resources, are some of the most common effects of substitution and monoculture practices by forest companies with state support. UN Special Rapporteur Stavenhagen has expressed concern for the expansion of forest plantations into Mapuche territory (Naciones Unidas [Comisión de Derechos Humanos] 2003).

The construction of a series of hydro dams—six in total—since the late 1980s by the Empresa Nacional de Energía (ENDESA), a former state company currently owned by Spanish capital, in the Alto Bio-Bio, the ancient territory of the Mapuche Pehuenche people, endangers their cultural survival and territorial rights.

The Ralco dam, located in lands that the Chilean state acknowledged as belonging to the Pehuenche people, was finished in 2004, resulting in the flooding of 3,500 hectares and forcing the relocation of 98 Pehuenche families (approximately 500 people). Due to its many impacts, Ralco was initially opposed by the vast majority of the people living in the area directly affected by its construction. The case was taken by a group of Pehuenche women to the IAHR Commission, ending up in an agreement with the Chilean state in 2003.[20]

[17] The Mapuche population in Chile has been estimated at one million. They represent over 90% of the total Indigenous population of the country. Their traditional territory is located in the central southern part of Chile and Argentina.

[18] Private forestry expansion in Mapuche territory has been possible to a large extent because of state subsidies for forest plantation and management established in Decree Law No. 701 of 1974.

[19] The Chilean state recognized approximately 500,000 hectares as belonging to the Mapuche people under the legal structure of *reducciones* in the late XIXth and early XXth century.

[20] According to this agreement, the Chilean government committed itself to provide material compensation to the Pehuenche claimants consisting in cash compensations and lands in exchange for those flooded by Ralco's reservoir. It also agreed to implement policies aimed at the environmental monitoring of Ralco, the restitution of lands seized from the Pehuenche in the past, the participation of Pehuenche in their development, and also in the creation of a new municipal district on Pehuenche territory, an area where the Mapuche are a demographic majority. Finally, this agreement included provisions for the implementation of processes with Indigenous peoples' participation aimed at ratifying ILO Convention 169, and including Indigenous peoples and their rights in the Constitution. Most of the provisions of this agreement have not been implemented to date.

In recent years there have been new threats to the Mapuche way of life, including the installation of salmon farms on the shores of Mapuche lakes and coastal areas and the construction of new hydro-dams and water treatment plants on their lands.

These developments have been possible because of the fragile protection of Indigenous peoples' rights in the country. Notwithstanding the legal transformations introduced in recent years, Indigenous peoples have not been recognized as such until today. Chile is one of the five states in Latin America that has not acknowledged in its constitution Indigenous peoples' existence or the multicultural and multi-ethnic nature of the state (Barié 2003).

According to the 1980 Constitution currently in existence, the only people who are acknowledged are the Chilean people. Legislation enacted in 1993 (Law 19.253) recognizes Indigenous individuals, communities and ethnic groups, as well as their rights concerning lands, languages and cultures. This recognition, however, is clearly insufficient when compared to international standards concerning Indigenous peoples' rights, such as those upheld by the International Labor Organization's Convention 169 (1989) and the United Nations Declaration on the Rights of Indigenous Peoples. It is also insufficient when compared to the rights accorded to these peoples by other Latin American states, in particular those concerning Indigenous land and resource rights.

According to the 1993 legislation in effect, Indigenous lands can be exchanged for lands of non-Indigenous status, or can be expropriated by the state in the sake of public interest. Water and subsoil resources as well as ocean resources can be ceded by the state to non-Indigenous individuals or corporations, which can exploit them despite their location on Indigenous lands. Although legislation introduced in 1994 requires large development projects to perform environmental impact assessment studies (EIA), which assess the impact on natural resources and human communities, these studies have not prevented the implementation of large development projects that have strongly impacted Indigenous communities.

State policies aimed at the acquisition of new lands for Indigenous peoples, in particular the Mapuche people, and at promoting their social, economic, and cultural development have been implemented in the last decade. Between 1994 and 2005, government programs have resulted in the acquisition, transfer and title clearance of 406,666 hectares for Indigenous peoples in Chile. The total investment made by the Chilean state is estimated at about CLP $78,500.000 (approximately U.S. $142 million); 19,452 families throughout the country have benefited from this policy. Of the land that has been transferred, approximately 200,000 hectares were recognized for the Mapuche (Aylwin 2006).

