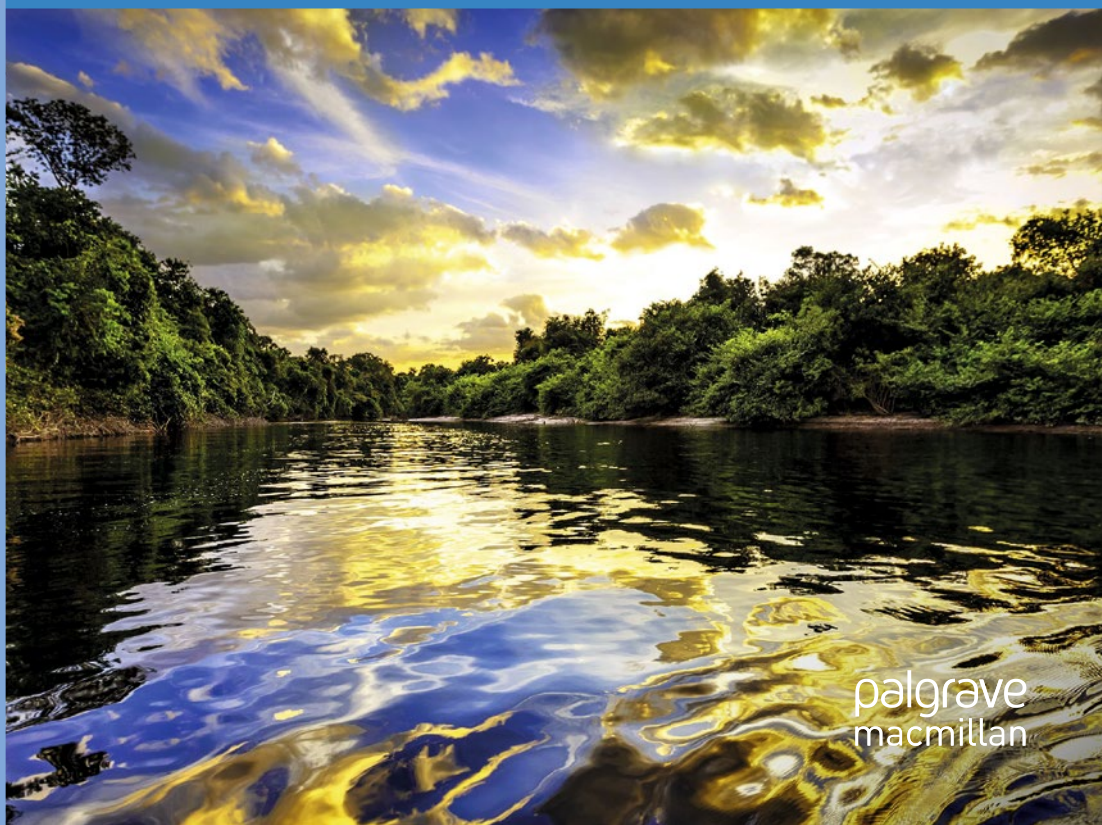
ENERGY, CLIMATE AND THE ENVIRONMENT

Indigenous Peoples and Climate Justice

A Critical Analysis of International Human Rights Law and Governance

Giada Giacomini



Energy, Climate and the Environment

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Foreword

When, on 13 September 2007, the United Nations General Assembly adopted by a large majority the Declaration on the Rights of Indigenous Peoples, it was immediately perceived that this was a matter of enormous historical importance. The Declaration was perceived as an instrument that began to relieve centuries of injustice, discrimination and dispossession of Indigenous peoples' lands, resources, freedom and even human dignity.

It is perhaps worth remembering that the Declaration of Independence of the US of 1776, known for its enlightening and comforting initial words, stating that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness", hides an often forgotten and obscure final part in which an indictment stands against the English King George III. Such indictment in reality represents an unaware confession of the crimes committed against the Indians of America: "He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian savages whose known rule of warfare, is an undistinguished destruction of all ages, sexes, and conditions".

It comes with no surprises, then, that the US was one of the four States which in 2007 voted against the adoption of the Declaration on the Rights of Indigenous Peoples (the other countries being Canada, Australia and New Zealand). But it is even more significant that since then, one at

a time, all the objecting States have withdrawn their vote against the Declaration. As a result, in conformity with the case-law of the International Court of Justice, today the Declaration on the Rights of Indigenous Peoples, as no longer contested by any state, reflects, until proven otherwise, international customary law obligations.

Almost a century has passed since 1923, when the Iroquois Indian leader Deskaheh went to Geneva, to the League of Nations, in the romantic and illusory attempt to have the Confederation of the Iroquois Six Nations accepted as a member of the organization. And today we can affirm that this century has not passed in vain, as it will clearly emerge from the present book. In fact, this book does not limit itself to analysing the normative and legal dynamics in existence, but it tries to verify their concrete effectiveness in the light of the practical application, not least the effects of climate change.

Such methodological approach is found not only in the aims and in the very structure of the book but also and above all in the modalities of the research conducted by the author who has alternated periods of study at the most authoritative international academic institutions to fieldwork among the Yanesha people in Peru. In short, the scientific data becomes existential and vice versa. The identification of the researcher with the object of the research, which, of course, also presents many risks that must always be kept under control through a rigorous research method, greatly expands the potential of the investigation, its ability to go beyond conventional knowledge and to reveal new theoretical horizons. This bet, full of unknowns and possibilities, has been accepted, perhaps even unknowingly (as often happens among young researchers), but, and this is the important fact, it has undoubtedly been won by the author.

In fact, unlike the academic literature of reference and perhaps even these same introductory lines, the work of Dr Giacomini has the fundamental merit of looking at the rights of Indigent peoples in a completely innovative perspective that enhances their ability to transform reality, both locally and globally. The author does not look at the past in an excessively remedial perspective, nor she looks at the future in a catastrophic key. Yet, she highlights such struggle in an historical present that is being repeated for hundreds of years. Indigenous peoples are considered not so much as predestined victims of Western capitalism in the

phase of internationalization, as the dominant narrative would impose, but as the fundamental actors of an extraordinary liberation path for the whole of humanity devastated by climate change and its feared catastrophic effects.

Moreover, the paternalistic logic that transfigures the native populations in "ecologically noble savages" is questioned by the author who avoids cliches and conventional readings towards interpretations certainly actualized and sophisticated: Indigenous peoples are not to be considered exclusively as guardians of the environment, because they themselves are strictly interconnected with Nature within a non-anthropocentric vision of the world. In short, they are neither the problem nor its solution, but they are involved in the problem *and* in the solution. Therefore, they must be considered as such by Western men who for centuries have declared war against the Planet and against Nature, in a word to our Mother Earth, in a crazy self-destructive project, so much so that several scientists share the belief that humanity has entered a new geological era called "Anthropocene".

Starting from these methodological and systemic premises, the book expresses all its potential when the discourse on Indigenous peoples encounters international climate change law and governance. Dr Giacomini is in fact able to reveal in a clear and convincing way two points of paramount scientific and political relevance.

The first point contests the traditional statement that, with reference to global forms of pollution, considers all states and all peoples (and also … all of us) "victims and responsible" at the same time. The case of Indigenous peoples confronting climate change impacts demonstrates exactly the opposite: they are sacrificial victims, that calling "innocent" is almost trivial, facing an existential threat caused by a mix of unsustainable practices implemented both at the local and global levels with the sole aim of achieving the maximum profit at any cost.

Such understanding is preparatory to the affirmation of the principles of "climate justice", which are the result of a much more radical rationale compared to the logic of "common but differentiated responsibility". Moreover, the principles of climate justice have deep legal implications due to their interlinkage with international human rights law, in its individual and collective dimension. This interaction between international

environmental and human rights law is two-sided (in the sense that the protection of human rights is enriched and deepened by the environmental dimension), not to mention "creative" and "transformative" in a juridical sense. Moreover, it is demonstrated, inter alia, by the very recent and ultra-innovative positions of the Parliamentary Assembly of the Council of Europe and the United Nations Human Rights Council on the affirmation of a right "to a safe, clean, healthy and sustainable environment". This right, far from the "right to a healthy and satisfying environment", object of criticism for its derivation from an anthropogenic vision of the relationship between man and nature, is characterized by its collective and intergenerational dimensions which the Western juridical culture could not even have imagined without the essential contribution to the Indigenous cosmovision to the conceptualization of such dimensions.

The second line of critical and prospective reflection emerging from the book is the result of the study of both complex and articulated Indigenous phenomenology. It focuses on the response that the international community should give to the announced global catastrophe induced by climate change. While it is clear that international efforts to achieve a limitation of harmful emissions have been delayed and that they are, at present, totally inadequate, this finding must not lead to hasty conclusions, dictated by chronic pessimism, in the sense of adherence to a security approach to climate change or the construction of increasingly impenetrable barriers to prevent the invasion of the feared, uncontrolled and growing flows of environmental refugees.

As Indigenous peoples teach us as survivors of America's post-discovery genocidal capitalism in all its manifestations and evolutions, the united and shared response of the international community must be based on continuous adaptation to the effects of climate change, within the framework of the core principles of "climate justice" and "common but differentiated responsibility".

After all, Beck himself, shortly before his untimely death, has theorized that from the epochal changes introduced by Anthropocene can derive some "emancipatory effects".[1] More specifically, the "anthropological

[1] U. Beck, Emancipatory Catastrophism: What Does it Mean to Climate Change and Risk Society?, in Current Sociology, vol. 63(1), p. 75 ss.

shock" generated by the widely mediatized scenes of disaster leads the international community to acknowledge that preventable environmental disasters inflict unsustainable suffering on the poorest and most vulnerable communities. In this liberating scenario, the existential threat of a serious disaster (*rectius*… his imagination) provokes a sense of anxiety-inducing urgency and a powerful desire for social change, that, in turn, can result in normative horizons generating "common goods".

In the sense indicated by this "liberating catastrophism", international climate law should consciously pass from a first historical phase dominated by the (largely failed) attempt to contain harmful emissions to a second phase focusing on adaptation to the negative consequences of climate change. From the reading of this book, it will emerge in a clear way the positive implications of the contribution of Indigenous communities to contrasting climate change, especially in terms of replicable concepts and practices at a global level, in the context of this epochal change on which depends our common future.

I have followed from the beginning the development and the elaboration of these new theses, sometimes remaining astonished, but always struck by their genuine originality. As a result, it is as if I had accumulated a scientific debt towards the author. For this reason, this Foreword is not a gift, but a restitution.

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Contents

Abbreviations

ACA	Environmental conservation area *Áreas de Conservación Ambiental*
ACHR	African Commission on Human Rights
ADRIP	American Declaration on the Rights of Indigenous Peoples
AE	Green Climate Fund's Accredited Entity
AfCHPR	African Charter on Human and Peoples Rights
AfCmHPR	African Court on Human and Peoples Rights
AIDESEP	Interethnic Association for the Development of the Peruvian Rainforest
APIB	Indigenous Peoples of Brazil
CAF	(Cancun Adaptation Framework)
CBD	Convention Biological Diversity
CEACR	(ILO Committee of Experts on the Applications of Conventions and Recommendations)
CERD	(UN Committee for the Elimination of Racial Discrimination)
CESCR	(UN Committee on Economic, Social and Cultural Rights)
COP	(Conference of the Parties)
ECOSOC	(United Nations Economic and Social Council)
ECtHR	(European Court of Human Rights)
EIA	(Environmental Impact Assessment)
EMRIP	(Expert Mechanism on the Rights of Indigenous Peoples)
EPA	US Environmental Protection Agency
FAO	(Food and Agricultural Organization)
FPIC	Free Prior and Informed Consent
GCF	Green Climate Fund
GEF	Global Environmental Facility
GHG	(GreenHouse Gas)

GNCDPA	(National Coordination Group for the Development of Amazonian Peoples)
HRC	(Human Rights Council)
IACmHR	(Inter-American Commission of Human Rights)
IACtHR	(Inter-American Court of Human Rights)
IAITPTF	(International Alliance of the Indigenous and Tribal Peoples of the Tropical Forests)
ICC	(International Criminal Court)
ICCAs	Indigenous and Community Conserved Areas
ICCPR	(International Covenant on Civil and Political Rights)
ICERD	(International Covenant on the Elimination of Racial Discrimination)
ICESCR	(International Covenant on Economic Social and Cultural Rights)
IE	(Green Climate Fund Implementing Entity)
IFIs	(International Finance Institutions)
ILO	International Labour Organization
IPCC	(Intergovernmental Panel on Climate Change)
IPOs	(Indigenous Peoples' Organizations)
IPP	Indigenous Peoples' Policy
IRM	Independent Redress Mechanism
IWGIA	International Work Group on Indigenous Affairs
MATs	(Mutually Agreed Terms)
MINAM	(Peruvian Ministry of the Environment)
MINEM	(Peruvian Ministry of Energy and Mining)
MOSOP	(Movement for the Survival of the Ogoni People)
MRTA	*Movimiento Revolucionario Tupac Amaru*
NDA	(Green Climate Fund's National Designated Authority)
NDCs	National Determined Contributions
NGO	Non-Governmental Organization
OAS	Organization of the American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
PFII	UN Permanent Forum on Indigenous Issues
PIC	Prior and Informed Consent
PROFONANPE	Peruvian Trust Fund for National Parks and Protected Areas
REDD	(Reducing Emissions from Deforestation and forest Degradation)
REDD+	(Reducing Emissions from Deforestation and forest Degradation, plus the sustainable management of forests, and the conservation and enhancement of forest carbon stocks)
RoN	(rights of nature)
SDGs	Sustainable Development Goals
TEK	Traditional Ecological Knowldege
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

UNESCO	United Nations Educational Scientific and Cultural Organization
IUCN	International Union for the Conservation of Nature
UNFCCC	United Nations Framework Convention on Climate Change
UNFPA	(United Nations Populations Fund)
UNGA	United Nations General Assembly
UNICEF	(United Nations International Children's Emergency Fund)

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Introduction

[T]he responsibility of researchers and academics is not simply to share surface information (pamphlet knowledge) but to share the theories and analyses which inform the way knowledge and information are constructed and represented.

—Smith (2021, p. 17)

Setting Up the Scene: An International Perspective

Indigenous peoples nowadays are still facing dramatic impacts that constitute the legacy of the colonial period, a legacy that is indeed still unfolding despite the fact that the historical imperial rule has come to an end in the past century. This is due to a variety of reasons, among which the combination between settler States' interests, corporations and extractivism seldom framed as best interest of the nation. On top of this, anthropocentric climate change is already affecting Indigenous communities around the globe by causing severe impacts which alter the normal functioning of ecosystems and associated natural resources. Furthermore,

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Indigenous peoples are being systematically targeted by settler States, corporations and other private actors when they try to defend their rights to land, or, more generally, their human rights.

