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Indigenous Peoples' rights, Judicialization and Natural Resources

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Abstract

Disputes between indigenous peoples, governments and transnational capital over the exploitation of natural resources in Latin America have become both highly judicialized and increasingly violent. Indigenous communities at the sharp end of processes of "accumulation by dispossession" have challenged state sovereignty over natural resources, appealing to the collective rights of indigenous peoples now enshrined in international and constitutional law and calling for alternative models of development. The widespread ratification by Latin American governments of International Labor Organization's Convention 169 during the 1990s prompted numerous challenges to large scale development projects in the national courts. The jurisprudence of the regional Interamerican Court of Human Rights has also strengthened indigenous peoples' claims and progressively incorporated key aspects of the 2007 UN Declaration on the Rights of Indigenous Peoples. However, the effects of such processes of judicialization are far from clear. Key international principles, such as prior and informed consultation, or free prior and informed consent (FPIC) are notoriously ambiguous and remain largely unregulated. National elites have deepened their alliances with transnational capital and governments have mounted a backlash against the regional human rights system, in part because of its progressive stance on indigenous peoples' rights. At the same time indigenous peoples' protest movements are criminalized and subject to violent repression. In this paper I will reflect on the relationship between law, judicialization, and violence in the governance of natural resource exploitation in indigenous territories in Latin America.

Introduction

Indigenous peoples in Latin America are amongst those human beings whose rights and indeed whose very existence have been most systematically denied and violated.[1] This has occurred through a combination of conquest, colonialism, racism and the violence of different national and international models of socioeconomic and cultural development. Although they only constitute 11 per cent of the total population of the region, of the 40% of Latin Americans who live below the poverty line, some 20 to 25% are indigenous, and they constitute an even higher percentage of the 17% of Latin Americans who live in extreme poverty. The livelihoods of indigenous peoples' across the region are severely threatened by the current boom in extractive industries (oil, gas and mining), with their lands, water, forests, fisheries and subsoil resources increasingly affected by national and transnational capital. Some campaigners have estimated that between 50 and 80 per cent of all global mineral resources targeted by mining companies are on lands claimed by indigenous peoples (Tebbteba Foundation/IWGIA 2012: 5). As a direct result of such development patterns, indigenous peoples' communities have been militarized and their environments contaminated. Political division and conflict within communities is often associated with the arrival of extractive industries, as some may gain more short term benefits than others and companies generally tend to try and play off one sector of indigenous communities against another. In extreme cases lands have simply been destroyed and communities displaced. Human rights violations and violence appear to go hand in hand with such patterns of resource exploitation. As a recent report into indigenous peoples and extractive industries states "Environmental degradation comes in the form of erosion of biological diversity, pollution of air, soil and water, and destruction of whole ecological systems, and other environmental impacts. Human rights violations range from the violation of indigenous peoples' rights to self-determination (which includes the right to determine one's economic, social, and cultural development); rights to land, territory and resources; displacement; and violations of the most basic civil and political rights including killings, arbitrary arrests and detention, torture, arson and forced relocation." (Tebbteba Foundation/IWGIA 2012: xxi-xxii). Indigenous peoples' protests against the impact of such forms of development

[1] The definition of exactly who counts as "indigenous" continues to be contentious, although it is now widely accepted that indigenous identity is not static or "pre-modern", but rather dynamic, changing over time. The most commonly cited definition, provided by UN special rapporteur Jose Martinez Cobo, emphasizes the characteristic of non-dominance as a result of historical colonization and its ongoing legacies:

> "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society."

The 2007 UN Declaration on the Rights of Indigenous Peoples does not itself define "indigenous peoples" but it makes clear who they are by emphasizing the common pattern of human rights violations they have suffered.

have been increasingly criminalized in recent years, as issues of socioeconomic development have been securitized and social protest reframed as a threat to national security (Mella 2007).

Paradoxically, at the same time as they face dispossession and criminalization, indigenous peoples have been the focus of a series of unprecedented legal innovations at international, regional and national levels during the last 20 years. The collective rights of indigenous peoples have been the subject of relatively strong legal codification at national and international levels. In effect, indigenous peoples are part of processes of legal globalization, involving the spread of international norms across borders and transnational phenomena. In turn social movements invoke legal norms to pursue their claims, in the process building new transnational epistemic communities.

