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**„Flogging a Dead Cow:
Indigenous Rights and Non-Conventional Hydrocarbon Extraction
in Vaca Muerta, Argentina“**

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Table of Contents

1. Introduction
 - 1.1. Indigenous Peoples in Argentina
2. Method
3. Legal and Regulatory Frameworks
 - 3.1. International Treaties
 - 3.2. National Norms
 - 3.3. Local Norms
 - 3.4. Participation, Consultation and Consent
 - 3.5. Specific State Obligations and Guarantees
 - 3.6. Institutions Guaranteeing Protection
 - 3.7. Regulation of Transnational Companies
4. Extractive Industries and Fracking in Argentina
 - 4.1. Background
 - 4.2. Fracking
 - 4.2.1. Water
 - 4.2.2. Toxic Waste
 - 4.2.3. Soil
 - 4.2.4. Air
 - 4.2.5. Seismic Activity
 - 4.2.6. Health
 - 4.3. Fracking Sites
 - 4.3.1. Sacred Protected Areas
 - 4.3.2. Campo Maripe
 - 4.3.3. Gelay Ko
 - 4.4. Repression and Corruption
 - 4.4.1. Secret Agreement between Chevron and YPF
 - 4.4.2. Governmental Attitudes and Discrimination
 - 4.4.3. Cost of Conflict
 - 4.5. Victories
 - 4.6. Future of Fracking in Argentina

4.6.1. Precautionary Principle

4.6.2. Prioritising Human Rights in Business

5. Conclusion

5.1. Recommendations

Bibliography

Appendix One: Interviews

Abbreviations

AIDA: Asociación Interamericana para la Defensa del Ambiente

BP: British Petroleum

CERD: Convention on the Elimination of all Forms of Racial Discrimination

CIP: Corporación Interestatal Pulmarí

CLC: Convention on Civil Liability for Oil Pollution Damage

CSR: Corporate Social Responsibility

ECLAC: UN Economic Commission for Latin America and the Caribbean

EIA: Estudio del Impacto Ambiental

HRC: Human Rights Committee

IACHR: Inter-American Commission on Human Rights

IAPG: Instituto Argentino del Petroleo y Gas

ICC: International Criminal Court

ICJ: International Court of Justice

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

INAI: Instituto Nacional de Asuntos Indigenas

ILO: International Labour Organization

MNC: Multinational Corporation

NGO: Non-Governmental Organisation

OAS: Organisation of American States

OECD: Organisation for Economic Co-operation and Development

TNC: Transnational Corporation

UN: United Nations

UNCESCR: UN Committee on Economic, Social and Cultural Rights

UNGC: UN Global Compact

UNDP: UN Development Programme

UNDRIP: UN Declaration on the Rights of Indigenous Peoples

USEIA: United States Energy Information Administration

YPF: Yacimientos Petrolíferos Fiscales

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“¡Marichiweu!” (“¡Diez veces venceremos!”)

1. Introduction

The focus of the text below is what happens to groups of indigenous peoples when they come into contact with the global hydrocarbon extraction industry. As such, it not only examines the direct impacts this has on their lives, but also the legal protections, or absence of such, which have been put in place both nationally, in Argentina, and internationally. Many studies show how being from an indigenous group has a direct link to the likelihood of living in poverty, as well as restricted access to education, health or public services. On average, indigenous peoples' salaries are half of those of non-indigenous people, and one out of three hectares given over to the extraction of natural resources overlap with indigenous lands.¹ An exact definition of indigenous peoples does not exist in international law although, as the CIDH says, a definition is not necessary in order to protect their rights. As there are a large number of widely different indigenous communities, a definition of the term would be restrictive, as it is with the definition of human rights. According to Art 1.1 of ILO Convention 169, there are some fundamental criteria that can serve as a guide in order to define who indigenous peoples are: historical continuity, territorial connexion and the presence of their own social, economic, cultural and political institutions.²

The indigenous community under consideration here is that of the Mapuche. This is one of the most numerous indigenous groups in South America, numbering more than one and a half million people according to official numbers, and the largest in Argentina (105,000). Within Argentina there are over 2 million indigenous people, comprising around 1.7% of the total population. Historically the Mapuche were located in the centre and south of what is it today Argentina and Chile (approximately 1,400 km from both the Atlantic and the Pacific Oceans). They were one of the few groups that resisted the Spanish invasion, a fight that continued for more than 300 years, but at the end of XIX century they were nearly wiped out by the 'Conquista del Desierto' and 'Pacificacion de la Araucanía' military campaigns in Argentina and Chile respectively. In the case of the communities displaced by the Campaña del Desierto these indigenous peoples moved

¹ P.B. Larsen, 'The "New Jungle Law": Development, Indigenous Rights and ILO Convention 169 in Latin America', *International Development Policy/Revue internationale de politique de développement*, vol. 7, no.2, 2016, p. 2, Available from <http://poldev.revues.org> (accessed 14 June 2017).

² Comisión Interamericana de Derechos Humanos, *Pueblos indígenas comunidades afrodescendientes industrias extractivas*, Comisión Interamericana de Derechos Humanos, 2015, p. 20.

to unwanted territories in Patagonia, but nobody could have imagined that a century later those territories would become so valuable for oil companies.³

This thesis aims to prove that the human rights of the Mapuche in Argentina have taken a lower priority than the rights of companies and the acquisition of profits; in addition, it seeks to prove that, in this, the companies have been helped by the Argentinian government. The initial motivation for tackling this topic grew out of the writer's personal background and areas of expertise and concern. Certainly there appears to be a case of moral imperative to investigate the exact circumstances surrounding the exploitation of resources on indigenous peoples' lands. However, this area of investigation also throws up issues which have a wider concern and relevance than those which are merely local. The conflict between the extraction of natural resources to supply and maintain lifestyles at a certain level for many sectors of a population, and the rights of those on whose land the resources are found, is one that has global application.

Extractives industries operate in 41 places in Latin America and 39% of hydrocarbon exploitation sites are in indigenous territories.⁴ Of these 41 locations, five are located in Argentina and also overlap with indigenous land. It is this overlap that is the origin of the conflict examined in this thesis. A report from the American NGO First Peoples Worldwide (FPW) analyses 52 of the most important oil companies in the country. It concludes that the main companies working in indigenous peoples' territories are Exxon Mobil, Chevron and Apache;⁵ all of them working in Argentinian Patagonia. This thesis will focus on one of them, Chevron, known to be one of the most controversial for its violations of human and environmental rights⁶ and for being the first to use fracking in Argentina. The Argentinian company YPF drilled its first well – in Plaza Huincal, Neuquén – in 1918 on land occupied by the Mapuche.⁷ Today, most famous reservoir in the area is called Vaca Muerta, close to the municipality of Añelo, in the Mapuche community known as Campo Maripe.

³ Pérez Esquivel, A., et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p.102.

⁴ D. Aranda, 'Impacto extractivista', Página10, February 2014, Available from <https://www.pagina12.com.ar/diario/principal/index-2014-02-10.html> (accessed 9 April 2017).

⁵ *ibid.*

⁶ Aranda, D., *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 909.

⁷ D. Aranda, 'Argentina: Petróleo y resistencias', Servicios de Comunicación Intercultural, 11 June 2014, Available from <https://www.servindi.org/actualidad/106782> (accessed 9 April 2017).

The Special Rapporteur James Anaya, in his report of 2011, about oil companies operating within or near indigenous territories stated:

‘Extractive industry activities generate effects that often infringe upon indigenous peoples’ rights; public agencies and private business enterprises involved in the extraction or development of natural resources, in both developing and developed countries, have contributed to these effects. Notably, some Governments have attempted to mitigate the negative effects of extractive operations, yet human rights continue to be violated as a result of an increasing demand for resources and energy. The Special Rapporteur considers the ever-expanding operations of extractive industries to be a pressing issue for indigenous peoples on a global scale. He therefore aims to contribute to efforts to clarify and resolve the problems arising from extractive industries in relation to indigenous peoples.’⁸

1.1. Indigenous Peoples in Argentina

The report mentioned above notes that in 2011 the UN had already warned of continuing violations of the human rights of indigenous peoples in Argentina.⁹ It also points out that one of the most contested cases is that of Chevron in Vaca Muerta, home to at least 29 indigenous communities with an especially large presence of Mapuche.¹⁰ The report goes on to say there are five large oil companies operating on this territory and that the extraction of hydrocarbons has led to a total transformation of the environment of this area. A vast expanse of land has seen a deterioration of its environment, in some cases with irreversible consequences.¹¹

The expropriation of indigenous peoples’ land was facilitated by the concept of *terra nullius* or ‘nobody’s land’. This was a term that allowed for the appropriation of land over several centuries, obscuring the population living there and their traditional ways of life. It was not until the adoption of UNDRIP article 28 that this concept was declared illegal and these communities were

⁸ United Nations General Assembly, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries Operating within or near Indigenous Territories*, Geneva, Human Rights Council, 2011, p. 8.

⁹ D. Aranda, ‘Impacto extractivista’, Página10, February 2014, Available from <https://www.pagina12.com.ar/diario/principal/index-2014-02-10.html> (accessed 9 April 2017).

¹⁰ *ibid.*

¹¹ Rodríguez López, D., A. Burucua, *Pasivos ambientales e hidrocarburos en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 41.

granted the right to remedy and restitution.¹² In 2014, the theme of the International Day of the World's Indigenous Peoples was implementing the rights of these communities. In 2015, the UN Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, highlighted the poor implementation of indigenous rights.¹³ Their rights are constantly violated and domestic laws are sparse, although 13 Latin-American constitutions recognise indigenous peoples and their rights.

According to Argentinian investigative journalist Dario Aranda, indigenous people are not on the agenda of the Argentinian government nor the media.¹⁴ For a long time, he contends, there has been a false belief that the country does not have an indigenous population, or, if it is, their existence is barely accepted. In addition, these communities are depicted as backward and the only way in which they are acknowledged is through the contribution their costumes or folklore make to tourism.¹⁵ Reality differs drastically from the folkloric depiction of indigenous life. These people's lives are characterised by violent evictions, poverty and exclusion, among other things, but the press tend to ignore these facts. In the best case scenario indigenous peoples are recipients of charity but never seen as political and/or social actors.¹⁶ However, contrary to what is believed by the majority, indigenous peoples had a flourishing and complex society long before the arrival of European colonists.¹⁷

The arrival of these colonists brought widespread repression against, and killing of, indigenous groups, with the result that by the end of 19th century, indigenous people in Argentina were close to extinction.¹⁸ In the absence of official data it is left to writers such as Dario Aranda to estimate the scale of the atrocity: it may be that up to 30 thousand people were exterminated during the Argentinian military advance across the country in the 19th century.¹⁹ Professor Mariano Nagy of Buenos Aires University mentions that 25,000 indigenous peoples lived in Patagonia,

¹² Huilcaman Paillama, A., 'Fin de la Doctrina de Terra Nullius, Política des Desposeimiento', *UNPFIP Network Blog* [web blog], 3 May 2012, <http://unpfip.blogspot.co.at/2012/05/fin-la-doctrina-de-terra-nullius.html> , (accessed 22 June 2017).

¹³ P.B. Larsen, 'The "New Jungle Law": Development, Indigenous Rights and ILO Convention 169 in Latin America', *International Development Policy/Revue internationale de politique de développement*, vol. 7, no.2, 2016, p. 4, Available from <http://poldev.revues.org> (accessed 14 June 2017).

¹⁴ Aranda, D., *Argentina originaria*, Buenos Aires, La Vaca Editora, 2010, p. 5.

¹⁵ *ibid.*, p. 5.

¹⁶ *ibid.*, p. 5.

¹⁷ Aranda, D., *Argentina Originaria*, Buenos Aires, La Vaca Editora, 2010, p. 6.

¹⁸ *ibid.*, p.10.

¹⁹ *ibid.*, p.13.

the area of study of this thesis. In the first year of the Campaña del Desierto, 1,300 died 'in combat' and 13,000 became prisoners of the state.²⁰

However, a large sector of society still denies that these atrocities took place and, unlike in cases such as those against the Argentinian dictatorship with its *Juntas Militares*, the crimes against humanity committed against the indigenous peoples have never been brought to court.²¹ For example, Law 24.411, passed in 1994 in response to the rights violations carried out by the junta, compels the state to pay compensation to families of the murdered and missing. However, indigenous people have never been granted such a measure for the genocide they went through.

Such violations of indigenous people's human rights have not stopped. In 2007, the World Bank report *Oportunidades Economicas para los Pueblos Indigenas en America Latina* noted that 8 out of 10 indigenous in the region were living in poverty, mainly due to exclusion, labour exploitation and limited access to fertile lands. A month later the UN Special Rapporteur on Indigenous Rights, Rodolfo Stavenhagen, wrote that a 'small-scale genocide' is being carried out against indigenous peoples as they are threatened by the oil, mining and forestry industries.²²

Despite three decades of genocide at the end of the 19th century, aimed at putting an end to the 'annoying savages' of the south, the response of civil society towards these events is far less than that prompted by the smaller-scale atrocities committed by the 1976–1983 military dictatorship. This is because the latter military action took place against the Argentinian middle class, those active in politics and academia: it 'all depends on the social sector suffering repression and its capacity to be heard in public', says Raul Zaffaroni.²³ In addition, the acts committed against indigenous peoples – evictions by the burning of houses, the slaughtering of animals, families being beaten or military exercises conducted on indigenous cemeteries – continue to be carried out, more than a century after the horrendous Campaña del Desierto.

²⁰ Aranda, D., *Argentina originaria*, Buenos Aires, La Vaca Editora, 2010.

²¹ W.M. Delrio, *Memorias de Expropiación. Sometimiento e incorporación indígena en la Patagonia*, Buenos Aires, Universidad Nacional de Quilmes Editorial, 2005.

²² *ibid.*, p. 20.

²³ Aranda, D., *Argentina Originaria*, Buenos Aires, La Vaca Editora, 2010, p. 70.

2. Method

In order to investigate how far the oil companies and government are complicit in violating the rights of indigenous peoples in Argentina it has been necessary to take information from a wide range of sources. The existing literature on human rights violations largely comes from NGOs and journalists working on the ground. The issue has also been raised by a small number of academics, most notably by Bartolomé Clavero, who dedicates a chapter in his monograph *Derecho Global* (Global Law) to how legislation negotiates between indigenous rights and the activities of transnational companies.²⁴ On a general level, the impact of fracking on health and the environment has received attention from a number of scientists. One of the most eminent people who have worked in this field is the late Theo Colborn, founder of the Endocrine Disruption Exchange, who exposed how the chemicals used in fracking act as endocrine disruptors, which lead to a wide range of serious health complaints.²⁵ It has also been necessary to examine the legal and regulatory frameworks that underpin both indigenous and basic human rights. These has largely been issued by international bodies, in the absence of action on the part of the Argentinian government.

It was also felt important to carry out fieldwork and engage with the actors on the ground. To this end I visited Argentina between 23 March and 8 June 2017. During this period I interviewed a number of players in the conflict (see Appendix One), including representatives of the government, the oil companies, indigenous peoples and commentators, including NGOs, journalists and academics. As part of the collection of data I compiled a questionnaire which was given to the interviewees and as well as sent out by e-mail. In what may be a significant avoidance of the issue, many of those organisations and individuals contacted were either reluctant, refused or – generally – ignored the request to engage with the questionnaire, despite having been contacted a number of times and given a sizeable amount of time in which to respond.

²⁴ Clavero, B., *Derecho Global*, Madrid, Editorial Trotta, 2014.

²⁵ C.F. Kwiatkowski, A.L. Bolden, R.A. Liroff, J.R. Rochester, J.G. Vandenberg, 'Twenty-Five Years of Endocrine Disruption Science: Remembering Theo Colborn' *Environmental Health Perspectives*, vol. 124, no.9, 2016.

3. Legal and Regulatory Frameworks

Latin America has been the continent where, more than in any other, reforms have been made in order to incorporate indigenous rights into individual countries' constitutions. Hence, this region is the one where indigenous peoples rights have had more resonance with the wider population. However, the regional human-rights system has not been able to improve the living conditions of this vulnerable sector of society.²⁶

In the case of Argentina, after the military dictatorship between 1976 and 1983, indigenous organizations began to emerge. Together with new international legislation in favour of the recognition of these vulnerable groups they prepared the way for the constitutional reform of 1994 where, for the first time, indigenous peoples' rights were formally recognized in the constitution. 'Until the reform of 1994, the constitution of 1853 established that Congress had the responsibility to maintain the peaceful relationship with the Indians, and promote their conversion to Catholicism'.²⁷

In order to discover how these rights may have been infringed it is important to study the individual items of legislation, looking at their background and to what, if any, extent they are effective in protecting indigenous rights. Below, the different types of legislation and treaties are outlined, on an international, national and local level.

3.1. International Treaties

One of the main pieces of legislation on an international level is from the Committee of the International Covenant on Civil and Political Rights. Art. 27 states:

'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their

²⁶ M.I. Martínez Espinoza, 'Exploraciones/Explorations: Ampliando el canon investigador sobre la participación política de los pueblos indígenas en América Latina', *European Review of Latin American and Caribbean Studies*, vol. 90, 2011, p. 73.

²⁷ L. Savino, 'Landscapes of contrast: The neo-extractivist state and indigenous peoples in "post-neoliberal" Argentina', *The Extractive Industries and Society*, vol.3, 2016, p. 409, Available from <http://www.sciencedirect.com/science/article/pii/S2214790X16300363> (accessed 7 July 2017).

group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

It clearly states that positive obligations on the part of the state can only be fulfilled when the state protects its citizens not only from state violations but also from other people or attacks by private entities. The same position has been taken by the International Covenant on Economic, Social and Cultural Rights.²⁸ This says that in order to guarantee the right to health states must adopt the necessary measures to combat the risks to health, applying policies intended to reduce and end contamination of air, water and soil, including contamination by heavy metals.²⁹

A more targeted piece of international legislation is the Indigenous and Tribal Peoples Convention, 1989 (No 169). This was created by the ILO. Although the ILO is made up of governments, companies and trade unions, there is no indigenous representation and only states are obliged to acknowledge ILO conventions and norms, which leads to an complete lack of control over transnational companies.³⁰ Argentina ratified this Convention in 2001 (Law 24. 071) and through this ratification the law has status above that of national law. Art. 16 of this Convention says that, whenever possible, indigenous peoples have the right to go back to their traditional territories. As will be seen, Argentinian justice has ignored this part of the convention. Art. 6 obliges governments adhering to this agreement to consult with the interested parties every time new legislation is proposed that could affect them, and to establish ways in which the population can participate in the adoption of these decisions in a free way. Art 6.2 states: 'The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures'.

The convention establishes the principle of consultation as an element of indigenous rights but 'generally falls short of requiring the consent of indigenous peoples' with the exception of relocation which requires free and informed consent.³¹ Art. 7 gives priority to the right of indigenous

²⁸ Comisión Interamericana de Derechos Humanos, *Pueblos indígenas comunidades afrodescendientes industrias extractivas*, Comisión Interamericana de Derechos Humanos, 2015, p. 33.

²⁹ *ibid.*, p. 39.

³⁰ B.Clavero, *Derecho Global*, Madrid, Editorial Trotta, 2014, p.159.

³¹ R. Pereira, O. Gough, 'Permanent Sovereignty over Natural Resources in the 21st century: natural resource governance and the right to self-determination of indigenous peoples under international law' *Melbourne Journal of*

people to establish the priorities regarding the process of development which affects them, and obliges governments to cooperate with indigenous peoples in order to assess the social and environmental impacts of these activities on their communities.³² Of equal, and paramount importance, is the right to property and possession over the land traditionally occupied by indigenous people, as laid down in Art. 14, while Art. 15 grants special protection to the natural resources located on their territory. The convention states that indigenous peoples should, as far as possible (governments have the right in the end to say if indigenous peoples should benefit or not),³³ benefit from the exploitation of their land and should also be compensated for any damage resulting from extractive activities. Last but not least, in certain cases the state will not be allowed to continue with these activities they have significant social, cultural and environmental impacts.³⁴ This convention on indigenous peoples is only binding on those who have ratified it and excludes companies which deal directly with indigenous peoples without intermediation or consultation with the state.³⁵

International Law, vol. 14, 2013, p. 27, Available from <http://www.austlii.edu.au/au/journals/MelbJIL/2013/15.pdf> (accessed 20 July 2017).

³² Art 7.

'1. 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 and regional development which may affect them directly.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.'

³³ M.Berraondo, A.Romero, *Pueblos indígenas frente a empresas que operan en competencia por los recursos: buscando formas de coexistencia*, Zaragoza, Idema, 2012, p. 46.

³⁴ Art 13:

'1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environments of the areas which the peoples concerned occupy or otherwise use.'

Art 15:

'1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.'

Art 18:

'Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.'

³⁵ B.Clavero, *Derecho Global*, Madrid, Editorial Trotta, 2014, p.167

A major development came in September 2007. After huge opposition from many states to the recognition of pre-existing communities, the UN passed the Declaration on the Rights of Indigenous Peoples (UNDRIP). This historic document affects around 350 million people around the world and deals mostly with collective rights, identity, territory and the autonomy of indigenous populations. The final text was supported by 143 countries, although 4 voted against (the USA, Canada, Australia and New Zealand). In a challenge to centralised governments, the right to self-determination is a central idea of the declaration. Art. 3 is key to this:

'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'. While Articles 5 and 7.2 state that indigenous peoples have the right to participate in the political process and must not be subjected to an 'act of genocide or any other kind of violence'.³⁶

The declaration also addressed the question of the forcible removal of peoples, the right to participation in decision making, and the importance of consent. These ideas are covered by Art. 10, Art. 18 and Art. 19. As these are so key to the argument below it is worth quoting the most important sections in full:

Art 10: *'Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.'*

Art 18: *'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.'*

³⁶ See: Art 5:

'Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State'.

Art 7.2:

'Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence'.

Art 8.1:

'Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture'.

Art 19: *'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.'*

A related issue is that of the right to hold traditional lands, protected under Art. 26 ('1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'), as well as their development,³⁷ and that such recognition respects the indigenous culture of the people who are entitled to the land ('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'). This should be carried out in a transparent way, through processes to which indigenous peoples have full access.³⁸

The declaration laid out the option of return for displaced people and mentioned the possibility of a right to remedy through restitution of their territory. This is stated in Art. 28.1: 'Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.'³⁹ This territory should be preserved and protected (Art. 29: '1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination. 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands

³⁷ '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.'

³⁸ Art 27: 'States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.'

³⁹ See also 28.2: 'Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress'.

or territories of indigenous peoples without their free, prior and informed consent') and the peoples given access to programmes to preserve and maintain their health.⁴⁰

Once the right to traditional lands has been guaranteed then Art. 32 states that the peoples then have the right to develop their territory according to their own priorities ('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'). This involves consultation on the part of the state and the setting up of appropriate mechanisms for compensation in the event of the use of indigenous lands for extractive industries.⁴¹ When the state is the owner of the subsoil, as is the case in Argentina, the consultation process 'has a purpose of reaching an agreement or getting the consent'.⁴²

Argentina is also one of the 177 countries that have ratified the Convention on the Elimination of all Forms of Racial Discrimination. In one of its country reports the Committee of the CERD recommend the government improve its fight against discrimination and promote human rights, highlighting the need for the social inclusion of indigenous peoples and their participation in policies aimed at reducing racial discrimination. As indigenous peoples have been excluded from discussions over the exploitation of their natural resources, as well as seen the dispossession of their territories, it is claimed that the threats and evictions they have experienced, from both public servants and private actors, amount to racial discrimination.⁴³

The final major international instrument of protection is that of the American Convention on Human Rights (ACHR). This deals, in the main, with general and universal declarations of human rights, not necessarily with those rights specific to indigenous peoples. Art. 1.1 notes that respecting and guaranteeing human rights, as a general obligation of the states, must be 'without

⁴⁰ 29.3. 'States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented'.

⁴¹ '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.'

