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DIPLOMARBEIT

Titel der Diplomarbeit

„The persistent impact of Pinochet’s policy concerning resource rights of the Mapuche with special focus on the forestry sector“

Verfasserin

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angestrebter akademischer Grad

Magistra (Mag.)

Wien, 2011

Studienkennzahl lt. Studienblatt:

A 057 390

Studienrichtung lt. Studienblatt:

Internationale Entwicklung

Betreuerin / Betreuer:

Ao.Univ.-Prof. Dr. iur. René Kuppe

Acknowledgements

First and foremost, I want to thank my family and my friends who at all times have supported and encouraged me during my studies and the process of writing this thesis. Moreover, I would like to express my gratitude to Prof. René Kuppe who aroused my interest in the topic of indigenous peoples.

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1. Introduction

1.1 Research question and chapter outline

“The situation of most indigenous people is one of poverty and marginalization as a result of the discrimination from which they have historically suffered” (Stavenhagen 2003: 5).

The approach on indigenous peoples in Chile by the state is still one of discrimination and suppression. Chile has followed the ideal of a unitary homogenous state. This ideal reached its peak under the military dictatorship, which lasted from 1973 to 1989. The indigenous Mapuche were persecuted, their indigenousness negated and their living space reduced even further. This was conducted by applying a discriminatory legal regime accompanied by illegal land seizure for the purpose of an export-oriented economic approach based on natural resources. However, this unequal treatment towards Chile’s indigenous population during the dictatorship was kept up despite the change to democracy in 1993. Although the succeeding democratic governments of the *Concertación* tried to meet some concerns of the indigenous peoples they never gave in to a comprehensive improvement and renunciation of Pinochet’s indigenous policy.

I chose to analyse the Mapuche people’s struggle for land and resources. The question how former military dictator Augusto Pinochet’s policy has influenced land and resource rights of the Mapuche in Chile guides this thesis. Moreover, the question whether the democratic governments of the *Concertación* managed to respect and protect indigenous rights sufficiently is followed. Therefore, the aim of this thesis is to outline how structural injustice provided for in national legislation and paired with a repressive approach towards the Mapuche, still helps the Chilean post-dictatorship governments conduct the ideal of a free market economy and a unitary state.

Under Pinochet, Chile was the first Latin American country to run through a complete neoliberal transformation according to the school of the “Chicago Boys”. Since then the economy has been predominantly based on the extensive exploitation of natural resources. However, this economic approach directly interferes with the Mapuche’s living space. As the areas inhabited by Mapuche were and still are targeted by the forestry industry and threatened by major infrastructural projects, relentless conflicts over land and resources were created as portrayed in this thesis. One needs to bear in mind that the Mapuche as an indigenous people

have a completely different attitude towards nature, land and natural resources strongly contradicting the market logic promoted by the state.

Due to an ineffective national indigenous law introduced by the first democratic government in 1993, which is predominantly adapted to the needs of the market this struggle over land favours the Chilean state and hence companies as disposers over land and resources. The state - striving for a prospering export economy - permits and even encourages enterprises to engage in forestry and infrastructural activities in southern Chile, thus in regions where the Mapuche live.

The economic interest the state and companies have in areas inhabited by Mapuche leads to conflicts. The use of violence and the breach of human rights especially by the application of repressive laws stemming from Pinochet's times towards the Mapuche are the means to enforce the access to land and resources.

This thesis will demonstrate the severe changes introduced by Pinochet on a legal as well as an economic level and their persistent effects on the lives of the Mapuche. Pinochet's impact on the Mapuche on a legal and a socio-economic level was grave rendering them the poorest and most marginalised group in the country. Nevertheless, there have been some remarkable efforts to finally recognise indigenous peoples as a part of Chilean society including their special relationship to land and rights emanating from this relationship. However, the crucial constitutional recognition of indigenous peoples in Chile has not been achieved yet. The ratification of the most important international document referring to indigenous peoples' ILO Convention N° 169 is one example for the process of growing recognition. This fact may change the approach and open up to new discussions and maybe finally the constitutional recognition of these peoples. However, one needs to bear in mind that the mere existence of legal provisions dedicated to the protection of indigenous rights is not sufficient in practice.

First, I will give an outline on the concept of indigenous peoples and portrait of the Mapuche people from a social and cultural point of view. The next step will be to give a historic overview ranging from the invasion by the Spaniards to the Chilean state's treatment towards its indigenous population in the 20th century. I will emphasise on specific legislation concerning the indigenous people up to the socialist Allende government in the early 1970s.

In the next chapter I will elaborate on the time of the Pinochet regime and its devastating effect on the Mapuche on a legal, social and cultural level. Subsequently, I will focus on the change to democracy and the new governments dealing with the *Cuestión Indígena* and their arrangement with Pinochet's legacy. Then I will elaborate on the Chilean forest and its significance for the Mapuche people, especially the Pehuenche. In these chapters I will mainly

focus on the continuous impact of the Pinochet regime on decisions made by subsequent democratic governments and the conflicts arising out of contradicting views and demands.

I will portray the conflict by delivering an overview of the struggle over land and resources in the forestry sector and therefore between Mapuche and logging companies. The use of legal instruments introduced under Pinochet and even worsened by the *Concertación* will be taken into account. Moreover, I will outline the resistance of the Mapuche and their movement and organisations.

Finally, I will focus on the international level and discuss certain legal instruments construed to protect indigenous peoples' rights and Chile's position towards and implementation of international law it has committed to.

1.2 Who are indigenous peoples

1.2.1 The notion of indigenous peoples

Firstly, I would like to explain the concept of an indigenous people and the significance of the term itself. It is rather complicated to give a clear definition of "indigenous peoples" or to explain the meaning of "indigenusness". There are several international institutions, which have provided definitions of the term such as the UN Working Group on Indigenous Populations¹ (WGIP), the International Labour Organization in its Conventions N° 107 and N° 169 and others such as the World Bank.

In the eyes of the UN Working Group on Indigenous Populations, objective criteria, such as historical continuity as well as subjective factors including self-identification need to be taken into account when defining indigenous peoples (Pritchard 1998: 43).

The WGIP asked the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, José Martínez Cobo, to give a definition, which he did in his famous *Study on the Problem of Discrimination against Indigenous Populations*². Martínez Cobo's comprehensive Study was elaborated between 1972 and 1986. His definition of indigenous peoples was used by the WGIP:

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

¹ The WGIP was established in 1982 and was a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights and met annually in Geneva. Due to the reform of the UN human rights machinery it was replaced by a new expert mechanism on the rights of indigenous peoples (Office of the UN High Commissioner for Human Rights 2010).

² See also UN Doc. E/CN.4/Sub.2/1986/7.

accordance with their own cultural patterns, social institutions and legal systems (Martinez Cobo qtd. By Pritchard 1998: 43)."

"This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

- a) Occupation of ancestral lands, or at least of part of them;*
- b) Common ancestry with the original occupants of these lands;*
- c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);*
- d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);*
- e) Residence on certain parts of the country, or in certain regions of the world;*
- f) Other relevant factors" (Martinez Cobo qtd. by Department of Economic and Social Affairs 2004).*

Martinez Cobo defines an indigenous person as:

"On an individual basis, one who belongs to these Indigenous populations through self-identification as Indigenous (group consciousness) and is recognised and accepted by these populations one of its members (acceptance by the group)" (Martinez Cobo qtd. by Pritchard 1998: 43).

"This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference" (Martinez Cobo qtd. by Department of Economic and Social Affairs 2004).

It needs to be noted that Martinez Cobo's definition remains the most accepted on international level. Moreover, indigenous representatives themselves announced at the World Council of Churches in 1996 that they endorsed the definition given by Martinez Cobo, *"we categorically reject any attempts that Governments define Indigenous Peoples. We further endorse the Martinez Cobo report"* in regard to the concept of "indigenous"³ (Department of Economic and Social Affairs 2004).

Furthermore, ILO Convention N° 169 elaborates on the term indigenous as well as tribal peoples⁴. The Convention N° 169 is the most important international treaty directly and comprehensively referring to indigenous peoples' rights⁵. However, it rather gives a statement of coverage than a definition, stating that

*"peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions"*⁶

Moreover, the factor of self-identification is again mentioned as a fundamental criterion in order to determine these groups (ibid. 2004).

³ See also UN Doc. E/CN.4/Sub.2/1996/21.

⁴ The term tribal peoples is also used by the ILO since there are people who are not indigenous in the literal sense but live in similar situations such as the Maasai in Africa (Department of Economic and Social Affairs 2004).

⁵ See also chapter 6.

⁶ Art. 1 ILO Convention N° 169.

Regarding the concept of “indigenous peoples”, the prevailing view today is that no formal universal definition of the term is necessary. For practical purposes the understanding of the term commonly accepted is the one provided in the Martinez Cobo study (ibid. 2004).

1.2.2 The special relationship to land and the notion of collective rights

One aspect I’d like to stress in this thesis is the special relationship indigenous peoples have to land very much differing from the one western society’s are used to. One might wonder which aspects actually distinguish indigenous peoples from predominant societies and why they need special protection. Former Chairperson and Rapporteur of the UN Working Group on Indigenous Populations Erica-Irene Daes elaborated in her report⁷ about indigenous peoples and their relationship to land that there are some elements unique to indigenous peoples:

- *“they have a profound relationship to their lands, territories and resources,*
- *this relationship entails multiple social, cultural, spiritual, economic and political dimensions as well as responsibilities,*
- *the collective dimension of this relationship is significant and*
- *the inter-generational aspect of such a relationship is also crucial to indigenous people’s identity, survival and cultural viability” (Daes 1997:5).*

Clearly, the special and distinctive feature stressed by Daes is the one of the relationship towards land. Therefore, when dealing with indigenous peoples their crucial relationship to the land they live on and the resources they base their lives on has to be given special attention. Land is the foundation for indigenous life, culture and social organisation.

“Indigenous peoples’ agricultural and other land use patterns provide means of subsistence, and, further, are typically linked with familial and social relations, religious practices, and the very existence of indigenous communities as discrete social and cultural phenomena“ (Anaya/Williams 2001: 49).

As the land provides the basis of livelihoods of indigenous peoples, they need to rely on the access to their traditional lands and resources in order to achieve their economic sustenance as well as to preserve their cultural and spiritual identity (Skjævestad 2008: 1). Land is not a mere object of possession or production; it is part of the total environment indigenous peoples

⁷ See also UN Doc. E/CN.4/Sub.2/1997/17.

live in. The link to the land is a spiritual one (Nesti 1999: 16). Therefore, the rights to land and resources are fundamental to indigenous peoples and their protection is of utmost importance in order to enable their ways of life.

In indigenous cosmology land is not considered a good or commodity. It is used in common. Therefore, the relationship to land is also one of a collective character. Rights, which focus on collectivity, the peoples, as the means by which individuals can enjoy them are those mostly linked to indigenous peoples (ibid. 1999: 14).

Other “collective rights” which relate to the rights of peoples are the right to self-determination, the right to development, the right to a healthy environment and the right to control and enjoyment of natural resources enshrined in international agreements (ibid. 1999: 14). However, these rights are object of severe debates and controversy. Nevertheless, the collective character of indigenous peoples’ relationship to land has been confirmed at the international level such as in the Martinez Cobo report. Moreover, ILO Convention N° 169 recognises the collective character of the relationship to land and considers land as the total area occupied by indigenous peoples (ibid. 1999: 17). Moreover, the UN Declaration on the Rights of Indigenous Peoples confirms the collective nature of the relationship to land and resources⁸.

1.3 Indigenous peoples in Chile

Today, there are still living members of eight different indigenous peoples in Chile, which are estimated to constitute about 4 to 10 per cent (about 700,000 to one million) of the total Chilean population (Heise 2000: 106). In the northern parts of Chile these people are the Aymara, the Quechua, the Colla and the Cunsa or Atacameños.

The Mapuche are concentrated in the south and the Santiago metropolitan area and inhabit the south-central regions of Chile and Argentina and constitute the largest indigenous group in Chile - 604,000 persons according to the 2002 census (Instituto Nacional de Estadística 2002: 23). Although the 2002 census counted 604,000 people as Mapuche their organisations claim they constitute 900,000 people.

The Rapa Nui live on Easter Island and are about 2,000 people today. The Kawashkar or Alacalufe, the Yámana or Yagan, live in the far south and constitute a vanishing number almost close to extinction. In my thesis, I will focus on the Mapuche people, constituting the

⁸ See also chapter 6.

largest indigenous group in Chile and the third largest indigenous population after the Quechua and Aymara in South America (Heise 2000: 107).

1.3.1 The Mapuche people of Chile

“The present situation of indigenous people in Chile is the outcome of a long history of marginalization, discrimination and exclusion, mostly linked to various oppressive forms of exploitation and plundering of their land and resources that date back to the sixteenth century and continue to this day. The current problems facing indigenous peoples cannot be understood without reference to the history of their relations with Chilean society”(Stavenhagen 2003: 6).

Mapuche means “people of the land”, *mapu* meaning land and *che* meaning people. However, *mapu* has a broader meaning than just “land”, it also means homeland, territory and earth which also reflects the strong bond of the Mapuche to their land. If it is robbed their ethnicity will suffer the same fate (Herrmann 2005: 11).

Originally, the Mapuche inhabited the southern cone of South America, which today covers half of Chile and half of Argentina. Researchers estimate that they have inhabited the area for 13.000 years (CONADI 2010). Today they predominantly live between regions⁹ Eight - Bío Bío, Nine - Araucanía and Ten - Los Lagos. The highest concentrations of Mapuche can be found in the provinces of Arauco, Bío Bío, Malleco, Cautin, Valdivia, Osorno, Llanquihue and Chiloé (Nesti 1999: 40). In the provinces of Malleco and Cautín in Araucanía they almost constitute 40 per cent of the total population (Calbucura 1993: 2). Around 36 per cent of the Mapuche people live in rural areas, whilst the predominant proportion of 54 per cent of them live in the area of the capitol Santiago and other cities (Heise 2000: 107).

1.3.1.1 Named after regions

The Mapuche who form one ethnical group are named after the geographical areas inhabited. The Mapuche territory is divided into four main regions or *wallmapu*: *puelmapu* - land of the east, *pikunmapu* - land of the north, *lafkenmapu* - land of the pacific coastal region in the west and *huillimapu* - land of the south (Being Indigenous 2009). Accordingly, the Mapuche people living in these regions are called Pikunche - people of the north and Huilliche - people of the south. Mapuche Lafkenche means the people living on the Pacific coast. Moreover, the Mapuche Pehuenche are so called because of their association with the *Araucaria araucana*

⁹ Chile has 15 administrative units called regions, represented by Roman numerals. In 2007, the Chilean Congress has declared two new regions – region XIV Los Rios (with Valdivia as its capital) and region XV Arica-Parinacota. These newly assigned numbers break the former geographical numerical order from north to south, the numerical system may be dropped in the future in favour of formal names (Chester 2008: 3). If the X Region is mentioned in this thesis the new XIV region Los Rios is included, due to practical reasons the old numerical order is followed in order to avoid confusion.

tree¹⁰ or in *Mapudungun*, *pehuen* (Herrmann 2005: 32). However, the dominant group inhabiting the centre calls itself Mapuche only.

All mentioned groups have the same language, *Mapudungun*, which exists in regional dialects differing slightly from each other. Nevertheless, all Mapuche groups understand *Mapudungun* (Heise 2000: 107). The common language is a vital part of strengthening identity and therefore being part of the Mapuche. Also, Mapuche are often referred to as *Araucanos* and *Araucania* as their living area. This name however, has a negative connotation for the Mapuche themselves since the term is related to the history of suppression during colonisation.

1.3.1.2 Culture

Shortly before the Spaniards arrived in 1541, the Incas expanded to the northern part of the Mapuche territory. Due to the influence of the Inca the Pikunche living in the northern area adapted their agriculture and irrigation (Instituto de Estudios Indígenas 2003: 158). They were under strong influence of the Spaniards and were heavily depleted during the time of colonisation. The Pikunche mixed into the Chilean rural population and no longer exist today (Lindig/Münzel 1976: 232).

In the central region, the Lafkenche and the Pehuenche practiced slash and burn cultures, agriculture and breeding of livestock. In the southern part of the Mapuche territory, the people lived on hunting, fishery and gathering (Heise 2000: 108). Despite practising horticulture on a small scale, the Mapuche developed techniques, which allowed them to live from the rich resources provided by forests, the sea, lakes and rivers.

The Pehuenche used to live in the cordillera between the 37th and the 39th degree of latitude (ibid. 2000: 109). As described in 5.3.1 they were and are more vagrant since they had to trek from the western valleys of the Andes to the plains of Eastern Patagonia to gather the seeds of the *Araucaria araucana* trees. Today, the lives of the Pehuenche are still deeply connected to the *Araucarias*, which are also called monkey-puzzle trees. The Pehuenche still maintain this way of life more than other Mapuche. One of the reasons might be the remote geographical location they mainly live in.

The Huiliche concentrated south of the Rio Toltén, predominantly live by seashores and therefore live of fishery, the gathering of shells and cultivation of potatoes (ibid. 2000: 109). Summarising, the Mapuche predominantly lived of agriculture and breeding of livestock,

¹⁰ See also 5.3.

additionally they were hunters and fishers and gathered fruit, seeds, plants and roots (ibid. 2000: 109).

Today the rural Mapuche mainly cultivate wheat and breed cattle as well as sheep and have to sell vegetables and handicraft on markets due to lower output of the land since their lands got diminished¹¹ (ibid. 2000: 109). Due to the abundance of resources it is estimated that the Mapuche population south of the Bío Bío river had reached half a million when the Spanish invaders arrived (Instituto de Estudios Indígenas 2003: 158). Historically, Mapuche people dedicated themselves to agriculture. Today it is difficult to generalise since there are many urban Mapuche (Minority Rights Group International 2008).

1.3.1.3 Concepts of life and relationship to land, social organisation

The political, social and cultural life of the Mapuche as well as the relation to the land and resources was determined by the belonging to the *lof*. The *lof* is a patrilineal institution with its leadership belonging to the *lonko* (chief). The basic social and administrative unit of Mapuche was and still is the so-called extended family. Originally, several families formed a community or *lof*. The rights and duties of the members of a *lof* were regulated by the *admapu*, the Mapuche law (Instituto de Estudios Indígenas 2003: 158).

The centre of the Mapuche's life is their relationship to the land, *mapu*, which they commonly use and farm. Therefore land is perceived as communal and collective. The family lives on a farm, consisting of several distantly located houses, (*rukas*) with vegetable gardens. Traditionally, each family had an own vegetable garden close to their houses, which belonged to the area of the extended family, and which was administered by the *lonko* (Heise 2000: 109). Additionally, vast areas were used as pasture land for livestock in summer.

Generally speaking, the land up to this day constitutes the central cultural, social, religious and economic foundation of Mapuche society (ibid. 2000: 109). Furthermore, for the Pehuenche, *Araucaria araucana* is the central foundation for the common identity of the Pehuenche, which is described in 5.3.

The head of the *lof*, the *lonko* elected, had the tasks to represent the *lof* and to arbitrate. However, no one of the community held central executive power, and the joining with other *lofs* only happened in time of a common external threat (ibid. 2000: 110). Only under these circumstances they elected a so-called *toki*, who had extensive powers during battles. The *lonkos* of today first and foremost hold a moral and traditional authority. The function of being *lonko* is passed on by heritage however the political function has been lost. Many

¹¹ See also chapters 2 and 3.

times presidents, treasurers, and secretaries replaced the *lonko* (ibid. 2000: 111). Despite these transformations the *lonkos* still play an important role in Mapuche social structure as well as the *machi* who are mostly women and respected authorities with special healing powers (Minority Rights Group International 2008).

The *comunidad*¹² today is the most important social unit besides the family in rural areas. The *comunidades* are common land, which is shared amongst the families. The Mapuche traditionally do not know individual ownership of land, in fact they only know the permanent ownership of land.

1.3.1.4 Spirituality and Religion

The tight social bonds in the Mapuche society are expressed by religious customs. Although most Mapuche are baptised and catholic, they hold on to original rites, which shows the cultural continuity. Two vigorous elements constitute the unity of the Mapuche people: the common language and the belief system (Dannemann/Valencia 1989: 26).

The most important ceremony within Mapuche culture is the celebration of *ngillatun*, which is finished by the popular hockey game *palin*. The *ngillatun* is celebrated every two to six years and is hosted by one community. The purpose of the ceremony is to give sacrificial offers to the higher powers and to ask for the well-being of oneself and the community (Heise 2000: 111).

The central higher power is *Ngenechen*, characterised by masculinity and femininity as well as by youth and old age, owner of space and people (Dannemann/Valencia 1989: 26). The *ngillatun* takes about two to three days and is celebrated at the end of the harvesting season, which mostly is in December or March. For the ceremony several hundred or even thousand people gather. Therefore, it is an important social meeting since many people from other communities or cities are invited which gives opportunity to deepen bonds and exchange news. In consequence, the celebration of *ngillatun* and *palin* were prohibited in the years after the military coup, later they had to be reauthorised (Heise 2000: 111).

The ceremony takes place under open sky on an open cultural site. The ritual centre is marked by a cultic pole the *rehue* (ibid. 2000: 111). The *rehue*, which resembles a human figure, is decorated with branches of Canelo (*Drimys winteri*) or Laurel, which are important medicinal plants for the Mapuche.

¹² The *comunidades* occurred after the military occupation of Mapuche territory by the Chilean state in 1881 and the final defeat of the Mapuche in 1883 (Heise 2000: 110). By the so-called *Proceso de Radicación* (process of settling), the Mapuche were coercively settled in the *comunidades* and accordingly in *reducciones*, which were small reservations (see also 2.2.1).

The psychic medium to get in contact with the higher powers is the *machi*. They are mainly women who are healers and seers and have the task to build the bridge between people and the higher powers. Their ceremonies called *machitun* are exercised in trance, similar to shamanism (Lindig/Münzel 1976: 235). Traditionally, the *machi* constitute an authority besides the *lonkos*, being an important institution to be asked before important decisions are made. Moreover, *machi* have considerable political and legal influence on Mapuche society (Heise 2000: 111). Despite syncretism introduced due to Christian missionaries the *ngillatun* is celebrated on a regular basis today.

1.3.1.5 The Mapuche Pehuenche

Compared to the other Mapuche, the culture of the Pehuenche has remained more traditional, which concludes from the geographical remoteness of their settlement area in the Andes (Heise 2000: 111). One feature, which distinguishes them from the rest of the Mapuche is their tight religious and economic bond to the *Araucaria araucana*, *pehuen* in *Mapudungun* or monkey-puzzle tree. The seeds of the trees, also called *piñones* or *ngülliw* in *Mapudungun* constitute the crucial part of their diet. They are collected in late summer and are stored over winter.

However, part of the seeds is sold on markets to purchase other items. Moreover, *Araucaria araucana* provides the Mapuche with wood, which serves for building houses and firewood (ibid. 2000: 111).

Aside from the vital economic meaning of the tree, it also has a profound religious significance to the Pehuenche. The *pehuen* is sacred therefore *Araucaria* forests constitute sacral areas. When celebrating the *ngillatun*, an *Araucaria* is the centre of the ceremony; moreover they celebrate it without *machi*.

The (traditional) livelihood of Mapuche Pehuenche was/is mainly subsistence and based on transhumance (Herrmann 2005: 10). Main activities are the collection and commercialisation of the *Araucaria* nut. Other important activities are working with wool, wood and breeding domestic animals.

Since the *Araucaria* poses a vital resource for the Mapuche they have gathered ecological knowledge¹³ about it and passed it on from generation to generation. In the spiritual belief of the Mapuche, plants and animals are very important as also seen in the numerous myths and rituals referring to these native species. However, native plants seem to be of greater

¹³ See also 5.3.1.

importance to the Mapuche than animals and forest animals are hunted on rather rare occasions. (ibid. 2005: 10).

1.3.1.6 The Mapuche today

Even though the democratic governments tried to improve the situation since the early 1990s, the standard of living is still below the national average and of non-indigenous Chileans for the indigenous (Stavenhagen 2003: 3).

Due to the economic inequalities, indigenous people in Chile have no free access to health care and their traditional medicine is ignored. Moreover, initiatives in the fields of bilingual education and the preservation of their culture are not sufficient.

Indigenous people in Chile are the group with the highest poverty rate. While 35,6 per cent of the indigenous are affected by poverty the number for non-indigenous persons is 22,7 per cent (ibid. 2003: 8). In 1996 11,7 per cent of the Mapuche lived in absolute poverty and 26,7 per cent in relative poverty compared to 5,5 per cent and 17,2 per cent of the non-indigenous population (Kaltmeier 2004: 201).

Moreover, the average income of indigenous families is less than half that of non-indigenous families (Stavenhagen 2003: 8).

In the field of education the position of the indigenous population is significantly worse than that of non-indigenous citizens. Indigenous children attend school for shorter periods of time and only 3 per cent of the rural Mapuche population over the age of 15 have a post-secondary education (ibid. 2003: 8). Furthermore, the infant mortality rate is above national average, exceeding 50 per cent in some rural areas (ibid. 2003: 8).

In the Eighth and Ninth Region a large proportion of the rural population are Mapuche. Half of the Mapuche population lives between the river Bío Bío and the island of Chiloé. The other half lives in the capital Santiago and other cities (Aylwin 1993: 5). Nevertheless, the majority of Mapuche people today (around 54 per cent) live in urban areas, mainly in Concepción, Temuco and Santiago. At present almost half of the Chilean Mapuche population lives in the metropolitan area of Santiago. Less than twenty per cent of the Mapuche are still fluent in their native language *Mapudungun* (Minority Rights Group International 2008).

The celebrating of the *ngillatun* is still very common among Mapuche. Once limited to rural areas, urban Mapuche communities have joined the festivities as well today (ibid. 2008).

Historically, Mapuche have lived on agricultural activities and many rural communities still do even though activities have diversified due to the low output of their diminished plots of lands. The family plots are continuously partitioned since the state-regulated inheritance law

gives any single Mapuche the right to a legitimate portion (Heise 2000: 114). Originally, the Mapuche were used to extensive farming on vast plots of land. However, due to legal changes throughout the late 19th and all of the 20th century¹⁴ they were forced to farm the small plots intensively, which makes them dependent on fertilizers and on high-yield seeds since they are not familiar with small scale farming. One consequence arising from this indirectly enforced way of farming is that Mapuche families have to sell their lands or it is destrained due to an overload of debt (ibid. 2000: 114).

Urban Mapuche are often employed as teachers and Mapuche women entered the profession as domestic servants (Minority Rights Group International 2008). Despite little information regarding the urban Mapuche there is evidence that they constitute the poorest groups in urban centres, living in shantytowns and at the outskirts of cities. Moreover, the ones employed mostly live on minimum wages and suffer from an instable employment situation as well as under the deprivation of social services (Aylwin 1998: 6).

Nonetheless, it can be observed that a culture of urban indigenous people is emerging since racism in cities leads to a new form of solidarity amongst Mapuche. Large proportions of Mapuche living in urban areas deal with uprooting and the loss of their ethnic identity and live in an advanced stadium of acculturation meaning strong assimilation towards the predominant national society. The traditional structures live on in remote rural areas where they are still dominant, however, the closer Mapuche societies live to urban centres, the stronger they adapt to the prevalent society and economic system (Heise 2000: 114).

Mapuche are rarely appointed in high political positions. Under president Lagos (2000-2006) there was a Mapuche secretary of state, Francisco Huenchumilla. However, Mapuche are hardly represented in the Chilean Congress and Senate. Moreover, the regions populated by the Mapuche remain among the poorest, least educated and most malnourished sectors of Chilean society (Minority Rights Group International 2008).

Despite some efforts of the Chilean state to improve the situation for the Mapuche, many lives are still marked by the ongoing violent confrontations due to the struggle over collective land, water rights and human rights abuses¹⁵. Even today the majority of Chileans has understanding of neither communal property nor of collective economic acitivity and of non-hierarchical forms of living. For many parts of the predominant national society the Mapuche pose a primitive and obsolete way of living with subsistence farming seen as obstacle to the economic development of the Chilean state (Heise 2000: 132).

¹⁴ See also 2.2 and following.

¹⁵ See also chapter 5.

In spite of the legal, economic and social deprivations there has been a strong Mapuche movement advocating their rights and demands.

2. Historical outline until 1973

In the following chapter I will illustrate the influence historical changes had on the lives of the Mapuche. The Spanish invaders struggled to subordinate the Mapuche, later the Chilean state started colonising and confining them to diminished plots of land. Only during the Allende government the state tried to improve the land and overall situation of Chile's indigenous population.

2.1 Arrival of the Spaniards and their struggle to subordinate the Mapuche

Before the arrival of the Spaniards in the 1540s the Mapuche inhabited the area reaching from the river Limarí in the north to the island of Chiloé in the south. Their territory was confined by the Inca in the north, by the Chono in the south, by the Argentinean Pampa in the east and the Pehuenche in the Andes, which formed a separate culture until 1650 (Heise 2000: 108). The Mapuche successfully resisted the attempt of the Inca to invade their territory between 1448 and 1482 although mutual trade alliances were established and the Inca had some influence (Herrmann 2005: 34). Like the Spaniards, the Inca were unable to conquer Mapuche territory.

When the Spanish invaders first arrived in 1541, south Chile was then called *La Frontera*. One of the reasons why the usually successful Spanish conquerors in Latin America struggled to subordinate the Mapuche is because of the latter's social organisation. Compared to other powerful empires overthrown by the Spaniards, like in Mexico and Peru, the Mapuche did not have one capitol that could have been overthrown. Moreover, they did not have one army, which could have been defeated in one big battle (ibid. 2005: 34). Also, the common language *Mapudungun* helped organising for battles and the Mapuche quickly adapted to the newly introduced horses and shotguns for fighting, which resulted in a strong resistance and even supremacy over the Spaniards in the battles (Heise 2000: 108). Due to the adaption of European livestock and the cultivation of oat and wheat the Mapuche managed to improve their living conditions, which served them throughout hostilities.

Consequently, the Spaniards managed to conquer only small parts of the Mapuche land but never the entire territory. In the part where the Spaniards were successful in colonisation, they suppressed the local population through slavery, enforced labour and forced dislocations¹⁶. In

¹⁶ The conqueror Valdivia introduced the so-called *encomienda* system: plots of land were distributed to his followers Spanish invaders justified by the obligation to protect the indigenous' lives, health and safety and to guarantee christianisation of the indigenous (ibid. 2000: 126).

contrast to the Pikunche, which had been weakened due to the battles with the Inca, the rest of the Mapuche managed to strongly resist the attacks of the invaders. The Mapuche led a successful guerrilla-war under their war-lords, the *tokis*, and soon Chile was called the Spaniards' cemetery (ibid. 2000: 128). Furthermore, the geographical conditions of the regions were exhausting to the intruding Spaniards.

2.1.1 Treaty of Quilín and consequences of the Spanish invasion

After a century of bloody struggles in 1641, a ceasefire was agreed upon between the Spanish invaders and the Mapuche. Among others, the *Treaty of Quilín* was concluded. The agreement recognised the independence of the Mapuche people and the river Bío Bío as the border between Spaniards on one side and Mapuche on the other side (Aylwin 1993: 3). In the view of the Spanish intruders, the conquered territory was to be secured and the indigenous territory influenced and pervaded by peaceful means like trade and missionaries (Heise 2000: 128). The indigenous territory south of the river Bío Bío was then called *frontera*.

Due to recognition of the independence of the Mapuche by the Spaniards in a treaty, the unique situation arose where an indigenous population resisted the invaders and the actual agreement of a mutually recognised border (ibid. 2000: 128). The Mapuche were regarded warriors by nature with ample military experience resisting Spain (Herrmann 2005: 32).

