

Nations unbound: Transnational projects, postcolonial predicaments, and deterritorialized nation-states (co-authored with L. Basch and C. Szanton Blanc), Glick Schiller's more recent work includes: *Georges woke up laughing: Long distance nationalism and the search for home* (2001, co-written with G. Fouron); *Migration, development, and transnationalization: A critical stance* (2010, co-edited with T. Faist); *Cosmopolitan sociability: Locating transnational religious and diasporic networks* (2011, a special issue of *Ethnic and Racial Studies* co-edited with T. Darieva and S. Gruner-Domic) and *Locating migration: Rescaling cities and migrants* (2011, co-edited with Ayse Çağlar).

'Emancipation' or 'regulation'? Law, globalization and indigenous peoples' rights in post-war Guatemala

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Abstract

During the last two decades processes of legal globalization have led to the increasing codification of the collective rights of indigenous peoples. In Latin America this shift towards 'codifying culture' began with a series of constitutional reforms during the 1990s which recognized a series of rights of indigenous people and the ratification by many states of the International Labour Organization's Convention 169 on the rights of indigenous and tribal peoples. For many, this regional 'neoliberal multicultural' turn (Hale, 2002, 2006) was not about recognizing rights as such, but rather heralded a series of governmental policies signalling limited acceptance of cultural diversity which ultimately facilitated transnational forms of capitalist accumulation.

The limited gains of state-endorsed multiculturalism and the threats posed to indigenous livelihoods by the current commodities boom have encouraged a growing number of counter-hegemonic legal engagements, or legal globalization 'from below', which resort to ever more transnationalized legal pluralities (Santos & Rodriguez-Garavito, 2005). Indigenous people across Latin America continue to judicialize their protests, appealing to legal entitlements, including both 'hard law' (treaty and constitutional law) and 'soft law' (such as the internal norms of multilateral development institutions), in order to claim greater autonomy and protest against the effects of dominant patterns of economic development. Using Boaventura de Sousa Santos's heuristic device of the regulatory and emancipatory dimensions of law (Santos, 1998, 2002), in this article I examine the effects of legal globalization and the

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appropriation of legal instruments and discourses by indigenous people in post-war Guatemala. Specifically, I highlight the distinct legal frameworks, and conflicting notions of property, development, citizenship and democratic participation and voice at play in recent mobilizations against mining projects. The conclusions reflect on the possible effects of judicializing indigenous peoples' political demands.

Keywords: legal globalization; indigenous peoples; rights; law; Guatemala; multiculturalism.

During the last two decades processes of legal globalization have led to the increasing codification of the collective rights of indigenous peoples. In Latin America this shift towards 'codifying culture' took the form of constitutional reforms implemented during the 1990s which recognized a series of rights of indigenous people and the ratification by many states of International Labour Organization's Convention 169 on the rights of indigenous and tribal peoples. For many, this regional 'neoliberal multicultural' turn (Hale, 2002, 2006) was not about recognizing rights as such, but rather heralded a series of governmental policies signalling limited acceptance of cultural diversity which ultimately facilitated transnational forms of capitalist accumulation.

The limited gains of state-endorsed multiculturalism and the threats posed to indigenous livelihoods by the current commodities boom have encouraged a growing number of counter-hegemonic legal engagements, or legal globalization 'from below', which resort to ever more transnationalized legal pluralities (Santos & Rodríguez-Garavito, 2005). Indigenous people in Latin America continue to judicialize their protests, appealing to legal entitlements, including both 'hard law' (treaty and constitutional law) and 'soft law' (such as the internal norms of multilateral development institutions), in order to claim greater autonomy and protest against the effects of dominant patterns of economic development. Using Boaventura de Sousa Santos's heuristic device of the regulatory and emancipatory dimensions of law (Santos 1998, 2002), in this article I examine the effects of such legal globalization and the appropriation of legal instruments and discourses by indigenous people in post-war Guatemala. Specifically, I highlight the distinct legal frameworks and conflicting notions of property, development, citizenship and democratic participation and voice at play in recent mobilizations against mining projects. In the final section I reflect on the possible effects of judicializing indigenous peoples' political demands.

The 'emancipatory' and 'regulatory' dimensions of law

Boaventura de Sousa Santos adopts a useful heuristic device – the idea of emancipation versus regulation – to signal the paradoxes of legal instruments (1998, 2002). Law clearly encompasses regulatory and repressive elements as well as emancipatory potentials. By codifying rights and setting out the obligations of states to uphold those rights, law raises the prospect that those

rights will be enforced. In this sense it holds out a utopian promise and has long been invoked by the weak and marginalized – for example, appeals to the ideal of citizenship by those, such as women or slaves, who were systematically denied formal citizenship rights. Today international human rights law holds out that utopian and emancipatory promise to peoples across the world. Although we can date the emergence of global human rights to the middle of the twentieth century, the last two decades have witnessed the global spread of international human right norms and 'rights consciousness' – 'a willingness, or eagerness, to make use of institutions (like courts) which enforce rights, or which decide when rights have been infringed on or broken' (Friedman, 2002, p. 38) and to deploy legal discourses and mechanisms as part of political and social struggles.¹ This has occurred in tandem with a related global trend for national constitutions to enumerate ever greater numbers of rights (Tate & Vallinder, 1995). Transitions from authoritarian to democratic regimes have frequently involved the drafting of new constitutions and these increasingly incorporate not only political and civil, but also social, economic and cultural rights, often with hundreds of articles setting out the precise obligations incumbent on states to uphold and defend them. This codification of ever greater numbers of rights is also related to the treaty commitments of the states in question. Governments' endorsement of internationally sanctioned human rights instruments signals their desire to sign up for membership of the international community; it does not of course prove their willingness or indeed their ability to guarantee those rights in practice.

Such developments have both encouraged and been driven by a marked tendency for social movements to frame specific political struggles in terms of more general legal entitlements. Rights consciousness is a key factor in explaining the growth of strategic litigation or the deployment of rights discourses by different social actors. The acquisition of 'legal literacy' is often intentionally promoted across national boundaries, for example through support by northern foundations and NGOs to southern-based human rights organizations. (A signal example is the work of the Ford Foundation in supporting human rights NGOs engaged in pioneering social action litigation.)² The combination of new legal opportunity structures and growing rights consciousness means that processes of grassroots-driven judicialization – or judicialization 'from below' – are in evidence in a range of different contexts.³ Social movements, often organized in so-called transnational action networks or TANs, have engaged in counter-hegemonic legal actions, appealing to international norms and the principles of law in order to stake their material, political or cultural claims and fight against oppression, violence and impunity within their nation-states and communities. Such dynamics have been theorized as part of 'boomerang' or 'spiral' models, whereby social movements engage internationally or transnationally in order to bring pressure to bear on their governments and effect change (Keck & Sikkink, 1998; Risse *et al.*, 1999). Kathryn Sikkink in particular has analysed the ways in which movements take advantage of and also create legal opportunity structures, which depend on

shifting interactions between domestic and international legal frameworks (Sikkink, 2005). Law then, can evidently be a terrain for counter-hegemonic actions or, in Santos' terms, emancipation.

