

The Mediterranean in a multi-polar world up to 2030

GOOD GOVERNANCE OF MINERAL RESOURCES IN THE MAGHREB: THE CHALLENGES AND OPPORTUNITIES OF REGIONALISATION

CONFRONTING INDIGENOUS PEOPLES RIGHTS TO RESOURCE EXTRACTION IN LATIN AMERICA

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Context

During the last decade, the number and intensity of social conflicts in Latin America has significantly increased, threatening democratic governance and stability. While the cause of these conflicts varies, a significant portion of them, and some may argue the most explosive, are associated with the extraction and management of natural resources. These conflicts bring to light the inherent tensions that exist among a diverse set of actors, including the interest of the State to promote economic growth through natural resources extraction, the rights of indigenous peoples to protect and manage their ancestral lands, and the contractual obligations granted to domestic and foreign private companies.

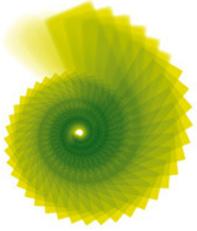
Latin America experienced extensive growth in foreign investment resulting from extractive industries during the 1990s. From 1990-2001 there was an increase of 400% in mineral investment in the region, reaching 23% of the total number of investments in exploration in the world by 2005.¹ While a number of oil and gas projects were set up throughout the region it is the increasing number of mining operations which represent the most growth in the extractive sector. As a result, the last decade has seen a considerable rise in the number of mining concessions for exploration and large-scale extraction of minerals and metals in Latin America. Noticeably, in Colombia, during the period from 2002-2010, the surface area with mining titles rose from 1.13 million to 8.53 million hectares, with the amount of titles in the Andean wetlands doubling.² In the last five years Peru has experienced a 10-30% rise in mining concessions in five regions.³ In Argentina, the number of mining projects climbed from 18 in 2002 to 614 in 2011.⁴ In Mexico mining concessions have

¹ Daniel Whalen, *Hidden Hegemony: Canadian Mining in Latin America*, Council on Hemispheric Affairs, July 25, 2011. <http://www.coha.org/hidden-hegemony-canadian-mining-in-latin-america/>

² Osorio Avendaño Camila, *El legado minero de Uribe*, La Silla Vacía, October 14, 2010, <http://www.lasillavacia.com/historia/18648>

³ *En últimos cinco años se incrementó entre 10 y 30% concesión minera en cinco regiones*, Diario 16, July 18, 2012, <http://diario16.pe/noticia/17616-en-aoltimos-cinco-aanos-se-incrementao-entre-10-y-30-concesiaon-minera-en-cinco-regiones>

⁴ Secretaría de Minería. Ministerio de Planificación Federal, Inversión Pública y Servicios. *Minería en Números*. <http://www.mineria.gov.ar/pdf/mineriaennumeros.pdf>



been granted on 26% of the country during the last decade, representing approximately 56 million hectares of land.⁵

Just as social conflicts continue to arise in Latin America from issues such as land disputes, labor issues, elections, and politics it has been documented that **the majority and most violent of these conflicts are directly related to development projects which seek to extract natural resources**. In Peru the work of the Defensoria de Pueblo (Ombudsman) to record conflicts in that country has enabled them to identify socio environmental issues related to the extraction of minerals as the cause of most of these conflicts.⁶ In its 103rd Report from September 2012 the Defensoria recorded 167 active conflicts in Peru, 75.4% (126 cases) of which represent socio-environmental conflicts.⁷ At a regional level the Observatorio de Conflictos Mineros de America Latina and the Observatorio Latinoamericano de Conflictos Ambientales presently has 161 registered mining conflicts which involve 173 projects in 212 communities throughout Latin America.⁸

As a result of its activities throughout Latin America, the Due Process of Law Foundation (DPLF) has become aware that these tensions are a growing problem in the whole region. We have seen escalations in violent confrontations with focal points in Peru, Bolivia and Mexico. Additionally we have learned about police and military activity used to quell human rights activists which are reminiscent of tactics used during periods of internal armed conflict and dictatorships. The state of emergency, the liberal use of force and the disregard for the enforcement of proper citizen and indigenous participation in decision making have again pushed communities to the brink.

