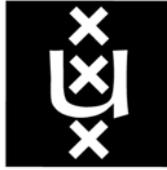


UNIVERSITEIT VAN AMSTERDAM



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# Indigenous People's Rights & Public International Law in Argentina

The mobilization of law in the context of the Mapuche  
people

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## **Abstract**

This paper focuses on the way International and Domestic legal frameworks are mobilized in the context of Mapuche people's claim to land in Argentina. The specific translation process that takes place between the global and the local, is central to this study.

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## INTRODUCTION

*“The law is not so much carved in stone as it is written in water, flowing in and out with the tide.”<sup>1</sup>*

The process of mobilizing law, understood as “the process through which a legal system acquires its cases”,<sup>2</sup> or in other words: putting the theory into practice, has occupied legal and social scholars for centuries. However, with recent and increasing recognition of indigenous people’s rights challenging the concepts at the heart of human rights theory, a new light from which to look at mobilizing the law has emerged.

This paper examines the mobilization of law within and between two spheres: international norms and their domestic implementing legislation, and the local setting in the communities of the Mapuche indigenous people in southern Argentina. Operating within these two spheres are “translators”, as Sally Engle Merry describes them, translating human rights into local language.<sup>3</sup> Their role is crucial to addressing the central question which this paper poses:

***How are international and domestic legal frameworks mobilized in the case of the Mapuche people in Argentina in the context of their land claims?***

This research aims at better understanding how law is “brought to life”; how international and local processes interact with respect to indigenous people’s land claims in the Mapuche community; and through what processes universal human rights ideas are adopted and applied locally?<sup>4</sup> This last question is central to understanding how international and domestic law can become relevant in the local context, and how it can be adopted and applied locally.

In this context, Merry’s theory of translators is very relevant and this paper places special emphasis on the work of different actors in the translation process. Translators are actors who operate in the global and local spheres, providing an interface between

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<sup>1</sup> J Melvoin, *Crime and Punishment* (Northern Exposure 1992).

<sup>2</sup> DJ Black, ‘The Mobilization of Law.’ (1973) 2 *The Journal of Legal Studies* 125-128.

<sup>3</sup>SE Merry, ‘Transnational Human Rights and Local Activism: Mapping the Middle’ (2006) 108 *American Anthropologist* 40.

<sup>4</sup> *Ibid.*

them. They take global concepts, such as international human rights norms, and bring them into local settings. They translate concepts in different cultural settings and as Merry points out: “put(s) global human rights ideas into familiar symbolic terms (...) using stories of local indignities and violations to give life and power to global movements.”<sup>5</sup>

### *Definitional challenges*

While this paper uses the global/local dichotomy, it should be acknowledged that such use does not come without definitional challenges.<sup>6</sup> For the purposes of this paper the term ‘global’ will relate to international norms and its domestic implementing legislation, while ‘local’ will refer to the localised settings within communities of Mapuche indigenous people and Mapuche culture<sup>7</sup> itself.

Studying the mobilization of law in the context of indigenous people’s rights recognition requires first and foremost establishing who the indigenous people are. Under international positive law there is no strict definition.<sup>8</sup> However, the one developed by Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination of Minorities, is widely used (both by courts of law and academia):

“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves *distinct* from other sectors of the societies now prevailing on those *territories*, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued

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<sup>5</sup> Merry (n3) 40.

<sup>6</sup> In relation to gender violence, Merry explains: “Clearly, the different layers, are to a greater or lesser degree, global or local. More or less the degree to which each layer is global corresponds to the degree to which its members see female inheritance in global terms as an international human rights issue. However, the terms ‘global’ and ‘local’ are not particularly useful. Their meaning is ambiguous and they often become a stand-in for social class”. SE Merry, *Human rights and gender violence; translating international law into local justice* (University of Chicago Press 2006) 212. See also DM Goodale, *The practice of human rights: tracking law between the global and the local* (Cambridge University press 2007) 11.

<sup>7</sup> The working definition of culture for the purposes of this paper, reads as follows: "... an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward life." C Geertz, *The Interpretation of Cultures* (Basic Books 1973) 89.

<sup>8</sup> It has been argued that defining indigenous peoples is neither necessary nor recommendable. ‘Indigenous and Tribal Peoples’ rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter American Human Rights System’ (2009) Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc 56/09, 23.

existence as peoples, in accordance with their own *cultural patterns*, social institutions and legal system.”<sup>9</sup> (emphasis added).

Key elements discerned from such definition are the concepts of “distinct”, “ancestral territories” and “cultural patterns”. This paper will examine these ideas further. Strictly related to the challenge of defining indigenous peoples, is the challenge of defining “tribal people”. Recently the Inter American Court for Human Rights established that tribal people are to be considered indigenous people.<sup>10</sup>

Another definition deserving attention is the term “lands”. For the purpose of the present thesis, while discussing the rights to land, the latter will refer to Article 13, paragraph 2 of the ILO 169 Convention which determines that “the use of the term lands (...) shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use”.<sup>11</sup>

Last but not least, essential to this debate is the problem of land rights, understood as the recognition of “the existence of indigenous use, occupancy and ownership” and the accordance of “appropriate legal status, juridical capacity and other legal rights in connection with indigenous people’s ownership of land”.<sup>12</sup> It is in this scope that land rights will be understood for the purposes of this thesis.

### *Indigenous people’s rights*

Over the last few decades, globally, there has been an increasing legal recognition of indigenous people’s rights to land. On an international level, indigenous people’s rights to land have been recognized under Article 14 of the ILO convention 169,<sup>13</sup> ratified by

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<sup>9</sup> Sub-Commission on the Prevention of Discrimination of Minorities, ‘Study of the Problem of Discrimination Against Indigenous Populations’ (1986) UN Doc. E/CN.4/sub.2/1986/7/Add 4, para 379. Available at <<http://www.un.org/esa/socdev/unpfii/en/spdaip.html>> accessed 7 August 2011.

<sup>10</sup> Case of the Saramaka People v. Suriname, IACHR (ser. C) No. 172 (28 November 2007), para 79 – 86.

<sup>11</sup> The Inter American Commission for Human Rights has incorporated a “broad concept of indigenous and territories, wherein the latter category includes not only physically occup(ied) spaces but also those used for their cultural or subsistence activities, such as routes of access” ‘Indigenous and Tribal Peoples’ rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter American Human Rights System’ (2009) Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc 56/09, 23.

<sup>12</sup> ‘Indigenous peoples and their relationship to land’ (2000) UN Sub-Commission on the Promotion and Protection of Human Rights, UN Doc E/CN.4/Sub.2/2000/25, para 33. In depth discussions related to the right to the spiritual relationship with the land escape the possibilities of the present paper.

<sup>13</sup> Adopted at the International Labour Office, 76th Session on 7 June 1989.

many Latin-American countries and by the Declaration of the Rights of Indigenous Peoples (hereinafter UNDRIP)<sup>14</sup> which explicitly recognises:

“the urgent need to respect and promote the inherent rights and characteristics of indigenous people’s, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and traditions”<sup>15</sup>

This international recognition has led to a number of states implementing significant legislative reform to align with these international norms. One notable example was during the “Latin American Spring” (as some have put it <sup>16</sup>) in countries like Ecuador, Bolivia and Argentina (amongst others).

Indigenous people’s rights to land can be understood within different groups of rights. These include (but are not limited to) collective rights, cultural rights, property rights, minority rights and self determination.<sup>17</sup> The scope of this thesis only allows to briefly mention the first two.

The notion of indigenous rights supposes a change in the concept of human rights itself, which, has tended to prioritize universality and individual subjects with the traditional view of human rights oriented around individualistic visions of rights, or, as Goodale succinctly explains:

“the idea of human rights in its dominant register –the one expressed through instruments like the Universal Declaration – assumes the most global of facts: that all human beings are essentially the same, and that this essential sameness entails a set of rights law”.<sup>18</sup>

Indeed, there is a change theory on human rights and indigenous rights, which are often seen to conflict with this “universality principle” and individual subject theory. When talking about indigenous rights, reference is made to groups and collective communities and to the rights of societies and cultures, as opposed to the principles of universality and

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<sup>14</sup> Adopted by United Nations General Assembly Resolution 61/295 on 13 September 2007.

<sup>15</sup> Adopted by General Assembly Resolution 61/295 on 13 September 2007

<sup>16</sup> Danish Institute for Human Rights, ‘Latin American Spring: Constitutional Reforms in Venezuela, Ecuador and Bolivia’ (Conference, Copenhagen, 24 August 2009).

<sup>17</sup> ‘Indigenous and Tribal Peoples’ rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter American Human Rights System’ (2009) Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc 56/09, 23.

<sup>18</sup> DM Goodale and SE Merry, *The practice of human rights: tracking law between the global and the local* (Cambridge University press 2007) 10.

individuality. Indigenous rights presuppose a protection of collective rights. Indigenous rights and collective rights are related but not synonymous; the first refers to the subject and the second refers to the object. Within collective rights, the rights of a certain group are at stake because of the existence of that group, as opposed to the classic idea of human rights as individual rights granted to each citizen. Accordingly, this leads to different conceptions of particular rights, for example, indigenous people viewing land rights in a particularly distinct light:

“(Mapuche people’s) sense of attachment to a territory takes the form of “belonging to” not to “being owners”.<sup>19</sup>

The concept of private ownership is alien to most indigenous groups with collective rights to use land being the understood norm. Commonly therefore many indigenous groups have not claimed individual legal title or ownership to land.<sup>20</sup>

The special relationship between indigenous people and their traditionally occupied land has been recognized as one deserving special attention. It must also be acknowledged that, in connection to this “special relation”, these land rights also possess a cultural dimension: the special relation of indigenous peoples to land has resulted in several courts establishing that Article 27 of the International Covenant on Civil and Political Rights, on cultural rights, is also applicable in the context of land rights.

Another way to understand this discussion is in relation to issues pertaining to reparations (a very important aspect within the Inter American Court for Human Rights in its recognition of indigenous people’s rights to land)<sup>21</sup> and reservations.<sup>22</sup> However, it is beyond the scope of this thesis to do so.

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<sup>19</sup> G Hoberman, ‘Rethinking Ethnicity and Democracy: Argentina and its Silenced Voices’ (2007) Florida International University working paper, <http://lanic.utexas.edu/project/etext/llilas/ilassa/2007/hoberman.pdf> , accessed 24 August 2011, p. 24, citing R Nankuqueo, ‘People of the Land, Without Land’, [www.greenanarchy.org](http://www.greenanarchy.org).

<sup>20</sup> Available at <http://www.indigenouspeoples.nl/indigenous-peoples/indigenous-issues>, last accessed 7 August 2011.

<sup>21</sup> M Rosti, ‘Reparations for Indigenous Peoples in Two Selected Latin American Countries’ in: Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press 2008) 349.

<sup>22</sup> ‘Indigenous and Tribal Peoples’ rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter American Human Rights System’ (2009) Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc 56/09, 23.

*Local context*

While research on indigenous people has been increasingly conducted in several Latin American countries, Argentina has been largely ignored in this literature. Hence, this study attempts to fill the gap. Argentina is a Federal state comprising 23 provinces. According to surveys conducted in 2004–2005, there are some 600.329 indigenous people in the Argentinean territory.<sup>23</sup> The greater majority belong to one of the following communities: Mapuche, Kolla, Toba and Wichí. They represent 50% of the total indigenous population and are found all over the Argentinean territory.<sup>24</sup> Indigenous people in Argentina are also believed to represent the poorest population in the country.<sup>25</sup>

At the time of the consolidation of the Argentinean nation-state, indigenous people were not considered citizens and were not awarded individual rights. After the military government of the seventies, indigenous people started claiming their rights, not as individual groups, but as communities. To date Argentina has ratified a number of international instruments related to indigenous people's rights, including the ILO 169 convention<sup>26</sup> which recognizes the communal tenure of the traditionally occupied lands under Article 14. Moreover, the Argentinean National Constitution, after its 1994 amendment, established the right of indigenous people to their culture, education and “communal possession and ownership of the lands (...) they traditionally occup(ied)” in the Argentinean Constitution (Article 75, paragraph 17).

Numerous provincial constitutions<sup>27</sup> have since adopted measures to ensure compliance with these norms of international and constitutional character. For example, Article 37 of Chaco Province's constitution recognises the communal property of land that indigenous people traditionally occupied. Similar provisions are found in the

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<sup>23</sup> Of the total indigenous peoples in Argentina, 23,8 % are self-recognized indigenous and 76,2 % are indigenous first generation descendents. Almost all self-recognized indigenous peoples (93,4%) are in fact indigenous first generation descendents (from either parent): National Statistics Institute Report, 'Encuesta Complementaria de Pueblos Indígenas (ECPI) 2004-2005 - Complementaria del Censo Nacional de Población, Hogares y Viviendas 2001' available at: [http://www.indec.mecon.gov.ar/webcenso/ECPI/pueblos/ampliada\\_index\\_nacionales.asp?mode=00](http://www.indec.mecon.gov.ar/webcenso/ECPI/pueblos/ampliada_index_nacionales.asp?mode=00) last accessed 15 July 2011.

<sup>24</sup> UNPO database, available at: <http://www.unpo.org/members.php> last accessed 20 July 2011.

<sup>25</sup> M Vom Hau and G Wilde, “‘We Have Always Lived Here’: Indigenous Movements, Citizenship and Poverty in Argentina’ Brooks World Poverty Institute Working Paper 2009, 5.

<sup>26</sup> by Statute 24.071 (1992).

<sup>27</sup> Argentina, being a Federal state, the provinces shall have all the power that has not been delegated to the Federal state. This includes, enacting their own constitutions, which are the supreme law of each province. (Article 5 of the Constitution).

provincial constitutions of Chubut (Article 34), Neuquén (Article 53) and Río Negro (Article 42).

Currently some Mapuche people occupy the lands that their ancestral communities have traditionally occupied. Many Mapuche people do not have a title of ownership of the land and a lot of the lands occupied by indigenous people are actually under the title of other private parties, or the State.<sup>28</sup> If indigenous land claims are to be recognized, — and these rights are made operative, — this could lead to the invalidation of the titles acquired by private individuals.<sup>29</sup> There is a legal vacuum in this event since there is no legal answer to overcome this conflict.<sup>30</sup>

This study chooses to focus on the Mapuche community for a number of reasons, in particular because the Mapuche community is the largest and most visible indigenous group in Argentina (both in academia and the media). Moreover, relevant case law, particularly the *Benetton* case, provides valuable insight to explore the theories canvassed above, especially on the role of translators, within the context of a Mapuche community. The *Benetton* case concerned land claims in the Santa Rosa community in the province of Chubut, between the Italian firm Benetton, and the Santa Rosa Mapuche community, with conflict arising in 2002 when the Curiñaco-Rua Nahuelquir family occupied the disputed land. To date, negotiations and lawsuits have not provided a satisfying solution for either party, and the case remains ongoing.

In order to answer the central research question, attention first focuses on the theoretical framework to understand what the theories on mobilization of law are before addressing the international legal framework. This paper will then draw attention to, and consider, implementing domestic legislation. Understanding the mobilization of law also requires study of who the Mapuche people are and how they have taken their land claims to court. Last, but not least, this paper will look at the role of translators in the mobilization of law, and what mobilization teaches us about the relationship between the global and local.

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<sup>28</sup> JM Salgado et al, 'Informe de situación de los derechos humanos del pueblo mapuche, en la provincia del Neuquén' (Observatorio de Derechos Humanos de Pueblos Indígenas 2009) 38.

<sup>29</sup> Rosti (n21) 349.

<sup>30</sup> *Ibid.*

*Methodology*

This paper is primarily based on desk research. Close examination of international and national legislation and jurisprudence has been conducted, as well as academic articles and books. The UN body system, policy documents and reports have also been taken into account. Finally, documents on NGOs and national human rights institutions have also been considered.

Although the focus of this paper is Argentina, reference is made to other countries, particularly in Latin American states such as Ecuador and Bolivia, largely due to their special relevance to the present topic.