Moreover, in 2001 a program aimed at improving the living conditions and promoting the economic, social and cultural development of Indigenous peoples living in rural areas was launched by the government. This program (*Orígenes*) received funding (U.S. $153 million) from the Inter-American Development Bank (IDB) and the Chilean government. By November 2004, *Orígenes* had targeted 642 communities, a large number of them Mapuche. However, these policies have failed largely due to lack of funding, improper use of public resources and the contradictions between these policies and state

efforts to expand the global economy into Indigenous peoples' territories without the consent of their communities.

Mapuche peoples' protests against these contradictory policies, and in particular against large developments, have been persecuted by the government. Resorting to the antiterrorist law passed by the military regime, and to a law on internal State security, the government has accused many Mapuche leaders and tried them for their involvement in social protest.[21] At least ten of them have been sentenced to prison for up to ten years. Police abuse in Mapuche communities has become a constant practice. Crimes committed by the police or by farmers against the Mapuche people remain in impunity. Criminalization of Mapuche peoples' social protest in the context of economic globalization has been condemned by the Mapuche, as well as by human right NGOs and the United Nations.[22]

On its last Report on Chile, the UN Human Rights Committee (2007) expressed its concern the lack of progress in the implementation of the provisions of the International Convention on Civil and Political Rights by the Chilean state, a signatory, with regards to Indigenous peoples. In particular, the Committee expressed concern to the application of an antiterrorist law against Mapuche people, which threatens due process rights, and with regard to the lack of progress in the protection of land rights affected by large development projects. The Committee recommended that the government reform its policies in these matters, revise antiterrorist legislation and protect ancestral land rights of Indigenous peoples in order to avoid conflicts that affect their communities. It also recommended that the government consult with Indigenous peoples before granting licenses for the economic exploitation of lands in conflict (Naciones Unidas [Comite de Derechos Humanos] 2007). However, to this date, the government has not followed these recommendations.

[21] In the Araucanía region alone, approximately 300 Mapuche people have been taken to court since 2000. They are accused of committing terrorist acts condemned by antiterrorist legislation enacted during the military regime. Ten Mapuche people are currently in prison due to court decisions in these cases. Antiterrorist legislation has been criticized by human rights advocates because it allows the use of faceless witnesses; enables long periods of preventive jail; and establishes penalties that are double those of ordinary crimes, preventing due process rights.

[22] The use of this legislation against the Mapuche people has been condemned by Human Rights Watch (2004), the UN-Special Rapporteur on the Rights of Indigenous Peoples (2003), the UN-Committee on Economic, Social and Cultural Rights (2004), and more recently by the UN Human Rights Committee (2007).

Section 4: Globalization of Human Rights and Its Implications for Indigenous Peoples

Fortunately, new scenarios that have emerged in recent years as a consequence of the other dimensions of globalization, in this case related to human rights, have allowed broader international recognition and protection of Indigenous peoples' rights. This can be seen in the adoption of several international conventions concerning the rights of Indigenous peoples, in the recent approval by the UN of a Declaration on the same rights, as well as in the jurisprudence that has emerged from human rights treaty bodies that concern these peoples.

4.1 ILO Convention 169

In 1989, the International Labor Organization approved Convention No. 169 on Indigenous and Tribal Peoples. This is the first and most comprehensive international convention solely devoted to Indigenous peoples and their rights. The Convention acknowledges Indigenous peoples as such, and not as populations as did the former Convention 107 of the ILO. It also acknowledges Indigenous peoples' right to decide their own priorities and to control their economic, social and cultural development (Article 7.1) as well as the right to preserve their own institutions (Article 8.2). These provisions have been central for Indigenous claims to political and economic autonomy throughout Latin America. Moreover, this Convention grants Indigenous peoples rights not only over their lands, but also over their territories and natural resources. Article 13.2 of Convention 169 defines territory as including "the total environment of the areas which the peoples concerned occupy or otherwise use." Rights to natural resources—which include participation in the use, management and conservation of these resources (Article 15.1) —, and rights to fair consultation, participation in the benefits, and compensation for any damages provoked by the exploration and exploitation of subsoil resources (Article 15.2) are also considered in this Convention.