In the treaty, the Mapuche agreed to respect the border and to let missionaries and traders enter their territories and allow the Spanish prisoners to return. During the following two hundred fifty years only few Spaniards settled in the area of *frontera*¹⁷. The contact with the Spaniards led to a reduction of the Mapuche population due to deaths caused by the war and the introduction of diseases such as Typhus, smallpox and others (Aylwin 1998: 3). At the time of the invasion through Spaniards in the 16th century, the Mapuche population constituted of an estimated million people. Only three decades later they had been diminished down to approximately 600,000. In the census of 1907 there were only 107,000 Mapuche registered (Calbucura 1993: 3).

The Mapuche belong to one of the few indigenous groups in Latin America that succeeded in resisting the Spanish invaders and later the Argentineans and Chileans who had become independent for more than three hundred years and which had an independent territory (Heise 2000: 108).

However, since the times of first contact with the invaders, they have had to live through radical social and cultural changes. Reasons for these changes were the introduction of new

¹⁷ In contrast the Pikunche were enslaved. They lived between Santiago and *la frontera* and had to subordinate in the feudalistic economic system (Heise 2000: 129).

and unknown plants and domestic animals, as well as the centuries of ongoing battles, which led to the loss of territories and the restriction to an area, which constitutes only a small part of the original territory (ibid. 2000: 108). Remarkably, these changes did not abrogate or splinter the Mapuche like it happened to other indigenous peoples. In fact, the dramatic changes resulted in resistance strengthening their ethnical identity and self-awareness (ibid. 2000: 108).

2.2 Colonisation

Chile declared its independence from Spain in 1818. With the defeat of the Spanish the treaties of 1641 were abrogated (Herrmann 2005: 32). The treaty of Quilín was renewed, this time without establishing the southern border of the indigenous territory, which until then was an autonomous enclave (Heise 2000: 130).

Chile's "liberator" Bernardo O' Higgins introduced a Supreme Edict in 1819, which acknowledged the free status of native population and their equality with the rest of the population. For decades the Mapuche continued their lives and maintained their territorial autonomy, laws, authorities and traditions (Aylwin 1998: 3). In 1825 in the peace negotiations of Tapihue, the Mapuche recognised the new Chilean state and in return they were assured rights of Chilean citizens (Heise 2000: 130).

In the mid- 19th century however, authorities in Santiago started discussing about gaining control over Mapuche territory in order to have access to the rich natural resources south of the river Bío Bío. From 1850 onwards, the settlement of colonists in the area of the *frontera* commenced. The Mapuche granted the settlers the right to utilise their land. However, the Chilean state transformed these rights of usufruct into rights of ownership. The Mapuche did not object this course of action since they had never perceived their land as their property (ibid. 2000: 130).

Accordingly, on December 4th 1866 a law, namely *ley de Radicación*, was passed, which declared the lands south of the Bío Bío to be "fiscal", meaning that the lands could be allocated to individuals for colonisation posing a violation of the former treaties with the Mapuche. In other words, the state confiscated the Mapuche territory and sold the biggest part to colonists. In 1869 a war with the aim to defeat the Mapuche, which affected the indigenous civil society started and lasted until 1881. The whole phase of colonisation in Chile is called the *Pacificación de la Araucanía* (pacification of Araucanía) finalised in 1883 after the ultimate surrender and suppression of the Mapuche (ibid. 2000: 131).

2.2.1 Radicación

The next step in the process of colonisation was the establishment of a commission, namely the *Comisión Radicadora de Indígenas*, which was created to settle indigenous population on lands over which they could prove possession (Aylwin 1998: 4). From that time on Chilean laws and authorities were imposed on the ancestral lands. Subsequently, the Mapuche were settled in so-called “*reducciones*”, lands granted by the state through communal titles extended to their chiefs and family members (ibid. 1998: 4).

The titles were called *reducciones* due to the imposed reduction on Mapuche land. In these *reducciones* each household received a plot of land and the head of the family was awarded a land title called *título de merced*. The *títulos de merced* were introduced when the Chilean state had finished the process of military occupation of Araucanía (Comisión Verdad Informe Tierras 2001-2003c: 5). The administering of the titles started in 1884 and was finished in 1929 in the provinces of Bío Bío, Arauco, Malleco, Cautín, Valdivia and Osorno (ibid. 2001-2003c: 5).

With the confinement to *reducciones* it was assumed that the Mapuche would soon change their lifestyles and become “Chilean” so that in a following step their lands could be divided (Herrmann 2005: 35). While the Mapuche families were given six hectares the Chilean and foreign settlers received an equivalent of 600 to 700 hectares (ibid. 2005: 36). Between 1884 and 1929 in the Regions Eight, Nine and Ten 80,000 Mapuche were confined to about 3,000 *reducciones* by the *Comisión Radicadora de Indígenas* (Calbucura 1993: 4). They included 510.000 hectares of land representing only 6,39 per cent of the ancestral territory south of the river Bío Bío (Aylwin 1998: 4). The remaining land, which posed more than nine million hectares was colonised by European or Chilean settlers who bought the land.

Since that time a long period of a policy promoting assimilation of indigenous population followed. The *reducciones* were enclaves of subsistence farming land with fixed boundaries where several families were united (Calbucura 1993: 4). With the ultimate defeat and settlement to *reducciones*, the cornerstone for the impoverishment of the Mapuche was set. The land allocated to Mapuche families was not only diminished in size but was also of poor quality. Since the land granted was so small it could no longer be divided (Herrmann 2005: 36).

At time of *radicación* some Mapuche leaders brought claims to the courts arguing that property lines did not include lands that their community had traditionally used for subsistence and/or that topographers had committed errors. In most instances, the cases

lingered in courts for decades uncompleted. In the meantime many neighbouring landowners asserted their property ownership by force. There have also been cases in which the courts upheld the claims of the Mapuche community against the Chilean landowner but the court ruling to return the land was never enforced (Haughney 2006: 168). Only on rare occasions would a Mapuche community conduct a non-violent takeover of land, for the most part they submitted legal claims.

2.3 From collective to individual ownership

Since the beginning of the 20th century the Chilean state passed laws that aimed to disintegrate the *comunidades* in order to achieve an integration and assimilation of the indigenous population into the society of the national state (Heise 2000: 113). The goal of this policy was to achieve the dissolution of the community-oriented indigenous culture by fragmentation of the *comunidades* and the subsequent alienation to private persons, not necessarily of Mapuche origin.

The principle of transformation of collective ownership into private ownership titles was well established throughout Chile's legal history. This period began when the phase of the distribution of *titulos de merced* finished in 1929. Since that time two legal principles dominated the goal to abolish collective ownership: The first one aimed to delegitimise the determination and discussion about the interests of the *comunidad indigena* and the second one aimed at disabling the recognition as Mapuche (Comisión de Verdad 2001-2003c: 7). Consequently, certain laws accompanied the transformation from collective to private ownership. Even though the Mapuche had already lost a lot of their ancestral lands being confined to *reducciones*, these reductions still posed an obstacle for the pursued *chilenización* of the Mapuche and the expansion of foreign and Chilean settlers. Therefore, the Chilean government had a vital interest in destroying the reductions and integrating the Mapuche into Chilean society.

2.3.1 Relevant legal provisions in the 20th century until 1970

From 1927 onwards the Chilean government introduced a number of law modifications, decrees and acts, with the aim to dissolve the *comunidades* of the Mapuche in order to divide their communal property into private plots of land (*hijuelas*). One main reason was the fact that indigenous land should be made alienable again and therefore by integrating the indigenous land into the Chilean market achieve the integration of the indigenous population as well (Heise 2000: 144).

Table 1: Overview on relevant legal provisions 1927-1961

1927: Ley¹⁸ N° 4.169 created a special tribunal for the division of the *comunidades indígenas*. Any single member of the community was entitled to request this division.

1930: Ley N° 4.802 abolished the *Comisión Radicadora de Indígenas* from 1866 and 1883. It created so called *Juzgados de Indios* whose object was to start the process of dividing the indigenous communities. The tribunals were authorised to divide a community against its will.

1931: Ley N° 4.111. The division of a *comunidad indígena* had to be asked for by at least one third of the community members. It gave the president the authority to expropriate the lands owned by the *comunidades indígenas*. It created the *Juzgados de Letras de Indios*, which modified functions of the *Juzgados de Indios*. These special courts operated from 1930 until 1972 with the aim to revoke the *radicaciones*.

1961: Ley N° 14.511. Its aim was to halt the further division of indigenous land. The alienation of indigenous land was confined to exceptional cases upon decision of the *Juzgados de Letras de Indios*. In practice further divisions and privatisations continued.

Sources: Heise (2000), Calbucura (1993), Comisión de Verdad (2001-2003c).

In consequence, based on law N° 4.111 of 1931 and law N° 14.511 of 1961, 823 Mapuche *comunidades* with a total area of 132.736,72 hectares were dissolved and privatised (ibid. 2000: 147). Before 1948, the majority of the *reducciones*, 733 out of the 823 had been dissolved already. The prepondering part of the divided land was alienated to private persons and was lost for the Mapuche.

By 1950 approximately one third of the land granted to Mapuche by a *título de merced* had already been usurped by private settlers (Herrmann 2005: 36). In the 1960s the number of *reducciones* had dropped to 2000 and reached only 600 in the 1980s (Calbucura 1993: 1).

In practice, the protection intended by Ley N° 14.511 of 1961 was not realised in numerous cases since it opened the possibility for exceptions. Land, which had been occupied illegally or had been acquired fraudulently by external private persons, was assigned to the latter since

¹⁸ In Chile, next to laws (*leyes*) there are also several types of decrees existing. The hierachical categorisation of legal provisions in Chile is as follows: 1. Constitution; 2. Laws (*leyes*); decrees with force of law (*Decreto con Fuerza de Ley – D.F.L.*), decree laws (*Decreto Ley – D.L.*) and international treaties (*convenciones*) ratified by Chile; 3. *Reglamentos*; 4. Decrees (*decretos simples*) (Heise 2000: XV).

many times the Mapuche were not able to prove their ownership due to missing demarcations or evidence of ownership. Moreover, the protection of individual ownership was given priority compared to the protection of the Mapuches' communal ownership (Heise 2000: 146).

Additionally, in cases where Mapuche filed for the restitution of their land and were granted their rights, they received a payment of compensation more often than they were actually returned their land (ibid. 2000: 147).

This process of fragmentation later accelerated during the Pinochet dictatorship and the introduction of the law decrees N° 2.568 and N° 2.750 in 1979¹⁹ Under the military regime of Pinochet the *reducciones* were finally divided and were turned over to private ownership (Herrmann 2005: 36). Of the 2000 *reducciones* that existed in the early 1970s only 665 remained in the 1980s (ibid. 2005: 36).

The proportion of privatised land still in the hands of the Mapuche can merely be estimated, since the land lost its indigenous status (*tierra indígena*) with the division (Heise 2000: 147).

2.3.1.1 Socio-economic consequences of the legislation

The division, the loss of the land and the national inheritance law lead to an increase of plotting of the privatised land and therefore an increase of the impoverishment of the Mapuche. Between the time of *radicación*, 1884 and 1929, a land owning Mapuche held 6,2 hectares of land, in 1963 the number had already dropped down to an average of 1,8 hectares (Heise 2000: 147).

Due to the necessity of intensive farming on the downsized plots, the quality of the land diminished dramatically and showed the scope of this *minifundización* (ibid. 2000: 147). This fact forced many Mapuche, to finally sell their land and leave it behind. Others tried to make a living aside from agriculture, by entering other sources of income as rural workers, maids or seasonal workers (ibid. 2000: 147).

Socioeconomically, the division of the common land into individual titles of ownership led to the rupture of the traditional community structures and impeded the collective functioning of communities. There used to be mutual dependence of ritualised help between the families, however, group coordination lost its importance as responsibilities became matters of the individual - for instance the individual ownership and the take over of new agrarian techniques (ibid. 2000: 114).

¹⁹ See also 3.4.1.

By virtue of the scarcity of land and the strong migration into urban centres, the Mapuche culture is exposed to a strong pressure of adapting to the predominant national society as intended by the laws. Even though the state-enacted granting of individual ownership titles disrupted the *comunidades* they still exist within old or changed structures. However, they are fragile towards external impacts since the economic and social support does not come from extended families anymore.

2.4 Socialist experiment under Allende 1970-1973

Salvador Allende with his coalition *Unidad Popular* was the first socialist president of Chile introducing the system of representative democracy. Central aims were to restructure the agrarian question, external trade and to nationalise the means of production. The social spending for education, health and living was increased in order to support deprived parts of society (Rinke 2007: 149). A crucial aim of the Allende government was the Agrarian Reform and its overall intention to expropriate great landowners.

2.4.1 Legislation concerning the indigenous population

In 1972, law N° 17.729²⁰ was introduced by the *Unidad Popular* government, which completely restructured the Mapuche land situation.

At that time, the Mapuche by their political organisation and their role as an important group of electors, were in the position to articulate their demands towards the state and therefore achieved that the Congress passed the law (Heise 2000: 148). The basis of the law was a list of demands by Mapuche organisations, which was not only confined to questions of land, therefore making the indigenous population direct contributors to the elaboration of the law. The new provision under Allende provided for consolidation and increase of the Mapuche land as well as the confirmation of communal ownership (WGIP 1984: 4).

In the course of the Agrarian Reform lands were given back to indigenous people, which had been expropriated in the foregoing centuries. The root cause for the demand for restitution of lands and land takeovers in the late 1960s and early 1970s was the usurpation from the *reducciones* and the ancestrally occupied land (Haughney 2006: 168).

²⁰ *Ley N° 17.729 de 28 septiembre de 1972, legisla sobre protección de los indígenas, en relación con el dominio, uso, goce, disposición, reivindicación y transferencia de sus tierras, y sobre desarrollo cultural, educacional y económico de dichos connacionales; crea el Instituto de Desarrollo Indígena.*

2.4.1.1 Content and impact of the law

The law stipulated that indigenous lands were stated to become inalienable and that the same was applicable to the forests of indigenous people. From now on the division of a *comunidad* was only possible upon a request of 100 per cent (absolute majority) of its members. In practice, not a single *comunidad* was dissolved since there has never been a mere majority to favour such a division (Heise 2000: 148).

The restitution of land was based on the *títulos de merced* and the *títulos gratuitos*, which had been provided by the law of 1866. In terms of law, this restitution was conducted by expropriations, which were provided for by law N° 16.640 promulgated in 1967 of the Agrarian Reform and by the reconstitution of the original borders of indigenous land titles (ibid. 2000: 148).

Within the year the law was in force, the Mapuche were granted 68,381 hectares of land, constituting about 53 per cent of the usurped lands that the state had granted Mapuche in *títulos de merced* (Haughney 2006: 168).

Furthermore, the *Instituto de Desarrollo Indígena* (IDI) was set up for the promotion of the social, economic, educational and cultural development of the communities. Moreover, the Directorate of Indian Affairs (DASIN) was established with the objective to promote the indigenous social, cultural and educational development and to achieve integration into the Chilean society while respecting their distinctive cultures (Du Monceau Labarca de Bergendal 2008: 53).

The *Juzgados de Letras de Indios* were abolished. Also, indigenous people were exempted from paying land taxes and the decrees of expropriation of Mapuche lands of 1931 and 1961 were to be annulled (WGIP 1984: 5).

Allende's law even enabled the acquisition of new land - for instance big landowners were expropriated and lands granted in the 1880s were also included. During the short period this new law was in force the Mapuche regained a big part of the land, which had been expropriated before by landowners. This was achieved by the implementation of the law as well as by direct takeovers through Mapuche themselves (ibid. 1984: 5). Some lands were taken over by Mapuche peasants (outside the law) that they had long claimed (Haughney 2006: 15).

However, usually legal title was not transferred to the peasants despite their claims to ownership. The Agrarian Reform Law N° 16.640 (1967) allowed the state to maintain ownership during a transitional period of three to five years, after which time peasants could

decide if they preferred a private cooperative or individual ownership (ibid. 2006: 168). In fact, this contradicts the concept of collective ownership.

Summing up, the *Cuestión Indígena* mainly focused on the Agrarian Reform. Customs, languages, cultural habits and ways of living, although mentioned in the law, were rather neglected by the Allende administration. Nevertheless, this law was the first of its kind, which intended to improve the reality of social and economic impoverishment of Chile's indigenous population. However, the law was based on the ideological assumption that the Mapuche were part of the exploited classes and therefore intended to cram them into the frame of class struggle (Heise 2000: 149).

Therefore, the Mapuche were the object of political instrumentalisation, which led to conflicts and tensions within the Mapuche communities. I ought to mention that law N° 17.729 was merely in force for one year, which makes it difficult to provide a comprehensive assessment of the legislation and its consequences. The intention of the new law was integration by granting land back and by letting the indigenous population participate in the progress of the intended rural development (ibid. 2000: 149).

3. The Pinochet era

During the Allende years the right wing opposition gained strength. Allende's Agrarian Reform, which had led to a new arrangement in terms of ownership titles, caused a decrease of the economic production. Due to these economic failures, Allende slowly lost support, which gave rise to the strengthening of the opposition, especially to right wing parties.

On September 11th 1973 the armed forces overthrew Allende's government in a coup d'état. This put an end to the Presidential Republic period of Chile (1924-1973). Instead, a military junta was established. This junta was both the executive and legislative branch of the government and followed an oppressive path. Constitution and Congress were suspended; rigorous curfew and censorship were established, left-wing parties were proscribed and their political activities prohibited.

After the 1973 coup Pinochet rapidly increased his power. *The Estatuo de la Junta del Gobierno* reiterated that the president of the junta was assigned executive power as provided by Decree Law N° 527 of 1974. Pinochet did not have a fixed term and could not be dismissed by the other members of the junta. He was given the title *Jefe Supremo de la Nación* (Hopkins 1995: 17). Originally, the junta members divided responsibility for direction of the state. However, by mid-1976 Pinochet virtually possessed complete executive power and in September 1976 he was designated president of the Republic. But Pinochet's power was further consolidated, as he became the de facto Generalísimo of the armed forces in 1978 (ibid. 1995: 17).

3.1 Political foundations of the regime

The pillars of the regime were Pinochet's personal political power, the police, especially the DINA (*Dirección de Inteligencia Nacional*) between June 1974 and August 1977 and the neoliberal economic think-tank the *Chicago Boys*. Therefore, the nature of policy making was radically changed in Chile, both in terms of substance and process. "*The junta soon became a weak legislature overwhelmed by political and economic advisers and a growing secret police (DINA) all of whom owed exclusive loyalty to the president*" (Hopkins 1995: 17).

Due to heavy, especially international protests the terror regime was doubted to be capable of governing the country. Thus, the dictatorship had to search for a new form of government. In

in his speech at Chacarillas in 1977 Pinochet announced the project of a new constitution, which would lead to the institutionalisation of the dictatorship.

The “transitory articles” of the constitution gave the government extraordinary powers in all areas and saw to it that the Congress to be elected in 1990 would be severely limited in its powers (ibid. 1995: 18). It was passed by a manipulated plebiscite in 1980, which gave the president extensive powers, which in large parts is the same today. DINA was transformed into CNI. The Constitution of 1980 clearly elevated Pinochet above the other members of the junta and extended his term as president until 1989. During the “transition period” of 1981 to 1989, the junta was subordinated to the chief of state and civilians were excluded essentially from the power structure (ibid. 1995: 17). *By the establishment of this new constitution, the project of a capitalistic revolution of building a new neoliberal society, received a political and institutional foundation* (Kaltmeier 2006: 18). Alongside the new labour law, and the 1978 Amnesty-Decree-Law N° 2.191 for the military, the new indigenous law of 1979²¹, became a cornerstone of the mentioned institutionalisation.

3.2 The terror regime

“On the day of the coup, the big landowners, the land barons, the military and the carabineros started a great manhunt against the Mapuches who had struggled and gained their land back; the massacres of Lautaro, Cunco, Meli-Peuco, Nehuente, Lonquimay and Panguipulli. The counter-revolution hit the Mapuche populations even harder than most other sectors” (WGIP 1984: 5).

Alongside the neoliberal experiment²² measures of terror against oppositional groups and indigenous people - whether they had political affiliations or not followed right after the coup. The military government suppressed the indigenous culture with all possible means. In its view the existence of more than one people within a state posed a threat to the national security since it would contradict a strong and authoritarian state (Heise 2000: 133). One famous statement of Augusto Pinochet was: *“Indigenous people do not exist we are all Chileans”* (Ray 2007:118).

The intent of the regime was to eradicate indigenous peoples systematically and to deny their indigenous status. This was achieved through the combination of measures of terror, violating various human rights and a new repressive, discriminatory legislation²³ towards the indigenous population. Moreover, the traditional ways of economic activity and the concept of collective ownership heavily contradicted the military government’s neoliberal view on

²¹ See also 3.4.1.

²² See also 3.2.

²³ See also 3.4.

economy (Heise 2000: 133). Therefore, the destruction of all organised groups within the population became a prerequisite for a working society and economy.

Countless human rights violations against the indigenous population of Chile followed. In general, indigenous people were claimed to be on the side of the political enemy, the left-wing groups, to “justify” the brutal and ruthless persecutions and killings, which were carried out in a systematic way. In the eyes of Pinochet, the Mapuche were a danger to national security, communist subversives and terrorists (Ray 2007: 128).

In “Operation Condor”, several Latin American right-wing regimes were collaborating in their aim to persecute political enemies and conducted so-called “forced disappearances”. The intention behind the operation was to assassinate key members loyal to Allende and Mapuche were claimed to be in on it (ibid 2007: 124).

“Plan Zeta” was invented by Pinochet to “justify” the persecution of oppositionals and Mapuche. In addition, “Operation Colombo” was undertaken by DINA the newly established secret police, which once more involved disappearances and killings of political dissidents. Another sad example of the terror regime was the “Death Caravan²⁴” carried out a few months after the coup. A Chilean army death squad was going from the south to the north of the country committing extrajudicial killings and forced disappearances. People were dragged away from their homes, often never to be seen again or found dead in the street (ibid. 2007: 125). The “crime” that some of the victims of the squad had committed was occupying land that large estate owners had their eyes on.

All these measures show Pinochet’s way of “dealing with subversives” as he liked to put it (ibid. 2007: 124). The clear goal behind the spread of terror was to paralyse society with fear. Many Mapuche were killed in extrajudicial executions or they disappeared - the so-called *disparecidas*. Furthermore, mass detention centres and concentration camps for the enemies of the terror regime were established all over the country where they were held captive for years, being tortured and many of them killed.

Chilean society was numbed with fear an ideal precondition to enforce the neoliberal changes in the country. 120 to 300 Mapuche leaders were killed or disappeared (ibid. 2007: 125).

Until 1975, all organisational structures of democratic or left-oriented forces were destructed (Kaltmeier 2006: 16). More than 3000 oppositionals were murdered and another 40,000 were displaced or exiled, countless were arrested and detained in camps - others lost their employment (ibid. 2006: 17). Thousands of Chileans, many of them Mapuche, were forced to leave the country and go into exile to Europe, North America or other Latin American states.

²⁴ Itinerary of the Death Caravan: Iquique, Pisagua, Copiapó, Calama, Antofagasta, La Serena, Rancagua, Curicó, Talca, Linares, Cauquenes, Concepción, Victoria, Temuco and Valdivia.

One important aspect of the terror was the visibility of punishment - and was aimed at inhibiting any action by society.

Terror was enhanced by its arbitrariness since anybody was a potential victim. Furthermore, terror was established in a sustainable manner meaning that it was not intended to be only punctual but to make it permanent. Therefore, the disappearances were used to constitute the persistent presence of fear, which even lasts up to this day in Chilean society (ibid. 2006: 17). The forced disappearances of oppositionals were carried out in a systematic way. They were the most effective form of terror since the uncertainty and the obvious absence are permanent and still perceptible today (ibid 2006: 37). The introduction of terror destroyed the highly evolved organisational structures of the labour movement and silenced any other critical environments (ibid. 2006: 17).

Besides the forced disappearances, torture, conducted in a massive way was the central element of the terror, which aimed at destroying autonomous subjects (ibid. 2006: 37).

3.3 Economic transformations

"The military dictatorship (1973-1990) carried out a profound structural transformation of the economy and the state, sharply reducing the state's entrepreneurial, redistributive, and regulatory functions and enlarging the role of the market in the provision of social services and the distribution of goods. This neoliberal restructuring broke with a forty-year pattern of import substituting industrialisation and a strong welfare state" (Haughney 2006: 3).

Under Augusto Pinochet, Chile was the first Latin American country to run through a complete neoliberal transformation. After the socialist changes under president Allende, Pinochet followed the opposite approach: the market was opened abruptly to foreign investment and state enterprises were privatised. Nationalisation was reversed and reprivatisation was implemented. The economy opened to the world market without restrictions. The economy was to be almost exclusively based upon exports and the state's control over the market was put to a minimum. The *Chicago Boys*, a think tank of young Chileans who had studied at the University of Chicago were allowed to realise their economic ideals, introducing the crass measures (Rinke 2007: 162). Pinochet followed the school of the *Chicago Boys*, promoting unlimited neoliberalism. Chile became the experimental model of this economic approach.

A new export-led agrarian industry with diversified production emerged. The Chilean economy grew by 32 per cent in the first four years of the dictatorship, which encouraged further privatisations (ibid. 2007: 163).

Exports resting upon the exploitation of natural resources especially copper, minerals and forestry were introduced in a comprehensive manner. Hence, all these natural resources had to be made accessible for the purposes of the free market.

Guided by the principal that rather technical than political considerations should govern national economic policies, the neoliberal economists of the military regime drastically reduced tariffs on most imports in the mid-1970s, forcing the manufacturing and traditional agricultural sector into bankruptcy (Haughney 2006: 164).

The process of social programmes to decrease unemployment rates, cultural and social programmes initiated by the Allende administration were interrupted violently by the putsch. The market was opened to foreign investment while the state-owned sector was reduced to a minimum. Social spending was reduced dramatically and the retirement plan and water supply were privatised. The income distribution worsened and salaries decreased to less than before the military dictatorship. Only a very small proportion of Chile's population benefited from high wages, the rest of the employees had to cope with minimum salaries which yet formed another comparative advantage²⁵ of the Chilean export model. The new entrepreneurship was to find these comparative advantages to benefit from them on the world market (Nohlen/Nolte 1992: 291).

After the military coup the military regime returned the properties given back under the Agrarian Reform to great landowners, not to Mapuche peasants despite their claim via *títulos de merced* or ancestral use. As a matter of fact, many indigenous people live in areas of interest for certain companies. In the north it was the desert regions, a potential target for mining companies, in the south the forests being of great interest for logging companies. Thus, the eradication and displacement of the indigenous population was of vital interest to the military government in order to conduct its neoliberal experiment.

Left-wing parties had supported Mapuche land takeovers in the 1960s and 1970s and the repression in the era after the military coup of 1973 was aimed at eliminating leftist support as well as returning the estates to former owners (Haughney 2006: 169).

²⁵ If a good can be produced at lower costs than other countries can.

3.3.1 Exports based upon natural resources and individual property

The economic approach, which followed export only aimed to the exploitation of the existing natural resources. Besides the export of raw materials of the mining sector a massive increase in exports of fishery and forestry goods as well as in fruit was carried out. One of the side effects of the increase in an export of natural resources during the dictatorship was grave environmental pollution. Today some 90 per cent of all Chilean exports are still based upon the direct exploitation of natural resources (Meller/O’Ryan/Solimano et al. 1996: 264).

Part of the neoliberal legal framework instituted by the military regime included the modification of laws regarding the use of water and subsoil resources. The military regime stressed rights as property rights, in particular the right of the private individual owner be it a corporation or a person to use that property at will of the owner (Haughney 2006: 184). Private property was even declared the “natural” form of ownership in official documents as in the 1974 *Declaración de Principios del Gobierno de Chile*. However, the regime introduced a legal and institutional framework, which defends the property rights of great capitalists instead of those of Mapuche peasants (ibid. 2006: 184). Rights became reduced to a question of private property, and private ownership with “exclusive possession”. That is the freedom the owner would exercise, in pursuit of self-interest. The market was supposed to efficiently deliver the “greatest goods for the greatest number”. All social responsibilities concerning the use of property goods or the revision of ownership claims were disregarded (ibid. 2006: 184).

3.4 Introduction of a new legislation concerning the indigenous population

The aim of the new laws concerning the indigenous population was to assimilate it and integrate it into national society and therefore to negate its indigenous status. The ideology of the military dictatorship was to achieve the republican ideal of national equality of all citizens in order to obtain the ideal of national security. Cultural or ethnical diversity were regarded threats to the civil and national unity. Besides the repressive military, civil as well as administrative laws were used to achieve the integration of all indigenous people of Chile and therefore the ultimate solution of the *Cuestion Indigena* (Heise 2000: 150).

Some laws were designed for the sole purpose to destroy indigenous structures and systems, annul the indigenous status and to abolish their rights like law N° 2568²⁶. Others were not

²⁶ See also 3.4.1.

explicitly referring to indigenous peoples but used against them like the Anti-terrorism law N° 18.314²⁷ or which indirectly had a negative effect on them threatening their livelihoods like law N° 701²⁸.

Regarding the *Cuestión Indígena*, the military dictatorship followed two approaches. First of all the question of land rights: The indigenous lands were to be integrated into the market and therefore subordinated under neoliberal economic thinking. Moreover, the integration of the indigenous population was to be achieved by social and cultural development in order to attain assimilation into society (ibid. 2000: 150).

3.4.1 Decree Law N° 2568 from communal to private lands

One of the most dramatic changes for the indigenous population I would like to emphasise was the introduction of law Decree N° 2568 of March 25th 1979 and law Decree N° 2750 of July 16th 1979, which slightly altered the foregoing. This law is entitled “for the Indians, Indian lands, the Division of the Reserves and the Liquidation of the Indian Communities”. The title alone clearly displays its ethnocidal purpose.

The law sets out the division and the liquidation of indigenous communities. It returned things to where they were before Allende and made them even worse (WGIP 1984). Before 1979 nothing had happened in terms of the indigenous property, Allende’s foregoing law N° 17.729 was never applied up to that point. However, abusive illegal treatment commenced right after the coup. The purpose of the newly introduced law decrees was a speedy transmutation of community property into private property. Allende’s law N° 17.729 was altered and made inefficient by these new provisions but not derogated as sometimes incorrectly assumed (Bulnes A. 1985: 104). As a result, the gains made by the law of Allende were reversed and the indigenous were expropriated again. Between 1979 and 1989 almost 100 percent of the formally undivided *reducciones* were divided which concerned an area of 300,000 hectares

3.4.1.1 Division

A *título de merced* was cancelled when the division of a community was asked for (Comisión de Verdad Histórica y Nuevo Trato 2001-2003a: 907). Approximately 150,000 hectares of land, which had been granted through those *títulos de merced* were usurped due to the new law (ibid. 2001-2003b: 1436). The division could be requested by an individual contradicting the concept of collective ownership, and was conducted by a public lawyer *Abogado Defensor de Indígenas* of the competent court *Juzgado de Letras*.

²⁷ See also 3.4.3.1.

²⁸ See also 3.4.2.

The land was divided into plots called *hijuelas* if the judge agreed to the division. The *hijuelas* were to be registered with an individual ownership title in the *Registro de Propiedad del Conservador de Bienes Raíces*. The newly created *hijuelas* were declared undividable even in case of death of their owners. This rule not only contradicted the Mapuche's customary law, which provides that the father transfers a part of his land to the son as a wedding gift but also national Chilean inheritance law, which foresees a legitimate portion for each child of the decedent (Heise 2000: 150).

