

**INDIGENOUS PEOPLES AND INTERNATIONAL HUMAN RIGHTS LAW: MINING,  
MULTINATIONAL CORPORATIONS AND THE STRUGGLES OF INDIGENOUS  
PEOPLES IN PERU**

by

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## **Abstract**

This thesis examines and questions the role of international human rights law and international economic law in relation to the increasing encroachment and dispossession of Indigenous lands and territories by multinational corporations (MNCs) in the extractive industry. It also aims to explore the role of a national state's legal framework and policies not only in validating, authorizing and embedding this process, but also in authorizing a growing and pervasive trend of persecution and criminalization of Indigenous communities who challenge and resist MNCs' operations. The examination of the relationship between national and international law provides a terrain to grasp how international economic law and international human rights law have become part of evolving regulatory architectures of global governance aiming to validate and embed global capital accumulation.

Focusing on Peru, this thesis argues that law, particularly international economic law and the legal framework developed in Peru since the 1990s, has played a prominent role in facilitating and embedding multinational corporate investment in the extractive industry, and in weakening the rights of Indigenous and peasant communities to control their land, water and resources. Peru's legal framework and policies on extractive industries have not only validated the expansion of MNCs operations and dispossession of Indigenous lands, but have also validated a growing trend of persecution and criminalisation of Indigenous communities. While international economic law constitutes, enables and protects MNCs, international human rights law and corporate social responsibility mechanisms are linked to and help to extend the expansion and deepening of global capital accumulation by means of laws and regulations designed to facilitate and remove barriers to the power and mobility of MNCs.

Notwithstanding legal and socio-economic barriers, Indigenous communities have mobilized against and resisted MNCs operations. A comparison of three conflicts involving corporate actors and local communities reveals the existence of intense social mobilization and resistance of Indigenous and peasant communities to defend their land rights, their environment and livelihood, their participation in the decision making process and fair distribution of economic benefits.

## **Lay Summary**

My thesis discusses a growing phenomenon in Latin America and around the world, which is the opposition and resistance of Indigenous communities to extractive projects that affect their lands, health and life. It discusses the central role of law in the dispossession of Indigenous lands by multinational corporations; as well as in the increasing criminalization and repression of affected communities.

Focusing on Peru, my thesis highlights Indigenous peoples' resistance and struggle for justice. Despite the legacies of racist colonial violence and significant legal obstacles in accessing justice, Indigenous communities in Peru continue opposing and resisting the dispossession of their lands and the violation of their rights by corporations and the State. My thesis embraces and supports Indigenous communities' demands for justice. It asserts the right to tell Indigenous communities' stories of discrimination, suffering and resistance as a mean of achieving agency, aiming to question and challenge mainstream narratives.

## **Preface**

This dissertation is my original and independent work and therefore I take responsibility for any errors or omissions.

Some segments in Chapter 3 reproduce and adapt writing from Gerardo J. Munarriz, “Rhetoric and Reality: The World Bank Development Policies, Mining Corporations, and Indigenous Communities in Latin America,” (2008) 10 (4) International Community Law Review 431.

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## **Dedication**

*I dedicate this thesis to:*

*The beloved memory of my mother Antonia Ulloa Huamansuri; my father Gerardo A. Munarriz  
and my sisters and brothers.*

# Chapter 1: Introduction: Conceptual Framework and Methodology of the Thesis

How to overcome the banality and invisibility - of daily genocide of Indigenous peoples in the Americas - that has become inflexible and tenacious? I do not think States, either separately or associated at the United Nations, are those who will formulate and tackle the question. The response is on the other side of the mirror, the side that does not duplicate the self-image, thereby preventing the images of the Others, the Indigenous in this case, from coming alive. In the international community we need more voices, voices that break mirrors and open eyes. It is the voice of the victims [Indigenous peoples] which can make visible the daily genocide.

(Bartolome Clavero, 2011)<sup>1</sup>

## 1.1 Introduction

Huancavelica, located in the central Andes of Peru, is known as the “city of mercury.”<sup>2</sup> I was born and raised in the city, and I recall finding on several occasions little silver balls on the playground of my primary school or on the sides of ditches or building foundations around my neighborhood while playing with my classmates and friends. We used to rub our copper colored coins with the little balls hoping to turn them into ‘silver coins.’ Little did our parents and teachers know that we lived with the toxic legacy of over 400 years of severe mercury contamination, which is currently among the highest worldwide.<sup>3</sup>

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<sup>1</sup> Bartolome Clavero, *¿Hay Genocidios Cotidianos? y Otras Perplejidades sobre América Indígena* (Copenhague : IWGIA, 2011) at 117. (My translation)

<sup>2</sup> Carlos Contreras, *La Ciudad de Mercurio, Huancavelica, 1570-1700* (Lima: Instituto de Estudios Peruanos, 1982).

<sup>3</sup> Nicholas A. Robins, et al., "Estimations of Historical Atmospheric Mercury Concentrations from Mercury Refining and Present-day Soil Concentrations of Total Mercury in Huancavelica, Peru," (2012) 426 *Science of the Total Environment* 146-154; Nicholas A. Robins and Nicole Hagan, “Mercury Production and Use in Colonial Andean Silver Production: Emissions and Health Implications,” (2012) 120:5 *Environmental Health Perspectives* 627-631.

Founded in 1571, Huancavelica played a vitally important role in the economic life of the Spanish colony in the Americas.<sup>4</sup> In late 1563, the Angaraes native peoples had revealed to the Spanish the large and exceptionally rich cinnabar deposits located in the Santa Barbara Hill just on the outskirts of the city. As the transition to amalgamation-based silver refining was adapted to the ores at Potosi (Bolivia) and other mining centers in the early 1570s, demand for Huancavelica's mercury surged.<sup>5</sup> The unprecedented flow of silver from the mining centers in the Andes would not only help Spain consolidate its position as a global power but would also play a key role in the emergence of the industrial revolution and ultimately of the modern global capitalist economy.<sup>6</sup> The less known or hidden history about Huancavelica's mercury mine is the fact that it also poisoned or killed hundreds of thousands of Indigenous labourers, earning for itself an infamous reputation as a "public slaughterhouse"<sup>7</sup> and the Mine of Death (La Mina de la Muerte).<sup>8</sup> In his account of Latin American history, *Memory of Fire*, Eduardo Galeano writes, "Bad dreams, nightmares about abysses or vultures or monsters, may portend the worst. And the worst, here, is being forced to go to the Huancavelica mercury mines or to the far-off silver mountain of Potosi."<sup>9</sup>

The fear of the Mita (forced Indigenous labour duty) in the mercury mines was so extraordinary that Indigenous mothers maimed and crippled their own sons to make them unfit

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<sup>4</sup> Guillermo Lohmann Villena, *Las Minas de Huancavelica en los Siglos XVI y XVII* (Sevilla: Escuela de Estudios Hispano-Americanos de Sevilla, 1949).

<sup>5</sup> Kendall W. Brown, "Workers' Health and Colonial Mercury Mining at Huancavelica, Peru," (2001) 57:4 *The Americas* 467-496, at 469.

<sup>6</sup> Nicholas A. Robins, *Mercury, Mining, and Empire: The Human and Ecological Cost of Colonial Silver Mining in the Andes* (Bloomington: Indiana University Press, 2011) at 4.

<sup>7</sup> Miguel Agia, *Servidumbres personales de indios* (Seville: Escuela de Estudios Hispano-Americanos, 1946), at 62; Report of Damián de Jeria, January 10, 1604, AGI, Lima 34, Archivo General de Indias, Seville.

<sup>8</sup> Production of mercury claimed thousands of victims and accidents; silicosis and mercury intoxication shattered countless other Indigenous lives. Kendall W. Brown (2001) *supra* note 5 at 468.

<sup>9</sup> Eduardo Galeano, *Memory of Fire, I. Genesis* (New York: Pantheon Books, 1985) at 173.

for it.<sup>10</sup> To meet the greater demand for Huancavelica's mercury, the Iberian conquerors forced Indigenous labourers to take turns working (seven days a week) in the mercury mines and refining plants. In the early 1600s, as many as two-thirds of Huancavelica's Indigenous labourers perished from mercury poisoning and other illnesses or accidents at the mines.<sup>11</sup> The poisonous mercury easily accumulated in their bodies; they inhaled mercury-laden dust in the mines and absorbed the poison through their skin. Indigenous labourers tending the primitive distillation ovens breathed in mercury gases as well. As the corpses of deceased Huancavelica Indigenous miners decomposed, they reportedly left puddles of mercury in their graves.<sup>12</sup>

The production of mercury not only caused the "human catastrophe of death, infirmity, abuse, and suffering dread," but also resulted in "one of the largest and longest-lasting ecological disasters ever known and one that continues to this day in Huancavelica."<sup>13</sup> As Rob Nixon writes, "violence, above all environmental violence, needs to be seen – and deeply considered – as a contest not only over space, or bodies, or labor, or resources, but also over time."<sup>14</sup> Nixon reminds us of Faulkner's dictum that "the past is never dead. It's not even past."<sup>15</sup> Today, despite the end of the mercury processing in the 1970s, Huancavelica remains among the most mercury-contaminated urban areas in the world.<sup>16</sup> The majority of the homes in the city are constructed from contaminated earthen materials and often interior walls and floors in these homes are

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<sup>10</sup> Kendall W. Brown (2001) *supra* note 5 at 474.

<sup>11</sup> Kendall W. Brown (2001) *supra* note 5; Nicholas A. Robins (2011) *supra* note 6.

<sup>12</sup> Kendall W. Brown, *A History of Mining in Latin America: From the Colonial Era to the Present* (Albuquerque: University of New Mexico Press, 2012) at 173-174.

<sup>13</sup> Nicholas A. Robins (2011) *supra* note 6 at 177, 184.

<sup>14</sup> Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Cambridge, Massachusetts: Harvard University Press, 2011) at 8.

<sup>15</sup> *Ibid* at 8.

<sup>16</sup> Nicole Hagan, et al., "Speciation and Bioaccessibility of Mercury in Adobe Bricks and Dirt Floors in Huancavelica, Peru," (2015) 37:2 *Environmental Geochemistry and Health* 263-272; Nicole Hagan, et al., "Mercury Hair Levels and Factors that Influence Exposure for Residents of Huancavelica, Peru," (2015) 37:3 *Environmental Geochemistry and Health* 507-514.

unsealed and uncovered. Therefore, the walls and dirt floors of homes are contaminated with a variety of mercury compounds, some of which are bioaccessible.<sup>17</sup> In 2015, a five-year-study concluded that mercury contamination from historic mercury processing in and near Huancavelica is above international health-based screening levels in the walls, floors, and indoor air in 75 percent of the earthen homes studied. Since at least 75 percent of the homes are made of earthen materials, and 75 percent of the homes in the study have mercury contamination above health screening levels, the number of people that could be at risk of unsafe exposure mercury could be as high as 20,000 (almost half of the city population), all of whom are potentially at risk for developing adverse health effects.<sup>18</sup>

The toxic legacies and environmental disasters affecting Huancavelica as a city are not only from the past. It is located in a region (also called Huancavelica), with the largest Indigenous population, highest poverty, malnutrition, and infant mortality rates<sup>19</sup> in Peru, that is currently the site of mining activity run by national and multinational corporations such as Buenaventura, Doe Run and others.<sup>20</sup> On June 25<sup>th</sup>, 2010 a reservoir of mine tailings collapsed in Angaraes, Huancavelica. The failure of the toxic waste reservoir owned by the Caudalosa Chica Mining Company (controlled by a group of Peruvian and foreign companies, among them the

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<sup>17</sup> Nicole Hagan, et al., “Residential Mercury Contamination in Adobe Brick Homes in Huancavelica, Peru,” in (2013) 8:9 *PLOS ONE* 1-9; Renzo Silva, “Familias en pobreza extrema son las mas afectadas con contaminacion de Mercurio,” in *La Republica*, Lima, July 20, 2015, online: <<http://larepublica.pe/impres/politica/16662-familias-en-pobreza-extrema-son-las-mas-afectadas-con-contaminacion-de-mercurio>> (retrieved 30 April 2017).

<sup>18</sup> Bryn Thoms (Lead Author) and Nicholas Robins, *Remedial Investigation: Huancavelica Mercury Remediation Project*, Study Project prepared by the Environmental Health Council, March 21, 2015; Elizabeth Prado, “Casi toda la ciudad de Huancavelica esta contaminada con mercurio,” in *La Republica*, Lima, 3 July 2015, online: <<http://larepublica.pe/impres/politica/12454-casi-toda-la-ciudad-de-huancavelica-esta-contaminada-con-mercurio>> (retrieved 30 April 2017).

<sup>19</sup> Instituto Nacional de Estadística e Informática (INEI), *Cifras de Pobreza 2014, Nota de Prensa No. 057*, 23 April 2015; Barbara Fraser, “If these walls could talk: Adobe homes in Peru’s Andes tell a centuries-old toxic tale,” in *Environmental Health News*, February 13, 2013.

<sup>20</sup> Honorio Pinto Herrera, “Desastre Ecologico y Ambiental en Huancavelica,” in (2010) 14:25 *Investigaciones Sociales* 321-338.



Scotiabank Peru S.A.A)<sup>21</sup> caused a devastating spill of more than 550 tons of tailings containing cyanide, arsenic and lead into seven rivers that provide the sole source of drinking and irrigation water for more than 40,000 Indigenous and peasants communities in the region.<sup>22</sup>

The predicament of Indigenous communities in Huancavelica, the devastation of their lives, and the contamination of their lands, rivers and lakes as a result of mining activities need to be understood within a historical, economic, political and legal context, both at the national and the international level. During more than five centuries, mining has played a prominent role in Latin America's economy, including that of Peru. Today, mining remains a major part of the economic life of the region and a source of conflict and profound human, social, cultural, and environmental consequences. As foreign direct investment, particularly multinational corporate investment has increased in the extractive industries since the 1980s and 1990s, conflicts related to corporate mining and oil exploitation and violations of Indigenous and peasant communities' rights have also become prevalent in the region. Multinational mining/oil corporations (MNCs)<sup>23</sup> have become well known for causing, directly or indirectly, severe environmental contamination

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<sup>21</sup> Scotiabank Peru S.A.A. is part of Canada's Bank of Nova Scotia or Scotiabank, "one of the largest financial institutions in North America and the Canadian bank with the largest international presence and projection." *Scotiabank, Reseñas Institucionales*, online: <<http://www.scotiabank.com.pe/Acerca-de/Scotiabank-Peru/Scotiabank-en-Peru/resenas-institucionales>> (retrieved 30 April 2017); Honorio Pinto Herrera, *supra* note 20 at 324.

<sup>22</sup> Deborah Poole and Gerardo Rénique, "Extractivism Spills Death and Destruction in Peru," in *NACLA*, September/October 2010 at 32-33; Harvey Wood, *Disaster and Minewater: Good Practice and Prevention* (London, UK: IWA Publishing, 2012) at 45.

<sup>23</sup> The Acronyms MNCs and TNCs (transnational corporations) are used as interchangeable shorthand by some authors. This thesis uses MNCs. Multinational corporations (MNCs) are business organizations which own and control 'income-generating assets in more than one country. Some MNCs are global or regional actors, operating across multiple States by controlling unique intellectual property, executing multi-market business strategies and orchestrating expansive networks of production and supply. See Robin F. Hansen, "The Public Policy Dimensions of MNEs Legal Personality: Is it time to unveil the masters of globalization?" in Andrew Byrnes, Mika Hayashi and Christopher Michaelsen, eds., *International Law in the New Age of Globalization* (Leiden: Martinus Nijhoff Publishers, 2013) at 241; A MNC may be also defined as a "cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management strategy." Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2004).

or disasters, industrial accidents, forced displacements, arbitrary detentions, torture and killings of Indigenous peoples.<sup>24</sup>

These infringements of Indigenous and local communities' rights by MNCs have taken place in the context of economic globalization and the increasing power and influence of those companies. Since the 1980s, there has been a strong push towards global economic integration, which has been made possible by the progressive dismantling of barriers to trade and capital mobility, together with fundamental technological advances and the steadily declining cost of transportation, communications, and information technology.<sup>25</sup> These developments, in turn, have been promoted and supported by international financial institutions (IFIs) such as the International Monetary Fund, World Bank and the associated regional banks (i.e. Inter-American Development Bank) which have not only provided funding to MNCs to explore and exploit mining/oil/gas projects, but have actively promoted and financed the liberalization of the hydrocarbon and mining sectors of national economies across the globe, including Latin America.<sup>26</sup>

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<sup>24</sup> UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, *Opening Remarks at First Session of the Open-ended Intergovernmental Working Group in Charge of Elaborating a Legally Binding Instrument on TNCs and Other Business Enterprises with Respect to Human Rights*, Geneva, July 6, 2015.

<sup>25</sup> A key feature of economic globalization has been the expansion of foreign direct investment (FDI) and proliferation of MNCs. During the 1990s FDI almost quadrupled, from \$1.7 trillion in 1990 to \$6.6 trillion in 2001; by 2007, it had exceeded \$ 15 trillion, and by 2012, it rose to \$23 trillion. In the same trend, global FDI income increased sharply in 2011, for the second consecutive year, to \$1.5 trillion, on a stock of \$21 trillion, after declining in both 2008 and 2009. While in 2001 there were about 64,000 MNCs, with about 840,000 foreign affiliates, by 2007 there were 79,000 MNCs with 790,000 foreign affiliates and by 2010 there were 82,000 MNCs with 810,000 affiliated entities. See United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2002: TNCs and Export Competitiveness*, Geneva, 2002; *World Investment Report 2008, TNCs and the Infrastructure Challenge*, Geneva, 2008; *World Investment Report 2010, Investing in a Low-Carbon Economy*, Geneva, 2010; *World Investment Report 2013, Global Value Chain: Investment and Trade for Development*, Geneva, 2013.

<sup>26</sup> Suzana Sawyer and Edmund T. Gomez, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State* (New York: Palgrave MacMillan, 2012); Tom Griffiths, "Holding the IDB and IFC (World Bank) to Account on Camisea II: A review of applicable international standards, due diligence and compliance issues," Amazon Watch, September 2007.

The pressure on Latin American and other Third World countries to deregulate markets and industries has made it easier for MNCs to have greater presence amongst some of the world's most vulnerable communities, among them, Indigenous communities. Furthermore, in the case of the mining and oil industry, many valuable mineral, gas, and oil deposits have been lately discovered in the world's remotest regions, often populated by Indigenous peoples. As a result, Indigenous communities are the victims of industrial accidents, severe environmental contamination, and forced displacements created by mining and oil operations. These communities, belonging to the most socially and economically marginalized sectors, are usually left without a legal remedy in either the home or the host country.<sup>27</sup>

I became involved in the human rights law field because of my own personal experience of human rights violations while I was completing my law degree at San Marcos University in Lima. My work experience at human rights organizations in Ecuador and Canada, and the research I conducted for my LL.M thesis, gave me an opportunity to become aware of the lack of information on the scale and nature of violations and atrocities committed against Indigenous peoples in the Andes, not only during the internal political violence in Peru in the 1980s and 1990s, but also as a result of the tremendous expansion of corporate investment in the extractive industries.

When I began my Ph.D. studies, my initial research proposal was intended to focus on the legal and procedural issues of the emerging corporate human rights accountability legal

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<sup>27</sup> In the field of foreign direct investment (FDI) regulation, 'home country' or 'home State' is the place, home or state, of the MNC (or the parent company) where the MNC's headquarters are located; 'host country' or 'host State' is the place, country or state, in which a subsidiary of a MNC carries out its local investment projects. Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 3<sup>rd</sup> Ed., (Cambridge University Press, 2010) at 8-18; Peter Muchlinski, *Multinational Enterprises and the Law* (New York: Oxford University Press, 2007) at 5-8; Don Dayananda, et al., *Capital Budgeting: financial appraisal of investment projects* (Cambridge, UK: Cambridge University Press, 2002) at 298-299.

framework, assessing its strengths and weaknesses. Later, however, as I began to carry out my research in depth and pay close attention to what was happening in the real life of affected Indigenous communities, I realized that this issue was multidimensional and well beyond legal and procedural issues. For Indigenous peoples affected by corporate activities in the extractive industry this was a matter of life and death. Impunity for those responsible for violations and immunity for corporate actors were overwhelmingly high. So I decided to focus on analyzing this predicament, and questioning the central role of law in the dispossession of Indigenous lands and in the increasing persecution and criminalization of affected communities.

Although this phenomenon is common in many countries in Latin America, and in fact around the world, I have chosen to focus on Peru because it represents an extreme example of a socially, geographically and racially segregated society in which Indigenous peoples are considered and treated as second class citizens, and the government assumes that public policy and the public interest consist primarily in attracting foreign direct investment through selling off the natural resources of the country. The focus on Peru is also because it is where I come from and I cannot help to wonder: how is it that hundreds of years after colonization, the injustices faced by Indigenous peoples in Huancavelica and other regions in Peru are still prevalent and how is it that they are still waiting for justice? And what does justice mean in a contemporary setting?

## **1.2 Issue to be Addressed**

This thesis examines the pervasive dispossession of Peru's Indigenous peoples' lands and territories and the infringement of their rights by MNCs' mining projects. It questions the role of

international law and Peru's legal framework and policies in validating, authorizing and embedding this process.<sup>28</sup>

Global mining production, including fossil fuels, has almost doubled since 1984, from just over 9 billion tonnes to over 17 billion in 2015, with the greatest increases over the past 10 years.<sup>29</sup> Latin America's steady rise of Foreign Direct Investment (FDI) inflows during the last two decades brought the influx of multinational mining and oil investment and the rise of concessions on Indigenous peoples' lands, which have been accompanied by pervasive abuses against Indigenous communities and encroachment of their rights. This critical and endemic situation has been repeatedly raised by the UN Special Rapporteurs on the rights of Indigenous peoples.<sup>30</sup>

As Victoria Tauli-Corpuz points out, "one of the key reasons why Indigenous peoples are being disenfranchised from their lands and territories is the existence of discriminatory laws, policies and programs that do not recognize Indigenous peoples' land tenure systems and give more priority to claims being put by corporations – both State and private."<sup>31</sup> Pervasive dispossession of Indigenous lands and territories and the infringement of their rights are, more

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<sup>28</sup> For the purpose of this dissertation, I concur with Joel Bakan's notion of "Law" which "refer to mandatory legal systems composed of rules, principles, and standards promulgated and enforced by sovereign state institutions, and recognized as authoritative and binding within their jurisdiction." Joel Bakan, "The Invisible Hand of Law: Private Regulation and the Rule of Law," (2015) 48:2 *Cornell International Law Journal* 279 at footnote 2.

<sup>29</sup> C. Reichl, M. Schatz, G. Zsak, *World Mining Data*, International Organizing Committee for the World Mining Congress, Volume 32, Minerals Production, Vienna, 2017 at 15.

<sup>30</sup> UN Special Rapporteur on the Rights of Indigenous Peoples (2015), *supra* note 24; Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, *Extractive industries operating within or near indigenous territories*, A/HRC/18/35, July 11, 2011.

<sup>31</sup> 6<sup>th</sup> Session of the UN Permanent Forum on Indigenous Issues, Special Theme: Territories, Lands and Natural Resources, *Press Release*, UN's Indigenous Forum issues recommendations regarding lands, territories and natural resources as two week meeting concludes, 25 May 2007, online: <<http://undesadspd.org/IndigenousPeoples/UNPFIIISessions/PreviousSessions/Sixth.aspx>> (retrieved 30 April 2017).

often than not, permitted and tolerated by States. As the UN Special Rapporteur on the rights to freedom of peaceful assembly and association points out,

The central role of corporations in natural resource exploitation means that they can potentially wield enormous power and influence over host States, rendering authorities unwilling to intervene in their interests. Corporations gain access to the corridors of power and often have the ear of key officials (sometimes through unethical means) and are therefore in a position to influence decisions in their favour at the expense of opposing views of other interested parties, including affected communities.<sup>32</sup>

What makes this situation critical is the fact that these communities affected or injured by mining and oil operations, come from the most socially and economically marginalized sectors of Latin America. Indeed, as several UN reports on Indigenous peoples point out, Indigenous peoples are at the bottom of the socio-economic scale. They are discriminated against within society, have generally weak political participation, and lack equal access to economic, social and cultural rights. They are often implicated in social and environmental conflicts and have less access to justice and security.<sup>33</sup>

While international economic law (international law on foreign investment and trade law) has facilitated the growth in power and influence of multinational corporations, it has greatly limited government prerogatives to enforce environmental regulations and human rights norms against multinational corporations.<sup>34</sup> Of particular concern is the influence that multinational

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<sup>32</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association, Maina Kiai, A/HRC/29/25, April 28, 2015 at paragraph 17.

<sup>33</sup> International Work Group for Indigenous Affairs, *The Indigenous World 2015* (Copenhagen, Denmark: IWGIA, April 2015) at 10; *Report of the High Commissioner for Human Rights on Indigenous Issues*, E/CN.4/2006/77, February 27, 2006 at 3, para. 2; see also José R. Martínez Cobo, *Study of the problem of discrimination against Indigenous populations*, UN Doc. E/CN.4/Sub.4/1986/7 and Add.1-4.

<sup>34</sup> Saskia Sassen, “When the global inhabits the national: fuzzy interactions,” in Stephen Gill and A. Claire Cutler, Eds., *New Constitutionalism and World Order* (New York: Cambridge University Press, 2014) at 115; Joseph E. Stiglitz, *Making Globalization Work* (New York: W.W. Norton & Co., 2006); Saskia Sassen, “De-Nationalized State Agendas and Privatized Norm-Making,” in Karl-Heinz Ladeur, Ed., *Public Governance in the Age of*

corporations exert over international investment agreements, which enable MNCs to sue governments when public interest policies or national legislation potentially harms corporate profitability and investment. The number of international investment agreements and the arbitrations under these agreements (investor-State legal actions) rose dramatically during the last two decades and the trend continues.<sup>35</sup> In just one of the tribunal systems, the World Bank's International Center for the Settlement of Investment Disputes (ICSID), the number of investment arbitrations has jumped by more than 400 percent between 2000 and 2012.<sup>36</sup> The current global economic order limiting State control in Latin America, including Peru, is particularly detrimental to economic, social, and cultural rights; for example, the right to a safe environment, sustainable livelihood, clean water, the highest attainable standard of physical and mental health, and especially in the case of Indigenous peoples, the right to control the use of their land.

During the last three decades, there has been substantial development in the promotion and protection of the rights of Indigenous peoples within international law. International human rights law has also developed conceptual and doctrinal tools to address harms caused by non-state actors. Yet, despite the growing number of international instruments, state constitutions and national laws asserting and protecting the rights of Indigenous peoples, and the development of transnational and international human rights litigation under the doctrines of extraterritorial

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*Globalization* (Aldershot, Hants, England: Ashgate, 2004) at 51–67; Susan Strange, *The retreat of the state: the diffusion of power in the world economy* (Cambridge: Cambridge University Press, 1996) at 16-48.

<sup>35</sup> The number of investment agreements rose from around 500 in 1990 to 2,700 by 2000, and it rose to 3,236 by 2014. See Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge, UK: Cambridge University Press, 2015) at 4.

<sup>36</sup> Transnational Institute, *Dangerous Weapons: How International Investment Rules Undermine Social and Environmental Justice*, Report, June 2012, online: <[https://www.tni.org/files/download/folleto\\_ingles2.pdf](https://www.tni.org/files/download/folleto_ingles2.pdf)> (retrieved 30 April 2017).

regulation and horizontality, Indigenous peoples continue to suffer serious and widespread violations of their human rights and fundamental freedoms in the context of extractive industries; often finding themselves increasingly subjected to discrimination, racism, exploitation, dispossession, and criminal prosecution. Indeed, almost as great a concern as the frequency with which Indigenous human rights are violated by MNCs operating in Latin America is the notable absence of effective national and international mechanisms for imposing legal accountability for such violations.

### **1.3 Central Question and Hypothesis**

The central question of this thesis is: What has been the role of law in validating, authorizing and embedding the increasing encroachment on and dispossession of Indigenous lands and territories by MNCs in the extractive industries?

This thesis argues that law, particularly international economic law and the legal framework developed in Peru since the 1990s, has played a prominent role in facilitating and embedding multinational corporate investment in the extractive industry, and weakening the rights of Indigenous and peasant communities to control their land, water and resources. Peru's legal framework and policies on extractive industries have not only validated the expansion of MNCs operations and dispossession of Indigenous lands, but have also validated a growing trend of persecution and criminalisation of Indigenous communities who question, challenge and resist MNCs' operations causing, directly or indirectly, harmful environmental impacts, adverse health and economic effects, forced displacements, community division and breakdown of social fabric, and serious injuries and deaths during protests.

### **1.4 Thesis' Specific Questions**

The following cluster of questions have guided my research and analysis:



- How does one understand the predicament of Indigenous communities in Peru, the devastation of their lives, the contamination of their lands, rivers and lakes as a result of corporate mining activities?
- What are the historical, economic, political and legal contexts, at the national and international level, that underpin this predicament?
- How does one understand the desperate and precarious situation of Indigenous peoples in Peru in light of an international order that supposedly protects human rights and Indigenous rights in particular? Why has international human rights law done little if anything to change this situation?
- What are the possibilities and limitations of the emerging legal framework for MNCs accountability through international human rights standards and mechanisms?
- Do Indigenous people's claims enter into conflict with other legal regimes (such as international trade law) and international agendas, which tend towards the emphasis of individual rights and the promotion of the centrality of the right to property as an essential feature of the human rights discourse?
- How and to what extent do international human rights norms and mechanisms play a role in framing, structuring, limiting, and co-opting Indigenous peoples' claims and aspirations?
- Why do these norms overlook, bypass or conceal the structural causes of many MNCs' violations of Indigenous peoples rights, which in the end, may facilitate and further MNCs access to natural resources located within Indigenous peoples' lands and territories?

## 1.5 Definition of “Indigenous Peoples”

There is no authoritative or incontrovertible definition of Indigenous peoples,<sup>37</sup> and no definition of Indigenous peoples has ever been adopted by any United Nations system body. One of the most cited descriptions of the concept of the Indigenous was formulated by Jose R. Martinez Cobo, the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his Study on the Problem of Discrimination against Indigenous Populations:

Indigenous communities, peoples and nations are those which, having an historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in these territories, or parts of them. They form at present non-dominant sectors of society and are determined to perceive, develop and transmit to future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as people, in accordance with their own cultural patterns, social institutions and legal system.<sup>38</sup>

Article 1 of the International Labour Organization (ILO) Convention Concerning Indigenous and Tribal People in Independent Countries, No. 169, contains a statement of coverage rather than a definition, indicating that the Convention applies to:

- a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to

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<sup>37</sup> Benjamin J. Richardson, Shin Imai and Kent McNeil, Eds., *Indigenous Peoples and the Law: Comparative and Critical Perspective* (Portland, OR: Hart Publishing, 2009) at 12-13.

<sup>38</sup> See UN Doc. E/CN.4/Sub.2/1986/7/Add.4, para.379 and 381.

which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Article 1 of ILO also indicates that self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.<sup>39</sup>

Historically, the term “*Indio*” (Indian) or “Indigenous” has been a very derogatory term; European conquerors and colonizers formulated the terms to refer to the inhabitants of “the oppressed but not defeated peoples.”<sup>40</sup> As one of the key tools of the colonizers was the imposition of their image of the colonized on the subjugated people,<sup>41</sup> sustaining hierarchical structures and social discriminations were part of the “sentimentality” and the governmentality of everyday life.<sup>42</sup> Yet native peoples in the Americas increasingly have subverted the colonial terms in their liberation struggle and in their claim for justice.

The use of a Capital “I” in reference to Indigenous peoples is intentional and based on a preference specified by the board of directors of the South and Meso American Indian Rights Centre (SAIIC) as a strong affirmation of their ethnicities. It is not intended to essentialize, overstate and romanticize their identities.<sup>43</sup> I am aware that the term Indigenous peoples is both a

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<sup>39</sup> International Labour Organization (ILO) Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No. 169, June 27, 1989 at Article 1.

<sup>40</sup> Silvia Rivera Cusicanqui, *Oprimidos pero not vencidos: luchas del campesinado aymara y q'uechwa de Bolivia 1900-1980* (Geneva: United Nations Research Institute for Social Development, 1986).

<sup>41</sup> Frantz Fanon, *The Wretched of the Earth* (New York: Grove Press, 2004), cited in Charles Taylor, “The Politics of Recognition,” in Charles Taylor and Amy Gutmann, Ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton, New Jersey: Princeton University Press, 1994) at 65.

<sup>42</sup> Homi K. Bhabha, “On Writing Rights,” in Matthew J. Gibney, Ed., *Globalizing Rights: The Oxford Amnesty Lectures 1999* (New York: Oxford University Press, 2003) at 177.

<sup>43</sup> Marc Becker, *Indians and Leftists in the Making of Ecuador's Modern Indigenous Movement* (Durham: Duke University Press, 2008) at footnote 1.

fragile legal category and signals a socially constructed, historically contingent, differently experienced and collectively embodied identity.<sup>44</sup>

This thesis questions and challenges discourses that tend to essentialize Indigenous identity and subjectivity based upon their ethnicity, race and notions of “evolved,” “achieved,” “immutable” or “natural” Indigenous culture, defining them either as the noble and mistreated descendants of pre-colonial societies or the ignorant and stubborn Indian peasantry whose “backward and primitive” ways will prevent the “development” and “progress” of the country or region. In the Americas, as Quijano argues, the term or category Indigenous peoples only has meaning with reference to the system of power which originates in the colonial experiences and which since then has grown and developed continuously, maintaining its basic original principles and colonial character.<sup>45</sup> The issue of the “Indigenous” cannot be looked into or debated except in relation to the colonality of the system of power, because outside that framework such a categorization of people would not even exist.<sup>46</sup>

In the context of 21<sup>st</sup> century transnational resource extraction, the content of the term Indigenous peoples, its philosophy and aspirations are not self-evident, but rather constitute a terrain of political struggle and contestation. As Li argues, communities’ “poverty, powerlessness and exclusion from valuable resources are integrally related.”<sup>47</sup> Law (national

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<sup>44</sup> John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at Introduction; Etienne Balibar and Immanuel Wallerstein, *Race, Nation, Class: Ambiguous Identities* (London, UK: Verso, 1991); Etienne Balibar, *Politics and the Other Scene* (London, UK: Verso, 2002).

<sup>45</sup> Anibal Quijano, “The challenge of the ‘Indigenous Movement’ in Latin America,” (2005) 19:3 *Socialism and Democracy* 55 – 78.

<sup>46</sup> *Ibid.*

<sup>47</sup> Tania M. Li, “Boundary Work: Community, market and State reconsidered,” in Arun Agrawal and Clark C. Gibson, Eds., *Communities and the Environment: Ethnicity, Gender, and the State in Community-Based Conservation* (New Brunswick, NJ: Rutgers University Press, 2001) at 161, cited in David Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Portland, OR: Hart Publishing, 2007) at 140.

and international) has been used as a tool and tactic to fix Indigenous identity and govern their conduct.<sup>48</sup> Thus, as Szablowski writes, “so long as the forces which have helped to construct and maintain aspects of their (powerless, poor) identity remain in place, vigorous efforts will be made to identify them in a manner that renders them ineligible as beneficiaries of newly valuable resources.”<sup>49</sup>

## **1.6 Research Methodology**

One of the aims of this thesis is to expose and denounce the responsibility of States and MNCs in the infringement of Indigenous peoples’ lives and rights, and to confront the ‘crime of silence,’ and the working of ‘dominant law’ inflicting second violations on Indigenous communities suffering through a judgement of denial.<sup>50</sup> To challenge the ‘crime of silence’ which enables the powerful to silence voices of pain and suffering in the courts, in the legislative bodies, in international negotiations, in the media, academia and education, Indigenous peoples need to tell and retell their stories and narratives for themselves, thereby breaking the grid of administration of silence.

How can society ever ‘do justice’ to Indigenous peoples if they “are not its parts but stand outside communication, if society cannot communicate with them but at most about them, indeed not even reach them but merely either irritate or destroy them?”<sup>51</sup> In the light of grossly inhuman social practices to which Indigenous peoples are subjected, “the justice of human rights is a

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<sup>48</sup> Tania M. Li, “Fixing Non-market Subjects: Governing Land and Population in the Global South,” in (2014) 18 *Foucault Studies* 34-48 at 39.

<sup>49</sup> David Szablowski (2007), *supra* note 47 at 140.

<sup>50</sup> See “Permanent People’s Tribunal on Global Corporation and Human Wrongs: Findings and Recommended Action,” University of Warwick, 22-25 March 2000, (2001) 1 *Law, Social Justice & Global Development Journal* (LGD); Jayan Nayar, “A People’s Tribunal against the Crime of Silence? the Politics of Judgment and an Agenda for People’s Law,” in (2001) 2 *Law, Social Justice & Global Development Journal* (LGD).

<sup>51</sup> Gunther Teubner, “The Anonymous Matrix: Human Rights Violations by ‘Private’ Transnational Actors,” in (2006) 69:3 *Modern Law Review* 327 at 345.

burning issue.”<sup>52</sup> As Teubner argues, the justice of human rights is aimed at removing unjust situations; it is only the counter-principle to communicative violations of body and soul, a protest against inhumanities of communication.<sup>53</sup> Therefore, “if the self-observations of mind/body (introspection, suffering, pain) and the spontaneous indignation, unrest, and protest [of Indigenous peoples], however distorted, gain entry to communication, then there is a chance to observe the closeness of justice. The decisive thing is the ‘moment’: the simultaneity of consciousness and communication, the cry that express pain.”<sup>54</sup> The most intimate scale, the body, writes Alejandra Roncallo, is the site where the violence of policies decided at broader scales is most dramatically felt; yet, it is also the less addressed in academic literature and it is urgent to fill this vacuum.<sup>55</sup>

Inspired by the prolific work of Eduardo Galeano, who was deeply politicized and intensely concerned with issues of historical context and who used *testimonio* and storytelling as challenges to the arbitrariness of power,<sup>56</sup> this thesis attempts to provide an account that critically describes and rediscovers Indigenous peoples’ resistance and struggles against the expansion of MNCs and their appropriation of their lands for oil, gas and mining projects, bringing forced displacements, violence, pain, suffering, detentions, criminalization and killings. Critical re-description, is “an attempt to redefine through narrative, a world we take for granted, inviting it to be seen differently as a mode of political engagement; it offers to legal thought the potential of

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid* at 346.

<sup>54</sup> *Ibid* at 346.

<sup>55</sup> Alejandra Roncallo, *The Political Economy of Space in the Americas: The New Pax Americana* (New York: Routledge, 2014) at 11.

<sup>56</sup> Daniel Fischlin and Martha Nandorfy, *Eduardo Galeano: Through the Looking Glass* (Montreal: Black Rose Books, 2002) at 4; Eduardo Galeano, *Memoria del Fuego*, 3 Vols. (Madrid: Siglo Veintiuno de España Editores, 1982); *Las Venas Abiertas de America Latina* (México, D.F.: Siglo Veintiuno, 2006); *We Say No: Chronicles 1963-1991* (New York: Norton, 1992); *Upside Down: a primer for the looking-glass world* (New York: Metropolitan Books, 2000); *Los Hijos de los Dias* (Montevideo: Ediciones del Chanchito, 2012).

storytelling in trying to understand the world differently than the way we usually know it.”<sup>57</sup> This method resonates with Foucault’s approach in his study of the emergence of the State and the operation of power. For Foucault,

It has long been known that the role of philosophy is not to discover what is hidden, but to make visible precisely what is visible, that is to say, to show that which is so close, which is so immediate, which is so intimately linked to us, that because of that we do not perceive it...the role of philosophy is to make us see what we see.<sup>58</sup>

In addition, according to Foucault, philosophy may be able to play a role in the struggle against power, but only on condition that it “sets itself the task of analyzing, clarifying, making visible, and thus intensifying the struggles that take place around power”<sup>59</sup>

Relying on the description and re-description approach, Chapter Two discusses three particular conflicts involving MNCs and affected Indigenous communities; in addition, each chapter of this thesis starts describing and telling a particular story about Indigenous suffering, struggle and resistance against MNCs and State’s policies and actions. It is in questioning ‘the power of power to erase victimage from public memory’ and in the attainment of the communication, circulation of their narratives, indignation, and their ‘cry that express suffering, pain’ that the possibility of justice for Indigenous peoples begins.<sup>60</sup>

In addition to the method of description, re-description and storytelling, this thesis builds on doctrinal and non-doctrinal socio-legal studies, which includes a combination of two

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<sup>57</sup> Sundhya Pahuja, “Laws of Encounter: A Jurisdictional Account of International Law,” in (2013) 1:1 *London Review of International Law* 63-98 at 65.

<sup>58</sup> Michel Foucault, “La Philosophie Analytique de la Politique,” in D. Defert and F. Ewald, Eds., with J. Lagrange, *Dits Et Ecrits, 1954-1988, 4 Vols., Vol. 3* (1994), 534, at 540, cited in Anne Orford, “In Praise of Description,” (2012) 25 *Leiden Journal of International Law* 609-625 at 617.

<sup>59</sup> *Ibid* at 622.

<sup>60</sup> Upendra Baxi, *Inhuman Wrongs and Human Rights: Unconventional Essays* (New Delhi: Har-Anand Publications, 1994) at 32; Gunther Teubner (2006), *supra* note 55 at 346; Pheng Cheah, David Fraser and Judith Grbich, “Introduction: the body of the law,” in Pheng Cheah, David Fraser and Judith Grbich, Eds., *Thinking Through the Body of the Law* (New York: New York University Press, 1996) at xv-xvi.

qualitative research methods: A) analysis of texts, documents and printed and electronic (computer-based and Internet-transmitted) material; and B) the study of conflicts involving MNCs and Indigenous communities in Peru.

### **1.6.1 Analysis of Texts and Computer-based and Internet-transmitted Documents**

The thesis examines relevant treaties, conventions, declarations, resolutions, decisions and rulings, reports, and scholarly writing publications on international human rights norms/mechanisms and Indigenous peoples rights with regard to states and non-states accountability for MNCs violations (with particular emphasis in the mining). This includes the emergent jurisprudence (concluding observations, decisions, and rulings) of cases holding both states and MNCs legally accountable for Indigenous human rights violations within the United Nations treaty-based human rights regime, the Inter-American human rights system, and in the civil courts of MNCs' home states.

In addition, the thesis uses the technique of analysis of documents – both printed and electronic (computer-based and Internet-transmitted) materials such as books, journals, magazines, newspapers, reports, testimonies, documentary videos, etc. produced and published by international, national and local Indigenous and human rights organizations, international and national non-governmental organizations, intergovernmental organizations (United Nations, Organization of American States, the World Bank, Inter-American Development Bank), relevant government agencies, and international business organizations and multinational (mining and oil) corporations.

### **1.6.2 Study of Conflicts Involving MNCs and Indigenous Communities in Peru**

An important part of the thesis is dedicated to the analysis of three conflicts involving MNCs and Indigenous communities in Peru.



- a) Minera Barrick Misquichilca (Subsidiary of Barrick Gold Corporation, Canada) v. Pierina Mine Communities (Ancash)
- b) Minera Yanacocha (Subsidiary of New Mont Mining Company, U.S.A.) v. Yanacocha Mine Communities (Cajamarca)
- c) Rio Blanco Copper (Subsidiary of Monterrico Metals, United Kingdom – China) v. Segunda y Cajas and Yanta Indigenous Peasant Communities (Piura).

These conflicts have been selected because they involve large-scale mining operations which are reported to have had serious impacts on Indigenous communities and have been associated with Indigenous land dispossessions and grave human rights violations. The mining projects are managed and developed by consolidated multinational corporations headquartered in Canada, the U.S., and the United Kingdom- China (Hong Kong), the countries with the largest mining investment in Peru. The study of the conflicts helps to illustrate the nature and degree of infringements caused by MNCs' activities, the degree of responsibility of multilateral financial institutions and the state, the level of participation of affected Indigenous communities in decision-making mechanisms and their ability to access justice, as well as the effectiveness or ineffectiveness of domestic (the host states), international (the UN and OAS), and transnational (the home states of the corporations) legal jurisdictions for bringing justice and remedies to victims. The study of the conflicts particularly demonstrates the link between the volatile and complex context on which economic liberalization and foreign investment coexist with state repression and violence, and the complicity of MNCs in furthering violence against Indigenous communities and violations of their fundamental rights. They also illustrate how persistent colonial legacies of racism gloss over the relationship of state, MNCs and IFIs with Indigenous

peoples, tending toward the social, regulatory and legal manipulation of Indigenous peoples and their potential claims and interests.

The analysis of these three conflicts could have benefited from a field study and interviews with affected communities in Peru; however, due to personal circumstances, it was not possible to carry out such field work. I tried, however, to address this limitation with an exhaustive and extensive analysis of documents, reports and studies carried out by other academics, Indigenous organizations, civil society, environmental and human rights organizations.

I am aware of the existence of peer reviewed journals and academic literature dealing with mining in Peru and the violations and abuses caused by MNCs operations; however, very few pieces reflect the views, interests, and visions of Indigenous communities affected by corporate extractive activities. Therefore, the study of the three conflicts in Chapter 2, as well as Chapter 3 (historical overview) and Chapter 4 (Peru's policies and regulations) have relied, in addition to academic sources, on the work of officials of inter-governmental and non-governmental organizations (both national and international), as well as on the work and reports of Indigenous and non-Indigenous human rights and environmental activists, and public intellectuals.

## **1.7 Theoretical Approach**

This thesis intends to address several conceptual problems of international human rights law, MNCs accountability and Indigenous people's rights movement, and the complex relations between them. It aims to address such conceptual problems in the context of global processes (economic, social, political and legal) and global inequalities which rest on the outcome of contentions, struggles and asymmetries (in relations of power) and on structural and legal

arrangements. To do so, the dissertation draws upon the work of Indigenous scholars, critical legal approaches such as Third World Approach to International Law (TWAIL), postcolonial legal theory, and postmodern and critical discursive perspectives.

Indigenous scholars such as James Anaya and Robert A. Williams Jr. offer an alternative approach to the mushrooming mainstream literature on Indigenous peoples and international human rights law which overlooks the current controversies and paradoxes in the human rights discourse and norms and privileges a liberal conciliatory stage in Indigenous peoples – state relations. While Anaya and Williams discuss international law’s discriminatory and colonial past, and the historical rationalization for the oppression of Indigenous peoples, they also praise the development of international human rights law and the steps taken by the international and regional human rights institutions and mechanism such as the UN and the OAS for the empowerment of Indigenous peoples.<sup>61</sup> In contrast, another Indigenous scholar -- Jeff Corntassel -- highlights the potential dangers of framing Indigenous claims in mainstream legal/rights discourse, and critically examine how Indigenous movements have become institutionalized and mainstreamed within the UN human rights system and how these developments have impacted grassroots Indigenous mobilization.<sup>62</sup>

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<sup>61</sup> James Anaya, *Indigenous People in International Law* (New York: Oxford University Press, 2004); Robert A. Williams, Jr., *Savage Anxieties: the Invention of Western Civilization* (New York: Palgrave Macmillan, 2012); Robert A. Williams, Jr., *The American Indian in western legal thought: the discourses of conquest* (New York: Oxford University Press, 1990); Robert A. Williams, Jr., “Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World,” (1990) *Duke Law Journal* 660.

<sup>62</sup> Jeff Corntassel, “Partnership in Action? Indigenous Political Mobilization and Co-optation during the First UN Indigenous Decade 1994-2004,” (2007) 29 *Human Rights Quarterly* 137-166; Jeff Corntassel, “Cultural Restoration in International Law: Pathways to Indigenous Self-Determination,” in (2012) *Canadian Journal of Human Rights* 93-125; Taiaiake Alfred and Jeff Corntassel, “Being Indigenous: Resurgences against Contemporary Colonialism,” in (2005) 40:4 *Government & Opposition* 597.

TWAIL and post-colonial legal perspectives,<sup>63</sup> unlike mainstream approaches to international law that mask and justify unjust power relationships and tend to decontextualize action, attempt to demonstrate that modern and contemporary international law has deeply entrenched Eurocentric liberal foundations, which are erroneously held to be value-neutral, and emphasize the need to place colonialism as a key backdrop against which to appreciate the historic role of international law in relation to Third World countries.<sup>64</sup> More specifically, TWAIL scholars explore and expose the hegemonic orientation of the liberal human rights movement, including that associated with leading international human rights NGOs.<sup>65</sup> They emphasize the need, in all its complexity, ‘to internalize the uncomfortable fact that human rights discourse is part of the problem of global hegemony and the absence of global justice.’<sup>66</sup> Yet, they provide insightful arguments to search and construct a counter-hegemonic potential for a reoriented human rights movement by ‘paying attention to the pluriverse of human rights, converting official and sanctioned human rights discourse in one of many languages of

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<sup>63</sup> Peter Fitzpatrick, *Law as Resistance: Modernism, Imperialism and Legalism* (Aldershot, Hampshire, England: Ashgate, 2008); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (New York: Cambridge University Press, 2011); Sundhya Pahuja, “the Postcoloniality of International Law” (2005) 46:2 *Harvard Journal of International Law*, 459 – 469; Peter Fitzpatrick, *Modernism and the Grounds of Law* (New York: Cambridge University Press, 2001); Dianne Otto, “Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference,” in Eve Darian-Smith and Peter Fitzpatrick, Eds., *Laws of the Postcolonial* (Ann Arbor: The University of Michigan Press, 1999).

<sup>64</sup> B S Chimni, “The Past, Present and Future of International Law: A Critical Third World Approach,” (2007) *Melbourne Journal of International Law* 27; Muthucumaraswamy Sornarajah, “Power and Justice: Third World Resistance in International Law,” (2006) 10 *Singapore Year Book of International Law* 19; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Antony Anghie and B S Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflict” in Steven R. Ratner and Anne-Marie Slaughter, Eds., *The Methods of International Law* (Buffalo, N.Y.: William S. Hein, 2005); James T. Gathii, “Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Projects in International Law” (1999) 5 *Buffalo Human Rights Law Review* 107.

<sup>65</sup> Upendra Baxi, *the Future of Human Rights* (New Delhi, Oxford University Press, 3<sup>rd</sup> edition, 2008); Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements, and Third World Resistance* (Cambridge, UK: Cambridge University Press, 2003).

<sup>66</sup> Balakrishnan Rajagopal, “Counter-Hegemonic International Law: rethinking human rights and development as a Third World strategy,” (2006) 27: 5 *Third World Quarterly* 767 at 768.

resistance, and enacting a cultural politics at many scalar levels.’<sup>67</sup> Further, these perspectives highlight the significant role played by Third World social movements in affecting/shaping the development of international law.

Postmodern and critical discursive perspectives provide a methodology of studying the working and manifestations of modern power through understanding power relations. According to Foucault, ‘power exists only as exercised by some on others, only when it is put into action...that the ‘other’ (the one over whom power is exercised) is recognized and maintained to the very end as a subject who acts and that, faced with a relationship of power, a whole field of responses, reactions, results and possible inventions may open up.’<sup>68</sup> The exercise of power or ‘governance,’ is described as a management of possibilities, and understanding the operations of power is to understand how these possibilities are administered over the object of the power relations, either inciting, inducing or seducing the object to be disciplined or making things easier, more difficult or forbidding absolutely for it. Thus, practices of ‘governance’ or ‘governmentality’ exercise normative control over the meaning and content of planned and systematic thoughts and actions that aims to shape, regulate or manage the way people conduct themselves by acting upon their hopes, circumstances and environment. Governance, in this sense, is most effective when it colonizes modes of thought. This methodology provides insightful tools to examine how and the ways in which power is exercised through various legal

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<sup>67</sup> *Ibid.*

<sup>68</sup> Michel Foucault, *Power: Essential Works of Foucault 1954 – 1984*, Vol. 3<sup>rd</sup> edition, J D Faubion/ trans. R. Hurley and others (London: Penguin, 1994) at 340.

and regulatory instruments at the global level, including institutions and mechanisms associated with international human rights law.<sup>69</sup>

Furthermore, postmodern and critical discursive perspectives not only provide tools to unmask ‘the superstructures of law that both hide and reflect the economic and political interests of the dominant forces of society,’ but turn towards political and ethical responsibility and engagement with questions of a relationship between law and force, and between law and justice.<sup>70</sup> Law pertains to the realm of the calculable; it is about debt, claim, obligation and entitlement, all assessed by a third party such as a judge, whose task is to engage in a commutative/distributive exercise that is meant to be kept within strictly *legal* boundaries.<sup>71</sup> Justice is not the same as ‘right’ or ‘law’ [droit]; it is that which attempts, nonetheless, to produce a new right; and to do so it is necessary, first, to take the context into account and then, at a given moment, to transform it radically.<sup>72</sup> In the name of justice-which-is not-law which one cannot renounce, there arises a duty to retain ‘one’s freedom to question, to get indignant, to resist, to disobey, to deconstruct.’<sup>73</sup> The later provides an important framework to focus on the voices and narratives of many Indigenous communities in the Andes who are continuously

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<sup>69</sup> Stephen Gill and A. Claire Cutler, *New Constitutionalism and World Order* (New York: Cambridge University Press, 2014); Ben Golder and Peter Fitzpatrick, *Foucault’s Law* (New York : Routledge-Cavendish, 2009); Michel Foucault, *Security, Territory, Population, Lectures at the College de France* (New York: Palgrave Macmillan, 1997); Michel Foucault, “Governmentality,” in Graham Burchell, Colin Gordon and Peter Miller, Eds., *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991); Michel Foucault, “Two Lectures,” and “Truth and Power,” in Colin Gordon, Ed., *Power/Knowledge: Selected Interview and Other Writings 1972-77* (Brighton: Harvester Press, 1980); Slavoj Žižek, “Against Human Rights,” (2005) 34 *New Left Review* 115-131; Tony Evans, “International Human Rights Law as Power/Knowledge,” (2005) 27 *Human Rights Quarterly* 1046; Jacques Rancière, “Who Is the Subject of the Rights of Man?” (2004) 103 *The South Atlantic Quarterly* 297; Jean- Luc Nancy, *The Creation of the World or Globalization* (Albany, NY: State University of New York, 2007).

<sup>70</sup> Jacques Derrida, “Force of Law: The “Mystical Foundation of Authority,” in J. Derrida, *Acts of Religion* (New York: Routledge, 2002) at 230.

<sup>71</sup> Pierre Legrand, Ed., *Derrida and Law* (Surrey, UK: Ashgate Publishing Limited, 2009) at Introduction, xxxi.

<sup>72</sup> Jacques Derrida and Maurizio Ferraris, *A Taste for the Secret* (Cambridge, UK: Polity Press, 2001) Translated from the French and Italian by Giacomo Donis and edited by G. Donis and D. Webb at 16-17.

<sup>73</sup> Jacques Derrida, *Paper Machine*, trans. Rachel Bowlby (Stanford, CA: Stanford University Press, 2005) at 155.

subjected to injustices, but also silenced and excluded, denied speech and voice, denied the right to tell their stories, to express what happened, to name the violence of ‘development’ and ‘progress.’ For Lyotard an extreme form of injustice is that of an *ethical tort of differend*, in which the injury suffered by the victim is accompanied by a deprivation of the means to speak about it or prove it.<sup>74</sup> And as Baxi points out, “practices of ‘governance’ exercise normative control over the meanings and content of human rights and sculpt regime-specific institutional arrangements often justifying even the worst excesses of silencing powers as serving either the ‘common good’ or ‘public interest’ [I would add ‘development,’ ‘economic growth,’ and ‘modernization].”<sup>75</sup> Thus, “governance consist in the power or authority to decide: *Who* may and may not ‘speak,’ *how* and *when* one may ‘speak,’ *what* one may ‘speak’ about, and to what *intent/effect* one may ‘speak.’”<sup>76</sup>

In using storytelling methods in the study of conflicts involving MNCs and Indigenous communities, and in combining different theoretical approaches (Indigenous legal scholars’ approach, Third World Approaches to International Law, postcolonial legal theory, and postmodern and critical discursive perspectives), this thesis has developed an original approach. This might appear an unconventional use of incompatible methodologies; yet it has allowed me to convey the historical and ongoing suffering of Indigenous peoples in Peru, the abuses and violations and injustices to which they have been subjected, and to highlight the central role of law in this predicament. In addition it has allowed me to understand how State officials, corporate actors and the Peruvian elite, including the mainstream media, have manipulated

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<sup>74</sup> Jean-Francois Lyotard, *The Differend* (Manchester: Manchester University Press, 1988) at 5.

<sup>75</sup> Upendra Baxi, ‘Epilogue: Whom May We Speak For, With, and After? Re-Silencing Human Rights,’ in Gurminder K. Bhambra and Robbie Shilliam, Eds., *Silencing Human Rights: Critical Engagements with a Contested Project* (New York: Palgrave Macmillan, 2009) at 253-254.

<sup>76</sup> *Ibid* at 254-255.

affected communities through the rhetorical discourse of “economic growth” “development” “the inevitability of progress” through mining because Peru is a “mining country;” and how and in which ways human rights discourse and legal instruments are instrumentalized by the same influential actors in order to secure their particular interests and goals.

## **1.8 Significance of Thesis Research**

The thesis’ research has two threads of legal significance. The first relates to the Andean and Amazonian Indigenous peoples’ physical and cultural resilience, and their resistance and inexhaustible struggle for justice. Despite historical and structural barriers and significant legal challenges and obstacles in accessing justice, Indigenous communities in Peru continue opposing and resisting the dispossession of their lands and the encroachment of their rights by MNCs operations and the state. They are not only at the forefront of demanding justice for the devastation of their lives, but they are at the forefront of resistance to environmental destruction, social disintegration, misery and injustice created by the nihilism of neoliberal globalization. The thesis expands the academic discussion on the prominent role of law and prevailing legal structures in validating and embedding the expansion of corporate mining projects, dispossession of Indigenous lands and a pervasive criminalisation of affected Indigenous communities. This thesis embraces, supports and is part of Indigenous communities’ demands for justice; it asserts the right to tell Indigenous and peasant communities’ stories as a mean of achieving agency, aiming to question and challenge mainstream narratives, “narrative monopolies, narrative oligarchies that silence [and or distort] the voices of human suffering, often in the name of



human rights.”<sup>77</sup> The process of globalization has located Indigenous peoples at the cutting edge of the “quest for global justice” and at the heart of contemporary trends in international law and international human rights law; in their search for justice, Indigenous peoples not only face and resist that ancient and terrible challenge of their own survival but contest and challenge the evolving legal architecture of global unaccountability and impunity, and in doing so Indigenous peoples become central to and constitutive of the evolving global order. Indigenous communities’ efforts, struggles and engagement with the corporate accountability movement through a *reoriented human rights discourse* contribute and strengthen the field of law referred as a ‘subaltern legality’ or ‘counter-hegemonic legality.’<sup>78</sup>

The second thread is related to the critical examination and assessment of existing literature and jurisprudence on MNCs accountability for the infringement of Indigenous people’s rights in Peru, from the lens of Indigenous peoples’ concerns, struggles and demands for justice. More specifically, the dissertation problematizes and questions the viability, complexity and contradictory nature of international human rights law through which Indigenous communities have been expressing their resistance and struggles. It assesses, for instance, the evolving doctrine of indirect state responsibility, under which states have the responsibility to regulate private actors under their control, and the theory of horizontality, in which multinational corporations can themselves be the source of human rights violations.<sup>79</sup>

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<sup>77</sup> Upendra Baxi, Foreword, in Daniel Fischlin and Martha Nandorfy, *The Community of Rights The Rights of Community* (Montreal: Black Rose Books, 2012).

<sup>78</sup> Balakrishnan Rajagopal, “Counter-Hegemonic International Law: rethinking human rights and development as a Third World strategy,” in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens, Eds., *International Law and the Third World* (New York: Routledge-Cavendish, 2008) at 63; Boaventura S. Santos and Cesar A. Rodriguez-Garavito, Eds., *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005).

<sup>79</sup> Parts of this jurisprudence are the decisions of the Inter-American Court of Human Rights (the Court) in *Awas Tingni Community v. Nicaragua* (2001), *Saramaka People v. Suriname* (2007), and *Kichwa Indigenous People of*

## 1.9 Organization of Chapters

The thesis is divided in seven chapters. Chapter One provides an introduction and conceptual framework and discusses the thesis' research methodologies and theoretical framework. Chapter Two examines three selected conflicts in Peru between Indigenous communities and multinational mining companies. It discusses the nature and degree of Indigenous communities' rights violations caused by MNCs' activities, the degree of responsibility of the state, the level of participation of affected Indigenous communities in decision-making mechanisms and their ability to access justice, as well as the effectiveness or ineffectiveness of domestic (the host states), international (the UN and OAS), and transnational (the home states of the corporations) legal jurisdictions for bringing justice and remedies to victims. Chapter Three provides a historical overview – within the global political economy -- of the volatile conflicts between Indigenous communities and MNCs, the encroachment on Indigenous communities' lands and environment and their struggles and agency. Chapter Four examines Peru's policies and legal framework that encourage and support foreign and private investment in the extractive industry which has affected negatively Indigenous communities' rights. Chapter Five analyzes the emergence and location of both Indigenous peoples and multinational corporations in international law and the asymmetries and imbalances. Chapter Six discusses the evolving legal framework for multinational corporate responsibility and accountability through international human rights standards, and the potential dangers of assuming that international human rights law is the only, or the best strategy for

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*Sarayaku v. Ecuador* (2012). See *The Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua*, Judgment of 31 August 2001, Inter-Am. Ct. H. R. (Ser. C) No. 79; *Saramaka People v. Suriname*, Judgment of Nov. 28, 2007, Inter-Am. Ct. (Ser. C) No. 172; and *the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of June 27, 2012, Merits and Reparations, Serie C, No. 245.

promoting/protecting Indigenous peoples' rights and aspirations. Chapter Seven provides some concluding remarks.

## 1.10 Conclusion

Jean-Luc Nancy's *The Creation of the World or Globalization* reflects on globalization and its impact on our being-in-the-world.<sup>80</sup> It discusses globalization as 'an unprecedented geopolitical, economic and ecological catastrophe' that entails social disintegration, misery, and injustice.<sup>81</sup> Yet, on the other hand, there is the possibility of an authentic world-forming, a 'creation' of the world which "maintains a crucial reference to the world's horizon, as a space of human relations, as a space of meaning held in common, a space of significations or of possible significance."<sup>82</sup> Nancy understands such world-forming in terms of an inexhaustible struggle for justice. In the name of a certain justice, the nihilism of globalization may be resisted. The future of the world hangs in the balance.

In the name of justice, Indigenous peoples who have been harmfully affected by MNCs' extractive projects have defied and resisted the forces of globalization. By focusing on particular voices, in this case on "silenced" Indigenous voices and underlining the role of their organizations and struggles,<sup>83</sup> the nihilism of globalization is challenged and resisted. The current Indigenous struggles and resistance, in more ways than one, deal with the frontier issues of our time: global and social justice, democracy, the environmental/ecological crisis and climate

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<sup>80</sup> Jean-Luc Nancy, *The Creation of the World or Globalization*, translated by F. Raffoul and D. Pettigrew (Albany: State University of New York Press, 2007).

<sup>81</sup> *Ibid* at 2.

<sup>82</sup> *Ibid* at 2; see also Jean-Luc Nancy, *After Fukushima: The Equivalence of Catastrophes*, translated by C. Mandell (New York: Fordham University Press, 2015).

<sup>83</sup> Stephen Gill, "Towards a Radical Concept of Praxis: Imperial 'common sense' Versus the Post-modern Prince," in (2012) 40:3 *Millennium: Journal of International Studies* 505-524.

change, and human rights.<sup>84</sup> The international community needs to hear the voices of Indigenous communities, “voices that break mirrors and open eyes,” as Bartolome Clavero points out,<sup>85</sup> voices that claim justice, dignity and humanity.

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<sup>84</sup> Jerry Mander, “Introduction: Globalization and the Assault on Indigenous Resources,” in Jerry Mander and Victoria Tauli-Corpuz, Eds., *Paradigm Wars: Indigenous Peoples’ Resistance to Globalization* (San Francisco: International Forum on Globalization, 2006) at 10.

<sup>85</sup> Bartolome Clavero (2011), *supra* note 1 at 117.

## Chapter 2: Study of Conflicts Involving MNCs and Indigenous and Peasants

### Communities in Peru

*To our father the creator Tupac Amaru:  
The bullets are killing; the machine guns are exploding the veins,  
Iron sabres are cutting human flesh;  
Here and in all parts;  
On the icy ridge of the hills of Cerro de Pasco, [Ancash, Cajamarca, and  
Piura...]  
In the cold plains, in the warm and hot coastal valleys,  
On the large living grass, between deserts...  
...  
Wait quietly,  
Listen quietly,  
Contemplate quietly this world,  
We are still here, we live  
[We are] fine, rising up!*  
(Jose Maria Arguedas, 1984)<sup>86</sup>

#### 2.1 Introduction

On September 1<sup>st</sup>, 2014, four Indigenous Ashéninka leaders from the community of Alto Tamaya-Saweto were shot and killed in a remote region of the Peruvian Amazon.<sup>87</sup> Edwin Chota, one of the victims, the president of his community and a long time environmental advocate, had fought for the rights of Indigenous communities in the Amazon region.<sup>88</sup> Since 2003, he had been working tirelessly to have the authorities grant his community formal title to their traditional lands in an effort to prevent incursions by loggers and private companies,

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<sup>86</sup> Jose Maria Arguedas, “*Tupac Amaru Kamaq Taytanchisman (Haylli – Taki)*” / “A Nuestro Padre Creador Tupac Amaru (Himno – Cancion)” in J. M Arguedas, *Katatay* (Lima: Editorial Horizonte, 1984). A bilingual Quechua-Spanish edition, edited by Sybila Arredondo de Arguedas. [Translated by the author].

<sup>87</sup> Andrea Zarate and William Neuman, “Peru Investigate the Killing of an Environmental Advocate,” in *the New York Times*, September 10, 2014, online: <[http://www.nytimes.com/2014/09/11/world/americas/peru-investigates-the-killing-of-an-environmental-advocate.html?\\_r=0](http://www.nytimes.com/2014/09/11/world/americas/peru-investigates-the-killing-of-an-environmental-advocate.html?_r=0)> (retrieved 30 April 2017).

<sup>88</sup> Scott Wallace, “Quadruple Homicide in Peruvian Amazon Puts Criminal Logging in Spotlight,” in *National Geographic*, September 11, 2014, online: <<http://news.nationalgeographic.com/news/2014/09/140911-peru-amazon-illegal-logging-chota-alto-tamaya/>> (retrieved 30 April 2017).

without any positive outcome.<sup>89</sup> Since 2005, Edwin Chota had been repeatedly submitting formal complaints to the police and judicial authorities about illegal incursions in his community's lands and the threats and violence he had been receiving, without any results.<sup>90</sup> Indigenous organizations severely criticized the police and judicial authorities for doing absolutely nothing to protect the four Indigenous leaders despite repeated complaints.<sup>91</sup>

Indigenous peoples and environmental activists around the world are being killed in record numbers trying to defend their land and protect the environment in the face of increased competition and conflicts over natural resources; major drivers are mining, agribusiness, logging, and hydropower.<sup>92</sup> In order to discuss and illustrate the main arguments of the thesis, three conflicts involving MNCs and Indigenous communities in Peru have been identified and selected:

- a) Minera Barrick Misquichilca (Subsidiary of Barrick Gold Corporation, Canada) v. Pierina Mine Communities (Ancash)
- b) Minera Yanacochocha (Subsidiary of New Mont Mining Company, U.S.A.) v. Yanacocha Mine Communities (Cajamarca)
- c) Rio Blanco Copper (Subsidiary of Monterrico Metals, United Kingdom – China) v. Segunda y Cajas and Yanta Indigenous Peasant Communities (Piura).

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<sup>89</sup> Beatriz Jimenez, "Vicepresidente de Ucayali blanquea madera de la tala ilegal, según Osinfor," in *La Republica*, Lima October 2, 2014, online: <<http://www.larepublica.pe/02-10-2014/vicepresidente-de-ucayali-blanquea-madera-de-la-tala-ilegal-segun-osinfor>> (retrieved 30 April 2017).

<sup>90</sup> AIDESEP, "No Queremos mas Sawetos, y la Solucion es Muy Simple: Titulacion de Comunidades Indigenas," *Pronunciamiento de la Comunidad Alto-Tamaya Saweto*, online: <<http://www.aidesep.org.pe/no-queremos-mas-sawetos-y-la-solucion-es-muy-simple-titulacion-de-territorios-indigenas/>> (retrieved 30 April 2017).

<sup>91</sup> *Ibid.*

<sup>92</sup> Global Witness, "On Dangerous Ground: 2015's Deadly Environment, the Killing and Criminalization of Land and Environmental Defenders Worldwide," Annual Report, London, UK, June 2016.

The conflicts have been selected because they represent large-scale mining operations which are reported to have had serious impacts on Indigenous communities and have been associated with grave human rights violations. As affected Indigenous communities began to organize themselves to demand respect for their rights enshrined in the Constitution and international human rights instruments, the Peruvian State, corporate actors and mainstream media have accused them of blocking the growth and prosperity of the country, and called them “anti-mining terrorists.”<sup>93</sup> Former President, Alan Garcia (2006 – 2011), has called Indigenous communities who have claimed their rights “barbarians, savages and backward people.”<sup>94</sup> These kind of responses have had devastating consequences for the fundamental rights of affected Indigenous peoples, where defending and claiming their rights has become a matter of death and life, as it was the case for the Ashéninka leaders. According to the Global Witness report, *Peru’s Deadly Environment*, Peru is the world’s fourth most dangerous country to be a land or environment defender, after Brazil, Honduras and the Philippines.<sup>95</sup> The report points out that at least 57 environmental activists, mostly Indigenous, have been murdered in Peru since 2002. This trend is rising, as 60 percent of those deaths occurred in the last four years. This is not only tolerated by the government, which has brought just one percent of those responsible for the

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<sup>93</sup> El Comercio, “*Shining Path and MRTA Aim to Direct Anti-Mining Protests? An Interview with Hernando De Soto*,” El Comercio, Lima, 06 July 2015; Amnesty International, “*Sacrificing Rights in the Name of Development: Indigenous Peoples under Threat in the Americas*,” London, UK, 2011.

<sup>94</sup> Rodolfo Stavenhagen, “Derechos Humanos y Ciudadanías Indígenas en América Latina,” in Sarah Albiez, Nelly Castro, Lara Jussen and Eva Youkhana, Eds., *Ethnicity, Citizenship and Belonging: Practices, Theory and Spatial Dimensions* (Madrid: Iberoamericana, 2011) at 122; Alan Garcia, “El Síndrome del Perro del Hortelano,” in *El Comercio*, 28 October 2007; “Receta para Acabar con el Perro del Hortelano,” in *El Comercio*, 25 November 2007; “El Perro del Hortelano contra el Pobre,” in *La Republica*, 2 March 2008, online: <<http://www.justiciaviva.org.pe/userfiles/26539211-Alan-Garcia-Perez-y-el-perro-del-hortelano.pdf>> (retrieved 30 April 2017).

<sup>95</sup> Global Witness, “*Peru’s Deadly Environment: the rise in killings of environmental and land defenders*,” London, UK, November 2014, online: <<https://www.globalwitness.org/en/campaigns/environmental-activists/perus-deadly-environment/>> (retrieved 30 April 2017).

crimes to justice; in the majority of the cases it is actually state-actors who have committed the crimes.<sup>96</sup>

The examination of the conflicts allow us to discuss the nature and degree of violations of Indigenous communities' rights caused by MNCs' activities, the degree of responsibility of the State, the level of participation of affected Indigenous communities in decision-making mechanisms and their ability to access justice, as well as the effectiveness or ineffectiveness of domestic (host states), international (the UN and OAS), and transnational (home states of the corporations) legal systems for bringing justice and remedies to victims. The analysis of the conflicts reveals, on the one hand, the fragile and ineffective nature of the laws and regulations recognizing Indigenous peoples' rights, particularly their lands, territories, health and environment. On the other hand, it reveals the strong and effective nature of the laws and regulations that promote, protect and guarantee the rights of corporate private investment in the extractive industry, particularly their property and contract rights, which are efficiently secured by police and courts. This asymmetric legal framework constitutes the source of oppression and contributes to the subjugation of Indigenous peoples and the immunity and impunity of MNCS.

Chapter Two is divided into five sections. Section Two, Three and Four will analyse the three conflicts mentioned above. The study of each conflict will provide an introduction of the actors involved in the corporate and community conflict; it will also discuss the nature and scope of the conflict and violations of Indigenous communities' rights, the contention and power imbalances between the MNC and the Indigenous Communities, and any domestic and international legal claims initiated by the affected communities and corporate actors. Section

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<sup>96</sup> *Ibid.*



Five will provide a summary of the chapter's main arguments, highlighting the common issues and insights arising from the examination of the three selected conflicts. It underlines particularly the volatile and complex context in which economic liberalization and foreign investment coexist with State repression and violence; the involvement of MNCs in furthering violence against Indigenous communities and violations of their fundamental rights; and the persistence of colonial legacies of racism and discrimination in the relationship of State and MNCs with Indigenous peoples, tending toward the social, regulatory and legal manipulation of Indigenous peoples and their potential claims and interests.

## **2.2 The Minera Barrick Misquichilca (Barrick Gold Corporation, Canada) v. Pierina Mine Communities (Ancash)**

On September 19, 2012, a peaceful protest of affected Indigenous communities against Minera Barrick Misquichilca's massive open-pit gold and silver mine, which destroyed their water sources, was violently repressed by the Police. At least nine people were wounded, among them Nemesio Poma Rosales (55) who later died. According to media reports, relatives of the injured said that "Nemesio was taken alive to the Pierina mine medical post where he bled to death."<sup>97</sup>

Minera Barrick Misquichilca's Pierina mine began operating in the 1990s and was one of the first new foreign investments in the Peruvian mining sector in more than thirty years together with Antamina (owned by Canadian firms Rio Algom, Noranda and Teck Corporation) and

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<sup>97</sup> Luis Manuel Claps, "Peru: Police Abuse in the Pay of Mining Companies," in *NACLA*, December 16, 2013; Efrain Rosales and Liliana Rojas, "Un muerto y nueve heridos deja enfrentamiento en centro minero Pierina," in *La Republica*, Lima, 21 September 2012, online: <<http://www.larepublica.pe/21-09-2012/un-muerto-y-nueve-heridos-deja-enfrentamiento-en-centro-minero-pierina>> (retrieved 30 April 2017); Human Rights Watch "Peru: Prevent Unlawful Killings of Protesters" September 20, 2012, online: <<http://www.hrw.org/news/2012/09/20/peru-prevent-unlawful-killings-protesters>> (retrieved 30 April 2017).

Yanacocha (owned by U.S. Newmont Mining Corporation). These constitute the biggest mineral operations (mega mines) constructed in Peru following the neoliberal reforms implemented by Alberto Fujimori's regime in early 1990s.

### **2.2.1 The Actors in the Conflict**

#### **The Minera Barrick Misquichilca**

Minera Barrick Misquichilca (MBM) is a wholly owned subsidiary of Toronto-based Barrick Gold Corporation (Barrick). Barrick is currently the world's largest gold producer with interests in 27 operating mines and development projects in 10 countries on four continents.<sup>98</sup> As government regulations in North America were becoming onerous, by the spring of 1994, Barrick shifted its interest to South America.<sup>99</sup> Peter Munk, Barrick's founder and chairman, became acquainted with the key countries in Latin America and their presidents (Chile, Argentina and Peru) thanks to Brian Mulroney, former Canadian prime minister who had been brought onto Barrick's international advisory board in early 1993.<sup>100</sup> Munk was aware of the radical shift underway in Latin America's economic policies which were opening up their economies to foreign capital.<sup>101</sup> He was very optimistic about Barrick's business prospects in the continent. In the fall of 1995, speaking at the Society of the Americas' meeting in New York, Munk pointed out, "an enormous shift has taken place over the past ten years in the affairs of our

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<sup>98</sup> About Barrick Gold Corporation, online: <<http://www.barrick.com/company/default.aspx>> (retrieved 30 April 2017).

<sup>99</sup> Donald Rumball, *Peter Munk: the Making of a Modern Tycoon* (Toronto: Stoddart Publishing Co., 1996) at 17.

<sup>100</sup> The other members of Barrick's international advisory board were: Peter Munk, Andronico Luksic, Vernon Jordan, Howard Baker, Dr. Karl Otto Pohl, Paul Desmarais, Jose Rohm, Bob Smith, and former U.S President George Bush (Sr.) *Ibid* at 13-17. On March 2015, Barrick hired former Canadian foreign affairs minister John Baird and former Republican speaker of the U.S. House of Representatives Newt Gingrich to serve on its international advisory board. See Rachelle Younglai, "Barrick Gold hires John Baird, Newt Gingrich," *the Globe and Mail*, 27 March 2015, online: < <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/barrick-boosts-chairman-john-thorntons-pay-package/article23675413/> > (retrieved 30 April 2017).

<sup>101</sup> Donald Rumball, *supra* note 99 at 17.

hemisphere...the fundamental change from the rhetoric of poverty-driven socialism, from the bankrupt ideas of Marxism, to the fabulous emergence of free enterprise, democracy, and all the things which we stand for, we believe in...”<sup>102</sup>

By 1994, Barrick’s subsidiary MBM was established in Peru and has been dedicated to the production and sales of gold; it also supports related activities such as exploration, development, mining and processing. MBM currently operates two mining projects in Peru: Pierina mine (acquired in 1996) in Ancash region and Lagunas Norte in La Libertad region. MBM began operations in Pierina in 1998 and became Peru’s second largest gold producer, after U.S Newmont’s Yanacocha mine. According to Barrick’s former president and CEO, Aaron Regent, “Peru, in particular, has been a motor of development for the corporation,”<sup>103</sup> and Pierina became “one of the lowest cost mines in the world and one of Barrick’s most profitable.”<sup>104</sup> Barrick, under the protection of a legal (tax) stability contract (signed during the Fujimori regime), is exempted from paying royalties and corporate taxes.<sup>105</sup> Pierina is an open-pit, truck-and-loader operation. Closure activities were initiated at Pierina in August 2013.<sup>106</sup>

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<sup>102</sup> *Ibid* at 18.

<sup>103</sup> Matthew Himley, “Global Mining an Uneasy Neoliberalization of Sustainable Development,” in (2010) 2 *Sustainability* 3270 at 3277.

<sup>104</sup> Barrick 1999 Annual Report at 21, online: < <http://www.barrick.com/files/annual-report/Barrick-Annual-Report-1999.pdf> > (retrieved 30 April 2017).

<sup>105</sup> Legal stability contracts that provide tax exemption to companies were introduced by Fujimori government with the aim of promoting foreign investment. A section of the law (1992 mining law) enabling mining companies to sign contracts allowing reinvesting up to 80 percent of their profits tax-free was modified in 2000. But the existing legal stability contracts remained in place, for they are protected by the 1993 Constitution (Art. 62) which prescribes that Contract-Laws can only be modified by agreement between the parties, and they cannot be modified by any legislative act or law. Eleven of the biggest corporations in Peru, including Xstrata, Teck Cominco, Newmont and Barrick Gold, are still benefiting from tax exemption. See Humberto Campodonico, “Recursos Naturales, Decada Perdida y Politica Macro,” in *La Republica*, 09 February 2015, online: < <http://larepublica.pe/columnistas/cristal-de-mira/recursos-naturales-decada-perdida-y-politica-macro-09-02-2015> > (retrieved 30 April 2017); Emilie Lemieux, *Mining and Local Development: challenges and perspectives for a fair and socially inclusive sustainable development in Canadian mining zones in Peru*, SUCO – Cooper Accion, June 2010 at 17.