Eighteen states, thirteen on them in Latin America, have ratified Convention 169. In Latin America, this international convention strongly influenced national constitutional reforms introduced during the 1990s that recognize Indigenous peoples and protect their rights. Although the enforceability of its provisions within the ILO system is limited, the Convention has inspired state courts' decisions on matters that concern Indigenous peoples, as well as the rulings of the Inter-American Human Rights Commission and Court, as we will see later in this article.

4.2 Biodiversity Convention

The UN Convention on Biological Diversity was adopted in Rio de Janeiro in 1992. In Article 8, paragraph (j) asserts the need to respect, preserve and maintain the knowledge, innovations and practices of Indigenous and local communities, and promote their wider

application with the approval of the holders of such knowledge, and to share equitably the benefits arising from their utilization.[23]

Given the importance of this provision, a Working Group on Article 8 (j) and related provisions was established in 1998 by the fourth meeting of the Conference of the Parties (COP 4). Since then this Group has been working on different initiatives. In 2000, the COP adopted a programme of action that focuses on issues central to enhancing Indigenous and local communities' role and involvement in achieving the protection of biodiversity and equitably sharing the benefits. In 2004, the COP 7 adopted the Akwé: Kon Voluntary Guidelines, which provide a process for the conduct of cultural, environmental and social impact assessments regarding development projects proposed for, or likely to impact, sacred sites and land and water traditionally occupied or used by Indigenous and local communities.

In its current programme (2006-2008) the Working Group has included among its main goals in relation to this provision the development of technical guidelines for documenting traditional knowledge; research into Indigenous and local communities vulnerable to climate change; and measures to protect the rights of Indigenous and local communities living in voluntary isolation.[24]

4.3 The UN Declaration on the Rights of Indigenous Peoples

Also at the UN level, last September 13, 2007, the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples. The Declaration, which had been approved in 2006 by the UN Human Rights Council, was adopted by the General Assembly with 144 member states voting in favor, four member states voting against (United States, Canada, Australia and New Zealand) and 11 abstentions (only Colombia in Latin America).

The UN Declaration was adopted after more than twenty years of debate, first within the UN Working Group on Indigenous Populations, and later by the UN Commission on Human Rights (replaced later by the Human Rights Council). This Declaration is probably the only UN Declaration which has been drafted and negotiated with the active participation of those for whom it is destined: Indigenous peoples. It is the first UN document of this kind which is completely devoted to Indigenous peoples.

The Declaration is a landmark in the construction of an international consensus on human rights, in this case on the rights of peoples historically neglected and discriminated against, composed of more than 300 million persons world wide. As Rodolfo Stavenhagen, the UN

[23] Article 8 (j) of this Convention states: "Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices."

[24] This programme also focuses on developing indicators for the retention of traditional knowledge, and methods and measures to address the underlying causes of the loss of such knowledge; providing views on the development of an International Regime on Access to Genetic Resources and Benefit-Sharing relevant to traditional knowledge, as well as in the development of a Code of Ethical Conduct to ensure respect for the cultural and intellectual heritage of Indigenous and local communities. The plan of action for the retention of traditional knowledge includes the further development of *sui generic* systems to protect traditional knowledge based on customary laws of Indigenous peoples (Pachamama 2007).

Special Rapporteur on the situation of the human rights and fundamental freedoms of Indigenous people stated last October 22 at the UN general Assembly, "[…] the Declaration reflects a growing international consensus concerning the content of the rights of Indigenous peoples, as they have been progressively affirmed in domestic legislation, in international instruments, and in the practice of international human rights bodies" (Stavenhagen 2007).

In its Preamble the Declaration affirms that Indigenous peoples are equal to all other peoples, while recognizing their right to be different. In this section the Declaration also condemns doctrines, policies and practices that support the superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences as racist and scientifically false. Moreover, in accordance with the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights as well as the Vienna Declaration and Programme of Action, it reaffirms the fundamental importance of the right to self-determination of all peoples.