Moreover, the law provided that the Mapuche, who lived on the *hijuelas* lost their indigenous status (ibid. 2000: 150). After a division, only Mapuche permanently living in the respective *comunidad*, the so-called *ocupantes*, received a legal ownership title. However, the use of the term *ocupantes* led to the fact that a non-indigenous person who had settled on *reducciones* several years earlier or acquired indigenous land in another illegal way was also granted the land. Art. 3 provided: "*Para los efectos de esta ley se presume de derecho, que todos los ocupantes de una reserva son comuneros de ella y tienen la calidad de indígenas*" (Bulnes A. 1985: 106). Therefore, an illegal status quo was finally legalised (Heise 2000: 151).

As a measure of precaution for the owners, the alienation of the new plots of land was prohibited for the following 20 years - only after this time the Chilean laws would fully apply to Mapuche land (ibid. 2000: 151). Especially during the military dictatorship, Mapuche land was reduced by illegal dislocation of boundary marks and fences, as well as by forced distraints or "voluntary" sale (ibid. 2000: 113). The laws passed by the military dictatorship led to the lease of fruitful Mapuche land to external private persons for up to 99 years. Today there are hardly *comunidades* left to partition.

3.4.1.2 Aims and effects of the law

The main thought behind D.L. N° 2568 was to finish with the communal lands of the Mapuche and their communities in order to make the land accessible for individual ownership and therefore for (forestry) companies and in some cases for tourism as well. Thus, the law encouraged the division of Mapuche communal lands and their conversion into privately owned lands. Moreover, it stated the liquidation of indigenous communities. Under the terms of this law, the subdivided communal lands were no longer considered indigenous lands nor were their owners recognised to be indigenous. Article 1 states: "*A partir de la fecha de su inscripción en el Registro de Propiedad del Conservador de Bienes Raíces, las hijuelas result antes de la división de la reserva, dejarán de considerarse tierras indígenas, e indígenas sus dueños y adjudicatarios*" (Bulnes A. 1985: 112). The recognition as indigenous

in terms of language or culture as it was introduced under Allende was no longer valid. Therefore, indigenous people were *ipso iure* made non-indigenous upon inscription. This negation of the existence of indigenous people by law caused a wave of national and international protest.

Another destructive factor of law N° 2568 was the possibility of introducing aliens into communities. This shows the intention to destroy traditional property rights and inheritance systems within the indigenous communities. The legislation of the military regime violated the customary law of the indigenous communities. The provocation of disputes and conflicts amongst the communities caused by the divisions was provided for with this kind of law (ibid. 1985: 106).

One important aspect of the indigenous land rights is the collective character of the land. Introducing individual property titles meant not only the destruction of the community but also of the cultural tradition. Furthermore, the divisions caused the inability of many indigenous people to carry out their traditional customs and labour. This law enabled single persons to ask for the community property to become private property (and the indigenous land was lost) as stated in Article 10 of the law: “*La solicitud puede presentarse por cualquiera de los ocupantes de la reducción*” (ibid. 1985: 109). This individual did not even have to be indigenous or a resident of the community; in fact it could be any illegal squatter or usurper of the land since as mentioned above *ocupante* was not defined (WGIP 1984: 6).

This shows the priority of one single will over the will of a whole community. Even if all of the other persons in the community were against the division they had no remedy to prevent it. Compared to this, the foregoing legislation of 1931, 1961 and 1972 did not enable the dissolving of a *comunidad* by a single person’s will, in the case of the Allende legislation, law N° 17.729 even prescribed absolute majority.

Finally, there could not be made an appeal of a judgment and a land division could not be annulled or rescinded – it was irreversible. The result of these ethnocidal decrees was that between 1979 and 1990 1,600 *comunidades* - which is almost all - were divided²⁹ and 72,068 individual property titles were granted over 463,000 hectares of land (Heise 2000: 152). The practical application of law No. 2568 meant a systematic division of indigenous communities until the year 1990. By 1990, the area in legally recognised Mapuche communities had been reduced to 300,000 hectares - this was approximately a 40 per cent loss with respect to that of the original number of hectares in *reducciones* (Haughney 2006: 169)

²⁹ According to Ray, only 18 out of 2134 *comunidades* remained undivided by the end of the dictatorship (Ray 2007: 124).

Moreover, law N° 2568 did not prohibit the tenancy of indigenous lands. This was of special interest in tourist areas like the shores of the lakes of Calafquen and Villarica where the lands and their renting out are of big value (Comisión de Verdad Histórica y Nuevo Trato 2001-2003a: 907).

Moreover, law N° 2568 abolished the IDI established under Allende and introduced the “Departamento de Asuntos Indígenas” of the INDAP – *Instituto Nacional del Desarrollo Agropecuario* (ibid. 2001-2003a: 907). Other areas IDI had taken care of like education and health were referred to the respective ministries. Therefore, there was no longer one single institution exclusively responsible for the indigenous population of Chile. Within INDAP, the *Dirección de Asuntos Indígenas* was created, predominantly planning the division of the *comunidades* and cooperated with the competent court (Heise 2000: 151).

The rationale behind this law was that the *reducciones* merely connected the people and the land by a legal title. Hence, once this title fell away, any socio-cultural connection was not taken into consideration and therefore the land was lost (Comisión de Verdad Histórica y Nuevo Trato 2001-2003b: 1436). All these discriminating measures following the implementation of the discussed provisions posed the hardest infringements for indigenous rights in Chilean history (ibid. 2001-2003b: 1437).

3.4.1.3 Socio-economic consequences of the legislation

Although the legislation led to the solution of some problems concerning land rights, soon its disastrous consequences showed. The military government provided with its legislation that the Mapuche communities should not be extended which would have made small farming sustainable. On the contrary, it provided for the concentration of Mapuche land in the hands of a few owners, which was enabled by the newly introduced exclusive and private ownership (Heise 2000: 152). Within only one decade almost all existing *comunidades* were dissolved.

The loss of the land also marked the loss of the cultural roots, since land, *mapu*, is the central significant point for Mapuche identity. Especially the indivisibility of the new plots of land had negative consequences since it hindered the exercise of customary inheritance law, which had been an important source of social security and retirement provision.

In practice, the Mapuche land was reduced even further. The prohibition of alienation for 20 years was only seemingly a protection for Mapuche who lived on small-scale farming. The law decree did not prohibit the leasing of the land for 99 years to external persons. As mentioned above the leasing especially took place in areas aimed at using them touristically like in the areas around big lakes (Lago Villarica, Caburgua, Calafquen, Panguipulli).

The conversion of collective ownership into individual ownership caused several economic and social problems for the Mapuche. The communally shared woods and grazing lands as well as sacred places for ceremonies and burials were converted into individual ownership and therefore access to the places was hindered to this date (ibid. 2000: 153). Although the Mapuche tried to adapt to the problem of a higher population within the *comunidades*, the small size of individual plots and the degradation of the soil due to intensive farming threaten their subsistence (ibid. 2000: 153). The partition of common land was heavily criticised by indigenous organisations since it vehemently contradicted the indigenous tradition and their historic relation to the land. Moreover, the allocated plots (average of 5,36 hectares) were too small for a family to live on subsistence farming (ibid. 2000: 113).

In consequence, these systematic measures disrupted the extended families and forced them to migrate to the cities by virtue of the bad economic situation. Due to the agrarian counter-reform many Mapuche were forced to leave the country and had to move to the city where they often faced discrimination in terms of employment, education and wage. Many stopped speaking their language, *Mapudungun*, and started speaking Spanish or even changed their names into Spanish ones.

3.4.2 Decree Law N° 701

Decree Law N° 701 was passed in 1974 and is still in force today³⁰. Said law promotes the conversion of degraded forests to plantations by subsidising 75 per cent of the costs for reforestation and plantation of exotic tree species. At one point in the 1980s the subsidies rose to 90 per cent³¹ (Haughney 2006: 165). These measures were part of the plan to become internationally competitive in the forestry sector (Clapp 1998: 579). Decree Law N° 701 established state subsidies to promote development of the forestry industry. From 1974 through 1986 some 800,000 hectares of new plantations were started. Among other provisions, Decree Law N° 701 guarantees the right to private ownership of lands and forests (Hopkins 1995: 13). Under the law logging companies could earn subsidies for establishing plantations made on lands declared “without current use”. Typically, such plantations were established on native forests that had been logged over the year of their largest trees and thus had become mixed stands of shrub and second-growth forest. These types of native forests were declared “without current use” because the remaining trees were not valuable for wood

³⁰ A revised D.L. N° 701 has been passed in 1994 but did not improve the situation much.

³¹ In addition, under the 1930 forest law (D.S. N° 4363), tree plantations made on land apt for forestry are exempt from taxes. This means that the large-scale tree plantations were virtually cost free for the conglomerates (Haughney 2006: 165).

products (Haughney 2006: 167). Under Decree Law N° 701 investment conglomerates gained a privileged position in the economy both nationally and locally. In 1985 forestry exports constituted 9 per cent of total exports, which rose to 13 per cent today (Hopkins 1995: 13). Since the law enables the cost-saving establishment of plantations the forestry industry has been heavily expanding since the introduction of the law. This law has massive impact on the Mapuche. They are threatened in their livelihoods as the areas inhabited by them are of great interest for logging companies³².

3.4.3 The Anti-Terrorism Law

In 1984 the Anti-Terrorism-Law N° 18.314 was introduced: *La Ley N° 18.314 “que determina conductas terroristas y fija su penalidad”*. It was heavily debated especially due to its unconstitutionality also at its time of introduction.

On a list of 19 crimes that not only include acts of violence against state authorities and their families, military and military chaplains but also adherents of doctrines “suspected of propagating violence”, such as members of the outlawed Communist and Socialist parties, as well as their supporters defined as “apologists for terrorism”, are defined as terrorism under said law (Derechos Chile 2002).

The counter terrorism law establishes penalties for common delinquencies as well as for the exercise of political rights. The object of the military government was to create a law, which would permit the prosecution of dissidents by a stringent regulation.

In 1991 the transitional government modified the law but proved that it would still be used. Additionally, it was modified in 2002 in the course of the penal reform (Instituto de Estudios Indígenas 2003: 239).

Alarmingly, this provision has been used against Mapuche even if they protested or demanded their land back peacefully. The holding of the trials before military courts leads to a different set of rules mostly disadvantageous for Mapuche who may be the accusers or also the ones indicted. Military tribunals are not confined to cases relating to the military only - offences against or committed by the police are sufficient. Moreover, judges are civil persons and their impartiality was hardly ever secured since the inquisitor and the judge who gives the verdict were the same person. Moreover, the military judge and the military public prosecutor belong to the same military unit which negates the right to due and just proceedings (ibid. 2003: 245). Furthermore, military proceedings are protracted due to massive bureaucratism. This fact leads to the neglect of charges and boosts impunity.

³² See also chapter 5.

3.4.4 Other laws affecting the indigenous population

The approximately 40 Mapuche organisations existing in 1973 were outlawed, disbanded or had to go underground. Activists fighting for the rights of the indigenous were prosecuted, tortured or were forced to leave the country. Laws N° 6, 22, 98 were designed to stop all actions by the IDI (Bulnes A. 1985: 103). All these imposed measures constituted an ending to Allende's policy for indigenous peoples in Chile.

In 1981 the water Code, *Código de Aguas* was reformed, which particularly affected indigenous populations who lived in coastal areas or based their lives on agriculture and fishery. This reform favoured the private sector, which was granted a great deal of control over lands (Comisión de Verdad Histórica y Nuevo Trato 2001-2003b: 1433). This provision was responsible for ENDESA to acquire all hydroelectric sources in Chile (Haughney 2006: 182).

The 1980 Constitution recognises the state as the owner of subsoil resources in Articles 19 and 24. According to the law the state may sell rights to explore and exploit subsoil resources and water to private interests who generally do not have to respond to state or society as a whole with respect to their use (ibid. 2006: 181). Since under the neoliberal regime the state's role became a merely "subsidiary" one this constitutional provision of the state as owner of subsoil resources is a rhetorical declaration only. The mining code and the water code promote private-sector exploitation of natural resources and private appropriation of the benefits from these social goods (ibid. 2006: 181).

Moreover, modifications in the mining and water codes eliminated provisions giving the state regulatory and supervisory powers.

Furthermore, the constitution of 1980 holds, that any act which supports a form of society or state or which is based upon class struggle is classified as terrorist and against the constitutional order (Kaltmeier 2006: 35).

In 1975 the State Security law, *Ley N° 12.927 de Seguridad del Estado*, which already existed was modified under the military dictatorship in order to serve its needs. The law defines that the government or other public authorities have the possibility to bring a case in front of the appellate court and is formulated rather vaguely. It provides for a procedure conducted by a military court including a special judge who has major discretion in considering evidence. Furthermore, the law does infringe the possibility to appeal against a sentence (Instituto de Estudios Indígenas 2003: 240).

3.5 The rising movement of the Mapuche

The efforts made by the dictatorial Chilean government to assimilate the Mapuche and to suppress their culture impacted their lifestyles. However, although many Mapuche have adopted some Chilean practices, many of them still stick to their own cultural values like the Mapuche Pehuenche in the Ninth Region.

Even though the majority of the *comunidades* was divided during the dictatorship, many Mapuche have been holding on to their original lifestyle and economy (Heise 2000: 134). A political movement in defence of their ethnic identity already emerged relatively early even before the dictatorship - the first political Mapuche organisations *Sociedad Caupolicán*, *Federación Araucana*, *Unión Araucana* were founded in the 1910s and 1920s (Minority Rights Group International 2008). The groups mainly focused on the protection of their communal lands and on demands for access to education.

Mapuche lifestyle is distinctive from the Chilean one and they maintain a collective identity and culture that differs from the rest of mainstream Chilean culture. Researchers like Mc Fall have found out that through the Mapuche's struggle with the Chilean government over land and resources they use their ritual, language and dress, their history and their relationship to the territory as part of their political mobilisation – thus they use their culture as a strategy (Herrmann 2005: 12).

3.5.1 The Mapuche mobilisation during the dictatorship: 1970s and 1980s

For the Mapuche the military putsch of 1973 marked a radical change. The Mapuche were one of the groups in society, which suffered the most under the repressive measures carried out under the dictatorship. For instance, in 1977 the police in Cautín, which is mainly populated by Mapuche, arrested 2,5 times more people than in Santiago. Not only was their land expropriated but their political and cultural organisations were destroyed as well. However, the Mapuche never accepted the repression. They were one of the first groups of society to organise a new cycle of mobilisation (Kaltmeier 2004: 199).

The grave human rights violations occurring during the military regime as well as the increasing international pressure stemming from the international indigenous movement and the drafting of ILO Convention N° 169 as well as the draft of the UN Declaration on the Rights of Indigenous Peoples led to the fortification of the representative indigenous movements (Heise 2000: 187).

Due to the introduction of D.L. N° 2.568 and D.L. N° 2.750 in 1978 the Mapuche were the first indigenous group in Chile to reorganise as a political group in order to create representative and law-protecting institutions (ibid. 2000: 187). In 1978 the Mapuche founded *Centros Culturales Mapuches*³³ which was renamed into *Ad-Mapu* in 1981. In the course of the following years *Ad-Mapu* became more political and radical.

Political parties tried to use Mapuche organisations. However, in most of the organisations the demands were similar, especially the pursuit of anti-colonial objectives. Moreover, most Mapuche organisations pressured for a return of democracy and aligned with unions, human rights activists and students against the dictatorship (Kaltmeier 2004: 200).

3.5.1.1 Aims and Demands

In the beginning of the rise of new organisations the indigenous demands were aimed at specific problems of different groups, mostly due to the lack of coordination. However, in the course of the 1980s the demands and concepts became more harmonised as the organisations identified more and more with the overall indigenous movement in Latin America. Furthermore, they incorporated legal positions, which had already been achieved elsewhere, such as the recognition of cultural and territorial rights (Heise 2000: 188). Hence, the indigenous movement in Chile gained closer contact to the international movement, be it organisations of Mapuche living in exile in Europe or the World Council of Indigenous Peoples or the participation at the elaboration of the ILO Convention N° 169 (ibid. 2000: 188).

Moreover, from 1987 onwards, conferences and seminars were held in Chile, enabling contacts between different indigenous groups and the possibility to fight suppressions aligned (ibid. 2000: 189). The foundation of the *Comisión Técnica de Pueblos Indígenas de Chile* (CTPICH) in 1988 is of special significance, its major goal was the constitutional recognition of indigenous peoples in Chile. The commission played an important role in clarifying and formulating common demands on a national and international level.

Since the military government did not meet any of the indigenous demands, the indigenous organisations introduced their requests to the parties of the *Concertación*. The strong contribution of the Mapuche in the battle against dictatorship made their organisations and the *Concertación's* candidate Patricio Aylwin come closer to each other. In May 1989, the CTPICH handed over a list of all demands, especially the constitutional recognition and the rights of ownership of land and rights to culture to the latter.

³³ Moreover, *Nehuen Mapu*, *Calfulican*, *Choin Folilche*, *Lautaro* and others emanated from *Centros Culturales Mapuches*.

Shortly before Aylwin became the first democratic president after the regime he signed an agreement with the Mapuche called *Nueva Imperial*. It contained the objectives of the Mapuche: Recognition as a people in the constitution, ratification of the ILO Convention N° 169, socio-economic demands, free medical care, drinking water and electrification, a bilingual vocational system, restitution of expropriated land, educational programmes, scholarships and technical assistance (Kaltmeier 2004: 200).

Disappointingly, the Mapuche shared their fate with other social movements who had confided in the transition through the new democratic administration. Moreover, after the dictatorship the question about land was not solved thoroughly³⁴.

³⁴ See also 4.3.1.

4. The succeeding governments of the *Concertación* and Pinochet's heritage

The *Concertación por el No* was a fourteen-party coalition of centrist and moderate leftist parties opposing the military dictatorship. It was formed to campaign for voting against another eight years of General Pinochet in the 1988 plebiscite. The victory of “no” opened the way for the first democratic parliamentary and presidential elections after the regime in December 1989 (Haughney 2006: 219). The Centre-Left party coalition *Concertación* became the first democratically elected government in seventeen years.

As I will portray, political leaders chose to still keep the main principles and policies of the neoliberal economic model (ibid. 2006: 219). The remarkable thing about the first democratically elected government under José Aylwin (1990-1994) was that it managed to start a change of society whilst securing the continuity of the model introduced under the dictatorship (Kaltmeier 2006: 18).

The force to a large extent responsible for the change, was the popular social movement including the indigenous one. They influenced the outcome of the plebiscite prior to the presidential elections (ibid. 2006: 19). For this reason the Mapuche managed to establish a national institution, the CONADI (*Corporación Nacional de Desarrollo Indígena*), and the passing of the new *ley indígena* in 1993³⁵. Moreover, the human rights movement could accomplish that the state created the Truth Commission *Comisión Nacional de Verdad y Reconciliación* or so-called Rettig Commission named after its chairman Raul Rettig .

It needs to be noted that the state addressed all the different social-movement-requests by establishing state institutions to solve the issues at hand. However, the government not only lived up to the concerns by making an agreement with the social movement. It also met the needs of the prevalent triad, military, neoliberal intellectuals and the entrepreneurs (ibid. 2006: 19). This arrangement foresaw that the neoliberal model should be carried on without any incisions, taking over the 1980 constitution and ensuring that the military, including Pinochet, was not exposed to criminal prosecution (ibid. 2006: 19). The arrangement was so comprehensive and structural that the aspired continuity made the heritage of the dictatorship outweigh the new changes.

³⁵ See also 4.3.

The second presidential phase of the *Concertación* under Eduardo Frei (1994-2000) showed that the *Concertación* acted according to the arrangement with the elites and deepened the neoliberal project.

By integrating anti-dictatorial movements from 1990 onwards, the *Concertación* carried on the continuation of *transformismo*³⁶ in Chile (ibid. 2006: 20). This last step of *transformismo* led to the end of the women's movement and large parts of the *indígena* movement. (ibid. 2006: 21). Only the human rights movement withstood the new *transformismo* and insisted on their demands of truth and justice. This pattern was kept up by the subsequent administrations. Moreover, *Concertación* leaders believed that the political institutions established by the military regime under the 1980 constitution were a prerequisite for a successful transition to democracy and other political and social reforms (Haughney 2006: 9).

4.1 The *Concertación* and neoliberalism

“The Centre and Left parties in Chile have agreed upon a path of modernisation and development that is in essence the same as the one of the conservative Right” (Haughney 2006: 16). Chile opened up to neoliberalism in a comprehensive manner. The dictatorship provided for the first phase of the installation of the neoliberal model. However, the post dictatorship governments of the *Concertación* were the ones that deepened the neoliberal pattern (Kaltmeier 2006: 24).

After the change of administration from Aylwin to Frei in 1995, the interest in indigenous concerns decreased dramatically. The Aylwin administration was predominantly occupied with dealing with human rights violations and the change to democracy whilst under Frei economic topics became the centre of attention. A prospering economy is seen as the most important factor for democracy in Chile (Heise 2000: 255). Particularly, the social democratic government under Ricardo Lagos (2000-2006) promoted new political forms of regulations, as in “the third way” or “the new middle” according to the role models of Blair and Schröder at that time (Kaltmeier 2006: 25).

The dictatorship introduced neoliberalism on an economic and institutional level whilst the governments of the *Concertación* changed the cultural and moral forms as well as political rationality. Therefore, neoliberal philosophy was intended to be introduced on all levels of society. This new political rationality was supposed to define the interrelationship of state, market and population anew (ibid. 2006: 25). Although the members of the *Concertación* had

³⁶ *Transformismo* is a defensive strategy of the elites during economic or political crisis, aiming at including movements and antagonistic groups to achieve passive consensus within a society (ibid. 2006: 20).

been harsh critics of the military regime and its principles the neoliberal model and its reduction of the state's role was defended and advocated by them.

Studies of Chile consistently show a lack of democracy and question the measures of economic success. Due to the neoliberal restructuring economic resources became more concentrated than they had been in the 1960s. This regime is kept up by the *Concertación*. Income inequality remained high during the 1990s. In 1996 the richest twenty per cent of Chilean households captured 57,1 per cent of the income while the poorest twenty per cent only had a share of 3,9 per cent (Haughney 2006: 3). “*Authoritarian prerogatives continue to curtail popular sovereignty and the accountability of elected officials, and the military is an institutionalised political actor*” (ibid. 2006: 3).

Before the Pinochet dictatorship the Chilean state was a welfare state providing for health care, social rights and services as well as economic benefits. However, this approach was abandoned during the regime since it turned to liberal legal traditions regarding natural resources (ibid. 2006: 13).

4.2 The *Concertación*'s way of dealing with the past

As I will elaborate, examples of the consistency of Pinochet's system are no prosecution of human rights violators, a lack of political participation and the perpetuation of the political system through the structures created under the dictatorship (Kaltmeier 2004: 201).

Under Aylwin, the state had had the task to provide for “Truth and reconciliation” by the Truth Commission. The aim of the Chilean Truth Commission was to elucidate major human rights crimes, committed during the dictatorship which were lethal, and to initiate a process of national reconciliation within the principal of “justice within a possible frame”. Therefore, justice was sacrificed for truth.

Human rights violations causing deaths were the focus of the Commission's documentation in the time frame of September 11th 1973 to March 11th 1990. Nevertheless, cases of torture, imprisonment, exile and others were not documented (ibid. 2006: 21). The perpetrators of the numerous crimes were not named even in cases where they were known. Many of them could continue their lives in post-dictatorship Chile and keep high positions.

Furthermore, there was neither public apology nor automatic criminal prosecution of the perpetrators (Wenzl 2006: 52). The government argued that human rights issues should be sacrificed in order not to endanger the democracy achieved in the country. Under Eduardo Frei and Ricardo Lagos, this process was left to processes of negotiations. Therefore, the so-called

Mesa de Diálogo sobre Derechos Humanos was initiated in 1999, which ultimately failed. Once more, *impunidad* - impunity was reinforced. In 2000 reports were submitted to president Lagos. However, the military showed no sign of guiltiness; the only positive aspect was that the existence of forced disappearances was admitted for the first time in Chilean history (Kaltmeier 2006: 29). Up to this day 1,197 persons are considered *disparecidas* in connection with the dictatorship. So far, merely the remains of 128 bodies have been recovered and identified (ibid. 2006: 37).

Many authors argue that Chilean democracy of today is an exact example for the continuation of a dictatorship under the cover of democracy (ibid. 2006: 35). The attempt of the *Concertación* government in 1992, which aimed to harmonise the national law with international law and render the amnesty law void, failed. Only Pinochet's arrest in London in 1998 made the world look at Chile's case and made the prosecution of crimes committed by the dictatorship more likely. This also led to the round table.

In July 2001, the proceedings against Pinochet were terminated due to his mental incapability. However, after the dictatorship there was a big consistency and a lack of transitional measures. For instance the de facto veto of the right-wing parliamentarians prevented the signature and ratification of the ILO Convention N° 169 until 2008 and the constitutionalisation of the *Ley Indígena* up to this day.

4.2.1 Continuation and manifestation of structures introduced under Pinochet

Before the *Concertación* could take over the military regime seized the 17-month transition period provided for in the constitution to establish security measures and subsequently prevent any change or regress in important political areas from taking place (Rottensteiner 1997: 35).

After the victory of the democrats in the elections in December 1989 the military government passed laws, aiming to put a limit to democracy - these laws were called *leyes de amarre* - laws that tie down. Besides these laws other existing provisions provide the model to protect democracy by the military forces as laid down in the 1980 constitution (ibid. 1997: 36).

In particular, the electoral laws and the designation of the senators lead to a compromising position for the new government as it had to engage with parties close to the former military regime (Heise 2000: 186). The political framework for the transition to democracy was determined by the military and enabled by the fact that the *Concertación* agreed to the 1988 plebiscite in order to achieve an institutional and constitutional change of administration (ibid 2000: 186). However, this fact also meant that it accepted the 1980 constitution.

Since the constitution was designed for the purposes of a military government the latter maintained its significant political power to this day (ibid. 2000: 186).

As only 54 per cent voted against the Pinochet regime in the 1988 plebiscite, the military junta felt strong enough to manage saving crucial elements of their ideology and their rule of governing during the negotiations with the opposition for the democratic future. Therefore, the Amnesty-Decree-Law N° 2.191 introduced in 1978 was upheld and saved former rulers from being charged with the crimes of murder and torture. The law relates to the probably darkest part of the military regime between 1973 and 1978 where the highest number of oppositionals was arrested, tortured and murdered (Wenzl 2006: 51).

The constitution of 1980 is still in power today with only a few small changes. Therefore, the military still has special rights and the president holds an exceptionally large amount of power. Even though the governments following the regime were democratic, it is still difficult to change the constitution since it would require a majority of three-fifths. However, this majority can only be achieved when right-wing delegates and senators agree. Therefore, many authors speak of a transfixed constitution (ibid. 2006: 52).

Another factor inhibiting processes against high profile militaries were the judges loyal to Pinochet. The dictator himself exchanged all members of the Supreme Court and replaced them by judges faithful to him. Moreover, the constitution states that these judges may stay in their positions as long as they don't resign, die or turn 75.

If persons were charged with crimes in a higher instance they mostly were not found guilty - *impunidad*. Moreover, the military still puts pressure on the democratic governments and threatens them to initiate a new putsch. The government adopted several laws for reconciliation for the benefits of Chileans returned from exile or relatives of *disparecidos*. Despite many signs of change the undemocratic structures laid down under Pinochet have not been questioned in their core to this day.

Although the *Concertación* won the plebiscite of 1988 it had to pay a high price. Patricio Aylwin insisted on recognising the constitution and the rules for the transitional period as well as the limits for convertibility of the political system laid down under the military regime (Huhle 2004: 282).

4.2.1.1 The secured influence of the right wing and power of the military

Although restrictive elements of the constitution were abandoned due to the constitutional reform in 2005³⁷, the 1980 constitution was not comprehensively changed and its structure remained as it was laid down under Pinochet (Rinke 2007: 186).

Up to this day the military has ensured its influence on several levels. Due to the constitution the four military supreme commanders cannot be dismissed. The military has the right to act as protector of the nation. The military law of 1989 limits the president's potential to influencing the appointment, promotion and retirement of military personnel (Rottensteiner 1997: 36).

The binominal election system, which ensures a disproportionate majority of the right-wing parties in parliament – allows for a veto of the minority. Before the change of regimes Pinochet appointed all members of the constitutional court who are not dismissible for eight years. Moreover he dismissed most of the members of the Supreme Court and substituted them by judges loyal to him.

Between November 1989 and March 1990 the regime privatised important state-owned companies. Furthermore, Pinochet put sympathisers of his government into high ranks of economy like the national bank. Chilean sociologist, Tomás Moulián described the transition as one from authoritarianism to democracy on the back of the democratic regime which is forced to play an important reproductive role in the socio-economic order founded by Pinochetism (ibid. 1997: 40).

The most prominent obstacle for the government under Aylwin was the balance of power in Congress, which was and still is marked by a stronger right-wing-representation, especially in the Senate. That's why changes of the constitution and thorough changes in the area of human rights violations are hard to achieve. Despite the acceptance of the new government in the civil society it had to compromise for every law-making project with at least one of the right wing parties. That's why the *Concertación* was and still is deemed to compromise according to many authors (ibid. 1997: 66).

Hence, many initiatives for amendments, especially in the human rights and indigenous rights area, could not be realised because the *Concertación* anticipated a “no” from the right parties. The priority of the *Concertación* is “*Gobernabilidad*” or the stability of the political institutions and the economic regime rather than popular participation or socioeconomic

³⁷ See also 6.8.1.

reforms (Haughney 2006: 214). Therefore the centrist and leftist parties do not have the power or will to conduct reforms.

4.3 Legislation concerning the indigenous population: Between modernisation and symbolic recognition

After the elections in 1989 and the return to democracy, the new government under Patricio Aylwin set up a special commission for indigenous peoples, namely the *Comisión Especial de Pueblos Indígenas* CEPI. The commission was created by decree (D.S. N° 30) and had the task to prepare a proposal for a new indigenous law, which was envisaged to newly regulate the *Cuestión Indígena*. Moreover, the new government aimed at achieving a change of the Chilean constitution in order to recognise the indigenous population on a constitutional level (Heise 2000: 185). In fact, the constitutional recognition still has not taken place up to this date. Furthermore, in late 1990 the ILO Convention N° 169 was brought forward in the parliament for ratification. Still, it took another 18 years until the ratification was finally realised. One positive aspect was that representatives of almost all indigenous groups took part in the development of the legal drafts.

However, their influence was confined to collaboration within the CEPI and the drafting of a discussion paper *Borrador de Discusión*, which became the basis of the new indigenous law (ibid. 2000: 186). The draft for the new indigenous law was brought into parliament in October 1991. Nevertheless, the indigenous legislation was vastly modified until the law was finally passed on September 23rd, 1993. The new *Ley Indígena* was developed in three different stages. The elaboration of a discussion paper, *Borrador de Discusión*, by the CEPI and indigenous representatives, the formulation of a draft *Proyecto de Ley* of the Aylwin administration, which was brought into parliament in 1991 and the passing of *Ley Indígena* (N° 19.253) in September 1993 after several hearings and modifications in the Chilean parliament (ibid. 2000: 187).

4.3.1 Overview of the new *ley indígena* of 1993

The political aim of the new government was the recognition of the indigenous peoples as such in order to manifest the pluri-ethnic composition of Chilean society. Moreover, the new legislation was intended to protect and promote indigenous people in order to overcome their discrimination and marginalisation in Chile (Heise 2000: 203). The draft law already showed the tendency of the law to come: it would focus on the status quo of land ownership,

the establishment of a corporation for indigenous peoples as well as two state-financed funds for expansion of land and to counteract poverty.