At the same time, we know from critical socio-legal theory and legal anthropology that law is also an instrument of domination and a pervasive means of reproducing patterns of domination and hegemony. Law codifies power relations, defines certain types of personhood and fixes particular identities. Through the process of what Clifford Geertz referred to as 'skeletalization of fact' (1993, p. 170), law reduces complex social processes to a particular set of ontological categories and representations. As Geertz argued, law is 'a distinctive manner of imagining the real' (1993, p. 173) and thus determines which events and interpretations are taken up as legal facts. Legal orders map out specific formulations of interest and understandings of disputes, as well as establishing the regulatory patterns for their settlement. Dominant modes of thought are thus symbolically represented in law, through which central concepts such as property, forms of political participation or rights-bearing persons and entities (legal subjects) are projected. Such constructions also systematically exclude those who do not conform to these ideals or categories.

Yet, while such categories are essential to the perpetuation and legitimacy of the law, in practice legal rules and concepts are open to interpretation. Even as they are 'fixed', at least partially, in specific legal instruments, interpretations and meanings are subject to ongoing contestation and reinterpretation by different actors. This is particularly the case where international norms and rights discourses are used or invoked in order to challenge national laws and situated practices. Legal anthropology has increasingly focused on globalization and transnational processes and there is particular concern with the ways in which universalist ideas and norms, for example about human rights or gender rights, are taken up and articulated in specific contexts (Merry, 2001, 2004, 2006; Goodale & Merry, 2007; Starr & Goodale, 2003; Stephen, 2005; Wilson, 1997, 2000). Legal systems and engagements with the law can therefore be understood as contested sites of meaning where dominant ideals and values provide the framework for contestation and for advancing alternative understandings and practices. In this way law is constantly negotiated and reshaped in a dynamic dialectic between hegemonic projections and counter-hegemonic actions (Santos 1998, 2002; Santos & Rodriguez-Garavito, 2005). Such processes of legal engagement and contestation are far from new. However, today two factors make them increasingly pervasive and complicated. First, the increasingly complex legal pluralism generated by economic and legal globalization and, second, the accelerated fragmentation and de-centring of state sovereignty which has occurred as a consequence of economic globalization and neoliberal policies encouraging ever greater outsourcing of the traditional functions of government.

Globalization has increasingly meant that multiple and overlapping legal spheres or forms of legal ordering extend across and beyond national borders.

It makes less and less sense (if indeed it ever did) for the legal systems of individual nation states to be examined as bounded national entities, as they are inevitably and increasingly affected and shaped by external and transnational phenomenon. As William Twining has noted, 'one consequence of globalization is a tendency to loosen the association of the ideas of law, state, and nation and so to make more salient the multiplicity of legal orderings' (2000, p. 138). These multiple forms of legal ordering include what we would normally identify as 'law'; that is, national state law and public international law. However, they are not confined to these phenomena alone. They also include regulatory regimes, or what some have termed 'transnational legal fields', attaching to processes of free trade-driven economic integration such as the World Trade Organization (WTO) or the North American Free Trade Agreement (NAFTA).⁴ Such free trade agreements have implied profound changes to national legal systems and state sovereignty. For example, private companies can now sue national governments in international arbitration if their expected profits are negatively affected by changes in regulatory policies (for example, such as increases in taxes). This effectively allows transnational companies to sidestep national courts and take their claims directly to the much less transparent arena of international arbitration.⁵ Indeed, one form of international or transnational legal ordering which has been of particular interest to socio-legal scholars is that of *lex mercatoria*, the supranational, market-oriented contract law used for transnational business – most recently characterized by the spread of international commercial arbitration (Dezaley & Garth, 1996; Teubner, 1997; Trubek *et al.*, 1994).⁶ Other examples of new, transnational legal phenomena or 'soft law' linked to economic globalization might include such things as the World Bank Inspection Panel or the WTO arbitration process (Randeria, 2003).⁷

The growth of human rights law has also been closely associated with the current phase of globalization. International human rights norms now form an increasingly dense web of obligations binding states, at least in theory, as an ever greater range of rights are becoming codified as international law. New human rights treaties (for example, on the rights of women, children or indigenous people) and the international forums through which they are monitored, particularly at the United Nations, have become key sites of legal transnationalism (Merry 2004, 2006; Morgan, 2004a, 2004b, 2007; Santamaría, 2008). As I aim to show in this article, indigenous social movements are increasingly using different kinds of law, including unofficial local law, national law, transnational legal orderings and processes, 'soft law' and international law, to challenge dominant patterns of development and government failures to deliver on the promises of multicultural democracy.

The second aspect that complicates critical engagement with the law is the unevenness and fragmentation of state sovereignty. During the nineteenth and much of the twentieth century, the reach of central government in many Latin American countries relied on informal compacts with private actors rather than formal norms enforced by strong state institutions across national territories

(O'Donnell, 1993; Salvatore *et al.*, 2001). From a more functionalist perspective many contemporary commentators signal 'weak states' or 'insufficient rule of law' as policy problems to be addressed in Latin America. Numerous authors have pointed to the acutely uneven reach of law as a defining feature of states in the region. For example, in a much-cited article, Guillermo O'Donnell likened the rule of law in Latin America to a heat map – blue where the rule of law functioned and applied to all citizens, implying an effective state presence and a monopoly over the use of force; green where the state is present but less effective, coexisting with informal, often illegal practices used to exercise governance; and brown where the state is hardly present, the rule of law does not apply and social and political life is dominated by alternative non-state, often highly violent, mechanisms. In most countries in the region the green and brown areas far outweigh the blue (O'Donnell, 1993).⁸