The Declaration acknowledges that Indigenous peoples, as a collective group and as individuals, have the right to the full enjoyment of all human rights and fundamental freedoms recognized in the UN Charter and Declaration of Human Rights,[25] but which in practice had not been respected by states in the past. [26]

Although several amendments were introduced in the final text of the Declaration in order to obtain the support of the African Group of States, which was necessary for its consensual adoption by the General Assembly,[27] in many aspects, the Declaration goes beyond the rights recognized by the ILO Convention No. 169. Among the most important rights acknowledged in this document are those of a political nature, including the right to self-determination, which is phrased in similar terms as Article 1 of the UN Covenant on

[25] Article 1 states: "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law"; Article 2 states: "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination […]."

[26] Due to this circumstance, James Anaya, an Indigenous jurist and Professor at the University of Arizona, stated that there should not have been a specific UN Declaration of Indigenous peoples rights. However, he admits the need of this Declaration based on the fact that such rights have not been respected in regards to Indigenous peoples. As he affirms: "There should not have to be a Declaration on the Rights of Indigenous Peoples, because it should not be needed. But it is needed. The history of oppression against Indigenous peoples cannot be erased, but the dark shadow that history has continued to cast can and should be lightened. The Declaration is needed for the difference it can and will make for the future. That's what the celebration is about." (Anaya 2006: 8)

[27] The most relevant of these amendments to the Declaration was that introduced to Art. 46, par. 1, which was revised as follows (indicated in bold): "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." The Indigenous Peoples Caucus on the Declaration affirmed that the most important provisions of the Declaration were kept intact, and there fore endorsed the proposed text. While considering that the addition to article 46.1 was not desirable, it considered that it did not undermine the integrity of the Declaration. (Indigenous Peoples Caucus 2007)

Civil and Political Rights and the UN Covenant on Economic, Social and Cultural Rights,[28] as well as the right to autonomy on internal and local affairs.[29]

These rights are affirmed throughout the Declaration when acknowledging Indigenous peoples' "right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State" (Article 5); the right to determine priorities and strategies for their own development (Article 23)[30]; and to develop and maintain their own institutions and juridical systems or customs (Articles 34 and 35).[31]

Also as a consequence of the right to self-determination, the UN Declaration established that states should obtain Indigenous peoples' free, prior and informed consent before adopting measures which may affect them, including relocation from their territories (Article 10); the adoption and implementation of legislative or administrative measures (Article 19); or the approval of projects affecting their lands territories and other resources, particularly in connection with the development, utilization or exploitation of minerals, water and other resources (Article 32.2).

Another important matter dealt with by the Declaration is land and resource rights. Aside from stressing Indigenous peoples' right to maintain and strengthen their spiritual relationship with "their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources […]" (Article 25), the Declaration affirms Indigenous ownership and control over lands, territories and resources that they posses by reason of traditional ownership or other occupation or use (Article 26.2). This provision is interpreted as recognizing aboriginal or ancestral title. The Declaration also establishes the obligation of states to give legal recognition and protection of these lands (Article 26.3).[32]

[28] Article 3 states: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

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

[30] Article 23 states: "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, Indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions."

[31] Article 35 states: "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards." Article 34 states: "Indigenous peoples have the right to determine the responsibilities of individuals to their communities."

[32] Article 26 states: "2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired; 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned."

Equally important is the provision establishing the right to redress, including restitution or compensation, for traditional lands, territories and resources that have been taken without the consent of the Indigenous peoples involved (Article 28).[33]

Additionally, the Declaration contains several provisions that acknowledge and protect Indigenous peoples' cultural rights, including the right to practise and revitalize their cultural traditions and customs (Article 11)[34], the right to use and develop their languages, oral traditions and names (Article 13)[35], and the right to maintain, control, protect and develop their intellectual property over their cultural heritage, traditional knowledge, and traditional cultural expressions, as well as to control and protect their intellectual property rights (Article 31).[36] It also establishes the right not to be subjected to forced assimilation or the destruction of their culture (Article 8.1). Finally, the Declaration (Article 37)[37] affirms the right to the observance and enforcement of treaties and other constructive agreements with states and their successors.