This study also (unavoidably) strongly draws upon experience gained during the author's experiences working at the Danish Institute for Human Rights (DIHR),<sup>31</sup> in particular whilst on a study on Informal Justice Systems, Access to Justice & Human Rights (conducted for the UNDP, UNIFEM and UNICEF in January 2009 – July 2010) and field study conducted in Ecuador.<sup>32</sup>

Last, but by no means least, interviews with the following experts on indigenous people's rights were carried out in Argentina:

- Cristina Massera, geologist, interviewed on 25.07.11 whilst working at Universidad Nacional de la Patagonia San Juan Bosco on an indigenous' lands project;
- Tomás Pomar, Professor Assistant in International Human Rights Law, Administrative Law and Tax Law at the Social Sciences and Law Faculty of the University of Buenos Aires, who was interviewed on 26.07.2011. Mr Pomar is the author of many articles on Human Rights;
- María Clara Mori, former researcher at Fundación Ambiente y Recursos Naturales (Environment and Natural Resources Foundation) FARN, who was involved in the report Mapuche- Benetton<sup>33</sup> and was interviewed on 17.08.2011; and
- Daniel Loncón, Universidad Nacional de la Patagonia San Juan Bosco interviewed via email 05.09.2011 – 04.10.2011.

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<sup>31</sup> I worked at DIHR from January 2009 to December 2010 as an intern, project assistant and independent consultant.

<sup>32</sup> Together with the legal advisor Annali Kristiansen.

<sup>33</sup> Farn Report. Benetton – Mapuche case. Compañía de Tierras del Sud Argentino Vs. the Curiñaco-Rúa Nahuelquir Family. Argentine Patagonia 2006. FARN, IRENE, OECD Watch.

## 1. THEORETICAL FRAMEWORK

*“...the processes of state reform are the outcome of confrontations and confluences among a variety of social and political actors – indigenous peoples being only one of them – and how they reflect pressures “from below” as well as “from above.”<sup>34</sup>*

Before delving into an exploration of the process of mobilization of law within the Mapuche communities, this chapter will consider the different theories of, and related to, the mobilization of law; the specific role of, as Merry describes them, ‘translators’ who bridge the global with the local; the susceptibility of processes of mobilization of law, from global to local through translation, to certain existing power relations; and finally, the indigenous movement in the context in which mobilization of law takes place.

### *1.1 Translation in a globalized world*

In the context of an increasingly globalised world, where ideas circulate at high speeds, often reaching unforeseeable distances, the bridge between the local and the global is vital to that circulation occurring, as are the translators who constitute that bridge. Theory abound as to the effect and manner of translation, in particular that from Merry who theorizes how concepts can be translated between different social and cultural contexts<sup>35</sup>

The roles of translators could be compared to the ones of diplomats. They “negotiate the middle in a field of power and opportunity<sup>36</sup>”. They are masters of both the global and the local languages. On the one hand they operate in the international human rights discourse to the benefit of international donors who are funds providers, and the interests of the media who are global exposure givers. On the other hand they also operate in the local field. They do so by actively participating in local initiatives and through the use of cultural terms familiar to the local settings. National and international NGOs, human rights commissions and institutions, educated transnational elites can be examples of translators.

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<sup>34</sup> W Assies, ‘Indigenous peoples and reform of the State in Latin America’ in: W Assies et al. *The Challenge of Diversity: Indigenous Peoples and Reform of the State in Latin America* (Thela Thesis 2000) 6.

<sup>35</sup> Merry (n6) 40.

<sup>36</sup> *Ibid.*, 41.

Translators communicate at different levels. They can “easily move between (global and local) layers because they conceptualize the issue in more than one way.”<sup>37</sup> These intermediaries move between fields, reconceptualising terms from one field to the other. Their role is key in giving local meaning to universal human rights principles. Typically these actors, with one foot in the local and the other in the global community, can combine thinking of a problem in human rights terms with thinking in local terms. “Through their mediation, human rights become relevant to a local social movement even though the oppressed group itself did not talk about human rights”.<sup>38</sup>

Within the translation process through which ideas travel, “frames” exist. According to Snow<sup>39</sup> a frame is a tool that social movement theorists have developed in order to analyse how persuasive a message is: “the higher the degree of frame resonance, the greater the likelihood it will be the successful persuasiveness in a social movement”<sup>40</sup>

Beyond frames, theorists look to collective action discourse. For instance, Steinberg considers it more accurate to use collective action discourses than frames<sup>41</sup> with different discourses being shaped by “group conflict” and “by internal dynamics of the discourse itself”. Ultimately the key lies in the interaction “between systems of signs and social action, so that words may be interpreted differently by activists and their targets”.<sup>42</sup>

The process of translation is heavily influenced by power relations. Talal Asad<sup>43</sup> argues that power inequity is to be found from the outset in the use of language, connecting general wealth and power inequalities at a global level.<sup>44</sup> This leads to higher risks of misinterpretation to the benefit of the stronger party, “especially when it means reinterpreting one set of experiences and categories in terms of another more powerful one.”<sup>45</sup>

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<sup>37</sup> Merry (n6) 210.

<sup>38</sup> *Ibid.*

<sup>39</sup> DA Snow and RD Benford, ‘Ideology, Frame Resonance, and Participant Mobilization’ (1988) 1 *International Social Movement Research* 197.

<sup>40</sup> *Ibid.* However another argument supports the idea that highly resonant discourses tend to be not so effective in the long run, because it requires limiting demands on authorities and other sacrifices. MM Ferree ‘Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany’ (2003) 109 *American Journal of Sociology* 340.

<sup>41</sup> MW Steinberg, ‘The Talk and Balk of Collective Action: A Dialogic Analysis of Repertoires of Discourse among Nineteenth Century English Cotton Spinners’ (1999) 105 *American Journal of Sociology* 736, 750.

<sup>42</sup> *Ibid.*

<sup>43</sup> Snow and Benford (n 39) 163–164.

<sup>44</sup> Merry (n6) 42.

<sup>45</sup> *Ibid.*

The dynamics of these power relations are reflected in constant negotiations. Oomen, in describing post-apartheid South Africa, observes how different forces interact in the context of traditional chieftaincy in South Africa. In the relations between chiefs and administration, a trade-off practice is performed with traditional leaders having to comply with official regulations being given wide discretion in exercising their powers.<sup>46</sup>

The idea that, as Foucault explores, power, discourse and subject creation are related is particularly interesting: “(...) Foucauldian insights apply: power is emanated in many places, and it is discourse that power and knowledge are joined together to create – in this case legal- subjects, categories, divisions”.<sup>47</sup>

These theories will be used to answer the central question throughout this paper. How do these theories relate to the indigenous movement? Assies explains that the existing power relations are without a doubt a very important element in the shaping of the indigenous movement. They translate as: “more or less asymmetrical relations of power under which the renegotiation of identity and forms of reorganization taken place”.<sup>48</sup>

### *1.2 The indigenous movement in context*

Understanding the process through which the indigenous people’s movement has evolved in Latin American countries is a very complex task. A task, although being beyond the scope of the present paper, is worth briefly considering. The reforms of the states and constitutions are the outcome of, as Assies highlights, “a complex process fraught with contradictions”<sup>49</sup> with a wide range of factors involved.

The indigenous movement dates back to the early 70’s (or even 60’s in Latin America), however, as Assies recognises, it was not until the 80’s that the world saw the proliferation of those movements. Indeed, the neoliberal model has been a great contributor to the facilitation of the indigenous movement,<sup>50</sup> with states retreating and greater roles being played by non-state actors. It is on this platform that the indigenous

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<sup>46</sup> B Oomen, ‘Chiefs! Law, Power and Culture in Contemporary South Africa’ (Phd Thesis, University of Leiden 2002) 49.

<sup>47</sup> *Ibid.*, 26.

<sup>48</sup> W Assies (n34) 6.

<sup>49</sup> *Ibid.*, 3.

<sup>50</sup> How the neo liberal model influenced the Mapuche people in particular will be dealt under chapter 4.

movements grew and became increasingly proliferated by indigenous people's organizations.<sup>51</sup>

Another important constituent element in the indigenous movement is the dynamic nature of culture itself. The "contemporary character of these movements and the way in which their discourses and claims are forged and reshaped through interaction with allies and adversaries"<sup>52</sup> is vital. Culture is not a frozen concept. It evolves with the elements surrounding it. As the world continues to 'globalise', indigenous people are brought together. Although it goes beyond the scope of this paper, the process of ethnogenesis and the revitalization of culture, is not doubt a very influential factor.

In brief, the indigenous movement is characterized by the changing relations between different actors, in particular the state, civil society and the economic sector.<sup>53</sup> The recognition of indigenous territories is subject to a "game of alliances and disputes over competencies among different institutions at the national, regional and local level"<sup>54</sup>

Merry's theory helps clarify and summarise the role of translators, being individuals in charge of bringing global human rights concepts into familiar terms within a local setting. They "remake transnational ideas in local terms"<sup>55</sup>. The relationship between the global and the local is unavoidably influenced by the role translators play as vehicles for human rights concepts translating human rights concepts from one field to another and ideas in one language into another. Throughout the process of translation power relations shape carriage of the message, or the way in which messages are conveyed. The indigenous movement illustrates the multifactor process of this translation, and provides another clear example of how law, politics and culture are intertwined.

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<sup>51</sup> Assies (n 43).

<sup>51</sup> *Ibid.*, 3.

<sup>52</sup> *Ibid.*, 6.

<sup>53</sup> *Ibid.*.,9.

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

<sup>55</sup> Merry (n3) 42.

## 2. INTERNATIONAL LEGAL FRAMEWORK

The understanding of how law is mobilized, or taken from theory into practice, requires identification and analysis of the legal framework. For this purpose the present chapter focuses on international legal frameworks recognizing indigenous people's rights to land.

Over the years, the rights of indigenous people have gained greater room in the international agenda. The International Decade of the World's Indigenous People declared by the UN,<sup>56</sup> lasting from December 1994 to 2005, followed by a Second Decade 2005-2015<sup>57</sup> illustrate this trend. The international normative sphere has not remained indifferent.

First, reference will be made to the International Labour Law Organization Convention 169 on Indigenous and Tribal People (hereinafter ILO 169) and the United Nations Declaration for the Rights to Indigenous People (hereinafter UNDRIP), which are probably the most interesting instruments of international character that specifically address the issue of indigenous people's land rights. This chapter closely considers both instruments as well as the Inter American system which is undeniably, one of the richest sources of case law concerning indigenous people's rights to land. Finally, attention must, and is, given to other international treaties, many of which are more general in nature but which nevertheless are very relevant in this context.

### 2.1 *ILO 169 Convention*<sup>58</sup>

The ILO 169 Convention was signed in Geneva in 1989, and is aimed at recognizing and promoting the protection of the rights of indigenous people. It is a legally binding international instrument for the 20 ratifying states, which includes many Latin American states, among which is Argentina<sup>59</sup> The Convention entered into force in September 1991.<sup>60</sup>

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<sup>56</sup> Adopted on the 21<sup>st</sup> of December 1993, by General Assembly Resolution A/RES/48/163

<sup>57</sup> Adopted on the 22<sup>nd</sup> of December 2004, by General Assembly Resolution A/RES/59/174

<sup>58</sup> Ratified by Argentina in 2000 and made operative through Statute 23.302.

<sup>59</sup> To date it has been ratified by Argentina, Plurinational State of Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras,

Its predecessor, the ILO Convention 107 (already established in 1957) recognized and protected cultural, religious, civil and social rights. However, it was heavily criticized for having an assimilationist approach. In other words, it failed to adequately consider the point of view of indigenous people.<sup>61</sup> Although it remains in force for States that have ratified it and have not ratified ILO 169 Convention, it is now considered outdated because the latter has expanded the scope of indigenous people's rights, particularly in relation to land rights.

For example, Article 13 of the ILO 169 Convention adds a completely new vision on land rights. Art 13, paragraph 1, reads as follows:

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

Clearly, the ILO 169 recognizes the cultural and collective dimensions of indigenous land rights. It obligates states to recognize a differentiated legal regime. Collective property under indigenous culture cannot be understood in the same terms as those enshrined in individual property under private law (not even in the form of condominiums).<sup>62</sup> Indeed, the indigenous people's property is not envisaged on an individual basis, but as a community concept which exists by inextricable reference to the existence of the community as a whole. This emanates from the special relation of indigenous people with their land<sup>63</sup> and goes to the heart of this differentiated legal regime.

Another example can be found in Article 14 which focuses on the right to land ownership, possession and use of land:

“1. The rights of *ownership and possession* of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases

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Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain and Bolivarian Republic of Venezuela.

<sup>60</sup> Text available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169> accessed 20 August 2011

<sup>61</sup> P Thornberry, *Indigenous peoples and human rights* (Manchester University Press 2002) 333.

<sup>62</sup> ‘Indigenous and Tribal Peoples’ rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter American Human Rights System’ (2009) Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc 56/09, 23.

<sup>63</sup> JM Salgado et al, *Convenio 169 de la O.I.T. sobre Pueblos Indígenas Su aplicación en el derecho interno argentino* (Observatorio de Derechos Humanos de Pueblos Indígenas 2010) 185 – 186.

to safeguard the right of the peoples concerned to *use* lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. (...)

2. Governments shall take steps as necessary to identify the lands which the people concerned traditionally occupy, and to guarantee effective protection of their rights of *ownership and possession*.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the people concerned.” (emphasis added).

The right to ownership is the first element recognized by the provision. It is a practical response to one of the biggest problems faced by indigenous communities around the globe: expulsion from their territories. Identification of the lands of indigenous people is a natural corollary of the previous rights.

This has had a key impact at a regional and national level. For example, in Latin America, the ratification of the ILO 169 led to a number of reforms in law and politics (the “Latin American Spring” as some have put it), most interestingly in Bolivia and Ecuador. Both states amended their constitutions to comply with their international obligations and even expanded their scope in some instances. The amended constitutions recognized indigenous rights in a very comprehensive way. Both constitutions established pluri-national states.<sup>64</sup> Further, more specific provisions related to land rights are found under Article 57, paragraphs 4, 5, 6, 7 and Article 11 of the Constitution of Ecuador. These provisions grant indigenous groups the right to ownership and possession, and the right to participate in the use of lands, territories and natural resources which they have traditionally occupied. It also provides a guaranteed right not to be displaced from their ancestral lands. Article 30, II paragraph 6<sup>65</sup> of the Bolivian Constitution, explicitly stipulates that indigenous people may be given collective land rights.

The case-law regarding indigenous people from high courts in states like Colombia<sup>66</sup> and Costa Rica is<sup>67</sup> clearly illustrates the Convention’s impact at a national

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<sup>64</sup> Articles 50 to 60 of the Constitution of Ecuador (2008) and Articles 30 to 32 of Bolivia (2009). A plurinational state understood as the one in which different nations live together. A more detailed definition is the one provided by ‘The Confederation of Indigenous Nationalities of Ecuador (CONAIE)’ in which (referring to Ecuador), it states that a plurinational state is: “Plural: Respects and encourages the socio-cultural diversity of the population of Ecuador. Redistributive: The state tries to distribute the national income in a more just way than before. The wealth will no longer be possessed only by a few people. It will be distributed to the sectors most in need. Anti-bureaucratic: The state reduces its bureaucracy in order to get its actions more dynamic and efficient. This also leads to less corruption. Democratic Defends the Solidarity: The state is in favor of mutual help and responsibility and cooperation between individuals and groups that have different cultural and socio-economical backgrounds.”

<sup>65</sup> Article 30, II paragraph 6 of the Constitution of Bolivia.

<sup>66</sup> Colombia -- Sentencia SU-039 of 1997 (the U`wa case) Available at <http://www.elaw.org/node/2508> accessed 13 September

level. Argentinean domestic courts have also issued decisions implementing the principles set in the ILO 169. Further discussion of these cases is set out later in this chapter.<sup>68</sup>

The ILO 169 has also had an impact in states like Brazil and Mexico with the creation of institutions for the protection of indigenous rights like the National Institution of Indigenous Matters in Mexico and the Indigenous National Foundation in Brazil.<sup>69</sup>

At the Inter American level, the ILO 169 also had significant impact, which will be considered in section 3 of this chapter.

