

CHILE

Nine indigenous peoples are legally recognised in the country:¹ the Aymara, Lickanantay, Quechua, Collas and Diaguita, the inhabitants of the Andean highlands and valleys of the north; the Rapa Nui from the Polynesian island of *Te Pito o Te Henua* (Easter Island); the Mapuche from the temperate and rainy *Wallmapu* in the south; and the Kawashkar and Yamana, from the southern Patagonian Channels. The population that self-identifies as belonging to or descending from one of these peoples numbers 1,188,340, or 7% of the country's total population.²

Chile voted for the adoption of the UNDRIP in 2007 and on 15 September 2008, Chile ratified the ILO Convention 169

2010 went down in the collective conscience as a year of tragedies that put the country's capacity to rise from its own ashes to the test. The earthquake and tsunami of 27 February hit the most populated area of the country. The loss of almost 600 lives bore no relation to the magnitude of the phenomenon nor to the material damage caused over an area of around 1,000 kms, including the region of Araucanía or *Wallmapu*, home to the Mapuche. In addition to the lamentable loss of life, the earthquake also forced more than 500,000 Chileans (indigenous peoples included) below the poverty line, exacerbating the increasing poverty already noted in the 2009 Casen survey.³ This survey - published in May - noted a one percentage point increase in indigenous and Chilean poverty over the three-year period 2006-2009, precisely when the country was obtaining its highest revenues as a result of the price of copper on the international market. This revelation of the unfair distribution of internal wealth must be added to the scant progress observed in terms of human rights. Legal reforms that would have guaranteed the exercise of rights were not introduced, and nor were public policies for indigenous peoples in line with international standards and recommendations.

New government, old practices in indigenous policy

In March 2010, Sebastián Piñera, the Coalition for Change's candidate, took over the presidency of the country. The political right has not won a majority by democratic means since 1958. In terms of indigenous peoples, Piñera's government programme noted an intention to continue the policies implemented by President Bachelet in the last phase of her mandate. Over this period, the formal relationship between policies and indigenous rights was abandoned and, in the case of the Mapuche, policies were refocused around poverty reduction, conflict prevention and institutional reforms. The move from Bachelet's "*Social Agreement for Multiculturalism*" to Piñera's "*Araucanía Plan*" had begun before the government handover and reveals a political agreement for transition.⁴

The nomination by the new government of senior civil servants linked to both the coordination and financing of public policies for indigenous peoples, who in the past had questioned Chile's approval of the international legal instruments for indigenous peoples (Sebastián Donoso as head of indigenous affairs⁵ and Felipe Larraín as Minister of Finances⁶) made it possible to foresee not only a stagnation, but even a setback with regards to the development of domestic policies related to the exercise of indigenous rights.

The way in which the National Corporation for Indigenous Development (CONADI) administered the Lands Fund demonstrated that these fears were not unfounded. Under the leadership of a director of Mapuche origin, supervised directly by Sebastián Donoso from the Ministry of the Interior, CONADI had the worst budgetary implementation since its creation in 1993. Of the almost 158 million dollars that made up its annual budget for 2010 - 98 million of which was for the Lands Fund – almost 100 million dollars had to be returned to the Treasury⁷ for lack of implementation, most of this corresponding to the budget for land purchases.

This dreadful management cannot be explained away as merely an issue of administrative negligence; it also reflects a change in the direction of the land policy, the tangible effects of which could be seen in the rules for the "*12th Tender for subsidies for the purchase of indigenous lands 2010*".⁸ Article 8 established a misunderstood criterion of equity which equalled the amount of funds available for families applying to these subsidies individually to the amount available for collective applications. This decision specially affected those communities applying for subsidies considered in Article 20(b) of the Indigenous Law of 1993 (cases in-



volving land conflicts), whose possibilities of receiving state funds to purchase ancestral lands or lands which had been usurped, were financially limited. In accordance to this new modality, state subsidies are not aimed at the reparation of indigenous peoples or oriented to the implementation of an indigenous right, but are oriented towards the acquisition of lands for productive purposes only. The

application of this financial criterion restricts the communities' possibilities of recovering their ancestral lands, affecting, first and foremost, 115 Mapuche communities to whom the state had made a commitment to purchase lands in a process that was due to be concluded at the end of 2010.

