Mining and Indigenous Peoples in Guatemala: The Local Relevance of Human Rights.

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ABSTRACT
This dissertation looks at the conflict between indigenous communities and mining in Guatemala from the perspective of 'localizing human rights'. The methodology of the dissertation relies on the one hand on literature study and on the other hand on data gathered during fieldwork. In the first part, a theoretical framework will be constructed on mining, globalization and the international politico-juridical framework protecting the rights of Indigenous Peoples. The second chapter will introduce the contemporary socio-political and economic context of globalization in Guatemala. The third and last chapter will be a case study of Goldcorp's Marlin mine in the western department of San Marcos and especially focus on community consultation as a form of rights-based resistance. Next to the resistance from Indigenous Peoples to the Marlin mine itself, the broader process of community consultations in the Western Highlands will be studied.

The dissertation concludes that as a response to a state absent in terms of effective indigenous rights protection, Indigenous Peoples in Guatemala are developing a localized human rights mechanism, rooted in their traditional ways of decision-making and fully protected by international indigenous rights law. The conflictivity in Guatemala generated by mining is a cause of a general tendency towards a development model based on mega-projects such as the extraction of natural resources. This development model clashes with the needs of Indigenous Peoples. As the intention to the dialogue from the side of the state is absent, the conflict implies international responsibilities.
Preface

This dissertation is the result of more or less one year of intensive contact with the issue of mining in Guatemala. It is also the result of (intensive) contact with and support from many people which I want to thank.

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Es un monstruo grande y pisa fuerte
toda la pobre inocencia de la gente.

(León Gieco, 1978)
Economic globalization is disadvantaging the weakest peoples on earth most profoundly. The impacts of climate change provide evidence for this sad fact, but related to this also the social impacts of activities of multinational companies worldwide involved in the extraction of natural resources are good examples. Mining, for instance, illustrates the local impacts of economic globalization very well. The contemporary mining sector is a typical business which produces huge profits at the expense of many peoples' livelihood and environment. This is why all over the South, and especially in Latin America (hosting 34% of global mining investment\(^1\)), mining operations lead to social conflicts.

One of the countries where these conflicts are most palpable is Guatemala. Abundant in natural resources, Guatemala has in recent years become the focus of investment in mega-projects which are part of broader investment plans and free trade agreements in the Central American region. The predominantly indigenous state (more than 50% of the population belonging to indigenous ethnicities\(^2\)), still licking its wounds from a devastating Civil War which lasted around forty years, does not have the necessary emancipated state institutions to deal with the socially negative effects of this wave of investment. Indigenous Peoples are the first victims of globalization in Guatemala. The fact that the state does not consult indigenous communities before implementing mining plans, causes new conflict dynamics.

As a counter-force to economic globalization, the human rights discourse has for many years been trying to mitigate and denounce the negative impacts of globalization processes on the human integrity of peoples worldwide. An essential question is, however, how a general discourse such as that of human rights can mean something for people affected locally by global powers, at the heart of the battlefield of globalization. “The Local Relevance of Human Rights: A Methodological Approach” by Oré Aguilar (2008) forms an interesting starting point in this respect. Aguilar argues that studies focussing on the local relevance of human rights must pay attention to "on the one hand, examining how these rights become relevant to the most excluded individuals and communities and, on the other, assessing local participation in human rights development and elaboration" (p. 8). In this dissertation we will sketch the conflicts generated by mining in Guatemala against these considerations. Brems' concept of "inclusive universality" (2003), by which she means that human rights can at the same time formulate universal human values and be culturally specific and open to different interpretations depending from the local context, is an additional theoretical starting point.

\(^1\) Lecture by José de Echave, 2009, November 9.

\(^2\) Data from the UNDP, 2004.
point. We will argue that the framework of rights of Indigenous Peoples is an example of the recognition that human rights must be locally relevant and culturally specific: the conflict between different visions on 'development' (between the mining business and Indigenous Peoples) in Guatemala affirms the need to adjust the existing power balances through human rights, in order to make a dialogue possible.

This dissertation will, in summary, look at the issue of mining from a 'localizing human rights perspective' and more specifically the rights of Indigenous Peoples as protected in international (but also national) law. The central question is whether (and how) this international framework can be locally relevant to indigenous communities affected by mining in Guatemala.

Methodologically, this dissertation partly relies on literature review and partly on a meta-analysis (a general juxtaposition of the discourse of different actors, without internally examining these actors in detail) of data collected during fieldwork in July and August 2009. As far as the fieldwork methodology is concerned, Oré Aguilar's paper (2008) proved to be useful in some aspects to conceptualize the human rights situation in the field. However, we must add here that our study has not examined “the lowest unit appropriate”, i.e. the indigenous community itself with its proper power dynamics.

The fieldwork data was collected, on the one hand, through personal in-depth interviews as a qualitative research method. Oré Aguilar's list of case study questions served as a guideline (2008, p. 31-32) for these interviews. On the other hand, lectures and workshops from an international seminar and a conference (both on mining in Latin America) in respectively San Marcos and Antigua resulted in useful data, as national and international civil society as well as political and academic representatives participated in these events. Next to that, general observations from close relations with civil society contributed to the analysis of the conflict in San Marcos. It must be noted that in terms of objectivity, it was hard to find the balance, especially in a country as polarized as Guatemala.

During our fieldwork, we had the opportunity to get acquainted with the perspective of various actors involved in the case (grassroots movements, NGOs, the national human rights officer for Indigenous Peoples, lawyers). We also listened to the side of the Guatemalan state, through representatives of the Ministry of Energy and Mining and the Ministry of Environment. It must be noted, however, that the time (1,5 months) available for fieldwork was too short to obtain reliable and complete results from the side of the indigenous communities themselves, because of various reasons (cultural complexity and ethical considerations, safety considerations, practical issues such as transportation etc.). Therefore, although we heard several stories from the side of the Indigenous Peoples themselves, the communities as such will not
constitute the main object of this study. Rather, the case study will focus on the investigation of the actors surrounding the indigenous communities affected by mining, by paying attention to such issues as the context of Guatemalan politics, the role of civil society, the private actor(s) involved, access to information for Indigenous Peoples etc (all of these contextual aspects are mentioned in the list of Oré Aguila, p. 31-32). Our main objective is to have a mapping of the local, national and international actors involved in terms of the human rights claim(s).

To further specify our research question, we have in our case study chosen to investigate the phenomenon of community consultation as a rights-based tool of resistance. The motivation for this choice lies in the fact that community consultation is a very relevant rights-based phenomenon in contemporary Guatemala. Moreover, community consultation has so far involved the participation of in total 500 000 Guatemalans (Loarca, 2009, p. 58). These are data from early 2009, the number of total participants keeps growing with each consultation. Since 2005, all over the Western Highlands (and specifically San Marcos and Huehuetenango), indigenous communities have united to organize community consultations, in which local communities vote (quasi-)unanimously “no” to the neoliberal development model coming their way (in the form of mining, or other mega-projects such as hydro-electric plants). What is the legal base of these consultations both in the international system protecting the rights of Indigenous Peoples and the national legislation; how can we situate the phenomenon within the practices and traditions of the Indigenous Peoples themselves? Is it an adequate and effective instrument for the claim that indigenous communities are formulating, and of what exactly consists this human rights claim? Has the Guatemalan state violated national or international (Indigenous Peoples) law? These are the questions that we want to address in our discussion of the Marlin gold mine in San Marcos and the phenomenon of community consultations in Western Guatemala.

Finally, we briefly want to motivate our choice for the case of the Marlin mine. First of all, it is a case which meets the selection criteria mentioned by Oré Aguilar (p. 20): the case represents a wider problem experienced by other local communities, the problem presented is a consequence of economic globalization, the affected local community is involved in the human rights claim, there is a presence of NGOs and international actors etc. Second, it is a symbolic case at this moment in Guatemala, being the only large-scale open-pit mine in exploitation as of today. Politically, as well, the Marlin mine in San Marcos is at the heart of the contemporary debate on the extraction of natural resources in Guatemala; both from the perspective of environmental impacts as from development and the rights of Indigenous Peoples. Moreover, the mine is itself situated in the territories of predominantly indigenous (Mam & Sipakapense) peoples. The literature (both academic and from civil society) on the Marlin mine, finally, is extensive. We hope with our
case study (paying special attention to the broader resistance process in the Western Highlands) to just unite some of the perspectives of various actors involved, from the point of view of rights of Indigenous Peoples.

In terms of structure, the first part of this dissertation will be the theoretical framework, uniting the theme of mining and the international politico-juridical framework on the rights of Indigenous Peoples. The emphasis will be on rights concerning land and natural resources, as these are especially relevant regarding mining. In a second chapter, the national situation in Guatemala will be introduced in order to sketch how mining investment is part of broader, externally imposed development plans on the country. Finally, in a rights-based case study of an operative mine in western Guatemala and the ensuing rights-based resistance in the broader region, the conflict between mining and Indigenous Peoples at local level will be studied.

CHAPTER I : THEORETICAL FRAMEWORK ON MINING AND RIGHTS OF INDIGENOUS PEOPLES

The first chapter of this dissertation will on the one hand concisely introduce the topic of mining within the context of economic globalization and pay special attention to the question on the specificity of the conflicts that mining generates with indigenous communities. On the other hand, we will sketch the international politico-juridical framework on the rights of Indigenous Peoples, the lens through which we will look at the problematic relationship between mining and development in general and (in Chapter II and III) specifically at the conflicts related to mining in Guatemala. The main objective in this theoretical framework is to formulate a hypothesis concerning the conflict between Indigenous Peoples and mining in Guatemala, and how human rights can be locally relevant in this case. This hypothesis will form the starting point for Chapters II and III.

1. MINING AND SOCIAL CONFLICT

1.1. THE MINING BOOM: ECONOMIC BACKGROUND

In a global context of resource scarcity and population growth, the mining sector has entered the twenty-first century as a booming business. Mining companies are in a race for metals extraction as huge profits are looming from the remaining stocks. The capitalist development model requires metals for everyday (luxurious) consumer products and technology (e.g. computers, jewellery), industries and transport (e.g.
copper cables, railways, aircraft). As this dominant development model spreads all over the world, more people need more metals. But whereas the demand for commodities increases, the global supply of primary natural resources shrinks. Economically speaking, this situation of scarcity is a synonym for an attractive investment climate.

1.1.1. NEW GOLD RUSH

During the last decade, the gold price, as an indicator for evolutions in the global investment in mining, has risen significantly (see Figure 1 below). The world gold production has increased from 879 metric tons in 1950 to 2540 tons in 2000 (Kingsley, 2004, no paging). During 2008, one ounce of gold (approximately 28.35 grams) reached the historical price of 1000 US dollars. As Joan Martinez-Alier puts it summarily: “The price of gold makes it still profitable to open new mines. Gold lasts a very long time but the existing stock of gold in the world (...) does not seem to satisfy humankind's desire (...).” (2002, p. 100). Belgian gold specialist Boris Cukon from Fuchs Global Natural Resources, confirms that “[t]he fact that [the gold price] exceeds the limit of 1000 dollars, functions as a magnet attracting new investors to buy gold themselves. In this way, [the gold price] becomes a self-alimenting spiral.” (Cukon, in Vanbrussel, 2009, p. 37, my translation). The rush for gold, then, is illustrative for the double function of contemporary metals mining: on the one hand, mining feeds the 'tangible' world economy. On the other hand, it is an important source of speculation and virtual capital, a safe refuge in times of crisis.

![Gold Price Chart](source: www.goldprice.org)

*Figure 1: Gold price 1990-2009 in US dollar/ounce (source: www.goldprice.org)*
Mining investments today are more than ever oriented towards the global South. Gavin Bridge illustrates that in the course of the past twenty years, mining companies have moved their targets from the North to states in the South, many of which have been characterized by thorough neoliberal restructuring during the 1980s and '90s - a point to which we will return later. In Bridge's view, “it is from these mines [in the south] that the bulk of future production will come” (2004, p. 418). Bridge's distribution statistics of investment in copper mining, for example, indicate that the investment in developing economies in relation to developed economies has evolved respectively from a 60-40% relation in 1990 to 90 versus 10% in 2001 (p. 418). For metals such as silver and gold, similar numbers could be given. 34% of all global mining investment is moreover situated in Latin America (lecture by José de Echave, 2009, November 9).

1.1.2. **Economic Logic for the Rush to the South**

The economic reasons for the rush to the global South are, in general, twofold: first, the creation of a financially interesting investment climate thanks to neoliberal restructuring of states by, especially, the international financial institutions. Second, the absence of rigid environmental regulations and social security regulations in developing countries plays a role (Janssens et al., 2008, p. 8; Bebbington, 2008, p. 889).

Since the 1980s, structural adjustment programs, and later poverty reduction strategy papers, have been transforming Latin American societies into liberal market economies, facilitating investments from the North (also called foreign direct investments or FDIs). The international financial institutions - The World Bank and its International Finance Corporation and the International Monetary Fund (IMF) - are the main promoters behind such neoliberal restructuring of states which have received aid from the international financial institutions (Gordon & Webber, 2008; Bebbington, 2008). Structural adjustment programs, which in the words of Duffield (2002) are part of a wider, neoliberal “radicalization and politicization of aid”, have caused “a massive wave of privatisation, drastic cutting of public spending and the transformation of collective lands into privately owned property” (Gordon & Webber, 2008, p. 68). These 'adjustments' have also changed the mining industry: whereas mining used to be typically a state-own business until the 1980s, structural adjustment programs opened up the mineral markets to enterprises from all over the world. The World Bank in a 2003 report on mining and development speaks of an “emergence of global values” and “an unprecedented competitive environment” since the last twenty years (Remy, 2003, pp. 1-2). In this same report, the World Bank praises the changes in the mining industry, because “[the] role of the state as a

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3 'The (global) South' and 'developing world' are generally accepted geopolitical terms to refer to those states which during the Cold War belonged to the so-called Third World (in contrast to the (global) North'). The global north is often defined as the whole of countries belonging to the Organisation of Economic Co-operation and Development (see [http://www.oecd.org](http://www.oecd.org)).
producer of mineral products was phased out, as it became clear that it was not sustainable because of a variety of factors”—among them “a lack of corporate focus”, “a lack of investment in exploration and modernization of equipment and technology” and “a poor record on environmental protection” (Remy, 2003, p. 2). In the light of structural adjustment programs, free trade agreements, too, have paved the way for more ‘flexible’ foreign direct investments.

Together with structural adjustment programs and the adoption of an interesting fiscal climate, states have modified the legislative framework on natural resources. According to the study by Bridge (2004), since 1985 more than ninety countries have adopted the necessary legislative alleviations to welcome foreign direct investment more easily, including mining laws. As Bridge writes, these legislative reforms “[are] frequently but one part of a broader package of neoliberal administrative and fiscal reforms. Their combined effect, however, is to open up new opportunities for the mining industry (...)” (p. 407). Mining companies have since the neoliberal transformation of the global South been attracted by a general deregulation in social and environmental terms, allowing them to have easier access to mineral stocks in developing countries and gather the necessary capital for their investments (Janssens et al., 2008, p. 7-8). Both aspects that we mentioned will be examined specifically for the case of Guatemala, further on in this dissertation.