<sup>106</sup> See Barrick Gold Corporation, Annual Information Form, 31 March 2014 at 14, 17, online: <<http://www.barrick.com/files/agm/Barrick-AIF-2013.pdf> > (retrieved 30 April 2017).

## **Indigenous / Peasants Communities (Jangas District, Ancash Region)**

The area and lands where the Pierina mine is located belong to Quechua-speaking Indigenous peasant communities. These communities live in social and political marginalization, with a high percentage of malnutrition of their population, without potable water, sewage and electricity.<sup>107</sup> According to Himley, Pierina mine's area of influence is made up of about eighteen peasant communities who have been affected by the mining operation. MBM considers eleven of these communities, in general the ones closest to the mine project, to be within its "direct" area of influence, and the others within its "indirect" area of influence.<sup>108</sup> In addition to Indigenous – peasant communities, there are a variety of settlement types within the area, including villages, and small towns. The majority of inhabitants of these settlements are Quechua speakers and their main activities are agriculture (small-scale farming) and livestock raising (sheep and cattle).<sup>109</sup>

### **2.2.2 Nature and Scope of the Conflict and Violations of Indigenous Rights**

The main sources of social conflict between MBM and the communities surrounding Pierina mine have been the stark differences between the expectations and interest of the company and the communities, the negative impacts of mining on communities' land and water sources, and the encroachment on communities' rights. In addition, communities believe that the State and local governments monopolized the decision-making process and power over mining concessions and contracts and that there is no meaningful participation and consultation of

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<sup>107</sup> Coordinadora Andina de Organizaciones Indígenas – CAOÍ, *Minería Canadiense en el Perú: Vulneración de derechos y conflictos sociales, Barrick en Ancash*, June 22, 2011, online: <<http://alainet.org/active/47522&lang=es>> (retrieved 30 April 2017).

<sup>108</sup> Matthew Himley, "Regularizing Extraction in Andean Peru: Mining and Social Mobilization in an Age of Corporate Social Responsibility," in (2013) 45:2 *Antipode* 394, at 403.

<sup>109</sup> *Ibid* at 403 and 406; Coordinadora Andina de Organizaciones Indígenas – CAOÍ, *supra* note 107.

affected communities, and they also have the perception that the expansion of mining projects is not subject to control and regulation.<sup>110</sup>

While the company expected to have low operating costs and higher financial benefits, the communities had very high expectations regarding social and economic benefits that a mining project would bring to their residents. Communities' expectations were reinforced by MBM promises during the company-community negotiations over land transfer. According to affected communities, promises of social development support, in areas like health, education, infrastructure and agricultural improvement, made by MBM during these negotiations were strong incentives for Indigenous communities to sell their lands.<sup>111</sup> Other incentives included the monetary proceeds deriving from the sale and the hope for employment at Pierina, which Indigenous residents recalled that MBM officials suggested, would be available for them at Pierina mine.<sup>112</sup> Yet, more than a decade later, as Himley argues, the social-development expectations of many community residents had not been met.<sup>113</sup> High levels of dissatisfaction and frustration are perceived among affected Indigenous communities, who have been displaced and or dispossessed from their lands.<sup>114</sup>

Indigenous communities have denounced serious problems of water contamination and water scarcity as a result of the mining operation which caused forced migration and

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<sup>110</sup> Coordinadora Andina de Organizaciones Indígenas – CAOI, *supra* note 107.

<sup>111</sup> Matthew Himley (2010), *supra* note 103 at 3281.

<sup>112</sup> *Ibid.*

<sup>113</sup> Matthew Himley, "Mining History: Mobilizing the Past in Struggles over Mineral Extraction in Peru," in (2014) 104:2 *Geographical Review* 174 at 185-186.

<sup>114</sup> Julio Lopez Mas and Pablo Condori Luna, "Gran Minería Aurífera y sus Repercusiones en el Desarrollo Económico Local," in *Gestión en el Tercer Milenio, Rev. de Investigación de la Fac. de Ciencias Administrativas*, UNMSM, Vol. 9, N° 18, Lima, Diciembre 2006 at 24; Limberg Chero Senmache, *El Otro Caso Barrick* (Lima: PLADES, 2009).

displacement.<sup>115</sup> MBM's open-pit technique and the use of cyanide heap leaching has vastly increased social and environmental impacts on Indigenous lands and environment, for it requires an increased quantity of land, water and energy and generates higher volumes of waste and toxic substances such as arsenic, cadmium, selenium, lead and mercury.<sup>116</sup> Journalists who reported health and contamination issues affecting Indigenous residents around the mining area have been harassed and received death threats.<sup>117</sup>

MBM's operation has also generated increasing disagreements and conflicts within communities and between communities.<sup>118</sup> The source of many of these conflicts and disagreements is the dilemma of improving their living or defending their environment and lands. For some communities and some members, despite the negative impacts of mining projects, the projects seem to become the only option for improving their wellbeing. Social and economic marginalization and lack of government's investment in affected communities make the mining projects, coupled with MBM's corporate social responsibility programs (community development projects), hard to refuse and the only choice for improving their precarious lives.

### **2.2.3 Contention and Power Imbalances between MBM and Indigenous Communities**

Whereas MBM (with the support of host and home States) has carried out a series of

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<sup>115</sup> Julio Lopez Mas and Pablo Condori Luna, *supra* note 114 at 24; Matthew Himley, "Monitoring the impacts of extraction: science and participation in the governance of mining in Peru," in (2014) 46 *Environmental and Planning A* 1069, at 1075; Sakura Saunders, Ed., *Debunking Barrick*, ProtestBarrick.Net, April 2013 at 10-11, online: <[http://protestbarrick.net/downloads/DebunkBarrick-Report\\_fnl\\_web\\_single.pdf](http://protestbarrick.net/downloads/DebunkBarrick-Report_fnl_web_single.pdf)> (retrieved 30 April 2017).

<sup>116</sup> Ricardo Grinspun, Carlos Larrea and Liisa North, "Post-neoliberalism in Latin America: Continuities and discontinuities in regimes of extraction," in Kalowatie Deonandan and Michael L. Dougherty, Eds., *Mining in Latin America: Critical approaches to the new extraction* (New York: Routledge, 2016) at 63; Anthony Bebbington, "Water and Mining Conflicts in Peru," in (2008) 28: 3-4 *Mountain Research and Development* 190-195.

<sup>117</sup> Tribunal a la Minería Transnacional: el caso de Barrick Gold Corporation en Latinoamérica (Chile, Peru y Argentina), "Argumentos para la Acusación en el Tribunal a la Minería Transnacional," 25 November 2006, online: <[http://www.olca.cl/oca/chile/region03/cargos\\_a\\_barrick.pdf](http://www.olca.cl/oca/chile/region03/cargos_a_barrick.pdf)> (retrieved 30 April 2017).

<sup>118</sup> Julio Lopez Mas and Pablo Condori Luna, *supra* note 114 at 24; Matthew Himley (2014), *supra* note 113 at 184-186.

community-level development initiatives as a part of its Corporate Social Responsibility (CSR) program aimed at obtaining a ‘social license’ and legitimizing the mining operation, affected Indigenous communities have undertaken a variety of measures, including protest, to hold MBM accountable for its social development promises during the land acquisition, and to demand remedies for Pierina mine’s adverse impacts on their land and water sources.

Barrick Gold has positioned itself as a driver of sustainable development and as a modern, socially and ecologically responsible mining company that respects human rights.<sup>119</sup> As Barrick’s Vice President and Assistant General Counsel, Jonathan Drimmer, points out,

[O]ur priority is to ensure that Barrick, and any entity that works on our behalf, respects the human rights of stakeholders impacted by our operations...The protection and respect of human rights and upholding the rule of law should be at the forefront of the global agenda, with companies, governments, civil society, and citizens working together toward that goal. Everyone gains when human rights are respected...For companies, it reduces the risk of disruptions to business, as well as the risk of reputational damage and lawsuits, and it upholds what should be core values for every multi-national.<sup>120</sup>

MBM has carried out a series of development projects involving primarily Indigenous communities that sold their lands to MBM. Among the projects are a temporary and rotational work program, stockbreeding and agricultural production, reduction of child poverty and

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<sup>119</sup> In 2012, Barrick established its Corporate Social Responsibility Advisory Board, which acts as an external sounding board on a range of corporate responsibility issues, including community relations, sustainable development, water, energy, climate change, security and human rights. The Board members includes Aron Cramer, Robert Fowler and Gare Smith. John Ruggie, former UNSR on Business and Human Rights, serves as a Special Consultant to the Board. Barrick’s CSR Advisory Board, online: <<http://www.barrick.com/responsibility/our-approach/csr-advisory-board/default.aspx>> (retrieved 30 April 2017).

<sup>120</sup> Jonathan Drimmer, “*BLOG: A Passion for Respecting Human Rights*,” November 5, 2014, online: <<http://barrickbeyondborders.com/blog/2014/11/a-passion-for-protecting-and-respecting-human-rights/>> (retrieved 30 April 2017).

malnutrition (in partnership with NGO World Vision),<sup>121</sup> and reforestation, entrepreneurship and agro-forestry (in partnership with NGO Socodevi and Canadian International Development Agency (CIDA), and Canadian and Peruvian governments).<sup>122</sup>

The Canadian government has demonstrated particular interest in Peru's mining sector and supported Barrick. From 1998 - 2012, CIDA financed (\$17.7 million) the Peru-Canada Mineral Resources Reform Project (PERCAN), that aimed to provide technical assistance and technological support to Peru's Ministry of Mines and Energy, and to reduce conflicts and facilitate the establishment of new mines.<sup>123</sup> According to a report submitted to the Inter-American Human Rights Commission, "PERCAN served as the platform for advising Peru on the implementation of mining sector regulations."<sup>124</sup> On May 2013, Prime Minister Harper visited Peru and announced his government's support for Peru's efforts to improve the environmental impact assessment process for mining and energy projects as well as support for natural resource management.<sup>125</sup> Days after the visit, the executive branch of Peru issued two supreme decrees (Decretos Supremos 054-2013 and 060-2013) to facilitate investments, further

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<sup>121</sup> Barrick Beyond Borders, online: <<http://barrickbeyondborders.com/people/2009/09/world-vision-update-4,000-children-and-families-in-peru-receive-help-to-defeat-poverty/#.VPEhGk1TG1s>> (retrieved 30 April 2017).

<sup>122</sup> In early 2013, CIDA was abolished as an independent agency by Canada's Harper government. This agency was incorporated into the Ministry of Foreign Affairs and International Trade where it is subject to commercial economic interests of Canada. CIDA has been increasingly subsidizing CSR initiatives and projects in Peru, in partnership with NGOs and Peruvian government, particularly in regions where Barrick and other Canadian companies operate. CIDA- Peru – International Development Projects, online: <<http://www.acdi-cida.gc.ca/cidaweb/cpo.nsf/fWebCSAZEn?ReadForm&idx=00&CC=PE>> (retrieved 30 April 2017).

<sup>123</sup> Bonnie Campbell, Etienne Roy-Grégoire and Myriam Laforce, "Regulatory Frameworks, Issues of Legitimacy, Responsibility, and Accountability: Reflections Drawn from the PERCAN Initiative" in Julia Sagebien and Nicole M. Lindsay, Eds. *Governance Ecosystems: CSR in the Latin American Mining Sector* (New York: Palgrave MacMillan, 2011) at 84; Project profile: Peru-Canada Mineral Resources Reform Project (Percan), online: <<http://www.acdi-cida.gc.ca/cidaweb/cpo.nsf/vWebCSAZEn/EC9BECACB9F82869852572F70037148D>> (retrieved 30 April 2017).

<sup>124</sup> Working Group on Mining and Human Rights in Latin America, *"The impact of Canadian Mining in Latin America and Canada's Responsibility"* Executive Summary of the Report submitted to the Inter-American Commission on Human Rights, April 2014 at 27.

<sup>125</sup> Canada-Peru Joint Statement, 22 May 2013, online: <<https://www.canada.ca/en/news/archive/2013/05/canada-peru-joint-statement.html>> (retrieved 30 June 2017).



relaxing the legal frameworks applicable to extractive industries, especially mining.<sup>126</sup> Canadian government's involvement in supporting Barrick has been revealed by a WikiLeaks document, which indicates a meeting of ambassadors and mining company executives from the United States, Canada, Great Britain, Switzerland and South Africa, hosted by the Canadian and US ambassadors in Lima in August 2005. Participants (among them the directors of Barrick, Antamina, Yanacocha, BHP Billiton and Quellaveco) discussed the possibility of encouraging Peru's government to relocate teachers opposed to mining away from conflict areas and persuading the Catholic Church to relocate similarly critical bishops and priests. Following the ambassadors' meeting, Peruvian government harassment and persecution of mining industry critics increased noticeably.<sup>127</sup>

As Himley argues, "despite the unambiguously idyllic picture of its social development programs that the firm presents in its public relations documents, many residents expressed frustration regarding what they considered to be a lack of development support from the firm;"<sup>128</sup> as well as regarding the environmental impact on their land and water and unfair labour practices associated with the mine.<sup>129</sup> MBM Director of Corporate Affairs' comments on Peru's Law on the Right to Prior Consultation to Indigenous or Native Peoples does not help to mitigate the sentiment of affected communities. He points out that the law on prior consultation is aimed only to consulting with Amazonian native communities and not Andean peasant communities, as they

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<sup>126</sup> Sociedad Peruana de Derecho Ambiental (SPDA), "Señalan que decretos 054 y 060 atentan contra el medio ambiente, patrimonio arqueológico y consulta previa," in *SPDA Actualidad Ambiental*, 8 July 2013, online: <<http://www.actualidadambiental.pe/?p=19556>> (retrieved 30 April 2017).

<sup>127</sup> Liisa North and Laura Young, "Generating right for communities harmed by mining: legal and other action," in (2013) 34:1 *Canadian Journal of Development Studies* 96 at 105; Jose De Echave, "Peru: Embajadas, Empresas Mineras y Embajadas," CooperAccion, Lima, 2 February 2011, online: <<http://www.cooperaccion.org.pe/opina/43-cooperaccion-opina/282-peru-wikileaks-empresas-mineras-y-embajadas>> (retrieved 30 April 2017).

<sup>128</sup> Matthew Himley (2010), *supra* note 103 at 3283-3284; Matthew Himley (2014), *supra* note 113 at 184-186.

<sup>129</sup> Lopez Mas and P. Condori Luna, *supra* note 114 at 24-25; M. Himley (2013), *supra* note 108 at 395.

already enjoy privileges through various regulations. He also stressed that the “ILO Convention 169 is not the only instrument to regulate the relations between the company and the Indians.”<sup>130</sup>

The first regional protests against MBM took place in March and June 2005 over the issue of environmental pollution caused by the Pierina mine operation, and a controversial Tribunal Tax decision (September 2004) that waived a \$141 million tax payment (plus \$51 million in interest for the 1996-2003 period) levied on MBM by Peru’s tax authority SUNAT.<sup>131</sup> This ruling is related to an alleged tax evasion issue involving Barrick during a simulated merger in 1996 of two of its own subsidiary companies to gain tax deductions.<sup>132</sup> According to Quiroz, Barrick’s tax evasion scheme was possible due to the fiscal mismanagement characteristic of the corrupt Fujimori regime, and it was part of the larger issue of corrupt economic policy management, including crooked privatization and banking rescue schemes executed by key finance ministers linked to private and foreign interests.<sup>133</sup>

In May 2006 members of 18 affected Indigenous communities protested, blockading access roads to the Pierina mine and demanding a salary increase and changes to unfair labour practices associated with the short-term work programs at the mine. Two members of the

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<sup>130</sup> Diario Gestion, “Barrick remarca: Consulta previa es para indigenas nativos,” in *Diario Gestion*, Lima, 4 November 2011, online: <<http://gestion.pe/noticia/1328363/barrick-remarca-consulta-previa-indigenas-nativos>> (retrieved 30 April 2017).

<sup>131</sup> Coordinadora Andina de Organizaciones Indígenas – CAOI, *supra* note 107.

<sup>132</sup> Alberto Quimper Herrera, “El Caso Minera Barrick,” in *La Republica*, 5 June 2003, online: <<http://www.larepublica.pe/05-06-2003/el-caso-minera-barrick>> (retrieved 30 April 2017); Peruvian Congress, *Informe Ampliatorio del Caso Pierina*, Lima, July 2003, online: <<http://www4.congreso.gob.pe/historico/ciccor/infofinal/barrick120.pdf>> (retrieved 30 April 2017).

<sup>133</sup> Alfonso W. Quiroz, *Corrupt Circles: A History of Unbound Graft in Peru* (Washington D.C. / Maryland: Woodrow Wilson Center Press / Johns Hopkins University press, 2008) at 397.

community were shot dead by the police and twenty persons were seriously injured, among them some policemen.<sup>134</sup>

In April 2007, several Indigenous communities mobilized against MBM's exploration of the Condorhuain Mountain area, which contains dozens of water sources that are essential for their consumption and agriculture. As they were protesting, they were attacked by other community members, allied to MBM, supported by members of the national police. In the same month, April 2007, social, labor and environmental organizations organized a 48 hours regional strike to protest against MBM and Antamina mining operations in the region. A 19 year old demonstrator was killed by the police, thirty people were detained, and a woman died of a heart attack after the police tear-gassed protesters.<sup>135</sup>

In December 2009 and March 2010, affected Indigenous communities occupied roads leading to Pierina mine to demand MBM comply with a series of its promises and commitments such as fair payment for effects on community common properties, and a compensation for the use of community lands.<sup>136</sup> The latest large protest against MBM's Pierina mine took place in September 2012, when Indigenous communities protested over a water shortage as a result of the

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<sup>134</sup> As part of its corporate social responsibility and social development agenda, Barrick carried out a temporary and rotational work initiative through which residents of nearby communities were hired to work on canal construction and reforestation on a short-term basis—typically for three months per year. The hiring occurred through intermediary companies which usually privileged and favored some communities at the expense of others. Matthew Himley (2010), *supra* note 103 at 3282-3284; La Republica, "Barrick Gold Mining Conflict Leaves Two Dead in Perú," in *La Republica*, May 7, 2006, online: <<http://www.minesandcommunities.org/article.php?a=3184>> (retrieved 30 April 2017).

<sup>135</sup> Corpwatch, "*Barrick's Dirty Secrets: Communities worldwide respond to gold mining's impacts*," May 2007, online: <[http://s3.amazonaws.com/corpwatch.org/downloads/Barrick\\_final\\_sml.pdf](http://s3.amazonaws.com/corpwatch.org/downloads/Barrick_final_sml.pdf)> (retrieved 30 April 2017).

<sup>136</sup> Servindi, "*Peru: Comuneros advierten aumento de protestas contra Barrick*," in Servindi, 28 December 2009, online: <<https://www.servindi.org/actualidad/20814>> (retrieved 30 April 2017); Diario La Primera, "*Comuneros se enfrentan a Barrick*," Lima, 23 March 2010, online: <[http://www.diariolaprimeraperu.com/online/nacional/comuneros-se-enfrentan-a-barrick\\_59125.html](http://www.diariolaprimeraperu.com/online/nacional/comuneros-se-enfrentan-a-barrick_59125.html)> (retrieved 30 April 2017).

destruction of their water sources; at least nine people were wounded, among them Nemesio Poma who later died at Barrick's Pierina mine medical post.<sup>137</sup>

#### **2.2.4 Domestic and International Legal Claims**

Peru's ineffective judicial remedies have prevented Indigenous communities, whose rights have been infringed by MBM's mining projects, from obtain declarations of liability, penalties for violations and damage caused, and reparations.<sup>138</sup> This is aggravated by significant barriers that Andean Indigenous communities confront in their interactions with the wider sociopolitical sphere, including unfamiliarity with the legal and institutional system, lack of access to the press and to "scientific knowledge", limited financial capacity, and racism, discrimination and language barriers as the majority of their members are Quechua speakers.<sup>139</sup>

In addition, MBM's leverage, capacity and excellent CSR programs and community relations approach to effectively mitigate and manage conflicts with affected communities<sup>140</sup> have played a key role in preventing communities from making legal claims. As Lemieux argues, mining companies began promoting CSR programs in Peru towards the end of the 1990s, in the hopes of offsetting the obvious unrest that was taking place, which manifested itself as protest by the local communities.<sup>141</sup> MBM established a communication team and a community-relations team who are based at the mine site. These teams are each composed of approximately ten members, both men and women; they are Peruvian nationals, usually not from the region, with

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<sup>137</sup> Efrain Rosales and Liliana Rojas, "Un muerto y nueve heridos deja enfrentamiento en centro minero Pierina," in *La Republica*, Lima, 21 September 2012, online: <<http://www.larepublica.pe/21-09-2012/un-muerto-y-nueve-heridos-deja-enfrentamiento-en-centro-minero-pierina>> (retrieved 30 April 2017).

<sup>138</sup> Working Group on Mining and Human Rights in Latin America, "*The impact of Canadian Mining in Latin America and Canada's Responsibility*" Executive Summary of the Report submitted to the Inter-American Commission on Human Rights, April 2014 at 23.

<sup>139</sup> Matthew Himley (2013), *supra* note 108; Matthew Himley (2014), *supra* note 115.

<sup>140</sup> Fiorella Triscritti, "Mining, development and corporate-community conflicts in Peru," in (2013) 48:3 *Community Development Journal* 437- 450.

<sup>141</sup> Emilie Lemieux (2010), *supra* note 105 at 9.

degrees in humanities such as sociology, anthropology and conflict management; they work in close partnership with local communities to identify their needs, attend to any issue they might raise and jointly manage development programmes. To monitor community grievances, Barrick uses a mechanism that it calls the ‘Community Grievance Management Resolution Procedures’ (CGMRP). The CGMRP defines the generic process (identification, tracking and redress) used to manage grievances from communities and other local stakeholders.<sup>142</sup> As Coumans points out, mining companies seek partnership with anthropologists, development organizations and socially responsible investment companies to help secure a so-called social license to operate and manage risk reputation; these corporate engagement actors define the problems to be addressed and implement solutions that may impede the agency of affected communities, providing information and advice regarding the communities to the company, lending legitimacy to CSR programs and “remaining silent about the environmental and human rights abuses to which they become privy.”<sup>143</sup> In fact, CSR programs (community and social development projects) have become mechanisms of collaboration through which companies involve affected Indigenous communities and contribute to the making of mining’s new modern subject, the *homo oeconomicus*, the neo-liberal subject, which is responsible, self-disciplined, environmentalist, but also the *informed* subject.<sup>144</sup> Ultimately, these CSR and community development initiatives have “enabled mining

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<sup>142</sup> Fiorella Triscritti (2013), *supra* note 140 at 444.

<sup>143</sup> Catherine Coumans, “Occupying Spaces Created by Conflict: Anthropologists, Development NGOs, Responsible Investment, and Mining” (2011) 52 Supplement 3 *Current Anthropology* 29.

<sup>144</sup> Fabiana Li, “From Corporate Accountability to Shared Responsibility: Dealing with Pollution in a Peruvian Smelter Town,” in K. Ravi Raman and Ronnie D. Lipschutz, Eds., *Corporate Social Responsibility: Comparative Critiques* (New York: Palgrave Macmillan, 2010) at 127-128.

companies to enroll State institutions, neighbouring communities and other actors into collaborative projects that evade corporate accountability.”<sup>145</sup>

The death and injury of several Indigenous villagers during protests against MBM mining projects remain unpunished. No criminal investigation has been filed or opened. Yet, MBM’s alleged workers (members of another pro-mining peasant community) denounced 17 leaders and members of the community of Paccha that were involved in the protest against MBM exploration of Condorhuain Mountain (home of numerous water sources and archaeological sites) in April 2007. Indigenous peasants were charged and indicted for crime of kidnapping, blockading a road, and serious injuries against MBM’s workers; the prosecutor asked for 30 years in prison for the 17 Indigenous peasants. Preliminary criminal proceedings began in 2007 and hearings started on April 2011, but it was postponed numerous times. Carmen Shuan, one of the indicted leaders and president of the Water Defenders Association, points out that the criminalization of their community has caused profound social, psychological, moral and economic harm.<sup>146</sup> In another case, Alejandro Tomas Rosales, one of the villagers wounded (by bullet splinters shot by the police brought by MBM to protect its installations) during the September 2012 protest, received medical treatment to save his life. The treatment was provided by MBM in exchange for him signing an agreement denying that the company was in any way responsible for the events that resulted in his shooting, and affirming that the company was helping him out of its corporate

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<sup>145</sup> *Ibid.* Fabiana Li, “Documenting Accountability: Environmental Impact Assessment in a Peruvian Mining Project,” (2009) 32:2 *Political and Legal Anthropology Review* 218-236.

<sup>146</sup> On July 2016, after nine years, a criminal court finally dismissed the case. Solsticio Peru, “Victoria Legal de los Defensores de Condorhuain,” in Solsticio Peru, 13 July 2016, online: <<http://www.solsticio-peru.org/web/?s=Condorhuain>> (retrieved 30 April 2017); Servindi, “Perú: Se movilizarán en respaldo a indígenas procesados por caso Condorhuain,” in Servindi, Lima 9 March 2012, online: <<https://www.servindi.org/actualidad/60767>> (retrieved 30 April 2017).

‘social responsibility.’ He never spoke to a lawyer about his rights, or to anyone except MBM’s community relations manager.<sup>147</sup>

At the international level, there is not a single case filed before any venue, except a complaint before the ILO filed by the General Confederation of Peruvian Workers (CGTP) against the Peruvian government and MBM for violating the freedom to organize a union by community residents employed at Pierina.<sup>148</sup>

### **2.3 Minera Yanacocha (New Mont Mining Company, U.S.A.) v. Yanacocha Mine Communities (Cajamarca)**

On July 3, 2012, thousands of people, among them Indigenous peasants, protested against the Minera Yanacocha’s proposed Conga open-pit gold mine, located in the region of Cajamarca. The Conga project is an expansion of Yanacocha gold mine, which has caused serious social and environmental problems, and has been the focus of persistent protests.<sup>149</sup> In the city of Celendin, a peaceful march involving around 3000 protestors led to a confrontation with the police and soldiers that left at least twenty people wounded; five peasants were killed, including a 17 year old youth.<sup>150</sup> On July 4<sup>th</sup>, environmental campaigner and former Catholic priest Marco Arana-Zegarra was pushed to the floor and severely beaten by riot police while he was sitting in the

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<sup>147</sup> Sakura Saunders (2013), *supra* note 115 at 10-11.

<sup>148</sup> Following the May 2006 protests and strike over labour issues, members of affected communities attempted to form a union, but the Ministry of Labour observed and denied the request for registration. Matthew Himley (2013), *supra* note 108 at 410.

<sup>149</sup> Raul Wiener Fresco and Juan Torres Polo, *Large scale mining: Do they pay the taxes they should? The Yanacocha case* (Lima: Latindadd, December 2014); Myriam Saade Hazin, “Desarrollo minero y conflictos socioambientales: los casos de Colombia, México y el Perú”, in *CEPAL, Serie Macroeconomía del Desarrollo*, No. 137, Santiago de Chile, September 2013.

<sup>150</sup> Inter-American Commission on Human Rights, “IACHR Expresses its Concern over the Aggressions in the Department of Cajamarca, Peru” *Press Release July 6, 2012*, online: <[http://www.oas.org/en/iachr/media\\_center/PReleases/2012/080.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/080.asp)> (retrieved 30 April 2017); Jorge Loayza, “Muertos en Cajamarca suben a 5, mientras la región vive en un clima de tensión,” in *La Republica*, Lima 5 July 2012, online: <<http://www.larepublica.pe/06-07-2012/muertos-en-cajamarca-suben-5-mientras-la-region-vive-en-un-clima-de-tension#!foto2>> (retrieved 30 April 2017).

Cajamarca City's main square; he was subsequently taken to the local police station, where he suffered further beatings and verbal abuse.<sup>151</sup> Immediately after Arana's violent detention, a woman who was witnessing the police repression approached one of the riot police and asks him, "Why are you treating us like this?" ("Porque nos tratan asi?"); the policeman angrily responded, "Because you are dogs, motherfucker!" ("Porque son perros, conchatumadre!").<sup>152</sup>

### **2.3.1 The Actors in the Conflict**

#### **The Minera Yanacocha**

Minera Yanacocha (MY) was legally established in Lima in 1992 and is comprised of: U.S. Newmont Mining Corporation (Newmont) (51.35 percent); Peruvian Compañía de Minas Buenaventura (Buenaventura) (43.65 percent);<sup>153</sup> and the World Bank's International Finance Corporation (IFC) (5 percent).<sup>154</sup>

Newmont Mining Corporation, the major shareholder, is the world's second-largest producer of gold, behind only Barrick Gold, with active mines in the U.S.A., Australia, New

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<sup>151</sup> Comision Internacional de Juristas - IDL, "*Acceso a la Justicia : Empresas y Violaciones de Derechos Humanos en el Peru*," Geneva - Lima, May 2013 at 60; Peru Support Group, "Police Abuses in Cajamarca," in *Peru Support Group*, 5 July 2012, online: <<http://www.perusupportgroup.org.uk/news-article-563.html>> (retrieved 30 April 2017).

<sup>152</sup> "Porque son Perros!" July 4, 2012, online: <<http://www.youtube.com/watch?v=n9BV0IW-ZXI>> (retrieved 30 April 2017); "Detention de Marco Arana Zegarra HD," July 5, 2012, online: <<https://www.youtube.com/watch?v=HZgHK3w5Hdc>> (retrieved 30 April 2017) ; Guarango Film and Video, *Daughter of the Lake (Hija de la Laguna)*, a Feature Documentary, Directed by E. Cabellos; Produced by Nuria Frigola, Peru 2015.

<sup>153</sup> Compañía de Minas Buenaventura, Corporate Profile, online: <<http://www.buenaventura.com/>> (retrieved 30 April 2017).

<sup>154</sup> The World Bank's IFC, in addition to holding a 5 percent share in Yanacocha and providing an initial loan in 1993, has supported several of the mine's expansion projects. According to a monograph prepared by CAO, "Yanacocha has been one of IFC's most profitable equity investments." The World Bank's Office of the Compliance Advisor Ombudsman (CAO), "*the Formation and First Steps of the Mesa de Dialogo CAO-Cajamarca, Peru (2000-2003)*," Monograph 1, Washington D.C., 2007 at 1, IFC Projects Database, online: <[http://www.cao-ombudsman.org/publications/documents/CAO\\_Monograph\\_MesaFirstSteps\\_EnglishPart1.pdf](http://www.cao-ombudsman.org/publications/documents/CAO_Monograph_MesaFirstSteps_EnglishPart1.pdf)> (retrieved 30 April 2017).



Zealand, Indonesia, Ghana, Mexico and Peru.<sup>155</sup> Newmont is currently “governed” by at least ten major corporate social responsibility (CSR) regimes.<sup>156</sup> Due to “hostile” U.S. government regulations,<sup>157</sup> Newmont began exploration in Peru in the early 1980s as “it turned its attention abroad, especially to undeveloped countries that were opening to foreign capital.”<sup>158</sup> According to Newmont’s CEO Peter Philip, the 1990 election of Fujimori in Peru brought stability and safety for the company; “it gave us enough safety in our investment to say we should go ahead and do it.”<sup>159</sup> In July 1992, Newmont’s board approval was given to develop Yanacocha’s open-pit mine. Immediately, Newmont’s officials engaged the Ackerman Group in Miami, a security firm headed by ex-CIA men,<sup>160</sup> and Forza, a Lima private security group, to meet the company’s requirement that personnel and property be well protected in Peru.<sup>161</sup>

Yanacocha mine, South America's largest gold mine, is located in the province and region of Cajamarca, approximately 800 kilometers northeast of Lima.<sup>162</sup> Yanacocha produced its first gold ore bar on August 1993, and it “quickly became the largest heap leach operation in

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<sup>155</sup> Simon Walker, “Gold: new fundamentals?” (Feb. 2015) 216:2 *Engineering & Mining Journal* 32 at 34; Newmont Mining Corporation SWOT Analysis, *Company Profile: Newmont Mining Corporation*, April 2014 at 1-8.

<sup>156</sup> Newmont’s membership and commitments: International Council on Mining and Metals Sustainable Development Framework (ICMM); United Nations Global Compact (UNGC); Voluntary Principles on Security and Human Rights (VPSHR); International Organization for Standardization Environmental Management System Standard, ISO 14001 (ISO); The Carbon Disclosure Project (CDP); International Cyanide Management Institute’s Cyanide Management Code (ICMC); Occupational Health and Safety Audit System 18001 (OHSAS); Partnering Against Corruption Initiative (PACI); Extractive Industries Transparency Initiative (EITI); Global Reporting Initiative (GRI). Newmont would also be governed by CSR regimes established by the World Bank Operational Guidelines and the OECD Guidelines on Multinational Enterprises. Newmont, Sustainability and Accountability, online: <<http://www.newmont.com/sustainability/accountability/default.aspx>> (retrieved 30 April 2017).

<sup>157</sup> According to Morris, “overly restrictive land use rules were imposed; environmental permitting bogged down in endless hearings; the 1872 mining law giving access to federal lands came under severe attack; and a moratorium was placed on issuing patents, that is, transferring federal land to miners, including for applications that already had been approved.” Jack H. Morris, *Going for Gold: the History of Newmont Mining Corporation* (Tuscaloosa: University of Alabama Press, 2010) at 206-208.

<sup>158</sup> *Ibid* at 206-208.

<sup>159</sup> *Ibid* at 211.

<sup>160</sup> AckermanGroupLLC Security & Investigative Consultants, online: <<http://www.ackermangroup.com/#home>> (retrieved 30 April 2017).

<sup>161</sup> Jack H. Morris (2010), *supra* note 157 at 213.

<sup>162</sup> Yanacocha, Nuestra Historia, online: <<http://www.yanacocha.com/quienes-somos/>> (retrieved 30 April 2017).

the world and Newmont's most profitable operation.”<sup>163</sup> Yet, MY, like Minera Barrick, is exempted from paying royalties and corporate taxes under the protection of a legal (tax) stability contract, signed during the Fujimori government.<sup>164</sup>

### **Indigenous, Peasants and Local Communities (Cajamarca Region)**

Minera Yanacocha's mining operation has directly and indirectly affected numerous local populations, among them Indigenous and peasant communities. One of the communities directly affected by the operation was Comunidad Campesina San Andres de Negritos (Negritos Peasant Community) and small land-holder peasant families, most of them “illiterate,” with no formal education.<sup>165</sup> The mining project has also indirectly affected Indigenous and peasant communities, villages, and families living adjacent to the mining operation and nearby towns, such as Porcon, Combayo, Tual, Encañada, Choropampa and Quillish.<sup>166</sup>

Most of these affected communities have been represented by their political authorities and organizations such as peasant patrols (Rondas Campesinas).<sup>167</sup> In addition, local NGOs such

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<sup>163</sup> Particularly, after Newmont obtained the majority holding, after winning a controversial legal battle to the French state-owned BRGM (one of the original owners of Yanacocha mine) in 1998. French businessman, Patrick Maugein, advisor to former French President Chirac, declared that Newmont paid \$US 4 million to Fujimori's security chief Vladimiro Montesinos to secure a favourable legal decision. Jack H. Morris (2010), *supra* note 157 at 213-215; Alfonso W. Quiroz (2008), *supra* note 133 at 396.

<sup>164</sup> Humberto Campodonico, “Recursos Naturales, Decada Perdida y Politica Macro,” in *La Republica*, 09 February 2015, online: <<http://www.larepublica.pe/columnistas/cristal-de-mira/recursos-naturales-decada-perdida-y-politica-macro-09-02-2015>> (retrieved 30 April 2017); Emilie Lemieux (2010), *supra* note 105 at 17.

<sup>165</sup> Raul Wiener Fresco and Juan Torres Polo (2014), *supra* note 149 at 13-15; Charis Kamphuis, “Foreign mining, law and the privatization of property: a case study from Peru,” in (2012) 3:2 *Journal of Human Rights and the Environment* 217-253; Alberto Pasco-Font, et al., “Peru: Learning by Doing,” in Gary McMahon and Felix Remy, Eds., *Large Mines and the Community: Socioeconomic and Environmental Effects in Latin America, Canada and Spain* (Washington D.C.: the World Bank / IDRC, 2001) at 143-197.

<sup>166</sup> *Ibid*; International Institute on Law and Society, *Pueblo Originarios en Caso Conga*, online: <[http://www.derechoysociedad.org/IIDS/Publicaciones/ACCIONES\\_DE\\_%20SOLIDARIDAD.pdf](http://www.derechoysociedad.org/IIDS/Publicaciones/ACCIONES_DE_%20SOLIDARIDAD.pdf)> (retrieved 30 April 2017).

<sup>167</sup> Alberto Pasco-Font, et al. (2001), *supra* note 165 at 149.

as Grupo de Formacion e Intervencion para el Desarrollo Sostenible (GRUFIDES)<sup>168</sup> and national NGOs such as Instituto Internacional de Derecho y Sociedad (IIDS)<sup>169</sup> have been involved in advocating for and defending affected communities' interest and rights.

### **2.3.2 Nature and Scope of the Conflict and Violations of Indigenous Rights**

The history of Minera Yanacocha is marked by social, political and legal conflicts with local Indigenous communities, peasant families, villages and the region as a whole.<sup>170</sup> This is the consequence of the immense impact of Yanacocha cyanide heap-leaching open-pit mine operations on the environment<sup>171</sup> and socio-economic structures of a rural region,<sup>172</sup> with high levels of poverty and strong social movement organizations.<sup>173</sup> In addition to the destruction of their fresh water supplies and contamination of their environment, Cajamarca's affected populations often point to fraud (in the lands' acquisitions), abuse of Indigenous and peasant communities, manipulation and cooptation of local authorities and media, and provocation,

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<sup>168</sup> Grupo de Formacion e Intervencion para el Desarrollo Sostenible (Sustainable Development Training and Action Group), online: < <http://www.grufides.org/>> (retrieved 30 April 2017).

<sup>169</sup> Instituto Internacional de Derecho y Sociedad (International Institute on Law and Society), online: <<http://www.derechoysociedad.org/>> (retrieved 30 April 2017).

<sup>170</sup> Jose De Echave and Alejandro Diez, *Mas Alla de Conga* (Lima: Red Peruana por una Globalizacion con Equidad-RedGE, March 2013) at 82-102; Mirtha E. Vasquez Chuquilin, "El Oro No Brilla Para Todos: El Impacto de las Actividades de Minera Yanacocha S.R.L. sobre los Derechos Humanos en Cajamarca" (Cajamarca, Peru: Grufides-APA, 2016).

<sup>171</sup> Jeffrey Bury and Anthony Bebbington, "New Geographies of Extractive Industries in Latin America," in Anthony Bebbington and Jeffrey Bury, Eds., *Subterranean Struggles: New Dynamics of Mining, Oil and Gas in Latin America* (Austin: University of Texas Press, 2013) at 45-47; Diego Cupolo, "The Price of Gold in the Twenty-First Century," Photo Essay, in *NACLA*, 14 October 2014.

<sup>172</sup> Cajamarca is one of Peru's most rural region (around 10-30 percent of the population lives in urban areas), and its economy mainly revolves around small-scale agriculture, livestock production, the dairy industry and tourism. Alberto Pasco-Font, et al. (2001), *supra* note 165 at 148; Servindi, "America Latina: se multiplicaran por veinte los conflictos provocados por la minería?" October 30, 2012, SERVINDI, online: <<https://www.servindi.org/actualidad/75831>> (retrieved 30 April 2017).

<sup>173</sup> Raul Wiener Fresco and Juan Torres Polo (2014), *supra* note 149 at 18-19; Ben Hallman and Roxana Olivera, "Gold Rush: How the World Bank Is Financing Environmental Destruction," in *the International Consortium of Investigative Journalists and the Huffington Post*, 15 April 2015, online: <<http://projects.huffingtonpost.com/worldbank-evicted-abandoned/how-worldbank-finances-environmental-destruction-peru>> (retrieved 30 April 2017).

harassment and repression against individuals and organizations that oppose and criticize the mining project as root causes of the conflict.<sup>174</sup>

According to economist Peter Koenig, Yanacocha “uses four times more water than the city of Cajamarca with its 250,000 inhabitants. Cajamarca had water in abundance in 1990, today suffers from water scarcity; it receives water two hours a day on average, but highly contaminated, exceeding standards of the World Health Organization by factors of ten or more, caused by heavy metals such as cyanide and mercury. Diseases and premature abortions exist in abundance.”<sup>175</sup> In 1999, a public denunciation of water contamination (with cyanide, arsenic, aluminum, iron and zinc) as a result of mining operations was made during a session of the Municipal Council of Cajamarca Province; an investigation was ordered, which was interceded by MY in order to avoid a negative report; in January 2000, the case was closed by the district attorney.<sup>176</sup> A 2014 dietary survey and heavy metals risk assessment in rural populations living near a gold mine in Cajamarca concludes that the dietary intakes of Lead (Pb) and Arsenic (As) are higher the closer the population is to the gold mine, and it is due to the consumption of local foods and water; it also expresses concerns regarding the dietary exposure to Arsenic (As), Cadmium (Cd) and Lead (Pb) in the studied rural population.<sup>177</sup> In February 2015, the

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<sup>174</sup> Mirtha Vasquez Chuquilin “El Oro No Brilla para Todos” (2016), *supra* note 170; Myriam Saade Hazin (2013), *supra* note 149; Charis Kamphuis, “Foreign Investment and the Privatization of Coercion: A Case Study of the Forza Security Company in Peru,” in (2011-2012) 37:2 *Brooklyn Journal of International Law* 529-578; Peter Bosshard, et al., “*Gambling with People’s Lives: What the World Bank’s New ‘High-Risk/High-Reward’ Strategy Means for the Poor and the Environment*,” A Report, Environmental Defense, Friends of the Earth, International Rivers Network, Washington D.C., 2003 at 16-18.

<sup>175</sup> Peter Koenig, “Agua es Vida: Conga Seria Fatal,” in *La Primera*, 4 February 2012, online: <[http://www.laprimera.pe/online/especial/conga-seria-fatal\\_104651.html](http://www.laprimera.pe/online/especial/conga-seria-fatal_104651.html)> (retrieved 30 April 2017).

<sup>176</sup> Raul Wiener Fresco and Juan Torres Polo (2014), *supra* note 149 at 18-20.

<sup>177</sup> Marta Barenys, et al., “Heavy metal and metalloids intake risk assessment in the diet of a rural population living near a gold mine in the Peruvian Andes (Cajamarca),” in (2014) 71 *Food and Chemical Toxicology* 254-263; Patricia Wiese and Roxana Olivera, “Bodas de Roble (O de Arsenico?),” in *Idee Revista No. 45*, Lima, Octubre 2014.

government agency for environmental assessment and supervision (OEFA), released a document that confirms the contamination of San Jose peasant community's sources of water and the Rio Grande, a river that is one of the sources of Cajamarca city's drinking water.<sup>178</sup>

Facing increasing contamination of their water, soil, and lands, Cajamarca's rural and urban communities have risen to defend their rights, water sources, health, and way of life.<sup>179</sup> Pablo Sanchez, Director of GRUFIDES, points out, "for every gram of gold, the mining company has to remove a ton of rock. It is 600,000 tonnes of rock per day. Water sources and springs have disappeared in Cajamarca. And when protests against the [mining] project began the army and police were paid by the mine. We are witnessing the mercenarisation of the Police [into watchdogs of MY]."<sup>180</sup>

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<sup>178</sup> Grufides, "Pobladores de San Jose denuncian muerte de sus animales, seria por aguan contaminadas de Minera Yanacocha," in *Servicio de Informacion Grufides*, 23 March 2015, online: <<http://grufidesinfo.blogspot.ca/2015/03/pobladores-de-san-jose-denuncian-muerte.html>> (retrieved 30 April 2017); OEFA – Resolucion Directoral No. 018-2014-OEFA/DS, 18 Diciembre 2014, online: <[http://www.oefa.gob.pe/?wpfb\\_dl=12572](http://www.oefa.gob.pe/?wpfb_dl=12572)> (retrieved 30 April 2017).

<sup>179</sup> Moises Arce, *Resource Extraction and Protest in Peru* (Pittsburgh, Pa.: University of Pittsburgh Press, 2014) at 84; Reinhard Seifert, *Yanacocha: El Sueño Dorado?* (Cajamarca: Ecovida) Tomo I, 2003; Tomo II, 2014; Anthony Bebbington, et al., "Mining and Social Movements: Struggles Over Livelihood and Rural Territorial Development in the Andes," in (2008) 36:12 *World Development* 2888-2905; Gianni Converso, Dir., *A Tajo Abierto (Open Pit)*, a Feature Documentary Film, 2011-2012.

<sup>180</sup> MY has a complex security system, consisting of three components: 1) the company's own security team, responsible for handling the system and managing, supervising and evaluating the tasks of its members, stationed police officers and hired private companies, and overseeing information production and analysis of the Security Control Center and relations with peasant patrols of neighboring communities; 2) the Peruvian National Police (Bureau of Special Operations-DIROES and a mobile police unit) in the framework of a cooperation agreement with the company, collaborates to protect its property, the well-being of its members and the residences of its high-ranking executives, in addition to escorting vehicles that transport goods and equipment. MY pays the police officers a special bonus and makes a contribution to the institution as a result of these services; and 3) Forza, the private security company hired to protect the mining facilities, its different offices located in Cajamarca and especially the gold refinery and explosive storehouse. In addition, MY has two contracts with private companies for the supply of information: the first, with Explosupport, for information produced in the city of Cajamarca and the second, with Andrick Service, for information gathered in the neighboring communities. Gino Costa, "Comprehensive Review of Minera Yanacocha's Policies Based on the Voluntary Principles of Security and Human Rights," Executive Summary, Lima, 12 May 2009 at 11; Mirra Banchon, "Mineria en Peru: Problemas para indigenas? In *Deutsche Welle*, 9 September 2014, online: < <http://www.dw.com/es/miner%C3%ADa-en-per%C3%BA-problemas-para-ind%C3%ADgenas/a-17919052>> (retrieved 30 April 2017).

### 2.3.3 Contention and Power Imbalances between Mineral Yanacocha and Indigenous Communities

The asymmetry between MY and affected Indigenous communities has been clear since early 1990s when MY's land acquisitions generated a series of complaints and protests regarding land prices, unfair compensation, the company's failure to comply with promises made at the moment of sale, and land expropriations.<sup>181</sup> During the exploration phase, the owners of the land were not informed about the existence of underground gold, which would lead to their evictions. This hiding of information was a conscious decision that MY made in order to buy lands more cheaply.<sup>182</sup> As MY encountered resistance from some Indigenous communities and peasant landholders, it resorted to State-sanctioned expropriation procedures and forced land evictions, while compensating landholders at what it determined to be the estimated market value of the land.<sup>183</sup> The dispossession of the Negritos peasant community's lands is an emblematic case. The Peruvian government neoliberal legal framework introduced in the early 1990s and subsequent administrative decisions led to the elimination of Negritos Community's communal title and its substitution with individual title. Having land held in individual title in turn effortlessly resulted in the disposition of community's lands to MY. Both the government and MY managed and coordinated the processes necessary to 'transfer' a portion of Negritos community's land interests to MY by way of an expropriation and a mining easement.<sup>184</sup> As of 2009, it was

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<sup>181</sup> Jeffrey Bury and Adam Kolff, "Livelihoods, Mining and Peasant Protests in the Peruvian Andes," in (2002) 1:1 *Journal of Latin American Geography* 3 at 11-12; Alberto Pasco-Font, et al. (2001), *supra* note 165 at 152-153.

<sup>182</sup> Raul Wiener Fresco and Juan Torres Polo (2014), *supra* note 149 at 14.

<sup>183</sup> Beginning in 1992, MY began purchasing lands for less than US \$80 per ha. Jeffrey Bury, "Mining mountains: neoliberalism, land tenure, livelihoods, and the new Peruvian mining industry in Cajamarca," in (2005) 37 *Environment and Planning A* 221 at 233.

<sup>184</sup> *Ibid*, at 230-234; Charis Kamphuis (2012), *supra* note 165; Christian Aid, "Unearthing the Truth: Mining in Peru," London, U.K., February 2005.

estimated that approximately one-third of Negritos community's original land interests had been transferred to MY.<sup>185</sup>

The asymmetry of power has also been reflected in the increasing contamination and disregard of Indigenous' lands and environment. In June 2, 2000, Peru witnessed one of the greatest environmental disasters in recent times as a result of mercury spill along a 40 kilometer stretch of road in the vicinity of the towns of San Juan, Choropampa and Magnadalena. It has been reported that over a thousand peasant villagers were poisoned by mercury, most of them children.<sup>186</sup> MY delayed reporting the accident to Peruvian authorities, and allegedly exacerbated the public health impact of the spill by paying villagers to collect the spilled mercury without providing proper protective clothing.<sup>187</sup> In March 2001, hundreds of residents of Choropampa and surrounding areas protested the company's inadequate response to the health problems caused by the spill by blockading the road between Cajamarca and Lima.<sup>188</sup> Seventeen years later, several affected villagers have died, included one of Choropampa's former mayors, and many others are still suffering severe consequences to their health.<sup>189</sup>

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<sup>185</sup> Charis Kamphuis (2012), *supra* note 165 at 229.

<sup>186</sup> Guarango Film and Video, *Choropampa: the price of gold*, Directed and Produced by Ernesto Cabellos and Stephanie Boyd, 2002; Friends of the Earth International, "*Mining Hands Off! Why International Financial Institutions must stop drilling, piping and mining.*" Amsterdam, the Netherlands, December 2003 at 22-25.

<sup>187</sup> Peruvian Ombudsman Office Report, Informe Defensorial N° 62: El Caso del Derrame de Mercurio que Afecto a las Localidades de San Sebastian de Choropampa, Magdalena y San Juan, en la Provincia de Cajamarca, Diciembre 2001; Jane Perlez and Lowell Bergman, "Tangled Strands in Fight Over Peru Gold Mine." *New York Times*, October 25, 2005; Steven Herz, et al., *Development without Conflict: the Business Case for Community Consent*, Washington D.C.: World Resources Institute, May 2007 at 41-46; Marco Arana-Zegarra, "El Caso del Derrame de Mercurio en Choropampa y los Daños a la Salud en la Poblacion Rural Expuesta," in (2009) 26:1 *Rev. Peru Med. Exp. Salud Publica* 113-118.

<sup>188</sup> Steven Herz, et al. (2007), *supra* note 187 at 41-46.

<sup>189</sup> Rocio Silva Santisteban, "Choropampa: la mineria impune," in *La Republica*, 3 June 2014, online: <<http://www.larepublica.pe/columnistas/kolumna-okupa/choropampa-la-mineria-impune-03-06-2014>>; Nelly Luna Amancio, "Tras 11 años del derrame de mercurio, sintomas persiste en Chropampa," in *El Comercio*, 22 May 2011, online: <<http://elcomercio.pe/ciencias/planeta/11-anos-derrame-mercurio-sintomas-persisten-choropampa-noticia-761410>>; Raul Mendoza, "La Agonia de Choropampa," in *La Republica*, 16 November 2008, online:

Unlike Barrick's approach, MY's corporate strategy to managing community relations has been to unconditionally claim its right to operate, and it has preferred to negotiate with government officials in Lima rather than with local and regional authorities; this approach has ultimately led to increasing tensions, conflicts and protests.<sup>190</sup> MY's plan to expand operations to Cerro Quillish generated an unprecedented regional movement which incorporated rural, urban communities and local authorities. In October 2000, local authorities passed a municipal ordinance declaring Cerro Quilish to be a protected area and off-limits to mineral exploration. MY challenged the municipal declaration in courts arguing that it violated its constitutional right to property and freedom to work, on the basis that MY held the mineral rights, and some of the surface rights, corresponding to Cerro Quilish. In 2003, the Peruvian Constitutional Court ruled in MY's favor, holding that local authority's declaration exceeded the authority of the municipal government.<sup>191</sup> In November 2004, however, after five years of persistent widespread mobilization and difficult negotiations, MY was forced to renounce its plan.<sup>192</sup>

In August 2006, about 100 members of the Combayo peasant community, concerned about the mine's pollution of their water sources, blockaded MY's vehicles from highway access.

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<<http://www.larepublica.pe/16-11-2008/alertas-medio-ambiente-la-agonia-de-choropampa>> (retrieved 30 April 2017).

<sup>190</sup> Fiorella Triscritti (2013), *supra* note 140 at 441, 446; Jeffrey Bury and Adam Kolff (2002), *supra* note 181 at 9; Anthony Bebbington, et al, "Movimientos sociales, lazos transnacionales y desarrollo territorial rural en zonas de influencia minera: Cajamarca-Perú y Cotacachi-Ecuador" in Anthony Bebbington, Ed., *Minería, Movimientos Sociales y Respuestas Campesinos* (Lima: CEPES, IEP, 2007) at 168.

<sup>191</sup> Peruvian Constitutional Court (Tribunal Constitucional de Perú) Decision No. 300-2002-AA/TC decided on April 7, 2003, online: <<http://www.tc.gob.pe/jurisprudencia/2003/00300-2002-AA%2000301-2002-AA%2000302-2002-AA.html>> (retrieved 30 April 2017).

<sup>192</sup> Javier Arellano-Yanguas, "Mining and conflict in Peru: Sowing the minerals, reaping a hail of stones," in Anthony Bebbington, Ed., *Social Conflict, Economic Development and Extractive Industry: Evidence from South America* (New York: Routledge, 2012) at 96-97; Ivan Salas Rodriguez, *Quilish Hora Cero: Cajamarca, la lucha de un pueblo que defiende su vida y dignidad* (Cajamarca, Perú, Julio 2005).



In the clash between MY's private security guards (Forza),<sup>193</sup> off-duty police officers and villagers, one protestor, Isidro Llanos Cheverría, was shot twice and killed. Three police officers working as private security guards at Yanacocha were identified as suspects by investigators.<sup>194</sup> In July 2012, thousands of Indigenous peoples and peasants protested against the proposed Conga open-pit gold mine, resulting in at least twenty people being wounded and five killed. The latest protest took place in August 2015, as hundreds of Indigenous and peasant inhabitants of eleven villages of Cajamarca mobilized through the main streets of Cajamarca city against MY, denouncing the reduction in the quantity and quality of water in their canals.<sup>195</sup>

While the State has failed to act as a credible and independent mediator in the conflict,<sup>196</sup> the role of environmental and human rights organizations such as Grufides became crucial in mediating, promoting and defending Indigenous communities' rights. The State, however, is not only perceived as a biased mediator supporting the company, but as involved in intimidation, surveillance, harassment, physical attacks and criminalization of Indigenous protests and

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<sup>193</sup> Forza was founded in 1991 by a group of Peruvian navy officers who specialized in subversion and espionage to provide full corporate security services. In 1993 Forza became MY's exclusive private security company. In 2007 Securitas, one of the largest transnational private security corporations in the world acquired Forza as part of its expansion into the Latin American private security market. According to the Securitas website, its decision to enter the Peruvian security market through the acquisition of Forza was decisively influenced by Forza's prestige, experience and position in the Peruvian market. Edmundo Cruz and Cesar Romero, "Evidencias vinculan a empresa Forza con Operación El Diablo," in *La Republica*, 6 December 2006, online: <<http://www.larepublica.pe/06-12-2006/evidencias-vinculan-empresa-forza-con-operacion-el-diablo>> (retrieved 30 April 2017); Edmundo Cruz, "Nuevas Pruebas Acusan A Forza," in *La Republica*, 3 February 2007, online: <<http://www.larepublica.pe/03-02-2007/nuevas-pruebas-acusan-forza>> (retrieved 30 April 2017); Securitas Peru, online: <<http://www.securitas.com.pe/es-pe/About-Us/Securitas-Peru/>> (retrieved 30 April 2017).

<sup>194</sup> Jose Luis Gomez del Prado, *Report of the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Mission to Peru*, A/HRC/7/7/Add.2, 4 February 2008 at 15-16.

<sup>195</sup> La Republica, "Minera Yanacocha blamed for the decline in the quantity and quality of water," in *La Republica*, Lima, 11 August 2015, online: <<http://larepublica.pe/imprensa/sociedad/392511-responsabilizan-yanacocha-por-la-disminucion-de-la-cantidad-y-calidad-del-agua>> (retrieved 30 April 2017).

<sup>196</sup> Fiorella Triscritti (2013), *supra* note 140 at 439, 447.

supporters.<sup>197</sup> Grufides and community leaders have been threatened, intimidated, persecuted and became targets of a smear campaign to discredit them.<sup>198</sup> In November 2006 an undercover police surveillance operation called “Operacion Diablo” was revealed in Cajamarca, which was carried out against Grufides and other local and regional human rights and environmental activists by a private security firm on behalf of Forza.<sup>199</sup> A peasant leader, Esmundo Becerra Cotrina, who was active in the defence of the environment and the Negritos peasant community’s territory from Yanacocha’s expansion, was assassinated in December 2006. He had been intimidated and received death threats and his name and photograph were also registered in Operacion Diablo’s surveillance documents entitled ‘Existing Threats to Yanacocha 2006’ and ‘Principal Leaders in Cajamarca that Oppose Yanacocha’s Mining Activity.’<sup>200</sup> In February 2014, police forcibly entered the home of the president of the peasant patrol of the Laguna Azul village; his wife Teodosia was severely beaten and dragged by her hair; the prosecutor instead of investigating the acts of police aggression, pressed charges against Teodosia for the theft of an allegedly stolen truck belonging to MY.<sup>201</sup>

Criminalization of social protest and judicial harassment of Indigenous and peasant community leaders and human rights defenders has become widespread in Cajamarca. Hundreds

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<sup>197</sup> Jose Perez Mundaca, “Yanacocha: Cambios y Permanencias en el Conflicto Social Minero,” *Tesis para optar el grado academico de doctor en antropologia*, Pontificia Universidad Catolica, Lima, Febrero 2010.

<sup>198</sup> Front Line Defenders, *Peru - Mirtha Vasquez Chuquilin, Grufides, Testimony*, November 2007, online: <<http://www.frontlinedefenders.org/es/node/2023>> (retrieved 30 April 2017); Front Line Defenders, “*Environmental Rights Defenders at Risk in Peru*,” Especial Report, Dublin, Ireland, June 2014; Amnesty International, “*Peru: Human Rights Defenders Suffer a Wave of Threats and Intimidation*,” Urgent Action, November 2006.

<sup>199</sup> Edmundo Cruz, “Espionaje: La Operacion ‘El Diablo’ contra el Padre Arana,” in *La Republica*, 3 December 2006; Guarango Film and Video, *The Devil Operation*, Directed and Produced by Stephanie Boyd, Lima, 2010.

<sup>200</sup> Jose Luis Gomez del Prado (2008), *supra* note 194 at 16-19; Charis Kamphuis (2012), *supra* note 165 at 239.

<sup>201</sup> International Institute on Law and Society, “*Conga: the Cry of the People*,” Video produced by IIDS, December 8, 2014, online: <[https://www.youtube.com/watch?v=fNM7S8KesGA&list=UU4nmPSrEpFqQZ\\_3vq6ZSxNA](https://www.youtube.com/watch?v=fNM7S8KesGA&list=UU4nmPSrEpFqQZ_3vq6ZSxNA)> (retrieved 30 April 2017).

of Indigenous peasants leaders and community members, human rights defenders and journalists have been accused and charged with crimes such as trespassing, disturbance, violence, kidnapping, obstruction public officials, rebellion, terrorism and others. Only in the context of the Conga protest, as of March 2013, 303 people were charged with different crimes.<sup>202</sup> On June 2014, the president of Cajamarca region, Gregorio Santos, was imprisoned as a formal preventative measure while he is investigated on corruption charges. Yet, many in the region saw his imprisonment as political persecution as he was firmly opposed to the Conga project.<sup>203</sup> On March 2015, Elvira Vásquez Huaman, an Indigenous leader opposing the Conga project, was charged with a crime against public tranquility (disturbance) by the Celendin attorney.<sup>204</sup>

The persecution, harassment and criminalization of Máxima Acuña de Chaupe (a Quechua Indigenous woman) and family are emblematic. Máxima Acuña and her family own and live on their land which is located next to the Lake Azul, considered by MY critical to develop its Conga project. In 2011, MY attempted to buy Maxima's land and when she refused to sell it, a campaign of intimidation, violence, physical attacks, judicial harassment and criminalization ensued. In May 2011 and again in August 2011, her homestead was destroyed by

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<sup>202</sup> Front Line Defenders (2014), *supra* note 198; Front Line Defenders, "2015 Annual Report: Human Rights Defenders in the Balance," Dublin, Ireland, January 2015 at 6; Cordinadora Nacional de Derechos Humanos, CEJIL, FEDEPAZ, GRUFIDES, "*Conflictos Sociales y Vulneracion de Derechos Humanos en el Peru*," Report submitted to the Inter-American Commission on Human Rights, March 2013, at 10.

<sup>203</sup> Dialogue with Eduardo Ballon, et al., "La Gran Empresa se Propone Ordenar el Territorio Regional," *Revista Que Hacer* No. 194, April – June 2014 at 25,28; Conga Conflict, "*Imprisoned President of Cajamarca wins re-election by a landslide*," 5 October 2014, online: <<https://congaconflict.wordpress.com/tag/gregorio-santos/>> (retrieved 30 April 2017).

<sup>204</sup> Elvira Vasquez points out that "This campaign [criminalization of social protest] is run by Yanacocha in complicity with the government, but we remain resolute in our struggle to oppose the Conga project, because they want to convert my community into a tailings deposit and we will not allow that... I stand firm in my struggle even if I go to jail. I am not frightened by the accusation. Accusations will come over and over again, but I will not give up my struggle. I was born here and will tirelessly defend my community." Wilfredo Cholan, "Cajamarca: Denuncian a la dirigente Elvira Vásquez por protesta contra Conga," in *Noticias Ser*, Lima, March 2015, online: <<https://blognoticiasser.lamula.pe/2015/03/06/cajamarca-denuncian-a-la-dirigente-elvira-vasquez-por-protesta-contraconga/noticiasser/>> (retrieved 30 April 2017).

police; in August 2011, she and her daughter were beaten unconscious. In May 2012, police attempted to evict her from their land; in the days that followed, MY filed a criminal complaint against Maxima and her family.<sup>205</sup> In October 2012, a local court ruled that the family were guilty of illegal occupation of the land, issued a suspended sentence of 3 years' imprisonment and ordered them to pay damages to MY. In August 2013, however, an appeal court found the decision null and void due to errors of law and facts as well as ignoring evidence favourable to the family, and ordered a new trial.<sup>206</sup> In August 2014, a new trial court sentenced Maxima and her family on charges of aggravated usurpation and trespassing to suspended prison term of two years and eight months, and ordered to pay the costs of proceedings and a civil reparation for damages done to MY. The judge also ordered that the family must leave the disputed lands.<sup>207</sup> In December 2014, however, a Criminal Appeal Court ruled in favour of the Acuña-Chaupe family. The ruling, in addition to declaring the innocence of the family, ordered the cessation of preventive eviction existed against them and also ordered the cessation of the provisional administration of the Maxima's land that the trial judge had awarded MY.<sup>208</sup> In February 2015 the Supreme Court dismissed the appeal (Recurso de Queja) brought by MY and, in May 2017, it

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<sup>205</sup> On 30 January 2013, Diros police came back to Maxima's home, hit her and her family, damaged their property, killed several of their animals and tried to evict them by force.

<sup>206</sup> Front Line Defenders, "*Peru: Attempted forced eviction of, and death threat against, human rights defender Ms Máxima Acuña de Chaupe and her family*," February 7, 2014, online: <<https://www.frontlinedefenders.org/en/case/case-history-maxima-acuna-de-chaupe#case-update-id-517>> (retrieved 30 April 2017).

<sup>207</sup> Given that during this first criminal trial the Chaupe family submitted documents proving ownership of their land, which were accepted by the appeal court, MY changed its legal strategy in the second trial accusing the family for usurpation and trespassing. Front Line Defenders, "*Update: Peru – Human rights defender Ms. Máxima Acuña de Chaupe and family receive suspended prison sentences and ordered to pay damages*," August 8, 2014, online: <<https://www.frontlinedefenders.org/en/case/case-history-maxima-acuna-de-chaupe#case-update-id-517>> (retrieved 31 May 2017).

<sup>208</sup> Asociación Ser, "*Nos sentimos impotentes con un Estado de lado del poder empresarial*," Interview with Mirtha Vásquez, Director and lawyer of Grufides, in NoticiasSer.Pe, February 10, 2016, online: <<http://www.noticiasser.pe/10/02/2016/entrevista/nos-sentimos-impotentes-con-un-estado-el-lado-del-poder-empresarial>> (retrieved 31 May 2017).

dismissed as well MY's last appeal (Recurso de Casacion).<sup>209</sup> The company has now initiated a civil proceeding to prove that the company owns the disputed land. Despite a favourable final ruling in the criminal proceedings, as of May 2017, Maxima and her family continue getting harassed and enduring attacks, the invasion of their home and destruction of their properties by MY's employees, Police and Forza security guards.<sup>210</sup>

Today, the leverage, influence and "immunity" of MY in Peru are so great that a congressman points out that MY "acts as a State within the Peruvian State without respecting legal decisions and judgments."<sup>211</sup> Indeed, as a journalist writes, "Yanacocha runs a parallel government in Peru. The transnational company owned by Newmont, Buenaventura and the World Bank literally does what it wish in the country. Yanacocha has Peru's National Customs and Tax Administration Office in its pocket, representatives in the Congress, the national police, the judiciary and a powerful media group at its service."<sup>212</sup> Despite the asymmetry between MY and affected Indigenous communities, resistance to large-scale mining projects has been especially significant in Cajamarca (as well as in Piura, next case) where communities and movements have challenged and impeded MY's Conga mining project from moving forward.

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<sup>209</sup> Grufides, "Corte Suprema de Lima absuelve definitivamente a Maxima Acuña y su familia del delito de usurpacion agravada," in Grufides Noticias, May 3, 2017, online: < <http://www.grufides.org/content/corte-suprema-de-lima-absuelve-definitivamente-m-xima-acu-y-su-familia-del-delito-de> > (retrieved 31 May 2017).

<sup>210</sup> Mining Watch, "Maxima Acuna, Peruvian Environmental Defender Attacked, Hospitalize," Press release, 21 September 2016, online: <<http://miningwatch.ca/news/2016/9/21/peruvian-environmental-defender-attacked-hospitalized>> (retrieved 30 April 2017); Amnesty International, "Urgent Action: Family Harassed by Mining Company Personnel," London, UK, 4 February 2016, UA: 182/13 Index: AMR 46/3392/2016; Amnesty International, "Urgent Action: Family Continues Facing Police Harassment," London, UK, 4 February 2015, UA: 182/13 Index: AMR 46/002/2015; Amnesty International, "Urgent Action: Family at Risk of Violence and Forced Eviction," London, UK, 18 July 2013, UA: 182/13 Index: AMR 46/004/2013.

<sup>211</sup> Servindi, "Unanime Condena a Yanacocha!" in Servindi, 4 February 2015, Online: <<https://www.servindi.org/actualidad/122585>> (retrieved 30 April 2015); Marisa Glave Remy, "Contra el Terror," in NoticiasSer.pe, Lima, February 4, 2015, online: <<http://www.noticiasser.pe/04/02/2015/contraluz/contra-el-terror>> (retrieved 30 April 2017).

<sup>212</sup> Carlos Alonso Bedoya, "El Gobierno de Yanacocha," in *Diario Uno*, 8 February 2015, online: <<http://diariouno.pe/columna/el-gobierno-de-yanacocha/>> (retrieved 30 April 2017).

Affected peasant/local communities have increasingly invoked global categories of ‘Indigenous rights’ and ‘environment’ to campaign against MY in the region. The incorporation of Indigenous and environmental rights discourse has been promoted and supported by national NGOs such as the International Institute of Law and Society and Grufides.<sup>213</sup>

### **2.3.4 Domestic and International Legal Claims**

Whereas criminal proceedings and investigations against numerous Indigenous and peasant leaders and human rights activists have been initiated, the death and injury of several Indigenous villagers and activists during protests against MY mining projects remain unpunished.<sup>214</sup> Furthermore, according to environmental engineer Reinhard Seifert, legal claims filed regarding water and soil pollution in Cajamarca have been closed and forgotten despite an abundance of evidence due to “the notorious corruption among judges and prosecutors. Most of them do not confront MY and in exchange they receive some perks. In these cases, all claims end up falling on deaf ears and, therefore, they are not investigated as they should be.”<sup>215</sup>

Despite the difficulties and barriers, affected Indigenous communities, with the support of human rights NGOs, have initiated three important legal claims:

#### **1) Dispossession of Negritos Community’s Lands**

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<sup>213</sup> Raquel Yrigoyen, “Who is applied to the rights of Indigenous peoples?” in Servindi, Lima, 06 October 2014, online: <<https://www.servindi.org/actualidad/115165>> (retrieved 30 April 2017).

<sup>214</sup> Cordinadora Nacional de Derechos Humanos, CEJIL, FEDEPAZ, GRUFIDES (2013), supra note 202 at 5-7; Nylva Hiruelas, “Territorio Yanacocha: relatos de impunidad,” in Gran Angular, 26 April 2015, online: <<http://elgranangular.com/blog/reportaje/territorio-yanacocha-relatos-de-impunidad/>> (retrieved 30 April 2017); Lynda Sullivan, “Peru’s Conga Mine Conflict: Cajamarca Won’t Capitulate,” in Upside Down World, 1 May 2014, online: <<http://upside-downworld.org/archives/peru-archives/perus-conga-mine-conflict-cajamarca-wont-capitulate/>> (retrieved 30 April 2017).

<sup>215</sup> Diego Cupolo, “In Peru, Scientist Documents the Impacts of Continent’s Largest Gold Mine,” in *Upside Down World*, 3 February 2015, online: <<http://upside-downworld.org/main/peru-archives-76/5207-in-peru-scientist-documents-the-impacts-of-continent-largest-gold-mine>> (retrieved 30 April 2017).

On March 2011, the community filed, as a final domestic legal resort, a constitutional amparo action before a civil court in Cajamarca relying on international human rights law. The legal action argues that MY and the State have violated the Negritos community's rights to property and illegally removed a large tract of lands from their communal property through expropriation and easement (between 1993-1995); and that both the State and MY are responsible for ongoing violations of the Community's rights as protected by the Peru's Constitution, the American Convention on Human Rights, and ILO Convention N° 169. The case is still ongoing before the Constitutional Tribunal.<sup>216</sup>

## **2) Choropampa Mercury Spill**

The June 2000 mercury spill at Choropampa generated a series of lawsuits and private settlement agreements between MY and individual peasant families, including an administrative proceeding against MY, and a criminal proceeding against the driver of Ransa, MY's transport company contractor. On September 2000, the driver of the Ransa was indicted with crimes against life, health and safety (causing negligent injuries) and sentenced to two years of suspended prison and ordered to pay civil reparation in favour of the victims.<sup>217</sup> The Ministry of Energy and Mines initiated an administrative proceedings for violation of environmental standards and ordered MY to pay a fine; however, the amount collected did not reach the victims, but rather it was destined for the Ministry of Energy and Mines.<sup>218</sup> Aiming to avoid

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<sup>216</sup> Justicia Viva, *Balance general de casos del area de Pueblos Indígenas y litigio constitucional del IDL*, December 2015, online: < [http://www.justiciaviva.org.pe/webpanel/doc\\_trabajo/doc18122015-091041.pdf](http://www.justiciaviva.org.pe/webpanel/doc_trabajo/doc18122015-091041.pdf) > (retrieved 30 April 2017); Charis Kamphuis (2012), *supra* note 165 at 248-250.

<sup>217</sup> Expediente Judicial No. 2000-012-P [Juzgado de Santa Apolonia seguido por delito contra la vida, el cuerpo y la salud contra Esteban Blanco Bar y otros.] The amount ordered to pay as civil reparation for the victims were 950,000 Soles (CAN\$ 372,154) which had to be paid by the both MY and Ransa as third party shared in subrogation. Grufides, "Caso Yanacocha: Choropampa," Report, Derechos Humanos-Minería y Salud, March 2010, (unpublished report, on file with author).

<sup>218</sup> Peru's Ministry of Energy and Mines, Resolucion Directoral No. 103-200-EM-DGM. *Ibid.*

lawsuits, MY entered into extrajudicial settlement agreements with a significant number of villagers (about 749) as well as with local authorities.<sup>219</sup> These agreements, however, have been the subject of significant controversy because they were highly divisive and contain clauses in which MY declares not to have any responsibility in the mercury spill and the villagers expressly waive the right to file any kind of civil, criminal or administrative action before any jurisdiction both domestic and foreign.<sup>220</sup> To date many affected villagers still remain embroiled in civil claims against MY in local courts, which suffer from delays, a serious lack of access to adequate legal counsel and inadequate funds to collect and prepare the evidence needed to substantiate their claims.<sup>221</sup>

In 2001 and 2002, in an attempt to find justice and secure just compensation, Choropampa residents filed two lawsuits against Newmont in U.S. courts with the support of U.S. and Peruvian law firms.<sup>222</sup> These proceedings were settled through arbitration six years later, reaching transactions considered “confidential by mutual agreement.”<sup>223</sup> Yet, these settlements were marked with significant controversy involving allegations of fraud, misrepresentation, divisive compensation amounts and incompetence against the U.S. and Peruvian law firms.<sup>224</sup> Grufides’s founder Marco Arana declares that ‘Yanacocha bought

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<sup>219</sup> Grufides, “*Caso Yanacocha: Choropampa*,” *supra* note 217.

<sup>220</sup> *Ibid*; Newmont Mining Corporation, *Newmont Annual Report 2014* (Nevada: Newmont Mining Co.) at 140, online: < <http://www.newmont.com/investor-relations/financial-reports/annual-reports/default.aspx> > (retrieved 30 June 2017).

<sup>221</sup> Charis Kamphuis (2012), *supra* note 165 at 232.

<sup>222</sup> *Castillo v. Newmont Mining*, CV-4453 (Denver Dist. Ct.) filed August 17, 2001; *Municipality of Cajamarca and thirty workers v. Newmont Mining and Minera Yanacocha*, CV-4275(Denver Dist. Ct.) filed May 31, 2002.

<sup>223</sup> Newmont, *Yanacocha Fact Sheet Choropampa*, January 2013, online: <[http://www.newmont.com/files/doc\\_downloads/south\\_america/yanecocha/Choropampa-Fact-Sheet-01-25-2013.pdf](http://www.newmont.com/files/doc_downloads/south_america/yanecocha/Choropampa-Fact-Sheet-01-25-2013.pdf)> (retrieved 30 April 2017).

<sup>224</sup> Charis Kamphuis (2011-2012), *supra* note 174 at 562.



impunity for 3 million dollars.’<sup>225</sup> As a Canadian lawyer argues, “serious allegations against Yanacocha officials, State authorities, certain NGOs, and individual lawyers and law firms continue to cast a dark legal shadow over the Choropampa accident.”<sup>226</sup> Given the International Finance Corporation’s share in MY, in December 2000 the Frente de Defensa de Choropampa filed complaints against MY with the Office of the Compliance/Advisor Ombudsman (CAO)<sup>227</sup> alleging that the adverse impacts being experienced by those exposed to the mercury had worsened and that MY failed to honor its commitments to affected individuals.<sup>228</sup> The complaint, however, failed to proceed from an initial investigation to a conflict mediation phase and did not enter the subsequent compliance phase of the CAO process. According to the CAO website’s succinct information, it decided against pursuing a health study due to a lack of institutional and social support (including the Ministry of Health) and closed the case in November 2003.<sup>229</sup> In 2002 the National Coordinator of Communities Affected by Mining (CONACAMI) filed a petition before the IACHR, alleging that the State and the company violated fundamental rights

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<sup>225</sup> In regard to the second litigation, in 2009, affected municipalities in Cajamarca signed a highly controversial settlement agreement with Newmont. It has been reported that Newmont paid \$3,000,000 to settle the lawsuit. The U.S. law firm took \$1,200,000 of the settlement pursuant to a contingency fee and a further \$115,000 in additional general costs. The Municipality of Cajamarca was left with about \$1,685,000 which would be shared with the Municipality of Magdalena, San Juan and Choropampa. Grufides, “*Caso Yanacocha: Choropampa*,” *supra* note 217; Charis Kamphuis (2011-2012), *supra* note 174 at 561-562; Peru Info, “*Yanacocha quiere pagar 3 millones por arreglo de derrame de mercurio*,” (Marco Arana’s interview by C. Hildebrandt) in Youtube, February 8, 2009, online: <<https://www.youtube.com/watch?v=cOAsQRLfaOI>> (retrieved 30 April 2017).

<sup>226</sup> Charis Kamphuis (2012), *supra* note 165 at 232.

<sup>227</sup> CAO is the independent recourse mechanism for IFC and MIGA, the private sector lending arms of the World Bank Group. CAO’s mission is to address complaints by people affected by IFC/MIGA projects and to enhance the social and environmental accountability of both institutions. The Office of the Compliance Advisor/Ombudsman, *About CAO*, online: <<http://www.cao-ombudsman.org/about/>> (retrieved 30 April 2017).

<sup>228</sup> The Office of the Compliance Advisor/Ombudsman, *Peru / Yanacocha-01/Cajamarca*, online: <[http://www.cao-ombudsman.org/cases/default.aspx?region\\_id=3](http://www.cao-ombudsman.org/cases/default.aspx?region_id=3)> (retrieved 30 April 2017).

<sup>229</sup> *Ibid.*

of Choropampa's population, but the petition apparently was refused for not complying with procedural requirements.<sup>230</sup>

### **3) Grufides's Surveillance and Harassment**

In regard to allegations of harassment and surveillance of Grufides and community leaders conducted by MY's private security force, Forza, no criminal proceedings were initiated. Although the chief of the surveillance operation and at least some members of his team were identified as workers for the security company Forza, the case ended up being dismissed and closed because for the prosecutor, Forza security company's actions were not criminal and there was not enough evidence to investigate the company.<sup>231</sup> Having exhausted all domestic remedies, in May 2009, Grufides's lawyers filed a petition with the Inter-American Commission on Human Rights (IACHR), alleging that the Peruvian State violated its obligations under the American Convention on Human Rights to prevent and sanction Forza's criminal actions; the petition alleges that the State not only failed properly to investigate, prosecute and sanction the individuals and organizations responsible for Operación Diablo, but it was complicit in these acts.<sup>232</sup> Eight years after its submission, the IACHR has not yet made a determination regarding its admissibility.<sup>233</sup>

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<sup>230</sup> Emilio Godoy, "Minería – America Latina: Danos a Cielo Abierto," in *Inter Press Service*, 21 July 2009, online: <<http://www.ipsnoticias.net/2009/07/mineria-america-latina-danos-a-cielo-abierto/>> (retrieved 30 April 2017); Grufides, "*Caso Yanacocha: Choropampa*," *supra* note 217.

<sup>231</sup> Also, the police officers who shot and killed Isidro Llanos during a protest against MY for its unfulfilled commitments and environmental contamination in 2006 were not prosecuted due to a 'lack of evidence.' Jose Luis Gomez del Prado, *Report of the UN Working Group on the use of mercenaries*, *supra* note 194 at 18; Charis Kamphuis (2011-2012), *supra* note 174 at 549-551; Front Line Defenders, *Peru - Mirtha Vasquez Chuquilin, Grufides, Testimony*, November 2007, online: <<http://www.frontlinedefenders.org/es/node/2023>> (retrieved 30 April 2017).