In fact, according to the 2021 International Work Group for Indigenous Affairs (IWGIA), in 2020, at least 331 Human Rights Defenders were killed—44 of them women. More precisely, 26% of these defenders were working specifically on Indigenous Peoples' rights and 69% of those killed were also working on land and environmental rights (IWGIA, 2021). In Brazil, the continued attack to Indigenous peoples by the Bolsonaro government has led to the filing of a statement to the International Criminal Court (ICC) of the Hague by the Articulation of Indigenous Peoples of Brazil (APIB). The statement, presented in August 2021, demanded that the court examine the crimes committed against Indigenous peoples by President Bolsonaro since the start of his term in January 2019, with special attention to the period of the COVID-19 pandemic. APIB demanded justice for what they believe constitutes a case of crime against humanity and inhuman treatment perpetrated by the Brazilian government, a government that is also unable to investigate, prosecute and judge the current government's conduct.[1] Indigenous peoples' rights are being infringed all over the world, with no exception within the different settler States' contexts, resulting in dramatic loss of lives, territories and resources.

The current environmental, climate and human rights crisis is also evident in recent developments of official UN institutions. The UN Human Rights Council (HRC) in Geneva adopted resolution A/HRC/RES/48/14 establishing a new Special Rapporteur on the promotion and protection of human rights in the context of climate change. This decision is relevant insofar as it promotes the significance of the interlinkage between climate change impacts and the violation of substantial human rights, which is an aspect that, of course, is crucial to this book. Another relevant decision in such matters comes from a somewhat counter-hegemonic institution, the International Rights of Nature Tribunal. In the last hearing, held simultaneously to the 16th Conference of the Parties of the

[1] See also Cultural Survival website at https://www.culturalsurvival.org/news/indigenous-peoples-sue-bolsonaro-hague-genocide-and-get-ready-mass-mobilizations-brazil, last accessed September 2022.

United Framework Convention on Climate Change (UNFCCC) in Glasgow, the verdict condemned the countries and governments of the COP (Conference of the Parties) as responsible for "ecocide, ethnocide and genocide" and for having been directly involved in predatory projects and extractivist policies carried out in the Amazon territories, which have resulted in expropriation, death and irreversible environmental damage.[2]

Another recent institutional development that involves Indigenous peoples in the climate change context is the recently adopted Glasgow Climate Pact. This document has been already criticized by non-governmental organizations (NGOs), activists and environmental organizations as it does not meaningfully address the current climate crisis, for example, with regard to the phasing-out of coal.[3] Indigenous peoples are mentioned in significant provisions of the pact, for example, in Article 62 with reference to Loss and Damage, and in Article 93 which "Emphasizes the important role of indigenous peoples' and local communities' culture and knowledge in effective action on climate change, and urges Parties to actively involve indigenous peoples and local communities in designing and implementing climate action".[4]

Despite the existence of multiple international human rights treaties, environmental treaties and related remedies—some of which specifically dedicated to Indigenous peoples—gross human rights violations at the expenses of Indigenous peoples still occur in settler States. The Indigenous quest for justice is still ongoing for what concerns human rights, climate change and access to land, because the existence of an international norm does not imply that violations will not occur. Therefore, there is a need to investigate what lies beyond the law, what are the causes that determine such injustices directed at undermining Indigenous peoples' existence

[2] For more information on this case, consult the International Rights of Nature Tribunal at https://www.rightsofnaturetribunal.org/tribunals/glasgow-tribunal-2021/, last accessed September 2022.

[3] The Glasgow Pact calls for a phase-down of coal, and phase-out of fossil fuels. This is the first time that coal has been explicitly mentioned in any COP decision. However, the final wording of the pact was forced by a group of countries led by India and China, advocating for the use of "phase-down" instead of "phase-out". The initial language on this provision was much more direct. It called on all parties to accelerate phase-out of coal and fossil fuel subsidies. Despite the less direct language, the inclusion of language on reduction of coal power is being seen as a significant movement forward (Sinha, 2021).

[4] Glasgow Climate Pact, FCCC/PA/CMA/2021/L.16, November 2021.

and what are the inherent flaws in the international legal system for what concerns human rights, climate change and the environment.

The present work aims at demonstrating that there still are several gaps in both international law and practices aimed at the protection of Indigenous peoples' rights when it comes to climate change governance. The book aims at doing so through a twofold process. On the one hand, it adopts a climate justice perspective that highlights current problematics in addressing climate change and Indigenous participation in law-drafting and environmental governance. On the other hand, it highlights that these problematics are inherent to the very structure of the contemporary human rights systems from a critical legal perspective. The quest for justice is still ongoing and much needs to be done for an authentic realization in practice of a legally pluralistic society where Indigenous peoples' cosmovision are part of the legal system alongside Westernized legal approaches.[5] Such realization requires Westernized legal systems to take a step back in order to realize a paradigmatic shift in environmental law, where humankind is conceptualized as an existential continuum with the other natural elements.

This work wishes not only to confirm the legal validity of the current achievements of international law to address Indigenous peoples' issues but also to suggest new ways forward to tackle current challenges in the climate change context and in international human rights law. The interpretation through critical legal thinking of climate change and human rights as an issue of justice is central if we want to challenge the current biodiversity and climate crisis. A justice interpretation of climate change

[5] Cosmovision refers, in general terms, to the worldview of a human group as a key concept for understanding otherness and delving into diversity between cultures. The cosmovision of a people is a structured vision in which the members of a community coherently combine their notions about the environment in which they live and about the cosmos in which they place human life. This world view represents one of the elements that identify each community and that manifest themselves through a set of beliefs, customs and traditions handed down by their ancestors that make up their own culture. In Indigenous cosmovision, the human being is not the centre of the universe but symbolizes just an element of the necessary balance with Mother Nature. However, each Indigenous people have their own cosmovision: consequently, it is understood that there is not a single Indigenous cosmovision but that there are different cosmovision belonging to each Indigenous people. However, some common principles governing Indigenous cosmovision have been identified. Among them, the sacredness of the territories, the extreme relevance of spirituality and the conception that all elements of the world have life stand out (Reguart Segarra, 2021, pp. 70–72).

relates to considerations of ethics, historical responsibility and political inclusion, aiming at not only addressing the current dramatic problems of severe environmental impacts but also re-addressing past wrongs through the enforcement of participatory rights. Therefore, the present work has been characterized by justice interpretations throughout its development, with the aim of promoting the need for a radical shift in global governance, namely from an environmental to an ecological approach in international governance.

This shift is challenging, and a considerable part of it can be realized only through a deep understanding of Indigenous peoples' holistic knowledge and views. Thus, the major focus of this work is on participatory governance, participatory parity and the possibilities provided in this sense by provisions of international human rights law and their limits. The focus of the different chapters constituting the present work, from environmental law to Free Prior and Informed Consent (FPIC), aim at demonstrating that inclusive and meaningful participation of Indigenous peoples is key to realizing this epistemological paradigmatic shift and addressing historical injustices. However, the present book also aims, at the same time, to warn academics and practitioners against the utilization of colonial approaches that would result in the idealization of Indigenous peoples as the ultimate bearers of knowledge that will save us all from environmental destruction, by denouncing the antithetical narrative that is often adopted in climate change law and governance that poses Westernized countries and Indigenous peoples at the opposite side of the spectrum.

A rightful interpretation of current challenges faced by Indigenous peoples in the context of climate change cannot disregard the climate justice discourse. This interpretation might be (and often is) narrated in terms of a vulnerability discourse, since Indigenous peoples are depicted as pertaining to one of most vulnerable populations to climate change impacts by international organizations and legal scholarship. This vulnerability is due, on the one hand, to the fact that they live in, and they are strictly dependent upon the conservation of fragile ecosystems, which are being disrupted by climate change impacts. On the other hand, their vulnerability reflects the multiple facets of political, economic and social injustices they have been traditionally subjected to. However, rather than

focusing on an approach solely based on a victimization of Indigenous peoples, this book would consider the centrality of fostering a decolonial approach in both legal theory and practice that would finally enable Indigenous nations to work on climate resilience alongside settler States. This work aims at doing so through the application of justice theories to the climate change realm, demonstrating how power imbalances, environmental racism and patterns of subjugation are related to the unequal burden of distribution of climate change impacts and to the marginalization of Indigenous peoples in international climate governance.

Thus, this book reconstructs the notion of climate justice starting from an analysis of the main theories that inform the fundamental basis for the conceptualization of the climate justice discourse. A climate justice discourse should deal with issues of distribution (and redistribution), political participation, recognition and capabilities. Such theoretical premise is necessary to construct a thorough climate justice discourse that is coherent and can provide the basis for a further analysis of international law and governance. Therefore, the theory of justice that this work proposes takes into consideration participation and cooperation with Indigenous peoples and other marginalized groups in order to achieve an inclusive and fair model of governance. Such participatory approach might take place with Indigenous peoples-led initiatives in environmental conservation, similarly to what is being done within the Convention on Biological Diversity (CBD) context with the Indigenous and Community Conserved Areas (ICCAs) initiative. They are the holders of relevant knowledge and customary law systems that can contribute to the definition and planning of adaptation strategies and biodiversity conservation. However, much work has still to be done in order to realize such inclusion and effective and meaningful participation.

Indigenous peoples' rights are protected by both international human rights and international environmental law frameworks. The latter has evidenced the importance of Indigenous knowledge systems in the global fight against climate change and in fostering biodiversity conservation. International human rights courts have contributed to the enforcement of Indigenous peoples' rights, whereas settler States have repeatedly violated these rights. Such contributions have been significant especially in the Inter-American and African justice system. The application of

international human rights law to the lawsuits brought by Indigenous communities has resulted in the general enforcement of the protection standards granted by instruments such as the International Labour Organization (ILO) Convention 169. It has also led to the application of more stringent requirements such as those concerning FPIC. The latter is considered a key instrument for the participation and inclusion of Indigenous peoples in national and global governance. The participation of Indigenous peoples at local and international levels are key issues that are driving the demands of Indigenous peoples at present.

The present work wishes to point to the fact that while international human rights law provisions are the main instruments through which Indigenous peoples are protected and remedies provided, there are important flaws in the very conceptualization of human rights. Such flaws are inherent to the fact that human rights were born into a Western philosophical tradition, the same tradition that informed the doctrines of discovery and subjugation of Indigenous peoples. It is not circumstantial then that the protection of human rights of specific categories (e.g. Indigenous peoples and other people considered vulnerable, such as women and children) required the creation of ad hoc instruments. Thus, human rights carry an intrinsic paradox, together with a promise of inclusiveness that is realized through the practical work of courts, quasi-judicial mechanisms and other bodies connected to the enforcement of human rights. However, through the critical analysis of international human rights law presented throughout the book, it is possible to evidence how human rights might not reflect in certain aspects Indigenous cosmovision and philosophies, especially for what concerns the conceptualization of the relationship between humankind and nature. In Westernized legal system, this relationship is markedly anthropocentric, in stark contrast with Indigenous cosmovision. The Western anthropocentric conceptualization of the law strongly influences legal approaches to climate change, embodied, for instance, in the so-called human rights-based approaches to climate change.

Political participation of Indigenous people in the international decision-making processes is key to address these imbalances in the theorization of human rights. Therefore, the present work provides evidence of the level of political participation of Indigenous organizations at the UN

level. However, it argues against the excessive State-centred model of UN negotiations that envisage participation of Indigenous representatives only if they are constituted as an NGO—and only with observer status. Indigenous peoples are often constituted as nations, having their own legal and social systems, and they should be allowed to participate in negotiations as such. An example of this political exclusion is represented by Reducing Emissions from Deforestation and forest Degradation, plus the sustainable management of forests, and the conservation and enhancement of forest carbon stocks programmes and its narratives around forests, which are seen as a commodity to enhance carbon stocks and realize profits out of the carbon market. This narrative represents the marginalization of Indigenous peoples' culture and cosmovision in climate governance.

As previously affirmed, the present work dedicates special attention to the issue of Indigenous peoples' participatory rights and FPIC. This part of the book is presented both through a theoretical approach and through the analysis of case studies. From a theoretical perspective, the difference between consultation and consent has proved to be fundamental when it comes to the respect of Indigenous peoples' rights to self-determination and property. The model of non-consensual acquisition of ancestral lands and territories typical of the colonization era still resonates today since settler States tend to give away Indigenous territories in concessions to firms without properly obtaining consent from affected communities. Indigenous peoples have demanded to be consulted before concessions or projects are implemented. This particular need resulted in the development of an emerging body of law at both the international and the domestic level that deals with consultation and consent issues. The effective realization of the consent requirement would indeed represent a paradigmatic shift from the consideration of Indigenous peoples as objects in international law to subjects of legal title upon territories and to self-determination. This approach is also relevant for what concerns the implementation of projects in Indigenous territories sponsored by international programmes and funds, such as the GCF.

Public international law recognizes the obligation to obtain consent from Indigenous communities as the key to operationalizing their right to self-determination. International organizations, UN agencies, international banks and funds have responded to the need to implement FPIC by adapting their own regulations. However, the consultation approach,

which has long been adopted by States' practice, entails consultations, negotiations and establishment of partnerships but without vesting Indigenous peoples with the power to withhold their consent and effectively influence the outcome of decision-making processes. Inter-American Court on Human Rights (IACtHR) went against this trend, contributing to the enforcement of the obligation for States to consult with Indigenous peoples on any legislative or administrative measure that might affect their rights.

The book gives evidence to the fact that Indigenous peoples have expressed their views and critiques in relation to the emergence of FPIC requirements. In their opinion, it should not only be regarded as a right but mainly as a process of constant dialogue between native communities and governments, aimed at addressing long-standing issues of power asymmetries between settler States and Indigenous peoples. They also pointed out that in this constant endeavour for the inclusivity and respect of Indigenous culture, the realization of their effective right to self-determination should be the key element to be addressed.

The essential elements constituting climate justice theory, participatory rights, environmental and human rights and self-determination rights of Indigenous peoples are consistently addressed in the present work in order to advocate for a paradigmatic shift in global international governance. The ultimate goal of this work is to create a theoretical basis, to be translated into governance and policies, that would ultimately foster effective Indigenous participation in the decision-making of climate policies and legislation. Such participation is founded on the effective respect by settler States and private actors of other essential elements such as Indigenous sovereignty over their lands and political, economic and cultural self-determination.

Another challenge evidenced in the present work focuses on climate litigation as a tool for addressing environmental injustice. Climate litigation might serve as an important instrument to strengthen climate governance and to enforce States' obligations in terms of emission reductions, especially with the progression of the so-called science of event attribution. This work considers the role of human rights-based climate litigation as a means of providing redress for breaches committed by settler States against Indigenous peoples' rights. However, critical elements such

as the difficulties in accessing justice systems for Indigenous peoples are also put in evidence together with the positive contributions of regional and international means of redress in a climate justice perspective. Indigenous peoples' climate litigation suits presented before international courts and UN human rights bodies are characterized by the utilization of a human rights-based approach to seek remedies for environmental injustice. The Inuit, the Athabaskan and the Torres Strait Islanders Petitions are the current existing lawsuits brought by Indigenous peoples in the category of climate litigation on a human rights basis. Starting from the Inuit Petition, which was not successful, this work subsequently analyses the other two claims under the light of climate justice, evidencing how flaws present in an excessively Westernized-centred system in international human rights law have the potential of influencing the outcome of jurisprudential decisions.