Such uneven reach of the law is undoubtedly a long-term historical phenomenon that responds to deep-rooted structural and social inequalities. However, the neoliberal state in Latin America is characterized by new forms of legal pluralism which are qualitatively different from those of the past. These involve the multiple and overlapping sovereignties linked to economic globalization – state and social, sub-national, national and supranational. They are also characterized by increasingly complex and fragmented patterns of legality and illegality involving both state and non-state actors (Comaroff & Comaroff, 2006).⁹ Neoliberal states do not necessarily seek to exercise coercion or jurisdiction evenly across their territory, according to the classic Weberian formulation of monopoly over the legitimate use of force and control of sovereign power in a given territory. Instead, a profound reshaping of relations between state, market and citizen has led to the devolution or ceding of sovereignty to a range of different actors. Neoliberal reforms of the state have increasingly fragmented law and shifted the terrain on which it is (re)produced and contested. These include the decentralization of certain state functions and the emphasis on the 'participation' of civil society actors, aimed at ensuring that they assume responsibility for the production and distribution of social goods. Such processes, which are an essential feature of the neoliberal model of social policy, have led to a blurring in practice between state sovereignty and what Dennis Rodgers (2006) has termed 'social sovereignty'. It is sometimes hard to discern the dividing line between state and non-state actors. This is increasingly the case in the legal field, as responsibility for low-level conflict resolution is devolved to non-state actors through the promotion of non-judicial alternative dispute resolution or – as discussed below – to indigenous peoples who have, at least in theory, been given the right to jurisdictional autonomy via constitutional reforms or the ratification of certain human rights instruments by Latin American states.

The combined effects of globalization and neoliberal reforms have been to de-link law and the state to an unprecedented extent. While this is in part related to the concentration of global power and capital across national borders,

it also potentially provides space for social movements to generate new forms of law and political practices. Undoubtedly engagements with dominant legal frameworks can lead to the cooption and demobilization of political demands, and to the sanctioning of certain identities, practices and discourses. Jessica Witchell and I have written previously about the ways in which certain notions of indigenous identity are fixed by international legal instruments and the problematic consequences this entails:

Indigenous identities ... are effectively being narrated or codified through dominant legal discourses, specifically those of international human rights law and multiculturalism. This has resulted in the projection of an essentialised, idealised and atemporal indigenous identity, the movement's leaders often perceiving such essentialising as tactically necessary in order to secure collective rights for indigenous people.

(Sieder & Witchell, 2001, p. 201)

Yet at the same time, by interacting with international norms (be these 'hard law' or 'soft law'), social movements engage in what Santos and Rodríguez-Garavito have called 'counter-hegemonic globalization', constructing, they maintain, a wider, plural 'subaltern cosmopolitan legality' (2005, pp. 3, 12–18).¹⁰ This may seem a case of David against the juggernaut of hegemonic globalization. Yet through these kinds of engagements indigenous peoples' social movements formulate alternative understandings of citizenship rights, challenging dominant interests in the state or the private sector. The effects of these processes are unpredictable and often, cumulatively, impact upon the construction of new dominant legal norms. The seminal work of Balakrishnan Rajagopal in particular has analysed the ways in which social movements in the South interact with international law. As he states, 'social movements seek to construct alternative visions of modernity and development that constitute valid Third World approaches to international law' (Rajagopal, 2003, p. 3). While emphasizing the ways in which international law validates certain types of resistance (such as anti-colonial struggles) while disqualifying others, Rajagopal also observes how 'international law and institutions provide important arenas for social movement action, as they expand the political space available for transformative politics' (2003, p. 23). Other critical socio-legal scholars have similarly focused on the interaction between international norms and social movements. For example, Santos and Rodríguez-Garavito argue that 'subaltern actors are a critical part of processes whereby global rules are defined, as the current contestation over the regulation of water provision and property rights on traditional knowledge bear witness' (2005, p. 11). In the Guatemalan case examined below, I analyse the interplay between indigenous social movements and national and international norms concerning exploitation of subsoil resources, considering the balance between the 'emancipation' and 'regulation' involved in such subaltern legal engagements.

Codifying 'culture': indigenous rights and the law in Latin America

The codification of rights in law is singularly important because it shapes the *formal* parameters and spaces for popular mobilization and struggle. Throughout the 1980s and 1990s, Latin American constitutionalism experienced a quantum shift as the region's indigenous peoples were recognized through a series of reforms to existing charters or new constitutions. While the specific content of these reforms varied from country to country, they all recognized society as 'multicultural', extending a series of recognitions and collective entitlements to indigenous peoples living within their borders, such as rights to customary law, collective property and bilingual education.¹¹ So widespread and generalized was this shift that analysts such as Donna Lee Van Cott referred to a regional model of 'multicultural constitutionalism' (2000a) in Latin America. In effect what occurred was a multicultural reframing of individual rights and citizenship, with potentially far-reaching implications. Whereas previously citizenship had been conceived of in terms of individual entitlements and obligations, the new constitutional order meant that indigenous peoples were recognized as the collective subject of rights: indigenous people continued to be individual citizens, but indigenous *peoples* also acquired citizenship rights (Assies *et al.*, 1999; Sieder, 2002; Stavenhagen, 2002).

These constitutional reforms raised expectations that indigenous peoples' rights to political and legal autonomy would be respected by national governments and that policies would be implemented which would ensure respect for cultural difference and improved conditions for indigenous populations, who constitute the poorest and most marginalized of Latin America's citizens. Political scientist Deborah Yashar (2005) has signalled how the claims for indigenous rights which preceded the constitutional shift had their roots in the dismantling of corporate citizenship regimes and the neoliberal economic turn and associated reform of the state in different Latin American countries. While social movements of indigenous people mobilized to demand respect for cultural difference and an end to discrimination, their claims were also clearly material.

A range of policies were subsequently implemented by Latin American states and international development institutions to target indigenous people and promote 'development with identity' (Andolina *et al.*, 2009). Yet, by the twenty-first century, disillusionment and frustration set in as the limits of this multicultural policy model became evident. Inspired by the work of anthropologist Charles Hale, a number of authors developed sophisticated critiques of states' recognition of indigenous rights, signalling how neoliberal states can live with, indeed welcome cultural difference at the same time as they continue to implement macroeconomic policies which are destructive of indigenous livelihoods and life chances (Hale, 2002, 2006; Postero & Zamosc, 2004; Richards, 2004). Many rightly view at least the first wave of 'state-sponsored multiculturalism' (Postero, 2007, p. 13) as a mechanism to reconstitute the

hegemony and legitimacy of weak states and fragile democracies, rather than signifying a real governmental commitment to guarantee rights for indigenous peoples. Despite the rhetorical commitment made to respecting indigenous rights implied by new constitutions and ratification of international instruments in Latin American countries, in case after case indigenous people continued to be persecuted by the state when they attempted to exercise their newly endorsed rights to autonomy and challenge hegemonic patterns of economic development. The targeted social policies developed during the 1990s were criticized as little more than tokenistic measures which provided limited paternalistic benefits. At the same time as more 'culturally appropriate' healthcare or educational provision was extended to indigenous populations, neoliberal economic development policies continued to threaten indigenous territories, despoil natural resources and displace indigenous peoples (Richards, 2004; Toledo Llancaqueo, 2005).¹² However, the fact that indigenous peoples' collective rights are now recognized as part of the block of constitutional norms in many countries has potentially opened up a new role for the judiciary in the defence of those rights. Perhaps just as importantly, the international legal commitments acquired by Latin American states towards their indigenous populations during the 1990s also raised the prospects of judicializing indigenous peoples' demands within a number of different arenas.