<sup>232</sup> Grufides v. Peru, Petition Alleging Human Rights Violation, Inter-Am. Ct. H.R. 32 (May 15, 2009), cited at Charis Kamphuis (2011-2012), *supra* note 174 at 550-551; Charis Kamphuis (2012), *supra* note 165 at 249.

<sup>233</sup> On April 2007 the IACHR granted precautionary measures in favor of Grufides' founder Marco Arana and lawyer Mirtha Vasquez, and requested the Peruvian State to adopt the necessary measures to safeguard the life and

On April 19, 2012, several Indigenous and peasants organizations filed a petition (Petition No. 716-12) before the IACHR requesting the protection of the ancestral territory of communities and peasant patrols in Cajamarca which would be affected by MY Conga project.<sup>234</sup> On May 5, 2014, the IACHR granted precautionary measures in favour of 46 leaders of peasant communities and patrols, including Maxima Acuña de Chaupe and her family and journalist César Estrada Chuquilin, and asked the Peruvian state to adopt the necessary measures to guarantee the life and physical integrity of the beneficiaries; reach agreement with the beneficiaries and their representatives on the measures to be adopted; and inform the Commission as to the steps taken to investigate the incidents that gave rise to the adoption of this precautionary measure.<sup>235</sup>

## **2.4 Rio Blanco Copper S.A. (Monterrico Metals, United Kingdom-China) v. Segunda y Cajas and Yanta Indigenous Peasant Communities (Piura)**

*They tortured us for three days, accusing us of being terrorists: ‘sons of bitches, you’re gonna die, why don’t you let the company do its work, you fucking ignorant Indians.’ When the prisoners cried out for God, they said ‘DINOES is God’...*

Mario Tabra Guerrero, president of Ayabaca Defence Front (Testimony)<sup>236</sup>

On August 1, 2005, thousands of members of Indigenous and peasants communities of the Ayabaca and Huancabamba provinces (in the northern region of Piura) participated in a

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personal integrity of the beneficiaries, asking for them to be assigned a police guard and requesting information on any judicial action taken by the State to resolve the case. See IACHR, *Second Report on the Situation of Human Rights Defenders*, OAS/Ser.L/V/II, doc. 66 (Dec. 31, 2011) at 138.

<sup>234</sup> The case is still pending to be determined its admissibility.

<sup>235</sup> IACHR, Precautionary Measures No. 452/11 May 5, 2014, online:

<<http://www.oas.org/es/cidh/decisiones/pdf/2014/MC452-11-ES.pdf>> (retrieved 30 April 2017).

<sup>236</sup> Carlos Castro, “Un Crimen Impune,” in *La Republica*, 11 January 2009, online:

<<http://cajamarca.de/mine/torturas-majaz.pdf>> (retrieved 30 April 2017); International State Crime Initiative, “*Torture at the Río Blanco Mine – A State-Corporate Crime? – Testimony Project*,” 15 September 2014, online: <<http://www.statecrime.org/testimonyproject/peru>> (retrieved 30 April 2017).

peaceful march protest against Rio Blanco Mining Project (initially known as a Majaz mining project). The march was violently repressed by a strong police contingent who fired tear gas and gun shots from helicopters. Many demonstrators were injured, including Melanio Garcia who was shot in the neck and later died while he was in captivity.<sup>237</sup> Mario Tabra Guerrero, together with 32 other protestors, including two women and Melanio Garcia, were intercepted, taken inside a mining camp and tortured by the police (Special Operations Unit- DINOES) and private security forces (Forza) working for Rio Blanco Cooper SA (initially known as Minera Majaz SA), a subsidiary of the British-Chinese mining company Monterrico Metals. After three days of torture in captivity, the peasants were freed and charged with terrorism.<sup>238</sup>

The region of Piura is considered a new frontier in the expansion of mining in Peru.<sup>239</sup> Before Monterrico Metals, another Canadian company, Manhattan Minerals Corporation, sought to initiate a gold mining project in Tambogrande; after six years of sustained protest by local populations, during which the main leader of the opposition was murdered, Manhattan Minerals finally withdrew its proposal in 2003.<sup>240</sup>

#### **2.4.1 The Actors in the Conflict**

##### **Rio Blanco Copper S.A. (RBC)**

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<sup>237</sup> Keith Slack, “*Mining Conflicts in Peru: Condition Critical*,” Oxfam America, March 2009 at 4, online: <<https://www.oxfamamerica.org/static/oa3/files/mining-conflicts-in-peru-condition-critical.pdf>>; see also Elizabeth Prado, “En Majaz si se Torturo el 2005,” in *La Republica*, 09 January 2009, online: <<http://cajamarca.de/mine/torturas-majaz.pdf>> (retrieved 30 April 2017).

<sup>238</sup> Cordinadora Nacional de Derechos Humanos, CEJIL, FEDEPAZ, GRUFIDES (2013), *supra* note 202 at 22.

<sup>239</sup> Anthony Bebbington and Jeffrey Bury, “Political Ecologies of the Subsoil,” in Anthony Bebbington and Jeffrey Bury, Eds., *Subterranean Struggles: New Dynamics of Mining, Oil, and Gas in Latin America* (Austin: University of Texas Press, 2013) at 16.

<sup>240</sup> Moises Arce (2014), *supra* note 179 at 73; Havard Haarstad and Arnt Floydsand, “Globalization and the power of rescaled narratives: a case of opposition to mining in Tambogrande, Peru,” (2007) 26:3 *Political Geography* 289-308; Guarango Film and Video, *Tambogrande: Mangos, Murder, Mining*, Directed and Produced by Ernesto Cabellos and Stephanie Boyd, 2007.

Rio Blanco Copper S.A (a subsidiary company) is wholly owned by British Monterrigo Metals plc (MM). MM is a resource development company incorporated in the UK in 2001, currently with corporate headquarters in Hong Kong. MM operates exclusively in Peru where it has seven projects (four in gold, two in copper and one in silver); currently the most significant and most advanced of these projects is the Rio Blanco project.<sup>241</sup> Monterrigo Metals recognized and praised Peru's new legal framework established in the 1990s; it points out:

In 1991, the mining law was simplified and now provides an attractive framework for development of minerals projects. There are few limitations on holding mineral concessions in Perú. Concessions can be held 100% by national or foreign companies indefinitely provided that an annual fee of US\$3.00 per hectare per year is paid to the government as a land tax. The same concession title is valid for exploration and for mining; hence, there is no complicated 'conversion' procedure. Peru's clear and simple mining law and excellent geological potential has helped the country to attract one of the largest budgets for minerals exploration and development in the world.<sup>242</sup>

In April 2007, a Chinese consortium, Xiamen Zijin Tongguan Development Co. Ltd (the Zijin Consortium) acquired a majority shareholding (89.9 percent) in MM; in September 2007, the South Korean LS-Nikko Cooper Inc. acquired the 10 percent of its shareholding. As of June 2017, the Zijin Consortium owns the majority shareholding of the Rio Blanco project with 45 percent; two other Chinese companies (Tongling Nonferrous Metals Group Co. and Xiamen C&D Real Estate Co.) own 35 and 20 percent respectively.<sup>243</sup>

### **Indigenous / Peasants Communities (Segunda y Cajas and Yanta)**

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<sup>241</sup> Anthony Bebbington, et al., *Mining and Development in Peru: With Special Reference to the Rio Blanco Project, Piura* (London: Peru Support Group, 2007) at 14.

<sup>242</sup> Monterrigo Metals, Peru, online: <<http://www.monterrigo.com/s/Peru.asp>> (retrieved 30 April 2017).

<sup>243</sup> Rio Blanco Cooper, Proyecto Rio Blanco, online: <<http://www.rioblanco.com.pe/nuestros-accionistas/>>; Monterrigo Metals, Company Profile, online: <<http://www.monterrigo.com/s/CompanyProfile.asp>> (retrieved 30 April 2017).

Rio Blanco mining project is located in the lands of two peasant communities, Segunda y Cajas (Huancabamba province) and Yanta (Ayabaca province). Both communities are legally recognised as self-governing Indigenous peasant communities and their lands are also legally registered. The initial mining project covered an area of 6,472 hectares in Huancabamba and Ayabaca provinces. The company later requested and received additional mining concessions, bringing the total to nearly 29,000 hectares, in what is slated to become a future “mining district.”<sup>244</sup> The members of these affected communities (and other peasant communities in the region) are organized in rondas campesinas (peasant patrols) which are highly structured organizations whose roles combine vigilance, local justice and representation.<sup>245</sup> In late 2005, the Frente por el Desarrollo Sostenible de la Frontera Norte del Peru (Front for the Sustainable Development of the Northern Frontier of Peru) was established and brought together the mayors of the four provinces likely to be affected by the Rio Blanco project, local defense fronts, peasant patrols, and leaders of affected Indigenous and peasant communities.<sup>246</sup>

The Red Muqui is a network of national and local NGOs that seek to promote sustainable development, as well as expand and defend the rights of rural and Indigenous communities and populations in areas of mining influence;<sup>247</sup> One of the NGOs of Red Muqui network is the

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<sup>244</sup> The company suggested that the proposed mine would likely be the beginning of a much larger ‘mining district’ in the whole region. A. Bebbington, et al. (2007), *supra* note 241 at iv; Javier Jahncke, La Violacion de los Derechos Humanos por Parte de las Empresas: El Caso Rio Blanco / Majaz en Peru,” in *Aportes DPLF*, No. 15, Año 4, September 2011 at 50.

<sup>245</sup> Alenjandro Diez, “Ronderos y Alcaldes en el conflict minero de Rio Blanco en Piura, Peru,” in Jose Bengoa, Ed., *Movimientos Sociales y Desarrollo Territorial Rural en America Latina* (Santiago: Editorial Catalonia, 2007) at 432-443.

<sup>246</sup> Anthony Bebbington, “Social Conflict and Emergent Institutions: Hypotheses from Piura, Peru,” in Anthony Bebbington, Ed., *Social Conflict, Economic Development and Extractive Industry: Evidence from South America* (New York: Routledge, 2012) at 76.

<sup>247</sup> Red Muqui Network, online: <<http://www.muqui.org/>> (retrieved 30 April 2017).

Ecumenical Foundation for Development and Peace (FEDEPAZ),<sup>248</sup> which has been providing significant support and legal assistance to affected communities in Piura.

#### **2.4.2 Nature and Scope of the Conflict and Violations of Indigenous Rights**

The protest of Segunda y Cajas, Yanta and surrounding communities is in response to a perceived risk of contamination by a proposed large-scale, open-pit mine which would irreversibly affect their livelihoods, health and life. The Rio Blanco project site is near the crest of the Andes, located in primary cloud forest in the Huancabamba Mountains, which comprise a fragile biological corridor for endangered species, and which feeds major rivers running to the coast and into the Amazon River. Communities in this area rely mainly on farming, raising cattle and growing crops for the local market and export.<sup>249</sup> Given that the company estimates the project will be among Peru's top two copper mines and possibly one of the very largest in South America, the social, economic and environmental effects that it would induce are likely to be great.<sup>250</sup> The effect on the quantity and quality of water would be critical, as the company had proposed to use large quantities of the local water resources in its mining processes and given that the region of Piura is desert or semi-desert and local livelihoods are highly dependent on the water draining from the area where the mining project is located.<sup>251</sup>

In addition, the legality and legitimacy of Rio Blanco Cooper's presence on the communities' lands has been questioned since the beginning of the exploration phase in 2003.

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<sup>248</sup> FEDEPAZ, online: <[http://www.fedepaz.org/index.php?option=com\\_content&view=featured&Itemid=31](http://www.fedepaz.org/index.php?option=com_content&view=featured&Itemid=31)> (retrieved 30 April 2017).

<sup>249</sup> Julio C. Postigo, Mariana Montoya and Kenneth R. Young, "Natural Resources in the Subsoil and Social Conflicts on the Surface: Perspectives on Peru's Subsurface Political Ecology," in Anthony Bebbington and Jeffrey Bury (2013), *supra* note 171 at 226-228; Oxfam America, "*Rio Blanco: Massive copper project proposed for Cloud Forest*," in Oxfam America, March 3, 2009, online: <<http://www.oxfamamerica.org/explore/stories/rio-blanco-massive-copper-project-proposed-for-cloud-forest/>> (retrieved 30 April 2017).

<sup>250</sup> Anthony Bebbington, et al. (2007), *supra* note 241 at iv-v.

<sup>251</sup> *Ibid.*

Claiming that the company illegally occupied their lands, affected communities have opposed the project. Even though the project is still only at the exploration stage, communities have already lost access to grazing land as well as to the right of access over lands that they and their animals had previously traversed.<sup>252</sup> As the resistance became persistent and more organized, the response of the company and government was violent and aggressive.<sup>253</sup> The conflict has left seven people dead, several disabled and over 700 persons investigated and / or prosecuted by Peruvian courts, including leaders, community members, authority officials and technical advisers.<sup>254</sup>

### **2.4.3 Contention and Power Imbalances between Rio Blanco and Indigenous Communities**

At the heart of the conflict between affected communities who depend on farming for their livelihoods and Rio Blanco Cooper and the State, which are promoting the establishment of a “mining district,” is the legality and legitimacy of the project. According to mining regulations, Segunda y Cajas and Yanta communities, like all surface owners, do not own the subsoil rights; the State does. Yet, according to the General Law on Peasant Communities and the Land Law,<sup>255</sup> community members have to give a two-thirds majority approval in the community assembly before the surface can be used and occupied by any third-party actor possessing rights to explore and exploit the subsoil. According to a Peruvian human rights lawyer, the company never

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<sup>252</sup> *Ibid.*

<sup>253</sup> Anthony Bebbington, “Social Conflict and Emergent Institutions: Hypotheses from Piura, Peru,” in Anthony Bebbington (2012), *supra* note 246 at 75-88.

<sup>254</sup> Javier Jahncke (2011), *supra* note 244 at 50; Cecilia Cherrez, et al., Eds., “*Cuando Tiemblan los Derechos: Extractivismo y Criminalization en America Latina*,” OCMAL-Accion Ecologica, Quito, Ecuador, November 2011 at 114-117.

<sup>255</sup> Ley 24656, “Ley General de Comunidades Campesinas,” April 13, 1987; Ley 26505 (Land Law), “Ley de la Inversion Privada en el Desarrollo de las Actividades Economicas en las Tierras del Territorio Nacional y de las Comunidades Campesinas y Nativas,” July 17, 1995.



fulfilled this requirement.<sup>256</sup> Only a handful of leaders gave the company permission to proceed, and even then only for ‘seismic’ tests; permission was not given for mineral exploration or the establishment of a mine camp. Assemblies in both communities subsequently rescinded permission and demanded the withdrawal of the company in 2003, which were sent to the Ministry of Energy and Mines.<sup>257</sup>

The government declared the project ‘of national interest’ in 2003,<sup>258</sup> despite the communities of Segunda y Cajas and Yanta unanimously rejecting it, and in November of the same year, the Ministry of Energy and Mines approved the project’s environmental impact assessment, which led to further protest marches.<sup>259</sup> In April 2004 clashes between demonstrators and police resulted in several injuries and the death of Reemberto Herrera. Ten police initially charged with this killing were later absolved.<sup>260</sup> A second march and clash with the DINOES police at the end of July 29, 2005, involving 2,000 to 3,000 community members, ended with several serious injuries, the death of Melanio Garcia and the detention, captivity and torture of 32 community members at the company’s mining camp. Prosecutor Félix Toledo Leiva visited the mining camp on August 2, yet did nothing to remedy the situation or protect the victims. The 32 detainees reported that they were beaten, kicked, blindfolded, and subjected to verbal abuse by

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<sup>256</sup> Javier Jahncke, coordinator of the Economic, Social, Cultural and Environmental Rights Area at FEDEPAZ, argues that instead, the company submitted the signatures of a group of individuals, and the Ministry of Energy and Mines granted authorization to initiate operations based on these signatures. However, it turned out that the signers had given permission some time ago to a different company, Minera Coripacha SA, which had conducted exploration and prospecting in the area and subsequently terminated its operations. Javier Jahncke (2011), *supra* note 244 at 50.

<sup>257</sup> Anthony Bebbington, “Social Conflict and Emergent Institutions: Hypotheses from Piura, Peru,” in Anthony Bebbington (2012), *supra* note 246 at 75.

<sup>258</sup> According to the Peruvian Constitution, the President can “dictate extraordinary measures through emergency decrees with the force of law in economic and financial matters, when required by the national interest.” Art. 118, paragraph 19.

<sup>259</sup> The government declared the project of national interest in order to allow a foreign company to operate within 50 kilometres of an international boundary. Global Witness (2014), *supra* note 95 at 11.

<sup>260</sup> Anthony Bebbington, “Social Conflict and Emergent Institutions: Hypotheses from Piura, Peru,” in Anthony Bebbington (2012), *supra* note 246 at 75.

DINOES officers and Forza security guards. They also stated that plastic bags filled with a chemical powder from the tear gas canisters were placed over them, covering half their bodies, which caused damage to their vision and skin burns. The two women in the group reported they were sexually assaulted and threatened with rape.<sup>261</sup> It has been reported that around 200 members of the affected communities, including their leaders, were charged with violent conduct for their participation in the second march.<sup>262</sup>

In August 2006, Monterrico Metals appointed Richard Ralph, former British Ambassador to Peru from 2003-2006, as Executive Chairman of the Board of Directors. According to an independent British delegation's report, during his time as Ambassador, Ralph was active on mining issues and among other things helped create an informal group of the Embassies (UK, Canada, Australia, U.S. and others) to discuss mining issues and support the sector.<sup>263</sup> This group of Embassies, according to U.S Embassy cables, "stepped up efforts to improve coordination with major foreign investors with an eye to reducing anti-mining violence...and to help to improve the investment climate and security conditions in mining communities."<sup>264</sup> The Embassies' efforts aimed to channel mining executives' concerns to the government in order to (among others) enhance criminal laws to prosecute private property damages and road blockades and introduce legislation to curb the power of NGOs who were "blame for everything and should

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<sup>261</sup> Javier Jahncke (2011), *supra* note 244 at 51-52.

<sup>262</sup> Wendy Coxshall, "'When They Came to Take Our Resources': Mining Conflicts in Peru and their Complexity," in (2010) 54:1 *Social Analysis* 35 at 38.

<sup>263</sup> As ambassador Ralph had visited the Rio Blanco mining site and voiced support for the project. Anthony Bebbington, et al. (2007), *supra* note 241 at 26-27.

<sup>264</sup> The Guardian, "*US embassy cables: Peru rocked by violent anti-mining protests*," in The Guardian, 31 January 2011, online: <<http://www.theguardian.com/world/us-embassy-cables-documents/38742>> (retrieved 30 April 2017); "*US embassy cables: Mining companies worried about security*," in The Guardian, 31 January 2011, online: <<http://www.theguardian.com/world/us-embassy-cables-documents/38881>> (retrieved 30 April 2017).

leave the country.”<sup>265</sup> In the same year, Ralph points out, “the political context in Peru has become more favourable following the election of Alan Garcia in June 2006... Garcia heads a stable, pro-Western, pro-free market, mining friendly government and he and government leaders at national and regional level are all giving the Company and the Rio Blanco Project robust political support vis-a-vis opposition activists.”<sup>266</sup> In late 2006, the government of Garcia enacted several laws to criminalize protest and passed a law which provided the government more control over NGOs.<sup>267</sup> In July and November 2006, the Ombudsman’s office issued a report questioning the legality and legitimacy of the project, detailing numerous illegalities in the process that authorized the exploration concession, including a failure to consult affected communities.<sup>268</sup> However, in December 2006, the company issued a press release saying the government had confirmed its legal title over the surface rights covering the project.

In March 2007, an independent British delegation issued a report, after a fact-finding investigation, identifying Peruvian government policy as a significant cause of socio-environmental conflicts in Piura, concluding that “non-violent protest and the democratic process have completely failed local populations”.<sup>269</sup> In September 2007 affected communities organised

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<sup>265</sup> Jose De Echave, “Peru: Wikileaks, Empresas Mineras y Embajadas,” Lima: CooperAccion, 2 February 2011, online: <<http://www.cooperaccion.org.pe/opina/43-cooperaccion-opina/282-peru-wikileaks-empresas-mineras-y-embajadas>> (retrieved 30 April 2017).

<sup>266</sup> Monterrico Metals plc. *Annual Report and Account 2006*, online: <<http://www.monterrico.com/i/pdf/2006annualreport.pdf>> (retrieved 30 April 2017).

<sup>267</sup> Ironically, on May 2006, during his presidential election campaign, Alan Garcia speaking at Ayabaca’s main square had promised to “respect the will of Agricultural community of Ayabaca, Piura and defend them from the imposition, dominion and humiliation of any mine.” Cecilia Cherrez, et al. (2011), *supra* note 254 at at 117-122; Angel Paez, “Peru: Apristas, Fujimoristas Back Law Increasing Oversight of NGOs,” in Inter Press Service, 8 December 2006, online: <<http://www.ipsnews.net/2006/12/peru-apristas-fujimoristas-back-law-increasing-oversight-of-ngos/>> (retrieved 30 April 2017); La Mula.pe, “Alan Garcia - Visita Ayabaca 2006,” Youtube, July 22, 2011, online: <<https://www.youtube.com/watch?v=u5TuR4peUhQ>> (retrieved 30 April 2017).

<sup>268</sup> Defensoria del Pueblo, Informe No. 001 -2006/ASPMA-MA, 2006; Defensoria del Pueblo, Oficio No. 0178-2006-DP/ASPMA, 2006; Defensoria del Pueblo, “Informe Extraordinario de la Defensoria del Pueblo: Los conflictos socioambientales por actividades extractivas en el Peru,” Lima, Defensoria del Pueblo, 2007.

<sup>269</sup> A. Bebbington, et al. (2007), *supra* note 241 at vi, 51.

a referendum in which the overwhelming majority – approximately 95 percent of voters – registered their objection to the Rio Blanco project. The referendum drew the wrath of President Garcia and Prime Minister Castillo who vigorously declared that “the vote was non-binding and it was not considered legal.”<sup>270</sup> Javier Janhcke, a human rights lawyer supporting affected communities, received death threats in March and September 2007.<sup>271</sup> In May and June 2008, President Garcia enacted Legislative Decree 1015 and 1073 which prescribed that only 50 percent plus one (instead of two-thirds of the community general assembly) of the members of the communities (both in the Andes and Amazon region) would be needed to approve a sale or lease of land to private investors. Both Decrees, however, were repealed by Congress after a widespread mobilization and protest of Indigenous and peasants communities in October 2008.<sup>272</sup>

In January 2009, Garcia’s government extended Monterrico Metals’ concessions (adding 27 more concessions, bringing the total to nearly 29,000 hectares).<sup>273</sup> Tensions rose again in 2009, when attempts by the police to arrest suspects for damaging the mining site resulted in the

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<sup>270</sup> While Indigenous and peasant communities flocked to the polling stations, García asked the public “Are we going to let misinformation and ideological manipulation stand in the way of the country’s progress? What do we Peruvians want? To stay where we are, or to grow?” Milagros Salazar, “*Peru: Communities Say ‘No’ to Mining Company in Vote*,” in Inter Press Service, 17 September 2007, online: <<http://www.ipsnews.net/2007/09/peru-communities-say-no-to-mining-company-in-vote/>> (retrieved 30 April 2017).

<sup>271</sup> La Republica, “Amenazan de muerte a promotor ambientalista de ONG,” in *La Republica*, Lima, 10 October 2007, online: <<http://www.larepublica.pe/10-10-2007/amenazan-de-muerte-promotor-ambientalista-de-ong>> (retrieved 30 April 2017).

<sup>272</sup> Decrees 1015 and 1073, were part of a great number of legislative decrees issued by Garcia over the first half of 2008, resorting to special powers he received from the Congress to facilitate the implementation of the free trade agreement with the United States. Lila Barrera-Hernandez, “One Step forward, two steps back: Peru’s approach to indigenous land and resources and the law,” in L. Godden and M. Tehan, Eds., *Comparative Perspectives on Communal Lands and Individual Ownership* (New York: Routledge, 2010) at 174-175.

<sup>273</sup> These concessions are located within the territory of the affected communities; they had been previously granted to Compania Minera Mayari S.A., also owned by Monterrico Metals. Edmundo Cruz, “El Consorcio Chino Zijin Opera a Ambos Lados de la Frontera de Peru y Ecuador,” in *La Republica*, Lima 14 January 2009, online: <<http://www.larepublica.pe/14-01-2009/el-consorcio-chino-zijin-opera-ambos-lados-de-la-frontera-de-peru-y-ecuador>> (retrieved 30 April 2017).

deaths of two local residents, Gástulo Correa and Vicente Romero, from the Cajas community.<sup>274</sup>

At this time the government was eventually prompted into action; the project was suspended, albeit temporarily, helping to ease the immediate tensions. Yet, the underlying issues, legality and legitimacy, were never addressed and instead a date of 2015 was set for work at the site to resume.<sup>275</sup>

In October and November 2014, the company and the Ministry of Energy and Mines, initiated an awareness campaign on mining with the population of the city of Huancabamba. While the Ministry of Energy and Mines has begun to develop workshops on mining promotion and participation mechanism of citizens, the company has reopened its administrative office in Huancabamba and has begun to implement community and social assistance programs with local populations. These facts, as well as the reactivation of several lawsuits against Indigenous and peasants for events dating from 2007 and the attempt to close investigations for the deaths, torture and serious injuries against farmers in the hands of the police, indicate a continuation in the company's strategy.<sup>276</sup> In September 2016, the Ministry of Energy and Mines' Environmental Affairs office approved "the modification and updating of the rehabilitation plan for the Rio

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<sup>274</sup> In 2010, two more activists opposing mining projects in the region were killed. On July 2010, Amadeo Mijahuanca Peña, the mayor of Namballe district, province of San Ignacio, Cajamarca region, was killed in mysterious circumstances. Mijahuanca was one of the leading environmentalists opposed to mining Río Blanco project. On August 2010, Arcesio Gonza Castillo, environmental activist and leader of the peasant community of Santa Rosa of Suyo, province of Ayabaca, was killed by unknown individuals. He had received death threats since 2005 because his opposition to mining activities in the region. Global Witness (2014), *supra* note 95; Ricardo Marapi, "Javier Jahncke: 'Arcesio Gonza: Asesinado por oponerse a la minería'" in CEPES Portal Rural, 27 August 2010, online: <<http://www.cepes.org.pe/node/2068>> (retrieved 30 April 2017).

<sup>275</sup> Peter Low, "Rio Blanco and the Conga Fallout," in *Peru Support Group*, February-March 2012, online: <<http://www.perusupportgroup.org.uk/article-545.html>> (retrieved 30 April 2017).

<sup>276</sup> CooperAction, Grufides, Fedepaz, "15<sup>th</sup> Report on Mining Conflicts in Peru: 2<sup>nd</sup> Semester 2014," Lima, December 2014, online: <<http://www.conflictosmineros.org.pe/reportes/13/02/2015/15-observatorio-de-conflictos-mineros-en-el>> (retrieved 30 April 2017).

Blanco mining exploration project.”<sup>277</sup> This decision has caused concern in affected communities, as the approved plan has not been consulted with them. The company has announced that it could start the mining exploitation phase in 2021.<sup>278</sup>

In November 2016, during the Asia-Pacific Economic Cooperation (APEC) summit held in Lima, Peru, China’s President Xi Jinping and Peru’s President Kuczynski signed new trade deals to enhance their 2009 trade agreement, including deals to strengthen and promote mining investments, among them the Rio Blanco mining project.<sup>279</sup> This volatile situation continues generating concern in affected communities that maintain their opposition to the mining project. In this context, it is difficult to imagine how renewed confrontations can be avoided once the Chinese Zijin Consortium, which also holds concessions on the Ecuadorian side of the border, escalates its exploration activities in the area. “Anti-mining rhetoric in Piura is becoming noticeably more radical in the interim, with a disconcerting number now talking of how they are prepared to die protesting. Better that, they say, than to die from the mine’s contamination thereafter.”<sup>280</sup>

#### **2.4.4 Domestic and International Legal Claims**

There are two significant legal actions initiated at the domestic level regarding the Rio Blanco Cooper operations in Peru, regarding usurpation of communal lands and torture of community members during a peaceful march protest against Rio Blanco project.

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<sup>277</sup> Ministerio de Energía y Minas, Resolución Directoral No. 214-2016-MEM-DGAAM, 14 Setiembre 2016. CooperAction, Grufides, Fedepaz, “*19<sup>th</sup> Report on Mining Conflicts in Peru: 2<sup>nd</sup> Semester 2016*,” Lima, November 2016, at 16-17, online: <<http://www.conflictosmineros.org.pe/?q=reportes/14/12/2016/19-observatorio-de-conflictos-mineros-en-el>> (retrieved 30 April 2017).

<sup>278</sup> *Ibid.*

<sup>279</sup> La Republica, “China firma 13 documentos de cooperación con Perú,” in La Republica, Lima, 21 November 2016, online: <<http://larepublica.pe/politica/823842-china-firma-13-documentos-de-cooperacion-con-peru>> (retrieved 30 April 2017).

<sup>280</sup> Peter Low, “Rio Blanco and the Conga Fallout,” in *Peru Support Group*, February-March 2012, online: <<http://www.perusupportgroup.org.uk/article-545.html>> (retrieved 30 April 2017).

## **The Crime of Usurpation of Communal Lands**

The actions and activities of Minera Majaz and its successor, Rio Blanco Copper, occurred without the permission of the affected peasant communities, which according to the Ombudsman Office constitutes a violation of Peruvian and international human rights law.<sup>281</sup> The involvement of the Ombudsman Office, at the request of Segunda y Cajas and Yanta communities, was significant; it prepared and published a report in November 2006 which concluded that Rio Blanco Copper did not have “authorization for the surface use of the owner’s lands,” and that its operations were therefore illegal. It recommended that the Ministry of Energy and Mines establish an internal office responsible for verifying the validity of such authorizations in the future in order to avert potential conflicts.<sup>282</sup> In 2007, the affected communities filed a criminal complaint against shareholders and officers of Rio Blanco Copper for the crime of usurpation before the Ayabaca’s prosecutor office. The prosecutor filed a formal complaint with the criminal court, and on November 2007, Judge Rafael Romero launched a legal inquiry over the issue against the Rio Blanco Copper’s board of directors. The company responded by filing seven habeas corpus petitions against the prosecutor. The prosecutor was subjected to administrative and criminal investigations, which were declared unfounded. At the end, the company succeeded in having the case returned to the beginning.<sup>283</sup> As of April 2017, the case remains under investigation. Affected communities aim to exhaust all available domestic remedies, before bringing the matter before the inter-American Commission on Human Rights.

## **The Torture Case**

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<sup>281</sup> Defensoria del Pueblo, Informe No. 001 -2006/ASPMA-MA, 2006.

<sup>282</sup> *Ibid*; Javier Jahncke (2011), *supra* note 244 at 51.

<sup>283</sup> *Ibid*; Cecilia Cherrez, et al. (2011), *supra* note 254 at 114-115.

In July 2008, the National Coordinator of Human Rights and Fedepaz, on behalf of the victims of the detention, abuses and torture at Rico Blanco mining camp on August 2005, filed a criminal complaint against the police officers who participated in the operation and their commanders, medical doctors who examined the victims and reported that there were no signs of torture, security personnel from the mining company and its security contractor (Forza), and the prosecutor who was aware of the torture and failed to report it.<sup>284</sup> In January 2009, the appalling claims of the victims were finally substantiated when a set of photographs depicting DINOES officers and Forza security guards engaged in cruel acts of abused and torture of the prisoners was leaked to a national newspaper.<sup>285</sup> In March 2009 the local prosecutor in Piura rejected the complaint and closed the investigation. Fedepaz subsequently filed an appeal against this decision with senior prosecutors, who ruled that local officials had failed to pursue all lines of enquiry and that investigations should therefore resume. The local prosecutor's office attempted to terminate the investigations on two further occasions, only to be later overruled by senior officials on appeal.<sup>286</sup>

Three criminal investigations have been initiated: One conducted against two colonels and 12 other police officers, which is at the trial stage; another one conducted against two police generals and more than 300 low rank police officers, as well as directors and employees of Rio Blanco Copper and Forza Security Company, and two medical doctors; and a third investigation

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<sup>284</sup> Javier Jahncke (2011), *supra* note 244 at 51; National Coordinator of Human Rights Website, “*Photographs confirm torture of peasants who protested against Majaz Mining*,” Lima, 9 January 2009, online: <<http://derechoshumanos.pe/2009/01/photographs-confirm-torture-of-peasants-who-protested-against-majaz-mining/>> (retrieved 30 April 2017).

<sup>285</sup> *Ibid*; International State Crime Initiative, “*Torture at the Río Blanco Mine – A State-Corporate Crime? – Testimony Project*,” 15 September 2014, online: <<http://www.statecrime.org/testimonyproject/peru>> (retrieved 30 April 2017).

<sup>286</sup> Peru Support Group, “*Rio Blanco: Justice Served?*” London, UK, Update No. 147, 2011 at 5-6; *Guerrero v. Monterrico Metals Plc.* [2009] EWHC (QB) 2475 (Eng.).



against former prosecutor Felix Toledo Leiva for the crime of omission.<sup>287</sup> In regard with the first investigation, on May 2012, the prosecutor indicted the 14 police officers arguing that they committed crimes against humanity in the form of torture to the detriment of 28 peasants, and asked 10 years' imprisonment and a payment of 10,000 Soles (CAN\$ 3,852) as reparation for each victim. In the second investigation, the prosecutor indicted only two police generals and a commander with crimes against humanity, aggravated torture and aggravated abduction, and asked for a 25 years' imprisonment and reparations.<sup>288</sup> The third investigation ended on November 2012, when the Criminal Court of Appeals of Piura convicted former Prosecutor Toledo Leiva for failing to file a complaint in relation to the torture he witnessed, sentencing him to three years in prison, disqualifying him for a year from exercising a public function and requiring a payment of 6,000 Soles (CAN\$ 2,313) for civil damages in favor of the State.<sup>289</sup>

As a result of the hostile political climate and the failure of local prosecution to hold the company accountable, and following the publication of photographs documenting the 2005 abuses, the victims filed a civil complaint against Monterrico Metals and its Peruvian subsidiary before the English High Court in June 2009.<sup>290</sup> The case was pursued on the basis of

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<sup>287</sup> L. Rojas, "Fiscalia pide 10 años de carcel para 14 policias por torturar a campesinos," in *La Republica*, Lima, 8 May 2012, online: <<http://www.larepublica.pe/08-05-2012/fiscalia-pide-10-anos-de-carcel-para-14-policias-por-torturar-campesinos>> (retrieved 30 April 2017); Javier Jahncke (2011), *supra* note 244 at 52.

<sup>288</sup> In March 2016, the criminal court joined both criminal proceedings. Red Muqui, "*Juzgado de Huancabamba unificó procesos por presunta tortura de 28 campesinos en campamento minero Río Blanco*," online: <<http://www.muqui.org/comunicaciones/noticias/item/403-juzgado-de-huancabamba-unifico-procesos-por-presunta-tortura-de-28-campesinos-en-campamento-minero-rio-blanco>> (retrieved 30 April 2017).

<sup>289</sup> Fedepaz, "*Condenan A Ex Fiscal Provincial de Huancabamba, Piura Por No Denunciar Torturas*," in Fedepaz, Lima 19 November 2012, online: <[http://www.fedepaz.org/index.php?option=com\\_content&view=article&id=200:or-los-hechos-de-torturas-a-28-campesinos-en-el-campamento-minero-de-la-empresa-ro-blanco-copper&catid=29:noticias&Itemid=146](http://www.fedepaz.org/index.php?option=com_content&view=article&id=200:or-los-hechos-de-torturas-a-28-campesinos-en-el-campamento-minero-de-la-empresa-ro-blanco-copper&catid=29:noticias&Itemid=146)> (retrieved 30 April 2017).

<sup>290</sup> The victims were assisted by the National Human Rights Coordinator and FEDEPZ who were able to secure expert medical and psychological reports on the torture victims, and with the support of the U.S.-based Environmental Defender Law Center, they liaised with the British firm Leigh Day & Co. in February 2009. Javier Jahncke (2011), *supra* note 244 at 52.

conventional tort; specifically it was brought under the Peruvian Civil Code for the harm committed against the captives and for negligence on the part of the U.K. parent company.<sup>291</sup> The core of the claimants' allegations was that Monterrico was complicit in the torture and mistreatment in the following ways: a) the mine camp manager, calling the protesters terrorist members of "Shining Path", incited the police to attack and mistreat them; b) some employees and the mine security contractor, Forza (now owned by Swedish Securitas), participated in the mistreatment (including capturing, beating and taunting protesters, carrying police munitions, providing sacks and ropes to detain protesters); and c) the company failed to prevent the mistreatment that occurred over two to three days on the mine premises.<sup>292</sup> Throughout the proceedings, Monterrico denied all these allegations. After a series of delays, chiefly caused by legal challenges mounted by the firm, a ten week trial was eventually scheduled commencing in October 2011. However, in July 2011 the proceedings were settled, on confidential terms, by a payment of compensation and legal costs, without admission of liability by the company.<sup>293</sup>

The confidential out-of-court settlement has been controversial, because whereas compensation can represent a form of redress, "the full details of the events of August 2005 are unlikely ever to be established or publicly disclosed."<sup>294</sup> Furthermore, the confidential nature of the settlement has caused significant division among some of the previously tight-knit

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<sup>291</sup> Peruvian Civil Code, Arts, 1969, 1978, 1981, and 1983; British Private International Law (Miscellaneous Provisions) Act, 1995, c. 42 (U.K.); *Guerrero v. Monterrico Metals Plc*, [2009] EWHC 2475 (Q.B.); *Guerrero v. Monterrico Metals Plc*, [2010] EWHC 3228 (Q.B.)

<sup>292</sup> Richard Meeran, "Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States," in (2011) 3 *City University of Hong Kong Law Review* 1-41, at 40.

<sup>293</sup> *Ibid* at 41.

<sup>294</sup> Peru Support Group, "legal Proceedings Against Monterrico Metals Settled," July 20, 2011, online: <<http://www.perusupportgroup.org.uk/news-article-509.html>> (retrieved 30 April 2017). Cited at Gwynne Skinner, Robert McCorquodale, Olivier De Schutter, "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business," ICAR, CORE, ECCJ, London, December 2013 at 126.

communities in Piura, resulting in a number of the victims feeling the need to move away.<sup>295</sup>

And most importantly, the underlying issues that led to these abuses being committed—the construction of Rio Blanco project and the criminalization of the communities’ protests—have never been resolved.<sup>296</sup> As one NGO focusing on the Monterrico case stated:

[W]elcome as it is for the farmers, this settlement does not address the fact that the criminalisation of protest and threats and violence against activists are on the increase around the world and that, in more and more cases, we are seeing collusion between the police and military authorities and the multinational mining companies. Even in this case, despite the settlement, [the] mine is still going ahead without adequate consultation with the community.<sup>297</sup>

## 2.5 Conclusion

Before the Law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment...He makes many attempts to be admitted, and wearies the doorkeeper by his importunity...Before he dies, all his experiences in these long years gather themselves in his head to one point, a question he has not yet asked the doorkeeper: “Everyone strives to reach the Law...so how does it happen that for all these many years no one but myself has ever begged for admittance?” The doorkeeper recognizes that the man has reached his end, and to let his failing senses catch the words roars in his ear: “No one else could ever be admitted here, *since this gate was made only for you*. I am now going to shut it.

(F. Kafka, Before the Law)<sup>298</sup>

Our struggle is not only for my family and my land, is for all communities, for the protection of peoples’ health and the lagoons...In Cajamarca there are communities where a great number of people have cancer because they have lead in their blood and nobody says and/or does anything. I will not be silent. I know they will come to look for

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<sup>295</sup> Ibid; Al Jazeera, “Peru: Undermining Justice: if multinational will do anything to control the public debate, how can indigenous peoples ever assert their rights?” *Video Documentary*, December 6, 2012.

<sup>296</sup> Gwynne Skinner, Robert McCorquodale, Olivier De Schutter (2013), *supra* note 294 at 126-127.

<sup>297</sup> CAFOD, “CAFOD Call on UK Mining Company to Change Its Ways as Torture Case Settled Out of Court,” CAFOD, July 20, 2011, online: <<http://www.cafod.org.uk/News/International-news/Monterrico-Metals-2011-07-20>> (retrieved 30 April 2017). Cited at Gwynne Skinner, Robert McCorquodale, Olivier De Schutter (2013), *supra* note 294 at 127.

<sup>298</sup> Franz Kafka, “Before the Law,” in *Wedding Preparations in the Country and Other Stories*, trans. Willa. And Edwin Muir (Harmondsworth: Penguin, 1978).

me and they will disappear me, but in the farm field I was born and in the earth I shall die.

Maxima Acuña de Chaupe (Indigenous woman from Sorochuco, Cajamarca, April 2015)<sup>299</sup>

Behind the rhetoric of Peru's economic growth, sustainable development and corporate social responsibility lies the flagrant violations of Indigenous peoples' rights, and their persistent struggle to defend their land and their rights to clean water, as well as to demand respect, dignity and equal distribution of resources and power. The examination of the three conflicts demonstrates the existence of an asymmetric legal framework, which, on the one hand, promotes, protects and guarantees efficiently and forcefully the rights of MNCs, particularly their property and contract rights. On the other hand, Indigenous peoples' rights, despite its formal and limited recognition in the Constitution and laws, have not been promoted, protected and guaranteed with the same force and efficiency. The degree of influence, leverage and access to the State by MNCs has reinforced this asymmetric legal framework and weakened public institutions, particularly those regulating and protecting Indigenous rights and environmental standards. Thus, this unequal legal framework and Peruvian institutions are the main source of the dispossession of Indigenous peoples' lands and violations of their rights, and they have contributed to the immunity and impunity of MNCs.

Testimonies of members of affected communities in the three conflicts analyzed reveal that MNCs' operations have caused, directly or indirectly, harmful environmental impacts, adverse health and economic effects, forced displacements, community division and breakdown of social fabric, violent deaths and serious injuries to community members during protest. As the

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<sup>299</sup> Sara Cuentas Ramirez, "Soy pobre y analfabeta, pero lucharé por nuestras montañas" in *El Pais*, Madrid, 7 April 2015, online: <[http://elpais.com/elpais/2015/03/17/planeta\\_futuro/1426588446\\_691506.html](http://elpais.com/elpais/2015/03/17/planeta_futuro/1426588446_691506.html)> (retrieved 30 April 2017).

UN Special Rapporteur on the Rights of Indigenous Peoples confirms, “[F]or decades, extractive industries have had a devastating social and environmental impact on several of Peru’s indigenous peoples, without benefiting them greatly. Consequently, there has been a high level of discontent and mistrust among Indigenous peoples towards the State and the industrial extractive sector, leading to many protests and clashes”<sup>300</sup>

The dispossession not only of their land, but also, cultures, and livelihood of Indigenous and peasant communities is recurrent across the three conflicts. The strategies through which dispossession are effected are violence and force, and legislative and discursive strategies.<sup>301</sup> Some of the violence used has involved the State security forces coupled with the criminalization of protest, while other acts have been the work of private security forces or extra-legal armed groups and individuals, or a convergence of State public power and MNCs’ power. Under Peruvian law, police officers are allowed to work for mining companies when off-duty.<sup>302</sup> Discursive strategies are used by the government, mining companies and the mainstream media groups, emphasizing the status of Peru as “historically” and “naturally” a “mining country,” counterpoising modern productive extraction against unproductive, backward or impoverished farming alternatives, and framing “economic development” on the basis of extractive industries.<sup>303</sup> In addition, market mechanisms (cash payments) and corporate social responsibility (CSR) programs (such as special community development funds and/or initiatives) play a role in making dispossession both profitable and acceptable for affected communities.

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<sup>300</sup> Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples’ rights in Peru with regard to the extractive industries*, 3 July 2014, A/HRC/27/52/Add.3, at paragraphs 18 and 69.

<sup>301</sup> Anthony Bebbington et al., “Anatomies of Conflict: Social Mobilization and New Political Ecologies of the Andes,” in Anthony Bebbington and Jeffrey Bury (2013), *supra* note 171 at 250-254.

<sup>302</sup> Charis Kamphuis (2012), *supra* note 165.

<sup>303</sup> Matthew Himley (2014), *supra* note 113.

The growth and proliferation of CSR programs, considered an important feature of the neoliberal regulatory rearrangements, has gone hand in hand with the growth of social conflict around mining in Peru.<sup>304</sup> CSR programs are developed by companies (sometime in partnership with NGOs funded by foreign governments such as Canada)<sup>305</sup> to convey the impression of action while limiting the cost of such programs. CSR programs aim in particular, to diffuse responsibility when necessary and deflect the claims of local communities, or to anticipate and dissipate conflict while closing down public debate that would threaten their projects. In Peru, as Bebbington argues, CSR programs can be seen as,

a pack of interventions...that combines control of large territories, regional economic power, social responsibility and very close relationships with political and military-police authorities...that combines market transactions and patronage relationships, and that in the process builds a wide-ranging web of relationships centred on the company...that begins to look very much like the [older] hacienda model that dominated the Andean countryside ...with deeply retrograde [and racist] attitudes towards Indigenous [communities].<sup>306</sup>

A comparison of the three conflicts reveals the existence of intense social mobilization and resistance of Indigenous and peasant communities to defend their land rights, their environment and livelihood, their participation in the decision making process and fair

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<sup>304</sup> Matthew Himley (2010), *supra* note 103 at 3272-3273.

<sup>305</sup> Catherine Coumans, "Whose Development? Mining Local Resistance, and Development Agendas," in Julia Sagebien and Nicole M. Lindsay (2011), *supra* note 123 at 114; Heidi Wudrick, *Corporate Social Responsibility in the Canadian Mining Sector: Ethics, Rhetoric, and the Economy*, Master Thesis (Burnaby: Simon Fraser University, 2015); Marco Chown Oved, "Fool's Gold: The limits of tying aid to mining companies," in *the Toronto Star*, December 15, 2014, online: <[http://www.thestar.com/news/world/2014/12/15/fools\\_gold\\_the\\_limits\\_of\\_tying\\_aid\\_to\\_mining\\_companies.html](http://www.thestar.com/news/world/2014/12/15/fools_gold_the_limits_of_tying_aid_to_mining_companies.html)> (retrieved 30 April 2017).

<sup>306</sup> Anthony Bebbington, "Extractive Industries and Stunted States: Conflict, Responsibility and Institutional Change in the Andes," in K. Ravi Raman and Ronnie D. Lipschutz (2010), *supra* note 144 at 106-111.

distribution of economic benefits. A prominent concern is about the actual or potential contamination and or loss of water resources that mining projects might lead to either through absolute reduction in availability or decline in water quality. Local and national human rights NGOs have provided important support to affected communities. When protest and conflict have arisen, in most of the cases, the government has failed to act as a credible and independent mediator; communities perceive the government as a biased mediator that backs corporations and criminalizes social protest. Since 2007, a number of legislative measures have been enacted, affecting the right to protest and encouraging impunity for police violence. As a result, Indigenous communities' leaders and members and human rights and environmental defenders have been the direct target of death threats, physical attacks, surveillance, stigmatisation and smear campaigns. Judicial harassment and the instrumentalization of criminal law have been particularly significant; hundreds of community leaders and human rights activists have faced criminal charges such as rebellion, terrorism, violence, usurpation, trespassing, disobedience or resistance to an official order, obstructing public officials, abduction, outrage to national symbols, disturbance or other public offences.<sup>307</sup>

Another important issue revealed by the examination of the conflicts is how the privatization of services and privatization of power and coercion (another important feature of the neoliberal regulatory rearrangements) has benefited MNCs.<sup>308</sup> The privatization of power and coercion, associated with policies that reduce the ability of the State to provide public services, has grown in size and importance; the most frequent forms of privatization are paramilitary

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<sup>307</sup> Front Line Defenders (2015), *supra* note 202; Inter-American Commission on Human Rights, 154 Period of Sessions, *Public Hearings on Social Protest and Human Rights in the Americas, March 16, 17, 19, 20, 2015*, online: <<http://www.oas.org/es/cidh/multimedia/sesiones/154/default.asp>> (last accessed 30 April 2017).

<sup>308</sup> Alexis P. Kontos, "'Private' Security Guards: Privatized Force and State Responsibility under International Human Rights Law," (2004) 4 *Non State Actors and International Law* 199-238.

formations and private armies (security companies).<sup>309</sup> In the context of Peru's proliferation of private security companies, mining companies have hired them and use them internally as a private army (for instance, Forza). Furthermore, Peruvian police, both as an institution and as a labor force, has been partially privatized in the services of mining companies. Thus, a convergence of public and private power has been increasingly used by mining companies to confront and repress the growing protest of Indigenous and peasant communities. As a result, both private security guards and police forces working for the companies (Minera Yanacocha, Rio Blanco Cooper and others) have been implicated in serious human rights violations such as arbitrary detention, torture and murder.<sup>310</sup>

Notwithstanding the Peruvian government's persistent denial of Indigenous identity and opposition to using the term "Indigenous peoples" to refer to affected Andean communities, and despite its racist and derogatory connotations, peasant communities in the Andes have begun to adopt and identify themselves as Indigenous peoples, and "capitalize on its positive connotations as a universal term by articulating their campaign arguments against mining projects along the main global axes of indigeneity: sovereignty, autonomy/ pluri-ethnicity, and the indigenous-environmental."<sup>311</sup> Thus, given Peru's weakened land rights regime, these communities have increasingly begun to claim the protection offered by international Indigenous rights regimes such as the ILO 169 and the UNDRIP, which allow them to substantiate legal claims at the

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<sup>309</sup> Francesco Francioni and Natalino Ronzitti, Eds., *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (New York: Oxford University Press, 2011).

<sup>310</sup> Charis Kamphuis (2011-2012), *supra* note 174.

<sup>311</sup> Wendy Coxshall (2010), *supra* note 262 at 44, 48; Jose Perez Mundaca (2010), *supra* note 197 at 220-225.



domestic level (Negritos peasant Community case) and “access an international rights regime corresponding to their needs” (Conga case).<sup>312</sup>

Overall, in situations where Indigenous rights have been violated (directly or indirectly) as a result of mining projects, the result is generally impunity for the perpetrators and lack of access to justice at all levels for the affected Indigenous and peasant communities. Legal actions taken in some instances either at domestic or international jurisdictions have gone to extraordinary lengths to be processed, have been delayed, dismissed, and or closed. Legal actions and litigation, however, as a part of a broader strategy taken by Indigenous and peasant communities (particularly in Cajamarca and Piura against Minera Yanacocha and Rio Blanco) have provided them opportunities to bolster their nascent organizations, by reaching and making connections with local, regional and national human rights NGOs, environmental and religious organizations, and sympathetic authorities, by providing a focus and injecting critical energy and attention that help to continue mobilizing their communities. Thus, increasingly, Indigenous communities, in Peru and worldwide, have been “resorting to the grammar of international human rights to formulate their struggles and claims for justice.”<sup>313</sup>

Legal remedies and compensatory approaches, however, cannot solve the problems caused by pervasive land dispossession and forced displacement. What is required is a critical analysis of the alliances between multilateral institutions, MNCs and States, as well as the centre-periphery patterns of dynamic inequality within the global political economy. Next

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<sup>312</sup> Charis Kamphuis (2012), *supra* note 165 at 231-232.

<sup>313</sup> Boaventura de Sousa Santos, *Epistemologies of the South: Justice against Epistemicide* (Boulder, CO: Paradigm Publishers, 2014) at 22-25; Joyce Green, Ed., *Indivisible: Indigenous Human Rights* (Winnipeg: Fernwood Publishing, 2014).

chapter provides a historical overview of Indigenous peoples in Latin America, and discusses the encroachment on their lands and environment in a global political economic context.

## Chapter 3: Indigenous Peoples in Latin America and the Global Political

### Economy: A Historical Overview

Since the days when the sword and the cross made their way into the Americas, the European conquest punished the adoration of nature, which was seen as the sin of idolatry, with the punishments of whipping, hanging and burning. The communion between nature and people, a pagan custom, was abolished in the name of God and later in the name of Civilization. Throughout the Americas, and the world, we are paying the consequences of this divorce. (E. Galeano, 2008)<sup>314</sup>

#### 3.1 Introduction

La Oroya, a mining city in the Peruvian Andes, whose inhabitants are mostly Indigenous and mestizo peoples, is classified among the ten most polluted cities in the world, and the children of the city are called “the Children of Lead.”<sup>315</sup> The source of the lethal contamination is a poly-metallic smelter and refineries plant constructed by U.S. Cerro de Pasco Copper Corporation in 1922<sup>316</sup> and currently operated by the U.S.-based Renco Group Inc.’s Doe Run Company. It has been reported that for years the Doe Run Company operated the smelter plant 24 hours a day, continuously emitting toxic smoke laden with heavy metals in the densely populated city.<sup>317</sup> The predicament of La Oroya’s inhabitants has been also experienced by

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<sup>314</sup> Eduardo Galeano, “*Nature is Not Mute*,” in IPS, Inter Press Service, 21 April 2008, online: <<http://www.ipsnews.net/2008/04/nature-is-not-mute/>> (retrieved 30 April 2017).

<sup>315</sup> Marina Walker Guevara, *La Oroya, children of lead: reporting on the health and environmental impacts of an American mining company operating in a Peruvian town*, Master Thesis, University of Missouri, 2005; The Blacksmith Institute, “*The World’s Worst Polluted Places: The Top Ten*,” New York, September 2006, online: <[www.worstpolluted.org/reports/file/10worst2.pdf](http://www.worstpolluted.org/reports/file/10worst2.pdf)> (retrieved 30 April 2017); Anna Kramer, “*Peru: Listening to La Oroya*,” in Oxfam America, 02 July 2012, online: <<https://firstperson.oxfamamerica.org/2012/04/peru-listening-to-la-oroya/>> (retrieved 30 April 2017).

<sup>316</sup> In 1900-1901, a syndicate was put together by North Americans James B. Haggin, J.P. Morgan, H. C. Frick, W. R. Hearst, and the Vanderbilt heirs to set up the Cerro the Pasco Investment Corporation. It began to operate in the Peruvian mining industry in 1906. David G. Becker, *The New Bourgeoisie and the Limits of Dependency: Mining, Class, and Power in ‘Revolutionary’ Peru* (Princeton, New Jersey: Princeton University Press, 1983) at 31.

<sup>317</sup> Areli Valencia, *Human Rights Trade-Offs in Times of Economic Growth: the Long-Term Capability Impacts of Extractive-Led Development* (New York: Palgrave Macmillan, 2016); Anna K. Cederstav and Alberto Barandiaran, *La Oroya Cannot Wait* (Lima: Sociedad Peruana de Derecho Ambiental y Asociacion Interamericana para la

Achuar, Quechua, and Kukuma Indigenous communities in the Amazonian region. Since 1971, a systematic disregard for environmental, social and human impacts has led to devastating water and soil contaminations on the area caused first by US-based Occidental Petroleum's and then by Argentina-based Pluspetrol's oil exploration and exploitation.<sup>318</sup> On December 2013, the death of five Indigenous children was reported, allegedly as a result of oil contamination; one of the children was previously diagnosed with high levels of heavy metals (lead and cadmium) in his blood.<sup>319</sup>

The predicament of Indigenous communities in Peru and all over the Americas as a result of mining and oil operations has a long history and has multidimensional economic, political, social and cultural causes and dynamics which have been instituted, supported, implemented and or enforced – directly or indirectly -- by law. The everlasting material wealth accumulation, the perpetual world economic expansion led by nation States and business enterprises, while undermining and shattering the well-being of the most vulnerable populations of the world, including Indigenous communities, has its roots in the epistemology of perpetual material accumulation and progress that guided the first European explorers arriving in the Americas in late 15<sup>th</sup> Century. As gold had become the new mark of wealth in the modern European world, the main objective of Christopher Columbus' expeditions was to reach lands rich in gold and

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Defensa del Ambiente, 2002); Interamerican Association for Environmental Defense, “*Public Health Crisis in La Oroya, Peru*,” online: < [http://www.aida-americas.org/project/doorun\\_en](http://www.aida-americas.org/project/doorun_en) > (retrieved 30 April 2017).

<sup>318</sup> Cultural Survival, “Peru: Force Oil Company to Clean Up Spill,” in *Cultural Survival*, 10 January 2014, online: <<https://www.culturalsurvival.org/take-action/peru-force-oil-company-clean-spills/take-action-force-oil-company-clean-spills>> (retrieved 30 April 2017); EarthRights International, Racimos de Ungurahui, Amazon Watch, *A Legacy of Harm: Occidental Petroleum in Indigenous Territory in the Peruvian Amazon*, Report, April 2007.

<sup>319</sup> Servindi, “Peru: Muerte de cinco niños de la etnia Achuar genera alarma en Cuenca del Corrientes,” in Servindi 30 December 2013, online: <<https://www.servindi.org/actualidad/98598>> (retrieved 30 April 2017); La Republica, “Demandan Investigar Muerte Subita de 5 Niños Achuar en el Corrientes,” in *La Republica*, Lima, 9 January 2014, online: <<http://www.larepublica.pe/09-01-2014/demandan-investigacion-muerte-subita-de-5-ninos-achuar-en-el-corrientes>> (retrieved 30 April 2017).

silver; he had persuaded the king and queen of Spain to finance his expeditions for that purpose.<sup>320</sup>

Columbus' voyages were seen and celebrated as a great "discovery" enterprise that had been planned and achieved in the name of the progress of humanity. Yet the Americas were invaded, Eduardo Galeano writes, not discovered, since it had been inhabited by the Indigenous peoples who lived there for thousands of years prior to the colonial encounter. The Americas were

not seen by the warriors and the monks, the notaries and the merchants who came in search of quick fortune and who imposed their religion and culture as the only and obligatory ones. Christianity, born among the oppressed of one empire, became an instrument of oppression in the hands of another, one which was taking history by storm. There were not any other religions, there could be only superstitions and idolatries; other cultures were nothing but ignorance. God and Man lived in Europe; the New World was inhabited by demons and monkeys...Such adventure of usurpation and plunder does not discover: it covers up. It does not reveal: it hides. To be successful it needs ideological alibis that turn arbitrariness into law.<sup>321</sup>

Thus, in the Americas, inequality before the law lies at the root of real history. Yet official history is written by oblivion, not memory.<sup>322</sup> Through the centuries, Indigenous peoples and their lands have been exploited, despoiled of gold and silver, nitrates and rubber, copper and oil; but their memories have also been usurped. "From the outset [they] have been condemned to amnesia by those who have prevented them from being."<sup>323</sup> Indeed, Indigenous peoples' memory has been stolen, appropriated, clouded or manipulated. In these lands, as in other

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<sup>320</sup> Howard Zinn, *A People's History of the United States: 1492-Present* (New York: HarperCollins Publishers, 2003) at 2-4.

<sup>321</sup> Eduardo Galeano, *We Say No: Chronicles 1963-1991* (New York: W.W. Norton & Company, 1992) at 179-180.

<sup>322</sup> Eduardo Galeano, *Upside Down: A Primer for the Looking-Glass World* (New York: Metropolitan Books, 2000) at 201.

<sup>323</sup> Eduardo Galeano, *Genesis: Part One of the Trilogy Memory of Fire* (London, UK: Methuen London Ltd., 1987) at Preface.

continents, “traffickers in slaves have their statues in city plazas, while streets and avenues tend to bear the names of those who stole the land and looted the public purse.”<sup>324</sup>

This chapter provides a historical overview of the origins of Indigenous peoples’ contemporary problems and challenges, and locates them within the global political economy. It discusses the current globalization process affecting them, and the prominent role played by MNCs and international financial institutions (IFIs) in such process. The focus of this chapter is to highlight how the prevailing legal structures and doctrines in the twenty-first century seems to be inspired by the colonial legal doctrines elaborated by Vitoria which validated Indigenous land dispossession and the encroachment on their life and culture.

The chapter is divided in five sections. Section Two will discuss the violent Iberian conquest, and the issue of colonialism and racism initiated in the 15<sup>th</sup> century and its long-lasting effects on the current economic, social and political situation of Indigenous communities. It will also examine the Creole independence and new republic period which in many economic and political aspects made Indigenous peoples’ situation worse.

Section Three will discuss the current “third globalization” process or neoliberal globalization process which encompasses the interventions of IFIs in the economies of Latin American states, and the increasingly prominent role played by MNCs. In this context of intensifying globalization, powerful industrialized states have used international law and multilateral institutions to create an international and globalized legal structure – a global system of power -- which facilitates, promotes and protects transnational corporate activity.<sup>325</sup> Parallel

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<sup>324</sup> Eduardo Galeano (2000), *supra* note 322 at 201.

<sup>325</sup> Penelope Simons, “International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human rights,” in Lara Blecher et al., Eds., *Corporate Responsibility for Human Rights Impacts: New Expectations and paradigms* (Chicago: ABA Publishing, 2014) at 79; Muthucumaraswamy Sornarajah, “Mutations

to this analysis, Section Three will also discuss Latin American states' multiculturalism policies and the constitutional recognition of Indigenous peoples since the 1980s and 1990s, which has been considered by some scholars as "neo-liberal multiculturalism" – a project that recognizes certain aspects of cultural difference while advancing economic policies that contradict indigenous rights to self-determination and autonomy in practice.<sup>326</sup>

Section Four will discuss the role of law and legal doctrines in this process of domination and hegemony. Law, regarded as the most respected and cherished instrument of European civilization, became the most vigorous and effective instrument of European empire during the violent conquest and colonization of Indigenous peoples.<sup>327</sup> Law continued playing a crucial role in shaping economic, social and political institutions during the post-independence creole republic, and it still plays a significant role in constituting, ordering and reordering elements -- at national and international levels -- of economic, social and political life that underpin asymmetries, inequalities and injustices. Section Five will provide a summary of the chapter's main arguments, emphasizing the parallel predicaments of Indigenous peoples in the present-day and the colonial period and the prominent role of law has played in shaping this situation.

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of Neo-Liberalism in International Investment Law," (2011) 3:1 *Trade Law and Development* 203; Susan Marks, "Empire's Law," (2003) 10 *Indiana Journal of Global Legal Studies* 449.

<sup>326</sup> Charles R. Hale, "Rethinking Indigenous Politics in the Age of the '*Indio Permitido*,'" (2004) 38 *NACLA*; Charles R. Hale, Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America, (2005) 28 *POLAR: Political and Legal Anthropology Review* 10; Shannon Speed, "Dangerous Discourses: Human Rights and Multiculturalism in Neoliberal Mexico," (2005) 28 *POLAR: Political and Legal Anthropology Review* 29; Patricia Richards, *Pobladoras, Indigenas and the State: Conflicts over Women's Rights in Chile* (Rutgers University Press 2004).

<sup>327</sup> Robert A. Williams, Jr., *Savages Anxieties: The Invention of Western Civilization* (New York: Palgrave Macmillan, 2012); Lauren Benton, *A search for sovereignty: law and geography in European Empires, 1400—1900* (New York: Cambridge University Press, 2010); Peter Fitzpatrick, *Modernism and the Grounds of Law* (New York: Cambridge University Press, 2001); Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

For the purpose of this dissertation, the term Latin America refers to all countries on the American Continent from Mexico southward, plus the Spanish-speaking countries of the Caribbean and Brazil. The term ‘Latin America’ as well as ‘America,’ however, have been contested by Indigenous peoples because they are expression of the European – Iberian colonization beginning in the 15<sup>th</sup> and 16<sup>th</sup> century, and they are foreign to their struggle. Since 1992, Indigenous peoples have increasingly embraced the name *Abya Yala* (Land in full maturity), a term the Kunas peoples of Panama use to describe the continent, as an alternative to Euro-centric terms such as Latin America and the Americas.<sup>328</sup>

### **3.2 Historical Overview and the Origins of Today’s Problems**

The estimated number of Indigenous peoples in the world is approximately 370 million occupying 20 per cent of the earth’s territory and spread across 70 countries worldwide, representing 5 percent of the world’s population.<sup>329</sup>

In Latin America, according to some estimates, there are approximately 51 million Indigenous peoples, who represent 11 percent of Latin America’s total population.<sup>330</sup> In percentage terms, there is a large variation in the proportion of Indigenous peoples in national

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<sup>328</sup> Marc Becker, “Moving Forward: the Fourth Continental Summit of Indigenous Peoples,” in *NACLA*, July 12, 2009; Walter D. Mignolo, *The Idea of Latin America* (Malden, MA: Blackwell Publishing, 2005); Juan Houghton and Beverly Bell, *Indigenous Movements in Latin America*, the Centre for Economic Justice, 2004, online: <[https://otherworldsarepossible.org/sites/default/files/indigenous\\_movements\\_latina\\_america-houghton\\_bell-2004.pdf](https://otherworldsarepossible.org/sites/default/files/indigenous_movements_latina_america-houghton_bell-2004.pdf)> (retrieved 30 April 2017).

<sup>329</sup> United Nations, Department of Economic and Social Affairs, *State of the World’s Indigenous Peoples*, New York, 2009 at 1 and 84; Gillette H. Hall and Harry A. Patrinos, Eds., *Indigenous Peoples, Poverty and Development* (New York: Cambridge University Press, 2012) at 10. Accurate statistical figures of Indigenous population in the world are not available due to several reasons: Issues of not acknowledging indigenous populations; manipulation of official census data; and Indigenous peoples making themselves invisible as a strategic response to the history of colonialism, discrimination and racism. In addition, in Latin America, due to the official policy of assimilation practised until recently by most States, Indigenous peoples were generally considered under the category of peasants and therefore hidden from official statistics which was also reflected in international and intergovernmental organization’s statistical reports.

<sup>330</sup> Donna Lee Van Cott, “Indigenous Peoples’ Politics in Latin America,” (2010) 13 *Annual Review of Political Science* 385-405 at 385.



populations; although precise figures can be difficult to determine with certainty, it is generally agreed that Indigenous peoples represent statistical majorities in Bolivia and Guatemala, and form a significant minority population in Peru, Ecuador, Belize, Honduras, and Mexico. For instance, in Guatemala Indigenous peoples represent about 66 percent of the population; in Bolivia 62 percent; in Peru 47 percent, in Ecuador 43 percent, in Belize 19 percent, in Honduras 15 percent, and in Mexico 14 percent.<sup>331</sup>

Among the major issues confronting Indigenous peoples today are pervasive social, economic and political exclusion, as well as widespread discrimination and marginalization. They are at the bottom of the socio-economic-political scale; they lack or have less access to justice and security, and are often implicated in conflict and forced displacement as a result of the expansion of extractive industries. National legislation may result in direct or indirect discrimination against them. This critical situation has been documented by UN reports on Indigenous peoples since 1986.<sup>332</sup> The 2009 UN Report on *the State of the World's Indigenous Peoples*, confirms that today the situation of Indigenous peoples continues to be critical,

Indigenous peoples face systemic discrimination and exclusion from political and economic power; they continue to be over-represented among the poorest, the illiterate, the destitute; they are displaced by wars and environmental disasters; indigenous peoples are dispossessed of their ancestral lands and deprived of their resources for survival, both physical and cultural; they are even robbed of their very right to life. In more modern

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<sup>331</sup> Ferran Cabrero, et al., *Ciudadania Inter Cultural: Aportes desde la participacion politica de los pueblos indigenas en Latin America* (New York: Programa de las Naciones Unidas para el Desarrollo, PNUD, 2013) at 20-21; Inter-American Development Bank, *Operational Policy on Indigenous Peoples and Strategy for Indigenous Development*, Washington D.C., July 2006, at 47.

<sup>332</sup> José R. Martínez Cobo, *Study of the problem of discrimination against indigenous populations* (E/CN.4/Sub.4/1986/7 and Add.1-4). Addendum 4, containing the conclusion, proposals and recommendations of the Special Rapporteur, was issued as a UN Publication, Sales No. E.86.XIV.3, see introduction, paragraph. (f); See also Report of the High Commissioner for Human Rights on Indigenous Issues, E/CN.4/2006/77, 27 February 2006, at 3, para. 2.

versions of market exploitation, indigenous peoples see their traditional knowledge and cultural expressions marketed and patented without their consent or participation.<sup>333</sup>

Furthermore, according to the conventional poverty indicators (defined in terms of cash income and market consumption),<sup>334</sup> a highly disproportional percentage of Indigenous peoples are among those who are poor and extremely poor.<sup>335</sup> In 1994, a World Bank regional assessment on living standards among Indigenous peoples in Latin America found systematic evidence of socioeconomic conditions far worse than those of the population on average; more than ten years later, a 2006 follow-up study found that Indigenous peoples still consistently account for the highest and “stickiest” poverty rates in the Latin American region.<sup>336</sup>

To fully understand Indigenous peoples’ current critical situation and the injustices and impositions they endure throughout the region, it is crucial to contextualize this situation within Latin America’s nominal democracies, which continue to be marked by centuries of authoritarian exercise of power, deep inequalities in the distribution of income and wealth, and racial/ethnic

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<sup>333</sup> The United Nations, Department of Economic and Social Affairs, *State of the World’s Indigenous Peoples*, New York, 2009 at 1.

<sup>334</sup> The conventional poverty indicators and parameters, defined on the basis of the Western concept of development, and constructed around cash incomes, consumption and food expenditures within a market and cash-based economic setting, have been criticized and challenged because they do not adequately reflect the realities of many indigenous peoples. Important non-income indicators such as lack of voice or power in political and bureaucratic system, the non-recognition of the collective rights of Indigenous peoples, their removal from ancestral lands, and their lack of access to basic infrastructure and social services, quality of environment, among others, should be taken into consideration. See Victoria Tauli-Corpuz, Chairperson, Address to the opening of Fifth Session of the UN Permanent Forum on Indigenous Issues, New York, 15 May 2006; Report of the International Expert Group Meeting on the Millennium Development Goals, Indigenous Participation and Good Governance, UN Permanent Forum on Indigenous Issues (UNPFII), New York, 15-26 May 2006.

<sup>335</sup> Ethan Freedman, “Poverty Rates Strikingly High Among Indigenous Populations,” in IPS-Inter Press Service, Washington, June 20, 2012, online: < <http://www.ipsnews.net/2012/06/poverty-rates-strikingly-high-among-indigenous-populations/> > (retrieved 30 April 2017); Marie Arana, “The Kids Left Behind by the Boom,” in *the New York Times*, Op-Ed, March 20, 2013, online: <<http://www.nytimes.com/2013/03/21/opinion/arana-the-kids-left-behind-by-the-boom.html>> (retrieved 30 April 2017).

<sup>336</sup> Gillette H. Hall and Harry A. Patrinos (2012), *supra* note 329 at 344; Gillette H. Hall and Harry A. Patrinos, Eds., *Indigenous Peoples, Poverty and Human Development in Latin America* (New York: Palgrave Macmillan, 2006).

and cultural fragmentation, marginalization, and discrimination.<sup>337</sup> Latin America's unjust socio-economic and other power structures have emerged out of a host of interconnected factors, including the violent and traumatic Spanish and Portuguese conquest, abusive colonial rule, the process of land concentration, and the emergence of powerful elites. The consolidation of the elites was linked to the effects of an unfair international division of labour which was established during Latin America's colonial past and reinforced by post-independence integration into the international liberal economic system as a supplier of raw materials to industrialized nations.<sup>338</sup> Furthermore, the creation and modernization of military and police institutions in the 20<sup>th</sup> century shored up oligarchic democracies that alternated in power with arbitrary dictatorships.

### **3.2.1 The Violent and Traumatic Iberian Conquest and Colonization**

The exploitation and domination of Indigenous peoples in Latin America, the dispossession of their land and the concentration of wealth, property, and land in the hands of the few began with the violent conquest and the subsequent establishment of the Spanish and Portuguese colonial system. 1492 marks the moment when the current era of globalization began and the beginning of the modern European era, whose profound effects and legacies are still felt and prevalent in almost all Indigenous nations and communities in the vast regions of the

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<sup>337</sup> Several authors have termed the elected civilian governments that emerged in Latin America in the 1980s as “nominal”, “low intensity” or “delegative” democracies. According to these authors, nominal democracies are largely cosmetic models. They manifest some of the forms associated with modern liberal democracy (e.g. voting in periodic multiparty elections and official separation of public powers), but leave historical inequalities and exclusions, and established centers of power substantially intact. Ethnic and other minorities suffer not only discrimination but murderous violence. In particular, military power continues, to varying degrees, to wield an effective veto over government decision-making after the advent of a civilian government. See Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford: Oxford University Press, 2000); Guillermo O'Donnell, *Counterpoints: Selected Essays on Authoritarianism and Democratization* (Indiana: University of Notre Dame, 1999); Barry K. Gills, Joel Rocamora and Richard Wilson, Eds., *Low Intensity Democracy: Political Power in the New World Order* (London: Pluto Press, 1993).

<sup>338</sup> Richard L. Harris and Jorge Nef, Eds., *Capital, Power, and Inequality in Latin America and the Caribbean* (Lanham, Maryland: Rowman & Littlefield Publishers, Inc.: 2008) at 1-23; Louis Lefebvre and Liisa North, Eds., *Democracy and Development in Latin America* (Toronto: CERLAC-York University, 1980).

Americas.<sup>339</sup> When the first explorers arrived in the Americas, Europe was dominated by the fever and passion for gold and money; Spain, like other European states, sought gold which had become the new mark of wealth.<sup>340</sup> What followed were massive and cruel enslavement and killings of Indigenous population in the Caribbean Islands and later in Central and South America.

The new colonized lands that produced gold and silver revolutionised markets in Europe and launched the first stages of the European modern and capitalist era. Between 1530 and 1650 alone, Spain received 181 tons of gold and 16,887 tons of silver from its colonies in the Latin America.<sup>341</sup> Peru (which at the time included Ecuador and Bolivia) and Mexico became the heartlands of the Spanish Empire, not only because of their rich mines but also because of their large Indigenous populations. *Mita*, the forced labour of the native people, was an official policy, which often meant their *de facto* enslavement. According to Bartolomé de Las Casas, Indigenous peoples “were habitually subject to the harshest and most iniquitous and brutal exploitation that humans have ever devised for fellow-humans.”<sup>342</sup> Indeed,

[T]he brutal nature of the conquest and the Spaniards' exploitation of their new lands to serve Spanish and world markets led to sudden loss of land by the native population. The conquerors reduced native populations to poor, often landless, communities working [in mines, textile mills], plantations and large estates [...] great inequalities in land distribution accompanied a power structure designed to maintain

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<sup>339</sup> Anthony Hall, *The American Empire and the Fourth World: The Bowl with One Spoon, Part One* (Montreal & Kingston: McGill-Queen's University Press, 2003) at 4; Tzvetan Todorov, *The Conquest of America: The Question of the Other* (New York: Harper & Row Publishers, 1984) at 4-5.

<sup>340</sup> Howard Zinn (2003), *supra* note 320 at 1-4.

<sup>341</sup> Celso Furtado, *Economic Development of Latin America: Historical Background and Contemporary Problems*, 2<sup>nd</sup> Ed. (Cambridge: Cambridge University Press, 1978) at 22.

<sup>342</sup> Bartolome De Las Casas, *A Short Account of the Destruction of the Indies* (London: Penguin, 1992) at 13; Lewis Hanke, “The New Laws—Another Analysis,” in John Francis Bannon, S.J. Ed., *Indian labor in the Spanish Indies: Was There another Solution?* (Boston: D.C. Heath and Company, 1966) at 58-59.

systems of land tenure and labour relation in which rural workers were tied to the large farms.<sup>343</sup>

For instance, in the Santa Barbara mercury mines located in Huancavelica in central highland Peru, most of the forced Indigenous labourers died swiftly as they worked in extremely unhealthy and unsafe conditions.<sup>344</sup> The cruel and lethal exploitation in the Potosi silver mines, located in what is now Bolivia, was similar. While Dominican friars Rodrigo de Loaysa and Domingo de Santo Tomas described it as the "accursed hill of Potosi," "a sink of iniquity" and "a mouth of Hell" consuming annually thousands of innocent and peaceful natives, the Viceroy Garcia Hurtado de Mendoza declared that the mine was the principal backbone or support of the colonial system.<sup>345</sup> The labour in the mines was so exhausting and hazardous that it led to Pneumoconiosis, described as the "first professional disease developed in America."<sup>346</sup> Some observers considered the entire colonial epoch in the region as a "vast religious and political organization for the exploitation of the mines."<sup>347</sup>

In addition to severe forced labour conditions, Indigenous populations were subjected to heavy tribute and demand for personal and domestic services, and violent oppression and repression. The Iberian colonizers and their descendants sought to control Indigenous populations as a means of generating tax revenue. In order to be able to meet their obligations, "the Indians would sell their children and their lands to the merchants. Failing to meet their

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<sup>343</sup> Jack A. Goldstone, *Revolutions: Theoretical, Comparative, and Historical Studies* (San Diego: Hartcourt Brace Javanovich Publishers, 1986) at 195.

<sup>344</sup> Henry Dobyns and Paul Doughty, *Peru: A Cultural History* (New York: Oxford University Press, 1976) at 122.

<sup>345</sup> Lewis Hanke *The Imperial City of Potosi: An Unwritten Chapter in the History of Spanish America* (The Hague: Martinus Nijhoff, 1956) at 3 and 25.

<sup>346</sup> *Ibid* at 25.

<sup>347</sup> Victor A. Belaunde, *Meditaciones Peruanas*, (Lima 1932) at 11. Quoted at Lewis Hanke, *supra* note 345 at 36.

obligations, very many died in consequence, some from torture and others from cruel imprisonment, since they were treated inhumanly and regarded as being lower than beasts.”<sup>348</sup>

European conquest and subsequent colonization meant not only the dispossession of Indigenous peoples’ lands and territories but the destruction of their economic, social, and political systems, their cultural traditions, and the extermination of much of their population. Indeed, according to Las Casas, the wickedness and suffering of the conquest and colonization of the Americas was on such a scale that “nobody will ever really learn the full extent of it until all is revealed on the Day of Judgment; it would be impossible to depict in all their ugly and horrendous detail the outrages and atrocities.”<sup>349</sup> James Anaya points out, “European encroachments frequently were accompanied by the slaughter of the children, women, and men who stood in the way. For many of the people who survived, the Europeans brought disease and slavery...resulting in human suffering and turmoil on a massive scale.”<sup>350</sup> The native population experienced a catastrophic demographic collapse without parallel in world history;<sup>351</sup> considered by Todorov as the “greatest genocide in human history.”<sup>352</sup>

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<sup>348</sup> Fray Toribio de Paredes de Benavente, “The Ten Plagues of New Spain,” in John F. Bannon, S.J., Ed., *Indian Labour in the Spanish Indies: Was There Another Solution?* (Boston: D.C. Heath and Company, 1966) 44 at 45.

<sup>349</sup> B. de Las Casas, *The Tears of the Indians: Being an Historical and True Account of the Cruel Massacres and Slaughters of Above Twenty Millions of Innocent People Committed by the Spaniards in the Islands of the West Indies, Mexico, Peru, Etc.* An Eye-witness Account written by B. de Las Casas, translated into English by John Phillips and Published in London in 1656, (Baarle-Nassau: SoMa, 1980) at 66.

<sup>350</sup> James Anaya, *Indigenous People in International Law* (New York: Oxford University Press, 2004) at 3.