After two years of discussions and alterations the Chilean parliament passed the law on September 28th, 1993, which came into force on October 5th, 1993 (ibid. 2000: 211). The 1993 indigenous law *Ley Indígena N° 19.253 Establece normas sobre protección, fomento y desarrollo de los indígenas* recognises cultural diversity within the Chilean nation. As its subheading reveals, the 1993 law predominantly deals with the protection, promotion and development of the Chilean indigenous population.

Unlike the indigenous law of 1972, which provided for the protection of indigenous lands from sale to non-indigenous persons, this law created a state agency for the development of indigenous peoples (CONADI), and set up funds for the subsidised purchase of additional indigenous lands (Haughney 2006:7). The 1993 law does not seek to restore lands usurped from the *reducciones* but only on case-by-case review of title disputes (ibid. 2006: 7). Legally *Ley N° 19.253* is of administrative nature and therefore regulates the relationship between indigenous citizens and the Chilean administration. It cannot be classified as a constitutional law for indigenous people since it was not codified as such and does not relate to the Chilean constitution (Heise 2000: 212). It consists of 80 Articles divided into nine different titles (*títulos*) as well as a section determining transitional rules.

4.3.1.1 Definition of indigenous peoples and the *comunidad*

One crucial element, if not the most important of all, which was requested by CEPI and also contained in the draft law is missing in the law of 1993: The recognition as indigenous peoples. In fact, the law refers to indigenous peoples as *indígenas*, *etnias indígenas* or *comunidades indígenas* (Heise 2000: 213). This can be explained by the fact that in the point of view of the oppositional parties a minority was still privileged even without the use of the term peoples and therefore the law would contradict the constitutional principle of equality (ibid. 2000: 207).

The law provides that the state recognises the indigenous as descendants of humans, which have existed on national territory since pre-columbian times and who preserve independent ethnical and cultural manifestations and for whom land is their principle foundation of existence and culture (Art. 1). Moreover, the law names the peoples, which are recognised as such: Mapuche, Aymara, Rapa Nui, Atacameños, Quechuas, Collas, Kawashkar, Yámana.

According to the law the state values their existence as well as their integrity, values and customs since they constitute an essential part of the roots of the Chilean nation. Paragraph

two sets out the aim of the Chilean state and society to respect and protect the indigenous cultures, families and communities and to promote their development and to protect the indigenous land to seize it adequately, to respect its ecological balance and to strive for its expansion

Article 2 of the law defines who is an *Indígena* and what is understood as *Comunidad*. The law constituted and listed the creation of the indigenous community (*comunidad*) in the governmental institution National Corporation for Indigenous Development CONADI. Nevertheless, the term community usually refers to the *ex-reducción* (Herrmann 2005: 36).

The novelty was that a *comunidad indígena* is declared a juristic person in Article 10 par. 5. This has legal consequences: The *comunidad* becomes a legal subject and addressee of rights, which are determined in the indigenous law (Heise 2000: 215). The *comunidad* has to be enlisted at a register, (*Registro de Comunidades y Asociaciones Indígenas*) which is maintained by CONADI. Theoretically, communities, which have been divided, get the opportunity to reunite on a legal basis. As a juristic person they can follow their interests and have a stronger representation.

However, the possibility to unite is not exclusively bound to former *comunidades* and can have negative effects too. Families (at least 10 adults) have the option to unite as a juristic person. The disadvantage is that a person who was part of a family before can be excluded. Persons wishing to unite have the opportunity to do so, however the reconstitution does not mean that the historically grown and later divided *comunidades* are reunited again. Persons, who are politically or economically weak can be excluded and lose their social safety net. Thus, solidarity, which is the core character of an indigenous *comunidad* is lost.

Today mostly extended families constitute themselves as a juristic person, whereas before, it would have been several families constituting larger social entities. With its legislation the state promoted the foundation of communities of interests but neglected the existence of historically and culturally grown communities with a special social value.

4.3.1.2 Culture and Customs

The recognition, the protection and promotion of indigenous cultures is determined in Articles 7, 8 and Articles 28 to 33.

Article 7 determines the right of the indigenous population to maintain and develop their own cultural manifestations and sets out the duty of the state to promote indigenous cultures. However, the state does not recognise indigenous cultures and languages as such (Heise 2000: 221). Moreover, the right enshrined in Art. 7 is made conditional upon the fact that the

cultural manifestations do not contradict public morals or law and order. Therefore, the state can infringe these rights by determining which fragments are worth protecting and promoting and which are not.

Article 32 envisages the introduction of an intercultural and bilingual educational system. However, CONADI is not obliged to introduce such a system, not even in areas with a high indigenous population (ibid. 2000: 223).

Another example of lacking definition is the notion of indigenous customs (*costumbre indígena*). It is neither defined nor differentiated from the notion of *manifestaciones culturales*. Due to this lack of definition it is likely that - depending on the respective interpretation - customs can be seen as violation of morals and public order.

Indigenous customs have an especially important meaning in legal proceedings. In penal and in civil proceedings the judge has to take indigenous customs into account. Therefore, the actual consideration of these customs underlies individual interpretation and is likely to be neglected since the formulation is so unspecific. Moreover, indigenous customs are only considered (if at all) in disputes amongst indigenous persons of the same ethnia. The concepts of the new law show that it falls short of responding to the actual situation of Chile's indigenous population.

By using terms and notions, which are not defined or are problematic, indigenous cultural and social reality is not covered by the law. The terms do not fit into the cultural context since they are dependent on the political will of the state or are defined too narrowly for certain ethnic groups. The creation of new forms of social and political structure can lead to conflicts and to the question why traditional forms have not been taken into account and promoted (ibid 2000: 213). Since the ideal of a homogenous unitary state is still strongly represented in Chile an infringement of cultural freedom is at stake.

4.3.1.3 Land and Resources

The next provisions I want to emphasise on are the ones covering the significant area of the recognition and protection of indigenous land (Articles 12-19). Article 12 par.1 defines which land is indigenous and recognised as such. The indigenous nature is made conditional upon the former granting of ownership titles by the state such as *títulos de merced*, *títulos de comisario*, *títulos gratuitos* and others. Moreover, it includes historically used land still owned by indigenous groups without an ownership title. However, this land is only treated as *tierra indígena* if the indigenous community makes a request for registration in the *Registro de Tierras Indígenas* after the transfer of the ownership from the state (Heise 2000: 218).

Therefore, the law only recognises land granted to the indigenous persons by the state and does not consider historical criteria as requested in the *Borrador de Discusión*.

The intended protection is that indigenous lands are not alienable, nonforfeitable and not mortgageable and cannot be acquired through loss (except amongst indigenous communities or persons of the same ethnic group) as determined in Art. 13 par. 1. Moreover, Article 13 in its third paragraph prohibits the leasing, lending or allowing a third party to use or administer land of the *comunidades*. However, the comprehensive protection is impaired since for all these cases exceptions can be made if CONADI agrees (par. 2). Therefore, indigenous land can be mortgaged.

CEPI had demanded the inalienability of indigenous lands for all time, however the new law does not determine the inalienability for all times to non-indigenous persons. Due to this, farmers who are in pecuniary troubles have the opportunity to receive credits. In addition, individual indigenous land can be leased for the time of five years or be exchanged for non-indigenous land of the same quality (Art. 13 par. 4). The division³⁸ of a *comunidad* with collective ownership is only possible upon the request of the absolute majority of the members of the community (Art. 16 par. 1)

Article 17 determines that plots resulting from the division of *comunidades* on the base of D.L. N° 2.568 of 1979 as well as the ones resulting from division according to Article 16 of the current law may not be divided any further, not even in cases of distribution of an estate after the owner's decease. However, paragraphs 2 and 3 list exceptions: The division is admissible upon CONADI's authorisation, for the purpose of community building and other qualified reasons. The division is decided by a judge and the resulting plots are not smaller than three hectares. Moreover, according to Article 17 (paragraphs 4-8) the owners of indigenous lands can grant usage rights to their ancestors, descendants as well as their relatives and in-laws. This provision shall give the opportunity to facilitate the return of indigenous persons who had to migrate to urban areas.

It needs to be pointed out that Article 16 indirectly prompts the division of collectively owned land. Since par. 2 foresees the option of the adjudication of a members' portion, disagreement about the division of the portions can be fostered. Consequently, this can ultimately lead to the division of the *comunidad*. Traditionally a *lonko* distributes land

³⁸ The division has to be requested at a judge who can conduct it alternatively according to national civil law or customary indigenous law. Irrespectively, each member of the community can request the adjudication of his/her portion of the community land at a judge without the *comunidad* being divided (par. 2). Moreover, those who have inherited co-ownership of the community land but do not live on the latter can judicially request compensation. These demands for compensation are handled by CONADI and are called rights of absentees: *Derechos de Ausentes* (Heise 2000:220).

amongst its members according to a complex system in order to gain stability of the community as a whole (ibid. 2000: 220). In the system mentioned certain parts of the land are for communal usage only, others are rotated amongst members. Moreover, the members do not individually own the distributed land; instead it is temporarily (but constantly) allocated to them (ibid. 2000: 220). If customary law in inheritance cases of collectively owned land is used and the inheritors do not come to an agreement, general civil law applies. This fosters potential conflicts amongst members of *comunidades*. Even if a single person strives for benefits it can rupture an intact community.

Succession upon death is determined in Article 18. Whilst individually owned indigenous land is subject to the civil law (*Código Civil*) infringed by the reservations of the indigenous law, collectively owned land of a *comunidad* can either underlie the traditional inheritance laws or alternatively national civil law.

Article 19 provides for the right of indigenous groups to carry out communal activities on state-owned land if there are important cultural or spiritual places like cemeteries, venues for the *ngillatun*³⁹ and others. The aim of the provisions is to protect and preserve indigenous land as well as prevent its further reduction.

However, the law provides for several exceptional rules, which actually enables persons with individual interests to circumvent certain rules of protection. In most cases CONADI's approval is necessary, which is a state corporation (and therefore also underlies the state's interest for land and resources). Collectively and individually owned land is protected. However, the administration's subtle attempt to ultimately dissolve collectively owned land is observable in the provisions about land. Moreover, the government wanted to keep the land open to economic use. The new law enables formerly migrated indigenous persons to return and opens the possibility to purchase land by means of the *Fondo de Tierras y Aguas*⁴⁰ (ibid. 2000: 221). The aspired comprehensive protection of natural resources was neither included in the draft law, nor in the final law of 1993. The Aylwin administration narrowed the protection of natural resources and the scope of the indigenous law, which overall impaired the protection of indigenous peoples (ibid. 2000: 211).

4.3.1.4 Funds

The new law established the foundation of two funds, one for land and water rights *Fondo de Tierras y Aguas* (Articles 20-22) and one for indigenous development *Fondo de Desarrollo*

³⁹ See also 1.3.1.4.

⁴⁰ See also 4.3.1.4.

Indígena (Articles 23-25). Both funds are financed by the state and are administered by CONADI.

Basically, the fund for land and water rights provides financial aid for the purchase of land if the surface of a community is too small. Moreover, it provides financial support to settle disputes over indigenous land. In addition, it helps finance the establishment as well as regulate and purchase water rights. The beneficiaries of these provisions are indigenous individuals, parts of a *comunidad* as well as complete *comunidades* if they fulfil the prerequisites of Art. 2 of being indigenous - certificate is issued by CONADI.

However, for the granting of any support one has to apply at CONADI. The committee at CONADI, which decides upon the application looks at factors such as socio-economic situation, own financial contribution, size of families or communities, number of members and age of title (Heise 2000: 233). The committee decides upon urgency about the application and reaches a conjoint decision.

The fund for indigenous development has the task to finance development programmes for indigenous individuals or communities, especially through the granting of credits, projects for the accumulation of capital and the bidding of economic aid programmes

Both funds do not provide for the actually needed financial means. There are no objective criteria that make the granting of financial support transparent. It seems the decisions are politically motivated in the commission and in the national assembly of CONADI (Heise 2000: 234). Unfortunately, the selection of beneficiaries of the acquisition of lands by CONADI is arbitrary (Instituto de Estudios Indígenas 2003: 185).

Moreover, in 2002 president Lagos declared that Mapuche who would engage in the occupation of estates or use violence were excluded from the programmes provided by CONADI. Furthermore, two thirds of the beneficiaries are men, which has social and economic impacts on the lives of the Mapuche (ibid. 2003: 185).

4.3.1.5 CONADI - *Corporación Nacional de Desarrollo Indígena*

The largest part of the new indigenous law by far are the provisions concerning CONADI⁴¹ (Arts 38-53) which is defined as a functional decentralised, public institution, is a juristic

⁴¹ It is divided into the national directorate *Dirección Nacional* and two regional sub directorates *Subdirección Norte* (Iquique) and *Subdirección Sur* (Temuco). The primary and deciding organ is the so-called national assembly (*Consejo Nacional*), which consists of nine representatives appointed by the state and eight indirectly elected indigenous representatives. The national assembly decides upon the politics of CONADI and approves of promotional programmes and monitors them. The leadership of CONADI lies in the hands of the national directorate (Heise 2000: 230).

person, has its own budget and is subordinated to the ministry of planning and cooperation - MIDEPLAN (Heise 2000: 225).

According to Art. 39 CONADI's central tasks are the promotion, coordination and implementation of the state's action towards a comprehensive development of the indigenous persons and communities, especially in an economic, social and cultural respect as well as promoting their participation on a national level. Moreover par. 2 of Article 39 defines the areas of CONADI, which are amongst others:

- The promotion of the recognition of indigenous groups and communities
- The promotion of indigenous cultures and languages and educational systems
- Promotion of indigenous women
- The legal counselling and defence of indigenous persons and their communities in cases of disputes over land and water as well as the function as arbitrators and intermediaries
- The monitoring and protection of indigenous land as foreseen in the law
- To ensure access of indigenous persons to the state's promotional programmes for the extension of land (funds)
- The promotion of the adequate usage of indigenous land and its ecological balance through the development fund and by the establishment of indigenous areas of development (*Áreas de Desarrollo Indígena*)
- The suggestion of reforms of law and administration to the president in order to promote better protection.

CONADI was set up with only 88 employees⁴², only 42 of them actually working on the implementation of the indigenous policies; the rest is responsible for administrative matters. Looking at these numbers it is quite obvious that CONADI is overwhelmed by the workload of being responsible for more than one million indigenous people (ibid. 2000: 254).

CONADI's main seat is in Temuco, which makes coordination with the ministries in Santiago difficult. Moreover, the higher instances have a poor understanding of the needs of the indigenous population and are therefore marginalising their problems. In addition, the CONADI lacks transparency in relation to the allocation of financial means and projects. The selection of indigenous representatives in the national assembly of CONADI is not transparent and oriented towards political interest (ibid. 2000: 262).

⁴² Compared to this CEPI had 90 employees exclusively dedicated to substantive questions.

The minor political meaning of the CONADI and therefore its ineffective work are another flaw; it lacks infrastructure as well as financial support and is only active in rural areas but not in urban centres. The indigenous representatives can be overpowered and the president gets to pick candidates. Participation of the indigenous themselves is infringed in CONADI and mostly limited to the allocation of financial support of the two funds. All remaining decisions about measures have to be made by the national assembly or the respective ministries (ibid. 2000: 270).

By adapting indigenous reality to the structure of the state and not reversed leads to the shortcomings of the new law. Moreover, the will of the state to change the situation is not observable and is reflected in CONADI's limited means. Additionally, the introduction of the new legislation had the effect of weakening the indigenous movement. On one hand indigenous leaders were put in positions in the national assembly and other functions in CONADI, but on the other hand they lost autonomy and their capability of formulating demands towards the government. This led to the shift of problems into the communities (ibid. 2000: 273).

4.3.2 Consequences and critical view on the 1993 indigenous law

4.3.2.1 Reality remains uncovered by law

It has been criticised that the law is very much focused on the *comunidades*. However, this is oriented towards Mapuche only, therefore realities of other indigenous groups are left out⁴³. Furthermore, the indigenous law is designed for rural areas and realities. Researchers and politicians estimated that two thirds of the indigenous population lived in rural areas. However, in the census of 1992 it turned out that 65 per cent of the indigenous population lived in urban areas and as much as 43 per cent of them in the *Región Metropolitana* of Santiago⁴⁴ (Heise 2000: 258). Due to these facts the indigenous legislation is also called *mapuchista* and *campesinista*.

The law does not live up to the needs and living situations of urban Mapuche. The state ignores the urban Mapuche population. Indigenous policies are implemented within a programme of subsidies and “integration” of a peasant sector into overall society (Haughney 2006: 212).

⁴³ For instance the Rapa Nui do not have the concept of a *comunidad*, as common for Mapuche.

⁴⁴ The results were not known when the law was elaborated.

The only provision urban indigenous people can benefit from is the possibility to align with others in indigenous associations (*Asociaciones*). However, the measures of promotion determined in the new law relate to the protection of indigenous land and the *comunidades*. Urban Mapuche predominantly live in difficult circumstances on the fringes of society marked by a high poverty rate and political as well as social discrimination and deprivation. The urban school system does not promote indigenous values and culture and therefore fosters loss of identity in young Mapuche. Ethnical and social discrimination play a significant role in urban life. Moreover, urban Mapuche do not have the possibility to gather in order to carry out social, cultural, religious or political activities.

Additionally, the possibility of constituting juristic persons questions the traditional meaning and function of the *comunidad* as a solidary network. The tendency towards disruption and division of *comunidades* into communities of single families or groups of interest was already noticeable a short time after the law came into force (Heise 2000: 257).

4.3.2.2 Indigenous Development

Another factor is that the notion of indigenous development is commonly used throughout the new law. Nevertheless, the concept of development is neither further explained nor defined. The only reference can be found in title III, Articles 23-27. CONADI has the task to promote the social and economic development of indigenous persons by granting financial support from the national indigenous development fund. Moreover, CONADI can suggest the establishment of indigenous areas of development (*Areas Indígenas de Desarrollo - ADI*). However, only MIDEPLAN can actually determine these areas (Heise 2000: 225).

In addition, CONADI defined that it wants to promote self-determined development (*autodesarrollo*) and therefore development with identity (*Desarrollo con Identidad*). The aim of such a development path is envisaged in modernisation of the state and the overcoming of poverty. Once more, the aim of promoting economic development is noticeable. The promotion of areas of indigenous development has a tactical background, as an additional promotion through other state institutions is envisaged (ibid. 2000: 244).

CONADI predominantly promotes small-scale projects for economic development. Due to the land situation indigenous people are forced to find other sources of income, which such projects seek to promote. However, the new law does not provide for a radical change of the land situation and scarcity of the latter in order to make subsistence farming feasible again. Moreover, it is doubtful whether indigenous persons are consulted if the projects implemented

are useful. Without participation ethnocentric and self-determined development is not possible.

In addition, the new law hampers the uniting as an *Asociación* or *comunidad* according to traditional patterns of organisation (ibid. 2000: 261). The possibility of joining an *Asociación* according to the new law does not fit into an indigenous context. Moreover so far the number of newly founded *Asociaciones* is rather small since it seems not to be accepted and not to be well known amongst indigenous groups.

4.3.2.3 Conflicts with other laws and the lacking protection of natural resources

Legally, the *ley indígena* lacks a clear differentiation from other laws leading to a situation of legal concurrence on many levels. Therefore, the protective value of the law gets diminished or even undermined.

The national environmental law and the indigenous law get into conflicting situation when it comes to the scope of the usage of primary forest as well as for situations when the use of land concurs with national parks or state owned forest reservations (Heise 2000: 264). Moreover, legislation about patents is infringing ways of life of indigenous persons (patents of medicinal plants etc.).

In the area of exploitation of natural resources the most conflicting legislation can be found. Water legislation as well as mining legislation contains provisions interfering with the protection and interests of indigenous life and create legal uncertainty (ibid. 2000: 264). The areas mentioned above assume that rights for exploiting resources are state-owned and can be allocated to parties other than the landowner himself. Similar provisions are valid for national or private investment programmes.

As a legacy of Hispanic law Latin American states own all subsoil resources, regardless of who owns the respective surface land (Haughney 2006: 181). The most prominent example in Chile are the dam projects⁴⁵ at the River Bío Bío where indigenous inhabitants were/are forcibly dislocated. This process has allowed the company ENDESA to acquire the rights to virtually all the potential sources of hydroelectric power in central and south-central Chile (ibid. 2006: 182). Therefore, even the areas of indigenous development are exposed to the states' economic and political will.

The current national laws concerning natural resources encourage private companies to gain concessions, which allow them to exploit the latter. For instance, the *Código de Agua* was

⁴⁵ See also 5.5.1.

reformed in 2005 alleviating the concessions for companies and infringing the access for indigenous communities (Anaya 2009: 19).

Most Mapuche communities and those of other indigenous communities in Chile do not have any type of subsoil resource concession. Not only do the Mapuche find themselves in unequal relationships with surface-landowners but also with those of subsoil resources or water sources (Haughney 2006: 182). The notification of landowners who might be affected is not requested. By the year 1996, 75 per cent of available water rights in the regions Bío Bío, Araucanía and Los Lagos had been authorised by state agencies to those who requested them. However, only 2 per cent of them were in the hands of the Mapuche (Aylwin 1998: 11).

Once more, a provision laid down under Pinochet provides for the infringement of indigenous rights. The legal regulations concerning water were modified in 1981 to allow private-sector interests to apply for use rights of rivers, streams, and other waterways. It is not even necessary to pay for water-use-rights, it is sufficient to follow the bureaucratic way of application and publication of the request for water rights (Haughney 2006: 182).

The 1993 indigenous law does not have any special provisions concerning water rights for indigenous peoples in other areas, despite the comments of congressmen and indigenous leaders on the need to recognise the rights to control natural resources within indigenous lands (ibid. 2006: 183). Under the current legal system, the rights to natural resources are subject to the pressures of oligopolistic⁴⁶ market forces, with little or no state regulation (ibid. 2006: 184). Given the tendency to overexploit natural resources in the neoliberal market model merely acquiring water rights would not be sufficient to guarantee integrity over natural resources or their replenishment (ibid. 2006: 183).

Moreover, the protection of land was undermined by the provision of Art. 13 par. 2, which enables individually owned indigenous land to be leased for five years or being swapped with non-indigenous land. Consequently, many Mapuche swapped their lands for compensation or leased it on a longer-term basis (following contracts) (Heise 2000: 265). However, a court recently ruled⁴⁷ the prevalence of ILO Convention N° 169, which will make it harder to neglect the will of the indigenous.

⁴⁶ See also 5.2.1.1.

⁴⁷ See also 6.7.1.

4.3.2.4 Land

“By not addressing the issue in comprehensive terms, the Concertación upheld a structure of inequality imposed by violence as if it were representative of the “rule of law” and therefore meriting defence as a bulwark against the lawlessness seen as characteristic of both the Popular Unity period and the military dictatorship” (Haughney 2006: 17).

In practice this law is unable to live up to the expectations of the Mapuche movement and remained too weak – the new government as under the Pinochet regime gave priority to the needs of the market with a very high access to natural resources. Thus, rather than to encourage a reform of the centralist state to enable territorial control of natural resources the law encourages indigenous individuals and groups to compete for funds on small-scale development projects that cannot change the causes of environmental degradation or prevent economic inequality (ibid. 2006: 212).

The legal corporate status as a juristic person makes it easier for individual indigenous communities to win grants but they still have to face the incursion of transnational corporations onto their lands (ibid. 2006: 213).

The first government of the *Concertación* (1990-1994) was not willing to make an overall review of land claims or return usurped lands on a comprehensive basis, not even to return to the situation of the original properties recognised by the state in the *títulos de merced* (ibid. 2006: 169). The national indigenous law only permits the regaining of lands, granted to indigenous people by the state. Therefore, ancient indigenous territories and resources are not covered and a structure of illegal usurpation and structural injustice was recognised by the law (Anaya 2009: 15).

Since Ley N° 19.253 is in force, 657,520 hectares of land were acquired with financial means provided by the *Fondo de Tierras y Aguas Indígenas* between 1994 and 2009, benefitting 613 comunidades or 69,200 families (ibid. 2009: 13). However, despite these programmes for acquiring land, there are no mechanisms, which recognise rights to lands or resources, which were traditionally used or occupied. Furthermore, UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people James Anaya like his predecessor Rodolfo Stavenhagen recommends the regaining and reconstitution of traditional communal indigenous territories, which entail natural resources for communal use (ibid. 2009: 14).

Moreover, the acquisition of land through CONADI led to the fragmentation of land and favoured lands with individual property titles rather than the ones for collective ownership.

Another negative effect is an increase of market prices due to the speculation of the land (ibid. 2009: 15).

Anaya criticised in his report that the Chilean state merely dedicates 0,31 per cent of its national budget to indigenous affairs. By these means the state is in no position to fulfil its duties in order to reconstitute lands and provide other programmes for its indigenous population.

4.3.2.5 Summary

The passing of the indigenous law in 1993 was a milestone in Chilean history. Since the brief Allende administration and after 17 years of being deprived of rights under Pinochet's military dictatorship this was the first time a government recognised the need for protection of indigenous people in respect to their land, cultures and identity. The direct pressure of assimilating to the predominant society was taken off (Heise 2000: 277).

However, a critical look on the legislation is unavoidable since it does not solve vast areas of indigenous life and legal concerns. In practice, the *Concertación* did not uphold provisions of indigenous or environmental laws when they clashed with major private-sector industrial projects (Haughney 2006: 1). Leaders of the *Concertación* agreed to work on a new indigenous law, which would incorporate the demands of the Mapuche movement. The new law seemed to represent a clear break from the dictatorship's denial of ethnic diversity and its efforts to eliminate the legal protection of indigenous lands from sale (ibid. 2006: 7).

Yet, it did not establish the collective rights demanded by the Mapuche movement including the recognition of the status of "a people", territorial control over the use of natural resources and political autonomy (ibid. 2006: 212). The reform continued the historic pattern of exceptional status of indigenous property titles - in practice even the protection of these lands has proven to be quite frail.

Programmes for farmers or small microentrepreneurs treat indigenous people like disadvantaged individuals, not as different peoples and therefore the subjects of collective rights. Following the end of the military dictatorship, the new democratic government hoped to resolve the most contentious land conflicts by negotiating with the private landowners and transferring some of the state's land in other situations (ibid. 2006: 169). With the ratification of the ILO Convention N° 169 and its application it remains to be seen if the shortcomings of the law will be outweighed.

4.4. Growing pressure on Mapuche lands and natural resources

Historically, experience has been that indigenous land with natural resources or a location being of economic interest in private ownership is in danger to be acquired legally or illegally by non-indigenous investors (Heise 2000: 276).

The connection between the attempt of opening foreign markets for Chile's export commodities and getting foreign companies to invest in Chile on one hand and the design of the 1993 law on the other hand needs to be borne in mind when looking at the situation of indigenous peoples in Chile.

In this chapter I elaborated on Chile's economic role⁴⁸ in the global market. The Chilean governments do not hesitate to continue projects, which directly interfere with indigenous interests such as the forestry industry but also megaprojects in the field of infrastructure. The Bío Bío dam project, the construction of a by pass for Temuco, a shore street, which leads from Concepción to Valdivia on indigenous land, a cellulosis plant close to Valdivia (Tenth region), which pollutes fishing areas of Mapuche Lafkenche are examples (Heise 2000: 274). Moreover, the ministry of state goods (*Ministerio de Bienes Nacionales*) worsens the situation of Mapuche with its politics of pushing deregulation and privatisation of state property. Areas attractive for economic use such as primary woods are rather sold to foreign investors than being protected for indigenous use (ibid. 2000: 275).

When transferring land to indigenous communities the ministry transfers individual plots of land in order to avoid collective ownership even though it is against the will of indigenous communities. This can be observed especially in areas with neighbouring non-indigenous third parties who pursue an interest in the land like in the south of the island Chiloé or the upper course of the River Bío Bío.

“Most developments are based upon the use and appropriation of indigenous lands, water, forests and other natural resources which are essential to indigenous material subsistence, and to which their cultures are deeply attached” (Aylwin 1998: 11).

As the second post-dictatorship government under Eduardo Frei put the emphasis on opening Chile's economy to international markets and therefore the orientation on export this has resulted in development projects affecting indigenous territories (ibid. 1998: 11).

As explained above the 1993 law did not live up to the Mapuche's expectations as it does not sufficiently protect natural resources and does not provide for a consultation mechanism, which would allow indigenous people to co-determine the use of resources. However, the law

⁴⁸ See also 4.1.

does not even stipulate that they are being asked prior to the implementation of a project gravely affecting their access and use of resources. Many times they are only informed when projects are inevitable (ibid. 1998: 14).

The intrusion on Mapuche territory includes the conduct of infrastructure projects for instance the building of highways or powerplants as well as forestry activities, which are implemented by government agencies such as the National Commission on Energy (CNE), the National Commission on Environment (CONAMA) or the National Corporation of Forestry (CONAF) (ibid. 1998: 11).

It needs to be noted that the pressure on Mapuche land and resources not only stems from private companies and conglomerates, but is applied by the state through the mentioned agencies as well.

As I will elaborate in the following chapter the pressure on forests has grown dramatically in the past decades and therefore on Mapuche territory as logging activities take place in their forested settlement areas. Not only the felling of native forests are of concern, also thousands of hectares of tree plantations surround and threaten Mapuche communities deranging the ecological balance in these regions.

Since CONADI with its limited means could not live up to communities' claims which are affected by these forestry activities people started to take action into their own hands.

4.5 The post dictatorship Mapuche movement and the current movement

1992 marked an important date for the indigenous movement in Chile like in other Latin American countries since 500 years of suppression and racism gave rise to new movements especially *Consejo de Todas las Tierras* in Chile.

Since the new democratic governments continued the neoliberal model most of the Mapuche organisations turned away from the *Concertación*. The era of the Nueva Imperial Agreement ended with Eduardo Frei's economic policy, as it threatened basic agreements (Aylwin 1998: 16). Today, there are numerous Mapuche organisations claiming their rights for recognition, lands and resources. Demands for political rights with respect to a territory, control over the use of natural resources within such a territory, the official status for the Mapuche language, a bilingual, bicultural public education programme, and political participation as Mapuche in the various levels of government are raised (Haughney 2006: 192).

4.5.1 1990s until today: Aims and Strategies

Whilst in the beginning of the 1990s the Mapuche's fight was marked by struggle for recognition and equal integration into Chilean society in the end of the decade it was characterised by the struggle for difference through an ethno-nationalistic discourse (Kaltmeier 2004: 202). This discourse is articulated by organisations which were founded only in the 1990s namely *Consejo de Todas las Tierras*, *Coordinadora de Comunidades en Conflicto Arauco-Malleco*, *Asociación Ñancucheo*, *Consejo de Loncos de Pincun-Huillimapu* and *Identidad Territorial Lafkenche* which all are not bound politically and emerged out of the *comunidades*.

In 1992, *Consejo de Todas las Tierras* and in 1997 and 1998 *Coordinadora Arauco-Malleco* made efforts to found a superordinated organisation to represent all Mapuche which ultimately failed. However, a tendency amongst the organisation evolved called "unity in diversity" meaning there are several local and regional organisations, which reconstruct old organisational structures like *ayllarehue* and *futamapu* (which is called *identidad territorial* in the new discourse) and who see themselves as Mapuche (ibid. 2004: 203).

Due to the disappointments in consensus-oriented approaches a more confrontational approach was followed. By occupying land spontaneously and by means of demonstrations the state was intended to be put under pressure and to enable communication to demand unfulfilled promises like the constitutional recognition as a people, the ratification of ILO Convention N° 169 and the restitution of land (ibid. 2004: 203).

