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"We are in the front line".

Rights of indigenous peoples to prior consultation and to FPIC and the right to public participation in environmental matters in Latin America: a comparative analysis

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To my God
To my parents Héctor and Ely,
my brothers and sister,
To my advisor, Prof. Kuppe,
and to my Lu.

ABSTRACT

The right of indigenous peoples to prior consultation and the right to Free, Prior and Informed Consent (FPIC) may at first glance appear similar to the right to public participation when it comes to environmental issues. Both interfere with government decisions about development projects and natural resource use. However, they have different origins. This paper addresses the importance of respecting indigenous peoples' sovereignty and knowledge in the international environmental debate through the exercise of the right to self-determination in its external dimension.

ABSTRAKT

Das Recht indigener Völker auf vorherige Konsultation und das Recht auf freie, vorherige und informierte Zustimmung (Free, Prior and Informed Consent - FPIC) mögen auf den ersten Blick ähnlich erscheinen wie das Recht auf Öffentlichkeitsbeteiligung in Umweltfragen. Beide greifen in die Entscheidungen der Regierung über Entwicklungsprojekte und die Nutzung natürlicher Ressourcen ein. Sie haben jedoch unterschiedliche Ursprünge. Dieses Papier befasst sich mit der Bedeutung der Achtung der Souveränität und des Wissens der indigenen Völker in der internationalen Umweltdebatte durch die Ausübung des Rechts auf Selbstbestimmung in seiner externen Dimension.

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INTRODUCTION

The rights of indigenous peoples to prior consultation and free, prior and informed consent (FPIC) may at first glance appear similar to the right to public participation in environmental matters. Both interfere with state decisions on development projects and the use of natural resources. However, they have different origins. The right to public participation in environmental matters is part of Principle 10 of the 1992 Rio Declaration on Environment and Development (Rio Declaration) and is one of the pillars of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) of 1998. More recently, it is also a pillar of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) of 2018, which is the second regional treaty derived from Principle 10 of the Rio Declaration.

Until 2018, the Aarhus Convention was the only regional agreement derived from Principle 10 of the 1992 Rio Declaration (Jendroška 71). The Aarhus Convention incorporated into the system of European countries three rights that are the pillars of what scholars today call part of the construction of environmental democracy (Gellers and Jeffords; Wates; Pickering et al.). These three pillars consist of access to information, citizen participation in environmental matters, and access to justice and remedies in environmental matters. This innovative instrument of international law has been the subject of much academic study (Perlaviciute and Squintani; Wates). However, there is one issue that was not very relevant in the Aarhus Agreement and that is the interaction between the rights derived from the right to a healthy environment and the rights of indigenous peoples to the protection of their lands. Indigenous peoples' rights were less significant in the Aarhus Convention due to the fact that the location of indigenous peoples' lands in Europe is small compared to other regions (IWGIA).

In 2018 the Escazú Agreement was adopted and entered into force on 22 April 2021. This is a regional agreement for Latin America and the Caribbean. Because Latin America has a significant population of indigenous people whose lands are located in places usually dedicated to infrastructure projects, economic development, etc., the relationship between environmental protection and protection of indigenous lands and their worldview becomes more clearly evident in that region (Galvao Ferreira and Mancilla 2).

Much has been written in academia on the relationship between indigenous peoples' land rights and environmental protection (Etchart; Hosen et al. 676; Staley 29). In the area of international law, different soft-law instruments that states and international organizations have developed have been analyzed. Principle 22 of the 1992 Rio Declaration, the United Nations Declaration on the Rights of Indigenous Peoples, the American Declaration on Indigenous Rights, as well as the jurisprudence of the different international human rights committees and courts, are some of the instruments mentioned above.

However, with the entry into force of the Escazú Agreement as a hard-law instrument, a space has opened up to compare the effects of these rights as international obligations in the domestic legislation of the countries of the region. Considering that ILO Convention 169 on Indigenous and Tribal Peoples is predominantly a Latin American convention¹, its implementation throughout the countries of this region has brought with it a number of controversies, particularly regarding the right to prior consultation and the application of FPIC. In terms of international hard-law, today the right to public participation in environmental decision-making contained in the Escazú Agreement is part of the international obligations of 13 countries in the region, 6 of which are state parties to ILO Convention 169.

Although these two topics are well-studied by scholars separately, no sufficient research have been made related to the interaction between these two rights in relation to different regions. A comparative analysis of these rights in the region is needed, not only in their nature, and in the ways in which they complement each other,

¹ 62.5% of the States Parties are Latin American countries.

but also in their differences reflected in the legislation of Latin American countries. This research aims to fill this gap by conducting a comparative analysis of the human rights related to prior consultation and FPIC of indigenous peoples, and the right to public participation in environmental matters in the region.

The present thesis seeks to answer two questions: What similarities and differences exist between the right to public participation in environmental matters and the human rights of indigenous peoples to prior consultation and FPIC? How have the similarities and differences of these rights been manifested in the domestic legislation Peru as a country of the region?

With the objective of answering the aforementioned questions, a systematic analysis will be made of the origins, justifications and texts of soft-law and hard-law at the international level, as well as the case law development on these rights in the field of international law, both with special focus in Latin America. This will be done in order to identify the characteristics and conditions of both sets of rights. Then, applying a comparative analysis, the presence of these characteristics and conditions through the legislative regulations of the aforementioned countries in order to verify whether the similarities and differences found are reflected in the national set of norms of Peru.

CHAPTER 1: ENVIRONMENT AND SOVEREIGNTY NARRATIVES

In International Law, indigenous people's rights to their lands have taken importance because of a historical vindictive vocation to the peoples, as victims of colonialism. When the International Environmental Law took off, this victimizing image of indigenous peoples continued. They were also taken as victims of climate change, and deforestation. But in reality, they are at the light spot of the solution. This research suggests that the best way to achieve the carbon neutral goals in Latin American countries is by protecting the indigenous peoples' rights to their lands and sovereignty. The fact this is not included in the Escazú Agreement, may be an indicator of the very little willing of the countries to achieve their environmental goals, in the very context of the region. Indigenous peoples' rights are not only victims of the development of the industrialized societies. They are not a side dish in the climate change problems, they are the main course, the solution in Latin America.

Indigenous Peoples and Local Communities and the Environment

The importance of Indigenous Peoples and Local Communities (IPLCs) to the climate stability is undeniable. Indigenous Peoples represent just 5% of the world's population, yet their lands are seated in 80% of the planet's biodiversity (Sobrevila 5). There has been increasing evidence and studies that have shown that indigenous peoples land management and preventing deforestation are linked (Akhtar et al.; Etchart; Blackman and Veit; Reyes-García et al.; Vergara-Asenjo and Potvin; Garnett et al.). Further research has been made on the effects of IPLCs on the reduction forest degradation and natural disturbances (Walker et al.).

In terms of IPLCs' collective forestlands as carbon sinks, according to the study made by Rights and Resources Initiative et al., these lands hold at least 54,546 MtC of aboveground carbon, which represent 24% of the total carbon storage of the world's

tropical forests² (1). What is more, 62,38% of the carbon storage by IPLCs' forestlands correspond to the Latin American region. It is important to stress that this amount of carbon sequestered includes not only recognized and legally designated lands but also those lands claimed as traditional but not legally recognized by the State. In the case of the Latin American region 7,145 MtC or 21% of the region's storage (Rights and Resources Initiative et al. 5). It is known that only 10% of the IPLCs' lands that are customarily claimed are legally own by them (Rights and Resources Initiative 9).

Indigenous peoples not only have an impact on the prevention of deforestation of natural forests, as we have seen above, since they protect them against logging from different legal or illegal economic activities. They also have a major role to play in reducing forest degradation³. Deforestation is one problem, but forest degradation poses an even greater threat. More forested land is at risk of degradation than deforestation: within the next 10 years, approximately 6.5 million square miles of forest will be degraded (Hancock).

An indicator of forest integrity is the density of woody carbon on the landscape, referring to "the amount of carbon stored aboveground in trees and shrubs", in contrast to the extent of degradation or disturbance of the forest (Walker et al. 3022). Walker et al. found that indigenous territories had the highest carbon density of any land category, including protected natural areas, during their study on conversion, degradation and disturbance of the Amazon forest (3022). According to the study, "indigenous land tenure and management are key to safeguarding Amazonian forests against increasing demands for the region's land, energy and mineral resources" (Walker et al. 3022). Then why is the participation of indigenous peoples not greater in the negotiation of international environmental instruments, such as the Escazú Agreement?

² According to Rights and Resources Initiatives et al., the amount of carbon aboveground that is stored by the forestlands of IPLCs is "an amount equivalent to more than 250 times the carbon dioxide emissions from global air travel in 2015" (1).

³ The act of deforestation involves clearing a forest and replacing it with something else, whereas, forest that have been degraded still exist but they can no longer perform a number of essential functions (Hancock)

The Narratives behind Environmental Conservation

As can be seen in the previous lines, there is a great deal of discussion about which spaces should be developed to improve environmental conservation. From a scientific perspective, there is increasing evidence regarding the positive impact of indigenous populations on the conservation of forest areas. Nevertheless, in the implementation of public policies and regulations, this discussion mainly revolves around natural protected areas or the restitution of indigenous peoples' lands as the best alternative for environmental conservation. However, as "environmentalist thought and practice exists on a spectrum (Nadasdy 295), the background of the discussion is grounded in the approaches taken by the actors and their narratives behind about nature.

From an anthropological perspective, different narratives exist underlying environmentalist agendas at both the global and national levels, which although not considered, reflect the views that different actors have on the world. For example, conservation as an environmentalist ideal under which nature has no influence of humans whatsoever, is a perspective that has been translated through the creation of national protected areas or national parks (Spence; Brockington et al.; West et al.; Sarma and Barpujari).

Yet, it is strange to consider that the purest state of nature is unaware of the human being that has been part of this landscape for around two hundred thirty thousand years (Vidal et al.). Humans are also part of nature, and like other living beings, they modify and influence their space, "the world is made materially and symbolically through human action" (West et al. 259). It is reasonable to think that this conservationist ideal has a particular vision of the landscape and according to Brockington, the vision of the fortress conservation has a very strong relation with capitalism⁴ (Brockington and Mora 8–10).

⁴ The creation of the earliest national parks, such as Yellowstone in the United States, emerged along with capitalism during the second industrial revolution (Brockington and Mora 8–9). According to Brockington, conservation has had a complex relationship with capitalism. From one side, it can be seen as a reactionary act, drawing a limit to the aggressive and exacerbated exploitations of nature by productive activities (Brockington and Mora 8). From the other side, it offered an opportunity to clear large areas where indigenous peoples lived, dispossessing them from their territories, making it more attractive for tourism and therefore for railroad companies investments (Brockington and Mora 10).

Such conservation, called Fortress conservation, is a way of seeing and interpreting the world, as well as of making and remaking it (West et al. 252). The creation of national parks would have a significant impact, both socially and environmentally, but there is a great lack of information on the subject (Brockington et al. 250). This kind of conservation is marked by an apparent separation between culture and nature, or people and their surroundings, which is present in the European or Western imaginary (West et al. 256), which is generally considered to be a product of Descartes philosophy (Nadasdy 297). This paradigm would have been imposed on the people who had previously inhabited these territories, although this separation does not exist in their collective imaginary (West et al.). This led to the dispossession of territories and the displacement of between 10 to 20 million people around the world (Sarma and Barpujari), including principally IPLC.

Environmental conservation is expressed in the international narrative, in global conferences as well as in international law, as rights-based approach to conservation. Once down on the ground, at a national level and after being translated into governmental actions, the actors playing a role in their implementation are different: national authorities, indigenous peoples and environmental NGOs. These new actors have different priorities and interests, thus advocate quite different approaches to conservation (Merino 289).