In addition to the politico-economical and legislative context of globalization which has facilitated the liberalization of the mining industry, there is of course the ecological wealth of resource stocks in developing countries. Mining companies are aware of the fact that huge amounts of minerals lie hidden in the ‘untouched’ soils of numerous states in the South, as there are many among these countries which have little or no mining tradition, although they often host a great wealth of minerals.

The extraction of minerals can, then, theoretically mean an enormous economic growth opportunity (and hence, the capitalist logic would say, welfare) for a state. In the reality of the global South today, however, we see that mining causes social conflicts in numerous places.

1.2. **The meaning of development**

Bebbington (2008) underlines that mining has socially always been an ambiguous industry: people have both fiercely protested against and in favour of mining throughout history. If we look at the South today, we see that mining especially triggers protest against mining companies, from the affected population near mining sites. These people apparently do not feel benefited by the mining industry. The fact that multinational mining companies tend to focus on remote, rural regions for their operations, triggers questions on the interaction between global powers and local communities. In many cases, the population in areas where mining permissions are granted, in the case of Latin America for example, makes a living out of small-scale
(subsistence) agriculture, an activity which is quasi-irreconcilable with mining because of the enormous socio-economic and ecological impacts of the latter. Also cultural aspects come into play, next to socio-economic ones. A closer look into the dynamics causing these conflicts, which are essentially on the meaning of 'development', is thus necessary.

1.2.1. DEVELOPMENT FOR WHOM?

The possibility for mining companies to extract, in a quasi-unhindered way, natural resources in the South has fuelled the debate on the resource curse, the observation that developing countries have rich soils but a poor population. In other words: mining in these states contributes little to the socio-economic development of the states themselves and especially affects the population near the mine in a negative sense (Janssens et al., 2008, p. 8). Sachs and Warner (2001), in a review of the existing literature on the phenomenon of the resource curse, clarify that there is no general academic agreement on the issue of the resource curse, because of a lack of consensus on the definition of 'growth'. Most definitions of 'resource curse', though, describe the phenomenon as the situation in which the extraction of natural resources causes crisis in a certain economic area (e.g. agriculture) which used to cause economic growth in a certain country before the dependence on resources such as minerals, hence natural resources “harm” growth (p. 833). Sachs and Warner conclude from their data: “Almost without exception, the resource-abundant countries have stagnated in economic growth since the early 1970s” (p. 837). The concept of the resource curse, then, illustrates that the distribution of wealth generated from mining is not equal. Contributing to the reality of the resource curse are the socio-economic and environmental impacts of mining. Migration to cities, land and water which are contaminated for centuries to come, disruption or displacement of communities and violent clashes between state forces and citizens: they are all part of the consequences of contemporary mining (Janssens et al., 2008).

The environmental impacts of mining are especially problematic. Bebbington (2008, p. 908) warns for “(...) the environmental challenges that mineral expansion will bring. Almost by definition this growth will take mining into new territories. (...) Mineral expansion will continue to drive new forms of social conflict”. Contemporary mines are mostly open-pit mines, which means large-scale and overground, with a central crater consisting of various terraces from which the ores are extracted. Mining requires “gargantuan quantities” of water, for each step in the process (Farrell et al., 2004, p. 12). A copper mine, for its average yearly production, consumes as much water as a Belgian city of 35 000 inhabitants does each year (Janssens et al., 2008, p.10). Mining activities lead to scarcity of water, in climatologically dry zones but also elsewhere, because of the lowering of the surface and ground water levels; companies have even been
involved in privatization initiatives of fresh water (p.11). For the extraction of metals, moreover, toxic substances such as cyanide and mercury are used—cyanide especially being a 'magic potion' to wash metals such as gold from ores (Kingsley, 2004, no paging). As cyanide is never really dissolved (it remains at the bottom of heaps of extracted ores), the surroundings of a gold mine are almost inevitably contaminated. One dose of cyanide the size of a rice grain can be lethal to human beings (Farrell et al., 2004, p.5). The (worthless) metallic leftovers of the extraction process are contained in tailings dams after processing the ores, a kind of highly toxic basins. Often these tailings dams are far from safe and cause infiltration in ground water or rivers: there are many cases throughout history of dam failures (Janssens et al., 2008, p.11; Farrell et al., 2004, p.5). Finally, generally considered the biggest environmental problem of mining, there is the effect of acid drainage. Mining exposes (depending from the composition of the rocks) sulphite-containing ores to water and air and in this way forms sulphuric acid. When sulphuric acid slips into rivers, it can cause grave ecological damage to the surrounding lands for centuries, possibly converting them into infertile wastelands forever (Farrell et al., 2004, p.9; Janssens et al., 2008, p.12). Citing from a paper presented at a conference in Quito by Cardiff and Sampat (2007), Bebbington (2008, p. 893) points out that “while mining contributes around 1 percent of global GDP, it consumes between 7 and 10 per cent of global energy and is responsible for 13 percent of sulphur dioxide emissions.” Mining projects, then, have a huge ecological footprint. In rural areas where the population lives of (small-scale) agriculture, the sustainability of livelihoods is directly affected by this combination of ecological and socio-economic impacts.

1.2.2. **THE CULTURAL TENSION LOCAL VS. GLOBAL**

According to the World Bank “mining is an essential industry and an immediate and important way to help the poor gain some of the benefits of modern society” (Remy, 2003, p. 3). Moreover, according to the Bank this is “the view of many in the developing world” (p. 3). The view of the World Bank, however, does not take into account situations in which local populations have different views of 'development' and 'growth' from that of the neoliberal capitalist development model represented by the contemporary mining industry. The existence of different views on 'development' particularly comes to light when socio-cultural realities of places affected by mining are taken into account. The fact that a global power (a mining company) because of the dynamics of economic globalization can settle itself "wherever it wants" implies a socio-cultural

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4 The definition of the term “livelihood” is the centre of much academic debate. In this dissertation, we think it is most appropriate to refer to the working definition of the Institute of Development Studies (Sussex University), within the sustainable rural livelihoods framework: “A livelihood comprises the capabilities, assets (including both material and social resources) and activities required for a means of living. A livelihood is sustainable when it can cope with and recover from stresses and shocks, maintain or enhance its capabilities and assets, while not undermining the natural resource base.” (Chambers and Conway, 1991, p. 6)
aspect: what does 'place' mean in this context and how does a local population culturally experience the arrival of such a power to its area? Especially when the local population consists of Indigenous Peoples, these cultural questions are pressing. Conflicts around extractive industries, after all, have already been the cause of various cases of violent oppression of Indigenous Peoples in recent years across Latin America.

In the case where local communities in an area affected by mining consist of Indigenous Peoples, cultural values are often connected to 'the local'- the area or territory where Indigenous Peoples have lived throughout centuries, according to particular traditions and customs and often also (politically, socio-economically and/or geographically) excluded from the rest of society (ILO, 2009). In many cases, areas where mining companies receive permissions for extraction, coincide with indigenous territories (as these are often rural, 'unspoilt', remote areas with a great wealth of natural resources). The value systems and visions on 'development' of these peoples are often radically opposed to those proposed by the mining sector.

In this light, it is relevant to refer to Escobar (2001): he draws attention to the debate on globalization and the cultural meanings of 'the local' and 'development', discussing the anthropological and discursive, but also political and concrete meaning of 'place' in our contemporary globalized world. The fact, for example, that "people's senses of place have been shown to change with the deterioration of local landscapes following the environmental impact of activities such as mining" (p. 148-149) has had a profound impact onto the local experience of globalization, Escobar argues. The often spiritual meanings that places have for Indigenous Peoples, for instance, are not taken into account in the development philosophy of the multinational mining business.

1.2.3. **Defense of the local?**

In the contemporary daily reality of Latin American countries we see that Indigenous Peoples everywhere are resisting to the extraction of natural resources on their territories- from Peru, Colombia and Ecuador to Mexico and Guatemala. Can we frame this resistance within a cultural conflict over meanings of 'the local' and 'development'?

Escobar (2001) thinks that the "construction of place" in cultural terms, can become the basis for claims to a different kind of development, rooted in the meaning of the local area or -in a term more commonly used when speaking of Indigenous Peoples- territory. In this way, resistance at local level can become a "subaltern strategy", a "defense of place project". As Bebington (2008, p. 901) writes in a key

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See for example the recent report of Amnesty International on the violent clashes in Bagua (the Peruvian Amazon), where Indigenous Peoples from the Amazon clashed with the army and security forces, during protests from the Indigenous Peoples against concessions on their territories for extractive industry companies (http://www.amnistia.org.pe/). Amnesty concluded that serious human rights violations were committed by the state.
passage, refering to Escobar:

These can become struggles against development oriented towards economic growth and for development as a process that fosters more inclusive (albeit smaller) economies, respects citizenship rights, demonstrates environmental integrity, and allows for the co-existence of cultures and localized forms of territorial governance (...).

There are thus clearly cultural elements attached to the conflicts generated by mining, too. Economic globalization has the tendency to erase local cultural meanings of "place" in order to facilitate the accumulation of capital (the basis of 'growth' in the capitalist philosophy). On the other hand, there are local populations, such as Indigenous Peoples, who attach a strong cultural value to the places in their direct environment and moreover see these places, and their sustainable conservation, as the basis for their thinking about development. It must of course be noted, as van de Sandt (2009) and Imai et al. (2007) also observe, that these struggles are not equal in terms of power distribution: the multinational mining sector has many weapons, Indigenous Peoples tend to have very few.

Human rights, then, need in this context to be locally relevant to Indigenous Peoples, as an instruments which must offer "efficient protection against the adverse impact of economic globalization" (De Feyter, 2006, p. 5). Therefore, Indigenous Peoples should be recognized, in the first place, as "peoples" with basic rights universally granted to every human being; but second also as peoples with specific aspirations concerning the development of their territories- as opposed to the development proposed by mining companies to whom the cultural meaning of the places where they extract metals does not matter.

2. **INDIGENOUS PEOPLES IN INTERNATIONAL LAW**

Our theoretical argument in this dissertation is that the international instruments protecting the rights of Indigenous Peoples must be placed within the framework of 'localizing of human rights'. As we will see, the set of internationals instruments which exists to day to legitimate the needs and justify the different aspirations of Indigenous Peoples in terms of development, while at the same time granting Indigenous Peoples universal rights as "peoples", is the result of a historical struggle for representation and non-discrimination. The discrimination and disregard that Indigenous Peoples keep experiencing today as a result of economic globalization, in our case mining, only affirms the need for a firm international politico-juridical framework protecting these peoples' rights to participate in the decision-making process on the development of their livelihoods. It also affirms the need for a juridical framework which addresses the right to adhere specific cultural meanings to 'the local', rooted in proper traditions and customs.

In this second part of our first chapter, we will therefore give an overview of the existing international instruments protecting the rights of Indigenous Peoples, focussing on rights concerning
consultation and participation in processes affecting the use and management of natural resources on indigenous territories— as these will be of further importance for our discussion of conflicts with indigenous communities generated by mining in Guatemala.

2.1. **Indigenous Peoples: definition(s) & history**

The debate on the “rights of minorities” is more or less as old as that on the human rights discourse itself. International anti-discrimination and anti-racism treaties are all evidence of improvements and specifications in the human rights system. A category apart within these “minorities” are so-called Indigenous and Tribal Peoples: often referred to as the “natives” or original inhabitants of post-colonial states, these are peoples that historically share particular socio-cultural, linguistic, religious or economic characteristics—often in close relationship with the land they live on— which differentiate them from the rest of society. Next to this, they find themselves often in a weaker political power position.

2.1.1. **Defining Indigenous Peoples**

The institution with the longest history in matters of Indigenous Peoples is the International Labour Organisation (ILO). The ILO's first Convention specifically on rights of Indigenous Peoples was Convention 107 (ILO C107), dating from 1957. This (legally binding) treaty defines indigenous and tribal peoples mostly in relation to the non-indigenous inhabitants of a nation, and primarily along historical margins. Indigenous and tribal peoples, according to the Convention, are peoples who are characterized by slower progress in development (in the words of the Convention: “whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community”, my italics). This view met much critique from the side of the Indigenous Peoples themselves, obviously. In the decades to come, especially the 1970s and 80s as these were also the decades of large-scale adjustment plans in the South, the pressure to more inclusively protect Indigenous Peoples grew. The result of this was a new Convention, which we will discuss below.

Within the UN, the issue of Indigenous Peoples has a more recent history— starting with the decades mentioned above. In the beginning of the 1980s, a study was made by UN Special Rapporteur José Martínez Cobo, on the “Problem of Discrimination Against Indigenous Populations” (with a mandate from the UN Economic and Social Council ECOSOC and the Human Rights Commission's Sub-commission on

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*Minority* is used as a political term here, not necessarily as a purely quantitative demographic term. Although Indigenous Peoples in Guatemala can be considered a “minority” according the international human rights system, for example, they constitute the majority of Guatemalans (around 60% of the total population, according to the UNDP, 2004).
Prevention of Discrimination and Protection of Minorities). The vast study can be considered the founding document of the Working Group on Indigenous Peoples (as a Sub-Commission of ECOSOC). In the study, rather than giving a fixed definition of Indigenous Peoples, Cobo provides, on the one hand, an overview of the complexity of characteristics of Indigenous Peoples based on data from many countries (although Africa is absent); on the other hand, he confirms that discrimination against Indigenous Peoples is a fact in the reality of many states, making recommendations and indicating specific areas for action such as land and political rights (Cobo, 1983). As far as a definition of Indigenous Peoples is concerned, Cobo does state that both objective and subjective elements are defining: among the first category belong “ancestry, culture and language”, among the second “self-identification and acceptance”. However, the Special Rapporteur doubts whether a division between these two categories exists at all, emphasizing that “it should be established that the indigenous populations themselves must be consulted about the criteria they consider valid, since it is their right to determine who belongs to those populations, and who does not” (p. 5).

Within the UN, today, there are three specific organs for the protection of the human rights of Indigenous Peoples: the UN Working Group on Indigenous Populations, the UN Permanent Forum on Indigenous Issues and the UN Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples. We will later return to the UN's framework on Indigenous Peoples, when we will discuss the Declaration on the Rights of Indigenous Peoples dating from 2007.

2.1.2. *Indigenous Peoples or Campesinos?*

Within the context of mining conflicts, and specifically these in Latin American countries, it is important to make clear what the difference is between the categories of *campesinos* and Indigenous Peoples. *Campesinos* are peasants who generally make a living out of small-scale (family-based) agriculture. They can be Indigenous Peoples, but not all *campesinos* are indigenous: *campesinos* can ethnically be mestizos (or rarely whites) as well. Next to the socio-cultural differences between *campesinos* and Indigenous Peoples, the latter generally find themselves on the lowest step in the socio-political classes ranking, below the *campesinos*, and have historically underwent the most structural forms of discrimination and exclusion. This does of course not take away that also *campesinos* have urgent needs and deserve the full protection of their rights. In the social and political reality of Latin America, non-indigenous *campesinos* and Indigenous Peoples also organize themselves together, because of their parallel politico-economic needs (for example agricultural land). In Guatemala, for example, an organisation called CONIC exists (the National Coordination of Indigenous Peoples and Campesinos). There can be tensions too, however, between *campesinos* and Indigenous Peoples- involving distrust and discrimination (also in this sense, Guatemala is
an example). As we will see, Convention 169 of the ILO states that the "self-definition" of someone as indigenous is the most fundamental criterion in order to claim indigenous rights. Identity is thus central.