The current mobilisation against the logging industry involves the action of men and women of all ages, local communities, sometimes also urban Mapuche allies who demonstrate not only support for specific land claims, but also the reconstitution of a national community - not only a specific local community (Haughney 2006: 190). Land takeovers are frequently accompanied by religious ceremonies, which are supposed to emphasise the cultural difference and are revitalising Mapuche culture, assert its contemporary validity and dignity and criticise the neoliberal exploitation of natural resources at the same time (ibid. 2006: 190). While *Consejo de Todas las Tierras* became the main point of contact on a national and international level *Coordinadora Arauco-Malleco* in collaboration with the urban Mapuche organisation *Meli Wixan Mapu* continues a more radical-confrontational course (Kaltmeier 2004: 203). At the same time, efforts are being made to establish autonomous structures with *Asociación Ñancucheo* from Lumaco making the best progress.

Moreover, the achievement of autonomy and political decentralisation of the Chilean national state is envisaged via "the long walk through institutions" (ibid. 2004: 203). The strategy is to

use the institutions for their own benefit and to prevent them from co-opting the organisations. Political autonomy is not meant to be ending in separatism. The innovation of the current cycle of mobilisation lies in the steady efforts to (re)build a “political will” to raise claims to rights as well as lands, to bridge the gap between the immediate, single community’s plight, its concrete needs, and a demand in terms of a collective holder of rights - a people (Haughney 2006: 190).

Coordinating organisations linked rural communities and urban groups, however they let the various communities decide separately on what kind of action they wished to pursue. The political reconstruction of a people is seen as beginning with political participation at the grassroots (ibid. 2006: 190).

Since 1993 a significant amount of land has been returned to indigenous communities. However, it still does not come close to the area being demanded by *comunidades*. Organisations were especially succesfull in claiming their rights to bilingual and intercultural education (Minority Rights Group International 2008).

There is no consensus in the Mapuche movement about a particular mode of development; however their claims and key values are common. Today Mapuche organisations use their claims to rights on the grounds of collective rights as a people, distinct from Chileans, rather than as rights due to them as equal, individual citizens (Haughney 2006: 186).

The issues of territory and control over resources of indigenous lands and collective political rights bring the movement into direct confrontation⁴⁹ with transnational companies on one hand and with the ideology of a Chilean state as a homogenous nation on the other hand (ibid. 2006: 193). Also, the movement of the Mapuche is very important to promote alternatives.

4.6 Contravening concepts

The concepts of development introduced by the Mapuche organisations differ from a neoliberal approach and are focused on ecological and social sustainability (Kaltmeier 2004: 203). The reactions of the economically competitive Chilean state towards Mapuche demands are repellent since it has to offer optimal conditions to accumulate capital. If necessary, repressive measures for national and transnational companies are applied⁵⁰.

⁴⁹ See also 5.5.

⁵⁰ See also 5.5.2.

The high level of repression during the last years can be explained by the nature of the conflicts – they are touching the core of the Chilean state and its national identity which is sustained by two sources: on one hand a monocultural identity based on homogenising tradition which marked the beginning of the national society and on the other hand an identity which was incorporated in the past decades which derives from the economic order and is aimed at fulfilling the neoliberal development path (Duran/Quidel qtd. by Kaltmeier 2004: 204).

On one hand the conflicts over land and resources endanger Chile as an industrial location, on the other hand the Mapuche challenge the homogenous national state with their demands for autonomy and recognition as a “peoples nation” (ibid. 2004: 204). The current state model would have to be replaced by a plurinational model. This would mean a stronger democratisation of the structures left by the Pinochet regime and political decentralisation. Moreover, the development path aspired by the Mapuche is based on reciprocity and ecological sustainability and is contrary to the current neoliberal system. For this aspect as well as for the democratisation other social organisations and movements could provide contact points of civil society.

The conflict between Mapuche and the Chilean state does not only take place on a cultural level but also deals with questions of political system, economic model and development paths pursued. This conflict cannot be solved within the limits of the existing structures. Only if the neoliberal and anti-democratic structures are broken open could both sides intertwine (ibid. 2004: 204).

Collective rights demanded by the indigenous population challenge the notion of equality as a political right of the individual citizen. Neoliberal philosophy separates culture from politics and views culture as discrete traits and not as a question of collective rights (Haughney 2006: 10). Therefore, if language, religion and traditional ceremonies are considered mere customs rather than rights which are linked to territory and material resources the loss of these cultural elements becomes the inevitable consequence of modernisation (ibid. 2006: 10).

The *Concertación* government tries to channel Mapuche demands into its framework of economic and social assistance programmes while rejecting broad political claims to rights. Direct action by Mapuche organisations such as land takeovers are treated as violations of law and order and as threats to national security (ibid 2006: 16). Some Mapuche activists do not want their demands for political autonomy and territorial control of natural resources to be met within neoliberal principles because these demands simply are not met within the system. However, the 1993 indigenous law exactly provides for the channelling of indigenous demands into neoliberal priorities rather than establishing political institutions that would facilitate alternatives and grant decision-making powers to indigenous peoples (ibid. 2006:

215). The demands for collective rights, territorial control over natural resources directly challenge neoliberal perception of citizenship, liberty and equality.

For the Mapuche these specific rights are not for individuals but inherent in the dignity and equality of all peoples. Moreover, their right to preserve their own culture means the right to material resources that make alternative development paths possible (ibid. 2006: 215). None of the principal parties has incorporated the Mapuche demands into their agenda – maybe because it means the reconsideration of the system promoted by them (ibid. 2006: 217). Not all Mapuche communities make demands for resource rights nor link their demands to those of other communities to assert a territorial claim but each community's conflict is understood as stemming from a common problem - the usurpation of territory (ibid. 2006: 168).

5. The Chilean forest as object of diverging interests

The Chilean forest constitutes a unique ecosystem with a high level of biodiversity. Moreover, it has been the base of Mapuche livelihood and hence their culture and spirituality living in the forested area of the Chilean south. On the other hand, the Chilean forest serves the state as one of the most important resources in the course of its export economy.

As I will portray in this chapter the state made the forest accessible for the forestry business, especially since the Pinochet regime, increasing the felling as well as the introduction of large-scale tree plantations through non-native species. On the other hand Mapuche populate these areas of interest for the logging industry, which were gradually threatened by a forestry sector marked by enormous expansion throughout the past decades. The industry largely dominated by two conglomerates is infringing the living space and the access to natural resources for the Mapuche creating poverty and driving them off their land. Therefore a zone of imminent conflict was created as the needs of the industry and of the Mapuche largely divert.

5.1 The Chilean forest and its biodiversity

“Quien no conoce el bosque chileno, no conoce este planeta” (Pablo Neruda qtd. by Rother 2003). This statement was made by Pablo Neruda, famous Chilean writer and poet who grew up close to the evergreen forests of southern Chile. By his songs and writings he tried to draw attention to the advancing destruction of the Chilean forests, which pose a unique ecosystem. Chile is one of the two with Uruguay being the other, Latin American countries without tropical but with temperate rainforests. However, its flora and fauna make up for this lesser diversity with a very high degree of endemism, meaning species found exclusively within its territory and nowhere else in the world.

For instance, the Valdivian Coastal Reserve established in 2005 is an invaluable reservoir of wildlife (Chester 2008: 53). Not only does it contain trees as important as the *Olivillo*, it also shelters rarely seen animals such as the world’s smallest deer, the Pudu and the tiny tree-dwelling marsupial *Monito del Monte* as well as other curiosities like the giant Forest Snail (ibid. 2008: 53). This exclusivity results from the fact that Chile is an ecologic island, surrounded by the Pacific Ocean, the Atacama Desert, the Andes Mountains and the Patagonian deserts (Hopkins 1995: 13). Therefore, 57 per cent of its 5,000 fern and flowering

native plant species are endemic, a proportion normally reached only at comparably sized oceanic islands.

The great temperate rainforests of southern Chile stretch from Valdivia to Tierra del Fuego. The Valdivia forest is the second largest temperate forest in the world. This is remarkable since there are hardly any temperate rainforests left outside the tropics (Greenpeace 2008). They vary in composition, in relation to latitude, altitude, temperature and precipitation (Chester 2008: 53). Nine⁵¹ of the formerly thirteen political-administrative regions of Chile are characterised by forest landscapes.

The native forests found in Chile are 12 different forest types. One of these is the *Araucaria araucana* forest as described in 5.1.1. Native forests represent the oldest temperate ecosystem in the Southern Hemisphere. They are remnants of the ancient super continent Gondwana, which split into South America, Antarctica, Australia, New Zealand, New Britain, New Caledonia, India, New Guinea and South Africa.

Today, forests cover 26 per cent of the country's total area of 75,7 million hectares, which constitutes 29,7 million hectares. Out of these 14,1 million hectares are owned and protected by the government. The remaining 15,6 million hectares of forest represent 13,4 million hectares of native forests and 2,1 million hectares of plantation forests, which are mainly comprised of *Pinus radiata* and *Eucalyptus sp.* (Herrmann 2005: 7).

29 of the native forests are currently under state conservation management and the State-Protected Forestry Areas System (SNASPE). This comprises 70 protected areas managed by the CONAF, *Corporación Nacional Forestal* (ibid. 2005: 121). However, the by far largest parts, the remaining 71 per cent of native forests, are privately owned. Therefore, the preponderant part of forests lies in private hands, which potentially endangers their protection.

5.1.1 *Araucaria araucana* forest

Araucarias can be found in Bío Bío (Eighth Region) and Araucanía (Ninth Region) in the western parts (Andes) at elevations above 600 metres (Chester 2008: 50). The main distribution is in the Ninth Region where the Mapuche Pehuenche live and also depend on this tree (Herrmann 2005: 8).

Basically, *Araucaria araucana* is one of the most important trees in Chile on an economic as well as on a spiritual level. At the same time, it is one of the most endangered species. The

⁵¹ Regions Five to Twelve.

Araucaria araucana, also named monkey-puzzle tree⁵² is the world's oldest conifer tree and endemic to Chile and Argentina. In *Mapudungun* it is called *pehuen*.

Araucarias are among the earliest types of seed-bearing plants. Fossils have been found, dating back 180 million years (Chester 2008: 50). The tree grows 50 metres, can live up to 1500 years and takes more than 20 years to bear seeds. The indigenous Mapuche Pehuenche have been harvesting the seeds for thousands of years.

The *Araucaria* tree is enlisted as one of the most endangered species in the Convention on international Trade in Endangered Species of Wild Flora and Fauna (CITES) and on the Red Data list of the International Union for the Conservation of Nature (Herrmann 2005: 121). The tree has been protected to some degree in Chile since the 18th century, originally in order to ensure a supply of timber for the Spanish navy. After the military Putsch of Pinochet and the dissolution of *reducciones* and the granting to private owners, exploitation stepped up. Therefore, the Supreme decree of 9th February 1976 was passed, which prohibited the logging of the monkey-puzzle trees. However, with a new Supreme Decree N° 141 of 9th October 1987 the absolute prohibition of the felling was declared void and once again the exploitation of many indigenous areas began (ibid. 2005: 115).

With the declaration as a national monument by Decree N° 43 in 1990 due to efforts made by Mapuche of Quinquen who went to Santiago to speak to government officials in order to stop the felling of *Araucaria araucana* was strictly prohibited. Exceptions are scientific investigations, construction of public works, natural defence and state management plans (ibid. 2005: 115) The role of the Mapuche is pointed out in the law - ironically it says that the tree symbolises the “most authentic and noble traditions of the Mapuche people and the Chileans nationality generally” (ibid. 2005: 121).

The exceptions in Decree N° 43 are quite problematic since the state reserved the right to endanger the tree population. Large-scale logging in the past and illegal clearing have brought this species close to extinction. Moreover, natural disasters have also played a role in the decline of the species. In 2003, a forest fire destroyed 71 per cent of the *Araucaria* forests in the Malleco National reserve - some of the trees were estimated to be 2000 years old (Chester 2008: 50).

Araucaria forest is protected at Laguna del Laja National Park in Araucanía, at Conguillio National Park in Bío Bío and at the Cañi Forest Sanctuary, a Lahuén Foundation Preserve in Pucón, Los Lagos about half of the trees are under state conservation management. Despite

⁵² The term “monkey-puzzle tree” stems from a 19th-century English gardener who remarked that the tree would be a puzzle for a monkey to climb (Chester 2008: 50).

the official protection of the trees, logging still takes place on a small scale outside protected areas (ibid. 2008: 50).

5.2 Deforestation and exploitation of the Chilean forest

The Chilean economy reflects that it is conditioned by its geography. Exploitation of natural resources has traditionally been the mainstay of economy - mining of nitrates, copper and other minerals, fishing and forestry have led the economy. After the 1973 military coup, government policies encouraged the growth of the forestry industry (Hopkins 1995: 13).

During the last three decades serious deforestation has taken place in southern Chile due to converting forests into agricultural land, illegal logging and the transformation of native forests into plantations of exotic species. The clear-cutting of native forests occurs in the temperate rain forests, transitional zones, and the far southern Patagonian zone of the Eighth, Ninth, Tenth, Eleventh and Twelfth Regions, thus the southern half of Chile.

The forest types are unique in the world, containing several tree species endemic to Chile. The trees in the Eighth, Ninth and Tenth Region, where the clear-cutting is concentrated, are characterised by a high degree of biodiversity. This is because they are to be found in a transitional zone between the warm, relatively dry climate zone of central Chile and the cooler, more humid zones of southern Chile (Haughney 2006: 161).

The timber industry has long valued the monkey-puzzle tree because of its excellent and versatile wood. Therefore, it is considered one of the most valuable trees of the southern part of South America (Herrmann 2005: 114). Accordingly, since 1820 the tree has become an important resource and object of drastic exploitation for European settlers and their descendants (ibid. 2005: 114). For instance, the wood of the *Araucaria* has been used for several purposes - construction of railway sleepers, tunnel linings, aeroplanes, ship masts, ceilings, floors, furniture, for mine construction, as cellulose and paper pulp (ibid. 2005: 115). Usually, logging has been carried out without any reforestation and natural regeneration could not keep pace with the intensity of the logging. Logged areas mostly became replaced by farming activities or plantations for exotic and fast growing species. According to a study conducted by the central bank of Chile, about 50-80 per cent of native forests were destroyed between 1984 and 1995. Moreover, it is anticipated that if the current rate of destruction continues Chile will be devoid of natural forests by the year 2025 (ibid. 2005: 8).

Even though the Chilean government is signatory to the Convention on Biological Diversity, Agenda 21 and the Montréal process for the sustainable management of temperate forests it

has not seriously initiated sustainable management practices for its native forests (ibid. 2005: 8). However, most of the unique species are underrepresented in the national system of protected areas. Due to the lack of regulation and oversight capacity in government agencies an aggressive exploitation of native forests was promoted.

Since 2008 there is a native forest law in Chile, *Ley de bosque nativo*, N° 20.283, which was debated for over 15 years due to heavy resistance by the forestry lobby until it was promulgated. It provides some protection but has been criticised for its shortcomings. It defines forests and categorises native trees related to their possible use ranging from preservation and conservation to multiple uses. Moreover, it entails forest management plans, environmental norms for protection, incentives for sustainable management, sets up a conservation fund and resources for research and established an Advisory Council. However, it does not sufficiently protect areas with a highly vulnerable biodiversity and is based on a weak penalty system (Kerosky 2007).

5.2.1 The forest as an object to the neoliberal industry

In the forestry sector land and labour costs are relatively low while transportation and freight constitute the largest component of production costs (Haughney 2006: 161). Decree law N° 701 of 1974 and the selling of state-owned industries and public lands under the military regime stimulated the rapid increase in the establishment of plantations of non-native tree species on lands designated apt for silviculture (ibid. 2006: 162). However, the foundation for the expansion of the forestry sector was laid prior to the military regime. From 1965 to 1973 state industries and incentives established by the Chilean state promoted the planting of pine trees through agreements between landowners and the CONAF.

After the military coup, many of the state-controlled industries were privatised - generally below their market value. Not only industries, but also expropriated estates and public lands administered by CONAF were transferred to the private sector. The process of property transfers encouraged the expansion of investment conglomerates. Although the debt crisis of the early 1980s hit Chile particularly hard, the forestry sector kept growing.

The twelve forest types of Chile are object of a certain felling regime managed by the CONAF. The only formal requirement to manage native forests is to achieve a felling permit. This permit is a “management plan” which has to be presented to the CONAF for approval and which has to outline the required information like the area of harvest, species composition, etc. (Herrmann 2005: 119).

These management practices have led to the loss of native forests. 95 per cent of native forests under management are not managed in a sustainable way (ibid. 2005: 119). Summing up, the transformation of the forestry sector reflects the neoliberal trend of concentrating land, capital and the transnationalisation of property ownership. As a result of the economic crisis in the early 1980s there was a shift in the ownership of the most important economic groups controlling the forestry sector (Haughney 2006: 162).

5.2.1.1 Chile's expanding forestry industry and its role in the world market

The forestry sector is the third most important source of foreign exchange after the mining sector and export agriculture. The forestry industry is located primarily in the southern portion of Chile's central valley and therefore interferes with the Mapuche who live in these areas. Today, forest products constitute 13 per cent of Chile's total exports by value. Wood-chips for pulp and paper are the most important sector for which the exotic plants from plantations are sufficient (Herrmann 2005: 119). After Australia and the United States Chile is the third largest exporter of wood chips in the world. Chile has 21 Free Trade Agreements covering 57 states. This is more than any other country in the world. The most important export partner has become China, second is the European Union followed by the United States of America. It was only in 2008 that the European Union was the most important export market for Chilean products (Deutsches Auswärtiges Amt 2010).

Exports from the production of wood products, especially wood pulp, wood chips for pulp and sawn wood account for more than 10 per cent of Chile's revenues. Moreover, the oligopolistic⁵³ industry structure makes production of wood chips very profitable for controllers of the pulp industry. Compared to other sectors with unequal distribution of returns among remunerations like mining and fishery, the wood chip industry has an even higher rate of profits (Haughney 2006: 161).

The native forest remains the primary source used for wood chips. The demand for this so called short-fibre pulp has meant a dramatic increase in the clear-cutting of native forests (ibid. 2006: 160) Initially, exports of wood chips stemmed from native old-growth forests⁵⁴ Moreover, since the mid-1980s wood pulp from both native and non-native tree species has become the most important export of the sector, accounting for approximately 40 per cent of the sector's revenues (ibid. 2006: 159). Additionally, the value of forestry exports has rapidly increased since the mid-1970s (ibid. 2006: 159).

⁵³ The market is dominated by few sellers.

⁵⁴ Old-growth forests are also called primary forests, ancient forests or frontier forests and constitute ecosystems that have not been deranged by human activities such as logging or infrastructural projects.

Table 2: Expansion of forestry sector exports

Value of exports in USD
1968: 17,8 million
1983: 339,7 million
1991: 913 million
1999: 1475 million

Source: Haughney 2006: 159

Table 3: Exploitation of native forests

Wood pulp industry in cubic metres	Use of firewood in cubic metres
1985: 780,000	1985: 3,5 million
1994: 4,3 million	1994: 5,8 million

Source: Haughney 2006: 159

The value of forestry exports increased by 171 per cent between 1970 and 1993 (ibid. 2006: 159). Moreover, forestry exports concentrate only on a few products produced by a small number of corporations owned by a small number of large investment groups, which combine Chilean capital with foreign capital (ibid. 2006: 159). Therefore, few (transnational) conglomerates control the forestry sector of Chile.

Even though wood pulp is Chile’s principal forestry sector export and two economic conglomerates (Angelini and Matte) are responsible for all of the Chilean wood pulp production, Chile only produces 1 per cent of the world’s wood pulp and 3 per cent of the world’s wood pulp exports (ibid. 2006: 169).

5.3 Significance of *Araucaria Araucana* as livelihood for the Pehuenche

The perception of the tree and its symbolic and spiritual importance provide a key to the Mapuche Pehuenche’s cultural understanding of nature and society: the Araucaria araucana tree is a physical expression of culture and life (Herrmann 2006: 655).

The *pehuen* as *Araucaria* is called in *Mapudungun* is essential not only on a material but also on a cultural and spiritual level for the lives of the Pehuenche (Nesti 1999: 49). Since the

Pehuenche depend on the *Araucaria araucana* trees they have developed a profound knowledge of frequency and degree of their seed production as well as the distribution of the trees including changes (Herrmann 2006: 659).

The seeds of the *Araucaria* trees constitute a major element of the Mapuches' diet. For instance, the local Mapuche Pehuenche eat the seeds raw, toasted, heated in the ash of the fire and boiled. Moreover, the seeds, *ngülliw* are dried in order to produce flour, which is used for the *muday*, a beverage, for ceremonies (ibid. 2006: 654). The seeds are used to feed livestock and are traded to travelling merchants who sell them in urban centres.

The *Araucania araucana* tree is perceived as a metaphor for the human being. In the Mapuche Pehuenche culture all the elements of nature possess a being called *ngen* that is its individual owner and who has special powers (ibid. 2006: 655). Therefore, the tree has always to be asked before its goods may be utilised. One of the most important community rituals is the *ngillatun*⁵⁵, where the feeling of respect for nature is expressed and earth is thanked for everything it provides. The sacred ceremony takes place around an *Araucaria* tree.

5.3.1 The Mapuche's role of conserving the *Araucaria* forests

The Mapuche Pehuenche have a special knowledge and understanding of the *Araucaria araucana* and of the operation of the forest's ecosystem which they consider themselves to be part of and which is strongly linked to their socio-cosmological and spiritual thoughts (Herrmann 2006: 660). That's why they have developed a relationship of respect and rationality towards the tree.

The collecting of the seeds is one of the most important activities in the annual calendar of the communities. In March, the seeds or *piñones* are harvested. Moreover, they gather different kinds of mushrooms, berries, roots, herbs and medicinal plants, which additionally possess a magical meaning in traditional medicine (Heise 2000: 110). The common driving of livestock into higher located pastures is characteristic for the tight bonds within communal life (ibid. 2000: 109). These so called *veraneadas* are vast state owned grass-lands where livestock grazes extensively (ibid. 2000: 109).

The methods of harvesting applied show the profound knowledge of the tree and the sustainable approach the Pehuenche use towards the *Araucaria araucana*. For example, seeds are dug into the soil to facilitate their germination. The harvesting of the seeds called the *piñoneo* takes place in the summer camps in the Andes where the families move. Furthermore, the harvest takes place in the post-dispersion phase of the seeds, therefore only part of the *ngülliw* of each season are collected. The harvesting area is divided amongst the

⁵⁵ See also 1.3.1.4.

families. Each of them has their own limited territory which itself is a form of sustainable management. Cones that are green or could not be reached with sticks or lassos are left on the trees. It has been observed that especially christianised Pehuenche took green cones as well which is highly condemned by other Mapuche Pehuenche. The work of Christian missionaries posed a serious threat to traditional knowledge since it caused disrespect for the *Araucaria* trees and the natural world and rituals of the Pehuenche (Herrmann 2006: 657)..

Once the cones fall on the ground they burst and dispense their seeds. However, not all seeds are collected and remain on the soil, sometimes they are pushed into the ground by the gathering people. Moreover, they possess knowledge of which areas are more productive, thus, areas with low productions of seeds are never visited (ibid. 2006: 657). Another sustainable factor is that most cones are collected from directly under the trees where the light conditions for a growing seedling are very poor. Another vital aspect of the *piñoneo* is the socio-cultural importance. While the men strike down the cones women and children gather under the tree to socialise – on some days the whole family spends time under the trees without collecting many seeds. This social factor is another unconscious contribution to sustainable management of the trees. Sometimes they cut the tops of young pines to enhance the ramification and therefore a higher cone yield (ibid. 2006: 658). So far, the Chilean government has not taken Mapuche knowledge into account when it comes to sustainable forest management.

5.3.1.1 Socio-economic impact of logging on the Pehuenche

The military dictatorship had an especially strong influence on the lives of the Pehuenche, as the *Araucaria* forests in the Andes were logged in a massive manner. The vigorous logging of *Araucarias* conducted in the higher areas of the Andes during the military dictatorship posed an additional threat to the lives of the Pehuenche. The logging of the trees was enabled by the granting of concessions by the state as well as by the alienation of state-owned land in the region (Heise 2000: 153).

Even though the subsequent administration under Aylwin provided for the prohibition of the logging of *Araucaria* trees, it is being continued illegally to this day. The main problems resulting for the Pehuenche are the limited opportunities to gather the *piñones*. Moreover, the vital religious and cultural relationship to the forests is destroyed. Due to the alienation of vast lands at the upper reaches of the Rio Bío Bío to private logging companies, access to grazing lands and areas where the *piñones* are gathered are infringed. Furthermore, the logging of the

Araucarias, which are protected in principle, cannot be controlled on private estates (ibid. 2000: 153).

The livelihoods of the Pehuenche are threatened and destroyed by the dam project⁵⁶ at the upper reaches of the river Bío Bío. The consequence of the politics during the military dictatorship was a rural exodus of many Mapuche, which unveiled in the census of 1992 and which exceeded the most pessimistic predictions (ibid. 2000: 154).

5.4 Native forests versus plantations

Due to the climate in southern Chile, trees are growing faster than in other regions of the world. Therefore, the Pinochet administration used this fact as a comparative advantage in the forestry sector. Under the military dictatorship primary forests were logged on a large scale and simultaneously afforestation was introduced and fostered by the 1974 law N° 701.

Instead of trees of the temperate rainforest pines and eucalyptus trees were planted which not only have a water demand much higher than those of endemic species, but also have to be treated with pesticides⁵⁷. However, the plantations started one century before Pinochet came to power. The first extensive plantations of Monterrey pine (*pino insigne* or *radiate*) were already established in the 1880s to shore up the Lota coal mine tunnels (Haughney 2006: 170).

In the 1930s the state began promoting the establishment of pine plantations, which averaged several thousand hectares a year. The Allende government was no exception to the rule of promoting plantations. During the Agrarian Reform, the rate of establishment of tree plantations rose to roughly 30,000 hectares per year. Internal consumption of various wood products also rose to historically high levels (ibid. 2006: 170).

However, after 1974 and hence the introduction of law N° 701⁵⁸, the rate of plantations rose dramatically due to the extensive system of subsidies for establishing and maintaining tree plantations and the transfer of many state-controlled properties to the private sector. The rate in the late 1970s reached approximately 70,000 hectares per year and continued to be high until the late 1990s (ibid. 2006: 171). Harvest in plantation forests has experienced growth by 180 per cent since 1990 (OECD 2005: 9).

⁵⁶ See also 5.5.1.

⁵⁷ See also 5.4.1.2.

⁵⁸ See also 3.4.2.

Table 4: Tree plantations in hectares

1965: 418,000
1976: 627,000
1997: 1,098,500
1999: 1,800,000
2001: 2,100,000
2005: 2,200,000

Sources: Haughney 2006: 171, Instituto de Estudios Indígenas 2003: 208, Herrmann 2005: 119, OECD 2005: 9

Due to estimations in 1999 there were 1,5 million hectares of the existing 1,8 million hectares of plantations located between the river Bío Bío and the island of Chiloé and therefore in ancestral lands of the Mapuche (Instituto de Estudios Indígenas 2003: 208). The area covered by plantations had been increased to 2,2 million hectares in 2005 which makes up 14 per cent of forest cover (OECD 2005: 9). Chile planted more pine plantations than any other country in the world except New Zealand. Of the two million hectares of tree plantations in Chile 68 per cent are comprised of pines and 24 per cent constitute eucalyptus trees (Du Monceau de Bergendal Labarca 2008: 78).

The rapid rate of destruction and the substitution with pine and eucalyptus plantations of native forest has been documented by Chile's Central Bank. The environmental organisation *Comité Nacional Pro Defensa Fauna y Flora* (CODEFF) calculated that 400,000 hectares of native forest were cut down and substituted with large-scale plantations of pine or eucalyptus between 1973 and 1984. The *Banco Central* calculated a loss of 400,000 to 900,000 hectares of native forests between 1985 and 1994 (Haughney 2006: 165). Variation in estimations of lost native forest derives from difference in methodology and to the definition of "forest".

Although the increase of production in the forestry sector led to a growth in exports, it does not signify that the indigenous population living in the exploited forested areas carries away any benefits (Instituto de Estudios Indígenas 2003: 209). However, the exorbitant growth rates are used by companies as well as by the government as justification for their expanding forestry activities. They argue that the areas exposed to plantations benefit. The grave consequences of the industrial plantation practices towards Mapuche communities are documented by the affected people as well as by non-governmental organisations, which draws another picture (ibid. 2003: 209).

Massive parts of the temperate rain forest have been destroyed irretrievably and the leftovers are endangered by the still expanding forestry sector. The maintenance of tree plantations has various effects on the environment and therefore the people inhabiting it. Since the plantations occur in the regions of southern Chile, which are predestined for growing trees due to optimum conditions, many rural Mapuche are affected by these plantations on several levels, on which I will elaborate in the following chapters.

5.4.1 Environmental impact of plantations

Not only has the forestry sector and in particular logging companies created problems of unemployment and poverty⁵⁹, they are also responsible for a number of environmental problems. These problems extend beyond the borders of the plantations, degrading the quality of the natural resources, and threatening the health of neighbouring communities (Haughney 2006: 167).

However, there is no legislation on the management of plantation forestry (IPS 2007). The consequences of the monocultures are a reduction of biodiversity, degradation of the soil, erosion and a decline in ground water. The processing industry as well as the use of fertilizers and pesticides leads to massive pollution and contamination of groundwater and a cut-back of medicinal plants (Van Hauwermeiren/De Wel 1997: 213).

The expansion of industrial tree plantations has transformed the landscape in large parts of the Eighth and Ninth Regions, creating vast zones where ranks of pine or eucalyptus trees have replaced native forests, small farm settlements, and agricultural estates (Haughney 2006: 167). In the Eighth Region, in particular, plantations of pine and eucalyptus have replaced native forests.

5.4.1.1 Impact on water

The introduced plants such as pines and eucalyptus are harmful to the soil because they suck up the water and nutrients, diminishing other species. Additionally, eucalyptus-oil prevents water from entering the soil (Herrmann 2005: 119). Native trees need more time to grow but the wood is of higher quality. Logging companies strive for high growth rates for their tree plantations in order to compete with the logging industries of other exporting countries. This competition is one reason for the constant demand for flat, relatively good agricultural soil as land for tree plantations (Haughney 2006: 177). This is the reason why companies prefer non-native tree species - they grow particularly fast.

⁵⁹ See also 5.4.2.1 and 5.4.2.2.

However, the fast growth of the exotic species means that they need exorbitantly large amounts of water. In Malleco, which is located in the Ninth Region, local farmers, Mapuche communities and nearby towns, have complained that their streams and springs had dried up⁶⁰. In many cases plantations had diminished the water supply so dramatically that small farmers were forced to leave because of the insufficient supply of water. Commercial harvest can already take place after a period of ten to fifteen years though optimal harvest occurs after twenty years (ibid. 2006: 178).

The loss of ground cover, humus soil and varied undergrowth of shrubs and low vegetation together with the type of leaf and upper story structure of pine and eucalyptus plantations means that rainfall is not captured and saved in the soil and vegetation (ibid. 2006: 178). The non-native trees deplete the groundwater supplies so quickly that the local water table cannot be replenished at the rate at which it is used. Even the air within monocrop plantations is noticeably drier than that of native forest and has already altered the regional climate (ibid. 2006: 178).