In the environmentalist movements, until now-a-days persists a narrative in which indigenous peoples are considered to be beings that transcend the everyday needs of the modern world, almost spiritual, who know all that is good and are moved only by the higher interests of the forest. This has been discussed in the academia as the “Ecologically Noble Savage” debate (Hames; Nadasdy). According to Nadasdy, this idealistic thought of indigenous peoples as the original environmentalists is harming to them because judges their behavior with concepts that are proper of the Euro-American culture, such as conservationism and environmentalism (293–95). It is worth noting that this is an openly exoticizing discourse, which ignores the claims of indigenous peoples as real actors and subjects them to an ideal of forest “fairies” with own interests and rights that demand to be acknowledged.

The Narratives of Indigenous Communities

A sign that evidences the asymmetries of power in environmentalism is found in the fact that Indigenous Peoples need to demonstrate that they are relevant in terms of the conservation, in Western view, of their own lands. For example, in a recent article, Merino raises the different narratives that other actors in environmental policies⁵ on Indigenous Peoples in Peru (286–312). He also contrasts them with the statements that Indigenous Peoples present about themselves in order to gain the support of state officials or environmental civil organizations (302–05).

Interestingly the members of the indigenous communities who were interviewed, initially provided some of the same westernized arguments that have been shown above, concerning their role in forest conservation. According to Merino, they gave three arguments in favor of their position, that are in line with the arguments of the other social and state actors (305–06).

First, they would resort to their image as “guardians of the forest”, in order not being bypassed in the creation of natural protected areas. Native people as security providers was the second argument presented, by which they reaffirm their land rights by putting them as more efficient to protect natural areas from illegal activities. Finally, they use economic arguments when reclaiming rightful entitlement to the exploitation of resources from their own lands. They demand that state institutions should pay attention to creating better and sustainable conditions for the sustainable exploitation of the resources in their own lands. This would have a great impact in preventing indigenous youths from having no other alternative but to work in illegal logging due to the deep poverty and marginalization they face (Merino 300).

⁵ Merino's analysis was conducted in relation to the postures of indigenous peoples in three cases where the Peruvian government created natural protected areas: the Cordillera Escalera Regional Conservation Area promoted by the regional government of San Martín, the Yaguas Reserved Zone created by the national government, and the Ichgkat Muja-Cordillera del Cóndor National Park (296). Peru's environmental management is a systemic organization that includes the National System of State Protected Areas (SINAPE). According to Law 26834, Law of Natural Protected Areas, management of protected areas is carried out at three levels: At the national level, the entity in charge is the National Service of Natural Protected Areas (SERNANP); at the regional level it is the regional governments that are in charge of administration, and in the third scenario, the conservation area can be managed by a private entity.

However, as could be observed, these three arguments appear to contradict each other, and at the bottom the conclusion of the interviews conducted by Merino suggests that the main issue of these peoples' claim is the recognition of their sovereignty over the lands on which they have resided and exercised control since before colonization (305–06).

The Concept of Sovereignty

One of the main rationales for the right of free, prior and informed consent is the restoration of indigenous peoples domain over their lands and resources, as it has been explain in a study conducted by the UN Expert Mechanism on the Rights of Indigenous Peoples (*OHCHR | Free, Prior and Informed Consent* 4). What is more, the study presents the argument that this right is based on a “historical legal doctrine firmly establishes indigenous people’s sovereign rights over ancestral lands and resources as a matter of long-standing international law” (Expert Mechanism on the Rights of Indigenous Peoples, *OHCHR | Free, Prior and Informed Consent* 4). Yet, what kind of sovereignty is it that indigenous peoples are demanding and why are state actors so reluctant to accept it in the context of environmental conservation?

The concept of sovereignty becomes one of the most controversial aspects when it comes to self-determination for indigenous peoples. The problem is that when we talk about sovereignty in the context of international law, there is a tendency to think of only one type of sovereignty: the Westphalian one. This is due to the fact that international law is usually considered as the legal structure that regulates independent states, which has been reaffirmed by its own judicial institutions such as the Permanent Court of International Justice in the S.S. "Lotus" Case (PCIJ). And at the same time, in international law, the concept of sovereignty is exclusively attached to the modern concept of state, so that only states can exercise sovereignty (Salmón 64).

While it is true that the notions of state, nation and sovereignty have been constructed and refined throughout history (Prokhovnik), it is clear that a milestone in international law has been the Peace of Westphalia in 1648 (Lesaffer 71–72; Parfitt and Craven).

It is often suggested that the modern conception of international borders and sovereignty within a territory -as well as the correspondence between nation and state- had been developing during the later stages of medieval Europe, yet it was not until end of the Thirty Years' War when it settled down in the old continent (Parfitt and Craven). Since then the so-called Westphalian sovereignty has been the main ingredient of international relations and diplomacy by taking the modern state as the primary subject of international law. However, it is worth bearing in mind that the concept of sovereignty is malleable and is nurtured by the historical context and its philosophies (Prokhovnik).

Following the 17th Century, this Eurocentric concept would not merely have been exported to the colonized territories but would also have taken shape in opposition to the control that indigenous peoples had over their lands (Bauder and Mueller 12–13). In fact, according to Bens, indigenous peoples had legal recognition in international law before the arrival of Europeans as settlers (Bauder and Mueller 5). Proof of this recognition can be seen that European explores in North America and Africa signed treaties with indigenous nations, in which the natives sought protection of territorial domain as sovereign nations despite they were allowing the settlers to use the resources of their lands (Stark 125; Parfitt and Craven). Yet, the status of indigenous nations in international law did not bear the same weight as that of the settler states. At the end of the 19th century, international jurists such as Lawrence recognized the existence of these communities but placed them outside the scope of international law since they did not meet the requirement of being "civilized nations", despite their status as independent states (qtd in Parfitt and Craven). Demonstrating the status of a civilized nation implied the creation of government institutions, laws and a governmental administration similar to European ones (Parfitt and Craven). So it was that the Westphalian concept of sovereignty excluded any form of shared sovereignty in the same territory, through the doctrine of *terra nullius*, which was unfamiliar to the indigenous nations (Bauder and Mueller 5; Parfitt and Craven).

This may be a result of the very different concept of "sovereignty" of indigenous peoples compared to Europeans. Many conceptual distinctions exist between these two views of statehood and/or nationhood.

On the one hand, traditionally in international law the characteristics of sovereignty possessed by states (Westphalian sovereignty) can be divided into two aspects: internal sovereignty and external sovereignty. The first has to do with the fact that the state is mainly a territorial subject, which can be understood in a positive and negative sense (Salmón 64). That is, while sovereignty means that there is exclusive exercise of jurisdiction in its territory, it also means that other states cannot intervene in its internal affairs (Salmón 64–65). External sovereignty, on the other hand, implies that there is no authority superior to the state, unless the state itself has so consented, as an expression of its sovereignty (Salmón 65).

For Krasner, Westphalian sovereignty has four important dimensions. In his view, the most important of these is the norm of non-intervention, which implies the "exclusion of external actors from national authority structures" (qtd. in Pitty and Smith 123). As mentioned above, "non-intervention" is typically considered as an expression of internal sovereignty in its negative aspect. It could be undermined by the ratification of treaties, which can be done through the second dimension of sovereignty, which is international recognition. The third and fourth characteristics presented by Krasner are related to the action and control exercised by a state within its territory and borders (Pitty and Smith 124).

The approach to the concept of sovereignty studied by these authors is from a political-legal perspective, which is the reason why the different dimensions interact with each other but do not overlap. Thereafter, it is arguable that European sovereignty could also be seen, not so much as a legal tool that determines duties and rights towards the international community, but rather as a way of drawing and defining the web of relationships between the state, its territory, its people and the other states or nations. For instance, the rule of non-intervention is more related to the position of the State in relation to other states and/or nations over what to do (or not do) within its territory than its exclusive jurisdiction. It could be seen as an expression of its sovereignty in external aspects.

Given the relational sense of sovereignty, Krasner's four dimensions can in turn be categorized into two aspects, the first two corresponding to a state's sovereignty over its external affairs and the latter two to its internal affairs.

On the other hand, indigenous sovereignty⁶, more than a legal or political concept, represents the relationship systems of the native peoples which could be described mainly in two dimensions (Bauder and Mueller 10–12). First, regarding internal affairs, indigenous sovereignty represents the relationship that native peoples have with their community and the cultural network that is knit among them, that is, what defines them as belonging to a nation. Another distinguishing aspect is that indigenous sovereignty is not strict or fixed but rather a construct that is profoundly defined by context and in essence is not material but psychological (Bauder and Mueller 11; Stark 123). Moreover, this construction of sovereignty linked to nationhood would probably have been intensified and used as a protest against the imposition of the fixed borders of Westphalian sovereignty (Stark 124).

Secondly, in terms of external affairs, the relationship of peoples to their territories and thus the interdependence with other communities or nations is noteworthy (Bauder and Mueller 10). For example, in Canada, the Anishinaabes were part of a dense network of loyalties, kinship, etc. with other non-Anishinaabe nations, for this network the access to land was very important (Stark 122–23). Similarly, different than the non-intervention principle of Westphalian sovereignty, for Inuit organizations, sovereignty implies the right to sit at the negotiating tables, nationally and internationally (Nicol 811).

Understandably, it can be said that the legal terms in which the relations of indigenous peoples with their territories are regulated cannot be taken from the Westphalian conception of sovereignty. In other words, Westphalian sovereignty cannot be the yardstick by which indigenous sovereignty is measured, since both are like water in two different states of matter, one solid and the other liquid.

It should be considered that sovereignty is a political constructed concept in which power relationships are described and therefore this political nature applies to

⁶ It should be noted that there is a great diversity of native or aboriginal nations and each one has a different worldview regarding their environment and control of their territories. Nevertheless, based on the literature consulted, it was possible to find some general aspects that would make it possible to characterize indigenous sovereignty in general terms.

describe power relationships in both, Westphalian sovereignty and indigenous sovereignty (Bauder and Mueller 2). Thus, the Eurocentric conception of sovereignty was used to justify the asymmetrical exercise of power in the colonization process. Interestingly, these are still the same concerns that make states reluctant to adopt international instruments such as the ILO Indigenous and Tribal Peoples Convention Nro. 169 (ILO Convention 169), the same that were brought to the table during the UNDRIP negotiations (Bauder and Mueller 9; Pitty and Smith 125).

Since the language of international law tends to be Eurocentric, Morton-Robinson proposes that when thinking about indigenous sovereignty we must "reorient our conception of power outside of a law, right, and sovereignty paradigm to think about Indigenous sovereignty and power in different ways" (qtd. in Bauder and Mueller 11). Right here is where the main problem of the recognition of indigenous rights would lie. International law as well as domestic law, having deep Eurocentric roots, does not have the necessary terms to understand these differences other than the concept of self-determination.

CHAPTER 2: RIGHT TO SELF-DETERMINATION AND SOVEREIGNTY NARRATIVES IN INTERNATIONAL LAW

Towards the end of the 19th century, the notion of self-determination was controversial. Depending on which tradition the jurist would follow, the term could be understood either as citizens' representation in a government and therefore individual freedom through self-ruling, or as an affirmation that state maps were based on the map of the nation, which came first (Parfitt and Craven). Accordingly, the concept can be summarized as an expression used in international law to observe the relationship between nation and state (Parfitt and Craven).

It was not until after the end of the First World War that the concept gained a clearer emphasis. In his Fourteen Points speech, the President of the United States pointed out that in order to preserve the future of Europe, the limits should be crafted in accordance with historical established relationships of nationality and loyalty (Parfitt and Craven). In his speech, Wilson considered that the "principle of justice to all peoples and nationalities, and their right to live on equal terms of liberty and safety with one another, whether they be strong or weak" was the foundation of international justice (Wilson)

One aspect of this principle involved the stand on the colonies. Implicitly based on the principle of self-determination, the fifth point of President Wilson's speech referred to the colonial system. He considered that it should be adjusted, in strict "observance of the interests of the populations concerned," which should have "equal weight with the equitable claims of the government whose title is to be determined" (Wilson). Thus, self-determination assumes that the importance of the subject peoples under colonial power and their claims are equal to the interests of the government that has some kind of title over them. Therefore, they could decide about themselves and their future.

