

Pascua Lama, Human Rights, and Indigenous Peoples: A Chilean Case Through the Lens of International Law

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Abstract

In recent decades, experience has shown that private corporations have been increasingly involved in environmental disasters and human rights abuses in all parts of the world. Many of these corporations belong to the energy, metallurgy, extraction, and mining sectors. Pascua Lama is the name of a major mining project on the border of Chile and Argentina. Since the onset of this mining project, civil society organizations have warned of the risk of serious threats to freshwater resources and indigenous rights. This Chilean case illustrates the difficulty of holding corporations accountable for environmental and indigenous rights abuses. The article suggests that interactions between three branches of public international law; namely, international human rights law, international law of indigenous peoples, and international environmental law can be helpful for individuals and communities affected to have access to an effective remedy.

A. Introduction

*“The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”*¹

On 6 November 2012, the Latin American Water Tribunal submitted a verdict on water damages in the case of Pascua Lama.² Recalling the United Nations General Assembly *Resolution on the Human Right to Water and Sanitation*,³ the Tribunal urged the States of Chile and Argentina to declare a moratorium on the mining project of Pascua Lama.

The Canadian transnational corporation *Barrick Gold* is undertaking a large-scale mining project that is located in the Andean Mountains on the border

¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 241-242, para. 29 (emphasis added); *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, 7, 41, para. 53 [Gabcikovo-Nagymaros Project Case] (emphasis added).

² Latin American Water Tribunal, ‘Caso Amenaza de Daños Irreversibles a Glaciares Transfronterizos y Afectación Permanente de la Cuenca del río Huasco (Chile), por la Ejecución del Proyecto Minero Binacional «Pascua Lama», Desarrollado por la Compañía Minera Transnacional Barrick Gold Corporation (Canadiense), República de Chile y República de Argentina’ (6 November 2012), available at <http://tragua.com/wp-content/uploads/2012/11/pascualama.pdf> (last visited 15 June 2013).

³ *The Human Right to Water and Sanitation*, GA Res. 64/292, UN Doc A/RES/64/292, 28 July 2010 [Resolution on the Human Right to Water and Sanitation].

of Chile and Argentina, making Pascua Lama the first bi-national gold mining project in the world. Even though the project is of bi-national character, the most important part of the mining activity is carried out on the Chilean side. As a matter of fact, the Pascua Lama Project is carried out in Chile by *Nevada Mining Company Ltd.*, a subsidiary of *Barrick Gold*. Therefore, when this paper refers to *Nevada Mining Company Ltd.*, it should be understood as *Barrick Gold*.

This project is currently under construction to exploit an open-pit gold and silver deposit. Once in production, it is “expected to be one of the world’s largest lowest cost mines and is expected to contribute significant free cash flow to Barrick for many years to come”.⁴ In addition, according to the company, the project will “generate enduring and substantial benefits for all concerned, through a combination of attractive economics, significant production at low cash costs, support by the governments of Chile and Argentina and robust environmental and community programs”.⁵

The mining zone covers 3000 km², which is six times the size of the city of Montreal, Canada. The climate where the project is carried out is mountainous and semi-arid, at an elevation of 3,800 to 5,200 meters, approximately 10 kilometers from Barrick’s Veladero mine. On the Chilean side, the project is located at the source of several rivers; among them, Del Estrecho River, tributary of Huasco River, which irrigates the entire fertile valley of Huasco. Currently, these water sources mitigate serious drought that can affect the whole region. Those most affected by this major mining project are farmers and breeders of the Huasco valley as well as indigenous communities. This mining project is currently in the final phase of construction. Even at this early stage of development of the Pascua Lama Mining Project, its operations have contributed to environmental pollution and have put the Andean ecosystem at risk, particularly in regard to the availability of and quality of water in this region. In addition to environmental concerns, this major mining project has been challenged because of its negative impact upon land and water rights of indigenous communities, namely the Diaguita Huascoalinos. The Diaguita are one of the indigenous peoples living in the North of Chile. According to Sergio Campusano, a Diaguita leader (Comunidad Diaguita Huascoalinos),

⁴ Trefis, ‘Barrick Gold’s Crucial Mega Mine May Be Delayed At Least By One Year’ (4 June 2013), available at <http://www.trefis.com/stock/abx/articles/189839/barrick-golds-crucial-mega-mine-may-be-delayed-at-least-by-one-year/2013-06-04> (last visited 15 June 2013).

⁵ Barrick Gold Corporation, ‘Pascua- Lama FAQs’, available at <http://www.barrick.com/operations/projects/pascua-lama/faq/default.aspx> (last visited 15 June 2013).

his community is affected by Barrick's extractive activities in the Andean zone of the Huasco River basin and has started to suffer the consequences of the Pascua Lama Project.

The Pascua Lama Project brings to light the difficulties in protecting access to clean and drinkable water when domestic law is not fully harmonized with international standards. In this context, various questions arise: What would be the practical relevance and positive impact that would result from advocating for the observance of international law in relation to the Pascua Lama Project? What are the State obligations concerning freshwater provision and access to freshwater? Which indigenous rights are at stake?

The aim of this paper is to address the tensions between the extractive industries, indigenous peoples' rights, and environmental law in the light of a particular case, the Pascua Lama Mining Project in Chile. An additional purpose of this paper is to examine the strengths and challenges that derive from the interaction between human rights, indigenous peoples, and environmental law. This paper does not intend to deeply analyze the topic of corporate social responsibility, however, it deals with the crucial issue of the impact of corporate activities on the human right to water, particularly in the context of indigenous peoples' lands and territories. Throughout this paper, the word "abuse" will be used for private corporations' interferences with the enjoyment of human rights and "violation" will be used specifically for States' direct infringements of human rights.⁶

⁶ Traditionally, the expression "human rights violations" refers to a State's acts or omissions, and "human rights abuses" to non-state actors' interferences. Compare A. Clapham & S. Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses', 24 *Hastings International and Comparative Law Review* (2001) 3, 339, 340: "While companies may not be in the habit of referring to themselves as 'organs of society', they are a fundamental part of society. As such, they have a moral and social obligation to respect the universal rights enshrined in the Declaration. While a company is not legally obliged under international law to comply with these standards, those companies who have violated them have found, to their cost, that society at large will condemn them. A growing nucleus of transnational companies has incorporated an explicit commitment in their business principles and codes of conduct to uphold the rights enshrined in the UDHR." Amnesty International and The Prince of Wales Leadership Forum, *Human Rights: Is it any of Your Business?* (2000), 23; A. R. Kolbe & R. A. Hutson, 'Human Rights Abuse and Other Criminal Violations in Port-au-Prince, Haiti: A Random Survey of Households', 368 *Lancet* (2006) 9538, 864, 867. See as an example where human rights violations and human rights abuses are used indistinctly: M. Stohl *et al.*, 'State Violation of Human Rights: Issues and Problems of Measurement', 8 *Human Rights Quarterly* (1986) 4, 592, 595; J. M. Mann, 'Health and Human Rights', 1 *Health and Human Rights* (1994) 1, 6, 17.

Consequently, in order to thoroughly analyze the Pascua Lama case, this paper will first address relevant international law standards in the field of environmental law, human rights, and indigenous rights (B). Subsequently, it will focus on the Chilean legal framework and international obligations (C). Finally, this case study will examine Pascua Lama in light of environmental standards, the human right to water, and indigenous peoples' rights to land, territories, and natural resources (D).

B. International Law

This section is structured around three cross-cutting issues; namely, environment, water, and indigenous peoples' rights within the specific context of extractive business activities. Extractive projects usually engender a significant impact on ancestral indigenous land, territories, and natural resources. International human rights law, international law of indigenous peoples, and international environmental law can simultaneously apply to these situations.

I. International Environmental Law

Like public international law, international environmental law is mainly composed of State's obligations regarding other States or the international community.⁷ Some of these environmental obligations come from widely accepted international environmental law principles, such as the duty to prevent environmental harm.⁸ Much of these obligations have to be applied at the domestic level, as they represent general environmental principles; for instance, the customary obligation to conduct an environmental impact

⁷ See *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, 56, para. 101 [Pulp Mills on the River Uruguay Case].