In addition to the loss of native species, the tree plantations lead to erosion and sedimentation of watercourses, which degrades the ecosystem even further (ibid. 2006: 179). Moreover, the water is not only diminished by the exotic trees; due to extensive use of pesticides and chemicals used in processing lumbermills and herbicides it is often polluted causing health problems for humans and the death of animals. Therefore rivers and lakes are poisoned and their fishing potential is limited (Stavenhagen 2003: 9).

5.4.1.2 The use of pesticides and herbicides

During the military regime many of the controls over the use of pesticide were removed. The use of 1080 (sodium monofluoro acetate) was prohibited but the law was not enforced since its specific regulations had not been enacted (Haughney 2006: 177). To inhibit rodents from eating the seedlings the logging companies vastly apply pesticides. These toxins cause the death of natural predators of rabbits and have caused sickness or deaths in domestic animals and even people (ibid. 2006: 177). Many times fumigation, applied by planes is the problem of poisoning since the application is indiscriminate and can fall onto lands bordering the plantations. Springs are affected and flow where families live. Moreover, aerial application makes the exact cause and effect relation between application and pesticide poisoning more difficult (ibid. 2006: 177). Therefore, the government often does not apply punitive sanctions

⁶⁰ International experts conducted a study together with the Corporación Nacional Forestal and came to the conclusion that the plantations had to be eliminated and the area should be reforested with native trees (ibid. 2006: 178).

for the use of prohibited toxins or their abuse because responsibilities are difficult to prove, except pesticides or herbicides are dumped into streams in large quantities.

Toxins used for the treatment of cut lumber and in paper and pulp production have contaminated streams and water sources - with little response from government authorities (ibid. 2006: 177). The one-crop tree plantations not only diminish valuable native biodiversity, their nature also makes them vulnerable to pests, which leads to the application of even more fumigation.

5.4.1.3 The committing of arson and illegal logging

Two additional factors, which are responsible for the destruction of vast parts of the native forests, are the illegal logging of primary forests and arson. Arson is committed to circumvent environmental laws since burnt down land is declared as being of minor value and tree plantations become permissible⁶¹ (Meller/O’Ryan/Solimano 1996: 265). The plantations and the logging are increasing in regard to the surface area, which means a strong impact on the local population and their economic possibilities. Most of the times it is farmers who are influenced the most and the group being affected most frequently are the Mapuche. The remaining success of the forestry industry puts pressure on the few existing native forests and consequently on Mapuche living in these areas. Moreover, it has been observed that burnt down areas only recover slowly and it showed that areas where fires happened over 20 years ago have only recovered to a minimal degree (Herrmann 2005: 116).

5.4.1.4 Impact on biodiversity

It is evident that a single species tree plantation creates a severe imbalance in the local ecosystem. Water and certain nutrients and minerals are quickly exhausted by the fast-growing pine and eucalyptus. These species are aggressive colonisers and facilitate the invasion of other exotic species, which destroys the rich endemic flora and fauna (Du Monceau de Bergenal Labarca 2008: 129). It is not only other plants that disappear, but animals such as birds, amphibians, reptiles and mammals as well, which vanished since their habitats have been destroyed (ibid. 2008: 135).

The loss of the rich natural resources also directly affects the Mapuche communities as important medicinal plants as well as berries, fruit and animals, which used to be gathered and hunted, have disappeared. This does not only have an impact on people’s diets but also on a cultural level as described in the subsequent paragraph.

⁶¹ See also 3.4.2.

5.4.2 Cultural and socio-economic impact

Due to the ever-expanding plantations the Mapuche land has lost its sources of water for drinking and irrigation, its woodland fauna and undergrowth vegetation important for diet as well as medicinal and ritual purposes (Stavenhagen 2003: 9). The loss of biodiversity not only has an environmental dimension but also a cultural one.

Mapuche communities and organisations stress that the expansion of tree plantations causes a problem of lack of water and usurped land as well as a loss of culturally specific values, practices and knowledge (Haughney 2006: 179). Indigenous cultural knowledge linked to native plants and cultural practices associated with native ecosystems are threatened as native species disappear or become rare (ibid. 2006: 179). The loss of biodiversity and cultural resources already started in times when forests were cleared for colonial settlement but was aggravated by the rate and extent of substitution of native forests through tree plantations. The loss of native plants means a loss of valuable knowledge of medicinal and subsistence uses of the plants.

The *ngillatun* reminds community members of their mutual responsibilities and relationship with other human communities and with the surrounding natural environment. The environmental impact as well as the scarcity of land has a direct effect on Mapuche communities who depend on the forests in order to hunt as well gather food and medicinal plants. Due to the vast promotion of a small economic segment in Chilean society the governments have accepted the infringement of indigenous people's land, health and environment (Du Monceau de Bergendal Labarca 2008: 122).

The expansion of tree plantations brought about a greater concentration of land ownership than had existed before the area of the Agrarian Reform. Since the tree plantations are owned by autonomous subsidiaries of large economic conglomerates, the degree of concentration is not fully captured by the government property registries. However, a big proportion of agricultural properties including tree plantations hold a great deal of land. These tree farms are mostly large, measuring over 130 hectares. In contrast to the tree plantations most Mapuche farms are very small, ranging from less than one to five hectares (Haughney 2006: 172). This situation occurred due to the heavy subsidising⁶² after the introduction of law N° 701. However, law N° 701 was not designed to subsidise small farmers as well as only 4 percent of them have benefited from it (Du Monceau de Bergendal Labarca 2008: 140).

⁶² In the mid-1970s up to 75 per cent of tree plantations.

5.4.2.1 Impact on labour and income opportunities

The changes in production of large estates from grains to raising livestock and then to logging led to reduced local seasonal jobs for Mapuche peasants. This gradual loss of seasonal jobs together with the small size of the *reducciones* meant greater economic hardship for Mapuche peasants and led to high rates of emigration to large urban areas such as Santiago, Temuco and Concepción (Haughney 2006: 174).

As explained above⁶³, the *radicación* onto small plots of land and the further division during the dictatorship⁶⁴ caused the immediate impoverishment of the Mapuche, forcing them to use the available natural resources intensively. Some communities like in the Malleco province would be confined to hilly areas unsuitable for intensive agriculture. Today, the soils of Malleco are classified as either very or severely eroded (ibid. 2006: 172). Due to the depletion of resources on the plots of land, rural peasant families produced less food and bought more, falling into deeper poverty (ibid. 2006: 173).

Agriculture depends on human labour. However, tree plantations do not. Therefore, the number of employees in areas of tree plantations drops dramatically (ibid. 2006: 172). Tree plantations only require intensive labour in the phase of planting; the rest is rather automated and mechanised. For example, in the city of Collipulli, job opportunities dropped by 44 per cent between 1992 and 2002 due to tree plantations. Many rural Mapuche are forced to take up seasonal or sporadic wage labour to supplement the familie's income. However, these seasonal jobs do not supplement the income enough to ensure subsistence security (ibid. 2006: 174).

Moreover, children cannot attend school since they have to help on the farms. Furthermore, the government does not support the growing of crops like wheat and sugar, since they are rather imported. Therefore, small farmers are forced to switch to fructiculture where working conditions like wages and social security are poor (Du Monceau de Bergendal Labarca 2008: 122).

In that farming for small farmers has become so difficult that many have started planting pines and eucalyptus on their small estates and even had to resort to felling native trees. Since agriculture is on the decline, Mapuche peasants are forced to sell their own trees. Usually they can only sell it below market price, which drives them into even deeper poverty (ibid. 2008: 123). The logging companies have a tendency to view the local population as a threat and as

⁶³ See also 2.2.1.

⁶⁴ See also 3.4.1.1.

obstacles to their plantations. Thus, labour force is hardly regional and companies deny local people access to forested areas (ibid. 2008:125).

Another aspect of tree plantations is that logging activities and truck traffic have infringed the access to roads together with soil erosion, leading to an isolation of communities (ibid 2008: 129). Moreover, the emigration of families from rural areas and often the local area means a reduction of the provision of basic social services. The remaining population experiences further difficulty in gaining access to basic services, which then tends to induce more emigration from the countryside (Haughney 2006: 175).

5.4.2.2 Tree plantations creating poverty

This job loss due to the expansion of tree plantations can be seen in the steady rise of unemployment in the Ninth Region during the 1990s despite the positive national economic growth over the same period of time. The low rate in the creation of new jobs remains typical for the forestry sector despite its dynamic expansion. These economic contradictions of the neoliberal model affect the Mapuche.

In 1996 11,7 per cent of the Mapuche lived in absolute poverty and 26,7 per cent in relative poverty compared to 5,5 per cent and 17,2 per cent of the non-indigenous (Kaltmeier 2004: 201). The neoliberal logic of creating a *trickle-down-effect* from which all society could benefit proves to be a myth. Furthermore, wealth can create poverty on one hand, but on the other hand the following happened in the Eighth region, one of the areas with a high population of Mapuche and a high number of forestry companies: In 1994 the forest industry in the area held a 15 per cent share of the overall national exports concentrating 30 per cent of investments in the country while the poverty rate with 33,9 per cent being the second highest of Chile (ibid. 2004: 202).

In the socioeconomic survey of the government conducted in 2000 the Ninth Region was recorded to be the poorest within the country (Haughney 2006: 156). The government's strong support of the logging industry makes clear that social and environmental considerations are put behind the interests of neoliberal growth.

5.4.3 The governmental approach to the forest

The *Concertación* government continued to promote industrial forestry just as the military regime had introduced. One of the reasons was the stagnation of the traditional agricultural sector (Haughney 2006: 158).

Overall, the post-dictatorial Chilean governments hardly followed a sustainable approach when it came to forest management. Chile has a long-standing history of exporting third-sector products therefore nature has been exploited for a long time. For the most part environmental aspects have not been taken into consideration, which led to irreversible damage and pollution. Nevertheless, the exploitation of nature reached a new dimension under Pinochet who abruptly opened the market for foreign investors and based the national income on exports and a free deregulated market. However, this economic policy does only benefit a few industrial conglomerates and infringes opportunities for the main part of Chile's society.

In its 2005 environmental review on Chile, the OECD criticises: "*The protection of nature has so far not been given enough emphasis and resources to deal with long term threats to Chile's highly endemic biodiversity*" (OECD 2005: 6).

A large proportion of the Chilean population lives in poverty with the indigenous population constituting the group hit hardest by massive impoverishment. Ironically, the forestry sector has been object of extensive state subsidies and credits since the 1930s, which makes logging even more beneficial for companies and contributed to the sheer dimension the sector has gained.

Moreover, in Chile understanding or support of nature preservation is little. Forests are not conceived as a common good of society, which deserve comprehensive protection. Hence, government efforts and the efforts of the Mapuche to protect the forests are often incompatible. The National Forest Reserve of Ralco⁶⁵ in the upper Bío Bío region is a textbook example that has led to grave problems. The reserve was established on Mapuche Pehuenche territory and limited the communities' access to the forest. The collection of the *Araucaria* seeds was restricted by CONAF. The Mapuche communities perceived all of these restrictions as unfair and unnecessary. They felt that their knowledge about the sustainable management of the trees had been ignored and not recognised and they demanded to be integrated into the efforts of the Chilean government to preserve the forest (Herrmann 2005: 123). Moreover, when considering the establishment of environmental standards quantitative cost-benefit analyses are carried out (OECD 2005: 7).

Concluding, it can be said that indigenous knowledge about biodiversity and its protection have not yet been taken into consideration from the government and decision makers only acknowledge scientifically proved methods. The reckless exploitation of natural resources in Chile partly results from efforts concerning decentralization made in the last four decades,

⁶⁵ See also 5.5.1.

which means little intervention by authorities and a lack of land use planning. The plantations are in the hands of a few conglomerates facing the impoverished rural population to live on dramatically confined estates, which are surrounded by the plantations and threatened on ecological and socio-economic levels.

Despite all the negative effects caused by the expanding land seizure (erosion, extraction of the soil, shortage of water) no change in the management of natural resources followed (Richter 2004: 76). This approach to the use of natural resources is enabled by a minimal state, which was introduced in the Pinochet era.

New sectors like salmon farms based on aquacultures and the forestry sector are of special interest for investments. The forestry sector is regulated in special legislation and under state control - still ecological consequences have not been taken into account yet (ibid. 2004: 77).

Although the neoliberal system managed to reach economic stabilisation after 20 years, the ecological aftermath of the enormous exploitation leads to counterproductive consequences. In Chile, some groups are privileged through mechanisms such as subsidies, credits and legal favouritism. Meanwhile indigenous groups are left out and their view on nature and development is not considered (Du Monceau de Bergendal Labarca 2008: 139).

It is not only the government favouring industrialists and the imbalance in access to land and resources. International institutions such as the Inter-American Development Bank (IDB), the International Monetary Fund (IMF) and the World Bank have supported Chile's forestry policy as well. Moreover, even the Food and Agricultural Organisation (FAO) and the UN Development Programme (UNDP) have been promoting research that suggests the planting of pines. This then stimulates foreign investments in the plantation sector (ibid. 2008: 139).

The support of the industrial forest industry placed the *Concertación's* economic policy in contradiction to the land claims of the Mapuche communities. However, some authors could observe a change in the consideration of ecological aspects induced by the ecological demands of the importing countries (Richter 2004: 79). Despite the progress in sustainable forest management since 1992 such as forest certification environmental effects of tree planting have been given little attention (OECD 2005: 9).

It is questionable whether this will lead to an actual improvement of environmental standards or a switch to countries with lower standards. It seems that improvements in the environmental area are slow. It is observable that environmental standards are considered but - in most cases - only theoretically. Environmental Impact Assessments (EIA), for instance, are not required to establish new tree plantations. Furthermore, any forest harvest of more

than 500 hectares a year is supposed to undergo EIA, however this is circumvented by the segmentation of the areas cut (ibid. 2005: 9).

When it comes to the actual practical implementation of environmental standards Chile lags far behind. Therefore, it is of utmost interest how and if the new Chilean right wing government will live up to the standards set in the vital ILO Convention N° 169.

5.5 Potential for conflicts

Potential conflict areas arise wherever national or transnational companies seize natural resources like industrial fishing and cellulose factories or where the focus lies on Mapuche-owned land which could be turned into logging areas and used for dam-building, tourism or street building (Haughney 2006: 156).

The vast activities of forestry companies led to a strong resistance of the Mapuche who inhabit the affected areas. They are the ones having to face the grave environmental, economic and socio-economic consequences of the still expanding and surrounding plantations and the logging activities involved. The areas the Mapuche claim as their ancestral land continue to be plundered and occupied by large companies exploiting natural resources (International Federation for Human Rights 2009).

As their livelihoods were more and more threatened by forestry activities in the 1990s many Mapuche waited for a response by CONADI. Since they never received it they started to seek justice by themselves (Aylwin 1998: 13). By 1997 groups of Mapuche started to occupy lands developed by Forestal Arauco, Miminco and Millalemu in Lumaco and requested their restitution (ibid. 1998: 13).

In the course of the recent years the Mapuche communities have responded to actions of logging companies by numerous public demonstrations, the occupation of estates owned by companies, the blocking of roads and other activities, which are pointed towards the retreat of forestry companies from Mapuche territory (Instituto de Estudios Indígenas 2003: 209).

The expansion of industrial tree plantations after 1974 brought problems in addition to the familiar conflicts over ownership, usurpation of lands, economic subordination and social discrimination. A territorial conflict between the Mapuche communities and the logging companies was created. The logging companies exercise a quasi-territorial control over large areas close to the plantations (Haughney 2006: 174). As portrayed above, the invasion of pine or eucalyptus plantations makes living conditions of the small farmers worse⁶⁶. Some of them

⁶⁶ See also 5.4.2.

speak of the “pinificación” of their land, a joke made on the term “pacificación” used by historians to describe the war of the Chilean Republic to conquer Araucanía (ibid. 2006: 174). The Mapuche communities are surrounded by plantations, which are fenced off and protected by private guards leading to transit problems and harassment, even public roads are closed to limit access to the plantations. Therefore, access to the woods is cut off. Heavy logging trucks have a destructive effect on roads and bridges; however the companies do not contribute to local tax since they are exempted from it. Some Mapuche organisations describe the conflict between logging companies and small (Mapuche)-farmers as an “occupation by stages” backed up by forceful measures taken by the companies and litigation in courts (ibid. 2006: 175):

Usually logging companies claim ownership or buy land historically claimed by a Mapuche community. The next step is that families are notified to leave their land accompanied by the threat of being evicted by court order. Then access roads are cut off in order to prevent neighbouring Mapuche from entering. Subsequently, the planting of pine or eucalyptus seedlings starts on lands previously used for cultivation or pasture. Some plantations even reach to the edges of families’ houses (ibid. 2006: 175). Consequently, this course of action applied by logging companies leads to tensions and provokes a resistance of Mapuche communities.

One example is the case of the Mapuche *comunidades* in Lumaco, Araucanía. Like in many other cases, with the military dictatorship logging companies intruded their land and founded plantations which had a grave social, cultural and environmental impact. With rising export numbers of wood products conflicts with the companies aggravated throughout the 1990s. The flora indispensable for the *machi* and the water supply for the *comunidades* diminished dramatically. In summer, drinking water even had to be transported to the communities. However, the companies have no obligation to conduct EIA studies of plantations (Instituto de Estudios Indígenas 2003: 211). To the contrary, they exploit the land to its limits but have no duty to contribute to the *comunidades*.

The comprehensive impact on people’s lives is not compensated in any way even though they rob their basic needs. However, if people resort to resistance heavy repression by the state is the consequence as described in the following chapters. Forestry companies benefit from a win-win situation whereas the Mapuche’s livelihood - their land and the forests - are irreversibly destroyed.

5.5.1 BÍO BÍO dam projects

Not only is Mapuche land constantly threatened and confined by logging activities, but also large and numerous infrastructure projects limit their right to land and create conflicts. The most prominent case I want to outline are the Bío Bío dam projects, which directly interfere with the land rights of Pehuenche communities.

The upper reaches of the river Bío Bío constitute ancestral Pehuenche lands. The former national energy company, *Empresa Nacional de Energía* (ENDESA), which was privatised during the military dictatorship and is in the hands of Spanish capital today, had developed a program of establishing six hydroelectric power plants (dams) in the catchment basin of the upper reaches of the river. The construction of the first power plant called Pangue started in the late 1980s and was finished in 1996 (Instituto de Estudios Indígenas 2003: 213). Since the latter project was authorised under the dictatorship there were no big legal obstacles in the way. However, it initiated a wave of movement amongst the indigenous communities claiming their rights, which led to some compensation payments under the democratic governments.

The second power plant called Ralco covers 3,5 million hectares of land and led to the dislocation of the local population, which count 625; amongst them 500 Pehuenche. The project was authorised by CONAMA, *Comisión Nacional del Medio Ambiente* in 1997 and by CONADI in 1999, which requested land swaps according to Article 13⁶⁷ of the 1993 indigenous law (ibid. 2003: 213). However, both authorisations demonstrated irregularities due to intervention by the former president Eduardo Frei.

Consequently, the Pehuenche and other Mapuche organisations formed heavy resistance against the project. They demonstrated and blocked roads in order to fight the planned flooding of their homeland. However, their actions were brutally repressed by the state and its Carabineros against the indigenous communities, not sparing children, women or elderly. These persons were put on trial in front of the military court of Chillán. Many of them were detained for a long time by request of the government and accused of breaching the 1984 Anti-Terrorism law⁶⁸ (ibid. 2003: 214).

In 2003 the Pehuenche reached an agreement with the Chilean government. However, it only handled financial compensation. In 2004 the area was flooded and Ralco started operating. There are further dams planned. It is needless to say that the flooding caused irreversible

⁶⁷ See also 4.3.1.3.

⁶⁸ See also 3.4.3.

environmental damage as well. The conflict over the Bío-Bío dam project demonstrates the value of the *ley indígena* and the CONADI. In reference to national development and progress the question about indigenous people was regarded negligible.

In the 1990s two directors of the CONADI were dismissed because they made critical remarks about the project. However, numerous studies prove the social and ecological incompatibility with standards. This provoked a tremendous loss of confidence in the CONADI and post-dictatorship administrations. Other examples are the way land-cases are handled in the courts: While they are waiting 3 to 10 years to be tried forestry companies are logging the disputed forests (Kaltmeier 2004: 201).

5.5.2 Conflicts and the use of violence

Prior to the military Putsch in 1973, the Mapuche had 500,000 hectares of land, which was reduced to 300,000 hectares during the dictatorship. Today, 60,000 hectares of the remaining Mapuche land are subject to land conflicts, half of them being disputed in court (Kaltmeier 2004: 201).

Logging companies' behaviour in order to gain land explains the potential for conflicts and provokes certain actions. Mapuche communities organise and assert their claims in courts and through direct action. They initiate pressure groups acting on behalf of those who have unsuccessfully applied for additional land or the restitution of their land. Moreover, by occupying disputed land, the Mapuche try to apply direct pressure and gain publicity. Furthermore, serious actions such as setting fires to forest plantations, destroying equipment and fences or blocking routes and clashes with the police have occurred (Stavenhagen 2003: 13).

It needs to be pointed out that the serious actions mentioned above mostly arise in provinces with higher concentrations of indigenous people and also higher poverty rates and which were affected during the military dictatorship by the reversal of measures taken to implement the land reform (ibid. 2003: 13). Therefore, in many cases Mapuche try to reclaim their *ex-reducciones*, which they had regained under the Agrarian Reform under Allende and which had been acquired by forestry companies during the late 1970s (Mella Seguel 2007: 84).

The responses of the public authorities and the forestry companies towards this social protest are the following: Logging companies solicitate the use of police (Carabineros) and also install systems of vigilance. Moreover, they often counter legal suits of the Mapuche with their own landsuits (Haughney 2006: 175). By these actions the companies prove that they see the local population as a threat. The livestock may trample seedlings, rural residents are

blamed for fires that damage plantations and even the existence of the families creates an obstacle for the expansion of plantations (ibid. 2006: 177). The Mapuche mobilisation by land takeovers, demonstrations and street-blockings faces heavy repression from the state, which decides to take the side of the companies. Another form of mobilisation and the assertion of land claims used by the Mapuche are to plant crops and harvest trees on the disputed areas. However, also non-violent forms of resistance provoke the use of violence by the police. To end land occupations or to conduct searches in Mapuche communities, the police resorted to intimidating and violent search-and-seizure operations, using helicopters, busloads of police, *guanacos* (armoured vehicles), and tear gas (ibid. 2006: 200).

Mapuche leaders complained of severe beatings and damage to property in police raids; of beatings and detention of individuals who were unlikely to have been involved in protests, such as elderly people; severely abusive treatment when in jail, and of the police maintaining some detainees incommunicado beyond the limits (ibid. 2006: 200).

It has been observed that logging company guards carried firearms, intimidated local Mapuche, and demanded identification of passengers on public transportation, carrying out police activities without legal authorisation (ibid. 2006: 199). Furthermore, it was charged that logging companies contracted former intelligence personnel of the *Concertación* government to oversee security operations and forced individuals to make false accusations against Mapuche, accusing them of an involvement with the violent incidents (ibid. 2006: 199). Sadly, the conflicts even led to the killings of several Mapuche struggling for their land⁶⁹.

5.5.3 Criminalisation of social protest

Even though the new indigenous law provides for administrative procedures conducted by CONADI to solve disputes over land, and which aim at acquiring the land for the indigenous parties, this possibility has become little effective. One reason are the mentioned limited financial resources of the Land Fund as well as increasing prices for land and the number of land claims being on the rise (Stavenhagen 2003: 14). Since the latter procedure has proven to be unreliable, the preferred course of action is to bring cases in front of criminal courts.

Criminal cases initiated against Mapuche leaders and communities have been increasing throughout the past years. Most offences, which are criminally prosecuted, are related to offences against private or public property and attacks against police officers. The police

⁶⁹ See also 5.5.4.1.

presence in some communities is vast and permanent leading to physical and verbal abuse often it numbs the local population with fear (ibid. 2003: 14).

However, Mapuche are accused of an even more serious offence. Groups of Mapuche are blamed for “conspiring to commit a terrorist act” or “illicit terrorist association” as defined in the Anti-Terrorism law (Ley N°18.314). Moreover, the Law of Internal Security of the State is invoked in such proceedings. These laws stemming from Pinochet’s time are very problematic since they allow for long pre-trial detention and the modification of some aspects of criminal procedure. This includes the protection of witnesses, which are often kept anonymous and secret in the pre-trial phase, constituting a danger for the human right to due process.

In 2007 the UN Human Rights Committee⁷⁰ noted that the procedural guarantees set out in Article 14⁷¹ of the ICCPR (ratified by Chile) have been restricted by the application of this law (HRC 2007). Moreover, as soon as members of the police or armed forces are involved as perpetrator or victim, cases are handled by military courts, which follow their own procedure (Stavenhagen 2003: 15).

It is noticeable that in cases where Carabineros affected Mapuche the responsible perpetrators are not convicted and remain in impunity, which violates Art. 25⁷² of the American Convention on Human Rights (Instituto de Estudios Indígenas 2003: 244).

All of these alarming facts are enabled by the reform of the law in criminal procedure introduced no sooner than in the year 2002. Moreover, during the reform of the penal law the law was modified in order to be adequate. This even worsened the defender’s position since it granted the judge several possibilities which had not been contained in the law before and which can infringe the defending side’s rights. The public prosecutor has the right to extend the secret investigation up to six months (ibid. 2003: 241). This possibility gravely infringes the defender’s right to rebut the public prosecutor’s arguments for the prolonged preventative imprisonment. The presence of witnesses without a face “*testigos sin rostro*” gravely violates the basic right to due process.

⁷⁰ The Human Rights Committee (HRC) is a body of independent experts that monitors the implementation of the ICCPR by its State parties.

⁷¹ Right of a fair trial.

⁷² **Right to Judicial Protection:** “1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: 1. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; 2. to develop the possibilities of judicial remedy; and 3. to ensure that the competent authorities shall enforce such remedies when granted”.

Additionally, due to the modifications in 2002, the law authorises the conduct of interceptions in the course of investigations if asked by the public prosecutor and authorised by the judge. All of these changes, which threaten a basic human right are actually utilised in trials against Mapuche.

Thus, these laws applied against Mapuche in land conflicts show the stigmatisation of the Mapuche movement, violate their individual rights and expose them to elevated penalties and therefore infringe their rights before jurisdiction (ibid. 2003: 242).

Summing up, the combination of a new criminal procedure, the use of the Anti-terrorism law and military jurisdiction poses a threat to the political right to due process. Therefore, land claims perceived as just by the Mapuche on one hand are heavily criminalised by the state on the other hand. It is of utmost concern that a law introduced under a military regime is still used by democratic governments. Special Rapporteur James Anaya reiterated in his latest report that putting Mapuche involved in social protest in front of military tribunals heavily contradicts international standards (Anaya 2010: 78). However, the fact that the democratic government under Ricardo Lagos worsened a law, which was already problematic from a human rights point of view in order to gain the better position in the struggle over land is a sad example for the values of the *Concertación* and again shows Pinochet's long shadow.

Moreover, the Chilean Senate Commission on the Constitution, Legislation, Justice and Regulations elaborated a study on the Mapuche conflict concerning public order and public safety in 2003. This study was handed over to former UN Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen. Alarmingly, the Commission found that the Chilean state was not fulfilling its obligation to protect farmers and legitimate landowners from criminal or even terrorist acts and stated that the existing laws like the *Ley Indígena* guaranteed the Mapuche's rights to land sufficiently (Stavenhagen 2003: 16).

5.5.4 Cases of mistreatment and the use of the Anti-Terrorism Law

In 2003, after more than a year in jail, two Mapuche community leaders, Pascual Pinchún and Aniceto Norín, as well as an activist, Patricia Troncoso Robles, were charged under the Anti-Terrorism Law with the burning of buildings and parts of tree plantations on two logging estates in Traiguén in December of 2001. One of the estates belongs to the former minister of agriculture under Patricio Aylwin and a member of the Constitutional Tribunal, Juan Agustín Figueroa (Haughney 2006: 200).

In the first trial in April 2003, the prosecutors used witnesses whose identity was concealed from the accused, “*testigos sin rostros*”. Additionally, their detention was prolonged before they were heard by the judge both admissible under the Anti-terrorism law. The three judges unanimously acquitted the defendants, but the Supreme Court overturned the acquittal in July 2003 and ordered a new trial on the grounds that the judges had not carefully considered all the evidence against the accused. In the second trial, two of the accused were found guilty of “terrorist threats”, but were acquitted of the act itself and condemned to five years of imprisonment (ibid. 2006: 200). The example of the sentencing of Pascual Pinchún and Aniceto Norín according to the law exemplifies that it would be used against people who identify with Mapuche and who participate in their demanding discourse (Instituto de Estudios Indígenas 2003: 240).

In December 2002, police detained twenty-six persons most of them members of the *Coordinadora Arauco-Malleco*, charging sixteen of them with “illicit terrorist association”. They were tried in October 2004, and eight of them were acquitted. The other eight had not appeared for the trial since they feared they would not receive due process. A judge had released them from detention a few months earlier as they awaited trial on a separate charge of illicit association and terrorist burning. In April 2005, however, as in the previous case, the Supreme Court overturned the acquittal and ordered a new trial on the grounds that the judges had not fully considered all the evidence presented by the prosecution, which included the use of witnesses whose identity had been concealed from the defendants (Haughney 2006: 200). Again, the questionable possibilities offered by the Anti-Terrorism law were used, the public prosecutor extending the secret investigation to six months (Instituto de Estudios Indígenas 2003: 241). The attorney defending the Mapuche of the *Coordinadora Arauco-Malleco* was intercepted as enabled by the penal reform. Therefore, the Mapuche had no defense in the trial since the prosecution was well informed about all the defender’s strategies (ibid. 2003: 242).

5.5.4.1 Excessive and lethal violence

The unyielding course of action applied against Mapuche who try to defend or claim their land did not stop in the 21st century. Even though Chile committed to several international agreements protecting basic human rights⁷³, they simply are not applied in practice when it comes to land conflicts. It almost seems as if the times of the military regime have not passed when looking at the numerous cases of excessive violence even resulting in deaths and often bordering on torture.

⁷³ See also 6.1.

One exemplary case is the murder of 17-year old Mapuche Alex Lemún in November 2002. Alex together with a group of other Mapuche occupied the Santa Elisa estate owned by logging company Minico, which is located in the community of Ercilla in Araucanía. Three Carabineros entered the estate and fired their arms in order to drive the Mapuche away. Alex, who belonged to the *comunidad* Montutui Mapu in Ercilla was hit by a shot and died five days later in hospital. The major of the Carabineros, Marcos Treuer was tried before the military court in Angol for resorting to unnecessary violence with lethal consequence according to Art. 330 par. 1 of the military code (Instituto de Estudios Indígenas 2003: 246). However, after only one day in detention⁷⁴ he appealed against the decision before the *Corte Marcial*, which declared the prosecution of Treuer void-*nolle prosequi*⁷⁵. The tribunal believed his statement that he had only fired his arms since he had heard a shot coming from the direction of the Mapuche group (ibid. 2003: 247). Once more, the concept of *impunidad*⁷⁶ for a state agent is observable.

Another case of crude brutality against a minor is the one of 12 year-old Mapuche Daniela Nancupil in 2001. She had been hit by shots stemming from arms carried by Carabineros. The case was brought forward to the military tribunal of Temuco, which did not induce proceedings against the Carabineros although they were the only three persons who were authorised to use the weapons, which had injured the child (ibid. 2003: 248).

In July 2006 a Mapuche community in Malleco was raided by Carabineros who fired tear gas, rubber bullets and ammunition on unarmed community members (Minority Rights Group International 2008).