2.2. **Convention 169 of the International Labour Organisation**

Convention 169 of the ILO is a highly relevant instrument in Latin America. Fourteen of the total of twenty states who have ratified C169 (as of November, 2009) are Latin-American: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru and the Bolivarian Republic of Venezuela. It is the only binding international treaty concerning rights of Indigenous Peoples.

2.2.1. **Redefining Indigenous Peoples**

Within the context of globalization, the question of international politico-juridical regulation concerning the relation between Indigenous Peoples and natural resources became more pressing. Convention 107 of the International Labour Organisation was therefore in 1989 revised and replaced by Convention 169 on Indigenous and Tribal Peoples in Independent Countries (ILO C169). Ratified by twenty states, the Convention is today the most important binding treaty concerning Indigenous Peoples and their rights to natural resources. First of all, the Convention shows a significant shift in its general view on the development of Indigenous Peoples and is therefore the beginning of a 'new dawn' in the debate. The assimilationist approach of Convention 107 (which spoke of peoples who were “not yet integrated into the national community”) is renounced in the introduction of the Convention, paving the way for a view more open to a development of these peoples in its own right, which not necessarily or uniquely is a historical matter of catching up with the rest of modern society. Convention 169 affirms the right of these peoples to develop without having to give up their proper “institutions, ways of life and economic development”. Convention 169, contrary to C107, recognizes synchronic power differences within a society, in terms of the ability of peoples “to enjoy their fundamental human rights” and moreover explicitly recognizes the right to develop in a different way. In its definition of Indigenous Peoples, then, C169 affirms that “social, cultural and economic conditions distinguish them from other sections of the national community” (Part I, Article 1), whereas C107 holds that these conditions are the manifestation of “a less advanced stage” of development (Part I, Article 1). Moreover, the subjective self-definition as “indigenous” is vital, according to C169 (Article 1). The ILO itself confirms that “[t]he Convention does not strictly define who are indigenous and tribal peoples but rather describes the peoples it aims to protect” (ILO, 2009, p. 9). The fact that it is an anti-discriminatory Convention (also as far as gender differences within peoples are concerned) is evident from Article 3.1.
In what follows, we will critically study the articles of the Convention which are related to land, territory, consultation and participation, as these form the focus of our research questions on Guatemala.

2.2.2. **Rights to Land and Territory**

The cornerstones of ILO C169, as Schulting (1997) points out, are consultation and participation: Indigenous Peoples have the right to be included in the development politics of states. These principles are essentially related to land issues, as stipulated in Part II of the Convention. We will first have look at the key articles concerning land rights and then discuss the issues of consultation and participation.

Articles 13, 14 and 15 are the crucial ones concerning land rights. recognizing the holistic meaning of land, rights of ownership and the specific collective relationship with natural resources. One could argue for different interpretations of several of the Convention's statements on land rights of Indigenous Peoples, regarding the political status of Indigenous Peoples. After all, it is nowhere stated that Indigenous Peoples have the last word or full sovereignty regarding development plans for their lands. The ILO itself, in its guide “Indigenous & Tribal Peoples Rights in Practice”, tries to clarify on this debate. First of all, it is made clear that “when the Convention talks about “lands”, the concept embraces the whole territory they use, including forests, rivers, mountains and coastal sea, the surface as well as the sub-surface” (ILO, 2009, p. 91)- a reaffirmation of Article 13. So, according to Article 14, Indigenous Peoples who have traditionally lived in a certain territory have the rights to “ownership and possession” of the lands and the natural resources (including those in the sub-surface, such as minerals) from these lands. In this light, Article 15 can be read as an affirmation of the obligation of governments to include local indigenous groups in the policy on resource management; although the wording of the article is weak enough to please national governments.

As the ILO itself is a tripartite organization, promoting dialogue between governments, employers (e.g. extractive industry companies) and employees (e.g. local communities), it is most logical to suppose that the main objective of the Convention is to encourage a dialogue between equal parts, paying specific attention to the weaker power position of indigenous groups.

2.2.3. **Consultation & Participation in Good Faith**

The theme of land is directly related to the themes of consultation and participation. Convention 169 is, more than Convention 107, a treaty on the political representation of Indigenous Peoples. The central right that Convention 169 in this respect mentions, is the right to consultation.

Land and natural resources form the focus of the consultation and participation rights that C169 outlines. Article 15.2. of the Convention obliges governments to construct a dialogue with indigenous groups
before embarking on activities related to the use of natural resources. The Convention does not establish a fixed format for consultation of indigenous groups, except for the stipulation that it has to be the state who “shall establish or maintain procedures through which they shall consult these peoples” (Article 15.2). Nor does the text include consequences for what has to happen after “ascertaining whether and to what degree their [the Indigenous Peoples’] interests would be prejudiced”. In Article 6.2, however, it is prescribed that the consultations must be carried out "in good faith". Article 7, moreover, recognizes that Indigenous Peoples decide over their own "development priorities". Also, the Convention obliges states to carry out impact studies before starting activities concerning the development of indigenous territories (Article 7.3).

Reading Article 7 as part of the “General Policy” (Part I) of the Convention, we can argue that the Articles from Part II (Land) are inextricably linked to this general policy. This means that, to a large extent, the right for Indigenous Peoples “to decide their own priorities for the process of development”, can be considered the basis for the whole of articles of the Convention. Of course, case-specific interpretation is always possible, and several articles contradict each other or are quite vague. Nevertheless, it must be recognized that the Convention constructs a firm legal foundation for the recognition of Indigenous Peoples as peoples with their proper development aspirations.

Convention 169 must, then, not be read as a manifest for the 'conservation of cultures', but as an essentially political treaty on economic, social and cultural development matters. The text defines Indigenous Peoples in terms of their self-image and is in many aspects merely a recognition of the evident fact that these peoples are citizens with the same rights as others (and thus not more rights, as is often misinterpreted). The difference is that the text redefines human rights departing from the needs and traditions of IP themselves. Therefore, C169 is a good example of the inclusive universality of human rights. The local needs or aspirations of Indigenous Peoples, however, “shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties” and customs and traditions cannot violate other universal human rights (Article 8).

2.3. Rights of Indigenous Peoples within the UN

In 1962, the United Nations had adopted a Resolution on Permanent Sovereignty over Natural Resources. The resolution, accepted by the General Assembly of the UN, especially focusses on the sovereignty of

7 "Good faith" is clarified by the ILO as follows: “Effective consultation is consultation in which those concerned have an opportunity to influence the decision taken. This means real and timely consultation. For example, a simple information meeting does not constitute real consultation, nor does a meeting that is conducted in a language that the Indigenous Peoples present do not understand.” (ILO, 2009, http://www.ilo.org/indigenous/Conventions/no169/lang—en/index.htm).

8 UN resolutions generally have a non-binding and recommendatory nature, according to the UN Charter, except for
nation-states over the use of the natural resources within their national territory (in the context of the Cold War). Indigenous Peoples are not mentioned, however, in this text. How have the United Nations addressed the specific needs of Indigenous Peoples, including the relation of Indigenous Peoples with natural resources?

2.3.1. **GENERAL COMMENT NO. 23 OF THE UN HUMAN RIGHTS COMMITTEE**

Before discussing the United Nations' Declaration on the Rights of Indigenous Peoples (2007), which is of course the most relevant instrument protecting the rights of Indigenous Peoples, we want to refer briefly to a General Comment (No. 23) of the United Nations Human Rights Committee from 1994. This General Comment No. 23 is a clarification of Article 27 from the (binding) UN Covenant on Economic, Social and Cultural Rights on the rights of minorities and wants to underline the status of minorities as peoples with full rights, be it with specific needs. For example, "the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous Peoples. (...) The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them" (Article 7). Especially this last aspect is an important precedent in the UN system recognizing the rights of Indigenous Peoples.

2.3.2. **THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES & THE RIGHT TO FPIC**

In comparison to the International Labour Organisation, the United Nations have come quite late with an international agreement on the rights of Indigenous Peoples. Moreover, the text that was adopted as a resolution of the General Assembly in 2007 took the form of a non-binding Declaration (such as the Universal Declaration on Human Rights). The agreement's weakness is that it is not legally binding, its strength lies in the amount of countries who signed the Declaration: 144 states in favour (UNPFII, 2009) and the general moral authority of the UN in terms of human rights.

In many aspects, the text is a UN version of Convention 169, ascertaining amongst other things Indigenous Peoples' right to consultation. Throughout the UN Declaration on the Rights of Indigenous Peoples, free, prior and informed consent (FPIC) is put forward as a condition for plans affecting the development of Indigenous Peoples and their territories. Article 32.2 for example states that this should be the case when there are plans to implement projects affecting natural resources. As a basic principle, the consultations should be conducted in “good faith”, as the ILO prescribes in Article 6.2. Consultation is resolutions that concern internal matters. Nevertheless, resolutions adopted by the General Assembly have a strong moral international authority.
according to this Article a mechanism to make sure whether Indigenous Peoples can give their free, informed and prior consent for a proposed investment or project. In this way, the UN Declaration consolidates the ILO Convention, as both international agreements make a central point of consultation and participation mechanisms concerning development.

Which are other central elements to FPIC? Dialogue with Indigenous Peoples should take place *prior* to the beginning of the proposed plans. The peoples also have to be *informed*, which means that they must have access to objective information on the concrete subject of the plans (for example mining of metals). This is in a sense a confirmation of the universal right to access to education, as included in the International Covenant on Economic, Social and Cultural Rights\(^9\), which considers education in the broader sense as a condition for personal development but also for participation. The right to FPIC is moreover essentially a *collective* right. Indigenous groups are according to the Declaration entitled “to determine the responsibilities of individuals to their communities” (Article 35), a right which is closely linked to participation processes within communities.

A people should, then, as a collectivity take the decision whether or not to give its consent to a certain development plan. However, the fact that communities can define the obligations of individual members to the entirety of the community, inevitably raises new questions on power relationships concerning the representation of individual members. As Colchester and Ferrari emphasize, an important challenge for IP is “to ensure that their systems of decision-making are genuinely representative and made in ways that are inclusive of, and accountable to, members of their communities”, because “prescriptive notions of who should represent a community are a recurring problem throughout the indigenous world”(2007, p. 20).

### 2.4. Protecting Rights of Indigenous Peoples through the Inter-American System

#### 2.4.1. The Inter-American System at a Glance

The Inter-American Commission and Court for Human Rights (autonomous organs which depend from the Organization of American States, OAS) are, for Latin American states, the most relevant international human right bodies. The Commission monitors general trends in the Americas and investigates the alleged human rights violations and petitions it receives. The Court is where cases can appear for a judge, if the American Commission decides to eventually take a case to this highest level. All member states of the Organization of American States are represented by the Commission; the Commission itself is composed of seven members. By ratifying the American Convention of Human Rights, a state agrees with the competences of the

\(^{9}\) ICESCR, 1966, Article 13.1.
Commission and the Court in terms of following-up the promises made by ratifying the American Convention (ACHR, Articles 33, 34 & 35; www.cidh.org, November 2009).

In the recent Press Release of the IACHR on the conclusions of its 137th Period of Sessions, one of the named “challenges in the region” is the effective protection of the rights of Indigenous Peoples. It is interesting, moreover, that the Commission refers to the right to FPIC. Although this right is not explicitly described by any article in the American Convention, the Press Release states that it is: "The Commission reiterates that the American Convention on Human Rights requires the States to carry out free and informed prior consultation (...)" (IACHR, November 2009, my emphasis). Thus, different instruments in the Inter-American System combine to ensure an effective, regional (or localized), protection of the rights of Indigenous Peoples. James Anaya -current UN Special Rapporteur for Indigenous Peoples- in an article that this set of instruments consists of international precedents in ILO Convention 169, the United Nations Human Rights Committee, the UN Committee on the Elimination of Racial Discrimination and the Inter-American Human Rights Bodies. He interestingly points to the link that the Inter-American System of Human Rights has explicitly made “between consultation resulting in full and informed consent, and protection of Indigenous Peoples’ property rights” (cfr. infra, the Awas Tigni case). Loarca (2009, p. 64) calls this same packet “the Inter-American Communitarian Right”.

2.4.2. PRECEDENTS IN THE INTER-AMERICAN SYSTEM CONCERNING INDIGENOUS PEOPLES

The Inter-American Commission, moreover, has experience with cases of conflicts where the rights of Indigenous Peoples have been at stake. We will give two examples here: a case where general human rights agreements have been interpreted in an inclusive way benefiting Indigenous Peoples and a case which has been explicitly argued on the base of rights of Indigenous Peoples.

An example of the first category is the case of the Mayagna Awas Tingni indigenous community in Nicaragua, which in 1998 had formulated a claim to its rights to land and natural resources to the Inter-American Commission with the help of civil society, because of a conflict with a Korean timber company. The case was taken to the highest instance and the Inter-American Court on Human Rights eventually made a pronunciation in 2001, in favour of the rights of the community, reiterating their rights to natural resources, notwithstanding the fact that Nicaragua is not a party to ILO Convention 169. Anaya and Grossman (2002)
would call it a landmark case. So, whereas the American Convention does not explicitly speak of indigenous communities' property rights, it can in a specific case take into account a broader discourse on the rights of Indigenous Peoples, stemming from other international human rights agreements, to make new, inclusive interpretations of existing human rights provisions possible.

An example of the second category is the case of the indigenous Saramaka people vs. the State of Surinam. Being even more a landmark case for the rights of Indigenous Peoples in Latin America, this conflict was on concessions for Chinese timber companies to cut forests in indigenous areas. The Inter-American Court judged that the Surinam state had amongst other things violated the peoples' rights to a fair EIS study. The Court stated that the Surinam state had to comply with three guarantees: 1) the state has to ensure the effective participation of the members of the indigenous groups respecting their customs and traditions, 2) ensure that if a plan is implemented in their territory, the peoples benefit reasonably from this project and 3) that no permissions concerning the exploitation of natural resources can be granted before there is an objective, state-supervised ESI study (CIDH, 2007; Loarca, 2009, p. 68-69).

3. Conclusion
In this chapter, we first gave an introduction to economic globalisation, mining and the conflicts at the local level. Then, we outlined the international human rights framework protecting the rights of Indigenous Peoples. The realisation of agreements on the rights of Indigenous Peoples can be considered an example of the recognition that human rights must be localized and universal in an inclusive way. We can conclude, first, that the creation of specific agreements on the rights of Indigenous Peoples (such as ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples) have contributed to a better understanding of the problems that indigenous communities worldwide face in a context of globalization processes. These processes have had the effect that the specific needs of Indigenous Peoples, which are often strongly connected to their holistic relationship with land and natural resources, have received attention from the highest instances of international politics and law.

Second, the right to free, prior and informed consent stands among these recognitions as one of the most important achievements. The fact that specific rights for Indigenous Peoples can be effective, is for example expressed by cases such as that of the Saramaka peoples vs. the state of Surinam. The Inter-American Commission and Court of Human Rights, as the most relevant organs for settling human rights conflicts concerning Indigenous Peoples in the Americas, have an important role to play and for this role they have a wide array of instruments at their disposal.
For mining conflicts in Guatemala, our hypothesis is that especially the rights to consultation and participation in the decision-making processes affecting development on the base of natural resources, can be relevant as an instrument of resistance for the problems faced by indigenous communities. As a condition, the discourse of the communities resisting to mining must be sufficiently, and in a structured way, rights-based and rooted in the indigenous identity (a point that van de Sandt, 2009, also makes). For indigenous rights to be relevant in the context of mining in Guatemala, we have to examine how the "dislocation of decision-making" (Oré Aguilar, 2008, p. 13), inherent to the globalization context which facilitates the activities of the multinational mining business, affects the Indigenous Peoples involved.