<sup>351</sup> For instance, on the Hispaniola Island, where Columbus first arrived, from 1494 to 1508 over three million Indigenous Arawaks had perished from war, slavery, and the mines; thus, in 1508 there were 60,000 people left; by 1515 there were about 50,000 people; by 1550 there were 500, and by 1650 a report shows none of the Indigenous Arawaks or their descendants left on the Island. See Howard Zinn (2003), *supra* note 320 at 5-7. In the case of Peru, according to David N. Cook, Peru’s estimated native population, prior to the arrival of the Europeans, was between 12 and 16 million people (perhaps as high as 30 million); that population fell to about 1.3 million in 1570 and to only around 700,000 in 1620, a total decline of about 95 percent or perhaps more! In the case of Mexico, the most reliable studies place the pre-conquest populations, as of 1519, at around 25 million; for 1523 the figure is 16.8 million, for 1580 it is 1.9 million, and for 1605 it is 1 million. David N. Cook, *Demographic Collapse: Indian Peru, 1520-1620* (Cambridge, UK: Cambridge University Press, 1981); Peter F. Klarén, *Peru: Society and Nationhood in*

### 3.2.2 Colonialism, Race and Social Stratification

There is no doubt that the desire for material wealth and the impulse of domination motivated the Iberians' inequities and atrocities, but their actions were also conditioned by notions of racial and cultural superiority which regarded Indigenous populations as "inferior beings, halfway between men and beast."<sup>353</sup> As Orihueala and Thorp point out, considering Indigenous peoples as "inferior and less than human because they were not Christian, these [European] elites established a system of economic exploitation and repression that embedded forms of discrimination and prejudice that remain powerful to this day."<sup>354</sup> Thus, according to Juan Ginés de Sepúlveda, one of Spain's foremost renaissance Aristotelian scholars, and official chronicler of the Spanish kings Carlos V and Felipe II,

Indians in America, being without exception rude persons born with a limited understanding and therefore to be classed as *servi a natura*, ought to serve their superiors and their natural lords the Spaniards. Spaniards have an obvious right to rule over the barbarians because of their superiority. In prudence, talent, virtue, and humanity Indians are as inferior to the Spaniards as children to adults, women to men, as the wild and cruel to the most meek, as the prodigiously intemperate to the continent and temperate, and that I have almost said, as monkeys or beasts to men. How can we doubt that these people, so uncivilized, so barbaric, so contaminated with so many sins and obscenities...have been justly conquered by such an excellent, pious, and most just kings and by such a humane nation which is excellent in every kind of virtue? These inferior people require, by their own nature and in their own interest, to be placed under the authority of civilized and virtuous princes or nations, so they may learn, from the might, wisdom, and law of their

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*the Andes* (New York: Oxford University Press, 2000) at 49; Thomas E. Skidmore, et al., *Modern Latin America*, 8<sup>th</sup> ed. (New York: Oxford University Press, 2014) at 21-22.

<sup>352</sup> Tzvetan Todorov (1984), *supra* note 339 at 4-5. It is important to note the devastating effects of the diseases brought by the Iberians: smallpox, measles, typhus, plague, influenza, malaria, and yellow fever on Indigenous populations. The Euroasian sicknesses "conquered the Americas before the sword could be unsheathed...they weakened Amerindian resistance to outside domination." David N. Cook, *Born to Die: Disease and New World Conquest, 1492-1650* (New York: Cambridge University Press, 1998) at xv.

<sup>353</sup> Tzvetan Todorov (1984), *supra* note 339 at 146.

<sup>354</sup> Jose Carlos Orihueala and Rosemary Thorp, "The Political economy of managing extractives in Bolivia, Ecuador and Peru," in Anthony Bebbington (2012), *supra* note 246 at 31.

conquerors, to practice better morals, worthier customs and a more civilized way of life.<sup>355</sup>

Unlike Gines de Sepulveda, Francisco de Vitoria, one of the foremost Spanish neo-Thomist theologians and jurists of the 16<sup>th</sup> century, asserted that the Indigenous peoples belonged to the universal realm they shared with all other human beings and were bound by the *ius gentium*; yet Vitoria was emphatic in claiming that they were not of the same stature as the Spanish themselves. Indigenous social and cultural practices, Vitoria affirmed, were at variance from those required by universal norms, which were reflected in Spanish practices. In fact, Vitoria articulated a legal justification for the conquest and for taking over Indigenous peoples' lands, based on cultural differences between Spanish and native societies.<sup>356</sup> In line with Gines de Sepulveda's views, Vitoria argued that,

These barbarians are unsuited to setting up or administering a commonwealth both legitimate and ordered in human and civil terms. Hence they have neither appropriate laws nor magistrates fitted to the task. Indeed, they are unsuited even to governing their own households; hence they lack of letters, of arts and crafts (not merely liberal, but even mechanical), of systematic agriculture, of manufacture, and of many other things useful, or rather indispensable, for human use. It might therefore be argued that for their own benefit the princes of Spain might take over their administration, and set up urban officers and governors on their behalf, or even give them new masters, so long as this could be proved to be in their interest, or take charge of them as if they were simply children. There is scant difference between these barbarians and madmen; they are little or no more capable of governing themselves than madmen, or indeed than wild beasts. They feed on food no more civilized and little better than that of beasts. ...In this connexion, what was said earlier about some men being natural slaves might be relevant. All these barbarians appear to fall under this heading, and they might be governed partly as slaves.<sup>357</sup>

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<sup>355</sup> Juan Gines de Sepúlveda, *Demócrates Segundo o de las justas causas de la guerra contra los indios*, Edición crítica bilingüe, traducción castellana, introducción, notas e índices por Angel Losada (Madrid, Instituto Francisco de Vitoria, 1951) at 38-43.

<sup>356</sup> As Fitzpatrick puts it, Vitoria conceived as the benign humanist who fathered international law...provided a consummate legitimation for one of the more spectacular rapacious imperial power. See Peter Fitzpatrick, "Terminal Legality: Imperialism and the (de) Composition of Law," in Diane E. Kirkby and Catharine Coleborne, Eds., *Law, History, Colonialism: The Reach of Empire* (Manchester: Manchester University Press, 2001) at 9.

<sup>357</sup> Francisco de Vitoria, *Political Writings*, edited by A. Pagden and J. Lawrance (New York: Cambridge University Press, 1991) at 290-291.



Thus, according to Vitoria, indigenous peoples (although they met some standards of rationality sufficient to possess rights of *dominium*) could be characterized as “unfit”, barbaric, and uncivilized, because they failed to conform to the European forms of civilization.

Spanish notions of *Limpieza de Sangre* (purity or cleanliness of blood) also worked in constructing racial discrimination and stratification aiming to subjugate and control Indigenous populations and other subjugated populations such as Africans. *Limpieza de Sangre*, a manifestation of race as lineage or genealogy, had been used in the Iberian Peninsula from the mid-15th century to persecute and discriminate against “New Christians” – Jews and Muslims who had converted to Christianity but considered to still have “contaminated blood.” In the Americas, one of the effects of the *Limpieza de Sangre* was the construction of divisive and segregated worlds, the *Republica de Indios* (republic of Indians) and *Republica de Españoles* (republic of Spaniards).<sup>358</sup> The implementation of *Limpieza de Sangre* in the Americas was fuelled by the numerous rebellions organized by Indigenous peoples and African slaves and by the perceived religious heterodoxy of these populations, many of whom retained aspects of their ancestral religious systems alongside their forced avowed Catholicism.<sup>359</sup>

Based on the ideology of racial and cultural superiority (racism and ethnocentrism) entrenched in their minds, attitudes, and behaviours, the European elites established a racially hierarchical colonial system. At the top, the white Spanish sector, which included less than two percent of the sixteenth-century population, was the most powerful and prestigious; at the very

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<sup>358</sup> Nelson Manrique, “Situation de España en el momento del descubrimiento,” in *500 años despues...El Fin de la historia?* (Lima: Escuela para el Desarrollo, 1992); Nelson Manrique, “Vinieron los sarracenos...El universo mental de la conquista de America,” (*Mecanograf.*) Lima: DESCO, 1993.

<sup>359</sup> Peter Wade, “Race in Latin America,” in Deborah Poole, Ed., *A Companion to Latin American Anthropology* (Malden, MA: Blackwell Pub., 2008) at 179.

bottom, the Indigenous people, who constituted over 95 percent of the population, were subjected to exploitation and onerous taxes and other exactions.<sup>360</sup>

The hostility between races and the ideological tension and controversy of the notion of European racial and cultural superiority are embodied in the contrasting opinions and arguments of Juan Gines de Sepulveda and Bartolome de Las Casas who participated and expounded their ideas at the Valladolid Debate in 1550 on the human condition of Indigenous peoples and on the nature of the methods used to extend the Spanish empire in the Americas. The central issue at the Valladolid Debate was the justice of waging war against Indigenous peoples. Sepulveda made plain in his Democrates Treatise, despite its complex and often confusing argument, that he considered Indigenous peoples barbarous, uncivilized, unteachable, and natural slaves according to the Aristotelian concept. The Spaniards were amply justified in carrying on war against them as an indispensable preliminary to Christianizing them.<sup>361</sup> Las Casas, on the other hand, denounced the atrocities committed against Indigenous peoples by the Spaniards blinded by greed and arrogance. He acknowledged the basic equality of all human beings and considered illegitimate the subjugation of indigenous peoples and the plunder of their lands and resources. Spain and Europe, he argued, might try to evangelize in the Americas, but by example and dialogue, not by imposition, threat and exploitation.<sup>362</sup>

The Valladolid Debate is a unique historical event. For the first time, and probably the last, a colonizing nation officially convened a formal inquiry, a “jury” of jurists and theologians,

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<sup>360</sup> Thomas E. Skidmore, et al. (2014), *supra* note 351 at 23; Magnus Morner, *Race Mixture in the History of Latin America* (Boston: Little, Brown and Company, 1967) at 60.

<sup>361</sup> Juan Gines de Sepúlveda (1951), *supra* note 355.

<sup>362</sup> Bartolome de Las Casas, *In Defense of the Indians: The Defense Against the Persecutors and Slanders of the Peoples of the New World Discovered Across the Seas*, Translated and edited by Stafford Poole (DeKalb: Northern Illinois University Press, 1992).

into the justice of the methods used to extend its empire. For the first time, too, and not the last, we see an attempt to stigmatize an entire race as inferior, as born slaves according to the Aristotelian theory.<sup>363</sup> As Lewis Hanke argues, the heated and bitter debate of Sepulveda and Las Casas in 1550 produced no clear decision, nor has agreement been reached by later generation on the true meaning of their confrontation. As he asks, “Can we not see in the Valladolid Debate yet another illustration of the fact that some of the past history is also a contemporary history?”<sup>364</sup>

Although the colonial period signified a process of oppressive and violent dispossession of Indigenous peoples’ lands conditioned and reinforced by notions of racial and cultural superiority, the post-independence period, particularly the 19<sup>th</sup> century, deepened and expanded this phenomenon.

### **3.2.3 Independence and the New *Republicas Criollas*<sup>365</sup> (Creole Republics)**

As Anghie points out, the “civilizing mission” became reproduced by the post-colonial state in its relationship with minorities,<sup>366</sup> including indigenous peoples. Formal political independence from Spain and Portugal during the first quarter of the 19<sup>th</sup> century did not substantially change the social and economic inequalities that existed within the colonial system. Patterns of economic and political exploitation of indigenous peoples, the unfair system of land

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<sup>363</sup> Lewis Hanke, *All Mankind is One: A Study of the Disputation between De Las Casas and Gines de Sepulveda in 1550* (DeKalb: Northern Illinois University Press, 1974).

<sup>364</sup> Ibid at 146 and 160; Lewis Hanke, *Aristotle and the American Indians: a study in race prejudice in the modern world* (Bloomington: Indiana University Press, 1959).

<sup>365</sup> In Latin America, *Criollos* (Creoles) are referred to American-born elite of Spanish descent, and involves a presumption of cultural and physical ‘whiteness’ and or racial purity. Yet, it is a deeply ambivalent and profoundly unstable social category considering that by the nineteenth century *Criollos* were largely of mixed race. See Liliana Obregon, “Completing civilization: Creole consciousness and international law in nineteenth-century Latin America,” in Anne Orford, Ed., *International Law and Its Others* (New York: Cambridge University Press, 2006) at 248-249.

<sup>366</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) at 10.

tenure, and the economic dependency established during the Spanish colonial period were institutionalized, perpetuated, and even deepened to an extreme degree by Latin America's oligarchic elite (which included the military, the wealthy landowning creoles, and the Catholic church), supported first by British and then by North American (mainly US) capitalist investors. Indeed, independence was for the Creoles, the minority class that assumed power after the withdrawal of Spanish empire. Indigenous peoples' conditions generally remained the same, with some exceptions, and in many cases were much worse than in the past.<sup>367</sup> As Clavero points out, the nineteenth century was, after the sixteenth century, the most lethal for Indigenous peoples in the Americas. Iberian and creole's 'cultural supremacy' and outright racism were the drivers of dispossession and genocide after independence.<sup>368</sup>

The new "creole republican" states emerged as instruments to maintain and protect the hegemony and privileges of the European and creole elite, which constituted less than 8 percent of the population.<sup>369</sup> These states recognized neither the multi-cultural and multi-ethnic character of the society nor any civil and political rights of Indigenous peoples who at that time constituted about 75 percent of the population; they officially excluded Indigenous peoples from the political system and public life.<sup>370</sup>

Ethnic and racial hierarchy, during this period, became even more entrenched in the society; racism as a way of social and political domination became more pervasive than in the

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<sup>367</sup> Rodolfo Stavenhagen, "Derechos Humanos y Ciudadanías Indígenas en América Latina," in Sarah Albiez, et al., Eds., *Ethnicity, Citizenship and Belonging: Practices, Theory and Spatial Dimensions* (Madrid: Iberoamericana, 2011) at 122; Brooke Larson, *Trials of Nation Making: liberalism, race, and ethnicity in the Andes, 1810-1910* (Cambridge: Cambridge University Press, 2004).

<sup>368</sup> Bartolome Clavero, *Hay Genocidios Cotidianos?* (2011), *supra* note 1 at 107-108.

<sup>369</sup> Rodolfo Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights* (Tokyo: United Nations University Press, 1990) at 43-51.

<sup>370</sup> Rodrigo Montoya, *Al Borde del Naufragio: Democracia, Violencia y Problema Etnico en el Perú* (Madrid: Talasa Ediciones S.L., 1992) at 41.

colonial period. Old colonial racism and ethnocentrism intersected with new 19<sup>th</sup> century “scientific” doctrines of racial “types” to play a significant role in maintaining a power structure which denied political representation and economic, social, and cultural rights to the Indigenous population. Simón Bolívar, a Venezuelan creole, one of the main leaders of Latin America’s independence movement, considered Indigenous peoples “barbarians, degenerated, brutish, almost savages, without moral principles which can guide them.”<sup>371</sup> According to his view, “Indians” were not capable of developing a political project; “Indian” was incompatible with the concept of citizenship. When Bolívar became president of Peru (1824-1826), he decreed the elimination of indigenous communities and approved the private distribution of their lands between their members, specifying that land titles would be granted only to those who managed to read and write the official language, Spanish.<sup>372</sup> In fact, Bolívar’s decision enabled creoles to acquire by purchase, deceit, or force the lands of many Indigenous communities that had hitherto eluded them. Bolívar also distributed state lands among his supporters, extending the *hacienda* system into which more Indigenous peoples were incorporated as serfs.

Led by the creole elites, the new Latin American republics became peripheries within the international global economy. The present international division of labour: on the one hand, industrial, and prosperous centres (Western Europe and later U.S.), and, on the other hand, non-industrialized and marginalized peripheries, among them Latin America, began with the establishment and expansion of Spanish and Portuguese colonialism in the sixteenth and seventeenth centuries. From 1860-1880 to 1930 fundamental socio-economic structures and

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<sup>371</sup> Cecilia Mendez, “República sin Indios: La Comunidad Imaginada del Perú,” in Henrique Urbano, Ed., *Tradición y Modernidad en los Andes* (Cusco: Centro Bartolomé de Las Casas, 1992) at 17-22.

<sup>372</sup> Adolfo Figueroa, Teófilo Altamirano and Denis Sulmont, *Social Exclusion and Equality in Peru* (Geneva: ILO, 1996) at 50.

political institutions that would shape Latin America's contemporary power structure were developed. During this period, known as the initiation and expansion of (trade-based export-import) growth, Latin America became more integrated into the international economic system in which it exchanged minerals and agricultural commodities for the manufactured goods of Europe and eventually North America. The new international economic system fastened a new dependency on Latin America, with first Great Britain and later the United States replacing Spain in the dominant role.<sup>373</sup> This new dependency and the events at the industrialized centres would be decisive and would sharply shape and affect Latin America's economic "development."

The meaning of the term "development" is a subject of debate beyond the scope of this thesis. However, this thesis concurs with Escobar and Esteva, who argue that in the aftermath of World War II a new global economic system emerged in which the essential trait of the Third World was its poverty and the solution was economic growth and "development." Thus, "development" discourse and practice eventually became a mechanism of control and interventions in the Third World, influencing both social and economic realities.<sup>374</sup> As Bebbington points out,

Many academics, especially social scientists, have seen a range of sins pass for development. At different times they have seen "development" serve as a vehicle for the further domination of Amerindian cultures by processes of modernization, of Latin America by the global capitalist North, of women by men, of environment by political

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<sup>373</sup> Thomas E. Skidmore, et al. (2014), *supra* note 351 at 42-57.

<sup>374</sup> Gustavo Esteva, Salvatore Babones, and Philipp Babcicky, *The Future of Global Development: A Radical Manifesto* (Bristol, UK: Policy Press, 2013); Escobar, *Encountering Development: the Making and Unmaking of the Third World* (New Jersey: Princeton University Press, 1995); Gilbert Rist, *The History of Development: From Western Origins to Global Faith* (London, UK: Zed Books, 2014).

economy and so on. Even if development is supposed to imply betterment, progress and expansion, it has in fact meant marginalization, exclusion and disempowerment.<sup>375</sup>

In order to question the assumptions behind the concept of “development” and because of the ambiguous dichotomy that the terms “development / underdevelopment” can imply (“modern / backwards,” “the West / the rest,” “us / them”, “civilized / uncivilized”), this thesis has chosen to place the word in quotation marks throughout the text.

Due to the European and North-American countries’ demand for minerals and metals, by the end of nineteenth century, the presence of mining became crucial in the political economy of Latin America, particularly in the Andean region (Peru and Bolivia). In the case of Peru, controlled by U.S. companies, above all Cerro de Pasco Copper Corporation, the mining industry allowed a fruitful subordinate role to Peruvian magnates; from the early 1900s, it also built a friendly legal infrastructure and commercial framework.<sup>376</sup> This economic pattern supported an underlying laissez-faire and conservative political economy: the Peruvian business elite needed the state only to impose order and pass laws favourable to their foreign partners, but did not want an interventionist state.<sup>377</sup> The prominence of extractive industries and the pattern of its development played a significant role in shaping weak and ineffective institutions and states, as well as entrenching deep, racial inequity in the region. As the growing European and North American demand for agricultural products and minerals raised the value of land, the great landowners launched assaults on the surviving native community lands. Thus, thousands of

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<sup>375</sup> A. Bebbington, “Geographies of Development in Latin America?” in (2002) 27:1 *Conference of Latin Americanist Geographers Yearbook* 105, at 130.

<sup>376</sup> Juan Carlos Orihuela and Rosemary Thorp (2012), *supra* note 354 at 32.

<sup>377</sup> *Ibid.*

indigenous communities were brutally dispossessed of their lands and forced to live on marginal lands or to work as seasonal cheap labourers on the large export-focused estates.<sup>378</sup>

As the Indigenous communities resisted and organized rebellions against this process of brutal dispossession, Latin American elites began to depend on military forces to suppress them. By the late 19th century, the state came to rely more and more on coercion to maintain the stability and expansion of the new economic and political order. Hence, by the turn of the 20th century, relatively modern military institutions were created to control Indigenous and peasant upheavals and to guarantee the dominance of landlords and oligarchies allied to foreign capital (mostly from the U.S.), which had taken over key sectors of the economy, especially in mining and oil. Latin America's peripheral economy was deeply affected by the succession of two world wars and the Great Depression of 1929; these events generated great incentives for the development of infrastructures needed to diversify their economy and overcome their dependency on the export of primary products. The whole region became involved in a new "development strategy", Import-Substitution Industrialization (ISI). This new model of "development" was introduced in Latin America under the protection of the oligarchic states and evolved under the conditions of the international economic order established at Bretton Woods in 1944.<sup>379</sup>

The ISI policies deepened Latin America's dependency on the international economy in general and the U.S. in particular. Since ISI took place in a highly non-egalitarian, exclusionary,

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<sup>378</sup> *Idid* at 33-34; See also Rosemary Thorp, et al., *The Developmental Challenges of Mining and Oil: Lessons from Africa and Latin America* (New York: Palgrave Macmillan, 2012).

<sup>379</sup> James Petras and Henry Veltmeyer, *Social Movements in Latin America: Neoliberalism and Popular Resistance*, (New York: Palgrave Macmillan, 2011) at 11; Henry Veltmeyer, et al., *Neoliberalism and Class Conflict in Latin America: A Comparative Perspective on the Political Economy of Structural Adjustment* (Houndmills, Hampshire: Macmillan Press Ltd., 1997) at 9-13.



and racist context, the already highly inequitable income distribution was reinforced. Far from being self-sustaining, economic growth was artificial and induced by external factors.<sup>380</sup> In the Andean countries, the push to diversity was radically weakened by the relatively early recovery of primary exports (tin, copper, silver, bananas, cacao, sugar, oil), inhibiting any possible incentive to diversify their economies.<sup>381</sup> By the late 1960s, the stagnation of ISI, growing inflation and unemployment, and the emergence of political violence and stronger social movements in both urban and rural areas gave rise, in many Latin American countries, to “bureaucratic authoritarian regimes” led by the military.<sup>382</sup> Ten years later, however, under the weight of the foreign debt crisis, persistent economic crisis, increasing poverty and unemployment, and social and political mobilization, military leaders decided to give up and let civilian governments take over what seemed to be an “unsolvable problem.”<sup>383</sup>

By the early 1980s, as primary commodities’ prices dropped and U.S. interest rates increased to finance the U.S. chronic trade deficit, Latin American governments began announcing they could not service their debt. All countries in the region were redlined by the banks, capital flows were abruptly reversed and debt burdens became unmanageable.<sup>384</sup> In order to deal with the debt crisis, and as a condition for obtaining more loans, the major international

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<sup>380</sup> Xavier Gorostiaga and P. Marchetti, “The Central American Economy: Conflict and Crisis,” in Nora Hamilton, et al., Eds., *Crisis in Central America: Regional Dynamics and U.S. Policy in the 1980s* (Boulder: Westview Press, 1988) 119, at 122.

<sup>381</sup> Jose Carlos Orihuela and Rosemary Thorp (2012), *supra* note 354 at 36.

<sup>382</sup> Guillermo O’Donnell, “Tensions in the Bureaucratic-Authoritarian State and the Question of Democracy,” in David Collier, Ed., *The New Authoritarianism in Latin America* (Princeton: Princeton University Press, 1979) at 285-318.

<sup>383</sup> Thomas E. Skidmore (2014), *supra* note 351 at 59.

<sup>384</sup> Joseph E. Stiglitz argues that the debt would have been manageable if the Reagan administration had not purposely hiked up interest rates. Joseph E. Stiglitz, “Whither reform? Towards a new agenda for Latin America,” *CEPAL Review*, August 2003.

banks, neo-liberal economists and functionaries of both U.S. Treasury Department and IFIs decided on a shift in paradigm towards a new “development” model for all of Latin America.

Thus, the Washington Consensus reforms, based on trade, capital market and financial sector liberalization, and a diminished role for the state, began to be implemented throughout the region – and in other continents as well -- in the 1980s and 1990s. Stabilization programmes under the auspices of the IMF and structural adjustment programmes (SAPs) managed by the World Bank were implemented. In the Andean region, the shift in the “development” paradigm was reinforced by the primary product boom, particularly mineral and hydrocarbons, and the return (yet again) to primary export-led growth; oil became a boom product starting in 1973 and from the mid-1990s, minerals also began to boom.<sup>385</sup> The application of Washington Consensus reforms was justified by the understanding of the IFIs and principal donor nations that Latin America’s volatility, crisis, and poverty arise from purely endogenous factors. Consequently, the new policies were necessary to reform backward and “developing” countries. Yet, Stiglitz begs to differ; he argues that “*macroeconomic events* originating outside the region had much to do with its volatility, in particular the high interest rates in the early 1980s and the changing sentiment of short term capital in the mid-1990s.”<sup>386</sup> Furthermore, he points out that the Washington Consensus reforms made Latin American countries more vulnerable to these outside shocks and contributed in other ways to their economic and financial failure.<sup>387</sup> The implementation of SAPs in Latin America has had severe negative effects on the economy and

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<sup>385</sup> Jose Carlos Orihueala and Rosemary Thorp (2012), *supra* note 354 at 37.

<sup>386</sup> Joseph E. Stiglitz, “Whither reform? Towards a new agenda for Latin America,” *CEPAL Review*, August 2003 at 19.

<sup>387</sup> *Ibid.*

consequently on the social welfare of the majority of Latin Americans, particularly Indigenous peoples.

Towards the end of the 1990s, extensive criticism of the SAPs and opposition from civil society and social movements, led to the inclusion of provisions and complementary policies in the SAPs that could reduce poverty, and to the expansion of the IFI agenda to include a variety of issues that fell within the general framework of “good governance.”<sup>388</sup> This brought a shift in the lending practices of the IMF and the World Bank from “structural adjustment” to “poverty reduction;” the later, according to the World Bank, recognizes that “complementary policies, particularly the provision of an effective social safety net—are necessary to minimize adjustment costs and to help make trade reform work effectively for the poor.”<sup>389</sup> The new Poverty Reduction Strategy Papers (PRSPs), which replaced the SAPs, established a new aid conditionality and disciplinary framework for Third World states’ engagement with the global economy and the international law which sustains it.

As PRSPs are still primarily achieved through economic growth which requires macroeconomic stability, privatization and liberalization, this new strategy and framework has become entrenched in traditional neo liberal economic policy prescriptions.<sup>390</sup> Thus, this new strategy is fundamentally a “Washington Consensus *redux*,” that has still an ideological focus on building market-oriented nations without much attention to the specific needs of recipient

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<sup>388</sup> Julio Faundez and Celine Tan, Eds., *International Law, Economic Globalization and Developing Countries* (Cheltenham: Edward Elgar, 2010).

<sup>389</sup> Bernard Hoekman, at al., “Trade Policy,” in Jeni Klugman, Ed., *A Sourcebook for Poverty Reduction Strategies, Vol. 2: Macroeconomic and Sectoral Approaches* (Washington, DC: The World Bank, 2002), at 33.

<sup>390</sup> Joe Wills, *Contesting World Order: Socioeconomic Rights and Global Justice Movements* (Cambridge: Cambridge University Press, 2017).

countries;<sup>391</sup> and which still creates and sustains an unfair distributions of benefits, marginalizing the public interest and citizens and privileging ‘private clubs’, particularly, MNCs.<sup>392</sup> As Dezalay and Garth argue, putting a “human face” on market hegemony, this new strategy is aimed at “making globalization and its violence more human and legitimate and trying to stem or control the social violence that threatens the position of the groups that have gained in relation to globalization.”<sup>393</sup> And in this manner, the antiglobalization discourse and methods of resistance against the injustices of the international order have been appropriated to undermine such opposition through notions of ‘broad based participation of civil society’, ‘ownership’, ‘partnership’ and ‘poverty reduction.’<sup>394</sup>

### 3.3 Globalization, Prominent Role of MNCs and Neo-Liberal Multiculturalism

In a policy research report entitled “*Globalization, growth and poverty*” prepared by the World Bank, globalization is referred to the ongoing process of global economic integration, and its timeline is divided into three main periods, suggestively called “waves.”<sup>395</sup> According to the report, the first wave of globalization is placed in the 1870 – 1914 period and is characterized by the expansion of international trade, encouraged by the rapid development of transportation

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<sup>391</sup> Mark S. Ellis, “The World Bank: Fighting Poverty – Ideology versus Accountability,” in Krista Nadakavukaren Schefer, Ed., *Poverty and the International Economic Legal System: duties to the world’s poor* (Cambridge: Cambridge University Press, 2013), at 304; Tor Krever, “The Legal Turn in Late Development Theory: The Rule of Law and the World Bank’s Development Model,” (2011) 52 *Harvard International Law Journal* 287; Nicolas M. Perrone, “The International Investment Regime after the Global Crisis of Neoliberalism: Rupture or Continuity?” (2016) 23:2 *Indiana Journal of Global Legal Studies* 603.

<sup>392</sup> Friedrich Kratochwil, “Legalism and the ‘Dark’ Side of Global Governance,” in Rain Liivoja and Jarna Petman, Eds., *International Law-making: Essays in Honour of Jan Klabbers* (New York: Routledge, 2014).

<sup>393</sup> Y. Dezalay and B. G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago: The University of Chicago Press, 2002), at 186, 197.

<sup>394</sup> Celine Tan, *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (London: Routledge, 2011); Celine Tan, “The New Biopower: Poverty Reduction Strategy Papers and the Obfuscation of International Collective Responsibility,” (2011) 32:6 *Third World Quarterly* 1039–1056.

<sup>395</sup> World Bank Policy Research Report, *Globalization, Growth and Poverty: Building an Inclusive World Economy*, Washington D.C.: the International Bank for Reconstruction and Development / the World Bank, 2002.

methods. The second wave took place in the 1950-1980 period and is characterized by the liberalization of international trade under the General Agreement on Tariffs and Trade (GATT) influence. In this second wave, the states with powerful economies achieved a degree of development without precedent; the Organisation of Economic Co-operation and Development (OECD) economies surged ahead with unprecedented growth rates. The amount of their exports became larger and larger and their transnational companies achieved a huge expansion (some of them created branches in more than twenty countries). At the opposite pole developing countries were focused on the exports of the basic products and did not have the opportunity to benefit from the capital flows. If in 1870 - 1914 the global economy was an option, in 1950 - 1980 period it became the only option. The third wave of globalization, starting around 1980 and continuing until the present day, has been stimulated by technological advances in transport and communications technologies and by the choice of large developing countries to improve their investment climates and to open up to foreign trade and investment. This period is often called by the World Bank report as "economy without borders" because modern technology increases the speed of long distance financial trades. The World Trade Organization (WTO), instituted in January 1995 as the successor of GATT became the only international organization with a mandate to establish the legal basis for trade between countries. The main goal of this system, points out the report, is to achieve maximum liberty for the commercial flows without undesirable secondary effects.<sup>396</sup>

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<sup>396</sup> *Ibid.*

### 3.3.1 Globalization, Prominent Role of IFIs and Increasing Power of MNCs

Since the 1980s there has been a strong impulse towards global economic integration, which has been made possible by the progressive dismantling of barriers to trade and capital mobility. This has taken place alongside fundamental technological advances and the steadily declining cost of transportation, information technology and communications. In line with the global movement towards a free market system supported by multilateral institutions such as the World Bank, the IMF, and the World Trade Organization, the influence of MNCs have increased tremendously.<sup>397</sup>

As several authors argue, although economic globalization or neoliberalism claims to be value-neutral, it is closely linked to two non-neutral trends. First, respect for the free market has been introduced as a value that is capable of trumping other values such as economic, social, and cultural rights. Second, the means of globalization have acquired the status of values.<sup>398</sup> Those means/values include: privatization of as many functions as possible; deregulation, particularly of private power, at both national and international levels; reliance upon the free market as the most efficient and appropriate value-allocating mechanism; minimal government intervention except in relation to law and order functions narrowly defined; and minimal international regulation except in relation to the “new” international agenda items such as bank failure and securities fraud, ensuring access to external markets, stemming international migration, and terrorism.<sup>399</sup> Further, neoliberal globalization has brought two fundamental developments. First,

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<sup>397</sup> Janet Dine, *Companies, International Trade and Human Rights* (Cambridge: Cambridge University Press, 2005).

<sup>398</sup> Jan Aart Scholte, “*The Sources of Neoliberal Globalization*,” United Nations Research Institute for Social Development (UNRISD) Programme Paper No. 8, October 2005; David Harvey, *A Brief History of Neoliberalism* (New York: Oxford University Press, 2005); Philip G. Alston, “the Myopia of the Handmaidens: International Lawyers and Globalization,” (1997) 3 *European Journal of International Law* 435, 438-444.

<sup>399</sup> Philip G. Alston (1997), *supra* note 398 at 438-444.

the rapidly increasing power of MNCs and international financial institutions, which already play a decisive role in relation to a wide range of policy decisions at the national and international level. Second, the restructuring of multilateral institutions such as the United Nations that is being directed and pursued by the U.S. and Western European countries' political interests.<sup>400</sup> Currently, deep structures and powerful interests support a continuation of "neoliberal globalization-by marketization."<sup>401</sup>

In this context MNCs have emerged as the principal vehicle for the international movement of capital. During the 1990s, the international production of MNCs expanded tremendously because of Foreign Direct Investment (FDI) flows.<sup>402</sup> As investment and trade are inextricably intertwined, MNCs are involved in 80 percent of the global trade. But, it is important to note, only a very small fraction of the universe of firms in most economies engages in international trade, and trading activity tends to be highly concentrated. In the European Union, the top 10 per cent of exporting firms typically accounts for 70 to 80 per cent of export volumes, while this figure rises to 96 per cent of total exports for the United States, where about 2,200 firms (the top 1 per cent of exporters, most of which are MNC parent companies or foreign affiliates) account for more than 80 per cent of total trade.<sup>403</sup> Mining and petroleum companies,

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<sup>400</sup> *Ibid.*

<sup>401</sup> Jan Aart Scholte (2005), *supra* note 398; Dan Danielsen, "Corporate Power and Instrumental States: Toward A Critical Reassessment of the Role of Firms, States, and Regulation in Global Governance," in Barbara Stark, Ed., *International Law and Its Discontents: Confronting Crisis* (New York: Cambridge University Press, 2015) at 171.

<sup>402</sup> United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2008, TNCs and the Infrastructure Challenge*, Geneva, United Nations, 2008; UNCTAD, *World Investment Report 2013, Global Value Chain: Investment and Trade for Development*, Geneva, United Nations, 2013.

<sup>403</sup> UNCTAD, *World Investment Report 2013*, Geneva, United Nations, 2013. In fact, the economic power of some TNCs surpasses the power of certain nation-states. TNCs account for 51 of the 100 largest economic entities in the world, and the top 200 TNCs had a combined revenue in 2000 greater than the combined GDPs of all States excluding those of the top ten countries. Furthermore, the revenues of just five of the largest TNCs are more than double the combined GDP of the poorest 100 countries. See Janet Dine (2005), *supra* note 397 at 10, 11, 47; Peter

such as Royal Dutch Shell, Exxon Mobil Corporation, British Petroleum, Total, Chevron, Glencore-Xstrata, Anglo American, BHP Billiton, Barrick Gold, and China National Offshore Oil Corp are among the world's top 100 non-financial MNCs.<sup>404</sup>

MNCs are not only economically powerful, with considerable leverage over communities and countries, particularly “developing” countries, but they have “the mobility and capacity to evade national laws and enforcement, because they can relocate or use their political and economic clout to pressure governments to ignore corporate abuses.”<sup>405</sup>

While economic globalization has greatly facilitated the growth of the *de facto* power of MNCs, it has limited government obligations and prerogatives to respect and protect the well-being and human rights of all peoples, and particularly, to enforce environmental regulations and human rights norms against powerful private actors, including corporations.<sup>406</sup> For instance, a key provision in many multilateral trade/commercial and investment agreements -- such as NAFTA, Bilateral Trade Agreements (USA – Colombia, USA-Peru, Canada-Colombia, Canada-Peru, etc.), and lately, the Trans Pacific Partnership Trade Agreement—is the right of

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Utting, ‘Business Responsibility for Sustainable Development,’ United Nations Research Institute for Social Development, UNRISD, Geneva, 2000.

<sup>404</sup> UNCTAD, *World Investment Report 2014: Investing in the SDGs: An Action Plan*, Geneva, 2014, at Annex Table 28 (the world's top 100 non-financial TNCs, ranked by foreign assets) available on the UNCTAD website; UNCTAD, *World Investment Report 2008: TNCs and the Infrastructure Challenge*, Geneva, 2008.

<sup>405</sup> David Weissbrodt, Keynote Address: International Standard-Setting on the Human Rights Responsibilities of Businesses, (2008) 26 *Berkeley Journal of International Law* 373, at 375; Dan Danielsen, “How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance,” (2005) 46 *Harvard International Law Review* 412.

<sup>406</sup> Saskia Sassen, “De-Nationalized State Agendas and Privatized Norm-Making,” in Karl-Heinz Ladeur, Ed., *Public Governance in the Age of Globalization* (Aldershot, Hants, England: Ashgate, 2004) at 51–67; Susan Strange, *The retreat of the state: the diffusion of power in the world economy* (Cambridge: Cambridge University Press, 1996) at 16-48; Joseph E. Stiglitz, *Making Globalization Work* (New York: W.W. Norton & Co., 2006).



corporations to take legal action against governments when their public policies affect those corporations' profit opportunities.<sup>407</sup>

In line with neoliberal market oriented economic policies and Washington Consensus reforms, mining, oil and land legislations have been substantially changed in almost all Latin American countries in order to establish clear guidelines for fostering corporate private investment. With the involvement and support of the World Bank and government donor agencies (e.g. the former Canadian International Development Agency, CIDA)<sup>408</sup>, and business think-tanks, new laws governing mining, oil and gas were enacted in order to facilitate the global expansion of mining/oil exploration and exploitation by MNCs.<sup>409</sup> Whereas most previous Latin American mining/oil legislation reserved the right of exploration and exploitation either exclusively or partially for the state, the new legislation opens the mining and energy sector to foreign investment and ownership, reduces state profits to pitiful royalties (between 0.4 to 3 percent), lifts restrictions and taxes on the import of equipment, and does not require profits to

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<sup>407</sup> Thomas Mc Donagh, “*Unfair, Unsustainable and Under the Radar: How Corporations Use Global Investment Rules to Undermine a Sustainable Future*,” Report Prepared for the Democracy Centre, San Francisco CA, 2013, online: <[http://democracyctr.org/dc\\_old/wp-content/uploads/2013/05/Under\\_The\\_Radar\\_English\\_Final.pdf](http://democracyctr.org/dc_old/wp-content/uploads/2013/05/Under_The_Radar_English_Final.pdf)> (retrieved 30 April 2017).

<sup>408</sup> Canada has provided technical assistance to support mining codes reforms directly or indirectly—through CIDA and the World Bank—in Colombia, Ecuador, Honduras, Guatemala, Peru, as well as in several African countries. In 2013, Canadian federal government budget folded CIDA into its foreign affairs and since then there has been more and more alignment of Canada's commercial interests, foreign policy and the international development agenda. Working Group on Mining and Human Rights in Latin America, “The impact of Canadian Mining in Latin America and Canada's Responsibility,” *Report submitted to the Inter-American Commission on Human Rights*, Lima, April 2014; Jennifer Moore and Teresa Velasquez, “Sovereignty negotiated: anti-mining movements, the State and multinational mining companies under Correa's ‘21st Century Socialism,’” in Anthony Bebbington, Ed. (2012), *supra* note 246 at 112; Canadian Network on Corporate Accountability, “*Dirty Business, Dirty Practices: How the Federal Government Supports Canadian Mining, Oil and Gas Companies Abroad*,” Ottawa, May 2007, online: <<http://www.halifaxinitiative.org/sites/halifaxinitiative.org/files/DirtyPractices.pdf>> (retrieved 30 April 2017).

<sup>409</sup> World Bank Group, *Mining Reform and the World Bank: Providing a Policy Framework for Development* (Washington, DC: World Bank, 2003) at 1-2; Chris Arsenault, “Colombia: Foreign Firms Cash in on Generous Mining Code,” Inter Press Service, Ottawa, 22 October 2007, online: <<http://www.ipsnews.net/2007/10/colombia-foreign-firms-cash-in-on-generous-mining-code/>> (retrieved 30 April 2017).

remain in the host country.<sup>410</sup> In the case of Colombia, for instance, while under the 1994 Mining Code royalties were set at a minimum of 10 percent for mineral exports above 3 million tonnes per year, and a minimum of 5 percent for exports below 3 million tonnes, the 2001 Mining Code (Article 227) reduced the tax royalties to 0.4 percent, regardless of how much material is extracted.<sup>411</sup> Furthermore, most of the mining legislation facilitates forced expropriation and involuntary resettlement and does not contemplate consultation with affected Indigenous peoples and communities.

This market oriented legal framework and the remarkable boom in mineral and hydrocarbons prices generated an enormous expansion of multinational mining, oil and gas corporations in the region. Indeed, the region's share of total global mining investment rose from 12 percent to 33 percent.<sup>412</sup> While between 1990 and 1997 global investment in mining exploration increased 90 percent, in Latin America it grew by 400 percent, and in Peru by 2000 percent.<sup>413</sup> According to a report by the Metals Economic Group, over the past decade, mining exploration investment in Latin America has more than doubled, even after experiencing a sharp drop in 2009; the region is now the primary destination for mining exploration investment in the

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<sup>410</sup> Jose De Echave, "Mining and Communities in Peru: Constructing a Framework for Decision-Making," in Liisa North, Timothy Clark and Viviana Patroni, Eds., *Community Rights and Corporate Responsibility: Canadian Mining and Oil Companies in Latin America* (Toronto: Between the Lines: 2006) at 17.

<sup>411</sup> The drafting process of Colombia's 2001 Mining Code began in 1997, when the Canadian International Development Agency (CIDA) -- the international assistance arm of the Canadian government -- partnered with Martinez Córdoba and Associates, a Colombian law firm representing several multinational companies, and CERI, the Canadian Energy Research Institute, an industry think-tank based at the University of Calgary, to rewrite a new Code. Once the new code had been drafted by CIDA, CERI and the Colombian corporate law firm, it was submitted to Colombia's Department of Mines and Energy (UPME). The code became law in August 2001. Chris Arsenault (2007), *supra* note 409.

<sup>412</sup> Jose De Echave, "Mining in Peru: between the transformation of conflicts and the programmatic challenge," Presentation to the seminar on Territory, Conflicts and Development, the University of Manchester, October 22, 2007, online: < <http://www.seed.manchester.ac.uk/andes/seminars/> > (retrieved 30 April 2017).

<sup>413</sup> World Bank, "Wealth and sustainability: the environmental and social dimensions of the mining sector in Peru," Vol. 2, Main Report (Washington, DC: World Bank, 2005), online: <<http://documents.worldbank.org/curated/en/234531468776740743/Main-report>> (retrieved 30 April 2017).

world, with 25 percent of total global investment going to Chile, Peru, Brazil, Colombia, Mexico and Argentina.<sup>414</sup>

American, European and Canadian mining companies have become principal players in this expansion. Latin America is the single most important destination for Canadian mining capital investment; from over \$60 billion invested in “developing” countries, about \$41 billion was invested in the region.<sup>415</sup> While before 1990 there was virtually no Canadian mining investment in Peru, by 2000 there were sixty Canadian companies active in the country.<sup>416</sup> It is important to note that the rise of Brazil, Russia, India, China and South Africa (BRICS) as global economic powers has also resulted in the expansion and influence of Brazil’s and China’s MNCs in the mining, oil and gas industry.<sup>417</sup>

The rise of mineral, oil and gas investment and expansion of MNCs has been accompanied by the increase of concessions on Indigenous peoples’ lands. In the case of Peru, whereas before 1992, around 4 million hectares were slated for mining exploration and exploitation, by 2002, this had increased to 7 million. By 2007, it increased to 13.2 million hectares, and by 2012 the total area concessioned for mining stretched about 26 million hectares, which has left about 60 percent of Peru’s Indigenous communities affected in one way or

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<sup>414</sup> Metals Economics Groups Special Report, *World Exploration Trends*, May 2012; MINING.com Editor, Latin American mining investment boom continues unabated, May 16, 2012, online: <<http://www.mining.com/latin-american-mining-investment-boom-continues-unabated/>> (retrieved 30 April 2017).

<sup>415</sup> *Ibid.*

<sup>416</sup> Jose De Echave, Mining and Communities in Peru: Constructing a Framework for Decision-Making, in Lissa North, T. Clark, and V. Patroni, Eds. (2006), *supra* note 410 at 17.

<sup>417</sup> The emergence of BRICS has indeed intensified the competition for access to land, natural resources and food in Latin America, which have had impact in the pattern of capital accumulation and commodification of land. For instance, since 2000 China and Latin America trade relationships have grown dramatically. In 2000 annual trade between China and the region was \$ 12.6 billion; by 2006 it surpassed \$ 70 billion. And countries such as Peru have become principal suppliers of minerals and timber. Mario Queiroz de Monteiro Jales, et al., “*Agriculture in Brazil and China: Challenges and Opportunities*,” Inter- American Development Bank, Integration and Regional Programs Department, Occasional Paper 44 (Buenos Aires: IDB-INTAL, 2006).

another.<sup>418</sup> A similar phenomenon has occurred with the oil and gas concessions in the region. During the last decade, vast strips of lands of the western Amazon in Colombia, Ecuador, Peru, Bolivia and Brazil have been opened up for oil and gas exploration; about 35 transnational oil and gas companies are competing for the contracts.<sup>419</sup> In Peru and Ecuador, blocks or regions designated for oil and gas projects already cover more than two thirds of the Amazon.<sup>420</sup> While in Ecuador, the government has zoned 65 percent of the Amazon for oil activities, the most critical situation is unfolding in the Peruvian Amazon basin where, between 2004 and 2008, the extension of concessions has increased from 14 percent to 75 percent, which means that three quarters of Peru's Amazon has been concessioned out to gas and oil corporations.<sup>421</sup> Many of the planned exploration and extraction projects are located on Indigenous peoples' lands.<sup>422</sup>

The massive influx of TNCs' mining investment to the region has also been accompanied by a dramatic rise in conflict and violence around large-scale mining and oil/gas operations and pervasive violations of Indigenous people's rights. For instance, Peru's Ombudsman's Office (*Defensoria del Pueblo*) in January 2017 registered about 144 conflicts around mining and oil/gas operations spread across the country,<sup>423</sup> compared to the 125 such conflicts registered in

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<sup>418</sup> Carlos Monge, "Entre Rio y Rio: El apogeo y la crisis del extractivismo neoliberal y los retos del postextractivismo en el Peru," in Alejandra Alayza and Eduardo Gudynas, Eds., *Transiciones y Alternativas al Extractivismo en la Region Andina* (Lima: Centro Peruano de Estudios Sociales, 2012) at 75; Anthony Bebbington, "Extractive industries and stunted states: conflict, responsibility and institutional change in the Andes," in K. Ravi Raman and Ronnie D. Lipschutz, Eds. (2010), *supra* note 144 at 97.

<sup>419</sup> Matt Finan, et al., "Oil and Gas Projects in Western Amazon: Threats to Wilderness, Biodiversity and Indigenous Peoples," *Plos One*, Online Scientific Journal, August 13, 2008, online: <<http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0002932>> (retrieved 30 April 2017).

<sup>420</sup> *Ibid.*

<sup>421</sup> Anthony Bebbington, "Extractive industries and stunted states" (2010), *supra* note 418; Matt Finan and Marti Orta-Martinez, "A Second hydrocarbon boom threatens the Peruvian Amazon: trends, projections, and policy implications," (2010) 5: 1 *Environmental Research Letters* 1.

<sup>422</sup> Matt Finan, et al. (2008), *supra* note 419.

<sup>423</sup> Defensoria Del Pueblo, "155<sup>th</sup> Report on Social Conflicts," Lima, January 2017, online: <<http://www.defensoria.gob.pe/modules/Downloads/conflictos/2017/Reporte-Mensual-de-Conflictos-Sociales-N-155--Enero-2017.pdf>> (retrieved 30 April 2017).

July 2009 and 70 registered in December 2008.<sup>424</sup> International and national studies have documented the increasing deprivation and dispossession of Indigenous peoples' lands and homes, as well as the devastation of their lives, land and environment by pervasive environmental hazards and pollution produced by mining, oil, and gas exploration and exploitation.<sup>425</sup> As Indigenous peoples have risen up against these infringements, they have been persecuted, criminalized and even murdered.<sup>426</sup>

### 3.3.2 Neoliberal Multiculturalism

Within the context of the globalization process discussed above, since the 1980s Indigenous peoples have emerged as a relevant political actors and made various socio-economic, political and cultural claims on Latin American States.<sup>427</sup> Key demands such as control over their lands, territories and resources, and political participation and recognition of autonomy as an expression of their right to self-determination as peoples have been articulated by Indigenous movements. In respond to these claims, States have reformed their constitutional and legal frameworks granting constitutional guarantees and rights.<sup>428</sup>

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<sup>424</sup> Defensoria Del Pueblo, "65<sup>nd</sup> Report on Social Conflicts," Lima, 31 July 2009, online:

<<http://www.defensoria.gob.pe/modules/Downloads/conflictos/2009/reporte-65.pdf>> (retrieved 30 April 2017).

<sup>425</sup> UN Special Rapporteur on the Rights of Indigenous Peoples, *Extractive industries and Indigenous Peoples*, July 2013, A/HRC/24/41; UN Special Rapporteur on the Rights of Indigenous Peoples, *Extractive industries operating within or near indigenous territories*, July 2011, A/HRC/18/35; Andy Whitmore, Ed., *Pitfalls and Pipelines: Indigenous Peoples and Extractive Industries* (Philippines: Tebtebba Foundation and IWGIA, 2012).

<sup>426</sup> Inter-American Commission on Human Rights, *Criminalization of the Work of Human Rights Defenders*, Washington, D.C., 31 December 2015; Jennifer Moore, "In the National Interest? Criminalization of Land and Environment Defenders in the Americas," Full Discussion Paper, Mining Watch Canada and ICLMG, Ottawa, August 2015; Inter-American Commission on Human Rights, *Second report on the situation of human rights defenders*, Washington, D.C., 31 December 2011, D.78.

<sup>427</sup> Donna Lee Van Cott, *From Movements to Parties in Latin America: the evolution of ethnic politics* (New York: Cambridge University Press, 2005); Deborah Yashar, *Contesting Citizenship in Latin America: the rise of Indigenous movements and the postliberal challenge* (New York: Cambridge University Press, 2005); Willem Assies, Gemma van der Haar, Andre J. Hoekema, Eds., *The Challenge of Diversity: Indigenous peoples and reform of the State in Latin America* (Amsterdam: Thela-Thesis, 1999).

<sup>428</sup> Among the countries that made constitutional reforms to include Indigenous claims are: Panama (1971), Guatemala (1985), Nicaragua (1986), Brazil (1988), Colombia (1991), Mexico (1992 and 2001), Paraguay (1992),

Thus, some constitutions have recognised the multicultural, pluriethnic, intercultural and/or plurinational nature of their States and societies: Colombia (1991), Peru (1993), Bolivia (1994 and 2009), Ecuador (1998 and 2008), Mexico (1992 and 2001). Customary law, within both State jurisdiction and Indigenous jurisdiction, has been recognized by Colombia, Ecuador, Bolivia, Peru, Paraguay and Mexico. Furthermore, rights to land, territories and natural resources have been recognized in the constitutions of Colombia, Ecuador, Bolivia, Brazil, Argentina, Paraguay, Peru, Venezuela and Mexico. While most of these constitutions only provide protection to Indigenous property owners – communal or private—over their lands, some of them (Ecuador, Bolivia, Colombia, Nicaragua, Panama, Brazil), acknowledge Indigenous peoples’ rights to the protection and demarcation of their land and territories, as well as rights to natural resources existing within their lands, particularly the right to consultation and participation in benefits.<sup>429</sup>

Yet, observers such as Bartolome Clavero and Rodolfo Stavenhagen have rightly pointed out the serious implementation gap between the proclamation of constitutional rights and the reality.<sup>430</sup> Further, in many Latin American States – if not in all— the constitutionally recognized rights of Indigenous peoples are limited or subordinated to the interests of third

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Peru (1993), Argentina (1994), Bolivia (1994 and 2009), Ecuador (1994, 1998 and 2008) and Venezuela (1999). See Jose Aylwin, “*Globalization and Indigenous Peoples’ Rights: An analysis from a Latin American perspective*,” in *Cahiers DIALOG*, No. 2008-01, Montreal 2008.

<sup>429</sup> *Ibid.*

<sup>430</sup> Bartolome Clavero, “Derecho y Cultura: el derecho humano a la cultura propia,” in *Programa de Cooperación sobre Derechos Humanos Mexico-Comision Europea*, Memoria del Seminario Internacional Derechos Humanos de los Pueblos Indigenas, Secretaria de Relaciones Exteriores, Mexico, 2006 at 29-40; UN Special Rapporteur on the Rights of Indigenous Peoples, Rodolfo Stavenhagen, *Progress report on preparatory work for the study regarding best practices carried out to implement the recommendations contained in the annual reports of the Special Rapporteur*, 20 January 2006, E/CN.4/2006/78/Add.4.

parties, or to the general interest of the State.<sup>431</sup> There has been also a policy contradiction, in which constitutional rights and laws concerning Indigenous peoples are inconsistent with other legislation such as trade, investment, mining, oil, and gas. Not without reason, Walsh has criticized it as an “additive” project that essentially treats indigenous peoples as minorities whose rights can be added on — as it were — to existing frameworks of citizenship, in contrast to a more radical or intercultural model whereby the recognition of Indigenous peoples’ rights would imply more profound changes to society as a whole.<sup>432</sup>

The implementation gap and policy contradiction have been considered by a number of analysts as features of the neoliberal multiculturalism politics and policies that have gained dominance in Latin America since the mid-1980s.<sup>433</sup> From this perspective, constitutional reforms recognizing Indigenous rights and adopting a multiculturalist discourse are part of the larger neoliberal political project that has been implemented parallel to the Washington Consensus reforms. It encompasses both economic restructuring and new governance practices aiming to reinforce the underlying goals the Washington Consensus reforms, re-legitimize the State and neutralize Indigenous peoples’ claims and demands. Claims and concepts of “citizenship” and “participation” are being appropriated and re-defined through their entanglement with global neo-liberal discourse which is limiting their political scope and

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<sup>431</sup> Bartolome Clavero, “Cultural Supremacy, Domestic Constitutions, and the Declaration of the Rights of Indigenous Peoples,” in Claire Charters and Rodolfo Stavenhagen, Eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen, IWGIA, 2009) at 344.

<sup>432</sup> Catherine Walsh, *Interculturalidad, reformas constitucionales y pluralismo jurídico*, Publicación mensual del Instituto Científico de Culturas Indígenas, Año 4, No. 36, Marzo del 2002.

<sup>433</sup> Xavier Albo, “Hacia el Poder Indígena en Ecuador, Peru y Bolivia,” in Ana C. Betancur, ed., *Movimientos Indígenas en America Latina: Resistencia y nuevos modelos de integracion* (Copenhagen: IWGIA, 2011); Shannon Speed, *Rights in Rebellion: Indigenous Struggle and Human Rights in Chiapas* (Stanford, California: Stanford University Press, 2008); Nancy G. Postero, *Now We Are Citizens: Indigenous Politics in Postmulticultural Bolivia* (Stanford, California: Stanford University Press, 2007); Charles Hale, “Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America,” (2005) 28 *POLAR* 10; Shannon Speed, “Dangerous Discourses: Human Rights and Multiculturalism in Neoliberal Mexico,” (2005) 28 *POLAR* 29.

creating new associations with the market place.<sup>434</sup> Thus, as Shannon Speed argues, neoliberal multiculturalism “cedes rights to Indigenous people, but with the effect of remaking them as subjects less likely to frontally challenge neoliberal economic and political policies. Even the recognition of collective group rights, often understood to be fundamentally opposed to liberal individualism, may be an integral part of neoliberal subject formation and the construction of neoliberal rule.”<sup>435</sup>

As it happens, in countries like Bolivia, Ecuador and Peru where Indigenous peoples have made tremendous efforts to bring fundamental changes in the nature of the State and its economic and social policies, current governments’ policies and practices indicate signs and/ or legacies of the resilient neoliberal multiculturalism project. As North argues, the often celebrated “new left” regimes in the Andean region of South America can be more precisely described as projects of “capitalist modernization” and State building; this is so since the fundamental character of the political economy is not being seriously challenged.<sup>436</sup> In fact, it appears that whatever the ideological orientation of the state in question (e.g. new left, Indigenous, multicultural, pluricultural and or intercultural, etc.), current Latin American States’ policies and actions cannot be seen in isolation from the neoliberal policies that shape and promote the international flow of capital and labor, and capital accumulation. The actions promoted by the States reinforce the commoditization of land and natural resources, which

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<sup>434</sup> Evelina Dagnino, “*Meanings of citizenship in Latin America*,” Institute of Development Studies, IDS Working Paper 258, Brighton, Sussex, November 2005.

<sup>435</sup> Shannon Speed (2008), *supra* note 433 at 31; Suzana Sawyer, *Crude Chronicles: Indigenous Politics, Multinational Oil, and Neoliberalism in Ecuador* (Durham: Duke University Press, 2004); Jose A. Lucero, “Ambivalent Multiculturalisms: Perspective, Futility, and Jeopardy in Latin America,” in Todd A. Eisenstadt, et al., Eds., *Latin America’s Multicultural Movements: The Struggle between Communitarianism, Autonomy, and Human Rights* (New York: Oxford University Press, 2013) at 18.

<sup>436</sup> Liisa North, “New Left Regimes in the Andes? Ecuador in Comparative Perspective,” in (2013) 91 *Studies in Political Economy* 1; Anthony Bebbington, “Extractive Industries, Socio-Environmental Conflicts and Political Economic Transformations in Andean America,” in Anthony Bebbington, Ed. (2012), *supra* note 246 at 13.



facilitates the entrance of large-scale land based investment, which usually focuses on energy, fuel, food production, and mineral deposits.<sup>437</sup> And neo-liberal multiculturalism plays a role in neutralizing, reining in and/or co-opting Indigenous peoples' demands and struggles and integrating them into the neoliberal policy framework.

### **3.4 The Role of Law and Legal Doctrines in Validating Indigenous Land Dispossession, Violence and Repression**

Law and official history have been central tenets sustaining and reproducing the dynamics of colonial and contemporary global domination. As David Kennedy argues, “law constitutes, creates the elements and actors of economic and political life, places them in structures, and helps set the terms for their interaction. It often provides the language – and the stakes- for economic and political struggle.”<sup>438</sup>

The conquest and colonization of native societies in the Americas, and later in other continents, were conducted through violence that was “forced, disciplined and regulated in the form of law, and which played the leading part in the creation of [European] civilization.”<sup>439</sup> One of the most telling descriptions of the colonial violence embedded in the law is the official juridical declaration known as the “Requirement”, prepared by the royal lawyer Juan López Palacios. It required Indigenous peoples to acknowledge the church and the pope as the ruler and superior of the whole world, and in his name the Spanish King and Queen as

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<sup>437</sup> Saturnino M. Borrás Jr., et al., “Land grabbing in Latin America and the Caribbean,” (2012) 39: 3-4 *Journal of Peasant Studies* 845 at 858; Sonia Arellano-López, “Conflicting land use agendas: environment, indigenous land rights and development in central Bolivia. The case of the Isiboro-Sécure Indigenous Territory and National Park (TIPNIS)”, *Paper presented at the International Conference on Global Land Grabbing II*, Department of Development Sociology, Cornell University, Ithaca, NY, October 17-19, 2012.

<sup>438</sup> David Kennedy, “Law and Political Economy of the World,” in (2013) 26 *Leiden Journal of International Law* 7-48.

<sup>439</sup> Peter Fitzpatrick (2001), *supra* note 327.

superiors, lords, and kings of the “new world”. The natives were also called upon to allow the Christian faith to be preached to them and to comply with it. If they failed to comply, the

Requirement warns:

We shall take you and your wives and your children, and shall make slaves of them, and as such shall sell and dispose of them, as their Highnesses may command; and we shall take your goods, and shall do all the harm and damage that we can, as to vassals that do not obey.<sup>440</sup>

The late 15<sup>th</sup> and 16<sup>th</sup> century violent encounter/confrontation between Europeans and Indigenous peoples from the Americas is revealed as the founding moment of modern international law, and was central to the formation and development of one of its most fundamental doctrines, sovereignty.<sup>441</sup> International law (*ius gentium* or the law of all peoples) reacted to the new relationship between the colonizer and the colonized by constructing Indigenous peoples as the “other”, the “barbarian or savage” and as being “outside” its framework, and therefore not entitled to legal rights and sovereignty.<sup>442</sup> Although the devastation, violence, genocide of the European enterprise have been extensively documented,<sup>443</sup> investigations on the role played by law, and the irreducible link uniting violence and law in the conquest and subsequent colonization of natives’ societies have not been very common. What remains veiled and/or forgotten is the violent colonial foundation of international law, and its ongoing exclusion and conflictual relationship with Indigenous peoples.

The successful conquest and colonization of Indigenous societies, and the successful foundation of European colonialism would eventually produce proper interpretative legal

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<sup>440</sup> Lewis Hanke (1974), *supra* note 363 at 35-36.

<sup>441</sup> Antony Anghie (2005), *supra* note 366.

<sup>442</sup> Robert A. Williams, Jr. (2012), *supra* note 327; Francisco de Vitoria (1991), *supra* note 357.

<sup>443</sup> Bartolome de Las Casas (1980), *supra* note 349; Bartolome Clavero, *Genocidio y Justicia: La Destruction de las Indias, Ayer y Hoy* (Madrid: Marcial Pons Historia, 2002).

models and discourses of self-legitimation, which would be neither neutral nor non-violent. The first interpretative legal model was the doctrine of discovery.<sup>444</sup> Soon after Columbus' collision with Western Hemisphere, Pope Alexander VI granted title to the lands of the New World to Spain provided that "these mainlands and islands found or to be found, discovered or to be discovered... be not actually possessed by some other Christian king or prince."<sup>445</sup> A title by discovery is a variation on the legal theme of *terra nullius* which posited that uninhabited lands were available for occupation and acquisition by Christian nations; and that uninhabited lands included those lands occupied by "backward" or non-agrarian peoples.<sup>446</sup>

The second discourse of self-legitimation is embodied in the jurisprudence of Francisco de Vitoria. Vitoria developed central tenets of international law, such as the doctrines of sovereignty and just war, in his attempt to resolve the unique legal problems that arose from the "discovery" and conquest of the Indigenous peoples of the Americas.<sup>447</sup> In opposition to the universal system of divine law administered by the Pope, Vitoria elaborated the *ius gentium* (a universal binding system of law administered by sovereigns) based on Aquinas' notion of natural law,<sup>448</sup> which would create a common framework binding Spanish and Indigenous peoples. In doing so, he rejects the authority of Pope Alexander VI's Bulls,

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<sup>444</sup> Robert A. Williams, Jr. (1990), *supra* note 327.

<sup>445</sup> Andrew Huff, "Indigenous Land Rights and the New Self-Determination," (2005) 16:2 *Colorado Journal of International Environmental Law and Policy* 295.

<sup>446</sup> *Ibid.*

<sup>447</sup> Vitoria's two famous lectures: *De Indis Relectiones* ("On the American Indians") and *De Iure Belli Relectiones* ("On the Law of War") are considered of basis of his law of nations which was to become the international law not merely of Christendom but of the world at large. See James Brown Scott, *The Spanish Origins of International Law: Francisco de Vitoria and his Law of Nations* (Oxford, UK: Clarendon Press, 1932). Vitoria's two lectures are collected in Francisco de Vitoria, *Political Writings* (1991), *supra* note 357.

<sup>448</sup> According to Aquinas there are four types of law: the eternal law (God's eternal plan for the universe), the natural law (part of the eternal law discoverable by reason and which is to be found in the human mind, it inheres in humanity), human law (create by human on the basis of natural reason), and divine law (revealed in scripture). St. Thomas Aquinas, *On Law, Morality and Politics* (Indianapolis: Hackett Publishing Company, 1998).

issued in 1493, which had conceded the Spanish Crown the right to occupy and conquer the American hemisphere.

Vitoria acknowledges that Indigenous peoples were rational beings who owned their lands. Indigenous peoples could not, therefore, be divested of their lands merely through proclamation, as had been attempted with the Papal grants of title to Spain.<sup>449</sup> Yet, according to Vitoria, and as previously noted, Indigenous peoples lacked full rational capacity, as evidenced by the uncultivated state of their lands and their apparent lack of Christian values. Thus, Vitoria argues that European nations were obligated to elevate Indigenous peoples to their full rational capacity.<sup>450</sup> In order to achieve that objective, Vitoria suggested that European nations would hold title to Indigenous lands until such a time as Indigenous peoples, pursuant to European instruction and practices, accepted Christianity and cultivated their lands as fully rational beings.<sup>451</sup> Given that Christianity was considered one of most important European universal practices, Vitoria argues that proselytizing Christianity was authorized by the *ius gentium*.<sup>452</sup>

Furthermore, according to Vitoria, *ius gentium* involves all rational humanity and encompassed rights such as the right to travel, sojourn and trade in foreign lands. More specifically, Vitoria argues that since the Spaniards had a right under *jus gentium* to travel and

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<sup>449</sup> Robert A. Williams, Jr. (1990), *supra* note 327 at 99; Francisco de Vitoria (1991), *supra* note 357 at 250-251.

<sup>450</sup> Robert A. Williams, Jr. (1990), *supra* note 327 at 104.

<sup>451</sup> *Ibid* at 105

<sup>452</sup> Vitoria discusses this issue in the section entitled “Second possible title, the Spreading of the Christian Religion.” See Francisco de Vitoria (1991), *supra* note 357 at 284-286.

trade in the land of the Indians, and providing that the Spanish did not harm the Indians, “the natives may not prevent them”.<sup>453</sup> He thus writes,

In the beginning of the world, when all things were held in common, everyone was allowed to visit and travel through any land he wished. This right was clearly not taken away by the division of property; it was never the intention of nations to prevent men’s free mutual intercourse [trade, commerce] with one another by this division...Spaniards may lawfully trade among the barbarians...they may import the commodities which they lack, and export the gold, silver, or other things which they have in abundance; and their princes cannot prevent their subjects from trading with the Spaniards, nor can the princes of Spain prohibit commerce with the barbarians.<sup>454</sup>

Any Indigenous resistance to the Iberian civilizing mission – proselytizing Christianity, travelling and trading, would have constituted acts of war and have justified the taking of Indigenous lands through force and violence. Ambassadors, Vitoria writes, are inviolable in *ius gentium*, and the Spaniards are the ambassadors of Christian civilization; therefore, Indigenous people are obliged to receive them hospitably. If recourse of war had to be taken to advance this cause, so be it, he seemed to imply.<sup>455</sup> In this regard, any resistance by Indigenous peoples to Christian proselytization was a cause for war, not because it violates divine law but because it violates *ius gentium*.

As Anghie argues, the notion of just war is crucial to an understanding of Vitoria’s legal doctrine because the conversion of Indigenous peoples and their lands into European and Spanish territory was to be achieved by the waging of just war, and the concept of sovereignty was developed primarily in terms of the sovereign’s right to wage just war.<sup>456</sup> Vitoria starts by affirming that among the most prominent prerogatives of the sovereign (the prince) are the rights

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<sup>453</sup> Vitoria discusses this issue in the section entitled “First just title, Natural Partnership and Communication.” *Ibid* at 278-283.

<sup>454</sup> *Ibid* at 278-280.

<sup>455</sup> *Ibid* at 282-283.

<sup>456</sup> Antony Anghie (2005), *supra* note 366 at 23.

to declare war, to wage war to its fullest extent, and to acquire titles. Vitoria's main argument, on this issue, is that barbarians are inherently incapable of waging a just war; he argues that only Christian subjectivity is recognized by the laws of war, and therefore only Christians may engage in a just war. Given that the power to wage just war is the most significant prerogative of sovereigns, he concludes that barbarians can never be truly sovereign, that they are at best, partially sovereign because denied the ability to engage in war.<sup>457</sup> Thus, according to Vitoria Indigenous peoples are by definition incapable of waging a just war; they are not sovereign because they are barbarians. Indigenous peoples who inevitably and invariably violate *ius gentium* are denied the status of the all-powerful sovereign who administers this law. They exist within the Vitorian framework only as violators of the law. They exist only as the objects against which Christian sovereignty may exercise its power to wage war.<sup>458</sup>

There were no rights for the Indigenous in the *ius gentium*'s scheme, apart from the "rights" to have things done to them so as to bring them within the ambit of Christian civilization. In fact, once Indigenous peoples' faults were established, "it was lawful to declare war on them, and consequently to exercise to the full the rights of war."<sup>459</sup> As a result, according to Vitoria, the war waged against them was "perpetual", and as he suggests,

[since] security cannot be obtained without the wholesale destruction of the enemy -- this [was] particularly the case in wars against the infidel, from whom peace can never be hoped for on any terms -- the only remedy [was] to eliminate all of them who are capable of bearing arms against us, given that they [were] already guilty.<sup>460</sup>

Vitoria's legal articulation, while appearing to promote notions of equality and reciprocity, constructed a comprehensive and inexorable system of norms that were inevitably violated by

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<sup>457</sup> *Ibid.*, at 26-28.

<sup>458</sup> *Ibid* at 26-29.

<sup>459</sup> Francisco de Vitoria (1991), *supra* note 357 at 283.

<sup>460</sup> *Ibid* at 321.

Indigenous peoples. It effectively legitimizes endless Spanish invasions of Indigenous lands and societies.

A century later, the prominent Dutch jurist Hugo Grotius continued to argue that war could be lawfully waged on the “Indians” if they were in breach of natural law, the main foundation of the law of nations.<sup>461</sup> Endorsing the claim that some individuals were by nature natural slaves over whom it was expedient to exercise sovereignty, Grotius argued that “the barbarians or natural slaves might rightfully be appropriated by civilized peoples.”<sup>462</sup> A century later, Swiss international law jurist, Emmerich de Vattel, argued that “there are others, who, to avoid labour, choose to live only by hunting and their flocks... Those who still pursue this idle mode of life usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have, therefore, no reason to complain, if other nations, more industrious and closely confined, come to take possession of a part of those lands.”<sup>463</sup> Later, British international law scholar and professor, John Westlake, continued affirming this tradition.

Discussing the international legal status of Indigenous peoples, Westlake pointed out:

When people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former [European race] may carry on the complex life to which they have been accustomed in their lands... The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied. If any fanatical admirer of savage life argued that the whites ought to be kept out, he would only be driven to the same conclusion by another route, for a government on the spot

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<sup>461</sup> Martti Koskenniemi, “Legal Universalism: Between Morality and Power in a World of States,” in Sinkwan Cheng, Ed., *Law, Justice, and Power: Between Reason and Will* (Stanford: Stanford University Press, 2004) at 39.

<sup>462</sup> Quoted by Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral backwardness of International Society* (Cambridge: Cambridge University Press, 2003) at 94.

<sup>463</sup> Emer de Vattel, *The Law of Nations or “Principles of the Law of Nature Applied to the Conduct of Nations and Sovereigns,”* trans. Joseph Chitty, 6<sup>th</sup> American Edition (Oxford: Oxford University Press, 1844), Bk. I, VII, #81., cited in Antony Anghie, “Vattel, Internal Colonialism, and the Rights of Indigenous Peoples,” in R. Nichols and J. Singh, Eds., *Freedom and Democracy in an Imperial Context: Dialogues with James Tully* (New York: Routledge, 2014) at 84-85.

would be necessary to keep him out. Accordingly international law has to treat such natives as uncivilized.<sup>464</sup>

The colonial encounter produced new mental categories to codify the relations between conquering and conquered populations: the idea of race as biologically structured, explaining not just physiognomic differences but also the mental and cultural differences.<sup>465</sup> Thus those relations of domination came to be considered as natural and legitimized through *ius gentium* -- international law-- which was formulated as a universal law based on natural law principles and discovered through human reason. As Baxi points out, law facilitated the emergence of “carefully regulated Empires”, in which “the idiom of conquest was replaced by the idiom of Order,” which was deployed over and over again to “mobilize manpower” for the mines and plantations.<sup>466</sup>

### 3.5 Conclusion

Indigenous peoples have been able to assume their historical position through [their] struggles. This is not merely a reformist struggle. The re-vindication of our identities is important for the reproduction of our historical cultures as peoples – for example the struggle for land is a vital element, because without land there can be neither our culture nor identity, absolutely nothing – but the constant of the indigenous movement has been what I call the global struggle, a proposal of an alternative to the entire system. None of us doubt that there were these two joined lines of struggle, the struggle for re-vindication, and the strategic struggle for change.

(Luis Macas, Ecuador 2010)<sup>467</sup>

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<sup>464</sup> John Westlake, *Chapters on the Principles of International Law* (Cambridge, UK: Cambridge University Press, 1894) at 141-143, cited in Robert A. Williams (2012), *supra* note 327 at 228.

<sup>465</sup> Youngblood Henderson, James (Sakej), The Context of the State of Nature, in: Marie Battiste, Ed., *Reclaiming Indigenous Voice and Vision* 11 (Vancouver: UBC Press, 2000).

<sup>466</sup> Upendra Baxi, Global Development and Impoverishment, in Peter Cane and Mark V. Tushnet, Eds., *The Oxford Handbook of Legal Studies* (New York: Oxford University Press, 2003) at 398.

<sup>467</sup> Luis Macas is the most renowned indigenous leader in Ecuador. A lawyer by training, he is currently executive director of the Instituto Científico de Culturas Indígenas (Scientific Institute of Indigenous Cultures, ICCI). A former president of the Confederation of Indigenous Nationalities of Ecuador (CONAIE), and former congressional deputy (in the late 1990s) and presidential candidate (in 2006) for the Movimiento Pachakutik (Pachakutik



Ted Moses, Grand Chief of the Council of the Crees of Quebec, in his statement to the World Conference on Human Rights in June 1993, pointed out, “Our lands -- entire territories -- were taken; we were dispossessed, our means of subsistence was denied; our peoples and our lands were despoiled. We are the victims of genocide in the most terrible and explicit meaning of that idea. Yet some of us have survived and are still here, along with the States that perpetrated these crimes against us. The world knows that the sovereignty, legitimacy, and territorial integrity of these states is tainted and fundamentally impaired because of the unjust, immoral, and murderous means employed in their establishment upon indigenous lands.”<sup>468</sup> Indigenous peoples in the north and south of the continent experienced devastating violence and dispossession during the encounter with the Europeans and during the colonial period. Since the early colonial time, Indigenous peoples have occupied the institutional position of “Other”, as essentially different from the Europeans. And as a result, they have been discriminated, marginalized, and silenced. Indigenous peoples, however, have shown a great resilience and will to stand for and defend their dignity and humanity.

After independence, law has been used, throughout Latin America, as a device to wipe out the customs, languages, legal traditions and systems of Indigenous peoples, aiming to annihilate and or assimilate them. The heirs of Hispanic colonialism – the creole elite—, who drafted the constitutions, had embraced the civilizing discourse of Vitoria’s *ius gentium* and subsequent international legal policies and rules. The creole elite, in fact, embraced and

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Movement, MP) party. See Jeffery Webber, “Indigenous Liberation and Class Struggle in Ecuador: A Conversation with Luis Macas,” in Clifton Ross and Marcy Rein, Eds., *Until the Rulers Obey: Voices from Latin American Social Movements* (Oakland, CA: PM Press, 2014).

<sup>468</sup> Ted Moses, “Statement by Ambassador Ted Moses on behalf of the indigenous peoples of the North American Region to the World Conference on Human Rights,” Vienna, 14-25 June 1993, online: <<http://www.dialoguebetweennations.com/dbnetwork/english/selfdetermination2.htm#TedMoses>> (retrieved 30 April 2017).

implemented the civilizing discourse in order to avoid being ostracized and excluded from the rights and entitlements assigned by the European “family of civilized nations.”<sup>469</sup>

It is important to note that central aspects of current policies designed and implemented by international financial institutions and States – in the present process of economic globalization -- can be traced back to the work of Francisco de Vitoria and the beginnings of the modern discipline of international law in the 15th and 16<sup>th</sup> centuries, which justified the dispossession of Indigenous peoples’ lands and natural resources.<sup>470</sup> The current dispossession and infringements of Indigenous peoples’ rights have become part of what some scholars called the long-term effects of a certain pattern of “development” that entails major violations of the collective, cultural, social, and environmental rights of indigenous communities in the region.<sup>471</sup>

The present dominant neoliberal globalization, corresponding to a new system of capital accumulation, has been increasingly confronted by a counter-hegemonic globalization, called by Baxi a “culture of globalism,” which is constituted by a series of initiatives, movements, and organizations that, reclaiming the languages of social justice, resist and challenge neoliberal globalization through local and global linkages, networks, and alliances.<sup>472</sup> These processes of neoliberal globalization and counter-hegemonic globalization have provided Indigenous peoples new venues and possibilities not only to mobilize politically and denounce injustices, but also to

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<sup>469</sup> Arnulf Becker Lorca, *Mestizo International Law: Global Intellectual History (1882-1933)* (New York: Cambridge University Press, 2011).

<sup>470</sup> Antony Anghie, Francisco de Vitoria and the Colonial Origins of International Law, (1996) 5 *Social Legal Studies* 321; Antony Anghie (2005), *supra* note 366.

<sup>471</sup> Mario Blaser, Harvey A. Feit and Glenn McRae, Eds., *In the Way of Development: Indigenous Peoples, Life Projects and Globalization* (New York: Zed Books, 2004); Rodolfo Stavenhagen, UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, (E/CN.4/2003/90) (January 21, 2003) [Thematic Report focused on the impact of large-scale development projects on human rights and fundamental freedoms of indigenous peoples and communities].

<sup>472</sup> Boaventura de Sousa Santos, Ed., *Voices of the World* (New York: Verso, 2010) at Preface; Upendra Baxi, “Globalization: A World without Alternative?” ICES Lectures, University of Colombo, November 24, 1992.

make legal claims. Thus, during the last thirty years, Indigenous peoples have emerged as political and social actors in Latin America; they have become active subjects and have engaged in social and political movements.

At the international level, Indigenous Peoples have made claims and demands for international legal personality, collective rights, and sovereignty, which have challenged the continuing efficacy and legitimacy of the modern nation-state and law and revealed ongoing dominant and exclusionary representational categories as established by Eurocentric international law. In this sense, it can be argued that Indigenous voices, worldviews, and claims have reached the global *nomos*, the complex normative universe in which we live,<sup>473</sup> in order to speak and demand recognition, dignity and justice. Yet, the global *nomos*, the international normative world and order, is far from settled. International law is a site of struggle and it is continually in formative negotiation through challenge, absorption, reining in, and contestation. Indigenous peoples and other disenfranchised social groups are claiming justice and accountability of States and influential non-States actors and challenging the inequality of power for which there is much less tolerance now than in the normative world order that emerged with the United Nations in 1948.<sup>474</sup>

The next chapter discusses Peru's policies and regulations on extractive industries and Indigenous peoples. It highlights the role of law in validating the expansion of MNCs operations and dispossession of Indigenous land and infringement of their rights, and in authorizing a pervasive trend of persecution and criminalization of Indigenous communities opposing MNCs operations.

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<sup>473</sup> Robert Cover, "Nomos and Narrative" (1983) 97 *Harvard Law Review* 4.