In 2008, another young man, 22 year-old Mapuche Matías Catrileo was shot and killed by police officers while occupying farm land claimed by his Yupeco-Vilcun community in the Ninth Region (ibid. 2008). According to Special Rapporteur James Anaya the police officer who shot him has been convicted to a suspended sentence of two years only (Anaya 2010: 78).

The police killed young Mapuche Jaime Facundo Mendoza Collio in August 2009. In this case the responsible Carabinero was detained and charged with the crime of using unnecessary violence leading to death (ibid. 2009: 23). However, said police officer has been released on bail in the meantime (ibid. 2010: 78).

⁷⁴ Compared to this most Mapuche accused of committing a crime against logging companies are in excessively long pre-trial detention.

⁷⁵ Latin: To be unwilling to prosecute (Martin, Oxford Dictionary of Law 2003: 330).

⁷⁶ See also 4.2.

Moreover, in 2008, nine Mapuche were arrested arbitrarily during a peaceful festival and charged for public disorder. They were tied down for more than 13 hours while in custody, were interrogated and beaten (Minority Rights Group International 2008).

Human rights organisations such as ODPI (Observatory for Indigenous Rights) and Amnesty International have detailed these incidents and demanded full investigation as well as constitutional recognition for the indigenous communities (ibid. 2008). Moreover, numerous house raids and serious acts of harassment conducted by Carabineros occurred in Bío Bío and Araucanía. The perpetrators did not distinguish between adults and children and four of these acts even constituted torture in terms of the Convention against Torture (International Federation for Human Rights 2009). It has been reported that the Mapuche concerned never received explanations by the police why their homes had been raided. Moreover, computers have been confiscated from Mapuche who had publicised information about the conflicts in blogs and on homepages which potentially infringes the right to freedom of expression (Anaya 2010: 78).

While imprisoned, Mapuche are detained under poor conditions, and many times become victims of degrading treatment and racist insults constituting mistreatment according to international law. Moreover it needs to be noted that even defenders of the rights of Mapuche such as lawyers, journalists and film makers have been subjects of harassment, degrading treatment, house raids and detention (International Federation for Human Rights 2009).

The injustice continues before the courts or military tribunals where Mapuche who demonstrated for their land get charged with serious crimes and Carabineros who committed crimes against life and physical integrity mostly remain unpunished.

5.5.5 Observations and recommendations by human rights experts- and institutions

Former UN Special Rapporteur on the rights of indigenous people Rodolfo Stavenhagen in his 2003 report recommended to the Chilean government not to charge offences as terrorist threat or criminal association when the acts relate to the social struggle for land and legitimate indigenous complaints (Stavenhagen 2003: 22).

Although former president Bachelet (2006-2010) committed to no longer using the Anti-Terrorism law in 2006, it is still applied as the arrestment of two students, Félix Delgado Ahumada and Jonathan Vega Gajardo in October 2008 shows (International Federation for Human Rights 2009).

Several human rights bodies such as the Inter-American Commission on Human Rights, the HRC, the Committee on the Elimination of all Forms of Racial Discrimination, the Committee against Torture as well as former UN Special Rapporteur Rodolfo Stavenhagen (2001-2008) and his successor James S. Anaya have examined this situation and demanded not to use the law and not to apply violent measures.

However, in his 2009 report⁷⁷ current Special Rapporteur on the rights of indigenous people, James S. Anaya who visited Chile in April 2009 stated that violence and the use of the Anti-Terrorism law have been continued since Stavenhagen's report and recommendations. He asked the state to reform the penal code, especially because of the violence used during house raids and the use of the Anti-Terrorism law (Anaya 2009: 22). When Anaya's report was submitted, 15 Mapuche or sympathisers were being accused and tried for committing a crime covered by the latter law (ibid. 2009: 24). Therefore, Anaya as well as the UN Human Rights Committee (HRC) in its 2007 report urged Chile to adopt a narrower definition of crimes of terrorism, to ensure it is not applied to individuals for political, religious or ideological reasons. Moreover, the Human Rights Committee noted that such a definition should be limited to offences, which can justifiably be equated with terrorism and its serious consequences, and must ensure that the procedural guarantees established in the Covenant are upheld (HRC 2007).

Furthermore, the Committee urged Chile to bring Law N° 18.314 into line with Article 27⁷⁸ of the ICCPR, and revise any sectoral legislation that may contravene the rights spelled out in the Covenant. However, the Chilean government has a different approach to the issues criticised by experts.

In its information about the Human Rights Committee's observations of 2007 the Chilean government stated in 2009⁷⁹ that the aim of the use of the law was to punish the perpetrators, not the Mapuche people; punishing those who commit crimes did not constitute "criminalising" a social demand, and much less an entire community. Moreover, it stated that the government has always recognised the legitimacy of indigenous peoples' claims and that the protection of the right to land has been enshrined in the Indigenous People's law since 1993, enabling the transfer of land (ibid. 2009). The government also stated the law had only been applied in situations of the utmost seriousness in nine prosecutions.

The persons subjects to the house raids stated that they did not receive explanations for these actions neither by the police nor by the public authorities. Moreover, in all of these raids an

⁷⁷ See also UN Doc. A/HRC/12/34/Add.6.

⁷⁸ Rights of minorities.

⁷⁹ See also UN Doc. CCPR/C/CHL/CO/5/Add.1 and 6.8.2.

excessive use of firearms, teargas and violence occurred against the indigenous people (Anaya 2009: 22). However, the Chilean government reported to the Special Rapporteur that it had not received any criminal complaints concerning house raids. In contrast, non-governmental organisations handed over numerous cases to Anaya in which victims of such violent house raids had filed complaints - some of them were not even responded to (ibid. 2009: 23).

Moreover, Anaya reiterated that he disapproved of the resort to violence as response to social protest especially in cases of legitimate demands for land by indigenous communities. He stated Mapuche using violence does not justify human rights violations through public authorities (ibid. 2009: 22).

Recently, the Chilean government reported to Anaya that Law N° 18.314 had only been applied in exceptional cases⁸⁰ during the last administration and that it has been evaluated in the light of international standards. Anaya welcomed this information and insisted that delinquencies committed in the course of legitimate demands by the indigenous need to be excluded from what constitutes terrorism internationally⁸¹ (ibid 2010: 77).

Furthermore Anaya observed that the policy of penalising communal delinquencies committed during social protest serves stigmatising the indigenous population and leads to conflicting situations between Mapuche and state authorities, which is not contributing to social peace (ibid. 2010: 76).

The Human Rights Committee urged the Chilean state to take immediate and effective action to put an end to abuse and that it should monitor, investigate, and try and punish police officers who ill-treat vulnerable groups which Mapuche in most cases belong to. Furthermore, it was recommended by the Committee that the state should extend human rights training to all members of the security forces (HRC 2007).

In his 2010 report⁸² Anaya stressed the importance of the implementation of effective mechanisms in order to remedy the territorial demands by Mapuche especially when looking at the way public authorities and jurisprudence react towards the Mapuche's social protest (Anaya 2010: 76). Furthermore, like Rodolfo Stavenhagen, Anaya suggested to provide some form of amnesty for indigenous which had been put on trial for defending their ancestral lands and being involved in connected social and political activities (ibid. 2010: 77). This suggested

⁸⁰According to the government, in these cases indigenous individuals had not carried out delinquencies during social protest but directly attacked public authorities or goods with firearms (ibid. 2010: 77).

⁸¹ Even though there is no exhaustive definition of what constitutes terrorism in international law there is understanding (see also report of the Inter-American Commission on Human Rights: <http://www.cidh.org/Terrorism/Spain/indice.htm>) that the legitimate struggle, demands and social protest of indigenous peoples have to be differentiated and excluded from discussion, penal typification and legal action in conjunction with terrorism (ibid. 2010: 78).

⁸² See also UN Doc. A/HRC/15/37/Add.1.

signal of good faith could lead to the creation of confidence and a new relationship between Mapuche and Chilean state (ibid. 2010: 77). Moreover, he recommended to the government the establishment of a special investigation of police operations against Mapuche and the effects of the use of military justice on human rights of the Mapuche. This investigation should have the aim to ensure that ordinary legal process will apply to cases of mistreatment and killings (ibid. 2010: 79). Additionally, he suggested to set up a plan for reparations to benefit the victims and families of Mapuche who had been affected by public authorities (ibid. 2010: 79).

6. International Law and indigenous peoples

In the course of the development of the international system of protecting human rights after World War II indigenous peoples have become a subject of special concern (Anaya/Williams 2001: 55). Therefore, in this chapter I will elaborate on vital provisions aimed at protecting indigenous people's rights. I will give special attention to the Conventions provided by the International Labour Organization and the UN Declaration on the Rights of Indigenous Peoples.

6.1 Legal documents dealing with indigenous peoples' rights

There are several international legal instruments relevant for the rights of indigenous peoples. The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), ILO Convention N° 107 on Indigenous and Tribal Populations, ILO Convention N° 169 concerning Indigenous and Tribal Peoples in Independent Countries, the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), the Convention on Biological Diversity, the UN Declaration on the Rights of Indigenous Peoples and the Friendly Relations Declaration.

Even though the American Convention on Human Rights does not specifically mention indigenous peoples, their rights to land and resources are affirmed as the Convention provides for general human rights provisions that protect indigenous land and resource tenure (Anaya/Williams 2001: 41).

In general, the most relevant UN-documents for indigenous peoples in international law are ILO Convention N° 169 and the newly adopted Declaration on the Rights of Indigenous Peoples. Therefore, I will focus on them in my thesis. While ILO Convention N° 169 is a binding international treaty on states the UN Declaration is of non-binding nature, but sets (minimum) standards for the states (=> soft law) and might become binding through state practice⁸³. Chile ratified the ILO Convention N° 169 on September 15th, 2008, which, compared to other Latin American countries, is rather late.

6.2 From ILO Convention N° 107 to Convention N° 169

To date, the International Labour Organization (ILO), which is a specialised agency of the United Nations is the only body to have adopted international Conventions exclusive to indigenous peoples. The ILO Convention N° 169 on Indigenous and Tribal Peoples was

⁸³ See also 6.6.1.

adopted in 1989 and entered into force in 1991. Today 22 countries⁸⁴ have adopted it. However, it was not its first Convention relating to the rights of indigenous peoples. In 1957 the ILO adopted Convention N° 107 on Indigenous and Tribal Populations which was the first international Convention relating to the topic (Roy/Kaye 2002: 19). The ILO has taken a flexible approach when considering indigenous questions, and has often worked directly with non-governmental organisations and indigenous organisations, as well as with trade unions.

At the time of adoption of Convention N° 107 on Indigenous and Tribal Populations the approach towards indigenous peoples was paternalistic, with integration into the predominant society as a major aim of the Convention. Moreover, Convention N° 169 acts on the assumption of a permanent existence of indigenous peoples whereas Convention N° 107 assumed a temporary existence, *transitoriedad*, of indigenous peoples (Dandler/Hernández Pulido/ Swepston 1994: 11). It assumed that indigenous societies would disappear with “modernisation” (ILO 2010). The ILO no longer takes this approach, and integration is not an issue of concern or of interest to the supervisory bodies (Roy/Kaye 2002: 19). Furthermore, Convention N° 107 used the term “populations” whereas Convention N° 169 refers to “peoples⁸⁵”.

Between 1957 and 1989 various developments led the ILO to consider revising Convention N° 107⁸⁶. After two years of intense debates ILO Convention N° 169 was adopted in 1989.

6.3 Implementation and supervision in the ILO system

Once a country ratifies the Convention it has one year in order to bring its national legislation, policies and programmes into line with the Convention. Subsequently the treaty becomes binding for the State Party.

In terms of supervision State Parties have to submit reports every five years stating if they brought national laws into line with the Convention and what they have done regarding practical application (ILO 2010). The Committee of Experts on the Application of Conventions and Recommendations (CEACR), which provides Observations about the implementation, examines the reports. In cases of alleged violations of the Convention so-called Representations can be submitted to the ILO through workers’ or employers’

⁸⁴ Argentina, Bolivia, Brasil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, the Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain and Venezuela.

⁸⁵ For the special meaning of the term peoples see also 6.4.1.

⁸⁶ As Convention N° 107 was revised in 1989 by Convention N° 169, it is not open for ratification. However, it remains binding for countries, which have ratified it.

organisations (ibid 2010). Additionally, indigenous people can also send information about their concern towards laws, judgements or new policies to the supervisory bodies directly or through worker's unions.

6.4 Overview on vital provisions

Indigenous people could and did contribute to the meetings for the conclusion of ILO Convention N° 169 as representatives of governments, employers' and workers' delegations and non-governmental organisations (Roy/Kaye 2002: 21). However, indigenous participation at the ILO during the adoption of Convention N° 169 was limited. Nevertheless, the Convention has become a benchmark for indigenous issues and remains the most comprehensive and detailed instrument on the subject. It needs to be borne in mind that it is the only agreement exclusively dedicated to indigenous peoples with binding character for its State Parties.

The key issues of the Convention are recognition of indigenous and tribal peoples to exist as distinct people, which is the overall aim of the Convention without differentiating or defining these peoples. It stipulates consultation and participation as fundamental for all action; respect for the traditions, cultures and ways of life of indigenous and tribal peoples; towards self-management to provide the resources and opportunities for indigenous and tribal peoples to decide their own future.

Basic principles set out in the Convention are the right to self-identification as a fundamental criterion; right of consultation and participation and the right to decide their own priorities for development. The main issues addressed in the Convention are cross-border contacts of indigenous peoples separated by national borders, education including first-language instruction, employment and work, land rights including natural resources and the environment, social security and health including traditional health practices as well as vocational training and traditional activities. The governments are required to take coordinated and systematic action to protect these peoples and respect their integrity as well as to provide the resources for their development (ibid. 2002: 22).

ILO Convention N° 169 is one of the most comprehensive instruments in the field of international law, touching on all aspects of indigenous peoples' lives such as bilingual education, customary law, the environment, land rights, spiritual values etc. The conceptualisation of the right to self-identification and the right to consultation and

participation for the first time is also significant. This has helped these issues to gain recognition in the field of international law relating to indigenous peoples (ibid. 2002: 22).

6.4.1 The use of the term “peoples”

One of the most controversial issues during the debates before adoption was the use of the term “peoples”. Some of the governments believed that the use of the term would give indigenous peoples the right to self-determination and therefore the right to secession. However, for indigenous peoples themselves, the only correct term was and is “peoples”. Therefore, a compromise was proposed: The term “peoples” should be used but only under a qualifying clause in Art. 1 par. 3, which states: *“The use of the term “peoples” in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.”* Indigenous peoples have criticised the inclusion of this Article in the Convention because it falls short of their expectations and sets a dangerous precedent (Roy/Kaye 2002: 21). The ILO’s position to this issue is that the meaning and implication of the term “peoples” is an issue for the UN to decide, and that the use of this phrase in the Convention clarifies that this matter is outside the jurisdiction of the ILO.

In ILO Convention N° 107 this difficulty was circumvented by the use of the term “populations” whereas for the content of the ILO Convention N° 169, after much debate, it was finally agreed on the use of the term peoples. However, the qualifying clause limits the meaning of the term in relation to its understanding in international law. Both, the ICCPR and the ICESCR, contain in their Articles 1 the right to self-determination for all peoples. Therefore, indigenous representatives criticised the infringement of the meaning in the Convention. They excoriated that there was no reason to take this right from them compared to other peoples and demanded that this double standard should be eliminated (Dandler/Hernández Pulido/ Swepston 1994: 58). However, for the ILO the aim was not to interfere with the right to self-determination. Nevertheless, due to the specific associations to the term peoples the indigenous peoples’ representatives wanted the term to be used. However, Art. 1 par. 3 infringes this usual association.

6.4.2 Consultation and participation as cornerstones

Consultation and participation are key issues in the Convention and constitute the cornerstone of the treaty. Article 6 determines that indigenous peoples should be involved in every step of

any development process, which may impact upon them; they should control and manage their own processes of development. Paragraph two states that the consultations shall be carried out in good faith and appropriate to the circumstances with the object to achieve agreement consent to proposed measures. Furthermore, Article 7 stipulates that the peoples concerned shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly (par. 1) and that prior impact assessment studies must be conducted to guide development interventions in indigenous areas (par. 3). Articles 6 and 7 of the Convention provide one of the most comprehensive sources for a state's responsibility to consult indigenous peoples (Anaya 2009: 33). The states should consult indigenous peoples through appropriate procedures and through their representative institutions in cases consideration is being given to legislative or administrative measures, which may affect them directly. The ILO elaborated that legislative measures also include constitutional reforms in the sense of Art 6 (ibid. 2009: 34).

6.4.3 The protection of the right to land and resources

The Convention sets out rules for the handling of land rights in its Articles 13 to 19. The most difficult aspect during the process of formulating these vital articles was to bear in mind the necessity of comprehensive and effective protection of indigenous land and the state's demand for sovereignty (Heise 2000: 78).

One of the most complicated tasks during the negotiations was to establish a set of strong land rights that could exist within the context of the national legal systems as a separate system of rules (Dandler/Hernández Pulido/ Swepston 1994: 61). Moreover, this has an economic aspect to it, since it was made possible that indigenous peoples gain land rights they never owned on a formal level or which they only had on a vague basis. The concept on which the Convention is based assumes that indigenous peoples have land rights, which have to be recognised even when they are not of the same nature as the ones of the national legal system (ibid. 1994: 62). Moreover, the national legal systems build the frame and within their borders the indigenous land rights have to be exercised.

During the conference, representatives of non-governmental organisations demanded a right for indigenous peoples, which would be chronologically pre-located and therefore surmount the invaders' rights. However, it was concluded that other groups, which are deprived of their rights but were not indigenous peoples would not have this advantage in time. Therefore, in order to express the special rights, the conference decided to use the phrase "*lands on which they traditionally live*" (Article 14).

6.4.3.1 Article 13

This provision stresses the importance of the respect for indigenous peoples' special relationship to their lands or territories, meaning that the collective nature of their view on ownership and possession shall be respected. Moreover, the collective aspect of the relationship to land is explicitly mentioned “[...] governments shall respect the special importance [...] of the peoples concerned of their relationship with the lands and territories [...] in particular the collective aspects of this relationship”. It is very important that this collective character is recognised by governments since it secures the indigenous peoples' access not only to natural resources but also enables them to exercise their culture and customs which are inseparably connected to the land⁸⁷. The impossibility for individuals to sell the land or to leave it to third parties such as logging companies therefore strengthens indigenous communities to exercise their rights over land and resources.

However, the Article using present tense only speaks of lands or territories, “[...] which indigenous peoples occupy or otherwise use [...]”. The use of the present tense weakens the provisions, since lands which used to be in the possession or which were used traditionally are not mentioned. It needs to be noted, that representatives of indigenous groups insisted on the use of the term “territories” in Art. 13 par. 2 and the relevant provisions. For them, only this term expresses the special relationship between them and their geographical environment (Dandler/Hernández Pulido/ Swepston 1994: 21). However, representatives of the governments criticised the use of this term since the term territories in their constitutions refers to the national territory and therefore could be capable of implying rights of sovereignty towards the state. Nevertheless, the term territories, was finally accepted and used in Articles 13, 7 par. 4, 15 and 16.

The relationship to the territory is based upon collective rights whose bearer is a collective. However, this collective relationship is not necessarily recognised by national legal systems. The government representatives identified a problem with the use of the term territories, for them it relates to various elements, such as water, forests, shores of lakes and the sea, soils, ice sea etc.. Moreover, it was criticised since it contradicts provisions of several constitutions of Latin American countries which have a hispanoromantic legal system and therefore inappropriate to be used in the Convention.

After lengthy discussions it was agreed that the term was to be used in the introductory provisions in paragraph 1 of Art. 13 and to be used in provisions, which relate to the

⁸⁷ See also 1.2.2.

recognition of indigenous peoples' rights to lands. The latter is of special importance for Articles 15 and 16 of the Convention, which handle the existence of natural resources and cases of resettlement/deplacement (ibid. 1994: 22).

6.4.3.2 Article 14

The Convention sets out in its Article 14, that governments of state parties have to recognise "*the rights of ownership and possession [...] of lands, which indigenous people [...] traditionally occupy [...]*". Moreover Art. 14 sets out, that measures have to be taken to determine these lands to ensure these rights are protected. Furthermore, Art 14 provides for the access to lands to which indigenous peoples traditionally had access to even if they did not live on them permanently but where they carried out traditional activities (Dandler/Hernández Pulido/ Swepston 1994: 23). Art. 14 par. 1 sets out two different types of land rights.

Firstly, it mentions the right to ownership and possession of lands indigenous peoples traditionally occupy. Therefore, they might have lived on these lands for some time or lost it recently. Moreover, the right includes that they live in and control the land and can dispose over it. Moreover, no formal title is necessary for the recognition of ownership rights (see Art. 17 par. 1). Therefore they hold the land rights by virtue of being indigenous.

Secondly, they have the right to use lands not exclusively occupied by them, but to which they "*[...] have traditionally had access for their subsistence and traditional activities*". Therefore, it is not necessary to have a right of ownership or possession to the land for using it. Paragraph 2 provides that governments shall take steps to identify the lands traditionally occupied by these people and to guarantee protection for ownership and possession.

Both terms ownership and possession were included in Article 14. In many cases ownership is a concept alien to indigenous perception. It needs to be noted that both terms have to be understood as separated and complementary and that both concepts are mentioned in order to cover a broad range of different situations (ibid. 1994: 67). The CEACR noted, that the concept of ownership might differ from country to country. The question whether the use of both terms possession and ownership also means the recognition of the rights associated with them remains unanswered (Heise 2000: 78). For instance if an indigenous group owns the land it could lease its right to possession of resources to a company. On the other hand if they only possess land it is relevant whether this legal title suffices to prevent an exploitation of the land (ibid. 2000: 78). Since Article 14 mentions different legal types for the relationship to land it can be assumed that the coexistence of different types is supported and the intention is to cover as many of the cases as possible.

Furthermore, a closer look on the phrase “lands which they traditionally occupy” is necessary to understand the reach of the provision. As in Article 13, present tense is used. The tense used is a hint to an intention to find a connection to present time, for instance a recent incident of dislocation or another kind of loss of lands. Moreover, the ILO-typical formulation in paragraph one, that in “appropriate cases” measures should be taken to safeguard the rights was criticised. Some participants of the conference were afraid that a formulation in that manner would leave too much space for governments to decide whether they would take measures or not.

Paragraph two has the purpose to make the rights listed in paragraph one effective. This effective protection mentioned is intended to guarantee the practical applicability of the right (Dandler/Hernández Pulido/ Swepston 1994: 69). Paragraph 3 deals with the establishment of procedures on the national level to ensure the resolution of land claims of indigenous peoples, “*adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned*”.

6.4.3.3 Article 15

The Convention reiterates that indigenous peoples should “(...) *participate in the use, management and conservation (...)*” of the environment and natural resources in indigenous lands (Article 15) (Roy/Kaye 2002: 22). Compared to the provisions of Convention N° 107 this Article constituted a novelty - up to the era of Convention N° 169 this field had not been regulated. The fundamental idea of the Article is that the use of land in accordance with customs and traditions necessarily contains the right to natural resources belonging to the land (Dandler/Hernández Pulido/ Swepston 1994: 71).

In many legal systems, resources in lands do not belong to private persons (to the owners of the land), especially mineral resources. However, many participants of the conference argued that the right to lands and resources of indigenous peoples should exist without conditions. Both paragraphs one and two are formulated in an open way, the rights themselves as well as their scope are not defined. However, the reason for this formulation is to maintain the applicability of the provision in different countries and therefore different legal systems (ibid. 1994: 72).

The provision does not contradict the state’s right to resources but creates procedural rights for indigenous peoples within the state’s ownership rights. It needs to be noted that the loss of land is the most prominent reason for indigenous peoples to lose identity and culture (ibid.

1994: 73). Land rights without the right to use the natural resources are more or less meaningless for the protection of indigenous peoples. In consequence, a government could dislocate a group of people if it simply awards a concession for the exploitation of resources (Heise 2000: 79). In Chile, this is what actually happened⁸⁸ to many indigenous communities as the water and mining code provide for separate kinds of rights.

Article 15 is concerned with the use of natural resources. In cases where natural resources pertain to their lands, indigenous peoples shall have the right to participate in the use, management and conservation of these resources therefore indigenous peoples do not automatically own resources on lands they own.

Paragraph 2 sets out in cases where the state retains ownership of the resources, indigenous peoples shall be consulted to ascertain if their interests and to what degree they would be affected before undertaking or permitting any programmes for the exploration or exploitation of these resources. Moreover, the Article provides for the participation of benefits and the granting of compensation when the resources are commercialised.

However, this provision weakens the rights of indigenous peoples because they only have the right of consultation but no right to impede the exploitation of e.g. forests on their lands. Moreover, it is not explained in what way and to what extent their rights should be specially safeguarded as stated in paragraph one which additionally weakens the provision and therefore the meaning of the protection for indigenous peoples. Article 15 gives the state the last word over national resources. This Article contradicts Article 14, stating that they own and possess their land whereas according to Article 15 they only have the right to participate in the management of the resources.

6.4.3.4 Article 16

Article 16 sets out a general prohibition of relocation or removal from lands, which are occupied by indigenous peoples. Paragraph two lists the circumstances in which peoples may be relocated. By using the term “relocation”, it is implied that in any case of loss of lands they have to be given new lands (Dandler/Hernández Pulido/ Swepston 1994: 75). Article 16 is connected with Article 13 par. 2, which uses the concept of territories for lands. Therefore, it can be assumed that in any case of relocation, the environmental aspects of the lands have to be taken into consideration. Paragraph two considers the circumstances in which relocations may take place.

⁸⁸ See also 4.3.2.3.

The ILO Convention calls relocations “exceptional measures” and lists no reasons justifying them automatically. Moreover, the free and informed consent of the indigenous peoples concerned is necessary before relocation takes place. It has to be noted that in the conference, representatives of indigenous peoples demanded that their consent should be made a condition indispensable for the relocation. However, this demand was not met. Instead, paragraph two provides for cases in which consent cannot be obtained but which have to be approved by appropriate procedures which have to provide for representation of the peoples concerned. Therefore, paragraph two requires certain prerequisites for cases where a consent cannot be obtained: The procedures have to be appropriate, there have to be public inquiries in cases where appropriate in order to provide effective representation. However, the paragraph does not define these prerequisites. Moreover, the paragraph sets out the opportunity for effective representation for the peoples concerned. Effective representation means, for instance, that the procedure has to be conducted in a language the peoples concerned have command of.

Paragraph 3 constitutes a change in the way of thinking and did not exist in the previous Convention of 1957. It sets out the right to return to the traditional lands. However, if the resources have been exploited or the land has been altered in another way it is doubtful whether the land can retain its cultural and spiritual value for the group that had been relocated.

Paragraph 4 provides for the provision of lands of the same quality and legal status as the lands relocated from. However, it has to be questioned whether this provision really complies with the concept of land of indigenous peoples. The provision of other lands, may they be of the exact same quality, still might not be able to reconstitute the peoples’ special relationship to their land.

It needs to be noted that if one bears in mind the concepts the indigenous have of land, the deep cultural bond on a mental and on a physical level, cannot simply be transplanted. The paragraph sets out an obligation to find lands of the same quality and with the same legal title. However, it does not definitely prohibit relocation in cases where land of the same value cannot be found. Therefore, exceptions from these obligations still are, even if they must be well-founded, possible.

Paragraph 5 requires the compensation for losses and injuries in connection with relocations. However, it has to be noted that any kind of compensation may it be financial or not, may not be the tool to redress the loss of culturally important lands.

6.4.3.5 Articles 17-19

During the conference some representatives of non-governmental organisations demanded that indigenous lands should be made inalienable. However, this suggestion was not realised, since the Convention wants to safeguard indigenous peoples' free rights to decide over their lands. Making them inalienable would have meant to take away their freedom of decision-making. Moreover, indigenous communities should have the option to dispose of their lands in order to let, sell or use it for other purposes. However, this could be problematic; indigenous people such as Mapuche peasants being poverty stricken might be forced to sell their land.

Paragraph 1 of Article 17 sets out that the procedures established by peoples concerned for the transmission of land rights among their members shall be respected. This paragraph should be read in connection with Article 8, which requires the due regard for customs or customary laws (Dandler/Hernández Pulido/ Swepston 1994: 79). Paragraph 2 again is related to the question of inalienability. Paragraph 3 requires the prevention of people who do not belong to indigenous peoples to take advantage of them.

Article 18 deals with penalties for unauthorised intrusion on indigenous land and Article 19 deals with agrarian programmes and the extension of land. This Article (19) is the only provision in this part of the Convention, which requires equivalent treatment compared to superior treatment in the other provisions.

6.5 Summary

In view of this, it needs to be noted that the ILO Convention N° 169 does not provide a comprehensive or definite protection of indigenous peoples since it leaves loopholes for states to enforce their interests. One example is that it does not provide for definite protection of unwanted exploitation of lands (Heise 2000: 83). Nonetheless, forced dislocations are handled restrictively. In addition, the Convention provides for the right of consultation - *consulta previa* in several areas, however, it does not mention any binding influence of the peoples concerned and merely provides an individual right of co-determination in public life and not as a collective (ibid. 2000: 82).

Overall, ILO Convention N° 169 contains drawbacks, which enable states to neglect the special protection of indigenous peoples. Nonetheless, the Convention is the only legal document that is binding upon its State Parties and which gives indigenous peoples the

opportunity to collectively participate in decision-making and the use of natural resources (ibid. 2000: 83). Therefore, it remains the only enforceable legal instrument dedicated to the rights of indigenous peoples on an international level. Moreover, the fact that some provisions are left open and are not too detailed is due to the circumstance that the intention was to make it applicable in as many different legal systems as possible. On the other hand, this leads to the aforementioned loopholes states can use in order not to respect certain rights of indigenous peoples.

6.6 United Nations Declaration on the Rights of Indigenous Peoples

6.6.1 Overview and comparison to ILO Convention N° 169

Generally speaking, compared to the ILO Convention N° 169, the provisions in the Declaration on the Rights of Indigenous Peoples are formulated in a stronger way in favour of indigenous peoples, which opens up more far reaching rights. However, one has to bear in mind that the Declaration is of non-binding character to states. As mentioned above, a Declaration constitutes so-called soft law⁸⁹ which has no legal binding force upon states. However, it might become customary international law (one of the sources of international law) through state practice and *opinio iuris*⁹⁰ or when it leads to the conclusion of binding treaties.

One of the issues I'd like to point out is the right to self-determination. It is remarkable that the Declaration sets out very clearly that indigenous peoples have the right to self-determination in its Article 3. According to this Article, they have the right “(...) *to freely determine their political status and freely pursue their economic, social and cultural development*”. Moreover, in Article 4 it is stated that “(...) *in exercising their rights to self-determination they have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions*”. This is quite far fetched since the ILO Convention includes a qualifying clause, which leaves it to the UN to define who has the right to self-determination and therefore excludes the derivation of the right to self-determination from its provisions. However, one can argue that in its Declaration the UN gave its view concerning indigenous peoples and their right to self-determination. Nevertheless, the Declaration does not challenge the state's

⁸⁹ In international law guidelines of behaviour, such as those provided by treaties not yet in force, resolutions of the United Nations, or international conferences that are not binding in themselves but are more than mere statements of political aspirations (Martin, Oxford Dictionary of Law 2003: 467).

⁹⁰ This means that a certain code of practice has been followed over some time by states as well as international organisations and when states show their will to oblige themselves legally (Reschke 1998: 57).

sovereignty, since it restricts the right to self-determination to affairs within a state (Heise 2000: 100). Therefore, the state remains in the stronger position it can still uphold national interests and therefore infringe internal self-determination (ibid. 2000: 101).