Indigenous peoples in Latin America

Studies indicate that approximately 400 different indigenous nations or peoples exist in Latin America, and although there are no official statistics for the region, it is estimated that 40 to 50 million people belong to these indigenous groups or nations which constitutes nearly 10% of the region's total population. The countries with the highest percentage of indigenous population include: Bolivia, Ecuador, Peru, Guatemala and Mexico⁹.

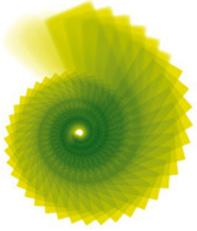
⁵ Enciso Angelica, *Devastación, de la mano de concesiones mineras*, La Jornada, August 8, 2011. <http://www.jornada.unam.mx/2011/08/08/politica/044n1pol>

⁶ In its 71st Report from 2010 the Defensoria del Pueblo identified 121 cases of socioenvironmental conflicts representing 47% of the total social conflicts recorded. 64% (77 cases) of these conflicts resulted from mining activities, the overwhelming majority of these conflicts 83% fall into the category of large scale or medium scale mining activity. http://www.defensoria.gob.pe/conflictos-sociales/objetos/paginas/6/44reporte_71.pdf

⁷ Defensoria del Pueblo 103rd Report from September 2012 at page 13 http://www.defensoria.gob.pe/conflictos-sociales/objetos/paginas/6/65reporte_mensual_de_conflictos_sociales_n-103_-s.pdf

⁸ Observatorio Latinoamericano de Conflictos Ambientales <http://olca.cl/ocmal/>

⁹ In Bolivia, the indigenous population corresponds to 66% of the total population, while in Guatemala it reaches 40%. In Mexico, although the indigenous population is only 12% of the total population, 13 million people belong to 62 different groups or nations, each one with its own distinct language, traditions and customs.



Whereas in Canada and the United States aboriginal or native groups have reached some level of recognition and development, indigenous groups in Latin America keep living in appalling conditions. They suffer endemic poverty as well as marginalization and exclusion from mainstream society – circumstances that have not changed significantly during the past decade. To make matters worse, efforts to apply international and national legal standards intended to guarantee indigenous people's rights have largely been ineffective. In accessing justice, members of indigenous groups must confront language barriers, cultural obstacles, and economic challenges that are compounded by the fact that they often live in remote rural areas.

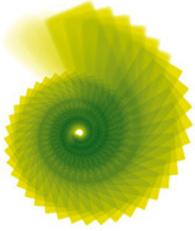
While these historic conditions of poverty and discrimination continue, the 21st century has brought new challenges for Latin America's indigenous peoples that are mainly related to the tension that exists between the rights of indigenous groups to their land, territory, and natural resources and the rights of States to use and exploit these lands. Although we call them “new” challenges –to differentiate them from traditional violations of civil and political rights which occurred in our continent during dictatorships and internal armed conflicts–, they are actually old tensions that have become visible after the signing of Indigenous and Tribal Peoples Convention No. 169 of the International Labor Organization¹⁰ and the United Nations Declaration on the Rights of Indigenous Peoples¹¹, as well as the emergence of indigenous movements in Latin America. **Now indigenous groups have an international legal framework to demand that their rights be respected fully.**

Indigenous peoples' rights

ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples recognize indigenous people's rights to the land, territory and natural resources. In different ways, these rights are also recognized by many national Constitutions and laws throughout the region in Latin America. In addition, **the Inter-American Court of Human Rights has stated that, under the Inter-American Convention of Human Rights, the right to property not only protects the private property of individuals but also the communal property of the members of indigenous communities** as well as the right to the land and natural resources associated with their culture which are indispensable for their social, cultural, and economic survival. According to the Inter-American Court –whose decisions are binding for most Latin American countries–, the right to communal property also includes the incorporeal elements deriving from territories and natural resources such as oral expressions and traditions, customs and languages, arts and rituals, knowledge

¹⁰ Indigenous and Tribal Peoples Convention, 1989 (No. 169)
http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312314

¹¹ UN Declaration on the Rights of Indigenous Peoples
http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf



and practices in connection with nature, culinary art, customary law, dress, philosophy and values¹².