⁸ "Since the Stockholm Conference on the Environment in 1972 there has been a marked development of international law relating to the protection of the environment. [...] Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm. This duty, in the opinion of the Tribunal, has now become a principle of general international law." See *Award in the Arbitration Regarding the Iron Rhine ("IJZEREN RIJN") Railway Between the Kingdom of Belgium and the Kingdom of the Netherlands*, Award of the Arbitral Tribunal, 24 May 2005, 27 Reports of International Arbitral Awards (2008), 35, 66-67, para. 59. See *Gabčíkovo-Nagymaros Project*, *supra* note 1, 78, para. 140.

assessment (EIA).⁹ Prevention and due diligence are also paramount principles in international environmental law. According to the International Court of Justice (ICJ), they have met the standard of a customary rule.¹⁰

Additionally, the ICJ asserted in a case related to the protection of the environment and the preservation of freshwater resources that the principle of due diligence implied at least the duty of vigilance and prevention.¹¹ The Court affirmed that this due diligence principle would be infringed “if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works”.¹² Furthermore, the Court concluded that “the responsibility of a party [...] would therefore be engaged if it was shown that it had failed to act diligently

⁹ “It has been defined as a process for identifying the likely consequences for the biogeophysical and socio-economic environments and for human health and welfare of implementing particular activities and for conveying this information, at a stage when it can materially affect their decision, to those responsible for sanctioning the proposals.” R. Ramanathan, ‘A Note on the Use of the Analytic Hierarchy Process for Environmental Impact Assessment’, 63 *Journal of Environmental Management* (2001) 1, 27, 27.

¹⁰ “[T]he principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’ [...]. This Court has established that this obligation ‘is now part of the corpus of international law relating to the environment’ [...]. See ICJ, *Pulp Mills on the River Uruguay Case*, *supra* note 7, 58, para. 101; *Corfu Channel (United Kingdom v. Albania)*, Judgment, ICJ Reports 1949, 4, 22; *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, 242, para. 29.

¹¹ “This vigilance and prevention is all the more important in the preservation of the ecological balance, since the negative impact of human activities on the waters of the river may affect other components of the ecosystem of the watercourse such as its flora, fauna, and soil.” *Pulp Mills on the River Uruguay Case*, *supra* note 7, 77, para. 188. The ICJ emphasized in the *Gabčíkovo-Nagymaros* case that “in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage”. *Gabčíkovo-Nagymaros Project Case*, *supra* note 1, 78, para. 140.

¹² *Pulp Mills on the River Uruguay Case*, *supra* note 7, 83, para. 204. The decisions of the Human Rights Committee (HRC) support this statement: “[T]he State did not require studies to be undertaken by a competent independent body in order to determine the impact that the construction of the wells would have on traditional economic activity, nor did it take measures to minimize the negative consequences and repair the harm done. The Committee also observes that the author has been unable to continue benefiting from her traditional economic activity owing to the drying out of the land and loss of her livestock.” The Committee concluded therefore that the State party violated the right enshrined in Article 27 of the Covenant. See HRC, *Ángela Poma Poma v. Peru*, Communication No. 511/1992, UN Doc CCPR/C/95/D/1457/2006, 24 April 2009, 11, para. 7.7 [HRC, *Ángela Poma Poma v. Peru*].

and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction".¹³

As previously mentioned, international environmental law mainly deals with legal obligations addressed to States; it does not provide legal entitlements for individuals or corporations. In contrast, international human rights law focuses on the human being and therefore provides legal entitlements for individuals to make claims in case of human rights violations. Consequently, the international human rights law framework seems to be a better option to protect individuals from water rights infringements. Indeed, individuals whose life, integrity, security, health, private life, etc. are affected due to water scarcity, accessibility or pollution would be entitled to claim reparation for such violations. It remains to be seen whether individuals can claim reparations for direct damage caused by water pollution or whether individuals can make such claims on behalf of future generations.

II. International Human Rights Law

Most of the time, activities of extractive business have a negative impact on environment and biodiversity, particularly on the availability of water resources. In this context, the United Nations Committee on Economic, Social and Cultural Rights has often reiterated the obligation that States Parties must "ensure that companies demonstrate due diligence to make certain that they do not impede the enjoyment of the Covenant rights by those who depend on or are negatively affected by their activities".¹⁴ According to this Committee, all States Parties to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) have the obligation "to ensure that all economic, social and cultural rights laid down in the Covenant are fully respected and rights holders adequately protected in the context of corporate activities".¹⁵

¹³ "The obligation of due diligence [...] is further reinforced by the requirement that [...] the rules and measures adopted by the parties both have to conform to applicable international agreements and to take account of internationally agreed technical standards." *Pulp Mills on the River Uruguay Case*, *supra* note 7, 79, para. 197.

¹⁴ Committee on Economic, Social and Cultural Rights (CESCR), *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, UN Doc E/C.12/2011/1, 20 May 2011, 2, para. 4 [CESCR, Statement on the Obligations of States Parties]. See also CESCR, *General Comment No. 3*, UN Doc HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008, 7, 9, para. 10 [CESCR, General Comment No. 3].

¹⁵ CESCR, *Statement on the Obligations of States Parties*, *supra* note 14, 1, para. 1.

To address human rights concerns in the context of business activities, it is worth bearing in mind that there is an international consensus that water is considered to be an internationally recognized human right, as clearly stated in *Resolution 64/292* (2010) of the United Nations General Assembly.¹⁶ It is noteworthy to recall that Catarina de Albuquerque, the United Nations Independent Expert on Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, pointed out that safe and clean drinking water and sanitation is a human right essential to the full enjoyment of life and all other human rights.¹⁷ The human right to water is a paradigmatic right where the indivisibility of human rights plays a paramount role.

For instance, access to safe drinking water and adequate sanitation must be considered a determinant of health, as pointed out by the former Special Rapporteur on the Right to Health.¹⁸ There is a close relation; they are

¹⁶ “Recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”. *Resolution on the Human Right to Water and Sanitation*, *supra* note 3, 1, para. 1. “By recognising the right to water the international community is making a moral statement about its commitment to support southern countries to scale up efforts to provide safe, clean, accessible and affordable water and sanitation for all.” A. M. Walnycki, ‘UN Recognises Access to Water and Sanitation as a Human Right’ (2 August 2010), available at <http://www.ids.ac.uk/go/news/un-recognises-access-to-water-and-sanitation-as-a-human-right> (last visited 15 June 2013).

¹⁷ G. Dupont, ‘Droit à l’Eau: “Passer de la Théorie à la Mise en Œuvre”’, *Le Monde* (10 September 2010), available at http://www.lemonde.fr/planete/article/2010/09/10/droit-a-l-eau-passer-de-la-theorie-a-la-mise-en-oeuvre_1409388_3244.html (last visited 15 June 2013). Compare Human Rights Council, *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation*, UN Doc A/HRC/12/24, 1 July 2009, 7, para. 13. See S. McCaffrey, ‘A Human Right to Water: Domestic and International Implications’, 5 *Georgetown International Environmental Law Review* (1992) 1, 1, 12; S. Klawitter & H. Qazzaz, ‘Water as a Human Right: The Understanding of Water in the Arab Countries of the Middle East’, 21 *International Journal of Water Resources Development* (2005) 2, 253, 254; J. Moe, ‘An Introduction to Human Rights and the Human Right to Health’, 2 *Queen’s Medical Review* (2008) 1, 19, 20; A. Cahill, ‘The Human Right to Water – A Right of Unique Status: The Legal Status and Normative Content of the Right to Water’, 9 *International Journal of Human Rights* (2005) 3, 389, 397; J. Scanlon, A. Cassar & N. Nemes, ‘Water as a Human Right?’, *IUCN Environmental Policy and Law Paper No. 51* (2004), 3.

¹⁸ “The right to health is an inclusive right, extending not only to timely and appropriate health care, but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.” See Special Rapporteur on the Right to Health, *Economic, Social and Cultural*

independent and interrelated because human rights tend to protect the integrality of the human being. There is also a close relation between clean and unpolluted water and a non-degraded and healthy environment. Concerning water access and water management, “human rights standards specify the essential minimum level of water access that must be protected”.¹⁹

In accordance with international human rights law, domestic law must incorporate control measures as well as legal remedies and reparations available for victims of human rights violations and abuses.²⁰ For instance, in *General*

Rights: The Right to Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, UN Doc E/CN.4/2003/58, 13 February 2003, 8, para. 23.

¹⁹ E. Filmer-Wilson, ‘The Human Rights-Based Approach to Development: The Right to Water’, 23 *Netherlands Quarterly of Human Rights* (2005) 2, 213, 237.

²⁰ “In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.” CESCR, *General Comment No. 9*, UN Doc E/C.12/1998/24, 3 December 1998, 2, para. 4. “Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of articles 2 (paras. 1 and 3), 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that Covenant are violated, ‘shall have an effective remedy’ (art. 2 (3) (a)). In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.” CESCR, *General Comment 3*, *supra* note 14, 8, para. 5. *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Art. 2, 993 UNTS 3, 5. “Each State Party to the present Covenant undertakes [...] [t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.” *International Covenant on Civil and Political Rights*, 16 December 1966, Art. 2 (3) (b), 999 UNTS 171, 174 [ICCPR]. “Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties

Comment No. 15 concerning the right to water, the Committee on Economic, Social and Cultural Rights has interpreted that

“[b]efore any action that interferes with an individual’s right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies (see also General Comments No. 4 (1991) and No. 7 (1997)). Where such action is based on a person’s failure to pay for water their capacity to pay must be taken into account. Under no circumstances shall an individual be deprived of the minimum essential level of water.”²¹

The obligation to grant access to effective remedies has been developed with regard to human rights abuses from non-state actors.²² This is related to the State’s positive obligation concerning the right to water and sanitation in cases of third party interferences, including corporate interference.²³ According

undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.” *American Convention on Human Rights*, 22 November 1969, Art. 2, 1144 UNTS 123, 145.