## 2.2 *United Nations Declaration for the Rights to Indigenous Peoples*

Although it is not a binding instrument, as is the ILO 169 for those states that have ratified it, the UNDRIP was labelled to be the most important document in protecting indigenous people's rights by Dr. Erica Rene A. Daes.<sup>70</sup> The declaration is considered a great achievement<sup>71</sup> and content-wise it goes beyond the ILO Convention 169. It does so, especially in relation to land and resource rights, as well as self-determination and right of political autonomy.<sup>72</sup>

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<sup>67</sup> The Constitutional Court annulled laws related to the Free Commerce Treaties, because of affecting indigenous peoples. In JM Salgado et al, *Informe de situación de los derechos humanos del pueblo mapuche, en la provincia del Neuquén* (Observatorio de Derechos Humanos de Pueblos Indígenas 2009) 28.

<sup>68</sup> Some examples include: *Sede, Alfredo and others v. Vila, Herminia and another*, Proceedings for eviction (file 14012-238-99), August 12, 2004; *Hoktek T'Oi Pueblo Wichi Indigenous Community v. Secretary of the Environment and Sustainable Development*, Appeal proceedings on an action for the protection of constitutional rights (acción de amparo), September 8, 2003 and *Quera Aboriginal Community and Aguas Calientes - Cochinoca People v. Jujuy province*, Judgment of September 14, 2001.

<sup>69</sup> Salgado (n 67) 28.

<sup>70</sup> Equality of Indigenous peoples under the auspices of United Nations Draft Declaration on Rights of Indigenous Peoples.

<sup>71</sup> As Chair of the UN Permanent Forum on Indigenous Issues, Victoria Tauli-Corpuz, addressed the UN General Assembly, with the following statement: "(it) will be remembered as a day when the United Nations and its Member States, together with Indigenous Peoples, reconciled with past painful histories and decided to march into the future on the path of human rights". International Working Group on Indigenous Affairs. Statement Of Victoria Tauli-Corpuz, Chair of the Un Permanent Forum on Indigenous Issues, on the occasion of the adoption of the UN Declaration on the Rights of Indigenous Peoples. Copenhagen: IWGIA, 2007. Available at <http://www.iwgia.org/graphics/SynkronLibrary/Documents/InternationalProcesses/DraftDeclaration/07-09-13StatementChairofUNPFIIDeclarationAdoption.pdf>, accessed 20 August 2011.

<sup>72</sup> R Kuppe and R Potz, *Law and Anthropology : international yearbook for legal anthropology* (Martinus Nijhoff Publishers 1999) 157.

In 1982 a Working Group on Indigenous Populations was created at the United Nations with the main objective of elaborating a Universal Declaration on the Rights of Indigenous People. The document in question was first drafted and submitted by the Working Group on Indigenous Peoples to the Human Rights Council (hereinafter HRC, then still Human Rights Commission).<sup>73</sup> Once adopted at the HRC level, it was taken to the General Assembly. In September 2006, the debate started in the context of the third committee. The negotiations took a year, while four countries were clearly against it (US, Canada, Australia and New Zealand), many African countries demanded more time to analyse specific issues raising a lot of controversy such as definition of indigenous people, self-determination, etc. Unsurprisingly, the issue of land rights was an area of great controversy as well. The Australian government for example submitted its concern regarding the rights of third parties (private owners of lands which indigenous people would claim). Finally, in its 107th session in September 2007, the UNDRIP was adopted. 143 states voted in favour, four against it<sup>74</sup> and 10 states abstained to vote.<sup>75</sup>

All in all the conclusion of the Declaration took 23 years of negotiations, mainly because of the lack of agreement in sensitive areas like self-determination and collective rights. Although the final product does not convey all the rights that were under discussion, it represents the compromise of 143 different states and their commitment towards the protection of indigenous rights.

The UNDRIP strongly emphasizes the importance of land rights to indigenous people and establishes a number of rights. These rights include the right of indigenous people not to be forcibly removed from their territories, not to be relocated without prior consent and compensation (Article 10); to maintain their spiritual relationship with their lands, territories and resources (Article 25); to property over the land, territories and resources (Article 26); to due process of adjudication of the lands (Article 27); to reparation, compensation and restitution (Article 28), to conservation and protection of the environment (Article 29); right not to undertake military activities in those territories (Article 30) and to determine priorities and strategies for the development of their lands and consultations and cooperation in good faith from states (Article 32).

In particular Article 26 establishes the following:

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<sup>73</sup> Interestingly, Argentina actually abstained to vote in that occasion.

<sup>74</sup> The countries that voted against it were the US, Canada, New Zealand and Australia. Since then, the four countries have reversed their position and openly expressed their support to the Declaration.

<sup>75</sup> Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa and Ukraine.

- “1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”

In concrete terms it means that indigenous people are entitled to own, use, develop and control lands, territories and resources. Not only are they entitled to traditionally acquired ownership or occupation of land (including resources and territories), but also to those acquired by non-traditional means. There is a positive obligation upon states to legally recognize and protect those rights. Such protection is to be practiced according to the customs, traditions and land tenure systems of the indigenous people concerned. Once again, the cultural dimension is recognized. Collective property of indigenous lands is to be protected.

Although it is not a binding instrument, some argue that it might contribute to evidence suggesting that indigenous land rights are part of customary international law<sup>76</sup> and it has, as will be shown below, been used by the Inter American Court in its case law to interpret the American Convention on Human Rights in a new light.

### 2.3 *The Inter American System*

#### 2.3.1 *Instruments*

Within the Inter American system the applicable instruments are: the Universal Declaration of Human Rights, The American Declaration of the Rights and Duties of Man<sup>77</sup>, which is the oldest one, the American Convention on Human Rights (Pact San

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<sup>76</sup> J M Pasqualucci, ‘International Indigenous Land Rights: A Critique of the Jurisprudence of the Interamerican Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples.’ (2009) 27 Wisconsin International Law Journal 51, 55. However, the lack of *opinio juris* and state practice makes it also possible to argue the opposite.

<sup>77</sup> Ratified by Argentina in April 30, 1948.

José de Costa Rica),<sup>78</sup> the richest source of case law, and most recently, the Draft of the Declaration on the Rights of Indigenous People.

Predating the Universal Declaration of Human Rights is The American Declaration of the Rights and Duties of Man.<sup>79</sup> Although it is not a legally binding instrument, jurisprudence of both the Inter-American Court of Human Rights' and the Inter-American Commission on Human Rights' have recognized it as a source of binding international obligations for the OAS's member states. Generally, the practice of the Inter American human rights system relies more on the provisions of the American Convention on Human Rights (in force since 18 July 1978), but the terms of the Declaration are still applicable regarding those states that have not ratified the Convention.<sup>80</sup> Article 26 of the Declaration reads as follows:

“Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home”.

The American Convention on Human Rights, also known as Pact San José de Costa Rica)<sup>81</sup>, has been ratified by 24 of the 35 OAS's member states. It will be further discussed under the case law. It is the most important instrument to the Inter American Court and the Convention establishes in Article 21:

“No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”

Another relevant instrument is the 1997 Draft of the Declaration on the Rights of Indigenous People by the Inter-American Commission on Human Rights (still pending for negotiations). Article 25 of the Draft Declaration reads as follows:

“Indigenous people have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”

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<sup>78</sup> Ratified by Argentina in 1996.

<sup>79</sup> Ratified by Argentina in April 30, 1948.

<sup>80</sup> For example Cuba and the United States.

<sup>81</sup> Ratified by Argentina in 1996.

Although there is no specific mention of indigenous people, this provision has been widely used by the judiciary to protect indigenous people's land rights by interpreting it in light of the ILO 169 and UNDRIP. The Draft Declaration has also been referred to in other cases<sup>82</sup>, expressing an emerging consensus in the normative field about indigenous people's rights to land.<sup>83</sup>

### 2.3.2 Case law

Regarding the first instrument mentioned under this section, the Inter American Commission understood that the provisions of the Declaration shall be interpreted in "light of the current developments in the fields of international human rights law" and with "due regard to the particular principles of the international human rights law governing the individual and collective interests of indigenous people"<sup>84</sup> as established in the *Mary and Carrie Dann* case.

The case was about an indigenous land claim against the United States lodged by the Inter American Commission. The Petitioners relied upon Article 26 of the United Nations Declaration on the Rights of Indigenous People (still Draft at that stage).<sup>85</sup> The commission found that US had violated the petitioners' right to property and had failed to comply with its international human rights obligations.

Related to the second instrument examined, a similar approach was taken in the *Awas Tingni vs Nicaragua* case,<sup>86</sup> which concerns an *amparo* action (a similar legal proceeding to a request for injunction) brought by the Regional Council of the North Atlantic Coast Autonomous Region ("RANN") to revoke a logging concession to utilize timber that had been granted by the Nicaraguan government in indigenous ancestral lands. Although the Nicaraguan Supreme Court had declared the concession

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<sup>82</sup> Separate opinion of Judge Sergio García Ramírez in Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 79 (31 August 2001), para 8, *Mary and Carrie Dann v. United States*, Inter-Am. C.H.R., Case 11.140, Report No. 75/02 (December 27 2002), para 118.

<sup>83</sup> Indigenous and Tribal Peoples' rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter American Human Rights System OEA/Ser.L/V/II. Doc. 56/09 Inter-American Commission on Human Rights (30 December 2009) 8

<sup>84</sup> *Mary and Carrie Dann v. United States*, Inter-Am. C.H.R., Case 11.140, Report No. 75/02 (December 27 2002), para 163.

<sup>85</sup> *Ibid.* They also relied upon Article 18 of the proposed American Declaration on the Rights of Indigenous People, which will be analysed further on.

<sup>86</sup> Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 79 (31 August 2001)

unconstitutional,<sup>87</sup> the logging operations had persisted. The case reached the Inter American Court for Human Rights (hereinafter IACHR). The Court decided that indigenous people have communal rights to property, and that Nicaragua had violated these rights.<sup>88</sup> Moreover, it ordered the Nicaraguan state to demarcate and recognise the ownership title over the land of the indigenous community in accordance with the community's values and customs.<sup>89</sup> The decision was based on Article 21 of the American Convention for Human Rights concerning the right to property. The court concluded an evolutionary interpretation of Article 21. By reference to the prohibition of a restricted interpretation of rights under Article 29 (b) of the Convention,<sup>90</sup> the Court decided that the right to property under Article 21 should be read in light of the present conditions, meaning that the right to property includes indigenous communal property, recognized under Nicaraguan law (Nicaragua ratified the ILO 169).<sup>91</sup>

The decision not only declared the existence of indigenous communal property, but also analysed the concept. Concretely it established that:

“Among indigenous people there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on *the group and its community*. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and *spiritual* element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations”.<sup>92</sup> (emphasis added).

Two main elements can be extracted from this quote. The first one relates to the communal property. As explained before, indigenous people's communal property is

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<sup>87</sup>The unconstitutionality lied on the fact that the concession had not been approved by the plenary of the Regional Council of the RAAN. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 79 (31 August 2001), para 103 (q)iii.

<sup>88</sup> Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 79 (31 August 2001), para 155.

<sup>89</sup> *Ibid.*, para 173 (3).

<sup>90</sup> Article 20 (b) of the American Convention for Human Rights reads as follows: “No provision of this Convention shall be interpreted as: 1. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein.”

<sup>91</sup> Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 79 (31 August 2001), para 148.

<sup>92</sup> Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 79 (31 August 2001), para 149.

inextricably related to the existence of the group as such. The second element – an integral part of the first element- is that of land having a spiritual meaning. This is a common feature of many indigenous groups for whom relation to land has a religious dimension. This landmark case recognized the indigenous approach to property, acknowledging its collective dimension and its cultural aspect.

Other relevant cases are *Yakye Axa vs. Paraguay*<sup>93</sup> and *Sawhoyamaya vs. Paraguay*<sup>94</sup>, where the Court condemned the state for violating the right to property established under Article 21 of the American Convention, read in light of the ILO 169, ratified by Paraguay. In the *Mayan Communities of the District of Toledo v. Belize*,<sup>95</sup> the Inter American Commission applied the ILO 169 criteria to determine the indigenous condition and it concluded that recognition of the community land ownership was required, as well as the obligation upon the state to demarcate those lands.

In a judgment issued in 2007, *Saramaka vs Suriname*<sup>96</sup>, the Court recognized rights to natural resources of indigenous people. Issued just a few months after the adoption of UNDRIP, it reaffirmed that the 169 ILO Convention and the UNDRIP are integral parts of the Inter-American system of human rights. The case concerned the logging and mining concessions which Suriname had granted on the territory of the Saramaka people, without their full and effective consultation. The Court, after a careful investigation into the rights of the tribal people, found that Suriname had violated the Convention because it had not respected the Saramaka's right to use and enjoy the natural resources of the land that they traditionally owned.<sup>97</sup> This right could only be limited if the survival of the Saramaka was not threatened by the limitation, and if the Saramaka were informed and consulted.<sup>98</sup>

More specifically, the Court affirmed the special relationship of indigenous people to land. It did so in the following words: "The lands and resources of the Saramaka people are part of their social, ancestral, and spiritual essence" (...) "and are necessary to the tribe's survival."<sup>99</sup> Moreover, it affirmed that Article 21 of the American

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<sup>93</sup> Case of the Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17 2005)

<sup>94</sup> Sawhoyamaya Indigenous Community vs. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 146 (March 29 2006)

<sup>95</sup> Case 12.053, Merits, Report No. 40/04 (2004); 13 IHRR 553 (2006)

<sup>96</sup> Case of the Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172 (28 November 2007).

<sup>97</sup> Case of the Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172 (28 November 2007), para 158.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*, para 82.

Convention encompasses the right to “natural resources traditionally used and necessary for the very survival, development and continuation of such people’s way of life.”<sup>100</sup>

This case also drew on the 1997 Draft of the Declaration on the Rights of Indigenous People by the Inter-American Commission on Human Rights (still pending for negotiations).

#### 2.4. *Other instruments*

Another relevant legal instrument is the International Covenant on Civil and Political Rights (hereinafter ICCPR)<sup>101</sup>, of which Article 27 reads as follows:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy *their own culture*,<sup>102</sup> to profess and practise their own religion, or to use their own language.”

The General Comment on Article 27, explicitly stipulates that the article applies to Indigenous People.<sup>103</sup> This article is relevant for the present discussion because indigenous property land rights have been claimed to be connected to cultural rights. The link between property land rights and cultural rights can be traced down to the special relation that indigenous people hold to their traditionally occupied land, as Special Rapporteur José R. Martínez Cobo has described:

“It is essential to know and understand the deeply spiritual special relationship between indigenous people and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture. For such people, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous people and Mother Earth, and their land, has a great many deep-seated implications.”<sup>104</sup>

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<sup>100</sup> *Ibid.*, para. 122.

<sup>101</sup> Ratified by Argentina in 1986.

<sup>102</sup> The working definition of culture for the purposes of this paper, reads as follows: "... an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward life" C Geertz, *The Interpretation of Cultures* (Basic Books 1973) 89.

<sup>103</sup> General Comment No. 23: The rights of minorities (Art. 27) : . 08-04-1994.CCPR/C/21/Rev.1/Add.5, General Comment No. 23. (General Comments). Paragraphs 3.2 and 7

<sup>104</sup> Special Rapporteur José R. Martínez Cobo, in volume V of the Study of the Problem of Discrimination against Indigenous Populations. paras. 196 and 197.

The spiritual relationship that indigenous people have with their ancestral lands is understood as the basis for indigenous land rights.<sup>105</sup> That is why it is of foremost importance to reach a good understanding of that fundamental relationship. Anaya argues that “their ancestral roots are embedded in the lands in which they live” or in which they have lived.<sup>106</sup> In this sense, indigenous cultural identity is inextricably linked to their traditional territory. Also, the ILO 169 establishes that states shall respect “the special cultural importance and spiritual values embodied in indigenous people’s relationship with their lands and territories”.<sup>107</sup>

In a consistent manner, the Inter American Court has recognized that indigenous people have a spiritual relationship with their ancestral lands. These lands are integral parts of their cultural identity.<sup>108</sup> As previously discussed in the Saramaka case, the Inter-American Court holds “that it is necessary to protect indigenous rights to their ancestral territory, not only to safeguard the physical survival of indigenous people, but also to ensure their cultural survival.”<sup>109</sup>

Another instrument of relevance is the Convention on the Elimination of All Forms of Racial Discrimination<sup>110</sup> which contains provisions related to Indigenous People’s Rights, and as stated under Recommendation No. 51:

“The Committee calls on states to recognize and protect indigenous people’s rights to its own development, control and use of their communal lands and territories that they have traditionally owned, or otherwise inhabit or use, without their prior informed consent, and to adopt measures to return such lands”.<sup>111</sup>

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<sup>105</sup> Pasqualucci (n 76) 56.