The provisions dealing with land rights are to be found in Articles 25 to 30 of the Declaration. I'd like to discuss some of these Articles and compare them to the relevant provisions in the ILO Convention N° 169. Article 25 relates to the special spiritual relationship that indigenous peoples have to their land and the right to maintain this relationship. Compared to Article 13 of the ILO Convention N° 169, which relates to this matter, the Declaration uses past tense stipulating the right to lands "*traditionally owned, occupied or otherwise used*" whereas the Convention only speaks of land, which people use or occupy.

Similarly, in contrast to Articles 13 and 14 of the ILO Convention, Art. 26 par. 1 of the Declaration uses perfect tense to describe to which lands indigenous people have a right to: lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. However, one has to bear in mind that this does not necessarily imply rights of ownership or possession as clarified by Art. 26 par. 2⁹¹. Nevertheless, the Articles compared to the ILO Convention are formulated in a more far reaching way. However, as it is a Declaration it has no binding force for UN State Parties.

Article 19 provides that states have to consult (*consulta previa*) indigenous peoples in good faith to obtain their free, prior and informed consent through their own representative institutions before taking legislative or administrative measures that affect indigenous peoples. Moreover, Article 29 par. 2 demands the free, prior and informed consent in cases of the storage or disposal of hazardous materials in indigenous lands or territories.

Article 10 relates to relocation and is formulated in a stronger way than the ILO Convention as well. It stipulates that relocation is only possible with the free, prior and informed consent of the indigenous peoples concerned. In comparison, ILO Convention N° 169 does not speak of prior consent. Peoples who have been relocated can choose between the provision with lands of equal status and quality or compensation with money. However, the Declaration does not contain an absolute prohibition of relocation but makes it more difficult for states to relocate groups of peoples than ILO Convention N° 169.

⁹¹ "*Indigenous peoples have the right to [...] lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired*".

6.7 Chile and ILO Convention N° 169

After long struggles, the Convention was finally ratified by Chile on September 15th, 2008 during the presidency of Michelle Bachelet. Since the national indigenous law of 1993 does not comprehensively protect indigenous rights and ILO Convention N° 169 leaves open certain fields the state's interest still might overpower indigenous interests in the future. In the case of Chile this can signify the continuation of previous exploitation and deprivation of indigenous land. However, due to the ratification the system of consultation (Article 6) has been introduced, which is not contained in the national indigenous law of 1993. This might play a role in large infrastructural projects and also concerning conflicts of forestry companies with indigenous communities. Moreover, it has recently been proven that Chilean national courts are applying the Convention's provisions.

6.7.1 Cases

In 2009, the Chilean Supreme Court, *Corte Suprema*, ruled an important precedent⁹². It recognised the ancestral indigenous law of the *comunidad* Aimara Chusmiza-Usmanaga by the application of ILO Convention N° 169 and therefore the superiority of the ILO Convention as well as ancestral law over the internal law of the Chilean state (Clavero 2009a). This can open a new chapter in the government's relation to its indigenous population. The right-wing forces still fighting the recognition of Chile's indigenous peoples as the bearers of special rights will face a stronger resilience backed up by the Convention. The above mentioned case was ruled for Aymara.

In its judgement the Supreme Court held up Art. 15 par. 1, which provides for the special protection of resource rights in conjunction with Art. 13 par. 2, which states that the term territories used in Articles 15 and 16 also includes areas "occupied or used otherwise" by indigenous peoples. Therefore, this judgement rendered effective on November 25th 2009 clearly stated the supremacy of the Convention over internal law and the superior value of ancestral indigenous law taking precedence over the state's law (ibid. 2009a).

On July 27th 2010, the *Corte de Apelaciones* of Puerto Montt ruled⁹³ in favour of the *comunidad* Mapuche Huiliche Pepiukelen of Pargua, which tried to defend its land and integrity towards a salmon company, "Los Fiordos", polluting the *comunidad's* land. The *comunidad's lonco*, Manuel Secundino Vera Millaquen, represented the *comunidad* before the courts. The *comunidad* related to the constitutional right enshrined in Article 19 of the

⁹² See also <http://clavero.derechosindigenas.org/?p=4439>.

⁹³ See also <http://www.politicaspUBLICAS.net/panel/c169/not-c169/669-triunfo-pepiukelen.html>.

Chilean Constitution, establishing the right to a life in an environment free of contamination. The court ruled that the company together with the *Comisión de Medio Ambiente* had violated the rights of the Papiukelen community. First and foremost it ruled that the concept of territory stated in the Conventions' Art. 13 par. 2 is superior to the respective Articles 12 and 13 in the law N° 19.253 and therefore covers all areas occupied or used by indigenous peoples. Furthermore, the court ruled that indigenous people have to be consulted within the conduct of an environmental impact study since the Convention provides for this right in Article 6 paras. 1 and 2. Moreover, the court affirmed that the state's duty to consult the indigenous people is a legal norm, which is applicable without the need for another law - "autoejecutable" (Toledo 2010).

In another case, the appellate court of Temuco declared an environmental resolution (*Resolución de Calificación Ambiental-RCA*) void⁹⁴ which had authorised the installation of an aquaculture for salmon farming in a river closeby (only 720 metres) the Palguin *comunidad* without its prior consultation in the course of an EIA. The appellate court also confirmed that the provisions concerning the *consulta previa* were *autoejecutable* in the case and that the environmental authority COREMA had violated the right of equality before the law in conjunction with the right to live in an environment free of contamination (Meza-Lopehandía G. 2010).

On the 4th of August 2010 another court of appeals - the *Corte de Apelaciones* of Valdivia ruled in favour of Mapuche communities⁹⁵ relating to ILO Convention N° 169 and also the UN Declaration on the Rights of Indigenous Peoples. A waste processing plant threatened Mapuche communities in the municipality of Lanco, owned by the municipality. The court declared a resolution (Resolución Extena N° 041 de 5 de abril de 2010) by CONAMA void, which had approved the environmental impact study about the project.

The court of appeals is the third of its kind (after Temuco and Puerto Montt) to abrogate administrative rules, which interfere with indigenous peoples' right to consultation as established in Convention N° 169 (Políticas Públicas 2010). The court ruled that the Mapuche communities' right established in Article 25⁹⁶ of the UN Declaration was violated. Moreover the appellate court based its verdict on Article 6 par 1 (a) of the ILO Convention N° 169, which states that "*peoples concerned have to be consulted through appropriate procedures*

⁹⁴ The *Corte Suprema* later revoked the verdict of the court in Temuco see below.

⁹⁵ See also <http://www.politicaspublicas.net/panel/jp/673-valdivia-rol-243.html#>.

⁹⁶ "*Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship to their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard*".

and in particular through their representative institutions whenever consideration is being given to legislative or administrative measures which may affect them directly”.

It remains to be seen if the *Corte Suprema* will repeal the verdicts of Puerto Montt and Valdivia as it did in the Palguin case⁹⁷, which was rendered by the appellate court of Temuco. The Supreme Court revoked its finding, ruling that an EIA including prior consultation was only necessary in cases of dislocation or the alteration of human customs and omitted the application of Convention N° 169. In its arbitrary finding, the *Corte Suprema* not only violated Convention N° 169 which stipulates the need for prior consultation in such a case but also the national environmental law (N° 19.300) which prescribes an EIA in such a case and the basic principle of equality before the law (Meza-Lopehandía G. 2010).

Despite the latter ruling leading to legal uncertainty, it can be noted that the ratification of the Convention clearly contributed to a potential sphere of recognition and revision of many cases. It needs to be seen how the courts will rule in cases relating to interests of forestry companies and companies conducting infrastructure projects contravening Mapuche interests. It is of special interest whether the Supreme Court will confirm the verdict of the Papiukelen case since the salmon industry like the forestry industry has become one of the most important economic sectors in Chile and could determine the way forestry cases will be dealt with too.

6.7.2 Resilience of the Chilean state to commit to the Convention’s and other international standards

It needs to be noted that on the day of ratification of the Convention Chile promulgated a provisional order, which regulates the consultation and the participation of indigenous peoples in Chile provided for in the ILO Convention N° 169. Therefore, the Chilean state reserved mechanisms in order to control future consultations. Thus, rights recognised on an international level are still infringed internally (Clavero 2009b).

Chile clearly tries to neutralise international standards in order to maintain its own rules concerning its indigenous population. Moreover Chile tried to add an “interpretative clause” in order to prevent the Convention being implemented in the light of the UN Declaration (ibid. 2009b). Additionally, the efforts for a constitutional reform aim at recognising indigenous peoples as such, but not their rights (ibid. 2009a).

⁹⁷ See also <http://prensa.politicaspUBLICAS.net/index.php/indigenaschile/2010/05/2/5/el-caso-de-lof-palguin-ante-la-corte-suprema-critica-a-una-sentencia-arbitraria>.

Furthermore, Chile still has to bring its sectoral laws into line with the ILO Convention N° 169, especially regarding the protection of natural resources. Currently, there are several governmental initiatives in order to protect natural resources for indigenous peoples, however so far only for *Áreas de Desarrollo Indígena*, which are ultimately determined by the state (Anaya 2009: 18).

Additionally, special Rapporteur Anaya urged Chile besides from the reform of sectoral laws and the adherence to the *consulta previa* for future projects, existing invasive projects should be re-evaluated (ibid. 2009: 18). The special rapporteur mentioned the Bío Bío dam projects conducted by ENDESA, pulp mills run by CELCO S.A., Celulosa Arauco, causing pollution in rivers in Mapuche Lafkenche territory, the installation of chemical plants treating wastewater polluting rivers and springs used by Mapuche in Araucanía and the installation of four hydroelectric plants in the Los Ríos region causing the flooding of 1200 hectares - the responsible Norwegian company SN Power did not consult the affected communities (ibid. 2009: 18).

As shown in 5.5.5, Chile sacrifices the compliance with international human rights standards of the ICCPR and the American Convention of Human Rights and others when it comes to the conflict over natural resources.

In his 2010 report, Special Rapporteur Anaya urged Chile's government to adapt the national legal system to international standards⁹⁸ for indigenous peoples' rights for their traditional territories. Currently, in Chile's internal legal order there are no effective remedies for indigenous peoples in order to reclaim, recognise or restitute lands claimed by them. There is no national mechanism existing which clearly permits the recognition, restitution and protection of land and resource rights traditionally owned by indigenous peoples (Anaya 2010: 74). Moreover, Anaya noted that it was Chile's duty to implement effective mechanisms in order to regard these territorial demands of the Mapuche (ibid. 2010: 75). The lack of effective access to the justice system contributes to the current conflictual situation as well as the Mapuche's mistrust towards state authorities and the national society which manifests itself in social protest (ibid. 2010: 75). Furthermore, the Special Rapporteur reiterated in 2010 that the Mapuche's territorial demands need to be considered completely apart from the phenomenon of terrorism (ibid. 2010: 79).

⁹⁸ The recognition of demands by indigenous peoples for their traditional lands which had been lost involuntarily is a vital part of international human rights instruments which are relevant for Chile: ILO Convention N° 169 (Arts. 12 and 14 par. 3), the UN Declaration on the Rights of Indigenous Peoples (Art. 40), and the American Convention on Human Rights (confirmed by case law) (Anaya 2010: 74). These international instruments contain the right for access to the justice system of indigenous peoples and need to be taken into account by Chile in order to meet indigenous demands (ibid 2010: 76).

6.7.3 The need for prior consultation - *consulta previa*

Like his predecessor Rodolfo Savenhagen, Anaya demands the prior consultation *consulta previa* in any development project planned to take place in indigenous regions and territories (Anaya 2009: 19). However, the question of how to treat projects affecting indigenous communities, which were existent prior to the ratification of the ILO Convention N° 169 remains. The Chilean state noted that such projects were not affected by the Convention due to the principle of no retroactive legislation. However, in his 2009 report Anaya states that the industrial and infrastructural projects of exploiting natural resources already existing at time of ratification do have current effects and will have effects in the future on the affected communities. Therefore, Anaya explains that these current and expected effects may they be caused by private companies or the state are covered by the Convention (ibid. 2009: 20).

Moreover, the ILO decided that consultations have to take place for projects in progress too relating to their current and future effects on indigenous communities including means of mitigation due to impacts made such as compensation and reparation (ibid. 2009: 21).

In cases where an activity or a project has substantial effects, which endanger a *comunidad's* physical or cultural well-being, the state might not authorise the continuation of the activity without the community's consent (ibid. 2009: 21). In this regard the Inter-American Court of Human Rights ruled⁹⁹ that the prerequisite of consent is enforceable in all cases of large-scale invasion, which have a major impact on indigenous communities (ibid. 2009: 21). Moreover, this is contained in Articles 10 and 29 par. 2 of the UN Declaration on the Rights of Indigenous Peoples.

6.8 Recommendations of the Human Rights Committee

In its Article 40, the International Covenant on Civil and Political Rights provides for a report mechanism in which the state parties have to submit periodic reports about the measures they adopted to give effect to the rights recognised in the Covenant and on progress made enjoying said rights. These reports, which have to be submitted every five years, are considered and commented by the Human Rights Committee. The Human Rights Committee is a body of independent experts that monitors the implementation of the ICCPR by its State parties (Human Rights Committee 2010). The Committee considered the fifth periodic report of Chile in March 2007 and adopted some concluding observations also concerning laws

⁹⁹ *Caso del Pueblo Saramaka v. Surinam*, Sentencia de 28 noviembre 2007, Serie C. No. 172, paras. 133-137.

affecting the indigenous population. There are still various areas of concern in Chile as expressed by the Committee¹⁰⁰.

6.8.1 General Remarks by the Committee

First of all there was a constitutional reform carried out in Chile in 2005, which put an end to the system of appointed senators and senators for life and abolished the provision under which chiefs of the armed forces could not be removed from office by the President of the Republic. Although the reference to the binominal system has been removed from the Constitution, the electoral system used in Chile can still hamper the effective parliamentary representation of all individuals, contradicting articles 3 and 25 of the Covenant (HRC 2007).

One other important reform was of the Code of Criminal Procedure and the separation of functions between the authorities responsible for prosecution and those responsible for rendering judgements.

Another area of concern for the Committee in its report was the fact that the 1978 Amnesty-Decree-Law N° 2.191 is still in force and therefore leaves the opportunity to be applied even though in practice it is no longer applied by courts (ibid. 2007). The law could not be repealed for lack of parliamentary majority. However, in 1998 the Supreme Court ruled that the D.L. is inapplicable based on the main instruments of International Humanitarian Law and human rights that Chile has ratified (ibid. 2009).

In 2007 the Committee criticised that a national human rights institution had still not been established and therefore recommended the establishment of the latter. This was finally considered in November 2009 where the Senate approved a bill to create a National Human Rights Institution empowered to adhere to international standards and to initiate legal proceedings in cases of certain human rights violations (Amnesty International 2010).

The next concern expressed by the Committee is the system of legally authorised detention *incommunicado*, which can last for up to ten days. The Committee urges that necessary legislative measures should be adopted to eliminate prolonged detention *incommunicado* (solitary confinement).

6.8.2 Remarks concerning indigenous issues

As described under 5.5.5 the definition of terrorism contained in the Counter-Terrorism Act N° 18.314, which may be excessively broad, is a field of great concern. Therefore, the

¹⁰⁰ See also UN Doc. CCPR/C/CHL/CO/5.

Committee is concerned that this definition has allowed for charges against members of the Mapuche community in connection with protests or demands for protection of their land rights.

Moreover, the Committee noted that there continue to be cases of ill-treatment by the security forces, primarily at the moment of arrest and against the most vulnerable, including the poor. Another cause for concern is that Chile's military tribunals continue to have jurisdiction to try civilians in civil matters, which is incompatible with Article 14¹⁰¹ of the Covenant. Moreover, the wording of Article 330 of the Code of Military Justice, may be interpreted as allowing the use of "unnecessary violence". Therefore, the Committee recommended that the state ought to amend the Code of Military Justice and limit the jurisdiction of military tribunals solely to military personnel charged exclusively with military offences and ensure that it does not contain provisions that allow treatment contrary to the rights established in the Covenant (HRC 2007).

Even though the state expressed the intention to give constitutional recognition to indigenous peoples, the Committee is concerned that claims of indigenous peoples, especially the Mapuche have not been met, and about the slow progress made in demarcating indigenous lands, which has caused social tensions (ibid. 2007).

Moreover, the Committee expressed its dismay that ancestral lands are still threatened by forestry expansion and megaprojects in infrastructure and energy, which clearly violates Articles 1 and 27¹⁰² of the Covenant. Therefore, it urged Chile to negotiate with indigenous communities and respect their lands in accordance with Art. 1 par. 2 and Article 27 of the Covenant. Moreover, the state was asked to accelerate procedures to recognise such ancestral lands (ibid. 2007).

6.8.2.1 Chile's response

In late 2008 the government of Chile rendered information¹⁰³ in regard to the concluding observations by the Human Rights Committee in 2007.

Relating to the demarcation requested by the Committee, the Chilean state responded that there were no pending cases involving the demarcation of indigenous lands and that they had already been delimited and demarcated and the boundaries determined in the nineteenth-century laws granting land titles (HRC 2009). Moreover, Chile responded that "*it has made every effort to resolve land claims made by indigenous peoples and communities [...]*" (ibid.

¹⁰¹ The right of a fair trial.

¹⁰² The right of self-determination and rights of minorities.

¹⁰³ See also CCPR/C/CHL/CO/5/Add.1.

2009). Chile described the different mechanisms used to return land to indigenous communities: Land subsidies, purchase of disputed land, transfer of state property to indigenous communities, subsidy for upgrading and regularisation of indigenous land. Chile stated that by the mechanisms as enlisted above between 1994 and 2005, some 493,000 hectares of land were returned to indigenous communities, benefiting over 18,800 families (ibid. 2009). Despite the return of lands, the financial means of CONADI are limited and therefore a comprehensive review of land claims has not been conducted.

Concerning the Committee's request to amend the Anti-Terrorism Law and to bring it in line with Article 27 of the Covenant, the Chilean government answered that then President of the Republic (Michelle Bachelet) had taken the policy decision not to apply this legislation to cases in which indigenous individuals were involved on account of their ancient demands and grievances, if it is possible to try them under ordinary law in future. Nevertheless, this political decision does not guarantee the abstention from using the law against Mapuche in land conflicts. As the latest cases show the law still seems to be applied against them.

Towards the Committee's request to consult indigenous communities before granting licenses for the economic exploitation of disputed lands, the government stated that it had legislation establishing procedures for consulting and involving indigenous communities in projects that are carried out on their lands. Moreover it stated, that the statute regulating indigenous lands is supplemented by other laws such as the Environment Act and establishes a consultation process for environmental impact studies. The ratification of the ILO Convention N° 169 recently approved by Congress would ensure that indigenous communities could participate in projects involving their lands (ibid. 2009).

The great concern expressed by the Human Rights Committee regarding the general implementation of the Covenant as well as the rights being of special interest to indigenous peoples show the lack of a consistency in human rights in Chile. It seems that the phase of the military dictatorship still makes the breach of human rights a cause of minor importance. The use of excessive violence, military tribunals and Anti-Terrorism provisions enabled by laws created under the dictatorship clearly show the long arm of Pinochet.

7. Résumé

In this thesis I elaborated on the remnants of Pinochet's policy and their effects on the Mapuche people today. Even though the Chilean state has made efforts to improve the situation of this people such as the ratification of the ILO Convention N° 169 and programmes promoting their rights and needs, they still pose the most vulnerable group of Chilean society. Due to Chile's economic strategy introduced under Pinochet and its dependency on exports and foreign capital the needs of the market are given priority over basic rights and environmental considerations whenever they interfere with Mapuche interests. This is accompanied by the ideal of a unitary homogenous state, which is still very present amongst Chile's predominant society and decision-makers and therefore impeding the development towards a pluralistic society and the consideration of indigenous needs. Every decision benefiting the indigenous population is marked by a very slow progress, debates taking years and resistance in a big part of the policy-makers as the late ratification of the ILO Convention N° 169 and the outstanding constitutional recognition demonstrate.

Pinochet's indigenous policy provided ideal prerequisites for the subsequent governments of the *Concertación* in order to pursue their economic aims. On one hand the right wing forces enjoy a special position, as was enabled by Pinochet's policy, the 1980 constitution and other provisions, they can determine and hamper policies concerning the indigenous population. Therefore important developments towards a climate of taking indigenous demands into account are only slowly progressing. On the other hand laws passed under Pinochet, which deprived the Mapuche of their lands to a large extent and ruptured their social organisation set the preconditions for the expanding export economy. Moreover, as shown in chapter 4 the indigenous law passed by the first democratic government after the military regime is rather adapted to the needs of the state and its economic and political philosophy as already promoted by Pinochet. Another factor inhibiting the Mapuche's struggle for their land and resources is the application of Pinochet's Anti-Terrorism law, bringing them in front of military tribunals and the use of excessive violence towards the indigenous population. The succeeding democratic governments apply these measures doubtful from a human rights' point of view in order to defend the interests of the state and companies.

Although steps have been taken to take indigenous demands into account Chile tries to find ways not to fully commit to international standards.

The Mapuche's spiritual relation to the land is in great contradiction to the government's approach. As explained in chapter 5 the expansion of non-native tree plantations enabled by Pinochet's law N° 701 has led to various negative effects on the native ecosystem and a loss of biodiversity as the benefits of industrial logging are privatised. Moreover, as I demonstrate in this thesis, the destruction of native forests eliminates resources used by the Mapuche and threatens their cultural practices and knowledge based upon biodiversity, resources and increases economic hardships for rural Mapuche communities.

The neoliberal economy enjoys ultimate priority and therefore seems to justify even the breach of basic human rights and the vast exploitation of nature and its irretrievable effects on the environment. The course of action of the Chilean state towards the indigenous population and especially the Mapuche continues and even benefits from Pinochet's policy of assimilation and denial.

Even though Pinochet was deselected the democratic governments of the *Concertación* did not manage to overcome his shadow - in some fields they even deepened his policy.

Human rights experts and countless reports of non-governmental organisations prove the little attention the Mapuche are given in Chile. Even under left-oriented governments like Michelle Bachelet which improved overall social standards the situation of Mapuche was left unheard and neglected. Real change is confined to political remarks but is hardly put into practice as the example of the still applied Anti-Terrorism law shows. Even though the Mapuche constitute the poorest and most underprivileged parts of Chilean society they have not been silenced by the state as their movement and mobilisation show. In fact, a strong Mapuche mobilisation emerged during the years of the military regime.

The ratification of the most important international document dealing with indigenous people's rights in 2008, ILO Convention N° 169 set an important corner stone for the future policy of the Chilean state. As recent national judgements show, the environment may slowly change in favour of the Mapuche's struggle for their indigenous resource rights and the struggles between communities and companies. However, the state still shows resilience taking indigenous demands and rights into account by actually realising their claims. It remains to be seen whether the old values introduced under Pinochet as unlimited economic liberty and a homogenous state will persist in the future and limit the Mapuche's rights.

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9. List of abbreviations

ADI	Áreas de Desarrollo Indígena
Art.	Article
Arts.	Articles
CEPI	Comisión Especial de los Pueblos Indígenas
CERD	International Convention on the Elimination of all Forms of Racial Discrimination
CITES	Convention on International Trade in Endangered Species
CNE	Comisión Nacional de Energía
CNI	Central Nacional de Inteligencia
CODEFF	Comité Nacional Pro Defensa Fauna y Flora
CONADI	Corporación Nacional de Desarrollo Indígena
CONAF	Corporación Nacional Forestal
CONAMA	Corporación Nacional del Medio Ambiente
CTPICH	Comisión Técnica de Pueblos Indígenas de Chile
DASIN	Dirección de Asuntos Indígenas
DINA	Dirección de Inteligencia Nacional
D.L.	Decreto Ley
D.S.	Decreto Supremo
EIA	Environmental Impact Assessment
ENDESA	Empresa Nacional de Energía
HRC	Human Rights Committee
ibid.	ibidem
ICCPR	International Covenant on Civil and Political Rights
IDI	Instituto de Desarrollo Indígena
INDAP	Instituto de Desarrollo Agropecuario
MIDEPLAN	Ministerio de Planificación Nacional y Política Económica
par.	paragraph
paras.	paragraphs
qtd.	quoted
UN	United Nations
WGIP	Working Group on Indigenous Populations

10. Glossary

<i>admapu</i>	Mapuche law
<i>Araucaria araucana</i>	endemic tree species in Chile
<i>che</i>	people
<i>comunidad</i>	common land shared by families, usually <i>ex-reducción</i>
<i>consulta previa</i>	prior consultation
<i>Corte Suprema</i>	Supreme Court
<i>disparecidas</i>	persons abducted during dictatorship with unknown fate
<i>impunidad</i>	impunity
<i>incommunicado</i>	solitary confinement
<i>hijuelas</i>	divided formerly communal land
<i>Ley Indígena</i>	Indigenous Law
<i>lof</i>	patrilineal community consisting of several families
<i>lonko</i>	head of the <i>lof</i>
<i>machi</i>	respected authorities with healing powers
<i>machitun</i>	<i>machi</i> ceremony
<i>mapu</i>	land, homeland, territory
<i>Mapudungun</i>	Mapuche's native language
<i>ngen</i>	owners of all elements of nature with special powers
<i>Ngenechen</i>	central higher power
<i>ngillatun</i>	most important ceremony in Mapuche culture
<i>ngülliw</i>	<i>Araucaria</i> seeds
<i>palin</i>	popular hockey game
<i>pehuen</i>	<i>Araucaria araucana</i>
<i>piñones</i>	<i>Araucaria</i> seeds
<i>radicación</i>	process of settling between 1884 and 1929
<i>reducción</i>	small reservations onto which Mapuche were settled during <i>radicación</i>
<i>rehue</i>	cultic pole constituting the ritual centre of the <i>ngillatun</i>
<i>ruka</i>	traditional house with vegetable garden
<i>testigos sin rostros</i>	witnesses with concealed identity
<i>título de merced</i>	land title granted to <i>lonkos</i> for a <i>reducción</i>
<i>toki</i>	elected war-lord

11. Abstract Deutsch

Das Militärregime unter Augusto Pinochet (1973 – 1989), führte einige tiefgreifende Veränderungen ein, welche die indigenen Völker Chiles und daher auch die Mapuche auf besondere Weise beeinträchtigen sollten.

Die Verabschiedung neuer Gesetze führte zum Widerruf der Landreform des Sozialisten Salvador Allende, welche den Indigenen Teile ihres ursprünglichen Landes zurückerstattet hatte. Somit wurden die Mapuche erneut ihres Landes enteignet.

Unter Pinochet wurden nicht nur rechtliche Bestimmungen Land betreffend eingeführt, ebenso wurde unter anderem ein Anti-Terrorismus Gesetz verabschiedet, welches die Verfolgung und Folter der Gegner des Regimes - darunter viele Mapuche - erlaubte. Pinochet negierte die Existenz indigener Völker und vertrat die These der Assimilation.

Überdies wurde Chile auch ökonomisch gravierend umstrukturiert, man folgte der neoliberalen Theorie der "Chicago Boys". Die Wirtschaft sollte vorallem auf die Exporte von Primärprodukten unter anderem auch Forstprodukte basiert werden. Aus diesem Grund erließ die Militärdiktatur ein Gesetz, welches Investitionen in den Forstsektor sowie das Errichten von großflächigen Plantagen subventioniert, was zu weiteren Landverlusten für die Mapuche führte. Pinochets Politik verschlechterte die Land- und Ressourcenrechte der Mapuche signifikant.

Ungeachtet des Wandels zur Demokratie 1990 ist der Einfluss der Militärdiktatur aufgrund der eingeführten Institutionen und der heute noch gültigen Verfassung von 1980 stark wahrnehmbar.

Trotz des Versuchs der post-diktatorischen demokratischen Regierungen der *Concertación* durch das neue Indigenengesetz 1993 sowie die Ratifikation der ILO Convention N° 169 2008 die indigene Bevölkerung anzuerkennen, konnte das Problem des Landverlusts mit all seinen Konsequenzen für die Mapuche nicht gelöst werden. Bis heute sind die indigenen Völker Chiles in der Verfassung nicht als solche anerkannt.

Die post-diktatorischen Regierungen folgten dem Ansatz, dass sich die indigenen Völker an den modernen Staat anpassen müssten, kollektive Rechte, welche einen zentralen Punkt der Existenz Indigener darstellen, wurden aufgrund der übermächtigen Priorität des freien Marktes, der permanent mehr Land für die Ausweitung des Forstsektors benötigt, nicht in ausreichendem Maße anerkannt.

Dies führt seit den 1990er Jahren vermehrt zu unerbittlichen Kämpfen um Land und natürliche Ressourcen. Der Staat reagiert auf den sozialen Protest der Mapuche um ihr Land mit dem Einsatz von Gewalt und der Anwendung Pinochets Anti-Terrorismus Gesetz und der Militärgerichtsbarkeit, welches internationale Menschenrechtsstandards bricht, zu deren Einhaltung Chile verpflichtet ist..

Anhand des Forstsektors wird veranschaulicht, wie Pinochets Negation der Rechte Indigener sowie das Streben nach ständiger Modernisierung in direkte Konfrontation mit den Forderungen der Mapuche tritt, welche die Grundlage der Existenz für Indigene bilden - die konstitutionelle Anerkennung als Volk sowie des ursprünglichen Landes sowie der Schutz natürlicher Ressourcen

12. Abstract English

The military “de facto” government under General Augusto Pinochet, which lasted from 1973 to 1989 made some large-scale changes, still gravely affecting the indigenous population of Chile and therefore the Mapuche. Due to the introduction of new legislation the land-reform of socialist Salvador Allende which gave the indigenous population parts of their land back was reversed and the Mapuche’s land expropriated again. Not only legislation concerning land was established – inter alia an Anti-Terrorist Law which allowed the state to torture and persecute all its enemies, amongst them many Mapuche. Pinochet followed the approach of assimilation and denied the existence of indigenous peoples in Chile.

Furthermore, under Pinochet Chile was the first Latin American country to run through a complete neoliberal transformation according to the school of the “Chicago Boys”. The economy was and still is predominantly based on export of primary goods and therefore also timber. Thus, the military regime installed a law, which stimulated investment in the sector and the introduction of large-scale tree plantations, which led to the loss of a rising number of Mapuche lands to forestry companies.

Pinochet’s policy directly interfered with the interests of Mapuche over land and resources. However, despite the change to democracy in 1990, the influence of a military regime is still conceivable due to deep-seated institutions set up by Pinochet and a constitution that ensured the continuous influence of the military.

Although the succeeding governments of the *Concertación* meant to recognise indigenous peoples and their demands by introducing a new indigenous law in 1993 and the ratification of ILO Convention N° 169 in 2008 the overall situation of land deprivation with all its consequences for the Mapuche is not solved. The constitutional recognition as indigenous peoples is still not achieved in Chile.

The post-dictatorial governments rather followed the approach that indigenous people had to adapt to the “modern state” and collective rights, being a vital part of their existence, were never acknowledged due to the priority of the free market, which perpetually demands more land for the expansion of the forestry sector. Therefore, relentless struggles over land and natural resources have been created increasingly since the 1990s. The state reacts towards the Mapuche’s social protest for their land by use of violence and Pinochet’s Anti-Terrorism law as well as military jurisdiction introduced by the military regime breaching the provisions of international human rights treaties Chile committed to. As portrayed by the example of the

forestry sector Pinochet's denial of indigenous rights and the striving for modernisation directly encounter demands for the constitutional recognition as a people and ancestral lands as well as the protection of natural resources as crucial basis of indigenous existence.

13. Curriculum Vitae

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