²¹ CESCR, *General Comment No. 15*, UN Doc E/C.12/2002/11, 20 January 2003, 17-18, para. 56 [CESCR General Comment 15].

²² “As part of their duty to protect against business-related human rights abuse, 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.” Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc A/HRC/17/31, 21 March 2011, 22, para. 25 (emphasis omitted).

²³ The notion of positive obligations with regard to human rights in the context of environmental pollution has been developed for the European Court of Human Rights. See *Taşkın and Others v. Turkey*, ECHR Application No. 46117/99, Judgment of 10 November 2004; *Öneryıldız v. Turkey*, ECHR Application No. 48939/99, Judgment of 30 November 2004; *Fadeyeva v. Russia*, ECHR Application No. 55723/00, Judgment of 9 July 2006; *Giacomelli v. Italy*, ECHR Application No. 59909/00, Judgment of 2 November 2006.

to the Committee on Economic, Social and Cultural Rights, the obligation to protect requires States Parties “to prevent third parties from interfering in any way with the enjoyment of the right to water”.²⁴ States’ positive obligations include the obligation to act with due diligence, which has been developed by the European Court of Human Rights and the Inter-American Court of Human Rights (Inter-American Court), as well as international and regional political forums.²⁵ The State must take a variety of effective measures in order to prevent third parties from polluting, degrading, or unfairly collecting water resources, including natural freshwater.

Since international human rights law must be incorporated into domestic law considering that its aim is centered on the individual, as a legal framework it may be in a better position to render access to water and sanitation justiciable for the individual. At any rate, any act that jeopardizes human access to safe water at the domestic level could mean human rights violations, and in some cases, violations of State environmental obligations.

III. Indigenous Rights

The *ILO Convention on Indigenous and Tribal Peoples* (1989) (ILO Convention No. 169) imposes on States the obligation to consult and afford wide participation to indigenous peoples. The right to participate does not confine itself merely to development projects but also includes larger topics such as self-government. As a general policy, Article 5 (a) of the *ILO Convention No. 169* states that in applying the provisions of this Convention “the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected” and (c) “policies [...] shall be adopted, with the participation and

²⁴ See CESCR, *General Comment No. 15*, *supra* note 21, 9, para. 23.

²⁵ See International Conference on the Great Lakes (ICGLR) & Organisation for Economic Co-operation and Development (OECD), ‘Key Outcomes of the ICGLR-OECD Joint Consultation on Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas and ICGLR Ministerial Meeting’ (29-30 September & 1 October 2010), available at <http://www.oecd.org/investment/mne/46128642.pdf> (last visited 15 June 2013); OECD, ‘OECD Pilot Project in the Mining Sector: Promoting Responsible Investment Through Enhanced Due Diligence: Draft Hypothetical Critical Scenarios and Examples of Key Challenges to be addressed in the Practical Guidance’ (8 December 2009), available at <http://www.oecd.org/daf/inv/investment-policy/44322960.pdf> (last visited 15 June 2013). The UN Security Council has mandated the UN Group of Experts on the DRC to develop guidelines on due diligence for companies sourcing minerals from eastern DRC. See SC Res. 1896, UN Doc S/RES/1896 (2009), 7 December 2009, 3, para. 7.

co-operation of the peoples affected”.²⁶ In this line, Article 6 (1) (a) establishes that governments shall “consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly”.²⁷

In this respect, Article 13 (1) provides that 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”.²⁸

Further, it must be borne in mind that Article 13 (2) of *ILO Convention No. 169* states that “the use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use”.²⁹ Additionally, Article 14 (1) recognizes “the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised”.³⁰ And, finally, Article 15 (1) provides that

“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.”³¹

The *ILO Convention No. 169* is complemented and reinforced by the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).³² The free, prior, and informed consent of the indigenous peoples concerned is one of the main principles established in this Declaration. Indeed, Article 18 states

²⁶ International Labor Organization (ILO), *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, Art. 5 (a) & (c), 28 ILM 1382, 1385 [ILO Convention No. 169].

²⁷ *Ibid.*, Art. 6 (a), 1386.

²⁸ *Ibid.*, Art. 13 (1), 1387.

²⁹ *Ibid.*, Art. 13 (2), 1387.

³⁰ *Ibid.*, Art. 14 (1), 1387.

³¹ *Ibid.*, Art. 15 (1), 1387.

³² *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, Art. 26, GA Res. 61/295 annex, UN Doc A/RES/61/295, 1, 8 [UNDRIP].

that “[i]ndigenous peoples have the right to participate in decision-making in matters which would affect their rights”³³ and Article 19 lays down that

“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”.³⁴

Another important pillar of this Declaration is the indigenous peoples’ right to land, territories, and natural resources. Articles 26, 29, and 32 reinforce the provisions of *ILO Convention No. 169*. Article 29 (1) states that “[i]ndigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources”.³⁵ Furthermore, Article 32 (2) establishes that

“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”.³⁶

The adverse environmental, economic, social, cultural, and spiritual impact on the lands, territories, and resources which indigenous peoples have traditionally owned, occupied, or used has also been addressed by the Inter-American Court, as in the case of *Kichwa Indigenous People of Sarayaku v. Ecuador*.³⁷ Indeed, Article 21 (Right to Property) of the *American Convention on*

³³ *Ibid.*, Art. 18, 6.

³⁴ *Ibid.*, Art. 19, 6.

³⁵ *Ibid.*, Art. 29 (1), 8.

³⁶ *Ibid.*, Art. 32 (2), 9.

³⁷ See *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 1 February 2000, IACtHR Series C, No. 66; *Moiwana Community v. Suriname*, Judgment of 15 June 2005, IACtHR Series C, No. 124; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, IACtHR Series C, No. 146; *Saramaka People v. Suriname*, Judgment of 28 November 2007, IACtHR Series C, No. 172; *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010, IACtHR Series C, No. 214; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012, IACtHR Series C, No. 245.

Human Rights (American Convention) constitutes a crucial provision to protect indigenous lands, territories, and natural resources, including water.³⁸

Moreover, the Human Rights Committee (HRC) “recognizes that a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may undermine the rights protected by Article 27 [of the International Covenant on Civil and Political Rights]”.³⁹ Indeed, Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that

“[i]n 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 group, to

³⁸ “[T]he Court found that the members of the Yakye Axa Community live in extremely destitute conditions as a consequence of lack of land and access to natural resources, caused by the facts that are the subject matter of this proceeding, as well as the precariousness of the temporary settlement where they have had to remain, waiting for a solution to their land claim. This Court notes that, according to the statements of Esteban López, Tomás Galeano and Inocencia Gómez during the public hearing held in the instant case, the members of the Yakye Axa Community could have been able to obtain part of the means necessary for their subsistence if they had been in possession of their traditional lands. Displacement of the members of the Community from those lands has caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering. Furthermore, in this settlement the members of the Yakye Axa Community do not have access to appropriate housing with the basic minimum services, such as clean water and toilets.” *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, IACtHR Series C, No. 125, 85, para. 164 [Yakye Axa Case]. Ancestral right to water as natural resource has been recognized by Chilean case law, see, for instance, *Alejandro Papic Dominguez Con Comunidad Indígena Aymara Chusmiza v. Usmagama*, Supreme Court of Chile, Case No. 2840-2008, Judgment of 25 November 2009.

³⁹ “Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. The Committee also points out that measures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.” HRC, *Ángela Poma Poma v. Peru*, *supra* note 12, 10, para. 7.4. Concerning logging activities, see HRC, *Länsman et al. v. Finland*, Communication No. 1023/2001, UN Doc CCPR/C/83/D/1023/2001, 15 April 2005, 14, para. 10.2.

enjoy their own culture, to profess, and practise their own religion, or to use their own language”.⁴⁰

IV. Interactions

According to Weeramantry, there are confluences rather than conflicts in the interplay between environmental protection and human rights.⁴¹ The concept that best articulates the relation between environment and human rights is sustainable development. This notion is also the decisive principle to settle irreconcilable conflicts between economic development and human dignity. As Scanlon affirmed, “human rights cannot be secured in a degraded or polluted environment”.⁴²

There is an obvious reciprocal interaction and interdependence between human rights and the environment, even though they are distinct fields.⁴³

⁴⁰ ICCPR, *supra* note 20, Art. 27, 179.

⁴¹ “The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.” Separate Opinion of Vice-President Weeramantry, *Gabcikovo-Nagymaros Project Case*, *supra* note 1, 88, 91-92.