Hunger strike: reforms to the military justice system and the anti-terrorist law

In July, 34 Mapuche being prosecuted for offences related to social protest actions under the anti-terrorist law began a hunger strike to draw the public's attention to the lack of guarantees of due process in the cases raised against them. In a number of these cases, people were being tried before the military courts for the crime of assault and battery of police officers, and then again before the civil courts for crimes under the anti-terrorist law.

The numerous public demonstrations in support of their demands and international pressure with regard to their procedural situation and humanitarian conditions forced the government to begin a negotiation process that finally ended in an agreement signed with the hunger strikers on 1 October. Based on democratic principles, the domestic legal code, international human rights law and ILO Convention 169, the agreement committed the government to "abandoning all lawsuits for terrorist crimes and reconsidering such actions under the rules of common criminal law",⁹ and to continue promoting, through the National Congress, "reforms to the Military Justice Code so that civilians are tried before the ordinary courts, thus avoiding a double court case, [and] bringing it into line with the principle of due process."¹⁰

In order to put an end to these double prosecutions, Congress received a legislative initiative from the government in October and approved a law that partially modified the military criminal court's jurisdiction by excluding civilians and minors (Legislative Bulletin 7203-02). According to a transitory system included within the same law, the Mapuche cases being heard before the military courts should therefore be transferred to the ordinary justice system within a period of no more than 60 days following the law's entry into force.

The part of the text of the agreement that brought the hunger strike to an end committed the government to abandoning lawsuits for terrorist crimes and reconsidering them as common law crimes. In Chile, according to the anti-terrorist law, common crimes against property, such as arson or damage to vehicles or ma-

chinery may be considered a terrorist crime if the judges determine that the crime was committed with the aim of instilling terror in the population. According to the National Human Rights Institute (*Instituto Nacional de Derechos Humanos* INDH), one aspect that caused great controversy in the debate on the draft reform was protection of the right to property, particularly with regard to arson of uninhabited buildings, which is classified and punished in the criminal code. The importance of the debate revolves around the fact that, if we look at the cases pending before the Cañete and Lautaro courts, it can be seen that 16 Mapuche community members have been accused of the crime of terrorist arson, while 32 more are being investigated for the crime of common arson.¹¹

Alongside the government's commitment to drop the cases relating to terrorist crimes, Law No. 20,467 was published in the Official Bulletin on 8 October 2010, introducing amendments to the anti-terrorist law. Broadly speaking, this reform removes the assumption that a crime has a terrorist aim simply because of the means used to commit it (for example, the use of incendiary devices), a relationship that in future will have to be proved. It also establishes a ban on applying the procedure established in the anti-terrorist law to minors, to whom the procedure and reduced penalties of the Law on Juvenile Criminal Responsibility should be applied, along with a provision that allows the defence to directly question "faceless" witnesses and experts. This amendment, however, did not impede the inclusion of faceless witnesses which seriously harms due process rights.

The system for extending the period of detention was maintained, along with the possibility of decreeing further exceptional precautionary measures such as detention in special places, restricted visiting regimes, interception of the detainee's communications and a six-month period of secrecy.

Although the reform was viewed favourably for its positive aspects, the anti-terrorist law retains standards which are not only far removed from international human rights standards but which are also questionably effective in terms of the objective of re-classifying the crimes of which the Mapuche are accused, as they do not necessarily prevent its arbitrary use in current and possible future cases.

Police violence and violations of rights on Rapa Nui (Easter Island)

The island of Rapa Nui (Te Pito or Te Henua, *the centre of the world* in the language of its inhabitants) is situated in Polynesia, 3,800 kms from the South American

coast. The Rapa Nui people signed a voluntary agreement with the Chilean state in 1888 in which, according to the Rapa Nui version, the ownership of their ancestral lands was guaranteed to them. The state, in contravention of this agreement, proceeded in 1933 to register the island's lands in the name of the state, arguing, in accordance with Article 590 of the Civil Code, that they were vacant lands.