The Inter American Court has also stated that communal property of indigenous communities can be limited –as any kind of property– but that limitation can only occur **after a consultation process with indigenous authorities that should be carried out respecting their traditions**. However, in several countries, indigenous territories have not been properly delimited, nor has the use and exploitation of natural resources been properly regulated. All too often, governments legislate on these issues or grant exploration and natural resources extraction licenses without previous consultation with the indigenous or tribal communities that are directly affected, in clear violation of ILO Convention 169¹³, Inter American Court rulings, and national laws.

An example of this were the incidents that occurred in Bagua, Peru, in May of 2009,¹⁴ when the Peruvian government passed a set of decrees regulating the use of indigenous lands and their natural resources without having consulted the decrees previously with the indigenous communities affected by these norms. The indigenous communities in Bagua protested against this legislation which, as they argued, denied them their constitutional right to a say in development programs that would affect their land and territories.¹⁵ Although the Peruvian government initially responded by sending in armed forces, it eventually withdrew the controversial pieces of legislation. **These events led to the killing of an estimated 34 people between policemen and indigenous persons,¹⁶ and seriously challenged the government's ability to govern.**¹⁷

Here the Peruvian state's lack of respect for the rule of law contrasted with experiences in nearby Colombia, where the Constitutional Court has repeatedly recognized that prior consultation is a fundamental right of indigenous peoples as well as communities of African descent, and has ruled that the lack of respect by the government of this fundamental right leaves the court with no alternative but to declare these norms unconstitutional¹⁸. Therefore, on several occasions the Colombian government has been forced to reinitiate the negotiation process, including discussion and approval of key laws such as the General Forestry Law (2006) and the Statute for Rural Development (2007). **The use of national courts to demand respect for**

¹² Inter-American Court of Human Rights, the Case of the Sawhoyamaya Indigenous Community v. Paraguay and the Case of the Yakye Axa Indigenous Community v. Paraguay.

¹³ ILO Convention 169, article 6.

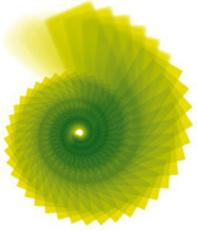
¹⁴ Romero Simon, *Fatal Clashes Erupt in Peru at Roadblock*, The New York Times, <http://www.nytimes.com/2009/06/06/world/americas/06peru.html>

¹⁵ Instituto de Defensa Legal, *Bagua Espera Justicia*, February 2010. http://www.idl.org.pe/webpanel/informes/150234file_BROCHUREBAGUAWEB.pdf

¹⁶ Defensoría del Pueblo, Informe de Adjuntía N° 006-2009-DP/ADHPD, Lima, Peru, 2009 http://portal.andina.com.pe/EDPFiles/EDPWEBPAGE_Defensor%C3%ADa.pdf

¹⁷ Federación Internacional de Derechos Humanos, *Peru – Bagua*, October 2009, <http://www.fidh.org/IMG/pdf/amer/pe529e.pdf>

¹⁸ Colombian Constitutional Court judgments C-079 from 2009 and C-030 from 2008.



indigenous people's rights in Colombia is an experience that has been shared with other countries of the region.

The right to prior consultation of Indigenous peoples

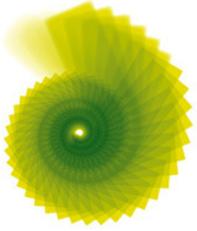
While the right to free, prior and informed consultation of Indigenous peoples has been established by international human rights instruments, countries in Latin America still struggle to implement this basic human right to have a voice within the decision making process when it comes to development projects which have a possibility of affecting communities. In September of 2011, moved to a great degree by the political pressure created by the Bagua events, **Peru enacted a law on the right to prior consultation of Indigenous peoples which is the first of its kind in Latin America.** There were great expectations that this law would provide a solution to the state of conflict surrounding extractive industries in Peru, but it is clear that this is only one element of a broad policy change which must come to fruition nationwide. Today, just as Peru continues to confront the challenges of implementing their new consultation law other legislative efforts are ongoing in Bolivia,¹⁹ Ecuador and Mexico²¹, as well as other countries, but the dispute between enforcing this right and promoting a development model which facilitates foreign direct investment are also unending.