⁴² “Linking human rights and the environment appears *prima facie* straightforward—especially in view of the now well-accepted fundamental relationship between human rights and sustainable development, one key element of which is environmental protection. Human rights cannot be secured in a degraded or polluted environment.” Scanlon, Cassar & Nemes, *supra* note 17, 14.

⁴³ “The contribution of environmental protection to the realization of basic human rights, and the role of human rights in protection of the environment are undeniable. Substantive rights such as the right to food, health and the right to life itself will not materialize for all of the world’s inhabitants unless we maintain a clean and healthy environment with a sustainable base of environmental and natural resources.” Statement by Klaus Töpfer (Executive Director of the United Nations Environment Programme), founded in Office of the High Commissioner for Human Rights (OHCHR), *Human Rights and the Environment: Conclusions of a Meeting of Experts*, OHCHR Doc HR/PUB/02/2 (2002), 5 [OHCHR, Human Rights and the Environment]. “While human rights and the environment are distinct fields, their interdependence is now broadly recognized. Similarly, there is a growing consensus around the specific role of procedural rights in relation to environmental matters, rights such as those to information, participation and access to justice.” Statement by Mary Robinson (United Nations High Commissioner for Human Rights), founded in OHCHR, *Human Rights and the Environment*, *supra* note 43, 3.

The Former United Nations High Commissioner for Human Rights, Mary Robinson, clarified this point by stating that

“the specific impact of environmental factors on the promotion and protection of human rights has been progressively more clearly illustrated: the effect of pollution on individuals’ right to health; the consequences of soil degradation for the right to food; the rights of individuals to be informed of the environmental conditions surrounding them and their families”.⁴⁴

Lador rightly added that “[w]e can hardly imagine an environmental issue not having a human rights dimension”.⁴⁵ Therefore, a wide range of human rights may be seriously affected and totally lose their meaning as people and communities cannot live in an environment that is not free from air, water, and land pollution.⁴⁶ The *Stockholm Declaration* first officially recognized the link between human rights and environmental protection in 1972.⁴⁷ Each of these

⁴⁴ Statement by Mary Robinson (United Nations High Commissioner for Human Rights), founded in OHCHR, *Human Rights and the Environment*, *supra* note 43, 2.

⁴⁵ Y. Lador, ‘The Challenges of Human Environmental Rights’, in United Nations Environment Programme, *Human Rights and the Environment: Proceedings of a Geneva Environment Network Roundtable* (2004), 7, 8. “Today the international community is becoming more inclined to perceive the objectives of human rights, environmental protection and economic development as complementary rather than as unrelated or opposing disciplines.” Statement by Klaus Töpfer, founded in OHCHR, *Human Rights and the Environment*, *supra* note 43, 5.

⁴⁶ “[...] [T]he realization of the right to adequate housing loses its meaning unless processes are put into place that ensure that people and communities can live in an environment that is free from pollution of air, water and the food chain.” Statement of Mr. Miloon Kothari (Special Rapporteur on Adequate Housing), at the World Summit on Sustainable Development (Johannesburg, 30 August 2002), available at <http://www.unhchr.ch/Hurricane/Hurricane.nsf/60a520ce334aaa77802566100031b4bf/f9025f723f7eb70ec1256f5b003ae963?OpenDocument> (last visited 15 June 2013).

⁴⁷ “The principle of IEL [International Environmental Law] recognized in the Stockholm and Rio Conferences are both inspired by, and consistent with, recognized principles of international human rights law, including the principle of ‘non-discrimination’, ‘non-retrogression’, ‘right to participation’, ‘right to a remedy’, ‘international cooperation’, among others. The congruence between these principles reinforces the human rights and environmental linkages and provides a further basis for action for the CESCR with respect to climate change.” See M. A. Orellana, M. Kothari & S. Chaudhry, *Climate Change in the Work of the Committee on Economic, Social and Cultural Rights* (2010), 11. “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility

rights plays an important role both in international human rights law and in international environmental law. In 2002, a group of experts recognized that

“[...] since 1992 important developments have occurred at the national and international levels. They indicate a growing inter-connectedness between the fields of human rights and environmental protection. The overall context for these developments is the concept of sustainable development, which requires that different societal objectives be treated in an integrated manner”.⁴⁸

The 2002 *Plan of Implementation of the World Summit on Sustainable Development* showed clearly that water is a critical nexus between human rights law and environmental law.⁴⁹ For this reason, water should receive protection both from human rights law and environmental law. This evolutionary dynamic involving environmental protection, human rights, and sustainable development was referred by Kothari as the “human rights paradigm”.⁵⁰

What is the exact link between the environment and human rights? According to the body of international and domestic case law, the linkages have been clarified by

“(1) recognizing the right to a healthy environment as a fundamental human right; (2) allowing litigation based on this right, and facilitating its enforceability in domestic law by liberalizing provisions on standing; (3) acknowledging that other human rights

to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.” *Declaration of the United Nations Conference on the Human Environment*, 16 June 1972, Principle 1, UN Doc A/Conf.48/14/Rev. 1 (1973), 3, 11 ILM 1416, 1416.

⁴⁸ OHCHR, ‘Final Text: Meeting of Experts on Human Rights and the Environment’, in OHCHR, *Human Rights and the Environment*, *supra* note 43, para. 4 [OHCHR, Final Text: Meeting of Experts on Human Rights and the Environment].

⁴⁹ “The provision of clean drinking water and adequate sanitation is necessary to protect human health and the environment.” See UN, *Report of the World Summit on Sustainable Development*, UN Doc A/CONF.199/20 (200), 11, para. 8.

⁵⁰ See Orellana, Kothari & Chaudhry, *supra* note 47, 11. “Only the human rights paradigm can offer fundamental and systemic solutions and changes to attain sustainable development.” See Statement of Mr. Miloon Kothari, *supra* note 46 (emphasis omitted).

recognized in domestic legal systems can be violated as a result of environmental degradation”.⁵¹

Environmental legal concerns have developed more quickly at the international level while the human dimension of global environmental concerns has been broadly recognized at the domestic level in the form of human rights. There is essentially, through the basic human needs dimension, an interaction between both environmental and human rights on the one hand, and international and domestic levels on the other hand.

Cases before the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court show that in situations of environmental pollution or degradation or if environmental protection fails, there are a number of human rights which may be threatened or violated, such as the right to life, the right to health, the right to an adequate standard of living, the right to private and family life, the right to property, and the right to water and sanitation, in addition to many other socio-economic rights.⁵²

What is at play in cases of watercourse pollution? Concerning an international watercourse, there could be a violation of international human rights law, international environmental law, and international water law. With respect to inland watercourses, however, there can be an international human rights law violation or international environmental law violation. There can also be domestic law violations; particularly under human rights and environmental constitutional provisions. Environmental protection and respect for human

⁵¹ OHCHR, ‘Final Text: Meeting of Experts on Human Rights and the Environment’, *supra* note 48, para. 15.

⁵² “Environmental degradation can start with a violation of a human right, the right to know. The inability to have an ecologically healthy environment violates other rights as well such as the right to health or to food and even has consequences for children who can no longer gain access to education.” Lador, *supra* note 45, 8. “The judiciary of Pakistan firmly established the right to safe and unpolluted drinking water as part of the right to life.” For a revision of judicial decisions in India, Bangladesh and Pakistan, see J. Razzaque, ‘Environmental Human Rights in South Asia: Towards Stronger Participatory Mechanisms’, in United Nations Environment Programme, *supra* note 45, 29 [Razzaque, Human Rights in South Asia].

rights are two sides of the same coin.⁵³ Therefore, “it is difficult to make a clear cut division between human rights cases and environmental cases”.⁵⁴

There is a coherent and harmonious relationship between environmental protection and human rights concerning human access to safe drinking water, and adequately complemented, they can play an important role in both international and domestic protection of the right to water, such as in the Chilean case.

B. The Chilean Situation

In light of international standards, there is not sufficient protection in Chile with regard to the human right to water and indigenous rights. This situation has been facilitated by the Chilean legal framework, as explained below.

I. Domestic Legal Framework

Despite the fact that more than 20 years have passed since the end of Pinochet’s dictatorship (1973-1990), the *Constitution of Chile* and most of the domestic legislation is still marked by the dictatorial legal and political orientations, with a clear trend towards liberalization and privatization. This includes public interest services, such as regulation and management of freshwater supply. Such a process has led to an imbalance between public welfare and the interests of private actors. There is a disproportionate concentration on the appropriation of the use of water in order to produce hydroelectric energy. Incredibly, almost 90% of the rights of usage belong to only three main private corporations.⁵⁵

The *Constitution of Chile* and legislation on land, water, mines, forest, fishing, etc. have essentially placed natural resources within the realm of the free market, with its exchange of goods and services as well as investments.⁵⁶ In the

⁵³ “National judicial systems have, in judicial decisions, translated the right to life as the basis of environmental and human rights. The [trends in the observance of human rights and freedom] integrate these concepts which in effect are two sides of one coin.” Statement by Klaus Töpfer, founded in OHCHR, *Human Rights and the Environment*, *supra* note 43, 8.