In light of these considerations, the present work wishes to highlight how different epistemological approaches to environmental governance are key to realizing an important shift characterized by the re-definition of the relationship between humankind and nature. Legal philosophies represented by Rights of Nature—that can be also framed as Earth Jurisprudence—might be informed by Indigenous epistemologies and cosmovision. While some of the current legal discourses focus on contesting the meaning of the attribution of legal personhood to nature, Earth Jurisprudence carries the possibility to realize a re-thinking of Western and Westernized law systems, including climate change law and governance. Such a rethinking and questioning is useful in a climate justice perspective because it challenges the epistemological conceptualization of the law by de-constructing and re-constructing the relationship between humankind and nature in a way that is akin to Indigenous cosmovision. Climate change, as the ultimate embodiment of anthropocentrism in the deployment of human actions (and inactions) which damage our planet, requires a radical rethinking of the role of humankind as agent and a repair of the broken relationship with nature through a legal philosophy that imparts moral—and practical—limits to human action.

Book Methodology

Conducting research on issues that regard, directly or indirectly, Indigenous peoples requires cultural sensitivity, care and attention. Indigenous peoples have traditionally been at the centre of research that wanted to fragment, use and reproduce their knowledge in order to gain some advantage, framed as innovation, research advancement or a benefit for all humanity. It is obvious, then, that Indigenous peoples have built mistrust towards researchers and practitioners, also because research is generally conducted following Westernized standards and conceptualizations, leaving no space for Indigenous standards for doing research. Universities and research institutes are not exonerated from the Westernized colonization and influence. Power is also administered through research and education, and scholars need to be aware of the message they are—indirectly—carrying with them when pursuing their research objectives, especially when conducting community-related work.

Indigenous peoples have been quite vocal that they are not so content that Western researchers take inspiration from them and their social and environmental movements without taking into account and respecting their holistic relationship with nature. The question here, in my opinion, is if we—Western scholars and practitioners—have the actual capacity to understand such differences in ethical ontologies, if we are committed to trying to switch our epistemological paradigm in order to embrace a different perception of the relationship between humankind and nature. This question is complicated, and this is the reason why through this book, I wish to challenge the hegemonic, Western ideas of environmental and human rights law.

For these and related reasons, the first thing I had in mind when writing this book was to create something that could be useful for advocating Indigenous peoples' rights within the current legal paradigm. Unfortunately, as demonstrated in this book, the Westernized way (e.g. litigation) is the main resources available at the moment to pursue

climate justice.[6] Therefore, the strong focus adopted in this book on FPIC and participatory rights as a means to address climate injustices is made specifically to address and inspire advocacy of Indigenous peoples' rights. Another important objective I had in mind was to evidence the flaws in Westernized legal thought that is at the very basis of the contemporary international human rights system. By presenting the law unadorned, and by challenging the very conceptualization of the law, my objective is to invite legal scholars to reflect about the origins of the law itself and not to take for granted the contemporary normative system that is at the genesis of human rights and environmental protection. This book is an invite to an aware self-reflection, to changing our Westernized-centred perspective when conducting legal research and to opening ourselves to the relativization of our legal thinking in the processes of law-making. Of course, such objectives require the adoption of a specific methodology.

I believe that when conducting research that engages with Indigenous peoples, colonialism and current injustices, it is important to clarify our position as (Western or Westernized) researchers and spell out clearly our intents when conducting such a research.[7] This is an approach that is rarely found in academic writing, but it is demanded from Indigenous peoples since research has traditionally been intertwined with colonial practices of subjugation (see generally Smith, 2021). Research—or its methods—is never objective, but it reflects a precise positioning in the political, legal and academic realm. There is no such thing as a disinterested, unbiased, neutral way of doing research. Rather, research reflects the legal and political framework of the particular geographical—and geopolitical—environment where it is originated and conducted. From the methods of analysis adopted in a work, it is possible to determine where does a researcher stand. In this book, my intent is to use Westernized methodologies of research to deconstruct, criticize international law in a

[6] However, other important initiatives such as the International Rights of Nature Tribunal are emerging. For more information on the past processes footnote 2.

[7] This is because even an Indigenous researcher can adopt Western methods to conduct research. As a consequence of colonization, perpetrated by European nations before, and settler states after, Westernized education is the prevailing method in schools and universities.

decolonial perspective. This is because as an Italian researcher, my education has always taken place in Westernized contexts, which have heavily influenced my *forma mentis* through a rationalistic, positivistic-derived way of reasoning—although I grew up within an educational context which has positively influenced my perception of the interlinkages between humankind and nature. However, the main objective of this book is to convey a message that deals with the importance of shifting our Western-centred perspective and embrace the fact that such a perspective is artificial, it has been created through colonialism, neocolonialism and genocide of Indigenous peoples.

Therefore, the research methodology adopted in this book wishes to position the present work in the field of critical legal studies and critical legal thinking. In fact, it aims at doing so by analysing theoretical and practical challenges to the very conceptualization of contemporary international human rights law, governance and communities' participation in decision-making through the application of different but correlated research strands. Critical legal thinking is in fact a useful methodology to understand law and its theoretical underpinnings under a new light, and this is particularly useful when approaching the research objective of the book: proposing a theory of climate justice that duly takes into consideration issues of protection of Indigenous peoples' rights and the relevant contribution of Indigenous peoples to environmental governance.

Before delving into the research methodology, a brief consideration on the overall objective of critical legal studies (CLSs) is due insofar as they reflect certain aspects correlated to the research methodology of the book. The CLSs movement dates back to the 1970s in the US, while comparable groups and organizations were also active in Europe. Such movements presented a diverse environment in which theoretical diversity could be expressed without laying down a universal method or theory (Fitzpatrick & Hunt, 1987). Even though such movements presented an intrinsic diversity in their manifestations, their common ground can be considered as defined by the importance of theoretical and methodological concerns in legal studies as opposed to the generalized orthodox legal scholarship. They are generally based on a critique of liberalism which implies the investigation of the inherent flaws of a legal system which aims at solving societal problems through the institution of objective

rules. Thus, CLSs demonstrate that liberal legal approaches offer an answer to social conflict providing a legal result which reflects the imbalances of power present in a society, and the parallel affirmation that liberal legal theory constitutes a universal value. CLSs, on the contrary, wish to contest this pretended universality, and they do so through the application of different methodologies and theoretical considerations (Hunt, 1986).[8]

Thus, the present work wishes to posit as a critique of international human rights law in the context of climate justice and related issues concerning Indigenous peoples. Legal instruments are analysed through special lenses which take inspiration from the CLSs methodology. These aspects unfold primarily as a theory of climate justice and a consideration of critical approaches to liberal legal theory. Secondly, critical approaches are applied through an historical perspective to the generation of the law, in particular by taking into consideration how international law developed a result of colonial practices; it then focuses on the link between imbalances of power and marginalization of Indigenous peoples in negotiations, climate governance and decision-making as a result of the colonial legacy. These aspects are evidenced through the analysis of critical aspects in the conceptualization of human rights, taking inspiration from the work of legal scholars such as Baxi and Grear, and the application of their theoretical framework to issues surrounding Indigenous peoples and climate change. This approach is useful to understand how and why Indigenous peoples have been traditionally excluded from decision-making in climate governance, and it has the objective to suggest ways in which participation can contribute to achieve climate justice. An important feature of this methodology consists in reflecting on how the figure of Indigenous peoples have been constructed and narrated in climate governance. While the purpose of this work is not, of course, to deny the important role of Indigenous peoples as environmental conservationists,

[8] CLSs have taken inspiration and applied different types of legal philosophies, such as Marxist studies and feminist studies. For example, in the early production of CLSs studies, Horwitz focused on doctrinal issues related to private law, while Klare and Stone focused on labour law (Horwitz, 1977; Klare, 1978; Stone, 1981). Other early authors of critical legal scholarship have dealt with civil rights (Freeman, 1978) and welfare rights (Simon, 1978), as well as more theoretical debates in jurisprudence (Kennedy, 1976; Unger, 1983), feminist issues (Mackinnon, 1982), and law and economics (Kelman, 1979).

it aims at evidencing the risks contained in depicting Indigenous peoples as our saviours from environmental destruction, in a dangerous new fashion of the "noble savage" that continues to affirm the old differentiation between Westernized, rational, white people, and "traditional", "undeveloped" Indigenous peoples.

The methodology that characterizes this book goes beyond theoretical conceptualizations and analysis. It also adds to the theoretical critique very concrete and actual aspects concerning Indigenous peoples and climate justice. The affirmations put forward in relation to climate justice and its theoretical underpinnings are further explained through the presentation of case studies and actual examples that demonstrate what climate injustice means in practice. This is done through the presentation of several practices: Indigenous participation in international decision-making, incorporation of international standards in national law (e.g. Peruvian consultation law), redress of human rights violations and States' and corporate accountability, international court cases and relevant climate litigation cases.

In order to present both theoretical and practical aspects, this book draws upon a great variety of sources authored by legal scholars, practitioners, NGOs, body of experts and scientists, governments' reports, case law of national and international courts, Indigenous declarations and law, and national legislations. The language and geographies of the resources used is either in English, Spanish, South American or Italian. Given that this book is characterized by particular features, that is to say a theoretical framework coupled with practical examples and cases, different types of audiences may find it useful. In fact, this book is dedicated to legal scholars, social sciences experts, students, Indigenous and non-Indigenous NGO personnel, Indigenous leaders and advocates for climate justice.

Finally, a brief consideration on what this book does not include. Because of its focus on international human rights law, the book does not analyse aspects correlated to intellectual property rights intertwined to Indigenous knowledge, nor it considers aspects akin to World Heritage sites connected, for an instance, to Indigenous sacred lands. Such aspects, which are important and relevant to Indigenous peoples, are extensively treated by other legal scholars who have dedicated their research to such issues (as an instance, see Drahos, 2014; Oguamanam, 2006; Dagne,

2015; Apaydin, 2017). Thus, the focus of this book rests predominantly within international human rights law and human rights aspects present in international environmental law.

Community Research Methodology

This book, in Chap. 1, wishes to contextualize community research conducted at the time of my PhD studies which was contained in the dissertation thesis. This research can be framed as "community research", insofar it focused on building an intimate, human space defined within the boundaries of the Yanesha territory adjacent to the Yanesha reserve and the Yanachaga-Chemillen National Park. My intention in producing this type of research within the context of PhD studies was to document social injustices (in this particular case, climate injustices) and helping to create space for advocacy of Indigenous peoples' rights.

The hypothesis of the community research project conducted at the time of my PhD studies was framed as "Indigenous peoples living in the Amazon area in Peru, despite their minimal contribution to global greenhouse gases emissions, are being impacted by the negative effects of climate change. This constitutes a case of climate injustice". Such type of research follows the sociological explanatory framework which traditionally leads to an explicative structure of the phenomena analysed. In other words, this model clarifies the given empirical conditions through existing theories (Statera, 2002, p. 319; Collins, 1989). In practice, the result of the research can be simply framed as a confirmation of the interdependence between the variables "Indigenous peoples" and "climate injustice". The causal relationship between the two variables elucidates the general proposition asserting the connection and frequent dependence between the fact of "belonging to an Indigenous community" and "being affected by climate injustice". Thus, research framed in this sense can be defined as a *verification* of the given hypothesis.

As a method to verify this initial hypothesis, I decided to get in contact with Indigenous communities which belong to the Yanesha ethnic group, also known as Amuesha, politically organized in the FECONAYA federation since 1981. The Yanesha people hold legal title on territories since the 1970s, when the *Ley de Comunidaded Nativas* was enacted (Caminha

de Souza Ribeiro, 2014). Interviews framed as dialogues were the means of interaction with Yanesha representatives. There are several reasons why this was the preferred methodology. First, for practical reasons. It would have been problematic to administer written questionnaires with closed answers. Indeed, the last available data regarding the literacy rates among Yanesha people affirms that almost 10% cannot read or write.[9] Therefore, an oral interaction might have been the most appropriate mean of collecting information. Secondly, an approach to research based on dialogue and active listening to the words of people I met would have allowed to collect information based on the representatives' perceptions of climate change, and not framed in Western scientific terms. Although the anthropological approach of engaging with people's stories as a means of understanding their culture and reality is not widely accepted in legal research, I firmly believe that in an Indigenous context, this is one of the possible paths to follow (Seidman, 2006).

In engaging directly with Yanesha people, the research aim was to understand their lived experience of climate change and the meaning they make of such experience, gaining access to the community's understanding of the environment. Before getting to the point of being introduced to the communities, I completed an extensive literature research to get to know their history and customs. Few academic authors have dedicated their research to the Yanesha people, while there is lack of specific demographic information about the communities (Smith, 2006). The only demographic and anthropologic statistics accessible are available in the Peruvian database of Indigenous peoples,[10] the INEI database[11] and the Oxapampa district website.[12] This lack of information, constituted a

[9] The last available data on the alphabetization of Yanesha communities dates to the 2007. See also: INEI, Censos Nacionales 2007, Resumen Ejecutivo, available at *inei.gob.pe*.

[10] Base de datos pueblos indígenas originarios, at *bdpi.cultura.gob.pe*.

[11] INEI, Censos nacionales 2017, at *censos2017.inei.gob.pe*. The INEI database does not offer specific information regarding Yanesha people. It is possible, by selecting the filter "por su costrumbres y su antepasados usted se considera" and the filter "región Pasco", where Yanesha communities live, to have the statistics of people who consider themselves as Quechua/Aymara; Amazon native; Other indigenous origin; afroperuvian/afrodescendant; white; mixed; other. According to the INEI database, more than 10,000 individuals in the Pasco region consider themselves as Amazonian native. By applying the filter "lengua con el que aprendiò hablar", the 0.55% of people (485 individuals) living in the region learnt Yanesha as first language.

[12] Municipalidad Provincial de Oxapampa, at *peru.gob.pe*.

challenge for the determination of the best way of interaction. Therefore, the interview modalities I used were aimed at establishing a human relationship and having a dialogue with open-ended questions, a sociological model also called semi-structured interview, where the Indigenous knowledge of the environment would be at the centre of our interaction.

For the purposes of the investigation on climate change impacts, it was desirable to get in contact with Yanesha representatives in their day-to-day context. In fact, people's behaviour and narratives become meaningful and understandable when placed in the very context of their lives (Seidman, 2006). Of course, this approach presents risks and challenges. For example, I believe that no matter how researchers define themselves—investigators, students, visitors—we are entering delicate ecosystems and diverse societies where people live in a totally different way compared to the societies of the Global North. For this reason, collaborating with an NGO that has worked for many years in the communities has helped me in establishing a human relationship with the people I got to know. I have shared meals with Yanesha families, which constituted an integrative behaviour. It helped me in building the human relationship and trust I was looking for in my experience in the Amazon.