The legal implications of this Declaration are currently being debated. For some states, in particular those who voted against the Declaration, it is a non-binding instrument. For Indigenous peoples, it is a fundamental legal document, which should orient state legislation and policies that concern them. It is clear that the Declaration does not have the same status as an international covenant or treaty. Formally, its provisions do not have, per se, legally binding implications, as do treaties. However, there are strong arguments that affirm that states are legally obliged to respect the rights acknowledged by Declarations, in this case one concerning Indigenous peoples.

Indeed, according to Article 42, the UN, its bodies and agencies, as well as states, "…shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration."

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[33] Article 28 states: "1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress."

[34] Article 11 states: "Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature."

[35] Article 13 states: "Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons."

[36] Article 31 states: "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions."

[37] Article 37 states: "1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements; 2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of Indigenous peoples contained in treaties, agreements and other constructive arrangements."

As James Anaya and Siegfried Wiesser affirm in a recent article on the Declaration, there are several elements to be taken into consideration to determine its legal implications. First, the Declaration is a solemn statement similar to the 1948 Universal Declaration, that Member States—in particular those who supported its adoption—should respect domestically and internationally.

On the other hand, individual component prescriptions of the Declaration might become binding if they can be categorized as generative of customary international law. As these authors affirm, the requirements for the establishment of new customary international law include a widespread and representative state practice in support of the new rule, including the specially affected states, as well as the feeling by states to be obliged by them (*opinio juris*).

According to these authors, the fact that four UN Member states (United States, Canada, Australia and New Zealand) opposed the Declaration,[38] does not necessarily invalidate the claims to the consideration of key parts of the Declaration or of the principles embedded in it as customary international law. When analyzing the practices these states with regard to key provisions of the Declaration, including the right to self-determination, the right to ownership, development, control and use of the traditionally owned or occupied lands, and the observance of treaties between states and Indigenous peoples, the authors conclude that these practices have not opposed the central principles contained in the Declaration, but rather have been consistent with those principles. This is also applicable to states that abstained during the vote on the Declaration at the UN General Assembly, such as Colombia, whose policy with regards to the central aspects of the Declaration is in line with its principles and provisions.[39]

Moreover, in talking about the existence of an *opinion juris*, these authors affirm that the participation of Member states, including those who voted against the adoption of the Declaration, in a process aimed at the creation of a special status and rights for Indigenous peoples, makes them part of the world consensus on customary international law, which generates binding obligations for states. This hods when taking into consideration that only a *jus cogens* norm requires the unanimity of the world community (Anaya and Wiesser 2007).

The implications of the UN Declaration in Latin American are yet to be seen. There are several factors, however, that allow us to be optimistic about its implementation throughout the region, and states' acceptance of its key provisions as customary international law.

The first and most important of these factors is the support that all Latin American states, except for Colombia, gave to the Declaration. This can be seen not only through the vote in favour of its adoption at the General Assembly, but also in many cases, through

[38] The U.S. explicitly rejected any possibility that the UN Declaration could become customary international law arguing that it lacks state support in practise. Consequently, it affirmed that the Declaration could not provide the basis for legal actions in international or domestic proceedings.

[39] Examples of these practices are Indigenous peoples' autonomy acknowledged in Canada through the aboriginal and treaty rights of its 1982 Charter of Rights and freedoms: the U.S. government's recognition of Indian tribes as political entities with inherent self-government powers; the 1840 Treaty of Waitangi in New Zealand; and the autonomy acknowledged to Indigenous peoples in Colombia through the *resguardos* (Anaya and Weisser 2007).

participation in debates about this international legislation in the last decades. The fact that three Latin American states took a leading role in the negotiations that ended up in the adoption of the final text should also be taken into consideration.

With regards to Colombia, notwithstanding its abstention when voting on the Declaration at the General Assembly, it is relevant to say that not only its constitutional provisions, but also its policies on matters such as the recognition of autonomy, and the demarcation of Indigenous lands, territories and resources, demonstrate a practice that is consistent with the rights and principles that are key to the Declaration. Consequently, Colombia has also demonstrated a willingness to be bound by its provisions.