⁵⁴ J. Razzaque, ‘Human Rights and the Environment: National Experiences’, 32 *Journal of Environmental Policy and Law* (2002) 2, 99, 104; Razzaque, ‘Human Rights in South Asia’, *supra* note 52, 31.

⁵⁵ ‘Mensaje No. 1774-357’ (6 January 2010), available at http://www.unesco.org.uy/iya2009/fileadmin/templates/conaphi.cl/documentos/1774-357_ref_cl_aguas.pdf (last visited 15 June 2013), 4.

⁵⁶ Centro de Derechos Humanos, Universidad Diego Portales, *Chile: Informe Intermediario de las ONG Sobre el Seguimiento de las Observaciones Finales (CCPR/C/CHL/CO/5)*, 6-12

case of indigenous peoples, these natural resources shape their customs and way of life, and are crucial in order to guarantee their economic, social, and cultural development. The Constitution and legislation on land, water, mines, forest, etc. allow private parties to appropriate those natural resources by means of a system of concessions from public authorities to private parties. The Constitution and the legislation guarantee the rights of the concessionaire through property rights, regardless of indigenous peoples' basic needs and rights.

The situation is made worse by the weaknesses and flaws of the environmental legislation as well as lax public environmental policy and management. Public policy has been characterized by the loosening of environmental checks and balances in order to facilitate extractive projects of natural resources, without taking proper account of environmental and social interests.⁵⁷

The *Constitution of Chile* only recognizes a limited number of fundamental rights, and not all of them are protected by a legal remedy. The Constitution only considers water as a good in which individuals and corporations can hold private rights. Indeed, water in the constitution is treated in the context of the right to property.⁵⁸ Thus, the right-holder of the right to use water is constitutionally protected by the right to property.⁵⁹ Water is seen as a good whose use becomes an appropriable right.⁶⁰ All attempts to reform the Constitution did not consider the possibility of explicitly recognizing the human right to water, but rather established at the constitutional level the principle that water is a public good.⁶¹

At the legal level, a process of establishment of rights to use water has occurred since the 1981 *Water Code* was passed. This Code is a landmark legislation that represents a turning point in the process of privatization of water. In Chile, civil law considers water as a public good.⁶² Specialized legislation

[Centro de Derechos Humanos, Chile: Informe Intermediario de las ONG].

⁵⁷ *Ibid.*

⁵⁸ See *Constitution of the Republic of Chile*, Art. 19 (24) (final paragraph).

⁵⁹ "The rights of private citizens over waters, recognized or constituted in conformity with the law, shall grant proprietorship to the owners thereof [...]" *Ibid.*

⁶⁰ A. Dourojeanni & A. Jouravlev, *El Código de Aguas de Chile: Entre la Ideología y la Realidad* (1999), 11.

⁶¹ See *Mensaje No. 1774-357*, *supra* note 55, 5-6. Parliament of Chile, 'Modifica Art. 19, N° 24, de la Constitución Política de la República, con el Objeto de Establecer que el Aprovechamiento y Consumo Humano del Agua, es de Carácter Prioritario', Número de Boletín 6795-07, 16 December 2009; Parliament of Chile, *Modifica Artículo 19 N° 24 de la Constitución Política de la República, con el Objeto de Establecer que las Aguas, Tienen la Calidad de Bienes Nacionales de Uso Público*, Boletín N° 6268-07, 16 December 2008.

⁶² *Civil Code of the Republic of Chile*, Art. 595. See also Dourojeanni & Jouravlev, *supra* note 60, 10.

such as the *Water Code* incorporates this view and legal approach into its text.⁶³ However, the *Water Code* also allows private actors, if certain requirements are met, to hold the rights to permanently use water.⁶⁴ After 20 years, the *Water Code* is still in force in Chile and there has been no further opportunity to amend it to incorporate into it the view of water as a vital human need that must be legally protected. As a result, there is no more water available to access because the vast majority of rights to use water have been recognized in favor of private actors.⁶⁵ Further, the domestic legal framework does not take into account international principles and standards, such as those that have been previously mentioned concerning water, i.e. the human right to access water and the right to a healthy environment in the context of sustainable development.

To sum up, the Chilean legal domestic system has facilitated private appropriation of water and also large-scale private mining projects, such as Pascua Lama, which jeopardize the effective fulfillment of Chile's international obligations concerning both human rights, including the right to water and indigenous rights, as explained below.

II. International Obligations

Chile has to comply with its international commitments, including the 1948 *Universal Declaration of Human Rights*,⁶⁶ the 1976 (revised in 2011) *OECD Guidelines for Multinational Enterprises*,⁶⁷ the 1977 ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (MNE Declaration),⁶⁸ the 1992 *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*,⁶⁹ the 1992 *Rio Declaration on Environment*

⁶³ *Water Code* (13 August 1981), Art. 5.

⁶⁴ *Ibid.*, Art. 6.

⁶⁵ Centro de Derechos Humanos, *Chile: Informe Intermediario de las ONG*, *supra* note 56, 6-12.

⁶⁶ *Universal Declaration of Human Rights*, 10 December 1948, GA Res. 217 A (III), UN Doc A/810, 71.

⁶⁷ OECD, *Guidelines for Multinational Enterprises* (2011).

⁶⁸ ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 16 November 1977, 17 ILM 422.

⁶⁹ *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, UN Doc A/CONF.151/6/Rev.1, 13 June 1992, 32 ILM 882.

and Development⁷⁰ and Agenda 21,⁷¹ the 1995 *Copenhagen Declaration for Social Development*,⁷² the 1998 *ILO Declaration on Fundamental Principles and Rights at Work*,⁷³ and the 2004 *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*.⁷⁴ These instruments encompass internationally widely accepted principles and standards related to human rights and environmental protection, including human access to healthy water and respect for water-related needs. In 1966, the International Law Association established a set of rules known as the *Helsinki Rules on the Uses of the Waters of International Rivers*.⁷⁵ Until the adoption of the 1997 *Convention on the Law of the Non-Navigational Uses of International Watercourses*,⁷⁶ the Helsinki rules “remained the single most authoritative and widely quoted set of rules for regulating the use and protection of international watercourses”.⁷⁷

Besides the aforementioned international standards, binding instruments such as the 1992 *Convention on Biological Diversity*,⁷⁸ the 1992 *Framework Convention on Climate Change* (UNFCCC),⁷⁹ the 1994 *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought*

⁷⁰ *Rio Declaration on Environment and Development*, UN Doc A/CONF.151/5/Rev.1, 13 June 1992, 32 ILM 876.

⁷¹ *Agenda 21*, UN Doc A/CONF.151/26 (Vol. I), 12 August 1992, 14.

⁷² *Copenhagen Declaration for Social Development and Programme of Action of the World Summit for Social Development*, UN Doc A/CONF.166/9, 4, 19 April 1995.

⁷³ ILO, *Declaration on Fundamental Principles and Rights at Work*, 18 June 1998, 37 ILM 1237.

⁷⁴ Food and Agriculture Organization, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, FAO Doc CL 127/10-Sup.1 annex, Guideline 8.11.

⁷⁵ C. Spiegel, ‘International Water Law: The Contributions of Western United States Water Law to the United Nations Convention on the Law of the Non-Navigable Uses of International Watercourses’, 15 *Duke Journal of Comparative & International Law* (2005) 2, 333, 340.

⁷⁶ *Convention on the Law of the Non-Navigational Uses of International Watercourses*, 21 May 1997, 36 ILM 700.

⁷⁷ S. M. A. Salman, ‘The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law’, 23 *International Journal of Water Resources Development* (2007) 4, 625, 629. See also generally P. Beaumont, ‘The 1997 UN Convention on the Law of Non-Navigational Uses of International Watercourses: Its Strengths and Weaknesses from a Water Management Perspective and the Need for New Workable Guidelines’, 16 *International Journal of Water Resources Development* (2000) 4, 475.

⁷⁸ *Convention on Biological Diversity*, 5 June 1992, 31 ILM 818. Ratified by Chile in 1994.