Getting to know the Yanesha communities was made possible, thanks to Chirapaq, the Peruvian Indigenous NGO that appointed me as visiting researcher in October and November 2018. Chirapaq concluded a cooperation agreement with FECONAYA, with the aim of fostering the development of local communities and the empowerment of Yanesha women.[13] I joined Mabel Lopez Cruz, the Chirapaq researcher that accompanied me during fieldwork, in the context of a project geared towards women empowerment, participating in meetings with Yanesha leaders.[14] Thus, participants in the research were chosen within the context of this project. Otherwise, the realization of the research would not have been possible, since the area is of problematic access and it would have been extremely difficult to reach the communities alone—meaning,

[13] Chirapaq, *Chirapaq y el pueblo yanesha ratifican alianza*, 2018, available at *chirapaq.org.pe*.

[14] Chirapaq, *Yanesha women revive traditional dyeing with innovative designs*, at *chirapaq.org.pe*.

without being introduced by person they trusted, and without knowing the road and where to find the community leaders.

I have visited communities located in San Pedro, Santo Domingo, Santa Rosa de Pichanaz, Nueva Aldea, Loma Linda—Laguna, Shiringamazú and its three sectors (San Luis, Progreso and Pueblo Libre), Siete de Junio—Villa America, Santa Rosa de Chuchurras and Buenos Aires. I have interviewed a total of 12 community leaders and/or representatives. Each visit lasted about one hour and a half. I mainly listened in silence during Mabel's work, until I was kindly invited to join the conversation and asked the leaders if they were willing to take part in the investigation. I deemed sufficient the number and information gathered from these interviews after the 12th. First, because they constituted a sufficient quantitative sample (few communities of the Palcazu area were not encountered, for example Alto Agarto).[15] Second, the answers were quite homogeneous and consistent, and information tended to be repetitive, demonstrating that the impacts of climate change in the area were felt in the same way by different communities.

Interviews or dialogues with open-ended questions followed this pattern: Mabel introduced me to the Yanesha representatives, explaining why I came there, my job at the university and my research areas. After this introduction, I reiterated my research purposes, how the data would be collected and managed, and informed them about the anonymity of their answers and that the audio files would be deleted once the interviews were processed. No personal data such as name, gender, and age was collected for the purposes of the research since the research objects were the impacts of climate change in the Yanesha reserve areas and the collection of personal information would not add relevance to this purpose. Dialogues were lasting 15–20 minutes, depending on the length of their answers. Mabel was sometimes acting as participant in the dialogues. Given her knowledge of the territory and Yanesha customs, I found her intervention appropriate and an important help in framing the dialogue with Yanesha representatives.

Finally, the data was managed first by transcribing the interviews. Punctuation was added in order to re-create the verbal material. The next

[15] A full list of communities is available on the Oxapampa province website, at *peru.gob.pe*.

step was paraphrasing and translating concepts into English, by summarizing the words of the participants and labelling the different concepts expressed, for example, “climate change effects”, “consequences”, “governmental actions in relation to the problems expressed”. The third step was analysing and exercising judgement about what was significant in the transcripts for the ends of the research. Finally, the data was organized in tables.

The community research in the Amazon has confirmed that Indigenous communities are taking on the burden of climate change consequences despite their environmentally sustainable lifestyles. This study allowed me to outline the present climate change impacts in the area and the significance they have for Yanesha communities. Such study can contribute to the advocacy for Yanesha people’s rights, highlighting the need for adaptation and mitigation policies. In the present book, this work has been recontextualized within a broader discourse around the colonization of the Peruvian Amazon, and the difference in the narratives regarding the forest put forward by Indigenous peoples and the government. This approach is coherent with the objectives of the book, insofar it gives relevance to the differences between a Westernized conceptualization of the Amazon as a territory which needs to be colonized and developed, and Indigenous cosmovision of the forest as a sacred place that connects the Yanesha with their ancestors.

Outline of the Book

This book consists of seven chapters, including introduction and conclusions. The research project embodied by the present work was conceived as aimed at defining the interaction between different legal clusters and political philosophy in order to reconstructing a theory of justice that has practical implications. This aspect is evident in the structure of the book, which follows a path towards the affirmation of a theory of climate justice with a strong focus on participatory rights, starting with a theoretical framework and following with legal and political implications.

Chapter 2 revolves around the notion of climate justice as the lenses through which we should read the following chapters and interpret issues

around Indigenous peoples and climate change. The meaning of climate justice is constructed through the most well-known political and legal theory of what does constitute justice and applied to the climate and environmental framework. It considers theories of justice built around discourses of distribution, recognition and participation as a justice discourse and how these theses can be applied to climate change. It then considers the so-called theory of the capabilities approach in the context of environmental justice and how this theory can be translated into a human rights theory in the realm of environmental law. This chapter aims at critically re-discussing narratives around recognition as a means by which settler States and post-colonial societies have given voice to Indigenous peoples in climate governance. In fact, Indigenous customary law associated with Indigenous knowledge has increasingly been recognized at the international level as a means by which humanity can be cope with the negative effects of climate change and environmental destruction. The chapter wishes to set the ground for critically rethinking the role of Indigenous peoples as heralds of ancestral knowledge not, of course, by diminishing the role of their knowledge and cosmovision around the environment and natural resources, but because of the role that international governance has attached to them as potential saviours of human-made environmental destruction. This chapter aims at warning us that this type of discourse, translated into legal instruments and practices, remains in the traditional colonial dichotomy that separates Indigenous from settlers, traditional from modern, nature from humanity.

The second part of Chap. 2 presents a case study based on the community research conducted in the Peruvian Amazon with Yanesha Indigenous representatives. The current situation of Yanesha people is put into perspective through a colonial and neo-colonial approach, evidencing, on the one hand, that a critical approach to the conceptualization of "vulnerability" of Indigenous peoples to climate change is needed, and, on the other hand, how their ancestral forest can be intended as sacred landscape, or as a resource to be exploited and made productive. After this introduction, the chapter enumerates the multiple challenges related to climate change that Yanesha people are facing. This information is the result of the fieldwork conducted in November 2018.

Chapter 3 is centred around the first legal cluster that the book analyses in a critical perspective. This chapter focuses on the interaction between climate change and human rights by taking into consideration critical legal approaches on the conceptualization of human rights. It then focuses on the challenges related to substantive rights, participatory and procedural rights in climate change governance. It then delves into the conceptualization of specific environmental rights—for example, the right to a healthy environment, that are also relevant for climate change impacts, considering how such impacts are the indirect cause of human rights violations.

Chapter 4 is specifically dedicated to the protection of the right of Indigenous peoples in international law and governance, with a particular stress on the participation of Indigenous peoples in climate change-related fora. International law is analysed through the lenses of how doctrinal of colonization and decolonization have shaped norms and behaviours and addresses the important difference between what constitute individual rights vis-a-vis collective rights. Indigenous peoples hold, unlike other minorities, specific collective rights that are linked to their peculiar ontologies and philosophies around property of ancestral lands and environmental resources. The second part of the chapter revolves around the dynamic of participation of Indigenous peoples in international context, and it draws upon concrete examples of exclusion and inclusion of Indigenous peoples in climate change and biodiversity decision-making.

Chapter 5 delves deeply into participatory rights of Indigenous peoples for what regards local decision-making, conservation governance and Indigenous customary law and knowledge associated to genetic resources. It aims at doing so by analysing two different legal frameworks: consultation and FPIC, and biodiversity conservation and the role of Indigenous customary law. In this first part, the chapter points at the operationalization of consultation and FPIC as key means to avoid injustices when it comes to the use of genetic resources associated with Indigenous knowledge, and to the implementation of green development projects in Indigenous lands and territories. The chapter presents relevant examples and case studies which focus on Peru, both for what regards consultation law and practices and the role of climate finance in shaping projects that

involve Indigenous peoples and their lands. It addresses the role of the Independent Redress Mechanism (IRM) of the Green Climate Fund (GCF) for the safeguard of Indigenous peoples in the case of disrespect of consultation and FPIC procedures established in the GCF policy sector.

In the second part of the chapter are analysed issues concerning biodiversity conservation, the role ICCAs play in helping emissions reductions and biodiversity conservation and the current status of Indigenous customary law. Matters related to the REDD+ programme and the utilization of forests and sacred lands to achieve emissions reductions objectives are analysed in a critical perspective from the point of view of Indigenous peoples.[16] In fact, the classical conservation paradigm prescribes that environmental conservation must be realized in the total absence of human beings from forests or other natural areas. This approach has resulted in the forces evictions of Indigenous peoples for conservation objectives. However, this conservation paradigm is now changing, thanks to other collaborative, participative approaches such as Indigenous and Community Conserved Areas (ICCAs), geographically delimited spaces where Indigenous knowledge and practices are part of the environmental protection governance. Lastly, the chapter addresses issues of Indigenous customary law and legal pluralism as the maximum embodiment of the participatory parity in settler States' law and governance.

Chapter 6 focuses on the strand of climate justice represented by access to legal means in the case environmental human rights have been violated. It provides a description and conceptualization of climate litigation as an instrument to achieve climate justice through redress of human rights violations connected to negative impacts of climate change. This chapter presents a focus on climate litigation related to Indigenous peoples, evidencing potentialities and flaws of case law brought before international human rights courts and commissions in a climate justice perspective.

Finally, Chap. 7 argues for the need of critically re-thinking human rights-based approaches to climate change, by allowing a paradigmatic

[16] The extended name of the programme is "Reducing emissions from deforestation and forest degradation, and foster conservation, sustainable management of forests, and enhancement of forest carbon stocks".

shift towards Earth Jurisprudence and Rights of Nature (RoN); however highlighting some important critical considerations, we should take into account when affirming that RoN are inextricably linked to Indigenous cosmovision, knowledge and beliefs. In its very final part, the chapter suggests a new approach to environmental law and governance represented by the right of ecological integrity, which can be further conceptualized in future research.

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Climate Justice as an Interpretative Approach

Introduction

This chapter lays the theoretical basis that constitutes the interpretative approach for this book, or, in other words, the framework of reference the reader should bring in mind when reading and analysing the next chapters. It first conceptualizes the notion of climate justice starting from a general definition of climate justice and provides an analysis of Indigenous climate justice movements and their claims, introducing the importance of realizing a decolonial environmental governance. The chapter then provides an analysis of the theoretical underpinnings that contributed to the theorization of climate justice, like the distributional paradigm and the capabilities approach. The intent here is also to provide a critical overview of the aforementioned justice theories that were developed in Western knowledge systems for what regards the current paradigm of climate injustice towards Indigenous peoples. The chapter does so by providing a critical examination of the politics of recognition, and by considering how other-than-Western theories, such as decolonial theories, have an important role in shaping an Indigenous climate justice discourse. The critical aspect of recognition is especially present in the last

G. Giacomini, *Indigenous Peoples and Climate Justice*, Energy, Climate and the Environment, https://doi.org/10.1007/978-3-031-09508-5_2

section of the first part of the chapter, where the politics of "recognition of Indigenous knowledge" are criticized in light of their neo-colonial approach to Indigenous laws and wisdom. In the second part of the chapter, following the same critical approach, the narration around a supposed "vulnerability of Indigenous peoples to climate change" is challenged through consideration of the active role of Indigenous peoples in the global fight against climate change and colonial and neo-colonial injustice. These aspects are then explained through a case study represented by the injustices suffered by Yanesha Indigenous peoples of Peru from both colonization practices and climate change impacts. Through this presentation, the chapter aims at highlighting how climate change impacts and the logic inherent to colonization are the two faces of a same coin.

The Notion of Climate Justice

Indigenous Climate Justice

The term "Indigenous peoples" refers to the 400 million persons worldwide who, prior to a period of invasion, colonization or settlement, exercised collective self-determination according to their own cultural and political systems. Indigenous peoples, notwithstanding the colonization processes they have been subjected, continue nowadays to exercise collective cultural and political self-determination within territories in which they live.[1] In fact, Indigenous peoples are distinct nations within existing societies, and such social, political and economic systems feature their own structures of government, law, justice, social organization and ontological conceptions of the surrounding environment.

[1] As an instance, consider the 2015 Wampis Statute, an Indigenous people of Peru, with which the Wampis nation declared its government to be autonomous under the principle of self-determination. See also: Estatuto del Gobierno Territorial Autónomo de la Nación Wampis, En memoria de nuestros ancestros y por nuestro derecho a la libre determinación como pueblo y nación., at https://nacionwampis.com/autonomia-en-accion/#estatuto, last accessed February 2021.

Climate change is believed to affect Indigenous and marginalized communities worldwide more than it affects other people. This is because climate change is generally understood as its impacts exacerbate the already difficult living conditions of Indigenous communities. This affirmation, frequently used in academia, in international governance and by Indigenous leaders themselves, often points to the fact that Indigenous peoples rely on sustainable lifestyles that are strictly dependent on the environment and its natural resources. The changing in meteorological patterns, increased heating and rainfall are threatening those peoples who rely of subsistence means to provide food, water and housing. Climate change impacts should raise at least some ethical questions, given that they disproportionately affect those who have not significantly contributed to the accumulation of global Green House Gases (GHGs) emissions in the atmosphere.[2]

Nowadays, those countries who are emitting large amounts of GHGs are perfectly aware of the consequences of their actions. The scientific community has been warning the world since decades and, despite the climate change denialism of certain political authorities, most States are still opting for fossil fuel-based economies and investments, while the solution to climate change should be a dramatic and quick lowering in the GHGs emissions.[3] These choices have an important impact on the choices of other people to live in a healthy and safe environment and, most importantly, have an impact on those peoples that did not contribute to climate change—especially native communities and developing countries. Skillington defines these pollution practices as "practices of domination", outlining the global imbalances of power that led to the arbitrary interference of some countries and people over the choices of others (Skillington, 2010, pp. 20–25).

Indigenous peoples—like the Yanesha, an Indigenous community living in the Peruvian Amazon whose case is widely discussed later on in the

[2] United Nations, Department of Economic and Social Affairs, at https://www.un.org/development/desa/indigenouspeoples/climate-change.html#:~:text=Indigenous%20peoples%20in%20Africa's%20Kalahari,negatively%20impacted%20traditional%20cattle%20and, last accessed March 2021.

[3] This is what is arguing the civil society movement Extinction Rebellion. Website: https://rebellion.global/, last accessed February 2021.

chapter—are increasingly becoming not able to enjoy their traditional livelihoods and access to territories and ancestral practices because of the injustices of climate change and colonization. The global pollution of vital resources perpetrated by industrialized countries through the use of a capitalistic approach to nature and the commodification of the atmosphere has created a great prejudice in the enjoyment of basic human rights for native communities and other vulnerable people. These acts of deliberate and aware pollution can be interpreted in the climate justice discourse as a "deliberate interference with the realization of capacities of the individual" (Hansungule, 2014).