Initial steps made since the adoption of the Declaration demonstrate the willingness of many Latin American states to abide by the Declaration's provisions. For example, Bolivia's Senate converted the UN Declaration into domestic law on November 1, 2007. This makes of Bolivia the first state in the world to adopt the Declaration as national legislation. Rodolfo Stavenhagen, the UN Special Rapporteur on Indigenous rights, recently asked Mexico to adopt the Declaration as internal legislation in that country.

Also relevant is the ruling of the Supreme Court of Belize in a case where Maya villages claimed customary property rights, which are protected by the Constitution of Belize and by international human rights law. In its ruling the Court accepted the arguments presented by the claimants, citing the United Nations Declaration on the Rights of Indigenous Peoples as evidence of the general principles of international law. In this ruling a Court member affirmed that he is "[…] of the view that this Declaration, embodying as it does, general principles of international law relating to Indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it" (Conteh 2007:132).

Indigenous organizations in the region not only have requested that states respect and implement the UN Declaration provisions, but also have manifested their commitment to promote the legal and constitutional reforms that are necessary to make domestic legislation conform to the principles and spirit of the Declaration (Parlamento Indígena de América 2007).

More relevant, the Inter-American Human Rights (IAHR) Commission as well as the Inter-American Human Rights (IAHR) Court, where Indigenous peoples have taken many complaints in the last three decades, have already acknowledged the contents of what was then the UN Draft Declaration on the rights of Indigenous peoples. They have also acknowledged the contents of the Inter-American Declaration on the same rights as general principles of international law which are applicable to all Member States of the OAS.

In its rulings on such complaints, the IAHR Court has affirmed, in effect, that the contents of the UN and OAS Draft Declarations on the Rights of Indigenous Peoples, even before their adoption as Declarations, as well as those of the ILO Convention 169 and other international human rights instruments, may be considered when deciding cases related to Indigenous peoples' rights. In the Awas Tingni decision, the Court applied an "evolutionary interpretation" of such rights taking into account contemporary developments on Indigenous peoples' rights to property their lands (par. 146-149).

In the decision on *Mary and Carrie Dann v. US* (2002), the IAHR Commission admitted that the rights granted to Indigenous peoples in the UN and OAS Draft Declarations and other international instruments concerning them were to be considered as "international general legal principles" currently in effect within and outside the Inter-American human rights system.

These are some elements that give us reason to think that the UN Declaration is already having relevant juridical implications in Latin America, thus contributing to shape a new scenario characterized by an increasing acknowledgement of Indigenous peoples' rights in the region, as well as by new policies framed in its general principles and provisions.

4.4 Jurisprudence of the Inter-American Human Rights System

Yet another expression of the construction of a supra-state human rights law is taking place in Latin America, with relevant implications for Indigenous peoples and their rights. As previously referred to, in recent years Indigenous peoples of the Americas, after exhausting domestic remedies for the protection of their human rights, have taken their complaints to the Inter-American Human Rights System. Both the IAHR Commission and Court have accepted Indigenous peoples' petitions based on, among others, the right to life, the right to physical integrity, the right to property, the right to political participation, the protection of family, discriminatory military drafting and right to judicial protection acknowledged by the American Convention on Human Rights (1969) and other regional human rights treaties.

In its decisions the Commission and Court have recognized the need for special protection for Indigenous peoples due to their vulnerability; the specificity that these rights have for Indigenous peoples based on their cultural diversity. These bodies have also affirmed the collective nature of Indigenous peoples' rights.

A large part of these complaints have been related to the violation of the right to lands, territories and resources. Jurisprudence on this matter has evolved substantially in the last few decades. The IAHR Commission, for instance, has long affirmed a state's obligation to protect Indigenous lands (the case of Guahibos in Colombia, 1970). In 1985, it recommended the identification and demarcation of Yanomami lands in the Northeast of Brazil, including more than 9 million hectares of Amazon forest, the habitat of approximately 1200 Yanomami. More recently, although not in Latin America but in the U.S., in the Dann case (2002), the Commission concluded that the U.S. government had not guaranteed the Dann sisters the right to property in conditions equal to those of ther rest of the citizens under the basis of the Inter-American Human Rights Declaration. It recommended that this government repair the violated right and effectively guarantee the Dann sisters the right to property in their ancestral lands in Western Shoshone. It also suggested that the U.S. revise its legislation to protect these rights.