<sup>474</sup> Gerardo J. Munarriz, "Rhetoric and Reality: the World Bank development policies, mining corporations, and Indigenous communities in Latin America," in (2008) 10 *International Community Law Review* 431.

## Chapter 4: Peru's Policies and Regulations on Extractive Industries and Indigenous Peoples

“For decades, extractive industries have had a devastating social and environmental impact on several of Peru's Indigenous peoples, without benefiting them greatly. Consequently, there has been a high level of discontent and mistrust among Indigenous peoples towards the State and the industrial extractive sector, leading to many protests and clashes” (James Anaya, 2014)<sup>475</sup>

### 4.1 Introduction

On September 28, 2015 a peaceful protest of Indigenous organizations in Apurimac, Peru against Las Bambas copper mine project owned by China's MMG Ltd. was violently repressed by the police.<sup>476</sup> Indigenous organizations had denounced substantial modifications of the Environmental Impact Assessment without respecting their right to consultation and proper procedures for public participation; they argued that those changes would greatly impact their health and environment. Three Indigenous protesters were killed, 15 wounded and about 30 detained.<sup>477</sup> Following the deadly clash, a state of emergency was declared and martial law implemented in the affected regions. Government officials justified the police actions and maintained their support for Las Bambas project, saying it will generate ‘economic growth’ and

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<sup>475</sup> Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples' rights in Peru with regard to the extractive industries*, 3 July 2014, A/HRC/27/52/Add.3, at paragraphs 18 and 69.

<sup>476</sup> Las Bambas copper mine project, under way since 2004, is operated by a consortium led by MMG Ltd., a subsidiary of Minmetals Corporation, one of China's major multinational state-owned enterprises. The MMG bought the project from mining giant Glencore-Xstrata in August 2014 for US\$6 billion, and the project is currently valued \$7.4bn. See Karen Rebelo and Silvia Antonioli, Reuters “China-backed group pays US\$6B for Glencore's Las Bambas copper mine,” in *Financial Post*, April 14, 2014, online: <<http://business.financialpost.com/investing/china-las-bambas-glencore>> (retrieved 30 April 2017); MMG Ltd., online: <<http://www.mmg.com/en/About-Us/Company-Overview.aspx>> (retrieved 30 April 2017).

<sup>477</sup> CooperAction, “*Informe Especial 2015: Caso Las Bambas*,” October 2015, online: <[http://cooperaccion.org.pe/main/images/Descargas-Otros\\_copy/Las%20Bambas%20-%20informe%20ocm.pdf](http://cooperaccion.org.pe/main/images/Descargas-Otros_copy/Las%20Bambas%20-%20informe%20ocm.pdf)> (retrieved 30 April 2017); BBC News Latin American & Caribbean, “Peru anti-mining protest sees deadly clashes,” in *BBC News*, 29 September 2015, online: <<http://www.bbc.com/news/world-latin-america-34389803>> (retrieved 30 April 2017).

bring ‘progress’ for the country.<sup>478</sup> A week later, at the Annual Meeting of the Boards of Governors of the World Bank and IMF, held in Lima, while “Peru’s economic soundness, investor confidence, and integration with the world economy,”<sup>479</sup> were highlighted and praised, the violence, repression and deaths at Las Bambas were silenced; not a word was said about the identity of the three Indigenous “extra-judicially executed” and the violations of their rights.<sup>480</sup> As one newspaper columnist put it, as they resemble “the color of earth and have Indigenous last names, they were treated as ‘worthless Indians’ as third-class citizens, as ‘dogs in the manger’ who do not exist.”<sup>481</sup> A year later, as affected communities’ concerns and claims have been not resolved, protests against the Las Bambas copper mine continue. On 14 October 2016 an Indigenous protester, Quintino Cereceda Huisa, was killed by the police during a rally; about 34 protesters were injured and another 12 were arrested.<sup>482</sup>

Since the 1990s, Peru has experienced a new cycle of expanded investment in extractive industries, particularly mining, oil and gas. New flows of foreign direct investment (FDI),

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<sup>478</sup> El Comercio, “Las Bambas: Cateriano afirmó que protestas son injustificadas,” in *El Comercio*, Lima, 29 September 2015, online: <<http://elcomercio.pe/peru/apurimac/bambas-cateriano-afirmo-que-protestas-son-injustificadas-noticia-1844657>> (retrieved 30 April 2017).

<sup>479</sup> Peru hosted the World Bank and IMF Annual Meetings (October 5-12, 2015). The World Bank’s Secretary Mahmoud Mohieldin highlighted that Peru was selected for the growing international prestige won over the last two decades due to its economic and social performance, and as “clear reflection of Peru’s achievements in recent years in terms of political and institutional stability, economic soundness, investor confidence, and integration with the world economy.” Jose de Echave, “*La Fiesta del Banco Mundial y el FMI*,” in Coopeaccion, October 2015, online: <<http://cooperaccion.org.pe/main/opinion/439-la-fieta-del-banco-muncial-y-el-fmi-jose-de-echave>> (retrieved 30 April 2017).

<sup>480</sup> Beto Chahuayllo Huillca (39), Alberto Cárdenas Chalco (24), and Exaltación Huamaní Mio (32). Fédération internationale des ligues des droits de l’Homme, “FIDH exige investigación imparcial y exhaustiva por ejecuciones de manifestantes que califican como extrajudiciales,” *Press Release*, 13 October 2015, online: <<https://www.fidh.org/es/region/americas/peru/fidh-exige-investigacion-imparcial-y-exhaustiva-por-ejecuciones-de>> (retrieved 30 April 2017).

<sup>481</sup> Rodrigo Montoya, “Muerte en Bambas, carnaval del BM y el FMI en Lima,” in *Diario Uno*, Lima, October 11, 2015, online: <<http://diariouno.pe/columna/muerte-en-bambas-carnaval-del-bm-y-el-fmi-en-lima/>> (retrieved 30 April 2017).

<sup>482</sup> Reuters, “*One Killed in Peru Protests against Las Bambas Copper Mine*,” in Reuters World News, October 19, 2016, online: <<http://www.reuters.com/article/us-peru-mining-clash-idUSKBN12F01W?il=0>> (retrieved 30 April 2017).

primarily from North America, Europe, Japan and China, have financed extensive mining and hydrocarbons exploration in the country.<sup>483</sup> While FDI in mining exploration in Latin America increased 400 percent between 1990 and 1997, in Peru it grew by two thousand percent.<sup>484</sup> Between 1998 and 2007, US\$93.5 billion of FDI flowed into the natural resources sector in Latin America; the average annual increase of FDI in the natural resources sector was 26 percent, but, in Peru FDI increased by over two thousand five hundred percent.<sup>485</sup> By 2009, Peru was considered the third highest recipient of mining FDI in the world.<sup>486</sup> Peru's total mining investments during 2013 reached about US\$9,724 million, which represents an increase of fourteen percent from 2012. The top sources of mining FDI are China (twenty two percent), U.S.A. (seventeen percent), Canada (fifteen percent), Switzerland (nine percent), and the UK (eight percent).<sup>487</sup> Peru is Canada's second largest bilateral trading partner in South and Central America, and the third largest destination for Canadian direct investment in South and Central

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<sup>483</sup> MNCs with large scale mining operations in Peru: Barrick Gold (Canada), Teck Resources (Canada), Pan American Silver (Canada), Newmont (U.S.), Freeport McMoran (U.S.), Doe Run (U.S.), Anglo American (UK), BHP Billiton (Australia-UK), Rio Tinto (Australia-UK), Monterrico Metals (UK-China), Shougang (China), Chinalco (China), Zi Jin (China), China Minmetals (China), Jianxi Cooper Corp. (China), Xstrata (Switzerland-Australia), Glencore (Switzerland), Vale (Brazil), Votorantim Metals (Brazil), Gold Fields (South Africa), Mitsubishi Materials (Japan), Nippon Mining and Metals (Japan), Sumitomo Metal Mining (Japan), Grupo Mexico (Mexico). See PricewaterhouseCoopers, *Mining in the Americas*, March 6, 2012, at 12, online: <<http://www.pwc.com/ca/en/mining/publications/pwc-americas-coe-event-highlights-presentation-2012-03-en.pdf>> (retrieved 30 April 2017); Keith Slack, "Mining Conflicts in Peru: Condition Critical," Washington, D.C.: Oxfam America, March 2009, at 2, online: <<http://www.oxfamamerica.org/static/oa3/files/mining-conflicts-in-peru-condition-critical.pdf>> (retrieved 30 April 2017).

<sup>484</sup> World Bank, *Riqueza y Sostenibilidad: Dimensiones Sociales y Ambientales de la Minería en el Perú* (2005), *supra* note 413.

<sup>485</sup> Jeffrey Bury and Anthony Bebbington, "New Geographies of Extractive Industries in Latin America," in Jeffrey Bury and Anthony Bebbington, Eds. (2013), *supra* note 171 at 42 and 44.

<sup>486</sup> Jose De Echave, "La Minería Peruana y los Escenarios de Transición," in Alejandra Alayza and Eduardo Gudynas, Eds., *Transiciones Post Extractivismo y Alternativas al Extractivismo en el Perú* (Lima: CEPES, 2012) at 63.

<sup>487</sup> Armando Mendoza, "Industrias extractivas y cambio climático en el Perú: vínculos y preocupaciones," in Paul M. Makedonski Valdeavellano, et al., Eds., *Caminos de Transición: Alternativas al extractivismo y propuestas para otros desarrollos en el Perú* (Lima: CooperAcción-RedGE, 2014), at 42; PricewaterhouseCoopers, *2014 Americas School of Mine Presentations: Update on Latin America*, 13 May 2014, online: <<http://www.pwc.com/gx/en/mining/school-of-mines-2014.jhtml>> (retrieved 30 April 2017).

America. By July 2014, some 90 Canadian companies were engaged in the natural resources sector (mainly focused on mining and oil & gas exploration). Since the Canada-Peru Free Trade Agreements entered into force in 2009, the trade relationship has grown substantially.<sup>488</sup>

The significance of the extractive industry for the Peruvian economy is crucial. Peru's average annual growth of six percent since 2002<sup>489</sup> is explained largely by the increase in exports (eighty seven percent); about seventy percent of these exports comprise minerals and hydrocarbons.<sup>490</sup> Mining accounts for over sixty percent of Peru's total exports, thirty percent of its income tax, seventeen percent of its internal taxation, six percent to its GDP, and twenty one percent for the total FDI stock.<sup>491</sup> Yet, in terms of direct employment, the contribution of mining reaches only one percent of Peru's economically active population.<sup>492</sup>

As it was in the past, today mining production is mainly controlled by foreign companies. In 2012, 60 percent of gold production was controlled by two companies (U.S. New Mont and Canada Barrick Gold); 80 percent of copper production was controlled by three companies owned by MNCs from UK, Australia, Canada, Japan, Switzerland, U.S., and Mexico.<sup>493</sup>

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<sup>488</sup> Government of Canada, *Canada-Peru Relations*, online: < [http://www.canadainternational.gc.ca/peru-perou/bilateral\\_relations\\_bilaterales/canada\\_peru-perou.aspx?lang=eng](http://www.canadainternational.gc.ca/peru-perou/bilateral_relations_bilaterales/canada_peru-perou.aspx?lang=eng) > (retrieved 30 April 2017).

<sup>489</sup> International Monetary Fund, "Peru: IMF Country Report N0. 13/45," February 2013, online: <<http://www.imf.org/external/pubs/ft/scr/2013/cr1345.pdf>> (retrieved 30 April 2017).

<sup>490</sup> Maritza Paredes and Lorena De La Puente, "Protestas y negociaciones socioambientales: el caso de las industrias extractivas," in Gerardo Damonte and Gisselle Vila, Eds., *Agenda de Investigacion en Temas Socioambientales en el Peru: Una Aproximacion desde las Ciencias Sociales* (Lima: CISEPA-PUCP, 2014) at 75.

<sup>491</sup> In 2009, Peru occupied first place in Latin America in the production of gold (sixth in the world), silver (first in the world), lead (fourth in the world), zinc (second in the world), and tin (third in the world). It was second in the production of copper in the region and in the world. Epifanio Baca Tupayachi, *Estudio Sobre Marco Normativo Minero en Peru* (Lima: Grupo de Propuesta Ciudadana, Lima, April 2014) at 5; Jose De Echave (2012), *supra* note 486 at 65.

<sup>492</sup> Jose De Echave (2012), *supra* note 486 at 66.

<sup>493</sup> Grupo de Propuesta Ciudadana, "Surveillance of the Extractive Industries," *National Report No. 15, Peru 2012*, Lima, June 2012, at 10, online: <<http://www.propuestaciudadana.org.pe/sites/default/files/publicaciones/archivos/Reporte%2015%20VIE%20final%20WEB%20ENGLISH%20VERSION.pdf>> (retrieved 30 April 2017).

This new cycle of expansion of FDI in the mineral and hydrocarbon sector has reached not only traditional regions of extraction, but also new and remote regions, often populated by Indigenous and rural populations, and it has increasingly affected their lands and territories. At the beginning of the 1990s Peru's mining concessions covered only two million three hundred thousand hectares; by 2001 mining concessions had increased to eleven million. By 2013 the total area concessioned for mining was about twenty six million seven hundred hectares, affecting about 60 percent of Peru's Indigenous communities.<sup>494</sup> Likewise, there has been an unprecedented expansion of the geographical area dedicated to hydrocarbon activities. Between 2004 and 2008, the extension of concessions for oil and gas in the Peruvian Amazon basin has increased from fourteen percent to seventy five percent, which means that three quarters of Peru's Amazon has been marked for oil and gas operations.<sup>495</sup> According to a 2014 report, 96 percent of Peru's land set for mining, oil, gas and logging exploration and exploitation, overlaps with protected areas, territories and lands inhabited by Indigenous peoples and rural communities.<sup>496</sup>

The remarkable increase of FDI and land concessions in the extractive industry in Peru has also been accompanied by a rise in conflict and violence around mining and oil/gas operations and pervasive violations of Indigenous people's rights. According to Peru's

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<sup>494</sup> Jose De Echave (2012), *supra* note 486 at 71-72; Carlos Monge, "Entre Rio y Rio: El apogeo y la crisis del extractivismo neoliberal y los retos del postextractivismo en el Peru," *supra* note 418 at 75; CooperAccion, *Noveno Informe Cartografico sobre Concesiones Mineras en el Peru*, Base De Datos 2016, Lima, July 2016, at 5, online: <<http://cooperaccion.org.pe/main/images/Archivos/Informedeconcesionesminerasmayo2016.pdf>> (retrieved 30 April; 2017).

<sup>495</sup> Matt Finer and Marti Orta-Martinez (2010), *supra* note 421; Matt Finer, et al. (2008), *supra* note 419; Anthony Bebbington (2010), *supra* note 418.

<sup>496</sup> Andrea Alforte, et al., *Communities as Counterparties: Preliminary Review of Concessions and Conflict in Emerging and Frontier Market Concessions*, Report, the Rights and Resources Initiative, 30 October 2014, online: <[http://www.rightsandresources.org/wp-content/uploads/Communities-as-Counterparties-FINAL\\_Oct-21.pdf](http://www.rightsandresources.org/wp-content/uploads/Communities-as-Counterparties-FINAL_Oct-21.pdf)> (retrieved 30 April 2017).



Ombudsperson Office (*Defensoria Del Pueblo*), from 2007 – 2011 there has been a 300 percent increase in the frequency of social conflicts.<sup>497</sup> While between January and September 2011, 420 conflicts were registered, in January 2017 alone 214 conflicts were registered; around 70 percent of those conflicts have socio-environmental origins (mining, oil and gas operations).<sup>498</sup> Peru is currently in the top ten countries with environmental conflicts, according to the Global Environmental Justice Atlas, produced by the Institute of Environmental Science and Technology of the Autonomous University of Barcelona (UAB).<sup>499</sup>

This chapter discusses Peru's policy and legal framework on the extractive industry and Indigenous peoples which has facilitated corporate and private investment in the extractive sector. Peru's legal framework and policies have not only validated the expansion of MNCs operations and dispossession of Indigenous lands, but also have legalized a pervasive trend of persecution and criminalisation of Indigenous communities who have challenged and resisted MNCs' operations. The chapter is divided into eight sections. Section Two will discuss Peru's neo-liberal structural adjustment policies and promotion of private investment. Section Three will examine the government's policies and regulations with regard to the extractive industry. Section Four will discuss State policies and regulations on Indigenous communities. Section Five will discuss domestic legal venues and access to justice. Section Six will examine the barriers to

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<sup>497</sup> Defensoria del Pueblo, Informe Defensorial N° 156, "*Violencia en los Conflictos Sociales*," (Lima: Defensoría del Pueblo, March 2012) at 40-41.

<sup>498</sup> Defensoria del Pueblo, "*155<sup>th</sup> Report on Social Conflicts*," Lima, January 2017, online: <<http://www.defensoria.gob.pe/modules/Downloads/conflictos/2017/Reporte-Mensual-de-Conflictos-Sociales-N-155--Enero-2017.pdf>> (retrieved 30 April 2017).

<sup>499</sup> The Global Atlas of Environmental Justice is an interactive map that catalogues thousands of localized stories of resistance against damaging projects: from mines to toxic waste sites to oil refining operations to areas of deforestation. The Atlas is an initiative of the Environmental Justice Organizations, Liabilities and Trade (EJOLT) project. This collaborative research project is supported by the European Union and coordinated by Professor Joan Martinez Alier at the Autonomous University of Barcelona (ICTA-UAB). Online: <<http://ejatlas.org/>> (retrieved 30 April 2017).

access to justice. Section Seven will examine Peru's international commitments and international legal venues available for affected communities. Section Eight will provide a brief summary of the chapter's main arguments.

## **4.2 Neo-Liberal Structural Adjustment Policies and Promotion of Private Investment**

Peru's colonial legacies and history, its relations with foreign capital and its elites' sustained preference for a laissez-faire approach left the country with endemic weak institutions, and the State needed to foster a diversified economy. By the mid-1980s, reinforced by the natural resources boom, Peru was returning (yet again) to a primary export-led economy, and embracing the Washington Consensus reforms with great vigour after the election of Alberto Fujimori as President in 1990.<sup>500</sup>

The implementation of neo-liberal economic policies by the Fujimori regime was strongly influenced by external and internal powerful actors. As discussed in Chapter Three, the Washington Consensus reforms, designed and promoted by IFIs, began to be implemented in Latin America in the 1980s and 1990s. After Fujimori won the presidential election in June 1990, several politicians and intellectuals with connections to the Peruvian elite, conservative parties and international finance approached Fujimori; the most important was Hernando De Soto, a Peruvian economist whose work emphasizes the importance of business and property rights and blames Peru's economic problems on excessive State regulation.<sup>501</sup> De Soto and a

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<sup>500</sup> Jose Carlos Orihueala and Rosemary Thorp (2012), *supra* note 354 at 37-38; As Bebbington argues, the increasing demand of minerals, particularly from China, Brazil, and India, together with the price increases, and the technological changes that make possible extraction in remote and hard-to-access hydrocarbon reserves have played a prominent role in the expansion of extractive industries in the region. Anthony Bebbington, et al., "Anatomies of Conflict: Social Mobilization and New Political Ecologies of the Andes," in Anthony Bebbington and Jeffrey Bury, Eds. (2013), *supra* note 171 at 244.

<sup>501</sup> Hernando De Soto, *The Other Path: the invisible revolution in the Third World* (New York: Harper & Row, 1989); *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

group of Peruvian bankers and economists working in the U.S. encouraged and convinced Fujimori to travel to the U.S., where they met (on 22 June 1990) with the head and representatives of the IMF, the World Bank, the Inter-American Development Bank, and the Council of the Americas, the latter representing the 200 largest U.S. investors in Latin America. At the meeting in New York, the leaders of the IFIs communicated and offered Fujimori their full support, only if he would carry out immediate and sharp Structural Adjustment Policies (SAPs) and complementary “realistic” short-term stabilization measures.<sup>502</sup> After this trip, as Kenneth Roberts points out, and “following the resignation of the economists who advised Fujimori during his campaign, a new team – heavily influenced by neoliberal apostle Hernando De Soto – implemented the shock economic program in early August 1990.”<sup>503</sup>

The implementation of the neo-liberal Structural Adjustment Policies was facilitated by Peru’s internal armed conflict. Internal political violence, initiated in May 1980 with the armed uprising of the Communist Party of Peru – Shining Path (PCP-SL), a ruthless self-styled Maoist organization, had greatly expanded in the following 10 years and it had spiraled out of control.<sup>504</sup> PCP-SL’s revolt “was the biggest internal conflict ever seen by Peru, and the country came close to losing.”<sup>505</sup> The scope and intensity of the insurgent movement were unprecedented and it threatened the viability of Peru’s political and economic system.<sup>506</sup> This critical situation coupled with the profound economic crisis gave Fujimori an opportunity to present himself as the

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<sup>502</sup> Susan C. Stokes, *Mandates and Democracy: Neoliberalism by Surprise in Latin America* (New York: Cambridge University Press, 2001) at 69-70.

<sup>503</sup> Kenneth M. Roberts, Neoliberalism and the Transformation of Populism in Latin America: The Case of Peru (1995) 48:1 *World Politics* 82-116, at 96 and footnote 38.

<sup>504</sup> In 1982-1984, a second insurgent organization emerged, the Tupac Amaru Revolutionary Movement (MRTA), a more urban insurgent movement inspired by the Cuban revolution. Charles D. Kenney, *Fujimori’s Coup and the Breakdown of Democracy in Latin America* (Notre Dame, Indiana: University of Notre Dame Press, 2004), at 23-27.

<sup>505</sup> Gustavo Gorriti, “The Fog of Forgetting,” (2006) 35:3 *Index on Censorship* 6, at 7.

<sup>506</sup> Cynthia McClintock, “Peru’s Sendero Luminoso Rebellion: Origins and Trajectory,” in Susan Eckstein, Ed., *Power and Popular Protest: Latin American social movements* (Berkeley: University of California Press, 2001).

country's savior. It allowed him to promote and justify, on the one hand, his neoliberal economic shock program and, on the other hand, his repressive, authoritarian, and ruthless counterinsurgency strategy. Indeed, days after his 1990 inauguration, the Fujimori government renegotiated agreements on Peru's foreign debt, and committed his government to "adopt the guidelines of the Washington Consensus for economic reform and the State apparatus"<sup>507</sup> and to implement a "low-intensity counterinsurgency war" policy. This policy had two lines of action, legal and illegal; the latter included extrajudicial executions of suspected subversives and widespread intimidation measures against political opponents.<sup>508</sup>

In the first two years of his government, Fujimori conducted a drastic structural adjustment program which featured radical restructuring of the labour, mining and hydrocarbon sectors to favour FDI, involving substantial legal changes and several rounds of privatization of State enterprises.<sup>509</sup> Thus, while in 1990 the State controlled fifty percent of mineral production, by 1997, this had fallen to fifteen percent, and by 1998 it was 1.5 percent.<sup>510</sup> The process of implementation of the neo-liberal economic model was accelerated immediately after Fujimori's self-coup in April 1992, which suspended the Constitution and dissolved Congress and the Courts. The Fujimori government, unbridled by the checks and balances of an elected

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<sup>507</sup> Carlos Contreras and Marcos Cueto, *Historia del Perú Contemporáneo: desde las luchas por la Independencia hasta el presente*, 5th Ed. (Lima: Instituto de Estudios Peruanos, 2013) at 344.

<sup>508</sup> Umberto Jara, *Ojo por Ojo: La Verdadera Historia del Grupo Colina* (Barcelona; Lima: Grupo Editorial Norma, 2003).

<sup>509</sup> Felix Jimenez, Giovanna Aguilar and Javier Kapsoli, *De la Industrializacion Proteccionista a la Desindustrializacion Neoliberal*, (Lima: CIES, 1999); Jorge Rojas, *Políticas Comerciales y Cambiarias en el Perú, 1960-1995* (Lima: PUCP, 1996).

<sup>510</sup> Albetto Pasco-Font, Alejandro Diez Hurtado, Gerardo Damonte, Guillermo Salas, and Ricardo Fort, *Gran Minería y la Comunidad*, Peru Report prepared for World Bank project on Large Mines and the Community, 1999.

legislature, adopted a set of legislative decrees (*decretos legislativos*) to severely restrict Constitutional rights. Human rights violations rapidly escalated.<sup>511</sup>

Thus, as Szablowski points out, Fujimori's legal reforms and policies decimated the labour and union movement, and throughout the 1990s, the Fujimori regime vigorously opposed efforts to mobilize against government policies, making liberal use of both accusations of terrorism and national security services.<sup>512</sup> Indeed, using the sweeping provisions granted under the new harsh anti-terrorist legislation introduced in 1992, the government security forces arrested and charged more people with terrorism and security-related offenses than had been arrested during the entire previous ten years.<sup>513</sup> Many of them were union leaders, students, and Indigenous peoples who opposed Fujimori's neo-liberal economic policies. In a way, the growth of an authoritarian regime and serious human rights violations in Peru was directly related to the economic model being imposed upon its population.<sup>514</sup> National and, in particular, international investors, took advantage of the economic and political climate to reap profits. Foreign companies took control of mining, ports, banks, commerce, transport, communications and health care.<sup>515</sup> Not surprisingly, Fujimori's economic policies were praised by North American

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<sup>511</sup> Gerardo J. Munarriz, "A Comparative Analysis of the UN and OAS Failures to Positively Affect the Human Rights Situation in Peru," *Master of Laws Thesis*, Osgoode Hall Law School, York University, 2004.

<sup>512</sup> David Szablowski (2007), *supra* note 47 at 40, footnote 57.

<sup>513</sup> Inter-Church Committee on Human Rights on Latin America (ICCHRLA), *Systematic Violations and New Legal Order: Human Rights in Peru* (Toronto, December 1993).

<sup>514</sup> Monsignor Miguel Irizar Campos of the Peruvian Bishops's Conference points out that the IMF and World Bank have a "certain complicity" in the violence as they provided loans knowing that Peru was engaged in a brutal internal conflict, and despite strong indications of serious corruption. Rights Action Report, "*The Difficult and Dangerous Search for Truth and Justice in Peru*", (March 2003) at 6.

<sup>515</sup> For instance, between 1990 and 1999, the stock of U.S. direct investment registered in Peru tripled, from about \$600 million to about \$1.8 billion. During the four-year period 1994-1997, the increase in U.S. direct investment in Peru was greater than in any other South American country. The largest investments were by mining and oil corporations such as Newmont Mining, Occidental Petroleum, Mobil Oil, Duke Energy, BHP Cooper, Noranda, Teck Cominco, Rio Algom, and BHP Cooper. Important investments were also made by Coca-Cola, Delta Air Lines, McDonald's, Chase Manhattan, Bank of Boston, J.P. Morgan and City Bank. See Cynthia McClintock and Fabian Vallas, *The United States and Peru: Cooperation at a Cost* (New York: Routledge, 2003) at 99.

business executives who applauded the opening of the economy, the elimination of almost all regulations, the control of inflation, and the plans to sell State companies.<sup>516</sup> Likewise, according to Francisco Durand, professor of Politics at the Catholic University, after the 1992 self-coup, the only civil society's institution in Peru that publicly endorsed and supported Fujimori's regime was Peru's National Confederation of Private Business Institutions (CONFIEP); during an interview in 1994, a representative of CONFIEP told him, "we had been looking for our Pinochet, and we finally found him."<sup>517</sup>

Fujimori's government (1990-2000) made a fully developed effort at stabilization and strong neo-liberal market policies throughout the decade, enacting a new Constitution and establishing a legal and regulatory framework that has provided favorable tax, royalty, and regulatory environments for foreign mining, oil and gas investors.<sup>518</sup> Subsequent governments, those of Alejandro Toledo (2001-2006), Alan Garcia (2006-2011), Ollanta Humana (2011-2016), and Pedro Pablo Kuczynski (2016-Present), have elaborated and implemented their policies, with some variations, on the basis of the neo-liberal economic framework built by Fujimori's

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<sup>516</sup> Nathaniel C. Nash, "No Longer a Pariah, Peru is Being Recast as Business Magnet" in *the New York Times* (November 2, 1993). Later, the International Council for Mining and Metals (ICMM) points out that Peru's framework and legislation "created an extremely attractive investment regime for large multinational companies." See ICMM, *The Challenge of Mineral Wealth: Using Resource Endowments to Foster Sustainable Development*, Peru Country Case Study (London: International Council on Mining and Metals, 2007) at 9.

<sup>517</sup> Video Film, "*Su Nombre es Fujimori*," Director Fernando Vilchez, Lima May 2016. CONFIEP brings together 27 associated business guilds, including the Federations of Chambers of Commerce and the National Society of Mining, Oil and Energy (SNMPE), online: <<http://www.confiep.org.pe/home>> (retrieved 30 August 2017).

<sup>518</sup> John Crabtree and Francisco Durand, *Peru Elite Power and Political Capture* (London, UK: Zed Books Ltd., 2017); Jose Carlos Orihueala and Rosemary Thorp (2012), *supra* note 354 at 37-38; Rosemary Thorp and Maritza Paredes, *Ethnicity and the Persistence of Inequality: The Case of Peru* (New York: Palgrave Macmillan, 2010) at 170-203.

government. These administrations not only institutionalized Fujimori's policies - they deepened and broadened the scope of neoliberal policies.<sup>519</sup>

### **4.3 Government Policies and Regulations on Extractive Industries**

The 1993 Constitution, enacted by Fujimori's regime, on the one hand implicitly recognizes Peru as a multi-ethnic, multicultural and multilingual nation, and on the other hand, establishes the foundations of the neoliberal economic model and strengthens its linkage to the global market system.<sup>520</sup> It prescribes explicitly the State's obligations to guarantee human rights (Art. 44), and among the Constitutional guarantees are the right to enjoy a balanced environment that is adequate for human development (Art. 2.22); the right to the protection of human health, including the health of families and communities (Art. 7); and the principle of equality before the law and of non-discrimination by reason of origin, race, language, religion, economic condition or any other motive (Art. 2.2).

Title III (Economic Regime) of the Constitution, contains the most important free market principles. It prescribes the State's obligation to guarantee free trade and free enterprise (Art. 59). It stipulates the non-discriminatory principle for local and foreign investments, equal treatment for public and private economic activities, and the possibility of the State and other public law persons to submit disputes arising from the contractual relationship to tribunals constituted under the signed treaties, or to national or international arbitration (Arts. 60, 63). It also prescribes that natural resources, renewable and nonrenewable, are the property of the nation; the State is sovereign in its use and can grant concessions for its use to private parties

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<sup>519</sup> Jose De Echave, "La Minería y las Transiciones que No Llegan," in Paul M. Makedonski Valdeavellano et al. (2014), *supra* note 487 at 59; Ricardo Grinspun, Carlos Larrea and Liisa North (2016), *supra* note 116; Jan Lust, "Social Struggle and Political Economy of Natural Resource Extraction in Peru," (2014) *Critical Sociology* 1-16.

<sup>520</sup> Constitución Política del Perú, 1993, Arts 2.19, 48, 89, and Arts 58 - 65. Lila Barrera-Hernandez (2010), *supra* note 272 at 169.

(Art.66). Yet, the State is required to promote the sustainable use of natural resources and it is entrusted with promoting the conservation of biological diversity and the sustainable development of the Amazon region (Arts. 67-69). The right to private property is guaranteed and must be exercised in harmony with the common good. That guarantee is made subject to a public interest override, in which case the property holder is entitled to just compensation and damages. Public property is inalienable and permanent, yet economic exploitation may proceed on public lands through concessions to private parties (Arts.70, 73). In addition, the Constitution guarantees the freedom of contract and the protection of contractual terms, which cannot be modified by laws or any other kind of provisions. Disputes arising from the contractual relationship can only be solved by arbitration or judicial means, according to the mechanisms of protection provided by the contract or law. And most importantly, it introduces and incorporates the controversial concept of *Contratos-Ley* (Contract-Laws) through which the State can establish guarantees and provide legal certainty and assurances to private parties; as Contract-Laws cannot be revised and modified legislatively, they are shielded from Congress' control and supervision (Art. 62).

In fact, Contract-Laws contributed to the implementation of legal stability agreements with MNCs which include special or preferential legal mechanisms such as accelerated depreciation, the possibility of deducting investments in public infrastructure from tax payments due, the exemption from tax payments until the initial investment was recovered or until income generated was used for reinvestment to increase production by more than ten percent, and deduction of research and mining exploration costs from tax payments.<sup>521</sup> For the next ten to

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<sup>521</sup> Jan Lust (2014), *supra* note 519.



fifteen years, it was prohibited to change any laws that protected the interests of MNCs, and until now these agreements are still in place; in fact, the 1990s framework established under the Fujimori government remains in place with few changes, which reaffirms the neoliberal, marked and pro-investment orientation of the Peruvian government.<sup>522</sup>

Two articles (88 and 89) in the same Title III (Economic Regime) of the Constitution are dedicated to the agrarian regime of Peru's Indigenous communities who are referred to as Comunidades Campesinas (Peasant Communities, those living in the Andean region) and Comunidades Nativas (Native Communities, those living in the Amazonian region). It prescribes that the State guarantees the right of land ownership in private or communal form or any other form of partnership (Art. 88). Peasant and Native communities are recognized as legal entities and granted legal person status under the law; they are declared autonomous, particularly in relation to the use of their lands which are vested in them in perpetuity, subject to their permanent use; any abandoned land, according to legal provisions, goes to State ownership to be awarded for sale (Art. 88, 89). One of the most radical changes in regard to Indigenous' land rights was the elimination of the protection inherent in the principles of non-alienability and the inability to carry mortgages or similar encumbrances, which were recognized and guaranteed by the previous Constitution of 1979. This change paved the way for parceling out and subsequent selling of Indigenous lands, thus instituting new forms of land tenure in their territories.

Another major change brought by the 1993 Constitution refers to the constitutional status of international human rights treaties. While the 1979 Constitution explicitly granted international human rights treaties constitutional standing (Article 105) and established the

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<sup>522</sup> Ricardo Grinspun, Carlos Larrea and Liisa North (2014), *supra* note 116; J. Lust, "Peru: Mining Capital and Social Resistance," in H. Veltmeyer and J. Petras, Eds., *The New Extractivism: A post-neoliberal development model or imperialism of the twenty-first century?* (London: Zed Books, 2014) at 192.

superiority (priority) of such treaties over domestic law (Article 101),<sup>523</sup> the 1993 Constitution neither makes specific references to any particular human rights instrument nor creates a general constitutional status for international human rights treaties. While it prescribes that treaties are part of national law (Article 55), the explicit constitutional hierarchy that the 1979 Constitution had granted to human rights treaties was eliminated.<sup>524</sup>

Important laws implementing the new commitment to liberalize the extractive industry and promote foreign investment include:

- Legislative decree 757, which promotes private investment and eliminates the state's exclusive privileges in economic activities and natural resources exploitation;<sup>525</sup>
- Legislative decree 662, which establishes a regime providing legal certainty and incentives to foreign investment;<sup>526</sup>
- Legislative decree 674, which promotes privatization of public enterprises;<sup>527</sup>
- Legislative decree 708, which promotes investment in the mining sector and declares that the promotion of mining investment is in the national interest;<sup>528</sup>

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<sup>523</sup> In addition, the 1979 Constitution specifically vested three international human rights instruments with constitutional rank: these were the International Covenant on Civil and Political Rights (CCPR), the Optional Protocol to the CCPR, and the American Convention on Human Rights. Peru Constitution (1979), Clause 16, Title VIII, Arts. 101 and 105.

<sup>524</sup> Most significantly, the Constitutional hierarchy granted to the three international agreements in the 1979 Constitution was abandoned. It can be extrapolated that the intent was for these international instruments to only be accorded a legal rank equal to that of domestic ordinary legislation in the 1993 Constitution. This represented retrogression in the importance accorded to the protection of internationally recognised human rights. Lately, in recent rulings, Peru's Constitutional Court argues that international human rights treaties are not only part of national law but also hold constitutional status. See Constitutional Court, Expedientes 0025-2005-PI/TC ; 0026-2005-PI/TC and 03343-2007-AA/TC, cited at Pedro Castillo Castañeda, *El derecho a la tierra y los acuerdos internacionales: El caso del Perú* (Lima: CEPES, 2009) at 57-60.

<sup>525</sup> Decreto Legislativo 757, November 8, 1991, Ley Marco para el Crecimiento de la Inversion Privada. The objective was arguably to set up a new efficient administration, eliminating legal and administrative barriers to private enterprise and economic activity, while promoting productive and environmentally harmonious development.

<sup>526</sup> Decreto Legislativo 662, August 29, 1991, Regimen de Estabilidad Juridica para las Inversiones Extranjeras.

<sup>527</sup> Decreto Legislativo 674, September 27, 1991, Ley de Promocion de la Inversion Privada de las Empresas del Estado.

<sup>528</sup> Decreto Legislativo 708, November 6, 1991, Ley de Promocion de Inversiones en el Sector Minero.

- Legislative decree 818, which provides the framework for large-scale investment in natural resources;<sup>529</sup>
- Legislative decree 653, which promotes investment in the agricultural sector and has led to the end of the land reform process started in the 1970s;<sup>530</sup>
- Land Law 26505, which following along the lines of legislative decree 653, consolidates the liberalization of Peasants and Natives communities' lands in all its aspects, eliminating most of the restrictions on land ownership and allowing private parties, national and foreign, to own large tracts of public lands throughout the country;<sup>531</sup>
- Legislative decree 667,<sup>532</sup> and the Special Land Titling and Cadastre Project (PETT) initiated in 1992, under the guidance of the Inter-American Development Bank (IDB), promote the formalization of rural property land. PETT is currently in its third phase, which plans to consolidate the registry and cadastre process and to formalize Indigenous community land-rights both in Andes and the Amazon region. In previous phases, it managed to reach important milestones with 83 percent of properties registered on the Coast and 53 percent in the Andes.<sup>533</sup>

A new Mining Law was enacted which makes the forced displacement and reallocation of communities and populations for mining purposes possible;<sup>534</sup> as was a new Hydrocarbons Law which reaffirms Peru's commitment to free competition and free market as a means to

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<sup>529</sup> Decreto Legislativo 818, April 22, 1996, Precisa el inicio de operaciones productivas de empresas que suscriban contratos con el Estado para la exploración, desarrollo y/o explotación de recursos naturales.

<sup>530</sup> Decreto Legislativo 653, July 30, 1991, Ley de Promoción de las Inversiones en el Sector Agrario. Legislative decree 653 was a major shift in land legislation, starting deregulation (or neoregulation) of a number of aspects related to that field, such as land tenure, expanding the limits for private ownership of land, the use of uncultivated land, marketing, credit, water use, administrative organization and land of forest and jungle, agribusiness, among others. See Pedro Castillo Castañeda (2009), *supra* note 524 at 71.

<sup>531</sup> Ley 26505, Land Law, "Ley de la Inversión Privada en el Desarrollo de las Actividades Económicas en las Tierras del Territorio Nacional y de las Comunidades Campesinas y Nativas," July 17, 1995.

<sup>532</sup> Decreto Legislativo 667, Ley del Registro de Predios Rurales, September 12, 1991.

<sup>533</sup> Inter-American Development Bank, PE-L1026: Rural Land Titling & Registration Project in Peru - Third Phase (PTRT-3), online: <<http://www.iadb.org/en/projects/project-description-title,1303.html?id=PE-L1026>>; USAID Peru Country Profile, Land Tenure and Property Rights, October 2016, online: <[https://www.land-links.org/wp-content/uploads/2016/09/USAID\\_Peru\\_Country\\_Profile\\_FinalForClearance\\_10-14-16.pdf](https://www.land-links.org/wp-content/uploads/2016/09/USAID_Peru_Country_Profile_FinalForClearance_10-14-16.pdf)> (retrieved 30 April 2017).

<sup>534</sup> Decreto Legislativo 109, DS 014-92-EM-TUO, June 4, 1992, Ley General de Minería.

achieve human well-being and national development.<sup>535</sup> Peru's General Law of Expropriation (Law 27117), provides that the government can expropriate private land upon declaration of public utility and social interest; the government has the right to expropriate the surface and subsurface rights, if desired; compensation must be paid to the landholder based on appraised value.<sup>536</sup> State expropriation procedures, and overall Peru's policy and regulations on extractive industries introduced by the Fujimori government have validated the expansion of MNCs activities and the dispossession of Indigenous lands.

#### **4.4 State Policies and Regulations on Indigenous Communities**

Peru's population reached almost 31 million people in 2014.<sup>537</sup> An estimated 45 to 47 percent of the population is Indigenous, 37 percent mixed Indigenous-European, 15 percent European, and 3 percent other.<sup>538</sup> The Quechua and Ayamara peoples are the most numerous, comprising about one-third of Peru's total population and located in the Andean region; other Indigenous peoples such as the Ashaninka, Awajun, Wampis, Achuar, Machiguenga are located in the Amazonian region.<sup>539</sup>

Most of Peru's Constitutions have been established on the basis of the cultural supremacy of the creole elite who believe that they are the bearers of the one and only "civilisation."<sup>540</sup> For much of Peru's post-colonial history, the State has been hostile to the idea of formally

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<sup>535</sup> Ley 26221, August 13, 1993, Ley Orgánica que norma las actividades de Hidrocarburos en el Territorio Nacional.

<sup>536</sup> Ley General de Expropiaciones, Ley No. 27117, May 15, 1999.

<sup>537</sup> Instituto Nacional de Estadística e Informática (INEI), *Estado de la Población Peruana 2014*, online: <[http://www.inei.gob.pe/media/MenuRecursivo/publicaciones\\_digitales/Est/Lib1157/libro.pdf](http://www.inei.gob.pe/media/MenuRecursivo/publicaciones_digitales/Est/Lib1157/libro.pdf)> (retrieved 30 April 2017).

<sup>538</sup> USAID Peru Country Profile, Land Tenure and Property Rights, October 2016, online: <[https://www.land-links.org/wp-content/uploads/2016/09/USAID\\_Peru\\_Country\\_Profile\\_FinalForClearance\\_10-14-16.pdf](https://www.land-links.org/wp-content/uploads/2016/09/USAID_Peru_Country_Profile_FinalForClearance_10-14-16.pdf)> (retrieved 30 April 2017); Ferran Cabrero, et al. (2013), *supra* note 331 at 20-21.

<sup>539</sup> International Work Group for Indigenous Affairs, *the Indigenous World 2014*, Copenhagen, Denmark: IWGIA, May 2014 at 159.

<sup>540</sup> Bartolome Clavero (2009), *supra* note 431 at 345-346.

recognizing either colonially derived Indigenous rights or liberal citizenship rights for the Indigenous population.<sup>541</sup> Thus, until the 1970s (when the implementation of the Agrarian reform programme began, 1969-1975) Peru's Andean region remained under a quasi-feudal informal legal order managed by local landlords and merchants, in which Andean Indigenous peoples were tied to the land in conditions of racialized serfdom.<sup>542</sup> Simultaneously, unitary property regimes facilitated the expropriation of Indigenous communal lands, while vagrancy laws and different forms of indentured labor and debt peonage (pongueaje, mozos colonos, etc.) secured the exploitation of the Indigenous labor force for the development of mining and agro-exports.<sup>543</sup>

In theory, legal recognition of Indigenous communities and their rights to communal land tenure were first recognized by Peru's Constitution of 1920. The next Constitution of 1933 reinforced this recognition and prescribed that Indigenous communal lands could not be either, sold, mortgaged or lost through adverse possession; yet, asymmetries, power imbalances, and unjust policy and regulations prevented many Andean and Amazonian Indigenous peoples from registering their communities until the Agrarian Reform of the 1970s.<sup>544</sup> The Agrarian Reform not only facilitated the expansion of Indigenous movements and organizations, it also sought to control them and subordinate them to the nationalist project conducted by the Peruvian military government.<sup>545</sup> Furthermore, the military government abolished the terms Indian (*Indio*) and Indigenous (*Indigena*) and addressed Indigenous peoples from the Andes and the Coast as

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<sup>541</sup> Mark Thurner, "Historicizing 'the Postcolonial' from Nineteenth Century Peru," (1996) 9 *Journal of Historical Sociology* 1; Mark Thurner, "'Republicanos' and 'la Comunidad de Peruanos': Unimagined Political Communities in Postcolonial Andean Peru," (1995) 27 *Journal of Latin American Studies* 291.

<sup>542</sup> Peter Gose, "Embodied Violence: Racial Identity and the Semiotics of Property in Huaquirca, Antabamba, Apurimac" in Deborah Poole, Ed., *Unruly Order: Violence, Power, and Cultural Identity in the High Provinces of Southern Peru* (Boulder: Westview Press, 1994). Cited on David Szablowski (2007), *supra* note 47 at 39.

<sup>543</sup> Florencia Mallon, *Peasant and Nation: The Making of Postcolonial Mexico and Peru* (Berkeley and Los Angeles: University of California Press, 1995).

<sup>544</sup> Nueva Reforma Agraria, Decreto Ley 17716, June 24, 1969; David Szablowski (2007), *supra* note 47 at 40.

<sup>545</sup> *Ibid.*

Peasants (*campesinos*)<sup>546</sup> while Indigenous peoples from the Amazon region were addressed as Natives (*nativos*).<sup>547</sup> The Constitution of 1979 not only extended the right to vote for the first time to Indigenous peoples, it also maintained the legal recognition of Peasant and Native communities and continued stipulating that their communal lands were inalienable, imprescriptible and could not be mortgaged. Yet, it downplayed the inalienability protection principle of communal lands, indicating that their sale will only be possible if two-thirds of the community members request their division and sale; and if this were the decision of a community, a specific law should be enacted for each case.<sup>548</sup>

As it was discussed previously, the Constitution of 1993 consolidated this trend, eliminating the Indigenous lands' inalienability and inability to carry mortgages. Indigenous communities' communal lands can now be sold after a two thirds vote in favour of the transaction by registered community members.<sup>549</sup> The 1993 Constitution together with the set of laws enacted by Fujimori's government, marks the beginning of a new era for Peru's Indigenous peoples, for it ended the period – at least formally -- of constitutional guarantees for Indigenous communities' rights initiated in 1920; it begins a period of systematic infringement of their rights.<sup>550</sup> Apart from the Constitution, multiple set of laws deal with Peasant and Native communities' rights to land and resources. Among the most prominent are: Law 22175 (1978) on Native communities, and Law 24656 (1987) on Peasant communities, which recognize their

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<sup>546</sup> Nueva Reforma Agraria, Decreto Ley 17716, June 24, 1969, Art. 115.

<sup>547</sup> Decreto Ley 20653 "Ley de Comunidades Nativas y de Promoción Agropecuaria de las Regiones de Selva y Ceja de Selva" June 18, 1974; Decreto Ley 22175, "Ley de Comunidades Nativas y de Desarrollo Agrario de la Selva y Ceja de Selva," May 9, 1978.

<sup>548</sup> Peru Constitution, 1979, Art. 163.

<sup>549</sup> Land Law 26505, July 17, 1995, Ley de la Inversion Privada en el Desarrollo de las Actividades Economicas en las Tierras del Territorio Nacional y de las Comunidades Campesinas y Nativas.

<sup>550</sup> Alberto Chirif, "*Derechos Indigenas en la Legislacion Peruana: Informe Final*," Lima, Instituto del Bien Comun, May 2012.

customs, practices and traditions, and their rights to communal land;<sup>551</sup> Land Law 26505 (1995) on private investment on Peasant and Native communities' lands;<sup>552</sup> and Laws 26821, 26834 and 29763 on sustainable use and protection of natural resources.<sup>553</sup>

Understanding how these laws operate, beside the numerous laws enacted since 1990, poses a significant challenge, particularly since many of those laws undermine the rights of indigenous communities covertly,<sup>554</sup> as it is the case of many of the 99 legislative decrees passed by Alan Garcia's government to facilitate the implementation of Bilateral Free Trade Agreements (BTAs) signed with the United States and Canada in 2006 and 2008 respectively. These legislative decrees aimed to facilitate land concessions for oil and gas exploration, mining, biofuel crops and logging, and to undermine land, environmental and cultural rights of Indigenous communities.<sup>555</sup> Of those 99 Legislative Decrees, only four were repealed after a widespread protest of Indigenous peoples in the Amazon region which culminated in the June 2009 Bagua massacre.<sup>556</sup> Among the most controversial legislative decrees still in force are 994, 1089, 1020 and 1080 which Indigenous peoples challenged and criticized. For instance, Legislative Decree 994 and its regulations create a special fast-track regime for awarding and titling State-owned idle lands with agricultural potential to private developers. These comprise,

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<sup>551</sup> Decreto Ley 22175, "Ley de Comunidades Nativas y de Desarrollo Agrario de la Selva y Ceja de Selva," May 9, 1978; Ley 24656, "Ley General de Comunidades Campesinas," April 13, 1987.

<sup>552</sup> Ley 26505, Land Law, "Ley de la Inversion Privada en el Desarrollo de las Actividades Economicas en las Tierras del Territorio Nacional y de las Comunidades Campesinas y Nativas," July 17, 1995.

<sup>553</sup> Ley 26821, "Ley Orgánica para el aprovechamiento sostenible de los Recursos Naturales," June 25, 1997; Ley 26834, "Ley de Areas Naturales Protegidas," June 30, 1997; Ley 29763, "Ley Forestal y de Fauna Silvestre," July 21, 2011.

<sup>554</sup> Alberto Chirif (2012), *supra* note 550 at 9.

<sup>555</sup> International Federation of Human Rights (FIDH), "Peru – Bagua: Bloodshed in the Context of Amazon Protest," Paris, October 2009, online: <<https://www.fidh.org/IMG/pdf/rapperou529ang.pdf>> (retrieved 31 May 2017); Patricia Urteaga-Crovetto, "Informe Socio Jurídico sobre Decretos Legislativos Vinculados a Derechos de Pueblos Indígenas" IBIS, Derechos, Educacion y Desarrollo, Lima, Agosto 2008.

<sup>556</sup> Stefano Varese, "Genocide by Plunder: Indigenous peoples of Peru's Amazonia Confront Neoliberalism," in James M. Cooper, et al., Eds., *Amazonia, Environment and the Law in Amazonia: A Plurilateral Encounter* (Portland: Sussex Academic Press, 2013) at 129.

with limited exceptions not including Indigenous territories, all lands that are unused due to lack or excess of water and all other unproductive lands. According to Legislative Decree 1089, titling of such lands is declared of national interest.<sup>557</sup>

The rationale behind Garcia's decision to enact those controversial legislative decrees was consistent with the Washington Consensus and the IFI's neoliberal prescriptions. Garcia proposed to formalize private property rights, offer up wide swaths of land for sale, and attract large-scale investment and modern technology.<sup>558</sup> Garcia described Peru's countryside as a space to be colonized once again in order to extract natural resources from spaces currently occupied by technologically backward, Indigenous and *mestizo* small-scale farmers and nomads who, in this account, are quite simply in the way.<sup>559</sup> Thus, portraying Indigenous communities, their organizations and allies as "dogs in the manger" and "backwards,"<sup>560</sup> Garcia accused them for undermining and blockading the "progress" and "development" of the country. He argued that "Peru's immense natural resource endowments are not legally titled, and therefore cannot be traded, do not attract investment, and do not generate employment. The result: continuing poverty." This problem persists, he maintained, "because of 'the law of the dog in the manger, which says if I can't do it, nobody can do it.'"<sup>561</sup>

As a result of the persistent struggle and demand of Indigenous peoples, the government enacted the Law on the Right to Prior Consultation to Indigenous or Native Peoples on August

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<sup>557</sup> Lila Barrera-Hernandez (2010), *supra* note 272 at 173-174.

<sup>558</sup> Anthony Bebbington, "Extractive Industries, Socio-Environmental Conflicts and Political Economic Transformation in Andean America," in Anthony Bebbington, Ed. (2012), *supra* note 246 at 3.

<sup>559</sup> Alan Garcia, "El Síndrome del Perro del Hortelano," *supra* note 94.

<sup>560</sup> Tami Okamoto and Esben Leifsen, "Oil Spills, Contamination, and Unruly Engagements with Indigenous Peoples in the Peruvian Amazon" in Havard Haarstad, Ed., *New Political Spaces in Latin American Natural Resource Governance* (New York: Palgrave Macmillan, 2012) at 179.

<sup>561</sup> Anthony Bebbington, "The New Extraction: Rewriting the Political Ecology of the Andes?" in *NACLA Report on the Americas*, September/October 2009 at 12.



2011.<sup>562</sup> Yet, both the legislative process leading up to the adoption of the law and its regulations, and the outcome of the process have been the subject of criticism from Indigenous organizations for falling short of the international standards (such as ILO 169), seeking instead to facilitate and validate economic investment of private companies in their territories.<sup>563</sup> The regulations on the implementation of Law of Prior Consultation were adopted on April 2012 without considering the comments made by Indigenous organizations. Thus, the final text declares explicitly that the consultation's outcome is not binding unless it reaches an agreement between the parties, and it reduces the timeline of different stages of the consultation process.<sup>564</sup> The law and its regulations adopt definitions of Indigenous peoples that are restrictive and incompatible with ILO Convention 169.<sup>565</sup> While the ILO Convention 169 indicates that self-identification as Indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of the Convention apply, the law on Indigenous consultation limits the term "indigenous" only to those of "direct" lineage and to those who keep "all" their cultural elements, excluding therefore the largest peasant populations from the Andes and coastal villages.<sup>566</sup> Furthermore, the regulations do not prescribe the need to conduct a consultation before concessions or before granting license agreements; does not provide transparency and

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<sup>562</sup> Ley N° 29785, Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios, August 2011; Reglamento de la Ley de Consulta Previa, Decreto Supremo N° 001-2012-MC, April 2, 2012.

<sup>563</sup> Miguel Vargas and Ian Miranda, "Consulta Previa: Una Mirada a 25 años del Convenio 169," in Jose Aylwin and Leonardo Tamburini, Eds., *Convenio 169 de la OIT: Los Desafíos de su Implementación en América Latina a 25 años de su Aprobación* (Copenhague: IWGIA, 2014) at 85-86.

<sup>564</sup> Anthony Bebbington, Martin Scurrah and Anahi Chaparro, Documento de Trabajo No. 8, "*La expansión de las industrias extractivas y los cambios en la defensa de los derechos de los pueblos indígenas*," December 2013, at 61, online: <<https://innovacionesinstitucionales.files.wordpress.com/2013/08/dt-8-pueblos-indc3adgenas-tierras-y-territorio1.pdf>> (retrieved 30 June 2017).

<sup>565</sup> *Peru: Informe Alternativo 2012 sobre el cumplimiento del Convenio 169 de la OIT*, Lima, Agosto 2012, at 10-11, online: <<http://www.justiciaviva.org.pe/webpanel/publicaciones/archivo13092012-110352.pdf>> (retrieved 30 June 2017).

<sup>566</sup> Cesar Gamboa and Sebastian Snoeck, Eds., *Análisis crítico de la consulta previa en el Perú: Informes sobre el proceso de reglamentación de la Ley de Consulta y del Reglamento* (Lima: Grupo de Trabajo sobre Pueblos Indígenas de la Coordinadora Nacional de Derechos Humanos, December 2012) at 15.

clarity on which situations the consultation should proceed, in cases of infringement of Indigenous rights, or on Indigenous participation in consultation plans.<sup>567</sup>

The implementation of the law has been sluggish. Since the law is seen by extractive companies, and even by the Ministry of Energy and Mines, as a factor that would hinder further investment, there has been a tremendous lobby to limit its application only to the Amazonian Indigenous communities, bypassing communities in the Andes.<sup>568</sup> The legal distinction between “natives” and “peasants,” established in the 1970s, is used today to justify the denial of the right to consultation to Andean Indigenous communities that fall into the “peasant” category.<sup>569</sup> Even President Humala endorsed this stance (on April 28, 2013) when he declared that “there are not native communities in the Andean highlands, the majority are agrarian communities resulting from the agrarian reform. For the most part native communities are only found in the Amazonian jungle.”<sup>570</sup> In order to reduce the number of communities that can request the application of this law, the government has published an official selective list of 55 communities that are to be considered Indigenous communities, 52 in the Amazonian region and only 3 in the Andes, although the Andes contains more than 70 percent of Indigenous communities.<sup>571</sup> Thus, as of

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<sup>567</sup> *Ibid* at 21.

<sup>568</sup> According to the Minister of Energy and Mines, Quechua communities should not be considered “indigenous” under the law because they mixed with Spanish colonizers centuries ago, often have formal town assemblies, and are less isolated than Amazon tribes. See Mitra Taj and Teresa Cespedes, “Exclusive: Peru rolling back indigenous law in win for mining sector,” *Reuters*, Lima, May 1, 2013, online: <<http://www.reuters.com/article/us-peru-mining-indigenous-idUSBRE9400CG20130501>> (retrieved 30 June 2017); Epifanio Baca-Tupayachi, *Estudio sobre Marco Normativo Minero en Peru* (Lima: Grupo Propuesta Ciudadana, April 2014) at 7.

<sup>569</sup> Lila Barrera-Hernandez, “Indigenous Peoples and Free, Prior and Informed Consent in Latin America,” in Lila Barrera-Hernandez et al., Eds., *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (New York: Oxford University Press, 2016) at 82.

<sup>570</sup> Gerardo Renique, “Peru: Humala Submits to United States and the Mining Industry,” in (2013) 46:3 *NACLA Report on the Americas* 12.

<sup>571</sup> Peru Ministerio de Cultura, Base de Datos de Pueblos Indigenas u Originarios, online: <<http://bdpi.cultura.gob.pe/lista-de-pueblos-indigenas>> (retrieved 31 May 2017).

September 2015, while ten consultations were completed in the hydrocarbon sector in the Amazon region, there was no consultation in the mining sector or in the Andean region.<sup>572</sup>

According to Peru's National Coordinator for Human Rights, there is a permanent risk of manipulation of the right of Indigenous communities to prior, free and informed consent in administrative procedures that do not address the illegitimacy of investment projects affecting their communal lands.<sup>573</sup> During a workshop organized by human rights NGOs in 2012, participants noted that many companies are involved in dividing the members of Indigenous communities, especially during the consultation process. One participant reported that in the Amazonian department of Loreto, in the context of a dispute between Ashuar communities and Talisman Oil Company, the company allegedly brought a group of armed pro-oil project Indigenous Ashuar in by helicopter.<sup>574</sup>

This situation has become appalling with the new regulation for environmental protection in hydrocarbon activities (passed on November 2014), which does not prescribe the need to comply with the law on Indigenous consultation under the section on the Environmental Impact

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<sup>572</sup> In 2016, the government finally began to recognizing the right to prior consultation of Andean Indigenous communities. According to the Ministry of Culture's Prior Consultation Office, as of December 2016, eight consultations have been initiated with Andean peasant communities, involving mining projects in the regions of Apurímac (2), Ancash (3) Ayacucho (2) and Cusco (1). Grupo de Trabajo sobre Pueblos Indígenas de la Coordinadora Nacional de Derechos Humanos, *"Informe Alternativo 2015 Sobre el Cumplimiento del Convenio 169 de la OIT,"* Lima, October 2015, at 16-17, 22; Cristina Blanco, "Balance del Perú en el Contexto Regional: una mirada comparativa del derecho a la consulta previa con relación a Colombia, Chile y Bolivia," in Karina Vargas, Ed., *La Implementación del Derecho a la Consulta Previa en el Perú: Aportes para el análisis y la garantía de los derechos colectivos de los pueblos indígenas* (Lima: Cooperación Alemana, December 2016) at 20; Guisela Mayen, Daniela Erazo and Ivan Lanegra, *El Derecho a la Consulta Previa, Libre e Informada: Hallazgos de un proceso de aprendizaje entre pares para la investigación y la acción en Ecuador, Guatemala y Perú* (Lima: SPDA, 2014) at 114.

<sup>573</sup> Cesar Gamboa and Sebastian Snoeck, Eds. (2012), *supra* note 566 at 16, 21.

<sup>574</sup> Comisión Internacional de Juristas - IDL, *"Acceso a la Justicia : Empresas y Violaciones de Derechos Humanos en el Perú,"* Geneva - Lima, May 2013 at 79.

Assessment (EIA).<sup>575</sup> Furthermore, in July 2014, Law 30230 was passed,<sup>576</sup> which establishes new fiscal and tax measures (favouring private corporations by pardoning billions of US dollars in past taxes), and simplification of procedures and permits for granting concessions in the extractive sector, aiming to promote and revitalize foreign investment at the expense of the already feeble and ineffective environmental standards. Some sections of this law, very vague and general, can also lead to and create conditions for the loss of property rights over land by Indigenous communities; the law prescribes the creation of special procedures (Title III) to grant land rights for investment projects (mining projects, oil, forestry, agro-industrial, etc.), regardless of the current or future use to be given to the premises. The risk, given the generality of the provisions contained in this law, is that these investments rights can ignore, trump or violate the rights enshrined in national and international legislation for the 6,069 Peasant communities and 1,469 Native communities across the country, since 72.7 percent of them (5,483 in total) have no way to prove their property rights due to lack of title deeds and georeferencing of the extent and location of their lands.<sup>577</sup>

Shortly after Law 30230 was passed by the Peruvian Congress, the New York-based credit rating agency Moody's Investor Service, upgraded Peru's debt by two notches, bringing it to the investment grade level of A3, placing Peru ahead of Argentina, Brazil and Colombia,

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<sup>575</sup> Decreto Supremo N° 039-2014-EM, "Reglamento para Protección Ambiental en las Actividades de Hidrocarburos," November 12, 2014; Dar – Agenda Ambiental, "*Primeras preocupaciones sobre el Reglamento para la Protección Ambiental en las Actividades de Hidrocarburos*," DAR, Lima, November 19, 2014, online: <<https://agendambiental.lamula.pe/2014/11/19/primeras-preocupaciones-sobre-el-reglamento-de-proteccion-ambiental-en-las-actividades-de-hidrocarburos/darperu/>> (retrieved 31 May 2017).

<sup>576</sup> Ley 30230, "Law establishing tax measures, simplification of procedures and permits for the promotion and revitalization of investment in the country," July 11, 2014.

<sup>577</sup> CooperAccion / CEPES, "*Impactos, Intereses y Beneficiarios de la Ley No. 30230*," Lima, October 2014, at 39, online: <[http://www.cooperaccion.org.pe/Descargas-Documents/Analisis\\_Ley30230.pdf](http://www.cooperaccion.org.pe/Descargas-Documents/Analisis_Ley30230.pdf)> (retrieved 31 May 2014); Laureano del Castillo, "*De la Búsqueda del Bien Comun a la Búsqueda de Facilidades para la Inversion*," CEPES/Rural, Lima, November 20, 2014, online: <<https://cepesrural.lamula.pe/2014/11/20/de-la-busqueda-del-bien-comun-a-la-busqueda-de-facilidades-para-la-inversion/cepesrural/>> (retrieved 31 May 2017).

countries with larger and more diversified economies.<sup>578</sup> Moreover, Christine Lagarde, Managing Director of the IMF praised Peru's economic policies and performance during her official visit to Peru on December 2014.<sup>579</sup> Since taking power in July 2016, the government of Kuczynski continued and deepened this trend; between December 2016 and January 2017 his government enacted 112 legislative decrees, 65 of which were designed to further facilitate foreign investment at the expense of weakening environmental standards and Indigenous peoples rights. Indigenous organizations have expressed their concern and questioned particularly legislative decree No. 1251, 1285, 1292, 1320, 1330, 1333, 1334 and 1353 which have far-reaching implications on their collective land rights.<sup>580</sup> In June 2017, the government of Kuczynski enacted a decree (D.S. 003-2017-MINAM) which established new and 'more flexible' air quality standards. Repealing previous more stringent regulations, the decree lowered and weakened previous air quality standards. For instance, it raised the maximum amount of sulphur

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<sup>578</sup> El Comercio, "Moody's elevó la calificación crediticia de Perú a nivel "A3"," in *El Comercio*, Lima, 02 July 2014, online: <[http://elcomercio.pe/economia/peru/moodys-elevo-calificacion-credicia-peru-nivel-a3-noticia-1740175?ref=nota\\_economia&ft=contenido](http://elcomercio.pe/economia/peru/moodys-elevo-calificacion-credicia-peru-nivel-a3-noticia-1740175?ref=nota_economia&ft=contenido)> (retrieved 31 May 2017).

<sup>579</sup> Lagarde points out, "Peru has been experiencing a decade of strong growth and we are confident that it will continue to grow, despite the slowing global economy and lower metal prices. We talked with President Humala on the need for Peru to implement fiscal and structural reforms recommended by the International Monetary Fund." El Comercio, "Lagarde: 'Confiamos que la economía peruana seguirá creciendo', La directora del FMI se reunió con el presidente Humala y lo incitó a implementar más reformas fiscales y estructurales" in *El Comercio*, Lima, December 02, 2014, online: <<http://elcomercio.pe/economia/peru/lagarde-confiamos-que-economia-peruana-seguira-creciendo-noticia-1775735>> (retrieved 31 May 2017); International Monetary Fund, *Statement by IMF Managing Director Christine Lagarde at the Conclusion of her Visit to Peru*, Press Release No.14/551, December 4, 2014, online: <<http://www.imf.org/external/np/sec/pr/2014/pr14551.htm>> (retrieved 31 May 2017).

<sup>580</sup> On 25 May 2017, the Congress repealed Legislative Decree No. 1333, which establishes a Special Project/Institution to facilitate access to land (including Indigenous lands) for investment priority projects. Indigenous organizations, led by the Pacto de Unidad, a coalition of six national Indigenous organizations had vigorously expressed their concern and had called for its repeal. Peru Support Group, "*Government legislative decrees may threaten indigenous land rights*," 18 February 2017, online: <<http://www.perusupportgroup.org.uk/article-1296.html>> (retrieved 31 May 2017); L. Hallazi, "*Nuevos Paquetazos Amenazan Los derechos de Propiedad*," in Servindi, 1 February 2017, online: <<https://www.servindi.org/31/01/2017/nuevos-paquetazos-amenazan-los-derechos-de-propiedad>> (retrieved 31 May 2017); Peru Support Group, "*Indigenous communities reject Decree 1333*," 13 May 2017, online: <<http://www.perusupportgroup.org.uk/news-article-1359.html>> (retrieved 31 May 2017).

dioxide, a by-product of smelting copper and other base metals, that can be emitted to 250 micrograms per cubic metre per 24 hours, from the 20 micrograms per cubic metre previously.<sup>581</sup>

The development of a legal and institutional framework to protect Indigenous rights and the environment during the last two decades has been very challenging and undergone several ups and downs, due to the prevalence of the perspective that Indigenous rights and environmental regulations are serious "obstacles" and represent extra costs for investors and companies. The tension between Indigenous peoples rights and the free market policy and regulations implemented by the successive governments has becomes more clear. The later has prevailed and facilitated the expansion of corporate extractive industries which has brought serious infringement on Indigenous communities' rights.<sup>582</sup>

#### **4.5 Access to Justice**

Access to justice –to effective judicial protection and to legal remedies-- is a key factor in protecting the rights of Indigenous communities affected by corporate mining, oil and gas projects. Access to justice is guaranteed in international agreements such as the International Covenant on Civil and Political Rights (Arts. 2 and 14) and the American Convention on Human Rights (Arts. 8 and 25). The right to access to justice, while not explicitly recognized in Peru's domestic legal system, is an essential component of the right to judicial protection and due process recognized in paragraph 3 of Article 139 of the Constitution, understood as access to an independent, impartial and competent court for the substantiation and determination of any

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<sup>581</sup> CooperAccion, "Los Nuevos Estadares de Aire y Una Nueva Demanda Contra el Peru," in CooperAccion, Lima 13 Junio 2017, online: < <http://cooperaccion.org.pe/main/advanced-stuff/cooperaccion-informa/732-los-nuevos-estadares-de-aire-y-una-nueva-demanda-contra-el-peru>> (retrieved 30 June 2017).

<sup>582</sup> Lila Barrera-Hernandez, "Recent Developments in Social Impact Management in Extractive Resource Development in Peru," (2009) 5 (2) *McGill International Journal of Sustainable Development Law and Policy* 155.

criminal charge or determination of rights and obligations of a different nature such as civil, fiscal, and labor.<sup>583</sup>

#### **4.5.1 Domestic Legal Remedies and Venues**

##### **Constitutional Actions**

Peru's Constitution (Title V) provides a number of constitutional actions as procedural venues to protect fundamental rights.<sup>584</sup> Regulated by the Constitutional Procedural Code, constitutional actions or processes can be exercised to stop threats or violations of rights.<sup>585</sup> Furthermore, they can be used to request information that the authorities hold in their possession; as well as for the enforcement of obligations under the Constitution, the law or any government policy. They can also be used to challenge any rules that oppose the Constitution; to resolve conflicts between different government's organs, or when their functions are unclear. In addition, these actions can be used not only to stop threats or violations of rights resulting from State acts and / or omissions but also when these violations result from private parties' acts or omissions.

##### **Criminal Proceedings**

The Peruvian Penal Code<sup>586</sup> does not provide for direct criminal liability for companies, but it provides accessory liability for having served as a facilitator or for covering up a crime. In that case, the company would be subject to criminal sanctions; only individuals, managers and representatives of the company assume direct responsibility for the wrongdoing. Thus, Art. 105

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<sup>583</sup> Sentencia Tribunal Constitucional, STC 010-2001-AI, FJ 10. Cited in Comision Internacional de Juristas – IDL (2013), *supra* note 557 at 38.

<sup>584</sup> Peru Constitution, 1993, Title V, on Constitutional Guarantees, Art. 200.

<sup>585</sup> Ley 28237, Código Procesal Constitucional, May 28, 2004. Among the most important constitutional processes are: 1) Habeas Corpus Process, 2) Amparo Process, 3) Habeas Data Process, 4) Compliance Process (Proceso de Cumplimiento), and 5) Popular Action and Constitutionality Review Process (Procesos de Acción Popular e Inconstitucionalidad).

<sup>586</sup> Código Penal, Decreto Legislativo 635, April 3, 1991.

prescribes measures applicable to a company when an offense is committed in the exercise of company's activities, or when using the company to facilitate or conceal an offense. In November 2009, the Judiciary developed a criterion for the application of Article 105 and established a series of guidelines to be observed in criminal proceedings when a crime is attributed to a legal person.<sup>587</sup> Article 104 prescribes the legal person's vicarious liability for offenses committed by its employees or representatives, in the context of its activities.

The Penal Code also prescribes criminal liability rules for environmental wrongdoings under the title 'Environmental Crimes' (Arts. 304-314) which aim to protect a balanced and healthy environment and punish conduct that causes discharges or emissions of toxic gases, noise, leaks, spills or radiation into air, soil, subsoil, and waters. Aggravated conduct encompass distorting information, hindering administrative oversight, and causing serious injury or death. Given the serious effects of these offenses, the penalties are not all that high (6 -10 years of prison). Art. 314 prescribes as a crime wrongful licensing by a public officer, for instance when the decision-maker grants a license for any industrial operation, or provides a favorable opinion regarding a license request, in contravention of applicable environmental protection rules and regulations. It also prescribes that legal representatives of legal persons or companies, whose actions on behalf of the company may constitute offenses under this Title, shall be criminally liable (Art. 314-A).

### **Civil Damages in Criminal Proceedings and Ordinary Civil Action for Damages**

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<sup>587</sup> Corte Suprema de Justicia, Acuerdo Plenario 007-2009-CJ-116, November 13, 2009, online: <[http://www.pj.gob.pe/wps/wcm/connect/c930ab804075b977b5c9f599ab657107/ACUERDO\\_PLENARIO\\_07-2009-CJ-116\\_301209.pdf?MOD=AJPERES&CACHEID=c930ab804075b977b5c9f599ab657107](http://www.pj.gob.pe/wps/wcm/connect/c930ab804075b977b5c9f599ab657107/ACUERDO_PLENARIO_07-2009-CJ-116_301209.pdf?MOD=AJPERES&CACHEID=c930ab804075b977b5c9f599ab657107)> (retrieved 30 Juen 2017).



Committing a crime usually generates damage and therefore responsibility of a civil nature. It is possible to claim civil damages in a criminal proceeding; to assert this claim it is necessary that the victim becomes an active party in the criminal proceedings.<sup>588</sup> Yet, an ordinary civil action for damages is also available, which would allow a claim for a higher amount of compensation.

### **Ombudsperson's Office (Defensoria Del Pueblo)**

Given that alternative dispute resolution mechanisms (such as conciliation and arbitration) have not been used in addressing and solving conflicts and infringements in the extractive industry sectors, Peru's Ombudsperson's office is the only public institution that has played a role of mediator between affected communities and government entities affecting their rights.<sup>589</sup> The Ombudsperson's office prepares reports containing recommendations which, however, are not legally binding.<sup>590</sup>

#### **4.5.2 Barriers to Access to Justice**

The main barriers to access justice for Indigenous communities are a) institutional, technical and organizational barriers, b) interference of political and economic power in the administration of justice, c) corruption, d) structural exclusion, discrimination, and racism, e) state violence and increasing criminalization of social protest, and f) legalization of private security forces and integration of National Police to the private security system

##### **a) Institutional, technical and organizational barriers**

Originating in the justice system itself, these barriers include inadequate institutional and legal infrastructure to address and solve fairly and effectively issues and conflicts in the field of

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<sup>588</sup> Código Penal, Decreto Legislativo 635, April 3, 1991, Arts. 92-101.

<sup>589</sup> Peru Constitution, 1993, Arts. 161 – 162.

<sup>590</sup> Comisión Internacional de Juristas – IDJ (2013), *supra* note 574 at 53-54.

environmental, social, and Indigenous peoples' rights. For instance, the Peruvian legislation on Indigenous rights and resources, including the Law on the Right to Prior Consultation, is a "regulatory puzzle" that provides different regimes with different and contradictory meanings. One commentator describes it as "too many rules in too many books resulting in too many opportunities for conflict and contradiction [and abuses], and delivering a system that is difficult to understand and implement."<sup>591</sup> This ultimately falls short of Peru's international commitments.<sup>592</sup> In addition, Indigenous communities, except in environmental matters, cannot claim compensation for damages in a civil suit as a group.<sup>593</sup>

Technical and organizational issues of the judiciary, inefficiencies in the procedural system (with outstanding unresolved files that make legal processes to take too long) are also barriers to access to justice. Furthermore, many Indigenous communities are unable to physically access judicial and public prosecutor offices because the geographic distances. Judicial offices are mostly located in major and medium-sized cities.<sup>594</sup>

#### **b) Interference of political and economic power in the administration of justice**

Judges, prosecutors and other judicial and government officials are often under pressure or influence from political authorities who may act on behalf of economic power and interests.<sup>595</sup> On December 2013, Paulo Vilca Arpasi, former Vice-Minister of Interculturality, admitted that his resignation in July had been due to "political pressure" from the government aimed at getting

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<sup>591</sup> Lila Barrera-Hernandez (2010), *supra* note 272 at 175.

<sup>592</sup> B. Clavero, "Enredo normativo y derechos indígenas en el Perú," in B. Clavero (2011), *supra* note 1 at 36.

<sup>593</sup> Comisión Internacional de Juristas – IDJ (2013), *supra* note 574 at 79.

<sup>594</sup> *Ibid* at 81-84.

<sup>595</sup> Mariano Salazar Lizárraga, "Autonomía e independencia del poder judicial Peruano en un estado social y democrático de derecho," in (2014) 10: 2 *Ciencia y Tecnología* 147-161.

certain investments approved.<sup>596</sup> Vilca had made 83 observations on the project's Environmental Impact Assessment, which were mysteriously withdrawn hours after their publication on the ministry's web page, and then later left unanswered.<sup>597</sup> In Peru judges are appointed for a limited period by the National Judicial Council and subject to confirmation in office for subsequent periods, which undermines their ability to act independently. This lack of security of tenure and potential political interference in the Constitutional Tribunal, partly explain its weakened role since 2008; a study of the jurisprudence of Constitutional Tribunal between 2005 and 2011 shows that about 60 percent of decisions on allegations of human rights violations were unfavorable to the plaintiffs. Likewise, in cases concerning the right of Indigenous peoples to prior consultation, of the nine cases that have been submitted to the Constitutional Tribunal eight claims have been dismissed.<sup>598</sup>

### **c) Corruption**

Corruption continues to be a very serious societal problem in Peru. While in 2014 Peru scored 38 out of 100 and ranked 85 out of 175 countries, in 2016, it scored 35 out of 100 and ranked 101 out of 176 countries on Transparency International's Corruption Perceptions Index.<sup>599</sup> There is a heightened sense of corruption among Peruvian respondents who consider

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<sup>596</sup> Servindi, "Paulo Vilca Admite que salio del Vice-Ministerio por Presiones Politicas," in Servindi, Lima, 14 December 2013, online: <<http://servindi.org/actualidad/97875>> (retrieved 31 May 2017).

<sup>597</sup> International Work Group for Indigenous Affairs, *the Indigenous World 2014*, Copenhagen, Denmark: IWGIA, May 2014, at 165.

<sup>598</sup> Juan Carlos Ruiz Molleda, "Informe Jurídico ¿Tenemos un TC de protección de derechos fundamentales o un TC de improcedencias?" in Justicia Viva, Lima 2013, online: <[http://www.justiciaviva.org.pe/webpanel/doc\\_trabajo/doc02052013-171540.pdf](http://www.justiciaviva.org.pe/webpanel/doc_trabajo/doc02052013-171540.pdf)> (retrieved 31 May 2017); Juan Carlos Ruiz Molleda, "Balance de las sentencias emitidas por el TC sobre el derecho a la consulta previa: Efectiva proteccion o pronunciamientos retoricos?," in Justicia Viva, Lima 2011, online: <<http://www.justiciaviva.org.pe/especiales/balance-idl-tc/balance.pdf>> (retrieved 31 May 2017).

<sup>599</sup> A country's score indicates the perceived level of public sector corruption on scale of 0 (highly corrupt) to 100 (very clean). A country's rank indicates its position relative to other countries in the index. Transparency

that all the governments are corrupt,<sup>600</sup> but characterize Alan Garcia's and Alberto Fujimori's as the most corrupt governments.<sup>601</sup> In October 2008, Garcia's entire cabinet resigned following a corruption scandal surrounding oil concessions to a foreign company which implicated members of Garcia's party. In December 2014, a former President of PERUPETRO (the State agency responsible for negotiating, underwriting and monitoring contracts for exploration and exploitation of hydrocarbons) told the criminal court that he held a meeting with then President Garcia and Garcia recommended him to deliver the bid from oil contracts to the Norwegian company Discover Petroleum International.<sup>602</sup> In 2009, Fujimori was convicted for human rights violations considered crimes against humanity and is currently serving 25 years in prison. He received additional sentences in several corruption cases; Transparency International has ranked him among the ten most corrupt leaders in recent history.<sup>603</sup> Overall, Peruvian citizens consider

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International, online: < [http://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](http://www.transparency.org/news/feature/corruption_perceptions_index_2016)> (retrieved 31 May 2017).

<sup>600</sup> As Brazil's multinational company Odebrecht's acknowledged of having paid bribes unnamed high ranking Peruvian officials in exchange of contracts between about 2005 and 2014, criminal investigations have been initiated on bribery and corruption involving high ranking government officials, including current president Kuczynski and former presidents Toledo, Garcia and Humala. Daniel Gallas, "Brazil's Odebrecht corruption scandal," in BBC News, 7 March 2017, online: < <http://www.bbc.com/news/business-39194395>> (retrieved 31 May 2017); Reuters World News, "Peru says Odebrecht scandal eclipses graft in Fujimori government," 25 January 2017, online: <<http://www.reuters.com/article/us-peru-corruption-idUSKBN1592K4>> (retrieved 31 May 2017).