'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.'

⁴² B.Clavero, *Derecho Global*, Madrid, Editorial Trotta, 2014, p.170.

⁴³ OHCHR, 'Comité ONU para la Eliminación de la Discriminación Racial publicó observaciones finales sobre Argentina', *OHCHR Blog* [web blog], 13 December 2016, <http://acnudh.org/comite-onu-para-la-eliminacion-de-la-discriminacion-racial-publico-observaciones-finales-sobre-argentina/>, (accessed 16 April 2017).

any class of discrimination’, so implicitly noting that discrimination against indigenous peoples is an issue within the purview of the convention. The ACHR also establishes the idea of the precautionary principle, something that is of importance to the issues under discussion in the text below.⁴⁴ It also notes that the enjoyment of property is something to be enshrined within the declaration of rights, and that if this is infringed then the party is eligible for just compensation.⁴⁵

Within the sphere of this thesis, dealing as it does with extractive petrochemical industries, it is important to at least mention the Kyoto Protocol, which was signed by Argentina on 16 March 1998. It is instructive to note, however, that Argentina ratified neither the International Convention on Civil Liability for Oil Pollution Damage (CLC), launched in 1969, nor the 1992 Protocol for the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. These actions suggest that unless there is considerable pressure and public exposure (as in the case of the Kyoto Protocol) the state of Argentina is reluctant to limit its ability to exploit its natural resources and be responsible for the damage that such extraction can cause. This is contrary to the declaration of the UN Economic Commission for Latin America and the Caribbean (ECLAC), which states that: ‘States must resume their proactive role and articulate with all social stakeholders the objectives of an equitable and sustainable energy policy’.⁴⁶

3.2. National norms

While international conventions and treaties do have an affect on how national governments behave, far more germane to the way in which national authorities act are the laws enacted at a

⁴⁴ Art. 4.1: ‘Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. In order for this positive obligation to arise, it must be determined that at the moment of the occurrence of the events, the authorities knew or should have known about the existence of a situation posing an immediate and certain risk to the life of an individual or of a group of individuals, and that the necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such risk’. R.Pereira, O.Gough, *Permanent Sovereignty over Natural Resources in the 21st century: Natural Resource Governance and the Right to Self-Determination of Indigenous peoples under International Law*, London, Melbourne Journal of International Law, 2013, p.41

⁴⁵ Art. 21: ‘1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law’.

⁴⁶ L. Savino, ‘Landscapes of contrast: The neo-extractivist state and indigenous peoples in “post-neoliberal” Argentina’, *The Extractive Industries and Society*, vol.3, 2016, p. 405, Available from <http://www.sciencedirect.com/science/article/pii/S2214790X16300363> (accessed 7 July 2017).

national level. The discussion below outlines the major legislation that deals with both indigenous peoples and extractive industries in Argentina.

There has been a great improvement in ethno-territorial rights over the last two decades in Latin America. Bolivia and Ecuador are considered the two countries which have done the most to protect indigenous communities. However, all these constitutional reforms have not succeeded in avoiding continuing human-rights violations against indigenous peoples.⁴⁷ This is especially so when dealing with extractive industries: 'Constitutions function differently for local populations depending on who the extractivist agent is. The *de jure* function works better when communities face private sector extractivism than when confronting land grabbing conducted by the state (or actors closely associated with the state, such as key commodity exports)'.⁴⁸

There is a worrying trend in the legislative power of Argentina to criminalise indigenous protest. The Observatory of Human Rights of Indigenous Peoples (ODHPI) noted that 374 Mapuche have been brought to court in Neuquén for defending their territory.⁴⁹ This is because there has been an increase in activism aimed at fulfilling the rights of indigenous peoples. In turn, the authorities seek to suppress and deter social movements through prosecutions, and there have been claims that extra-judicial killing has taken place, for example, the murder Javier Chocobar, killed on 12 October 2009. The case has yet to be brought to court.

The Mapuche of Neuquén are targeted for prosecution. Spearheading this movement against the Mapuche are businessmen like Carlos Sapag, brother of the former governor Jorge Sapag. Among the things that have been claimed are that the Mapuche are supported by FARC (Fuerza Armada Revolucionaria de Colombia) and the Spanish terrorist group ETA. 'The main reason for these prosecutions is that the Mapuche want to bring to light the fraudulent and illegal way in which they have appropriated indigenous land, where private speculators have had the complicity of public organs'.⁵⁰

⁴⁷ M. Kröger, R. Lalander, 'Ethno-territorial rights and the resource extraction boom in Latin America: do constitutions matter?' *Third World Quarterly*, vol. 37, no.4, 2016, p. 1, Available from <http://www.tandfonline.com/doi/abs/10.1080/01436597.2015.1127154?journalCode=ctwq20> (accessed July 2017).

⁴⁸ *ibid.*, p. 15.

⁴⁹ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 115.

⁵⁰ D. Aranda, *Argentina Originaria*, Buenos Aires, La Vaca Editora, 2010, p. 57.

Bartolome Clavero, a professor at the Universidad de Sevilla and member of the UN Permanent Forum on Indigenous Issues writes in his article *Expolio del Pueblo Mapuche en el Neuquen* that there is evidence of provincial policies that are systematically inimical for the recognized rights of indigenous communities. 'International human rights legislation and international law of indigenous peoples are being ignored, and the Movimiento Popular Neuquenino (MPN), who have governed the region since 1962, and Sapag promote genocidal policies supported in different ways by the legislature and provincial judiciary'.⁵¹

On 1 November 2006, 'Dia de la Reparacion Historica' ('The Day of Historical Reparation'), the Congress sanctioned the seven articles of Law 26. 160. This law suspended all evictions for 4 years and forced the state, through the National Institute for Indigenous Affairs, to conduct 'a technical-legal cadastral survey of the situation regarding ownership of the land occupied by indigenous communities'.⁵² However, according to Julio Garcia, a lawyer specializing in indigenous law, the application of this law has two main problems; the government is both keeping quiet about the law and not training judges in its use, in addition, the research into land ownership is facing a huge backlog.⁵³ Moreover, evictions have not stopped and provinces are very reluctant to start the research. The budget granted for the project has been exhausted with no explanation of how it has been spent. This norm affects only those who have traditionally occupied, and continue to occupy, a territory, which excludes all the families wanting to go back to their ancestral lands. It also refers only to those indigenous peoples who are a legal entity, but it fails to take into account that most of them lack this legal requirement. Therefore, the scope of this law is too narrow and this makes the law itself useless.⁵⁴

The evaluation of the compliance of Argentina with the International Covenant on Civil and Political Rights acknowledges the importance of this law in stopping evictions but it does not include the aim that the state should, following investigation, pass over the title to the land to

⁵¹B. Clavero, *¿Hay Genocidios Cotidianos?*, Copenhague, IWGIA, 2011, p. 132.

⁵²J. Anaya, *La situacion de los pueblos indigenas en Argentina*, Copenhague, IWGIA, 2012, p. 16.

⁵³D. Aranda, *Argentina Originaria*, Buenos Aires, La Vaca Editora, 2010, p. 25.

⁵⁴ *ibid.*, p.112; Art. 1, 'La emergencia declarada por la Ley No 26.160 alcanza a las Comunidades Indígenas registradas en el Registro Nacional de Comunidades Indígenas (Re.Na.C.I.) u organismo provincial competente, así como a aquellas preexistentes.- Se entenderá por "aquellas preexistentes" a las comunidades pertenecientes a un pueblo indígena preexistente haya o no registrado su personería jurídica en el Registro Nacional de Comunidades Indígenas u organismo provincial competente'.

those indigenous peoples who are entitled to own it.⁵⁵ This law is clearly not in line with international standards guaranteeing the right to land of indigenous peoples. Is also a major concern that the state has not, so far, given these communities the documentation required to prove their territorial claims.⁵⁶

Resolution n° 4811/96, Art. 2, of the National Institute of Indigenous Affairs (INAI) established criteria through which indigenous communities can be registered as legal entities, these include: name and geographical location, proof of ethno-cultural and historical origin, and a description of how the community is organised.⁵⁷ The documentation only needs to be presented once, without the need to update it. The validation of the *personeria juridica* lasts for the duration of the existence of the community.⁵⁸

The first time law 26.160 was applied was in the case of the Mapuche community Las Huaytekas, against José Luis Martínez Pérez, the proxy of Joseph Lewis, an English millionaire owner of a large area of land in Patagonia. The judgement pointed out clearly that it did not matter when the occupation started, even if it had been before the the law was enacted. It also followed the judgment of the Inter-American Court of Human Rights which found that until the legal situation has been completely understood, the state should prevent any act that could lead to the rights of indigenous people to the land being damaged.⁵⁹ Following ILO Convention 169, it also declared that indigenous communities 'shall not be moved from the territories they occupy and

⁵⁵ 'A pesar de la importancia de la norma para frenar los desalojos, ella no tiene entre sus objetivos que el Estado realice, luego de las medidas de relevamiento, la titulación de los territorios a nombre de los pueblos indígenas'. ODHPI et al., 'Evaluacion sobre el cumplimiento del Pacto Internacional de Derechos Civiles y Políticos en Argentina, 2016, p. 2.

⁵⁶ *ibid.*, p. 2.

⁵⁷ 'a) Nombre y ubicación geográfica de la Comunidad.

b) Reseña que acredite su origen étnico-cultural e histórico, con presentación de la documentación disponible.

c) Descripción de sus pautas de organización y de los medios de designación y remoción de sus autoridades.

d) Nómina de los integrantes con grado de parentesco.

e) Mecanismos de integración y exclusión de sus miembros.'

⁵⁸ Instituto Nacional de Asuntos Indígenas (INAI), 'Tierras y Registro nacional de Comunidades Indígenas' Ministerio de Desarrollo Social, <https://www.desarrollosocial.gob.ar/wp-content/uploads/2015/08/6.-INAI-Tierras-y-registro-nacional-de-comunidades-ind--genas.pdf> (accessed 14 March 2017).

⁵⁹ 'Hasta tanto se concrete la delimitación y titulación de las tierras indígenas, los Estados deben abstenerse de realizar actos que puedan llevar a que los agentes del propio Estado, o terceros que actúen con su aquiescencia o su tolerancia, afecten la existencia, el valor, el uso o el goce de los bienes ubicados en la zona geográfica donde habitan y realizan sus actividades los miembros de la comunidad indígena'. D. Aranda, 'Un antes y un después en la aplicación del derecho de los pueblos indígenas', *Dario Aranda Blog* [web blog], 9 December 2015, <http://www.darioaranda.com.ar/2015/12/un-antes-y-un-despues-en-la-aplicacion-del-derecho-de-los-pueblos-indigenas/>, (accessed 29 March 2017).

the state is obliged to respect this right regardless the occupation was before or after this law'.⁶⁰ According to indigenous peoples, the Neuquén authorities' avoidance of this law is because the research would reveal the usurpation of lands that originally belonged to the Mapuche community.

Official reports, like the Auditoria General de la Nacion and that of the INAI, mention the lack of compliance with this law. In mid 2011, only 4.22% of the land at stake had been investigated. By 2017 only 6 provinces had concluded their research, but even where it had been concluded there was no legal recognition of possession and property.⁶¹ However, Art. 18 of the Código Civil y Comercial states that indigenous communities do have the right to possession of the lands that they traditionally occupied.⁶² This represents a change in approach, the National Constitution, which was valid up until 1994, said in Art. 67.15 that the Congress should keep the peace with the 'Indians' and promote their conversion to Catholicism. However, in the reform of the constitution, Art. 75.17 recognizes the pre-existence of indigenous peoples, guarantees that their identity is respected and gives them the right to a bilingual and intercultural education. It also acknowledges communal possession and property and assures their participation in the management of their natural resources and interests, among other rights.⁶³

In an interview with Raul Zaffaroni, a judge for the Inter-American Court on Human Rights and former member of the Instituto Nacional contra la Discriminacion, la Xenofobia y el Racismo, he points out that it is important to create a legal entity that guarantees that indigenous people, as an entity, can be granted rights which already exist. This means that the people can begin to use

⁶⁰ C. Ovejero, M. Moreno Ferullo, M.B. Leguizamón, 'Argentina' IWGIA, 2016, Available from http://www.iwgia.org/images/stories/sections-esp/regiones/latin-america/docs/MI2016/Argentina_MI2016_web.pdf (accessed 23 March 2017), p. 198.

⁶¹ Amnesty International, *2017 Derechos Humanos Agenda Para Argentina*, Buenos Aires, Amnistia Internacional Argentina, 2017, p. 9.

⁶² *Derechos de las comunidades indígenas. Las comunidades indígenas reconocidas tienen derecho a la posesión y propiedad comunitaria de las tierras que tradicionalmente ocupan y de aquellas otras aptas y suficientes para el desarrollo humano según lo establezca la ley, de conformidad con lo dispuesto por el artículo 75 inciso 17 de la Constitución Nacional*.

⁶³ *To recognize the ethnic and cultural pre-existence of indigenous peoples in Argentina; to ensure respect for their identity and their right to a bilingual and intercultural education; to recognize the legal status of their communities, and the communal possession and ownership of the lands they traditionally occupy; to regulate the provision of other suitable lands sufficient for human development, which shall not be alienable, transferable or subject to taxes of embargoes; and to ensure their participation in the management of their natural resources and other interests affecting them. The provinces can exercise these powers concurrently*.

these rights, which they already own, without further legislation.⁶⁴ This does not mean, however, that this status affords indigenous people complete protection. Amnesty International and the Special Rapporteur of the UN for Indigenous Peoples' Rights have both claimed that fake legal recognitions are being used to favour extractive projects on indigenous lands.⁶⁵

A further protection to indigenous lands should be provided under Law 26.331 (de Presupuestos Minimos de Proteccion Ambiental de los Bosques Nativos). This obliges the provinces to undertake a territorial audit of native forest and orders local authorities, together with indigenous communities, to indicate which territories are devoted to conservation and which to other uses. Although there have been conflicts over its implementation, this is to date the only territorial framework in existence.⁶⁶

In terms of environmental protection, Art. 41 of the National Constitution establishes a wide right to environmental information and an obligation on the authorities to provide it. It also provides the right to a healthy environment, something that creates an obligation to engage in environmental protection. This is further seen in Art. 43, which provides a right to prior restraint when a collective good, like the environment, is in danger of damage. This is intimately connected to the principle of prevention and can be invoked when the damage has not yet occurred but is imminent.⁶⁷

The National Constitution also deals with how natural resources are managed in Argentina. Art. 124 grants the management of natural resources to the provinces. While management may be at a regional level, the business of extraction is a national concern. The national legislation, *Autoabastecimiento de Hidrocarburos YPF 26.741*, declares that self-sufficiency in hydrocarbons is in the national interest and the achievement of this will guarantee economic development and social equity. The main thrust of this law was to provide legal means to renationalise 51% of the com-

⁶⁴ 'El otorgamiento de personería jurídica sirve para hacer operativos los derechos ya existentes de las comunidades indígenas, que los vienen ejerciendo históricamente y no a partir de su nacimiento como personas jurídicas. Sus sistemas de organización política, social, económica, cultural y religiosa, y los derechos que ello apareja, como la designación de sus propios líderes y el derecho a reclamar sus tierras tradicionales, son reconocidos no a la persona jurídica que debe inscribirse para cumplir con un formalismo legal, sino a la comunidad en sí misma'.

⁶⁵ *Derechos Humanos. Agenda para Argentina*, Buenos Aires, Amnesty International, 2017, p.16.

⁶⁶ ODHPI et al., 'Evaluación sobre el cumplimiento del Pacto Internacional de Derechos Civiles y Políticos en Argentina', 2016, p. 3.

⁶⁷ D. Rodríguez López y A. Burucua, *Pasivos ambientales e hidrocarburos en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 78.

pany Repsol YPF Gas S.A.⁶⁸ While the outcome may be seen as positive by some, the drive to create the law does not appear to be altruistic but opportunistic given the recent discovery by Repsol of a large reservoir of gas in Vaca Muerta.

Decree 929/13 was passed in 2013 by President Cristina Fernández de Kirchner, it gives very high levels of tax concessions to all those investing in fracking activities.⁶⁹ This decree was made a few days before the finalization of the agreement between YPF and Chevron, suggesting that it was a tailor-made legal framework for the American company as a condition for its investment in the country. This agreement was made behind closed doors and is still largely unknown among wider society.⁷⁰ The modification of the legislation overseeing this controversial sector should have been done not by decree but through a debate in the national congress.⁷¹ Environmental controls were not established even though fracking is considered to be one of the most contaminating extractive industries.⁷²

Some of the new privileges that gave rise to largest controversies are: direct awarding of concessions for 35 years without public tender and provinces owning the resources not being allowed to implement new taxes (12% is the maximum). All this in direct violation of the National Law of Hydrocarbons, limits the Law of Energy Sovereignty and is against the General Law of Environment.⁷³ President Cristina Fernández was denounced for signing the decree, with some claiming it was a criminal act. It is worth noting that from 2010 onwards the executive has not had the power to dictate tax norms, this is an exclusive right of the national congress.⁷⁴

Decree 929/13 is applicable at a national level. Although natural-resource management belongs to the provinces (see Art. 124 of the National Constitution), the provinces delegated responsibil-

⁶⁸ J.D. Taillant, A. Roeloffs and C. Headen, *Fracking Argentina: Informe técnico y legal sobre la fracturación hidráulica en Argentina*, Córdoba, Centro de Derechos Humanos y Ambiente & ECOJURE, 2013, p. 77.

⁶⁹ J.D. Taillant, A. Roeloffs and C. Headen, *Fracking Argentina: Informe técnico y legal sobre la fracturación hidráulica en Argentina*, Córdoba, Centro de Derechos Humanos y Ambiente & ECOJURE, 2013, p. 61.

⁷⁰ *ibid.*, p. 62.

⁷¹ H. Fernández, 'Un decreto que confirma la no política petrolera', *La Nación*, 20 July 2013, Available from <http://www.lanacion.com.ar/1602681-un-decreto-que-confirma-la-no-politica-petrolera> (accessed 2 April 2017).

⁷² D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 80.

⁷³ F. Gutiérrez Rios, 'Acuerdo YPF-Chevron: Violencia física y simbólica en el contexto extractivista petrolero en la Argentina', *Anuari del Conflict Social*, no.4, 2014, Available from <http://revistes.ub.edu/index.php/ACS/article/view/12274> (accessed 22 March 2017).

⁷⁴ J.M. Picolotti, 'Análisis del decreto 929/2013 desde una óptica jurídica y ambiental', Center for Human Rights and Environment, 2 August 2013, Available from <http://center-hre.org> (accessed 2 April 2017).

ity for legislation related to hydrocarbons to central government.⁷⁵ In essence, the policy was decided by a very small group of people who took no account of the wishes and needs of the provinces, which were the owners of the natural resources. In doing so, they have defined the next 30 years of hydrocarbon policy in Argentina.⁷⁶

Argentina does not have a national law that regulates fracking, one reason why this activity is governed by existing norms related to hydrocarbons and mining, as well as environmental law.⁷⁷ It is important to remember that, in Argentina, provinces have competence and jurisdiction over the management of their natural resources.⁷⁸ Moreover, there are some international treaties that, without mentioning it explicitly, regulate fracking, and according to the National Constitution those are part of internal law.⁷⁹

The concessions are governed by Law 27.007 (which modified the existing Law 17.319). It confers great benefits on companies, such as concession periods of up to 45 years, no upper limit on the size of concession granted, a tax rate of only 12% (the lowest in the market: Bolivia has 50%, Venezuela 30%, Australia 25%, Canada 20% and Nigeria 19%), and the use of foreign tribunals (New York and Paris) to settle any disputes. It takes into consideration neither indigenous rights nor environmental controls.⁸⁰ Enrique Martinez, former president of INTI (Instituto Nacional de Tecnología Industrial), was one of the few Kirchner supporters who opposed the law, pointing out that the new norms only provide for companies, the same companies which have caused the environmental damage and energy crisis in the first place, and all this in the name of energy sovereignty.⁸¹

In Art. 31 the law provides for the application of 'the most rational and effective techniques' when carrying out extractive work. To avoid accidents, permit holders should apply safety measures which follow accepted practice in the sector. If an accident occurs it should be reported to the authorities. While Art. 75 points out the obligation of the authorities to check the activities

⁷⁵ *ibid.*

⁷⁶ J.M. Picolotti, 'Análisis del decreto 929/2013 desde una óptica jurídica y ambiental', Center for Human Rights and Environment, 2 August 2013, Available from <http://center-hre.org> (accessed 2 April 2017).

⁷⁷ J.D. Taillant, A. Roeloffs and C. Headen, *Fracking Argentina: Informe técnico y legal sobre la fracturación hidráulica en Argentina*, Córdoba, Centro de Derechos Humanos y Ambiente & ECOJURE, 2013, p. 66.

⁷⁸ National Constitution, Art. 124.

⁷⁹ *ibid.*, Art. 75.22.

⁸⁰ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 88.

⁸¹ *ibid.*, p. 742.

of these companies in order to guarantee compliance with the law, this does not happen in practice.

The law can be seen as an extension of Decree 929, where the privileges of the latter are granted to all companies through the Concesion de Explotacion No Convencional. Gerardo Rabinovich, vice-president of the Instituto Argentino de la Energía (IAE) said that 'this law is incomplete, does not create consensus and does not deal with the issue in depth. It does not succeed in reversing the situation.'⁸² Among the main changes to the former Hydrocarbons Law 7.319 is that the concession periods are extended for non-conventional extraction for up to 35 years (the previous law granted 25 years and there was no difference between conventional and non-conventional extraction), and the amount of investment needed by the companies in order to benefit from this law became US\$250 million and not US\$1 billion as before. The concept of CSR only appears to say that companies have to give 2.5% of their initial investment to the provinces where they are carrying out the extraction. In addition, in terms of environmental legislation, the only sentence which mentions it is the one which requires the national and provincial administrations to unify environmental legislation.⁸³

Art. 2.342 of the Argentinian Civil Code says that the state owns the subsoil, although private companies, or any other entity, can own the surface. This aids the state in devolving rights to entities who wish to extract hydrocarbons. The way in which this is done is governed by the General Environmental Law 25.675, which states that the use of the natural resources should be done in a sustainable way, not compromising opportunities for present and future generations, and points out that the entity which damages the environment is responsible of its restoration, if possible, or compensation is to be paid at a level determined by a judge.

Art. 11 of this law establishes, as a condition, that any activity in the country which may cause environmental damage or will affect people's quality of life must present a report beforehand (EIA, 'Estudio del Impacto Ambiental'). Unfortunately, not in all companies abide by the law. In

⁸² El Economista, '¿Qué cambia con la nueva ley de hidrocarburos?', El Economista, 21 October 2014, Available from <http://www.eleconomista.com.ar/2014-10-¿que-cambia-con-la-nueva-ley-de-hidrocarburos/> (accessed 23 March 2017).

⁸³ Gutiérrez, F.M., Araya, T.M., Campolieti, F., 'Ley de Hidrocarburos', *M&M Bomchil Abogados Blog*, [web blog], 12 November 2014, <http://www.bomchil2.com.ar/es/publicaciones>, (accessed 21 July 2017). 'que el Estado Nacional y las provincias deberán "propender" a establecer una legislación ambiental uniforme respecto de las tareas de exploración, explotación y/o transporte de hidrocarburos y "propiciar" la adopción de un tratamiento fiscal uniforme que promueva las actividades hidrocarburíferas a desarrollarse en sus respectivos territorios.'

a report from 2012 on the Anglo-Dutch multinational Shell by the Subsecretaria de Ambiente, the oil company presented a report on a project which lacks basic documentation. This is argued by lawyer and specialist in environmental law Juan Fittipaldi, to go against Art. 12 and makes it impossible to approve the concession. However, in this case authorities gave the green light to the project.⁸⁴ The law, through Art. 21, also has the obligation to ensure citizen participation in the process of evaluating environmental damage and in the environmental management of the territory: the IAPG claims that the companies operating in Argentina respect the regulations strictly.⁸⁵ However, as we can see, this is far from reality. Environmental justice is a basic human right and other social, environmental and civil rights are involved in its protection.