<sup>106</sup> SJ Anaya, *Indigenous Peoples in International Law* (Oxford University Press 2004) 3. On March 26, 2008, the United Nations Human Rights Council appointed Prof. S. James Anaya to serve for an initial period of three years as the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. A United Nations rapporteur reports to the Human Rights Council on a particular subject.

<sup>107</sup> International Labour Organisation [ILO], Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 13(1), June 27, 1989, 72 ILO Official Bulletin 59, 1650 U.N.T.S. 383 [hereinafter ILO Convention No. 169].

<sup>108</sup> Pasqualucci (n 76) 97.

<sup>109</sup> Case of the Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172 (28 November 2007), para 90 in Pasqualucci (n 76) 56.

<sup>110</sup> Ratified by Argentina in 1968.

<sup>111</sup> Committee on the Elimination of Racial Discrimination, "General Recommendation XXIII (51) Concerning Indigenous Peoples" (August 1997).

Also the Rio Declaration acknowledges the importance of indigenous people in relation to a sustainable development, although no specific mention to land rights is made. The Declaration states:

“Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”<sup>112</sup>

Finally, mention shall be made to the corner stone of the United Nations Human Rights system, this is the Universal Declaration on Human Rights. Article 17 reads as follows:

“Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.”

Although parts of the Declaration are considered norms of international customary law, and thus binding upon all states, other parts remain controversial, such as the case of property rights enshrined under Article 17, which has not even been included in the ICCPR nor the ICESCR.<sup>113</sup> Representing a ‘universalist’ human rights discourse, the instrument does not mention indigenous people.<sup>114</sup> However, it does add useful elements to be used in the context of land claims by indigenous people.

Reference is also made to General Assembly Resolution 3201 Declaration on the Establishment of a New International Economic Order.<sup>115</sup> Article 4 provides as follows:

“the right of all States, territories and peoples under foreign occupation, alien and colonial domination or apartheid to restitution and full compensation and all other resources of those States, territories and people”

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<sup>112</sup> Rio Declaration on Environment and Development, 1992, Principle 22, UNEP website : <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>

<sup>113</sup> It has been argued that at the time of the creation of the main UN Covenants, the ideological debate between East and West and the large-scale nationalisation of banks, railways and other industries in the West of Europe, led to no provision on property being incorporated into those two documents.

<sup>114</sup> M Scheinin, *International law and indigenous peoples* (The Raoul Wallenberg institute 2005) 4.

<sup>115</sup> C Charter, ‘Reparations for Indigenous Peoples: Global International Instruments and Institutions’ in: F Lenzerini, *Reparations for indigenous peoples: international and comparative perspectives* (Oxford University Press 2008).

In addition, the 1974 General Assembly Resolution entitled Charter of Economic Rights and Duties of States obligates states that exercise ‘colonialism, apartheid, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination’ to provide ‘restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and people’<sup>116</sup>

Last but not least, indigenous rights to land, are for some scholars, part of international customary law and as such binding upon states. For instance in the arguments submitted under the *Awas* case, it was stated that “there is a customary international law norm which affirms the rights of indigenous people to their traditional lands”.<sup>117</sup> The court did not elaborate on this matter. However, the argument has been put forward stating that there is not enough state practice nor *opinio juris* to consider indigenous people’s rights to land as customary law.

In conclusion, there is an extensive international legal framework acknowledging the existence of indigenous people’s rights to land. The international legal framework recognizes communal property of indigenous land. By doing so, it also recognizes the cultural dimension and specific relevance of land to indigenous people. Moreover, the Inter American Court has established in its case law the obligations upon states to demarcate indigenous land and to consult with indigenous communities regarding any decision that may affect them.

After this brief description of the international law landscape of indigenous rights, attention will now be drawn, in chapter 3, to the corresponding domestic legislation.

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<sup>116</sup> General Assembly Resolution 3281 (XXIX) Charter of Economic Rights and Duties of States. December 1974. UN Doc A/Res/29/3281

<sup>117</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. Hum. Rts. (Ser. C) Case No. 79 (Judgment of Aug. 31, 2001), para 140 (d). However, the lack of state practice and *opinio juris*, makes it also possible to argue the exact opposite.

### 3. DOMESTIC LEGAL FRAMEWORK

Understanding the mobilization of the domestic legal framework requires a study of the domestic legal framework as such. Argentina being a dualist country, under international legal theory; international law is not directly applicable and will not be 'law of the land' until it is translated into a domestic norm.<sup>118</sup>

This chapter will first focus on the constitutional provisions that have been enacted to implement international obligations that the Argentinean state has assumed. Then, this chapter will deal with the federal norms in place and will finally address the provincial legislation giving recognition to indigenous people's rights to land.

#### 3.1 *The Constitutional block*

Argentina's national Constitution, as amended in 1994,<sup>119</sup> contains a few specific norms that regulate the effects of international law in the national legal order. According to Articles 31 and 75, paragraph 22 of the Constitution, international law has supremacy over national laws, but not over the constitutional norms. Article 75 paragraph 22 enumerates twelve human rights treaties, which do have constitutional supremacy (for example the UDHR, the ICCPR and the CSER among others). These human rights instruments are part of the Constitution. They conform, what has been called by the Argentinean constitutionalist Bidart Campos, "the constitutional block" and shall be understood as:

"the set of norms including dispositions, principles or values materially constitucionals, outside the text of the constitution, (with the objective) of being the parameter of control of the constitutionality of the norms "infra"-constitucionals".<sup>120</sup> (own translation)

According to Article 75, paragraph 22 of the Constitution, the UDHR, IACHR, and the ICCPR are part of the constitutional block. This means that the mentioned human rights instruments have the same weight as the Constitution. Moreover, as seen in the previous

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<sup>118</sup> For more on dualist/monist theories of International Law please read: A Cassese, *International Law*, (Oxford University Press 2004) 213.

<sup>119</sup> Statute 24.309 declared the necessity of the reform.

<sup>120</sup> G Bidart Campos, *Tratado elemental de derecho constitucional argentino* (Ediar 1995) 555-556.

chapter, they are part of the *corpus iuris* that defines indigenous people's rights. Therefore, these are norms of constitutional character that relate to indigenous people's rights at the domestic level.

Furthermore, indigenous people's rights have been specifically recognized under Article 75, paragraph 17 of the national constitution which establishes the right of indigenous people to their culture, education and the communal possession and ownership of the lands that they traditionally occupy. Concretely, it reads as follows:

“The Congress is empowered (...) to recognize the ethnic and cultural pre-existence of indigenous people of Argentina. To guarantee respect for the identity and the right to bilingual and intercultural education; to recognize the legal capacity of their communities, and the community *possession and ownership* of the lands they traditionally occupy; and to regulate the granting of other lands adequate and sufficient for human development; none of them shall be sold, transmitted or subject to liens or attachments. To guarantee their participation in issues related to their natural resources and in other interests affecting them. The provinces may jointly exercise these power”  
(emphasis added)

This provision was unanimously approved in 1994. It eliminated the previous provision (contained in Article 67, paragraph 16) of the 1853's Constitution, which required Congress “to maintain peaceful treatment with the Indians and promote their conversion to Catholicism.”<sup>121</sup> The term “Indians” was exchanged for “indigenous”, which is believed not to have such a pejorative connotation.<sup>122</sup> Also, the use of the term “people” instead of “populations” highlights the recognition of their ethnic and cultural pre-existence and the obligation upon the state to recognize their right to identity as such.<sup>123</sup>

The new provision originates in the national statutes 24.071 and 23.30. Hence, the following section will first address these two norms, before referring to other relevant norms.

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<sup>121</sup> Its origins can be traced to the conquer epoch. However such provision had already been overruled in the Constitutional reform of 1949.

<sup>122</sup> The term indigenous is more exact, since it comes from the latin term “originary from the country” than the term “indians” which refers to the conquest and discovery of the “Indias”. V Bazán, ‘Los Derechos de los Pueblos Indígenas en Argentina: diversos Aspectos de la Problemática. Sus proyecciones en los ámbitos interno e internacional’ (2003) 108 Boletín Mexicano de Derecho Comparado. 759, 764.

<sup>123</sup> *Ibid*, 765 This change is correlative to the one experienced from the ILO 107 to the ILO 169. This has a great significance from the international public law point of view, but which discussion escapes the scope of the present paper.

### 3.2. Federal norms

#### 3.2.1 *Statute 23.302*

Passed in 1985, this statute is one of the most important of the Argentinean legislative system in relation to indigenous people's rights to land. It is to be interpreted in the light of the Constitution as amended in 1994, and in the context of the ILO 169 Convention, ratified by Argentina in 2000. Although criticized for having a very "assimilative" character,<sup>124</sup> (in accordance with the 107 ILO Convention in force at that time), its role remains very relevant.

The Statute declares in Article 1 that the attention and support to indigenous people and the communities is in the national interest. Moreover, it gives legal personality to indigenous communities. However, Article 2 of the statute establishes that the aforementioned legal personality will only be effective upon registration on the Registry of Indigenous Communities and will expire with the cancellation of such registration.

Furthermore, under Article 5, a National Institute on Indigenous Matters (Institucion Nacional de Asuntos Indígenas, also known as INAI), is created as the administrative organ which will apply the law. The INAI is headed by an indigenous assessor with consultative attributions. Also, INAI is in charge of the coordination with provincial governments in order to take care of education and health of the communities.

Most importantly, the disposition of the adjudication of land suitable for production to the corresponding indigenous communities, is introduced by virtue of Article 7.

Also, the regulatory decree issued four years later (Nº 155/1989), establishes that INAI will authoritatively apply statute 23.302 and the 107 ILO Convention<sup>125</sup>, with attributions including coordination with the provincial authorities.

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<sup>124</sup> By assimilative character it is understood that the indigenous peoples are rather to be integrated with the rest of society than their point of views and differences being taken into account.

<sup>125</sup> Now applicable to ILO 169.

*3.2.2 Statute 24.071*

ILO 169 Convention was incorporated in the national legal realm through statute 24.071 in 1992. At the time of its enactment, the ILO 169 had been approved in 1989 but was only ratified in 2000. This statute literally transcribes the ILO Convention.<sup>126</sup>

*3.2.3. Statute 25.607*

In order to promote the rights enshrined in the Constitution the Statute 25.607 was enacted. Article 1 establishes the undertaking of a campaign promoting the indigenous people's rights contained under Article 75, paragraph 17 of the Constitution. Article 2 determines that such undertaking, including the planning, coordination, execution and evaluation of the campaign, shall be carried out by the relevant authority, which according to Article 7 is the Human Rights Sub Secretary of the Nation, in cooperation with the INAI. Moreover, it will count on the active participation of indigenous communities, respecting their ways of organization. Lastly, Article 3 provides that the achievement of the goals of the present statute requires the INAI to translate, in written and oral form, the content of Article 75 paragraph 17 into the different languages of the indigenous people who inhabit the country.

*3.2.4 Statute 26.160*

Another very important statute is 26.160 on emergency possession and indigenous property. Passed in 2006, this statute declares a state of emergency for a period of three years (which has by now been extended and remains in force up to 2012).<sup>127</sup> Article 1 declares a state of emergency concerning the possession and ownership of the indigenous lands of those indigenous groups properly registered according to the law. The emergency state requires the evictions of indigenous people to be suspended, according to Article 2.

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<sup>126</sup> Since the Convention was already examined in the last chapter, for further details please see First Chapter.

<sup>127</sup> Interestingly, during the voting process in order to decide whether to extend the time frame of operation for the surveys or not, the province of Neuquén, where many Mapuche live, voted against. JM Salgado (n67) 15.

Also, under Articles 3 and 4, a special fund is set up with the aim of creating a regional cadastral survey of the lands inhabited by indigenous communities. The aim of this census is to get a better understanding of how many indigenous people live in each community, where each community lives, how do they live, what do they do, etc. Acquiring knowledge about the territory makes it possible to undertake possession and ownership actions. Recognizing the cartography information has been for a long time the privilege of a small elite, this statute whilst recognizing the importance of understanding the territory, aims at broadening the information available on indigenous people land situation.<sup>128</sup>

The statute finds its basis in the recognition that the State's failure to properly demarcate indigenous lands is one of the biggest challenges for indigenous people.<sup>129</sup> At the international level, the importance of demarcation had already been recognized under the ILO Convention 169 (Article 14, paragraphs 2 and 3). Also, the *Awás Tingni* against Nicaragua case before the Inter-American Court of Human Rights referred to the States' obligations to demarcate indigenous lands and territories.<sup>130</sup> Moreover, the proposed American Declaration on the Rights of Indigenous People also makes this provision (Article 18, paragraph 8).

Since its enactment, the statute has been referred to in several of the land claims brought to court like the *Benetton* and the *Paichil* cases.<sup>131</sup> However none of these obtained much success in stopping the evictions from taking place, until the recent *Quilmes* judgment.<sup>132</sup> The Court ordered a suspension of any attempts to evict the *Quilmes* Indigenous community of Colalao del Valle, in the province of Tucumán, after a Provincial Civil and Commercial Court had previously ordered the eviction of the group. The decision held that such evictions must be put on standby until proceedings aiming at determining the ownership of the land are concluded. The decision was based on statute

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<sup>128</sup> Instituto Nacional de Asuntos Indígenas, *Relevamiento Territorial de Tierras de Pueblos originarios Ley 26.160/06. Relevamiento Territorial de Tierras de ocupación tradicional. Manual de procedimientos* (Ministerio de Desarrollo Social 2007), 13.

<sup>129</sup> *Indigenous peoples and their relationship to land. Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes. UN Sub-Commission on the Promotion and Protection of Human Rights. U.N Doc. E/CN.4/Sub.2/2000/25 (30 June 2000) Paragraph 49.*

<sup>130</sup> *Mayagna (Sumo) Awás Tingni Community v. Nicaragua, Inter-Am. Ct. Hum. Rts. (Ser. C) Case No. 79, para. 103(k) (Judgment of Aug. 31, 2001) para. 173(4)-(7).*

<sup>131</sup> *Nahuelquir Rosa Sara-Curiñanco Atilio s/Usurpación, Juzgado Correccional de la Circunscripción Judicial del Noroeste del Chubut, 2002 and Comunidad Mapuche Paichil Antreao y otro c/Prov. Del Neuquén s/ Acción de Amparo, Juzgado Civil y Comercial de la IV Circunscripción Judicial del Neuquén, 2004.*

<sup>132</sup> *Comunidad Quilmes s/ deslojo, Juzgado Civil y Comercial de la Segunda Nominación de Tucumán, 2011. (expediente 1938/11)*

26.260. This was the first time this law had been applied by a court deciding on this community's case.<sup>133</sup>

Although the *Quilmes* case is a positive sign in terms of statute implementation, it has been criticised for, so far, failing to meet the clear objectives and the high expectations raised by its enactment. As a matter of fact, violent evictions have taken place in many different areas of the country. Only 8 of the 23 provinces of Argentina have actually signed agreements with INAI to implement the census project. For those provinces that have signed an agreement, there is still no guarantee of implementation.<sup>134</sup> For instance, Santa Cruz Province has since 2008 received the funds to start activities. To date, no initiative to start the process has taken place.<sup>135</sup>

The case of the *Primavera community* is particularly emblematic in this regard. The case involves approximately 150 communities in the province of Formosa, who requested the surveys prescribed by statute 26.160 to be conducted. Although they were supported by national bodies such as the National Institute against Discrimination, the requests were not heard. In December 2009, Félix Díaz, the local leader of the community decided to set up home in the claimed ancestral lands, in sign of protest for the lack of survey implementation and in protest at the establishment of part of the Formosa National University on their ancestral territory. On 23 November, Félix Díaz and the families who settled in the same territory were confronted by the provincial police who used indiscriminate violence against them (including women and children). The confrontation led to the death of an individual.<sup>136</sup> The case reached the Inter American Commission for Human Rights, who ordered the Argentinean state to take precautionary measures in order to guarantee the right to life and physical integrity of the members of the Primavera Community.<sup>137</sup>

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<sup>133</sup> Available at <http://servindi.org/actualidad/14909> accessed 21 September 2011.