<sup>601</sup> La Republica, "Alan García es percibido como el peruano más corrupto según encuesta de Datum," in La Republica, Lima, 21 Octubre 2014, online: <<http://www.larepublica.pe/21-10-2014/alan-garcia-es-percibido-como-el-mas-corrupto-segun-encuesta-de-datum>> (retrieved 31 May 2017).

<sup>602</sup> Cuarto Poder, "Lo Que Sabe Saba," America TV, 14 December 2014, online: <<http://www.americatv.com.pe/cuarto-poder/reportaje/lo-que-sabe-saba-noticia-13685>> (retrieved 31 May 2017); J. Osorio, "Caso Petroaudios: Expresidente de Perupetro compromete a Alan García en faenón," in *Diario 16*, Lima 11 December 2014, online: <<http://diario16.pe/noticia/55746-caso-petroaudios-expresidente-perupetro-compromete-alan-garcia-faenon>> (retrieved 31 May 2017).

<sup>603</sup> The Economist, "Corruption in Peru: A Widening Web," May 24, 2013, online: <<http://www.economist.com/blogs/americasview/2013/05/corruption-peru>> (retrieved 31 May 2017).

the judiciary to be among the most corrupt institutions in the country; user surveys indicate unofficial payments affect both the speed and the final outcome of judicial processes.<sup>604</sup>

#### **d) Structural social exclusion, discrimination, and racism**

Thorp and Paredes argue, “[T]he embeddedness and extreme nature of overall inequality has much to do with the depth and embeddedness of ethnic inequality.”<sup>605</sup> Weak institutions and deep racial, ethnic and cultural inequalities are the legacy of Peru’s colonial and creole republic periods, which remain prominent to this day, combined with class and geographic divisions.<sup>606</sup> Significant racial and ethnic mixing (*mestizaje*) “has not eliminated the perception of distinctive and hierarchically organized cultural and racial traits by Peruvian society, nor has it prevented discriminatory practices based on these traits.”<sup>607</sup>

Racialized discourses by Peruvian elites and mainstream intellectuals are prominent in sustaining discriminatory practices and in considering any opponent, particularly Indigenous, of neoliberal economic policies as intellectually inferior beings. In July 2006, at the international conference of the Council of the Americas on Development and Investment with Social Equity, President Pedro Pablo Kuczynski pointed out that,

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<sup>604</sup> Proetica-Transparency International, “IX Encuesta Nacional sobre percepciones de la corrupción en el Perú 2015,” Survey prepared by Ipsos-Apoyo, 2015, at 18, online: <<http://www.proetica.org.pe/?q=content/encuesta-nacional-sobre-percepciones-de-la-corrupci%C3%B3n>> (retrieved 31 May 2017).

<sup>605</sup> Rosemary Thorp and Maritza Paredes (2010), *supra* note 518 at 2.

<sup>606</sup> David Sulmont, “Race, Ethnicity and Politics in Three Peruvian Localities: An analysis of the 2005 CRISE perceptions survey in Peru,” in (2011) 6:1 *Latin American and Caribbean Ethnic Studies* 47-78; Adolfo Figueroa and Manuel Barron, “Inequality, Ethnicity and Social Disorder in Peru,” *CRISE Working Paper 8*, Centre for Research on Inequality, Human Security and Ethnicity, University of Oxford, March 2005.

<sup>607</sup> Rosemay Thorp and Maritza Paredes (2010), *supra* note 518 at 7; Andy Livise, “El Racismo se Resiste a Morir,” in *Diario Uno*, Lima, January 4, 2015, online: <<http://diariouno.pe/2015/01/04/el-racismo-se-resiste-a-morir/>> (retrieved 31 May 2017).

[Those ideas] about changing the rules and policies, changing contracts, nationalizing [natural resources]; which is a bit the ideas in one part of the Andes, places in which the high altitude impedes proper oxygenation of the brain; it is fatal and disastrous.<sup>608</sup>

In the same line, Peruvian writer and Nobel prize winner, Mario Vargas Llosa, argued that,

Indian peasants live in such a primitive way that communication is practically impossible...The price they must pay for integration is high—renunciation of their culture, their language, their beliefs, their traditions and customs, and the adoption of the culture of their ancient masters...It is tragic to destroy what is still living, still a driving cultural possibility...but I am afraid we shall have to make a choice...Modernization is possible only with the sacrifice of the indian cultures.<sup>609</sup>

In 2009 Vargas Llosa vehemently and harshly criticised Indigenous organizations for their opposition to Garcia's government legislative decrees and for following "the retrograde slogans of their leader." After the 2009 Bagua protest and massacre and the repeal of two controversial decrees, Vargas Llosa wrote, "If this is not a Pyrrhic victory, what is it? Despite their somewhat diffuse language, the decrees were pretty well oriented; they pursued an imperative necessity: to attract private investment and top-notch technology into a region which has large reserves of gas, oil and many minerals and could be a source of prosperity and modernization for that poor country which is Peru, starting, of course, with those who need more help, the native communities of the Amazon."<sup>610</sup>

Pervasive racism and alleged "cultural superiority," that would constitute a kind of "cultural racism,"<sup>611</sup> are the basis of many public policies, and they play a significant role in

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<sup>608</sup> Margarita Huayhua, *Runama Kani icha Alquchu?: Everyday Discrimination in the Southern Andes*, A Ph.D. Dissertation, Anthropology, The University of Michigan, 2010, at 237.

<sup>609</sup> Mario Vargas Llosa, "Questions of Conquest: What Columbus Wrought and What He did not", *Harper's Magazine*, December 1990, 45, at 52-53. Quoted in Maria Elena García, "The Politics of Community: Education, Indigenous Rights, and Ethnic Mobilization in Peru," in (2003) 30:1 *Latin American Perspectives* at 85-86.

<sup>610</sup> Mario Vargas Llosa, "Victoria Pirrica," in *El Pais*, Madrid, June 28, 2009, online: <[http://elpais.com/diario/2009/06/28/opinion/1246140013\\_850215.html](http://elpais.com/diario/2009/06/28/opinion/1246140013_850215.html)> (retrieved 31 May 2017).

<sup>611</sup> Rocio Silva Santistevan, "¿Existe el racismo cultural?," in *La Republica*, Lima, 14 September 2008, online: <<http://www.larepublica.pe/14-09-2008/kolumna-okupa-existe-el-racismo-cultural>> (retrieved 31 May 2017).

facilitating Indigenous land dispossession and preventing Indigenous peoples from accessing justice. “Cultural racism” thus becomes an institutional violence that justifies the fact that, for instance, most of the Indigenous territories are concessioned without any consultation or respect for their inhabitants, and government authorities absolutely lack interest to address and remedy environmental, health and social crises caused by oil spills, mine tailings on land, lakes and rivers in areas inhabited by Indigenous communities.<sup>612</sup> In the last two decades, contaminated and abandoned mine sites affecting Indigenous and peasant populations have dramatically increased due to mining; while in 2003 the total contaminated sites were only 611, in 2012 they were 7,576 and in 2015 they reached 8,616. The regions with the highest contaminated sites are Ancash, Cajamarca, Puno and Huancavelica, all in the Andean region.<sup>613</sup>

The mechanisms, norms and values that reproduce and sustain racial, ethnic and cultural discrimination have been defined, developed and entrenched over the years by the institutions such as the police and judiciary. More than one-third of Peru’s population speaks languages other than Spanish, and so they cannot express themselves in their mother tongue during legal proceedings due to the absence of interpreters. There is a lack of government policies that promote the incorporation of bilingual court officials or official translators in the judicial system. Judicial officers are not required to have knowledge of Indigenous languages; the National Judicial Council does not appoint judges and prosecutors with knowledge of Quechua or Aymara

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<sup>612</sup> Juan Carlos Ruiz Molleda, “*Menores indígenas que trabajaron recogiendo petróleo en Cuninico, carecen de atención médica a pesar de tener problemas de salud*,” in Justicia Viva, Lima December 12, 2014, online: <<https://www.servindi.org/actualidad/119613>> (retrieved 30 June 2017); Servindi, “*Denuncian completo desinterés del Ejecutivo por crisis ambiental y social en la Amazonia*,” in Servindi, Lima, November 28, 2014, online: <<https://www.servindi.org/actualidad/118673>> (retrieved 30 June 2017).

<sup>613</sup> Ministerio de Energía y Minas, *Pasivos Ambientales Mineros*, 09 March 2015, online: <<http://www.minem.gob.pe/minem/archivos/file/Mineria/LEGISLACION/2015/marzo/ANEXO%20PAMs%202015.pdf>> (retrieved 30 June 2017); Defensoría Del Pueblo, “Un Llamado a La Remediación!: Avances y pendientes en la gestión estatal frente a los pasivos ambientales mineros e hidrocarburíferos,” *Informe No. 171*, Lima, June 2015; Myriam Saade Hazin (2013), *supra* note 149 at 52.

in areas with large Indigenous populations.<sup>614</sup> Despite the constitutional recognition of the right to cultural identity and legal pluralism, which implies respect for Indigenous methods of conflict resolution, little has been done to implement this right and to develop appropriate mechanisms which would be effective in the context of disputes with oil and mining companies.<sup>615</sup> Furthermore, Indigenous peoples are underrepresented at all levels of political office in Peru, at national, regional, and municipal levels. While the presence of Indigenous peoples in both official and non-state governance systems has improved in recent years, they do not have the leverage to influence political decision making.

#### **e) State violence and increasing criminalization of social protest**

Violence exercised by State and non-State actors and increasing criminalization of social protest constitutes another contributing factor for the systemic lack of access to justice for Indigenous peoples in Peru.<sup>616</sup> State violence exercised against Indigenous communities when they demand their collective rights to territory and natural resources or challenge certain economic development projects (mining, oil or gas) has become increasingly frequent, resulting in deaths of Indigenous protesters and criminal prosecution. Cases such as Bagua and Las Bambas illustrate this predicament. Also, violence exercised by non-state actors such as paramilitary forces and private security companies (associated with powerful corporate economic interests) are used to force Indigenous peoples off land, in order to secure deniability and impunity; physical violence and the violence of prevailing forms of economic development are

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<sup>614</sup> Comision Internacional de Juristas – IDL (2013), *supra* note 574 at 85-86.

<sup>615</sup> *Ibid.*

<sup>616</sup> FIDH-OMCT, Observatory for the Protection of Human Rights Defender, *Annual Report, “We are no afraid” Land Rights Defenders: attacked for confronting unbridled development*, Geneva, December 2014; Amnesty International “*Indigenous Peoples’ Long Struggle to Defend their Rights in the Americas*,” London, UK, Amnesty International Publications, 2014; Global Witness (2014) *supra* note 95; Front Line Defenders (2014), *supra* note 198.



inextricably linked.<sup>617</sup> Peru's Ombudsperson's Office recorded 196 deaths and 2,369 persons injured from 2006 to 2011 alone (during Alan Garcia's government) as result of police intervention in situations of social conflicts and protests.<sup>618</sup> During the government of Humala (2011-2016), it recorded 74 deaths and 2,119 injured.<sup>619</sup> As of December 2016, during the government of Kuczynski, 4 Indigenous protesters have died and about 55 have been injured in protests and disputes over natural resources.<sup>620</sup> According to a report submitted to the Inter-American Commission on Human Rights, to date no one has been found criminally responsible for any of the civilian deaths in the context of social protest that have occurred since 2001; not one of the victims has received any reparation or compensation through the civil courts, because using civil proceedings is virtually impossible (particularly for Indigenous peoples) due to onerous procedures, tight deadlines for filing the claim and high cost.<sup>621</sup> As Global Witness' report points out, in the majority of the cases, it is actually State actors who have committed the crimes; 73 percent of the suspected perpetrators of known killings of environmental and land defenders in Peru since 2002 have been the police or police in conjunction with armed forces or a private company's security forces.<sup>622</sup>

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<sup>617</sup> Rachel Sieder and Maria Teresa Sierra, "Indigenous Women's Access to Justice in Latin America," (2011) 5:2 *Journal for Human Rights* 36-51.

<sup>618</sup> Defensoría del Pueblo, *Decimosexto Informe Annual Enero-Diciembre 2012*, Lima, Mayo 2013, at 79.

<sup>619</sup> *Ibid*; Defensoría del Pueblo, *Decimoseptimo Informe Annual Enero-Diciembre 2013*, Lima, Mayo 2014, at 123; see also Defensoría del Pueblo, *Reports on Social Conflicts*, monthly reports from January 2014 – July 2016.

<sup>620</sup> Grufides, "Apurimac: protesta contra minera Las Bambas deja un muerto," in Grufides, Lima, 14 October 2016, online: <<http://www.grufides.org/blog/apur-mac-protesta-contra-minera-las-bambas-deja-un-muerto>> (retrieved 30 June 2017); Servindi, "Dos Muertos y 20 Heridos deja Represion Policial en Pataz," in Servindi, Lima 6 November 2016, online: <<https://www.servindi.org/actualidad-noticias/06/11/2016/dos-muertos-y-20-heridos-deja-represion-policial-en-pataz>> (retrieved 30 June 2017).

<sup>621</sup> Cordinadora Nacional de Derechos Humanos, CEJIL, FEDEPAZ, GRUFIDES (2013), *supra* note 202 at 5; see also Coordinadora Nacional de Derechos Humanos, *Informe Anual 2014-2015*, Lima, August 2015 at 42-43.

<sup>622</sup> Global Witness (2014), *supra* note 95.

The impunity described above is exacerbated and promoted by policies and laws that criminalize social protest and condone the use of lethal force by security forces. These policies, initiated under Alan García's government and intensified by Humala, have resulted in judicial harassment and constant and systematic assaults on Indigenous leaders defending their collective rights to life and territory.<sup>623</sup> The most controversial and highly criticized laws are legislative decree 982 (July 2007) and law 30151 (January 2014) which allow members of the armed forces and national police to use lethal force during social protests, granting them exemption from criminal responsibility if they cause injury or death while on duty. According to the Instituto de Defensa Legal (IDL), Law 30151 is equivalent to having a "licence to kill."<sup>624</sup> In addition, there is a set of legislative decrees (passed by the Executive in 2007 and 2010) which was adopted under the pretext of combating organized crime, but in practice has facilitated the criminalization of social protest. These rules allow preliminary summary investigations, without respecting the right of defense of those under investigation; introduce the concept of "hostile group," and classify as such any group of people gathering to protest and call attention to their demands; allow detention without a warrant, and arbitrarily extend the concept of *flagrante delicto* (violating the principle of temporal immediacy) as a basis for detention. They also allow performing preliminary investigations with the isolation of the detainee and without the presence of his or her counsel; and allow personal and house searches without warrants and even without

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<sup>623</sup> International Work Group for Indigenous Affairs, *The Indigenous World 2014*, Copenhagen, Denmark: IWGIA, May 2014, at 163; Front Line Defenders (2014), *supra* note 198 at 2-3.

<sup>624</sup> IDL, "Con licencia para matar: sobre el proyecto de ley de impunidad para PNP y militares que maten o hieran," Lima, 15 January 2014, online: <<http://derechoshumanos.pe/2014/01/idl-con-licencia-para-matar-sobre-el-proyecto-de-ley-de-impunidad-para-pnp-y-militares-que-maten-o-hieran/>> (retrieved 30 June 2017); Luis Manuel Claps, "Police Repression Legalized as Mining Protest Grow in Peru," in *NACLA*, February 13, 2014, available at <https://nacla.org/blog/2014/2/13/police-repression-legalized-mining-protests-grow-peru> (retrieved 30 June 2017).

the presence of the prosecutor. Among the most prominent are: legislative decrees 982, 983, 988, 989, 991, and 1095.<sup>625</sup>

The case described by Chris Hufstader, Oxfam America's Regional Communications Manager, illustrates the pervasive judicial harassment of Indigenous peoples. He points out,

Over the years I have visited a few communities in Peru where violent conflict has erupted; I have spoken with people who have been beaten, imprisoned, or persecuted by the government for standing up for their rights. The alleged crimes vary. Refusing to sell your farm to a mining company—or holding out for a better price—comes up a lot. One Indigenous woman from the highlands of Cusco told me how the police threw her in jail, accused her of trespassing on her own land! Her farm is now part of a copper mine [Tintaya copper mine run by Australian BH Billiton and Anglo-Swiss Xstrata]. It took two decades before she was compensated as part of a conflict-resolution effort Oxfam helped create. It took years to sort out the rights violations, relocate farmers, and set up a development fund.<sup>626</sup>

In the same region, while the death of three Indigenous villagers and wounding of several others (during protests against the Glencore-Xstrata mine in 2012) remain unpunished, the criminal proceedings against the former mayor of Espinar, Cusco and union leaders is in process; the prosecutor asked for dismissal of criminal charges against police officers who killed the villagers, but requested 20-25 years of prison for the former mayor and union leaders who are accused of being responsible for the deaths and damages caused during the protest.<sup>627</sup>

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<sup>625</sup> Cordinadora Nacional de Derechos Humanos, CEJIL, FEDEPAZ, GRUFIDES (2013), *supra* note 202 at 11-17; Front Line Defenders (2014), *supra* note 198 at 2-3; Given that these legislative decrees and laws clearly infringe fundamental rights enshrined in the Constitution and international instruments, human rights organizations submitted two constitutionality review processes (No. 12-2008-PI / TC and No. 22-2011- PI / TC), challenging their legality and constitutionality. The first action was dismissed and the second is still pending.

<sup>626</sup> Chris Hufstader, "Torture charges corroborated in Peru," in Voices, Video and Photos from Oxfam's Fight against Poverty, March 4, 2009, online: < <https://firstperson.oxfamamerica.org/2009/03/torture-charges-corroborated-in-peru/> > (retrieved 30 June 2017).

<sup>627</sup> RPP Noticias, "Cusco: Juicio oral a ex alcalde de Espinar, Oscar Mollohuanca, inicia el 2015," in *RPP Noticias*, February 25, 2015, online: < <http://rpp.pe/peru/actualidad/cusco-juicio-oral-a-ex-alcalde-de-espinar-oscar-mollohuanca-inicia-el-2015-noticia-772632> > (retrieved 30 June 2017); La Republica, "En marzo iniciará juicio oral contra exalcalde por protestas en Espinar," in *La Republica*, February 26, 2015, online: < <http://larepublica.pe/26-02-2015/en-marzo-iniciara-juicio-oral-contra-exalcalde-por-protestas-en-espinar> > (retrieved 30 June 2017).

## **f) Legalization of private security forces and integration of National Police to the private security system**

Despite the involvement of several corporations in alleged gross violations of human rights in the context of social protest in the extractive sector,<sup>628</sup> the State has not developed a regulatory framework on business and human rights that would provide venues for corporate legal accountability and for more reliable protection of Indigenous communities' interests and rights; quite the contrary, it has progressively facilitated greater protection for companies by providing them a legal framework to establish public-private instruments of coercion as a strategic measure. For instance, it has promoted the legalization of private security forces to provide security and protection to corporations through D.S. No. 005-94-IN and Law 28879.<sup>629</sup> These laws have facilitated police and military officers' access to employment in the private security industry, explicitly allowing retired military or police officers to supervise private security companies, and private security companies to hire actively serving police and military officers. Furthermore, the government has authorized the integration of the National Police to

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<sup>628</sup> Rio Blanco Copper S.A, subsidiary of Monterrico Metals from United Kingdom – China; Minera Yanacocha S.A., subsidiary of New Mont Mining Company from U.S.A.; and Anglo-Swiss Xstrata, among others. It has been reported that in the mining camps of these companies Indigenous and local community members and human rights activists were illegally detained and subjected to torture or ill-treatment. Cordinadora Nacional de Derechos Humanos, CEJIL, FEDEPAZ, GRUFIDES (2013), *supra* note 202 at 17.

<sup>629</sup> D.S. No. 005-94-IN, Reglamento de Servicios de Seguridad Privada, 12 May 1994 [enacted during Fujimori's government]; Ley No. 28879, Ley de Servicios de Seguridad Privada, 17 August 2006 [Private Security Services Act, enacted during Alan Garcia's government, it replaced the first]. According to a UN Report, the privatization of security has expanded enormously in Peru since the 1990s because the government does not seem to have increased police numbers. It estimates the number of private security guards to be 100,000 (50 percent of which in the informal sector), outnumbering Peru's public police force of about 92,000. In many cases, these companies are run by former members of the Armed Forces or the Police, or they occupy senior positions. Report of the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Chairperson-Rapporteur, Jose Luis Gomez del Prado, *Mission to Peru*, A/HRC/7/7/Add.2, 4 February 2008, at 6, 13, 14.

this private security system through Law 28857 and D.S. N° 004-2009-IN,<sup>630</sup> which authorize members of the national police to provide "Extraordinary Supplementary Services" (individually or institutionally) to individuals or corporations, public or private, in exchange for a monetary reward.<sup>631</sup>

#### **4.6 Peru's International Commitments and International Legal Venues**

Peru's Constitution (Art. 205) recognizes the possibility to appeal to or access international courts or bodies constituted under treaties or conventions to which Peru is a party, after exhausting domestic remedies.<sup>632</sup> The Constitutional Procedural Code in regulating Art. 205, explicitly recognizes only two international venues which anyone whose rights have been infringed can access: the United Nation Human Rights Committee and the Inter-American Commission on Human Rights.<sup>633</sup> While the Constitution does not explicitly recognizes the

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<sup>630</sup> Ley No. 28857, Ley del Régimen de Personal de la Policía Nacional del Perú, July 27, 2006; D.S. N° 004-2009-IN, Reglamento de Prestación de Servicios Extraordinarios Complementarios a la Función Policial, July 15, 2009.

<sup>631</sup> On the basis of these laws, MNCs in the extractive sector have signed agreements with the National Police to secure their assets. These agreements allow companies to request permanent police presence or ask for rapid deployment of larger units to prevent or repress social protests. In some cases, the companies provide full financial and logistical support which means an incentive to use force. As of April 2013, the existence of thirteen agreements were revealed, which were kept secret for years; among the MNCs involved in these agreements are Minera Barrick Misquichilca, Minera Antamina, Xstrata Tintaya / BHP Tintaya, Minera Yanacocha, and Compañía Minera Aprodita (agreement with the 6<sup>th</sup> Brigade of the Peruvian Army). See National Coordinator for Human Rights, Grufides, Human Rights without Borders, Society for Threatened Peoples (STP), "*Police in the Pay of Mining Companies: The responsibility of Switzerland and Peru for human rights violations in mining disputes*," Camarca, Peru – Ostermundigen, Switzerland, December 2013; SERVINDI, "*Peru: Emplazan al Gobierno a responder por convenios entre minera y policia*," in Servindi, Lima, March 5, 2013, online: <<http://www.servindi.org/actualidad/83551>> (retrieved 30 June 2017); Instituto de Democracia y Derechos Humanos-Pontificia Universidad Catolica del Peru, "*Diagnostico Nacional sobre la Situacion de la Seguridad y el Respoeto a los Derechos Humanos: Referencia Particular al Sector Extractivo en el Peru*," Lima: Embajada de Suiza – IDEHPUCP - Socios Peru, November 2013.

<sup>632</sup> Constitucion Politica del Peru, 1993, Art. 205.

<sup>633</sup> Codigo Procesal Constitucional, Ley 28237, May 28, 2004, Title X (International Jurisdiction), Arts. 114-116.

constitutional status of international human rights treaties ratified by Peru, the binding jurisprudence of the Constitutional Court has accorded them constitutional status.<sup>634</sup>

Peru has signed and ratified most international and regional human rights instruments and treaties, including those that enshrine Indigenous peoples' rights. Among the most prominent are: the International Covenant on Civil and Political Rights (ICCPR);<sup>635</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>636</sup> the International Convention on the Elimination of All forms of Racial Discrimination (ICERD);<sup>637</sup> the International Labour Organization Convention 169 (ILO Convention I69);<sup>638</sup> and the American Convention on Human Rights (the American Convention).<sup>639</sup> In addition, it signed both the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP);<sup>640</sup> and the American Declaration on the Rights of Indigenous Peoples.<sup>641</sup>

Indigenous organizations and non-governmental human rights organizations (NGOs) have been increasingly using these international venues in order to denounce the violation of

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<sup>634</sup> Constitutional Court Rulings: Expedientes 0025-2005-PI/TC ; 0026-2005-PI/TC, and 03343-2007-AA/TC, cited at P. Castillo Castañeda, *El derecho a la tierra y los acuerdos internacionales: El caso del Perú* (Lima: CEPES, 2009) at 57-60.

<sup>635</sup> The International Covenant on Civil and Political Rights adopted on December 16, 1966 and entered into force on March 23, 1976. This Covenant has two Optional Protocols, which contain the individual complaints procedure and the abolition of death penalty. It was signed by Peru on August 11, 1977 and ratified it on April 28, 1978, and entered into force 28 July 1978.

<sup>636</sup> International Covenant on Economic, Social and Cultural Rights adopted on December 16, 1966 and entered into force on March 23, 1976. It was signed by Peru on August 11, 1977 and ratified it on April 28, 1978, and entered into force on 28 July 1978.

<sup>637</sup> The International Convention on the Elimination of All Forms of Racial Discrimination adopted on December 21, 1965 and entered into force on January 4, 1969. It was signed by Peru on 22 July 1966 and ratified it on September 29, 1971, and entered into force on 29 October 1971,

<sup>638</sup> ILO Convention 169 was approved in 1989 and entered into force in September 1991. It was ratified by Peru on 17 January 1994 and entered into force on 2 February 1995.

<sup>639</sup> American Convention on Human Rights, 22 November 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. Peru ratified the American Convention on 27 July 1977 and entered into force on 28 July 1978.

<sup>640</sup> UNDRIP was adopted by the General Assembly of the United Nations on 13 September 2007. Peru was one of the States voting in favour of the adoption of the UNDRIP.

<sup>641</sup> The General Assembly of the Organization of American States in Santo Domingo adopted the American Declaration on the Rights of Indigenous Peoples on 15 June 2016. Peru was one of the signatory States.

Indigenous peoples' rights, to claim corporate legal accountability and to point to the State's responsibility as well. These actions help inform public opinion and increase the visibility of Indigenous peoples' plight, and contribute to the mobilization of actors that can provide support, protection and remedies. For instance, during the last three years, the Inter-American Commission on Human Rights has held thematic hearings on Peru's Indigenous peoples' rights and corporate legal accountability, with the participation of State representatives, Indigenous organizations and NGOs.<sup>642</sup> These hearings, however, do not generate binding decisions. And even if they can produce binding decisions, one of the great limitations is their lack of enforceability.

#### 4.7 Conclusion

We are all equal under the law. Under what law? Divine law? Under earthly law, equality grows less equal every day and everywhere, because power usually sinks its weight onto only one tray on the scale of justice... (Eduardo Galeano, 2000)<sup>643</sup>

Although Peru has ratified or expressed support for important international instruments protecting Indigenous peoples' rights (ILO 169 and UNDRIP), government policies and actions have been inconsistent, weak, and even detrimental to Indigenous peoples' rights. Peru is a country where "MNCs and their local affiliates have come to enjoy enormous influence over the decision of the Peruvian State," and where "powerful elites have the ear of the State at the

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<sup>642</sup> Among the most important hearings are: "Human Rights and Extractive Industries in Peru" (162 Period, May 25, 2017); "Rights of Indigenous Peoples to Legal Recognition and Property in Peru" (153 Period, October 31, 2014); "Human Rights and State of Emergency in Peru" (153 Period, October 31, 2014); "Impact of Canadian Mining Activities on Human Rights In Latin America" (153 Period, October 28, 2014); "Human Rights Situation of the Indigenous Peoples in the Territorial Reserve of Kugapakori, Nahua, Nanti, et al. (RTNKN) in Peru," (150 Period, March 24, 2014); "Human Rights Situation of Indigenous Peoples in Voluntary Isolation in Peru" (149 Period, November 01, 2013); "Consultation Right of Indigenous Peoples in Peru" (146 Period, November 01, 2012); "Right to Prior, Free, and Informed Consultation of Indigenous Peoples and Afro-descendants in the Andean Region" (141 Period, March 29, 2011). See Inter-American Commission on Human Rights, Sessions & Hearings, online: <<http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=17>> (retrieved 30 June 2017).

<sup>643</sup> Eduardo Galeano, *Upside Down: A Primer for the Looking-Glass World*. Trans. M. Fried (New York: Metropolitan, 2000) at 201.

highest level,”<sup>644</sup> and its sustained preference for a laissez-faire approach has favoured MNCs’ interest to the detriment of Indigenous, peasant and local communities. As the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, pointed out in Lima, it is known that “corporations have more power than governments and decide what is legal and what is not.”<sup>645</sup> And in many respects, Indigenous peoples’ rights remain inadequately protected in the face of extractive industries.<sup>646</sup>

Since the early 1990s, Peru has been converted to a neoliberal economy dominated by private sector and market forces. While neoliberal reforms have been implemented through Latin America in the past three decades, Peru has become one of the most open and liberal economies not only in Latin America, but in the world.<sup>647</sup> The legal framework developed since the 1990s has eased foreign and private investment in the extraction industries, and weakened the rights of Indigenous and peasant communities to control their land, water and resources both above and below the ground; it has facilitated Indigenous land dispossession.

Issues of historical marginalization, systemic discrimination and racism, and geographical fragmentation underlie the make-up of Peru’s current policy on land tenure and resource extraction where much of the emphasis lies on expanding mining and oil concessions. Peru’s mixed bag of laws and regulations on Indigenous and peasant lands and resources has developed a porous system which allows the penetration of private and foreign companies in

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<sup>644</sup> J. Crabtree and I. Crabtree-Condor, “The Politics of Extractive Industries in the Central Andes,” in A. Bebbington, Ed. (2012), *supra* note 246 at 59, 61; Francisco Durand, *Poder Politico y Gobierno Minero*, Cuadernos de CooperAccion No. 1, Lima, June 2015.

<sup>645</sup> Servindi, “Victoria Tauli-Corpuz’ presentation at the Peoples’ Summit (COP 20) in Lima, Peru,” in Servindi, Lima, December 9, 2014, online: <<http://www.servindi.org/actualidad/119388>> (retrieved 30 June 2017).

<sup>646</sup> Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples: The situation of indigenous peoples’ rights in Peru with regard to the extractive industries*, 3 July 2014, A/HRC/27/52/Add.3, at paragraph 10.

<sup>647</sup> Jose Perez Mundaca (2010), *supra* note 197 at 214-215; Jeffrey Bury, “Livelihoods in transition: transnational gold mining operations and local change in Cajamarca, Peru,” in (2004) 170:1 *Geographical Journal* 78 at 80.



Indigenous and peasant communities' lands and territories and the obtaining of concessions for mining and oil projects.<sup>648</sup> As opposition to the growing impact of extractive industries has resulted in intense social protest by Indigenous, peasant and local communities, a number of laws have been passed affecting the right to protest and encouraging impunity for police violence.

Considering Peru's international commitments, there are serious infringements that permeate Peruvian law and policy towards Indigenous peoples' rights, particularly in relation to their individual and collective land's rights, the recognition of their legal personality, and their right to Free Prior and Informed Consent and consultation.<sup>649</sup> As Peruvian anthropologist Alberto Chirif argues, Peru's Law on the Right of Indigenous Consultation has distorted the spirit of ILO 169. It prescribes the right to consultation after concessions have already granted to oil, gas and mining companies; and the denial of the existence of Indigenous peoples in the Andes, by government officials and companies, aims to blatantly elude the recognition of their rights.<sup>650</sup> Ultimately, Indigenous peoples' right to prior consultation has been "expropriated" or coopted by Peruvian State and corporate actors who have imposed their own terms and conditions to reconfigure its content and essential meaning in order to make it an instrument of legitimizing extractive projects and making it inaccessible or at least irrelevant to Indigenous peoples.<sup>651</sup>

While imbalances and asymmetries are reproduced and reinforced in the Peruvian legal framework, access to justice for Indigenous peoples has become increasingly difficult. For more

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<sup>648</sup> Lila Barrera-Hernandez (2010) *supra* note 272.

<sup>649</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twenty-first periodic reports of Peru*, 25 September 2014, CERD/C.PER/CO/18-21, paragraphs 14-17.

<sup>650</sup> Alberto Chirif, "20 years after Peru's ratification of ILO 169, Is There Something to Celebrate?" in Servindi, Lima 23 April 2015, online: <<http://www.servindi.org/actualidad/128507>> (retrieved 30 June 2017).

<sup>651</sup> Marco Huaco, "El 'Modelo Peruano', o de expropiación del derecho de consulta previa de los pueblos indígenas," in Servindi, Lima, 2 December 2013, online: <<https://www.servindi.org/actualidad/97142>> (retrieved 30 June 2017).

than two decades, Latin America, including Peru, has been involved, with the support and funding provided by multilateral development banks, bilateral donor agencies and international organizations, in the promotion and implementation of legal and judicial reform projects.<sup>652</sup> For Indigenous peoples, the outcomes of these projects, aiming to improve access to justice and the rule of law, have been on the whole disappointing; old and endemic problems remain.<sup>653</sup> For corporate actors, however, the results have been beneficial, because as the role of law has been reduced to the facilitation of utility maximizing exchange and optimal market allocation, these legal and judicial reform projects have enhanced the protection of corporate property and contract rights. Ultimately, from the multilateral development banks' viewpoint, "the law's value for economic development lies in its ability to provide a stable investment environment and the predictability necessary for markets to operate." Law is essentially restricted to restraining governments and facilitating commercial transactions.<sup>654</sup>

Considering that Peru's national laws and policies not only fail to protect the rights of Indigenous peoples, but in several instances negatively affect their rights, Indigenous peoples have placed great expectations in international law, particularly in international human rights instruments and treaties that recognize and protect their rights. Yet, the crucial question is, to what extent does international law that recognizes and protects Indigenous people's rights have the effectiveness, rigor and enforceability in relation to international economic law that

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<sup>652</sup> Roberto Laver, "The World Bank and Judicial Reform: Overcoming 'Blind Spots' in the Approach to Judicial Independence," (2012) 22 *Duke Journal of Comparative and International Law* 183; Lawyers Committee for Human Rights, *Building on Quicksand: The Collapse of the World Bank's Judicial Reform Project in Peru*, New York, April 2000.

<sup>653</sup> Pedro Rubim Borges Fortes, et al., *Law and Policy in Latin America: Transforming Courts, Institutions, and Rights* (London, UK: Palgrave-Macmillan, 2017) at Introduction.

<sup>654</sup> Tor Krever, "The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model," (2011) 52 *Harvard International Law Journal* 288; Julio Faundez, "Rule of Law or Washington Consensus: the evolution of the World Bank's approach to legal and judicial reform," Amanda Perry-Kessaris, Ed., *Law and the Pursuit of Development: Principles into Practice?* (New York: Routledge, 2010) at 181.

guarantees and protects the rights of MNCs? The next chapter will discuss the emergence and location of both Indigenous peoples and MNCs in international law and issues of asymmetries, imbalances and contentions in the current international legal system.

## Chapter 5: Indigenous Peoples and Multinational Corporations at

### International Law: Asymmetries and Contentions

The [MNC] enterprise operates as a quasi-state whose especial obligations to those under its control are accepted in both moral philosophy and international law doctrine. (S. R. Ratner, 2001)<sup>655</sup>

[Indigenous peoples] have successfully penetrated supranational institutions such as the International Labour Organization (ILO) and the United Nations (UN)...In so doing, they have secured a degree of leverage in international fora that had previously been reserved for States. (S. Allen, 2009)<sup>656</sup>

#### 5.1 Introduction

On 5 June 2009, using a combined offensive of helicopters and ground forces, heavily armed members of the Peruvian Police Special Forces launched a violent operation to reopen a section of a highway called *La Curva del Diablo* (the Devil's Curve) near the town of Bagua in the northern Peruvian Amazon that had been blocked by the Awajun and Wampis Indigenous peoples.<sup>657</sup> According to the Peruvian Ombudsman office, by the end of the day, 33 people were confirmed dead, about 200 injured and 83 people detained.<sup>658</sup> Indigenous organizations counted over 50 Indigenous dead, over 200 wounded, and many people missing; according to witnesses, the police burned bodies and threw them into the river to hide the real death toll, and also took

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<sup>655</sup> Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility," (2001) 111 *The Yale Law Journal* 443 at 509.

<sup>656</sup> Stephen Allen, "The UN Declaration on the Rights of Indigenous Peoples: Towards a Global Legal Order on Indigenous Rights?" in Andrew Halpin and Volker Roeben, eds., *Theorising the Global Legal Order* (Portland: Hart Publishing, 2009) at 187.

<sup>657</sup> Gerardo Renique, "Blood at the Blockade: Peru's Indigenous Uprising," *NACLA*, 8 June 2009, online: <<https://nacla.org/node/5879>> (retrieved 30 June 2017).

<sup>658</sup> Peru's Ombudsman Office, Informe de Adjuntia N° 006-2009-DP/ADHPD, Actuaciones Humanitarias Realizadas por la Defensoria del Pueblo con Ocasión de los Hechos Ocurredos el 5 de Junio del 2009 en las Provincias de Utcubamba y Bagua, Region Amazonas, en el Contexto del Paro Amazonico, Lima 2009.

prisoners among the wounded in the hospitals.<sup>659</sup> On the day of the clash in Bagua, the then Peruvian president, Alan Garcia, declared during a televised interview, referring to the Indigenous protest,

Enough is enough. These peoples are not monarchs [do not have crowns], they are not first-class citizens. Who are 400,000 natives to tell 28 million Peruvians that you have no right to come here? This is grave error, and whoever thinks this way wants to lead us to irrationality and a retrograde primitivism.<sup>660</sup>

The massacre of Bagua – as it became known - put an end to a two-month demonstration, for the second time over a period of eight months, by an Amazonian Indigenous organization (Inter-Ethnic Association for the Development of the Peruvian Amazon - AIDESEP),<sup>661</sup> demanding the repeal of a set of legislative decrees passed by the Peruvian government to facilitate the implementation of Bilateral Free Trade Agreements (BTAs) signed with the United States and Canada in April 2006 and May 2008 respectively.<sup>662</sup> Indigenous communities denounced these new laws,<sup>663</sup> asserting that they aimed to facilitate land concessions for corporate oil and gas

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<sup>659</sup> Emily Schmall, “The Devil’s Curve: Faustian Bargains in the Amazon,” in (2011) 28:1 *World Policy Journal* 111; La República, “Denuncian que la policía estaría quemando cadáveres de amazónicos,” *La Republica* and *Cordinadora Nacional de Radio*, 5 Junio 2009, online: <<http://larepublica.pe/05-06-2009/denuncian-que-la-policia-estaria-quemando-cadaveres-de-amazonicos>> (last accessed 30 June 2017); Milagros Salazar, “Peru: ‘Police Are Throwing Bodies in the River,’ Say Native Protesters,” *IPS-Inter Press Service*, 8 June 2008, online: <<http://www.ipsnews.net/2009/06/peru-lsquotpolice-are-throwing-bodies-in-the-riverrrsquo-say-native-protesters/>> (retrieved 30 June 2017); Milagros Salazar, “Peru: Families of Dead Native Protesters Tell their Stories,” *IPS-Inter Press Service*, 16 June 2009, online: <<http://www.ipsnews.net/2009/06/peru-families-of-dead-native-protesters-tell-their-stories/>> (retrieved 30 June 2017).

<sup>660</sup> Anthony Bebbington, “Extractive Industries, Socio-Environmental Conflicts and Political economic Transformations in the Andean America,” in Anthony Bebbington, Ed. (2012), *supra* note 246 at 9.

<sup>661</sup> Founded in the late 1970’s, AIDESEP is a national organization of the Amazonian Indigenous peoples of Peru of about 350,000 members and 1,350 communities in the region. Online: <<http://www.aidesep.org.pe/>> (retrieved 30 June 2017).

<sup>662</sup> The US-Peru Trade Promotion Agreement (PTPA) entered into force on February 1, 2009; the Canada-Peru Free Trade Agreement entered into force on August 1, 2009. See US-Peru Trade Promotion Agreement, online: <<http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa>> (retrieved 30 June 2017); Canada-Peru Free Trade, online: <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/background-contexte.aspx?lang=eng>> (retrieved 30 June 2017).

<sup>663</sup> Between January and June 2008, Alan Garcia’s government enacted 99 legislative decrees under competencies given to him by Law No. 29157 which delegated to the Executive the power to circumvent Congress and directly

exploration, mining, biofuel crops and logging, and violated Peru's Constitution as well as the *United Nations Declaration on the Rights of Indigenous Peoples* and the International Labor Organization (*ILO Convention 169*).<sup>664</sup>

Economic globalization has brought greater emphasis and transformation on established fields of international law such as international economic law and international human rights law.<sup>665</sup> On the one hand, there has been an explosive growth of private international and economic law and institutions pertaining to investment, trade and economic transactions and relations, as well as those pertaining to governmental regulation of those matters. On the other hand, there has been a tremendous development of international human rights law and institutions pertaining to freedom of expression, the prohibition of torture, as well as the right to food, to an adequate standard of living, the right to development, and rights of minorities and Indigenous peoples, among others. As the phenomenon of economic globalization has arguably impacted on State sovereignty, diminishing the importance of sovereign States,<sup>666</sup> non-state actors such as MNCs and Indigenous peoples have also arguably begun to play a significant role

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pass legislation "with the purpose of facilitating the execution of the US-Peru Trade Promotion Agreement and its Amendment Protocol, and in order to support economic competitiveness for its use" (Art.1). International Federation of Human Rights (FIDH), "*Peru – Bagua: Bloodshed in the Context of Amazon Protest*," Paris, October 2009, online: <<https://www.fidh.org/IMG/pdf/rapperou529ang.pdf>> (retrieved 30 June 2017); Jorge Agurto, "Perú: Porque Luchan Los Pueblos Indígenas Amazónicos?" *SERVINDI*, Mayo 17, 2009, online: <<https://www.servindi.org/actualidad/11574>> (retrieved 30 June 2017).

<sup>664</sup> Centro Amazónico de Antropología y Aplicación Práctica-CAAAP, Documento de Trabajo, *Los Decretos Legislativos que Afectan los Derechos Fundamentales de los Pueblos Indígenas de la Amazonia Peruana*, Lima, Junio 2009.

<sup>665</sup> William Twining, "Implications of 'Globalization' for Law as a Discipline," in A. Halpin and V. Roeben, eds. (2009), *supra* note 656 at 42.

<sup>666</sup> Duncan B. Hollis, "Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty," (2002) 25:2 *Boston College International and Comparative Law Review* 235; Phillip R. Trimble, "Globalization, International Institutions and the Erosion of National Sovereignty," (1997) 95:6 *Michigan Law Review* 1944; Jack Goldsmith, "Sovereignty, International Relations Theory, and International Law," (2000) 52:4 *Stanford Law Review* 959.

in the creation, implementation, and enforcement of international law, particularly in the field of international economic law and international human rights law, respectively.<sup>667</sup>

How and to what degree are the main issues discussed in the thesis<sup>668</sup> connected to and affected by the emergence and development of international economic law and international human rights law? Given that both international legal fields have become relatively autonomous specialized legal systems and often contradict and conflict each other, how does this conflict play out in the case of Indigenous peoples who are seeking to express their resistance and claims through international human rights discourse and institutions? Are both international legal fields a simple set of neutral laws and mechanisms of regulation and governance associated with the contemporary global political economy?

This chapter analyzes the emergence and location of Indigenous peoples and MNCs in international human rights law and international economic law respectively. The chapter is divided in five sections. Section Two discusses the difficult and complex process of recognition and establishment of Indigenous peoples' rights in the field of international human rights law. It analyzes the parallel normative and political developments that have taken place at the international level (United Nations) and within the regional (Inter-American) human rights systems, and the nature of those recognized rights. Section Three analyzes the current process of

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<sup>667</sup> Math Noortmann and Cedric Ryngaert, *Non-State Actors Dynamics in International Law: From Law-Takers to Law-Makers* (Burlington, VT: Ashgate, 2010) 1; Lillian Aponte Miranda, "Indigenous Peoples as International Lawmakers," in (2010-2011) 32:1 *University of Pennsylvania Journal of International Law* 203; Peter Muchlinski, "Multinational Enterprises as Actors in International Law: Creating 'Soft Law' Obligations and 'Hard Law' Rights," in M. Noortmann and C. Ryngaert, *Non-State Actors Dynamics in International Law: From Law-Takers to Law-Makers* (Burlington, VT: Ashgate, 2010) at 9; Karsten Nowrot, "Transnational Corporations as Steering Subjects in International Economic Law: Two Competing Visions of the Future?," in (2011) 18:2 *Indiana Journal of Global Studies* 803; Stephen Tully, *Corporations and International Lawmaking* (Boston : Martinus Nijhoff Publishers, 2007).

<sup>668</sup> The volatile conflict between Indigenous communities and MNCs; the encroachment of Indigenous communities' life, lands and environment; the lack of legal accountability of state and MNCs for their actions affecting Indigenous communities' rights; and Indigenous peoples' struggles and agency.

recognizing international legal personality of MNCs under international economic law. It discusses how during the past twenty years States have granted substantive and procedural rights under international law on foreign investment and trade law to MNCs, which have begun to exercise these rights. Section Four discusses the conflicts and asymmetries between international human rights law and international economic law; given the contradiction, asymmetries, and imbalances between international economic law and international human rights law, this section discusses their role, on the one hand, in facilitating, authorizing and legitimizing MNCs' operations and activities that infringe Indigenous peoples' rights, and on the other hand, in framing, limiting, co-opting, and placing constraints on Indigenous peoples' fundamental claims and demands. Section Five will provide a summary of the chapter's main arguments, highlighting the asymmetries and imbalances and contested nature of the current international legal system.

## **5.2 Emergence and Recognition of Indigenous Peoples at International Law**

On 13 September 2007, by a landmark decision, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>669</sup> by a vote of 143 states in favour to 4 states against (Australia, Canada, New Zealand and the United States of America)<sup>670</sup>, and 11 abstentions.<sup>671</sup> Although it is a non-binding instrument, UNDRIP provides a comprehensive statement of international standards and guidelines on Indigenous peoples' rights. Among these guidelines are the recognition of Indigenous peoples' rights to the

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<sup>669</sup> UN Resolution Adopted by the General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, 107<sup>th</sup> Plenary Meeting, 13 September 2007, A/RES/61/295 (2 October 2007).

<sup>670</sup> Eventually, Australia endorsed the UNDRIP in 2009; New Zealand, Canada and the U.S. endorsed it in 2010.

<sup>671</sup> Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine.



lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired (art. 26).<sup>672</sup>

The UNDRIP did not arise in a vacuum. Two factors have contributed to the recognition of Indigenous peoples rights at international level. First, there were major changes in the nature and structure of the contemporary international legal system in the aftermath of the two world wars, which brought shifts in the ordering of world's political power relations and the emergence and proliferation of international and intergovernmental institutions such as the United Nations and the Bretton Woods institutions, which arguably "constituted themselves on precepts of a peaceful and just world order."<sup>673</sup> These changes in the sphere of world organizations and shifts within contemporary international law's normative assumptions brought the rise of international human rights law system,<sup>674</sup> which has provided individuals and marginalized and oppressed groups, among them Indigenous peoples, an international space and voice and allowed them to bring and posit their own narratives and stories and to be able to make international legal claims.<sup>675</sup> Second, more importantly, however, there have been persistent and courageous efforts by Indigenous peoples organizations and movements at the national, regional and international

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<sup>672</sup> These new standards have been referred by the Supreme Court of Belize in its 2007, 2010 and 2014 decisions that recognizes Indigenous Mayan peoples' pre-existing rights to their land, and their rights to free, prior and informed consent (FPIC) before extractive operations are undertaken in their territory. Rodolfo Stevenhagen, "Making the Declaration Work," in Claire Charters and Rodolfo Stevanhagen, Eds., *Making the Declaration Work: the UN Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, December 2009) at 358.

<sup>673</sup> James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 2004) at 49.

<sup>674</sup> Cassese argues that the rise of human rights and self-determination doctrine, have subverted the very foundations of the world community by introducing changes, adjustments and realignments to many political and legal institutions...To be sure they have not changed the actual structure of that community or the main rules of the game. Sovereign states have remained the true holders of powers; each powerful state continues in the main to deal with national interests. Nevertheless, the two doctrines have introduced the seeds of subversion into this framework, destined sooner or later to undermine or erode the traditional structure and institutions, and gradually to revolutionize those structures and institutions. Antonio Cassese, *Human Rights in a Changing World* (Philadelphia: Temple University Press, 1990) at 13.

<sup>675</sup> Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000) at 201.

level to oppose and denounce ‘blatantly racist-European colonial-era legal doctrines’<sup>676</sup> denying Indigenous peoples’ fundamental rights guaranteed under principles of “modern” international law. As Robert Williams points out,

The movement emerged out of the social and political activism of Indigenous peoples throughout the world, protesting violations of their human rights by governments and resource development corporations. Through their activism, they sought to draw attention to and support their struggles for cultural survival against the governments, agents, and proxies of a highly urbanized, expansion-minded, resource-consuming form of civilization.<sup>677</sup>

Today, international law, at least in theory, secures Indigenous peoples’ rights to: live as distinct communities; practice and revitalize their cultural and religious traditions; participate meaningfully in the political and policy decisions that impact them; enjoy the use of their traditional lands; and govern themselves in sovereign autonomy.<sup>678</sup> Yet, as Patrick Macklem argues, international legal recognition to date has been partial and ambivalent, in part because Indigenous rights pose unique challenges to traditional understandings of the international legal order. Indigenous peoples’ rights, he points out, “expose the suspect origins and ongoing adverse consequences of the international distribution of sovereignty.”<sup>679</sup>

### **5.2.1 Indigenous Peoples and Contemporary International Human Rights Law**

Anaya points out that “the expanding opening in international law for concern with non-state entities on humanistic grounds, forged by the modern human rights movement, has been the

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<sup>676</sup> Robert A. Williams, Jr. *Savages Anxieties: The Invention of Western Civilization* (New York: Palgrave / Macmillan, 2012) at 228.

<sup>677</sup> *Ibid* at 228-229.

<sup>678</sup> Rebecca Bratspies, Introduction, Symposium: Land, Liberties, and Legacies: Indigenous Peoples and International Law, (2006-2007) 31:2 *American Indian Law Review*, 254.

<sup>679</sup> Patrick Macklem, *The Sovereignty of Human Rights* (New York: Oxford University Press, 2015); Patrick Macklem, “Indigenous Rights and Multinational Corporations at International Law,” in (2001) 24 *Hastings International and Comparative Law Review* 475 at 482.

basis for international law to revisit the subject of Indigenous peoples and eventually become reformulated into a force in aid of Indigenous peoples' own designs and aspirations.”<sup>680</sup> Yet, the emergence of Indigenous peoples as subjects and participants of international human rights law did not become part of international law discourse until the latter part of the 20<sup>th</sup> century. Indeed, as discussed in the previous chapter, Vitoria's doctrine of sovereignty, further developed from a Eurocentric perspective, privileged only European or European-derived territorial arrangements as States. Indigenous peoples were not considered sovereign; they were subjected to State policies of assimilation.<sup>681</sup> Moreover, the post-World War II period of decolonization bypassed Indigenous peoples, and the early human rights structure did not account for Indigenous peoples' political, social and cultural association as “peoples” nor for their experiences of discrimination and marginalization. It is only in the past 30 to 40 years, parallel to their persistent mobilization and struggles, that Indigenous peoples have been able to play an important participatory role in international human rights lawmaking processes.<sup>682</sup>

Indigenous peoples have participated in informal and formal processes of human rights norm-building and decision-making through the formation of national and transnational networks and collaboration with nongovernmental organizations (NGOs) and scholars and academics, which led to important international conferences convened by major human rights bodies within the United Nations (UN), the Organization of American States (OAS) and other international organizations.<sup>683</sup> Through their participation in institutionalized structures and meetings

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<sup>680</sup> James Anaya (2004), *supra* note 673 at 53.

<sup>681</sup> *Ibid* at 19-31.

<sup>682</sup> *Ibid* at 76-72; Lillian Aponte Miranda (2010-2011), *supra* note 647 at 203; Stephen Allen (2009), *supra* note 656 at 187.

<sup>683</sup> Seminal conferences, convened by Indigenous transnational movement, include the conference that led to the creation of the World Council of Indigenous Peoples, the International Non-Governmental Organization Conference

(primarily at the UN level) Indigenous peoples have contributed to the production of “hard” and “soft” international law concerning Indigenous rights.<sup>684</sup> In relation to ‘hard law,’ Indigenous peoples participated, though in a relatively limited way, in the production of International Labor Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169), which revised ILO Convention 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, adopted in the 1950s aiming to promote the assimilation of Indigenous peoples.<sup>685</sup> They have also participated in the UN human rights treaty compliance bodies submitting written reports, presenting formal briefings and engaging with its complaint procedures;<sup>686</sup> and through their multiple advocacy efforts before the Inter-American Human Rights Commission and Court (‘hard law’).

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on Discrimination against Indigenous Peoples of the Americas, the Inuit Circumpolar Conference, and the World Conference of Indigenous Peoples on Territory, Environment, and Development. See Lillian Aponte Miranda (2010-2011), *supra* note 647 at 203.

<sup>684</sup> Hard law is binding law that give rise to legal consequences; soft law are rules that do not have the binding force of law, but they are nevertheless influential in shaping behaviour. Soft law is used most frequently either as precursor to hard law or as supplement to a hard law instrument. See Dinah Shelton, “Normative Hierarchy in International Law,” in (2006) 100:2 *American Journal of International Law* 291 at 319-320.

<sup>685</sup> Luis Rodriguez-Pinero, *Indigenous Peoples, Post colonialism, and International Law: The ILO Regime (1919-1989)* (Oxford, England: Oxford University Press, 2005).

<sup>686</sup> Examples of Cases submitted to the UN Human Rights Committee alleging Indigenous; rights violations in connection with extractive industries: Bernard Ominayak, Chief of the Lubicon Lake Band vs. Canada (oil, gas, timber); I. Lansman et al. vs. Finland (logging); J. Lansman et al. vs. Finland (logging, mining). Latest Urgent Action Procedures, Follow Up & Early Warning before the UN Committee on the Elimination of Racial Discrimination: Brazil, 11/03/2011 (UA/EW); Chile 02/09/2011 (UA/EW); Colombia, 02/09/2011 (UA/EW); Costa Rica, 02/09/2011 (UA/EW); Russian Federation, 11/03/2011 (UA/EW); Ethiopia, 102/09/2011 (UA/EW); India, 02/09/2011 (UA/EW); Indonesia, 02/09/2011 (UA/EW); Papua New Guinea, 11/03/2011 (UA/EW); Peru, 02/09/2011; Suriname, 20/09/2011 (UA/EW); Tanzania, 11/03/2011 (UA/EW); United States of America, 11/03/2011 (UA/EW); Finland, 11/03/2011 (Follow Up); Guatemala, 02/09/2011 (Follow Up). Fergus MacKay, Ed., *A Compilation of UN Treaty Body Jurisprudence, the Recommendations of the Human Rights Council and its Special Procedures, and the Advice of the Expert Mechanism on the Rights of Indigenous Peoples* (Moreton-in-Marsh, UK: Forest People Programme, January 2013).

In addition, Indigenous peoples have contributed to the standard-setting work of the UN Permanent Forum on Indigenous Issues (UNPFII),<sup>687</sup> and the UN Working Group on Indigenous Populations ('soft law'). Indigenous peoples' active participation in the UN Working Group on Indigenous Populations, established in 1982, was significant, and it ultimately led to the passage of the UNDRIP.<sup>688</sup> Thus, Indigenous peoples have contributed to the development of innovative jurisprudence that specifically addresses their interests and claims.<sup>689</sup>

## **5.2.2 International Human Rights Law Sources of Indigenous Peoples' Rights**

### **ILO Convention 169**

Concluded in 1989 and in force since September 1991, the ILO Convention 169 is the first and most comprehensive international convention exclusively devoted to Indigenous peoples and their rights. Although the ILO is not strictly an international body on the human rights system, Convention 169 constitutes the only accepted source of 'hard law,' or binding treaty, that specifically addresses the rights of Indigenous peoples in States parties, and it has therefore significantly influenced the advancement of Indigenous peoples' human rights.<sup>690</sup> The

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<sup>687</sup> UNPFII was established in July 2000 by the United Nations Economic and Social Council (ECOSOC) with the mandate to "discuss indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights." The UNPFII hosts an annual conference on which Indigenous peoples share their views on thematic topics related to their concerns and rights. See Establishment of a Permanent Forum on Indigenous Issues, UN ECOSOC Resolution 200/22, UN Doc. E/RES/2000/22 (28 July 2000).

<sup>688</sup> UN Working Group on Indigenous Populations was established in 1982 as a subsidiary body of ECOSOC with the mandate of preparing thematic studies on Indigenous peoples' human rights, presenting annual reports to the former Sub-Commission on Human Rights, summarizing discussions and making recommendations and elaborating upon the draft of UNDRIP. The Working Group actively solicited the participation of Indigenous peoples' representatives in their information-seeking, policy-shaping and standard-setting work. The Working Group was abolished in 2007 and replaced with the Expert Mechanism on the Rights of Indigenous Peoples.

<sup>689</sup> Dinah Shelton, "The Inter-American Human Rights Law of Indigenous Peoples," (2013) 25 *University of Hawaii Law Review* 937.

<sup>690</sup> As of June 2017, only 22 States (of the 185 ILO member States) have ratified the Convention, fourteen on them in Latin America. Only four States from Europe and other industrialized States: Norway, Denmark, Netherlands and Spain. Online:

ILO Convention 169 recognizes Indigenous peoples as such, and not as populations as did the former ILO Convention 107. The preamble of the Convention implicitly recognizes the human right to self-determination for Indigenous peoples, though in a way limited in nature and scope; it provides that ‘the aspirations of these peoples to exercise control over the own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions within the framework of the States in which they live should be recognized.’<sup>691</sup>

The Convention recognizes 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). In addition, the Convention grants Indigenous peoples rights not only over their lands, but also over their territories and natural resources. Article 13.2 of the Convention defines territory as including “the total environment of the areas which the peoples concerned occupy or otherwise use.” Articles 14 and 15 of the Convention recognize Indigenous peoples’ substantive and procedural land and resource rights. It specifically recognizes Indigenous peoples’ substantive rights of ‘ownership and possession over lands which they traditionally occupy,’ including participation in the use, management and conservation of these resources, and procedural right to prior informed consultation ‘in cases where the State retains ownership of mineral or sub-surface resources or rights to other resources pertaining the lands,’ and compensation for any damages provoked by the exploration and exploitation of subsoil resources.<sup>692</sup>

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<[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312314](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314)> (retrieved 30 June 2017).

<sup>691</sup> ILO Convention 169, Preamble, online:

<[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C169)> (retrieved 30 June 2017).

<sup>692</sup> ILO Convention 169, articles 14-15.

ILO Convention 169 introduces the concept of ‘self-recognition’ as a ‘fundamental criterion’ to the field of international Indigenous protection. It also prescribes other additional international legal requirements such as the account of ancestry from populations which inhabited the country, or geographical region to which the country belongs, at the time of the conquest or colonization or the establishment of present State boundaries, and the historic connection to territory that now falls under the sovereign authority of an independent State<sup>693</sup>.

### **United Nations Instruments**

The UN Universal Declaration of Human Rights (UDHR), proclaimed by the UN General Assembly in 1948, contains provisions relevant to Indigenous peoples such as the rights to freedom, equal treatment, nondiscrimination, life, liberty, proper standard of living and the security of person.<sup>694</sup> The International Covenant on Civil and Political Rights (ICCPR),<sup>695</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>696</sup> and the International Convention on the Elimination of All forms of Racial Discrimination (ICERD)<sup>697</sup> also contain provisions relevant to Indigenous rights. Article 1 of the ICCPR recognizes peoples’ rights to self-determination and article 27 protects the right to cultural integrity; as applied to Indigenous peoples, article 27 has been interpreted to protect Indigenous peoples’ ability to collectively practice their culture and, thereby, to continue their way of life.<sup>698</sup> Article

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<sup>693</sup> ILO Convention 169, articles 1 (2), 1 (1) (a), 1 (b).

<sup>694</sup> Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester: Manchester University Press, 2002).

<sup>695</sup> The International Covenant on Civil and Political Rights adopted on December 16, 1966 and entered into force on March 23, 1976. This Covenant has two Optional Protocols, which contain the individual complaints procedure (used by Indigenous peoples) and the abolition of death penalty.

<sup>696</sup> International Covenant on Economic, Social and Cultural Rights adopted on December 16, 1966 and entered into force on March 23, 1976.

<sup>697</sup> The International Convention on the Elimination of All Forms of Racial Discrimination adopted on December 21, 1965 and entered into force on January 4, 1969.

<sup>698</sup> Human Rights Committee, Bernard Ominayak, Chief of the Lubicon Lake Band vs. Canada, *Report of the Human Rights Committee*, 45 UN GAOR Supp. (No.43) at 1, UN Doc. A/45/40, Vol. 2; Human Rights Committee,

1 of the ICESCR also recognizes people's rights to self-determination and article 15 supports the right to cultural integrity; in its interpretation of this right, the UN Committee on Economic, Social and Cultural Rights has noted that the strong communal dimension of Indigenous peoples' cultural life is indispensable to their existence, well-being and full development.<sup>699</sup>

Article 1 and 2 of the ICERD prohibit the discriminatory treatment of individuals and groups along racial, ethnic and religious lines. It is important to highlight the 1997 CERD General Recommendation on the rights of Indigenous peoples. The Committee called upon States to “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent”<sup>700</sup> Further, the CERD calls upon the States “to recognize and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories...”<sup>701</sup> The reference to “*informed consent*” and “*control*” in the scope of Indigenous rights to land and resources has been very important in advancing their claims. Interpretations of CERD should carry additional weight given that the prohibition of racial discrimination has arguably acquired the status of *jus cogens* under

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*General Comment No. 23* (50) (art. 27), adopted by the HRC at its 1314 meeting (fiftieth session), 6 April 1994, UN Doc. CCPR/C/21/Rev.1/Add.5.

<sup>699</sup> ICESCR General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a)), 36, 37, UN Doc. E/C. 12/GC/21, 21 December 2009.

<sup>700</sup> CERD, *General Recommendation XXIII (51) concerning Indigenous People Adopted at the Committee's 1235<sup>th</sup> meeting, 18 August 1997*, UN Doc. CERD/C/51/Misc.13/Rev.4

<sup>701</sup> *Ibid.*



international law, and consequently, will void any law or practice found to be in violation of the norm.<sup>702</sup>

The latest standard-setting international law instrument pertaining to Indigenous peoples' status and rights is the UNDRIP.<sup>703</sup> It emphasizes already recognized Indigenous rights such as right to self-determination (art. 3) and cultural integrity (art. 11). It also recognizes Indigenous peoples' substantive rights to ownership, occupancy, use, and control of their ancestral land and resources (arts. 25, 26), and procedural rights to free and informed consent prior to the State's engagement in a natural resource or large-scale infrastructure projects that may impact their way of life, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (art. 32).<sup>704</sup> Unlike ILO 169, UNDRIP does not provide an explicitly definition of 'Indigenous peoples.' It has implicitly adopted a fluid conception of Indigenous identity, mainly driven by self-identification, thus rejecting an official legal definition based on strict parameters.

### **Organization of American States (OAS) Human Rights System**

The relevance of the OAS human rights system is the unique jurisprudence developed lately by the primary organs of the Inter-American human rights system, the Inter-American Commission on Human Rights (the Commission) and the Inter-American Court of Human

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<sup>702</sup> *Jus cogens* are those principles and rules accepted by all States, as standards from which no derogation is permitted. The especial force of such peremptory principles and rules lies in rendering null and void any international treaty contrary to them. In particular, the principle on respect for fundamental human rights belongs to the category of *jus cogens*. Antonio Cassese, *International Law*, 2<sup>nd</sup> ed., (New York: Oxford University Press, 2005) at 65. Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1990) at 513.

<sup>703</sup> Claire Charters and Rodolfo Stevanhagen, eds. (2009), *supra* note 672.

<sup>704</sup> UN Resolution Adopted by the General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, 107<sup>th</sup> Plenary Meeting, 13 September 2007, A/RES/61/295 (2 October 2007).

Rights (the Court)<sup>705</sup> that gives prominence to the collective and individual land and resource rights of Indigenous peoples, and a host of procedural rights connected to the substance of land ownership and possession. This body of jurisprudence has been developed around the right to property, defined in cultural and religious as well as economic terms.<sup>706</sup> The sources of Indigenous peoples' rights, at the OAS level, include the American Declaration of the Rights and Duties of Man (the American Declaration),<sup>707</sup> and the American Convention on Human Rights (the American Convention),<sup>708</sup> the former a 'soft law' instrument and the latter a 'hard law' or binding treaty in ratifying States. On June 15, 2016, after nearly 30 years of negotiations, the American Declaration on the Rights of Indigenous Peoples was adopted at the 46th General Assembly of the OAS.<sup>709</sup> The American Declaration, largely following the UNDRIP and reproducing it literally in some instances, provides that self-identification as Indigenous peoples will be a fundamental criterion for determining to whom the Declaration applies. It affirms the

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<sup>705</sup> The Commission was established in 1959 as the principal organ of the OAS with a mandate to promote the observance and protection of human rights in the member States and to serve as a "consultative organ of the OAS" on human rights matters. In 1965, the Commission gained explicit competence to accept communications alleging human rights violations. In 1990, the Commission created the Special Rapporteur on the Rights of Indigenous Peoples with the goal of calling attention to the condition of Indigenous peoples in the Americas who have been exposed to serious human rights violations. The Commission applies the rights contained in the 1948 American Declaration of the Rights and Duties of Man to all OAS member states and the rights and obligations in the 1969 American Convention on Human Rights to the states parties. Following conclusion of Commission proceedings, the Commission may refer a case to the Court, an organ established by the American Convention in 1979, if the respondent state is a party to the Convention and has accepted the Court's jurisdiction. While the Commission issues non-binding recommendations, the Court's decisions are binding and may be executed in domestic courts. The Court has broad powers to afford remedies to victims of violations. See Dinah Shelton (2013), *supra* note 689 at 943.

<sup>706</sup> See Inter-American Commission on Human Rights, "*Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the IACHR System*," OEA/Ser.L/V/II., Doc. 56/09, December 2009; Inter-American Commission on Human Rights, "*Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*," OEA/Ser.L/V/II., Doc. 47/15, December 2015.

<sup>707</sup> See American Declaration of the Rights and Duties of Man, O.A.S. Res. XXVIII, OEA/Ser.L/V/II.23, doc. 21 rev. 6 (1948).

<sup>708</sup> Organization of American States, American Convention on Human Rights, 22 November 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

<sup>709</sup> OAS Press Release, "A 17-Year Wait Pays Off for Indigenous Peoples," 15 June 2016, online: <[http://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-075/16](http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-075/16)> (retrieved 30 June 2017).

right of self-determination, rights to education, health, self-government, culture, lands, territories and natural resources, and it includes provisions that address gender equality and the particular situation of Indigenous peoples in the region, including protections for those living in voluntary isolation and those affected by a state's internal armed conflict.<sup>710</sup>

Although the early case law of the Commission was hesitant in its approach to Indigenous rights, since the 1980s, the Commission has steadily addressed issues of Indigenous peoples' rights through its special reports and case law, later developed by the Court, which includes decisions on admissibility, merits, mediation, subpoenas and settlements.<sup>711</sup> In 1985, the Commission affirmed the Brazilian State's obligation to protect Indigenous Yanomami peoples' rights to life, security, health, and integrity, and recommended the identification and demarcation of their lands in the Northeast of Brazil, including more than 9 million hectares of Amazon forest.<sup>712</sup> In 2002, the Commission concluded that the U.S. government had not guaranteed the Dann sisters (members of the Western Shoshone indigenous peoples) the right to property in conditions equal to those of the rest of the citizens under the basis of the American 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.<sup>713</sup> In 2004, in *Maya Indigenous Communities of the Toledo District vs. Belize*, the Commission found Belize to have

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<sup>710</sup> Indian Law Resource Centre, "*The American Declaration on the Rights of Indigenous Peoples*," 15 June 2016, online: <<http://indianlaw.org/adrip/home>> (retrieved 30 June 2017).

<sup>711</sup> The Court is an autonomous judicial institution of the Inter-American human Rights System whose main objective is to apply and interpret the American Convention. It has the authority to hear contentious cases between States, or contentious cases brought against a State by individuals at the request of the Commission, after the Commission has first dealt with the petition regarding violations of rights enshrined in the American Convention.

<sup>712</sup> Inter-American Commission on Human Rights, Resolution N° 12/85, Case N° 7615, BRAZIL, March 5, 1985.

<sup>713</sup> Inter-American Commission on Human Rights, Report N° 75/02, Case N° 11.140, Mary and Carrie Dann, United States, December 27, 2002.

violated Article 23 of the American Declaration by failing to take effective measures to recognize the communal property right to the lands traditionally occupied and used by the Maya, and by granting concessions to third parties (logging and oil companies) to utilize the traditional property and resources of the Maya people without conducting effective consultations with and obtaining the informed consent of the Maya people.<sup>714</sup> And, most importantly, the Commission recognized that the jurisprudence of the Inter-American System has acknowledged that the property rights of Indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include Indigenous communal property that arises from and is grounded in Indigenous custom and tradition.<sup>715</sup>

Along the same lines, the Court has resolved several cases that concern Indigenous peoples' rights and has consequently developed jurisprudence that implies significant advances in many ways.<sup>716</sup> In the 2001, the Court found that the Nicaraguan State violated the right to judicial protection, and the right to property as contained in the American Convention, to the detriment of the Awas Tingni Indigenous community.<sup>717</sup> The Court emphasized that the concept of Indigenous property cannot be understood in a purely individual or economic sense, but, rather is intimately tied to the group members' collective identity, substance, culture, spiritual

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<sup>714</sup> Inter-American Commission on Human Rights, Report N° 40/04, CASE 12.053, Merits, *Maya Indigenous Communities of the Toledo District vs. Belize*, October 12, 2004, para. 192-196.

<sup>715</sup> *Ibid* at para. 130-132.

<sup>716</sup> Dinah Shelton (2013), *supra* note 689 at 942; Mario Melo, Recent Advances in the Justifiability of Indigenous Rights in the Inter-American System of Human Rights, (2006) 3:4 *SUR International Journal on Human Rights* 31-48; Isabel Madariaga Cuneo, the Rights of Indigenous Peoples and the Inter-American Human Rights System, (2005) 22 *Arizona Journal of International and Comparative Law* 53-63.

<sup>717</sup> Nicaraguan government had granted a concession to a transnational (Korean) extraction company to exploit timber on Indigenous ancestrally (undemarcated and untitled land) occupied lands, without their consent and without any process of prior consultation. See *The Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua*, Judgment of 31 August 2001, Inter-Am. Ct. H. R. (Ser. C) No 79.

life, integrity, and economic survival – in short, to their very existence.<sup>718</sup> And, most importantly, it also recognized the property-based right of Indigenous communities to free and informed prior consent and prior consultation before extractive industry concessions are granted to their land. The *Awas Tingni* case set the stage for *Saramaka People v. Suriname* (2007)<sup>719</sup> and *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012).<sup>720</sup> In *Saramaka People v. Suriname*, the Court reaffirmed Indigenous peoples' right to both prior consultation before extraction concessions are granted on their lands and, where profound impacts may result, to free, prior, and informed consent. In *Kichwa Indigenous People of Sarayaku v. Ecuador*, a case concerning the granting of oil exploration and exploitation licenses within the traditionally occupied Indigenous territory, the Court re-affirmed its prior jurisprudence pertaining to Indigenous peoples' rights to communal property, but it went on to assert that the use and enjoyment of property is necessary to ensure Indigenous physical and cultural survival, which means, according to the Court, "the right to use and enjoy the territory would be meaningless for Indigenous and tribal communities if that right were not connected with the protection of natural resources in the territory."<sup>721</sup>

During the last three decades, the demands and claims for recognition of Indigenous peoples have resulted in a steady evolution of a common understanding regarding the scope and content of their rights on the basis of long-standing principles of international human rights law and policy. Yet, the legal jurisprudence and theoretical work lag behind practical realities on the

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<sup>718</sup> *Ibid* at para. 149. See Claudio Grossman, "Awas Tingni v. Nicaragua: A Landmark Case for the Inter-American System," in *Human Rights Brief*, Spring, 2001.

<sup>719</sup> Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Judgment of Nov. 28, 2007, Inter-Am. Ct. (Ser. C).

<sup>720</sup> Inter-American Court of Human Rights, *the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of June 27, 2012, Merits and Reparations, Serie C, No. 245.

<sup>721</sup> *Ibid* at para. 146.

ground. The paradox of the plethora of international legal instruments, jurisprudence and domestic legislation recognizing the rights of Indigenous peoples alongside the increasing marginalization of the majority of Indigenous peoples and infringement of their rights does not simply reflect the gap between law and its implementation. It is also the effect of the asymmetries and power relations between States, MNCs, intergovernmental institutions and Indigenous communities, within the context of the neoliberal economic globalization that has developed a more powerful and effective set of binding norms on international economic law (IEL) which Posner and Sykes characterize as the “most elaborate and detailed body of international law in existence.”<sup>722</sup>

### **5.3 Multinational Corporations at International Law**

Most studies today acknowledge the central role played by MNCs in the evolving globalization and liberalization of the world economy.<sup>723</sup> Indeed, MNCs are “the driving force behind globalization. Through their production, trade and investment activities, they are integrating countries into a global market.”<sup>724</sup> Their status as influential participants in international economic relations and “driving force” of the processes of globalization is clearly illustrated by the fact that foreign direct investment, a constitutive activity of MNCs, is now a central component of the global economic system.<sup>725</sup> The central role played by MNCs in the international trade and investment fields and the global economy generally has also been

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<sup>722</sup> Eric A. Posner and Alan O. Sykes, *Economic Foundation of International Law* (Cambridge, Massachusetts: the Belknap Press/Harvard University Press, 2013) at 263.

<sup>723</sup> Jonh G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W. W. Norton & Company, 2013) at xv; see also Patrick Macklem, “Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction,” (2005) 7 *International Law FORUM du droit International* 281.

<sup>724</sup> Oxfam, *Rigged Rules and Double Standards* (Oxfam, 2002), cited in Janet Dine, *Companies, International Trade and Human Rights* (New York: Cambridge University Press, 2005) at 10.

<sup>725</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2<sup>nd</sup> ed., (New York: Oxford University Press, 2012).

recognized by the WTO and other international institutions.<sup>726</sup> MNCs not only occupy a significant status as economic players on the international and global economy, but they are also prominent social and political actors who are increasingly involved in the development and enforcement of the regulatory structures of the international economic system embodied by two of the most dominant public international law fields of international economic law (IEL): international trade law and the international foreign investment law.<sup>727</sup>

### 5.3.1 Notion, Definition and Legal Personality

The legal concept of a corporation refers to an artificial legal entity that is legally separate from its owners, investors and managers, and which enjoys its own personality and can hold rights and obligations in its own name.<sup>728</sup> The notion of separate legal personality for corporations has also been recognized as a concept of international law by the International Court of Justice (ICJ) both in the Barcelona Traction Case (Belgium v Spain)<sup>729</sup> and the Ahmadou Sadio Diallo Case (Republic of Guinea v Democratic Republic of the Congo).<sup>730</sup>

The concept of corporation as a “legal person” is the legal cornerstone of the corporation’s power and ubiquitousness; it has led the corporation to become the “most effective structure for capital accumulation, having the potential to demonstrate an effective management

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<sup>726</sup> United Nations Conference on Trade and Development, *World Investment Report 2009*, Vol. 1, Transnational Corporations, Agricultural Production and Development; United Nations Conference on Trade and Development, *The Universe of the Largest Transnational Corporations*, UNCTAD/ITE/ILA/2007/2 (2007).

<sup>727</sup> Peter Muchlinski (2010), *supra* note 667 at 9; Karsten Nowrot (2011), *supra* note 667 at 803; Stephen Tully (2007), *supra* note 667.

<sup>728</sup> Peter Muchlinski, “Corporations in International Law.” In *Max Planck Encyclopedia of Public International Law*, Edited by R. Wolfrum (Oxford: Oxford University Press, 2009).

<sup>729</sup> ICJ – Barcelona Traction, Light and Power Co. Ltd. (Belgium v Spain) (New Application: 1962); second phase judgment of 5 February 1970 (1970) *ICJ Reports* 3, at paragraphs 38-47.

<sup>730</sup> ICJ – Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, *I.C.J. Reports* 2007, p. 582, at paragraph 61.

system because it allows a separation of ownership from management.”<sup>731</sup> Joel Bakan argues that this unique feature attributed by law together with the corporation’s legally defined mandate which is “to pursue, relentlessly and without exception, its own self-interest, regardless of the often harmful consequences it might cause to others” has converted the corporation into “a pathological institution, a dangerous possessor of the great power it wields over people and societies.”<sup>732</sup>

Multinational corporations do not exist as legal entities defined or recognized formally by law. MNCs are made up of large multinational business chains and/or complex structures of individual companies with a vast variety of interrelationships. These may be organized within the MNC group itself, consisting of linked affiliates controlled by their parent company, or they may be composed of economically integrated but legally separate corporate entities. In either case the legal concept of the corporation will have a role to play in the structuring of the underlying multinational company and the risks and limited liabilities it involves. In terms of defining MNCs, there have been several definitions put forward by economists and international organizations.<sup>733</sup> The UN Document, ‘Norms on the Responsibilities of TNCs and other Business Enterprises with regard to Human Rights,’ defines MNC as “an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.”<sup>734</sup> A MNC may also be defined as a “cluster of corporations

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<sup>731</sup> Alice De Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Cheltenham, UK: Edward Elgar, 2011) at 1.

<sup>732</sup> Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Viking Canada, 2004) 1-2.

<sup>733</sup> Peter Muchlinski, *Multinational Enterprises and the Law* (New York: Oxford University Press, 2007) at 5-8.

<sup>734</sup> UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, paragraph 20, (2003).



of diverse nationality joined together by ties of common ownership and responsive to a common management strategy.”<sup>735</sup>

The development of the law relating to corporations, particularly MNCs, under international law is taking place in the context of economic globalization and contested doctrinal, legal and political debates. Traditionally, the notion of the corporation has been located within the order of municipal law. Yet, the multinational character of modern corporations has raised questions as to whether international law should also develop rules pertaining to multinational corporate actors, especially given that lately new sets of claims have arisen relating to the accountability and liability of corporations for acts that may infringe and violate international law, particularly international human rights law. Similarly, calls for a transparent, stable, and predictable investment environment have given rise to specialized rules of international law that offer protection to the assets of corporate investors among others, particularly in the fields of international trade and investment law.

In this regard, the question whether corporations are subjects of international law or possess intentional legal personality is contested and debatable. Some authors consider that MNCs are not subjects of international law and do not have international legal personality.<sup>736</sup> This traditional position is based on political and technical perspectives, arguing that

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<sup>735</sup> Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2004) at 1.