The General Environmental Law defines, in a subjective way, environmental damage as all relevant alterations that modify the environment, resources, the balance of ecosystems or collective goods and values in a negative way. These alterations can be caused by legal acts, lawful or unlawful action or omission. The extractivist pattern of development necessarily entails a certain degree of environmental impact. It also denotes that all citizens have the right to environmental information unless there is a legal case for it to be withheld. This is also governed by the Law of Free Access to Public Information 25.831, which is a basic legal framework that allows all physical or legal entities to ask, at no expense, for environmental information. There is no need to explain why the information is required and, in the case of denial of access, the authority has to present a coherent and valid argument why it was refused.

Art. 28 of the General Environmental Law lays down that the entity which causes environmental damage will be responsible for its restoration to its previous state. If this is impossible, the entity will have to pay compensation to the Environmental Compensation Fund: a fund that has not been provided with regulation, composition or sense of end use.⁸⁶ An entity can only escape liability if it can prove it has taken all necessary measures to avoid the damage (Art. 29). Finally, this law also obliges those carrying out activities which pose a risk to the environment to have insurance to cover any possible damage, and allows every person the right to ask for the end to

⁸⁴ OPSur, 'Neuquén, el avance no convencional de Shell', *OPSur Blog* [web blog], 25 March 2017, <http://www.opsur.org.ar/blog/2014/05/20/el-avance-no-convencional-de-shell-en-argentina/>, (accessed 4 July 2017).

⁸⁵ 'Las compañías operadoras respetan estrictamente las regulaciones vigentes en las provincias en las que desarrollan sus actividades', E.López Anadón et al., *El abecé de los hidrocarburos en reservorios no convencionales*, Buenos Aires, IAPG, 2014, p. 10.

⁸⁶ D. Rodríguez López, A. Burucua, *Pasivos ambientales e hidrocarburos en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 72.

activities damaging the environment through a legal instrument called 'recurso de amparo' (see below).⁸⁷

The responsibility for industrial waste is partly governed by Law 25.621 (de Gestión Integral de Residuos Industriales). This says that polluters are responsible for the damage they cause and should try their best to minimize their amount of waste. It punishes those who, in the use of that waste, contaminate the environment, putting at risk the population and flora and fauna. Resolution 24/2004 of the Secretaria de Energía de la Nación establishes that in case of serious incidents, companies must inform the authorities immediately. That was not the case when Repsol-YPF was responsible for the spill that led to the closure of the only sports facility of the municipality Plaza Huincul.⁸⁸ The Civil Code, in laws 18.398 and 22.190, prohibits contamination by hydrocarbons and other harmful substances. Art. 1.113 states that liability not only lies with the entity which has caused the damage, but is also extended to those under its employment and to its plant and machinery (unless these have been used without consent).

Dangerous residues fall under Law 24.051, defining them as those able to cause damage, directly or indirectly, to living beings or causing contamination of the soil, water, atmosphere or general environment. In annex III it prohibits waste disposal in water. It defines acts of poisoning or contaminating the soil, water, atmosphere or environment in general in a way dangerous for health as a penal crime. A company would also be responsible for its managers, directors or any other representative of the company. The use of water is governed by Law 25.688 (de Presupuestos Mínimos de Gestión Integral de las Aguas), Art. 5 of which demands the need for authorization from the competent authority prior to the use of water. Provinces can make use of the natural resources within their territories but the state keeps some jurisdictions, as in the case of extractive industries (Art. 124 of the constitution). In terms of the environment, the state establishes a minimum legal framework to protect it and provinces must complement it with the creation of new legislation (Art. 41.3 of the constitution).

⁸⁷ D. Rodríguez López, A. Burucua, *Pasivos ambientales e hidrocarburos en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 81

⁸⁸ F.C. Christiansen, H. Scandizzo, *Polos: Injusticias ambientales e industrialización petrolera en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 49.

3.3. Local Norms

Although provinces have theoretical control over their natural resources, the national state has the power to dictate a minimum legal framework which has to be respected.⁸⁹ Each province has its own constitution under which local norms can be put in place, unless they conflict with national priorities. The Neuquén Constitution outlines the rights, protection and status of indigenous peoples in the province, and provides for their education and cultural protection. It also establishes the legal status of the indigenous people as well as their property and participation in the political process.⁹⁰

A number of laws enacted at a local level in Neuquén also have an impact on the scope of this thesis. Law 1.926 regulates the extraction of hydrocarbons at a provincial level, while Decree 3075/1998 deals with the compensation to be paid by oil companies in the event of environmental damage taking place. So far, however, this decree appears to have not been fully enacted.⁹¹ Other aspects of preservation, conservation and defence of the environment fall under a further piece of legislation, that of Law 1.875.

In 2012 the province adopted Decree 1483/12 which regulates the rules and procedures for the exploration for, and exploitation of, non-conventional reservoirs of hydrocarbons. Art. 3 states that all projects engaging in exploration and exploitation must have an environmental license before starting work and, in some cases, carry out risk analyses in which, among other things, companies have to describe the composition of the fluids used in their wells. In terms of flow-back, dumping in surface waters and storage in open air receptacles is banned outright, and the pools where the liquids are kept must be waterproof.⁹² For other toxic waste, at the end of 2015

⁸⁹ J.D. Taillant, A. Roeloffs and C. Headen, *Fracking Argentina: Informe técnico y legal sobre la fracturación hidráulica en Argentina*, Córdoba, Centro de Derechos Humanos y Ambiente & ECOJURE, 2013, p. 68.

⁹⁰ Art. 53: '*La Provincia reconoce la preexistencia étnica y cultural de los pueblos indígenas neuquinos como parte inescindible de la identidad e idiosincrasia provincial. Garantiza el respeto a su identidad y el derecho a una educación bilingüe e intercultural. La Provincia reconocerá la personería jurídica de sus comunidades, y la posesión y propiedad comunitaria de las tierras que tradicionalmente ocupan, y regulará la entrega de otras aptas y suficientes para el desarrollo humano; ninguna de ellas será enajenable, ni transmisible, ni susceptible de gravámenes o embargos. Asegurará su participación en la gestión de sus recursos naturales y demás intereses que los afecten, y promoverá acciones positivas a su favor*'.

⁹¹ D. Rodríguez López, A. Burucua, *Pasivos ambientales e hidrocarburos en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 43.

⁹² J.D. Taillant, A. Roeloffs and C. Headen, *Fracking Argentina: Informe técnico y legal sobre la fracturación hidráulica en Argentina*, Córdoba, Centro de Derechos Humanos y Ambiente & ECOJURE, 2013, p. 95.

the Neuquén administration signed a further decree in which oil dumps should be constructed a minimum distance of 8 km from urban areas.⁹³

3.4. Participation, Consultation and Consent

Key to indigenous peoples retaining control over their territories and being aware of their rights, is how far they can participate in the political process. The fight for this participation has been ongoing for many years. Although the main protests took place in the 1990s, indigenous peoples in Latin America continue to demonstrate to gain their right to participation. Indigenous peoples' rights are based on their right to self determination. This right embraces participation in politics, the economy, culture, law and control of territory.⁹⁴

According to ILO Convention 169 and the UNDRIP, the right to participation is formed by another three main rights: consultation, free, previous and informed consent, and participation in public policy making. Although many are signatories to the ILO convention, together with the UNDRIP, still there is a general situation of breach of these international obligations by Latin American states.⁹⁵ Self determination is one of the most controversial rights when it comes to participation. It is seen as a separatist claim in many cases,⁹⁶ instead of seeing it as a right of communities with specific and different cultures and history to decide their own destiny.

There is no formal procedure for prior consultation with indigenous peoples in Argentinian law. The General Environmental Law only references the right to 'universal' consultation and establishes that these opinions will not be binding.⁹⁷ It is up to the state to decide in which projects it wishes to participate, and which indigenous communities, if any, may participate in discussions and how. In the few cases this consultation does take place, it is not in the original language of

⁹³ OPSur, 'Un año de victorias en la lucha contra el fracking', *OPSur Blog* [web blog], 26 December 2016, <http://www.opsur.org.ar/blog/2016/12/26/un-ano-de-victorias-en-la-lucha-contra-del-fracking/>, (accessed 14 June 2017).

⁹⁴ M.I. Martínez Espinoza, 'Exploraciones/Explorations: Ampliando el canon investigador sobre la participación política de los pueblos indígenas en América Latina', *European Review of Latin American and Caribbean Studies*, vol. 90, 2011, p. 72.

⁹⁵ M.I. Martínez Espinoza, 'Exploraciones/Explorations: Ampliando el canon investigador sobre la participación política de los pueblos indígenas en América Latina', *European Review of Latin American and Caribbean Studies*, vol. 90, 2011, p. 75.

⁹⁶ *ibid.*, p. 76.

⁹⁷ J.Anaya, *La situación de los pueblos indígenas en Argentina*, Copenhagen, IWGIA, 2012, p. 22.

these communities, and corruption, manipulation and falsification of documents are the norm.⁹⁸ As the Special Rapporteur James Anaya notes, 'principles of consultation and consent function as instrumental to rights of participation and self-determination'.⁹⁹

3.5. Specific State Obligations and Guarantees

The Inter-American Commission considers the main obligations on states to be: adopting a suitable and effective legal framework; preventing human rights violations; overseeing and controlling the activities of companies and other stakeholders; guaranteeing effective participation and access to information; preventing illegal activities and any form of violence; and, guaranteeing access to justice through adequate investigation, sanction and remedy of human rights violations.¹⁰⁰ These obligations are outlined in more detail below.

1. Adopting a proper and effective legal framework:

This obligation comes from Art. 2 of the American Convention on Human Rights:

*'This obligation includes the adoption of the appropriate domestic legislation to protect the most relevant human rights in the field of extractive and development activities, the repeal of legislation which is incompatible with the rights enshrined in the Inter-American instruments, and to refrain from adopting legislation contrary to these rights.'*¹⁰¹

*'Indeed, by virtue of its duty to adapt domestic law, States have to review their laws, procedures, and practices to ensure that the land rights of indigenous and tribal peoples are safeguarded in this context, in accordance with the rights established in the Inter-American human rights instruments.'*¹⁰²

⁹⁸ ODHPI et al., 'Evaluación sobre el cumplimiento del Pacto Internacional de Derechos Civiles y Politicos en Argentina' 2016, http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ARG/INT_CCPR_CSS_ARG_24354_S.pdf (accessed 13 July 2017).

⁹⁹ United Nations General Assembly, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples*, Geneva, Human Rights Council, 2013, p. 9.

¹⁰⁰ Comisión Interamericana de Derechos Humanos, *Pueblos indígenas comunidades afrodescendientes industrias extractivas*, Comisión Interamericana de Derechos Humanos, 2015, p. 41.

¹⁰¹ paragraph 67 IACHR Report Indigenous Peoples, Communities of African Descent, Extractives Industries 2015

¹⁰² *ibid.* paragraph 70.

2. Preventing, mitigating and suspending negative impacts on human rights:

When there is a case of environmental damage or a violation of human rights by extractive industries, usually these companies evade their responsibility by questioning the relationship between their activities and the damage or violations. The behaviour of the state is often similar: to blame the private actor. In the end this leads to the impunity of culprits and the defencelessness of victims, who, in many cases, belong to disadvantaged social groups. In order to fight against this injustice, the Inter-American Court of Human Rights developed the binding jurisprudence of the 'doctrine of the foreseeable and avoidable risk'.¹⁰³

'The duty of prevention is a central part of the general obligation to guarantee human rights and it entails, in the words of the Inter-American Court, all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages'.¹⁰⁴

The IACHR has ruled that an illicit act that is not blamed on the state because is the work of an individual, can end up being the responsibility of the state because of its lack of due diligence.¹⁰⁵

The IACHR continues:

'i) State authorities knew, or should have known, of the existence of a real and immediate risk to life and/or physical integrity of an individual or specific group of individuals and that ii) said authorities did not take the necessary measures, within the realm of their powers and attributions, which rationally, were expected to be taken to prevent or avoid the risk'.¹⁰⁶

¹⁰³ J. C. Ruiz Molleda, '¿Cómo imputar responsabilidad al Estado por graves violaciones de derechos humanos cometidas por terceros?', Informando Justicia, 7 September 2016, Available from <http://www.justiciaviva.org.pe/new/como-imputar-responsabilidad-al-estado-por-graves-violaciones-de-derechos-humanos-cometidas-por-terceros/> (accessed 9 May 2017).

¹⁰⁴ *ibid.* paragraph 82.

¹⁰⁵ 'Un hecho ilícito violatorio de los derechos humanos que inicialmente no resulte imputable directamente a un Estado, por ejemplo, por ser obra de un particular o por no haberse identificado al autor de la trasgresión, puede acarrear la responsabilidad internacional del Estado, no por ese hecho en sí mismo, sino por falta de la debida diligencia para prevenir la violación o para tratarla en los términos requeridos por la Convención'; J.C.Ruiz Molleda, '¿Cuáles son las obligaciones de los Estados cuando realizan actividades extractivas en los territorios ancestrales de los pueblos indígenas?', IWGIA, 2016, Available from http://www.iwgia.org/iwgia_files_publications_files/0750_Los_aportes_del_nuevo_Informe_de_la_CIDH_en_materia_de_Pueblos_Indigenas_2016.pdf, (accessed 9 April 2017).

¹⁰⁶ Paragraph 84, IACHR Report Indigenous Peoples, Communities of African Descent, Extractives Industries 2015.

3. Overseeing and inspecting the activities of companies and other non-state actors:

This is one most innovative elements of the report. It is intended to counter the problem of extractive industries making use of their multinational status to elude their responsibilities for indigenous people.

'Such a framework must include efficient methods of supervision and accessible means of redress where violations occur. This may involve negotiations between host states and states of origin at the entry level, such as during bilateral or other agreements and before foreign companies are accepted for business'.¹⁰⁷

4. Guarantee mechanisms of effective participation and access to information:

'States have a specific duty to consult, and ensure their participation in decisions on any measures affecting their territories, taking into account the special relationship between indigenous and tribal peoples to their land and natural resources'.¹⁰⁸

'One of the central elements for the protection of the right to property of indigenous peoples is precisely that States establish effective and previously notified consultations with indigenous communities in relation to the acts and decisions which can affect their traditional lands. Member States have the obligation to guarantee that each determination is based on a process of previously informed consent provided by the entirety of the indigenous community'.¹⁰⁹

5. Preventing illegal activities and violence against the population of affected areas by extractive or development activities:

'States are obligated to monitor and prevent illegal extractive activities in territories inhabited by indigenous peoples...and to investigate and punish those responsible'.¹¹⁰

¹⁰⁷ *ibid.* paragraph 76.

¹⁰⁸ *ibid.* paragraph 106.

¹⁰⁹ *ibid.* paragraph 107.

¹¹⁰ *ibid.* paragraph 127.

6. Guaranteeing access to justice through investigation, sanction and adequate remedy of the violations of human rights:

'If the apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention'.¹¹¹

'Evidence of human rights violations in cases of environmental damage, for example, can entail enormous costs as they require sophisticated technical testing or expert scientific opinions, as well as experts' fees and costs related to the transportation of the experts to the affected areas; costs which generally cannot be assumed by the affected individuals and require the intervention of specialized agencies'.¹¹²

All these paragraphs are binding obligations because they are recognized by the Inter-American Court of Human Rights.¹¹³ However, in an Argentinian context these obligations are circumvented due to a clouding of the division between the state and companies. Both companies and the state receive profits from, and are the engine of, the non-conventional hydrocarbon business. This being so, YPF is often seen as being indivisible from the state as the state uses its power to modify laws in order to benefit the state-owned company.¹¹⁴ This is the major problem for fracking in an Argentinian context.

The 'doctrine of foreseeable and avoidable risk' mentioned above, whose origin lies in the European Court of Human Rights, was established as a positive obligation on the state. To prosecute, the state must be, or should have been, aware of the existence of a real and immediate risk for a

¹¹¹ *ibid.* paragraph 135.

¹¹² *ibid.* paragraph 137.

¹¹³ J.C. Ruiz Mollada, '¿Cuáles son las obligaciones de los Estados cuando realizan actividades extractivas en los territorios ancestrales de los pueblos indígenas?', IWGIA, 2016, Available from http://www.iwgia.org/iwgia_files_publications_files/0750_Los_aportes_del_nuevo_Informe_de_la_CIDH_en_materia_de_Pueblos_Indigenas_2016.pdf, (accessed 9 April 2017).

¹¹⁴ F. Gutiérrez Ríos, 'Acuerdo YPF-Chevron: Violencia física y simbólica en el contexto extractivista petrolero en la Argentina', *Anuari del Conflicte Social*, no.4, 2014, p. 47, Available from <http://revistes.ub.edu/index.php/ACS/article/view/12274> (accessed 22 March 2017).

known person or group of people, did not take all the necessary measures within its power, and that these measures could have prevented the damage.¹¹⁵

3.6. Institutions guaranteeing protection

There are a number of institutions tasked with protecting indigenous rights within Argentina, both national and international. Given the complexity of the number of different actors operating within the country it is important to at least outline their responsibilities and spheres of operation.

Corporacion Interestatal Pulmarí

The CIP was created in 1987 and is one example of the incompetence of the Argentinian institutions which are supposed to protect indigenous rights. The aim of this corporation was to manage, in a sustainable way, 112,000 hectares in Neuquen, oversee progressive restitution to the Mapuche and promote neighbouring communities. 'None of this has been done', says Veronica Huilipan, spokesperson of the Conferencia Mapuche. Instead, 'they offered the territories to the highest bidder'.¹¹⁶

Inter-American Court of Human Rights

This court has claimed, among other things, that: 'The members of indigenous peoples who have unwillingly lost possession...are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights'. It has also said of the traditional possession of lands by indigenous peoples that this is the legal equivalent of a 'state-granted full property title'.¹¹⁷

¹¹⁵ 'En esta nueva etapa, tanto la empresa como la Nación, no sólo obtienen parte de la renta sino que además son motor y garantes en el pretendido desarrollo masivo de hidrocarburos no convencionales (...) Esta ambigüedad permite que se confunda YPF con el Estado, que el Estado modifique las normas para favorecer a YPF y, por extensión, al conjunto de las operadoras'; J.C. Ruiz Molleda, '¿Cuáles son las obligaciones de los Estados cuando realizan actividades extractivas en los territorios ancestrales de los pueblos indígenas?', IWGIA, 2016, Available from http://www.iwgia.org/iwgia_files_publications_files/0750_Los_aportes_del_nuevo_Informe_de_la_CIDH_en_materia_de_Pueblos_Indigenas_2016.pdf, (accessed 9 April 2017).

¹¹⁶ D. Aranda, *Argentina Originaria*, Buenos Aires, La Vaca Editora, 2010, p. 50.

¹¹⁷ R. Pereira, O. Gough, 'Permanent Sovereignty over Natural Resources in the 21st century: natural resource governance and the right to self-determination of indigenous peoples under international law' *Melbourne Journal of*

Inter-American Commission on Human Rights

Along with the Inter-American Court, the commission on human rights also claims that possession of land should be enough for indigenous peoples to claim ownership and obtain official recognition of property rights.¹¹⁸ States are obliged to guarantee the human rights protected by Inter-American instruments, but also to undertake due diligence to prevent violations of those rights and to investigate and compensate for the consequences of violations.¹¹⁹ Although there is no specific mention of the protection of the environment, this is taken for granted as a fundamental precondition of the enjoyment of several rights, as it is associated with other international treaties such as the ICCPR, ICESCR, and Carta Mundial de la Naturaleza o el Tratado de Cooperación Amazonica.¹²⁰ For example, severe contamination is incompatible with the right to life or to health.

Instituto Nacional de Asuntos Indígenas

The National Institute of Indigenous Affairs, INAI, was established in 1985 to create and implement policies in favour of indigenous peoples. It is also responsible for the National Registry of Indigenous Communities. Among its basic goals are: 'to push the application of Law 26.160...to design, execute and finance together with provincial governments and indigenous communities programmes to regularise ...to develop active mediation in the conflicts between communities and other stakeholders'.¹²¹ Its aim is to help indigenous communities regularise their landownership by providing financial help.¹²² In 2004 it created the Consejo de Participación Indígena (In-

International Law, vol. 14, 2013, p. 40, Available from <http://www.austlii.edu.au/au/journals/MelbJIL/2013/15.pdf> (accessed 20 July 2017).

¹¹⁸ R. Pereira, O. Gough, 'Permanent Sovereignty over Natural Resources in the 21st century: natural resource governance and the right to self-determination of indigenous peoples under international law' *Melbourne Journal of International Law*, vol. 14, 2013, p. 41, Available from <http://www.austlii.edu.au/au/journals/MelbJIL/2013/15.pdf> (accessed 20 July 2017).

¹¹⁹ Comisión Interamericana de Derechos Humanos, *Pueblos indígenas comunidades afrodescendientes industrias extractivas*, Comisión Interamericana de Derechos Humanos, 2015, p. 36.

¹²⁰ *ibid.*, p. 37

¹²¹ Instituto Nacional de Asuntos Indígenas (INAI), 'Tierras y Registro nacional de Comunidades Indígenas' Ministerio de Desarrollo Social, <https://www.desarrollosocial.gob.ar/wp-content/uploads/2015/08/6.-INAI-Tierras-y-registro-nacional-de-comunidades-indigenas.pdf> (accessed 14 March 2017).

¹²² 'Acompañar Comunidades Indígenas en todas las acciones tendientes a consolidar la posesión de la tierra que ocupan, con el objetivo de alcanzar la Propiedad Comunitaria de las mismas. Con ese fin el INAI subsidia a las Comunidades para afrontar las erogaciones económicas que acarrear las labores profesionales ejercidas en : acciones y/o defensas judiciales, asesoramiento jurídico/contable, talleres de capacitación legal, ejecución de medidas, intervención de escribanos, antropólogos y otros profesionales.' Amnesty International, *2017 Derechos Humanos Agenda Para Argentina*, Buenos Aires, Amnistía Internacional Argentina, 2017, p. 10.

digenous Participation Council), 'as a means of involving indigenous peoples in the development and implementation of its programs and policies, including those on land surveys and social services'.¹²³ Unfortunately INAI has proven ineffective in this task because indigenous communities continue to suffer dispossession of their lands by transnational corporations, private actors and the government. Provinces, such as Neuquén, do not collaborate with the institutions which carry out that survey. James Anaya, former Special Rapporteur on the Rights of Indigenous Peoples has highlighted the problem of lack of financing for the institution and the lack of participation of indigenous peoples.¹²⁴

Consejo Consultivo de Participacion de los Pueblos Indigenas de Argentina

This council was created by Decree 672/2016 in 2004 by the INAI. It was strongly criticised by indigenous communities because of the lack of consultation and participation with these groups, nor did it deal with the most important issues for these groups, like common land property or threats to indigenous people and their land from extractive industries such as fracking.¹²⁵

The Confederacion Mapuche de Neuquén

The CMN is an autonomous political organization representing the Mapuche communities located in the province of Neuquén. Created in 1971 by the provincial government, since 1990 it has distanced itself from the position of the government.¹²⁶

Committee on the Elimination of Racial Discrimination (CERD)

The OHCHR has expressed serious concern about the large amount of evictions taking place among, and violence towards, indigenous communities in the country, even in the face of Law 26.160. It has also expressed its concern about the impunity of security forces and other people

¹²³ L. Savino, 'Landscapes of contrast: The neo-extractivist state and indigenous peoples in "post-neoliberal" Argentina', *The Extractive Industries and Society*, vol.3, 2016, p. 409, Available from <http://www.sciencedirect.com/science/article/pii/S2214790X16300363> (accessed 7 July 2017).

¹²⁴ J. Anaya, *La situación de los pueblos indígenas en Argentina*, Copenhagen, IWGIA, 2012, p. 34.