⁷⁹ *Framework Convention on Climate Change*, 9 May 1992, 1771 ILM 107. Ratified by Chile in 1995.

and/or Desertification, Particularly in Africa,⁸⁰ the 1997 *Kyoto Protocol*,⁸¹ and the 1997 *Convention on the Law of the Non-navigational Uses of International Watercourses*, provide a concrete environmental and human rights legal framework to be respected, protected and fulfilled in the context of foreign investments.⁸²

In the field of indigenous rights, Chile's international obligations derive from the 1989 *ILO Convention No. 169* and the 2007 UNDRIP. For instance, Rodolfo Stavenhagen, the former Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, in his 2003 country report concerning Chile, highlighted the inconsistencies between the legislation on land, water, mines, and other sectors and the provisions of the *Indigenous Act*.⁸³ These contradictions also arise with respect to the provisions of international instruments such as the ICCPR, the ICESCR, and the *ILO Convention No. 169*. The *Constitution of Chile* also raises serious doubts as to its compatibility with the abovementioned international instruments. The former Special Rapporteur also emphasized the crucial principle that the protection of human rights "should take precedence over private commercial and economic interests".⁸⁴

In 2007, the HRC was troubled "to learn that 'ancestral lands' are still threatened by forestry expansion and megaprojects in infrastructure and energy".⁸⁵ Therefore, according to obligations set by Articles 1 and 27 of the ICCPR the HRC stated that Chile should "[c]onsult indigenous communities before granting licences for the economic exploitation of disputed lands, and

⁸⁰ *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, 17 June 1994, 1954 UNTS 3. Ratified by Chile in 1997.

⁸¹ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 37 ILM 22. Ratified by Chile in 2002.

⁸² United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 1993: Transnational Corporations and Integrated International Production* (1993), 33.

⁸³ Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Indigenous Issues: Human Rights and Indigenous Issues: Addendum: Mission to Chile*, UN Doc E/CN.4/2004/80/Add.3, 17 November 2003, 21, para. 59.

⁸⁴ *Ibid.* See also Centro de Derechos Humanos, *Chile: Informe Intermediario de las ONG*, *supra* note 56, 6-12.

⁸⁵ HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Chile*, UN Doc CCPR/C/CHL/CO/5, 18 May 2007, 5-6, para. 19.

guarantee that in no case will exploitation violate the rights recognized in the Covenant”.⁸⁶

In 2009, Chile provided information on the implementation of the concluding observations issued by the HRC. Concerning the issue of consulting indigenous communities before granting licenses for economic exploitation of disputed lands, as well as the Committee’s advice to guarantee that in no case would exploitation violate the rights recognized in the Covenant, the State asserted that

“Chile has legislation establishing procedures for consulting and involving indigenous communities in projects that are carried out on their lands. These procedures depend on the type of licence or concession that is being sought. [...] Mining concessions have special legal status under the Constitution and the Mining Code, which regulates their ownership, use and enjoyment”.⁸⁷

In addition, the Chilean State points out that “the statute regulating indigenous lands is supplemented by other laws such as the *Environment (Framework) Act*, and establishes a consultation process for environmental impact studies.”⁸⁸ The document ended by mentioning that

“the 1989 ratification of the International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), which was recently approved by Congress, will ensure that indigenous communities participate in projects involving their lands without prejudice to the protection afforded to them by the State under the Indigenous Law.”⁸⁹

The information provided by the Chilean government in 2009 affirms that consultation and fair participation of indigenous communities in projects involving their lands will take place. According to this information, indigenous

⁸⁶ *Ibid.*, 5-6, para. 19 (c).

⁸⁷ See HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Chile: Addendum: Information provided by the Government of Chile on the Implementation of the Concluding Observations of the Human Rights Committee (UN Doc CCPR/C/CHL/CO/5)*, UN Doc CCPR/C/CHL/CO/5/Add.1, 22 January 2009, 7, para. 24.

⁸⁸ *Ibid.*, 8, para. 25.

⁸⁹ *Ibid.*, 8, para. 26.

communities are protected at least by international human rights instruments such as the ICCPR and the *ILO Convention No. 169*, and by domestic legal instruments such as the *Environment Framework Act* and the *Indigenous Act*.

Regarding investments on indigenous peoples' lands in Chile, the Committee on the Elimination of Racial Discrimination (CERD) acknowledged "that indigenous peoples are affected by the exploitation of subsoil resources in their traditional lands and that in practice the right of indigenous peoples to be consulted before the natural resources of their lands are exploited is not fully respected".⁹⁰ In this context, the CERD recalled international standards enshrined in the *ILO Convention No. 169* and the Committee's *General Recommendation No. XXIII* (1997).⁹¹ In consequence, the Committee urged the State to "hold effective consultations with indigenous peoples on all projects related to their ancestral lands and to obtain their consent prior to implementation of projects for the extraction of natural resources, in accordance with international standards".⁹² The approval and the implementation of projects for the extraction of natural resources must be conducted in accordance with the right to participate, the duty to hold effective consultations, and the duty to obtain affected peoples' consent prior to approval. In this regard, the HRC argued,

"participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members".⁹³

⁹⁰ Committee on the Elimination of Racial Discrimination (CERD), *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Chile*, UN Doc CERD/C/CHL/CO/15-18, 7 September 2009, 4, para. 22 [CERD, Concluding Observations: Chile].

⁹¹ In *General Recommendation No. XXIII* the Committee affirmed that it is conscious of the fact that in many regions of the world indigenous peoples have lost their land and resources to colonists, commercial companies and State enterprises. The Recommendation then adds that "[t]he Committee calls in particular upon States parties to: [...] (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics; (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent". CERD, *General Recommendation No. XXIII*, UN Doc HRI/GEN/1/Rev.6, 27 May 2008, 285, 285-286, para. 4 (c) & (d).

⁹² CERD, *Concluding Observations: Chile*, *supra* note 90, 4, para. 22.

⁹³ HRC, *Ángela Poma Poma v. Peru*, *supra* note 12, 11, para. 7.6.

Finally, in 2010, the CERD addressed a letter to Chile requesting more information about recommendation 22 concerning the obligation to conduct prior and effective consultations with indigenous peoples.⁹⁴ The Committee asked about the procedures to obtain prior and informed consent from indigenous peoples concerning projects that involve the extraction of natural resources – which significantly affect indigenous rights and interests – as well as the compatibility of such procedures *vis-à-vis* international standards.⁹⁵ Effective consultation and free, prior, and informed consent form an integral part of participatory rights and are closely related to a number of other human rights, such as the freedom of opinion, the freedom of expression, and the right to access information.⁹⁶

The Pascua Lama mining project constitutes a good example of the interaction between international environmental law, international law of indigenous peoples, and international human rights law.

C. Pascua Lama

The Pascua Lama mining project was examined twice by the State environmental agency in charge of the environmental impact assessment system. This mechanism has existed in Chile since 1997.⁹⁷ The first time the

⁹⁴ CERD, ‘Letter from Anwar Kemal’ (27 August 2010), available at http://www2.ohchr.org/english/bodies/cerd/docs/followup/Chile_27082010.pdf, 2.

⁹⁵ *Ibid.*

⁹⁶ “Under article 27, a State party’s decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities [...]” HRC, *General Comment No. 34*, UN Doc CCPR/C/GC/34, 12 September 2011, 4-5, para. 18. See also HRC, *Ángela Poma Poma v. Peru*, *supra* 12, UN Doc CCPR/C/95/D/1457/2006, 10, para. 7.2.

⁹⁷ The Chilean environmental impact assessment system (EIAS) was established by the *Chilean Environmental Framework Act* which was adopted in March 1994. Since the enactment in 1997 of the *Executive Decree No. 30/97*, or *Environmental Impact Assessment System (EIAS) Regulations*, public and private projects listed in those regulations (Article 3) cannot be executed or modified unless they are first submitted to the EIAS. The EIAS was implemented by the National Environmental Commission (Conama) when more than one region was involved, or by the respective regional Commission (Corema) when only a single region was involved. *Law 19.300* was recently modified by *Law 20.417*, that creates new environmental institutions such as: the Ministry of the Environment, which is in charge of environmental policies and programmes; the Environmental Assessment Agency, which is in charge of managing the EIAS; and, the National Bureau of the Environment, which is in charge of overseeing compliance with environmental laws. Baker & McKenzie,

project was submitted was in 2000, and its execution was authorized in 2001.⁹⁸ *Barrick Gold* submitted the project to the State environmental agency again in 2004, due to the company introducing modifications to the initial project. These modifications seriously threatened the existence of three Chilean glaciers known as Toro 1, Toro 2, and Esperanza. The modification of the project in 2004 planned to displace a large portion of each glaciers to a nearby location.

Eventually, in 2006, the environmental agency issued *Environmental Qualification Resolution No 24/2006*, which approved the modifications to the project.⁹⁹ However, the authorization pointed out that the company could have access to minerals only if the mining activity did not cause any retreat, displacement, destruction, or physical intervention of the three glaciers.¹⁰⁰ This signified that the effective protection of the existing glaciers in the zone of exploitation would be a decisive condition for the execution of the project. *Barrick Gold* would have an obligation to regularly control the glaciers in the zone of exploitation and to periodically conduct studies in order to verify and provide evidence that the mining activity would not affect the glaciers, nor the water quantity or quality of the basin.