CHAPTER II: MINING AND INDIGENOUS COMMUNITIES IN GUATEMALA

From our theoretical discussion on mining, development, human rights and Indigenous Peoples, we will now move to the concrete case of Guatemala. One chapter will be dedicated to describing the historical context, the situation of Indigenous Peoples today in Guatemala and the place of mining investments within the broader development plans for the region. The last chapter of this dissertation will be a case study, from an Indigenous Peoples rights perspective, of Goldcorp's Marlin Mine in the department of San Marcos and the wave of more than 30 community consultations in the Western Highlands.

In this chapter, the main objective is to describe the conflictivity that (proposed) mining investments today cause in Guatemala, against the historical, socio-economic and political background of the country. After a brief introduction to the violent history of the country, we will discuss the link between the official end of the Civil War (by the signing of the Peace Agreements) and the opening-up of the region to foreign direct investment, especially through the Plan Puebla-Panama and free trade agreements. It will be argued that the plans for mining investments in Guatemala cannot be seen apart from the broader 'development' plans in the Central-American region. Then, we will ask ourselves how this situation affects the rights of Indigenous Peoples, as more than 60% of the Guatemalan population is considered indigenous.

1. CONTEXT

Guatemala is a Central-American country of 108,889 square kilometres and with its around 13 million inhabitants the biggest Central American state in terms of population size. The first language of 60% of the
population is Spanish; 40% speaks Amerindian languages (23 officially recognized indigenous languages).\textsuperscript{12} Guatemala gained its independence from Spain on the 15\textsuperscript{th} of September, 1821 and is a democratic republic, led by a president which is elected by popular vote each four years. The current president and head of government (since 14 January 2008) is Álvaro Colom, from the centre-left party Unidad Nacional de Esperanza (UNE, National Union of Hope). The economy of Guatemala depends especially on agriculture (coffee, sugar and bananas being important export crops), manufacturing and remittances from migrants to the USA.\textsuperscript{13} Although the country is the biggest economy of Central America and a medium-income country, the social development indicators are very low. According to the latest data, Guatemala (122\textsuperscript{th} out of 182 countries in the world ranking), together with Nicaragua (124\textsuperscript{th}) has among the lowest Human Development Indices in Latin America and the Caribbean; only Haiti scores worse in the region (149\textsuperscript{th})\textsuperscript{14}.

\textsuperscript{12} These are CIA data. In “Breaching Indigenous Law”, however, Imai et al. (2007, p. 103) state that Guatemala has “24 language groups with 52 distinct languages” (data from Raymond G. Gordon Jr.’s Ethnologue: Languages of the World, 2005).


1.1. THE CIVIL WAR

Guatemala has a violent and bloody past, with the Civil War from 1960 to 1996 standing out as the country's most tragic and traumatic experience. The war was, roughly speaking, a war between few, but very powerful *haves* and many, but weak *have-nots*: poor farmers fought in revolutionary movements against subsequent governments which supported a small economic elite of especially large-scale landowners. The report *Memory of Silence*, which was completed by the Historical Clarification Commission (CEH)\(^\text{15}\) in 1999 states:

> The anti-democratic nature of the Guatemalan political tradition has its roots in an economic structure, which is marked by the concentration of productive wealth in the hands of a minority. This established the foundations of a system of multiple exclusions, including elements of racism (...) (Conclusions Part I, paragraph 4).

This “system of multiple exclusions” is what led to the atrocities of the Civil War. We will not discuss the Civil War in detail here, though it is important to briefly refer to a structural problem underlying the armed

\(^{15}\) This was the Commission founded to investigate human rights violations related to the Civil War, in order to reveal the truth of the Civil War and facilitate reconciliation in post-conflict Guatemala.
conflict that had the country in its grip for three decades and which has left permanent wounds in Guatemalan society: the profoundly unequal distribution of land.

As Wittman & Saldivar-Tanaka (2006, p. 24) point out, Guatemala “has one of the most unequal land distribution patterns in the world”. They cite data from the United Nations Verification Mission in Guatemala (2000), finding that “less than 1 percent of landowners hold 75 percent of the best agricultural land, 90 percent of rural inhabitants live in poverty, and more than 500,000 campesino families live below the level of subsistence” (Wittman & Saldivar-Tanaka, p. 24). There was (and still is) a big divide in Guatemala between small-scale subsistence agriculture, especially in the Highlands (agricultural production at family level and sometimes on community-owned lands) and agriculture on large plantations in the lowlands and coastal areas, owned by rich landholders (which employ small-scale farmers during harvest seasons, to work often in precarious circumstances and for very low wages). From its independence from Spain onwards, moreover, the politics of Guatemala have been largely characterized by factual dictatorships, defending the interests of a few families (mostly from European descent) who have traditionally had the economy of the country (and the majority of the lands) in their hands.

In 1944, the so-called October Revolution took place: a left-wing-oriented coalition (a movement representing students, campesinos -although not necessarily from indigenous communities-, the urban working class and intellectuals), who had for several years been resisting to the Guatemalan oligarchy, gained power. The main leaders coming out of this Revolution were Juan José Arévalo and Jacobo Arbenz Guzmán. Both of them became president of Guatemala (Arévalo from 1945 to 1951, Arbez from 1951 to 1954) and tried to pass land reform laws, with the objective to modernize the country in a more just and sustainable way. However, Arbenz's government was thrown over by a military coup in 1954, with the support of the United States' government, which in turn had its stakes in the powerful United Fruit Company (which was in the hands of the Guatemalan oligarchy) (Wittman & Sladivar-Tanaka, p.28). This coup was the beginning of a long and devastating period, in which revolutionary peasant and workers movements fought the old Guatemalan powers. According to the Historical Clarification Commission (1999, Conclusions Part I, paragraph 2), an estimated 200 000 died in the armed conflict. Of the officially registered total victims (42 275), the large majority (83%) are indigenous Mayan Guatemalans.
1.2. **Peace & Free Trade Agreements, the Plan Puebla-Panama, Mega-projects**

1.2.1. **Context**

The Civil War officially ended on May 6, 1996, when the Guatemalan government, the main revolutionary party URNG and a delegate from the United Nations signed the Peace Agreements. The Agreements would force the government to realize significant reforms in Guatemala: a reform of the land tenure system, of social security, recognition of the rights of Indigenous Peoples (through a special *Agreement on the Identity and Rights of Indigenous Peoples*), etc. (Imai et al., 2007, p. 106-107). Wittman & Saldivar-Tanaka say that “[t]he 1996 peace accords recognized that both the historical social exclusion of Guatemala’s indigenous and campesino rural populations and the unequal distribution of land were not only root causes of the civil conflict, but also primary obstacles to long-term national development and a lasting peace” (2006, p. 23).

As economist Luis Solano from the San Carlos University of Guatemala points out, however, the Peace Agreements were especially welcomed by the economic elites of Guatemala, who saw in the Agreements a stabilisation of the economic and financial climate. Foreign direct investment would be a key opportunity for these elites to increase their wealth and politico-economic influence (2009, p. 3). The CIA World Factbook, indeed, observes that the Peace Agreements “removed a major obstacle to foreign investment” (CIA, November 2009). The government of the first post-war president, Álvaro Arzú, had itself close links with the economic elites that had always governed Guatemala. Arzú's government opened up the country to mining and oil capital, as well as maintaining close connections with the big sugar companies in the country (Solano, 2009, p. 3).

The Peace Agreements, then, were the moment in history when Guatemala would enter the neoliberal markets. This tendency would be affirmed by Guatemala's signing of the Central American Free Trade Agreement (CAFTA) with the United States, which took a start in 2006 and “has since spurred increased investment in the export sector” (CIA, November 2009). Other free trade agreements that were made after the end of the Civil War include SIEPAC (Central American Electrical Interconnection System) and an Association Agreement with the European Union which is still being negotiated (Reina, 2008, p. 5). While the promised measures for a real and thorough agrarian reform, then, were a first but inadequate step (Wittman & Saldivar-Tanaka, 2006), foreign direct investment would be welcomed at rapid pace. Carmen Reina (2008, p. 4) clarifies that the transformation of Guatemala into a country of mega-projects was being designed already twenty years ago, with the crisis in the sector of the traditional agriculture for export, and the coinciding wave of structural adjustment plans in Latin America.

Investment in the region has been further encouraged by the Plan Puebla Panama (PPP), an
international infrastructure modernization plan for Central America, ranging from Puebla in southern Mexico to the southernmost republic of Central America, Panama. The plan consists for Guatemala of investments in highways, (air)ports, cement factories, hydro-electric plants and also mining, as we will see later (De Walsche, 2009; Pickard, 2002). Indeed, according to Luis Solano, these 'mega-projects' are all part of a plan designed by a mix of the old Guatemalan economic elite on the one hand and on the other hand new emerging actors which bring in capital. This plan has as its objective to keep the politico-economic power and generated wealth in the country within a traditionally small part of the population. Moreover, a secondary objective of these mega-projects is to attract even more foreign investors.

During the presidency of Óscar Berger (2003-2008) and his National Alliance Party, two national economic agencies were given the space for encouraging foreign investment with emphasis on extractive industries and the electricity sector. In Solano's eyes, the power of these two agencies -which was further consolidated with the coming to power of actual president Colom- is central to the renewed elite politico-economic model of Guatemala- a model which “at the same time is the model of capitalist accumulation and the amplification of investments” (2009, p. 7, my translation).

1.2.2. M I N I N G I N T H E E C O N O M Y O F G UAT E M A L A

Mining has not been of importance in the evolution of economic growth which Guatemala has experienced from 2004 to 2006, says a recent Oxfam America report written by a research professor from the University of Montana's Department of Economics (Power, 2008, p. 7). The sector of “mining and quarrying” (including, next to metals mining, the extraction of non-metal resources such as fossil fuels and cement) in 2006 accounted for less than two percent of the GDP of Guatemala, Oxfam writes based on data of the UN's statistics database CEPALSTAT. In terms of domestic production, agriculture and manufacturing are much more important and as to foreign exchange, remittances from migrants (especially to the U.S.) dominate international trade (in Guatemala, as in Honduras, remittances even equalled the total value of all export products in 2004) (p. 7).

An important factor that Central American states such as El Salvador, Guatemala and Honduras share, is that they are among the weakest tax collectors in Latin America and the world. Guatemala performs most poorly with little more than 11% of the GDP collected in taxes during 2008, according to the study Undermining the poor by the British NGO Christian Aid (Kumar, 2009, p. 6). The mineral taxation systems in Honduras and Guatemala are moreover designed in favour of mining companies: the contribution of taxes on natural resources exploitation to the governments of the two countries is “well below the regional average” for Latin America of 28% (p. 6). According to the report, Honduras and Guatemala even “have
royalties and tax legislation that is more favourable to companies than the majority of African nations” (p. 23). In the case of Guatemala, companies only have to pay 0.5 percent of royalties to the state and 0.5 percent to the municipalities where mining takes place (MEM, 2001, Article 63). We can conclude that such a fiscal climate creates very interesting investment conditions for the transnational mining business in Guatemala, as the profits of mining activities outweigh the taxes, and thus the contributions to the state, by far.

1.3. **INDIGENOUS PEOPLES IN ’POST-CONFLICT’ GUATEMALA**

Guatemala is a country of enormous ethnic diversity. Depending from the source, 39% (according to the latest official governmental census of 2002, INE, November 2009) to 66% of the population (according to data from the United Nations' 2004 Development Report, p. 92) are indigenous. These widely differing numbers are due to the government's rather conservative position in terms of the recognition of the size of Guatemala's indigenous population (van de Sandt, 2009, p. 3). It is generally accepted that around 60% of the Guatemalan population is indigenous, although it is likely that even more Guatemalans actually belong to indigenous groups: identifying yourself as 'indigenous' in the Guatemalan reality means a barrier to development (Imai et al., 2007, p. 103). There are three main indigenous groups in Guatemala (Maya, Xinca and Garifuna), of which the large majority is Maya. The Mayas are in turn divided into 22 ethnic groups. The most prominent of them are the K'iche' (1.27 million Guatemalans), the Q'eqchi’ (850 000), the Kaqchikel (830 000) and the Mam (620 000) (INE, 2002, November 2009). The sad fact that 'being indigenous' almost without exception means 'being poor', is supported by data from the UN Human Development Report of 2004, which provides evidence for the fact that Indigenous Peoples all over Latin America are more likely to be poor than other parts of the population. In Guatemala, 87% of the indigenous people are poor, alongside 54% of the non-indigenous people (UNDP, 2004, p. 67). The largest part of the indigenous population makes a living out of subsistence agriculture, small-scale trade and seasonal labour at plantations for export crops.

More than ten years after the Peace Agreements, little has improved for the majority of Guatemalans. With the Peace Agreements of 1996, promises were made to especially improve the conditions of the Indigenous Peoples, the majority of the Guatemalan population. In *Memory of Silence*, it is emphasized that during the Civil War the rights of Indigenous Peoples were violated in brutal ways, be it civil rights (Conclusions, Part II, paragraph 87) or cultural rights (paragraph 88). The *Agreement on the Identity and Rights of Indigenous Peoples* (1995) recognizes the institutionalized racism in Guatemala as a violation of international human rights, referring to the International Convention on the Elimination of All Forms of Racial Discrimination (1965) and (at the time still not ratified by Guatemala) ILO Convention 169 as
international instruments which should keep the Guatemalan state to its promise to effectively respect the
ingredients of Indigenous Peoples (Part II, C). A recent human rights study finds that, although during the last
decade progress has been made in health, education and nutrition indicators, Guatemala still has very low
scores in terms of protecting economic, social and cultural rights, especially compared to the rest of the
region. Of children younger than five, 50% suffers from chronic malnutrition; more than 60% of the children
does not finish primary school at proper age; and for every 100 000 children that are born in Guatemala, 290
women die (CESR & ICEFI, 2009, p. viii-ix). “A state which abandons the indigenous population cannot
demand loyalty, nor can it demand that this population identify itself with its principles, because the state is
absent when it comes to the needs of Indigenous Peoples”, anthropologist Irma Alicia Velásquez Nimatuj
said in the prominent Guatemalan newspaper Prensa Libre on the occasion of this year's International
Indigenous Peoples Day (Reynoso, 2009, p. 4, my translation). In 2009, according to Prensa Libre,
discrimination and racism of Indigenous Peoples are still firmly present in Guatemalan society.

As we will see in what follows, mining leads to new confrontations in Guatemala, to a large extent
exactly because of the reasons named above: little has been realized in practice for a development of
Indigenous Peoples in its own right. Conflicts today in Guatemala between mining companies and
Indigenous Peoples are, then, the result of globalization processes in Guatemala.