¹²⁵ ODHPI et al., 'Evaluación sobre el cumplimiento del Pacto Internacional de Derechos Civiles y Politicos en Argentina' 2016, http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ARG/INT_CCPR_CSS_ARG_24354_S.pdf (accessed 13 July 2017).

¹²⁶ L. Savino, 'Landscapes of contrast: The neo-extractivist state and indigenous peoples in "post-neoliberal" Argentina', *The Extractive Industries and Society*, vol.3, 2016, p. 411, Available from <http://www.sciencedirect.com/science/article/pii/S2214790X16300363> (accessed 7 July 2017).

involved in violence against indigenous peoples and their defenders: 'The impunity in these cases transmits a blunt message from the state that tolerates and consents the violation of rights to life and integrity of people of those communities'.¹²⁷ This body has increased its monitoring of indigenous peoples' rights. It has also encouraged states to review their policies on this issue, furthermore, it presses states to abide by their duty to consult when extractive projects can affect indigenous peoples' lives.¹²⁸

International Court of Justice (ICJ)

The ICJ only deals with disputes between states so this court is not really the arena for the defence of indigenous peoples' rights. Its jurisdiction is consensual, only those accepting it will have compulsory jurisdiction, which makes it unlikely that this court will develop international jurisprudence on indigenous peoples rights.¹²⁹

International Criminal Court (ICC)

The great innovation that the ICC has brought onto the international stage is that genocide is no longer an exclusive matter for individual states. People, including authorities and civil servants, can be brought to court for this crime, which is a step forward for indigenous peoples because of the difficulty of bringing states to book.¹³⁰ With its inception, certain crimes can now be considered international, such as, crimes against humanity, selective murder of indigenous leaders, forced displacement or denial of the right to participation as a community, among others. Contrary to the International Court of Justice, the ICC can act *ex officio* to prosecute. Unfortunately it has not been very successful in protecting indigenous peoples around the world.¹³¹

¹²⁷ Amnesty International, *2017 Derechos Humanos Agenda Para Argentina*, Buenos Aires, Amnistia Internacional Argentina, 2017, p. 12.

¹²⁸ R. Pereira, O. Gough, 'Permanent Sovereignty over Natural Resources in the 21st century: natural resource governance and the right to self-determination of indigenous peoples under international law' *Melbourne Journal of International Law*, vol. 14, 2013, p. 37, Available from <http://www.austlii.edu.au/au/journals/MelbJIL/2013/15.pdf> (accessed 20 July 2017).

¹²⁹ *ibid.*, p.36.

¹³⁰ B. Clavero, *¿Hay Genocidios Cotidianos?*, Copenhagen, IWGIA, 2011, p. 254.

¹³¹ *ibid.*, p. 255.

Human Rights Committee (HRC)

This body can receive denunciations from non-state parties alleging violations of the ICCPR and, although it does not expressly protect indigenous peoples rights, with the expansion of Art. 27 it now oversees elements of indigenous culture: such as the recognition of land as 'constituting an essential element of indigenous culture'.¹³²

UN Committee on Economic, Social and Cultural Rights (UNCESCR)

Through a broad interpretation of the ICESCR this committee also protects indigenous rights: 'It has recommended that states "ensure the participation of indigenous peoples in decisions affecting their lives" and required states parties to consult and seek the consent of the indigenous peoples concerned'.¹³³

ILO Compliance Committee

This group of experts on the application of conventions and recommendations can 'take actions against non-compliance, submit observations and make direct requests'. The steps taken by the Compliance Committee are one of the most important in international law, because, even though their powers of sanction are limited, they can have a great influence by, for instance, recognizing that consultations with indigenous communities are compulsory when their interests are at stake.¹³⁴

3.7. Regulation of Transnational Companies

That transnational companies have responsibilities and fall under the remit of government regulation is something that has been made explicit by Chevron. In one of its human rights policy documents it states: 'We believe that although governments have the primary duty to protect and ensure fulfilment of human rights, we have a responsibility to respect human rights and can play

¹³² R. Pereira, O. Gough, 'Permanent Sovereignty over Natural Resources in the 21st century: natural resource governance and the right to self-determination of indigenous peoples under international law' *Melbourne Journal of International Law*, vol. 14, 2013, p. 36, Available from <http://www.austlii.edu.au/au/journals/MelbJIL/2013/15.pdf> (accessed 20 July 2017).

¹³³ *ibid.*, p. 37.

¹³⁴ *ibid.*, p. 38.

a positive role in the communities where we operate'.¹³⁵ To what extent companies abide by this laudable aim is something that is investigated further below.

Transnational corporations have a strong influence in both the political and economic spheres. A large percentage of the world's fossil fuel reserves is located in poor countries. The latter end up bending the law in order to satisfy the desires of these companies, turning the companies into one of the main human rights violators.¹³⁶ Measures taken by international organizations and the UN have not been successful in curbing and controlling this situation. Most of the codes of conduct are voluntary and, therefore, there is no legal requirement for companies to follow them; they are something many transnational companies avoid following, especially when they impact on the making of profits.

James Anaya, Special Rapporteur on the Rights of Indigenous Peoples, said in his report of 2010 that the responsibility of companies in relation to indigenous peoples' rights is that companies should not carry out or accept any project if the state has not carried out consultations with the indigenous communities which will be affected. It is not enough to merely assume consultation has taken place, they must investigate to find out if a consultation has been carried out, nor can the companies carry out the consultation themselves.¹³⁷

UN Guiding Principles on Business and Human Rights

After Kofi Annan chose John Ruggie as his Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises, in 2011 Ruggie published a set of guiding principles called *Protect, Respect and Remedy: Guiding Principles on Business and Human Rights*.¹³⁸ In this guide, indigenous peoples are treated as a vulnerable group in need of protection but not entitled to specific rights:¹³⁹ 'They refer to the need for companies whose operations may impact individuals or groups (indigenous peoples) that have spe-

¹³⁵ Chevron Corporation, 'About our human rights policy', Chevron Corporation, 2016, Available from <https://www.chevron.com//media/chevron/shared/documents/AboutOurHumanRightsPolicy.pdf> (accessed 25 March 2017).

¹³⁶ A. Pérez Esquivel et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 152.

¹³⁷ B.Clavero, *¿Hay genocidios cotidianos?*, Copenhagen, IWGIA, 2011, p. 207.

¹³⁸ B.Clavero, *Derecho Global*, Madrid, Editorial Trotta, 2014, p.164.

¹³⁹ *ibid.*, p.165.

cial protections under international human rights law to pay attention to those standards'.¹⁴⁰ The guidelines are applicable to all states and companies, regardless of 'their size, location, ownership and structure'.¹⁴¹ The responsibility to follow these guidelines 'applies whether or not a company is a participant in the UNGC'.¹⁴²

Among the states' duty to protect human rights and, one of the foundational principles of the guidelines, is that:

*'States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication'.*¹⁴³

Of the operational principles, the one affecting directly the topic of this thesis is as follows:

*'States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies'.*¹⁴⁴

In the case of areas affected by conflict, which may be indigenous peoples' territories, the guiding principle establishes that:

'Because the risk of gross human rights abuses is heightened in conflict- affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

- (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;*

¹⁴⁰ The Global Compact, *The CEO Water Mandate, Guidance for Companies on Respecting the Human Rights to Water and Sanitation*, Oakland and New York, Pacific Institute and Shift, 2015. p. 28.

¹⁴¹ United Nations, *Guiding Principles on Business and Human Rights*, Geneva, UN Publishing Services, 2012, p. 1.

¹⁴² The Global Compact, *The CEO Water Mandate, Guidance for Companies on Respecting the Human Rights to Water and Sanitation*, Oakland and New York, Pacific Institute and Shift, 2015. p. 16.

¹⁴³ UN, *Guiding Principles on Business and Human Rights*, Geneva, UN Publishing Services, 2012, p. 3.

¹⁴⁴ *ibid.*, p. 6.

(b) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation.'

Regarding corporate responsibility and the respect for human rights, among its foundational principles the document states that:

'Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved... The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work'.¹⁴⁵

The operational principle most related to the conflict dealt with in the text below is as follows:

'In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved... This process should... Involve meaningful consultation with potentially affected groups and other relevant stakeholders'.¹⁴⁶

When dealing with the controversial issue of remediation, it states:

'where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes... States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy'.¹⁴⁷

¹⁴⁵ United Nations, *Guiding Principles on Business and Human Rights*, Geneva, UN Publishing Services, 2012, p. 13.

¹⁴⁶ *ibid.*, p. 19.

¹⁴⁷ United Nations, *Guiding Principles on Business and Human Rights*, Geneva, UN Publishing Services, 2012, p. 24, 27.

Finally, it is important to highlight what it is said about non-judicial grievance mechanisms. They should be:

'based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances'.¹⁴⁸

Global Compact

The UN created this guide in 2000 after major concern was raised about transnational companies and their effect on human rights.¹⁴⁹ Although control in this area is weak, one of the main instruments which aims to constrain the poor behaviour of transnational companies is the Global Compact. It tries to commit companies to observe human rights through a voluntary self-regulation framework: 'It is to date one of the most important international initiatives to make companies assume their corporate social responsibility'.¹⁵⁰ It is, of course, questionable whether it is possible to enforce or trust companies in this respect, especially when other actors and motivations in their sphere of operations have more power. Among its 10 principles there is nothing specifically referring to indigenous peoples, although principle number 8 could affect them when it says that companies should promote initiatives to support the environment.¹⁵¹ Principles numbers 1 and 2 could be applied to indigenous groups but the statement regarding 'human rights universally recognized' make these principles not applicable for this group.¹⁵²

When it comes to the impact of extractive industries and compensation measures, UN documents say that when it is impossible to avoid damage the indigenous peoples are entitled to fair and equitable compensation from the companies following international norms: however, this ignores the necessity for previous consultation when assessing the impact of the damage.¹⁵³ The same happens in the case of participation in the benefits ensuing from extraction where any previous

¹⁴⁸ *ibid.*, 34.

¹⁴⁹ B.Clavero, *Derecho Global*. Madrid, Editorial Trotta, 2014, p.162.

¹⁵⁰ B.Clavero, *¿Hay genocidios cotidianos?*, Copenhagen, IWGIA, 2011, p. 207.

¹⁵¹ B.Clavero, *Derecho Global*. Madrid, Editorial Trotta, 2014, p.163.

¹⁵² *ibid.*, p.163.

¹⁵³ '*Cuando no es posible evitar impactos adversos por razones sustantivas, los pueblos indígenas deben ser compensados a través de una 'reparación justa y equitativa' por cualquier daño derivado de las actividades empresariales, tal como se establece claramente en los instrumentos internacionales*', B.Clavero, *¿Hay genocidios cotidianos?*, Copenhagen, IWGIA, 2011, p. 210.

consultation with, and agreement of, the indigenous community has been disregarded. Any compensation must be seen as a right, not something that is given out on the whim of the company as either charity or as part of a public-relations exercise.¹⁵⁴

Corporate Social Responsibility (CSR)

CSR is seen by some as an oxymoron, and indeed it is arguable that companies engaging with good social practice on a voluntary basis is unlikely, as it goes against their primary mission of making a profit. However, this is an area which has seen initiatives launched in partnership with the UNED Finance Initiative and UN Global Compact. The investors guide for oil companies, produced in partnership with these two bodies, states that: 'Good corporate governance is indicative of a responsible, transparent and accountable company, and allows risks to be correctly identified, managed and reported'.¹⁵⁵ Through CSR, companies finance social projects supporting locals living in the oil field. These are projects that appear to be at odds with their primary aim of extracting raw materials for a profit. However, they not only help to launder the companies' brand image but the projects are often tax deductible.¹⁵⁶ When these projects have an environmental element they are often merely greenwashing.

In addition, the idea of corporate social responsibility is still in its infancy in the region. The number of projects is expected to grow over the coming years as more companies make use of this instrument: 'There [are] already a considerable number of CSR initiatives under way in the region'.¹⁵⁷ However, there is a significant lack of support from the states for this issue and a lack of public awareness, which still associates CSR with working conditions rather than with topics like the environment.¹⁵⁸ The role of CSR in preventing human rights violations by TNCs is questioned in the region because CSR is considered a 'defensive response by TNCs to the mounting

¹⁵⁴ 'La diligencia con la que deben actuar las empresas en relación con los derechos indígenas puede implicar el establecimiento de mecanismos específicos de reparto de los beneficios guiados por el espíritu de las normas internacionales (. Un enfoque empresarial basado en el respeto a los derechos indígenas exige que el reparto en los beneficios sea percibido precisamente como una forma de cumplimiento de un derecho, y no como una concesión graciable o caritativa que busque lograr el apoyo social del proyecto o minimizar posibles conflictos'; *ibid.*, p. 210.

¹⁵⁵ James, G., *Engaging with Oil and Gas Companies on Fracking: An Investor Guide, Principles for Responsible Investment*, 2016, p. 13.

¹⁵⁶ A. Pérez Esquivel et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p.34

¹⁵⁷ UN, *United Nations Conference on Trade and Development, Corporate Social Responsibility in Latin America*, New York and Geneva, United Nations, 2010, p. 3.

¹⁵⁸ *ibid.*, p. 4.

criticism that results from the harmful socio-ecological consequences of corporate activity and its impacts on sustainable development'.¹⁵⁹

CSR first appeared in the US and Europe, and afterwards was brought to Latin America in the 1990s by multilateral organizations like the OECD, UNDP and OAS, private companies, educational institutions and NGOs.¹⁶⁰ Due to the manifest corporate complicity in human rights violations, particularly by extractive industries, and after huge pressure from activists and other stakeholders, the CSR agenda now includes a broader range of human rights. However, there has not been a real advance in the compliance of TNCs with human rights policies as we can see, for instance, in the case of oil industry. Although most of these companies, like BP, Shell or Chevron, have a code of conduct, they also maintain their bad practices as CSR is not monitored because it is neither compulsory nor legally binding.¹⁶¹

This study takes issue with the claims made by the oil companies. John S. Watson, Chairman of the Board and Chief Executive Officer of Chevron, says, the company has three main values: 'acting with integrity, protecting people and the environment, and engaging in partnership. We respect the law, support universal human rights, protect the environment and benefit the communities in which we work'.¹⁶² Given the evidence below, these are questionable to say the least. It is also notable that, of the five most important oil companies working in the area, only four have CSR projects.¹⁶³ Unfortunately, the impact of these CSR policies has been too little too late, and in many cases the voluntary regulations have been used only as a strategy to enter the indigenous territories and deceive the people there and also to polish the company image.¹⁶⁴

Environmental Liability (*pasivo ambiental*) and Impunity

This is a term that came to the fore in 2012 when the Argentinian government decided, through the Law 26.741, to appropriate 51% of the shares the Spanish company Repsol, the parent com-

¹⁵⁹ *ibid.*, p. 82

¹⁶⁰ *ibid.*, p. 82.

¹⁶¹ *ibid.*, p. 83.

¹⁶² Chevron Corporation, *2015 Corporate Responsibility Report Highlights*, San Ramón, Chevron Corporation, 2016.

¹⁶³ El Patagónico, 'Las compañías petroleras incorporan la Responsabilidad Social Empresaria', El Patagónico, 28 July 2014, Available from <http://www.elpatagonico.com/las-companias-petroleras-incorporan-la-responsabilidad-social-empresaria-n748475> (accessed 17 April 2017).

¹⁶⁴ M. Berraondo, A. Romero, *Pueblos indígenas frente a empresas que operan en competencia por los recursos buscando formas de coexistencia*, Zaragoza, Idema, 2012, p. 16.

pany of YPF. Argentina does not have a specific law governing this area and the definition of environmental liability is very vague. This legal loophole is even more striking in the hydrocarbons sector.¹⁶⁵ However, it could be defined as the amount of money needed to rebuild an area to similar conditions before the concession.¹⁶⁶ It was defined by the Environmental Protection Agency in US as an obligation to incur, in the future, costs as a consequence of an activity or conduct done in the past or present that may affect the environment adversely.¹⁶⁷

Neuquén city estimated the environmental damage caused by Repsol to be in the region of US\$1,500 million. This damage had been denounced by indigenous communities and NGOs since the 1990s but the authorities had ignored the matter until central government took over a governing share of the company.¹⁶⁸ A report from the UNDP, *ARG 97/024 Environmental Emergency, Hydrocarbons, Compensation and Sustainable Development*, calculated the environmental damage caused in only three areas of Neuquén between 1991 and 1997 to be US\$545 million.¹⁶⁹ This report is the only one written about environmental liability in the country to date, but it was not disclosed to public in order to avoid the publicising of indigenous-rights violations in the area.¹⁷⁰ The main natural resources mentioned in the report are soil, surface and ground water, flora, fauna and the landscape, together with cattle breeding, one of the main activities in Patagonia.¹⁷¹

After the final agreement between Argentina and Repsol in March 2013, Assupa (Asociación de Superficiarios de la Patagonia) requested an embargo against the Spanish company on the basis that they had not complied with the payment for environmental damage. The government was not only held accountable for the company but also made the Argentinian population pay for it.¹⁷² The final amount established for compensation was US\$307 million, far to little to compensate for the real damage, and Argentina renounced any plans to begin legal action against Repsol

¹⁶⁵ D. Rodríguez López, A. Burucua, *Pasivos ambientales e hidrocarburos en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 54.

¹⁶⁶ *ibid.*, p. 37.

¹⁶⁷ *ibid.*, p. 47.

¹⁶⁸ *ibid.*, p. 17.

¹⁶⁹ *ibid.*, p. 19.

¹⁷⁰ D. Rodríguez López, A. Burucua, *Pasivos ambientales e hidrocarburos en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 36.

¹⁷¹ *ibid.*, p. 36.

¹⁷² *ibid.*, p. 20.

and pledged itself to protect the multinational against any other legal claim.¹⁷³ Awarding environmental impunity to private interests outweighed the national interest.

Jorge Sapag promised the money obtained through this environmental liability was going to be used for greater diversification of the economy and investment in alternative energies, but, to the contrary, almost all of it was given over to current expenses, mostly personnel. In the end, the concept of environmental liability is just seen as an amount of money to be given to the province instead of financial support to support the health, lives or housing of people living there.¹⁷⁴

In 2006 the Secretariat for Environment and Sustainable Development (SAyDS) issued Resolution 515/2006 creating a programme for the environmental management of contaminated places (PROSICO). This was the only national law regulating environmental liability. Although all the projects have been completed, they appear as though they are in progress on the secretariat's website and none of the stakeholders have had access to information or results coming out of them.¹⁷⁵

The principles related to the environmental liability are laid out in Art. 4 of Ley General del Ambiente 25.675:

The prevention principle Environmental problems will be prioritised, trying to avoid possible negative impacts.

The precautionary principle When there is a risk of severe or irreversible damage, the lack of information or scientific certainty can not be used as a reason for not taking any measures.

The principle of intergenerational equity Those responsible for environmental protection should ensure that it remains in a state which present and future generations can enjoy.

Principle of responsibility Those who damage the environment are responsible for the costs of composition.

The principle of subsidiarity Not only companies but also the state have the obligation to protect the environment.

¹⁷³ *ibid.*, p. 23.

¹⁷⁴ *ibid.*, p. 35.

¹⁷⁵ *ibid.*, p. 55.

The principle of sustainability Economic and social development and the use of natural resources shall be done in a sustainable way in order to protect present and future generations' rights.

The principle of solidarity Both the nation and provinces are responsible for preventing and mitigating the impacts of damage.

Principle of cooperation Natural resources and ecological systems will be used in an equitable and rational way.¹⁷⁶

4. Extractive Industries and Fracking in Argentina

4.1. Background

Uti possidetis juris has been the principle used to justify the appropriation of indigenous peoples' land: 'as you possess, so may you possess'.¹⁷⁷

ILO Convention 169 does not properly defend the right of indigenous peoples to sub-surface resources; it does not condemn states for retaining ownership of the subsoil and its resources, when normally such rights belong to landowners. The Constitutional Court of South Africa, for instance, has said that 'under indigenous law and by virtue of traditional occupation and use, ownership of subsoil and minerals may vest collectively in indigenous peoples'.¹⁷⁸

During the economic crises of the 1970s some profound changes appeared in the 'global dynamic of capital accumulation', named the 'neoliberal turn'. One of the most important elements of this was the new subordinate relationship between nations and transnational corporations. In Lat-

¹⁷⁶ D. Rodríguez López, A. Burucua, *Pasivos ambientales e hidrocarburos en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 81.

¹⁷⁷ R. Pereira, O. Gough, 'Permanent Sovereignty over Natural Resources in the 21st century: natural resource governance and the right to self-determination of indigenous peoples under international law' *Melbourne Journal of International Law*, vol. 14, 2013, p. 24, Available from <http://www.austlii.edu.au/au/journals/MelbJIL/2013/15.pdf> (accessed 20 July 2017).

¹⁷⁸ R. Pereira, O. Gough, 'Permanent Sovereignty over Natural Resources in the 21st century: natural resource governance and the right to self-determination of indigenous peoples under international law' *Melbourne Journal of International Law*, vol. 14, 2013, p. 26, Available from <http://www.austlii.edu.au/au/journals/MelbJIL/2013/15.pdf> (accessed 20 July 2017).

in America this lasted until the 1990s when a 'post-neoliberal' movement arose due to a severe crisis in neoliberal ideology in most of the countries of the region.¹⁷⁹

After the crisis in 2001, there was a new process of accumulation where extractive industries expanded into areas previously considered uneconomic, regions inhabited by indigenous communities. Economic, energy and food needs have placed South America in the position of being a supplier of raw materials.¹⁸⁰ Although these activities are done locally, their organization is a global issue which leads to a decrease in the power of governments and local communities.¹⁸¹ These activities have similar characteristics: they are controlled by transnational corporations; they develop on a large scale affecting existing activities in the region; they need cutting-edge technology and a large amount of non-renewable resources like water; and, they are very profitable for some but not for the locals living in the area where these activities take place.¹⁸²

The isolation from foreign capital that took place in 2001 finished a few years later with the boom in global commodities. Argentina started its recovery through exporting large amounts of wheat, gas and oil, among other things. The Kirchner administration was guaranteed popular support for its policies such as universal child allowance, support for same-sex marriage legislation and keeping prices for public services below market prices.¹⁸³ However, it also gave rise to a new form of extraction called progressive extraction, where the state is a major actor and where the profits of this activity are reintroduced into the economy through social programmes in order to combat poverty. This can lead to a non-virtuous circle: projects to combat poverty need new extractive activities but these activities produce social and environmental impacts that will need more projects in order to solve them.¹⁸⁴ As Maristela Svampa has written, this new-extractivism 'destroys regional economies, demolish bio-diversity, and dangerously deepens land grabbing by

¹⁷⁹ E. López, F. Vértiz, 'Extractivism, Transnational Capital, and Subaltern Struggles in Latin America' *Latin American Perspectives*, vol. 20, no.30, 2014, Available from <http://journals.sagepub.com/doi/abs/10.1177/0094582X14549538>, (accessed 27 June 2017).

¹⁸⁰ F. Gutiérrez Rios, 'Acuerdo YPF-Chevron: Violencia física y simbólica en el contexto extractivista petrolero en la Argentina', *Anuari del conflicte Social*, no.4, 2014, p. 41, Available from <http://revistes.ub.edu/index.php/ACS/article/view/12274> (accessed 22 March 2017).

¹⁸¹ *ibid.*, p. 42.

¹⁸² *ibid.*, p. 43.

¹⁸³ L. Savino, 'Landscapes of contrast: The neo-extractivist state and indigenous peoples in "post-neoliberal" Argentina', *The Extractive Industries and Society*, vol.3, 2016, p. 407, Available from <http://www.sciencedirect.com/science/article/pii/S2214790X16300363> (accessed 7 July 2017).