In mid-2010, groups of Rapa Nui families began a process of peaceful occupation of public and private buildings as a way of pressurising the government to recognise their ancestral property rights to the land on which these buildings are located and, also, to respect the island's territory, which belongs to them by ancestral right. In reaction to the social protest commenced by the clans, the government established working groups charged with addressing their demands, including the situation of occupied lands, immigration problems, the production of a development plan and the island's rank as special territory. The clans' representatives criticised this approach or its lack of consistency with the territorial demands and for the lack of consultation procedures, in accordance with current legislation and, in particular, the provisions of ILO Convention 169.

Alongside this, the government chose to use pressure to clear the disputed buildings. These measures were implemented on 7 September, a day before the formal constitution of the working groups. Another eviction took place on 3 December and left numerous islanders injured - some with shot wounds. Finally, on 29 December, a group of 70 islanders who were protesting in Riro Kainga square were evicted by a hundred heavily armed police officers who beat up around 20 people, including women and children.¹²

In this context, on 16 December, in hearings held in two cases before the Easter Island Criminal Court, the Public Prosecutor formally charged five members of the Tuko Tuki clan with alleged crimes of peaceful seizure and violation of dwellings. The stated crimes had been reported by officials from the Ministry of Public Works (MOP) who were living in buildings located on the ancestral territories claimed by the clan and which are up for discussion in the working group proposed by the Vice-president of the Republic.

In carrying out these evictions, which were in violation of fundamental guarantees and conducted under a cloak of legality, the actions of the police, the public prosecutor and the judge on Easter Island have created an atmosphere of mistrust among the Rapa Nui who, despite complying with the legal rulings against them and presenting their demands to the working groups set up by the govern-

ment, claim that they have been the victims of threats and the disproportionate use of force on the part of the authorities.

The UN Special Rapporteur on the rights of indigenous peoples, James Anaya, stated his concern at these evictions and violent clashes, recommending to the government that “the police presence on the island should not exceed what is necessary and proportionate to ensure the safety of the island’s inhabitants,”¹³ and urging it moreover to make the utmost efforts to conduct a good faith dialogue with the Rapa Nui representatives on underlying issues given

*that this is particularly pressing in relation to the recognition and effective guarantee of the right of the Rapa Nui clans to their ancestral lands, based on their customary ownership, in accordance with ILO Convention 169, to which Chile is a party.*¹⁴

Indigenous peoples and natural resources: situation in the north of the country

On the basis of specific legislation adopted to govern the use and management of natural resources – based on a system of private concessions protected by the right to property - the state has guaranteed the expansion of the global economy into the indigenous territories, continually backing the numerous investment projects planned by individuals or promoting large public projects located on indigenous territories without considering the wishes of the communities living there, with serious social, cultural and environmental consequences.

In the north, the indigenous Lickanantay, Quechua and Aymara living in the area of the Loa River have seen their access to this river affected due to the monopolisation of water rights by water and mining companies. The group of local indigenous communities administers 34% of the water rights established in the basin, 36% are in the hands of water companies and 30% in the hands of mining companies. The large mining investment projects planned in the basin will herald an expansion of the urban population and thus increase pressure on water resources, which will most probably have a negative impact on the indigenous communities.

In addition, the state has encouraged the mass expansion of geothermal energy projects on northern indigenous territories in order to satisfy the demand for energy created by the growth in large-scale mining. For this reason, and by

means of Law 19,657 on Geothermal Energy Concessions, privatisation of this resource has been permitted, protecting the concession holders' rights through the right to property. The law also declares 20 thermal water sites ancestrally owned by the indigenous peoples as probable sources of geothermal energy. During 2009, 20 concessions were awarded in just one go, without the affected communities having been consulted and even against their wishes. During 2010, 90 geothermal concessions were under negotiation, the majority of them compromising indigenous territories.

In the south of the country, the Sollipulli area has been included in the call for tenders for a geothermal exploration area. This area covers various mountainous communities of Araucanía, affecting around 17 Mapuche communities and a protected area (Villarrica National Reserve). As in the north of the country, the actions of the administrative authorities and all the procedures have been undertaken without implementing the consultation established in ILO Convention 169. The affected communities have begun administrative and legal proceedings to defend their territorial rights without, however, any concrete results to date.