In contrast to Asia and Africa, where the concept of "indigenous peoples" has been much more contested, the majority of Latin American countries have at least accepted the existence of their pre-conquest populations. Although controversy continues about the political, economic and social implications of legally recognizing the collective rights of indigenous peoples, little by little Latin American states have in theory accepted the principle that these populations should enjoy some degree of internal self-determination within existing nation states. Compared to other regions of the world, Latin America has been a front runner in recognizing indigenous peoples' rights in law.

These changes are due to a combination of various factors, including: (a) advances in international human rights norms regarding indigenous peoples and the receptivity of Latin American societies to these norms; (b) the shift towards a kind of "multicultural" or "plurinational" constitutional order in the region throughout the 1990s and 2000s (Assies et. al 1999; Van Cott 2000; Sieder 2002; Sánchez Botero 2010; Yrigoyen 2010), in itself a clear example of norm diffusion shaping regional "legal" or "constitutional culture"; (c) the emerging jurisprudence of the Interamerican system of human rights regarding the rights of indigenous peoples (Rodriguez-Piñero 2007; Anaya 2009), even though this is highly contested by governments; (d) the invocation of individual and collective human rights by indigenous peoples' social movements (Yashar 2005; Brysk 2000; Speed 2007), and (e); growing national and regional tendencies towards judicialization – taking social struggles to the courts as rights claims (Sieder, Schjolden y Angell 2005; Santos y Rodriguez-Garavito 2005; Rodríguez-Garavito, Villegas y Uprimny 2006; Couso, Huneeus y Sieder 2010).

During the last twenty years the combination of all of these factors put Latin America in the vanguard of debates about the legal codification of the collective rights of indigenous peoples and their justiciability or actionability before the courts. The implications of such rights guarantees for processes of development remain highly contentious.

Norm transformation: the impact of international law.

In general terms, Latin America is a region of "high porosity to human rights norms and institutions" (Rodríguez-Piñero 2007: 185). This is due to a series of historical factors including the sustained circulation of ideas such as citizenship and rights, and the role that law has played in the constitution of the region's nation-states and their diverse imaginaries - something which continues in the recent round of constitutional transformation in Ecuador and Bolivia (Goodale 2008). It is also due to such factors as the strength and transregional nature of Latin American social movements, especially human rights and indigenous peoples' movements (Sikkink 2005). As I will explain in more detail below, the role of the Interamerican system of human rights has also been very important on questions of indigenous rights and development. The Interamerican Court of Human Rights is one of the most rights-guaranteeing courts in the world. The rulings and recommendations of the Interamerican Commission and Court of human rights directly or indirectly influence jurisprudence and legal culture throughout different countries.

Compared to other regions in the world, Latin America has led the process of legal recognition of indigenous peoples' rights, at least in terms of norm shifts. International Labor Organization Convention 169, the first binding international legal instrument dealing with indigenous peoples' collective rights – has been ratified by most countries in Latin America (14 out of 22 signatories). ILO 169 replaced the earlier 1957 ILO Convention 107 on tribal and indigenous peoples. This earlier convention was marked by an ideology of integrating indigenous people into dominant society and culture: an ideology that was reflected in the policies of many Latin American states before the 1970s. The ratification of ILO 169 by Latin American states can be understood as part of what Finnemore and Sikkink have referred to as the "cascade of norms" that occurred when Latin American governments ratified numerous human rights treaties and conventions following their transition to democratic, constitutional rule in the 1980s and 1990s (Finnemore and Sikkink 1998). Ratification was also a reaction to the growing continental mobilization of indigenous peoples' social movements which reached its apogee in 1992, centring on rejection of official celebrations of the Spanish quincentenary (Bengoa 2008; Stavenhagen 2002).

ILO Convention 169 establishes the obligation on states party to the convention to protect and promote the social, economic and cultural rights of indigenous peoples who live within their national territories, respecting their social and cultural identity and their specific customs, traditions and institutions. Amongst its most important articles are those stating that indigenous peoples have a right to make decisions about development projects that affect them, and to be adequately consulted about these prior to their initiation.[2] The promise of "prior consultation" subsequently

[2] Article 7 (1) of the Convention establishes that "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national

became a lightning rod for indigenous mobilizations against the operations of extractive development industries in their historic territories.