2. GUATEMALA'S MINING MAP

2.1. MINING AND INDIGENOUS TERRITORIES IN CONTEMPORARY GUATEMALA

2.1.1. POLITICO-JURIDICAL FRAMEWORK

The first mining investment in Guatemala by a foreign company was in 1960, when the Canadian companies
INCO and Hanna Mining founded the Guatemalan subsidiary company Exmibal (Imai et al., 2007, p. 105;
Vandenbroucke, 2008, p. 35). In 1966, the company received a 40-year permission for the extraction of
nickel (and other metals) in the municipality of El Estor, in the eastern department of Izabal (Imai et al.,
2007, p. 105). The Exmibal project would become a first example of conflicts between mining and
indigenous (Q'eqchi') communities in Guatemala. In 1981, after only three years of actual production, the
nickel mine had to shut down. Various explanations are given for the closing, ranging from disputes with the
government on the renegotiation of the contracts to the increasing oil prices and falling nickel market value
(Imai et al., 2007, p. 106; Vandenbroucke, 2008, p. 36-37). Today, a new company is exploring on the site,
with new conflicts as a consequence.
To understand contemporary mining investment in Guatemala, it is important to highlight that Indigenous Peoples have been consistently absent from subsequent mining laws. In 1955, president Castillo Armas passed a new law to encourage capital investment in the exploration and exploitation of natural resources. With this new legislative framework, the Guatemalan state hoped to attract investors which were interested in the country's rich subsoil. The law went through several changes in the course of the last two decades. In 1985, the anterior mining law was replaced by decree 69-85. But according to the Ministry of Energy and Mines, decree 69-85 “contained a large quantity of paperwork to obtain a mining concession and moreover many technical requirements, which demotivated investment and made the number of illegal exploitations increase” (2006, p. 8). A new mining code was therefore established in 1993 (decree 41-93). This in turn was revised by the mining law of 1997 (48-97), the law still in force today. The payment of royalties\(^\text{16}\) is in the new mining law reduced to 0,5% to the government and 0,5% to the local municipalities where the metals are extracted, whereas before in both cases it was 7% (MEM, 2001, Article 63; 2006, p. 9).

According to Udiel Miranda, juridical expert for the San Marcos-based NGO COPAE, the mining law which was approved in 1997 regulated mining activities worse than its predecessor, and must be seen as one of the first laws proposed by the postwar government to encourage foreign investment in Guatemala (interview, 2009, August 22).

The actual mining law divides permissions for mining into 3 categories: the reconnaissance licence, the exploration licence and the exploitation licence. The reconnaissance licence grants “the exclusive right to identify and locate possible areas for exploration, within the licence’s territorial limits and to unlimited depth in the subsoil”. The area can be between 500 and 3000 square kilometres in size (MEM, 2001, Article 21). The licence for exploration “confers to the titleholder the exclusive right to locate, study, analyze and evaluate the deposits which have been granted, within the licence’s territorial limits and to unlimited depth in the subsoil” (Article 24). The exploitation licence grants “the exclusive right to develop the deposits”, for “a maximum term of up to twenty five years”, but with the possibility for the licence to be “extended at the request of the titleholder for another period of up to twenty five years” (Article 27 & 28). The obligations of the exploitation licence holder include, amongst other things: to present a prior environmental impact study, which must be approved by the National Commission of the Environment\(^\text{17}\) and “[t]o compensate totally for damages and prejudices caused to third persons in the undertaking of operations” (Article 31).

\(^{16}\) The calculation of the royalties follows the “judicial declaration of the volume of the marketed mining product based on the value of sale consigned in the national market or international stock exchange” (Article 62).

\(^{17}\) A lot of criticism from civil society exists on this article, because the studies can be accepted by ”administrative silence” (which means that if within a certain term no reaction comes to the study from the government, it is approved).
A new mining law, to even more encourage investment in the extraction of natural resources, was proposed in 2007. It contained not a word on specific rights of Indigenous Peoples, however. The law met a lot of opposition at the negotiation tables from the side of civil society, which filed complaint against the decree. The Constitutional Court on the 16th of June 2008 eventually declared the law to be unconstitutional. According to the Court, seven articles of the proposed law partly violated the Guatemalan Constitution. The sentence of the court “prohibits that mining companies can unlimitedly exploit the subsoils, that they contaminate and use areas neighbouring to the mine site to loose used water, and that environmental impact studies are automatically approved after 30 days of administrative silence, as it occurred [at the time]” (Naveda, 2008, no paging). An important remark is that to licences already granted before the 16th of June 2007, the sentence of the Court would not apply, and companies could take advantage of judicial delays to quickly sign contracts within a more attractive politico-juridical context. The debates around the new mining law are till going on as of today.

2.1.2. **CONFLICT DYNAMICS**

According to the latest official data made available (November, 2009) by the ministry of Energy and Mines to Udiel Miranda, lawyer for COPAE (a San Marcos-based christian NGO), there are 145 metals mining permissions in Guatemala today (1 reconnaissance licence, 117 licenses for exploration and 27 for exploitation) (Escobedo, 2009). Van de Sandt (2009, p. 6) observes that most mining concessions are situated in the Western Highlands and that in the departments where most mining concessions are, the largest part of the population is indigenous (Maya). Geographically, moreover, mining concessions in Guatemala strikingly coincide with poor areas. Figure 4 below (from 2004, elaborated by the NGO Madre Selva) shows the geographical situation of mining permissions (represented on the map by spots, the different colours differentiate between reconnaissance, exploration and exploitation licences), in relation to the areas where people live in conditions of poverty. It is striking that many of the granted permissions are situated in some of the country's poorest (and hence also 'most indigenous') regions.
The data above show that lands of indigenous communities all over Guatemala are given in concession to mining companies. This situation has already led to several one-sided violent confrontations, in a state where structural violence against Indigenous Peoples has never been absent since the Civil War. The Fenix Project in El Estor, the successor of Exmibal, is a good example of a region where mining permissions for exploration and exploitation of nickel lead to new tensions. The mine, once owned by Exmibal (cfr. supra) and today by the Canadian Company Hudbay Minerals/Skye Resources via a Guatemalan subsidiary, is not (yet) in its exploitation phase but has been the cause of various violent evictions of Q'eqchi' communities in the area over the last few years. Recently, in October 2009, another deathly incident occurred when during protest of indigenous communities against eviction from their lands, a paramilitary group with alleged connections to Hudbay killed a community leader.

As sociologist Carmen Reina (2008, p. 5) states, large scale investments in Guatemala -such as mining- benefit only a small part of the population. It is no coincidence, she says, that “this process of capitalist accumulation” stretches itself out especially over the poorest zones of the country, at the expense of the indigenous population. Van de Sandt (2009) sees the conflict on mining of metals in Guatemala as a conflict around two irreconcilable models of development: on the one hand the model of neoliberal

Figure 3: Mining permissions and poverty in Guatemala, 2004 (source: Colectivo Madre Selva)
globalization and on the other hand “the alternative development, based on local identities” (p. 8). We can link this observation to Escobar's (2001) idea of “defense of place as a project”: the social mobilization for the (political) protection of the local, inspired by the specific meaning a place has in cultural, ecological or socio-economic terms for the (indigenous) peoples involved. As van de Sandt states:

The indigenous communities affected by mining find themselves, from one moment to another, in the centre of a transnational political field, which involves a multitude of actors: multinational companies, national governments, NGOs related to the environment and development, organisations of Indigenous Peoples, academic and research institutions and several international agencies (p. 8, my translation).

Indeed, mining in Guatemala is an example of how the local territories of Indigenous Peoples become the interaction centre of globalization dynamics. The conservation of natural resources and the livelihood is at stake for indigenous communities in Guatemala, but also something broader: participation in the development politics of the state, beginning with the sovereignty over the local territory. The struggle that Indigenous Peoples have begun against mining companies in Guatemala, as we will see, must be seen as a symbolic one: it is not only a struggle against mining, it is a more general struggle for participation too.

3. CONCLUSION

In this chapter, we have discussed the place of mining within the history and actual socio-political context of Guatemala. Several factors play in the conflict that mining generates: the historical context, the dynamics of globalization and capitalist accumulation (through e.g. free trade agreements) and cultural aspects. We can conclude that the conflict generated today by mining in Guatemala is merely the surface of a structural unequal power balance which has since the end of the Civil War never been adjusted.

In the practice of resistance against mining in Guatemala, as we will see for our case study on the Western Highlands of Guatemala, Indigenous Peoples themselves are claiming their rights as 'grassroots' movements, which means in the form of a social movement that grows bottom-up (from the communities to the state) instead of being granted their rights top-down (from the state to the communities). This particularly comes to light through what we shall describe in the next chapter as the “consultation movement”: all over the Western Highlands (and some other parts of the countries), indigenous communities gather to vote unanimously “no” to mining in their territories. As international agreements such as the UN

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18 We use the term “grassroots movements” within the “environmental justice” framework of Martinez-Alier, who emphasizes that such movements are “growing out of the complaints against the appropriation of communal environmental resources and against the disproportionate burdens of pollution” (2002, p. 270). Alier emphasizes that ecological distribution conflicts are conflicts about “incommensurable values”. The grassroots movements that we refer to, communities organizing themselves in the struggle against mining in Guatemala, value the environment in a way incompatible to that of the supporters of a development model based on extraction of natural resources. From a lesser power position, they are protecting their livelihood (Martinez-Alier, 2002; Vandenbroucke, 2008).
Declaration on the Rights of IP and ILO Convention 169 state that such consultations must be held by the state, as a way to construct a dialogue with Indigenous Peoples on proposed development models, one could say that Indigenous Peoples themselves are developing a rights-based mechanism in its own right, rooted in their cultural traditions and in the context of structural, historical absence of the state.

Our approach in the next chapter towards the case of Goldcorp’s Marlin Mine and the wider resistance in the West, therefore, shall focus on the question as to which extent rights of Indigenous Peoples are brought into practice locally in the context of conflicts generated by mining in Guatemala.

**CHAPTER III: RIGHTS-BASED RESISTANCE? THE MARLIN MINE & THE 'CONSULTA MOVEMENT' IN THE WEST**

As far as the structure of this case study is concerned, there will be first a descriptive part in which we will sketch a profile of the Marlin mine. Then, we will look at the conflict in San Marcos, focussing on the practice of community consultation, the general resistance process in the Western Highlands and mapping the different actors involved in the (resistance to) the Marlin case and the 'consulta movement' in the West. The clash between visions on 'development' will thus be studied through the localizing human rights framework.

1. **CONTEXT OF THE MARLIN PROJECT**

1.1. **Geographical situation**

The Marlin gold mine is situated in the western department of San Marcos. The mining permissions for the Marlin project are located in Sipakapa and San Miguel Ixtahuacán, two predominantly indigenous municipalities consisting of many small communities spread across the highlands, at a height of between 1000 and 2000 metres above sea level. The municipality of Sipakapa has a total of 14 043 inhabitants, in San Miguel Ixtahuacán 29 650 people live (Tribunal Latinoamericano del Agua, 2008, p. 1). The map below (Figure 5) shows the location of the active mine within the concessioned area. It illustrates clearly that the largest part of the mine and the additional permissions are located on the territory of San Miguel Ixtahuacán (85% of the mine) (Imai et al., 2007, p. 109) and to a lesser extent on that of Sipakapa (the industrial

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19 Both Sipakapa (with 'k') and Sipacapa (with 'c') are correct spelling forms. As the first form is used by the Indigenous Peoples themselves, we have chosen this form for further use in this dissertation.
installations are located in the municipality of Sipakapa, however). The inhabitants of San Miguel are predominantly indigenous Maya-Mams (speaking their own language, Mam); those of Sipakapa are mostly indigenous Maya-Sipakapenses (speaking Sipakapense). In both municipalities, the large majority of the people makes a living out of small-scale subsistence agriculture. San Marcos is one of the poorest departments of Guatemala, especially the Highlands region where the indigenous Mam and Sipakapense peoples live (COPAE, 2009a, p. 20).

![Figure 4: The Marlin project, San Miguel & Sipakapa (source: van de Sandt & van Dorst, 2009)](image)

1.2. THE COMPANY AND THE MINE

1.2.1. THE COMPANY

The Marlin mine is property of Goldcorp Inc., which calls itself “North America's lowest-cost and fastest growing senior gold producer” (Goldcorp website, November 2009). The mine was initially owned by Glamis Gold, a company which in November 2006 completed a fusion with Goldcorp (Goldcorp website, November 2009). Under the name Goldcorp Inc., the Canadian enterprise now owns the Marlin project
through its Guatemalan subsidiary Montana Exploradora. The project fitted within Glamis' broader strategy: becoming a leading mining company in the Americas, by fusing with other companies and hence acquiring more mining permissions. By taking possession of the Marlin project, Glamis bought its most important gold reserves ever. In November 2003, a 10-year exploitation licence for the mine was approved and in May 2004, in name of Montana Exploradora de Guatemala S.A., the construction of the mine took a beginning (Castagnino, 2006, p. 7). A month later, the project was granted a 45 million dollar loan from the World Bank (through its International Finance Corporation IFC). The first commercial production of the Marlin mine began in December 2005 (Goldcorp website, November 2009).

1.2.2. **Environmental impact & emerging conflictivity**

The Marlin project is especially known as a gold mine, but Goldcorp also extracts and processes silver ore in San Marcos. The project combines the methods of open-pit mining and underground mining. According to data from the company itself, in 2008 -the third full year of commercial production- the open pit mine of the Marlin project produced a total of 1 697 137 tonnes of ore, with an average of 2.57 g/t gold and 40.5 g/t silver. The underground operation has delivered 554 346 tonnes of ore (Goldcorp website, November 2009).

One of the central issues in the conflict between the Marlin mine and local communities concerns the environmental impacts of the mine, especially impacts on the water supply. As we discussed in the first chapter, the large-scale extraction of metals such as gold and silver today inevitably poses serious environmental challenges. According to Goldcorp's own data (from the 2008 Environmental and Social Performance Annual Monitoring Report), there are no significant problems in terms of the impact of the mine on the groundwater, the surface water and aquatic life; and where the company could do better, it pretends to be working on improvements (p. 67-73). According to civil society, however, the contamination of water exceeded the limits allowed by the established national and international open-pit mining norms (COPAE, 2009b, p. 28). The ESI study itself, along with the Ministry of Energy and Mines, stated that water scarcity nor infiltration (for example through the tailings dam) would cause for serious problems in the area (Castagnino, 2006, p. 12; Montana Exploradora de Guatemala, 2003, p. 1-18, 19).

There is, then, a clear opposition in the two discourses on the environmental impacts of the Marlin mine. From a human rights perspective, the Foodfirst Information and Action Network (FIAN) had observed just before the beginning of the mining activities that in the area the human rights to water and food are seriously threatened, in a region characterized by a semi-arid mountainous climate. These rights are stipulated by the International Covenant on Economic, Social and Cultural Rights and the Guatemalan Constitution, which says that “water sources are a public good and that their exploitation has to be in
accordance with the social purpose” (FIAN, 2005, p. 20 and 24). Bebbington et al. rightly observe that much of the social protest around mining operations has (and will have) to do with pressures on water resources, both “because water is of tangible importance to livelihoods” and because “concerns around secure access to good quality water are likely to favour articulations across a wider geographical spectrum (...) and also a wider political spectrum (...)” (2008, p. 908). The distrust about the environmental impact of the mine, especially expressed through concerns about water access (central to the livelihood of the subsistence farmers of San Miguel Ixtahuacán and Sipakapa), has played an important role in the beginning of the social protest against Marlin and the formulation of rights claims.