That said, this conception of self-determination would still be too bold for the Central Empires. Article 22 of the Covenant of the League of Nations would reduce Wilson's fifth point to no more than a change of title over the colonies, opening the way to the Mandate system. The Colonial Powers placed themselves in a situation of superiority over territories and populations under their control up to prewar times. Although the

development and welfare of the settled peoples apparently prevailed, this development and welfare could only be understood from the eyes of the "civilized" nations and from Westphalian sovereignty. It was therefore the "sacred trust" of these civilized nations to "guide" the other nations, without the voice of these nations being heard in case they did not want to maintain their status as "guided" nations. Consequently, the interest of the populations subject to the system of mandates and their claims did not have nearly the same status as that of the imperial powers.

From Principle to a Human Right

This was a distorted paternalistic view of self-determination that persisted until the end of World War II. Self-determination, as a principle, was used in connection with the right of every state or nation to self-government as a sign of its sovereignty. The Charter of the United Nations (UN Charter) collected the principle of self-determination that was in international law in a much more explicit way. Article 1, paragraph 2 of the Charter of the United Nations establishes respect for the principle of self-determination as the basis for relations between nations. However, in Chapter XI, the non-self-governing territories remained conditioned to administration by those Imperial Powers until they reached "the plenitude of self-government", which in other words comprised the undervaluation of their existing governments. It was not until 1960 that the demands for self-determination of the colonized nations could be heard without any conditions of "civility", and this change was reflected in the UN Declaration on the Granting of Independence to Colonial Countries and Peoples Against Decolonization -Resolution 1514 (XV). This Declaration expressed self-determination as a "right of all peoples", which was followed by the Article 1 common to the two International Covenants on Human Rights of 1966.

The language shift from "principle" to "right" emerged during the negotiations of the International Covenant on Civil and Political Rights (ICCPR). The General Assembly assigned to the Commission on Human Rights the study of ways to ensure the right to self-determination, which brought up the discussion of this issue given that self-determination in the UN Charter was enunciated as a principle (Taylor, "Article 1" 44–45). The discussion revolved around, among other arguments, the fact that as a

principle, self-determination was a complex political principle of the highest value, which was too uncertain to be included in a legally binding instrument and potentially justiciable (Taylor, "Article 1" 45). Even so, the position that self-determination was not only a principle but also a right of the utmost importance for the consequent fulfillment of all human rights prevailed in the General Assembly.

Decolonization with a Westphalian Perspective

The right to self-determination in the Covenants was at first conceived still with a Westphalian notion of self-determination and decolonization. This can be clearly seen in General Comment No. 12 of the Human Rights Committee (CCPR) where the central idea in the right to self-determination was decolonization (CCPR, paras.6–7). Independence from colonial rule and the principle of non-intervention are taken by the Committee as essential characteristics of self-determination, the same features that differ from indigenous sovereignty. From this point of view, it is arguable that Common Article 1 was intended as a principle among the existing States and the future new States that will be formed as a result of decolonization, by virtue of their independence. Nonetheless, this right to decide to become independent as a state would only be bounded by the limits drawn by the colonial administration (i.e., on the basis of the pre-existing colonial system), ruling out the idea of self-determination on the basis of common ethnic or linguistic characteristics (Parfitt and Craven).

It must be taken into consideration that the United Nations is an organization whose membership is based on Westphalian statehood. Parfitt and Craven point out that in the case of the decolonization of some African countries during the 1960s, the legal figure of *uti possidetis iuris* (as possessed in law), also used to demarcate the borders of the new countries that became independent from Spain, was followed. By doing so, the continuity of the colonial borders was ensured. The application of the principle of *uti possidetis* in the 20th Century to ensure self-determination, could be understood as a reflection of the Westphalian conception of sovereignty even at the time of decolonization. The populations within borders imposed by the imperial powers and which were subject of colonial domination, were considered "peoples". In contrast,

indigenous nations whose original territories and populations are not necessarily constrained by such boundaries were not considered "peoples" (Wensing 100).

It is apparent that a certain fear of the right to self-determination undermining the territorial integrity of States led to the exclusion of ethnic groups and minorities from the concept of "peoples" in its early stages.⁷ Curiously, it is the rigid conception of territoriality held by Westphalian states that prevents minority communities such as indigenous peoples from benefiting from the decolonization process. So the claim of indigenous sovereignty over the control of their lands and territories was restricted by the principle of territorial integrity, when in the great majority of cases indigenous peoples did not seek the Statehood as a western way (Gilbert 226).

It should be stressed that Westphalian sovereignty considers territorial control as a purely political domain within the framework of the principle of non-intervention. Indigenous sovereignty generally considers territorial control as a relational - and not a dominion - conception between the people and their lands and is therefore not only political but also a social issue.

Self-Determination outside the Westphalian Post-Colonial Context

Considering that indigenous peoples have suffered from the domination and subjugation by the colonial powers, Westphalian decolonization -focused on territorial

⁷ The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations of 1970, Resolution 2625 (XXV), on one hand, strongly encouraged the speed of the decolonization process on the basis of the right of self-determination. As a result, the "people" could seek the "establishment of sovereign and independent states, the free association or integration with an independent State or the emergence into any other political status freely determinate".

On the other hand, the Declaration enshrined that the right to self-determination could not be a pretext to disrupt the principle of territorial integrity, as it states that "nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color."

Consequently, it can be said that in the declaration the concept of "peoples" is not subordinated to an ethnic group or nation, but to the population found within the territory occupied by the colonial power. It is worth noting that the territorial limits were imposed precisely by the colonial entity, overlaying the Westphalian conception of its sovereignty on the colonized territories, as it was to their convenience for its administration. Needless to say, for this reason the indigenous nations were not included in the "peoples" definition.

integrity- has prolonged their oppression. The control and use of indigenous lands for agriculture and cattle raising was one of the focal points of the colonial economy (Martínez Cobo, para.168). Similarly, the structure of exploitation of land and natural resources was transferred to various independent post-colonial states, invading or reducing indigenous territories for exploitation by agro-industry and extractivism, among others. As a result, indigenous peoples are subject to a form of "domestic colonization" by the independent States (Martínez Cobo, para.244).

During this time, outside the westphalian post-colonial context, the concept of self-determination as a right of peoples was not completely clarified in international law. The CCPR avoided giving details on definitions and scope of Article 1, of course without understating the importance of this right as an "essential condition for the effective guarantee and observance of individual rights" (CCPR, para.1). Despite the fact that in multiple communications, representatives of indigenous peoples presented allegations of Article 1 violations under ICCPR, the CCPR has circumvented the development of this article.

According to the Committee's General Comment No. 23, "self-determination is not a right cognizable under the Optional Protocol 1" (CCPR, para.3.1), because it is a collective right whose victim is not an individual but a community as a whole, while communications sent through the mechanism established by Optional Protocol 1 could only be made by individuals (CCPR, *Kitok*, para.6.3; CCPR, *Lubicon Lake Band*, para.32.1; CCPR, *Marshall et Al.*, para.5.1; CCPR, *Poma Poma* 6.3). It could be held that this is a restrictive interpretation of the Optional Protocol, since in the same way that article 1 refers to the subjects of the mechanism as individuals, it also states that the matter of the mechanism may relate to "any of the rights set forth in the Covenant", which may also include art. 1. Through this restrictive approach, the collective right to self-determination continued to operate more as a hermeneutic principle rather than as a justiciable right in the ICCPR framework.

It is likely this limitation was created to prevent a human rights body from having to pronounce on any political claim of secession, which could ultimately be a threat to the sovereignty of States. Such a restriction is indicative of the controversy over the right to self-determination that existed in the 1960s, and which persisted as an

argument even in later years during the negotiations of the Optional Protocol to the International Convention on Economic, Social and Cultural Rights⁸. Then, in what way have indigenous peoples' claims to self-determination been dealt with outside the context of decolonization? Apparently, as a consequence of the impossibility of claiming the collective character of this right, its meaning began to be adapted to individual rights, which was reflected in the development of the differentiation between internal and external self-determination.

Self-Determination in Individual Rights

It is noteworthy that even when the CCPR does not admit the allegations based on Article 1, it tends to redirect its decisions basing them as possible violations of Article 27 (CCPR, *Mahuika et Al.*; CCPR, *Tina Sanila-Aikio*), which establishes non-discrimination before the law, or even Article 25, which refers to the right to political participation (CCPR, *Marshall et Al.*). According to the Committee, the link between these rights and the right to self-determination lies in the fact that the former must be interpreted in the light of Article 1, giving it a hermeneutic character. Thus, they should be read in the context of the right to self-determination of the members of the community, and recently more specifically as part of their internal self-determination (CCPR, *Tina Sanila-Aikio*, para.6.9; CCPR, *Käkkäläjärvi et Al.*, para.9.9).

For instance, in its General Comment 23, the CCPR has held that the right to prior consultation of indigenous peoples is included in Article 27. This interpretation arises since in the case of minorities such as indigenous peoples, their lands, resources and traditional economic activities are part of the culture of a minority of a minority (CCPR, *Mahuika et Al.*, para.9.5).

Despite the CCPR's refusal to pronounce itself on Article 1, it pronounced itself indirectly on indigenous peoples' self-determination, mainly through Article 27, at

⁸ According to Rossi et al., originally the Working Group put into consideration to exclude the Part I (right to self-determination) of the ICESCR from the individual communication mechanism, noting that the CCPR caselaw on the subject “had rejected arguments base don article 1 of the ICCPR and that the communications mechanism was not appropriate for dealing with alleged violations of the right to self-determination because it was a collective right conferred upon peoples as such” (40).

various times. Prior to 1989 - the year of adoption of ILO Convention 169 on Indigenous and Tribal Peoples - the Committee rarely mentioned the relationship between Article 1 and Article 27 (CCPR, *Kitok*)

During the 1990s, this relationship became much clearer and began to be cited in the CCPR cases as mentioned above. Accordingly, the Committee confirmed the right of members of indigenous peoples to prior and informed consultation. It was stated that particularly in the case of indigenous communities the exercise of Article 27 implies the right to effective participation of the members of a community in decisions in which they are affected, given the close relationship between their way of life and their territories and resources (CCPR, para.3.2; 7; *Mahuika et al. v. New Zealand*, para.9.8). In that way, the collective relationship between indigenous communities and their territories as protected by an individual right.

Following the adoption of the United Nations Declaration of Human Rights in 2007, the Committee made much more explicit that article 27 is a form of internal self-determination for indigenous peoples. In this way, despite the fact that this article protects an individual right, the Committee is also required to consider the collective harm caused (CCPR, *Tina Sanila-Aikio*, para.6.9). Furthermore, it started to reiterate that consultation alone cannot satisfy Article 27 in cases of resource use on indigenous communities' lands; consent or FPIC would be required for participation to be effective (CCPR, *Poma Poma*, para.7.6; Taylor, "Article 27" 811).

Given its narrow interpretation of the ICCPR Optional Protocol 1, important aspects of self-determination as a collective right have not been developed in greater detail by the Committee (Taylor, "Article 27" 789). However, it is worth examining the discursive development of the CCPR in the context of the mechanism of individual communications, as they reflect important changes in the conception of self-determination as a collective human right in international law, such as the limitations presented by the concept of territorial integrity.

Even during the process of decolonization, as previously noted, references to self-determination have gone hand in hand with the principle of territorial integrity, since this rigid notion of territoriality is an aspect of the Westphalian sovereignty, which has

been carried through the *uti possidetis* doctrine. Therefore, the right to self-determination was strongly related with the right to secession and independence of peoples in former colonial territories, and it continued to be seen as a possible justification for secessionist aspirations, even by indigenous peoples (Gilbert 220; 226). This limited the revindication of indigenous sovereignty in international law.