¹⁸⁴ F. Gutiérrez Rios, 'Acuerdo YPF-Chevron: Violencia física y simbólica en el contexto extractivista petrolero en la Argentina', *Anuari del conflicte Social*, no.4, 2014, p. 44, Available from <http://revistes.ub.edu/index.php/ACS/article/view/12274> (accessed 22 March 2017).

expelling or displacing rural peasant or indigenous communities and brushing off any process of decision-making by citizens'.¹⁸⁵ In most cases these extractive industries are located in state-owned territories by virtue of the fact that they have been declared to be of public utility, which allows for compulsory appropriation and compensation (an acknowledgement of the right to property). However, is not the case when dealing with land owned by indigenous people, where the authorities pretend that land has no owner.¹⁸⁶

Latin America is a region highly dependent on fossil fuel. 78% of the energy consumed comes from this source, which has led to a very strong business in hydrocarbons, promoted in many cases by governments.¹⁸⁷ This, in some cases, entails carrying out extractive activities in national parks and on indigenous peoples' territories. Much contemporary extraction involves the use of fracking, a process which is controversial: 'Any of the countries where fracking technique is applied or will be, has an integral knowledge of its risks and the impact of the serious and irreversible damage that this can cause to the environment and peoples health'.¹⁸⁸

Today, industry and the government of Argentina see the discovery of large reserves of shale gas and shale oil as a unique opportunity to move towards energy independence. However, this involves taking considerable risks. The main problems which stem from this method of extraction are the large amount of water used, the impact on natural resources and environmental contamination. In 2001 the German laboratory Umweltschutz Nord was asked by the Confederacion Mapuche of Neuquén to carry out research into the environmental impacts of hydrocarbon extraction in the area. The results show that there are 630,000 m³ of contaminated soil with chrome, lead and arsenic, among other heavy metals, in layers up to 6 metres deep. The case of the water was similar. Analysis showed that 42 out of 98 people had symptoms of chronic hydrocarbon poisoning.¹⁸⁹

¹⁸⁵ L. Savino, 'Landscapes of contrast: The neo-extractivist state and indigenous peoples in "post-neoliberal" Argentina', *The Extractive Industries and Society*, vol.3, 2016, p. 407, Available from <http://www.sciencedirect.com/science/article/pii/S2214790X16300363> (accessed 7 July 2017).

¹⁸⁶ B.Clavero, *¿Hay genocidios cotidianos?*, Copenhagen, IWGIA, 2011, p.106.

¹⁸⁷ Alianza Latinoamericana Frente al Fracking, *Última Frontera: Políticas públicas, impactos y resistencias al fracking en América Latina*, Alianza Latinoamericana Frente al Fracking, 2016, p. 7.

¹⁸⁸ *ibid.*, p. 7.

¹⁸⁹ A. Pérez Esquivel et al., *La Tentacion de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p.103.

4.2. Fracking

Hydraulic fracturing was used for the first time in 1949 by the American company Halliburton.¹⁹⁰ This is the method used to create artificial fractures in the rock where the oil and gas are located. These fractures let the fossil fuels contained in the rock move through the pores to the production well. The way in which the subsoil is drilled uses a mixture of chemicals and water at very high pressure. Among these are worth mentioning are lubricants, anti-corrosives, antifreezes and acids. The environmental organization Environmental Defense Fund that works closely on US fracking regulation and control suggests that more than 1,000 chemical components are used in the process of fracking.¹⁹¹ A normal well uses an average of 11 million litres of water and between 55,000 and 220,000 litres of fracking fluid, fluids that many companies keep secret but which the law in Neuquén obliges them to make public.

According to a report from the USEIA (United States Energy Information Administration), the advances in this new technology increase global gas resources by 40% and Argentina occupies second place, after China, in the global market for non-conventional shale gas, and fourth place for shale oil after Russia, the USA and China. In the international sphere it is a very controversial technique due to its environmental impacts and contamination of aquifers and groundwater. It is banned in countries like Bulgaria, Northern Ireland and France.¹⁹²

Texas is one of the test cases for fracking. The first judicial conviction for an oil company, Aruba Petroleum, employing this technique was in Texas. The company was sentenced to pay compensation of US\$2.9 million to a family because the tribunal found that the health problems of the family were a direct consequence of fracking.¹⁹³ Not only does it have an impact on health, it is also economically questionable. The extraction processes are more complex, with higher costs, lower performance and more socio-environmental risks.¹⁹⁴ However, recently there have been a wide range of international initiatives supporting fracking, which is seen as an alternative to the careful husbanding of existing oil fields before they reach exhaustion.¹⁹⁵

¹⁹⁰ *ibid.*, p.11.

¹⁹¹ J. D. Taillant, A. Roeloffs, C. Headen, *Fracking Argentina: Informe técnico y legal sobre la fracturación hidráulica en Argentina*, Córdoba, Centro de Derechos Humanos y Ambiente & ECOJURE, 2013, p. 21.

¹⁹² D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p.1051.

¹⁹³ *ibid.*, p.1277.

¹⁹⁴ A. Pérez Esquivel et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p.11.

¹⁹⁵ *ibid.*, p. 40.

4.2.1. Water

Although the right to water and sanitation has been recognised since 2010, when it was adopted by the UN General Assembly and Human Rights Council,¹⁹⁶ water plays a central role in the fracking industry: 'The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic (household) use'.¹⁹⁷ Violations of this right may impact on the right to health, to food and to an adequate living, to work (in the case of smallholder farmers for example) and right to life.¹⁹⁸

A fracking well uses the same amount of water as that consumed by 11,000 families (of four members) in one day; this would fill six Olympic swimming pools. When this use takes place during times of drought, the affects of this activity are disastrous. There have been cases where the aquifers from where the company takes water have been polluted due to perforations in the pipes. According to YPF, the average distance between the shale reservoir and the aquifer is approximately 2,000 m but still we find cases where these reserves have been contaminated.¹⁹⁹ In most of these cases the contamination of the aquifer is irreversible.

In 1997 the province of Neuquén was instructed to provide a daily amount of 250 litres of water to each member of the indigenous communities, but the order was never put into practice. In reality, each family has only 120 litres per week, and this water came from a contaminated aquifer providing water for human and animal consumption and for orchards.²⁰⁰ In the municipality of Navarrete in Neuquén, the Director for the Environment said that they only have access to water from 6 until 9 in the morning and from 7pm until midnight. However, oil companies do not suffer from these restrictions. According to the director, if the municipality did not provide water to the plant they would not have this problem of supply. The official position is that the reason for these shortages is down to problems with the supply network.²⁰¹ On 28 June 2012 the Laboratory for Toxicology and Legal Chemistry of the Supreme Court of Justice of Argentina

¹⁹⁶ The Global Compact, *The CEO Water Mandate, Guidance for Companies on Respecting the Human Rights to Water and Sanitation*, Oakland and New York, Pacific Institute and Shift, 2015, p.10.

¹⁹⁷ *ibid.*, p.17.

¹⁹⁸ *ibid.*, p. 20.

¹⁹⁹ Taillant, J.D., A. Roeloffs, C. Headen, *Fracking Argentina: Informe técnico y legal sobre la fracturación hidráulica en Argentina*, Córdoba, Centro de Derechos Humanos y Ambiente & ECOJURE, 2013, p. 32.

²⁰⁰ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 357.

²⁰¹ F. C. Christiansen, H. Scandizzo, *Polos: Injusticias ambientales e industrialización petrolera en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 60.

confirmed that one of the lakes in the area (Los Barrales) contained 50 times more hydrocarbons than allowed for aquatic activities and was not at suitable for consumption. The Undersecretary for the Environment for Neuquén rejected the report without giving any reason.²⁰² Despite this evidence, the National Academy of Engineering in its report *Environmental Aspects of the Production of Hydrocarbons from Non-Conventional Deposits* considers that this to be a 'baseless concern'.²⁰³

However, Eduardo D'Elía a prominent oil engineer and knowledgeable about renewable energies and the evolution of environmental impacts, has a clear opinion of fracking: it is not possible to know how far the fractures go and what their contact is with ground waters.²⁰⁴ The extent of the oil reserves are not clear since companies tend to lie in order to manipulate the price on the stock market. He also reminds us that, according to Argentinian law, the burden of proof of no contamination is lies with the companies and so far this has never happened. D'Elía is a supporter of renewable energies: with the same amount of money needed for a fracking well, US\$20 million, it is possible to build a non-polluting wind farm with a capacity 20 times higher, creates more employment and has a life expectancy of 30 years instead of two.²⁰⁵

4.2.2. Toxic Waste (Flowback)

All actions which introduce substances into underground waters must have previously received a permit to do so.²⁰⁶ A fracking well generates, on average, 11,000 litres of contaminated water per day; with 1,000 fracking wells operating, this is equivalent of the amount of water consumed by all the Argentinian population in six months. When the toxic waters are stored in the open air, there is a high risk of evaporation and the consequent contamination of the air.

Angel Guzman is a cattle breeder who claims to have been suffering from health problems since 2002. His land is only 15 km from one of the oil wells. He claimed in an interview in 2010 that during storms, or at night, the companies spill contaminated water into local canals. However, the answer given by laboratories is always 'we cannot do anything', showing a fear of possible

²⁰² D. Aranda, *Tierra Arrasada*, Argentina, Sudamericana, 2015, p. 382.

²⁰³ E.López Anadón et al., *El abecé de los hidrocarburos en reservorios no convencionales*, Buenos Aires, IAPG, 2014, p. 17.

²⁰⁴ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 1265.

²⁰⁵ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 1265.

²⁰⁶ Ley 25.688 Régimen de gestión ambiental de aguas, artículo 6.

retaliation.²⁰⁷ A report from the Secretaria de Ambiente y Desarrollo Sustentable de la Nacion noted the presence of a lethal dose of metals in one of these canals and laid the responsibility for this at the feet of the local authorities under laws 1875, 2267 and 2175, which require them to take the necessary measures to control this action. In 2014 the response of the government was to support those responsible for spill and the justice system threw out the case.²⁰⁸

Companies in charge of the waste were set up to deal with only conventional waste and not hydrocarbons. Now, with the drastic increase in this type of activity, their capacity to deal with the waste has been greatly curtailed. Therefore, they have become negligent. That was the case when Indarsa, one of the main companies working in this area, was responsible for a spill of toxic waste. Even though it was confirmed by authorities that they have been working illegally, and after a fine from the Environment Secretary of €160,000, they still have not paid.²⁰⁹ Although organisations such as IAPG deny the existence of such facilities – in the face of prosecutions and the outlawing of the practice – it is still possible to find open air pools full of toxic waste in Neuquén close to urban areas.²¹⁰ According to a indictment from 2014, Comarsa, the other prominent company in charge of waste, increased its sphere of operations by 465% between 2009 and 2014 although it had no permission to do so. This took place with the help of the authorities which sold them land for the symbolic price of 35 pesos per m² in exchange for the construction of a natural barrier that absorbs polluting gas. So far not even one tree has been planted.²¹¹

4.2.3. Soil

Many different environmental organizations and media have reported that soil close to fracking areas is usually contaminated: 'We [can] talk about an agricultural incompatibility in fracking areas'.²¹² Productivity of the land has fallen drastically and agriculture and cattle raising areas are in a very precarious situation due to damage from hydrocarbon extraction.²¹³

²⁰⁷ F. C. Christiansen, H. Scandizzo, *Polos: Injusticias ambientales e industrialización petrolera en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 55.

²⁰⁸ *ibid.*, p. 56.

²⁰⁹ A. Pérez Esquivel et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p.135.

²¹⁰ Personal communication.

²¹¹ OPSur, 'Basureros petroleros: cuando el remedio es peor que la enfermedad', *OPSur Blog* [web blog], 10 April 2015, <http://www.opsur.org.ar/blog/2015/04/10/basureros-petroleros-cuando-el-remedio-es-peor-que-la-enfermedad/>, (accessed 12 July 2017).

²¹² Taillant, J.D., A. Roeloffs, C. Headen, *Fracking Argentina: Informe técnico y legal sobre la fracturación hidráulica en Argentina*, Córdoba, Centro de Derechos Humanos y Ambiente & ECOJURE, 2013, p. 40.

²¹³ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 357.

Allen is one of the so-called dormitory towns for the employees of the oil industry in Neuquén. Its economy, starting in the 1930s, was based on fruit growing, becoming the biggest producer of apples and pears in the country.²¹⁴ At the end of the 1960s hydrocarbon extraction began with the activities of YPF and the situation changed. According to Sebastian Hernandez, president of the Chamber of Fruit Growers, oil companies pay 10 times more per hectare than a farmer gets through production of agricultural produce, so there is considerable economic pressure on them to hand over the land to the fracking industry, knowing that in some cases the damage of the soil will be irreparable.²¹⁵ This is disputed by the oil companies; Chevron asserts, flying in the face of scientific evidence, that, 'at the end of a well's 40 to 50 year life, the site is fully restored.'²¹⁶

4.2.4. Air

Tropospheric ozone released into the atmosphere while fracking can, if inhaled, damage lung tissue and cause chronic obstructive pulmonary disease among other things.²¹⁷ It can also modify rain patterns in a way that is extremely harmful for crops. A report from the UNEP and the World Meteorological Organization, *Integrated Assessment of Black Carbon and Tropospheric Ozone*, says that this substance causes the loss of 52 million tones of crops per year, equivalent to 1 to 4 % of annual global production of corn, rice, soja and wheat. As Lefxaru Nahuel member of the Mapuche Confederation and Multisectorial contra la Hidrofractura said, even a technical report from the federal court has declared that pollution of the air is worse than contamination of soil and water, because the effect of the toxins is greater when they are inhaled rather than ingested.²¹⁸ An example of government inaction in relation to this can be seen from the announcement in 2014 that the dumping of waste in the urban areas of Neuquén would cease, something that is yet to come to pass.²¹⁹

²¹⁴ A. Pérez Esquivel et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p. 124.

²¹⁵ *ibid.*, p. 127.

²¹⁶ Chevron Corporation, Shale and Tight Resources, California, Chevron Corporation, 2017, <https://www.chevron.com/operations/shale> (accessed on 17 July 2017).

²¹⁷ TEDX (The Endocrine Disruption Exchange), 'The Fossil Fuel Connection', TEDX, <https://www.healthandenvironment.org/uploads-old/Thefossilfuelconnection.pdf> (accessed on 19 June 2017).

²¹⁸ 'Inclusive, el peritaje de la justicia federal dice que la contaminación del aire es peor que la contaminación del suelo y del agua porque el efecto de los metales pesados y los hidrocarburos es mucho más nocivo cuando se aspira que cuando se ingiere', OPSur, 'Basureros petroleros: cuando el remedio es peor que la enfermedad', *OPSur Blog* [web blog], 10 April 2015, <http://www.opsur.org.ar/blog/2015/04/10/basureros-petroleros-cuando-el-remedio-es-peor-que-la-enfermedad/>, (accessed 12 July 2017).

²¹⁹ *ibid.*, p. 6.

4.2.5. Seismic activity

According to the oil company, YPF, the intensity of seismic activity due to fracking is 10,000 less than that detectable by human beings and so far, after drilling thousands of wells, there has been no proven earthquakes as a result. However, scientists have not yet ruled out a connection between fracking and seismic activity.²²⁰ Judge Mario Tommasi in Cutral C6, a town in Neuqu6n, rejected a request from one of the oil companies to carry out seismic testing on the lands of the Huenctru Trawel Leuf6 Mapuche community after the community had filed a lawsuit in order to prevent major environmental damage.²²¹ At present there is still a long way to go in order to fully understand the real impact of this activity.

4.2.6. Health

UN Declaration on the Rights of Indigenous Peoples

Art 24.

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

According to Theo Colborn, an expert on the dangers of industrial chemicals, chemical products used in fracking, when mixed with aquifers or surface water, can be very damaging to human health.²²² Although YPF says that in Argentina only between 3 to 12 chemical substances are used and in very low doses, these chemicals can be easily found in ice creams, cheeses or drinks. In addition, it is clear to Lisa McKenzie, expert in environmental health, that continuous exposure to contaminated air during fracking activities constitute a major risk to health.

²²⁰ *ibid.*, p. 44.

²²¹ H. Scandizzo, 'Oil drilling threatens indigenous Mapuche in Argentina', Intercontinental Cry, 22 February 2012, Available from <https://intercontinentalcry.org/oil-drilling-threatens-indigenous-mapuche-in-argentina/> (accessed 27 June 2017).

²²² TEDX (The Endocrine Disruption Exchange), 'The Fossil Fuel Connection', TEDX, <https://www.healthandenvironment.org/uploads-old/Thefossilfuelconnection.pdf> (accessed on 19 June 2017).

Although the IAPG claims that 'the information about chemical additives used in hydraulic stimulation fluids is not secret or reserved', this is not always the case.²²³ In November 2001 the German consultancy Umweltschutz Nord presented a report which focused on the health impacts of hydrocarbon exploitation in the area of Loma La Lata (Neuquén). It confirmed the presence of 30 heavy metals in the blood of indigenous peoples living in that area, as well as severe bone pain and cardiovascular and bronchial-pulmonary conditions among other things. The count of these toxic substances was 700 times higher than allowed.²²⁴ This report also pointed out that even Repsol-YPF has admitted contamination of the area is its *Contaminación del Freático con Gasolina, Estudio y Proyecto de Recuperación*.²²⁵

Tumours have been the primary cause of mortality among people from Neuquén since 2000, and deaths from cancer in the area are much higher for both men and women than the national rate.²²⁶ According to The Endocrine Disruption Exchange, extracting oil introduces large amount of harmful chemicals into the environment: 'Extremely low concentrations of many chemicals can damage the endocrine system of our bodies...critical to healthy development and normal function'.²²⁷ In animals, these substances can affect not only their offspring but also future generations with host of health problems like infertility, cancers or metabolic disorders such as obesity. Surprisingly, in the light of this evidence, the Argentinian government standards for chemical safety are very light.²²⁸

4.3. Fracking Sites

Under Spanish colonialism, the territory of Patagonia and its indigenous people enjoyed independence from the conquerors. This ended with the so-called 'Conquest of the Desert' where, by nearly wiping out the indigenous inhabitants, the government aimed to transform the former inhospitable territory in a place 'ripe for hard-working settlers (of European descent) and new be-

²²³ E.López Anadón et al., *El abecé de los hidrocarburos en reservorios no convencionales*, Buenos Aires, IAPG, 2014, p. 18.

²²⁴ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 345.

²²⁵ *ibid.*, p. 345.

²²⁶ F. C. Christiansen, H. Scandizzo, *Polos: Injusticias ambientales e industrialización petrolera en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 58,59.

²²⁷ TEDX (The Endocrine Disruption Exchange), 'The Fossil Fuel Connection', TEDX, <https://www.healthandenvironment.org/uploads-old/Thefossilfuelconnection.pdf> (accessed on 19 June 2017).

²²⁸ TEDX (The Endocrine Disruption Exchange), 'The Fossil Fuel Connection', TEDX, <https://www.healthandenvironment.org/uploads-old/Thefossilfuelconnection.pdf> (accessed on 19 June 2017).

ginnings', while the remaining indigenous peoples were used as cheap labour.²²⁹ This technique has been applied regularly in Argentina since end of the 1950s, to the extent that most of the gas and oil consumed in the country comes from wells which have been drilled on indigenous land.²³⁰

Of the energy used in Argentina, 90% comes from hydrocarbons. After the discovery of the reservoir of Loma La Lata at the end of the 1970s, one of the most important in Latin America, this dependence on fossil fuel energy increased. In the 1990s, and after the privatization of the sector, the reserves decreased drastically and the lack of investment in other energy resources led to the need for huge levels of imports.²³¹ One of the main ideas behind national hydrocarbon exploitation was that it should help the populations of remote areas in the country. It might be said that oil exploitation helped to create and shape the state, its economy and demographic distribution, especially in Patagonia and through the activities of YPF.²³²

In the 1990s the state-owned company YPF was privatized and it ended up in the hands of the Spanish firm Repsol, which held more than 98% of its shares. The concession would have ended in 2017 but in 2002 it was extended by the executive power for another 10 years without any investigation into the claims of the human-rights violations of the Mapuche community and without, supposedly compulsory, prior consultation with the indigenous peoples.²³³ In November 2011 Repsol announced 'the second biggest discovery of oil in the history of the company', but in April 2012 the Argentinian government took over the multinational, using as their main justification the company's lack of investment and its contamination of the environment.²³⁴

This sudden discovery of environmental problems by the government was seen as surprising by many and general opinion is that the authorities wanted to take control of the Vaca Muerta oil

²²⁹ L. Savino, 'Landscapes of contrast: The neo-extractivist state and indigenous peoples in "post-neoliberal" Argentina', *The Extractive Industries and Society*, vol.3, 2016, p. 408, Available from <http://www.sciencedirect.com/science/article/pii/S2214790X16300363> (accessed 7 July 2017).

²³⁰ E.López Anadón et al., *El abecé de los hidrocarburos en reservorios no convencionales*, Buenos Aires, IAPG, 2014, p. 7.

²³¹ Alianza Latinoamericana Frente al Fracking, *Última Frontera: Políticas públicas, impactos y resistencias al fracking en América Latina*, Alianza Latinoamericana Frente al Fracking, 2016, p. 15.

²³² F. C. Christiansen, H. Scandizzo, *Polos: Injusticias ambientales e industrialización petrolera en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 46.

²³³ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 418.

²³⁴ *ibid.*, p. 433.

field. Guillermo Coco, former Minister of Energy, Environment and Public Services calculated the costs of environmental damage in Neuquén to be in the region of US\$1,500, but the authorities in charge of dealing with the damage have not claimed the money. Their reason, according to Ricardo Apis, president of the Asociación de Superficiarios de la Patagonia, is that pushing environmental controls would prove a disincentive for companies thinking of moving to the region.²³⁵

At the time the government took over the company, there were two main aims, self-sufficiency and exports, and the only way to reach both was through the controversial technique called fracking.²³⁶ The Argentinian government agreed to pay Repsol US\$5 billion compensation, an agreement that needed to be approved by national legislators: in contrast the Mapuche community, those living in the territory, barely took part in the negotiations.²³⁷ The Law of Hydrocarbons Sovereignty, created to take over the company, proved ineffective. More imports were needed in order to satisfy national energy demands and transnational companies were not willing to invest without receiving benefits from the government.²³⁸

Neuquén is the leading area for gas production and is second for oil production in the country. Oil was discovered for the first time in 1918 but production was not regular until 1940 with a major boom occurring during the 1960s.²³⁹ YPF is the company with the greatest number of wells in the area and, together with the American company Chevron, is in charge of the exploitation of Vaca Muerta, the biggest reservoir found so far in the country. The small town of Añelo in Vaca Muerta suddenly turned into the biggest headquarters of hydrocarbon exploitation outside the USA.²⁴⁰ The total surface of Vaca Muerta is 30,000 km², out of which 20,000 have been given to the state company.²⁴¹ In 2010 Añelo had a population of only 3,000, but after the discovery of Vaca Muerta and its potential as a oil zone, the number of inhabitants doubled in four years.²⁴²

²³⁵ Pérez Roig, D., 'La mega causa ambiental en la Cuenca Neuquina y la negociación con Repsol', *OPSur Blog* [web blog], 18 March 2014, <http://www.opsur.org.ar/blog/2014/03/18/la-mega-causa-ambiental-en-la-cuenca-neuquina-y-la-negociacion-con-repsol/>, (accessed 21 April 2017).

²³⁶ A. Pérez Esquivel et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p. 22.

²³⁷ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 565.

²³⁸ Alianza Latinoamericana Frente al Fracking, *Última Frontera: Políticas públicas, impactos y resistencias al fracking en América Latina*, Alianza Latinoamericana Frente al Fracking, 2016, p. 16.

²³⁹ A. Pérez Esquivel et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p. 57.

²⁴⁰ *ibid.*, p. 55.

²⁴¹ *ibid.*, p. 63

²⁴² *ibid.*, p.15.