During the 1990s many states ratified the International Labour Organization's Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169 hereafter). ILO 169 was approved by the ILO's General Assembly in 1989 and codifies the collective rights of indigenous and tribal peoples, setting out a series of obligations for state parties to the Convention. ILO 169 has been ratified by more states in Latin America than in any other region of the world. While processes of ratification have often been contentious, this regional endorsement signals the relative acceptance of the concept of indigenous peoples in Latin America, compared to Africa and Asia where the term is much more problematic. It can also be explained as part of the 'rights cascade' that followed the return to constitutional democracy throughout Latin America in the 1980s and 1990s, which involved the ratification of numerous human rights treaties by new democratically elected governments (Lutz & Sikkink, 2001). Latin American states parties to the ILO Convention include Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Honduras, Guatemala, Mexico, Peru, Paraguay and Venezuela.

Rights guaranteed by the Convention include equality of opportunity and treatment, protections for indigenous peoples' religion and spiritual values and customs, rights to ownership and possession of traditionally occupied lands, and rights to appropriate forms of health and education provision.¹³ It also commits governments to recognizing the jurisdictional autonomy of indigenous peoples; articles 8, 9 and 10 of the Convention provide indigenous peoples with the right to administer their own forms of justice, as long as these respect fundamental and internationally recognized human rights.

In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary law. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, wherever necessary, to resolve conflicts which may arise in the application of this principle.

(ILO 169, art. 8)

To the extent compatible with the national legal system and internationally recognized human rights, the methods customarily practiced by the peoples concerned for dealing with offences committed by their members shall be respected. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

(ILO 169, art. 9)

In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics. Preference shall be given to methods of punishment other than confinement in prison.

(ILO 169, art. 10)

The Convention also specifies that indigenous peoples have a right to prior consultation on development proposals affecting their livelihoods.

In applying the provisions of this Convention, governments shall: consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.

(ILO 169, art. 6.1.a)

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual wellbeing and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly.

(ILO 169, art. 7.1)

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

(ILO 169, art. 7.3)

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

(ILO 169, art. 15.2, emphasis added)

States in the region retain ownership of subsoil resources, but according to the principles of ILO 169 they cannot decide development priorities without prior consultation with the indigenous peoples who inhabit those territories. Disputes over the extent of indigenous autonomy and quite what is understood as adequate prior consultation have increasingly featured in domestic and regional courts in Latin America. This is partly because nowhere has prior consultation been defined through legislation in individual states. As I will discuss below with reference to the case of Guatemala, this lack of legal definition – involving commitment to a broad internationally sanctioned principle and lack of precision about how such principle should be upheld and made operational in practice – has prompted a range of different legal actions and engagements by indigenous people.

ILO 169 is the first international instrument dealing with indigenous peoples' rights that is binding on signatory states. However, it heralded part of a broader international trend towards codifying indigenous peoples and their rights within the international system. In September 2007 the UN General Assembly finally adopted the UN Declaration on the Rights of Indigenous People (UNDRIP), marking the culmination of more than twenty years of negotiations between states and indigenous peoples' representatives at the UN on the text of the declaration.¹⁴ The Declaration recognizes the rights of indigenous peoples to the lands, territories and natural resources that are critical to their ways of life. Going much further than ILO 169, it affirms that indigenous peoples, like all peoples under international law, have the right to self-determination of which *free, prior and informed consent* is an integral part.¹⁵

(1) Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

(2) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

(3) States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

(UNDRIP, art. 32)

The UN Declaration is based upon principles of partnership, consultation and cooperation between indigenous peoples and states and reaffirms the international community's commitment to respect diversity and the right to difference. It is not legally binding because it has not yet achieved the status of a convention. However, by interpreting how existing international human rights law applies to indigenous peoples it sets new international standards for states to meet and constitutes the most complete statement to date of the international human rights of indigenous peoples. Irrespective of its non-binding character, it will become the new framework for all UN programmes and has already influenced the operating protocols of development NGOs and multilateral institutions such as the Inter-American Development Bank (see below). Bolivia was the first country in Latin America to adopt the UN Declaration on Indigenous Rights as national law, approving a National Law on Indigenous Peoples in November 2007 which is an exact copy of the declaration.

Negotiations continue on a proposed American Declaration on the Rights of Indigenous Peoples within the Organization of American States.¹⁶ If that draft convention is finally approved and ratified by the requisite number of states it will become part of the regional norms enforceable through the Inter-American human rights system. However, even in the absence of a regional human rights instrument specifically addressing the collective rights of indigenous peoples, in the last decade indigenous peoples in the Americas have increasingly judicialized their claims at the regional level and even before UNDRIP's adoption by the General Assembly, the Inter-American Court of Human Rights had begun to cite the declaration in its rulings.¹⁷ A number of contentious cases related to indigenous land claims and issues of prior consultation have been taken to the Inter-American Commission by indigenous movements and their allies. For example, in 1997 the U'wa people, in alliance with a number of Colombian and US-based NGOs, brought a case against the Colombian government to try to stop a mining concession in their territory granted to the Oxy and Shell oil companies, part of a long-running and multifaceted legal battle between the U'wa and the Colombian state (Rodríguez-Garavito & Arenas, 2005). In 2001, in the celebrated case of *Awas Tingni vs. Nicaragua*, the Inter-American Court of Human Rights confirmed that indigenous peoples have collective rights not just to the land they occupy, but also to its resources. The judges declared that the rights of the indigenous community in question to territory and to judicial protection had been violated by the Nicaraguan government when it granted concessions to a Korean lumber company to log on their traditional land, and recommended a series of remedies.¹⁸ Notwithstanding the fact that the implementation of the court's recommendations has been hugely contentious and complex,¹⁹ this important

and innovative jurisprudence is a clear example of the ways in which social movements' engagement with law helps to shape international legal norms.