Climate justice then

> seeks to introduce ethics into policymaking and foster a more human-rights and equity-conscious perspective in climate change responses. A climate-justice agenda embraces a conscious recognition of the development imbalances brought into relief by climate change. It further recognises the fact that the distribution of climate change effects is inherently unjust, with the most devastating costs exacted upon the poorer developing nations on the global economic periphery, rather than on the industrialised creators of the problem. […] climate justice seeks to combine the climate change discussion with human rights in a way that is equitable for the most climate-vulnerable groups. […] this means not just thinking of the political and moral issues inherent in tackling climate change as questions of distributive justice, but rather as a matter of avoiding (i) worsening climate change by continuing to emit enormous quantities of GHGs and (ii) hindering development for poorer nations in the methods we find to reduce those emissions. (IBA, 2014, p. 46)

Moreover, the problem of climate change is deeply intergenerational. Once emitted, the greenhouse gases (GHGs) molecules remain in the atmosphere for years and years contributing to the warming of the planet for decades and centuries (the average time spent by a molecule of carbon dioxide in the atmosphere is 5–200 years).[4] Intergenerational equity is one of the main concerns of climate justice, which seeks to bring into the

[4] The Guardian, How long do greenhouse gases stay in the air?, 2012, available at https://www.theguardian.com/environment/2012/jan/16/greenhouse-gases-remain-air#:~:text=Between%2065%25%20and%2080%25%20of,chemical%20weathering%20and%20rock%20formation, last accessed February 2021.

discourse the issue of the "intergenerational buck passing" and "the tyranny of the contemporary" in relation to the problem of the ecofootprint crime and atmospheric pollution we are passing to our next generations (Gardiner, 2011a, 2011b).

The ethical considerations of climate change reflect the imbalances of power between the so-called developed and the non-developed countries, in other words, between those who produce the so-called luxury emissions and those who are emitting GHGs just at the basis of subsistence.[5] Thus, the sources of climate change reflect the underlying infrastructure of our current model of civilization. Combatting the "Capitalocene"[6] or the "Chthulucene"[7]—the current geological era based on the alterations of nature and ecosystems due to our economic model of exploitation built on fossil fuels—means attempting to change substantially our society. Limiting the emissions and forbidding the extraction of fossil fuels would have an unprecedented negative effect on the global economy, effect that the greatest polluting States want to avoid. The mainstream strategy adopted by the most polluting countries is to assume a status quo bias, since the implementation of *real* mitigation measures would mean a profound alteration of the current economic system and societies' lifestyles (Baer, 2017).

The climate injustice problem is also evident in the distribution of the "ecofootprint". It is possible to recognize the harmful, criminal aspect of the "ecofootprint crime". Ecological footprint measures the human impact on the planet in terms of productive ecosystems required to support the consumptive demands of any defined human population,

[5] Seventy-five percent of the world annual CO_2 emissions come from the industrialized countries in the "Global North". Climate justice then requires understanding this inequality, linking it to the underlying inequalities rooted in human health, power and privilege.

[6] The term "Anthropocene" was coined by Jason Moore. In his words, "the Capitalocene signifies capitalism as a way of organizing nature—as a multispecies, situated, capitalist world-ecology" (Moore, 2016, p. 6).

[7] This term is used by Donna Haraway, which configurates the problem of the Anthropocene as fundamentally a problem of thinking humanity's place in the web of life: "It matters what thoughts think thoughts." Chthulucene requires sympoiesis, or making-with, rather than auto-poiesis, or self-making. This means that what is needed is learning to cope with the issue of living and dying together on a damaged earth. The Chthulucene is "made up of ongoing multispecies stories and practises of becoming-with in times that remain at stake, in precarious times, in which the world is not finished and the sky has not fallen—yet" (Haraway, 2015).

taking into account the material standard it enjoys at the time of the assessment. The ecofootprint is thus defined as the area of land and water ecosystems required to produce the necessary resources to sustain a determined population, and to assimilate its produced wastes (Rees, 2001). It is a useful instrument to measure the current human impact on the resources of our planet and the (unequal) distribution of consumption of ecological services. Indeed, per capita ecofootprints are correlated to the level of wealth. Residents of the Global North (the US, Canada, many Western European and other high-income countries) require from 5 up to 12 hectares of land per capita to support their lifestyles, while inhabitants of the poorest countries require less than one hectare of land for their survival.[8] The estimated global average ecofootprint is around 2.8 hectares per capita. The current human population requires almost 17 billion hectares to sustain itself, which is more than the planet can offer without compromising its regenerative ability. This means that humanity is overshooting the planet's resources which should instead be dedicated to future generations, consuming natural assets beyond nature's reproductive capacity.[9]

Turning again to the distribution of the ecofootprint, it should be noted that industrialized countries consume seven times more resources compared to developing, low-income countries. This means that they are living on "ecological deficits" with the rest of the world. Life-support services might indeed come from other countries thanks, for example, to the complex interrelations of global trade.[10] International trade is the way wealthy nations extend their ecological footprint in the most remote areas of the world, sometimes provoking indirect effects such as land grabbing and undermining of local food sovereignty (Liberti, 2015). Ecological deficit countries (e.g. the US, Western Europe, Japan and other wealthy nations) are in need of globalization in order to support their current consumerist lifestyles, and this is why they tend to defend

[8] See Worldwide Fund for Nature website, at https://www.worldwildlife.org/blogs/sustainability-works/posts/our-footprint-in-seven-facts, last accessed September 2022.

[9] See Earth's Overshoot Day website, at https://www.overshootday.org/about/, last accessed September 2022.

[10] The EU is one of the world's largest importers of soybeans from Brazil and the US. See also The Observatory of Economic Complexity website, at https://oec.world/en/profile/bilateral-product/soybeans/reporter/bra, last accessed September 2022.

the current neo-liberal markets as fair, without ethical or distributive considerations. This dependence on other countries' ecological surplus is a factor of risk for national and international stability, as the world's population is growing and resources become scarcer and demand increases (Rees, 2002).

For Westra, uncontrolled pollution of the atmosphere can be considered as a criminal offence and should be prosecuted through civil liability. The entity of the crime would likely become stronger if the victims did not express their consent for the activities that are damaging them and if they have no direct or indirect benefits deriving from the harmful activities or if they are not able to move and relocate—such as Indigenous communities, whose cultural survival is deeply entrenched to the characteristics of the territory they inhabit (Westra, 2008, p. 29). However, understanding climate impacts on Indigenous communities should not only focus on measuring the impacts on flora and fauna in their territories. Rather, they should be contextualized in a broader discourse that deals with underlying patterns of subjugation, colonial domination, undermining of Indigenous laws and ways of being, and insufficient protection in current legal frameworks. A decolonial approach to climate governance considers colonialism, capitalism and industrialization—which ultimately is the cause of climate change—as deeply entrenched (Whyte, 2017). This interlinkage may present itself in very complex forms, including the activities related to extractive industries, assimilationist policies and military force. This approach is needed to go beyond a simple affirmation of vulnerability of Indigenous peoples to climate change because of their dependence on the environment and its natural resources.

Because of this profound unfairness, Indigenous climate justice movements have been raising worldwide demanding redress to developed countries that share the largest part of GHGs emissions, linking this particular fact to the perpetration of neo-colonial practices. Indigenous peoples are in fact "among the most audible voices in the climate justice movement", whereas climate injustice is another representation of environmental, human-caused colonialism: "[c]limate injustice, for Indigenous peoples, is less about the spectre of a new future and more like the experience of déjà vu" (Whyte, 2016). Episodes and patterns of

environmental racism are a demonstration of this underlying logic, whereas environmental racism is intended as a racial discrimination towards socially disadvantaged communities through the systematic targeting of their geographical areas as recipient of pollutants or toxic waste facilities. Environmental racism is also tied up to the systematic practices that exclude such marginalized communities from decision-making, or from leadership positions in environmental politics (Chavis, 1994).

Climate injustice towards Indigenous peoples can assume many forms, among which are unjust distribution of the negative climate impacts and marginalization in environmental governance at the local, national and international levels. Indigenous organizations and NGOs have organized themselves in order to make their voices heard at all levels, demanding justice and a critical re-thinking of environmental and also economic development policies, calling for the need of a de-carbonization of the economy. The Bolivian Platform on Climate Change (*Plataforma Boliviana frente al cambio climatico*) and the Peruvian Indigenous Peoples Platform to Tackle Climate Change (*Plataforma de Pueblos Indigenas para enfrentar el Cambio Climatico*) are two examples of grassroots movement that deal with climate justice and broader issues of colonization and Indigenous peoples' rights. In the US, Indigenous initiatives such as the Indigenous Peoples Biocultural Climate Change Assessment Initiative, the Indigenous Climate Change Working Group of the University of Arizona and the Confederated Salish and Kootenai tribes with their Climate Change strategic plan are taking the lead in the climate justice movement.[11]

Indigenous climate justice movement are asking for a critical rethinking of current power imbalances and dominant legal structures, not just for the sake of Indigenous populations but also for the preservation of Mother Earth:

> The United States and other industrialized countries have an addiction to the high consumption of energy. Mother Earth and her natural resources cannot sustain the consumption and production needs of this modern industrialized society and its dominant economic paradigm, […]. The

[11] The Climate Change strategic plan (2013) can be consulted at: http://csktclimate.org/downloads/Climate%20Change%20Strategic%20Plan/CSKT%20Climate%20Change%20Adaptation%20Plan%204.14.16.pdf, last accessed February 2021.

> non-regenerative production system creates too much waste and toxic pollutions. We recognize the need for the United States and other industrialized countries to focus on new economies, governed by the absolute limits and boundaries of ecological sustainability, the carrying capacities of the Mother Earth, a more equitable sharing of global and local resources, encouragement and support of self sustaining communities, and respect and support for the rights of Mother Earth and her companion Moon.[12]

Thus, by taking inspiration from Indigenous movements, the book adopts a climate justice approach in dealing with current aspects of international human rights law. Climate justice values are the lenses through which different aspects of international law and governance are analysed. This approach does not focus solely on what the law prescribes and what actions are being taken to address Indigenous peoples' challenges in the climate change realm. The book, in adopting a critical legal approach that aims at deconstructing the law, wishes to unravel the imbalances and the misrecognition of Indigenous rights that are embedded in the legal system itself, by virtue of a cross-contamination of capitalistic and colonial values *within* the law itself.[13] While this aspect is extensively dealt with in the next chapter, here the focus relies on the theorization of the Indigenous climate justice movement itself. The next sections explore the theories that contributed to shaping the *rationale* behind global climate justice movements, with the objective of reconstructing the notion of climate justice by considering the different theoretical inspiration stemming from political theory that have shaped the current demands for ethical consideration of climate change impacts.

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[12] The Mystic Lake Declaration, November 21, 2009. At https://www.ienearth.org/docs/TheMysticLakeDeclaration.pdf, last accessed September 2022.

[13] This conceptualization resonates particularly with Esmeir (2006) work, and it is an important framework to contextualize the human rights critique expressed in the next chapter. Esmeir in fact denotes that the modern constitution of law was realized both through dehumanization, intended as withholding of rights—or non-recognition of peoples as *humans*, and humanization, intended as the process by which Indigenous peoples and other categories progressively were granted personhood status. Esmeir defines this process of recognition as "juridicalization". In the next chapter, I will apply a similar theoretical framework to international human rights law and its constitutive paradox, arguing that it is a legal regime that has been constituted both by exclusiveness (misrecognition or non-recognition) and inclusivity (recognition).

Distribution, Recognition and Participation as a Justice Discourse

This section draws upon classical Western theories of justice and their contribution in the environmental justice discourse. Distribution, recognition and participation are deeply interlinked to each other in the development of a justice discourse in the environmental and climate change realm. In particular, the key point of this section is to underline the justice aspects of recognition and participation as fundamental tools to address the inherent distributive injustices of the climate change effects and environmental harms. However, later on in the chapter, I re-interpret the concept of recognition of Indigenous laws and knowledge arguing how this could represent a dangerous discourse if not permeated by decolonial approaches. Participation rights are a key aspect of this research project, since they are considered an important mechanism to ensure Indigenous peoples' right to self-determination and to redress historical injustices such as political, cultural and economic marginalization (Charters, 2010).

The classical model that interprets justice as a matter of distribution has been the prevalent theory quoted by political theory scholars in the past four decades. John Rawls is considered the most eminent scholar of the distributive justice model. Any interpretation of Rawlsian environmental justice is mainly procedural: it assumes that a distribution of environmental benefits and burdens is just only when it arises within a system of processes—within a liberal democracy—that is itself just and fair.

In Rawls' famous work *A Theory of Justice*, justice is defined as a "a standard whereby the distributive aspects of the basic structure of society are to be assessed" (Rawls, 1971, p. 8). For Rawls, in order to assess an ideal just distribution of social and economic advantages, we should position ourselves beyond what he calls the "veil of ignorance", a place where we do not know how and where we are going to be born, out place in society and what will be our strengths and weaknesses. Rawls argues that beyond the veil, everybody would ideally choose for a fair distribution of liberties and political rights and "equal division of income and wealth" (Rawls, 1971, p. 130). Justice, then, is considered as the fair and ideal distribution of all these resources, where everyone, without substantial

differences, evenly shares the goods and bads. This principle, framed as "basic liberties and fair equality of opportunity", is not the only one governing Rawls' theory of justice. A second assumption, the difference principle, completes the theory.

In fact, while the first principle theorizes the equal distribution of the basic liberties for all parties in a given society, the principle of difference permits the existence of inequalities, whereas they are believed to benefit, in the long run, the least advantaged. Differences in society are primarily allowed because those advantages can be interpreted as the rewards for social positions occupied by certain parties that are open to all under the terms of fair equality of opportunity.[14] The principle of difference principle justifies inequality in this way: if the greater expectations of a representative and advantaged man in a certain social group satisfy the needs of the least advantaged, then those greater expectations are compatible with justice (Altham, 1973).

Some scholars deem Rawlsian liberal approach to justice incompatible with environmental justice ideals, or, more precisely, ecological justice principles (Barry, 2001). Other authors argue that liberal justice is not incompatible with environmental justice, insofar as environmental justice would present strong anthropocentric values that see the environment as a means to satisfy human needs (Dobson, 2007, p. 51; Fox, 1984). However, in Bell's views in response to these arguments, he sustained that neutralist liberalism[15]—at least in its Rawlsian version—"is able to accommodate more of environmentalists' concerns than might have been supposed [but] this version of 'green neutralist liberalism' is

[14] "Society should take into account economic efficiency and the requirements of organization and technology. If there are inequalities in income and wealth, and differences in authority and degrees of responsibility, that work to make everyone better off in comparison with the benchmark of equality, why not permit them? […] But since the parties are assumed to be mutually disinterested, their acceptance of these economic and institutional inequalities is only the recognition of the relations of opposition in which men stand in the circumstances of justice" (Rawls, 1971, p. 131).