<sup>736</sup> John G. Ruggie, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. E/CN.4/2006/97, 2006; Ian Brownlie, *Principles of Public International Law*, 5<sup>th</sup> ed., (Oxford: Clarendon Press, 1998); Karl P. Sauvant and V. Aranda, “The International Legal Framework for Transnational Corporation”, in Arghyrios A. Fatouros, Eds., *Transnational Corporations: The International Legal Framework*, Vol. 20 (New York: Routledge, 1994); Fleur Johns, “The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory” (1993-1994) 19 *Melbourne University Law Review* 893; Francois Rigaux, “Transnational Corporations”, in Mohammed Bedjaoui, Ed., *International Law: Achievements and Prospects* (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1991) at 121; Louis Henkin, “International Law: Politics, Values and Functions,” (1989) *Recueil des cours de l’Academie de droit international* 126; Antonio Cassese, *International Law in a Divided World* (Oxford, Oxford University Press, 1986).

acknowledging MNCs as a subject of international law would substantially reduce the power of States and thus their traditionally dominant positions in international law and that, unlike States, MNCs lack the legitimacy and authority to directly participate in the international law-making process. Yet, as Chetail argues, these political and technical perspectives invoked for denying international personality to MNCs are not convincing.<sup>737</sup> Other authors consider that MNCs have acquired a limited personality or functional personality derived from international law. They argue that, in some specific circumstances, the capacity to have rights and obligations and the capacity to bring international claims have been directly conferred on them by international law (mainly international economic law) by three distinct sources: international contracts, treaties and customary law.<sup>738</sup> This position goes in line with the policy oriented approach advocated by Judge Rosalyn Higgins who argues that MNCs are participants in the process of international law; they make claims across State lines with the aim of maximizing certain values such as

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<sup>737</sup> Chetail points out that the political and technical reasons argued to deny corporations international legal personality are in contradiction with the sliding-scale conception of international personality as acknowledged by the ICJ in the *Reparation for Injuries* case. In that particular case, the Court clearly rejected any kind of analogy with the State in order to infer the attributes of international personality: “the Court has come to the conclusion that the [United Nations] Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State.” Moreover, while the capacity to participate in the international law-making process may be considered as a potential indicator, it is nevertheless not part of the definition given by the Court. That definition is based on the capacity to have rights and obligations under international law and the capacity to bring international claims. See Vincent Chetail, “The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward,” in Denis Alland, Vincent Chetail, Olivier de Frouville and Jorge E. Vinuales, Eds., *Unity and Diversity of International Law: Essays in Honour of Prof. Pierre-Marie Dupuy* (Leiden, Netherlands: Martinus Nijhoff Publishers, 2014) 105, at 112.

<sup>738</sup> Karsten Nowrot (2011), *supra* note 667 at 803; Jose E. Alvarez, “Are Corporations Subjects of International Law,” in (2011) 9:1 *Santa Clara Journal of International Law* 1; David Kinley and Junko Tadaki, “From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law,” (2004) 44:4 *Virginia Journal of International Law* 944–946; Surya Deva, “Human Rights Violations by Multinational Corporations and International Law: Where from Here?,” (2003-2004) 19 *Connecticut Journal of International Law* 50–56; Nicola Jagers, *Corporate Human Rights Obligations: In Search of Accountability*, (New York: Intersentia, 2002); Steven Ratner (2001), *supra* note 635; Cristina Baez, et al., “Multinational Enterprises and Human Rights,” in (1999-2000) 8 *University of Miami International and Comparative Law Review* 217–222; Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, (New York: Cambridge University Press, 1997).

fairness and predictability in international business transactions.<sup>739</sup> Therefore, the lack of formal legal personality is irrelevant, as the actions of MNCs result in real legal consequences at the international level.<sup>740</sup> This approach has provided a theoretical framework for the development of treaty-based (hard law) legal regimes and soft law instruments pertaining to corporate rights and obligations in international law. This has led to developments in relation to the protection of MNCs' rights and investments under hard law international investment agreements (IIAs), including bilateral investment treaties (BITs), and obligations and responsibilities for MNCs under soft law declarations, code of conducts and guidelines.<sup>741</sup> Thus, it can be argued that MNCs have increasingly become actors or subjects in international law, possessing 'hard law' rights and 'soft law' obligations.<sup>742</sup>

### **5.3.2 Multinational Corporations as Actors in International Law**

Given that MNCs “represent new loci of power in the global economic order”<sup>743</sup> with tremendously influential roles, MNCs have progressively been involved in the development and enforcement of the regulatory structures of international trade law and international law on foreign investment; such a legal structure is considered as one the significant factors in the growth of MNCs.<sup>744</sup>

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<sup>739</sup> Rosalyn Higgins *Problems and Process: International Law and How We Use It* (New York: Oxford University Press, 1994) at 50.

<sup>740</sup> Peter Muchlinski (2009), *supra* note 728.

<sup>741</sup> In addition, as Muchlinski points out, there exists new environmental liability rules that apply to corporations either indirectly through national law or directly through treaty obligations, as well as the criminal liability of corporations under international law has been accepted for certain egregious violations of international crimes, such as war crimes or crimes against humanity, though corporations have been excluded from the jurisdiction of the International Criminal Court. *Ibid.*

<sup>742</sup> Peter Muchlinski (2010), *supra* note 667 at 9.

<sup>743</sup> Symposium, “Multinational Enterprise as Global Corporate Citizen,” Sydney M. Cone (Moderator), Jose E. Alvarez, James L. Gunderson, John R. MacArthur, and Steven R. Ratner (speakers), in (2001) 21:1 *New York Law School Journal of International and Comparative Law* 1.

<sup>744</sup> Peter Muchlinski (2007), *supra* note 733 at 33-43.

## MNCs as Actors in International Trade Law

As Posner and Sykes argue, international trade law is the most elaborate and detailed body of international law in existence, consisting of dozens of bilateral, regional, and multilateral treaties. The most significant multilateral arrangement, the World Trade Organization (WTO), successor to the General Agreement on Tariffs and Trade (GATT) and established in 1995, now has 159 members as well as the most extensively developed dispute resolution system of any body of international law.<sup>745</sup> The WTO is a treaty, or a collection of treaties, and at the same time an international organization. As a treaty, the WTO consists of legally binding rights and obligations between the parties and mechanisms for clarifying those rights and determining compliance or non-compliance.<sup>746</sup> As an international organization, the WTO operates through various organs and plays a role internationally, and has possibly become the most influential international standard setting forum, with a relatively more robust rule-making procedure and greater resources than the United Nations. As the WTO regulations are also intended to benefit and protect private business activities, MNCs have been actively involved in the formation of the WTO and its subsequent development, as well as in the WTO dispute settlement process.<sup>747</sup>

It has been argued that MNCs exercised a considerable influence in the drafting and negotiations of the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS), the General Agreement of Trade in Services (GATS) as well as in relation to securing

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<sup>745</sup> Eric A. Posner and Alan O. Sykes (2013), *supra* note 722 at 263.

<sup>746</sup> Donald McRae, 'The Place of the WTO in the International System,' in Daniel Bethlehem, Donald McRae, Rodney Neufeld and Isabelle Van Damme, Eds., *The Oxford Handbook of International Trade Law* (New York: Oxford University Press, 2009) at 55.

<sup>747</sup> Karsten Nowrot (2011), *supra* note 667 at 803.

the approval of the Agreement creating the WTO in January 1995.<sup>748</sup> As MNCs are often able to exercise considerable influence on the adoption and content of international agreements, they substantially contribute to the phenomenon named “partial privatization of economic diplomacy” in the field of international trade law.<sup>749</sup> In regard to the MNCs’ involvement in the WTO’s decision-making processes, a similar picture emerges. They participate through their representatives or their business associations, informally and unofficially, but exercise an often considerable influence on individual WTO members, as well as on the outcome of WTO decision-making processes as a whole.<sup>750</sup>

MNCs’ involvement in the WTO’s dispute settlement mechanisms has also been very influential. It starts prior to the initiation of a WTO member complaint with close interactions with government authorities. Often, governmental authorities not only receive their initial information on trade-restricting practices of other WTO members from the affected private corporations, but the government also enter into consultations with interested private corporations and business associations. Once the formal complaint is open, MNCs have several options to participate in the WTO panel and Appellate Body proceedings. As Nowrot writes, “Aside from the involvement of interested private economic actors in the selection of panelists --

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<sup>748</sup> In the Uruguay Round, MNCs managed to exercise an often “decisive influence on the course of the negotiations” on TRIPS and GATS by informal and unofficial means such as by way of their representatives accompanying State delegations as advisors, providing draft texts of the agreement to negotiators, and lobbying activities at the international and in particular domestic level of the contracting parties of the GATT 1947. *Ibid* at 809-811; Susan K. Sell, “Multinational Corporations as Agents of Change: The Globalization of Intellectual Property Rights,” in A. Claire Cutler, Virginia Haufler, Tony Porter, Eds., *Private Authority and International Affairs* (Albany: State University of New York Press, 1999) at 169; Peter Drahos, “Negotiating Intellectual Property Rights: Between Coercion and Dialogue,” in Peter Drahos and Ruruth Mayne, Eds., *Global Intellectual Property Rights: Knowledge, Access and Development* (New York: Palgrave Macmillan: Oxfam, 2002) 161 at 172; Sylvia Ostry, “What are the Necessary Ingredients for the World Trading Order?” in Horst Siebert, Ed., *Global Governance: An Architecture of the World Economy* (New York: Springer, 2003) 123 at 124-25.

<sup>749</sup> Nicholas Bayne and Stephen Woolcock, “Economic Diplomacy in the 2000s,” in Nicholas Bayne and Stephen Woolcock, eds., *The New Economic Diplomacy: Decision-Making and Negotiation in International Economic Relations* (Burlington, VT: Ashgate, 2003) at 295.

<sup>750</sup> Karsten Nowrot (2011), *supra* note 667 at 811-813.

as occurred, for example, in the Kodak/Fuji case<sup>751</sup> – a notable form of participation is the possibility of direct representation in the WTO member’s delegation in the dispute settlement proceedings.”<sup>752</sup> In addition, MNCs can provide support and advise, informally and unofficially, WTO members in the course of dispute settlement proceedings, and submit amicus briefs.

### **MNCs as Actors in International Investment Law**

International investment law is a well-established discipline grounded in principles of customary international law that stretch back into the nineteenth century.<sup>753</sup> Since the beginning of the 1990s, however, it has emerged as one of the most dynamic and practically important fields of international law, in general, and of IEL, in particular.<sup>754</sup> One of its main purposes has been to provide legal protection to foreign investors and their investments.

Economic, political and historical factors shaped, and continue to shape, the development of the international law on foreign investment, as well as international trade law. Thus, the rise of free market economics in the last two decades of the twentieth century, associated with the Washington Consensus policies, played a prominent role in the liberalization of regulations on foreign investment. The adoption and rigorous promotion of free market economics by the IMF and the World Bank led to the pressures being exerted on Third World countries to enter into international investment agreements (IIAs) containing rules on investment protection and de-regulation or neo-regulation on foreign investment entry.<sup>755</sup> Thus, since the 1990s, there has been

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<sup>751</sup> August Reinisch and Christina Irgel, “The Participation of Non-Governmental Organizations (NGOs) in the WTO Dispute Settlement System,” (2001) 1 *Non-State Actors and International Law* 127 at 139.

<sup>752</sup> Karsten Nowrot (2011), *supra* note 667 at 816.

<sup>753</sup> Chester Brown and Kate Miles, Eds., *Evolution in Investment Treaty Law and Arbitration* (New York: Cambridge University Press, 2011) at 3.

<sup>754</sup> Rudolf Dolzer and Christoph Schreuer (2012), *supra* note 725.

<sup>755</sup> Muthucumaraswamy Sornarajah, “Mutations of Neo-Liberalism in International Investment Law,” (2011) 3:1 *Trade Law and Development* 203; Muthucumaraswamy Sornarajah, “The Clash of Globalization and the International Law on Foreign Investment,” (2003) 10:2 *Canadian Foreign Policy Journal* at 15.

a steady rise of IIAs; most of them bilateral investment treaties (BITs) between two countries; others treaties with investment provisions (TIPs) include free trade deals with investment chapters such as NAFTA between Canada, Mexico and the United States, and the Trans-Pacific Partnership Trade Agreement (TPP), involving 12 countries, among them U.S., Canada, Japan, Australia, Mexico, Chile and Peru.<sup>756</sup> In addition the WTO came into existence in 1995 with the asserted objective of liberalizing not only international trade but also aspects of investment which affected such trade. The connection between international trade and international investment was asserted to justify the competence of the WTO in the field of international investment and many of its recent instruments dealt directly with areas of foreign investment.<sup>757</sup>

The continuing proliferation of IIAs, particularly BITs, together with the now often very detailed reasoning set out in an increasingly large number of arbitral awards, has contributed to the rapid development of international investment law.<sup>758</sup> International investment law's normative significance and changes need to be highlighted. First, the normative framework on the substantive standards of protection for MNCs and their investments has been extraordinarily strengthened and expanded. Despite the absence of a comprehensive multilateral agreement, the provisions on expropriation, fair and equitable treatment, national treatment, most favored nation treatment, and full protection and security as stipulated in the numerous IIAs and BITs are in

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<sup>756</sup> By the end of 2015, the regime of IIAs consisted of 3,304 treaties (2,946 BITs and 358 TIPs). The number of BITs increased dramatically during the 1990s; their number rose from 385 in 1989 to a total of 2,265 in 2003, and 2,500 in 2006. World Investment Report 2016 – *Investor Nationality: Policy Challenges*, UNCTAD, Geneva, 22 June 2016 at 101, online: <[http://unctad.org/en/PublicationsLibrary/wir2016\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf)> (retrieved 30 June 2017).

<sup>757</sup> Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 3<sup>rd</sup> ed., (New York: Cambridge University Press, 2010) at 2-3. For instance, intellectual property is covered by TRIPS instrument; the GATS deals with the services sector and covers the provision of services through a commercial presence in another country, which is foreign investment in the services sector; the Trade-Related Investment Measures (TRIMS) instrument deals with performance requirements associated with foreign investment. Despite its efforts, to date, the WTO has been unable to establish a comprehensive instrument on global investment. *Ibid* at 2, footnote 4.

<sup>758</sup> Chester Brown and Kate Miles, Eds. (2011), *supra* note 753; M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge, UK: Cambridge University Press, 2015).

general largely standardized, thus constituting a quite comprehensive core of largely undisputed protection standards for foreign investors. Second, the effectiveness of and recourse to the legal regime on the settlement of international investment disputes have also been remarkably increased and reinforced.<sup>759</sup> This investor-State settlement regime has disempowered host State judiciaries, shifting legal authority to a professional community of well-paid international arbitrators, and empowering the commercial interests of MNCs in the arbitration process.<sup>760</sup>

The tremendous expansion of trade and investment not only has increased the economic and political power of MNCs but also of their home States, who have traditionally seen the need to ensure the protection of the MNCs as the “driving force” behind trade and investment. MNCs themselves must be seen as distinct bases of power capable of asserting their interests through the realm of international investment law.<sup>761</sup> As Sornarajah points out, their collective power to manipulate legal outcomes must be conceded. It is a fascinating fact that, through the employment of private techniques of dispute resolution, MNCs are able to create principles of law that are generally favorable to them; that they can bring about such legal outcomes through pressure on their States is obvious. By employing low-order sources of international law such as decisions of arbitrators and the writings of ‘highly qualified publicists,’ it is possible to employ vast private resources to ensure that a body of law favorable to MNCs is created.<sup>762</sup> Thus, in this regard MNCs have become ‘law-makers’ in the field of international investment law, contributing to the law-making processes and participating actively in the dispute settlement mechanisms.

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<sup>759</sup> Karsten Nowrot (2011), *supra* note 667 at 820-821.

<sup>760</sup> David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton: Princeton University Press, 2016) at 199.

<sup>761</sup> Karsten Nowrot (2011), *supra* note 667 at 821.

<sup>762</sup> Muthucumaraswamy Sornarajah (2010), *supra* note 757 at 5.



The forms of MNCs' participation in the field of international investment law are quite similar to their involvement in the law-making processes of international trade law, with MNCs playing overall influential, but largely informal and unofficial, roles.<sup>763</sup> Likewise, MNCs have played a significant role in asserting their interests in the negotiation of agreements and/or contracts directly concluded with the respective host States in relation to the undertaking of foreign investments. These 'State contracts' have increasingly been accepted and endorsed by arbitration tribunals and academics as having the status of 'internationalized contracts.' Thereby, they can therefore be seen as another source and legal basis for the international investment regime.<sup>764</sup>

MNCs' influential participation in the dispute settlement mechanisms of international investment law has also increased. Most of the IIAs contain both arbitration clauses for the settlement of disputes between the contracting States themselves and arbitration clauses for settlement disputes between private investor and States. This type of arbitration mechanism (private investor v. States) has been strengthened and enhanced since the beginning of the 1990s due to the general acceptance of its proceedings and a number of structural changes which has further strengthened the position of MNCs in this mechanism.<sup>765</sup>

Since late 1990s the number of investment arbitrations has rapidly increased; IIAs, particularly BITs have triggered a wave of investor claims against States. For instance, while

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<sup>763</sup> Peter Muchlinski, Federico Ortino and Christoph Schreuer, *Oxford Handbook of International Investment Law* (New York: Oxford University Press, 2008) at 7.

<sup>764</sup> Karsten Nowrot (2011), *supra* note 667 at 823-824.

<sup>765</sup> *Ibid.* The majority of disputes are handled by the World Bank's International Center for Settlement of Investment Disputes (ICSID) based in Washington and the United Nations Commission on International Trade Law (UNCITRAL). The Permanent Court of Arbitration (PCA) in The Hague, the London Court of International Arbitration (LCIA) as well as the Paris-based International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce (SCC) also handle disputes.

during the whole period from 1966—the year the World Bank’s ICSID Convention entered into force—until 1992, only 28 investor-State disputes had been registered at the ICSID, by December 2013 this had risen almost 12 fold to 459 cases, the majority of which were filed by MNCs from industrialised countries against Third World countries.<sup>766</sup> According to the United Nations Conference on Trade and Development (UNCTAD), 2015 and 2016 saw the highest number of known investor-State dispute settlements (ISDS) ever filed in a single year; investors initiated 70 and 62 new ISDS claims respectively, bringing the total number of known cases to 767; yet, since most arbitration forums do not maintain a public registry of claims, the total number of cases is likely to be higher.<sup>767</sup> Industrialised-country investors brought most of the 70 and 62 cases, following the historical trend in which industrialised-country investors have been the main ISDS users, accounting for over 80 per cent of all known claims. While the most frequent home States of claimants are industrialised countries (the U.S., the Netherlands, United Kingdom, Germany, Canada, France, Spain...), the most frequent respondent States are Third World countries, the so-called ‘developing’ or ‘emerging market economies’ (Argentina, Venezuela, Egypt, Mexico, Ecuador, India, Russia, Poland...).<sup>768</sup> In 2012 the ICSID rendered the highest damage award to a private investor claimant in the history of ISDS (US\$ 1.77 billion) in *Occidental v. Ecuador*, a case arising out of a unilateral termination by the State of Ecuador of an oil contract and convened under the authority of the U.S.-Ecuador Bilateral Investment

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<sup>766</sup> ICSID (2014) The ICSID *Caseload Statistics* (Issue 2014-1) at 7.

<sup>767</sup> UNCTAD, World Investment Report 2016, *supra* note 736 at 104-105; UNCTAD, Investor-State Dispute Settlement: Review of Developments in 2016, *IIA Issues Note No. 1*, May 2017, online: <[http://unctad.org/en/PublicationsLibrary/diaepcb2017d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2017d1_en.pdf)> (retrieved 30 June 2017).

<sup>768</sup> Investor claimants have challenged a broad range of government measures, including changes related to investment incentive schemes, alleged breaches of contracts, alleged direct or *de facto* expropriation, revocation of licenses or permits, regulation of energy tariffs, allegedly wrongful criminal prosecution, land zoning decisions, invalidation of patents, and others. The majority of new cases were brought under BITs. Information regarding the amount sought by investors is limited; for cases where this information has been reported, the amount claimed ranges from US\$ 10 million to about US\$ 16.5 billion. *Ibid.*

Treaty.<sup>769</sup> The number of new cases over the last two years confirms that MNCs continue relying on this investor-State arbitration mechanism. The increasing number of victories for MNC claimants (70% in 2012) and high amounts of damages awarded as in the *Occidental v. Ecuador* case demonstrate the protective potential of this regime.<sup>770</sup>

In sum, MNCs are now not only recognized under international treaties as having binding and enforceable rights under international law but they enjoy controversial procedural privileges as well. MNCs are highly prominent actors in the field of international economic law and their interests have been well attended to by States and intergovernmental organizations resulting in the creation of investor protection “hard law” rights. MNCs have also played a significant role in lobbying and influencing States and intergovernmental organizations in the creation and development of norms and regulations of investor obligation and responsibility which are mainly contained in “soft law” instruments, of non-binding nature, some of them located in the international human rights field. These “soft law” regulations (e.g. the UN Global Compact and the UN Guiding Principles on Business and Human Rights) aim to promote MNCs’ respect for human rights through voluntary initiatives and without relying explicitly on either domestic or international liability. (This issue will be discussed in Chapter Six).

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<sup>769</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11), Award, 5 October 2012 and Dissenting Opinion; UNCTAD, Recent Developments in Investor-State Dispute Settlement (ISDS), *IIA Issues Note No.1*, May 2013.

<sup>770</sup> There have been few exceptions, such as the outcome of the *Renco Group, Inc. v. Republic of Peru* (ICSID Case No. UNCT/13/1) in which the ICSID dismissed US Renco Group’s \$800 million compensation claim (Award rendered in July and November 2016); and the outcome of *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12) in which the ICSID dismissed OceanaGold mining firm’s \$250 million claim and ordered the Canadian-Australian firm to pay El Salvador \$8 million to cover legal fee and costs (Award rendered in October 2016). See ICSID Case Details, online:

<<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=UNCT/13/1>> (retrieved 30 June 2017); <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/09/12>> (retrieved 30 June 2017).

## **5.4 International Economic Law and Indigenous Peoples' International Human Rights**

### **Law: Asymmetries, Imbalances, and Contentions**

Whereas Indigenous peoples and MNCs have become actors and subjects of international law, their location and the international standards recognizing and containing their rights differ in nature, leverage and effectiveness. MNCs have become influential and central subjects in international economic law, securing their interests and rights mostly in “hard law” binding international instruments. Indigenous peoples, on the other hand, occupy a peripheral position in international human rights law and their rights have been enshrined mostly in “soft law” non-binding instruments. Such asymmetry comes not from the fact that MNCs or Indigenous peoples do not have legal personality, but from the powerful role that MNCs’ interests play in the creation and evolution of these international norms and systems. How MNCs lobby home and host States, as well as intergovernmental organizations, and secure wide support from mainstream legal academics and law firms is a fundamental factor in this process of creating, shaping, and strengthening international norms that will advance and protect their interests.

#### **5.4.1 International Economic Law (IEL) Mediating and Enhancing the Power of Multinational Corporations**

International law, writes David Kennedy, “is part of the field, the terrain, the language, the structure, through which asymmetries between the diplomatic world of international relations and the economic world of private markets, arise and are reinforced. It provides the normative fabric, the marker of status, the purveyor of *entitlement* through which the routine operations of

people pursuing politics and economics generate asymmetry and hierarchy.”<sup>771</sup> The current global economy and its dominant legal framework -- international economic law -- which has focused on supporting the integration of a global market through the national and international regimes regulating trade and investment, has contributed to creating and reinforcing inequalities and inequities. In particular, Third World countries fail to benefit from multilateral trade and investment agreements as currently constituted.<sup>772</sup> Indeed, according to Anne Orford, international trade and investment liberalization “furthered by the Uruguay Round agreements entrenches a relationship between States and transnational corporations that privileges the property interests of those corporations over the human rights of local peoples and communities.”<sup>773</sup> The WTO, the central institution of IEL, in promoting foreign trade and protecting intellectual property “enhances the power of MNCs, the major engines of free trade, thus contributing to an environment that promotes permissive conditions for business related human rights abuses, especially if they are endowed with enforceable rights under BITs and FTAs.”<sup>774</sup>

As Weiler points out, there are deep inequities in the current international trade system, the most notable and notorious being the one rooted in an inequitable distribution of tariff reductions and other barriers (including subsidies) which continue to exclude agriculture to the detriment of many [Third World] economies and consumers in industrialized countries. There was a distinct political deception, Weiler writes, in the Uruguay Round process whereby

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<sup>771</sup> David Kennedy, “Law and Political Economy of the World,” in (2013) 26 *Leiden Journal of International Law* 7, at 42

<sup>772</sup> Beverly M. Carl, *Trade and the Developing World in the 21<sup>st</sup> Century* (Leiden, the Netherlands: Brill, 2001).

<sup>773</sup> Anne Orford, “Contesting Globalization: A Feminist Perspective on the Future of Human Rights,” in Burns H. Weston and Stephen P. Marks, Eds., *The Future of International Human Rights* (New York: Transnational Publishers Inc., 1999) at 169.

<sup>774</sup> Sarah Joseph, *Blame it on the WTO? A Human Right Critique* (New York: Oxford University Press, 2011) at 3.

important systemic reform was pushed and accepted as the multilateral ‘Single Undertaking’, whereas the actual negotiations of terms of trade was left to the usual multi-lateralized bilateralism where each state is on its own and which favours the industrialized consuming economies with plenty of trade leverage, at the expense of the [Third World] economies with less leverage or none at all.<sup>775</sup> The failure of the WTO’s Doha Development Round of global trade negotiations in 2008 is illustrative of these asymmetries. As Stiglitz points out, the Doha Round was torpedoed by the United States’ refusal to eliminate agricultural subsidies – a *sine qua non* for any true development round, given that 70% of those in the developing world depend on agriculture directly or indirectly.<sup>776</sup> The US position was truly astonishing, given that the WTO had already judged that U.S.’s cotton subsidies – paid to fewer than 25,000 rich farmers-- were illegal. The U.S.’s response was to bribe Brazil, which had brought the complaint, not to pursue the matter further, leaving in the lurch millions of poor cotton farmers in Sub-Saharan Africa and India, who suffer from depressed prices because of U.S.’s largesse to its wealthy farmers.<sup>777</sup>

Currently, the two largest regional free trade agreements – the Transatlantic Trade and Investment Partnership (T-TIP)<sup>778</sup> and Trans-Pacific Partnership Free Trade Agreement (TPP)<sup>779</sup> have been criticized and opposed by labour, union and environmental organizations and

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<sup>775</sup> Joseph Halevi Horowitz Weiler, “The WTO: Already the Promised Land?,” in Antonio Cassese, Ed., *Realizing Utopia: The Future of International Law* (New York: Oxford University Press, 2012) 418-426.

<sup>776</sup> Joseph E. Stiglitz, “*the Free Trade Charade*,” in the Project Syndicate, 4 July 2013, online: <<http://www.project-syndicate.org/commentary/transatlantic-and-transpacific-free-trade-trouble-by-joseph-e--stiglitz>> (retrieved 30 June 2017).

<sup>777</sup> *Ibid.* Since the breakdown of negotiations in July 2008, there have been repeated efforts to revive the negotiations, so far without success.

<sup>778</sup> The Transatlantic Trade and Investment Partnership (T-TIP) is an ambitious and comprehensive trade and investment agreement being negotiated between the United States and the European Union. Office of the US Trade Representative, online: <<https://ustr.gov/ttip>> (retrieved 30 June 2017).

<sup>779</sup> The Trans-Pacific Partnership free-trade agreement (TPP) was negotiated behind closed doors by 12 Pacific Rim nations, included the United States, Canada, Australia, New Zealand, Japan, Mexico, Malaysia, Chile, Singapore, Peru, Vietnam, and Brunei. It was signed in February 2016, but its ratification is very uncertain since the US officially withdrew from the TPP in January 2017. Office of the US Trade Representative, online: <<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership>> (retrieved 30 June 2017).

Indigenous peoples. Given the history of the Doha Round failure, Stiglitz argues, it now seems clear that “the negotiations to create a free-trade area between the US and Europe, and another between the US and much of the Pacific area (except for China), are not about establishing a true free-trade system. Instead, the goal is a *managed* trade regime – *managed*, that is, to serve the special interests that have long dominated trade policy in the West.”<sup>780</sup> According to critics, the TPP agreement could very well go beyond NAFTA in the new powers and rights it hands to MNCs; it would trample not only over individual rights, civil liberties and free expression, but also over fundamental collective rights of Indigenous communities.<sup>781</sup> As the UN Special Rapporteur on the Rights of Indigenous Peoples points out, the major issue with the TPP is the clause of non-discrimination between a local and an international investor which grants extraordinary rights to multinational firms, often at the expense of Indigenous rights.<sup>782</sup> According to Tauli-Corpuz, trade agreements like the TPP prioritize corporate rights over human rights; even if States implement policies to protect Indigenous rights, companies may challenge them at international tribunals with the support of such trade agreements.<sup>783</sup> In fact, the TPP “proposes to establish a parallel system of justice where companies can sue countries in a

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<sup>780</sup> Joseph E. Stiglitz (2013), *supra* note 776. Joseph E. Stiglitz and Adam S. Hersh, “*The Trans-Pacific Free Trade Charade*,” Project Syndicate, 2 October 2015, online: < <https://www.project-syndicate.org/commentary/trans-pacific-partnership-charade-by-joseph-e--stiglitz-and-adam-s--herh-2015-10>> (retrieved 30 June 2017).

<sup>781</sup> Jose Aylwin, et al., *El TPP y Los Derechos de los Pueblos Indigenas en America Latina* (Copenhagen: IWGIA, 2016); David P. Vincent, “The Trans-Pacific Partnership: Environmental Savior or Regulatory Carte Blanche?” (2014) 23 *Minnesota Journal of International Law* 1; Sarah Anderson and Manuel Perez-Rocha “*Mining for Profits in International Tribunals: Lessons for the Trans-Pacific Partnership*,” Institute for Policy Studies, April 2013.

<sup>782</sup> The TPP was drafted with no input from the Indigenous Peoples who live in countries that will be affected by the agreement; the secrecy of the TPP entirely disregarded the concept of Free, Prior and Informed Consent, a tenet of the UN Declaration on the Rights of Indigenous Peoples which states that policies affecting Indigenous Peoples should not move forward without the full understanding and approval of those it might affect. See interview with Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples, “the TPP Agreement will be a serious threat to the rights of Indigenous peoples,” in *La Jornada del Campo*, Mexico, 16 January 2016; Report of the Special Rapporteur on the rights of indigenous peoples on the impact of international investment and free trade on the human rights of indigenous peoples, UN A/70/301, 7 August 2015.

<sup>783</sup> *Ibid.*

tribunal of judges composed of unaccountable international trade lawyers with little to no process for appeal.”<sup>784</sup>

Asymmetries and imbalances has been also created and reinforced by international investment law. As today’s transnational land deals, and the commodification processes they represent, take place within the process of economic globalization, international investment law has intensified the commodification of land worldwide.<sup>785</sup> Provisions of international investment law construe land as a commercial asset and have facilitated access to land for foreign investors and imposing discipline on the exercise of regulatory powers in land matters.<sup>786</sup> Furthermore, the concept of private property, central to the protection of foreign investment, has been universalized and entrenched through the instruments of international investment law.<sup>787</sup> The proliferation of thousands of IIAs with the protection of an absolute concept of private property rights, especially that of foreign investors, privileges and benefits MNCs at the expense of local populations such as peasants and Indigenous communities.

Likewise, economic globalization has brought the establishment of the constitution-like regimes for the protection of investor’s rights embedded within contemporary IIAs. Many of these investor rights and rights-enforcing instruments resemble rights usually found within national constitutional systems. IIAs grant MNCs the ability to enforce constitution-like commitments—to equality of treatment or to certain minimum standards of fairness, for

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<sup>784</sup> Dawn Paley, “*Tremendous Pharmaceutical Profits or Totally Protected Plunder?*” 17 April 2013, online: <<http://dawnpaley.ca/2013/04/22/tremendous-pharmaceutical-profits-or-totally-protected-plunder/#more-755>> (retrieved 30 June 2017).

<sup>785</sup> Nicholas Dorf, “Making and Offer They Can’t Refuse: Corporate Investment in Africa and the Divestment of Indigenous land Rights,” (2015) 38:1 *Boston College International and Comparative Law Review* 65.

<sup>786</sup> Lorenzo Cotula, “The New Enclosures? Polanyi, international investment law and the global land rush,” (2013) 34:9 *Third World Quarterly* 1605-1629.

<sup>787</sup> Muthucumaraswamy Sornarajah (2003), *supra* note 755 at 2-10.



instance—undertaken by states to attract foreign capital.<sup>788</sup> With constitution-like rights in hand, and with an ability to move easily across national borders, multinational corporations have become the model of the new global citizen.<sup>789</sup> A central objective of these investor rights and rights-enforcing instruments is to remove specific governmental functions from the options of policy instruments available to host States, thus placing potentially significant constraints on State regulatory capacity. In addition, advances in international investment arbitration have greatly expanded the scope of investment protection well beyond the intention of States making investment treaties, to the detriment of host States and their populations; these developments take place on the basis of the trickle-down theory that wealth enhancement will benefit everyone. Instead, such wealth enhancement has made the rich richer and the poor poorer.<sup>790</sup>

Indeed, as Stiglitz points out, today inequality is now rising rapidly. He affirms that contrary to the ‘rising tide lifts all boats’ hypothesis and the theory of ‘trickledown economics,’ “the rising tide has only lifted the large yachts, and many of the smaller boats have been left dashed on the rocks.”<sup>791</sup> According to Piketty, the widespread market economy has brought deep national and global inequalities. We are experiencing today, he argues, a sharp rise in national and global inequality; witnessing a severe contrast between slow income growths for most of the population and rising incomes at the top.<sup>792</sup> The worsening inequality at national and global

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<sup>788</sup> David Schneiderman, “Habermas, Market-Friendly Human Rights, and the Revisibility of Economic Globalization,” in (2004) 8:4 *Citizenship Studies* 419-436.

<sup>789</sup> Leslie Sklair *The Transnational Capitalist Class* (Oxford: Blackwell, 2001).

<sup>790</sup> Muthucumaraswamy Sornarajah, “A Justice-Based Regime for Foreign Investment Protection and the Counsel of the Osgoode Hall Statement,” (2012) 3:4 *Global Policy* 463-366.

<sup>791</sup> Joseph E. Stiglitz, “Inequality and Economic Growth,” in Michael Jacobs and Mariana Mazzucato, Eds., *Rethinking capitalism: economics and policy for sustainable and inclusive growth* (Chichester, West Sussex, UK: Wiley-Blackwell, in association with the Political Quarterly, 2016) at 134; Joseph E. Stiglitz, *The great divide: unequal societies and what we can do about them* (New York: W.W. Norton & Company, 2015).

<sup>792</sup> Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge, MA: Belknap Press / Harvard University Press, 2014).

levels is an inevitable outcome of the existing international economic order; and international law has played a prominent role in reproducing massive poverty and inequalities.<sup>793</sup> Certainly, “global poverty and inequality, like spectacular wealth and military prowess are by-products of struggle underwritten by legal arrangements and defended in legal terms.”<sup>794</sup>

International trade and foreign investment law have created a power asymmetry between an effective alliance that often exists between MNCs and the host State, on the one hand, and local populations (among them Indigenous communities), on the other hand. As Foster argues, in many cases there is a situation in which MNCs have disproportionate resources and rights vis-à-vis local populations, “but only limited obligations or risk exposure running in the other direction— a dynamic that presents an inherent risk of exploitation and abuse. Investment treaties presently do nothing to address this power asymmetry, because they deal exclusively with the relationship between the investor and the host State.”<sup>795</sup>

#### **5.4.2 Indigenous Peoples’ International Human Rights Law: Shortcomings**

One of the major limitations of Indigenous peoples’ rights recognized through international human rights law is their lack of enforceability. As Nicole Friederichs and Lorie M. Graham point out, the biggest obstacle to overcome is the lack of implementation of court rulings and decisions of international human rights bodies. In a world without an international body that can enforce law, only shame and international pressure can be used in governments’ compliance

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<sup>793</sup> Thomas Pogge, “Divided against itself: aspiration and reality of international law,” in James Crawford and Martti Koskeniemi, Eds., *The Cambridge Companion to International Law* (New York: Cambridge University Press, 2012) at 373; Margot E. Salomon, “Winners and others: accounting for international law’s favourites,” in Conor Gearty and Costas Douzinas, Eds., *The Cambridge Companion to Human Rights Law* (New York: Cambridge University Press, 2012) at 271.

<sup>794</sup> David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton: Princeton University Press, 2016) at 199.

<sup>795</sup> George K. Foster, “Investor, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties,” (2013) 17:2 *Lewis and Clark Law Review* 361 at 368.

with decisions. As was the general pattern in most of the legal cases, the effectiveness of these mechanisms is far from guaranteed.<sup>796</sup> Consistent with the international structure of human rights protection, most of Indigenous peoples' rights are framed in "soft" law, without binding force. Thereby, a great imbalance results when it is compared and confronted with international economic law, leaving MNCs in a very privileged position with more leverage and legal resources than Indigenous peoples.

In addition, the recognition of Indigenous peoples' human rights remains ambivalent due to the lack of consensus on their very existence. This has been evident in the obstacles posed by some States to the adoption of the UNDRIP among them the U.S. and Canada. Even after Canada officially removed its objector status to the UNDRIP<sup>797</sup> and adopted it in May 2016 stating that it intends to implement the declaration in accordance with the Canadian Constitution in full partnership with Indigenous peoples, the Minister of Justice and Attorney General of Canada, Jody Wilson-Raybould, stated that "simplistic approaches, such as adopting the UNDRIP as being Canadian law are unworkable."<sup>798</sup> Furthermore, as some critics argue, the American Declaration on the Rights of Indigenous Peoples, adopted in June 2016, falls well below of the standard set by the UNDRIP and the jurisprudence developed by the Inter-

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<sup>796</sup> Matthew Chuckran, "Are Human Rights Mechanisms Useful Tools in Settling Indigenous Peoples' Claims?" *Cultural Survival*, 14 March 2012, online: <<https://www.culturalsurvival.org/news/are-human-rights-mechanisms-useful-tools-settling-indigenous-peoples-claims>> (retrieved 30 June 2017).

<sup>797</sup> On November 2010, the Harper government had endorsed the UNDRIP, but publicly declared that it was just an "aspirational document, a non-legally binding document that does not reflect customary international law nor change Canadian laws." See Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, 12 November 2010, online: <<http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>> (retrieved 30 June 2017).

<sup>798</sup> Minister of Justice and Attorney General of Canada, Jody Wilson-Raybould 's Address to the Assembly of First Nations Annual General Assembly, July 12, 2016. See Inuit Tapiriit Kanatami, "*Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada*," A Position Paper, Ottawa, January 24, 2017, at 12-13, online: <<https://www.itk.ca/wp-content/uploads/2017/01/ITK-Position-Paper-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-Peoples-English.pdf>> (retrieved 30 June 2017).

American Human Rights System. Those standards have been restricted, eroded and or omitted from the American Declaration because of pressure exerted by governments aimed at safeguarding States' interests over and above those of Indigenous Peoples.<sup>799</sup> Thus, the recognition of Indigenous peoples' human rights remains uncertain and its articulation peripheral and it belongs to the realm of 'soft law.'<sup>800</sup>

As Indigenous peoples' claims and demands have been framed and expressed through the language of rights, caution is clearly warranted with respect to simple reliance on human rights to achieve genuine change for Indigenous communities. As Thornberry writes,

Human rights are double-edged. As Indigenous groups structure their claims in the language of human rights, so human rights structure the modes of social representation and the potential responses. The individual rights 'grid' or syntax of human rights makes difficult the case for the collective claim. Human rights set apparent limits to the kind of social practices embraced. Rights practice is still infused by notions of progress and civilization.<sup>801</sup>

Therefore, it can be argued that although Indigenous peoples' involvement and intervention in international human rights institutions have transformed the dominant perception of their rights, they run the risk of being absorbed, embedded, and hence 'reined in' by the new imperium nature of universal human rights law, which according to Marks, represents "one of the more

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<sup>799</sup> Nancy Yañez Fuenzalida, "OAS: Regressive elements in the American Declaration," International Working Group for Indigenous Affairs, 28 June 2016, online: <[http://www.iwgia.org/news/search-news?news\\_id=1377](http://www.iwgia.org/news/search-news?news_id=1377)> (retrieved 30 June 2017); Bartolome Clavero, "La Declaracion Americana sobre Derechos de los Pueblos Indigenas: El Reto de la Interpretacion de una Norma Contradictoria," Ensayo, 11 August 2016, online: <<http://www.bartolomeclavero.net/wp-content/uploads/2016/07/DADPI-Clavero.pdf>> (retrieved 30 June 2017).

<sup>800</sup> Upendra Baxi, "What may the 'Third World' Expect from International Law?" in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens, Eds., *International Law and the Third World: Reshaping Justice* (London, UK: Routledge, 2008) at 17.

<sup>801</sup> Patrick Thornberry (2002), *supra* note 694 at 427-428.

striking successes of globalization and international law. For if we live today in an ‘Age of Human Rights,’ this is in significant part because of the international legal context with reference to which human rights are today defined, invoked, contested, promoted, explicated and debated.”<sup>802</sup>

In this regard, Corn tassel’s discussion of how Indigenous movements might have become institutionalized and mainstreamed within the UN human rights system during the first UN Indigenous Decade (1994-2004), is telling.<sup>803</sup> Corn tassel points out that a system that once denied an Indigenous rights agenda now embraces it and channels the energies of transnational Indigenous network into the institutional fiefdoms of member states; what results is a cadre of professionalized Indigenous delegates who demonstrate more allegiance to the UN system than to their own communities.<sup>804</sup> Moreover, a study and analysis of international human rights literature on Indigenous peoples concludes that the increasing institutional participation of Indigenous peoples within international human rights system, and the articulation of their claims through human rights law, has not only provided legitimacy to the institutional management of the issues of Indigenous peoples, but also has enabled the aspirations of Indigenous peoples themselves to be captured and to some extent be co-opted by institutional human rights procedures.<sup>805</sup> Further, according to Dwight Newman, the development of international human rights norms and doctrine recognizing Indigenous peoples’ right to consultation and or to free prior and informed consent (FPIC), as the Indigenous rights discourse more generally, “embodies

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<sup>802</sup> Susan Marks, “Human Rights in Disastrous Times,” in James Crawford and Martti Koskenniemi, Eds., *The Cambridge Companion to International Law* (New York: Cambridge University Press, 2012) at 314.

<sup>803</sup> Jeff Corn tassel, “Partnership in Action? Indigenous Political Mobilization and Co-optation during the First UN Indigenous Decade (1994-2004),” (2007) 29 *Human Rights Quarterly* 137-166.

<sup>804</sup> *Ibid* at 161.

<sup>805</sup> Chris Tennant, “Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993” (1994) 16:1 *Human Rights Quarterly* 1-57 at 56.

a Janus-like legal order, potentially expanding the subjects and scope of international law while also implicitly closing the door on some such expansion. The development of one seemingly small norm may both open and close many possibilities.”<sup>806</sup>

Likewise, Karen Engle’s critique of the prevalence of a cultural rights frame in Indigenous peoples’ legal claims warns against the reification of Indigenous culture, alongside the rejection of self-determination claims and the acceptance of a cultural rights framework by international human rights institutions. The emergent rights to culture within mainstream human rights doctrine, sometimes for individuals and sometimes for groups, fits quite comfortably with – and was perhaps even facilitated by – neoliberal development models.<sup>807</sup> According to Engle, the notion of Indigenous culture has been co-opted and undermined by mainstream human rights legal frameworks, so that Indigenous peoples are often forced to give up those parts of their culture that are seen to conflict with universal understandings of human rights.<sup>808</sup> The recognition of cultural rights for Indigenous peoples within various international and regional instruments and through the adjudicatory and quasi-adjudicatory mechanisms of international and regional human rights institutions, resulted from a number of compromises along the way and largely displaced or deferred many of the very issues that initially motivated much of Indigenous peoples’ movement and advocacy: issues of economic dependency, structural discrimination, and lack of Indigenous autonomy.<sup>809</sup> The outcome of this process can result in a

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<sup>806</sup> Dwight Newman, “Norms of Consultation with Indigenous Peoples: Decentralization of International Law Formation or Reinforcement of States’ Roles?” in Andrew Byrnes, Mika Hayashi and Christopher Michaelsen, Eds., *International Law in the Age of Globalization* (Leiden: Martinus Nijhoff Publishers, 2013) 265 at 285.

<sup>807</sup> Karen Engle, “On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights” in (2011) 22:1 *The European Journal of International Law* 141-163 at 142

<sup>808</sup> Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Durham: Duke University Press, 2010).

<sup>809</sup> *Ibid.*

disempowering shift from substantive political goals to the institutional objective of mere formal participation.

These critiques are significant in pointing out the potentially debilitating effect on alternate practices and strategies, which may step outside of the accepted mainstream human rights framework and discourse. This is so particularly if one consider the inherent limitation of “the market or economic model of resistance” that international law sanctions through the doctrine of human rights, considered by Rajagopal as one of the reasons why international law has remained oblivious to the violence and infringements caused by ‘development’ projects<sup>810</sup> such as oil, gas and mining investments. As Rajagopal argues, the “human” in the mainstream human rights framework “is the *homo oeconomicus*, the modern market being who is possessed of full rationality, and whose attempt to realize his/her full potentialities are confined within the moral possibilities of the State and the material conditions of the global market economy.”<sup>811</sup> Thus, without dismissing the value of human rights as a tool of strategy and mobilization for oppressed groups, Rajagopal remains deeply sceptical of current tendencies to constitute it as the sole and prominent language of resistance and emancipation for oppressed social groups.<sup>812</sup> Given its colonial legacy, statist and anti-tradition bias, economistic method, and deep imbrications with the “development” discourse, he writes, human rights law and discourse remains, at best, a partial, fragmentary, and a sometimes useful tool of mobilization – not by any means the sole language of resistance and emancipation for oppressed social groups.<sup>813</sup>

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<sup>810</sup> Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements, and Third World Resistance* (Cambridge, UK: Cambridge University Press, 2003) at 199.

<sup>811</sup> *Ibid*; Philippe Chevallier, “Michel Foucault and the Question of Right,” in Ben Golder, Ed., *Re-reading Foucault: On Law, Power and Rights* (New York: Routledge, 2013) at 182.

<sup>812</sup> Balakrishnan Rajagopal (2003), *supra* note 810 at 232.

<sup>813</sup> *Ibid*.

## 5.5 Conclusion

Among the Indigenous Peoples of Latin America, this *tortured body* and another body, the *altered earth*, represent a beginning, a rebirth of the will to construct a political association. A unity born of hardship and resistance to hardship is the historical locus, the collective memory of the social body, where a will that neither confirms nor denies this writing of history originates. ‘Today, at the hour of our awakening, we must be our own historians.’ (Michel de Certeau, 1986)<sup>814</sup>

Michel de Certeau’s twin metaphor of *tortured bodies* and *altered earth* in the quotation above aptly characterizes Indigenous peoples’ resistance, and emergence as a new entity, as global subjects and actors that have challenged and disrupted the national and global processes of exclusion and marginalization.

International law, Nico Krish argues, is simultaneously instrumental and resistant to the pursuit of power. International law is important to powerful States and actors as a source of legitimacy, but in order to provide legitimacy, it needs to distance itself from power and has to resist its mere translation into law. International law then occupies an always precarious, but eventually secure position between the demands of the powerful and the ideals of justice held in international society.<sup>815</sup> Along the same lines, Claire Cutler’s understanding of international law as a form of praxis involving a dialectical relationship between theory and practice, thought and action, and law and politics, leads her to point out, “international law-making is to be understood in dynamic terms as a process giving rise to material, institutional, and ideological conditions embodying both oppressive and potentially emancipatory social relations...Law exists not as a fixed body of neutral and objectively

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<sup>814</sup> Michel de Certeau, *Hererologies: Discourse on the Other* (Minneapolis: University of Minnesota Press, 1986) at 225.

<sup>815</sup> Nico Krisch, “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order,” in (2005) 16:3 *The European Journal of International Law* 3629-408.



determinable rules, but as a construct of, and thus deeply embedded in, international society.”<sup>816</sup>

Indigenous peoples’ and MNCs’ engagement in the process of international lawmaking and legalization could be seen as participating in “a continuation of politics by other means.”<sup>817</sup> For law is also seen as “a site for ongoing political and economic struggle...a continuation of the politics of war and economic struggle... a legitimating distraction from the effort to remake those politics or reframe that struggle, and an effort to institutionalize the ideology of a particular time and place [and actors] as universal.”<sup>818</sup> The international legal field, therefore, should be seen as “a virtual space for battle that may vary in intensity in different places and times – and that have more or less strong echoes in national and local power relations...The hierarchies and categories that make acquiescence to economic and political power seem natural and inevitable, but are themselves the product of struggles.”<sup>819</sup> The development of the current international legal architecture (primarily embodied by international economic law and mainstream human rights law) that has its roots in the post War World II and entrenched during the last three decades, is the outcome of dominant structures, patterns of power in, and dominant conceptions of the global political economy. These international “hard law” and “soft law” regulations are neither fortuitous nor “simply a set of neutral laws and mechanisms of regulation and governance associated with contemporary capitalism but also reflect a specific complex of dominant forms of *political agency*, as well as a set of actors, practices and forces in political and civil society –

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<sup>816</sup> A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (New York: Cambridge University Press, 2003) at 103.

<sup>817</sup> Sol Picciotto, *Regulating Global Corporate Capitalism* (New York: Cambridge University Press, 2011) at 443.

<sup>818</sup> David Kennedy (2013), *supra* note 771 at 35-37.

<sup>819</sup> Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: The University of Chicago Press, 1996) at 316-317.

particularly large corporations. These practices have as a goal, at least in the terminology used by the World Bank (1997),<sup>820</sup> the ‘locking in’ of neoliberal frameworks of accumulation.”<sup>821</sup>

Yet, contradictions, dislocations and inequalities associated with this international legal architecture and current global crises are producing contestations linked to new patterns of resistance. The case of Indigenous communities confronting MNCs and States using international and national norms on FPIC is illustrative. Given the tremendous inequalities of power and resources among Indigenous communities, States, IFIs and MNCs it is not surprising that procedural rules of consultation often strengthen and legitimize relationships of domination between them. But consultations have also been sites to resist and contest those relationships of domination. The details of the procedural rules -- who participates, how long the consultation will last, what type of compensation is agreed—can open opportunities for Indigenous political mobilization. And they can serve as a last resort for those who have everything against them, as it is today for the many Indigenous communities in Latin America in their fight against collective annihilation.<sup>822</sup>

As MNCs have become influential actors and ubiquitous legal entities in their own rights, the collision between Indigenous people’s rights and MNCs interests and activities has escalated, particularly in the extractive industries. Corporations, both national and multinational, have been and continue to be involved in human rights violations, and civil society groups, including

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<sup>820</sup> World Bank, *The State in a Changing World: World Development Report* (New York: Oxford University Press, 1997).

<sup>821</sup> Stephen Gill and A. Claire Cutler, Eds., *New Constitutionalism and World Order* (New York: Cambridge University Press, 2014) at 4.

<sup>822</sup> Cesar Rodriguez Garavito, *Etnicidad.gov: Los recursos naturales, los pueblos indigenas y el derecho a la consulta previa en los campos sociales minados* (Bogotá: Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia, 2012) at 79; Cesar Rodriguez Garavito, "Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields," in (2011) 18:1 *Indiana Journal of Global Legal Studies* 263.

Indigenous organizations, have documented numerous cases of corporate involvement in human rights abuses. Over the last three decades, a corporate accountability movement for human rights violations has been developed in the legal field. The next Chapter discusses the legal framework for MNCs accountability through international human rights law, aiming at analyzing the possibilities but also the limitations of such legal framework.

## Chapter 6: The Legal Framework for MNCs Accountability through

### International Human Rights Law: Possibilities and Limitations

In the globalized market economy the traditional environment becomes altered irreparably, non-renewable natural resources are destroyed and extracted exclusively for private gain, numerous Indigenous communities and masses of people are uprooted, evicted or resettled with little or no regard to their actual needs and rights, sometimes accompanied by organized violence intended to intimidate, harass and make them comply with decisions taken by outside interests without or explicitly against their consent. Often, the same results are achieved through bribery, corruption and co-optation.

(R. Stavenhagen 2003)<sup>823</sup>

The courts and businesses are very far away from giving the right sort of weight to human rights. So, we are entering a dangerous time in which there is a platform of consensus that links human rights and businesses, but there is also a real risk that it is going to be weakened. Rights and protections need to be robust enough when pitted against intense commercial pressures. This has not yet been formulated and implemented, and I would say it is the real problem.

(S. Leader, 2012)<sup>824</sup>

#### 6.1 Introduction

On November 7, 2016, about 1,000 Indigenous community members from the province of Chumbivilcas, in the southern region of Cusco, began a protest and occupied the installation of Toronto-based Hudbay Minerals' Constancia open-pit mine. Indigenous communities denounced the failure and refusal of the Canadian company to comply with its economic, social and environmental commitments and agreements.<sup>825</sup> During a previous protest, on November 14, 2014, 500 riot police troops confronted the Indigenous communities' rally with firearms, tear gas

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<sup>823</sup> Rodolfo Stavenhagen, UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples, E/CN.4/2003/90, paragraph 69, January 21, 2003. [Thematic Report focused on the impact of large-scale development projects on human rights and fundamental freedoms of Indigenous peoples and communities].

<sup>824</sup> Interview with Sheldon Leader: TNCs and Human Rights, (2012) 17 *SUR – International Journal on Human Rights* 107, at 108.

<sup>825</sup> Jennifer Moore, "Communities from the District of Chamaca Strike at HudBay Minerals' Constancia Mine in Cusco, Peru," Mining Watch, November 10, 2016, online: <<http://miningwatch.ca/blog/2016/11/10/communities-district-chamaca-strike-hudbay-minerals-constancia-mine-cusco-peru>> (retrieved 30 June 2017).

and other weapons. On that occasion, several Indigenous protesters, including elderly and pregnant women, were severely beaten and injured by the riot police.<sup>826</sup> On October 26, 2016, national human rights organizations denounced the existence of private agreements between the National Police of Peru and a number of mining, hydrocarbons and other extractive corporations, among them the Toronto-based Hudbay Minerals, to secure their assets. These agreements allow companies to request permanent police presence or ask for rapid deployment of larger police units to prevent or repress social protests. In return, the companies provide monetary payment and logistical support to the police units.<sup>827</sup>

Multinational corporations are becoming well known for severe environmental contamination or disasters, industrial accidents, forced displacements, arbitrary detentions, torture and killings of Indigenous peoples that often result from their activities in developing countries. These consequences can be considered as violations of both civil and political rights, and economic, social, and cultural rights enshrined in international and regional human rights instruments.<sup>828</sup> As Scott points out, by the very nature of their activities, multinational corporations, alone or in association with governments and/or other actors such as mercenaries or paramilitaries, have the potential to impact pervasively on the interests that the international legal

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<sup>826</sup> Derechos Humanos sin Fronteras, “Informe: conflicto entre la comunidad campesina de Uchucarco y la empresa minera Hudbay,” Cusco, 14 November 2014, online: <<http://dhsf-cusco.blogspot.ca/2014/11/informe-conflicto-entre-la-comunidad.html>> (retrieved 30 June 2017); Servindi, “Peru: Denuncian a Minera Hudbay por Represión e Incumplimiento de Acuerdos,” in Servindi, Lima, November 25, 2014, online: <<https://www.servindi.org/actualidad/118453>> (retrieved 30 June 2017); Investigative MEDIA’s Documentary Film “Flin Flon Flim Flam: An Expose on Hudbay Minerals,” directed and produced by John Dougherty, 2015.

<sup>827</sup> Coordinadora Nacional de Derechos Humanos, “Policía Nacional si presta servicios a empresas mineras, brindándoles protección y seguridad,” Cusco – Lima, 03 November 2016, online: <<http://cooperacion.org.pe/main/advanced-stuff/cooperacion-informa/653-policia-nacional-si-presta-servicios-a-empresas-mineras-de-proteccion-y-seguridad>> (retrieved 30 June 2017); Servindi “Mineras pagan 100 soles diarios a policías por reprimir protestas,” in Servindi, Lima 27 October 2016, online: <<https://www.servindi.org/actualidad-noticias/27/10/2016/las-bambas-paga-100-soles-diarios-la-policia-nacional-por-reprimir>> (retrieved 30 June 2017).

<sup>828</sup> Sarah Joseph (2004), *supra* note 735 at 1-5; Patrick Macklem (2005), *supra* note 723 at 281.

order has sought to protect as human rights.<sup>829</sup> Likewise, the Chairman-Rapporteur of the UN Working Group on Transnational Corporations has pointed out, “the working methods and activities of TNCs affect the enjoyment of human rights, including the right of people to self-determination, which involves the possibility of exercising sovereignty over natural resources and wealth, the right to development, the rights to health and welfare, and adequate living conditions. The modalities and working methods of TNCs also have a profound impact on the right to a healthy environment.”<sup>830</sup>

Given the weaknesses and lack of effective remedies of the host state’s legal systems, Indigenous peoples have sought to challenge MNC’s and states’ actions or inactions affecting their fundamental rights through the discourse and mechanisms of international human rights law. In general, international human rights law has been one field of public international law that has moved beyond an exclusive state focus, in which non-state actors may have rights as well as obligations under international law.<sup>831</sup> Thus, in addition to the substantial developments in the promotion and protection of the rights of Indigenous peoples in recent years, international human rights law has developed conceptual and doctrinal tools to address harms caused by non-state actors such as MNCs. These doctrines are: the doctrine of ‘horizontality’, in which MNCs

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<sup>829</sup> Craig Scott, ‘Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights,’ in Asbjorn Eide, Catarina Krause, and Allan Rosas, Eds., *Economic, Social and Cultural Rights: A Textbook* (Dordrecht; Boston: M. Nijhoff Publishers, 2001) at 564; Craig Scott, “Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms,” in Craig Scott, Ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001) at 45.

<sup>830</sup> Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations, Report of the sessional working group on the working methods and activities of transnational corporations on its second session, UN Doc. E/CN.4/Sub.2/2000/12, 28 August 2000, paragraph 11, 14.

<sup>831</sup> Craig Scott and Robert Wai, “Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational ‘Private’ Litigation,” in Christian Joerges, Inger-Johanne Sand and Guther Teubner, Eds., *Transnational Governance and Constitutionalism* (Portland, Oregon: Hart Publishing, 2004).

and other private entities are indirectly bound by international human rights standards, and therefore, can themselves be the source of human rights violations, and the doctrine of ‘indirect state responsibility’ or ‘extraterritorial regulation’, under which states have the responsibility to regulate non-state actors under their control.<sup>832</sup>

On the basis of these doctrines, a handful of legal cases have been brought against states for MNCs’ human rights abuses before the Inter-American Court of Human Rights and other regional human rights systems, and a number of civil suits have been filed against MNCs for damage caused by their allegedly abusive overseas practices in the U.S., the UK, Australia and Canada.<sup>833</sup> Most of the U.S. cases have been brought under the Alien Tort Claims Act (ATCA)<sup>834</sup> which grants jurisdiction and rights to aliens to sue persons for grave breaches of the law of nations (including international human rights law), and transitory tort jurisdiction. Transitory torts are torts committed in other countries which are unlawful under the law of that foreign country, and where that country’s law is consistent with the policies of the US forum.<sup>835</sup> Thus, since the 1990s there has been an increase in the number of proceedings launched against U.S. parent companies under ATCA and transitory tort jurisdiction alleging violations of human rights obligations, including cases regarding violations of Indigenous peoples’ rights.<sup>836</sup>

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<sup>832</sup> Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006); Nicola Jagers (2002), *supra* note 738.

<sup>833</sup> Sarah Joseph, “Transnational Corporations and Indigenous Rights,” (2006) 8 *Balayi: Culture, Law and Colonialism* (UTS journal on Indigenous issues) at 70-82; Tara Melish, “The Inter-American Court of Human Rights: Beyond Progressivity,” in Malcolm Langford, Ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge, UK: Cambridge University Press, 2008) at 372; Liisa North and Laura Young (2013), *supra* note 127 at 96-110.

<sup>834</sup> 28 U.S.C. & 1350.

<sup>835</sup> Sarah Joseph (2004), *supra* note 735 at 65.

<sup>836</sup> Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (New York: Cambridge University Press, 2006) at 207; Laura Westra, *Environmental Justice and the Rights of Indigenous Peoples: International and Domestic Legal Perspectives* (London, UK: Earthscan, 2008) at 1004.

This chapter discusses the legal framework for multinational corporate responsibility and accountability through international human rights standards, which has provided Indigenous peoples with a tool to challenge the lack of legal accountability (and impunity) of MNCs, and the responsibility of both host and home states of these corporations. The human rights regime has been useful to Indigenous peoples' efforts to mobilize and pressure states, non-state actors and national and international public opinion and highlight their claims and demands for justice. This chapter is divided into five sections. Section Two discusses the legal framework for MNCs responsibility and accountability through international human rights standards, with a focus on the doctrine of horizontality and the doctrine of indirect state responsibility, and assesses its possibilities and limitations. Section Three discusses the lack of international binding regulations for MNC's accountability in relation to the reluctance of states and international organizations to establish and enact such regulations, and instead prefer to develop voluntary norms and regulations contained mainly in "soft law" instruments, of non-binding nature such as the UN Guiding Principles on Business and Human Rights and UN Global Compact. Section four discusses the increasing corporate social responsibility (CSR) movement developed by MNCs aiming to establish self-regulatory, voluntary code of conducts as a way to provide enhanced corporate accountability. Section Five provides a brief conclusion.

## **6.2 The Legal Framework for MNCs Accountability through International Human Rights Standards**

As it was discussed in Chapter Three, the massive influx of MNCs mining, oil and gas investment to the Latin American region has been accompanied by dispossession of Indigenous lands and pervasive and increasing abuses against Indigenous communities. Such violations are,



more often than not, permitted and tolerated by states.<sup>837</sup> This critical and endemic situation has been repeatedly raised by the UN Special Rapporteur on the Rights of Indigenous Peoples, who, in his 2007 report, points out that extraction of natural resources from the subsoil has had a highly discriminatory impact on Indigenous populations. Gold-mining in San Miguel Ixtahuacán and Sipakapa in Guatemala, nickel extraction in the Goro and Prony deposits in New Caledonia, and the gas pipeline in Camisea in the Peruvian Amazon have had devastating effects on Indigenous peoples, who have witnessed the destruction of their traditional territories as a result of highly polluting technologies and disregard of local communities' right to the environment. Cases of extrajudicial executions, forced disappearances, torture, arbitrary detentions, intimidation and harassment have taken place in connection with the Indigenous communities' and organizations' defence of their lands, natural resources and ancestral territories.<sup>838</sup> Such widespread abuses, "negative and even devastating consequences from the extractive industries suffered by Indigenous peoples" have been raised and reported again by the UN Special Rapporteur on the Rights of Indigenous peoples in 2013.<sup>839</sup>

The protection of human rights is not traditionally considered a responsibility of corporations or non-state actors generally. Since the 1990s, however, there has been an extensive

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<sup>837</sup> Permanent Forum on Indigenous Issues, Report of the international expert group meeting on extractive industries, Indigenous Peoples' rights and corporate social responsibility, E/C.19/2009/CRP. 8, May 2009; International Expert Workshop on Indigenous Peoples' Rights, Corporate Accountability and the Extractive Industries, *Concept Paper*, February 2009, online: <<https://www.un.org/development/desa/indigenouspeoples/meetings-and-workshops/7136-2.html>> (retrieved 30 June 2017).

<sup>838</sup> Rodolfo Stavenhagen, Report of the UN Special Rapporteur on the Rights of Indigenous Peoples, A/HRC/4/32 paragraph 52 and 53, February 27, 2007.

<sup>839</sup> Statement by James Anaya, the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples, 68<sup>th</sup> Session of the UN General Assembly, Third Committee, 21 October 2013, online: <<http://unsr.jamesanaya.org/statements/statement-of-special-rapporteur-to-un-general-assembly-2013>> (retrieved 30 June 2017).

discussion and activity aimed at developing corporate human rights accountability.<sup>840</sup> This change of attitude has come about as a result of the pressure from non-governmental organizations, environmental and human rights activists and scholars. Further, international campaigns denouncing human rights violations and environmental disasters such as the damaging experience of Shell (in Nigeria), British Petroleum Co. plc (in Colombia), Exxon Valdez (in Alaska), Union Carbide (in Bhopal, India) and other cases have influenced legal and business academics, corporations and business community, and governments to discuss and consider the notion of corporate human rights accountability. Now, the precise content and scope of this process and discussion remains open to ideological contestation and to the hegemonic and counter-hegemonic movements in law.<sup>841</sup>

Whereas Henderson argues that, far from being harmless, the adoption of corporate human rights responsibility threatens prosperity in poor countries as well as rich, and it is likely to reduce competition and economic freedom and to undermine the market economy,<sup>842</sup> Stephens, Muchlinski and Nolan call for reining in MNCs unchecked power, imposing regulations that force accountability for human rights violations.<sup>843</sup> Stephens further points out that international law has already developed applicable standards, and the task ahead is to find

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<sup>840</sup> Peter Utting, "The Struggle for Corporate Accountability," (2008) 39: 6 *Development and Change* 959; Andrew Clapham, (2006), *supra* note 832; Olivier de Schutter, Ed., *Transnational Corporations and Human Rights* (Portland, Oregon: Hart Publishing, 2006).

<sup>841</sup> Ronen Shamir, "Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony," in Boaventura de Sousa Santos and Cesar A. Rodriguez-Garavito, Eds., *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005) at 115; Peter Utting (2008), *supra* note 840 at 970.

<sup>842</sup> David Henderson, *Misguided Virtue: False Notions of Corporate Social Responsibility* (London, UK: Institute of Economic Affairs, 2001).

<sup>843</sup> Beth Stephens, "The Amoralism of Profit: Transnational Corporations and Human Rights," (2002) 20:1 *Berkeley Journal of International Law* 45 at 90; Peter Muchlinski (2007), *supra* note 733 at 516; Justine Nolan "All Care, No Responsibility? Why Corporations Have Limited Responsibility and No Direct Accountability for Human Rights Violations under International Law," in Lara Blecher et al., Eds., *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (Chicago: ABA, 2014) at 3.

effective mechanisms to enforce those norms, to ensure that the amorality of profit does not permit corporate human rights abuses to fester for another fifty years.<sup>844</sup>

Despite a strong theoretical and moral case for extending responsibility for human rights violations to MNCs, the legal responsibility of these entities for such violations remains uncertain.<sup>845</sup> Craig Scott points out that in spite of what seem to be intuitively evident connections between MNCs and the capacity to violate human rights, the movement towards human rights accountability of corporate actors has been, and still is, fighting an uphill battle.<sup>846</sup> Indeed, today, as Nolan argues, “though there is an increasing recognition that corporations have a responsibility to respect (if not protect) human rights within their everyday operations, the precise legal basis of that responsibility and possible mechanisms for enforcing human rights standards are lacking.”<sup>847</sup> Nonetheless, as noted earlier, international human rights law has developed conceptual and doctrinal tools to address harms caused by non-state actors such as MNCs, mainly through the method of state responsibility. These doctrines are: horizontality and indirect state responsibility or extraterritorial regulation.

*a) The Doctrine of Horizontality*

No international human rights treaty imposes direct obligations on non-state actors. International human rights norms are generally conceptualized as duties upon states. The states that constitute the primary subjects of international law hold human rights obligations towards individuals within their jurisdiction. The traditional focus of human rights law has been the ‘vertical’ relationship between the state and the individual. Yet, MNCs and other private entities

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<sup>844</sup> *Ibid.*

<sup>845</sup> Peter Muchlinski (2007), *supra* note 733 at 517.

<sup>846</sup> Craig Scott, “Multinational Enterprises and Emergent Jurisprudence” (2001), *supra* note 829 at 563.

<sup>847</sup> Justine Nolan (2014), *supra* note 843 at 25.

are indirectly bound by international human rights standards. International human rights law imposes responsibilities on states to respect, protect and ensure the enjoyment of human rights by persons within their jurisdiction. Included within these obligations are a duty upon governments to protect persons from human rights abuses by other private entities; this duty is often referred to as the ‘horizontal’ application of human rights. Thus, a failure to regulate private conduct that has an impact on the realization of human rights may constitute a violation by the state. Corporations and other private entities may accordingly be subject to indirect human rights obligations through the ‘horizontal’ application of human rights standards. The doctrine of horizontal obligations constitute a departure from the traditional Westphalian system of public international law predicated upon states’ duties vis-à-vis one another.<sup>848</sup> Nonetheless, a contextual reading of universal standards supports the extension of state obligations into the private sphere.<sup>849</sup> The individual’s duties to other individuals and the community are recognized by the preamble to the International Covenant on Civil Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) calls upon each state party to ‘prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation’ (art 1(d)). These provisions are expressed to extend to private actors, but there is no current mechanism for enforcing direct human rights obligations on private parties at the international

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<sup>848</sup> Andrew Clapham (2006), *supra* note 832.

<sup>849</sup> *Ibid.*

level.<sup>850</sup> Abuses by private entities must therefore be redressed on the basis of an act or omission of the state. MNCs thus participate indirectly in international human rights law.

Although the horizontal application of human rights is currently an underdeveloped component of international human rights jurisprudence, there are important instances of states being held liable for violations of the rights of Indigenous peoples, in situations where MNCs have been involved in perpetrating that abuse.<sup>851</sup> On 31 August 2001, the Inter-American Court of Human Rights delivered its judgment in *Awas Tingni Community v. Nicaragua*.<sup>852</sup> The case concerned the grant by Nicaragua of a concession to a Korean company for large-scale logging on the community's traditional lands. The Court found that Nicaragua violated numerous articles of the American Convention of Human Rights. The Court highlighted the violation of the Awas Tingni community's right to private property which was interpreted as encompassing the customary property rights of Indigenous peoples, and which was negatively affected by the Korean company concession. The Court was not satisfied with the cancellation of the company concession, and it requested the State to provide an effective mechanism for the demarcation of the Indigenous community's properties. In this case, the Court clarified that States' parties have a positive obligation to prevent the commercial exploitation of Indigenous lands without their consent and to protect those Indigenous lands from degradation by commercial operations in the instances where Indigenous lands are inadequately demarcated.<sup>853</sup>

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<sup>850</sup> Nicola Jagers (2002), *supra* note 738 at 41.

<sup>851</sup> Sarah Joseph (2006), *supra* note 833 at 70-82.

<sup>852</sup> Inter-American Court of Human Rights, Court Judgment No 79, the Case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* of August 31, 2001, online:

<[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_79\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf)> (retrieved 30 June 2017).

<sup>853</sup> *Ibid.*

On 27 May 2002, the African Commission on Human and Peoples' Rights delivered its decision in *Center for Economic and Social Rights v. Nigeria*.<sup>854</sup> The case concerned the harmful human rights effects in the homeland of the Indigenous Ogoni peoples, caused by the oil exploration activities of a consortium consisting of the Nigeria government, the Nigeria National Petroleum Company and the Shell Petroleum Development Company, a subsidiary entity within the transnational Shell group. The government of Nigeria not only failed to prevent human rights violations by the consortium, it also provided security personnel to the consortium who committed gross human rights abuses by using disproportionate violent force to protect consortium installations and operations from protesters. The Commission found that Nigeria violated the rights to health (article 16, African Charter of Human and People's Rights, ACHPR) and a general satisfactory environment (article 24 ACHPR) as the oil explorations had seriously despoiled the natural environment in Ogoniland. The Commission also found violations of a people's right to be free from the forced deprivation of their wealth and natural resources (article 21 ACHPR), the right of non-discrimination (article 2 ACHPR), the right to property (article 14), the right to housing (article 18), the right to food (article 4, 16, and 22), and the fundamental right to life (article 4) which was entailed in killings and terrorizations of consortium opponents by security forces provided by the government.<sup>855</sup>

These two cases, *Awas Tingni Community v. Nicaragua* and *Center for Economic and Social Rights v. Nigeria*, demonstrate that Indigenous people can expect some vindication from international human rights bodies as a last resort to challenge MNCs abuses and exploitation of their land. It must be noted, however, that the resolution of both cases took a long time (nearly

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<sup>854</sup> African Commission on Human and Peoples' Rights, Decision regarding Communication No. 155/96, 27 May 2002, online: < <https://www.escri-net.org/sites/default/files/serac.pdf> > (retrieved 30 June 2017).

<sup>855</sup> Sarah Joseph (2006), *supra* note 833 at 75-76.

six and five years respectively),<sup>856</sup> and most importantly, the implementation of the decisions presented substantial difficulties. In the case of Awas Tingni, it took seven years for the state to demarcate the land and grant land titles to Indigenous communities; over the seven years that elapsed between the judgment and demarcation, the Awas Tingni suffered continual encroachment on their land.<sup>857</sup> And in the case of the Ogoni peoples, the decision did not seem to have any positive effects for the Ogoni communities, as they continued suffering forced displacement and encroachment on their rights.<sup>858</sup>

Under the doctrine of horizontality, host states are required to prevent human rights abuses by MNCs when they operate within their jurisdiction. In order to fulfill this obligation, host states usually pass and enforce legislation dealing with environmental protection, labour standards, Indigenous rights, etc. Yet, due to the power imbalances between MNCs and host states (usually developing countries), MNCs can abuse their economic power to gain regulatory concessions; or host states may be fearful that regulating corporate conduct may jeopardize economic benefits associated with foreign investment.<sup>859</sup> Host states may even deliberately act in concert with MNCs in disregard to the rights of local communities in order to gain financial and commercial benefits, which may sometimes and perhaps often flow to corrupt government officials rather than to the public coffers. Or even worse, host states can even be complicit with MNCs in perpetrating serious human rights violations in order to suppress local communities' opposition to MNC operations, as it happened in Nigeria where serious human rights violations

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<sup>856</sup> *Ibid.*

<sup>857</sup> David Fautsch, "An Analysis of Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples, and Proposals for Reform," in (2010) 31:2 *Michigan Journal of International Law* 449 at 464-467.

<sup>858</sup> Cathrin Zengerling, *Greening International Jurisprudence: Environmental NGOs before International Courts, Tribunals, and Compliance Committees* (Leiden: Martinus Nijhoff Publishers, 2013) at 112-113.

<sup>859</sup> Beth Stephens (2002), *supra* note 843 at 58-60.

(arbitrary detentions, torture and killings) against the Ogoni Indigenous peoples were connected with Nigerian government violence and oil development and operations in the Niger Delta by Royal Dutch/Shell oil group.

Moreover, the usually complex and amorphous corporate concepts and structures may render it difficult for a host state to attribute appropriate legal responsibility for violations committed by MNCs.<sup>860</sup> Although a MNC group of hundreds of subsidiary companies may often operate as a single economic entity, it is normally treated in corporate law as if each corporate component is a separate legal person; “it is atomized and unrealistically deemed for legal purposes to be scores or hundreds of separate corporations.”<sup>861</sup> In fact, MNCs have the ability (constructed and enabled through law and by law) to operate an integrated command and control system through two dis-aggregated institutional structures. First, the collection of discrete corporate units – parent, subsidiary, sister and cousin companies that make up the MNC group; second, the global system of separate nation-states on which those corporate units are registered and operate and do business.<sup>862</sup> Thus, within a MNC group, there are often a number of subsidiaries that may be incorporated in different jurisdictions to the holding or parent company; under corporate entity law, each of these subsidiaries are considered to be a separate legal entity, subject to differing legal regimes with the consequence that a parent or holding company cannot be held accountable for their conduct.<sup>863</sup> MNCs, very often, are able to allocate

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<sup>860</sup> Menno T. Kamminga and Saman Zia-Zarifi, Eds., *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000) at 3.

<sup>861</sup> Phillip I. Blumberg, “Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems,” (2002) 50 *the American Journal of Comparative Law* 493 at 528.

<sup>862</sup> Michael Anderson, “Transnational Corporations and Environmental Damage: Is Tort Law the Answer?” (2002) 41 *Washburn Law Journal* 399 at 401.

<sup>863</sup> In common law jurisdiction, in most instances the parent company is not liable for the activities of the subsidiary following the principle established by the House of Lords decision in *Salomon v. Salomon* [1897] A. C. 22 (Eng).



legal responsibility to their various corporate parts so as to minimize their exposure to real legal liabilities; thus enjoying a degree of autonomy from national jurisdiction that is unique in the global legal order. As Anderson points out, there is not a court anywhere in the world that exercises jurisdiction over all of the components of a MNC group doing business in three or four continents; yet, many MNCs can and do operate their many parts with a coherence of intent and implementation that resembles a single entity – an entity that is controlled neither by international law nor the legal norms of any single state.<sup>864</sup> Interestingly enough, Stiglitz points out that multinational mining companies in several developing countries such as India, Papua New Guinea, Thailand and Peru have used the shield of limited liability (part of these complex and amorphous corporate structures) to shift the enormous costs of their environmental damages to the host state's governments, resulting in a substantial business advantage.<sup>865</sup> Thus host states may not be able to exercise jurisdiction over the subsidiary's foreign parent companies, or the host state may lack the ability to enforce a judgment against a foreign parent company. Therefore, victims of MNCs' human rights violations in a host state may find themselves without effective access to adequate remedies for those violations.

*b) The Doctrine of Indirect State Responsibility or Extraterritorial Regulation*

In international human rights law, states are not generally required to regulate the extraterritorial actions of their private citizens, either natural or corporate. Yet, it is generally recognized that states are entitled to exercise jurisdiction on the basis of nationality, and thus, states would be able to impose extraterritorial obligations on their corporate nationals operating

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The separation of parent and subsidiary liability was achieved in some jurisdictions, such as the U.S., by way of statute.

<sup>864</sup> Michael Anderson (2002), *supra* note 862 at 402.

<sup>865</sup> Joseph E. Stiglitz, *Making Globalization Work* (New York: W.W. Norton & Co., 2006) at 194-195.

abroad if they wish. In this regard, Sornarajah – examining the nature of the home state’s responsibility -- argues that home states of corporations committing serious human rights abuses abroad themselves incur responsibility for those abuses by virtue of the way in which both global power realities and the link between corporation and national state-society interact with classic international law doctrine and modern principles.<sup>866</sup> Home state responsibility – he argues -- can arise in one or both of two ways. First, there can be responsibility for breach of the positive duty to provide for civil recourse by victims of *jus cogens* human rights violations against the corporation in its home state courts. Secondly, there is a form of indirect responsibility for failure to use mechanisms of control available, or potentially available, to the home state to prevent or stop abuses of which relevant state officials were forewarned or came to have knowledge.<sup>867</sup> Although there are sufficient policy justifications and sufficient reservoir of rules and principles for the home states to regulate the conduct of their MNCs abroad, they have generally refrained from doing so. This practice, coupled with the inability or unwillingness of host states to act creates an accountability gap in which MNCs are able to evade legal accountability for their actions.<sup>868</sup> In many cases, this accountability gap leaves victims of MNCs human rights abuse in developing states without justice and without access to effective remedies. In order to bridge this gap, the issue that arises is the extent to which home states are capable of (and willing to) regulating the operations of MNCs abroad.<sup>869</sup>

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<sup>866</sup> Muthucumaraswamy Sornarajah, “Linking State Responsibility for Certain Harms Caused by Corporate nationals Abroad to Civil Recourse in the Legal Systems of Home States,” Craig Scott, Ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001) t 491.

<sup>867</sup> *Ibid.*

<sup>868</sup> Beth Stephens (2002), *supra* note 843 at 58-60.

<sup>869</sup> Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive industries, human rights, and the home state advantage* (New York: Routledge, 2014).