In addition to public international law comprising human rights instruments and the jurisprudence of the Inter-American Court, during the last two decades indigenous peoples and their rights and entitlements have also been encoded in the 'soft law' of international development institutions such as the World Bank, the Inter-American Development Bank and the various bilateral development agencies. This is part of the 'cultural turn' in international development practice (Radcliffe, 2006). In 1991 the World Bank issued its Operational Directive 4.20, which aimed to incorporate the principles of ILO 169 into World Bank operational guidelines and underlined the need for the 'informed participation' of indigenous people in development projects and plans affecting them (Davis, 2002). In 2005 the Bank replaced OP 4.20 with Operational Policy 4.10, which aimed to bring policy more in line with emerging principles of international law. In February 2006 the Inter-American Development Bank approved a comprehensive Operational Policy on Indigenous Peoples and Strategy for Indigenous Development, which entered into force in August 2006.²⁰ As well as providing a clear definition of indigenous peoples,²¹ this policy also defines 'indigenous rights', 'indigenous governance' and 'development with identity', and commits the IDB to promoting 'development with identity' while protecting and safeguarding indigenous peoples' rights (Inter-American Development Bank, 2006). Like ILO 169, these internal norms establish the principle of prior consultation with indigenous peoples regarding development projects that directly affect them. It should be emphasized that these are internal guidelines within banks (which are accountable to their major shareholders), not norms which can be legally enforced in courts; any oversight mechanisms are internal to the banks themselves. Additionally, as with ILO 169, these guidelines fail to define precisely what constitutes adequate prior consultation. Both the World Bank and the Inter-American Development Bank have been strongly criticized for supporting large-scale investment projects to exploit natural resources that have been disastrous for indigenous livelihoods and the environment (Murray Li, 2007; Randeria, 2003; Sawyer, 2004). In this sense it is not at all clear that these new operational directives have made a significant difference to their overall lending practices (the IDB guidelines were only recently adopted, but the experience of the World Bank since the approval of operational directive 4.20 provides sufficient cause for scepticism). As the case from Guatemala examined below indicates, the incorporation of these kinds of internal norms or 'soft law' has provided additional possibilities for social movements to mobilize against prejudicial development interventions. Yet such legal mobilizations may risk ever more complex legal and quasi-legal entanglements, shaping indigenous political engagements yet offering limited concrete gains.

Guatemala: commitments to indigenous rights

In terms both of legal norms and public policy innovations, official multiculturalism in Guatemala is weak compared with other countries in the region, particularly the Andean countries where constitutional reforms recognizing indigenous rights and policy innovations aimed at providing 'development with identity' have been far-reaching. In Colombia, constitutional changes were a result of a crisis in governmental legitimacy (Van Cott, 2000a); in Ecuador and Bolivia they were the result of extensive organization and political mobilization by indigenous peoples (Lucero 2008; Yashar, 2005; Zamosc, 2004). In Guatemala the multiculturalization of the state was a consequence of the highly internationalized peace process, mediated by the UN, which was concluded in 1996, bringing an end to thirty-six years of armed conflict. Indigenous people had previously organized as part of the guerrilla movement or in human rights organizations. However, the massive violence of the military's counter-insurgent campaign, which left over 200,000 people assassinated or disappeared, severely limited the possibilities for mass-based popular movements to develop. Although Guatemala has one of the highest percentages of indigenous population in the Americas (approximately 50 per cent of the population are Mayan) and a long tradition of indigenous political organizing, it was not until the late 1980s that organizations emerged to specifically demand collective rights as indigenous peoples. Their demands were taken up within the peace process and amplified as a result. The government made a series of commitments to respect indigenous peoples' rights and identity. Following the signing of the final peace settlement, international development agencies and multilateral banks and donors took a leading role in supporting and implementing the agreements. As a consequence, the Guatemalan state was 'multiculturalized' to a significant degree, even though local elites tended to oppose the recognition of substantive rights for the indigenous population.

The Agreement on the Identity and Rights of Indigenous Peoples (AIDPI), signed by the government of Guatemala and the guerrillas of the Unidad Revolucionaria Nacional Guatemalteca (URNG) in May 1995, committed the Guatemalan state to implement a series of constitutional reforms in order to recognize indigenous peoples' collective rights.²² These included the right to be subject to customary law, the right to bilingual education and protections for communally-held lands, but excluded territorially-based autonomy arrangements. After the final signing of the peace agreement in December 1996, indigenous organizations began to draft proposals for constitutional reform to recognize the collective rights of the indigenous population, including the right to select their own authorities and develop and apply their own forms of law within their communities. According to the terms of the peace agreement and the 1985 constitution itself, proposals for constitutional reform had to be first agreed by Congress

and subsequently approved in a popular referendum. A package of constitutional reforms was finally approved in October 1998, nearly two years after the peace settlement was finalized, and covered an extensive range of issues, including reforms to the executive, judiciary and legislature. However, the recognition of indigenous rights was one of the most controversial aspects of the proposed reforms. Business elites mounted a vociferous campaign against the recognition of indigenous jurisdiction, fearing that recognizing indigenous rights to exercise law would inevitably raise the issue of territory and indigenous land claims. In the event, the proposed constitutional amendments were rejected in a national referendum on a turnout of just 18 per cent of the electorate.

In the absence of constitutional reform, the formal legal standing of indigenous rights is weak in Guatemala in contrast to, say, Colombia, Ecuador or Bolivia. Nonetheless, indigenous rights activists have looked to existing constitutional articles and to ILO 169 to support their rights claims. For example, two articles of the 1985 constitution provide a basis for recognizing indigenous authorities, their norms, procedures and decisions. Article 58 states that 'the right of people and communities to their cultural identity in accordance with their values, language and customs shall be recognized'. Article 66 states that: 'Guatemala is formed by diverse ethnic groups amongst whom are indigenous groups of Mayan descent. The state recognizes, respects and promotes their ways of life, customs, traditions, forms of social organization, use of indigenous dress by men and women, languages and dialects'. Some argue that 'recognizing, respecting and promoting' obligates state authorities to recognize the autonomy of indigenous authorities and their right to exercise customary law. However, this interpretation is not endorsed by the majority of high court judges in the country who tend to adhere to a more formalist and restrictive interpretation of the law.²³

In addition to these constitutional articles, Guatemala ratified ILO Convention 169 on the rights of indigenous and tribal peoples in March 1995 and the Convention finally entered into force in the country in June 1997. A number of attempts were made within and outside the legislature to block its adoption, but its adoption was strongly supported by the UN and major international donors supporting the peace process. A consultative opinion of the Guatemalan Constitutional Court requested at the time of ratification concluded that Convention 169 did not contradict the Guatemalan constitution.²⁴ Some jurists argue that article 46 of the constitution, which gives international human rights conventions and treaties ratified by Guatemala pre-eminence over domestic law, means that, in effect, ILO 169 is superior to internal legislation. However, there is no clear policy on the part of the Guatemalan Supreme Court, Constitutional Court or head of the public prosecution service (*Fiscal General*) with respect to the application of ILO Convention 169 or indeed the legal implications of articles 58 and 66 of the constitution. Many lawyers tend to view constitutional articles and

international conventions as abstract statements of principle rather than judiciable rights, arguing that secondary legislation is required to make the principles into binding law. The status of ILO 169 then remains highly contested.