Even as the conflicts continue in the region important strides have been made within legislative bodies, upper courts and constitutional tribunals in an effort to resolve these politically charged encounters. **There are an increasing number of judicial decisions regarding the extraction of natural resources in Latin America** and indigenous people's rights. The Colombian Constitutional Court and the Inter-American Human Rights Court have issued important rulings which address the conflicts between the rights of local and indigenous communities and implementation of development projects. In many of these cases projects have been halted until the proper environmental impact assessment, or prior consultation process is carried out with affected communities. **Since 2003 the Inter-American Commission has issued six precautionary measures in cases dealing with extractive industries in Latin America, these cases dealt with large scale development projects such as hydroelectric dams and mining projects.**

¹⁹ In Bolivia the only consultation law which has been enacted deals specifically with a highly disputed road project through an indigenous territory and national park named Isiboro Secure. This law was challenged on constitutional grounds but was upheld in a judgment issued by the Plurinational Constitutional Tribunal in June of 2012. Currently the Bolivian government is carrying out a consultation process which is being opposed by many indigenous communities within the territory.

²⁰ Bolivia march revives Tipnis Amazon road dispute, January, 2012, BBC, <http://www.bbc.co.uk/news/world-latin-america-16804399>

²¹ Informe final de la Consulta sobre el Anteproyecto de Ley General de Consulta a Pueblos y Comunidades Indígenas, 2011, <http://clavero.derechosindigenas.org/wp-content/uploads/2011/05/MEXICO-CDI-Informe-Consulta.pdf>



Beyond the importance of promoting State accountability for violations of international law, there is also increased attention given to the role played by transnational companies that benefit from these concessions to exploit hydrocarbons and mines throughout Latin America. The debate on business and human rights and the extent to which human rights standards -originally aimed at States- create binding legal obligations also for companies is currently ongoing in many parts of the world but is only nascent in Latin America. In any case, the need to address the State's or a third party's responsibility through legal mechanisms at the national and international levels is currently a subject of great debate and legal analysis. Among these efforts, we should mention work done to establish an overarching policy on human rights due diligence for corporations by a coalition of organizations known as the International Corporate Accountability Roundtable²²; the Maastricht principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights²³ and the work that DPLF is currently doing to promote new standards within the Inter-American Human Rights System to establish the responsibility of States for the actions of third parties.

Conclusions

When analyzing these issues from an international law perspective we can clearly visualize a series of legal instruments, mechanisms and institutions which are applicable in the region, yet there is a dramatic lack of information about them. A similar information deficit exists on recent developments within supranational legal systems such as the United Nations and the Inter-American System of Human Rights, all of which must be taken into account in any serious discussion on these topics. The general population's lack of trust in State institutions signifies that institutional mechanisms available at the national and international levels are underutilized – including judicial mechanisms– while there is an overuse of public demonstrations and other –sometimes violent– protest mechanisms.

Therefore, one crucial way of addressing this growing tension is to promote a higher use of the legal and institutional mechanisms available to stakeholders at the national and international levels to address the conflicts related to the impact of extractive industries in Latin America and to promote legal accountability for human rights violations committed either by the State or private corporations. For this to happen it is necessary to create legal tools which present the international legal framework and that are easily accessible to local communities. When communities become aware of the scope of their right to land within the context of natural resource extraction it elevates their arguments to a new realm of discussion and negotiation. By fostering the application of international standards we are able to encourage the use and development of national rules to enhance a true level of dialogue where it is most needed.

²² See: <http://accountabilityroundtable.org>

²³ See: http://openheimer.mcgill.ca/IMG/pdf/Maastricht_20ETO_20Principles_20-20FINAL.pdf