Due to the lack of public funds needed to develop the Vaca Muerta project, the Argentinian government, along with YPF, started to search for international investors. In July 2013 President Kirchner passed Decree 929 in which tax benefits were given to those willing to invest in the country: a few days later an agreement was finalised between the national oil company YPF and Chevron to develop the area of Vaca Muerta.²⁴³ It is surprising that, according to this decree, only companies already working in the area can benefit from the tax breaks, although its stated aim was to find new investors. It appeared to be so tailor-made for Chevron that is very unlikely that other companies will feel attracted to invest.²⁴⁴ This type of exploitation generates a financial and jurisdictional infrastructure which is close to illegal. The creation of off-shore companies in tax havens like the Caiman Islands or Delaware for these activities is a very common practice that, among other things, helps to free companies from obligations in case of damage, not to mention tax.²⁴⁵

The first well to use fracking in Latin America was drilled in the Gelay Ko indigenous community in 2011. It was done during the summer season when the Mapuche move to higher areas to search for fodder for their animals: 'They did it secretly' according to the chief of the community.²⁴⁶ Oil companies have been working in the area for the the last 40 years and across 224 hectares there are 222 oil wells. There are power cables everywhere but the community is in extreme need of electricity. Although tonnes of oil are extracted water is in extremely short supply, with social services only providing four litres per day per person. According to the UN, a person living in a rural area would need a minimum of 100 litres per day.²⁴⁷

Seven years after the discovery of the field, the business is still not as successful as expected due to lack of investment and the drop in the price of the oil, as well as the high cost of extraction. Although former policies seem to not be working properly, the new president Mauricio Macri, who has been in power since December 2015, seems willing to continue along the same lines.²⁴⁸

²⁴³ Taillant, J.D., A. Roeloffs, C. Headen, *Fracking Argentina: Informe técnico y legal sobre la fracturación hidráulica en Argentina*, Córdoba, Centro de Derechos Humanos y Ambiente & ECOJURE, 2013, p. 61.

²⁴⁴ H. Fernández, 'Un decreto que confirma la no política petrolera', *La Nación*, 20 July 2013, Available from <http://www.lanacion.com.ar/1602681-un-decreto-que-confirma-la-no-politica-petrolera> (accessed 2 April 2017).

²⁴⁵ OPSur, 'Vaca Muerta, un megaproyecto que se extiende', *OPSur Blog* [web blog], 17 April 2017, <http://www.opsur.org.ar/blog/2017/04/25/el-megaproyecto-vaca-muerta-una-propuesta-de-intervencion/>, (accessed 10 May 2017).

²⁴⁶ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamerica, 2015, p. 1076.

²⁴⁷ *ibid.*, p. 1112.

²⁴⁸ A. Pérez Esquivel et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p. 20.

4.3.1. Sacred Protected Areas

Oil companies like Shell in the Netherlands and Total in France cannot carry out fracking in their home countries but they do it abroad and even in protected areas like Auca Mahuida, which is also a place for Mapuche sacred rituals.²⁴⁹ Although the exploitation took place before the area was declared protected, this extractive activity, instead of coming to an end, has continued to grow.²⁵⁰ In 2008 the Protected Areas law came into being but was never ratified locally so the province, together with the oil companies, make use of this loophole to proceed with the activity.²⁵¹

One of the most striking cases is that of the well in Pampa Las Yeguas II, inside the 705,000-hectare Nahuel Huapi National Park. It was built without the approval of the Environment Secretary, an essential requirement in the case of a protected area. As the lawyer specialising in environmental law, Juan Fittipaldi, has pointed out, the company started working without having the documentation required.²⁵² The Mapuche community have claimed part of the national park as their property, to which the park authority answered with an accusation of usurpation. However, their reaction was not the same against the oil company testing on the borders of the protected area.²⁵³

4.3.2. Campo Maripe

In Vaca Muerta there are dozens of Mapuche communities. One of them is called Campo Maripe, whose people have lived in Añelo, Neuquén, since 1927 and whose main activity is agriculture and raising livestock. Their subsoil is one of the most promising locations for the hydrocarbon industry in the Vaca Muerta formation. With nearly 500 wells at the beginning of 2016, it is considered to be one of the areas most affected by fracking outside of the USA.²⁵⁴ Loma Campana is the area where the Campo Maripe Mapuche community lives. This area has suffered spills, fires and accidents during the transporting of waste. The community constantly

²⁴⁹ *ibid.*, p. 95.

²⁵⁰ *ibid.*, p. 96.

²⁵¹ *ibid.*, p. 97.

²⁵² A. Pérez Esquivel et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p. 98.

²⁵³ G. Galafassi, '“Recuperación ancestral mapuche”. Divergencias ideológicas y conflictos entre Mapuches y el Estado' *Cuadernos de Antropología Social*, no.35, 2012, p. 82, Available from <http://www.redalyc.org/articulo.oa?id=180923259005> (Accessed 9 July 2017).

²⁵⁴ Pérez Esquivel et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p. 101.

attacks the oil companies' non-compliance with the law which puts at risk both the workers and the environment.

Añelo

Añelo is one of the cities that has suffered the greatest consequences of the Vaca Muerta reservoir discovery. From 75 inhabitants in 1970 to 6,000 now, its population is expected to reach 30,000 in 2030.²⁵⁵ Fundación YPF and the Banco Interamericano de Desarrollo (BID) advertise this as a sustainable city but the reality is very different. Overpopulation has led to a lack of housing or to an increase in prices which make it impossible for the part of the population not working in the oil sector to afford accommodation.²⁵⁶ Dependence on the oil industry does not leave space for the development of different economic activities, which preserves this imbalance and inequality. Herding is being replaced by extensive breeding in corrals, with a consequent decrease in the quality of the meat and with pollution leading to its contamination, something which has sounded the death knell for small producers.²⁵⁷ The United Nations Development Programme (UNDP) in its report on the environmental contamination by the oil companies in this area confirmed the damage and suggested compensation of US\$900 million to the province. The companies have not paid and the government has never claimed the payment.²⁵⁸

4.3.3. Gelay Ko

The first fracking operation in Argentina took place in this Mapuche community near Zapala. The compulsory consultation with its population and the environmental impact study were completely ignored.²⁵⁹ The field has 222 oil wells in an area of 224 hectares which, for Mapuche communities, forms a case study of the challenges that fracking brings to indigenous peoples. There is no electricity, although the power grid crosses the territory, and no running water (only 16 litres per day are delivered to each family) and the closest hospital is 60 km away.²⁶⁰ Cristina

²⁵⁵ L. Daumas, *Añelo, ¿Ciudad emergente y sostenible?*, Buenos Aires, OPSur, 2014, p. 9.

²⁵⁶ *ibid.*, p. 9.

²⁵⁷ *ibid.*, p.11.

²⁵⁸ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 333.

²⁵⁹ UN Human Rights Council, 'Violations of collective human rights and environmental rights by the Chevron, Total and Shell oil companies in Argentina Patagonia', United Nations General Assembly, Geneva, 2016, p. 4.

²⁶⁰ L. Savino, 'Landscapes of contrast: The neo-extractivist state and indigenous peoples in "post-neoliberal" Argentina', *The Extractive Industries and Society*, vol.3, 2016, p. 412, Available from <http://www.sciencedirect.com/science/article/pii/S2214790X16300363> (accessed 7 July 2017).

Linkopan, a young mother of four and *logko* (head) of the Gelay Ko community who fought against the fracking industry died from a respiratory illness (the diagnosis was pulmonary hypertension) on March 14, 2013 at the age of 30.²⁶¹ For many she now represents the danger of oil extraction in indigenous territories.²⁶²

4.4. Repression and Corruption

The Observatorio de Derechos Humanos de Pueblos Indígenas (ODHPI) is an organization working for the legal defence of the Mapuche in the region of Patagonia. In their report about the situation of this community from 2013 they claimed that the situation suffered by this people was more akin to colonialism than democracy and all violations of human rights are done with the complicity of the government and the judicial power.²⁶³ Furthermore, they mentioned that ILO Convention 169, with its compulsory free, prior and informed consultation with indigenous peoples, is constantly being infringed. According to the ODHPI the government has admitted the pre-eminence of the extractive industry over these communities and is making use of the criminalization of protest in order to infringe their rights. Between 2005 and 2012 at least 347 Mapuche were involved in judicial processes for defending their territory.²⁶⁴

The political party Movimiento Popular Neuquino (MPN) has controlled the province of Neuquén, the location of Vaca Muerta, since 1963, with the Sapag family occupying pride of place. Luis Sapag, the oldest son of the founder Felipe Sapag, has close relations with Chevron Argentina managers.²⁶⁵ The grip of a single family on the reigns of power has had a detrimental effect on the democratic process within the state, to say nothing of the influence that can be wielded by the oil companies. Ricardo Esquivel, director of the Environment Secretariat in charge of environmental control of the oil industry in the province of Neuquén once declared his hope that economic sanctions would not affect investment;²⁶⁶ a clear statement in favour of these companies even in the face of their alleged violations of regulations and environmental protection.

²⁶¹ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 1027.

²⁶² *ibid.*, p. 413.

²⁶³ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p.1181.

²⁶⁴ D. Aranda, Buenos Aires, Sudamericana, 2015, p. 1204.

²⁶⁵ A. Pérez Esquivel et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p. 64.

²⁶⁶ *ibid.*, p. 82.

As Martin Maliqueo and Relmu Ñamku, members of the Mapuche community Winkul Newen, say, in this fight they have only two options, to accept the compromises implicit in the negotiations for economic compensation or to become radicalized. In 2010, after many years of confrontation with the Apache Corporation oil company, they decided to blockade production, but one unexpected event changed everything. One of the sons of the couple was accidentally injured and, after a proposal from the company to finance treatment, they decided to stop the blockade. Later on, in 2011, there was an oil leak which the company declared had only affected 130 m². The community, together with a group of experts, proved that in reality the damage covers 1,600 m² but the state refused to act, so the Mapuche decided to break the truce, with the consequent escalation of the conflict.²⁶⁷ The peak of the confrontation came during an eviction on 28 December 2012; during a volley of stones thrown by the protestors one ended up breaking the window of a car and seriously injuring the face of a court employee, Verónica Pelayes. Since then the protests have continued, on a lesser level, but to no avail. YPF bought the Apache Corporation in 2014 and has consistently refused to reach an agreement with the community.²⁶⁸

According to the Observatorio de Derechos Humanos y Pueblos Indígenas, in 2013 there were 42 penal cases brought against members of Mapuche community in the province of Neuquén. In the end most of them have been rejected, as it was the case of Relmu Ñamku, who had been accused of attempted murder.²⁶⁹ According to Silvina Ramirez, in this case Mapuche land rights and the right to prior consultation were clearly violated by the central and local governments. It was proved that the defence of the territory by the Mapuche was legitimate as they had suffered systematic violence by the company and the state.²⁷⁰

When the Mapuche cannot be quelled by violence, the state and companies turn to more underhand means of achieving their aims. One of the clearest example of corruption in Neuquén is the case of the Mapuche community Gelay Ko described above. As Lidia Álvarez, their spokesperson has said, the company had bought the favour of the previous chief of the indigenous community. Once the indigenous people realized this another person, Cristina Linkopan, was chosen as

²⁶⁷ *ibid.*, p. 114.

²⁶⁸ *ibid.*, p. 115.

²⁶⁹ A. Pérez Esquivel et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p. 115.

²⁷⁰ C. Ovejero, M. Moreno Ferullo, M.B. Leguizamón, 'Argentina' IWGIA, 2016, Available from http://www.iwgia.org/images/stories/sections-esp/regiones/latin-america/docs/MI2016/Argentina_MI2016_web.pdf (accessed 23 March 2017), p. 202.

a chief but the government, together with the oil multinational, continued to support the previous candidate.

4.4.1. Secret Agreement between Chevron and YPF

At the end of 2012 an agreement was announced between Chevron and YPF to invest in Vaca Muerta. This was in an area of 395 km² known as Loma Campana which lies in territory claimed by the Mapuche indigenous community. This gave rise to one of the greatest conflicts seen in the region. The right of the Mapuche community to prior consultation and consent as ordained under international law was violated.²⁷¹ This claim is side-stepped by Chevron, which points out that the 'development of oil resources...involves a number of steps. These include obtaining permission to drill from the landowner and government'.²⁷² The oil company also claims to conduct environmental, social and health studies to identify possible adverse impacts on the local people and environment but this was not the case in Argentina.

The unstable economic and legal situation of non-conventional hydrocarbon energy, together with the reluctance of international companies to work in Argentina after the expropriation of Repsol, led to the the government granting extraordinary privileges to companies in order to attract foreign investment. Among the privileges given to the oil company in this agreement was that the provincial owners of the natural resource could not impose new taxes and should maintain the extraction fee at 12%.²⁷³

The conditions of the agreement were only made public after a legal battle and a ruling from the supreme court. YPF argued that the details should remain secret to protect its status as a PLC. In November 2015 the Supreme Court ordered the full disclosure of the agreement but YPF appealed against the ruling.²⁷⁴ Finally, after the unsuccessful appeal the court ordered the company to hand over the document with no recourse to appeal.²⁷⁵ The current government, which is very

²⁷¹ Alianza Latinoamericana Frente al Fracking, *Última Frontera: Políticas públicas, impactos y resistencias al fracking en América Latina*, Alianza Latinoamericana Frente al Fracking, 2016, p. 16.

²⁷² Chevron Corporation, Shale and Tight Resources, California, Chevron Corporation, 2017, <https://www.chevron.com/operations/shale> (accessed on 17 July 2017).

²⁷³ A. Pérez Esquivel et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p. 23.

²⁷⁴ *ibid.*, p. 23.

²⁷⁵ La Nación, 'La Justicia le ordenó a YPF que entregue el contrato secreto con Chevron', La Nación, 15 July 2016, Available from <http://www.lanacion.com.ar/1918578-la-justicia-le-ordeno-a-ypf-que-entregue-el-contrato-secreto-con-chevron> (accessed 21 April 2017).

critical of ex-president Kirchner and her policies, also refuse to make public the contract, which shows a clear continuity of preference for the rights of transnational companies over the wider population.²⁷⁶

Despite being ignorant of the terms of the agreement, Jorge Sapag, governor of the province of Neuquén, signed Decree 1208 which was needed to validate the agreement in the province. However, in order to be able to sign the YPF-Chevron agreement it was necessary for the Supreme Court to resolve a major problem. Chevron had been accused of a spill of 650,000 barrels of crude oil in Ecuador which contaminated 2 million hectares and caused 306 cases of cancer across 227 families, as well as wiping out two indigenous communities.²⁷⁷ However, Chevron claims the case against the company was a farce and withdrew its assets from the country and moved them to Argentina.

In October 2012 Ecuador ordered the company to pay a compensation of US\$8.646 billion. When the company refused to apologize for what it had done, the amount was raised to US\$19 billion.²⁷⁸ On 7 November 2012 Argentinian judge Adrián Elcuj Miranda acquiesced to the request of the Ecuadorian tribunal and decided to put in place a preventive embargo of US\$19 billion on Chevron assets.²⁷⁹ Miguel Galuccio, President of YPF, said to the press that these measures were harmful to Argentina and to investment in the country and, on 22 May 2013, the chief prosecutor Alejandra Gils Carbó ordered the lifting of the embargo and 13 days after the Supreme Court enacted, against its remit to promote justice and protect society, the order according to national government wishes.²⁸⁰ The Nobel-Peace-Prize winner Adolfo Pérez Esquivel said that this action granted impunity to one of the most harmful oil companies in the world and was not only detrimental for the wellbeing of the Argentinian people but all Latin-Americans.²⁸¹

Pablo Fajardo, who was in charge of the legal team representing Ecuador against Chevron, mentioned not only economic reasons but also racism as being the cause of the pollution. The technology installed in the area was not used in the US anymore and it appeared that the lives of the

²⁷⁶ Alianza Latinoamericana Frente al Fracking, *Última Frontera: Políticas públicas, impactos y resistencias al fracking en América Latina*, Alianza Latinoamericana Frente al Fracking, 2016, p. 19.

²⁷⁷ C. Pagni, 'Un socio incómodo', La Nación, 12 November 2012, Available from <http://www.lanacion.com.ar/1525725-chevron-un-aliado-incomodo> (accessed 23 March 2017).

²⁷⁸ *ibid.*

²⁷⁹ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 800.

²⁸⁰ *ibid.*, p. 826.

²⁸¹ *ibid.*, p. 850.

people of the indigenous community were worth less than those of Americans: 'Chevron said that health problems exist not because of the toxins but because of the lack of cleanliness of the indigenous peoples'.²⁸² In order to counter the problems the company was facing, it was necessary put in place a tailor-made framework regulating its activity and approved by Chevron itself. Contrary to what would be expected, the contract falls under the jurisdiction of the state of New York and, in case of international arbitration, this will take place at the International Chamber of Trade located in Paris.²⁸³

The area known as Loma Campana – with its more than 500 wells – is the only place where extraction is currently taking place. Other companies are waiting to see how the market evolves before starting work, something which shows the insecurity of Argentinian energy policy.²⁸⁴ As can be seen in the Chevron Corporate Responsibility report of 2015, the company is proud of its skills in managing potential community impacts through a wide range of instruments like social impact assessments or issuing guides on how to manage problems and 'resettlement': wordings which betray the company's lack of a sense of irony. The agreement between Neuquén province and YPF says that the field of Loma Campana will remain in the hands of YPF until 2048. Now the claim is approved, Chevron is able to pay US\$300 million to acquire 50% of the work carried out by YPF.²⁸⁵

4.4.2. Governmental Attitudes and Discrimination

As James Anaya, former UN Special Rapporteur on the Rights of Indigenous Peoples, has said, 'the courts have tended to favour private property rights of individuals or corporations over collective forms of indigenous ownership'.²⁸⁶ In addition, in Argentina 'many evictions have occurred since Law 26160 entered into force and many provincial courts do not recognize as indigenous those communities registered in the federal National Institute of Indigenous Affairs'.²⁸⁷ In a

²⁸² *ibid.*, p. 886.

²⁸³ OPSur, 'Vaca Muerta, un megaproyecto que se extiende', *OPSur Blog* [web blog], 17 April 2017, <http://www.opsur.org.ar/blog/2017/04/25/el-megaproyecto-vaca-muerta-una-propuesta-de-intervencion/>, (accessed 10 May 2017).

²⁸⁴ A. Pérez Esquivel et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p. 25.

²⁸⁵ *ibid.*, p. 63.

²⁸⁶ United Nations General Assembly, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples*, Geneva, Human Rights Council, 2013.

²⁸⁷ L. Savino, 'Landscapes of contrast: The neo-extractivist state and indigenous peoples in "post-neoliberal" Argentina', *The Extractive Industries and Society*, vol.3, 2016, p. 411, Available from <http://www.sciencedirect.com/science/article/pii/S2214790X16300363> (accessed 7 July 2017).

report dated August 2016 from the Ministry of Security, it admits that the Argentinian government carries out intelligence surveillance of Mapuche communities and local authorities avoid registering indigenous people as legal persons. The latter is the only way they can access the legal process to defend themselves against the state.²⁸⁸

National and local authorities in Argentina are not famous for being protective of the environment, due in part to a lack of communication between stakeholders, an absence of transparency, together with the imposition of criteria by the authorities which control national energy policy. Except in very specific cases, the authorities and journalists tend to ignore the risks faced by populations living close to oil wells and their complaints about pollution.²⁸⁹ The eight biggest refineries, comprising 98% of the business, are located very close to urban areas. However, this is not the main problem, a bigger risk is the lack of information and transparency in this sector and the lack of control by the authorities.²⁹⁰

As the national coordinator in the Equipo Nacional de la Pastoral Aborígen (ENDEPA) says, discrimination against indigenous peoples is a constant, not only on the street but also in institutions.²⁹¹ According to this organization, which fights for the rights of indigenous communities, one of the main drawbacks that people suffer when it comes to their legal defence is the lack of official translators. In an interview with Raul Eugenio Zaffaroni, former judge of the Supreme Court and currently working at the Inter-American Court on Human Rights, he pointed out that the biggest disadvantages faced by indigenous people in Argentina were the lack of political representation, together with clear elements of discrimination; for this expert, it is of paramount importance to fight for equality before any other right, and this fight has to be done in the political and also judicial arena.²⁹² According to this former judge of the Supreme Court, indigenous genocide is made invisible through social and ethnic status and conditions. During the last dictatorship those suffering were the middle class who were active in politics, so the recognition of

²⁸⁸ Amnesty International, 'El Estado privilegia los intereses de las petroleras y criminaliza al pueblo Mapuche', Amnistía Internacional, 28 November 2016, Available from <http://www.mapuche.info/print.php?pagina=6828> (accessed 4 July 2017).

²⁸⁹ *ibid.*, p. 8.

²⁹⁰ Obse OPSur, 'La seguridad jurídica es privar a los Pueblos Indígenas de garantías que les corresponden', *OPSur Blog* [web blog], 28 September 2014, <http://www.opsur.org.ar/blog/2014/09/28/seguridad-juridica-es-privar-a-los-pueblos-indigenas-de-garantias-que-les-corresponden/>, (accessed 19 June 2017).

²⁹¹ D. Aranda, *Argentina Originaria*, Buenos Aires, La Vaca Editora, 2010, p. 67.

²⁹² *ibid.*, p. 67.

their persecution was easy. It all depends on which sector of society struggling to make itself heard.²⁹³

The Observatorio de Derechos Humanos de Pueblos Indígenas (ODHPI) has found that 347 members of the Mapuche community have been prosecuted in the Neuquén region merely for defending their own territory; however, the most worrying issue is those murders and strange deaths that are considered to be accidents by the authorities.²⁹⁴ According to Dario Aranda, no head of state or high ranking official has ever repudiated this violence by provincial governments and corporations against indigenous peoples. Human rights, it seems, are only for urban dwellers and the white middle class.²⁹⁵ The authorities and instruments of state control are suspected of privileging the interests of oil companies before those of the population. Successful prosecutions, if they ever do occur, are often already too late. That is the case in San Lorenzo: when, eventually, a sentence was handed down the oil company had already finished its work. By then, 14 of the 44 claimants had passed away.²⁹⁶ Amnesty International has denounced the Ministry of Security for issuing threats that indigenous claims will be treated under an antiterrorist legal framework.²⁹⁷ Under the excuse of protecting the State, this becomes a legitimised way of using violence against these communities.²⁹⁸

In an interview with Jorge Nahuel, *werken* (spokesperson) for the Xawnko area of the Confederación Mapuche de Neuquén, he admitted that very often indigenous people end up negotiating directly with oil companies even though the transnational corporations are not authorized to negotiate prior consent, something which is only granted to the state.²⁹⁹ According to Mr Nahuel, the lack of legal recognition, the non-regulation of their land rights and the violation of the right to prior consent are the three main problems indigenous peoples face with the oil industry. The

²⁹³ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 127.

²⁹⁴ *ibid.*, p. 113.

²⁹⁵ *ibid.*, p. 125.

²⁹⁶ F. C. Christiansen, H. Scandizzo, *Polos: Injusticias ambientales e industrialización petrolera en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 16.

²⁹⁷ Amnesty International, 'El Estado privilegia los intereses de las petroleras y criminaliza al pueblo Mapuche', Amnistía Internacional, 28 November 2016, Available from <http://www.mapuche.info/print.php?pagina=6828> (accessed 4 July 2017).

²⁹⁸ M. Belski, 'Criminalización de la comunidad Mapuche: un discurso alarmante', *El País*, 20 January 2017, Available from https://elpais.com/internacional/2017/01/20/argentina/1484924405_337484.html (accessed 10 July 2017).