Westphalian sovereignty persists in the latent fear of state fragmentation, to the detriment of territorial integrity. As mentioned by the UN Committee on the Elimination of Racial Discrimination (CERD), referring to the Declaration on Friendly Relations, such fragmentation "may be a detrimental to the protection of human rights as well as to the preservation of peace and security" (CERD, *General Recommendation 21* para.6). Given this concern⁹, the institutions of international law began to differentiate external from internal self-determination, restricting the applicability of the any of these aspect to specific situations.

Thus, the question of secession was left to the external aspect of self-determination, and only as a "remedial right" in specific cases of oppression¹⁰ (Gilbert 222). CERD in its Recommendation 21 states that external self-determination implies the right to freely determine "their political status and place in the international community" exemplified by "the liberation of peoples from colonialism and by the prohibition of the subjection of peoples to alien domination, subjugation and exploitation" (CERD, para.4). External self-determination was thus intended to overthrow colonialism .

Meanwhile, internal self-determination referred to "the rights of all peoples to freely pursue their economic, social and cultural development without outside interference" within an independent state (CERD, *General Recommendation 21* para. 4). As a result, the internal aspect is linking it to the individual right to political participation of a

⁹ Even during the UNDRIP negotiations, the relationship between secessionist aspirations and self-determination was very present in the discussion. The African Group expressed its fear in applying the latter concept in a context that does not imply colonial domination and that it would be "misrepresented" in that sense a fundament for secession (Oldham and Frank 6).

¹⁰ In international law, as Supreme Court of Canada have described in the Quebec Secession Case, the pursue of Statehood can be reached in three scenarios: "In situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development." (qtd. in Scheinin 10; qtd. in Gilbert 222).

nation already constituted as a sovereign state, related to article 25 of the ICCPR (Taylor, "Article 1" 42). What is questionable about this conceptualization is that in the case of indigenous peoples, limiting their self-determination to the internal aspect ignores the question of indigenous territoriality, since it restricts it to the boundaries of the state's sovereignty (Gilbert 222).

Self-Determination, Participation, Consultation and Consent

During the 1970s, the Economic and Social Council authorized the development of a study regarding the status of Indigenous peoples around the world (Ludescher 23). The mentioned study was conducted by a group of experts headed by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Martínez Cobo, and has been considered as one of the most extensive studies made by the UN in the human rights scope (Ludescher 23).

Martínez Cobo concludes that the right to self-determination is a "precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future" (para.580). Although this study addresses the problem of indigenous communities in relation to the right to political participation, as internal self-determination (paras.575–579), it does not reduce it merely to this aspect. Highlights of its conclusions are that it affirms that the right to self-determination of indigenous peoples should be recognized not only in economic, social and cultural terms, but also in political terms as a collective right, which includes both the internal and external expression of this right (para.581). More specifically, it considers that indigenous peoples have the right to express various forms of autonomy within the state as a "collective right to be different and to be considered different", which do not necessarily include the right to secede from the State in which they live (para.581).

ILO Indigenous and Tribal Peoples Convention (No. 169)

Despite what was mentioned in Martínez Cobo's study, ILO Convention 169 does not expressly mention the right of self-determination of indigenous peoples, and bearing in mind the previous discussion, it led to the definition of the term *peoples* in article 1

(3) in a limiting manner¹¹. Article 1 (3) states that the *peoples* “shall not be interpreted as having any implications on the term by international law”. Since the concept of the right to self-determination was approached mainly from a political focus at the time of its adoption in 1989, i.e. its external aspect, it was noted that it exceeded the mandate of ILO (ILSD and PRO169 25).

Regardless of that, there is no doubt that ILO Convention 169 is of great relevance in the evolution of the concept of self-determination, due to its clear provisions on collective rights that are derived from self-determination and ensure their autonomy. The right to consultation and the right to free and informed consent, are expressions of this autonomy, as will be seen below. Although only 24 states have ratified this agreement, ILO Convention 169 is the only binding treaty open to ratification entirely devoted to the rights of indigenous and tribal peoples. Furthermore, its importance has a global reach due to the incorporation of its statements in a big range of jurisprudence and international standards (Larsen 95). By emphasizing the right of indigenous peoples to establish their own autonomous institutions, not only cultural or religious, but also political, the Convention efforts operationalize the right to self-determination while maintaining the territorial integrity of the state (Gilbert 225). Furthermore, it establishes the duty of member states to provide the means for their full development¹².

The Westphalian conception of territoriality explained above has caused reluctance to use the concept of "territory" with respect to indigenous nations as peoples prior to

¹¹ Even though the use of the term “people” was severely restricted in ILO Convention 169, the adoption of this terminology was a major step forward in comparison with its predecessor, the Indigenous and Tribal Population Convention No. 107 adopted in 1957. This other instrument does not use the term “peoples” but “populations. This shows the shift in the way indigenous peoples are treated in international law and how the concept of self-determination has been evolving through time. Yet, it is noteworthy that although the ILO Convention 107 is no longer open for ratification, remains in force in some countries, such as Bangladesh, India or Pakistan (ILSD and PRO169 25)

¹² This is established in the article 6 (1) of ILO Convention 169: 1. In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them; (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.”

ILO Convention 169. Aside from the use of the term "lands", Ludescher argues that the use of territory implies some form of control and sovereignty rights, as opposed to land, which refers to a material aspect of ownership and possession (28–29). In addition, the Convention does not limit the use of the concept of territory as the exercise of dominion and material power, but takes this concept to its relational meaning, that is on a political but also on a social and cultural level, relating territory to the spiritual and cultural value that indigenous nations give not only to their lands but also to the natural resources on them.

In this regard, the close relationship between indigenous peoples and the control of their territory and resources imply the exercise of their autonomy and self-government as a very important element towards the concrete exercise of the right of self-determination of indigenous peoples. As stated above, the concept of territorial unity - as an effect of Westphalian sovereignty - has been a limiting factor in the recognition of this right. It is worth remembering that the territoriality, in the terms of indigenous sovereignty, in most of its communities, is not a matter of domination and exploitation, but rather it has a relational understanding. It provides a relationship between them and their identity as a people or nation, since it is where their ancestors have lived, and their history has developed, in addition to the sacred and spiritual significance that most indigenous peoples maintain with their territories (ILSD and PRO169 91).

Consent is precisely a concrete form of application of the right of self-determination in these cases (Gilbert 239). Participatory rights as a democratizing ground of self-determination are not sufficient protection of the rights of indigenous nations. While it has been established that indigenous peoples have the right to participate in general democratic life as an expression of the internal aspect of self-determination within independent States, it should be noted that indigenous peoples are in a marginalized position¹³ in the context where they live (Gilbert 239). Then, it is reasonable to expect

¹³ The study conducted by the then Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Martínez Cobo, defines this situation of marginalization of indigenous peoples as part of their definition. As he proposes in the conclusions of his study, "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at **present non-dominant sectors of society** and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence

the dilution of indigenous peoples' positions and the disregard of their points of view which may prevent them from freely pursuing their own destiny.

Since the relationship between indigenous peoples and their lands or territories represents a substantial element of their identity and culture, the notion of the right to consent of indigenous nations is formed in international law based on this recognition. The Indigenous and Tribal Populations Convention No. 107, adopted in 1957, also uses terminology such as consent and territories. It is, however, only considered in the case of dispossession of indigenous communities from their "customary territories"¹⁴. Moreover, the exception to this rule is quite broad since among the reasons that justifying these measures is the "interest of national economic development". Definitely the scope of *consent* in this case does not meet the internal aspect of self-determination for these groups.

It is worth pointing out that ILO Convention 107 did not seek to recognize the right to self-determination of indigenous nations in any way. On the contrary, according to Article 2 (1), they are perceived as populations whose characteristics revolve around their lack of integration into the life of their own countries. Consequently, it was the duty of the independent State to integrate them into "modern life", which could be considered a form of cultural assimilation. Consequently, indigenous peoples were not seen as collectives, but rather as a group of individuals in an early stage of development (Ludescher 22).

This integrationist approach was severely criticized by the Special Rapporteur Martínez Cobo. In his study he affirmed indigenous peoples' ownership, possession and control of their land and its natural resources are unrestricted and must be recognized (para.540). Therefore, the "full and informed consent" is necessary when their lands, land rights and their natural resources are taken, and those rights are terminated (Martínez Cobo, para.540). Thus, by granting the State's obligation to

as peoples, in accordance with their own cultural patterns, social institutions and legal system" (Martínez Cobo, para.379).

¹⁴ Article 12 (1) of ILO Convention 107 reads as follows: "The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations".

obtain consent -without the justifications set forth in ILO Convention 107-, the protection of the rights to their lands and territories is more efficient and allows these populations to decide on the development of their lands, territories and the use of their resources.

Article 16 of ILO Convention 169 takes up this idea and strengthens it, establishing primarily the displacement of indigenous peoples from their lands as a general prohibition. Relocation then is an exception that can only be justified as a factually necessary measure, which has to be unavoidable, such as severe impacts of global climate change that may cause loss of life (ILSD and PRO169 98). In this context, the requirement of "free and informed consent" appears to function as a guarantee that the peoples understand that it is a necessary measure for their own safety and well-being. Under this interpretation, when the Convention in Article 16(2) states that "where their consent cannot be obtain, such relocation shall take place only following appropriate procedures", it is only reasonable to argue that this lack of consent has a factual cause, for example, that the danger is imminent, and that the relocation must be immediate.

This approach to Article 16 is consistent with Article 13. However, whenever the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) deals with cases of relocation, it does not interpret the criteria of prohibition, but rather the implementation of the exception. This means that the CEACR does not discuss whether the situation involving the relocation of indigenous communities is a prohibited situation or not, but rather assumes that it may fall within the exception and directly analyzes the consultation requirement (CEACR, *Costa Rica*; CEACR, *Denmark*). Anyway, even this view is still relatively stronger in comparison with Convention 107, since at least this position requires that consultation and consent shall be requested by the Committee in these cases.

It should be noted that the notion of consent is a step further than participation or consultation alone, as is the purpose of the latter. As such, ILO Convention 169 not only applies the consent requirement in displacement scenarios, but also broadens its scope and sets it as the objective of the consultation that must be conducted prior to measures that may affect directly indigenous peoples. The cornerstone of the

Convention is the right to be consulted, but consent, as the objective of consultation, must determine how consultation should be conducted. According to Heriksen, consent as a right requires that consultation processes are not just a time for providing information or listening, but need "a new, more open and collaborative approach to policy development by government departments" (qdt. in ILSD and PRO169 70). Although the ILO has made it clear that the concept of free and informed consent in Article 6 does not constitute a right to veto (16), it also entails the right to withhold consent (ILSD and PRO169 64) and, when it is raised as an objective of consultation, it leads to the States Parties having to negotiate and even yield their positions in order to reduce the gap between positions and achieve consensus (ILSD and PRO169 68).

Besides having the right to consult, the fact that its objective is to achieve consent means that it is this latter that gives indigenous peoples the power to negotiate with their governments. That is, to have a place at the negotiation table, and to have sufficient agency to manage their own destiny. Thus, consent, as the purpose of consultation, extends beyond participation and becomes an expression not only of their subsistence but also of their collective autonomy to freely determine their political status (which does not imply separation from the state in which they live). It is the external expression of their right to self-determination that gives a hint of recognition of their indigenous sovereignty, and the ILO Convention 169 could have been taken as a way to establish more appropriate State-indigenous relationships aligned with social justice (Larsen 108).