[15] Bell's interpretation of Rawlsian neutral liberalism can be deduced from this quote: "A political value is one that is not simply drawn from a 'comprehensive' moral, religious or philosophical doctrine. More positively, a 'political' value is one that can be accepted by all 'reasonable' citizens because it is neutral among 'reasonable' doctrines. If something is a 'good, politically speaking', it makes a positive contribution to the maintenance of a cooperative society of free and equal citizens each with the capacity to form, revise and pursue their own doctrines and the ability to live by principles of justice appropriate for such a society" (Bell, 2002).

unlikely to satisfy all environmentalists […] democratic liberals should not regard such dissatisfaction as a serious problem" (Bell, 2002).

Even though Bell's argument might seem convincing, this book does not focus on distributional aspects and liberal approaches to justice. In fact, Rawlsian approaches to justice have a distinct anthropocentric feature—for example, in *Political Liberalism*, Rawls adopts quite a restrictive conception of reasoning in favour of environmental politics. For example, he sustains that political values include "to foster species of animals and plants *for the sake of biological and medical knowledge with its potential applications to human health*; to protect the beauties of nature for *purposes of public recreation* and the pleasures of a deeper understanding of the world [emphasis added]" (Rawls as cited in Bell, 2002). This approach is in contrast with Indigenous non-anthropocentric theorization of environmental and climate justice, which have been previously addressed.

The distributional justice framework described could be potentially extended to climate change issues. For example, Rawls' distributional paradigm proposes that the international society, to be just, should not be characterized by positions of inferiority or domination (Rawls p. 121). From this assumption derives the duty of cooperation and assistance from "well-ordered peoples" to other societies burdened by unfavourable conditions in order to establishing a global regime in which all societies are able to participate as equals. This idea particularly resonates, in the climate law realm, with the principle of common but differentiated responsibilities and in the duty of cooperation of industrialized countries towards developing ones in achieving climate change mitigations objectives. By virtue of this principle, the duty of assistance to climate vulnerable communities should be seen as part of the global distribution equity paradigm and should not be limited to minimal granting of means of subsistence to developing countries (Beitz, 1999). Yet, the application of equalitarian principles to climate change issues could be rejected, since for liberal theorists, the only drivers for countries' actions are economic and strategic interests, and not duties of mutual assistance. Allocation of resources and interests in fulfilling and respecting human rights do not depend on an allocation of justice but rather on the national circumstances of each State. Thus, justice issues are only relative to the internal sovereignty of States and can be only relatively extended to countries in

need, also because of the absence of the identification of specific agents that have the obligation to fulfil the universal rights of all people. However, such State-centred reasoning leaves unresolved the political problem of the uneven distribution of the burden derived from climate inequalities. It is not possible to frame climate change only as an internal issue when rising GHGs emissions are a problem that is cosmopolitan in nature.[16]

Furthermore, one of the greatest obstacles in the application of the Rawlsian model to climate issues stands in the integration of humanity's relationship with nature into the theory. This challenge is not explicitly dealt with in Rawls' theory, and it seems that "whatever is outside of the Rawlsian framework can, from the point of view of political philosophy, be safely ignored" (Gardiner 2013). The problem of climate change, on the contrary, raises important questions about who we are and how we understand our role within the complex and interrelated system of Mother Earth, and perhaps moral and political theory should engage more on aspects which deals with "humanity's relationship with nonhuman nature" (Gardiner, 2011a, 2011b). This aspect particularly resonates in Indigenous demands for redress of historical injustices—also towards Mother Earth—and other claims, inter alia the need to cut GHGs by 95% by 2050 if humanity wants to avoid the worst impacts of climate change.[17]

In light of the considerations explained, this book sustains that it is not only necessary to focus on the distributional and anthropocentric aspects of the justice discourse if we wish to delineate a theory of climate justice of which ultimate goal is to foster a system of protection for Indigenous peoples from harmful impacts of climate change and redress of historical wrongful conduct (as in Read, 2011). Global capitalism, in nurturing the

[16] Kenehan sketches the two main theories of international justice. The approach here described corresponds to what she defines as "the statist position", whereas liberal statists are mainly concerned with the domestic distribution of justice and contend that the obligations towards outsiders are minimal and they should be activated under extreme circumstances. The second theory, the cosmopolitan justice, on the contrary, contends that statism cannot be extended internationally. In her views, Rawls "duty to assist" could resolve the dilemma between these two different approaches: "when a people falls below the threshold of well-orderedness, then other well-ordered peoples have a positive duty to assist them so as to help them rise out of burderness" (Kenehan, 2015).

[17] Indigenous Peoples' Global Summit on Climate Change, The Anchorage Declaration, 24 april 2009, at https://unfccc.int/resource/docs/2009/smsn/ngo/168.pdf, last accessed February 2021.

already existing radical inequalities, has proved to result in a "capabilities failure", where all resources tend to concentrate in few centres rather than be equally distributed among all people (Skillington, 2017, pp. 91–116). The necessity to investigate the causes of this unjust distribution has been addressed by important scholars like Axel (Honneth, 1995, 2008; Honneth & Fraser, 2003; Fraser, 1998, 2009; Young, 2011). From their perspective, it is not sufficient just to consider what happens behind the "veil of ignorance", but it is necessary to investigate on the actual realm of political, economic and social injustices that ultimately cause unjust distribution, providing the answers on the causes that have led to such differences at the global and national levels. This approach to justice, together with the capabilities approach described in the next section, and with the decolonial approach represented by decolonial justice theories, constitutes the theoretical framework used in this book for the analysis of law and policy concerning the protection of Indigenous peoples' rights in the climate change context.

For Young, the scope of justice is broader than mere distributive issues. Of course, in a world with vast difference between the so-called Global North and Global South, between countries where people consume a huge amount of Earth's resources and other countries have people starving to death, the consideration of distribution of rights, wealth and power should be rightfully taken into consideration.[18] However, the unfair distribution of wealth and income of contemporary capitalistic societies derives from the "social structure and processes that produce distribution". As outlined by Walzer, it is of crucial importance to develop a pragmatic theory of justice that investigates the causes of such misdistribution (Walzer, 1983).

In her book *Justice and the politics of difference*, Young argues that situations of oppression and domination are the underlying element of the differences in distributional patterns. These differences are not to be considered as given, but rather they derive from dynamic elements such as social, institutional relations and societal group differentiation. Group

[18] I am fully aware of the critical debate around the conceptualization of Global North/Global South and why it should be avoided. In this book, I will use it to refer generally to theories, countries and authors that pursue a non-Western/non-Westernized approach to legal theory, or that are at least critical of certain of its aspect and pursue a decolonial approach to theory and practice.

differentiation, for example, being part of an Indigenous nation, does not per se imply oppression, as normally the most diverse groups coexist in a society. Oppression happens through "the inhibition of a group through a vast network of everyday practices, attitudes, assumptions, behaviors, and institutional rules" (Young, 1988). The five "faces of oppression"—exploitation, marginalization, powerlessness, cultural imperialism, violence—are the criteria to understand whether an unjust distribution of privileges, rights, wealth and power to only certain groups takes place. These criteria particularly resonate with challenges Indigenous peoples are still facing nowadays and that are exacerbated by climate change impacts and environmental racism directed towards the communities. A conception of justice based on Young's criteria should focus on the elimination of institutionalized domination and oppression in order to realize a correct redistribution of privileges and rights.

Fraser considers both distribution and recognition as a basis for a bivalent theory of justice, where the two aspects are interlinked but at the same time they can be considered separately, or, in other words, she proposes a theory that integrates struggles for recognition and those of redistribution without subordinating one to the other.[19] Misrecognition—intended as the non-acceptance of minor social groups in the broader community—is fostered by institutional constructed subordination and inequity that leads to unjust distribution. These problems of injustice—both unjust distribution and misrecognition—can be addressed through patterns of "participatory parity" of all affected parties in the political procedures. It is important to examine carefully which are the social and cultural practices in a society that impede the full participation of certain groups as accepted members of the community (Fraser, 1998).

Honneth defines recognition as a process of self-worth that is initiated by the consideration that the others give to a determinate group or individual. He argues that for a community to exist, it relies on the

[19] Theories of recognition resemble Hegel's master-slave narrative, which seems somewhat to inform contemporary theories of recognition. In the master-slave dialectic, identities and subjectivities are formed by virtue of mutual recognition: "self-consciousness exists in and for itself when, and by the fact that, it so exists for another; that is, it exists only in being acknowledged". This narrative seems to suggest that the realization of the self-consciousness of an individual requires the recognition of another self-determining individual, and only through this mutual process a condition for freedom may emerge (Hegel, 1997, p. 178).

recognition that others give to that community. When such a recognition does not take place, this situation creates patterns of oppression and non-recognition of human integrity. Honneth defines the three aspects that constitute the key forms of disrespect: violation of the body, denial of rights and denigration of ways of life. All three aspects concur to form the notion of recognition which deeply differs from a simple tolerance: it requires individuals to be free from any form of physical coercion, their right to be respected, promoted and fulfilled including right to political participation and their distinguished cultural traditions not to be oppressed (Honneth, 1995).

Indigenous peoples worldwide have been subject, since the time of colonization, to various forms of misrecognition that have been embodied by the denial of the three formal aspects described by Honneth. Killing and subjugation of entire peoples, cultural genocide and denial of any political rights have been the instruments used by the oppressing colonial regimes (Kingston, 2015). Some of these forms of misrecognition and ethnocidal approaches have been put into practice even by post-colonial States and also in more recent times—one need only think to the Stolen Generations of Australia or to the forced sterilization of Indigenous women that took place in Peru in the 1990s—leading to an increased marginalization of native communities (Murphy, 2011; Serra, 2017). The patterns of disrespect of Indigenous peoples can also fit in Fraser's definition of what causes misrecognition of the social status of individual and communities: cultural domination, being rendered invisible, disrespect and stereotype. Misrecognition is, in her views, an "institutionalized relation of social subordination" (Fraser, 2000).

According to Schlosberg, the causes of the unjust distribution derive essentially from the problem of misrecognition of political and social actors. The lack of recognition of oppressed communities can take various forms—insult, degradation, devaluation, deprivation—and it results in several damages among which the distributive injustice of political and civil rights and all kind of material resources. While Rawls and other liberal theorist focus on an ideal scheme of justice in liberal societies, for the recognition paradigm scholars, overarching impediments should be explored in order to formulate an effective theory of justice (Schlosberg, 2007). This theoretical framework can be applied to the current social,

political and cultural situation of Indigenous peoples because of overarching patterns of (neo)colonialism, exclusion from decision-making and governance, and marginalization through relegation of Indigenous peoples in areas known as "reserves".

If misrecognition threatens the respect of basic human rights, renders invisible individuals and communities and institutionalizes the cultural domination of the majority against the people who do not belong to it, what are the possible theoretical solutions than might allow the recognition and respect of these people in the mainstream society? Theoretically speaking, participation and procedural justice might be of great help in supporting the recognition of those who are marginalized and been rendered invisible. If we intend justice as the "fair and equitable institutional process of a state", the procedural rules of political participation might lead to the actual inclusion of misrecognized people into the broader community (Schlosberg, 2007). Recognition and participation are intrinsically linked and mutually supportive and, together with democratic decision-making procedure, they constitute the basis for a just society. Justice must indeed rely on participatory processes to relieve both the problems of unjust distribution and misrecognition.

Young, in her aforementioned work, states that justice must focus on the political process as a tool to address different kinds of injustices. The democratic structures allow deliberation and decision-making, which in turn help to meet the conditions of social justice. She argues that for a norm to be just, every individual should have, in principle, a right to deliberate and participate without coercion. Fraser similarly calls for the respect of the principle of the "parity of participation", which is constituted by both the respect in institutional patterns of cultural value and the availability of resources to make the participation of all different social actors possible (Young, 1990). Subordination, misrecognition and maldistribution are all different aspects of injustice that can be addressed with better schemes of participatory justice, which in turn need the elimination of all social injustices to work properly.

Current Indigenous peoples' claims are profoundly related to the issues of justice and participation in national and international deliberations (Charters, 2010). Bringing the voice of marginalized peoples into national and international fora requires an extensive use of different type of

resources to allow participation, such as economical means and capacity building initiatives. Most importantly, it requires the political will of governments. The legal requirement of FPIC is one of the fundamental tools that is believed might foster a true dialogue and democratic participation of Indigenous people in deliberations regarding administrative and legislative measures, development projects and extraction initiatives. Enabling participation of Indigenous peoples in international debates where key policies and development initiatives are decided, in particular those related to the environmental and climate governance, is the key for the recognition of Indigenous peoples not only as vulnerable victims but also as heralds of relevant knowledge that should be integrated in the greater community's views.

Therefore, this book dedicates a specific focus to participatory justice and FPIC in climate change law and governance, as we shall see later on. Participation, inclusion and recognition are key strategies against neocolonial practices, environmental racism and exclusion of Indigenous views and claims in climate governance. While such aspects are extensively discussed in the next chapters, the next section focuses on the last important theories that ultimately contribute to shaping the theoretical underpinnings of the notion of climate justice applied as framework in this book.

Capabilities Approach, Human Rights and Justice

The capabilities approach, as a wide-ranging normative framework, is useful for the assessment of individual wellbeing, for the development of policies and for the commencement of social changes in the society (Nussbaum, 2011). It has characterized the emerging of a new body of theoretical academic literature especially from the 1990s and it has been used to frame different aspects concerning economics, development studies and for the creation of a theory of justice. Thus, this section aims at framing the principal aspects of the capabilities approach in order to apply its theoretical underpinnings to the understanding of Indigenous peoples' struggles and demands in the context of climate change.

Amartya Sen and Martha Nussbaum, who also write from the perspective of the liberal tradition, are regarded as the main scholars who contributed to the theorization of the capabilities approach, nonetheless their divergence in the theorization of capabilities, as described further on. This approach can be used to evaluate a wide range of aspects of people's welfare, shifting from a mainly monetary consideration to issues such as inequality, poverty, access to healthcare and other important aspects of societies. It can be also used as an instrument for cost-benefit analysis or as a tool for welfare policies design or development policies by governments and NGOs in developing countries (Robeyns, 2005). The capabilities approach is considered the foundation of the human development paradigm, but it is by no means a theory that aims at explaining the distributional inequality, poverty or wellbeing. It is rather a tool that provides a conceptual framework for the evaluation and representation of these phenomena (Nussbaum & Sen, 1993).