²⁹⁹ F. Gutiérrez, S. Millaman, 'El conflicto petrolero no se resuelve hasta que no haya una restitución territorial y política', *Mapuexpress* [web blog], <http://www.mapuexpress.org/?p=3904> (accessed on 19 June 2017).

industries operate under a policy of absolute impunity and the main victims are the indigenous people.³⁰⁰

In support of this view, James Anaya states that:

'Where property rights are indirectly but still significantly affected, for example in the extraction of subsoil resources that are deemed to be under state ownership, the state's consultations with indigenous peoples must at least have the objective of achieving consent. If consent is not achieved, there is a strong presumption that the project should not go forward ...and ...[that] the state must show that indigenous concerns were heard and accommodated, though without the heavy burden of mitigation that exists where property rights are at issue'.³⁰¹

4.4.3 Cost of Conflict

Maybe if the costs of conflict experienced by companies in the extractive industries were understood in a deeper way, their relationship with indigenous communities would receive priority. The costs can be enormous. One of the major oil companies estimated they suffered a loss of US\$6.5 billion over a two-year period from conflicts with indigenous people, where the cost most ignored is staff time spent trying to resolve the situation.³⁰² One interviewee for the study *Cost of Company-Community Conflict in the Extractive Sector* said:

'I had a meeting with the CEO and CFO [of a large mining company operating in a conflict-affected country] and they were very clear. They said 'Listen, [Country X] is only 5 percent of our turnover. We have vast business opportunities in [neighboring Countries Y and Z] and in the rest of the world. We simply don't have time to look at this stuff. Because [X] is absorbing all our time. It is not about money, it's about opportunity cost'.³⁰³

³⁰⁰ 'Hay una política de absoluta impunidad y la principal víctima de esa situación son los Pueblos Indígenas', OPSur, "'La seguridad jurídica es privar a los Pueblos Indígenas de garantías que les corresponden"', *OPSur Blog* [web blog], 28 September 2014, <http://www.opsur.org.ar/blog/2014/09/28/seguridad-juridica-es-privar-a-los-pueblos-indigenas-de-garantias-que-les-corresponden/>, (accessed 19 June 2017).

³⁰¹ R R. Pereira, O. Gough, 'Permanent Sovereignty over Natural Resources in the 21st century: natural resource governance and the right to self-determination of indigenous peoples under international law' *Melbourne Journal of International Law*, vol. 14, 2013, p. 29, Available from <http://www.austlii.edu.au/au/journals/MelbJIL/2013/15.pdf> (accessed 20 July 2017).

³⁰² Davis, R., D. Franks, *Costs of Company-Community Conflict in the Extractive Sector*, Cambridge, Harvard Kennedy School, 2014, p. 6.

³⁰³ *ibid.*, p. 20.

The main problem for the prevention of these conflicts is the time needed to build a sustainable relationship with local communities: this is in direct confrontation with short-term production deadlines. Also, limits on cash flow lead to the adoption of trying to remedy social impacts instead of preventing them, which in the long run turns to be more expensive.

4.5. Victories

Nowadays there is a movement against fracking in all the countries of Latin America, not only coming from those directly affected, like indigenous communities, but also from different sectors of society which have become aware of the risks of this technique. At a regional level, environmental justice has followed a different development path. For example, in countries like Ecuador or Bolivia constitutional reforms have been made, although there is still a long way to go.³⁰⁴ In the case of Argentina, February 2011 was the first time the judiciary in Neuquén found against an oil company. It said that the right to prior information and consent was violated in the case of the Mapuche community Wentrú Trawel Leufú. They clearly pointed out that all branches of government which neglect laws designed to protect indigenous communities should be considered to be acting in a discriminatory way.³⁰⁵

Cinco Saltos in Neuquén was the first Latin American city to ban fracking. Among its arguments was that the Environmental, Public Health and Food Security Commission of the European Parliament had declared itself to be against fracking in 2011.³⁰⁶ Neuquén is the capital of the anti-fracking movement in Argentina. The key date for this city is 28 August 2013, the day that the province approved the law for the YPF-Chevron agreement. A demonstration organized by Multisectorial Contra el Fracking of more than 5,000 people comprised trade unionists, political parties, environmentalists and students. This led to seven hours of police repression, resulting in a teacher being shot and injured. That day the Mapuche community saw four of their houses burnt down by unknown persons, something which has yet to be properly investigated.³⁰⁷ In this province the most active organizations against fracking are the Asamblea Permanente del Comahue por el Agua (APCA) formed by environmentalists from different municipalities, and the Multi-

³⁰⁴ F. C. Christiansen, H. Scandizzo, *Polos: Injusticias ambientales e industrialización petrolera en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 12.

³⁰⁵ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 1285.

³⁰⁶ *ibid.*, p. 1486.

³⁰⁷ A. Pérez Esquivel et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p. 108.

sectorial mentioned above. Both started to fight against the hydrocarbon industry in 2011, using workshops, mobilizations, blockades of roads etc.

However, oil is the main resource of Neuquén, which makes it so difficult to criticize the industry. A report from the Instituto Argentino del Petróleo y del Gas (IAPG) estimates, with a large degree of investment in Vaca Muerta, there has been a growth of 39 % for other economic activities.³⁰⁸ States and regions continue to oppose diversification of the energy market and focus on oil as the engine of the economy, while organizations critical of this cannot formulate a common alternative discourse.³⁰⁹ Such inaction leads to events like the closure of the only park in the city of Plaza Huincul due to the contamination of the soil. However, even in the face of such difficulties and set backs there are now there are more than 51 municipalities that have rejected fracking.³¹⁰

The development of renewable energy is something that is yet to be seriously discussed in Argentina. These forms of energy cannot guarantee a constant supply of energy due to the dependence on uncontrollable factors such as the wind or sun. One of the best examples we have is Germany, a country known as its environmental awareness. Only 7% of its electricity comes from the wind and 3.5% from photovoltaic panels. Eighty percent still comes from coal, gas, oil and nuclear, and it is the fifth largest consumer of oil in the world.³¹¹

4.6. Future of Fracking in Argentina

The nationalization of Repsol and the different policies carried out by the Argentinian government and other stakeholders show a clear stand in favour of promoting investment in the hydrocarbon sector. Miguel Galuccio, former CEO of YPF, said to the national newspaper Diario Clarín that due to the energy deficit suffered by the country, the discussion is not about if we are going to exploit the sector but how.³¹² The IAPG recently published a guide on how to drill

³⁰⁸ *ibid.*, p. 68.

³⁰⁹ F. C. Christiansen, H. Scandizzo, *Polos: Injusticias ambientales e industrialización petrolera en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 61.

³¹⁰ A. Pérez Esquivel et al., *La Tentación de Esquisto*, Buenos Aires, Ediciones del Jinete Insomne, 2016, p. 111.

³¹¹ E. López Anadón, *El abecé de los hidrocarburos en reservorios no convencionales*, Buenos Aires, Instituto Argentino del Petróleo y del Gas, 2014, p.15.

³¹² Taillant, J.D., A. Roeloffs, C. Headen, *Fracking Argentina: Informe técnico y legal sobre la fracturación hidráulica en Argentina*, Córdoba, Centro de Derechos Humanos y Ambiente & ECOJURE, 2013, p. 64.

properly in non-conventional reservoirs, covering all the different stages of the activity. However, the lack of transparency in this sector make us doubt the motivations for doing this by the authorities and business sector, as well as their ability to carry out such procedures safely.³¹³ With the exception of the legislation in Neuquén, Argentina lacks norms specifically regulating hydraulic fracturing, and taking in to account the broad implications and effects of this activity, we cannot be satisfied only with generic norms but with specific ones where all the stakeholders participate in their formulation.

The year 2016 ended with important victories against fracking. Nine municipalities declared themselves to be free of fracking and oil dumps in urban areas were eradicated in Neuquén.³¹⁴ For some, the solution to the conflict between oil companies and indigenous peoples is transferring the people to other territories but, as senator Magdalena Odarda says, 'this can never be allowed as a solution. That was the method used in times of the genocide of General Roca, to expel Mapuche communities to places with no water, where it was impossible to live with dignity, to the poorest places of our Patagonian territory'.³¹⁵ The new president Mauricio Macri announced on 10 January 2017 a new investment project to be negotiated with the Government of Neuquén, oil trade unions and companies. Again indigenous communities are being left out of all forms of dialogue.³¹⁶

4.6.1. Precautionary Principle

Law 25.675 (Ley General del Ambiente) enshrined the precautionary principle in Argentinian legislation in 2002. The principle established that the absence of information or scientific certainty will not be a reason for inaction in the face of serious or irreversible danger to the environment, health or public security.³¹⁷ The Asociación Interamericana para la Defensa del Ambiente (AIDA), with the support of Heinrich Böll Foundation of the Green Party in Germany, published the report *Principio de precaución: Herramienta jurídica contra el fracking*, which investigates

³¹³ *ibid.*, p. 65.

³¹⁴ OPSur, 'Un año de victorias en la lucha contra el fracking', *OPSur Blog* [web blog], 26 December 2016, <http://www.opsur.org.ar/blog/2016/12/26/un-ano-de-victorias-en-la-lucha-contra-del-fracking/>, (accessed 14 June 2017).

³¹⁵ D. Aranda, *Tierra Arrasada*, Buenos Aires, Sudamericana, 2015, p. 671.

³¹⁶ Amnesty International, *2017 Derechos Humanos Agenda Para Argentina*, Buenos Aires, Amnistía Internacional Argentina, 2017, p. 11.

³¹⁷ F.C. Christiansen, H. Scandizzo, *Polos: Injusticias ambientales e industrialización petrolera en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 8.

the principle further and specifically within a Latin American context. It states that many countries in Latin America promote fracking, although it has well known risks and there are no existing scientific studies of its technical, economic, environmental and social viability.³¹⁸ The conclusion of the report is clear: promoting fracking is a poor decision for the environment, politics and society. It deepens the dependency on fossil fuels instead of promoting cleaner energies.³¹⁹ This environmental principle together with the principle of prevention are 'repressed and even interpreted in such a way as to counter any legal objection that might be raised to try to regulate fracking, even minimally'.³²⁰ Currently, indigenous communities have to provide the burden of proof that chemicals used while fracking are dangerous, whereas under the precautionary principle this should be the responsibility of the transnational companies.³²¹

4.6.2. Prioritising Human Rights in Business

Transnational companies' impacts on human rights has long been a worrying issue for international bodies like the UN. In 2005 its Secretary General created the Special Rapporteur on Human Rights and Transnational Corporations and other Business Enterprises. In 2008 the special rapporteur, John Ruggie, presented the first internationally accepted framework to prevent and deal with the possible negative impacts of business activities on human rights, to be not only recognized in domestic law but also in international law.³²² The guidelines specifically state that companies must respect indigenous rights recognized by the UN, regardless of their recognition under different domestic laws; this is because these peoples are considered to be 'especially vulnerable' due to their relationship with the land and territories that give them not only their material livelihood but also cultural and spiritual enrichment.³²³

However, the guidelines see indigenous groups as in need of protection but not as entities with 'rights, guarantees or self determination priorities and strategies for the development': compa-

³¹⁸ Hoffmann, D., 'Principio de precaución: Herramienta jurídica contra el fracking', *Cambio Climático Bolivia* [web blog], 4 July 2016, http://www.cambioclimatico-bolivia.org/pdf/cc-20160704-_principio____.pdf, (accessed 14 June 2017).

³¹⁹ *ibid.*

³²⁰ UN Human Rights Council, 'Violations of collective human rights and environmental rights by the Chevron, Total and Shell oil companies in Argentina Patagonia', United Nations General Assembly, Geneva, 2016, p. 4.

³²¹ *ibid.* p. 4.

³²² M.Berraondo, A.Romero, *Pueblos indígenas frente a empresas que operan en competencia por los recursos: buscando formas de coexistencia*, Zaragoza, Idema, 2012, p. 13.

³²³ *ibid.*, p.15.

nies are in charge of development and that is why it is only possible to advise, not oblige, them to respect universal human rights, putting aside the specific rights of indigenous peoples.³²⁴ This leads to a culture of impunity towards transnational companies when the UN only advises not obliges them to act.

The challenges brought by corporate-related human rights violations in Latin American, and in the context discussed here, Argentina, will require the establishment of enforceable legal obligations on TNCs. Former UN Special Rapporteurs Martin Scheinin and Manfred Nowak proposed the creation of a World Court of Human Rights, which would, for the first time, 'carry a mandate to try private companies accused of human rights abuses'.³²⁵

5. Conclusion

Across the globe 46 % of all oil and gas is located in indigenous territories and the salaries that employees receive are five times higher than average.³²⁶ These are greatly illuminating statistics. Daniel Corach, researcher at CONICET (Consejo Nacional de Investigaciones Cientificas y Tecnicas), and director of Servicio de Huellas Digitales Geneticas de la Facultad de Farmacia y Bioquimica of the University of Buenos Aires, concluded after investigation that 60% of Argentinians have an indigenous background: this was a further, potentially explosive statistic, destroying the myth that the country did not have, or does not have, an indigenous population.³²⁷

Indigenous peoples are not an homogeneous group. There is not one single organization that represents them all, and that could be a point of weakness. Maybe if there were a greater degree of political organisation, and a focus for lobbying, the diverse indigenous peoples of Argentina would have a greater voice on the national stage. Only in the last decade has the Mapuche community recovered 233,000 hectares of their land: eleven times the surface area of Buenos Aires. This restoration is not only a matter of having more territory but also of recovering a crucial cultural element of indigenous identity, their ancestral land.

³²⁴ B.Clavero, *Derecho Global*, Madrid, Editorial Trotta, 2014, p.173.

³²⁵ UN, *United Nations Conference on Trade and Development, Corporate Social Responsibility in Latin America*, New York and Geneva, United Nations, 2010, p.96.

³²⁶ D. Aranda, 'Impacto extractivista', Página10, February 2014, Available from <https://www.pagina12.com.ar/diario/principal/index-2014-02-10.html> (accessed 9 April 2017).

³²⁷ D. Aranda, *Argentina Originaria*, Buenos Aires, La Vaca Editora, 2010, p. 17.

Amnesty International has recently pointed out its serious concern about the situation of human rights in Argentina, especially regarding indigenous peoples and their exclusion from policy- and decision-making, the lack of legal acknowledgement of their territories, criminalization and the non-investigation of torture cases.³²⁸ Most of the indigenous communities in the country do not hold legally recognized land and this has led to a historic level of dispossession of land by big landowners and extractive industries, as well as through the creation of natural parks in indigenous areas.³²⁹ The NGO also mentioned that although there is a legal recognition in Argentinian law of the right to be consulted, there is a lack of formal procedures to carry out this consultation, at a national and also provincial level.³³⁰

Governments are not willing to put their authority at risk, so the creation of an internationally binding legal framework for indigenous peoples is highly unlikely: however, 'because dispossession poses a major threat to their survival in many parts of the world, indigenous peoples' rights to land and natural resources need to be effectively protected and must be made enforceable under international human rights law.'³³¹ This is of paramount importance because the right to permanent sovereignty over natural resources is a central part of the right to self-determination, and 'the essential legal basis for indigenous peoples to triumph over assimilation and other neo-colonial practices'.³³²

Many of the violations of indigenous rights take place under the umbrella of 'development'. However, development with the imposition of rights and unfair privileges for some sectors, and at the expense of the environment, is not an improvement over the present situation. Unfortunately, history teaches us that violations of human rights have can only have catastrophic consequences, and that is why dialogue and democracy should be a priority. It is also important to remember that Art. 41 of the Argentinian national constitution states that the right to a healthy en-

³²⁸ Amnesty International, *2017 Derechos Humanos Agenda Para Argentina*, Buenos Aires, Amnistia Internacional Argentina, 2017, p. 2.

³²⁹ 'Desposicion historica de grandes extensiones de sus tierras por estancieros y por la presencia de empresas agropecuarias, petroleras y mineras, o por la superposicion de parques nacionales y areas protegidas sobre areas habitadas o utilizadas por pueblos indigenas'.

³³⁰ Amnesty International, *2017 Derechos Humanos Agenda Para Argentina*, Buenos Aires, Amnistia Internacional Argentina, 2017, p. 14.

³³¹ R R. Pereira, O. Gough, 'Permanent Sovereignty over Natural Resources in the 21st century: natural resource governance and the right to self-determination of indigenous peoples under international law' *Melbourne Journal of International Law*, vol. 14, 2013, p. 45, Available from <http://www.austlii.edu.au/au/journals/MelbJIL/2013/15.pdf> (accessed 20 July 2017).

³³² *ibid.*, p. 45.

vironment is a fundamental right. This is something that the media do not pay attention to, so for information people have to turn to social networks and alternative sources of news.

Argentinian energy policy shows a double dependency: on fossil fuels and the international private sector. The latter is in a powerful position as it possesses the technology with which to develop fracking as a sector in Argentina. 'The development and promotion of fracking in Latin America has been done with extreme secrecy', says the Alianza Latinoamericana Frente al Fracking.³³³ Lack of environmental information about the risks, secret agreements between government and transnational corporations, laws manipulated in order to please those multinationals, violation of indigenous peoples rights and the right to be informed are some of the common ways in which the information is hidden.

Argentina does not have an energy policy for sustainable production and energy consumption. Its energy independence is not secure, which leads to an import of fossil fuels such as oil and gas at prices much higher than the market rate. It is extremely important that government and all stakeholders sit down together and try to come to mutually satisfactory legal framework under which all actors, from the state to indigenous groups, can participate to develop a sustainable energy policy for the country. There is some hope in this regard, a strong movement against fracking can be seen in a number of countries, like France where the activity has been forbidden since October 2011, Germany where is extremely regulated, and even, to a small but growing extent, Argentina.

In the end, ultimate responsibility for what occurs in Argentina lies with the actors controlling the state, i.e. the government and governmental agencies. The path of development does not necessarily lie down the route to non-conventional hydrocarbons, however, to make choices that take the development of the state in a different, potentially more environmentally friendly and socially minded direction, requires political vision and courage: both elements that are seriously lacking in the governance of Argentina. Coupled with this is the cultural whitewashing of Argentina's history, one intimately tied up with the history of colonialism: the denial of the existence of indigenous peoples and strongly embedded social structures that merely serve to maintain existing power relations. This is compounded by the influence of, and intimate and potentially

³³³ Alianza Latinoamericana Frente al Fracking, *Última Frontera: Políticas públicas, impactos y resistencias al fracking en América Latina*, Alianza Latinoamericana Frente al Fracking, 2016, p.12.

corrupt relationship of the state with, transnational companies who only have a remit to make a profit. While it might be naïve to expect that companies would take responsibility for their actions, it is incumbent on both nation states and international bodies to at least try and reign in their power.

5.1. Recommendations

Following this in-depth study of the legal framework surrounding fracking, a number of areas can be identified where recommendations can be made in order to better protect indigenous rights. It is important to assume that, in some cases, fracking will not be possible due to the location of the oil or gas field: this may be for environmental reasons, or for reasons of indigenous land rights. It is an urgent necessity that an administrative process intended to enforce the free and informed prior consultation, as laid out in Convention 169, is put in place. To avoid conflicts, clear regulation of institutions, competences and terms is of paramount importance, as well as close collaboration between different jurisdictions. The creation of minimum exploitation standards would also be another desirable step but, above all, it is important not to forget the need for the proper participation of indigenous peoples in all the decision-making processes surrounding fracking.³³⁴

Legal frameworks which are aimed not only at protecting but establishing the supremacy of human rights will not reduce foreign investment. On the contrary, 'clarifying the relationship between trade and investment could add to a stable legal environment'.³³⁵ According to the CIDH, when projects include foreign investment the degree of impunity under which companies operate is compounded; there is a need for multinationals to be held accountable for violations against indigenous peoples' rights in their country of origin.³³⁶ As the CIDH has pointed out, nowadays there is a worrying trend that likes to place human rights and development in opposition: howev-

³³⁴ D. Taillant, A. Roeloffs and C. Headen, , *Fracking Argentina: Informe técnico y legal sobre la fracturación hidráulica en Argentina*, Córdoba, Centro de Derechos Humanos y Ambiente & ECOJURE, 2013, p. 100.

³³⁵ M.Krajewski, *Ensuring the Primacy of Human Rights in Trade and Investment Policies*, Brussels, CIDSE, 2017, p. 2.

³³⁶ Comisión Interamericana de Derechos Humanos, *Pueblos indígenas comunidades afrodescendientes industrias extractivas*, Comisión Interamericana de Derechos Humanos, 2015. Available from www.cidh.org (accessed on 13 June 2017), p. 18.

er, one cannot exist without the other.³³⁷ It is surprising that countries rich in natural resources – where extraction is supported – cannot benefit from this wealth and have such a low level of human development.

The Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, visited Argentina from 27 November to 7 December 2011. Although he praised the important steps Argentina has made towards a recognition of indigenous peoples' rights, there is still a major problem to tackle: the lack of implementation of the law.³³⁸ An additional problem remained, that of the contamination of the environment, especially by projects which had run their course. This has still not been dealt with by the government and provinces in a proper way. Furthermore, the benefits of these projects do not flow to the indigenous peoples, and, if any at all do arrive, they are social benefits given by companies when these should be responsibility of the state.³³⁹ The national census ignored indigenous peoples until 2011, which makes it more difficult to assess the changes in the situation of these groups and the adoption of measures in order to improve their situation.³⁴⁰ Poverty among indigenous peoples is extreme: according to UNICEF 23.5% of households are in poverty, in contrast with 13.8% of non-indigenous households. The state clearly neglects access to basic services for indigenous communities.³⁴¹ As a result of all this, the rapporteur strongly recommended that the state should prioritize indigenous peoples' issues, adopting uniform public policies with the participation of indigenous peoples.³⁴² However, he also point out that the interests of indigenous peoples and companies 'are not entirely or always at odds with each other'; in many cases these groups are open to discussion with transnational corporations as long as the extraction is carried out 'in ways beneficial to them and respectful of their rights'.³⁴³ States should support the indigenous peoples' own extraction of resources, giving these priority over any other proposals.³⁴⁴ Although states are not legally obliged to regulate the activity of transnational companies located in their territories, this could be considered a moral obligation in order

³³⁷ Comisión Interamericana de Derechos Humanos, *Pueblos indígenas comunidades afrodescendientes industrias extractivas*, Comisión Interamericana de Derechos Humanos, 2015. Available from www.cidh.org (accessed on 13 June 2017), p. 19.

³³⁸ J. Anaya, *La situación de los pueblos indígenas en Argentina*, Copenhagen, IWGIA, 2012, p. 8.

³³⁹ *ibid.*, p. 23.

³⁴⁰ *ibid.*, p. 26.

³⁴¹ *ibid.*, p. 31.

³⁴² *ibid.*, p. 33.

³⁴³ United Nations General Assembly, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples*, Geneva, Human Rights Council, 2013, p. 3.

³⁴⁴ *ibid.*, p. 6.

to protect human rights.³⁴⁵ Even if there is a satisfactory legal framework in the country, the lack of political will to implement laws and the passing of responsibility to communities and oil companies makes the situation more difficult.³⁴⁶

The existence of a national norm regulating environmental liability is of paramount importance. The Argentinian constitution states that is the nation which dictates the norms of minimum standards of protection, while the laws of the provinces should complement them (Art. 41). This has created many difficulties when enacting environmental laws in Argentina and had enabled both central government and the provinces to disregard the protection of the environment in the name of promoting development.³⁴⁷ It is notable that the decisions taken by the Argentinian government could have drastic and long-lasting consequences. A study by Cornell University, published in the scientific magazine *Climatic Change Letters*, stated that in 20 years non-conventional oil exploitation will leave a footprint much higher than that of coal, and the chemical substances used in this technique could appear in dairy or meat products.³⁴⁸

In the last 20 years, four referenda have been held in Argentina regarding the extraction of hydrocarbons. In all of them there was a clear rejection of this activity. This could explain the opposition of the government to direct democracy when dealing with this subject.³⁴⁹ In the words of Relmu Ñamku, the Mapuche leader of the Winkul Newen community, who was accused of attempted murder: 'The lack of public policies to generate dialogue has deepened racism and discrimination. There is a state barrier that does not allow cultural diversity to be seen as a strength in the construction of a society more free, fair, open and democratic'.³⁵⁰ The power of the global South has increased, but this has been through 'accumulation by dispossession', which

³⁴⁵ *ibid.*, p. 13.