Sipakapa: challenging the logic of neoliberal development through law

In recent years conflicts between indigenous peoples' views about development and state-endorsed investment practices have become acute in Guatemala, as they have in many regions of Latin America. As part of economic liberalization reforms, a new Mining Code was approved in 1997 (Decree no. 48-97). This law reversed previous restrictions on foreign companies owning 100 per cent of mining operations, increased tax breaks and investment opportunities for transnational capital and reduced the royalties payable to the Guatemalan state to just 1 per cent. This law is part of a global trend of legal reforms which are part and parcel of the neoliberal development model – some campaigners estimate that over seventy countries have 'modernized' their mining legislation in recent years.²⁵ In line with the new legislation, a significant number of licences for mineral, hydroelectric and oil exploitation were extended to domestic and foreign companies. This was part of an accelerated expansion of investment in natural resource exploitation which has occurred throughout the region since the early 1990s, driven by rising commodity prices and accompanied by complex processes of international financing. While these mining companies are registered in particular countries, they are subject to frequent mergers and acquisitions and operate through many different local subsidiaries, making it hard to keep track of precisely which economic interests are behind particular projects and where efforts to ensure greater accountability can be directed.

As a consequence of these new policies towards transnational capital, mining operations have begun in different sites throughout Guatemala, many of them in areas of high indigenous residence and extreme poverty. As mentioned above, indigenous peoples have no legal rights to territorial autonomy in Guatemala and – in common with the rest of Latin America – states retain the rights to subsoil resources. However, ILO 169, together with the 'soft law' of the World Bank, IDB and other donors, clearly points to a requirement for prior consultation about development projects which will affect indigenous peoples' ways of life. Yet in Guatemala, as elsewhere in the region, no regulatory framework to mediate the interests of private capital and the collective rights of indigenous peoples has been established. In his study of mining operations in indigenous areas of Peru, David Szablowski has observed that state support for mining development relies on a 'strategy of selective absence' whereby states effectively delegate the 'responsibility for the social mediation of mining development' to the mining companies (2007, p. 58). In a context characterized by extreme poverty, ethnic discrimination, chronic

mistrust on the part of indigenous communities towards government and suspicions of the motives and methods of transnational corporations, and continued state and para-statal violence, the prospect of effective and peaceful mediation by international companies is extremely low.

During the decade and a half since the peace accords were concluded, domestic and international NGOs and UN agencies working in Guatemala have worked to promote indigenous 'rights consciousness' and to strengthen local forms of indigenous organization. In 2004 and 2005 indigenous community activists in the western department of San Marcos mobilized to call on the government to annul a concession for open-cast gold and silver mining and processing, known as the Marlin project. The license for exploration was granted to Montana Exploradora SA, a subsidiary of Canadian mining company Glamis Gold, in 1996, the first mining project to be approved according to the new 1997 Mining Code. The project was supported by the World Bank, receiving some \$35 million in loans and \$10 million in equity investment from the International Financial Corporation, the branch of the World Bank which lends to private companies (Fulmer *et al.*, 2008; Solano, 2005). Although the licence was approved after the national congress had ratified ILO Convention 169, the indigenous Maya Mam and Sipakapense communities of the directly affected municipalities of San Miguel Ixtahuacán and Sipakapa were not consulted about the proposed mining project. The company began operations in San Marcos in 2004 and local protests soon gathered pace, drawing support from environmentalists, the Catholic Church and indigenous and popular organizations in other parts of the country. In January 2005 an indigenous protestor was killed when police opened fire on a demonstration in the neighbouring department of Sololá attempting to block the passage of mining equipment to San Marcos along the Panamerican highway. Sixteen indigenous activists, including the mayor of Sololá, were subsequently charged with terrorism (Solano, 2005).

The issue of adequate prior consultation was effectively put to the test in a protracted contest between Montana Exploradora and local activists. When Glamis applied to the World Bank's International Financial Corporation for support for the Marlin project, it had to organize consultations as a requirement to receive the loan. The company claimed it had spoken to around 3000 people in San Marcos. However, many of those supposedly consulted subsequently claimed that in fact company representatives had merely presented the mine as a *fait accompli* or 'done deal'. They alleged they had been given little information about the environmental and health impacts it might have, including those related to possible cyanide contamination of the water table. They also claimed that at no point did the company representatives give them an opportunity to make any decisions about the project. Predictably, the Marlin project was denounced as an anti-democratic imposition and demands grew for development priorities for the municipality and surrounding areas to be decided by local people.

In June 2005 a public consultation was announced by the municipal authorities of Sipakapa. This was to be held via open community assemblies in different villages. Montana Exploradora immediately tried to impede the vote, submitting a legal injunction to order the municipality to suspend proceedings. In the end pressure from the company forced the municipal mayor to back down. However, the local Community Development Council, a body set up as part of the ongoing process of municipal decentralization, held the consultation regardless. The 2002 legislation establishing rural and urban community development councils and the 2002 Municipal Code clearly state that the councils can convene plebiscites on matters of local concern affecting the rights and interests of indigenous communities at the request of indigenous authorities or communities, and that they will respect local indigenous principles, norms, procedures and forms of authority, including the community assembly.²⁶ In all, eleven out of thirteen villages voted against the mining development, mostly unanimously. The Ministry of Energy and Mines submitted an injunction to the Constitutional Court claiming that the popular vote was unconstitutional. However, the court upheld the villagers' right to organize a plebiscite and vote, citing ILO Convention 169 and the 2002 municipal code. However, the court failed to comment on the substance of the ballot itself: the communities in question had effectively rejected the mining operations, voting in favour or against the Marlin project in the community assemblies. Yet ILO 169, which partly inspired this quasi-legal mobilization, does not provide indigenous peoples with a right of veto. It merely affirms their rights to prior consultation and to the benefits of such development operations. When communities reject development initiatives such as the Marlin mine the Convention provides little guidance about how such conflicts can be resolved.