Thus, the focus of the capabilities approach is not exclusively on the level of income and availability of material resources, but it rather aims at investigating what people are able to do and to be, their quality of life, their level of freedom, their access to adequate food, healthcare, high-quality education system and their ability to participate in the political, social and cultural life. The capabilities approach has the aim of covering all the different facets of wellbeing, where development and justice are integrated in a unique view of the different dimensions of life. The use of this approach implies the acceptance of its implicit criticism of other evaluative approaches, namely the utilitarian and welfarist income-based theories (Nussbaum & Sen, 1993). For an instance, the United Nations Development Programme (UNDP) Human Developments Reports make use of the capabilities approach as a tool for the evaluation of the human development index, which it is notably not centred on an income-based approach.[20] However, the capabilities approach should not be confused with merely a human rights measurement tool, even though both are concerned with the wellbeing, freedom and dignity of all individuals (United Nations Development Programme, 2000; Fukuda-Parr, 2011).

[20] See generally UNDP website: http://www.hdr.undp.org/, last accessed February 2021.

In Sen's views, the capabilities approach should only be considered as an evaluative tool and not as a theory of justice (Sen, 1995, p. 268). A theory of justice should include both aggregative and distributive considerations, while the capabilities approach does not include an aggregative principle, neither any procedural components (Sen, 2004). For Nussbaum, on the contrary, the capabilities approach can be used for the development of a partial theory of justice, through the delineation of the political principles that should underpin each constitution (see generally Nussbaum, 2007). Nussbaum aims at reconstructing the fundamental principles that every government should apply to guarantee fairness to its citizens. She proposes a general list of "Central human capabilities" that should be incorporated in legal instruments in order to enable individuals to "function" in a variety of areas of central importance. Capabilities are viewed as fundamental entitlements which should be included as the goal of both national and international cooperation. Therefore, Nussbaum developed a list of fundamental capabilities, which include life, bodily health, the development and expression of senses, imagination and thought, emotional health, relationships with other species and the world of nature (Nussbaum, 2007). This list particularly resonates with the provisions enshrined in fundamental and binding provisions of international human rights law, such as the right to life, the right not to be subjected to inhuman or degrading treatment and freedom of speech and thought.

In fact, the capabilities approach, as framed by Nussbaum, "is a species of human rights approach". There is a strong interlinkage between capabilities and human rights, insofar as enjoying a good life rests on the attainment of "a variety of functions that would seem to be of central importance to a human life" (Nussbaum, 1997). The concept of capabilities is especially relevant for what concerns the clarification of the ethical underpinnings of the States' positive obligations towards individuals and communities, particularly for what regards the so-called second-generation rights—economic and social rights—that are traditionally involved in a development discourse. Human rights, as prerogatives attached to every individual for the just fact of being human, could be framed as claims to essential capabilities. The link between these three aspects—capabilities, human rights and obligations—are recurrent themes in Nussbaum's work, together with the ways by which capabilities

should be granted through constitutional arrangements, legal enforcement and judicial interpretation (Elson et al., 2021, p. 4).

Therefore, the capabilities approach as a theoretical framework is essential in defining the rationale behind the *positive* obligations of States towards individuals and communities. States not only have to refrain from committing human rights violations but also have a positive obligation of protecting, fulfilling and respecting human rights (as established, inter alia, by the UN Committee on Economic, Social, and Cultural Rights). This approach goes beyond the simple legal monitoring of instruments put in place by States: it can work as an indicator of the level of commitment states have toward the achieving of results, including the actual realization of particular socio-economic conditions. Such an approach is useful to argue, in a climate justice perspective, that States have positive obligations not to cause indirect harm—and violation of human rights—that take place through climate change impacts. Caney, for an instance, asserts that people have the right not to suffer from climate change consequences that ultimately would violate their right to life, subsistence and health (Caney, 2006).

Sen does not agree in establishing a predetermined list of capabilities. In his opinion, "theoretical thinking cannot 'freeze' a list of capabilities for all the societies for all time to come, irrespective of what the citizens come to understand and value" (Sen, 2004). This is because having a fixed list would undermine the reach of particular realities of democratic decision-making, creating a discontinued relationship between societal needs and theoretical thinking. In addition, for Sen, there is a problem in the determination of the different level of importance and balance among the different capabilities listed. By giving a specific order in the enumeration of the capabilities, priority is implicitly given to a certain capability over another. This approach can hardly be applied in practice, insofar general principles and priorities should be adapted to the particular ad hoc conditions typical in a society (e.g. the right to have a shelter might be considered a priority in a society where people do have access to food, but do not have adequate housing and vice-versa).

However, both authors agree that participation is an important component of their theory of the capabilities approach. Sen and Nussbaum understand human beings not only as recipients of rights and capabilities

but also as important agents of change through their involvement and participation in the political life (Nussbaum et al., 1993). For Sen, participation should be intended as a freedom and a function. Thus, participation can be considered as a central concept for the development of a theory of justice through the capabilities approach.

Nussbaum's capabilities theory has been criticized for not taking into account the crucial and instrumental value of the environment to human capabilities (Holland, 2008). Without this important inclusion in the list, her approach cannot contribute to delineate the conditions of social justice. Since the realization of human capabilities is effectively entrenched to the natural environment, certain entitlements are matter of justice. Nussbaum does include natural environment in the eight capability ("Other Species"), but she does not theorize how these resources are essential in enabling many of the other central capabilities, such as life and bodily health—or, if we think about Indigenous peoples, how certain natural resources such as rivers and mountain are essential for the survival of their cosmologies or beliefs (Schlosberg, 2007). Environmental conditions can then be intended as meta-capabilities: in other words, having any of the capabilities requires the existence of a natural environment that enables such capabilities. Thus, justice requires an ecological protection in order to assure that human beings are able to "function". This extension of the capabilities approach can work for the development of a theory of environmental justice that seeks to redress and remedy the unequal distribution of environmental externalities and on how society should allocate advantages and disadvantages.

The capabilities approach, embedded in participation and recognition theories, gives shape to a theory of justice that is not solely distribution-based. The three components of justice—participation, recognition and distribution—are intended as a set of factors all necessary for the functioning of the human beings. But how can we link these theories to climate justice and Indigenous peoples' claims?

Climate justice as a movement criticizes mainstream environmental law for paying little attention to the distributional effects of environmental policies, for emphasizing participation of elites and advocacy in environmental negotiations rather than participation of affected communities and for deciding what should be part of the environmental debate

disregarding the importance of neighbourhoods, workplaces, cities and marginalized areas (Manzano et al., 2016). Environmental and climate change law has for a long period neglected the questions of justice, human rights-based approaches to climate change and ecological thought (see generally Purdy, 2018). Climate justice, as part of the broader environmental justice framework, calls as well upon the unjust distribution of the negative effects derived from climate change.

The capabilities theory applied to environmental/climate justice movements and communities' claims can work as a frame to understand the battles over environmental conditions and access to sacred sites on ancestral lands (Schlosberg & Carruthers, 2010). The broad and global process of mobilization that has culminated in the 2019 Indigenous Peoples' March has brought a renovated, integrated and pluralistic approach to the climate justice discourse.[21] The collective experience of environmental injustice felt by Indigenous communities worldwide has been the catalyst for the emerging of a global claim to translate the justice discourse into practice.[22] Such communities then consider environmental justice as a "set of conditions that remove or restrict the ability of individuals and communities to function fully—conditions that undermine their health, destroy economic and cultural livelihoods, or present general environmental threats" (Schlosberg & Carruthers 2010). Thus, environmental and resource conflicts are likely to undermine many of the Indigenous peoples and local communities' fundamental capabilities as intended by Sen and Nussbaum.

An interesting focus of Indigenous peoples' climate justice claims is that they do not exclusively rely on human rights-based approaches to climate change in order to ask for redress. The human-centred paradigm is somewhat discarded as the main preoccupation is the preservation of the health of the environment as characterized by having an intrinsic importance, and not just an enabler of human capabilities. However, as evidenced throughout the book and especially in the chapters regarding the international law framework and climate litigation, human

[21] Massimo R. The Indigenous People's March: What you need to know, 2019, available at https://wtop.com/dc/2019/01/the-indigenous-peoples-march-what-you-need-to-know/, last accessed September 2022.

[22] Ibid.

rights-based approaches to climate change constitute the main available strategy for Indigenous peoples to obtain redress for injustices. Within a human rights-based rationale, the protection of the environment and the preservation of biodiversity can be guaranteed through the protection of Indigenous cultures and spiritual practices (Magallanes-Blanco, 2015). This is because Indigenous traditional knowledge, which includes a broad range of beliefs, practices, and cosmologies, is intrinsically connected to the environment and to the geographical landscape of Indigenous ancestral territories.

Through specific human rights-based claims based on the need to enable Indigenous peoples' cultural, religious and traditional capabilities in the climate change context, Indigenous peoples frame their demands for justice. An important aspect of such claims is represented by the focus on procedural and participatory justice that ultimately grants the operationalization of the right to self-determination and the recognition of Indigenous peoples as crucial stakeholders in climate policymaking. However, this process of progressive recognition and inclusion presents several challenges. The concept of cultural genocide, that has been used to describe the dramatic loss of Indigenous traditions and culture due to the colonization process, is still resonant today insofar lack of recognition of Indigenous agency and deprivation of the access to political participation in matters related to communities' land, territories resources and environmental governance is still unhappily present in many national contexts.

The theoretical approaches to justice described in this and in the previous section can help us, on the one hand, to understand and frame the reasoning beyond climate justice arguments; on the other hand, they provide an initial basis for framing of the concept of vulnerability—addressed later on in the chapter—intended as the deprivation of the possibility to enjoy certain human rights and human capabilities. However, the aim of this book goes beyond unravelling the theoretical reasons that are at the core of the notion of climate justice. The central question is how to realize Indigenous climate justice in practice and how can Indigenous peoples thrive and survive in the context of exclusion and marginalization typical of the "colonial déjà vu" of our times, where climate change impacts are yet another manifestation of the Westernized power against societies and

nations that are not aligned to its standards. The issue at stake is not only the survival of Indigenous peoples as distinct communities, but the ecological health of the planet itself which sustains all human and nonhuman life. Therefore, the realization of Indigenous climate justice is something that concerns all human communities, and it depends on a critical rethinking on the relationship between human and nonhuman beings. The recognition of the relevance of Indigenous customary law and Indigenous knowledge, also defined as traditional ecological knowledge (TEK) in international biodiversity law, is crucial in order to realize such paradigmatic shift in climate law and governance.

Thus far, the theories analysed that inform the climate justice discourse resonate with the Western legal tradition of liberal thought. This is because environmental justice and climate justice theories have been traditionally shaped by Eurocentric ontologies and epistemologies. It is important, in this context, to give relevance to the work of authors that contributed to shaping alternative approaches to justice where non-dualistic, non-Cartesian intellectual heritages shape the emancipatory approaches that are indeed at the core of climate justice reasoning especially for what concerns Indigenous peoples and decoloniality.

Decolonial Theories

Other environmental justice scholars have argued that liberal conceptualizations of justice, with particular regard to the distributional paradigm, have fostered an assimilation of Western narratives and practices in non-Western countries (Vermeylen & Walker, 2011). This approach fosters the replication of colonial injustices because of the application of theories that pertain to the colonial domain to issues related to Indigenous peoples and other marginalized communities that are suffering the impacts of climate change. On the contrary, the objective of this book is to suggest the importance of considering alternative epistemologies and ontologies that would lead to a decolonization of climate governance, especially if we wish to deal with Indigenous peoples. The consideration of the pluralist vision of climate justice is an important prerequisite to avoid what can be defined as "epistemic violence" (Vermeylen, 2019). Thus, this section presents the work of scholars that have dedicated their studies

to the re-appropriation of justice theories through a decolonial approach. In fact, climate justice should deal and confront the colonial legacy that has ultimately brought oppression to Indigenous peoples, and not only constitute an abstract theory which does not engage with the consequences of subjugation.

Coloniality in fact persists through other forms of oppression, and climate change is one of those forms. It is fundamental, then, to consider how colonialism can inform and de-centre theories of climate justice. Mignolo has conducted relevant research in the field of decoloniality and "epistemic disobedience" (Mignolo, 2009). Decolonial theory investigates how the power relations that created the "indigenous" as inferior race and created a global model of capital accumulation during colonization are still resonant today. This approach indicates that current economic and political structures have colonial roots, and it can be applied to the climate change realm insofar as emissions, pollution and extractivism are deeply interlinked to the development of capitalism.

Another fundamental author of the decolonial project is Escobar, who alongside Mignolo contributed to the promotion of counter-hegemonic epistemologies. He discussed the value of imagining the Third World as the product of new forms of imperialism perpetrated by two factors, namely the US-lead form of imperial globality and the emergence of self-organizing social movement networks, which function under a new logic that can be designated as counter-hegemonic (Escobar, 2004, 2007, 2008, 2014). The Indigenous climate justice movements analysed in the first section of the present chapter can account to this type of social movements analysed by Escobar insofar as they represent the manifestation of a political will that is locally rooted but yet internationalized in a global strategy (as demonstrated in Chap. 5, where Indigenous participation at the UN level is analysed).

The book *Globalization and the Decolonial Option*, edited by Escobar and Mignolo, represents a synthesis of a project on decoloniality and modernity in which different authors of non-Western countries took place. This book is important as it assumes certain postulates that are relevant to the understanding of Indigenous epistemologies, such as the fact that history is not linear—as it generally understood by Western

scholars, but is a relative concept, made of simultaneous histories, interconnected "by imperial and colonial powers" and "by imperial and colonial differences" (Mignolo & Escobar, 2010, p. 2). The history of development and progress narrated by Western scholars is, at the same time, the history of oppression and environmental racism for other marginalized communities that constitute the periphery of the capitalistic imperialism.

The broader environmental justice discourse, which also includes climate justice, despite it has been traditionally defined in Westernized concepts and terminologies (e.g. the intrinsic anthropocentric definition of the concept "environment" as everything that "surrounds" humankind) is progressively being reshaped by non-Western epistemologies. This new tendency has brought to the emergence of a second wave environmental justice, also defined as critical environmental justice (Holifield et al., 2009; Pellow, 2018; Sikor & Newell, 2014, cited in Álvarez & Coolsaet, 2018). The application of decoloniality theory is a feature of the second wave of environmental justice, insofar as it seeks to evidence how counterhegemonic heritages, epistemologies and ontologies must inform the emancipatory practices that characterize climate justice (for an account of decolonial theory, see Quijano, 2000; Mignolo, 2011, 2012).

A decolonial approach to climate justice, then, should take into consideration how coloniality has progressively de-humanized Indigenous peoples, and considered their knowledge as "traditional", inferior to the "real" and universal knowledge expressed by Western ideas and ontologies. Decoloniality in this context refers to breaking, through epistemic disobedience, the cages constructed by colonialism that have dehumanized Indigenous peoples and exploited nature to the very point of changing the climate of our Planet. The next section wishes to apply a decolonial approach to the issue of recognition of customary law and Indigenous knowledge. These two elements are crucial in contemporary environmental politics which are related to Indigenous peoples; however, there is still little effort by scholars and practitioners to problematize Westernized approaches to Indigenous laws and customs.