In the past decade, in a series of landmark decisions, the IAHR Court has acknowledged Indigenous peoples' right to ancestral lands and territories as an existing right under the basis of the Inter-American Human Rights Convention and of the general principles of international law. In the case of *Awas Tingni v. Nicaragua*, the IAHR Court ruled in 2001 that the Nicaraguan state had violated the right to property by granting a logging concession on the community's traditional lands and thus by not taking sufficient measures

to guarantee the traditional land and resource tenure of this Indigenous community of Nicaragua's Atlantic Coast. In this decision the Court acknowledged the value of Indigenous peoples' communal property under Article 21 of the American Convention (par. 149); the validity of land possession based on customary law, even without a land title, as a means to assert property rights (par. 151); the close relationship between Indigenous people and their lands, and the need to consider this relationship as a fundamental base for its culture, spiritual life and economic survival (par. 149).

In 2005, in the *Yakye Axa v. Paraguay* case, the IAHR Court affirmed that the right to judicial protection in Article 25 of the Convention requires states to provide legal remedies that offer a real possibility to restitute Indigenous peoples' lands, of which they have been historically dispossessed. Moreover, the Court stated that Paraguay had not adopted adequate domestic legislation to ensure the effective use of the traditional lands and natural resources by members of the Yakye Axa community, located in the Chaco, and expelled from its traditional territories by private landholders. The Court also stated that Paraguay had violated Article 21 (in relation to Articles 1.1 and 2) of the American Convention, the right to property, which negatively affected members of the Yakye Axa community. It ordered the reparation of this violation in the benefit of the community, the identification of its traditional territories and their entitlement to the community within three years. The Court also affirmed that the state should give alternative lands to the community in consultation with its members if it was not possible to give them the title for their traditional lands. It also ordered the creation of a fund for land acquisition.

Further, in the case *Sawhoyamaxa v. Paraguay* in March 2006, the IAHR Court stated that Paraguay had violated the right to property (Article 21 of the Convention) and the right to life (Article 4.1) of the Sawhoyamaxa Indigenous community in the Chaco. The Court concluded in this case that traditional Indigenous possession over their lands has effects which are equivalent to property rights granted by the state; that traditional possession allows the community to demand official recognition by the state and its registration as such; that members of Indigenous peoples that have lost their traditional lands against their will maintain their property rights over them, even without a legal title, except when they have been transferred to third parties in good faith; and that they have the right to obtain the restitution of those lands or to obtain other lands of the same quality and extension (par. 128). The Court added that the right to obtain land restitution remains permanent throughout time while Indigenous peoples maintain a relationship with those lands and resources, including material aspects (harvest, fishing, hunting, gathering, use of natural resources) and spiritual aspects (ceremonies) (par. 131).

Consequently, the Court mandated the state of Paraguay to adopt all administrative and legislative measures within three years of the ruling to restitute the traditional lands claimed by the community. The Court also ordered Paraguay to consider purchase or expropriation for this purpose.

In these three decisions the IAHR Court has recognized what in the Canadian context has been denominated the "aboriginal title" over lands and resources traditionally owned by Indigenous peoples, consequently generating a new scenario for the protection of Indigenous territorial rights in the region. Unlike in the Canadian context, this type of recognition had not been made by Latin American states or domestic courts in the past. Moreover, in the last two decisions mentioned above (*Yakye Axa* and *Sawhoyamaxa*), this

right is recognized even over lands where non-Indigenous property has been acknowledged by the states in accordance with their national legislation. The last decision (*Sawhoyamaxa*) acknowledges that Indigenous peoples' right to obtain land restitution is maintained permanently throughout time while Indigenous peoples' relationships with those lands and resources persists.