Lately, the UN human rights treaty bodies have begun to encourage home states to pay greater attention to preventing MNCs registered in their jurisdiction from committing human rights violations abroad. Thus, the Committee on Economic, Social and Cultural Rights has suggested that State parties should take steps to ‘prevent their own citizens and companies’ from violating rights in other countries.<sup>870</sup> The Committee on the Elimination of Racial Discrimination (CERD) has noted ‘with concern’ reports of adverse impacts on the rights of Indigenous peoples in host states from the activities of MNCs registered in Canada. The CERD encouraged Canada to ‘take appropriate legislative or administrative measures’ to prevent such acts, further recommending that the state explore ways to hold such corporations ‘accountable.’<sup>871</sup> The CERD has made similar comments with regards to the United States and Australia.<sup>872</sup> Likewise, the Human Rights Committee has questioned Canada’s extra-territorial obligations, including the obligation to protect rights abroad by regulating Canadian corporations and by providing accountability and remedial mechanisms when rights are violated abroad.<sup>873</sup> In addition, the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights provides a basis for conceptualizing the application and implementation of states’ extraterritorial obligations in order to secure more effective protection

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<sup>870</sup> Committee on Economic Social and Cultural Rights, 'The Right to Water, General Comment No 15', 26 November 2002, UN Doc E/C.12/2002/11 [33].

<sup>871</sup> CERD, “Concluding Observations for Canada,” 25 May 2007, CERD/C/CAN/CO/18, at 4 para. 17.

<sup>872</sup> CERD, “Concluding Observations for the United States of America,” 8 May 2008, CERD/C/USA/CO/6, at 10 para. 30; CERD, “Concluding Observations for Australia,” 13 September 2010, CERD/C/AUS/CO/15-17, para. 13.

<sup>873</sup> Yet, during the examination of Canada’s periodical report with the UN Human Rights Committee, the Canadian government representatives challenged the application of UN Treaties to potential human rights violations by Canadian companies operating abroad. Invoking the principle of “extra-territoriality,” the Canadian delegation pointed out that “individuals affected by the operation of Canadian companies abroad were thus not necessarily under Canadian jurisdiction.” Mike Blanchfield, “Ottawa clashes with UN human rights panel over mining complaints,” in *the Globe and Mail*, 08 July 2015, online: <<https://www.theglobeandmail.com/news/politics/ottawa-sidesteps-questions-from-un-panel-on-human-rights-complaints-in-canadian-mining-industry/article25349401/>> (retrieved 30 June 2017). Human Rights Committee, Concluding observations on the sixth periodic report of Canada, 13 August 2015, CCPR/C/CAN/CO/6.

of human rights from corporate violations; the Principles aim at ensuring that home states of companies bear the responsibilities for human rights violations committed outside their territories.<sup>874</sup>

As noted above, on the basis of extraterritorial regulations, a number of transnational civil suits have been brought against MNCs for damage caused by their allegedly abusive overseas practices in the U.S., the UK, Australia and Canada. The U.S. is the only jurisdiction to have enacted specific legislation providing causes of action for individuals that refer directly to international human rights standards and that have extraterritorial operation: the Alien Tort Claims Act (ATCA),<sup>875</sup> the Torture Victim Protection Act (TVPA),<sup>876</sup> and portions of the Foreign Sovereign Immunities Act (FSIA).<sup>877</sup> Other specific laws in the U.S. with potential bases for human rights claims are the Racketeer Influenced and Corrupt Organizations Act (RICO),<sup>878</sup> the Anti-Terrorism Act,<sup>879</sup> and the doctrine of transitory torts. These statutes do not primarily deal with human rights violations or refer specifically to international human rights, yet their scope is wide enough that they encompass certain human rights violations.<sup>880</sup> Most of the U.S. cases have been brought under the ATCA, which grants jurisdiction to aliens to sue persons for grave breaches of international law norms. According to ATCA “the [U.S. federal] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in

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<sup>874</sup> On 28 September 2011, at a gathering convened by Maastricht University and the International Commission of Jurists, a group of experts in international law and human rights adopted the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. Olivier De Schutter, et al., “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,” (2012) 34 *Human Rights Quarterly* 1084-1169.

<sup>875</sup> 28 U.S.C. & 1350.

<sup>876</sup> 28 U.S.C. & 1350 (note).

<sup>877</sup> 28 U.S.C. & 1330, 1602-1611.

<sup>878</sup> 18 U.S.C. & 1961 et seq.

<sup>879</sup> 18 U.S.C. & 2331-2339C.

<sup>880</sup> Beth Stephens, Judith Chomsky, Jennifer Green, Paul Hoffman and Michael Ratner, Eds., *International Human Rights Litigation in U.S. Courts* (Leiden, the Netherlands: Martinus Nijhoff Publishers, 2008) at 73-127.

violation of the law of nations or a treaty of the United States.”<sup>881</sup> Cases (brought under ATCA) regarding violations by MNCs of the rights of Indigenous peoples include:

a) *Wiwa v. Royal Dutch Petroleum*, *Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum*

*Development Company* (alleging the defendants’ complicity in human rights abuses against the Ogoni people in Nigeria, including summary execution, crimes against humanity, torture, inhumane treatment, arbitrary arrest, wrongful death, assault and battery, and infliction of emotional distress).<sup>882</sup> The first case was brought against the Royal Dutch Petroleum Company in 1996. The second case was filed in 2002 against Brian Anderson who was the head of Shell’s Nigerian operation. The third case against Shell’s Nigerian subsidiary was filed in 2004. On June 2009, the parties agreed to a settlement for all three lawsuits; the settlement provided a total of \$15.5 million to compensate the plaintiffs, to establish a trust for the benefit of the Ogoni people, and to cover some of the legal costs associated with the case.<sup>883</sup> While ultimately the cases were settled out of court, the courts nonetheless found that the case could have proceed.<sup>884</sup>

b) *Kiobel v. Royal Dutch Petroleum Co.* (alleging that Shell and its Nigerian subsidiary Shell Petroleum Development Company of Nigeria were complicit in the commission of torture, extrajudicial killing and other violations pursuant to the ATCA).<sup>885</sup> In June 2010, the district

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<sup>881</sup> 28 U.S.C. & 1350. Ibid, p. 27-43.

<sup>882</sup> 226 F 3d 88 (2d Cir 2000). The claims were filed by Ken Wiwa (son of the late Ogoni activist Ken Saro-Wiwa who was executed together with Dr. Barinem Kiobel in 1995) and other members of the Movement for the Survival of the Ogoni People. The three lawsuits were filed against the actions of the company, the head of its Nigerian operation, Brian Anderson, and the Nigerian subsidiary itself. The cases were brought under ATCA and TVPA. The first case against Royal Dutch/Shell also alleges that the corporation violated RICO Act. The case was also the subject of the *Nigeria* case before the African Commission on Human Rights.

<sup>883</sup> Center for Constitutional Rights, “*Wiwa et al v. Royal Dutch Petroleum et al.*,” online: <<http://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al>> (retrieved 30 June 2017).

<sup>884</sup> *Wiwa v. Shell Petroleum Dev. Co. of Nigeria*, 2009 WL 1560197 (2d Cir., 3 June 2009).

<sup>885</sup> 133 S. Ct. 1659 (2013). The lawsuit was filed in US federal court in 2002 against Royal Dutch Petroleum Company, the Shell Transport & Trading Company, and their joint subsidiary Shell Petroleum Development

court dismissed the plaintiffs' claims arguing that a direct business relationship between the US and Shell Petroleum Development Company of Nigeria had not been shown. In September 2010 the court of appeal affirmed the lower court's dismissal of the lawsuit, and argued that ATCA could not be used to sue corporations for violations of international law. The plaintiffs petitioned the Supreme Court in June 2011 asking it to hear an appeal of the lower court's ruling. In April 2013, the Supreme Court affirmed the dismissal of the case; it argued that ATCA could not be applied to Shell's actions in Nigeria, and that foreign claimants could not bring civil suits in the U.S. courts under ATCA against foreign corporate defendants that have a mere corporate presence in the U.S. for alleged egregious human rights violations.<sup>886</sup> As several authors argue, the U.S. Supreme Court significantly limited the application of the ATCA by finding that the presumption against extraterritoriality exists with regard to claims brought for violations of customary international law occurring abroad where U.S. citizens, including corporations, might be liable.<sup>887</sup> This case severely undercut 30 years of jurisprudence by limiting U.S. courts' ability to hear cases on human rights violations committed outside the U.S, limiting the ATCA only to those cases that "touch and concern" the U.S. with "sufficient force."<sup>888</sup>

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Company of Nigeria Ltd (SPDC), on behalf of the late Dr. Barinem Kiobel and eleven other Nigerian activists (members of the Movement for the Survival of the Ogoni People) who were detained illegally, tortured and executed by a military dictatorship in Nigeria in 1995.

<sup>886</sup> Center for Constitutional Rights, "Kiobel v. Royal Dutch Petroleum Co. (Amicus)," online: <<https://ccrjustice.org/home/what-we-do/our-cases/kiobel-v-royal-dutch-petroleum-co-amicus>> (retrieved 30 June 2017).

<sup>887</sup> Gwynne L. Skinner, "Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in A New (Post-Kiobel) World," in (2014-2015) 46 *Columbia Human Rights Law Review* 158; Anna Grear and Burns H. Weston, "The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape," (2015) 15 *Human Rights Law Review* 21-44.

<sup>888</sup> Center for Constitutional Rights, "Kiobel v. Royal Dutch Petroleum Co. (Amicus)," *supra* note 886.

c) *Doe v. Unocal* (alleging Unocal complicity in gross human rights abuses, including forced labour, by the Myanmar military in the area of Unocal's pipeline).<sup>889</sup> The case, initiated in 1997, is one of the most significant ATCA cases that recognized that corporate liability is actionable under ATCA when corporations are complicit with State human rights violations. In 2005, however, after an eight year legal battle, Unocal settled with the plaintiffs out of court for an undisclosed sum.<sup>890</sup>

d) *Beanal v. Freeport McMoRan* (Alleging Freeport-McMoRan's complicity in human rights abuses, including environmental and health rights violations and cultural genocide against the Amungme peoples in Irian Jaya, West Papua, Indonesia).<sup>891</sup> In 1996 Tom Beanal, a leader of the Amungme people of West Papua, filed suit against Freeport-McMoRan in US federal court. The same year, Yosefa Alomang also filed suit against Freeport-McMoRan in Louisiana state court. The district court dismissed the case in 1998 on the basis that the environmental and human rights abuses alleged by Beanal were not violations of the "law of nations." Beanal appealed this ruling, but the court of appeals affirmed the lower court's dismissal of the case in 1999. In the Louisiana state court case, Alomang alleged that Freeport had engaged in human

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<sup>889</sup> 963 F. Supp. 880 (C.D. Cal. 1997); 110 F Supp 2d 1294 (CD Cal 2000); 395 F.3d 932 (9th Cir., 2002).

<sup>890</sup> Jeremie Gilbert, "Corporate Accountability and Indigenous Peoples: Prospects and Limitations of the US Alien Tort Claims Act," (2012) 19 *International Journal on Minority and Group Rights* 25 at 30; Armin Rosencranz and David Louk, "Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch," (2005) 8 *Chapman Law Review* 130; Rachel Chambers, "The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses," (2005) 13:1 *Human Rights Brief* 14-16.

<sup>891</sup> 969 F Supp 362 (ED La 1997), (aff'd 197 F 3d 161 (5<sup>th</sup> Cir 1999)). Freeport McMoRan's Grasberg mine, operated as part of a joint venture with the Indonesian military government of the deposed General Suharto, was accused of creating an environmental and social catastrophe, and complicity with the actions of the military forces which carried out human rights violations extending to surveillance, personal injury, mental and physical torture, house arrest, death threats, and extrajudicial killings. Chris Ballard, "Human Rights and the Mining Sector in Indonesia: A Baseline Study," *MMSD Working Paper* No. 182, October 2001; Chris Ballard and Glen Banks, "Resource Wars: The Anthropology of Mining" (2003) 32 *Annual Review of Anthropology* 287-313; Jane Perlez and Raymond Bonner, "Below a Mountain of Wealth, a River of Waste," in *the New York Times*, 27 December 2005, online: <<http://www.nytimes.com/2005/12/27/world/asia/below-a-mountain-of-wealth-a-river-of-waste.html>> (retrieved 30 June 2017).

rights and environmental violations through its corporate policies and conduct at its Grasberg mine in West Papua. Alomang's case was also dismissed by the state court in 2000 for failure to state an actionable claim against Freeport.<sup>892</sup>

e) *Sarei v Rio Tinto Plc* (Alleging Rio Tinto engaged in a joint venture with the Papua New Guinea (PNG) government to maintain a copper mine in Bougainville, which resulted in international environmental violations, racial discrimination and crimes against humanity stemming from a military blockade motivated by Indigenous communities resistance to the mine).<sup>893</sup> In 2000, Indigenous residents of the island of Bougainville in PNG filed suit against Rio Tinto under the ATCA in US federal court. Rio Tinto sought dismissal of the case, which the district court granted in 2002, relying in part on a letter from the US State Department favoring dismissal. The plaintiffs subsequently appealed. After nine years of protracted litigation, on October 2011, the Court of Appeals reversed the lower court's dismissal of the case; the court upheld the dismissal of the claims regarding racial discrimination and crimes against humanity, but it reversed on the plaintiffs' claims regarding genocide and war crimes. The case was supposed to return to the district court for further proceedings on the genocide and war crimes claims. Yet, following the US Supreme Court's ruling in *Kiobel v. Royal Dutch Petroleum Co.*,<sup>894</sup> the Supreme Court vacated the October 2011 appeals court ruling, and ordered the appeals court

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<sup>892</sup> Business and Human Rights Resource Centre, "Freeport-McMoRan lawsuits (re West Papua)," online: <<http://business-humanrights.org/en/freeport-mcmoran-lawsuits-re-west-papua-0>> (retrieved 30 June 2017).

<sup>893</sup> 221 F Supp 2d 1116 (CD Cal 2002). According to the civil suit, PNG governmental security forces' blockade of Bougainville cut off medical supplies to pressure the people to submit to PNG control and reopen the mine. The siege resulted in deaths from preventable diseases such as TB and whooping cough, in more than 2,000 children in the first two years; and between 1990 and 1997, approximately 10,000 Bougainvilleans died as a result of the siege. See, Hagens Berman Sobol Shapiro LLP, "Oceanic Islanders use Federal Law to Sue British Mining Giant Rio Tinto for Alleged Ecocide and Human Rights Crimes," September 18, 2000, online:

<<https://www.hbsslaw.com/cases/closed-case/pressrelease/closed-case-oceanic-islanders-use-federal-law-to-sue-british-mining-giant-rio-tinto-for-alleged-ecocide-and-human-rights-crimes>> (retrieved 30 June 2017).

<sup>894</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).



to reconsider the case in light of the *Kiobel* decision. On June 2013 the appeals court upheld the dismissal of the case, citing the Supreme Court's reasoning against the extraterritorial application of the ATCA.<sup>895</sup>

f) *Aguinda v. Texaco* and *Jota v. Texaco* (alleging that between 1964 and 1992 Texaco's oil operations polluted the rainforests and rivers in Ecuador and Peru, resulting in environmental damage and damage to the health of Indigenous and non-Indigenous communities who live in the region).<sup>896</sup> In 1993, a group of Ecuadorian citizens of the Amazonian region filed a class action lawsuit in US federal court against Texaco (*Aguinda v. Texaco*), and in 1994 a group of Peruvian citizens living downstream from the Amazonian region also filed a class action lawsuit against Texaco in US federal court (*Jota v. Texaco*). Both lawsuits were dismissed by the US federal court in 2002 on *forum non conveniens* grounds. Judge suggested claims of environmental damage were unlikely to activate the ATCA.<sup>897</sup>

As noted earlier, the doctrine of transitory torts also provides a cause of action regarding Indigenous claims in the U.S. and other common law countries such as the UK, Canada and Australia. Human rights violations will normally correspond with a type of tort, even though the language of tort may not intuitively reflect the seriousness of a human rights violation.<sup>898</sup> Scott argues that there are two ways in which a human-rights-related claim could be characterised in formulating a private law cause of action. First, human rights could be cited as the *direct* cause of action such that, for instance, a company could be sued for a violation of the human right not

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<sup>895</sup> Business and Human Rights Resource Centre, "Rio Tinto Lawsuits (re Papua New Guinea)," online: <<https://www.business-humanrights.org/en/rio-tinto-lawsuit-re-papua-new-guinea>> (retrieved 30 June 2017).

<sup>896</sup> *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

<sup>897</sup> Business and Human Rights Resource Centre, "Texaco/Chevron lawsuits (re Ecuador)," online: <<http://business-humanrights.org/en/texacochvron-lawsuits-re-ecuador>> (retrieved 30 June 2017).

<sup>898</sup> Sarah Joseph (2006), *supra* note 833 at 78.

to be tortured. Second, human rights could be *indirectly* pleaded in that, while they could be the object or purpose of the litigation, other legal categories would be invoked in order to vindicate the substance of human rights; for instance, a plaintiff might choose to sue a corporation for battery rather than a human right regarding torture.<sup>899</sup>

Indigenous claims against MNCs under the doctrine of transitory torts have, for instance, arisen in *Dagi v. BHP* in Australia (alleging that Australian Broken Hill Proprietary's severe pollution of Ok Tedi and Fly River and adjacent lands in Papua New Guinea, resulted in economic loss and environmental damage, and prejudiced the plaintiffs' enjoyment of their land and waters).<sup>900</sup> In Canada foreign affected citizens, including Indigenous communities, have filed eight civil suits against Canadian mining corporations: Cambior lawsuit (filed in 1997, alleging damages suffered by Indigenous Guyanese as the result of a failed tailings dam at the Omai mine affecting some 23,000 people); Copper Mesa Mining lawsuit (filed in 2009, alleging threats, violence, and human rights abuses against three Ecuadorians by the security forces of Copper Mesa in Ecuador); Anvil Mining lawsuit (filed in 2010, alleging Anvil's involvement in gross human rights violations, including rape and executions, through having provided logistical support to the Democratic Republic of Congo's army); Hudbay Minerals lawsuits (three cases filed in March 2011, alleging the company's security forces involvement in the gang rape of 11 Indigenous women, murder of a local Indigenous leader and permanent injury of another Indigenous resident in Guatemala); Tahoe Resources lawsuit (filed in June 2014, alleging the company's security forces involvement in shooting and injuring seven men protesting outside the company's Escobal silver mine in Guatemala); and Nevsun lawsuit (filed in November 2014,

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<sup>899</sup> Craig Scott, "Translating Torture into Transnational Tort" (2001), *supra* note 829 at 62.

<sup>900</sup> [1995] 1 VR 428. Motion to dismiss the case was denied. But, the case was eventually settled.

alleging the use of slave labor at Nevsun's Bisha mine in Eritrea). Three lawsuits (Cambior, Copper Mesa, and Anvil) were dismissed arguing that the foreign country was the appropriate venue for the suit, the corporate directors had not sufficient connection to the plaintiffs to establish an enforceable legal obligation, and Canadian court lacked jurisdiction. As of June 2017, Hudbay Mineral (3 cases), Nevsun and Tahoe Resources lawsuits are ongoing at the Ontario Superior Court and the BC Superior Court respectively. In the five cases the court rejected the mining companies' position that the cases should be dismissed, allowing the lawsuits to proceed in Canada.<sup>901</sup>

Transnational litigation has overall serious limitations for holding MNCs liable for human rights violations committed outside their headquarters. Not a single decision on the merits has been delivered in the relevant transnational cases against MNCs. A review of the different jurisdictions and cases, in the home States of MNCs, reveals that not one case has yet been finally determined in favour of the plaintiffs. Cases have often stalled due to preliminary challenges raised by the defendants, and due to out of court settlements. In almost all of the transnational human rights cases against MNCs in the U.S., Canada, Australia and the UK, the defendants have sought an order for dismissal of the case under the doctrine of *forum non conveniens*, which allow common law courts to dismiss cases on the basis that the case should be heard in an alternative forum. *Forum non conveniens* constitutes a significant, if not an insurmountable, obstacle for claimants to overcome;<sup>902</sup> in fact, as Baxi points out, it plays a prominent role in upholding a dehumanising form of capitalism according to which the risk of

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<sup>901</sup> Business and Human Rights Resource Centre, "Corporate Legal Accountability, Lawsuits in Canada," online: <<http://business-humanrights.org/en/corporate-legal-accountability/case-profiles/country-where-lawsuit-filed/americas>> (retrieved 30 June 2017); Penelope Simons and Audrey Macklin (2014), *supra* note 869 at 246-259.

<sup>902</sup> Phillip I. Blumberg (2002), *supra* note 861 at 505.

harms caused by corporate activities is borne by communities and societies in the global south, which are least equipped, from a regulatory and legal-system perspective, to prevent and seek compensation for those harms.<sup>903</sup>

An exception in this scenario is the ongoing and endless Texaco/Chevron lawsuit (Re: Ecuador) which came as a result of the dismissal of *Aguinda v. Texaco* and *Jota v. Texaco* by the US federal courts in 2002 on *forum non conveniens* grounds. In connection with the dismissal, Texaco agreed that courts in Ecuador and/or Peru would have jurisdiction over the plaintiffs' claims. In 2003, a class action lawsuit was brought against Texaco (which had been acquired by Chevron) in Ecuador alleging severe environmental contamination of the land where Texaco conducted its oil operation activities. In February 2011, an Ecuadorian judge issued a decision against Chevron, ordering it to pay \$8.6 billion in damages and cleanup costs, with the damages increasing to \$18 billion if Chevron does not issue a public apology. Chevron indicated that it believes the ruling is "illegitimate" and "unenforceable," and it filed an appeal. In January 2012 the Provincial Court of Justice of Sucumbios upheld the February 2011 ruling against Chevron. In November 2013, Ecuador's Supreme Court upheld the ruling against Texaco/Chevron for environmental damage but halved damages to \$9.51 billion.<sup>904</sup> The company, however, has refused to comply and instead initiated litigation in the U.S. (racketeering lawsuit alleging that the plaintiffs' lawyers and representatives have conspired to extort up to \$113 billion from Chevron through the Ecuadorian legal proceedings) and the

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<sup>903</sup> Upendra Baxi, "Geographies of Injustice: Human Rights at the Altar of Convenience," Craig Scott, Ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001) at 197.

<sup>904</sup> *Aguinda v. Chevron Corp.*, Juicio No. 174-2012, Corte Nacional de Justicia (Ecuador); Business and Human Rights Resource Centre, *Texaco/Chevron Lawsuit (Re: Ecuador)*, online: <<http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador#c9332>> (retrieved 30 June 2017).

Netherlands (arbitration claim before the Permanent Court of Arbitration at the Hague, alleging the government of Ecuador violated an US-Ecuador bilateral investment treaty).<sup>905</sup>

In an effort to enforce the Ecuadorian judgment, the Ecuadorian plaintiffs filed a lawsuit in Canada in May 2012 targeting Chevron's assets in this country. In September 2015, the Canadian Supreme Court ruled that Ecuadorian plaintiffs should be allowed to try to get hold of Chevron assets in Canada, to collect on the \$US9.51 billion that Ecuadorian courts had awarded them. In January 2017, however, the Ontario Superior Court ruled that the assets of Chevron Canada Limited could not be seized to pay out a foreign judgment against Chevron Corp. because they are two separate and distinct entities. The court found that Chevron Canada's corporate veil should not be pierced, as the parent did not have complete control over the subsidiary; yet, the judge also decided that the case against Chevron can proceed to trial. The plaintiffs applied for leave to appeal the decision to the Ontario Court of Appeal.<sup>906</sup> As Joseph points out, this story of protracted and ongoing 'lawfare' tells just how difficult, if not impossible, it can be to hold major MNCs accountable for human rights and environmental harms when those harms have taken place in a Third World country in a virtual regulatory vacuum.<sup>907</sup>

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<sup>905</sup> In respect of racketeering lawsuit, in March 2014, a U.S. federal court ruled that the judgment issued by the Ecuadorian court against Chevron was the product of fraud and racketeering activity; thus, the court prohibited the Ecuadorian judgment from being enforced in the U.S. In August 2016, the decision was upheld by a U.S. court of appeals; and in June 2017, the US Supreme Court declined to hear an appeal by Ecuadorian plaintiffs. Concerning the arbitration claim, in February 2011, the Hague arbitration panel issued an Interim Measures Order, requiring Ecuador to take all measures to suspend enforcement of the Ecuadorian judgment. In August 2011, it awarded Chevron \$96 million; and after the US Supreme Court declined to hear Ecuador's challenge to Chevron's arbitration award, Ecuador executed the arbitration decision in July 2016, and paid the \$112 million (\$96 million award plus interests) compensation to Chevron. See Business and Human Rights Resource Centre, *Texaco/Chevron Lawsuit (Re: Ecuador)*, *supra* note 904.

<sup>906</sup> *Ibid*; *Chevron Corp. v. Yaiguaje*, 2015 SCC 42.

<sup>907</sup> Sarah Joseph, "Protracted Lawfare: the tale of Chevron Texaco in the Amazon" (2012) 3:1 *Journal of Human Rights and the Environment* 70-91; The Real News Network, "*US Supreme Court Declines to Hear Chevron*

Another major limitation of transnational litigation is the controversial out of court settlements, which allow companies to literally trade remedies for legal immunity and “turning human rights into a transaction of value.”<sup>908</sup> Relevant out of court settlements were reached in *Doe v. Unocal*, *Wiwa v. Royal Dutch Petroleum*, *Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Development Company* in the U.S. and *Dagi v. BHP* in Australia where claimants received compensation. Yet, in *Dagi v. BHP* several affected Indigenous communities rejected or did not participate in the settlement. The harmful effect of BHP mining activities in Papua New Guinea (PNG), at Ok Tedi is often cited as one of the worst man-made environmental disasters in the world; it has disrupted the traditional food webs and lives of more than 50,000 people by putting 90,000 tons of rock waste and tailings per day into the Ok Tedi and Fly River system.<sup>909</sup> In 1994, Indigenous Ok Tedi and Fly River landowners residing in the affected area brought suit against BHP in the Victorian Supreme Court in Australia. BHP responded by secretly drafting legislation for the PNG government that would make it a criminal offence to take legal action against BHP in courts outside Papua New Guinea. The lawsuit was eventually settled out of court in 1996. Several communities along the river, however, vehemently rejected the settlement, refusing to let BHP Billiton avoid justice.<sup>910</sup>

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*Pollution Case: an interview with Steven Donziger, the human rights lawyer representing affected Indigenous communities,”* 22 June 2017, online:

<[http://therealnews.com/t2/index.php?option=com\\_content&task=view&id=31&Itemid=74&jumival=19374](http://therealnews.com/t2/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=19374)> (retrieved 30 June 2017).

<sup>908</sup> Catherine Coumans and Patricia Feeney, “Privatized Remedy and Human Rights: Re-thinking Project-Level Grievance Mechanisms,” *A Brief prepared for the Third Annual UN Forum on Business and Human Rights*, Palais des Nations, 1 December 2014, at 8.

<sup>909</sup> Peter S. Adler, Janesse Brewer, and Caelan McGee, *the OK Tedi Negotiations: Rebalancing the Equation in a Chronic Sustainability Dilemma*, the Keystone Centre, August 24, 2007, online:

<<https://www.mediate.com/pdf/The%20Ok%20Tedi%20Negotiations-TKC-08-24-07.pdf>> (retrieved 30 June 2017).

<sup>910</sup> BHP Billiton’s history in Papua New Guinea, at Ok Tedi has the hallmarks of corporate behaviour outliving its time, of a drive for profit with complete disregard for social responsibility, natural environment and human life/habitat, and of a company so bereft of a sense of responsibility that it ultimately gave its shareholding away. It

In light of the above case it can be argued that out of court settlements and compensation may often be the result of adverse public campaigns and pressure (at national and international level) or a commercially driven decision of the MNC or as part of a broader litigation strategy, rather than the result of a successful claim in the home state's jurisdiction. Indeed, by settling disputes out of court before they can finally be determined, MNCs not only avoid having a public hearing of the truth or falsity of the alleged human rights abuses, but, most importantly, they also affect (and prevent) the development of jurisprudence and precedent, which could pave the way for more victims to bring claims against MNCs for human rights violations.<sup>911</sup> As Coumans and Feeney argue, trading remedy for legal immunity and "turning human rights into a transaction of value is particular concerning in cases of gross violation of human rights and criminal acts."<sup>912</sup>

Finally, another serious limitation of transnational litigation as a means of pursuing corporate accountability in home state's jurisdictions is the reluctance of home state courts to 'pierce the corporate veil' so as to hold a parent company liable for the human rights abuses of its subsidiary.<sup>913</sup> The decision in the *Kiobel* case is telling; pursuant to this case, as Grear and Weston argue, "by most interpretations, foreign corporations were largely if not completely

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walked away from one of the worst man-made environmental disasters in the world, deftly throwing its responsibility sideways to the Papua New Guinea (PNG) government. See Mining Watch, "One of World's Worst Mine Disasters Gets Worse – BHP Admits Massive Environmental Damage at Ok Tedi Mine in Papua New Guinea, Says Mine Should Never Have Opened," *News Release*, 11 August 1999, online: <<http://miningwatch.ca/news/1999/8/11/one-worlds-worst-mine-disasters-gets-worse-bhp-admits-massive-environmental-damage-ok>> (retrieved 30 June 2017).

<sup>911</sup> Kate Macdonald, "The Reality of Rights: Barriers to accessing remedies when business operates beyond borders," Report, LSE and Corporate Responsibility Coalition, May 2009; Oxford Pro Bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*, A Comparative Submission prepared for Special Representative of the UN Secretary-General on human rights and transnational corporations and other business enterprises, 3 November 2008.

<sup>912</sup> C. Coumans and P. Feeney (2014), *supra* note 908 at 8.

<sup>913</sup> Penelope Simons and Audrey Macklin (2014), *supra* note 869 at 253.

accorded immunity from US pursuit of human rights violations against foreign nationals in foreign countries. Thus, the US Supreme Court closed down, *prima facie* at least, a much favoured strategy of international human rights litigation aimed at establishing extraterritorial human rights accountability.”<sup>914</sup> Furthermore, the procedural and other preliminary legal obstacles are considerable and time-consuming. Many human rights victims will not have the resources to bring cases against MNCs in foreign jurisdictions. And, many MNCs fall outside the reach of the jurisdictions in which the cases are being heard.<sup>915</sup>

### **6.3 States and International Organizations’ Reluctance to Establish International Binding Regulations for MNCs Accountability**

The extra-territorial liability of multinational corporations can be ensured either by extending existing obligations of states to regulate and control corporate actors beyond their territorial confines, which was discussed in the previous section, or by directly imposing legal human rights obligations on corporations. The viability and discussion of the latter option, however, has been contentious and political in international law.<sup>916</sup> As Muchlinski points out, it would appear misguided to pretend that international law is somehow ‘neutral’ or ‘depoliticized’ in its approach to MNCs; to the contrary, international law has always displayed a specific agenda for private property protection and this has helped to protect corporate interests.<sup>917</sup> Thus, while Ruggie asserts that the imposition of binding obligations by international law on private

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<sup>914</sup> Anna Grear and Burns H. Weston (2015), *supra* note 887 at at 24.

<sup>915</sup> Sarah Joseph (2006), *supra* note 833.

<sup>916</sup> Ronen Shamir, “Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility,” (2004) 38: 4 *Law and Society Review* at 659; Peter Muchlinski, “Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by Intergovernmental Organizations,” (2003) 3 *Non-State Actors and International Law* at 130.

<sup>917</sup> Peter Muchlinski (2010), *supra* note 667 at 34-35.



non-state actors is not possible, as corporations are not subjects of international law,<sup>918</sup>

Sornarajah argues that the establishment of international accountability norms binding MNCs is a definite mark of progress.<sup>919</sup> Yet, the battle, he writes, has been an arduous one; “it is rather strange that when multinational corporations already have personality to assert rights against states, there is this hoary revival of an outdated doctrine and archaic notions relating to personality of MNCs to impede efforts to establish accountability mechanisms under international regimes.”<sup>920</sup>

The significance and the exact role of international law in regulating human rights abuses by MNCs have been on the discussion table at various fora since the early 1970s. The contentious and heated debate on this issue, which remains far from settled, could be compared to tides, with the momentum of negotiating an international instrument going up and down.<sup>921</sup> According to Surya Deva, a least three high tides are discernable.<sup>922</sup> The first high tide was represented by the 1990 draft of the United Nations Code of Conduct on Transnational Corporations (the Code). Due to significant differences between North Atlantic - European and Third World countries, the Code could not be adopted and thus this high tide receded.

The second high tide was reflected in the approval of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms) by the UN Sub-Commission on the Promotion and Protection of

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<sup>918</sup> John G. Ruggie, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *UN Doc. E/CN.4/2006/97*, 2006, paras. 60-65 and 69.

<sup>919</sup> Muthucumaraswamy Sornarajah, “Power and Justice: Third World Resistance in International Law,” (2006) 10 *Singapore Year Book of International Law* at 46.

<sup>920</sup> *Ibid.*

<sup>921</sup> Surya Deva, “The Human Rights Obligations of Business: Reimagining the Treaty Business,” Paper presented at the Workshop on *Human Rights and Transnational Corporations: Paving the Way for a Legally Binding Instrument*, organised by the Permanent Missions of Ecuador and South Africa to the UN, Geneva (11-12 March 2014).

<sup>922</sup> *Ibid.*

Human Rights (UN Sub-Commission) in August 2003.<sup>923</sup> The struggle, however, to have the United Nations competence established over the issue of accountability of MNCs for human rights violations became arduous and contentious and the second high tide receded as well.<sup>924</sup> The Norms were considered by the UN Commission on Human Rights in April 2004; yet, it did not approve them, and said they had "no legal standing" and reduced them to another voluntary aspirational code of conduct.<sup>925</sup> Thus, the Norms were effectively abandoned in 2005; the process of their consideration and adoption was halted at the UN Commission due to a combination of public and behind-the-scenes lobbying by powerful business groups such as the International Chamber of Commerce (ICC) and the International Organization of Employers (IOE) and influential Western states, and supported by some academics, including John Ruggie, who proposed instead self-regulatory regimes or voluntary codes of corporate conduct, aiming to gradually ratchet up the levels of commitment and accountability.<sup>926</sup>

Once the Norms were abandoned, the UN Commission opted to call for the appointment by the UN Secretary-General of a Special Representative on the issue of human rights and

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<sup>923</sup> The Norms were prepared by the UN Sessional Working Group on the Working Methods and Activities of Transnational Corporations, established in August 1998. Larry Cata Backer, "Multinational Corporations, Transnational Law: the United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law," (2006) 37 *Columbia Human Rights Law Review* 287 at 328-329.

<sup>924</sup> David Kinley, Justine Nolan and Natalie Zerial, "The politics of corporate social responsibility: Reflections on the United Nations Human Rights Norms for Corporations," (2007) 25:1 *Company and Securities Law Journal* 30-42; David Weissbrodt and Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (2003) 97 *American Journal of International Law* 901.

<sup>925</sup> Commission on Human Rights Decision 2004/116, "Responsibilities of transnational corporations and related business enterprises with regard to human rights," *U.N. Doc. E/CN.4/DEC/2004/116*, April 20, 2004.

<sup>926</sup> David Kinley and Rachael Chambers, "The UN Human Rights Norms for Corporations: The Private Implications of Public International Law," (2006) *Human Rights Law Review* 1; Henry J. Steiner, Phillip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (New York: Oxford University Press, 2008) at 1405; David Weissbrodt, "Business and Human Rights," (2005-2006) 74 *University of Cincinnati Law Review* 70.

MNCs and other business enterprises.<sup>927</sup> In July 2005, John Ruggie, Professor of the Kennedy School of Government at Harvard University, was appointed as Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG).<sup>928</sup> In his 2006 Interim Report, Ruggie was strongly critical of the Norms initiative, emphasizing that the imposition of binding obligations by international law on private non-state actors is not possible, as MNCs are not subjects of international law.<sup>929</sup> His report ultimately concluded that the Norms should categorically be abandoned rather than pursued. During his first years of his mandate, Ruggie developed the ‘Protect, Respect and Remedy’ framework (the Framework),<sup>930</sup> which culminated in the Guiding Principle on Business and Human Rights (GPs), another form of ‘soft law,’ which was submitted to the HRC in March 2011 and endorsed on June 2011.<sup>931</sup>

The ‘Protect, Respect and Remedy’ Framework, based on the notion of differentiated but complementary responsibilities, has three arms: the *State duty* to protect against human rights abuses by third parties, including business enterprises; the *corporate responsibility* to respect

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<sup>927</sup> Commission on Human rights, C.H.R. res. 2005/69, U.N. Doc. E/CN.4/2005/L.11/Add.7 at 68 (2005); Commission on Human rights, ‘Promotion and Protection of Human Rights,’ E/CN.4/2005/L.87 (15 April 2005).

<sup>928</sup> Ruggie was appointed for an initial period of two years. This term was later extended for one more year and in June 2008; the Human Rights Council further extended the mandate for another three years. The SRSG received the following mandate: identify and clarify standards of corporate responsibility and accountability; to elaborate on the role of states in effectively regulating corporations, including through international cooperation; to research and clarify the implications of concepts such as ‘complicity’ and ‘sphere of influence’; to develop materials and methodologies for undertaking human rights impact assessments of corporate activities; and to compile a compendium of best practices of states and corporations. *Ibid*; Human Rights Council, ‘Mandate of the Special Representative of the Secretary General of the issue of Human Rights and Transnational Corporations and Other Business Enterprises,’ Resolution 8/7 (18 June 2008) at para. 4.

<sup>929</sup> John G. Ruggie, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. E/CN.4/2006/97 (2006), paras. 60-69.

<sup>930</sup> Human Rights Council, “Protect, Respect and Remedy: A Framework for Business and Human Rights,” A/HRC/8/5 (7 April 2008) at para. 8.

<sup>931</sup> Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework,” A/HRC/17/31 (21 March 2011); Human Rights Council, “New Guiding Principles on Business and Human Rights,” Endorsed by the UN Human Rights Council (16 June 2011).

human rights; and the need for more effective access to remedies.<sup>932</sup> Ruggie deliberately selected the term ‘protect’ with reference to States and ‘respect’ with reference to corporations. Likewise, the choice of the term ‘responsibility’ rather than the ‘duty’ to respect human rights was deliberate, so as to denote that a breach of these responsibilities might not entail legal consequences for corporations.<sup>933</sup> According to Deva, these two aspects might have helped in earning corporate support of the Framework, while access to effective remedies part might have persuaded the civil society, without the realization that these remedies were tied to narrow corporate responsibilities.<sup>934</sup>

Both the Framework and the Guiding Principles adopt an approach in which corporations have a responsibility to respect all international recognized human rights. The key tenet to enable corporations to meet their responsibility to respect human rights is ‘due diligence’ which implies taking steps to become aware of, prevent and address adverse human rights impacts.<sup>935</sup> Thus, corporations should adopt a human rights policy, conduct impact assessments, integrate human rights policies throughout their operations and track their performance. Regarding access to remedies, the Framework and Guiding Principles stipulates that people aggrieved by corporate activities should be able to seek redress through a range of judicial, non-judicial and company-level grievance mechanisms.<sup>936</sup> While the Framework and the Guiding Principles made a contribution in pushing the corporate accountability agenda forward on several levels,<sup>937</sup> they

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<sup>932</sup> Human Rights Council, ‘Protect, Respect and Remedy: A Framework,’ *supra* note 930 at para. 9.

<sup>933</sup> *Ibid* at para. 54.

<sup>934</sup> Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (New York: Routledge, 2012) at 105-106.

<sup>935</sup> Human Rights Council, ‘Protect, Respect and Remedy: A Framework,’ *supra* note 930 at para. 56.

<sup>936</sup> *Ibid* at para. 60-64; para. 83-101.

<sup>937</sup> Ruggie points out that extraterritorial regulation of MNCs’ activities could be a legitimate option for States to set out the expectations that companies should respect human rights throughout their operations and that States should invoke laws and policies to foster business respect for human rights. He also reminds that States do not relinquish

also embody regressive steps. Neither the Framework nor the Guiding Principles elaborate a role for binding international human rights obligations for business actors; they shift the focus of debate from the human rights obligations of corporations to the obligations of States and unduly narrow the scope of corporate obligations.<sup>938</sup> Furthermore, the Guiding Principles seem to sideline access to an effective remedy as a human right, recognized in all major international and regional human rights instruments; no Guiding Principles explicitly recognizes the victims' right to seek adequate reparation in the form of compensation, restitution and rehabilitation.<sup>939</sup> As Justine Nolan argues, "many features of Ruggie's work are 'too soft': the source of corporate responsibility is inchoate and the language adopted in the Guiding Principles is weak and non-authoritative."<sup>940</sup>

The third high tide on the debate for establishing a binding international legal mechanism for corporate human rights accountability began in September 2013 when the Republic of Ecuador made a statement at the 24th Session of the Human Rights Council stressing the importance of a legally binding international framework. On June 2014, the Human Rights Council adopted a significant resolution by which it decided "to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally

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their human rights obligations when they contract out public services to private companies or when they negotiate trade and investment-related agreements or contracts, and encourages multilateral institutions dealing with business-related issues to promote business respect for human rights within their respective mandate. Further, the Guiding Principles rightly give due importance to the access to effective remedy, though not framed as a right, and map various types of redress mechanisms. See Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,' A/HRC/17/31 (21 March 2011).

<sup>938</sup> Surya Deva (2012), *supra* note 934 at 110.

<sup>939</sup> *Ibid* at 114.

<sup>940</sup> Justine Nolan, "The Corporate Responsibility to Respect Human Rights: soft law or not law?" in Surya Deva and David Bilchitz, Eds., *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (New York: Cambridge University Press, 2013) at 20, 138.

binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”<sup>941</sup> The first two sessions of the open-ended intergovernmental working group (held in July 2015 and October 2016 respectively) had a mandate to conduct constructive deliberations on the content, scope, nature and form of the future international binding instrument. The third session will take place in October 2017.<sup>942</sup>

#### **6.4 Problematizing Corporate Social Responsibility**

In line with the “soft-law” voluntary self-regulatory initiatives supported by the UN and international business organizations, MNCs have increasingly adopted corporate codes of conduct and policies addressing human rights which have become the basis for their corporate social responsibility programs (CSR).<sup>943</sup> Several commentators have criticized MNCs practices under these voluntary regimes and called into question their adequacy and effectiveness in preventing involvement in egregious human rights abuses by MNCs operating in countries of the global south, particularly in conflict zones and under authoritarian or repressive regimes. Penelope Simons concludes, after reviewing and assessing the language, human rights content, and compliance mechanisms of these voluntary codes, developed by a number of corporations, industry groups, and intergovernmental organizations (OECD Guidelines, UN Global Compact),

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<sup>941</sup> The resolution was co-sponsored by Ecuador and South Africa, and also supported by Bolivia, Cuba and Venezuela. In the vote of the resolution, 20 Members of the HRC supported the resolution, while 13 Members abstained, and 14 Members voted against it, among them the U.S., European Union and Japan. Before the vote, both Ecuador and South Africa highlighted the unprecedented support of hundreds of civil society organizations and social movements for the resolution. Human Rights Council, “*Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*,” 26<sup>th</sup> Session, A/HRC/RES/26/9 (July 14, 2014).

<sup>942</sup> Human Rights Council, *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Mandate*, online: <<http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx>> (last accessed 30 June 2017).

<sup>943</sup> David Kinley and Junko Tadaki (2004), *supra* note 738 at 953-962; Sean D. Murphy, “Taking Multinational Codes of Conduct to the Next Level,” (2005) 43 *Columbia Journal of Transnational Law* 389 at 413-420.

that they are flawed and inadequate, and therefore unable to ensure that MNCs are not implicated in human rights violations in their extraterritorial activities.<sup>944</sup> She argues that many of the human rights provisions that do exist are drafted in vague terms, and few of the instruments reviewed deal sufficiently with human rights issues relevant to corporate activity in conflict zones or repressive regimes. Furthermore, she argues that all voluntary codes are drafted in permissive language; none of the codes or policies provide for any sort of effective compliance mechanisms such as provisions for independent monitoring, or requirements for credible reporting and verification of reports. Thus, the existing corporate self-regulation regimes with their permissive and inadequate provisions, voluntary compliance, voluntary self-assessment and voluntary verification of such assessment, are at best minimalist and at worst ineffective in creating real accountability on the part of MNCs for complicity in violations of human rights in their extraterritorial activities.<sup>945</sup>

Likewise, Christine Parker criticizes the all-too-common approach within CSR today of instituting voluntary corporate codes of conduct which allow corporations to manufacture the outcomes that suit them best, rather than those that flow from effective, external regulation. She points out the dangers of allowing the development of initiatives within the field of corporate responsibility that simply mask or mollify conflicts.<sup>946</sup> Along the same lines, John Conley and Cynthia Williams express their skepticism about the prospects for CSR.<sup>947</sup> Echoing the concerns

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<sup>944</sup> Penelope Simons, "Corporate Voluntarism and Human Rights: The Adequacy and Effectiveness of Voluntary Self-Regulation Regimes," (2004) 59:1 *Relations Industrielles* at 129-130.

<sup>945</sup> *Ibid.*

<sup>946</sup> Christine Parker, "Meta-Regulation: Legal Accountability for Corporate Social Responsibility," in Doreen Mcbarnet, Aurora Voiculescu and Tom Campbell, Eds., *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge, UK: Cambridge University Press, 2007) at 207-37.

<sup>947</sup> John Conley and Cynthia Williams, "Engage, Embed, and Embellish: Theory and Practice in the Corporate Social Responsibility Movement," (2005-2006) 31 *Journal of Corporation Law* 1-38.

raised by Simons and Parker, Conley and Williams lament the lack of an effective, independent, and enforceable review of corporate behavior that flows directly from the disaggregated sites of power and responsibility that characterize the post-regulatory world of so-called ‘new corporate governance.’<sup>948</sup>

Simons, Parker and Conley and Williams’ analysis and conclusions resonates with Shamir’s insightful argument regarding CSR discourse as a corporate response to the pressures and struggles to hold MNCs accountable for human rights violations and which has evolved into a field of private and self-regulation that bears all the hallmarks of new governance.<sup>949</sup> He argues that law has a potentially transformational role in subjecting MNCs to enforceable rules concerning their duties and responsibilities towards the public good. Yet, the field of CSR is not a mere derivative of these new pressures. Rather, it is corporate response to such pressures that eventually allows for the emergence of the field. Today, to a greater or lesser degree, corporations begin to speak, albeit often in utilitarian terms, about their responsibilities to a multitude of “stakeholders.” MNCs, he writes, with the help of market-oriented NGOs, business groups and associations, academic experts, and commercial consultants, have gradually embraced CSR as a business opportunity, treating CSR as a “project” that has to be managed with an eye to the strategies, goals, and methods of the business enterprise as a whole. Therefore, MNCs have transformed the idea of CSR into a marketing device and into a commodity that conceals the power relations that underlie the relationship between global capitalism and social inequality, social harm and social wrongs.<sup>950</sup>

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<sup>948</sup> *Ibid* at 31.

<sup>949</sup> Ronen Shamir (2005), *supra* note 841; Ronen Shamir, “Capitalism, Governance and Authority: The Case of Corporate Social Responsibility,” (2010) 6 *Annual Review of Law and Social Science* 531-553.

<sup>950</sup> Ronen Shamir (2005), *supra* note 841 at 109.



The views and arguments of prominent business and legal scholars on CSR might confirm Shamir's arguments. Rachel Kyte, former Vice President for Business Advisory Services at the World Bank's International Finance Corporation, argues that CSR is neither charity nor philanthropy, and it is driven by the quest for a win-win scenario for business and its stakeholders.<sup>951</sup> In line with Besmer's main argument that CSR is profitable for the company in terms of "savings in operating expenses and overhead costs," optimizing existing resources, and improving public image while also benefiting society,<sup>952</sup> Kyte asserts that "companies that have excelled at CSR would note that it strengthens the bottom line, enhances brand value, helps to penetrate new markets, and creates business opportunities. CSR is smart business when it is fully integrated into the business process."<sup>953</sup> Similarly, John Ruggie argues that

over time, CSR has evolved into a social institution in its own right...For none of these firms and industries – like oil and mining, Nike or GAP – is CSR a matter of choice; it becomes an operational necessity. It becomes social risk management. And their practices slowly spread to other businesses. CSR also creates opportunities for business, which businesses otherwise might not recognize and act upon – or at least not as quickly.<sup>954</sup>

Another commentator points out that the current CSR initiative or "corporate human rights initiative" shares some essential characteristics with the ancient *lex mercatoria* -- which he defines as a set of good mercantile practices, growing out of the needs and customs of the

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<sup>951</sup> Rachel Kyte, "Balancing Rights with Responsibilities: Looking for the Global Drivers of Materiality in Corporate Social Responsibility & the Voluntary Initiatives that Develop and Support Them," (2007-2008) 23 *American University International Law Review* 559 at 563-64; see also Debora L. Spar, "the Spotlight and the Bottom Line: How Multinationals Export Human Rights," (1998) 77 *Foreign Affairs* 7.

<sup>952</sup> Veronica Besmer, "The Legal Character of Private Codes of Conduct: More than Just a Pseudo-Formal Gloss on Corporate Social Responsibility," (2006) 2 *Hastings Business Law Journal* 279 at 291-292.

<sup>953</sup> Rachel Kyte (2007-2008), *supra* note 951 at 564.

<sup>954</sup> John G. Ruggie, "The Business of Business is Business: Against the Proposition," The Economist Debate, Gotham Hall, New York City, 2 November 2008, online: < <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-Economist-Debate-2-Nov-2008.pdf> > (retrieved 30 June 2017).

marketplace that ultimately gave rise to law in more recognizable and more enforceable form.<sup>955</sup> The corporate human rights initiative, he argues, has developed at the intersection of the law and the market place, which mirrors the two dominant faces of globalization: the expansion of international trade and commerce without regard to boundaries, and the universalizing effects of the human rights movement.<sup>956</sup> Since the 1990s, he writes, prominent MNCs have adopted codes of conduct which make the protection of at least some human rights an explicit corporate objective.<sup>957</sup> Many companies now advertise their international human rights policies; corporate officers periodically gather at human rights roundtables and affirm the strategic value of a public commitment to such rights, even as a self-styled ‘progressive’ stream of corporate and management scholarship offers a theoretical foundation for understanding the economic self-interest of CSR.<sup>958</sup> This corporate human rights initiative, Steinhardt writes, offers fertile ground for the emergence of a stable and significant body of commercial standards which would constitute ‘a’ or ‘the’ new *lex mercatoria*.<sup>959</sup> He concludes by highlighting that “we will see the continued development of broad-based organizations specifically devoted to bring human rights issues into the corporate boardroom [...], and if a new law of corporate human rights responsibility emerges from this ‘buzzing, blooming confusion’ of developments and initiatives, it would not be the first time that law had gradually crystallized from commercial practices that

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<sup>955</sup> Ralph G. Steinhardt, “Corporate Responsibility and the International law of Human Rights: The New *Lex Mercatoria*,” Phillip Alston, Ed., *Non-State Actors and Human Rights* (New York: Oxford University Press, 2005) at 179.

<sup>956</sup> Ralph G. Steinhardt (2005), *supra* note 955 at 225.

<sup>957</sup> Steinhardt points out that a global standard for social accountability – SA8000—has been created to guide and assess corporate compliance with international human rights norms across industrial and geographical boundaries. Coalitions in apparel, textiles, and footwear have adopted standards industry-wide to govern international labour practices. *Ibid* at 177-178.

<sup>958</sup> *Ibid* at 178.

<sup>959</sup> *Ibid* at 224.

were grounded in what the entrepreneurial class considered to be its own long-term self-interest.” [Emphasis added]<sup>960</sup>

While “the blurring of the public/private divide in terms of authority and capacity is allowing well-organized, well-resourced and self-interested corporations to stealthily divide and conquer those who seek to bring them to account for the social consequences of their actions,”<sup>961</sup> the CSR discourse and movement have steadily developed and been integrated into the emerging private regulation of corporate human rights responsibility, positioning and commanding the agenda and *long-term interest of the entrepreneurial class*. The debate and struggle for state and non-states accountability for MNCs human rights violations continue. The current normative order affecting MNCs is far from settled, and it is continually in formative and dialectical negotiation and contestation (through challenge, absorption, and reining in) with local Indigenous and non-Indigenous communities, and environmental and human rights NGOs, who continue challenging MNC’s *unchecked power* and *amorality of profit* and demanding binding international regulations.

## 6.5 Conclusion

Granting the indictment of both acquisitive/predatory notions of rights over ‘land’ and of all anthropocentric narratives of human rights, how may ‘we’ proceed to de-personify aggregations of techno-scientific capital that claim a higher order of human rights than those born as human and that, in turn, also enjoy a near-complete immunity and impunity for crimes against humanity?

(Upendra Baxi, 2012)<sup>962</sup>

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<sup>960</sup> *Ibid* at 179 and 225.

<sup>961</sup> David Kinley, Ed., *Human Rights and Corporations* (Surrey, UK: Ashgate, 2009) at Introduction, xvii.

<sup>962</sup> Upendra Baxi, Foreword, in Daniel Fischlin and Martha Nandorfy, *The Community of Rights The Rights of Community* (Montreal: Black Rose Books, 2012).

This chapter has critically examined the legal framework for multinational corporate accountability through international human rights standards. Currently, corporations are not subject to binding human rights obligations contained in international treaties. Such obligations adhere only to the States that sign them. Therefore, international human rights norms impose only indirect responsibilities on corporations through States.

Although international human rights law has developed conceptual and doctrinal tools -- “horizontal” and “extraterritorial regulation” -- to address harms caused by non-State actors, its main problem and challenge has been enforcement and compliance. Unlike some other areas of international law, whether public or private, international human rights institutions and mechanisms have limited direct enforcement capabilities, even against States responsible for human rights violations. Furthermore, with regard to MNCs’ conduct, there is an additional enforcement problem in that international human rights treaties do not provide for any direct international monitoring or assessment of conduct concerning private actors. Instead, monitoring and assessment are indirect, through the lens of State responsibility. The important initiative of adopting direct international binding regulations – the UN Norms – was strongly criticized and vigorously opposed by international business and industry organizations, supported by influential Western States and some academics. The Norms were effectively abandoned in 2005. Thus, while MNCs have been granted “hard law” binding and enforceable rights under international trade and foreign investment law, they have secured “soft law” instruments of non-binding nature to regulate their obligations and responsibilities which are embedded in the prevailing international human rights law and CSR mechanisms.

International law’s inadequate response to concerns raised by tragedies and abuses caused by MNCs such as Texaco in the Ecuadorian Amazon, Union Carbide in Bhopal, or the

Australia's Broken Hill Proprietary (BHP) in OK Tedi, Papua New Guinea can be attributed to the same “power-centred” agenda that created doctrinal justifications for Indigenous dispossession in the past, that is the economic interest of powerful states which have been eager to protect their overseas investments. It is clear that home States have generally been reluctant to regulate the operations of their corporate nationals abroad due to the perception that such regulation would place their MNCs at a competitive disadvantage compared to MNCs registered in other countries. In addition, host States’ ability and desire to regulate corporate activities has been impaired by the imperative of securing foreign direct investment in a globalized marketplace. In the end, despite some incorporation or adoption of human rights standards by the MNCs themselves – through corporate social or human rights initiatives -- the overall ethos and priority continue to lie in economic interests. Both States and MNCs continuously balance human rights concerns with economic interests, such as for instance the protection of Indigenous rights versus the protection of investor’s rights.<sup>963</sup> Yet, the tragic human and social impact and abuses of MNCs’ operations signals an urgent need for States, particularly home States, to regulate corporate conduct and move towards a “people-centered” international law.<sup>964</sup>

Meanwhile, affected Indigenous communities, despite tremendous structural barriers and significant legal challenges, including economic, social and political marginalization, and substantive and procedural obstacles in accessing justice and obtaining remediation, continue searching and battling for justice and demanding State and non-State accountability for MNCs

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<sup>963</sup> Ryan Suda, “The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization,” Olivier De Schutter, Ed., *Transnational Corporations and Human Rights*, Portland (Oregon: Hart Publishing, 2006); David Kinley and Justine Nolan, “Trading and Aiding Human Rights: Corporations in the Global Economy,” (2008) 25: 4 *Nordic Journal of Human Rights* 353-377.

<sup>964</sup> Muthucumaraswamy Sornarajah, “Power and Justice: Third World Resistance in International Law,” (2006) 10 *Singapore Year Book of International Law* 19; Sara Seck, “Home State Responsibility and Local Communities: The Case of Global Mining,” in (2008) *Yale Human Rights and Development Law Journal* 177.

abuses and violations. International human rights doctrines of ‘horizontality’ and ‘extraterritorial regulation’, despite their limitations, still constitute the only legal mechanism for claiming States and non-States accountability for MNCs’ human rights violations. Yet, as noted in Chapter Five (section 5.4.2), caution is clearly warranted with respect to simple reliance on and uncritical embrace of this legal field. As the struggle and demand for corporate human rights accountability has intensified, the prevailing international human rights field, together with the CSR field, not only have been transformed into business and managerial assets but also have become a paradigm for the deployment of authority and law, playing a role on the one hand in validating and legitimizing MNCs expansion and operations in the global market economy, and on the other hand in overlooking or bypassing MNCs’ violations and impunity.

## Chapter 7: Conclusion: International Human Rights Law, Global Governance and Indigenous Peoples' Resistance and Demand for Justice

[The Indigenous peoples in Peru] had been transformed into a corralled nation (isolated in order to be better and more easily managed) about which only those who had walled it in spoke, while viewing it from a distance with repugnance or curiosity. But oppressively isolating walls do not extinguish the light of human reason, especially after that light has had centuries of use, nor do they dam up the springs of love from which art, [life and resistance] flows.

(Jose M. Arguedas, *I Am Not an Acculturated Man*, 1968)<sup>965</sup>

I am personally a strong advocate of the politicization (through local, regional, national and transnational organizations) of Indigenous peoples as the primary and fundamental tool for their liberation and autonomous development...[so they can] make individual and collective choices and decisions that are based on a critical knowledge of their own culture/politics and the culture/politics of the dominant national/global society...There is a need to define a new generation of Indigenous human rights that guarantee, both in the biosphere and in society as a whole, the existence, protection and development of autonomous Indigenous territories, cultural diversity and linguistic and epistemological specificity, as well as the Indigenous peoples' demand to dream their future in their own civilizational terms. (Stefano Varese, 2006)<sup>966</sup>

In the Americas, and throughout the world, there are “vested interests and interest-ridden juridical blindness that obscure and blur” the persistence of violence, harm and dispossession of Indigenous peoples' lives and lands.<sup>967</sup> This juridical blindness is reinforced by a pervasive racism and historical myopia which make Indigenous communities' predicament invisible,

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<sup>965</sup> Jose Maria Arguedas, *The Fox from Up Above and the Fox from Down Below*, Trans. F. H. Barraclough (Pittsburgh, Pa.: University of Pittsburgh Press, 2000) at 268-269.

<sup>966</sup> Stefano Varese, *Witness to Sovereignty: Essays on the Indian Movement in Latin America* (Copenhagen: IWGIA, 2006) at 274 and 285.

<sup>967</sup> Bartolome Clavero, “On De-Colonialism and Post-Colonialism,” in Christine Hunefeldt and Leon Zamosc, Eds., *Ethnicity from Various Angles and Through Varied Lenses: Yesterday's Today in Latin America* (Portland, Oregon: Sussex Academic Press, 2011) at 274-275.

distorting timeframes and thus making their lives less transparent.<sup>968</sup> Thus, the plight of shattered and “poisoned” Indigenous children in Huancavelica, La Oroya, Cerro de Pasco, Cusco, Cajamarca, Ancash, and many other places in Peru and elsewhere, as a result of mercury, lead, arsenic, and cadmium contaminations produced by corporate mining and hydrocarbon exploitations, are walled up and silenced.

This thesis has sought to understand the desperate or precarious situation of Indigenous peoples in Peru in light of an international order that supposedly protects human rights and Indigenous rights in particular. Alongside, it aimed critically to examine the role of a national state’s legal framework and policies not only in validating, authorizing and embedding the increasing encroachment on and dispossession of Indigenous lands and territories by MNCs in the extractive industries, but also in authorizing a growing and pervasive trend of persecution and criminalization of Indigenous communities who challenge and resist MNCs’ operations. The examination of the relationship between national and international law, and the relationship between corporate, state, and law in this process provides a terrain to grasp how international economic law and international human rights law have become part of evolving regulatory architectures of global governance aiming to validate and embed global capital accumulation.

The 1980s and 1990s witnessed the beginning of the third historical cycle of invasion and dispossession of Indigenous lands and territories in Latin America, conducted primarily by private corporations with the support of state regulations and policies, including IFI policies.<sup>969</sup> Indigenous resistance and opposition to this process have been increasingly and severely

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<sup>968</sup> *Ibid.*

<sup>969</sup> The first and second historical cycle of invasion and dispossession of Indigenous peoples’ land and territories happened in the 16<sup>th</sup> and 19<sup>th</sup> century respectively. Raquel Irigoyen Fajardo, Presentation, 156<sup>th</sup> Session of the IACHR—Thematic Hearing: Human Rights Situation of Defenders of the Environment in the context of Extractive Industries in the Americas (October 19, 2015).



repressed and criminalized. While in 2004 Global Witness documented 36 land and environmental defenders killed, in 2015, it reports 185 known deaths worldwide, by far the highest annual death toll on record and a 59 percent increase from 2014. The deadliest countries for land and environmental defenders in 2015 were Brazil, the Philippines, Colombia, and Peru;<sup>970</sup> about 40 to 50 percent of the victims were Indigenous and nearly three-quarters of the deaths were in Central and South America. This is “likely just the tip of the iceberg – it is safe to assume that some deaths are not being publicly reported.”<sup>971</sup> The pervasive and growing persecution, violence against and criminalization of Indigenous peoples are not isolated issues, they are “neither capricious nor accidental.” They are “part of concerted attack aiming to silence, avoid and or limit debate on serious economic, social, and environmental policy questions, and stop [Indigenous] challenges to established power and practices” of State and corporate actors.<sup>972</sup> They are “often essential for the production and reproduction of wealth and productivity in the economic sense and part and parcel of what we call successful 'development' or globalization.”<sup>973</sup>

Paradoxically, Indigenous peoples’ land dispossession, persecution, violence and criminalization have happened not only in the context of economic globalization, which has

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<sup>970</sup> Global Witness, “*On Dangerous Ground, 2015’s Deadly Environment, the Killing and Criminalization of Land and Environmental Defenders Worldwide*,” Annual Report, June 2016; CIEL, Article 19, and Vermont Law School, “*A Deadly Shade of Green: Threats to Environmental Human Rights Defenders in Latin America*,” Report, London, UK, August 2016.

<sup>971</sup> Global Witness, “*Global Witness releases new data on the murder rate of environmental and land activists in Honduras, the highest in the world*,” March 04, 2016, online: <<https://www.globalwitness.org/en/press-releases/global-witness-releases-new-data-murder-rate-environmental-and-land-activists-honduras-highest-world/>> (retrieved 30 June 2017).

<sup>972</sup> Jennifer Moore, “*In the National Interest? Criminalization of Land and Environment Defenders in the Americas*,” Mining Watch Canada-ICLMG, Discussion Paper, Ottawa, August 2015 at 5; Inter-American Commission on Human Rights, “*Criminalization of the Work of Human Rights Defenders*,” Report, OEA/Sr.L/V/II., Doc. 49/15, Dec. 2015.

<sup>973</sup> Balakrishnan Rajagopal, “Global governance: old and new challenges,” in UN Human Rights Office of the High Commissioner, Ed., *Realizing the Right to Development* (New York: UN Publication, 2013) at 170; Susan Marks, “Human Rights and Root Causes,” in (2011) 74:1 *Modern Law Review* 57.

facilitated the liberalization of trade and investment and corporate expansion, but in the context of growing international/national human rights norms and declarations aiming to promote and protect Indigenous peoples' rights. The emergence and development of ethnic claims and Indigenous peoples' rights came hand in hand with "development" policies sponsored and financed by the World Bank, which provided abundant resources for projects and programs on Indigenous peoples. The UN Special Rapporteur on the Rights of Indigenous Peoples have extensively documented "deep, systemic, widespread and blatant violations" of Indigenous rights, enshrined in the UNDRIP and ILO Convention 169, by states and corporate actors.<sup>974</sup> The paradox of the growing numbers of international and national legal instruments recognizing Indigenous peoples' rights alongside the increasing dispossession of Indigenous lands, persecution and criminalization, does not simply reflect the gap between law and its implementation; it also reflects the asymmetries of power between states, MNCs, intergovernmental institutions and Indigenous peoples, which allow the development of powerful and effective binding norms protecting corporate trade and investor rights, embodied in international economic law (IEL) in contrast to non-binding soft-law norms regulating corporate responsibilities for the environment and Indigenous peoples' rights, embodied in corporate social responsibility (CSR) voluntary mechanisms and international human rights instruments.

While IEL and corporate law "constitute, enable and protect MNCs"<sup>975</sup> international human rights law and CSR mechanisms are linked to and help to extend the expansion and

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<sup>974</sup> Victoria Tauli-Corpus, *Statement of the UN Special Rapporteur on the Rights of Indigenous Peoples*, August 9, 2015, online: <<http://unsr.vtaulicorpuz.org/site/index.php/en/statements/76-9august2015>> (retrieved 30 June 2017); Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, *Extractive industries operating within or near indigenous territories*, A/HRC/18/35, July 11, 2011.

<sup>975</sup> Joel Bakan, "The invisible Hand of Law: Private Regulation and the Rule of Law," in (2015) 48:2 *Cornell International Law Journal* 279 at 286.

deepening of global capital accumulation by means of laws and regulations designed to facilitate and remove barriers to the power and mobility of MNCs. Thus, international human rights norms and discourse have been “instrumentalized” by MNCs, IFIs and States. MNCs have increasingly embraced and adopted international human rights norms and discourse and embedded them in their CSR programs. Barrick Gold’s Vice President points out that, MNCs increasingly started to recognize their role in accountability for human rights thanks to the UN Guiding Principles on Business & Human Rights; “everyone gains when human rights are respected...For companies, it reduces the risk of disruptions to business, as well as the risk of reputational damage and lawsuits, and it upholds what should be core values for every multi-national.”<sup>976</sup> The World Bank has also articulated the understanding that sustainable development requires at a minimum the institutionalization of universal human rights for particularly vulnerable populations such as Indigenous peoples.<sup>977</sup> The World Bank, however, was reluctant to adopt the principle of free, prior, and informed *consent* established by the ILO 169; instead, it adopted a policy of free, prior, and informed *consultation*; a very weak formulation aiming not to have binding commitment to take the views of Indigenous communities in decision-making processes, and which has been describe by critics as the “obligation to inform Indigenous peoples that their human rights are about to be violated.”<sup>978</sup> This weak formulation was subsequently applied by

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<sup>976</sup> Jonathan Drimmer, “*BLOG, A Passion for Respecting Human Rights*,” November 11, 2014, online: <<http://barrickbeyondborders.com/authors/jonathan-drimmer/>> (retrieved 30 June 2017).

<sup>977</sup> The International Bank for Reconstruction on Social Development, *Development and Human Rights*, 1998 at 20; see also the World Bank Operational Policies and Bank Procedures on Indigenous Peoples (OP/BP 4.10) and on Involuntary Resettlement (OP/BP 4.12), online: <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,menuPK:4564185~pagePK:64719906~piPK:64710996~theSitePK:502184,00.html>> (retrieved 30 June 2017).

<sup>978</sup> Stuart Kirsch, *Mining Capitalism: The Relationship between Corporations and Their Critics* (Oakland: University of California Press, 2014) at 208. On August 4, 2016, the World Bank’s Board of Executive Directors approved a new Environmental and Social Framework. Standard 7 on Indigenous Peoples/Sub-Saharan African Historically Undeserved Traditional Local Communities is the policy that replaces the current safeguard for

many international financial institutions and MNCs; it has also been deployed by States – such as Peru -- as a means of blocking Indigenous demands for free, prior, and informed consent.

Since the early 1990s, Peru has become one of the most open and neoliberal economies not only in Latin America, but in the world. The legal framework developed since then has eased foreign and private corporate investment in the extractive industry, reinforced MNC's leverage and access to the state, and weakened the rights of Indigenous peoples, facilitating the dispossession of their lands. At the same time, Peru signed and ratified one of the most important international instruments protecting Indigenous peoples' rights, ILO 169, which was ratified in January 1994 and entered into force in February 1995. The Fujimori government's decision to ratify ILO 169 was a simple formality and strategic for it was not implemented at all. It took sixteen years for the Law on the Right of Indigenous Consultation to be enacted. Yet, according to Indigenous organizations, it distorted the spirit of ILO 169 for it prescribes the right to consultation after concessions have already been granted to oil, gas and mining companies; and most importantly, it prescribes that if an agreement is not reached, the final decision on the approval of the legislative or administrative measure should be made by the state agency. Ultimately, the principle of free, prior, and informed *consent* has been “expropriated” or coopted by the State and corporate actors, imposing their own terms and conditions to reconfigure its

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Indigenous peoples, Operational Policy 4.10. While the new policy introduces important concepts, such as protection for Indigenous peoples in voluntary isolation, and free, prior, informed consent, its language is complicated, confusing and difficult to apply. In addition, it sets a weaker set of standards and supports project activities resulting in the allotment of collectively-held Indigenous lands. See Indian Law Resource Centre, “*The World Bank Approves Indigenous Peoples Policy*,” August 4, 2016, online: <<http://indianlaw.org/mdb/world-bank-approves-indigenous-peoples-policy>> (retrieved 30 June 2016); Forest Peoples Programme, “*World Bank undermines decades of progress on building protections for the rights of Indigenous Peoples*,” October 4, 2016, online: <<http://www.forestpeoples.org/topics/safeguard-accountability-issues/news/2016/10/world-bank-undermines-decades-progress-building>> (retrieved 30 June 2017).

content and essential meaning in order to make it an instrument of legitimizing extractive projects and making it inaccessible or at least irrelevant to Indigenous peoples.

The analysis and discussion of Indigenous peoples' predicament in Peru and the critical examination of international law and Peru's policies and laws governing Indigenous peoples and the extractive industries, has allowed this thesis to expose and demystify the official image of Peru as a successful mining country. Both nationally and internationally, Peru is presented, identified, and shown as a model of a successful country, with stable and sustainable economic growth. Peruvian government officials, as well as representatives of multilateral financial institutions and executives of multinational companies, support and promote this discourse. They call for further laws and regulations that would allow this path of success, economic growth and progress to continue. The thesis, however, has shown the other side of that success, the side that often remains in the dark and is almost never shown, which is the deep suffering and dislocation of many Indigenous communities that have been affected by mining projects. And the law, both national and international, seems powerless and incapable of confronting this reality; on the contrary, the law is complicit.

The international legal architecture that has emerged since the 1980s, primarily formed by hard laws constituting, enabling and protecting MNCs and soft laws governing MNCs' responsibilities with human rights and Indigenous peoples' rights, operates not only "conservatively to lock-in existing entitlements to private property, but also innovatively to create new forms of private property in ways that allow capital to overcome limitations and barriers to accumulation."<sup>979</sup> It has become a "doctrine of the universal, self-evident and

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<sup>979</sup> Stephen Gill and A. Claire Cutler (2014), *supra* note 821 at 16.

individualized ‘rights of man,’ dedicated to the production of value, that effectively masks in universalistic and naturalized legal doctrines the lurid trail of violence that accompanied the dispossession of Indigenous populations.”<sup>980</sup> In fact, as Tully argues, different aspects of this global legal architecture continue to be structured by imperial relations inherited from five hundred years of western imperialism.<sup>981</sup> Examined in a historical context, the new alliance between international economic law and the neo-liberal version of human rights is hardly novel or surprising: commerce has, since, the time of Vitoria, furthered itself through an invocation of natural rights and ‘civilization.’<sup>982</sup>

Human rights, as Teubner argues, “are aimed at removing unjust situations, not creating just ones.”<sup>983</sup> Thus, it is important for Indigenous peoples to remain alert to the way human rights are always implicated in larger structures of power and to the deeply political character of human rights practices.<sup>984</sup> Dominant human right discourse and mechanism have become a powerful ideology and “squeezed out other more critical and potentially transformative alternatives”<sup>985</sup> and have the potential to absorb and co-opt Indigenous peoples’ struggles and resistance, for every decisive political action and event is double-sided: “the spaces, the liberties, and the rights won by individuals [and groups] in their conflicts with central powers always simultaneously prepared a tacit but increasing inscription of individuals’ [and groups’] lives within the state

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<sup>980</sup> David Harvey, *Seventeen Contradictions and the End of Capitalism* (New York: Oxford University Press, 2014) at 59.

<sup>981</sup> James Tully, *Public Philosophy in A New Key, Vol. II: Imperialism and Civic Freedom* (New York: Cambridge University Press, 2008) at 127-165.

<sup>982</sup> Antony Anghie (2005), *supra* note 366 at 256.

<sup>983</sup> Gunther Teubner (2006), *supra* note 51 at 345-346.

<sup>984</sup> Duncan Ivison, “Human Rights and Political Agency: On Pogge’s Analysis of Human Rights Violations Today,” in David Kinley, et al, Eds., *Human Rights: Old Problems, New Possibilities* (Cheltenham, UK: Edward Elgar Publishing, 2013) at 73.

<sup>985</sup> *Ibid.*

order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves.”<sup>986</sup>

As the nature of human rights law is as paradoxical as the law itself, today international human rights offers an ethical/moral language -- in the field of law -- to confront injustices, to expose the amorality, immorality of the modern face of power at all levels – local, regional, national, supranational, and global.<sup>987</sup> In the field of law and rights, “there is a battle to be fought, not only over which universals and what rights should be invoked in particular situations but also over how universal principles and conceptions of rights should be constructed.”<sup>988</sup> Indeed, as Thornberry argues, “the ability of human rights and international law to accommodate the Indigenous is a forerunner of *bigger battles* about what kind of human rights are appropriate for a world integrating and diversifying at the same time, and how nations address and respect the ‘others’ of their imagination. Only in the imaginary ‘*glass-ball country*’ could these issues be resolved; in the substantial world, the conversation continues, and *the struggle...*”<sup>989</sup> Indigenous Peoples, within their critical dimension and location, and as global subjects, play a disruptive role on both current critical thought and standard forms of political being.

In the face of neoliberal globalization and increasing competition over resources and knowledge, the challenges for Indigenous peoples are formidable. The persistent escalation of persecution, criminalization and violent and deadly attacks against Indigenous leaders and activists and environmental and land defenders which has become a ‘daily genocide’ can and

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<sup>986</sup> Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998) at 121.

<sup>987</sup> Upendra Baxi, Fareword, at L. Westra, *Globalization, Violence and World Governance* (Leiden: Brill NV, 2011).

<sup>988</sup> David Harvey, *A Brief History of Neoliberalism* (New York: Oxford University Press, 2007) at 179.

<sup>989</sup> Patrick Thornberry (2002), *supra* note 694 at 427-428.

must end.<sup>990</sup> As the current globalization process and global injustice destroy the world, Indigenous peoples embrace the possibility of an authentic world-forming, a ‘creation’ of the world which means “immediately, without delay, reopening each possible struggle for a world that must form the contrary of a global injustice.”<sup>991</sup> The process of globalization has located Indigenous peoples at the cutting edge of the “quest for global justice” and at the heart of contemporary trends in international law and international human rights law. Indigenous peoples’ resistance and inexhaustible struggle for justice continue. As Victoria Tauli-Corpuz points out, “there is no slowing down. We have managed to survive against all odds in the past millennium. We contributed in reshaping discourses on human rights, development and environment. The terrains of our struggles range from our own communities to the national, regional and global arenas.”<sup>992</sup>

In a letter he wrote to the Spanish King in 1613, Felipe Huaman Poma de Ayala, an Indigenous chronicler and writer, highlighted all the sufferings of Indigenous peoples in the colony. In one section of the letter, he writes: “At the mercury mines of Huacavelica the Indian workers are punished and ill-treated to such an extent that they die like flies and our whole race is threatened with extermination...”<sup>993</sup> When he wrote all these sufferings he said, “Escrivillo es llorar,” “To Write is to Cry.”

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<sup>990</sup> CIEL, Article 19, and Vermont Law School, “A Deadly Shade of Green: Threats to Environmental Human Rights Defenders in Latin America,” Report, London, UK, August 2016; UN Special Rapporteur on the Situation of Human Rights Defenders, “*Situation of Human Rights Defenders*,” Report, UN A/71/281, 3 August 2016.

<sup>991</sup> Jean-Luc Nancy, *The Creation of the World or Globalization*, translated by F. Raffoul and D. Pettigrew (Albany: State University of New York Press, 2007) at 54.

<sup>992</sup> Victoria Tauli-Corpuz, “The Prospect Ahead,” in J. Mander and V. Tauli-Corpuz, Eds., *Paradigm Wars: Indigenous Peoples’ Resistance to Globalization* (San Francisco, CA: Sierra Club Books, 2006) at 219.

<sup>993</sup> Felipe Huaman Poma de Ayala, *Letter to A King: A Peruvian Chief’s Account of Life Under the Incas and Under Spanish Rule*, Arranged and Edited with an Introduction by Christopher Dilke and translated from Nueva Cronica y Buen Gobierno (New York: E. P. Dutton, 1978) at 135.



Writing this thesis has also been to cry, but more importantly, it has been to express survival, resistance and hope. The demands of justice have led Indigenous communities to defy an unjust context in order to transform it. Indigenous peoples bear witness for justice at the risk of their own lives; they do not abdicate before the demand of justice.<sup>994</sup> Maxima Acuña de Chaupe's resistance and struggle against the US Newmont Gold Corporation's Conga Project in Peru, represents Indigenous peoples' resistance to the nihilism of globalization and their inexhaustible struggle for justice. She affirms:

Our struggle is not only for my family and my land, is for all communities, for the protection of peoples' health, life, and the lagoons...In Cajamarca there are communities where a great number of people have cancer because they have lead in their blood and nobody says and/or does anything. *I will not be silent. I know they will come to look for me and they will disappear me, but in the farm field I was born and in the earth I shall die.*<sup>995</sup> [...] *I defend the land; I defend the water, because it is life.* I am not afraid of corporate power; I will continue the struggle for the *compañeros* who died in Celendín and Bambamarca and for those in Cajamarca who continue the struggle.<sup>996</sup>

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<sup>994</sup> Jacques Derrida and Maurizio Ferraris, *A Taste for the Secret* (Cambridge, UK: Polity Press, 2001) Translated from the French and Italian by Giacomo Donis and edited by G. Donis and D. Webb, at 16-17.

<sup>995</sup> Sara Cuentas Ramirez, "Soy pobre y analfabeta, pero lucharé por nuestras montañas" in *El Pais*, Madrid, 7 April 2015, online: <[http://elpais.com/elpais/2015/03/17/planeta\\_futuro/1426588446\\_691506.html](http://elpais.com/elpais/2015/03/17/planeta_futuro/1426588446_691506.html)> (retrieved 30 June 2017).

<sup>996</sup> Maxima Acuña's Acceptance Speech, 2016 Goldman Environmental Prize recipient ceremony, 18 April 2016, online: <<http://www.goldmanprize.org/recipient/maxima-acuna/>> (retrieved 30 June 2017).

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