Although the constitutional changes approved in Latin American countries during the 1990s varied in the degree to which they recognized indigenous rights, all were profoundly influenced by ILO 169 (Van Cott 2000; Yrigoyen 2011). This first phase of multicultural constitutional reforms has been interpreted by some authors as a means to try and shore up the legitimacy of governments and as an extension of rights (Van Cott 2000). Others have viewed the turn to multicultural constitutions and policies as a new form of regulation that reflects contemporary forms of neoliberal rule (Hale 2004; Hernández, Sierra and Paz 2004; Sierra, Hernández and Sieder 2013). Certainly these constitutional changes led to a wave of policy measures across the continent during the 1990s that were aimed at indigenous peoples and supported by the Inter-American Development Bank and the World Bank (Plant 2002; Davis 2002; Andolina, Laurie and Radcliffe 2010). In some countries these reforms and programs opened important spaces for indigenous professionals to participate in the elaboration and implementation of public policies, creating new institutions such as the Project for the Development of Indigenous Peoples and AfroEcuatorians in Ecuador, known as PRODEPINE (Andolina, Laurie and Radcliffe 2010). However, this first wave of reforms failed to respond fully to indigenous peoples' demands that their historic territories and livelihoods be protected.

The limitations of the constitutional changes approved and the lack of official political will to guarantee indigenous peoples' rights in practice has generated different responses. In some countries, such as Mexico, Guatemala and Colombia, indigenous peoples' organizations have stopped focusing on achieving national legal reforms and have instead turned to strengthening de facto forms of territorial, political and legal autonomy: for example, the autonomous Zapatista municipalities in the state of Chiapas, Mexico (Baronnet, Mora and Stahler-Sholk 2012; Padilla 2009). Indigenous organizations have also invoked constitutional and international norms, for example taking cases of alleged abuse of their collective rights as peoples before national courts, but also to such extranational forums as the International Labor Organization, the Interamerican Commission and Court, and soft law bodies such as the World Bank Inspection Panel (Sieder 2007; Fulmer, Godoy and Neff 2008; Sierra, Hernández and Sieder 2013; Padilla 2009). Issues including discrimination, control over territories and natural resources, abuse of due process rights and systematic state violence against indigenous peoples have all been contested in Latin American courts. This judicialization of indigenous rights was particularly marked in Colombia during the 1990s (in part due to the extensive guarantees established in the Consitution of 1991), and that country's Constitutional Court went the furthest in establishing new jurisprudence guaranteeing their collective rights, often in direct opposition to executive power (Rodríguez-Garavito and Arenas 2005; Sánchez Botero 2010). In most other

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and regional development which may affect them directly." http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169 (accessed March 2012).

countries, however, the high courts were less receptive to indigenous peoples' claims.

The prospects for presenting legal appeals in defence of collective rights depends on many factors, including the specific legal formulations protecting those rights, ease of access to presenting a constitutional writ or action (in Colombia, for example, presenting an *acción de tutela* is relatively straightforward and low cost, whereas in Mexico the obstacles to presenting an *amparo* are numerous),[3] or the existence of different support structures for processes of legal mobilization (Epp 1998). The status of ILO 169 varies from country to country: for example, in Argentina international human rights conventions automatically become part of constitutional norms following their ratification by the congress and senate; in others, jurists have argued that international human rights conventions are subordinate to the national constitution. Most countries have not passed secondary legislation to implement the commitments acquired in ILO 169. Particularly contentious is the issue of prior consultation: long and bitter struggles have been waged before the courts over what constitutes "prior informed consent in good faith," for example in Colombia surrounding the struggle of the U'wa people to prevent oil exploitation on their territories (Rodríguez-Garavito and Arenas 2005; Rodríguez-Garavito 2011), or in Guatemala by indigenous peoples opposed to open-cast gold mining (Fulmer, Godoy and Neff 2008; Sieder 2007). Such battles have generated an important jurisprudence and public debate on how to operationalize the commitments set out in ILO 169.[4] Across Latin America indigenous peoples' movements have trained their members about ILO 169 through different workshops and publications supported by local NGOs and international development agencies. Governments have increasingly turning to drafting legislation to regulate processes of prior consultation in the hope of defusing growing indigenous protest over natural resource exploitation (Rodríguez-Garavito 2011). In the wake of the 2009 Bagua massacre of indigenous people protesting against extractive industries in the Amazon, the Peruvian government of Umala Ollanta passed an Consultation with Indigenous Peoples' Law in August 2011 which makes it mandatory to seek the opinions of affected indigenous communities (although the law does not mention "consent"). However, the approval of the law has not stopped the government's plans to promote extractive industries in indigenous reserves, including so-called "untouchable" reserves where non-contacted indigenous peoples live in isolation (Tebbteba Foundation/ IWGIA 2012: 136).