However, despite the substantial advances that ILO Convention 169 has made, it can be observed that at the time of the negotiations it was clear that the acceptance of collective rights in international law was critical and necessary for indigenous peoples. However, there were still reservations regarding the interpretation of secessionist ambitions as implications of indigenous peoples' self-determination, which is evident in the Convention's language. The ambiguous and open-ended language as well as provisions such as article 1(3) and article 34, opened the way for the implementation of the Convention in domestic law to contain more restrictive interpretations. As Larsen mentions, the implementation of this Convention is not a result of the States failing to pay adequate attention to indigenous rights (96). This is the result of a State-driven renegotiation of the Convention's basic principles, in which an agreement is reached

between those who will achieve the most benefits for the interests of the State (Larsen 107). To put it another way, due to the ambiguous terminology of the Convention, the distribution of negotiation power is no longer based on social justice but on economic power. Thus, indigenous peoples do not enjoy sufficient political status to adequately establish their relationship with the State, since the right to consultation is reduced and detached from its objective, consent.

United Nations Declarations on the Rights of Indigenous Peoples

With the adoption of UNDRIP, the right to consent, more specifically the right to free, prior and informed consent (FPIC) as an expression of the self-determination of indigenous peoples, became more evident and concrete in international law. The Declaration, unlike ILO Convention 169, is not only the first international instrument to expressly recognize the right to self-determination, but these were applicable to indigenous peoples as *peoples* in terms of international law (Oldham and Frank 6).

Already in the Preamble of the UNDRIP a paradigm shift occurs in recognizing indigenous peoples as victims of colonization, admitting that they have been subject to historical injustices perpetrated against them. This acknowledgement was not previously found in any other international instrument, apparently due to the careful language used to differentiate the situation of indigenous peoples from that of the decolonization process. In that sense, earlier instruments dealt rather with discrimination against an ethnic minority in a "special situation" than with their recognition as a people by virtue of the social justice resulting from decolonization.

The preamble also acknowledges that by the virtue of the right to self-determination, all peoples shall freely determine their political status, thereby recognizing the importance of the external expression of this right. Moreover, article 3 explicitly states that, by virtue of the right of self-determination, they "freely determine their political status and freely pursue their economic, social and cultural development". This way, Article 3 reproduces in its entirety Article 1 (1) common to the International Covenants of 1966, taking indigenous peoples' right to self-determination also in its external expression.

According to the UNDRIP, the right to self-determination within the State is manifested in the autonomy and self-government in matters relating to their internal and local affairs (article 4), by maintaining their own institutions (article 5), while retaining their right to political participation (article 5) and to a nationality granted by State where they live (article 6). As for the external aspect of self-determination, however, it can be said that many States objected to its inclusion.

In general, States objected to the inclusion of a provision based on the common article 1 of the ICCPR and the ICESCR (Ludescher 26). The provisions that might be considered disruptive of Westphalian state sovereignty such as the right to self-determination in its external dimension and territorial rights were the most objected to in the negotiation process of the Declaration (Ludescher 26). According to Van Dyke, as a result of this discussion, Article 46(1) was added, which limits the scope of the right of self-determination to its internal aspect (qtd in Ludescher 26). For this reason, Article 46(1) again refers to the Westphalian territoriality problem by pointing that "nothing in this declaration may be interpreted [...] as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States".

As mentioned above, this constant concern of States for territorial integrity has led to the external element of self-determination of indigenous peoples being set aside, and therefore influences the interpretation of the rest of the Declaration's provisions. One of these is the recognition of territorial autonomy and the objective of achieving free prior and informed consent during consultation. This is especially important in negotiations that deal with environmental matters that affect them in a concrete way.

The failure to recognize the external aspect of the right to self-determination counts as a reduction in the value of this right. In this regard, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) in the document called "Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination" emphasized in its recommendations that indigenous peoples have the political status of *peoples*, which means that their self-

determination extends beyond the borders of the States in which they live (paras.17; 61). In this manner, the EMRIP considers that one expression of this dimension is that Indigenous Peoples can participate in international fora on matters that affect them, and that, although this extends their self-determination beyond borders, it "does not affect the territorial integrity of the States" (para.61).

Regarding this point, the external dimension implies that self-determination involves more than simply presenting their issues in international forums. Different civil groups representing different interests within a State or among many States also have a space for participation in the international forum. Nevertheless, they do not constitute a people. It is by virtue of the political status of peoples that indigenous nations have the right not only to participate but also to ensure that the principle of equal rights among nations is respected. Consequently, indigenous peoples should be treated as political entities with sufficient negotiation power (not only participation) on international instruments that affect them. Only then will the principle of equal rights apply to all peoples.

Regarding the right to FPIC, the Declaration maintains a measure of uncertainty in its application. This generates controversy as to whether consultations should culminate in an agreement or consent, and what to do when the government cannot reach the mentioned agreement. Even a decade before the adoption of the UNDRIP, CERD General Recommendation No. 23 called on States Parties, under the International Convention on the Elimination of All Forms of Racial Discrimination, not to take any decision directly relating to their rights and interests without their informed consent (CERD, *General Recommendation 23*, para.4 (d)). In this regard, CERD's position was clear on the need for consent.

This is a reasonable conclusion given that the original version of the Draft Declaration stated that "States shall obtain consent from the affected peoples through freely given and informed consent" (Ludescher 43). Furthermore, it stated that FPIC was an essential precondition to obtaining approval for any project that would affect indigenous lands, territories, and resources (Ludescher 43). Instead, the text of the Declaration consistently holds that "States shall consult and cooperate in good faith [...] in order to obtain their free, prior and informed consent". This refers both to the

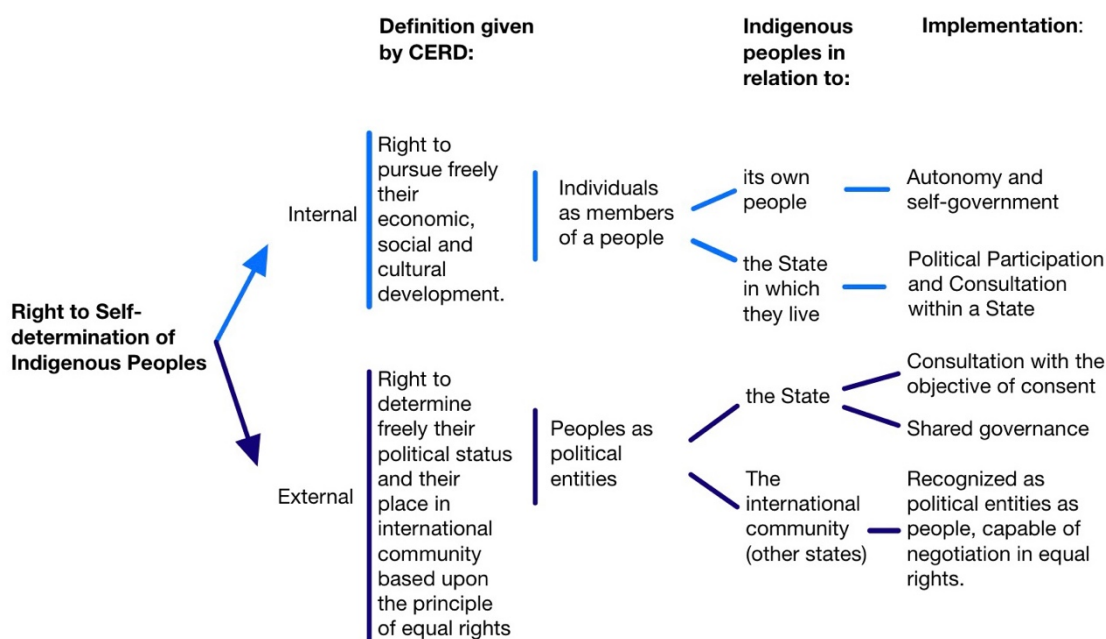
adoption and implementation of measures that may affect them (article 19), and to projects that may affect their lands, territories or resources (article 32).

Yet this does not diminish the importance of consent as an expression of the right to self-determination. The EMRIP, in its study on FPIC, taking the view of the former Special Rapporteur on the rights of Indigenous Peoples, James Anaya, notes that the objective to reach consent entails that the consultation process has a nature of negotiations towards a mutually acceptable agreement (para.16). Considering the above Larsen's statement with regard to the ILO Convention 169 as a framework to establish a mechanism for new State-Indigenous Peoples relationships, consent as a negotiating force can only be conceived together with the right to be consulted, the right to participation and the right of indigenous peoples over their lands, territories and resources (EMRIP, "FPIC" para.14). It is in this sense that the right to FPIC is the manifestation of the right to self-determination.

Conclusion

Now, bearing in mind what was already outlined in the previous chapter, indigenous sovereignty is not a concept of material domain but rather a relational concept. It is not only a political but also a social notion, representing the system of relationships of which the indigenous people and their communities are a part. In this sense, according to Bauder and Mueller (*supra*), this network of relations could be seen from two dimensions: regarding internal or external affairs. On the one hand, the first is linked to nationhood, meaning what it signifies for them to be part of their own nation. In this case, their sovereignty represents the relationship that an indigenous people have among themselves and within their own community. On the other hand, external affairs represent the relationship of the peoples with their territories and therefore the recognition and establishment of relationships with other communities or nations, thanks to the interdependence among them.

If these two dimensions of indigenous sovereignty are understood and translated into the terms of the right to self-determination, bypassing Westphalian notions of territoriality, this right would look as described in the Figure below.



This table draws on the relationship of the State-Indigenous People as part of the external dimension of the right to self-determination. This is because by freely determining its status as a political entity, it also establishes relationships with other political subjects, such as the State in which their territories extend. In this way, the external dimension of self-determination is capable of supporting the concept of indigenous sovereignty in relation to its external affairs. Thus, it gives a space to content indigenous sovereignty in international law.

As for the internal dimension of indigenous sovereignty, in the sense of its nationhood, corresponds to the exercise of its internal self-determination. This can be translated into the recognition of the autonomy and self-government of indigenous nations by the States.

Here it is important to distinguish between the internal self-determination exercised by indigenous communities as a people or nation and that exercised as a group of individuals (minorities) who are nationals of the State in which they live. This right to participate in political life and to participate in decision-making matters are rights as part of the self-determination of the independent State in which they inhabit. This

aspect of the right of indigenous communities is also shared by all citizens and it is the right to public participation that can be applied to the decision-making process in environmental matters that is grounded in article 25 of the ICCPR.

CHAPTER 3: RIGHT TO PARTICIPATION IN ENVIRONMENTAL MATTERS, RIGHT TO A HELTHY ENVIRONMENT AND NARRATIVES OF NATURE IN INTERNATIONAL LAW

It has been pointed out earlier that the Escazú Agreement is a relatively new international instrument since its adoption was in 2018 and its entry into force in April 2021. However, most of the principles it contains have already been in the environmental international and domestic law for some time.

During the early 1970s this was an issue discussed in the domestic level (Ebbesson, "Notion of Public Participation" 51). Recommendations to the governments were made in international environmental forums for promoting environment awareness and participation in the formulation of decisions (United Nations, *Stockholm Conference* 14; UN General Assembly 18). These UN documents did not have a significant impact on international law or public policy in the immediate future, yet they supported the growing international debate concerning environmental and participatory rights, which led to Principle 10 (Ebbesson, "Principle 10" 288–89). And so, it was not until the early 1990s when Public Participation reached attention in international law as a very important issue with the UN Conference on Environment and Development in Rio de Janeiro (UNCED) (Ebbesson, "Notion of Public Participation" 52).

The Principle 10 of the 1992 Rio Declaration been the basis, not only for Escazú Agreement, but also for the Aarhus Convention (*supra*). According this principle, "environmental issues are best handled with the participation of all concerned citizens at the relevant level" and proposes that at a national level the "States shall facilitate and encourage public awareness and participation"¹⁵.