Large mining projects have also had an impact on non-renewable water reserves such as the glaciers. The Pascua Lama gold megaproject being implemented on the ancestral territory of the Diaguita de los Huascoalinos community by CMN Nevada Ltd. (a subsidiary of Barrick Gold Corporation) is particularly critical given its size and because its impact may herald the disappearance of the main water reserves contained in the mountain glaciers (Estrecho, Toro I and II, Esperanza and Guanaco), particularly as the mining project is located under the ice. In addition, it is causing contamination of the water table of these glaciers (El Estrecho and Chollay rivers), affecting all the river communities downstream.

The environmental approval granted to the Barrick Gold Company by the Regional Environmental Commission (COREMA) in order to develop a limestone mine to supply Pascua Lama is only exacerbating the environmental degradation yet more, not to mention the fact that the location of this mine will directly affect the Diaguita indigenous territory.

In the case of Pascua Lama, a complaint is pending before the Inter-American Commission on Human Rights, aimed at establishing the Chilean state's international responsibility for violating the rights enshrined in the American Convention on Human Rights by authorising the project against the wishes of the indigenous communities and without safeguarding their territorial rights. This case was declared admissible on 12 February 2010, and has given rise to Case No. 12,741. ○

Notes

- 1 Indigenous Law No. 19,253 of 1993.
- 2 Government of Chile. Encuesta Caracterización Socioeconómica Nacional, CASEN, 2009. Unlike in previous years, the survey summary published in May 2010 omitted to list the population of each indigenous people.
- 3 http://www.mideplan.gob.cl/casen2009/RESULTADOS_CASEN_2009.pdf
- 4 *Informe alternativo 2010 respecto del cumplimiento del Convenio 169 sobre pueblos indígenas y tribales de la OIT, al cumplirse un año de su entrada en vigencia en Chile*, 1 September 2010. Available at: <http://bit.ly/dVSqLs> [Consulted on: 25-01-2011]
- 5 Two articles by Sebastián Donoso criticising the ratification of Convention 169 and the application of special measures in favour of indigenous peoples can be found in: *Chile y el Convenio 169 de la OIT: reflexiones sobre un desencuentro* from 2008, available at: <http://bit.ly/c3HxfQ> [Consulted on: 25-01-2011], and: *Lo negativo de la discriminación positiva* from 2004, available at: <http://bit.ly/9RfDaD> [Consulted on: 10-01-2011]
- 6 For Felipe Larraín, international law on indigenous rights encourages separatism. See his opinion in: *Comisión de Verdad Histórica y Nuevo Trato: opinión de minoría*. Available at: <http://bit.ly/f1RpT7> [Consulted on 10-01-2011]
- 7 Although numerous public authorities acknowledged the lack of budgetary implementation, the amounts returned were never specified. The figure of 50,000 million pesos (100 million dollars) is an estimate made by the Governor of the Region of Araucanía, Andrés Molina, in statements to the press. See: *Bio-Bio La Radio.- Intendente de La Araucanía califica como histórico el gasto presupuestario del 2010*. Available at: <http://bit.ly/ezWMoD> [Consulted on: 10-01-2010]
- 8 **CONADI, 2010:** *12º concurso subsidio adquisición de tierras por indígenas año 2010*. Available at: <http://bit.ly/fKsZnp> [Consulted on: 10-01-2010]
- 9 *Texto del Acuerdo*. Concepción, 1 October 2010. Available at: <http://bit.ly/eMTJVs> [Consulted on: 10-01-2011]
- 10 Idem.
- 11 INDH, stated report, p. 110.
- 12 *Violento desalojo en Rapa Nui 29 dic 2010*. Video available at: <http://bit.ly/hzHPtY> [Consulted on: 25-01-2011]
- 13 *Declaración del relator especial de la ONU sobre los derechos de los pueblos indígenas, James Anaya, ante los desalojo de indígenas rapa nui*. 12 January 2011. Available at: <http://bit.ly/dR19Is> [Consulted on: 25-01-2011]
- 14 Ibidem.

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