[3] See Cepeda 2005; Domingo 2005.

[4] For an analysis of cases of prior consultation in Latin America see Carvajal et al. 2009.

The UN Declaration on the Rights of Indigenous Peoples in Latin America

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly in September 2007 after more than two decades of deliberation and wrangling between nation states, is the most complete and advanced international instrument on the individual and collective rights of indigenous peoples. It brings together advances in standard setting and sets out states' obligations. A significant normative advance, the Declaration is slowly becoming a point of reference in indigenous organizations' campaigns and in attempts to generate national and regional jurisprudence in Latin America. Compared to ILO 169 the Declaration emphasizes the following elements:

Self-determination.

Article 3 affirms that "*Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*." The recognition of the right to self-determination is effectively the basis for the constitutional recognition of indigenous peoples' autonomy rights. It also signals recognition that the denial of autonomy rights in the past led to the systematic violation of indigenous peoples' human rights.

Article 4 of the Declaration linked autonomy directly to the right of self-determination: "*Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions*." This presupposes measures to guarantee indigenous peoples' self-government within territories enjoying a degree of legislative and jurisdictional autonomy. Such measures have been approved in some Latin American constitutions (notably the 2009 Bolivian constitution, the 2008 Ecuadorian constitution and the 1991 Colombian constitution), but not in others. In general, official endorsement of autonomy arrangements has been limited to the level of municipal government – something some authors have referred to as "municipalisation" of indigenous claims (Burguete Cal y Mayor and Gómez Gómez 2008). Nonetheless, some states (for example, Nicaragua, Panama, Colombia, Ecuador and Bolivia) do recognize wider territorial ambits of indigenous political autonomy, and in the Andean region recognition of indigenous jurisdictions has been a feature of constitutional law since the 1990s. Widespread trends favouring political and administrative decentralization since the 1980s, combined with the relative stability of national borders in Latin America, means that indigenous claims to greater political autonomy are not automatically seen as a threat to the continued existence of the nation-state. However, the exercise of indigenous political autonomy necessarily involves the more politically contentious issues of control over land and natural resources.

2) *Participation according to indigenous forms of law and governance*

Article 18 of the Declaration signals that "*Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*" In other words, the participation of indigenous peoples cannot be mandated through the imposition of mechanisms designed by third parties that are different from the norms, practices and authority structures of indigenous peoples. During the 1990s and 2000s some Latin American countries experimented with more plural forms of participation and representation. While disputes continue over what is an "authentically indigenous" form of government or procedure, this is perhaps one of the less contentious aspects of the Declaration for the region.

3) *Consultations in good faith according to "free, prior and informed consent"*

Instead of the figure of "prior consultation" established in ILO 169, the UN Declaration establishes the potentially much stronger concept of "free, prior and informed consent" (FPIC). Article 19 of the declaration states "*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them*." One of the most controversial aspects of ILO 169 was that although it guaranteed the right of prior consultation, nowhere did it stipulate that the results of those consultations had to be respected by governments. By contrast, the Declaration effectively establishes a potential right of veto to indigenous peoples and puts a greater emphasis on the need of all parties to a conflict to reach a consensus. However, to date Latin American governments have in practice rejected the stipulation that consent must be secured prior to the approval and initiation of policy initiatives deemed to be in the national interest, particularly those related to the exploitation of natural resources.

4) *Rights to land*

ILO 169 recognized indigenous peoples' property rights over lands they had traditionally occupied and used. The UN Declaration offers a much clearer formulation: in article 26 it states "1*. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned*." Definitions of "traditional ownership, occupation and use" have yet to be defined. Previous experience in Latin America indicates that this will most likely occur through test cases before the courts and that both governments and the private sector will strongly resist challenges by indigenous peoples to existing property arrangements.