¹⁵ The Principle 10 states as follow: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." (United Nations, *Río Declaration* 5)

Also noteworthy is the mention in the Rio Declaration of indigenous peoples as vital to environmental management and development, due to their knowledge and traditional practices (United Nations, *Río Declaration* 7). For this reason, Principle 22 of the Declaration calls on States to enable their effective participation in sustainable development¹⁶. Although Principle 22 was already a big step forward in the importance of indigenous peoples regarding the challenges of environmental protection, to "enable their effective participation" does not entail the same notion of consultation and free and informed consent previously analyzed.

The Rio Declaration was an open door to the democratization of public affairs in international law and policy-making, at a time when participation in decision-making and access to information were issues only part of domestic law (Ebbesson, "Principle 10" 289). However, while indigenous communities were considered by virtue of their traditional knowledge, their participation was not yet recognized as "peoples" as such, but rather as a minority. The right to autonomy over their territories was not yet reflected in the international environmental discourse.

Principle 10 can be summarized in its three main components: access to information, public participation and access to justice, for all concerned citizens¹⁷. Although these are interrelated and interdependent elements, due to its proximity to the rights of indigenous peoples to consultation and to free, prior and informed consent, the present research will focus on the second element.

Right to Public Participation and its rationale

Up to this point, public participation in environmental matters was taken as a principle within the international discourse on the management of environmental care, not yet

¹⁶ The Principle 22 states as follow: "Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development" (United Nations, *Río Declaration* 7).

¹⁷ This was an important change at the time, as prior to the Rio Declaration, most of the provisions on information exchanges were focused on exchanges between States (Ebbesson, "Principle 10" 289)

motioned as a right. Then, what is the justification behind public participation? For Ebbesson there are three main rationales: to improve quality in environmental decision-making, to enhance legitimacy and to reflect the adaptation of human rights in the environment protection context ("Principle 10" 289–90).

Regarding the first argument, public participation as a pillar principle in environmental management, is based on a technical-environmental necessity (Ebbesson, "Public Participation" 353). Due to opportunity for outside review and improvement that public participation brings to the table, it is possible to overcome some inherent problems of the type of activities that impacts the environment; such as the conflict of interest in the environmental assessments, how it would affect the activities of the population, and the promotion of innovative alternatives, as a product of the dialogue (Ebbesson, "Public Participation" 353).

As for the second rationale, public participation increases trust and acceptance of government decisions in environmental matters, legitimizing them as part of the popular decision (Ebbesson, "Public Participation" 352). It is noteworthy that legitimacy through the democratization of decision-making processes is precisely the product of granting freedom to the population to determine the manner of its development, which is translated into the substantive right to internal self-determination. This enhances the connection of the second rationale with the third.

In third place, public participation in environmental matters refers to the chance for the public to participate actively and engage in a variety of environmental decision-making processes (Ebbesson, "Public Participation" 351–52). In other words, it is the application of the prior right to political participation in the context of the environmental challenges of this generation. This is consistent with most human rights international instruments and treaties which have acknowledged the right to public participation in public affairs (Razzaque 60) as right related to a substantive right of self-determination.

The CCPR states that by virtue of the right to self-determination enshrined article 1(1) of the Covenant, peoples have the right to choose the form of their constitution or government, which is related to article 25, but distinguishes from it since article 25

deals with “the right of individuals to participate in those processes which constitute the conduct of public affairs” (CCPR, *General Comment 25*, para.2). Article 25 recognizes and protects three individual rights: to participate in the conduct of public affairs, to vote and be elected, and to access public service. According to the CCPR, “taking part [...] in bodies established to represent citizens in consultation with government” constitutes direct participation in the conduct of public affairs (*General Comment 25*, para.6), which also covers the right to public participation in the environmental decision-making process. In that sense, the right of public participation is a participatory and procedural right, and in the context of environment protection it is considered an instrument of “community empowerment” (Razzaque 58), as it is the right to political participation.

Up to this point, public participation in environmental matters remains a procedural right that is, so far, an accessory to the substantive right of internal self-determination. However, this procedural right has also been linked to various substantive human rights in the environmental context, such as the right to life, health or water (Ebbesson, “Principle 10” 298). This is because this right to public participation in environmental matters preceded and contributed to the consolidation of the human right to a healthy environment (Knox, “Right to Healthy Environment” 81).

Public Participation as way to Green Human Rights

As it was acknowledged by Knox, the right to public participation in environmental matters was progressively included in subsequent multilateral agreements (“Right to Healthy Environment” 81–82). Indeed, as this right grew in importance it was an essential element for the building of national, regional and international law and jurisprudence towards the human right to a healthy environment, especially in the universal system (Scopelliti, “A Human Rights-Based Approach to Climate Change” 118).

Needless to say, that the international Bill of Rights composed of the Universal Declaration of Human Rights (UDHR), the ICCPR and the ICESCR did not include the right to a healthy environment. According to Knox, this was a result of the fact that the

modern environmental movement emerged after the adoption of the Covenants in 1966 ("Right to Healthy Environment" 82). The only global human rights instruments that had explicit mentions of the environment were those related to indigenous peoples' rights, i.e. the ILO Convention 169 and the UNDRIP (Knox, "Right to Healthy Environment" 84). That is because of the subsistence relationship that indigenous peoples have with their territories and the natural resources within them. A relationship with the environment that evidently predates Western awareness.

Yet, not only the right to public participation, but also the other two elements of Principle 10, would need to be grounded in a substantive human right previously adopted in an international or regional human rights instrument in order to be justiciable within the regional or universal systems. In this sense, the right to public participation has been part of other rights such as the right to life, the right to private and family life, the right to health and the right to property¹⁸, etc. (Knox, "Human Rights" 787–89). Thus, the elements of Principle 10 were also used to "greening" general human rights (Scopelliti, "A Human Rights-Based Approach to Climate Change" 124). Indeed, in countries that ratified the Aarhus Convention, the European Court of Human Rights (ECtHR) applied the elements of Principle 10 developed in that instrument when interpreting general human rights within the European Convention on Human Rights (ECHR), in particular the right to private and family life. (*Di Sarno Et Autres v. Italie*; *Tătar v. Roumanie*; *Grimkovskaya v. Ukraine*).

At the regional level, given that the core human rights treaties generally do not explicitly contain the right to public participation in environmental matters, this right has been developed in the jurisprudence of their respective international regional courts. Thus, depending on the region, the right to public participation has been conceived as part of diverse human rights such as the right to respect for private and family life, right to property and right to health. Within the African region, the African

¹⁸ As previously mentioned, there is some confusion in the literature on the development of the right to public participation in environmental matters and indigenous peoples' rights such as the right to prior consultation. Therefore, it is important to note that the development of the Inter-American Court's jurisprudence on private property refers to the right to prior consultation and not to the right to public participation ("Public Participation" 362). The Inter-American Court develops the American Convention's right to private property in light of Convention 169 to recognize the rights of indigenous peoples, which are not explicit in the American Convention. This is precisely the error that this chapter attempts to clarify.

Charter on Human and People's Rights expressly includes the right to a satisfactory environment (Ebbesson, "Public Participation" 361–62), which reduces the need for greening other human rights as for the European and American regions.

Public Participation as part of the Human Right to a Healthy Environment

At the time of the adoption of the Escazú Agreement in 2018, the right to a healthy environment had not yet been recognized by the United Nations General Assembly as a human right. Hence the importance that both the Escazú Agreement and the Aarhus Convention explicitly recognize in their article 1 the right of every person of present and future generations to live in a healthy or adequate environment for health and well-being. Thus, these instruments develop the elements of Principle 10 in the framework of the right to a healthy environment, and as a procedural guarantee of this right. In particular, the Escazú Agreement replicates the recognition of this right in the region, which goes back three decades in article 11 of the Protocol of San Salvador in 1988. Although, given the limitations of this treaty in Article 19 (6), such right has not considered as justiciable in the Inter-American System of individual petitions. In this sense, in application of the Escazú Agreement, the right to public participation in environmental matters cannot be addressed without considering the human right to a clean, healthy and sustainable environment.

According to the Special Rapporteur on Human Rights and the Environment Factsheet, this human right contains substantive and procedural elements. On the one hand the rights to clean air, safe and sufficient water, healthy and sustainably-produced food, healthy ecosystems and biodiversity, a safe climate and toxic-free environments. On the other hand, the procedural rights include access to information, access to justice with effective remedies and the right to participate in decision-making in environmental matters -which is the focus of this research.¹⁹

¹⁹ UN Special Rapporteur on human rights and the environment, *The right to a safe, clean, healthy and sustainable environment. Factsheet*. Web. 07 Oct. 2022
<https://www.ohchr.org/sites/default/files/2022-05/Recognition-Factsheet-FINAL.pdf>

Despite its great importance and conceptual development, however, the human right to a clean, healthy and sustainable environment had not been recognized as such by the United Nations General Assembly until July 2022²⁰ and by the Human Rights Council until October 2021²¹. This recent recognition does not stand in isolation, on the contrary, it is finally an acknowledgement of the important progress made in the last decades by both at the multilateral level and, especially, at the regional level in the area of human rights and environment.

At the multilateral stage, the idea that environmental protection is strongly related to the enjoyment of human rights has been expressed by the UN General Assembly (UNGA) itself almost six decades ago (Knox, "Human Rights" 786). In 1968, UNGA Resolution 2398 XXIII "Problems of Human Environment" was adopted with the purpose of convening the United Nations Conference on the Human Environment in 1972. In the preamble of this resolution, the General Assembly notes the consequences of environmental pollution on "the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights, in developed countries".²²

As a consequence, the well-known Declaration of the UN Conference on Human Environment or Stockholm Declaration goes beyond the mere relationship between the environment and the "enjoyment of basic human rights".²³ Its Principle 1 refers to the right to "freedom, equality and adequate conditions of life, *in an environment of quality* that permits a life of dignity and well-being" (*emphasis added*), as a fundamental right of the *man*.²⁴

Knox mentions that subsequent UN Conferences on the environment and sustainable development have not used the same language as in the Stockholm Declaration

²⁰ UN General Assembly Resolution 76/300, "The human right to a clean, healthy and sustainable environment". 28 July 2022 A/RES/76/300

²¹ UN Human Rights Council Resolution 48/13, "The human right to a clean, healthy and sustainable environment". 8 October 2022 A/HRC/RES/48/13

²² UN General Assembly Resolution 2398 (XXIII), "Problems of the human environment". 3 December 1968 A/RES/2398(XXIII).

²³ United Nations, "Report of the United Nations Conference on the Human Environment" (5-16 June, 1972). Declaration of the United Nations Conference on the Human Environment.

²⁴ Ibidem.

(Knox, "Human Rights" 786). Neither in the 1992 Rio Declaration²⁵, nor in Johannesburg Declaration in 2002²⁶ nor Rio+20 in 2012, included similar wording²⁷. Although in 1987 the report of the World Commission on Environment and Development (Brundtland Commission) declared the right to an adequate environment for health and well-being as a fundamental right of every human being, that is a human right (Knox, "Human Rights" 786).

Behind the notion of Nature

In short, although the right to public participation is an extension of the right to political participation, and this in turn is strongly linked to the right to self-determination, it can be said that in its recent development the right to public participation in environmental matters is a procedural aspect of the right to a healthy environment. Nonetheless, this research points out that the latter right is a right that, although it is not included in a global human rights instrument, has been constructed over the years from a Western point of view.

Narrative of the Right to a Healthy Environment

The right of indigenous peoples to a healthy environment, although its recognition has been a great advance in international human rights law and has even been used by indigenous peoples as allegations in protests, etc., does not include the same conception that indigenous peoples have of nature.