The Sipakapa consultation was the first time that an exercise of this type was held in Guatemala invoking ILO 169 to contest mining operations. In addition, a series of legal and quasi-legal or 'soft law' actions against the Marlin mining concession were filed outside the country by Guatemalan popular organizations and NGOs, evidencing the transnationalization of indigenous rights claims. UNISTRAGUA, a trade union confederation, filed a complaint with the ILO itself, alleging that the government had failed to meet its obligations to ensure due consultation. In addition, Madre Selva, a local environmental NGO, together with community representatives from Sipakapa, filed a complaint with the Compliance Advisory Ombudsman, the office that investigates complaints against projects funded by the World Bank's International Financial Corporation.²⁷ In August 2005 the World Bank's Compliance Advisory Ombudsman issued a report stating that the bank had failed to consult the local community adequately or properly evaluate the environmental and humanitarian impact of the mine.²⁸ The report also noted that regulations applying to mining operations in Guatemala provided no guidance on how companies should seek approval from local people for their activities. NGO activists also presented a case against the state of Guatemala before

the Inter-American Commission of Human Rights in the hope that the case would eventually be heard in the Inter-American Court of Human Rights.

These legal and quasi-legal engagements by indigenous social movements and their allies represent new developments in indigenous peoples' fight to defend their natural resources and territories. Subsequent to the Sipakapa poll, other indigenous communities organized similar consultation processes in opposition to proposals for natural resource exploitation. Yet the results of these different legal and quasi-legal engagements have been far from encouraging. NGOs and the mining companies have battled over the relative rights of indigenous peoples and mining companies in the Guatemalan courts. A major victory was achieved by campaigners in April 2007 when the Constitutional Court upheld an appeal against the 1997 Mining Law presented by the Centre for Legal, Environmental and Social Action (CALAS). However, the court's objections to the Mining Law were primarily on environmental grounds (Central America Report, 27 June 2008). On the more vexed issue of prior consultation rights for indigenous peoples, the court ruled in favour of an appeal put forward by Montana Exploradora claiming that the Sipakapa plebiscite was unconstitutional. The court's view was that such popular consultations had no basis in law and that the municipal authorities of Sipakapa had no right to forbid Montana from operating in the area, as only the Ministry of Energy and Mines could decide energy policies (Central America Report, 1 June 2007). The court's ruling points to the central weakness of ILO 169: while prior consultation must be ensured, its outcomes are not legally binding. Mining companies – and therefore the signatory governments that endorse their operations – can remain within the legal obligations set out by the Convention merely by ensuring that communities are informed about future developments. Unlike the 2007 UN Declaration on the Rights of Indigenous People, which stipulates that 'free, informed and prior consent' must be obtained, ILO 169 does not imply any rights of voice, much less veto, on the part of indigenous communities residing on the lands where such operations are carried out. Such partial recognition of rights, and the accompanying legal fragmentation characteristic of globalization, may result in long and exhausting legal engagements on the part of social movements without any guarantee of longer-term benefits. Despite attempts by indigenous organizations in Guatemala during 2008 and 2009 to promote legislation to regulate prior consultation, no new law has been approved by congress. Meanwhile construction of the mine and plant for cyanide processing of the ore at Sipakapa has continued, together with threats and intimidation against local activists who oppose the plant.

Conclusions

By juxtaposing the now internationally sanctioned collective human rights of indigenous peoples and the failure of governments to deliver on those rights in

practice, indigenous peoples' movements have framed a powerful critique of hegemonic forms of development and globalization. They have increasingly challenged liberal conceptions of rights premised on ideas of property as something which can be assigned a monetary value and allocated to, or bought by individuals, irrespective of their connection to a specific place. And in their demands for greater recognition of political autonomy rights they also call into question and destabilize established understandings of democracy and citizenship as a contract between individuals and government alone. Yet such challenges take place within an increasingly complex and fragmented panorama of globalized legal pluralism, where the promises contained within international charters of indigenous peoples' rights are often directly at odds with international and national legal regimes governing trade and investment.

Balakrishnan Rajagopal underlines the regulatory and emancipatory tensions of law when he writes that 'human rights discourse ... is now not only the language of resistance, but also that of governance' (2003, p. 168). I have suggested here that the legal recognition of indigenous peoples' rights by states and the international community has provided opportunities and risks for social movements. The codification of rights in legal instruments provides avenues for new forms of struggle and engagement. However, by its very nature such codification also determines certain categories – such as 'prior consultation' – which become the focus of legal dispute, risking the possibility that complex political and cultural struggles get reduced to highly technical debates over legal definitions. In Colombia the U'wa people fought a complex legal battle against oil exploration in their territories for more than fifteen years, involving complaints before the Colombian Supreme Court, the Constitutional Court and the Inter-American Commission of Human Rights. In each case, the key issue was whether the government had undertaken adequate consultation with indigenous communities prior to granting licenses for exploration. In the face of continued protests by U'wa groups, in January 2006 a decision by the Council of State (*Consejo de Estado*) held that the government had met its legal obligations with respect to prior consultation, that the lack of agreement between the government and the affected communities and the latter's refusal to take part in a consultation process did not affect the legality of the initiation of oil exploration.²⁹ Independently of the outcome of legal petitions, sectors of the U'wa continue to argue for a radically different vision of development. However, their experience of legal mobilization points to the difficulty of securing accountability and effective voice through actions before domestic and international courts.

The increasingly plural legal landscape associated with contemporary globalization has generated powerful new forms of regulation (including state-endorsed multiculturalism), but has also opened up new possibilities for counter-hegemonic struggles. However, ultimately state sovereignty is increasingly fragmented and the locus of legal and political responsibility – where the buck stops – far from clear. Creative engagements with the principle of collective rights for indigenous peoples enshrined in ILO 169 and at least

partially endorsed by multicultural constitutional reforms across Latin America are generating new forms of political action that press governments to make good on their promises. But, at the same time, given their failure to guarantee those rights in practice, this has led to increased levels of confrontation between indigenous peoples, government agencies and transnational corporations. In the fragmented sovereignties and legalities of contemporary states, legal recognition of rights for distinct cultural groups such as indigenous peoples has gone hand in hand with new forms of capital accumulation, violence and exclusion. As John and Jean Comaroff have observed, in many postcolonial states 'the reach of the state is uneven and the landscape is a palimpsest of contested sovereignties, codes and jurisdictions' (2006, p. 9). At the same time 'vastly lucrative returns ... inhere in actively sustaining zones of ambiguity between the presence and absence of the law' (2006, p. 5). The ever expanding opportunities for legal engagement generated by the codification of indigenous rights may also, ultimately, contribute to sustaining such forms of ambiguity and profit at the same time as it opens possibilities for new counter-hegemonic politics.

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Notes

1 The role of NGOs and civil society organizations in driving this global 'rights revolution' has been fundamental. As Douglas Cassel has observed, it would be wrong to view human rights law as an autonomous set of norms and institutions – 'without constant advocacy and agitation from NGOs, human rights treaties would not be drafted or ratified, enforcement mechanisms not created or used, and violators not constantly exposed' (Cassel, 2004, p. 20).