<sup>134</sup> K Wessendorf, *The Indigenous World 2010* (International Work Group for Indigenous Affairs 2011), 230.

<sup>135</sup> *Ibid.*

<sup>136</sup> Available at [http://www.derechosindigenas.org.ar/index.php?option=com\\_content&task=view&id=65&Itemid=19](http://www.derechosindigenas.org.ar/index.php?option=com_content&task=view&id=65&Itemid=19) accessed 21 September 2011.

<sup>137</sup> MC 404/10 – Comunidad Indígena Qom Navogoh “La Primavera”, Argentina. Available at <http://www.cidh.org/medidas/2011.sp.htm> last accessed 28 September 2011.

As geographer Massera explains, the situation is even more difficult when power relations are at stake, as is the case between the Benetton group and the Mapuche as will be analysed further on in this paper.<sup>138</sup>

The controversy originated by statute 26.160 is clearly illustrated by the current bill, proposed by the senator Adriana Bortolozzi (from Formosa province), that seeks to limit its operation.<sup>139</sup> The bill recalls that the provinces have exclusive competence<sup>140</sup> in the matter of indigenous people, hence statute 26.160 is unconstitutional for attributing those powers to the INAI (of national capacity). Furthermore, it is up to the provinces to deal with land titling, so the statute in question breaches the autonomy of the provinces. The bill also suggests that maybe the multicultural model has failed. Finally, the memorandum to the Bill concludes by wondering: “Has the time come to acknowledge the failure of the multipluralism?”<sup>141</sup>

### 3.2.5 *Other developments*

Related to the above, there is a bill seeking to limit the extent to which foreigners can buy land in Argentina.<sup>142</sup> In Article 7 of this bill, it establishes 20% of the total agricultural land of the country as the limit to any title of foreign ownership. On top of that there is a proposed limit of 1000 hectares for every owner from abroad, be it a natural or legal person.<sup>143</sup>

Moreover, the creation of a committee to regulate communal property was announced during a public speech made by the President on the occasion of the 200 years of the Argentine Republic celebrations. However, to this date, no initiative has been seen in order to undertake the proposal.<sup>144</sup>

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<sup>138</sup> Interview with Cristina Massera, geographer working at Universidad Nacional de la Patagonia. Indigenous' Lands project, 25 July 2011.

<sup>139</sup> (S-4287/10) Proyecto Ley de Derogación de la Ley 26.160 sobre Declaración de Emergencia. Senado de la Nación. Secretaría Parlamentaria. Dirección General de Publicaciones.

<sup>140</sup> It is not among the delegated competences established under Articles 121 to 129 of the National Constitution.

<sup>141</sup> (S-4287/10) Proyecto Ley de Derogación de la Ley 26.160 sobre Declaración de Emergencia. Senado de la Nación. Secretaría Parlamentaria. Dirección General de Publicaciones, para 19.

<sup>142</sup> It should be recalled that the indigenous land problems are often related to the installation of big multinationals, hence the relevance of this bill.

<sup>143</sup> Mariano Obarrio, ‘Limita el Gobierno la Compra de Tierras’ *La Nacion* (Buenos Aires, 28 April 2011) <http://www.lanacion.com.ar/1369001-limita-el-gobiern.-la-compra-de-tierras> accessed 24 August 2011.

<sup>144</sup> K Wessendorf (n 134) 205.

From civil society's point of view, indigenous organisations are also aiming at "obtaining constitutional status for ILO Convention 169; creating an Historic Reparation Fund for Development with Identity; providing implementing regulations for the right to free, prior and informed consent; recognising the public and legal status of the pre-existing nations and, consequently, expanding the reductionist status of "communities"; providing implementing regulations for communal property."<sup>145</sup>

### 3.2 Provincial level

Althabe defines the indigenous people rights' recognition process as a "genesis invertido" (inverted genesis) by which provincial norms as opposed to federal norms, have been first to recognize indigenous people's rights to land.<sup>146</sup> In fact, as described above, a statute from the province of Formosa, was already passed in 1985. This statute has special influence on the statute 23.302 described before, which dates from the same year.

Similar precedents before 1994 are found in statutes of the following provinces: Salta (1986), Chaco (1987), Misiones (1987), Río Negro (1988), Chubut (1990) and Santa Fe (1993).

In 1994, following the National Constitutional reform, a number of provincial constitutional reforms also took place.<sup>147</sup> For example the Constitution of the Province of Buenos Aires (1994), establishes in its Article 36, paragraph 9 that the province guarantees the *communal possession* of indigenous lands that are legitimately occupied by indigenous people. Similar provisions may be found in the constitutions of Chubut (Article 34),<sup>148</sup> Neuquén (Article 53),<sup>149</sup> Chaco (Article 37),<sup>150</sup> Salta (Article 15),<sup>151</sup> and Tucumán (article 149).<sup>152</sup>

Concerning the right to land, the constitution of Neuquén in its Article 53 establishes:

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<sup>145</sup> *Ibid.*

<sup>146</sup> R Althabe et al, 'Derechos Indígenas en la Argentina: reflexiones sobre conceptos y lineamientos generales contenidos en el artículo 75 inciso 17 de la Constitución Nación' (1995) 8858 *El Derecho* 1, 7.

<sup>147</sup> The Province of Formosa actually reformed its constitution already in 1991, including a provision on indigenous land rights, which reads as follows: "Assures the ownership of community lands" (own translation).

<sup>148</sup> Reformed in 1994.

<sup>149</sup> Reformed in 2006.

<sup>150</sup> Reformed in 1994.

<sup>151</sup> Reformed in 1998.

<sup>152</sup> Reformed in 2006.

“The Province shall recognize its communities as legal entities, and shall recognize their communitarian *ownership* over the lands they traditionally hold, and shall order the grant of any other lands apt for human development. Such lands shall not be transferable, alienable, and shall remain free from encumbrances. The Province shall assure its participation in the administration of their natural resources and any other interests that may affect them, and shall promote positive actions in their favour”. (own translation, emphasis added)

In many ways, this provision goes beyond the protection at federal level. A primary reason is because the text is incorporated in the Declarations, Rights and Guarantees part of the constitution. Secondly, the state not only recognizes those rights but also assumes the positive obligation to do anything necessary in order for those rights be respected and guaranteed. Lastly, the text affirms that indigenous people are an indivisible part of the identity and idiosyncrasy of the province.<sup>153</sup>

All in all, it can be argued that Argentina shows increasing efforts to adapt national law to the relevant international standards concerning indigenous people’s rights, and that these processes partly have a bottom-up character, having originated in provincial legislation. The efforts show a strong commitment of the Argentinean state to respect, protect and promote indigenous people’s rights to land. However, in contrast to the numerous international instruments regarding indigenous people’s rights ratified by Argentina, there is corresponding implementing legislation. There is still a lack of regulatory statutes that specifically address these issues. Moreover, courts often still base their decisions on norms other than international norms that are technically of a lower status..<sup>154</sup>

While the legislation described above targets indigenous people in general, the next chapter will address the position of a specific indigenous group: the Mapuche people. Who are they? How do they mobilize to claim their rights? These are some of the questions that the following chapter attempts to answer.

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<sup>153</sup> JM Salgado et al (n 127) 20.

<sup>154</sup> *Ibid.*



## 4. THE MAPUCHE PEOPLE

*The human being is land that walks*<sup>155</sup>

While thinking of the mobilization of law also as “the link between the law and the people served or controlled by the law”,<sup>156</sup> the understanding of who the Mapuche people are acquires particular relevance to this study. That is why firstly, this chapter will attempt to describe who the Mapuche indigenous people in Argentina are. Secondly, this chapter will address the way globalization has impacted this group. Lastly, this chapter will describe how the Mapuche people have organized themselves in different types of national and international organizations.

### 4. 1. *The Mapuche people*

After defeating the Spanish in 1641 on the conquest of their land, the Mapuche native to the southern cone of South America were recognized as an autonomous nation by Spain. However, in the late 1800s, the Argentine and Chilean armies carried out extermination campaigns against the Mapuche living in the Patagonia region and took control of the land (also known as the Conquest of the Desert in Argentina). Since then the Mapuche people have been claiming their rights to the traditionally occupied lands. As a matter of fact, the name Mapuche, means people of the land; mapu referring to land and che, to people.<sup>157</sup>

The Mapuche people, legally recognized as pre-existing people,<sup>158</sup> are the most numerous indigenous population of Argentina. There are approximately 114000 in total in the country.<sup>159</sup> They traditionally inhabit the provinces of Río Negro, Neuquén, Chubut and Santa Cruz. However, Mapuche are also to be found in the provinces of

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<sup>155</sup> E Frites et al, *La tierra de los pueblos indios* (Asamblea Permanente por los Derechos Humanos Argentina 1996).

<sup>156</sup> DJ Black, ‘The Mobilization of Law.’ (1973) 2 *The Journal of Legal Studies* 125-128.

<sup>157</sup> Some argue that this is where the common term “che” (used by Argentines and Uruguayans to refer to ‘hey’/ ‘so’/ ‘man’) comes from. Others however argue that it actually comes from the Guaraní language, and it means “me”.

<sup>158</sup> The “Statute of the Lof Ñorkinko”, is the document through which they have been granted legal recognition. The term pre-existing makes reference to Article 75 paragraph 17 of the Constitution, under which indigenous people are understood to pre-exist the creation of the State as such.

<sup>159</sup> INDEC 2004-2005 survey on Indigenous Peoples. Available at [http://www.indec.gov.ar/webcenso/ECPI/pueblos/ampliada\\_index.asp?mode=07](http://www.indec.gov.ar/webcenso/ECPI/pueblos/ampliada_index.asp?mode=07) accessed 15 August 2011.

Buenos Aires and la Pampa.<sup>160</sup> There is also a big population of Mapuche in Chile.<sup>161</sup> Out of the total Mapuche population, only 13430 actually live in Mapuche communities.<sup>162</sup> Most Mapuche live in rural areas, only 90789 live in urban centres.<sup>163</sup> The Mapuche population is predominantly young, with 28365 Mapuches between 6 and 14 years old and 23179 between 18 and 29.

There are complex debates related to the identity of the Mapuche. Although some guidelines exist in order to establish who belongs and who does not belong to the Mapuche indigenous group (as stated in the introduction: self-recognized, or descendent by father or mother), this issue is characterized by many tensions. Some people see benefits and pride in identifying themselves as Mapuche, and therefore, will be eager to call themselves Mapuche, in views of the potential benefits. Others, however, act the opposite way. This other group, perceives belonging to the Mapuche community as grounds for being discriminated against and thus choose to disassociate themselves from their culture. This way, this group of individuals seeks to be included in the dominant non-indigenous society, in which it finds benefits. Moreover political interests can affect the way indigenous people see themselves: the more rights they are granted, the more willing they will be to consider themselves indigenous.<sup>164</sup> As stated above, this is an issue of high complexity and the current paper does not allow room for a more in-depth discussion. However, it is worth mentioning that in spite of the official numbers, there is an ongoing internal conflict in this relation.

Furthermore, indigenous people have struggled to avoid what has been called the indigenization of the state (“folklorized and exotized Indians”). It has been described as a process through which, indigenous people become something exotic as a piece from a museum, instead of being recognised as individuals belonging to a community with a

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<sup>160</sup> Available at <http://www.minorityrights.org/4095/argentina/mapuche.html> accessed 15 August 2011.

<sup>161</sup> Mapuche people live on both states, Argentina and Chile. They have been forced to live in either one side or the other of the boarder. However, they recognize them-selves as part of the same group. Most Mapuche organizations do regroup Mapuche people from both sides of the boarder. It is still interesting to notice that because of being subject to different national regimes, their claims are shaped slightly in a different manner.

<sup>162</sup> Mapuche communities in this case refers to the communities geographically delimited,, those that share a common territory.

<sup>163</sup> Urban centres being considered those centres in which at least 2000 people live.

<sup>164</sup> Interview with Cristina Massera, geographer working at Universidad Nacional de la Patagonia. Indigenous' Lands project, 25 July 2011. This is also a very common phenomenon in indigenous populations from other states, as experienced during the field study in Ecuador carried out in the context of the Informal Justice Systems Study conducted at the Danish Institute for Human rights, in which I participated.

certain culture, and respect of that determined culture.<sup>165</sup> For example the Indigenous community of Santa Rosa, requested the museum Leleque (which features Mapuche people as historical material) to be removed.<sup>166</sup>

#### 4.2. *Mapuche People & Globalization*

Contrary to popular belief, Mapuche people have not been isolated from the global world, at least since the 16<sup>th</sup> century.<sup>167</sup> For example, the Mapuche people would have been involved in the external commerce with the Spanish crown for the exportation of textiles.

Several core elements have had special relevance in the way that Mapuche people have been affected by the globalization process. They can be described in the following ways.

Firstly, neo-liberalism and restructuring of capitalism is a very influential element. The last two decades saw neo-liberalism as the dominant economic model. This model did not evolve without the installation of big national and also transnational companies everywhere in the Argentinean territory (as in other countries), many of which have set up their businesses on indigenous lands.<sup>168</sup> Endesa, the energy company in Chile, and Benetton, the clothing company, in Argentina, are perhaps the most notorious examples. Such companies have and still put indigenous communities in a very disadvantaged situation, often forcing them to leave behind the lands that they have traditionally occupied.<sup>169</sup>

Another influential element is the crisis of the nation-state. The process of globalization has entailed, many argue, the weakening of the state, its presence, functions and legitimacy.<sup>170</sup> Interestingly enough, although the state seems to be playing a weaker role, it has actually moved closer to the indigenous people, through the establishment of

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<sup>165</sup> JM Salgado et al, *Informe de situación de los derechos humanos del pueblo mapuche, en la provincia del Neuquén* (Observatorio de Derechos Humanos de Pueblos Indígenas 2009), 61.

<sup>166</sup> [http://www.mapuche.nl/espanol/benetton\\_prensa.htm](http://www.mapuche.nl/espanol/benetton_prensa.htm) last accessed 21 August 2011.

<sup>167</sup> J Lavanchy, 'El pueblo Mapuche y la Globalización. Apuntes para una propuesta de comprensión de la cuestión Mapuche en una era global' Trabajo final presentado al seminario "Desarrollo hacia fuera y globalización en Chile siglos XIX y XX (Universidad de Chile 2003) 2.

<sup>168</sup> Lavanchy (n 167) 3.

<sup>169</sup> According to Article 17 of the National Constitution, compensation shall be paid in cases of expropriation, which can only be authorized by reasons of public interest.

<sup>170</sup> Lavanchy (n 167) 4.

diverse indigenous institutions<sup>171</sup> and the enactment of law to protect indigenous rights, as we have seen in the previous chapter.