As mentioned above, with Westphalian sovereignty brings the concept of a people's domination over its territory and resources. Here nature serves man from a material point of view. This conception is also translated in the right to a healthy environment. In words of Borras, this right implies that "nature is protected to satisfy man's needs"

²⁵ United Nations, "Report of the United Nations Conference on Environment and Development" (3-14 June, 1992). Río Declaration on Environment and Development. A/CONF.151/26/Rev.1 (Vol.1)

²⁶ United Nations, "Report of the World Summit on Sustainable Development" (26 August-4 September 2002). Johannesburg Declaration on Sustainable Development A/CONF.199/20

²⁷ In the first principle of the Río Declaration, proclaims that human beings "are entitled to a healthy and productive life in harmony with nature". Whereas in the Johannesburg Declaration, there is not mention about of a healthy environment as a fundamental or human right.

(qtd. in Guzmán Torán 22). It thus maintains the anthropocentric vision of law and transfers the relationship of superiority of the human being over the non-human of the Western world (Descola 22).

Having studied the process of decolonization, which was imposed and characterized by a Western-European perspective, it is evident that indigenous peoples have been left out of the international debate as political entities with equal rights among other peoples. This obviously includes a debate so important for their survival as climate change management and environmental protection. Hence, it cannot be denied that the process of development of international law today, and with it, to a large extent, the way in which human rights have developed, also carries with it this Western European and anthropocentric vision. However, the right to self-determination of peoples is no longer just an individual human right, since it originated as a political principle among the international community, it is a right which, if properly interpreted, can also include the worldview of indigenous sovereignty.

The relationship with the environment that is expressed in the right to a healthy environment maintains the concept called by Descola as naturalism. It is the guiding principle of Western cosmology and responds to "the belief that nature exists" and that "certain entities owe their existence and development to a principle foreign to the effects of human will" (Descola 226). That is to say, nature exists separately from human beings, with autonomy from them. The nature/culture dichotomy, between the non-human and the human, is part of this European-Western worldview (Descola 227). This is why in a Western context the identity of people and their culture is not necessarily linked to their environment or surroundings in a synergistic way.

It is not the purpose of this paper to downplay the importance that individual rights, such as the right to property -e.g. *Awas Tingni v. Nicaragua*- or the right of minorities to enjoy their culture -e.g. CCPR cases outlined in the previous Chapter- have benefited the self-determination of indigenous peoples. Nonetheless, it is important to emphasize that these rights not only reflect the relationship that indigenous peoples have with their territory and the environment that surrounds them (Guzmán Torán 23). The conception of sovereignty from the indigenous point of view, as it has also been shown previously in Chapter 1, is rather a system of relations, among the people as

an identity, with their territory and its resources and with other peoples. Indigenous sovereignty relates the people to nature -its territory and resources- not in a position of superiority and domination but in a notion of coexistence and cooperation. This is because the conception of the relationships established is not necessarily anthropocentric.

Indigenous Narratives about "Nature"

Following the ontologies developed by Descola, certain indigenous nations, as for example in Australia, at the moment of classifying the entities of the environment, do not separate human beings from animals and plants or water sources, etc. They develop their classification independently of the form that these entities have (animals, humans, rivers, etc.), thus making a group that is related to other groups formed in the same way. This is what Descola refers to as Totemism (225). As can be seen in this worldview there is no hierarchical relationship between humans and non-humans, but rather all these grouped entities share the same quality.

Many indigenous peoples, in contrast to Western naturalism, have an approach to their identity in which they do not have a dualistic relationship with nature, but a monistic one. For instance, for many of the native communities in the Amazon, such as the Achuar in Ecuador and Peru, or for those in the sub-Arctic region of Canada, human and non-human entities have the same characteristics and social attributes (Descola 221–22). This worldview is called by Descola as animism.

Thus, plants and animals possess a soul, thoughts and will and are no different from humans, being able to relate to each other. Not only do they have an interdependent relationship with nature, but they are a whole (Guzmán Torán 23). In this sense, what is known as "respect" for mountains, rivers, plants and animals is not based on the need for their usefulness for the life of human beings but is based on the fact that they are also subjects who live, act, withhold feelings and thoughts, and have the same value as the people. Animism is then understood as a "system of categorization of the sorts of relationships that humans maintain with non-humans" (Descola 226), i.e. not as a categorization of entities but of relationships.

It can be seen that the idea of nature is also a social construction (Descola 226). In naturalism the idea of nature or environment is an object of exploitation, while in other worldviews, it is the subject of social relationship. Consequently, when this is translated into the language of rights, not only humans would be subjects of rights but also non-humans or nature. It is here, in this ontology that the so-called *right of nature* makes sense, as it contains other meaning than the right to a healthy environment.

Ontological Plurality in International Law

Abyssal thinking in International Law

In international human rights law all these ontological frameworks have been overlooked because modern epistemology and modern law "represent the most consummate manifestations of abyssal thinking" (Santos 33). De Sousa Santos describes abyssal thinking as the separation of the epistemological universe by a line, which separates knowledge from the nothingness, the "non-existence" (31). In other words, nothing can exist on the other side of the line. In this sense, "popular, lay, plebeian, peasant or indigenous knowledges" are on the other side of the line where "there is no real knowledge", only mere beliefs (33). De Sousa Santos postulates that the abyssal lines were progressively constituted by the new imperial cartography. The cartography of the Treaty of Tordesillas between Portugal and Spain in 1494 and later on in the 16th Century the so-called "friendship lines", reflected that on one side of the Earth the principles of equality and sovereignty applied but on the other side this was non-existent (Santos 35).

This abyssal line can be seen during the very process of Westphalian decolonization. It is arguable that during the process of decolonization the lines began to blur in physical terms, and the concepts of Friendship, peace, truce and equality moved across the lines thanks to the principle of self-determination. Nevertheless, abysmal thinking persisted in international law. The Westphalian concept of territoriality kept other epistemologies, such as indigenous peoples' being considered less civilized and in need of integration towards development, on the other side of the line. As a result,

it has prevented other worldviews and knowledges on identity and nature from influencing the debate on human rights and more specifically on international environmental law.

Self-Determination as a way to overcome the abyssal thinking in International Law

The way to overcome abyssal thinking in international law is not through the juxtaposition of knowledge systems, without understanding the context or the antecedents -such as the case of the rights of nature in Ecuador-, but in the revaluation of the concrete interventions of society (Santos 60). The ecology of knowledge proposed by De Sousa Santos, considers that the hierarchies in the knowledge system depend on the context (60). He suggests the application of what he calls the precautionary principle, which is that the preference among forms of knowledge should be "given to the one that guarantees the highest level of participation of the social groups involved in its design, implementation and control, and in the benefits of the invention" (Santos 60). In international law, it is not enough with the mere participation and advisory role. To truly integrate the plurality of epistemologies in international forums, the power of negotiations depends of the recognition of political entities other than Western ones. The reduction of power asymmetry between peoples and nation-states, in international environmental policy can be achieved through the exercise of self-determination.

This research argues that the exercise of self-determination is what allows an epistemological plurality to be heard in both domestic and international law. It is worth highlighting what Santos considers the ecology of knowledge to be essential to overcome abysmal thinking. And in this sense, it is necessary to start from a point of acceptance that "no single type of knowledge can explain all possible interventions in the world" and therefore they are all incomplete in different ways (Santos 58)

Therefore, it can be said that legal concepts that come from different ontological systems, such as the right to nature and the right to a healthy environment contain different epistemological categories. On the one hand, the right to nature corresponds to an animist worldview, typical of the indigenous peoples of the Amazon. Although it

is an essential way of seeing the relationships in nature, it could not be taken as a human right. Human rights maintain an anthropocentric nature, as is the product of the dominant naturalistic cosmovision. However, it is the postulate of the present work, to show the necessity to pass the barrier of abysmal thinking, especially in the framework of the protection of the environment, in international law.

In both domestic and international law, this obstacle can only be overcome through the recognition of the external self-determination of indigenous peoples in the sense developed in Chapter 2. For instance, the right of nature could be added to the discussion of the environment not as a human right, but as part of a set of knowledges of indigenous peoples. Knowledges that for historical reasons has been neglected and now should have the same weight in the discussion and development of international law as the Western knowledge.

The only way to involve these types of cosmovision is to start with the impulse for an egalitarian co-presence and the incompleteness of knowledge (Santos 58). De Sousa Soto's concept of radical co-presence assumes that "practices and agents on both sides of the abyssal line are contemporaneous on equal terms". Here, De Sousa Soto (53) refers to knowledge co-existing and being equally relevant.

Applying this to international law, it must be added that knowledge should be equal not only in terms of contemporaneity but also in terms of power relations (Tennberg). International law is a legal correlate of the international relations of states, but in order to welcome other knowledges is necessary to be open to other non-state political entities. As has been established in the Charter of the United Nations, the principle of equal rights (co-presence) and the self-determination of peoples (the political recognition to be present) are the basis of friendly relationships among nations (knowledges). Which corresponds to the consequence of radical co-presence (the abolition of war).

In this sense, the fact that the self-determination of indigenous peoples has remained limited to its internal dimension has been an example of this abysmal line in international law. To overcome this situation, the political strengthening of indigenous peoples and the establishment of new types of relations between nation-states and

indigenous peoples, where the starting point is negotiation mechanisms, are necessary.

At the international level, as mentioned above, it is necessary for indigenous peoples to exercise their right to self-determination of their political status in the international community, as political entities, with respect of the principle of equal rights. This is especially true in matters such as the environment, which involves the treatment of their territories and where their sovereignty or existence may be affected.

At the State-Indigenous Peoples level, one way is to apply FPIC as a tool to balance negotiation power, since it is a strategic element that provides the possibility for consultation to reduce power asymmetries. One way to apply the right of self-determination of indigenous peoples in its external expression within the State in which they live, is the co-government through the national-building approach, and the shared sovereignty of the territories.

CHAPTER 4: RECOGNITION OF THE EXTERNAL SELF-DETERMINATION OF INDIGENOUS PEOPLES IN THE LATINAMERICAN REGION AND PERUVIAN ENVIRONMENTAL LAW

At Multilateral Level

Although, as mentioned by the Expert Mechanism (*supra*), there are already spaces at the transnational level where indigenous peoples participate in the United Nations system, such as the United Nations Permanent Forum on Indigenous Issues (UNPFII), this is an advisory body. There is no doubt that the UNPFII is a necessary space for indigenous peoples to exercise the external dimension of their right to self-determination, but it is clearly not sufficient to have a major influence on the design of environmental agreements. Even though in the framework of the Paris Agreement a Platform for Indigenous Peoples and Local Communities (IPLCs) was established, as noted by Gupta et al. over the years, the views of indigenous peoples have had a greater presence, yet a very marginal influence compared to NGOs and the business sector (Gupta et al. 233).

It is worth to consider that so far, the notion behind the right to a healthy environment, expressed in the nature/culture duality, has been reflected both in the UNFCCC and in the Paris Agreement. The current conception of REDD (Reducing Emissions from Deforestation and Forest Degradation) has brought with it the investment of large sums of money from the private sector in order to reach the "carbon neutral" goal. These investments have transferred the concept of Fortress Conservation to the Peruvian Amazon and with it, the eviction of native communities in areas (Greenfield).

At Regional Level: Commentaries on the Escazú Agreement

At the regional level, applying the De Sousa Soto's concept of radical co-presence in the design of a treaty, implies to approach the issue accordingly to its context. Therefore, the importance of indigenous peoples and their territories in the region must be considered.

The above lines have pointed out the existence of scientific evidence of the great role of IPLCs in environmental conservation, especially in Amazonian countries and Latin America in general. With respect to indigenous peoples' lands alone in countries such as Brazil, Colombia, Mexico and Peru, on average more than 92% of these indigenous peoples' forested lands constitute carbon sinks. According to Akhtar et al (5), emissions sequestered by IPLC forested lands are equivalent to around 30% of the National Determinate Contribution (NDC) goals of these countries for 2030. Even applying an alien concept to indigenous peoples, such as the NDC targets, has shown that indigenous peoples are important for forest conservation.