Despite these mandatory requirements, Barrick's extractive activities pose a major risk of polluting the Huasco River basin and destroying the glaciers Toro I, Toro II, and Esperanza, as well as other glaciers close to the zone of operations. Since the execution of the project, various anomalies and environmental threats have appeared. In 2009, the Operational Control Committee (a governmental supervisory body), after a verification visit, found that Barrick Gold had failed to comply with several requirements imposed by *Resolution N°24/2006* regarding water and glaciers. First, Barrick has extracted water from a non-authorized point, which jeopardizes the water resources of the Huasco River basin.¹⁰¹ Second,

'Chile: The Environmental Impact Assessment System Under Chilean Law', 5 *Latin American Legal Developments Bulletin* (1997) 3, available at <http://db.natlaw.com/interam/ch/en/sp/spchen1.htm> (last visited 15 June 2013); R. Vergara, P. Sandoval & P. Infante, 'Environment-Chile', available at <http://www.latinlawyer.com/reference/article/40629/chile/> (last visited 15 June 2013).

⁹⁸ Regional Environmental Commission of Chile (CONAMA), *Resolution of Environmental Qualification No. 39/01* (2001) (modified by CONAMA, *Resolution of Environmental Qualification No. 59/01* (2001)).

⁹⁹ CONAMA, *Resolution of Environmental Qualification No. 24/06* (2006).

¹⁰⁰ *Ibid.*, § 9.22.

¹⁰¹ Ministry of Public Affairs, 'Informe Técnico COF: Visita Inspectiva del Comité Operativo de Fiscalización: RCA Corema Atacama N° 24/2006' (22 December 2009), available at http://www.e-seia.cl/archivos/Inf_Tec_DGA____COF_-_EIA_ModificacionesProyecto_Pascua_Lama__Dic_09_.pdf (last visited 15 June 2013).

Barrick has conducted operations such as transporting filler material with heavy machinery that produces particle dust around the mining project location. This particle dust can accumulate on the glaciers located near the project, particularly on the Estrecho Glacier.¹⁰² This could lead to an enhanced melting of mountain glaciers and the subsequent danger of seriously affecting the water resources of the Huasco River basin.¹⁰³ Third, due to the construction of a road that crosses the Huasco River, Barrick has altered the free flow of water of the Estrecho River and therefore has threatened the water resources of the Huasco River basin.¹⁰⁴

On 19 January 2010, the Chilean authorities decided to initiate an administrative procedure in order to sanction the irregularities in the execution of the mining project. One of the most serious problems was the existence of particle dust on the glaciers. The dust was swept up in the air by the permanent activity of big mining tracks and afterwards installs itself on glaciers, causing an abnormally rapid melting process. The corporation did not dampen the roads and its big tracks were not covered with a tarpaulin in order to avoid the release of dust. These irregularities caused, *inter alia*, the accelerated melting of the Estrecho Glacier, a phenomenon that had not been taken into account in the environmental impact assessment study. That affected water supplies of the Huasco River basin. According to the scientific data, a dust layer of one millimeter increases the normal rate of glacial melting by 15%. Moreover, the corporation allegedly drew water from prohibited locations. Consequently, the State environmental agency fined the *Nevada Mining Company Ltd.* due to constant infringements.¹⁰⁵

In April 2013, in the context of a *recurso de protección*, the Court of Appeal of Copiapó temporarily ordered Pascua Lama Mining Project building operations to cease, except those operations that were aimed at preventing further environmental damages.¹⁰⁶

¹⁰² The Estrecho Glacier is the main source of the Estrecho River.

¹⁰³ *Ibid.*, 18.

¹⁰⁴ *Ibid.*, 20.

¹⁰⁵ V. Vargas Rojas, 'Estado Chileno Acusado en Washington por Proyecto Pascua Lama', *El Ciudadano* (25 October 2011), available at <http://www.elciudadano.cl/2011/10/25/43129/estado-chileno-acusado-en-washington-por-proyecto-pascua-lama/> (last visited 15 June 2013).

¹⁰⁶ Court of Appeal of Copiapó, 'Corte de Copiapo Acoge Orden de no Innovar y Paraliza Obras del Proyecto Pascua Lama' (10 April 2013), available at http://www.poderjudicial.cl/modulos/Home/Noticias/PRE_txtnews.php?cod=5082&opc_menu=&opc_item= (last visited 15 June 2013). Without mention of author, 'Barrick Suspense Trabajos de Construcción de Pascua Lama Tras Fallo Judicial', *La Tercera* (10 April 2013), available at <http://www.latercera.com/noticia/negocios/2013/04/655-518141-9-barrick-suspende->

In every stage of the Pascua Lama Project, it seems that the Chilean State did not fully comply with its international obligations concerning water, environmental protection, and indigenous peoples' rights. The Chilean State granted authorization to the Pascua Lama Project without considering the concerns raised by indigenous communities during the environmental assessment process.¹⁰⁷ Hence, the rights to consultation and to free, prior, and informed consent were not respected.¹⁰⁸ The environmental impact assessment study did not consider the socio-cultural impact on the life systems and traditional customs of indigenous peoples, who have freely occupied and used the Andean Mountains since time immemorial.¹⁰⁹ Allowing *Barrick Gold* to take possession of those lands has allowed the appropriation of an indigenous natural and socio-cultural heritage, which has conserved indigenous culture for

trabajos-de-construccion-de-pascua-lama-tras-fallo-judicial.shtml (last visited 15 June 2013).

¹⁰⁷ “As regards the allegation that the Community was not consulted in connection with the environmental impact evaluation of the Pascua Lama Project and modifications thereof, the Commission considers that right of access to information is one of the components of the prior consultation process. On that, the Commission has stated: “[O]ne of the central elements to the protection of indigenous property rights is the requirement that States undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories... [and that member States are obliged] to ensure that any determination... is based upon a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives [...]” *Diaguaita Agricultural Communities of the Huascoalinos and Their Members v. Chile*, IACHR Petition 415/07, Report 141/09, 30 December 2009, para. 60 [Diaguaita Agricultural Communities of the Huascoalinos].

¹⁰⁸ A good example of international recognition of this fundamental principle is the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, 2161 UNTS 447.

¹⁰⁹ “With respect to the arguments on approval of the environmental study for modifications to the Pascua Lama project, which envisions locating said project on the ancestral territory of the Huasco-Altino Diaguaita Community, without any environmental and cultural impact study on the community and the members thereof, as well as failing to consult them prior to approval being granted for the Pascua Lama project, and the unresolved civil suit to render the acquisition by the Nevada Mining Company of the Chollay ranch null and void, the Commission notes that these arguments tend to establish a potential violation of Article 21 of the American Convention.” *Diaguaita Agricultural Communities of the Huascoalinos*, *supra* note 107, para. 57.

centuries.¹¹⁰ The latter adds an element to the discussion of water uses, namely, the cultural or traditional dimension of water use. The State did not protect and still does not protect the rights of the communities and peoples affected because it does not adopt the appropriate measures needed to prevent the company from seriously affecting the availability and quality of the water in the zone. In addition, the Chilean authorities have not taken the necessary measures to prevent the company from jeopardizing the very existence of the glaciers present in the area.¹¹¹ The State must abide by its human rights obligation to protect the right to water as a human right and to protect the glaciers as a vital source of water in the region. Furthermore, the State has to take all measures to ensure the full implementation of, *inter alia*, the ICECSR, the *ILO Convention No. 169* (Articles 13, 14, and 15) and the *American Convention*. Finally, the State has also failed to guarantee that in no case will exploitation violate the rights recognized in the ICCPR. Indeed, the State has failed to guarantee the rights embodied in Articles 1 and 27 of the Covenant.

From an environmental point of view, in Pascua Lama, Chile did not abide by its international obligations related to desert or semi-arid zones. Furthermore, the Chilean State failed to respect the precautionary principle when analyzing the environmental impact of the project. The precautionary principle is a rule of conduct in which, in order to protect the environment, States must apply precautionary measures when there is a risk of a serious and irreversible harm, and there is no absolute scientific certainty of the capacity of either impeding or avoiding it.¹¹² It may be noted that the environmental impact assessment, as it is referred to in Chilean domestic legislation and implemented by Chilean authorities, is not in conformity with Chilean international obligations,

¹¹⁰ See M. Lundberg & Y. Zhou, 'Hunting-Prohibition in the Hunters' Autonomous Area: Legal Rights of Oroqen People and the Implementation of Regional National Autonomy Law', 16 *International Journal on Minority and Group Rights* (2009) 3, 349, 375; See also HRC, *Länsman et al. v. Finland*, Communication No. 511/92, UN Doc CCPR/C/52/D/511/1992, 8 November 1994, 10-11, paras 9.6 & 9.8. These principles were further developed in *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, UN Doc CCPR/C/70/D/547/1993, 16 November 2000, 15, para. 9.5 and in HRC, *Ángela Poma Poma v. Peru*, *supra* note 12, 10, para. 7.2.