5) *Intellectual Property Rights*

The UN Declaration recognizes intellectual property rights for indigenous peoples linked to their alternative forms of knowledge. Article 31 states "*1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights*." These provisions have significant implications for the negotiation of commercial contracts, for example to develop biogenetic resources. These issues have already been the focus of indigenous protests and actions before the courts in a number of Latin American countries and such conflicts are likely to continue. This aspect of the Declaration also has implications for the future negotiation of treaties for trade and economic integration which have, to date, entirely ignored indigenous peoples' collective rights.

6) *Rights to Development*

The Declaration reflects an emergent right of indigenous peoples to decide their own forms of development. Article 32 signals that "*1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources*." Their free, prior and informed consent must exist before the start of any project which will affect their territories or resources: "*2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources*." At the same time, the impacts of economic development on indigenous peoples must be mitigated or compensated for: "*3. States shall provide effective mechanisms for just and fair redress for any such activities and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*"

The ways in which the UNDRIP affects the politics, jurisprudence and economic policies of different Latin American countries will depend on national and supranational legal opportunity structures and the strategies of indigenous social movements and their allies. However, the opportunities for indigenous peoples to contest dominant patterns of development appear to be narrowing. States continue to treat "the indigenous question" as a matter for national policy and in practice refuse to let indigenous rights claims hamper megaprojects and extractive industries.

Indigenous organizations and their allies will likely continue to make recourse to transnational organizing and to regional and international forums in order to amplify their demands. The role of the UN Special Rapporteur for Indigenous Peoples has been particularly important in this respect: the reports of the Rapporteur for different Latin American countries, including Mexico, Guatemala, Colombia and Chile, made a series of recommendations for policy reforms. At the same time, the Special Rapporteur has made numerous declarations about the regularization of free, prior and informed consultation. Even before the UNDRIP was adopted by the UN General Assembly in 2007, it was invoked by the then Special Rapporteur, the Mexican sociologist Rodolfo Stavenhagen. In one of his reports, Stavenhagen stated that "in relation to mega-development projects, free, prior, and informed consent is essential to guarantee the human rights of indigenous peoples," and that together with "the right to self-determination of indigenous peoples and communities, these are the necessary prior conditions for such strategies and projects" (cited in Morris et al. 2009: 15). The subsequent Special Rapporteur, US legal scholar James Anaya, also made a series of recommendations about prior consultation and has dedicated a number of his reports to the issue of extractive industries. During his time as Special Rapporteur Stavenhagen signalled the "implementation gap" between existing norms and jurisprudence and official policies towards indigenous populations. Like his predecessor, Anaya produced highly critical reports about the state of indigenous peoples' rights in different Latin American countries, signalling the absence of actions on the part of governments to meet their international obligations. These reports have become important resources for indigenous peoples' organizations in their political struggles to ensure their collective rights are respected in practice.

During the 2000s the Interamerican Court of Human Rights developed its jurisprudence on the collective rights of indigenous peoples and the obligations of the member states of the Interamerican system to uphold them in practice (Morris et al. 2009). The jurisprudence of the Court began to reflect the substance of the UNDRIP, particularly with respect to the issue of prior consultation. A number of important precedents have been set, beginning with the landmark case of *Awas Tingni vs. Nicaragua*. The Court criticized the Nicaraguan government for not having demarcated the communal lands of the Awas Tingni community and for granting logging concessions without consultation. In its historic sentence of the Court in August 2001 developed an "evolutionary interpretation" of article 21 of the American Convention on Human Rights, which protects property rights, extending this to include the communal property of indigenous peoples administered according to their own forms of law (Anaya and Crider 1996; Rodríguez-Piñero 2007). In the twelve years since the Awas Tigni judgement, the Court has increasingly ruled to protect and specify indigenous peoples' territorial and cultural rights and has developed significant jurisprudence affirming indigenous peoples' rights to FPIC.