2 The Centro de Estudios Legales (CELS) in Argentina or DeJusticia in Colombia, for example, are trailblazers in advancing collective rights entitlements through public action litigation in Latin America.

3 For discussions of recent experiences of judicialization in Latin America and other new democracies, see Gargarella *et al.* (2006), Gloppen *et al.* (2004), Santos (2002), Sieder *et al.* (2005) and Couso *et al.* (2010).

4 On the transnationalization of legal fields, see Trubek *et al.* (1994).

5 Effectively foreign investors now have the right to file suit against laws or regulations at the national, state or local levels if they consider these may result in a breach of contract, even if these laws or regulations are enacted for public interest objectives, such as environmental protection or public health.

6 International commercial arbitration is often referred to as a kind of 'soft law' because of its apparently voluntary nature (the parties to a contract have to agree to be bound by such terms). Its growth has seemed to suggest to some that the law of nation-states is becoming increasingly irrelevant to international commercial transactions and the functioning of the global economy. Contracts are made between private entities and are increasingly regulated outside national legal systems and courts. However, a more sceptical view of this kind of legal globalization – while recognizing the importance and impact of these new transnational legal phenomena – would argue that state law continues to be central to global economic production and regulation. As Eve Darian-Smith observes, 'state sovereignty and state law have been important in sustaining, servicing, and enforcing global economic operations, and will remain so in the foreseeable future' (2000, p. 811).

7 As Randeria (2003, p. 320) underlines, the World Bank inspection panel ostensibly functions to review the extent to which bank staff have met the procedures and rules of the institution; it does not adjudicate between parties to a conflict.

8 Recent anthropological engagements with the state suggest that such apparent 'lawlessness' is not so much about the absence of the state; rather, it constitutes a defining characteristic of 'stateness'. The bibliography is extensive, but see Das and Poole (2004), Comaroff and Comaroff (2006) and Hansen and Stepputat (2001, 2005) for useful discussions.

9 It is analytically insufficient to juxtapose 'legal' state behaviour against illegal, non-state actions: the legal and the illegal exist in a constant interplay and indeed are constitutive of the very nature of law. See Veena Das and Deborah Poole (2004) on the Janus-faced nature of the state and its 'illegibility'.

10 In their analysis of 'subaltern cosmopolitan legality', Boaventura de Sousa Santos and César Rodríguez-Garavito emphasize three points: first, the fact that 'experiments in subaltern cosmopolitan legality ... seek to articulate new notions of rights that go beyond the liberal ideal of individual autonomy, and incorporate solidaristic understandings of entitlements grounded on alternative forms of legal knowledge' (2005, p. 16). Second, they argue against fetishizing the law, stressing the need to see counter-hegemonic legal actions as part of broader political struggles. And, third, they emphasize the multi-scale nature of such 'subaltern cosmopolitan legality', pointing to the ways in which social movements 'exploit the opportunities offered by an increasingly plural legal landscape' (2005, p. 16).

11 A detailed comparison of these reforms is beyond the scope of this paper. The nature and extent of the constitutional rights extended to indigenous peoples through this first round of 'multicultural reforms' continues to be a matter of controversy across the region. For an earlier overview, see Van Cott (2000b).

12 Richards examines the case of Chile – one of the few Latin American countries not to have reformed its constitution to recognize indigenous rights. Chile was also one of the last countries in the region to ratify ILO Convention 169, which was finally approved by President Bachelet in September 2008, following approval by the Chilean Senate.

13 See <http://www.unhcr.ch/html/menu3/b/62.htm> (accessed 4 January 2010).

14 The UN General Assembly approved the Draft Declaration with 143 states voting in favour. Only four countries voted against adoption – Canada, Australia, New Zealand and the United States – and eleven states abstained (Azerbaijan, Bangladesh, Bhutan, Burundi, Columbia, Georgia, Kenya, the Russian Federation, Samoa and Ukraine).

15 The UN Declaration, by codifying 'free, prior and informed consent', provides a much stronger instrument than ILO Convention 169, which merely affirms the right to 'prior consultation' – a much more ambiguous term.

16 OEA/Ser/L/V/II.95 Doc. 6 (1997).

17 The Inter-American Commission and Court uphold the instruments of the Inter-American system (the Declaration and the Convention), but also have a mandate to ensure respect for all human rights treaties ratified by member states – such as ILO 169.

18 An extensive bibliography exists about this case. See particularly Nash Rojas (2004), Rodríguez-Pinero Royo (2004) and Anaya and Crider (1996).

19 See comments by James Anaya, United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, in 'Anaya: Nicaragua's titling of communal lands marks major step for indigenous rights', <http://www.galdu.org/web/index.php?odas=3577&giellal=eng> (accessed 4 January 2010).

20 This document can be found at http://www.iadb.org/sds/IND/site_401_e.htm (accessed 4 January 2010).

21 'For the purposes of this policy, the term *indigenous peoples* refers to those who meet the following three criteria: (i) they are descendants from populations inhabiting Latin America and the Caribbean at the time of the conquest or colonization; (ii) irrespective of their legal status or current residence, they retain some or all of their own social, economic, political, linguistic and cultural institutions and practices; and (iii) they recognize themselves as belonging to indigenous or pre-colonial cultures or peoples.'

22 Guatemala's majority indigenous population who constitute the poorest and most marginalized sector of the population. According to World Bank figures for 2000, while Guatemala's twenty-three indigenous groups represented 43 per cent of the population (a conservative estimate), they accounted for 58 per cent of the poor and 72 per cent of the extremely poor. Almost three-quarters of indigenous people live in poverty, as compared with 41 per cent for non-indigenous (World Bank, 2003, p. 4).

23 In contrast to high courts in other Latin American countries, neither Guatemala's Supreme Court nor its Constitutional Court (created in 1986) has developed a proactive, rights-enforcing jurisprudence. On the role of high courts in 'rights revolutions', see the essays in Sieder *et al.* (2005) and Couso *et al.* (2010).

24 In its opinion the court stated that no incompatibility existed between the 1985 constitution and Convention 169. Constitutional Court of Guatemala, case file 199-95.

25 Rights Action (2005: 9).

26 Ley de Consejos de Desarrollo Urbano y Rural, article 15; Código Municipal, article 65.

27 For a discussion of mining and the World Bank, see Szablowski (2007); for a more detailed discussion of the Sipakapa complaint before the Compliance Advisory Ombudsman, see Fulmer *et al.* (2008).

28 See Compliance Advisory Ombudsman (2005).

29 For full text of the decision, see http://www.ramajudicial.gov.co/csj_portal/assets/consejoestado/1708.htm (accessed 4 January 2010).

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