2. CONFLICT OVER CONSULTATION: A RIGHTS-BASED ANALYSIS OF THE ACTORS INVOLVED

2.1. INFORMATION IN THE COMMUNITIES & THE FIRST PROTESTS

Castagnino observes (2006, p. 7, my translation) that “the arrival of Glamis Gold to Guatemala reactivated the conflictivity in the country over the issue of mining”. The Berger government and the companies argued that mining was an opportunity for Guatemala to develop, stating that it would bring along rural development and employment in the mining areas. Civil society, journalists and academics took a critical stance to the government's discourse, as they had done in the Exmibal story. But even some politicians and the Catholic Church criticized the new mining plans for Guatemala (p. 8). In this way, less than ten years after the end Civil War, mining brought to surface the still existing social division in Guatemala. Civil society in Guatemala was soon well informed about metals mining. In the Western Highlands, however, as elsewhere in Guatemala, knowledge among the Indigenous Peoples about the theme was little or absent. The government and the mining company had held information campaigns, obviously favouring mining (Castagnino, 2006; van de Sandt, 2009, p. 30).

Among local leaders, distrust grew as a result of the Environmental and Social Impact Study, which falsely alleged that the affected communities had been consulted (van de Sandt, 2009, p. 30). The argument for the fact that in the ESI study Montana claims to have consulted the communities, might have to do with the land acquisition process. This process had begun from 1998-'99 onwards. Jurist Udiel Miranda from the NGO COPAE, himself indigenous villager of the municipality of Comitancillo (not so far from Sipakapa and San Miguel Ixtahuacán), relates:

People from the company came and went during those years, asking people questions about the productivity of their lands, proposing projects for planting forests, etc. In our village they didn't come, but in Sipakapa and San Miguel they did. At that time, nobody in the communities knew that they were from a mining company. Those were the years just after the signing of the Peace Agreements when everywhere in Guatemala organizations (such as NGOs) came to communities, with international funding, they said, to propose development projects (interview, 2009,
In the exploration phase of the Marlin project, during 2003, Montana had several community meetings in San Miguel (30) and Sipakapa (17), according to the company “to address environmental and other community concerns” (Imai et al., 2007, p. 109). In this way, Montana could presumably allow itself to claim these community meetings to be a type of consultation with the local population. However, these community meetings in reality had to pave the way for a smooth acquisition process of the lands of 254 landowners: these lands were sold in some cases for more than ten times the common price, for a total of 9 million quetzales (Imai et al., 2007, p. 109; ACOGUATE, 2009, p. 18). After being granted concessions from the government, as a matter of fact, the company had to buy land from the local farmers. Joris van de Sandt (2009) argues that Montana acquired its lands for mining in an illegal way, by practically imposing a private land tenure system. However, the fact that many people sold their land anyway, makes it difficult for those who did not sell their land to defend the communal land tenure titles. The tactic of social division, then, plays a very important role here too.

Regarding prior information, we can conclude that Montana did not conduct a transparent information process in the communities of Sipakapa and San Miguel. By providing false information, Montana abused the trust of local communities to buy them off their lands for often large amounts of money. By 2004, however, many communities were aware of the fact that a mining company was installing itself in their territories. As a reaction to not being adequately informed and consulted, communities (with the support of various NGOs) began to gather to inform and consult themselves. In what follows, we will first look at the legal basis of community consultation in Guatemala and then study the practice.

2.2. Community Consultation: legal basis & the example of Sipakapa

2.2.1. Legal basis for community consultation in Guatemala
Juridically, there exist various types of “community consultation” and it should be clear which kind of consultation is currently being conducted by communities in the Western Highlands (but also elsewhere) in Guatemala on the issue of mining. As Loarca (2009) points out, the type of consultation being brought currently into practice by the communities in the context of mining is a mix of the consultation of “good faith” as recognized internationally by Convention 169 and traditional Mayan community consultation (also

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20 1 quetzal = 0.08 euro (December 2009).

21 The argument of the existence of collective land titles in Sipakapa and San Miguel Ixtahuacán is one which lies beyond the scope of the questions addressed in this dissertation. We refer to van de Sandt (2009) for an extensive investigation on this aspect.
in “good faith”) as recognized legally in Guatemala through the recognition of the existence of juridical pluralism in the country. This recognition of juridical pluralism is ensured by the Municipal Code (Article 2) and the Guatemalan Constitution (Article 66). “Although there does not exist a Consultation Law in Guatemala, nor [a law on] the administrative regulation of these consultations, the regulations of the Municipal Code, the American Convention of Human Rights and Convention 169 of the ILO are sufficient to realize [the consultations]”, Loarca clarifies (p. 60). In the Municipal Code (Decree 12-2002), Article 65 and 66 provide the legal basis for community consultation. Article 66 provides the modalities for such consultation, stating that both voting by ballots and voting methods based on a community's proper juridical system are allowed.

2.2.2. THE EXPERIENCE OF SIPAKAPA & THE INTER-AMERICAN COMMUNITARIAN RIGHT

The organized resistance from communities to the Marlin project did curiously enough not begin in San Miguel Ixtahuacán (where the majority of the mining permissions are located), but in Sipakapa. The fact that it began in Sipakapa, might be explained by the politico-cultural history of the municipality: the Sipakapense people had always resisted fiercely to oppressing powers in the course of Guatemalan history (COPAE, 2009a).

The consultation in Sipakapa was planned for June 2005. In January 2005, the municipality began to pave the way for the establishment of a consultation of good faith. Glamis Gold (Montana) was informed about the plans for a community consultation in Sipakapa and denied its legitimacy, criminalizing the organizers of the consultation (lecture Delfino tema, 2009, July 26). Delfino Tema, current mayor of Sipakapa and one of the leaders in the protest of Sipakapa since 2005, commented on this: “they [Montana] said that we were against development. But we didn't see development coming from their side” (lecture, 2009, July 26). Notwithstanding the climate of tensions, the community consultation of good faith in Sipakapa took place, in the town itself as well as in ten communities around the town, on the 18th of June 2005. One of the around seventy international observers22 present at the consultas, Ladan Mehranvar, underlines that the consultations were conducted in varying ways, depending from the proper cultural traditions and customs in each community (Imai et al., p. 113). A total of more than 2500 indigenous people voted in Sipakapa's community consultations23, around 45% of the population of Sipakapa qualified to vote.

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22 International observers of community consultation (representatives from the media, NGOs, academic researchers, ...) have a double function in observing the consultation process: on the one hand, their observation can grant legitimacy to the consultation and its results. On the other hand, the presence of international observers can help to guarantee the safety of the peoples involved (Castagnino, 2006, p. 20; Imai et al., 2007).

23 The NGO COPAE (2009a, p. 30) states that 2564 people voted, according to observer Ladan Mehrevar 2502 participated in the consulta (Imai et al., 2007, p. 114).
98% of the voters rejected mining on their territories (Castagnino, 2006, p. 20). Translated to community level, of the thirteen communities of which consists Sipakapa, eleven were opposed to the presence of mining activity in their region, one community voted in favour and one was neutral (COPAE, 2009a, p 30). According to Delfino Tema, the clear result of the community consultation can be seen as an illustration of the aforementioned culture of resistance in Sipakapa (lecture, 2009, July 26).

The state would declare that the consultations could not be legally binding, as a result of which the Sipakapense people decided to take the case to the Constitutional Court (both because of violation of the checks and balances and because of the constitutionality of the consultation, Loarca, 2009- cfr. infra). Montana had made clear that it would not pay considerable attention to the outcome of the consulta. The company continued to explore land while the municipality of Sipakapa was opposed to mining on their territories (Imai et al., 2007, p. 117). The Compliance Advisor Ombudsman (CAO), who monitors human rights for the World Bank and IFC (the World Bank, as said, through the IFC finances the Marlin Project) was also sent to the region in March 2005 after receiving a complaint from the Sipakapense people in cooperation with an NGO, to mediate in the growing tensions between the company and the local communities. In several aspects, such as the water issue, the CAO criticized the company for not investing enough in a dialogue with the local communities and insisting on a careful monitoring of the water (Imai et al., 2007). As far as the consultation process is concerned, however, the CAO would later state that “[t]he legal status of this vote is not clear” (2005, p. 18).

The consulta of 2005 in Sipakapa, although it was denied its legitimacy by the state and Montana, set a rights-based example of resistance for indigenous communities in the Western Highlands of Guatemala. Imai et al. in “Breaching Indigenous Law” (2007, p. 116-117) make three clear points to legitimize the consultation of good faith carried out in Sipakapa: 1) the consulta was “a decision that was channelled through existing governance structures in the community”, 2) “the process contemplated a range of different results”, 3) “the community had the right to bind the government of Guatemala and the mining company to the outcome of the consulta on its territory. According to Indigenous law, the community could decide whether there should be mining in their territory”.

2.3. A WAVE OF CONSULTATIONS

Based on the example of Sipakapa, community consultations were organized across the Highlands of the department of San Marcos and the neighbouring department Huehuetenango (across the border of the Mexican indigenous province Chiapas), where in both regions the largest part of the population consists of

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24 For a detailed overview of the CAO’s report on the Marlin mine, see Imai et al., 2007.
indigenous Maya Mams. Also in other departments where mining permissions (licenses for exploration) have been granted, communities set up consultations. The table in Annex 2 shows the community consultations on mining and other mega-projects related to natural resources held between June 2005 and May 2009. It should be noted that these results do not indicate relative results, that is, how many people that are qualified to vote in each municipality effectively voted. Consultations 1 until 33 were on mining of metals, 34 (Quiché) was on hydro-electrics plants and oil extraction, 35 (Zacapa) was on hydro-electric plants and 36 (Sacatepequez) was on a cement factory and mining. The table indicates that the people who voted, quasi-unanimously voted against mega-projects related to natural resources on their territories. In total, the community consultations have meant a participation of half a million (indigenous) Guatemalans (Loarca, 2009, p. 58). Based on the example of the consultation of Sipakapa, where the people voted against a mine already present and exploiting metals on their territory, these communities (of which the territories have to larger or lesser extent been given in concession for mining exploration) have given a clear signal that they do not want mining on their lands.

An important question arising from these results is how we must interpret them in human rights language. As we indicated, on the one hand, there is a clear legal basis for the practice of community consultation of Indigenous Peoples. On the other hand, apart from (reliable?) numbers of people who voted in these consultations, we do not have -from our fieldwork- sufficient data on the level of information and representation in each one of these communities, especially in terms of power structures within the community (Oré Aguilar, 2008, p. 31); nor do we have -apart from the case of Sipakapa- evidence for the fact that these consultations have been accompanied by a coordinated packet of human rights claims from the communities themselves.

Loarca (2009) sees the consultations as "a normative body in full development, protected by international law" (p. 55, my translation). From Loarca's perspective, the Indigenous Peoples in the Western Highland of Guatemala are bringing international law correctly into practice; however, it is unclear how Loarca sees the organization aspects of the resistance: how is this "normative body" coordinated and which shared claims are made between different communities, apart from the case of Sipakapa? Before discussing the state responses, the position of the private actor and the international aspects of the Marlin case (and by extension the process of resistance in the region), we want to give some examples of bottom-up resistance against mining, around the Marlin mine and in the broader region, questioning whether these initiatives from below are formulating a coordinated, localized packet of human rights claims. We will focus on the social organization aspects and highlight two issues here: the resistance in San Miguel Ixtahuacán and the recent foundation of the Consejo de los Pueblos del Occidente (CPO).
2.4. **Bottom-up, coordinated rights-based resistance?**

2.4.1. **Conflictivity and resistance in San Miguel Ixtahuacán**

To start with, we must have a look at the situation in San Miguel Ixtahuacán. Because, if Sipakapa was the first municipality to organize a consultation, followed by many other municipalities in San Marcos and Huehuetenango whose territories are threatened by mining permissions, what is the position of the peoples in San Miguel, the only municipality where the mine itself is located? And why does San Miguel not appear in the list of the 36 community consultations already conducted?

As van de Sandt describes (2009, p. 54), the communities of San Miguel near the mine (Agel, San José Ixcaniche, Nueva Esperanza and Salitre) began resisting to the Marlin project only a while after the mine started its exploitation activities, when they gradually saw the negative impacts of the mine; this came in combination with complaints on precarious working conditions from locals working in the mine and a feeling of unjust treatment with regard to the land acquisition process of Montana. During 2006, a first organisation was formed out of people from the communities near the mine who had health and environmental complaints which they blamed to the mining activities. In January 2007, the group wanted to start negotiations with the local representatives of Montana, specifically on a fairer (higher) price for their lands and compensation for damages to houses, allegedly caused by mining traffic and dynamite explosions from the mine\(^{25}\). However, the company was not willing to start a dialogue with the local inhabitants, stating that it was not going to renegotiate issues which had already been settled (ACOGUATE, 2009, p. 28). From then on, the conflictivity grew, including various violent confrontations. Montana would adopt a strategy of criminalization and intimidation of the protest, which was condemned by local human rights NGOs. Montana employees who had been participating in protests got fired, eight women from communities near the mine got arrest warrants for "usurpation of private property", seven campesinos were accused of violent acts against the company and its staff during the blockades (ACOGUATE, 2009, p. 28-32). ADISMI (Integral Development Association of San Miguel Ixtahuacán) sent a letter to the stakeholders of Goldcorp in May 2007 on the human rights violations by the company in their municipality, without much effect however (Imai et al. 2007, p. 124). The polarized situation in San Miguel, characterized by intimidation, division and criminalization, continues up to today.

Udiel Miranda, jurist from the NGO COPAE and defending the human rights of the organisations of San Miguel in resistance to the mine, explains:

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\(^{25}\) COPAE, in cooperation with the Unitarian Universalist Service Committee (UUSC), in November 2009 published a study on the damages to the houses, concluding that there is no other possibility than that these are caused by mining activity.
It is difficult to work in San Miguel, because within the same community there are people in favour and people opposed to the mine. Moreover, the municipal council itself seems to be in favour of the mine. Several communities have organized their consultation, but without any official request to the municipal council. An official consultation in San Miguel would be different from all the other consultations that have already taken place: it is the only municipality where there is already mining activity, where the communities are so divided and where the municipal council will not directly authorize the consultation process and make agreements with the communities, instead the communities will have to come with agreements on the community level itself (interview, 2009, August 22).

Carmen Mejía of ADISMI says:

As communities in resistance to the Marlin project, we are just claiming the respect for our human rights, to natural resources, to a future for our children. There is a lot of division in San Miguel because of the land acquisition process by the company: some people sell themselves to the company, others do not. We believe that Montana is violating Convention 169 of the ILO which says that we should have been consulted before the mining activities started (lecture, 2009, October 15).

Recently, the organisations of San Miguel formed the Frente Miguelense de Defensa (FREDEMI, the Defense Front of San Miguel), to unify the protest of the different organizations in San Miguel. It must be noted that the Catholic Church in San Miguel (supported by a Belgian Father) has an important role in FREDEMI, as it has explicitly chosen the side of the communities which are resisting against the Marlin mine. In religious terms, also, there is growing social division in San Miguel Ixtahuacán: the company itself has installed several evangelical churches as a reaction to the Catholic protest to the mine (also elsewhere in Guatemala, evangelical churches are becoming hugely popular).