In the 2007 case of the *Saramaka people vs. Suriname*, the Saramakas' customary lands had been distributed to logging and mining companies without any regard for their rights. The Court confirmed that the property rights of indigenous peoples

derive from custom (not formal title), and noted that their rights to land are exercised jointly with their rights to self-determination and their rights to "freely dispose of their natural wealth and resources". The judgement also affirmed the right of the Saramaka people to FPIC in line with their customary practices, stipulating that "the state has the obligation to not adopt any measure without the consent of the community." The Saramaka ruling was recently reaffirmed in the case of *Sarayaku vs. Ecuador* in July 2012. The Court found that by allowing oil exploitation in the Sarayaku people's lands the Ecuadorean state had violated the community's right to be consulted, as well as their community property rights and communal identity. In 2010 the Court ordered the Guatemalan government to halt open-pit gold mining at the Marlin mine in San Marcos, the second largest gold mine in Latin America, operated by the Canadian multinational Goldcorp, in order to safeguard the health of the affected Mayan communities.[5] However, neither Goldcorp nor the Guatemalan government took action to halt the mining operations.

Fig. 1: ILO Convention 169 vs. UN Declaration

ILO Convention 169 (1989)	**UN Declaration (2007)**
Use of term "peoples" implies no rights under international law Art. 1	Self-determination Art.3
Respect for customary law Art. 8	Autonomy/ self-government rights Art. 4
Right of consultation Arts. 6, 15	Participation/ consultation according to indigenous norms Art.18
Prior Consultation Arts. 6, 15	Free Prior and Informed Consent Arts 2, 3, 19
Rights to ancestral land Art.14	Rights to traditional land and territories Art. 26
	Intellectual property rights

[5] Interamerican Commission on Human Rights. PM 260-07 Communities of the Mayan Peoples (Sikapekense and Mam) in the municipalities of Sipacapa and San Miguel Ixtahuacán in the department of San Marcos, Guatemala, 2010. See www.rtfn-watch.org/uploads/media/IACHR_-_MC_260_01.pdf (consulted August 2012).

	Art.31
Consultation on development initiatives Art. 7	Rights to decide form of development Art.32

Backlash: the development boom and the criminalization of indigenous protest

Advances in international law protecting indigenous peoples' rights stand in contrast to the increasingly violence faced by indigenous communities across Latin America. Can laws and treaties, or action before national and international courts, really improve the situation for indigenous peoples? Conflicts around natural resource exploitation and more broadly about patterns of economic development in Latin America point to the fundamental contradictions between increased autonomy rights for indigenous peoples and prevailing models of resource exploitation. Given the indivisibility and collective nature of indigenous rights, their legal recognition and guarantee implies not just the questioning of indigenous peoples historic marginalization and ongoing patterns of discrimination against them: they also bring into question the entire dominant model of economic development.

Yet this development model continues to be broadened and deepened, with Latin American countries in effect returning to their nineteenth century role as primary product exporters. In 2009 Peru witnessed the widespread mobilization of Amazonian indigenous peoples against the massive mining and petro-exploitation boom which has seen more than 90% of the Peruvian Amazon region granted in concessions to transnational companies for resource prospecting and exploitation. Clashes between security forces and indigenous protesters at the town of Bagua led to the death of 33 people and provoked a new cycle of protest against mining, gas and petroleum operations.

In 2011 the Brazilian government rejected the ruling of the Interamerican Court ordering it to halt construction of the Belo Monte hydroelectric dam until it could ensure due consultation with the indigenous peoples affected. The Brazilian government has argued that consultation is only a procedural formality, that the national priority is the generation of electricity, and that indigenous peoples' rights must be secondary to the priorities of national development which require integrationist policies (Rodríguez Garavito 2013: 22-3). In response to the Court's ruling the Brazilian government temporarily withdrew its support and unleashed a backlash against the Court which has put in question the very future of the Interamerican system.

In February 2012 the National Confederation of Indigenous Nationalities of Ecuador (CONAIE), the largest indigenous confederation in the country and one of

the strongest in Latin America, called on its members to increase their protests against the Correa government following the approval in 2011 of a new mining law favouring transnational corporations and the government's continued support for oil exploration in the Amazon region (IPS 2012). Only weeks ago the Correa government announced its decision to permit drilling for oil in the Yasuni National Park in the Amazon, one of the most biodiverse protected areas in the country.[6]

In Bolivia, massive protests in 2011 over government plans for the construction of a transnational road through the protected Indigenous Territory of Isiboro Sécure National Park (TIPNIS), home to the Moxeño, Yurakaré and Chimán indigenous groups, led to clashes between protestors and police and an eventual suspension of the project by the Morales administration. However, in February 2012 President Morales approved a new law providing for consultation with TIPNIS inhabitants aimed at securing approval from them to resume work on the controversial road (Herrera Farell 2012).