¹¹¹ Concerning the very importance of the glaciers in the Andes Mountains, see A. Rabatel *et al.*, 'Current State of Glaciers in the Tropical Andes: A Multi-Century Perspective on Glacier Evolution and Climate Change', 7 *The Cryosphere* (2013) 1, 81.

¹¹² P. Daillier & A. Pellet, *Droit International Public*, 8th ed. (2009), 1453; UNESCO, *The Precautionary Principle: World Commission on the Ethics of Scientific Knowledge and Technology* (2005), 14.

especially concerning the right to consultation, indigenous rights, and the right to water.

In practice, neither the Constitution nor the *Mining Code* provide for a special consultation procedure of the affected indigenous communities. In the case of Pascua Lama mining activities, the indigenous rights violation appears crystal clear if we bear in mind Article 15 (2) of the *ILO Convention No. 169*. It states that

“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. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities”.¹¹³

Extractive megaprojects have been increasingly developed on indigenous ancestral lands over the last few decades. Generally speaking, the State's failure to recognize and demarcate indigenous lands has facilitated land privatization and deprivation of their lands, resources and livelihood, to the benefit of private third parties. State authorization to private third parties to carry out extractive activities on disputed lands has contributed to indigenous land spoliation. In the specific case of the Pascua Lama Project, the Inter-American Commission took into account that indigenous peoples' rights were at stake. The Commission declared in 2009 the admissibility of a petition submitted in June 2007 by the Comunidad Agrícola Diaguita “Los Huascoaltinos” against Chile due to alleged violations of the rights to property, to access to justice, and to participation.¹¹⁴ Interestingly, since 1903 the Diaguita Huascoaltinos have had a legal title

¹¹³ *ILO Convention No. 169*, *supra* note 26, 1387.

¹¹⁴ *Diaguita Agricultural Communities of the Huascoaltinos*, *supra* note 107. In October 2011, the Inter-American Commission held a special public session about this case (Case 12.741). See M. Hofsommer, ‘Case 12.741 Agricultural Community of Diaguita de los Huascoaltinos, Chile’ (1 November 2011), available at <http://hrbrief.org/2011/11/case-12-741-agricultural-community-of-diaguita-de-los-huascoaltinos-chile/> (last visited 15 June 2013).

to the land in the Andean zone of the Huasco River basin.¹¹⁵ Subsequently, large swaths of these lands (ca. 130,000 out of 377,964 hectares) were illegally usurped and registered at the Property Registration Office by private actors. As a result, different property titles – both indigenous, private non-indigenous, and governmental – existed simultaneously over the same land. One of these property titles was acquired by the *Nevada Mining Company Ltd.* The Pascua Lama mining project is currently under development in the geographic area under this property title.¹¹⁶ In this context, indigenous communities have challenged *Barrick Gold* in regards to the ownership of those lands at the national level.

The Diaguita Peoples intend to protect their cultural and territorial integrity as well as the water resources necessary for their physical and cultural subsistence. The water level of the Huasco River has markedly decreased and State agencies themselves have found pollution even at this early stage of exploration and construction of the mine.¹¹⁷ It may be recalled that the Inter-American Human Rights System provides extensive protection of the right to property, incorporating the collective and cultural dimension of this right and adopting an integrative approach that covers the lands, territories and natural resources of indigenous peoples.¹¹⁸ The Diaguita Peoples argues that the Project – approved without prior consultation with affected communities – encroaches upon the rights set out in the *Indigenous Act*, *Environmental Act* and the *ILO Convention No. 169* ratified by Chile in 2009.

¹¹⁵ Centro de Derechos Humanos, *Chile: Informe Intermediario de las ONG*, *supra* note 56, 8. The Diaguita Peoples' land, known as Estancia Los Huascoaltinos, was registered in 1903 in the property registry at the Property Registration Office in Vallenar (Atacama, Chile). See Ministry of Environment, 'Recurso de Reclamación Ante la Comisión de Evaluación de la Región de Atacama' (17 May 2011), available at <http://seia.sea.gob.cl/archivos/RecursoREIAPAC27-11.PDF> (last visited 15 June 2013), 4.

¹¹⁶ The Pascua Lama Mining Project has been implemented on indigenous ancestral land belonging to the Diaguitas Huascoaltinos community, and affects the glaciers Guanaco, Toro I, Toro II, and Esperanza which provide water to the Estrecho and Chollay Rivers. This hydrological system gives sustainability to the Diaguita Huascoaltino territory. Secondly, this mining project was approved against the will of the affected community. Lastly, the project was approved by the Chilean environmental authorities without a proper impact assessment of the project upon the customs, culture and ways of life of the Diaguita Huascoaltinos. Centro de Derechos Humanos, *Chile: Informe Intermediario de las ONG*, *supra* note 56, 11.

¹¹⁷ Vargas Rojas, *supra* note 105.

¹¹⁸ "[...] access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water." *Yakye Axa Case*, *supra* note 38, 85-86, para. 167. See also UNDRIP, *supra* note 32.

A situation comparable with Pascua Lama led to a complaint submitted to the Inter-American Commission in 2002. The case involved the construction of a huge hydroelectric plant in the Upper Bío-Bío (Bio-Bio Region, South of Chile) known as Ralco.¹¹⁹ The plant was developed at the heart of indigenous lands and territories, which seriously impinged upon indigenous rights and raised grave concerns about the preservation of ecosystems as well as social and environmental sustainability. In the *Ralco* case, a friendly settlement was reached. In the section related to Foster Development and Environmental Conservation in the Upper Bio-Bio sector, the Commission recalled that

“the parties, furthermore, point out the importance to continually seek positive environmental impact in accordance with the terms and conditions of said environmental rating report. Without prejudice to the foregoing, the parties agree on the pertinence of facilitating access for indigenous communities to the follow-up and supervision reports of the external auditors and those issued by the respective public agencies”.¹²⁰

Over the last decade, there has been an increasing number of cases before the Inter-American Human Rights system concerning investment projects and indigenous rights. Some of them are closely connected to natural resources and environmental protection. For instance, in the *Kuna* case before the Inter-American Commission, petitioners argued that the construction of a major Hydroelectric plant violated their rights because the project was implemented without prior consultation with the affected communities. According to the petitioners,

“construction of the Bayano Hydroelectric Dam, which resulted in the flooding of the ancestral territory they used to inhabit, violated the collective rights of the Kuna of Madungandí and Emberá of Bayano peoples”.¹²¹

¹¹⁹ Vargas Rojas, *supra* note 105.

¹²⁰ *Mercedes Julia Huentao et al. v. Chile*, IACHR Petition 4617/02, Report No. 30/04, Friendly Settlement, 11 March, 2004, para. 35 (note 1) (emphasis omitted).

¹²¹ *Kuna of Madungandí and Emberá of Bayano Indigenous Peoples and Their Members*, IACHR Petition 12.354, Report No. 58/09, 21 April, 2009, para. 2. See also *Ngöbe Indigenous Communities and Their Members in the Changuinola River Valley v. Panama*, IACHR Petition 286-08, Report No. 75/09, 5 August, 2009; IACHR, ‘PM 382/10’, available at <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp> (last visited 15

Thus, in 2009 the Commission concluded that the petition was admissible with respect to the alleged violation of Article 21 of the *American Convention* and in connection with Article 1 (1) thereof. Furthermore, under the principle of *iura novit curia*, the Commission decided to analyze in the stage on merits the possible application of Articles 2, 8, 24, and 25 of the Convention.

The Pascua Lama Project emphasizes the threats and risks that can affect the full enjoyment of indigenous peoples' rights, as a consequence of either the lack or the weakness of state regulatory mechanisms. This mining project also highlights the importance of the need of the State to fully comply with international environmental law and international human rights law, including indigenous peoples' rights.

D. Conclusion

The legal analysis of Pascua Lama, like other megaprojects, should be understood within the more global context of international environmental law, international human rights law, international investment law, and international economic law. Indeed, conflicts concerning water are often related to tensions between economic development on the one hand, and respect and protection of the environment and human rights – particularly the right to water – on the other. This legal analysis is also the right moment to discuss the role of private corporations, particularly transnational enterprises, with respect to the human right to water and sanitation. Concerning freshwater, human rights support the environmental approach and both tend to increasingly penetrate and influence investment law. The emergence of a human right to access drinking water and sanitation is a major step in this dynamic interaction.

The case of Pascua Lama shows the urgent need to make these international standards a reality at the national and local levels. Pascua Lama also clarifies the need to elaborate on and improve the complementarity of domestic and international law. Moreover, Pascua Lama highlights that a proper interaction between both legal orders in the contemporary world, particularly concerning the environment, human rights, and water, would be a key step towards legal coherence and stronger protection to individuals and communities. The Pascua Lama mining project is just an example of what can occur when major investment projects are developed on ancestral lands and territories without the free, prior, and informed consent of affected indigenous communities. The added value of applying international human rights and environmental

standards at the domestic level is to strengthen the protection of right holders that are experiencing human rights and environmental abuses.