Imai et al. (2007) rightly point out that there is a huge power imbalance between the resistance capacity of the communities and the weapons that Montana (literally) has at its disposal (security forces and military equipment, for example). This situation is inevitably reminiscent of the Civil War, with the oppressor being this time a private actor. The power imbalance between on the one hand, the grassroots movement from San Miguel and NGOs such as COPAE and, on the other hand Montana/Goldcorp, once again manifests itself through the current promotion campaign of the company across municipality of San Miguel and around, in the light of the announced community consultations (when these will take place, however, is still not clear). On the internet, on advertisements along the roads, in schools, newspapers etc. the company presents itself as the motor of development for the region.26

On the one hand, the human rights violations in San Miguel Ixtahuacán are obvious. In a report on the situation in San Miguel, ACOGUATE (2009) provides a clear overview of the registered cases of intimidation and threats by Montana/Goldcorp. According to Delfino Tema, mayor of Sipakapa, the tensions in San Miguel have also had their impact on the resistance in his municipality, in terms of social division within the communities between people in favour and people opposed to the mine (lecture, 2009, July 26). In

\[26\] Cfr. one of the slogans of Goldcorp: "Para nosotros en Goldcorp, lo valioso es el desarrollo" ("For us in Goldcorp, development is what we value most").
addition, there exists research (by COPAE) proving the responsibility of Montana in the contamination of water, as well as in the damage to houses (and hence the company is violating the rights to food and decent housing\textsuperscript{27}). On the other hand, the social division within communities makes it hard for the human rights defending organisations working in San Miguel to present coordinated human rights claims and prepare a well-organized consultation process; although the grassroots organisations within the FREDEMI have claimed repeatedly that for example the right to free, prior and informed consent has been violated by the company. These tensions make it unsure whether a coordinated community consultation process on the municipal level can take place and, moreover, it is unsure whether the outcome of such a consultation process could provide an extra lever towards the effective protection of human rights (as such a process could possibly generate more violence and social division, and hence more human rights violations).

2.4.2. \textit{Consejo de los Pueblos del Occidente} (CPO)\textsuperscript{28}

In the course of 2008, out of the experience of the process of community consultations, local authorities and grassroots movements across the departments of San Marcos and Huehuetenango (predominantly Mam territory) had been gathering to prepare the foundation of a coordinated platform of resistance to mining in the Western Highlands. This is how on the 28th of March 2008 \textit{La Asamblea Departamental por la Defensa de los Recursos Naturales} (the Departmental Assembly for the Defence of Natural Resources) was created- later renamed to \textit{Consejo de los Pueblos del Occidente} (CPO), with a first meeting as such on the 9th of May 2008 (van de Sandt, 2009, p. 38). The CPO today geographically contains representatives from 6 departments in the Western Highlands: San Marcos, Huehuetenango, Quiché, Quetzaltenango, Sololá and Totonicapán. According to ACOGUATE (2009, p. 17), the consejo is "one of the most important efforts that have been made to develop strategies, plan actions and share experiences on the resistance to the exploitation of natural resources, as being key to the consultation processes in the Western Highlands of Guatemala" (my translation). Is the CPO indeed a relevant effort to coordinate a rights-based, localized strategy in the resistance to mining of the Indigenous Peoples (especially Mam) in the west of Guatemala?

Francisco Rocael, legal representative and coordinator of the CPO, tells that the first steps towards the creation of a Departmental Assembly were made with the intention to give follow-up to the community consultations which were held during July 2006, simultaneously, in 4 municipalities of Huehuetenango. Today, still, the basis of the CPO consists of the municipalities which have held community consultations, predominantly indigenous Mam peoples. In an interview, Rocael explains the growth process of the CPO,

\textsuperscript{27} Article 11 of the International Convenant on Economic, Social and Cultural Rights.

\textsuperscript{28} "Council of the Peoples of the West"
refering to the division at many levels in Guatemalan society that the CPO had to conquer:

(...) Now we have a common vision with for example the peoples of San Marcos, that we as the Indigenous Peoples of Guatemala do not want mining in our country. (...) Look at the Congress, it is itself divided, with a right-wing majority, and no one representing the Indigenous Peoples or the social movements. With the CPO, we want to unite the voice of the peoples, that we do not want mining. (...) Now, we are in the phase of designing a common strategy with the whole Consejo (interview, 2009, August 20, my translation).

To the question which obstacles he sees to validate the results of the community consultations through the CPO into an increased rights-based participation of Indigenous Peoples in the development decision-making process, Rocaël in this same interview answers that Guatemala stays a "exclusive, racist and colonial" state.

This statement is affirmed by a Declaration of the CPO dating from July 14, 2009 (the day of important protests in the capital Ciudad Guatemala), titled La voz de los pueblos y la actitud de un estado opresor y colonial ("The voice of the peoples and the attitude of an oppressing and colonial state"). Among the demands of this declaration are the "immediate withdrawal of the Marlin mining project" (CPO, 2009, my translation). In the discourse of the declaration, we also read rights-claiming language. The proposed mining law, for example, is rejected, because it is "no product of consensus as obliged by Convention 169 of the ILO". The declaration is concluded with a call for the "strengthening of our struggle process, which comes from the demands of the communities, defending our territory, our collective rights and the community consultations". The right to water and land are important images used in the declaration, as symbols for the defence of the livelihood. José Aníbal Cuadra, a representative from the CPO from Quiché, in an interview adds that the CPO tries to work in close cooperation with lawyers and other juridical experts to use the existing legal framework in the most adequate way to formulate human rights claims (2009, July 27).

As van de Sandt (2009, p. 60, my translation) notices, the CPO has known an "impressive development" during the last years, which has "considerably increased the legitimacy of the communitarian resistance to mining and other mega-projects". However, he notices at the same time a paradox at the heart of the resistance in Guatemala: "While the resistance movement of the communities is constantly growing, however, it has not yet been able to translate its demands -related to the conformity between the right to consultation and the right to live in a clean environment- in a clear and comprehensive political program" (p. 66). Van de Sandt thinks that this is partly due to a decreasing collective indigenous identity as a result of economic globalization. Next to this aspect, however, we should not forget that the self-definition of oneself as "indigenous" has implications in Guatemalan society concerning the opportunities of one's livelihood, including the confrontation with discrimination and racism (a point that Imai et al., 2007 also makes).
The CPO, then, seems a promising movement for the coordination of bottom-up, localized rights claims from the indigenous communities in the Western Highlands, especially those who held their community consultations. At this moment, however, the CPO and its structure seem still slightly immature and its rights discourse too general to speak of a coordinated institution effectively using human rights as a tool to obtain participation in Guatemala's development politics at the national level. If the example of San Miguel Ixtahuacán illustrated the fragmentation of the communities and the rights-based resistance to mining, it must be admitted that the CPO is an illustration of the opposite: an effort to coordinate the movement growing out of the consultation process in different parts of the Western Highlands, as a political counter-discourse to an absent state. This process will face more crucial questions, however: will the focus of the CPO's strategy be on the indigeneity, on the politics of identity? Or will it be on the coordinated reclamation of rights, based on both universal and specific needs (the latter as Indigenous Peoples) as a political strategy? These two aspects do not necessarily exclude each other; nevertheless, a movement focussing more on the (political) aspect of rights claims to adjust power imbalances within the state seems more likely to gain more force, for example through cooperation with non-indigenous actors. The path that the CPO will choose, will not be clear until a coordinated political program (based on human rights?) is composed.

2.5. STATE, PRIVATE AND INTERNATIONAL RESPONSES TO THE MARLIN CASE & THE 'CONSULTA' MOVEMENT

We have so far been focussing on the process of resistance in the communities, especially through the community consultations, as a (possible) human rights claiming movement from below. In the last paragraph of this case study, we want to give an overview of the other stakeholders and their positions in the mining and indigenous rights debate (both the Marlin case and the general situation in Western Highlands). First, there is the state, not only as the central government but also in the form of the Judiciary and the National Ombudsman for Human Rights of Indigenous Peoples. Then, we will ask ourselves which rights language the private actor speaks (in this case Montana/Goldcorp as an example from our case). To end with, we will underline the international character of the Marlin case, both referring to international actors and to possible international paths to conflict resolution.

2.5.1. THE STATE

The Judiciary

First, there is the role of the Judiciary. The Constitutional Court in 2007 argued that the consultation of
Sipakapa was unconstitutional because the municipal agreement of Sipakapa had stated that the result of the consultation would be legally binding, which the Court said could not be the case (CC, 1179-2005). Nevertheless, although Guatemala does not have a Consultation Law, this is a strongly debatable pronunciation. Moreover, as Loarca (2009) argues, there had been illegal involvement of the state in the case, disrespecting in this way the division of power between the Judiciary and the State. Imai et al. (2007, p. 127) confirm that "[the] courts in Guatemala have not been able to provide an effective counterbalance to the exercise of state power, in part because the Constitutional Court itself is beholden to the members of the legislature who appoints them".

The Sipakapa case illustrates that the Judiciary in Guatemala seems not capable to judge the legal status of the bottom-up community consultation process in more than 30 municipalities, because of a (intentional) failure of the Judiciary to have a consequent Indigenous Peoples-protecting legislative framework. A report by ACOGUATE observes that Guatemalan law is confusing on the issue of consultation (2009, p. 20). There is, according to the NGO-network, no clarity on the hierarchy between Convention 169 and the Guatemalan Constitution looking at other articles of the latter, such as Article 125, which states that the "technical and rational exploitation of (...) minerals and other non-renewable natural resources is of public utility and necessity" (my translation); this is also reflected in the Mining Law (48-97), which stipulates that the subsoil resources are in every case property of the state. The ILO (2009, p. 91) on the contrary states that Convention 169 includes sub-surfaces always in its definition of "lands".

\textit{The ministry of Energy and Mining (MEM)}

As we already briefly remarked, there is a debate going on in Guatemala on a reform of the Mining Law, also known as Initiative 3528. After the first proposal on the reform of the mining law, civil society won a case before the Constitutional Court in June 2008, which declared the new Law (which the government hoped to pass by "administrative silence") to be partly unconstitutional (Naveda, 2008). In a lecture (2009, August 4) on a revised proposal for the new Mining Law, a representative from the MEM with the intention to counter the critique of civil society stated that "any person or entity on technical or legal grounds can resist to the granting of any mining permission during the administrative process of the request" and that moreover "the fact that an ESI study is required, promotes the public participation during the whole project" (my translation). According to Rafael Maldonado, the main negotiator defending the voice of civil society at the so-called "dialogue tables" on the Mining Law, however, the proposal for a new mining law is still very weak in the area of social and environmental regulations.
Crucial for civil society is a regulation of community consultations (a Consultation Law pending in the Congress has never been passed up to today), a clear water management plan, respect for human rights, social guarantees for the closing phase of a mining project and serious ESI studies which are not simply approved by "administrative silence" (lecture, 2009, August 4). The distrust of civil society and communities towards the state of Guatemala is understandable: the MEM was one of the instances which filed complaint against the consultations in Sipakapa (Imai et al., 2007, p. 125).

At state level, the encouragement of a decent monitoring and defence of human rights in Guatemala is the task of the Human Rights Ombudsman. The Human Rights Ombudsman is a delegate of the National Congress and has at his disposal various sub-ombudsmen. Also for the Rights of Indigenous Peoples, an ombudsman is appointed; the current Ombudsman for the Human Rights of Indigenous Peoples is Martín Sacalxot. In an interview (2009, August 26), we asked Sacalxot which according to him were the biggest obstacles for gaining respect from the state for the results of indigenous community consultations on mining and if these consultations are, according to the Procuraduría, a legitimate process at all. In Sacalxot's opinion, the Guatemalan state in the issue of mining and other mega-projects on indigenous territories has displayed "a lack of observance considering the basic guarantees for the implementation of the rights of Indigenous Peoples". Among these guarantees, a first aspect that he names is the cultural integrity of IP, as for example expressed by Article 7.3 of Convention 169. Sacalxot especially underlines that "ethnic impact" studies must be carried out, to 'measure' the potential cultural impact of the implementation of mega-projects. Sacalxot emphasizes also that these studies must be carried out by the state, and not by private actors as has happened already previously in Guatemala.

With regard to community consultations, Sacalxot clearly condemns the state of Guatemala for never having adequately informed and initiated a dialogue with indigenous communities on the implementation of mega-projects on their territories. The actual process of consultations in the Highlands of Guatemala must, according to Sacalxot, be seen as a reaction to the absence of the state in terms of its obligation to consult the Indigenous Peoples of Guatemala. As an answer to the question to which extent, then, the community consultations are a legitimised rights-based instrument, Sacalxot refers to the "right to reparation" within indigenous Maya cultures: the claim to the right for fair compensation for damages done to the environment, but also to the cultural and spiritual values of Indigenous Peoples. The community consultations held by the

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29 Procuraduría de Derechos Humanos de Pueblos Indígenas
communities themselves, must be seen as a claim for the right to reparation, he says, because the state has never consulted the peoples.

From the position of the Human Rights Ombudsman for Indigenous Peoples we can conclude that there is a conflict between the vision of the Proraduría and that of the Ministry of Energy and Mines (and by extension a conflict with the state politics of the central government).

2.5.2. **The role of the private actor: Montana (Goldcorp)**

To get to know the perspective of the mining sector in Guatemala, we can take Goldcorp (ex-Glamis Gold) as an example. It is the only mining company of its size which is already actively exploiting minerals on indigenous territories and is involved in the exemplary case of Sipakapa. In terms of rights of Indigenous Peoples, specifically rights which have to guarantee their participation in the decision-making process of the development model, Goldcorp has its own discourse which obviously starts from the point of view of the company and its activities. As we did not have the chance to interview or hear representatives from Goldcorp, we rely on facts, reports, and statements of the company.

From this information, it seems that a clear analysis of the rights of Indigenous Peoples and how to bring them into practice, is consistently absent from Goldcorp's discourse. Along with its ESI study, Montana in February 2004 submitted an Indigenous Peoples Development Plan to the International Finance Corporation: a plan in which the company presents its efforts for the development of the indigenous communities affected by the mine. Montana tells among other things that it set up a 'Community Relations Group' to "conduct meetings and facilitate participation of Indigenous Peoples at the community, organization and individual level" and that it "conducted community opinion surveys in September of 2002 and February of 2003" (p. 9-10). Montana's plan triggers two questions: first of all, there is no word on prior consultation with the Indigenous Peoples, nor on an objective (state-initiated) information process before the representatives of the mine arrived. Moreover, as Sacalxot (the National Human Rights Ombudsman) underlined, the state must consult the peoples, not the company. Second, the fact that a company imposes a "development plan" onto indigenous communities, implies a power imbalance and violates the right that these communities have to dialogue with the state, as established in international law. The complaint of Goldcorp against the community consultation of Sipakapa, demonstrates that the company does not legitimize the communities' own mechanisms of decision-making, and that it instead only authorizes spaces for dialogue and decision-making installed by the company itself. This is a worrying trend contributing to the conflictivity around the Marlin mine but also at national level. The communities are given the chance to participate in the development model proposed by Montana, but they have never had the opportunity to
decide if this development model is what they wanted. In San Miguel Ixtahuacán, for example, Goldcorp has founded the development organization *Fundación Sierra Madre*, which according to the company "has been very active constructing, improving or supporting health clinics, banks, school projects, bridges, and water delivery systems" (Goldcorp website, November 2009).