Although the UNDRIP and its enshrinement of the principle of FPIC represents an important global legal advance, transforming these principles into practice seems an almost impossible challenge. Most governments in Latin America have yet to enshrine the principle of FPIC in national legislation. Only Peru and Bolivia have passed laws to this effect, and in practice the official interpretation of which communities should be consulted and how is highly restrictive. César Rodríguez Garavito has noted the tendency of governments to turn the substantive rights of prior consultation and free prior and informed consent into procedures based on the principle prevalent in contractual law of equality between the parties, emphasizing form over content and outcome (Rodríguez Garavito 2011). For example, a 2009 Chilean law interprets the right to consultation as little more than an obligation on the part of government to receive indigenous peoples' petitions with no consequences specified if those petitions are not taken into account (Rodríguez-Garavito 2013: 23).

At the same time, national elites have deepened their alliances with transnational capital and many governments –including the regional hegemon Brazil- have mounted a backlash against the regional human rights system, in part because of its progressive stance on indigenous peoples' rights and the potential impediments this poses to development. For years there have been numerous reports of alliances between governments, companies and paramilitary forces to displace indigenous peoples from lands identified as strategic for extractive industries' operations. At the same time indigenous peoples' protest movements are being increasingly criminalized and subject to violent repression. For example, anti-mining activists are increasingly branded as "terrorists" by government and the media, increasing possibilities of violence being used against them as well as long prison sentences being meted out when they try to exercise their right to protest and claim free, prior and informed consent. Chile has led the way in using –and

[6] Jonathan Watts "Ecuador approves Yasuni national park oil drilling in Amazon rainforest", *The Guardian*, 16 August 2013. www.theguardian.com/world/2013/aug/16/ecuador-approves-yasuni-amazon-oil-drilling (consulted August 2013).

abusing- its anti-terrorist legislation against Mapuche activists protesting against the exploitation of forestry in their territories. However, such tendencies towards the hyper-penalization of social protest are observable across the region.

Conclusions

In this paper I have tried to reflect on the relationship between law, judicialization, and violence in the governance of natural resource exploitation in indigenous territories in Latin America. While the region is certainly characterized by significant legal advances in the recognition of indigenous peoples' collective rights, these have not yet transformed patterns of development. Indeed the deepening hold of extractive industries has led to greater confrontation between indigenous peoples and governments, confrontations which involve violence and the criminalization of protest movements. Boaventura de Sousa Santos's conception of law as both regulatory and emancipatory has often been used to analyse international law regarding indigenous peoples' rights. It is certainly true that FPIC is now increasingly recognized as a minimum standard for development initiatives affecting indigenous peoples. However, while extractive industries now endorse notions of "community consultation" as part of their corporate responsibility strategies, they fail to ensure rigorous standards for ensuring FPIC. Neither do governments enforce such standards, despite their mounting legal obligations to do so. Even when governments or international bodies adopt such international principles, there is little guarantee that they will be meaningfully upheld in practice. For example, in May 2011 the World Bank's International Finance Corporation accepted that its safeguard mechanisms should adopt FPIC as a guiding principle. Yet the IFC has previously ignored the World Bank's internal guidelines in its dealing with indigenous peoples, for example in financing of Goldcorp's Marlin Mine in Guatemala (Sieder 2010). As Rodríguez-Garavito has argued, FPIC can be understood as a emerging form of global legal hegemony (Rodríguez Garavito 2013), but not as a guarantee of rights in practice. Indigenous peoples may be subjects of rights under international law, but they continue to be the objects of development policy, or to suffer the consequences of development initiatives that they are now largely superfluous to. As one Mayan woman told us in a popular health tribunal against Goldcorp's operations in Central America in 2012, "before they at least wanted us to work on their plantations, now they just want the minerals that lie below the lands on which we live." Despite advances in international and national law, current developments in Latin America suggest that indigenous peoples are more subject to the violence of development and modernity than ever.

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