The valuation of the ethnic diversity is another element to take into account. Traditionally states have had an “ethnocentric” tendency.<sup>172</sup> From the 20s to the 70s there is an “indigenist” movement however the state is still a strongly “nationalist” state.<sup>173</sup> A more favourable time for diversity, follows that period. This can be explained through either Kymlicka’s or Taylor’s theories. The former relates this more favourable context to diversity with a postmodernist vision, and the rise of multiculturalism. According to him, it’s a multiculturalism derived from the different ethnicities. Thus, there is a multicultural citizenship.<sup>174</sup> The other theory frames it as “politics of recognition” (politics of the difference), as opposed to the universal politics on dignity that was blind to differences. Aside from theory, statistics show a general tendency in the people to sympathize with the Mapuche cause. For example 92 % of the Chilean population interviewed in a survey supported the regulation of the Mapuche territories.<sup>175</sup>

The development of communication technology has a role to play in how globalization has affected the Mapuche position. In what Castells would call the culture of virtual reality,<sup>176</sup> there are two processes taking place: the world process and the re-territorialisation process. The latter is represented by a social movement that affirms the concept of what is local.<sup>177</sup> Those movements use “tools whose appropriation potentialize social fights by producing networks that operate at a local, regional and national level” (international and transnational can be added).<sup>178</sup>

Urbanization has affected the general population and particularly indigenous people for numerous decades. However with the raise of the so-called, mega-cities, the Mapuche people have been both: segregated and self-segregated to the poorest areas. For the urban Mapuche, there is another phenomenon in place: re-ethnification. It has to do

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<sup>171</sup> Such as the National Institute on Indigenous Matters (Instituto Nacional de Asuntos Indígenas, I.N.A.I.), or the Indigenous Matters Lawyers Association (Asociación de Abogados en Dercho Indígena, AADI), among many others.

<sup>172</sup> For more on this please see R Stavenhagen, *Ethnic Conflicts and the Nation-State* (Palgrave MacMillan 1996).

<sup>173</sup> Lavanchy (n 167) 15.

<sup>174</sup> W Kymlicka, *Ciudadanía Multicultural* (Ediciones Paídos 1996), 60.

<sup>175</sup> Lavanchy (n 167) 16. Although such statistics are not available for Argentina, there are reasonable grounds to believe that the result would not be significantly different.

<sup>176</sup> M Castells, *La Era de la Información. Tomo II* (Alianza Editorial 1998), 405.

<sup>177</sup> For more on this please see N García Canclini, *Consumidores y Ciudadanos. Conflictos Multiculturales de la Globalización* (Editorial Grijalbo 1995).

<sup>178</sup> Lavanchy (n 167) 18.

with recuperating and strengthening their identity as well as reinventing their traditions.

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Also, literacy has played a very important role in how globalization has influenced the Mapuche people's movement. The written world allows for the handling of information in different ways (by either manipulation, contextualization, etc). There are high levels of uneducated Mapuche, however more interesting is to look at the educated Mapuche: their role is fundamental. Many of the intellectual Mapuche have a strong international presence. Education of the Mapuche has been thought first as a way to Christianize them, and secondly to convert them into "good citizens". Ironically though, through education the Mapuche people have become the population that questions the status quo of a still rather ethnocentric state.<sup>180</sup>

Last but not least, from 1999 the Mapuche have been present in the media. The media make the Mapuche claims more visible.<sup>181</sup> There are a small quantity of radio shows, such as *Witrangé Anay!*, produced by the Communications Mapuche Llüfkeñ Mapu Centre, (probably the most important one). Moreover, the internet is very important for the Mapuche movement.<sup>182</sup> They are probably the indigenous group with the biggest presence on the net in Argentina. A recent study showed that there are 20 Mapuche sites (including *Rehue Dutch Foundation*), among which 15 had a base in European collectives and 71 were personal sites.<sup>183</sup> Also, some Mapuche leaders have been travelling around the world in order to share and spread their message with the rest of the world. An example is the Chilean Mapuche leader, Juana Calfunao, who spent several months, from March to August 2011, in Geneva. He also travelling to different parts of Europe, giving lectures and approaching international organizations which are interested in his cause.

#### 4.3 *Different forms of organization*

All over the world, indigenous people's groups have organized themselves in order to get protection or expand the scope of their rights. The Mapuche people have found protection, not only through international organizations protecting indigenous people in

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<sup>179</sup> *Ibid.*, 30.

<sup>180</sup> *Ibid.*

<sup>181</sup> Lavanchy adds that the different media are not neutral and political, economic and social powers do also play a role. However the public sympathy that generally people have towards the Mapuche people as exposed in the previous point, counter balances this. Lavanchy (n 167) 18.

<sup>182</sup> See for example: <http://www.mapuexpress.net/>

<sup>183</sup> Lavanchy (n 167) 20.

general, but through their own organizations.<sup>184</sup> They have also worked together with other indigenous groups.<sup>185</sup>

Since 1976, as part of the Unrepresented Nations and Peoples Organization (UNPO), and through many other means, the Mapuche people have sought to organize themselves. The Committee Exterior Mapuche (CEM) became a member of UNPO in 1993. Three years later, the Mapuche International Link (MIL) was launched in Bristol, replacing the Committee Exterior Mapuche (CEM), which operated internationally since 1978.<sup>186</sup> The organisations and communities subsequently set up a political and organisational body called the Indigenous Plurinational Council in Argentina (CPIA).<sup>187</sup>

In the context of the Universal Declaration, the Permanent Forum within the framework of the (at the time) Human Rights Commission, sponsored by the member states of the UN was created.<sup>188</sup> It is an advisory body to the Economic and Social Council. Mapuche people see the Forum as an opportunity to open a constructive dialogue between indigenous people and government on issues such as the environment, development, education, health and culture.<sup>189</sup> Other bodies at the UN with special mandate on indigenous people are the Expert Mechanism on the Rights of Indigenous People and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous People.<sup>190</sup>

Contrary to what was taught in schools no longer than a decade ago, indigenous people in Argentina, still exist.<sup>191</sup> Not only do they exist, but they have achieved a high level

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<sup>184</sup> Such as Enlace Mapuche Internacional (England); - Centro de Documentación Ñuke Mapu (Sweden); - Comité Belga - America India - (Belgium); - Grupo de apoyo Mapuche, (Germany); - Centro de Documentacion Indigena RUCADUGUN - (Germany); - Mapuche Nation Support Committee, (Calgary, Canada) - Mapuche Nation Support Committee, (Edmonton, Canada) - Mapuche Nation Support Committee, (Winnipeg, Canada) - Mapuche Nation Support Committee, (Montreal, Canada).

<sup>185</sup> See for example <http://www.mapuche.info/news01/dsur991024b.html> last accessed .2011

<sup>186</sup> [http://www.mapuche-nation.org/english/html/m\\_nation/main/history.htm](http://www.mapuche-nation.org/english/html/m_nation/main/history.htm), last accessed 20 August 2011.

<sup>187</sup> International Working Group on Indigenous Affairs. Statement Of Victoria Tauli-Corpuz, Chair of the Un Permanent Forum on Indigenous Issues, on the occasion of the adoption of the UN Declaration on the Rights of Indigenous Peoples. Copenhagen: IWGIA, 2011. Available at <http://www.iwgia.org/graphics/SynkronLibrary/Documents/InternationalProcesses/DraftDeclaration/07-09-13StatementChairofUNPFIIDeclarationAdoption.pdf>, accessed 20 August 2011. P 207

<sup>188</sup> Available at <http://www.un.org/esa/socdev/unpfii/> last accessed 19 August 2011.

<sup>189</sup> [http://www.mapuche-nation.org/english/html/m\\_nation/main/history.htm](http://www.mapuche-nation.org/english/html/m_nation/main/history.htm) last accessed 20 August 2011.

<sup>190</sup> A more in-depth discussion about the role of these organizations, although very interesting, shapes the possibilities of the present paper.

<sup>191</sup> Contrary to what was taught in schools no longer than a decade ago, Indigenous people in Argentina, do still exist It was common in primary school syllabus to learn that during the Conquest of the Desert (headed by Grl Roca), all indigenous had been killed. This goes in line with the aspiration of

of coordination within the different communities and formed NGOs operating internationally. Various international organizations have achieved lot for indigenous communities in terms of protecting their right to land, press work, lobbying; to educational programmes and cooperation with other indigenous groups.<sup>192</sup>

The above shows how the Mapuche people have built a strong community at the national and international level. This is a suitable platform to strengthen and promote their land claims. Often it is through international channels (both international legislation and international media, among others) that their position is strengthened.

This raises the question of whether this progress has led to the actual claiming of indigenous people's rights and the ability to raise formal claims in court by the Mapuche people in Argentina? In other words: what is the Argentinean case law regarding Mapuche people and their right to land? These questions will be addressed in the next chapter.

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a "white" Argentina, as envisaged by the founders. For example Article 25 of the National Constitution still reads as follows: "The Federal Government shall foster European immigration".

<sup>192</sup> For example with the Mapuche peoples of Chile. See [http://www.mapuche-nation.org/english/html/m\\_nation](http://www.mapuche-nation.org/english/html/m_nation), last accessed 20 August 2011.

## 5. CASE LAW

*“(Mapuche) fluid identities and solidarities”<sup>193</sup>*

Acknowledging that the process of mobilizing law is one “through which law acquires its cases”,<sup>194</sup> the present chapter will draw attention to case law. This chapter will attempt to give an overview of the existing case law of the Mapuche people’s claims to land in Argentinean’s courts.

The first case is the judgment that goes furthest in recognising communal land rights. In the *Sede*<sup>195</sup> case (2004) indigenous possession was recognised. It acknowledged the property titles granted by the state, making inoperative the claim filed by the Sede family by which the indigenous community Kom Kiñé Mu was requested to leave the land. From the judgment it can be read that the land had been donated in 1900 to a traditional leader (cacique) by President Roca,<sup>196</sup> for the favourable participation of the community in the Desert Conquest.<sup>197</sup> This decision finds its basis on the supremacy principle that the national constitution prevails over the civil code. Thus, ethnic pre-existence gains primacy over individual property titles. In terms of communal property, the judgment states:

“the communitarian possession of indigenous people does not correspond to the form of individual ownership provided by the Civil Code. Pursuant to an operation??. categorical and unequivocal order of the national constitution, any traditional occupation of an indigenous community must be considered as community possession although its members have not practiced it by means of typical acts qualifying ownership according to national law (Civil Code, Art. 2384). It is precisely the constitution which tells us that these communities have possessed and posses legally

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<sup>193</sup> FR Carnese, AL Caratini, and AS Goicoechea, ‘Interethnic Relations in Native-American Populations of Argentine Patagonia: A Genetic Demographic Analysis’ in: C Briones and JL Lanata (eds), *Contemporary Perspectives on the Native Peoples of Pampa, Patagonia, and Tierra del Fuego* (Bergin & Garvey 2002) 124.

<sup>194</sup> DJ Black, ‘The Mobilization of Law.’ (1973) 2 *The Journal of Legal Studies* 125-128.

<sup>195</sup> Sede Alfredo y otros c/ Vila, Herminia y otros s/ desalojo, Juzgado Civil y Comercial n. 5 de la III Circunscripción Judicial de Rio Negro, 2004.

<sup>196</sup> Roca was the President of Argentina from 1880 to 1886, and again from 1898 to 1904.

<sup>197</sup> The Conquest of the Desert was a military campaign headed by General Roca in the 1870s (later the president of the Republic). During the conquest many indigenous peoples who inhabited the Patagonia region were killed (some claimed it to have been a genocide). The conquest established Argentine dominance over Patagonia, which was inhabited.

(the land) for the simple reason of pre-existence to the State and of preserving their traditional occupation.”<sup>198</sup>

The next case concerns the Huayquillan community. In the *Community Mapuche Huayquillan*<sup>199</sup> c/Brescia, Celso Armado y otro (2004)’s decision, the judge recognized ownership of the land claimed by the community. The land had been occupied by the Mapuche in a continuous and peaceful manner for about 40 years. The community had constructed houses and constantly conducted agricultural activities. The judgment points at Article 75, paragraph 17 of the Constitution and the ILO 169 Convention as the basis for the decision to recognize collective ownership of land.

Another judgment in which collective ownership was recognized is the *Oñate*<sup>200</sup> ruling. The case involves the dispute over a piece of land between the Oñate family, belonging to the Mapuche indigenous community Kom Kiñé Mu and José Pablo Rago and José Luis Calviño. The plaintiffs claimed ownership over the land on the basis of its traditional occupation, at least since 1925. However, the respondents claimed the same rights based on a lease in principle granted by the state dating from 1950. The case also involved the removing of the fences that had been put up by the defendants. The judge recognized that the land belonged to the Mapuche community and based his decision on Article 2 statute 23302 (implementing the ILO 169 Convention).

Not only have the courts recognised collective property, but they have also in some instances granted its concrete enforcement. Such is the decision provided under the *Quintriqueo*<sup>201</sup> judgment. This case is striking because of its successful outcome: not only did the decision rule in favour of the Mapuche community, but the judgment was also followed by an enforcement, something not commonly seen. The community received immediate restitution of the land as a precautionary measure.

Precautionary measures were also taken in the *Paichil*<sup>202</sup> case. The particularity of this judgment is that it reached the Inter-American Court for Human Rights. With the assistance of the Centre of Human Rights and Environment, the

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<sup>198</sup> Sede Alfredo y otros c/ Vila, Herminia y otros s/ desalojo, Juzgado Civil y Comercial n. 5 de la III Circunscripción Judicial de Río Negro, 2004, para 86.

<sup>199</sup> Comunidad Mapuche Huayquillan c/Brescia, Celso Armado y otro, Juzgado en lo Civil, Comercial, Laboral y de Minería de Chos Malal, provincia de Neuquén, 2004.

<sup>200</sup> Oñate, Dolorindo y otros c/ Rago, Pablo y otro s/ Interdicto de retener, Juzgado Civil y comercial n 5 de la III Circunscripción Judicial de Río Negro, 2002.

<sup>201</sup> Quintriqueo José c/ Newbery, Tomás s/ Acción autónoma de nulidad de sentencia, Juzgado civil de la IV Circunscripción judicial de la provincia de Neuquén, 2003.

<sup>202</sup> Comunidad Mapuche Paichil Antreao y otro c/Prov. Del Neuquén s/ Acción de Amparo, Juzgado Civil y Comercial de la IV Circunscripción Judicial del Neuquén, 2004.

indigenous community presented a claim to stop the indiscriminate deforestation and the extraction of natural materials from the Cerro Belvedere. The judgment noted that the felling of trees and the extraction practice interfere not only with the environment, but also with the Mapuche religious manifestations. Indeed the Mapuche community claimed the violation of the sacredness of the land where for centuries they had held their religious ceremonies. Moreover, the judgment recognized the community's rights in spite of the lack of legal personality. Notwithstanding a successful decision for the claimants, the deforestation continued. This was the reason why the case was brought to the Inter American Commission.

The Inter American Commission on April the 6<sup>th</sup> 2011, requested the Argentinean state to issue provisional measures on behalf of a Mapuche community: Lof Paichil Antriao. The Inter-American Court for Human Rights argued that the situation is of high risk and emergency, and called for the immediate action of the Argentinean state, before irreparable harm was caused to the indigenous community. Although the territory in question was protected by a judicial decision, members of the community couldn't access the land, depriving them from the possibility of exercising the religious practices that Mapuche culture imposes. Moreover, the families in question would be in a very precarious health and nutrition situation. Furthermore, the Court requested that the Argentinean state adopt the necessary measures to ensure that the members of the community in question could develop their ritual practices without having the police or other security groups forcing them to leave, or being aggressive towards them.

In the recent *Petrolera*<sup>203</sup> ruling, the decision rejected a motion filed in 2007 by an oil company seeking to prevent the obstruction of oil exploration work in the area Los Leones. The rejection of the claim is based on the following arguments: the recognition of the community and its constitutional status. The decision also affirms that the community ownership of land is not based on the individual possession under the Civil Code, but it is based on the pre-existence of the community, even before the State's existence, and the fact that it has preserved the traditional occupation.

Moreover, the decision points to the non-compliance with the procedure of consultation or joint management of natural resources. The ruling maintains that the right of participation includes consultation, and a genuine dialogue between the parties

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<sup>203</sup> *Petrolera Piedra del Águila SA c/ Curruhuinca Victorino y otros s/ Acción de Amparo*. Juzgado Civil N° 2 en lo Civil y Comercial de Cutral Co. Neuquén, 2011.

should thus be established. Such a dialogue should be characterized by communication and understanding, mutual respect, good faith and sincere desire to reach an agreement. Furthermore, the judgment states that the indigenous communities should be able to participate freely and fully in all phases of the process and that consultation should take place before the adoption of decisions. Finally the judgment determines that by not respecting the principles mentioned the following norms had been violated: Article 75, paragraph 17 of the Constitution, and Article 53 of the provincial constitution, and Articles 6, 7 and 15 of ILO Convention 169 on Indigenous Rights<sup>204</sup> and Articles 10, 19, 29, Clause 2, 30 and 32, Clause 2, Clause 2 of the UN Declaration on the Rights of Indigenous People.