³⁴⁶ United Nations General Assembly, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries Operating within or near Indigenous Territories*, Geneva, Human Rights Council, 2011, p. 13.

³⁴⁷ D. Rodríguez López, A., Burucua, *Pasivos ambientales e hidrocarburos en Argentina*, Buenos Aires, Ediciones del Jinete Insomne, 2015, p. 61.

³⁴⁸ V.L. Bacchetta, 'Geopolítica del fracking', *Nueva Sociedad*, no.244, 2013, p. 64, Available from http://nuso.org/media/articles/downloads/3928_1.pdf (accessed 24 June 2017).

³⁴⁹ D. Aranda, 'Asambleas Socioambientales', *Dario Aranda Blog* [web blog], <http://www.darioaranda.com.ar/asambleas-socioambientales/>, (accessed 25 March 2017).

³⁵⁰ D. Aranda, 'Descreemos de aquellos que sabemos sostendrán el modelo extractivista', *Dario Aranda Blog* [web blog], 19 November 2015, <http://www.darioaranda.com.ar/2015/11/descreemos-de-aquellos-que-sabemos-sostendran-el-modelo-extractivista/>, (accessed 27 June 2017).

goes directly against ethno-territorial rights.³⁵¹ In addition, this is made worse by the relationship between indigenous peoples and transnational corporations, which is based on deception, coercion and human rights violations. Companies, with the collusion of national governments, take advantage of weak legal frameworks to impose their will.

³⁵¹ M. Kröger, R. Lander, 'Ethno-territorial rights and the resource extraction boom in Latin America: do constitutions matter?' *Third World Quarterly*, vol. 37, no.4, 2016, p. 15, Available from <http://www.tandfonline.com/doi/abs/10.1080/01436597.2015.1127154?journalCode=ctwq20> (accessed July 2017).

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Appendix One

Interviews

Dario Aranda (Journalist and Author)

What is your relationship to this subject?

I am a freelance journalist working for commercial newspapers like Pagina 12, La Jornada de Mexico and alternative media in Argentina dealing with extraction and its impacts like those on indigenous peoples.

Have you been personally affected by fracking?

You are aware that what you do has a price. There are some places I can't go or interviews I'll never get. Pagina 12 is close to the government and I have been censored several times. When I criticized Kirchner my salary was reduced by 80% because of the lack of work. Also media close to the companies won't publish your articles as simply it is a subject that does not sell.

What, according to you, is the cause of the conflict?

On a macro level it would be the capitalism that exploits natural resources where someone does not have to pay the cost for it. In France for instance, fracking is banned but the French company Total came to Argentina to use this technique. There is a relocation of dirty companies from the first world to the third. It is also due to overconsumption across the world. The micro cause would be the systematic violation of the rights of indigenous peoples.

Do you have any proof?

The best proof is to drive around those territories like Vaca Muerta, where you can see all the spills and the injustice these communities suffer. I was even told by workers of oil companies that they pour the flowback water onto the paths so when trucks are driving they don't lift so much dust.

Do you believe indigenous peoples are protected by the authorities?

The law for the indigenous peoples like an axe without an edge, it is very nice but completely useless. That is the case for indigenous communities.

Do you think the government treats all stakeholders in the same way?

No. All governments, national, provincial and local regardless of their political affiliation have always favoured companies over indigenous people, feeling a structural racism towards them. Judges are hyper-conservative, much more than the other 2 powers, executive and legislative. Both governments, the former one and the current have opened the country up to transnational companies for them to come and loot the natural resources. They have a clear priority for companies over indigenous peoples.

Can there be a balance between the protection of human rights and development?

The Mapuche need oil but they don't want to be sacrificed for it. They do not oppose extraction but oil exploitation. Indigenous peoples need their lands but also oil companies.

Does fracking have any benefit?

It is a clear example of how harmful humanity can be towards the planet.

How important is energy independence for you?

The concept itself is a lie. We will never have energy sovereignty with these companies. Indigenous peoples should have real participation in the extractive model.

Have you seen any change in the usage of the land due to fracking?

It is said that nobody lives in those territories, but that is not true. Extraction needs territories which can be sacrificed and that will not be able to be used for anything else. And when it is decided which territory is going to be sacrificed it is also decided which population, the indigenous peoples, because western white capitalist culture take precedence over indigenous culture. There is no difference from the way the Nazis treated the Jewish people, imposing one culture over another.

Do you have any alternative to fracking?

Yes, listen to indigenous peoples living in those places and renewable energies. The South is known as the Saudi Arabia of the wind, but that energy is not exploited because the government prefers to privilege transnational oil companies. It is not an option for government and companies.

Who is the responsible for possible environmental damage?

Companies and the government but no-one has ever been held accountable for this.

Do you think this subject is treated in a transparent way?

There are two sides, one powerful, the other suffering... There is a violation of the Law of Public Information. Two of the most important newspaper in the country, *Diario Clarin* and *La Nacion*, last summer created a campaign to criminalize the Mapuche. In my book, I don't have the opinions of oil companies because they only talk to those not putting them in under the spotlight.

How are indigenous peoples perceived?

Today they are seen as terrorists because they are the ones questioning capitalist extraction in Latin America. There is no possible dialogue because indigenous people are nothing without their land, and oil companies also want their land.

How can we fight against fracking?

The fight against fracking challenges democracy itself. Presidents, just because they have been elected, do not have the rights to control our lives. They need to be in charge but at the will of the people, like in the Zapatist concept.

Do you have anything to add?

The fight against the extractivist model is not only an environmental fight but a fight for human rights and development.

Lefxaru Nawel (Indigenous Spokesperson)

What is your relationship to this subject?

I am the spokesperson (*werken*) of the Confederacion Mapuche that represents more than 70 Mapuche communities

Have you been personally affected by fracking?

Yes, like everybody living in Neuquén. We suffer inflation and social problems. Only 8% of the population lives off the oil and the other 92% live on a salary of less than half of the others. We also suffer environmental pollution and degradation.

What, according to you, is the cause of the conflict?

The illegal acts of the government and the complicity of the judicial and legislative system. Laws exist but they are not complied with. In Neuquén, democracy has been totally corrupted. Since the province came into existence, 50 years ago, the same political party has ruled the area

Do you have any proof?

Three generations have now been contaminated. Animals can not be sold or eaten. The only solution is to live off the oil money.

Do you feel protected by the authorities? Do you believe indigenous peoples are protected by the authorities?

No, we protect ourselves. It is an unequal fight.

If no, how can this be solved.

The only solution would be to respect the consent of communities and their right to prior information.

Do you think the government treats all stakeholders the same?

No. Its way of acting is illegal and racist. Government policy only benefits transnational companies.

If no, which ones are treated unfairly and why?

Indigenous communities. The Mapuche are one third of the total population in Neuquén, 600,000 people. 35% of the total is poor, 45% of these poor are children less than 8 years old.

Can there be a balance between the protection of human rights and development?

We disagree with fracking because it comes from an imperialist political need that comes with other interests. The companies that benefit most come from the USA. For instance, all the oil companies use infrastructure provided by the North American company Halliburton. Businessmen didn't invest in the exploration of new sites which led to a drop in reserves, giving a perfect excuse for fracking. We are against fracking because the state does not uphold its role of guaranteeing rights of the people. The state should guarantee the right to consent of communities, their way of life, the use of funds and the diversification of the energy mix to guarantee a dignified life.

Does fracking have any benefit?

No. It leads to an incremental increase in social injustice and an impoverishment of the society. We are not against the extraction of oil and gas.

How important is energy independence for you?

We would support it if the population's access to energy were guaranteed. In 2013 a bottle of gas cost 40 pesos, today it is between 250 and 300 pesos. With the expropriation of Repsol, 'for energy sovereignty', the price of petrol increased by 300%. In this country everything is transported by road, so the prices of all the basic consumer products increased, which led to inflation.

Have you seen any change in the usage of the land due to fracking?

This was an area of cultivation of apples and pears. The expansion of oil extraction put this activity in danger and fracking made the situation worse, and the trees are disappearing. The oil industry is subsidized and that money was taken away from the fruit industries so their land became cheaper and could be bought easily by the oil companies.

Do you have any alternative to fracking?

The government, as the constitution says, should invest in renewable energies but the country does not invest in them, it keeps extracting hydrocarbons because it is in the interests of the transnational companies.

Who is the responsible for any possible environmental damage?

The state always ends up paying, never the oil companies. They are never fined, although, for instance, the existence of open-air dumps is forbidden by law.

Do you think this subject is treated in a transparent way?

No. There is a manipulated treatment of it in the media and by the government to attract investment. In the media there is exacerbated racism. There is even racism at schools where the truth about us is not taught, as in the media.

How are indigenous peoples perceived in relation to fracking?

We do not have, like in Chile, political prisoners but many people have been indicted. We are seen as violent, foreigners and terrorists because we are the main problem for oil companies. The trade union has been bought off.

How can we fight against fracking?

For instance, for the last one-and-a-half years the Campo Maripe community has blocked the entrance to sites for the oil companies. Now everybody can see that the situation has reached boiling point.

Do you have anything to add?

Contamination is a part of doing business. The family in the government of Neuquén give structural support to oil companies. Extraction generates great environmental damage and Comarsa, the company in Neuquén dealing with the oil waste, gives legal backing to the oil companies.

Felipe Gutiérrez (NGO)

What is your relationship to this subject?

OPSur is an NGO, founded in 2008, that wants the democratization of the discussion around energy. We have followed the issue of the fracking since its beginning.

What, according to you, is the cause of the conflict?

Is a conflict that has to do with the extractive model dominant in Latin America. This activity needs a lot of energy, being at the same time the engine of extraction. It is an economic activity without connexion to other productive systems, with great environmental and social impacts and without the creation of employment and wealth for locals. It's bad model of development imposed by states in complete coordination with large groups of corporations and in conflict with the Mapuche model. The base of the conflict is that laws to achieve the better development of these communities are not applied.

Do you believe indigenous peoples are protected by the authorities?

The government has a neoliberal and multicultural indigenous policy. It has recognized indigenous communities but without giving them any rights. They tend to only present indigenous people as folkloric figures. If the state does not protect indigenous rights, it loses its reason for existence, because it does not comply with what it should do.

Do you think the government treats all stakeholders the same?

There is historical discrimination practised those of power. In general, in Argentina indigenous people are omitted from general discourse.

Can there be a balance between the protection of human rights and development?

It would be something desirable. The neoliberal capitalist model has an enormous impact on the development of the Mapuche. Neuquén relies greatly on hydrocarbon income which makes the city very dependent on the international market.

Does fracking have any benefits?

Safe fracking does not exist. Conventional extraction generates impacts and fracking doubles those risks. The Secretaria de Ambiente does not fulfil its role of supervising

the industry. In order to be profitable fracking has to be done on a massive scale and that huge number of wells generates a big impact on health and the environment.

How important is energy independence for you?

Argentina is absolutely dependent on fossil fuels (nearly 90% of its energy). Nearly more than in major oil-producing countries. Today Argentina produces less oil and gas than in 2010 when Vaca Muerta was discovered. There are no policies for energy efficiency.

Have you seen any change in the usage of the land due to fracking?

All this area is very rich and the most important region in the country for fruit trees. The coexistence of this industry with the oil industry is impossible. The fruit industry of the area is at risk because many clients from Europe do not want to buy these fruits anymore. There is also a great deal of speculation over land in this area.

Do you have any alternatives to fracking?

Renewable energies, but the oil business generates lots of money and foreign exchange for the state and for the national and local bourgeoisie, the owners of companies involved in fracking.

Who is the responsible for any possible environmental damage?

There is an architecture of impunity, so companies like Chevron can not be found guilty of anything. They create fake companies in tax havens so they can avoid extraction taxes, as are imposed in Ecuador.

Do you think this subject is treated in a transparent way?

Companies should engage in public relations but many of them, like Chevron, are semi-clandestine companies, for instance, their trucks do not carry a logo. From the government side, there is no administrative mechanism to answer our reports. There is too little information from organisations like the Secretaria de Medio Ambiente.

How are indigenous peoples perceived in relation to fracking?

The Mapuche community has been fighting for their rights since 1990 and that's why they have been criminalized. Newspapers like La Nacion keep negating the Mapuche's rights. There is a huge level of criminalization of social protest.

How can we fight against fracking?

There are more and more people involved in this debate. The discussion has to be brought to the majority, to democratize information about this topic.

Martin Kaindl (Oil Company Think Tank)

What is your relationship to this subject?

The IAPG is a non-profit, civil and private organization composed of 160 companies, which is nearly all the oil and gas companies in Argentina. It was founded 60 years ago and is a big technical think-tank where better practices are debated and information is exchanged, among other things. Is also a specialized training centre.

What, according to you, is the cause of the conflict?

In reality, it is not a significant conflict and it has its origin in conventional extraction. With the boom in Neuquén, everyone wanted to have his share. The expectations raised by Vaca Muerta made everybody want to take positions. Conflict also depends on the area and the oil company, and it is the state which has to find a solution for it and recognize indigenous communities, and not the oil companies. However, the state is not as present in the conflict as it should be and that is the main problem. There is a need for a referee between companies and indigenous peoples.

Do you believe indigenous peoples are protected by the authorities?

We should look at the indigenous peoples from the north of the country that the state mistreats, not at the oil companies and the Mapuche.

Can there be a balance between the protection of human rights and development?

Vaca Muerta was discovered in 1929, the first time fracking was used anywhere was in 1940 and 1959 in Argentina. This technique is very well known and not dangerous

at all. However, in the popular imagination, oil companies are seen as evil and the ones causing conflict.

Does fracking have any benefit?

It has changed the energy map of the world. Countries like the US are not interested in entering into a war for oil reasons because is self-sufficient. Even Argentina appears on the map of oil countries.

How important is energy independence for you?

Until 2006 Argentina was self-sufficient. Afterwards during the Kirchner regime, the producer was paid so little that it was not profitable to produce stockpiles, which lead to the loss of reserves. If the current government had not established energy tariffs – before, most of the energy was subsidized – there wouldn't be money to explore Vaca Muerta and reach self-sufficiency. This will happen in approximately 2022.

Have you seen any change in the usage of the land due to fracking?

In Neuquén there is no pollution because of the oil industry, it has been there for nearly 90 years. There are no contaminated rivers. Fracking is a very well known and commonly used technology. An average well costs around US\$ 7–8 million. Companies are not interested in losing money.

Do you have any alternative to fracking?

Argentina has less than 1% renewable energies. Its energy matrix is based on gas, the cleanest hydrocarbon and the best for a transition to renewable energies. The country has passed laws to promote these energies but the problem is that these energies are intermittent. Germany, the green country par excellence, has only 6% renewable energy and we are trying to reach 15%. Of the total energy of a country, only a maximum of 20% can be renewable.

Who is the responsible for any possible environmental damage?

In nearly in all cases there is no contamination because we work under conditions of strict security.

Do you think this subject is treated in a transparent way?

Oil companies have a long way to go regarding communication. For states, for instance, environmental reports are compulsory and we shouldn't have problems accessing them.

How are indigenous peoples perceived in relation to fracking?

Some say the Mapuche come from Chile and are bad. Some communities have lived in the area for a long time and others have just arrived. It is a complicated situation. They never resort to the law, their complaints are rarely heeded. There is no sense of authority. With their blockade they gain negotiating power and some companies agree to their requests.

Do you have anything to add?

The state should be in the middle of the conflict and create a uniform law for hydrocarbons and the environment.

Ricardo Riva (State Ombudsman)

What is your relationship to this subject?

Searching for dialogue between the parties to find solutions and to make coexistence possible.

What, according to you, is the cause of the conflict?

The cause of the conflict is not defining who is the owner of those lands, if it belongs to indigenous peoples or oil companies. If those are ancestral territories and the state gives priority to exploitation by transnational corporations, the state should also search for compensation for those indigenous groups affected. Is not difficult to resolve, you just need to sit and talk.

Do you believe indigenous peoples are protected by the authorities?

Yes, it is written in legislation and, as an example, we can see that they win nearly all the trials which are brought.

Do you think the government treats all stakeholders the same?

I would only like to say that using penal actions because the activities of a company are in danger is perverse because first what it needs to be done is to solve non-resolved problems.

Can there be a balance between the protection of human rights and development?

Definitely, but we have to sit, work and comply with the legal obligations that the state has assumed and achieve balance in that way.

Does fracking have any benefits?

Financially speaking, yes. Environmental reports need to be examined to clarify if they are correct in order to have a proper idea of the benefits.

Have you seen any change in the usage of the land due to fracking?

No. The impact on agriculture is a lie. People stopped producing because it is not profitable anymore and many of those lands have been used as property investments. It has nothing to do with fracking or the issue of contaminated water.

Do you think this subject is treated in a transparent way?

No, because there are many interests at stake and the media is a part of this. If this issue were transparent it could be solved.

How are indigenous peoples perceived in relation to fracking?

When I was working as Undersecretary of Justice for Human Rights I dealt with a lot of them and my advise was always to not demand things in a violent way, but to work through dialogue and wait for the decision of the courts. Some people even say the Mapuche's fights are encouraged by Europeans or that they are not indigenous people.

Do you have anything to add?

We need to search for formulas that allow coexistence and quality of life. The law has to be applied and violence cannot be used.

Silvina Ramirez (Lawyer)

What is your relationship to this subject?

I have been working for more than 20 years on the topic of indigenous peoples and the extractive industries in most of the Latin American region. Indigenous peoples are closely linked to their territories and extractive industries, fracking among them, are the big threat to their rights.

What, according to you, is the cause of the conflict?

A capitalist system that has, as a rule, to encourage energy consumption without having consideration for the consequences for the planet. This consumption is unstoppable.

Do you have any proof?

There are environmental impact studies proving the serious consequences of fracking. Indigenous peoples living in Vaca Muerta are experiencing those impacts at first hand. Debates regarding capitalism and its consequences, like the destruction of the planet, is a central topic among intellectuals, academics or activists.

Do you believe indigenous peoples are protected by the authorities?

Since the birth of the states as we know them today, there has been a traumatic relationship between indigenous peoples and the state. Although the existence of a very powerful legal framework that includes indigenous peoples rights has been ratified by the authorities, the truth is that the authorities do not protect these rights.

If no, what are reasons and means to solve this?

The relationship with indigenous peoples should be handled in a different way. The right to consultation should be respected. The state should consider indigenous peoples as political subjects and they both should enter into dialogue and find solutions, especially for land rights.

Do you think the government treats all stakeholders the same?

The Argentinian government privileges companies whose aim is the exploitation of natural resources. In this case there is an equal treatment.

If no, which ones are treated unfairly and why?

Throughout history indigenous peoples have been unfairly treated. Their rights are violated and they are not recognized as pre-existing communities. Before, the reason behind this was colonialism and today financial interests and bad development and progress.

Can there be a balance between the protection of human rights and development?

Of course a balance is possible, but we need to bear in mind that more than one model of development is possible. From the point of view of capitalism, development is linked with production and consumption. The more we do both, the more we develop. We don't know where this way of thinking is going to take us but definitely human rights and development should be compatible.

Does fracking have any benefits?

No. If natural resources are extracted at the cost of contaminating the planet and its inhabitants, this can not bring any benefits.

How important is energy independence for you?

It is important, but we need to think of other type of energy. In our country fracking is carried out by transnational companies, which does not help energy independence.

Have you seen any change in the usage of the land due to fracking?

Fruit agriculture is disappearing in the area of Vaca Muerta. Indigenous communities cannot live in polluted lands any longer. Their animals cannot eat food grown there.

Who is the responsible for any possible environmental damage?

It depends. The state must act as a guarantor and the companies which cause the damage should be responsible.

Do you think this subject is treated in a transparent way?

On the contrary, I think the way this topic is treated is biased, without giving all the information and generating in public opinion a strong rejection of those opposing fracking, like indigenous peoples.

How are indigenous peoples perceived in relation to fracking?

Like those against development, like minorities that are not heard because there is a general interest that has to prevail over their rights.

How can we fight against fracking?

Like all fights, with popular mobilization, knowledge of what is at stake and awareness.

Do you have anything to add?

I am not a specialist in fracking but, like any other extractive activity, if it's not treated in a rational and careful way, there is a risk of irreversible damage. Is not only an indigenous matter but a matter for the whole of humanity and the planet, as the constitution from Ecuador said in 2008 when it included nature as legal entity with rights.

Abstract

English

This thesis seeks to demonstrate that the extraction of hydrocarbons by fracking in Argentina has seriously infringed the human rights of the indigenous peoples of the country. To do this it concentrates on the plight of the Mapuche in one particular region, that of Neuquén. Using an in-depth investigation of the treaties and legislation, both national and international, that govern the extraction of hydrocarbons on indigenous land, as well as the legal rights afforded to indigenous peoples, the thesis looks at how the law has been evaded by and manipulated for the benefit of, multinational and national oil companies, especially Chevron and YPF. The three rights that form the focus of indigenous protests are: rights over land and natural resources; the right to free, prior and informed consent; and, the right to participation in decision-making processes. Investigation of the secondary literature has been complemented by field work in Argentina which included a series of interviews with key actors in the field. Research found that indigenous peoples face a series of problems, from the appropriation of land to severe health issues arising from the pollution caused by fracking. Responsibility for these problems is evaded by both the authorities and the companies that cause them. To ensure that such infringements of rights do not occur in the future it is essential that companies observe the precautionary principle and, following the recommendations of international bodies to adopt robust CSR policies, incorporate support of human rights into business practices.

Keywords: human rights, indigenous rights, extraction, fracking, consultation, participation, self-determination, Argentina, Chevron, YPF

Deutsch

Ziel dieser Thesis ist es, auf die ernsthafte Verletzung der Menschenrechte der indigenen Bevölkerung Argentiniens bei der Gewinnung von Kohlenwasserstoff durch Fracking hinzuweisen. Die Forschungsarbeit konzentriert sich dabei auf die besondere Zwangslage der Mapuche der Region Neuquén. Die wissenschaftliche Arbeit beleuchtet, durch tiefgreifende Untersuchung der nationalen und internationalen Abhandlungen und Rechtsgrundlage, welche die Gewinnung

von Kohlenwasserstoff auf Grundbesitz der indigenen Bevölkerung regeln, sowie deren legalen Rechten, wie die Gesetzgebung zu Gunsten der multinationalen und nationalen Ölgesellschaften, im besonderen durch Chevron und YPF, umgangen und manipuliert wird. Der spezielle Fokus des indigenen Widerstands liegt hierbei bei der Einhaltung der folgenden Rechte: Das Recht der Entscheidungsfreiheit über Land und natürliche Ressourcen; das Recht auf eine freie, vorhergehende und sachkundige Zustimmung; das Recht auf Teilnahme am Entscheidungsprozess; die Recherche der Sekundärliteratur wurde durch Feldforschung in Argentinien, welche eine Reihe von Interviews mit Schlüsselfiguren der jeweiligen Parteien beinhaltete, komplettiert. Die Forschungsarbeit ergab, daß die indigene Bevölkerung einer Reihe von Problemen gegenübersteht, von Enteignung des Landes zu ernstzunehmenden Gesundheitsaspekten, welche aus der Verschmutzung durch Fracking resultieren. Die Verantwortung für diese Probleme entziehen sich Behörden und die Firmen, welche sie verursachen. Um zu garantieren, dass solche Rechtsverletzungen in der Zukunft nicht mehr vorkommen, ist es essentiell, dass Firmen das Vorsorgeprinzip beachten und, den Empfehlungen internationaler Einrichtungen für eine stabile unternehmerische Gesellschaftsverantwortungspolitik übernehmend, die Unterstützung der Menschenrechte in die Geschäftspraktiken anwenden.

Schlüsselworte: Menschenrechte, Menschenrechte der indigenen Bevölkerung, Gewinnung, Fracking, Konsultation, Inahme am Entscheidungsprozess, Selbstbestimmung, Argentinien, Chevron, YPF