Particularly Peru would need to retire all its passenger vehicle fleet to compensate for the only the half of the emissions sequestered by the forested lands of Indigenous Peoples, yet over one third of them have been recognized by the state (Akhtar et al. 11). Only the IPLC lands that have some type of recognition constitute 34,81% of the national territory (Rights and Resources Initiative 7). The lack of legal acknowledgment of these lands has resulted in their exposure to deforestation caused by economic activities, such as illegal logging, mining, cattle ranching and agriculture, but also legal extractive investment and infrastructure projects (Walker et al.; Pacheco et al.).

Thus, it is necessary that regional environmental agreements recognize the self-determination of indigenous peoples and distinguish the rights they have by virtue of their self-determination. As discussed in Chapter 1, the presence not only of knowledge - such as Principle 22 enshrines - but also the sovereignty of indigenous peoples is essential in environmental matters.

Certainly article 9 of the Escazú Agreement has a novel and important distinction, the protection of human rights defenders in environmental cases, who in the region are mainly indigenous leaders. However, it makes no further distinction about the voice of indigenous peoples in Article 7, other than a mention of international obligations regarding the rights of these peoples in paragraph 15. The Escazú agreement, despite being in one of the most important and challenged regions due to this struggle between worldviews, sits on the other side of the abysmal line, without the capacity to make a

correct distribution of rights. The opportunity has been lost for the region to have a system of environmental participation that can differentiate the self-determination of indigenous peoples from the interests of civil society and its relevance in the discussion of environmental protection at the domestic level.

This is also a product of the lack of equity standards among peoples in the international community, which is why indigenous peoples are overlooked. It is the postulate of the present thesis that these political entities can not only be consulted for their knowledge in environmental matters, but also have power and pressure in the negotiation as party members of these treaties. An example of this is the permanent participation of Indigenous People in the Arctic Council. Based on the Arctic Environmental Protection Strategy (AEPS), the Arctic Council is an intergovernmental forum where the eight Arctic States are represented and the six non-governmental organizations representing the Arctic indigenous peoples and acting as Permanent Participants (Scopelliti, "Non-Governmental Actors and a Changing Climate" 62–63).

According to Scopelliti, Principle 22 of the Rio Declaration was a major influence on the development of the AEPS that invited Arctic indigenous peoples to be observers ("Non-Governmental Actors and a Changing Climate" 62). Transposing the concepts of the Ecology of Knowledge, it is true that Principle 22 is a way of recognizing what is on the other side of the abyssal line. However, it must be considered that it does not necessarily imply that the valuation of indigenous knowledge has the same weight as that of knowledge in order to maintain the radical co-presence.

This is consistent with Tennberg's argument that the step for Arctic indigenous peoples was the effect of the use of political power relations (268). For her, to move Arctic indigenous peoples from observers to a permanent decision-making participant status in the Arctic Council, was evidence of three sorts of power relations between the states and the indigenous peoples. Firstly, sovereign power, through the use of "people" or "peoples", secondly, disciplinary powers through the use of knowledges, and thirdly government power recognizing a broader concept that environmental issues (Tennberg 268).

At Domestic Level: Peruvian legislation

The Right to Public Participation in Environmental Matters

Authors like Tigre affirm that in most countries of South American region, multilateral environmental agreements have played an important role in outlining the domestic law (Tigre 1098). Nevertheless, in countries like Peru the major game changer -in particular on the subject of proceeding access rights in environmental decision-making – was the Free Trade Agreement between United States and Peru (Gamboa 102). In fact, the reason for the significant environmental institutional strengthening between 2006 and 2011, such as the creation of the Ministry of the Environment in Peru in 2008, was due to the FTA with the United States and the approval of the Peru LNG gas export project -Camisea II (Gamboa 102).

Thus, it is arguable that until the 2010s, the rationale of the state administration for large institutional environmental improvements has been primarily in order to promote private investment. In other words, the driver has been a predominantly economic growth and market expansion, and not necessarily an environmental or human rights approach. This becomes clearer when one observes the position of the state in the face of the socio-environmental conflicts that have erupted in Peru over the course of this young century. Instead of fulfilling its role as guarantor of the fundamental rights that emanate from the constitution and carrying out its purpose of protecting nature, it simply acts as a mediator between the company and the communities or citizens, in order to promote security and order for the economical actors (Gamboa 107–08).

One of the key pieces of legislation developed in the aforementioned context has been Law No. 28611, General Environmental Law (GEL) published in 2005. This law includes the express recognition of the right to a healthy, balanced and adequate environment for the full development of life, in its article 1. Also, in its chapter 4 it includes the extensive elaboration of access to environmental information, as well as the right to citizen participation. Beyond minor differences, which correspond to the time in which the Law was drafted, its provisions are very similar to those established

in the Escazú Agreement, including provisions regarding the participation of vulnerable people and indigenous communities.

Peru is a signatory State, but not a party to the Escazú Agreement, and a Member State of ILO Convention 169 since 1994. Bearing in mind the above, it should be clarified that the GEL is a legal provision prior to the Escazú Agreement and Law No. 29785, Law on the Right to Prior Consultation of Indigenous or Original Peoples recognized in ILO Convention 169 (Prior Consultation Law), published in September 2011. It is noteworthy that art. 71 of the GEL recognizes the knowledge of indigenous peoples, peasant and native communities in relation to the conservation and sustainable use of natural resources as Principle 22 of the Rio Declaration. Additionally, Article 72 recognizes the right of indigenous peoples to be consulted "preferably with a view to establishing agreements", showing the Peruvian State's position on FPIC.

Although the GEL records the right to citizen participation in a manner similar to the Escazú Agreement, socio-environmental conflicts constitute 64% of the 218 registered social conflicts (Defensoría del Pueblo 10). Considering that most of the social conflicts that involve indigenous communities are as a result of environmental issues, it is arguable that the problem, at least in the Peruvian context, is not one of public participation but rather of indigenous rights.

Right to Prior, Free and Informed Consent

The 2011 Prior Consultation Law and its Regulations approved by Supreme Decree No. 001-2021-MC, instead of using self-identification as a fundamental criterion to determine indigenous groups, both the Law and the Regulations add objective criteria such as being of direct descent from the original populations, maintaining the lifestyle and spiritual ties with the territory, etc. This reduces the scope for the recognition of these peoples and consequently limits not only in the exercise of their rights but also in the classification of their lands as indigenous territories in the exercise of their rights. Regarding the right to PFIC, both the Law and the Regulations explicitly mention consent. Yet, while the Law indicates it as the purpose of the consultation, its

Regulations reduce it to the "sincere desire to reach an agreement or consent" as a result of the consultation. Article 5 (d) of the Regulations indicates that if the purpose of the consent is not reached, the "entity promoting the consulted measure is empowered to issue it".

The problem in consultations with indigenous peoples is precisely the failure to reach an agreement, and this has been explicitly limited by Article 5 (d) of the Regulations, or the agreements are subsequently unfulfilled (Defensoría del Pueblo). The limitation of the right to self-determination through the objective of FPIC has great consequences on the social conflict in the country. Following Larsen's postulation (supra), it is evident that although the right to prior consultation is recognized, without a real application of the FPIC it does not fulfill the right to self-determination.

It is worth stressing that the right to FPIC presupposes a power relationship between the State and indigenous peoples, which is crystallized in the negotiations to reach the agreement. It is this power relationship that arises from the objective of reaching the consent that allows indigenous peoples to freely determine and consolidate their political status vis-à-vis the State in which they live. In this sense, the right to consultation is not sufficient to satisfy the self-determination of indigenous peoples.

This applies to the environmental decision-making, and according to what has been previously discussed, a rights-based approach to conservation in the Peruvian context must hold at least the right to FPIC.

Nation-Building Approach and Shared-Governance

This discussion also opens the possibility of considering other approaches as a way of exercising external self-determination of indigenous peoples within a State. In order to reconcile the acknowledgement of indigenous sovereignty and self-determination in situations of environmental conservation, Merino applies a "nation-building approach" to environmental conservation.

The well-studied case of the Ngarrindjeri Aboriginal Nation in Australia is remarkable as a way of understanding how the concept of nation-building would work in forest conservation. An indigenous nation that in concert with the South Australian Government has won in 2015 the Australian Riverprize for water management in the Murray River (International River Foundation). As it is mentioned by the International River Foundation, the Ngarrindjeri's Kungun Ngarrindjeri Yunnan Agreement (KNYA) was an innovating landmark. Thus, a participatory approach was used in order not only to involve the Ngarrindjeri aboriginal people but to develop institutional capacity building in wetland management for land owned by them. Noting that respect for the human rights of indigenous peoples lies in the recognition of their internal and external sovereignty based on their right to self-determination, it is arguable that one manner of understanding the so-called rights-based conservationism can be through a conservationism with a "nation-building approach".

CONCLUSIONS

1. The studies compiled in this research detail the importance of indigenous peoples and their territories for the care of the environment. These studies do not only include indigenous territories because of their high forest density and biodiversity, but also because the exercise of their sovereignty contributes to the management and sustainability of these lands. Why, then, is the influence of indigenous peoples in the negotiation of international environmental instruments, such as the Escazú Agreement, not greater?

2. This lack of influence of indigenous peoples on environmental law may be due to the different conservationist narratives held by both indigenous peoples and environmental policy makers. On one side of the spectrum is the approach of fortress conservation, which depicts the ideal of unspoiled nature, separate from humans. This comes from the nature/culture dichotomy held by a Western worldview. On the other side of the spectrum is conservationism held by indigenous peoples, which contains a yearning to exercise their ancestral sovereignty. But, what kind of sovereignty do indigenous peoples refer to?

3. Since indigenous sovereignty has not been further developed as such in law, this paper postulates an anthropological perspective to understand it. It is in this sense that the concept of Western or Westphalian sovereignty differs from indigenous sovereignty, in that the former is the expression of power and dominion over the population and territory. On the other hand, indigenous sovereignty is a relational sovereignty, it functions more as a way of expressing the complex relationships that indigenous people manage internally, with their people and their territory, as well as externally, with other peoples.

4. The expression of indigenous sovereignty can only be observed in international law through the right to self-determination of peoples. However, the road to the recognition of both internal and external self-determination of indigenous peoples has been a

history of struggle in the face of Westphalian sovereignty. The conception of territoriality has long limited the acceptance of the external expression of the right of self-determination of indigenous nations. That is, the right of indigenous peoples to freely determine their political status as a non-state political entity in relation to the nation-states at the international level and vis-à-vis the state within which these communities inhabit. Even today, the principle of territorial integrity prevents the recognition of this right, even at the domestic level.

This paper thus proposes a new way of classifying the attributes of this right in the context of indigenous peoples, in an attempt to align the relational conception of indigenous sovereignty with the right to self-determination. This new classification is based primarily on the need to balance the power relations for the external expression of indigenous nations' self-determination. It is also necessary for them to be recognized as political entities, not only by the international community, but also at the domestic level in the State in which they live. For the latter purpose, the right to FPIC can be used as an instrument of balance of power.

5. The question now is how to integrate these political entities into the international environmental discussion. For that we have to see whether the narratives behind the relationship between indigenous peoples and the environment can be covered by international law.

Guzman has studied the application of the right of nature in the Ecuadorian constitution and legal system, and postulates that the implementation of this right has not worked because it has been perceived and used as a resource of political rhetoric in Ecuador (83). Nevertheless, it is the position of this research paper that the right to nature and its potential in the international debate on the environment will not be considering, neither in the domestic law of the States nor in the international community, if indigenous peoples are recognized as political entities and based on their right to self-determination, respect for the principle of equality among peoples.

6. Therefore, it is possible to think that the ontological differences between indigenous peoples and international law in relation to nature are diametrically opposed. However, the best way to include this different knowledge of the world in international law is

precisely through the right of self-determination and respect for equality of rights among peoples, both in the international, regional and domestic spheres.

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