The mentioned case-law shows that the Argentinean justice system is willing to recognize its international obligations. Rights are clearly and unequivocally granted to the indigenous communities. Communal land ownership is recognized to indigenous people, based on their pre-existence to the state and on the grounds of international and constitutional norms that have hierarchy over other norms. The international norm has made its way into the local setting. Claims at local level by indigenous communities are good signs of this: they represent international ideas taking meaning locally.

However, the enforcement of decisions is often lacking, rendering these judgments into paper tigers. For example, Salgado argues that in the province of Neuquén, there has not been a systematic policy related to land rights that actually live up to the constitutional expectations nor in accordance with the reality and traditions of the Mapuche culture.<sup>204</sup>

The above cases, however, were not solved by themselves. How, via what politics and processes, is this normative toolkit taken from theory to practice? On that note the *Benneton* case<sup>205</sup> will be discussed in the next chapter, which gives valuable material to analyse this process of mobilization of law through the role of the translator. The discussion will take a more anthropological perspective, and the following question will be addressed: How did the translator in this case operate between the global and the local, translating human rights concepts from one place to the other?

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<sup>204</sup> JM Salgado et al, *Informe de situación de los derechos humanos del pueblo mapuche, en la provincia del Neuquén* (Observatorio de Derechos Humanos de Pueblos Indígenas 2009), 38.

<sup>205</sup> Nahuelquir Rosa Sara-Curiñanco Atilio s/Usurpación, Expte. N° 159/2003 (Juzgado Correccional de la Circunscripción Judicial del Noroeste del Chubut, 2002).

## 6. TRANSLATING HUMAN RIGHTS

*“the law says that we have rights to these ancestral territories, but the Argentine government did not decide against Benetton” (...) “every Mapuche comes from an element of nature: this means that for each one of us our own origins are in forces that reside in our territory, in this territory where we live”<sup>206</sup>*

In the mobilization of international human rights and its implementing legislation at the national level (representing the global) to the Mapuche culture (representing the local), the translation process is crucial. The last chapter will be dedicated to the case study of the *Mapuche – Benetton* conflict.<sup>207</sup> The facts concerned will be described in depth as they will be used to explain the role of translators within the realization of indigenous’ rights of the Mapuche people of Argentina. Secondly, the role of translators will shed some light on understanding the bridge between the global and the local. Thirdly, the following question will be addressed: what does this teach us about the relation between the global and the local in the context of the implementation of human rights provisions?

6.1. *The case: Compañía de Tierras del Sud Argentino Vs. the Curiñaco-Rúa Nahuelquir Family (Mapuche - Benetton case)*

In 1991 the shares of *Compañía de Tierras del Sud Argentino*<sup>208</sup> (a company incorporated in 1889) were purchased by Edizione Holding International n.V Benetton’s property. So, Benetton began operations in Argentina, in a territory of 900.000 hectares in the provinces of Santa Cruz, Río Negro, Buenos Aires and Chubut.<sup>209</sup> That land is used for wool production.<sup>210</sup>

In the year 2002 Mr Curmiñaco and Mrs Rúa Nahuelquir (both Mapuche), after consultation with the Independent Institute of Colonisation (IAC), settled in Santa Rosa

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<sup>206</sup> G Hoberman, ‘Rethinking Ethnicity and Democracy: Argentina and its Silenced Voices’ (2007) Florida International University working paper , 24. Available at <http://lanic.utexas.edu/project/etext/llilas/ilassa/2007/hoberman.pdf> , accessed 24 August 2011, citing R Nankuqueo, “People of the Land, Without Land”, [www.greenanarchy.org](http://www.greenanarchy.org).

<sup>207</sup> Nahuelquir Rosa Sara-Curiñanco Atilio s/Usurpación, Expte. N° 159/2003 (Juzgado Correccional de la Circunscripción Judicial del Noroeste del Chubut, 2002.

<sup>208</sup> The company owns a vast territory, donated by President Uriburu to compensate costs originated by the Desert Campaign.

<sup>209</sup> This operation is said to illustrate that Benetton does not comply with European norms related to foreign investment in developing countries. Resolution 15/11/99. Available at Mapuche-Nation.org, <http://www.mapuche.info/lumaco/Benetton.html>, accessed 21 August 2011.

<sup>210</sup> Its productions are not limited to wool, but also agricultural, oil, mining and forestry activities are conducted.

land (about 300 hectares), which according to IAC was public.<sup>211</sup> Benetton raised a formal complaint claiming ownership of the land. In October, Justice Colabelli ordered the eviction of the family.

Compañía Tierras del Sud Argentino filed two lawsuits against the Mapuche family. A criminal one for usurpation, dismissed because of lack of essential elements, and a civil lawsuit for restitution of the property. The public and oral trial took place in 2004 and ruled against the Mapuche family. Justice Eyo resolved that the land should be given back to Tierras del Sud Argentino company.

Soon after, Pérez Esquivel (human rights activist and Nobel Peace laureate (1980) and member of NGO SERPAJ (Service Peace and Justice) wrote a letter addressed to Luciano Benetton requesting the international group to return the land to the Mapuche family. The dialogue began and Benetton, soon after, decided to donate 2500 hectares of land. The Mapuche family rejected such a donation arguing that only restitution of the land would be accepted.<sup>212</sup>

After this rejection Pérez Esquivel organized a meeting. In November of the same year the Mapuche family and Benetton group met in Rome. Mostly, it evolved around the discussion: donation versus restitution. The Mapuche family insisted on a dialogue based on “historical reparation and restitution”. The Mapuche offered Benetton to return the land to the Argentinean state, who would then return it to them. Although it lasted four hours, no final agreement was reached.<sup>213</sup>

In 2005 a new donation was suggested (7500 hectares) by the Benetton group. However, in 2006 after technical studies were conducted,<sup>214</sup> the province of Chubut decided to reject such a donation due to the disproportionate investment that it would cause to the province to make such lands productive.<sup>215</sup> Without reaching a legal agreement, finally in 2007 the Mapuche family decided to return to the land. More recently, in 2011 another decision was issued, once again against the Mapuche family.

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<sup>211</sup> This means that anyone can stake a claim, subject to specific regulations (Civil Code Article 2341).

<sup>212</sup> This was apparently the second donation received by the Indigenous communities in Chubut in the year 2004.

<sup>213</sup> Farn Report. Benetton – Mapuche case. Compañía de Tierras del Sud Argentino Vs. the Curiñaco-Rúa Nahuelquir Family. Argentine Patagonia 2006. FARN, IRENE, OECD Watch.

<sup>214</sup> Among others, by the National Institute of Agricultural Technology (Instituto Nacional de Tecnología Agropecuaria, INTA) <http://www.inta.gov.ar/santacruz/index.htm> last accessed 21 September 2011.

<sup>215</sup> According to a Benetton press release: “In fact, the land offered has abundant water resources, with 10 kilometres along the banks of the Chubut river, and would be well suited to intensive use, not only for animal grazing, but also for the cultivation of fruit and vegetables.” Available at [http://press.benettongroup.com/ben\\_en/about/facts/fact2](http://press.benettongroup.com/ben_en/about/facts/fact2), accessed 21 August 2011.

Justice Omar Magallanes, granted the Italian firm control over more than 500 hectares in Santa Rosa. An appeal was filed after which big manifestations in Patagonia and the capital followed. The case is still ongoing.

The relevance of this case lies on the fact that it represents a larger problem. Indeed the Benetton conflict is far from being the only one. An investigation conducted by the newspaper *Página 12* estimated 8.6 million hectares of land are approximately in dispute between indigenous communities and multinational companies.<sup>216</sup>

Among all these cases this one in particular provides for a good example in which to discuss the role of translators within the global/local dichotomy. In spite of the lack of a final decision, the involvement of Pérez Esquivel was crucial to open a dialogue. This is why this is such an interesting case to analyse in order to understand the role of ‘translators’.

## 6.2. *Translating human rights*

This section will address how translation can take place at different levels. Firstly the actors closest to the conflict have a key role in acting as intermediaries between the two fields of analysis. Secondly, a broader set of actors, including NGOs are involved. This way, and looked at it from a broader perspective, it is the stakeholders themselves who can facilitate the translation process. Lastly, society at large through the implementation of education strategies, can operate as long term translators, and even create translators itself.

### 6.2.1. *Translators at the heart of the conflict*

Pérez Esquivel initially got involved in the *Benetton* case<sup>217</sup> by writing an open letter to Luciano Benetton. The letter dated 14<sup>th</sup> of June, serves as a good tool to analyse the role of the translator; the one who translates human rights concepts between different fields, making the mobilization of law possible this way.

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<sup>216</sup> 600.000 indigenous peoples have already been affected by the expansion of the multinationals ‘Benetton, denunciado por usurpación’ (*Página 12*, 22 May 2007) <http://www.pagina12.com.ar/diario/sociedad/3-85341-2007-05-22.html>, accessed 24 August 2011.

<sup>217</sup> Pérez Esquivel’s involvement also lead to the involvement of Serpaj, NGO which he is a head of.

In this letter Pérez Esquivel uses both languages: the Mapuche culture language and the legal human rights discourse. Although with a strong focus on the cultural dimension of the conflict, it still frames the claim into a legal one.

The letter starts by a clear call to the Mapuche culture. It reminds the reader that “Mapuche” means “man of the land”. There is a “profound communion” with the “Pachamama”, (the mother earth), its sons and its people. It recalls the generations that have lived and rest now in the Pachamama. Explicit mention to the identity, values and traditional cultures is made. Moreover, the letter suggests that in Mapuche culture, land is life, without land there is no life. This way the land claim is taken away from the ownership or lack of ownership dichotomy and is put in terms of cultural identity and survival.

However, the letter has also a strong legal tone to it as well. From the beginning it refers to the rights of indigenous people, the right to dignity and the right to legitimate ownership of the land which is claimed by the Mapuche people. It also makes reference to the existence of legal requirements, ownership title documents, which the Mapuche people lack.

The letter continues by making reference to the Mapuche culture, whilst introducing legal concepts as well. The following extract illustrates very well how the translator effectively makes use of both the local and the global frames:

“They will continue claiming their *rights* to lands as *legitimate* owners, from generation to generation, although they do not have the documents that an unfair system claims, and adjudicates lands to those that have money, and they repel them from their homes, taking lands from them, the *stars* and the *winds* that bring the voices of the elders” ( emphasis added, own translation)

(...)

“we all live life, when we arrive we are leaving, and there is nothing we can take with us, we can leave hands full of hopes in view to build a more *fair* world and brotherhood for all”. (emphasis added, own translation)

Indeed, in this letter Pérez Esquivel, manages to convey a double message, for different audiences using different frames. He addresses the Italian firm (in this case, representing the global), using Mapuche concepts (representing the local). The use of terms such as “*rights*”, “*legitimate*” and “*fair*”, are clearly part of an internationally recognized human rights language. Whereas the use of terms like “*winds*” and “*stars*” is related to concepts

of the Mapuche idiosyncrasy. This way, Pérez Esquivel addresses both: the local and the global.

This can be put into the context of Merry's translator's theory. Pérez Esquivel "negotiated the middle in a field of power and opportunity"<sup>218</sup> He mastered both languages: the international human rights discourse by the use of common codes such as the terms *rights*, *legitimate* and *fair*, and also the Mapuche language by the use of concepts like the *stars* and the *winds*. On the one hand, Pérez Esquivel operated in the international arena, through human rights discourse. On the other hand, he also operated in the local field. He got involved through the NGO Serpaj and he used cultural terms familiar to the local setting.

By translating human rights concepts, the translator creates dialogue opportunities. Pérez Esquivel met with Luciano Benetton in Travieso (in the context of the summit of Nobel Peace Laureates in November in Italy). They agreed to have a meeting with the Mapuche couple and other representatives. This was an important step towards promoting dialogue.

Together with the Mapuche family and the Benetton representatives, the following were present at the meeting in Rome: Pérez Esquivel, lawyer Dr. Macayo, Mr Millan (spokesman for the 11 de Octubre organization, a very important Mapuche organization),<sup>219</sup> representatives of the Gorbachev Foundation and RADICI, Dr Victorio Taccettu (Argentinean ambassador in Rome at the time of the events) and the Mayor of the city. They all in a one or another way represent translators. Dr Macayo, as legal representative of the Mapuche family is probably one of the most interesting actors in the sense that he represents Mapuche interests through the international legal discourse. Statements as the following are good illustrations of this:

"We test the Argentine *democratic* system, to see how impartial *Justice* is. Our intention is for historical truth to be assumed by the state institutions that usurped us" (emphasis added and own translation)<sup>220</sup>

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<sup>218</sup> Merry, (n3) 41.

<sup>219</sup> More information available at: <http://rehue.home.xs4all.nl/act/act178.html> last accessed 28 September 2011.

<sup>220</sup> The original version reads as follows: "Ponemos a prueba el sistema democrático argentino, a ver qué tan imparcial es la Justicia. Pretendemos que la verdad histórica sea asumida por las instituciones del Estado que nos usurpó"

The framing of the claim in terms of democracy is certainly a very tactical strategy, to convert a claim which for the Mapuche people may not have had so much to do with democracy but with their existence and religion; into a rights frame, political discourse.

Mauro Millán, from the 11 de Octubre NGO, is another interesting translator. He was present at a conference in Vienna “Enlazando Alternativas II”,<sup>221</sup> where representatives from the European Union and Latin America were present. Mr Millan, was invited to present on the Benetton/Mapuche conflict. He operated at three levels. Firstly by endorsing the indigenous claims; secondly, by framing those claims in the different levels of the state, showing the different sectors in tension: and thirdly, by attracting international attention, investing the political credit earned at the national and local level.<sup>222</sup>

The important role played by translators is evidenced by the reference made by the main actors to the conflict, Rosa Rúa Nahuelquir and Atilio Curinaco, who also wrote two open letters, one of which containing an interesting remark: “We replied to Benetton *through* Serpaj and Pérez Esquivel” (emphasis added). This proves the crucial role of the translator, which made it possible for the main parties to communicate *through* the translator.

#### 6.2.2. *Other translators: community of stake-holders*

External actors to the conflict have also had translation roles. In other words, Pérez Esquivel and the group present at the aforementioned meeting, were not the only “translators” at work in that case. Many Mapuche activist groups<sup>223</sup> started up a media campaign<sup>224</sup> aimed at bringing the conflict to the attention of the international community. The conflict that began as the one between a family and a private owned company became the conflict of the Santa Rosa community as a whole.<sup>225</sup> As Merry would put it, “thought of as human rights violations, local problems become issues that a

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<sup>221</sup> Cumbre de los Pueblos - Enlazando Alternativas 2 (Viena, May 2005)

<sup>222</sup> Available at <http://www.ram2009.unsam.edu.ar/GT/GT%2062%20-%20Medios%20Audiovisuales%20y%20Tecnolog%C3%ADas%20de%20la%20Informaci%C3%B3n%20y%20la%20Comunicaci%C3%B3n%20problemas%20y%20desaf%C3%ADos%20p/GT62-Ponencia%5BGrillo%5D.pdf> last accessed 23 September 2011.

<sup>223</sup> For example Greenarchy ([www.greenanarchy.org](http://www.greenanarchy.org)), Serpaj ([www.serpaj-ar.com.ar](http://www.serpaj-ar.com.ar)), Mapuche Nation (<http://www.mapuche-nation.org/>), among many others.

<sup>224</sup> See for example: [http://www.santarosarecuperada.com.ar/english/historical\\_background.html](http://www.santarosarecuperada.com.ar/english/historical_background.html) or <http://www.mapuche.info/lumaco/Benetton.html> last accessed 21.08.2011

<sup>225</sup> <http://www.santarosarecuperada.com.ar/bitacora/index.php?catid=2&blogid=1> last accessed 21 August 2011.

global audience can understand”.<sup>226</sup> The use of human rights language turns a local case into a global concern. The focus of the campaign was the “historic problem relating to the creation of the Argentinean state in the 19th century and its relationship with the native populations who lived there before the birth of the state.”<sup>227</sup> These NGOs operated between the local and the global. By keeping close contact with Mapuche communities and working in the field, but at the same time using an international recognized human rights discourse and operating at global level, these NGOs have positioned themselves as perfect intermediaries.