In a ruling related to the right to political participation and to the right not to be discriminated, the IAHR Court acknowledged in the 2005 case *Yatama v. Nicaragua* that candidates of Yatama, an Indigenous political party of the Atlantic Coast of Nicaragua, were prohibited from participation in the municipal election of 2000. This decision by Nicaragua's electoral council was made on the ground that Yatamahad had no candidates in 80% of the state municipalities, as required by national electoral law. Yatama claimed that it had no connections or funding to enter their candidates in non-Indigenous areas and, consequently, that it was disqualified from participating in the elections even in the areas where the party had structure and leadership, thus violating the Indigenous people´s rights. The Court considered that electoral law imposed an excessive restriction on the political rights of the Indigenous people as it required a form of organization foreign to their customs and traditions, and it ordered the government to modify the electoral legislation.

Final Remarks

It is evident that globalization is a process which is conceptualized in different ways by distinct actors (states, transnational corporations, multilateral agencies, civil societies and Indigenous peoples) according not only to their philosophical perspectives, but also in accordance to their specific interests. Whatever concept of globalization is accepted, what is certain is that it is a phenomenon that is deeply affecting Indigenous peoples' lives in many different ways.

As we have seen throughout this article, in its economic dimension globalization is a having a tremendous impact on Indigenous peoples' traditional lands, territories and resources, and in general, their habitats or ecosystems. Such habitats are being increasingly incorporated into global markets, and appropriated by TNCs or private national corporations related to them. This is a result of policies that are being defined and implemented by multilateral agencies (the World Bank and the IMF, among others) and by the worlds' economic leaders, and that are being imposed on Third World countries—or consented to by their elites—through FTAs or bilateral investment agreements, without informing and consulting Indigenous peoples.

In the same vein, globalization is having huge impacts on Indigenous peoples' cultures, which are being threatened by the expansion of global culture into their communities and by the modification of their ancestral habitats with which their cultures are intertwined. They are also being impacted by the usurpation of their traditional knowledge, without consultation or compensation.

Economic globalization also undermines Indigenous peoples' ability to control their lives, and to self-determinate as peoples. When decisions concerning them are made by distant and undefined entities, whose actions cannot be easily adjudicated, when states are losing sovereignty at the hands of multilateral global institutions, Indigenous peoples also lose their capacity to control their present and to orient the future of their communities. These negative implications explain why these peoples are so strongly resisting economic globalization, which many Indigenous leaders think of as another form of colonization, similar to that which has been taking place in their territories for centuries, but in some cases even more aggressive and violent than earlier forms of colonization.

However, from a different perspective, globalization, as we have seen throughout this article, has had beneficial impacts for Indigenous peoples, opening new alternatives for them and their communities. The clearest expression of this beneficial form of globalization is that related to human rights. The construction of a special regime within international law for the protection of their rights has enabled Indigenous peoples to be considered part of the community of peoples.

The evolution experienced by international law in this regards has been impressive. In a few decades Indigenous peoples have gone from being ignored by international law, to being recognized in their specificity and their right to self-determination, in equal terms as all peoples.

This is due not to the generosity of states, but to strategies that Indigenous peoples have implemented through their active participation in different international forums (the UN Working Group on Indigenous Populations and the UN Permanent Forum on Indigenous Issues, the International Labor Organization, the Interamerican Human Rights System, among others) where this emergent international law has been framed. The case of the UN Declaration on the rights of Indigenous peoples is probably the best example of this. Without the active involvement of Indigenous peoples in debates about its content, the Declaration probably would not have been adopted, or its final text would be very different than the text that was finally approved.

As James Anaya, an Indigenous professor at the University of Arizona, argues, Indigenous peoples have been successful in appropriating human rights discourse and institutions, and consequently have been able to develop an international regime for the protection of their rights (Anaya 2006). This is closely related to another dimension of globalization—communications—which will have to be approached through other studies specific to this topic. Communication systems, including the internet, transportation, etc., which globalization has also made possible, have had enormous implications for the construction of globalization from below, or non-hegemonic or alter-globalization, where Indigenous peoples from different regions of the world, including Latin America, have been central players.

The scenario for Indigenous peoples, with the recent acknowledgement of their status through the adoption of the UN Declaration, and with other expressions of international law that concern them, is different than that of the past. There are reasons to be optimistic for the future. Indigenous peoples, however, will have to confront the processes in which the states are losing their sovereignty at the hands multilateral agencies and TNCs, which are promoting economic globalization. The ways in which this conflict will be solved are still to be seen.

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