After the aforementioned inquietude of investors about the human rights situation surrounding the Marlin project and earlier warnings of the World Bank's CAO, the consultation firm On Common Ground was charged with an independent investigation of the human rights situation in San Miguel and Sipakapa. Civil society and grassroots movement from the region, such as ADISMI, criticized this initiative because it would not permit the participation of the indigenous communities themselves in the research and was therefore considered discriminating and racist (ACOGUATE, 2009, p. 36). One of the researchers, who later withdrew from the evaluation process out of protest against On Common Ground, asserted that there had been made mistakes in the process of the ESI study and that the right to FPIC had been violated by the study, stating that "the interests of Goldcorp were during the whole process [of the investigation] prioritized above the interests of the local population" (cited anonymously in ACOGUATE, 2009, p. 36, my translation). Goldcorp was as well removed from a Canadian list of "social and environmental responsible companies", partly because of the growing opposition of the local population to the Marlin mine (p. 36). In October 2009, Goldcorp became a member of the ICMM (International Council on Mining and Metals), an organization uniting companies "committed to the responsible production of the minerals and metals society needs" (http://www.icmm.com/, November 2009).

2.5.3. The Marlin Mine: An International Case

Finally, we want to question which international institutions or stakeholders (can) have a significant role in the conflict of mining versus indigenous communities in Guatemala, and specifically the recognition of indigenous rights to participate in the decision-making process. Our central question here is which international responsibilities and mechanisms for conflict resolution there are. We will focus on two relevant international instances: the Inter-American Commission for Human Rights and the Canadian state.

**The Inter-American Commission and Court for Human Rights**

As we have seen, according to Carlos Loarca (2009), the "Inter-American Communitarian Right" might be an instrument to cancel the Constitutional Court of Guatemala's decision regarding the unconstitutionality of the *consulta* in Sipakapa, and sentence the state of Guatemala to effectively respect the rights of Indigenous Peoples. Therefore, however, the complaint which is currently pending for investigation by the Inter-
American Commission, must first be accepted. Loarca -advocating the case of Sipakapa before the Inter-American Commission- refers to various precedents at the IACHR (in Surinam, in Nicaragua, etc.) where Indigenous Peoples have won cases concerning the violation of their rights by the state. Loarca especially refers to the "3 guarantees" that were formulated in the sentence of the case of the Saramaka peoples vs. the state of Surinam (2007, cfr. supra) and thinks that these could be applied to the Sipakapa case too (interview, 2009, August 4). In the ILO, on the contrary, Loarca does not seem to put much belief: "the Convention [169] is an important instrument, but as an institution the ILO cannot effectively guarantee the protection of Indigenous Peoples rights" (interview, 2009, August 4, my translation). Udiel Miranda from COPAE thinks that both the ILO and the Inter-American Commission cannot do much but "making recommendations" to the state of Guatemala, which will not change the practices of the state (interview, 2009, August 22). However, Miranda here forgets to mention that if the Commission decides to take the case to the Court, the Court could condemn the state of Guatemala as in the case of the Saramaka people vs. the state of Surinam.

In the opinion of Mario Tema, the previous mayor of Sipakapa, it is "little probable that the current licence for exploitation of Montana is cancelled". He hopes however that the "opinion of the peoples is taken into account and the licences for exploitation will not expand" (cited in ACOGUATE, 2009, p. 20, my translation). In "Reaching Beyond the State" (Davis & Warner, 2007), like Loarca, put faith too in the Inter-American system as an institution with a "powerful voice of accountability in a region struggling to fully democratize" (p. 252)- Davis & Warner investigated whether the Inter-American system could be effective in strengthening the peace process in Guatemala. As of today, however, it is not clear whether the IACHR will accept the case of the Sipakapense people, although there are clear precedents in the Inter-American system to condemn the state of Guatemala for not effectively protecting IP rights. Another question, of course, is whether a condemnation by the Commission or a judgement by the Court could effectively lead to increased implementation of indigenous rights within Guatemala (data from Davis & Warner, 2007, proves it could).

The Canadian State

Goldcorp is a Canada (Vancouver)-based multinational mining company, with shares on the Toronto and New York stock exchanges (www.goldcorp.com, November 2009). NGOs working in San Marcos, such as Rights Action (an American-Canadian human rights organization) have been trying for some time to hold the state of Canada accountable for the human rights violations by Goldcorp in Guatemala30. It is, indeed, striking, that the mining business in Guatemala is to a large extent Canadian: both the controversial Fenix

30 See for example: http://www.rightsaction.org/articles/Pensions_Canadians_101807.html (an article from 2007, which argues that the Canadian Pension Plan (CPP) is investing in the Canadian mining business in Latin America).
As the Marlin Mine in San Marcos, for example, are property of Canadian multinationals. Again, here, we did not have the opportunity to interview representatives from the Canadian state. Therefore, we just want to highlight two perspectives on the responsibility of Canada from the existing literature.

Gordon & Webber (2008) argue that the state of Canada is nothing less than an imperial force in Latin America which must be analysed within the concept of 'accumulation by dispossession', a force which gained power through a mining investment wave which "paralleled the neoliberal counter-reformation of the 1980s and 1990s in the region" (p. 64). Gordon & Webber think that social movements in Latin America, especially referring to Chile and Colombia as examples, have an important role in "liberating" themselves from the Canadian power to gain sovereignty over natural resources: "Emancipation from Canadian mining imperialism will only come to pass through the deepening and expansion of such mass movements of liberation" (p. 83). Can the community consultation process in the Highlands of Guatemala be seen as such a "mass movement of liberation"?

Imai et al. (2007) state that the Canadian state is an actor which can be held accountable for the indigenous rights violations related to the Marlin mine, as Canada has been actively promoting mining investment in Latin America and hence has interests in the Marlin project as well. They conclude that the state of Canada must more actively monitor the human rights behaviour of Canadian companies such as Goldcorp, but that in order to do so, "embassies and ambassadors should take a more neutral role" (p. 134). They underline that Canada, also, has "an interest in the mine being profitable" and that "the fragility of internal mechanisms of accountability" within Guatemala calls for external responsibilities (p. 137). They think that "a Canadian court that could provide a forum to fairly hear evidence and provide appropriate sanctions [for violations of Indigenous rights] may be the best for which we can hope" (p. 137).

Two paths are offered here, then, concerning the confrontation with Canada as a major power in Guatemala: on the one hand, the "mass movement" from below (in the case of Guatemala, the community consultation process) , from the indigenous communities themselves to gain sovereignty from Canada, the imperialist force; and on the other hand, 'classic' top-down jurisdiction within Canada.

An experience from our fieldwork is telling: on a visit to the mine site in El Estor (Izabal) with a guide from a local NGO, we tried to go up into the wooded hills at the other side of the main road along the mine site, to have a panoramic view onto the whole site. A security employee from the mine, however, arrived when we wanted to take a path that led to the hills, stating that "he was sorry", but that at the other side of the road the land was "Canadian" and that we had to "ask permission first to the company in Canada" (2009, August 11). In the hills, various indigenous Q'eqchi' communities are settled.
3. CONCLUSION

We have in this case-study highlighted some rights-related conflict dynamics within Guatemala between on the one hand indigenous communities, grassroots movements and NGOs, and on the other hand the state and private actors (in addition to the state of Canada). By focussing on the Marlin case, we have sketched how the resistance which began in Sipakapa has extended to other indigenous communities across the Highlands, were mining permissions have been granted. The questions that we wanted to answer were the following: What is the legal base of these consultations both in the international system protecting the rights of Indigenous Peoples and the national legislation; how can we situate the phenomenon within the practices and traditions of the Indigenous Peoples themselves? Is it an adequate and effective instrument for the claim that indigenous communities are formulating, and of what exactly consists this human rights claim? Has the Guatemalan state violated national or international (Indigenous Peoples) law?

The first answer is that there is a firm legal basis for the process of community consultations in Guatemala, which consist both of what Loarca (2009) calls the "Inter-American communitarian right" (in which treaties such as ILO 169 are integrated) and articles from the Guatemalan Municipal Code and Constitution. However, the latter two are in several aspects confusing and unclear, which is partly due to the lack of regulation of consultation of Indigenous Peoples at national level (cfr. a Consultation Law). The consultations stem directly from traditional indigenous ways of decision-making, the right to which is fully protected by international law. Regarding the second question, we can say that the process of community consultations which started with Sipakapa and grew across the Highlands seems to be the beginning of a rights-based movement. Structures as the CPO, although still immature, are promising, in a country which has historically been characterized by social divisions. Apart from the community consultations, however, there is not yet a shared, coordinated packet of human rights demands formulated by all the resisting municipalities together (see also the absence of claims for collective rights, van de Sandt, 2009). As for now, we can say that communities (that is, through the structures of representation that we discussed- grassroots movements and NGOs) are defending their livelihood against mega-projects and are using for this, more and more, a rights-based language. They want a voice in the development process of Guatemala and are aware of the fact that international law provides a framework for these claims. In terms of effectiveness, it is difficult to draw conclusions. We have seen that the Guatemalan state itself does not provide for a Judiciary and a government which support the Indigenous Peoples. If the Inter-American Commission decides to accept take the case of Sipakapa and take it to the Court, which could condemn the state of Guatemala, an important precedent could be created.

Finally, the Guatemalan state, in the Marlin case, has clearly violated indigenous rights (ILO
Convention 169, the Inter-American precedents and arguably also the Constitution and the Municipal Code) to participation in the decision-making process on the development of their territories. It has not taken any initiative to consult the indigenous Mam and Sipakapense peoples of San Miguel Ixtahuacán and Sipakapa on the proposed mining project. Also in other municipalities where mining permissions have been granted, the state has never consulted the peoples concerned. Moreover, in the responses to the absence of the state from the communities, the state has even more polarized the debate by explicitly choosing the side of the mining companies and proposing a legislation in which indigenous rights are quasi-absent. These are worrying trends and create serious new dynamics of conflictivity in 'post-war' Guatemala.
Conclusions

Guatemala is a country still at war in the foundations of its society. Indigenous Peoples in Guatemala remain at the lowest step of society's ladder. The Peace Agreements officially ending the Civil War in 1996 were to a large extent a disguised packet of neoliberal reforms and the structural causes of the 40-year armed conflict, such as the highly unequal power balance between a majority of Indigenous Peoples and a small oligarchy, have not been addressed until today. It is not surprising, then, that a new conflict is growing in Guatemala, caused by the dynamics economic globalization, through the implementation of mega-projects and more specifically mining of metals. In this dissertation, we have looked at this conflictivity generated by mining through a human rights lens. Human rights must constitute a counterforce to the negative impacts of globalization (De Feyter, 2006) and they can do so, as Brems (2003), De Feyter (2006) and Oré Aguilar (2008) point out, if the discourse is effectively translated in local needs and aspirations. In the case of Guatemala, localizing human rights means protecting indigenous rights: in a country where around 60% of the population is indigenous, it is striking to witness that this majority is still facing serious problems to fully enjoy economic, social and cultural rights, as recent studies prove.

The focus in our theoretical framework, as well as in our case study, has been on the rights concerning the participation of Indigenous Peoples in the decision-making process on natural resources and specifically mining on their territories. We have brought our theoretical framework into practice by looking at the case of a Canadian-owned mine in indigenous territories, the Marlin mine, and the consultation wave ensuing in the Western Highlands of Guatemala, inspired by the experience of the indigenous Sipakapense communities affected by the Marlin project. For the case of the Marlin mine, we have pointed out that the case of Sipakapa is emblematic for an indigenous rights movement still being born. The struggle of the communities around the Marlin mine has become a symbolic one. The community consultations that Indigenous Peoples in cooperation with municipalities have been holding all over the Western Highlands must be regarded as a central instrument of resistance, a reaction on the absence of the state to dialogue with the peoples involved on their free, prior and informed consent. It must also be underlined that the ensuing process of community consultations as a reaction is fully justified by international law (such as Convention 169, which affirms that communities can hold legitimate consultations according to their own traditions and customs). In doing so, these indigenous communities are creating, out of their own political traditions, a local human rights instrument- a "normative body in full development" (Loarca, 2009). The fact that the consultations are on the cultural dignity and the "right to reparation" that Indigenous Peoples claim, is
crucial. The consultation process could also sow the seeds for new forms of social reconciliation and unification in Guatemala between indigenous communities, as the example of the CPO illustrates. To speak of a rights-based grassroots movement in Western Guatemala, however, it might be too early. The social impacts of the Civil War still constitute an important barrier when it comes to the organisation and identity aspects of this movement.

If the Inter-American Commission accepts the case of Sipakapa, it might take the case to the Court and sentence the state of Guatemala for not having ensured the effective participation of the Sipakapense (and Mam) peoples in the decision-making process on the Marlin Mine. The "Inter-American communitarian right" (Loarca, 2009) and the existence of precedents such as the case of the Saramaka peoples in Surinam could be the main argument to condemn the state of Guatemala. Moreover, the Inter-American system has proven to be critical to states on the theme of Indigenous Peoples. An international condemnation of the Guatemalan state could mean a big step forward for the local relevance of human rights in Guatemala, but also an important precedent for indigenous communities all over Latin America defending their territories against the usurpation by extractive industries. Next to the Inter-American system, the claims for collective land titles (as argued by van de Sandt, 2009) in San Miguel and Sipakapa could be an additional rights-based instrument.

The absence of the intention from part of the state to initiate a dialogue with Indigenous Peoples calls, finally, for international responses to prevent a new serious (armed) conflict. Not only the global human rights system and transnational civil society hold a responsibility in this, but also national states, mining companies, shareholders and consumers of metals in the North. Mining will stay a necessary economic sector, but the mining business will inevitably have to change and admit that given some politico-juridical and geographical-ecological realities (where sustainable economic alternatives exist), mining cannot occur in a sustainable and just way. In Guatemala, a moratorium on the current mining concessions and operations as well as other mega-projects, and a serious national debate on the sustainable and inclusive division of land and power are arguably the only way to prevent a new civil conflict at national level. Localized human rights arguments, such as arguments regarding the rights of Indigenous Peoples, are one step to claim this serious dialogue between equal parts.
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ANNEXES

ANNEX 1: LIST OF ABBREVIATIONS

ACHR: American Convention of Human Rights

ADISMI: Association for the Integral Development of San Miguel Ixtahuacán

C107: Convention 107 concerning Indigenous and Tribal Peoples in Independent Countries

C169: Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries

CAO: Compliance Advisor Ombudsman

CAFTA: Central American Free Trade Agreement

CEH: Commission for Historical Clarification

COPAE: Pastoral Commission Peace and Ecology of San Marcos

CPO: Council of the Peoples of the West

ECOSOC: UN Social and Economic Commission

ESI STUDY: Environmental and Social Impact Study
ANNEX 2: COMMUNITY CONSULTATIONS IN GUATEMALA


Legend: N: amount of participants/communities who voted against mining on their territories, Y: amount of participants who voted in favour, 0: amount of neutral votes, ?: no data available. SM: Department of San Marcos, HT: Department of Huehuetenango, QC: Department of Quiché, ZA: Department of Zacapa, SA: Department of Sacatepéquez.
<table>
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<th>Date</th>
<th>Results &amp; participation</th>
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<td>18/06/05</td>
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<td></td>
<td></td>
<td>(re-issue of consultation in May 2005)</td>
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