Many Mapuche people themselves, through different forms of organizations, have also exercised such a role, through their committed involvement at the international level via a wide range of organizations aimed at promoting their rights.

Looking at the Benetton case from a larger point of view, the involvement of Mapuche activists in the global scene since an early stage is very interesting. Mapuche people have adopted a human rights frame to claim their rights from an early stage onwards. The following extract from a letter is just an example of how a member of the Mapuche community from Chile has used the human rights terminology and platforms, to endorse the groups’ claim:

“The name Mapuche means ‘people of the land’, yet today we hold only 1,5% of the land we had when the Spanish arrived A decree signed by President Pinochet in March 1979, decree No, 2568 permits the Mapuche communal lands to be divided and pass into individual ownership; this is a real threat to our survival as a people, for since this decree was signed the number of Mapuche communities has declined from 2,066 to 655. We therefore need to have established a principle of the recognition of the communal nature of our landholdings and our right to recover lost lands.”<sup>228</sup>

As seen in previous cases, first of all reference to the local Mapuche is made: “The name Mapuche means people of the land”, but immediately after the statement addresses the concepts of “ownership”, “recognition” and “right”. This statement shows the translation process made by a Mapuche himself. In this case he operates in both fields: the global and the local. Being a Mapuche himself, there is no need to emphasise the

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<sup>226</sup> Merry (n6) 227.

<sup>227</sup> As stated by the Benetton press release, available at [http://press.benettongroup.com/ben\\_en/about/facts/fact2](http://press.benettongroup.com/ben_en/about/facts/fact2) last accessed 21 August 2011.

<sup>228</sup> Statement delivered by Mr Reynaldo Mariqueo to the UN Working Group on indigenous Populations Document submitted to the UNITED NATIONS HUMAN RIGHTS COMMISSION Sub-commission Prevention of Discrimination and Protection of Minorities Working Group on indigenous Populations Fourth Period of Sessions Geneva, 29 July to 2 August 1985. Available at <http://www.mapuche-nation.org/english/html/documents/doc-22.htm> last accessed 22 August 2011.

Mapuche language that much, but he does approach his audience with an international human rights frame.

As pointed out by Brios: “Their politics of representation in terms of both *darstellung* and *vertretung*,<sup>229</sup> has managed to get across to international, national and local audiences”<sup>230</sup> The intermediaries that operate within the two social spheres, normally as third parties, are actually the main party involved. The stake holder is in this case taking ownership of its cause. As Brios very well synthesises:

“Mapuche activism has developed amidst pressures from above and from below in sociological terms that makes the business of coping with political representation a problematic venture for the indigenous intelligentsia” (...)“activists are expected to translate the ideological umbrella suitable to advance indigenous claims in the abstract, into concrete politically feasible actions and proposals vis à vis both the widest polity and the Mapuche constituency”.<sup>231</sup>

Whilst translating concepts from local to global, local concepts are protected from being lost in translation. Indeed, this is illustrated in the “Statute of the Lof Ñorkinko”, a document through which the Mapuche indigenous communities requested the Argentinean state to be granted legal recognition as pre-existing people (according to Article 2 of Statute 23.302). Clearly, the fashion in which the writing of such a document was made, systematizes and standardizes “one compendium of Mapuche culture and philosophy that also seeks legitimacy in the eyes of the Mapuche themselves.”<sup>232</sup> The document is evidence of a “new discursive genre of contact”(...) that crashes the dichotomies of pauperize interpretation.”<sup>233</sup>

### 6.2.3 *The role of translators in society at large*

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<sup>229</sup> Gayatri Chakravorty Spivak defines *Vertretung* as: "stepping in someone's place (is) to tread in someone's shoes." Representation in this sense is "political representation," or a speaking for the needs and desires of somebody or something. *Darstellung* is representation as re-presentation, "placing there." Representing is thus "proxy and portrait." A.M Baldonado, 'Representation' Available at <http://english.emory.edu/Bahri/Representation.html> last accessed 25.08.2011

<sup>230</sup> C Briones, “We Are Neither an Ethnic Group Nor a Minority, but a Pueblo-Nacion Originario.” The Cultural Politics of Organizations With Mapuche Philosophy and Leadership’ in: C Briones and JL Lanata (eds), *Contemporary Perspectives on the Native Peoples of Pampa, Patagonia, and Tierra del Fuego* (Bergin & Garvey 2002), 112.

<sup>231</sup> *Ibid.*, 116.

<sup>232</sup> LA Golluscio, ‘From Secrecy to Public Performance: The Political Uses of Mapudungun’ in: Briones and Lanata (n 231) 161.

<sup>233</sup> *Ibid.*

The translation process taken place at the *Benetton* case can also be understood in its broader context. For example, on a more long term perspective there are translation processes undertaken at the educational level. The University of Patagonia San Juan Bosco is a good example of how translation can be understood in a broader concept. The objectives promoted by the University of Patagonia are new educational policies (intercultural paradigms), participation of the society, assuming a critical position and active against the violations of the indigenous people's rights, promotion of participation in the academia.<sup>234</sup> These objectives aim at strengthening the position of the Mapuche people. This exercise renders the University into a translator itself, and even better, in a creator of translators. The University provides a platform where the global and the local can meet, and those who will operate in both fields can be trained.

In terms of concrete activities carried out by the University the distribution of leaflets informing about national and international law protecting indigenous people's rights is another way of acting as a translator.<sup>235</sup> The strengthening of education could no doubt have a bigger impact in the long run. It would provide Mapuche people with the necessary tools to pursue their claims.

Indeed, in the long term the rationale behind these policies is to promote direct participation of indigenous people themselves. This is different than "being the voice of the voice-less".<sup>236</sup> Education can be an interesting bridge between the global and the local, where tools can be developed in order to promote critical thinking.<sup>237</sup>

The case illustrates how the translation process is undertaken, from global to local and from local to global. As noted earlier, Merry's views on 'intermediaries' can be, saving some distances, applicable to the land claims of the Mapuche people in Argentina. Indeed, the role of translators is crucial for the mobilization of law. The role of translators the *Benetton* case helped building the bridge between the local and the global.

6.3 *The relation between the local and the global & how can human rights promotion be strengthened?*<sup>238</sup>

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<sup>234</sup> Universidad Nacional de la Patagonia San Juan Bosco Secretaría de Extensión Universitaria Cátedra Libre de Pueblos Originarios. Tríptico.

<sup>235</sup> *Ibid.*

<sup>236</sup> According to Loncón this is a position often disrespectful of the right to self-determination. Daniel Loncón, Universidad Nacional de la Patagonia San Juan Bosco interviewed via email 5 September 2011 – 4 October 2011.

<sup>237</sup> Daniel Loncón, Universidad Nacional de la Patagonia San Juan Bosco interviewed via email 5 September 2011 – 4 October 2011.

<sup>238</sup> Merry (n3) 40.

In the previous section the role of translators in the mobilization of law was discussed and their important role in linking the local and the global was highlighted. This teaches us something about the relationship between the local and the global.

Firstly, it seems that the local and the global tend to use different types of frames. In the local, a certain set of concepts and language will apply and in another context, it will be a different set of concepts and languages. Secondly, there are intermediaries who can master the arts of both the local and the global. They are called translators and they operate both in the local and in the global. They can bring concepts from one field to the other and hence facilitate an exchange. Thirdly, the existence of such translators who facilitate exchanges, allow the possibility of opening the dialogue between the two and potentially facilitating the mobilization of law, taking it from theory to practice.

At a more general level this teaches us something more: As seen in the first chapter, international law has granted wide protection to indigenous people, sometimes even more than its domestic implementation. The Mapuche social movement is part of a bigger, indigenous global movement. In this sense, pressures from above have influenced the Mapuche's position immensely. As seen in chapter two, the Inter American Court for Human Rights has recognized indigenous people's rights to communal property land. The *Amas* and the *Saramaka* cases constitute very important precedents; Chapter four on the Mapuche people and their forms of organization, including at international and global level, and together with other indigenous groups from all around the globe, show how these "pressures from above" are exercised in the mobilization of law in the context of the Mapuche people land claims in Argentina.

Also, pressures from below have been exercised. Indeed this is done firstly, through the enactment of domestic legislation implementing the international legal framework, as seen in chapter three. Local initiatives and forms of organization from the local level (chapter 4) are contributing factors to the mobilization of law. The fact that the Mapuche people bring, sometimes even successfully, cases to court, as explained under chapter 5, is a sign of the law being mobilized. Indeed, law is taken from theory to practice.

The involvement of translators that facilitate the dialogue between the local and the global plays a crucial role in the mobilization of law. By being able to address both targets, translators re-frame concepts of law, adapting them into a specific context. The process of translation is exercised both ways, from global to local and from local to global.

However, and as pointed out initially, there are power relations at stake. Indeed, translation processes also translate power inequalities. On top of that, as Merry alerts: misinterpretations can take place, to the benefit of the most powerful party: “especially when it means reinterpreting one set of experiences and categories in terms of another more powerful one”.<sup>239</sup> Clearly, the *Benetton* conflict provides a good example of these different power relations at stake. The Mapuche people, although obtaining wide international attention, still are in a dispute with a multinational company, who has at several occasions shown its power. The dialogue was opened, but it was not done in the interpretative frame of the Mapuche people, which would have required taking into account their points of view related to their culture. Tensions which put genuine dialogue on one side of the balance, and the dilation of the truthful recognition of indigenous people’s rights arose. Daniel Loncón recalls that Benetton offered a donation, instead of a restitution.<sup>240</sup>

Land claims by indigenous people are reshaped not so much to accommodate to the local culture discourse/frame, as to the dominant discourse. Mapuche people while claiming their right to land are mainly forced to use the western style procedure. They have used state institutions –the legal system- in order to undermine the dominant discourse: the state discourse.<sup>241</sup> In their culture after all the concept of ownership does not exist. This is an important indication of existing power relations that govern the process of translating human rights into local terms.

Although there are some successful cases on land claims by indigenous people in Argentina, it would seem to be that their successfulness still relies heavily on Western values and codes, which translators need to handle and transform in one direction or the other.

In the first chapter the following was considered: “this highlights the relational character of ethnic identity as well as the more or less asymmetrical relations of power under which the renegotiation of identity and forms of reorganization taken place”.<sup>242</sup> Indeed, negotiations in the *Benetton* case, illustrate asymmetrical relations. The

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<sup>239</sup> Merry (n3) 42.

<sup>240</sup> Daniel Loncón, Universidad Nacional de la Patagonia San Juan Bosco interviewed via email 05.09.2011 – 04.10.2011.

<sup>241</sup> A Rose, ‘Divisions of Power and Interest – Land Conflicts in Santa Rosa’ (2009) University College London. Available at <http://www.santarosarecuperada.com.ar/bitacora/index.php?itemid=162&catid=2#top> last accessed 23 August 2011.

<sup>242</sup> Assies, (n34) 6.

involvement of Pérez Esquivel translates that the land conflict is still very much discussed under the terms of the most powerful party.

To conclude, the local and the global interact reinforcing each other. On the one hand, international law strengthens the position of indigenous people, who, on the other hand, stand against their states, sometimes successfully, giving room to case law that will strengthen once more, the international sphere. However, certain power inequalities become evident throughout this translation process. For law to be mobilized, the role of translators is crucial. This will contribute to the promotion of international human rights norms in local settings.

## CONCLUSION

The present paper on the mobilization of law has first introduced the theory of translators who operate between the global and the local, re-conceptualizing terms using different sets of frames. Then, the international legal framework has been described. The domestic implementing legislation has also been established, followed by an explanation on who are the indigenous people of interest in the study: the Mapuche people. Furthermore, the relevant case-law has been referred to and particular attention was paid to the *Benetton* case. This case provides a good example for the analysis of the role of translators and the lessons learned on the relation between the local and the global have been the matter of the last chapter.

This brings us to where we started: The objective pursued with this research paper was to better understand the interaction between the international and the local in the particular field of Indigenous People's land claims within the Mapuche community in Argentina. To do so the following question was asked:

***How are the international and domestic legal frameworks mobilized in the case of the Mapuche in Argentina in the context of their land claims?***

The research conducted in the present paper showed that international and domestic legal frameworks are mobilized in the case of land claims by Mapuche people in Argentina throughout different channels.

First of all, international law is enacted, after which individual states are to ratify and then legislate implementing norms. Numerous, have been the international instruments adopted in order to address indigenous people's land claims. Argentina has ratified most relevant international instruments in this regard. It has also passed implementing legislation in order to make the international norm operative. But how are those norms brought to life in the context of the Mapuche people?

As for the Mapuche people, they have reached high levels of national and international organization and great media exposure. This has contributed to their claims being heard and sometimes taken successfully to court. Furthermore, the role of translators who operate in the local and in the global field have been of great relevance in

conveying a message with a double frame: addressing the local and the global at the same time.

This firstly, teaches us that pressures from above and from below are exercised and that the global/local are governed by power relations. The role of translators is crucial to convey such struggles and more importantly, that there are new paths to bring both the global and the local together by the strengthening of dialogues. In short; mobilizing law involves the interaction of forces from above and from below and most importantly, translators who operate in the middle. International norms established at the heart of the elite of the world, have made their way to the most remote villages of the south of Argentina, where Mapuche people live.

The challenges described all through this paper faced by Mapuche people in Argentina, could also be applicable to other regions of the world. So the lessons learnt should also be taken into account in other states where indigenous people live. Of course, each state and each indigenous community has its own nuanced problematic, but the main principles analysed here can very well serve to strengthen indigenous rights positions all over the world.<sup>243</sup>

At a more general level, this means that translators make it possible for an international human rights norm to be implemented, adapted and understood in the local settings, where often, human rights violations take place. It is of utmost importance that the work done by translators such as NGOs, Human Rights Commissions and other institutions is taken seriously and promoted, because without them the norms would be little more than a remote fiction. Most indigenous people all over the world usually live their everyday lives very far from decision making settings, so if participation is supposed to be the corner stone of human rights theory (human rights based approach)<sup>244</sup>, human rights norms need to be close enough to its stake holders, in this case, indigenous people.

How to strengthen the bridge between the international and the local? If human rights are to be meaningful not only in the context of the Palais de Nations in Geneva, at

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<sup>243</sup> W Kymlicka, *Derecho de las minorías en filosofía política y el derecho internacional*. In *Derechos Ancestrales Justicia en Contextos Plurinacionales* (V&M Gráficas 2009) 10.

<sup>244</sup> J Kirkemann Boesen and T Martin, *Applying Human Rights Based approach* (The Danish Institute for Human Rights 2007). Brief definition is as follows: “framework that integrates the norms, principles, standards, and goals of the international human rights system into the plans and processes of development. HRBA seeks to regulate the relationship between the state and the public based on the notion of public rights and state duties and places values such as empowerment, participation, equality, non discrimination, and accountability at its centre.” Available at [http://www.humanrights.dk/what+we+do/focus+areas/human+rights+based+approach+\(hrba\)/tools+and+methods/dihr+and+the+human+rights-based+approach](http://www.humanrights.dk/what+we+do/focus+areas/human+rights+based+approach+(hrba)/tools+and+methods/dihr+and+the+human+rights-based+approach) last accessed 19 August 2011.

the UN headquarters in New York; if they should reach the most remote village of the Argentinean Patagonia, the role of translators must be strengthened.

This paper has also then help to illustrate how law, politics and culture are interrelated and how they feed off each other. Bringing global human rights to local settings requires the involvement of translators who can talk both languages: the local and the global. Therefore, if human rights are to have a meaning locally, the role of translators shall be strengthened and their work encouraged. National Human Rights institutions, NGOs, social and human rights activists, development agencies, among many other actors, bring international law to life in remote areas, this is no small achievement towards a world in which human rights norms are present and meaningful everywhere.

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