Recognition of Customary Law and Indigenous Knowledge: Same Old (Neo-)Colonial Story?

In the application of the notion of climate justice on the ground, the first step in addressing the problem of misrecognition of Indigenous views and cultures in global climate change governance should be the consideration of their customary law and knowledge as having same relevance as law derived from Western positivist systems of beliefs. Such a recognition is already taking place in some national contexts since there is growing acknowledgement that knowledge and customary laws support Indigenous peoples' and local communities' resilience to environmental change including climate change, as well as contribute directly to biological and cultural diversity, and, more generally, to sustainable development. This development has been fostered by provisions contained in international human rights law and international environmental law, as extensively treated in the next chapters.

Recognition of the relevance of customary law constitutes both a challenge and an opportunity. While States do not generally appreciate possible challenges to positive, state-originated law, Indigenous peoples reject the general definition of "customary law" as a colonial imposition. This is because the term "customary" may denote a depreciative meaning in contrast to law originated by the State, in a Westernized system of decision making. In addition, the reduction of all existing Indigenous legal systems under the labelling of "customary law" might cause a misrepresentation of the great variety and differentiation of Indigenous legal systems (see generally Tobin, 2014). In fact, it is estimated that at present there are 5000 Indigenous peoples distributed in more than 70 countries, and there as many distinct legal regimes as there are distinct Indigenous peoples.[23] In addition, customary law is the legal regime applied in case of post-conflict situations, failed States and States with no normal functioning of the juridical system. Given these multiple facets of the meaning of "customary law", it is important to clarify what we mean by using this term.

Indigenous peoples often reject this notion when applied to their living law and customs. Defining Indigenous law as "customary law" might

[23] PFII. *Report of the Secretariat on Indigenous Traditional Knowledge*, E/C.19/2007/10, New York, 2007, p. 12.

imply a certain degree of denigration of their legal regimes and subordination to the positive law of the State (Tobin, 2014). This is due to the legacy of colonial and post-colonial regimes and their logic of subordination of Indigenous culture and its consideration as "primitive" and "regressive". Customary law is not, indeed, at the basis of all Indigenous law, which may also be produced and reproduced in written from, positivistic-derived or based on natural law (Borrows, 2010, p. 12). Thus, the term "customary law" is wrongfully being applied to all types of Indigenous peoples' legal systems.

In terms of opportunities, this reference continues to be used by contemporary legal scholars, Indigenous representatives and academics, playing a significant role in international negotiations on the rights of Indigenous peoples. For Tobin, the answer to the issue around the utilization of the term "customary law" is that

> [i]t does provide the foundations and backbones of the vast majority of [Indigenous regimes]. It is also the one aspect of Indigenous legal regimes that courts have recognized as providing the basis for recognition and enforcement of ancestral rights over their traditional territories, lands and resources. As such it plays a vital role in the definition and protection of the rights of all Indigenous peoples. (Tobin, 2014 p. 9)

So, it looks like the use of this term may still serve to strengthen Indigenous communities' capabilities when facing States' prerogatives over their lands, territories and resources and for the inclusion and participation of Indigenous peoples in national and international governance. In fact, legal aspects related to the protection of customary law are present in different instruments of international human rights law and international environmental law, which grant an additional layer of protection to Indigenous peoples' communities against possible neo-colonial and exploitative practices of States and governments.

The definition of "Indigenous knowledge" presents a similar contested background as seen with customary law. Scholars, policymakers and international organizations often refer to "Traditional Knowledge" or "Traditional Ecological Knowledge" to indicate the broad system encompassing Indigenous systems of knowledge, cosmovisions, mythology,

traditional medicine and Indigenous relationships with nature and geographical spaces. These terms are often associated to concepts such as sustainable use of natural resources, sustainable development and conservation policies, both at the national and international levels. The Indigenous historian Donald Fixico tracks the origins of traditional knowledge as deeply entrenched to the environment and the adjustments the communities had to made through centuries of adaptation (Fixico, 2003, p. 51):

> The basis of traditional knowledge derives from identification of identity and culture.[…] Much of this traditional knowledge originated from the practicalities of life on a daily basis in relationship to an environment and its climate. As people have made these adjustments, cultural identities have developed and evolved from the peoples' actions within a group that is generally called a nation.
>
> Simultaneously, much of traditional knowledge comes from mundane daily living, thereby establishing cultural norms that may be called an order to life. Tribal elders have taught this observation for generations. By maintaining order in life, a balance occurs and decreases the chance for confusion and chaos. Hence, it is the role of the elders to maintain peace and order, to supply advice, teach, and to advise.

However, the use of the term "traditional" attached to "knowledge" is contentious for at least two reasons. First of all, "traditional" might evocate something archaic, obsolete and in stark contrast to Westernized science and knowledge. On the contrary, Indigenous knowledge should not be considered as monolithic and static, but rather as a system that can change depending on different time and spatial settings. For example, in the context of climate change, the Inuit people of Sachs Arbour created a knowledge base of environmental changes and developed the ability to acknowledge signs that something unprecedented is happening (Berkes, 2009).

Second, the use of this term might contribute, in the worst-case scenario, to reifying and stigmatizing Indigenous peoples as communities anchored to the past, antithetic to modern societies or against the use of technology. Or, in the best of the cases, to heavily romanticize Indigenous

knowledges and cosmovisions, in a way that resembles the myth of the "ecologically noble savage", which fosters the idea that all Indigenous communities live in harmony with nature, in contrast with Westernized State societies that cause environmental degradation and pollution (Hames, 2007). This conceptualization of Indigenous knowledge and ways of life as intrinsically conservationists and respectful of the environment, as promoted and conceptualized in Westernized societies, has been criticized by different authors. In particular, Krech, Redford, etc. have been critical on this issue. Krech found that Native Americans understood environmental interactions, but they were no conservationists: they historically contributed to the depletion of several species of game (Krech, 1999; Kelly & Prasciunas, 2007).

Because of the reasons listed earlier, this book would use the terminology "Indigenous knowledge", to indicate the complex system of beliefs, traditions, customary laws and ecological knowledge of Indigenous peoples, with the exception of sections that explicitly deal with international human rights law and international environmental law, as such instruments regulate, recognize and promote Traditional Ecological Knowledge (TEK). In fact, the political discourse around the protection, use and recognition of Indigenous knowledge, also declined as TEK, has gained momentum in international law especially in the realm of international biodiversity law. Because of this recognition, Indigenous leaders and organizations have accepted this definition and contextualization of their knowledge, as it appears evident in determined narratives and declarations.[24]

[24] For instance, the PFII makes large use of the term "traditional knowledge", especially when advocating the urgent need for the institution of a system that truly protect Indigenous rights over their intellectual property: "Regarding the negotiations taking place at the sessions of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization (WIPO), the Permanent Forum reiterates the urgent need to develop an instrument that responds to the current lack of adequate protection of traditional knowledge and recognizes indigenous peoples as equal stakeholders and the legitimate holders of their knowledge. The Forum calls upon the Intergovernmental Committee to fast-track the negotiations and to use its core budget to fund indigenous peoples' participation in the deliberation", PFII, Report on the eighteenth session (22 April–3 May 2019) Economic and Social Council Official Records, 2019 Supplement No. 23, E/2019/43-E/C.19/2019/10.

Protection and respect of Indigenous customary law knowledge is well-established at the international level. The international law instruments are analysed in depth in other chapters; however, here it is worth mentioning that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) refers to "laws, customs and traditions",[25] while the Convention 169 refers to States' obligations to consider with due regard "customary laws".[26] However, it is a commonly believed that the most powerful contributions to the recognition of Indigenous peoples' customary law have taken place in the international negotiation on access to traditional knowledge and benefit-sharing. In such context, Indigenous peoples have argued that provisions regulating the regime to access their knowledge should duly consider, and be based upon, Indigenous customary law. The Nagoya Protocol to the Convention on Biological Diversity (CBD), the first binding instrument that formally recognizes the extraterritorial power of Indigenous peoples' customary law, provides an obligation for States to "take into consideration Indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resource".[27]

Indigenous knowledge not only is defined as essential in biodiversity conservation but also is increasingly being recognized as a key to combat climate change. Native communities' culture, beliefs and religion are indeed considered crucial tools to achieve environmental protection, and

[25] "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards", UNDRIP, Article 34.

[26] "In applying the provisions of this Convention:

- (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals; […]", ILO Convention 169, art. 5; "1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
- 2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle" (Idem, Article 8).

[27] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Article 12(1).

therefore could extensively contribute to the development of adaptation strategies. The Paris Agreement[28] and the Cancun Agreements[29] recognize the importance of Indigenous knowledge systems, customary law and beliefs, which are deeply embedded and connected to the natural environment.

Preservation and recognition of Indigenous knowledge is considered essential for its positive contribution to sustainable development (ILO, 2017, pp. 23–29). Indigenous communities generally rely on what is defined as "sustainable" and "traditional" management of resources and ecosystems.[30] This sustainable management is nurtured by Indigenous knowledge systems that recognize the intrinsic and spiritual value in landscapes and natural elements. Sustainable harvesting, traditional livestock keeping and fishing, gathering and collecting of fruit and natural medicines are able to minimize the emissions while simultaneously conserving biodiversity.[31] Also, it has been proved that granting the management of forests to Indigenous peoples and securing their land rights contributes to lowering consistently the GHGs emission levels (Stevens et al., 2014). At the same time, Indigenous ways to interact with the ecosystems are unique and they could provide an important added value to climate mitigation. The Intergovernmental Panel on Climate Change (IPCC) has recognized this aspect in its Fifth assessment report, whereas "Indigenous, local, and traditional forms of knowledge are a major resource for adapting to climate change […] Natural resource dependent communities, including Indigenous peoples, have a long history of

[28] UNFCCC, Paris Agreement, Article 5.

[29] UNFCCC, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1, Article 12.

[30] For instance, note the narrative of international organizations such as the WIPO: "Climate action and sustainability: Indigenous peoples are part of the solution", at https://www.wipo.int/wipo_magazine/en/2020/01/article_0007.html, last accessed September 2022; the FAO: "Indigenous peoples' sustainable livelihoods", at https://www.fao.org/3/aj033e/aj033e02.pdf, last accessed September 2022; or the wording of the former UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli Corpuz: "Through our participation we succeeded in getting some decisions which directly refer to us such as the need to take into account our human rights and our traditional knowledge, among others […] It is my hope that this book will serve as an instrument for indigenous peoples to use in establishing partnerships with all relevant players to achieve the common goals of mitigating climate change and achieving sustainable development", at https://www.ciel.org/reports/indigenous-peoples-and-traditional-knowledge-in-the-context-of-the-un-framework-convention-on-climate-change-2020-update/, last accessed September 2022.

[31] Ibid.

adapting to highly variable and changing social and ecological conditions" (Ford et al., 2016).

Thus, Indigenous knowledge is believed to have an important role in the global fight against climate change. It has been recognized and promoted at the international level by Food and Agricultural Organization in the climate-start agriculture project—which aims at incorporating both traditional and modern techniques,[32] by the International Union for the Conservation of Nature (IUCN) that has identified a consistent number of adaptive practices, and, finally by the United Nations Educational, Scientific and Cultural Organization in its Local and Indigenous Knowledge Systems (Macchi et al., 2008).[33] Indigenous initiatives for climate change adaptation and biodiversity conservation are being implemented at the national level in a variety of countries, demonstrating that native communities play an essential part also in sustainable agricultural practices, food security and inclusive development.[34]

However, a process of comprehensive recognition of the important role of Indigenous knowledge and culture is not straightforward and simple. Customary law relies on very different principles and sources compared to the Westernized and positivistic law standards, such as the importance of spiritual and holistic links with the land, oral transmission of principles through songs, ceremonies and stories (Black, 2010, pp. 45–47). The establishment of rules for the recognition of customary law is fundamental to assure respect for Indigenous peoples' legal regime and their inclusion in climate change governance. In fact, despite the great importance posed by international law to Indigenous knowledge, the rights of Indigenous peoples remain largely unprotected under the current legal regime (Tobin, 2010).

[32] See generally FAO website: http://www.fao.org/climate-smart-agriculture/it/, last accessed February 2021.

[33] See generally UNESCO website: http://www.unesco.org/new/en/natural-sciences/priority-areas/links/, last accessed September 2022.

[34] For example, biodiversity conservation and climate adaptation initiatives are being implemented in the Peruvian Andes where Quechua communities are managing the Potato Park aimed at restoring the region potatoes biodiversity, following their customary laws and knowledge. In South Africa, in 2008, traditional livestock keepers adopted the Declaration of Livestock Keepers Rights, which recognizes the importance of biodiversity conservation for the sustainable use of traditional breeds. Traditional knowledge helped to prevent an environmental disaster in 2004, when Moken people in Myanmar recognized the signs of an incoming tsunami and moved their village to a higher ground, avoiding death (see generally: Tobin, 2014, p. 136; ILO, 2017, p. 28).

In conclusion, I would like to point out at some crucial implications that should be considered when we frame Indigenous claims within a recognition discourse. As demonstrated in this section, current narratives around justice, Indigenous knowledge and climate change revolve around particular patterns of recognition of Indigenous communities in national and international law and governance. But is the recognition approach truly acknowledging Indigenous claims? Is it meaningfully incorporating and promoting Indigenous customary law within mainstream, positivistic legal systems, at the national and international level? Three sorts of considerations on the recognition approach in law and governance are due in order to address these complex questions.

First of all, the recognition narratives around the "ecologically noble savage"—those narratives who proclaim Indigenous people like our saviours from climate change and environmental degradation thanks to their "ancestral knowledge"—perilously resemble those colonial narratives that contributed to the creation of the subaltern, in the stigmatization of "the other" in contraposition to Westernized, white, rational cultures and systems of government. The danger of framing Indigenous claims over their knowledge within such a recognition scheme might limit the potential of their self-affirmation and self-determination, insofar as is the Westernized world that *accords recognition* to their knowledge as a tool to fight climate change and environmental degradation.[35]

The logic of recognition, in this sense, has pervaded the history of international human rights law, as I will discuss in Chap. 3. States have tended—at the beginning—to accommodate Indigenous and other marginalized groups' needs and claims, especially in the years of the decolonization process, but only by granting social and cultural rights, avoiding to explicitly renounce to effective control over lands and natural resources. Or, when such territorial concessions were granted, States have reserved a special permission to override Indigenous rights to land possession for the best interest of the nation and for development projects of strategic

[35] In my views—as I will explain in this section—the use of this concept should be avoided, even though it is widely used by academics and practitioners—and I do not deny in my very early career as a PhD candidate I applied it (however, it was always accompanied by statements about the importance of decolonization), but thanks to further studies, I made the conclusion presented here in this book (e.g. see the book review "Giacomini, 2020b").

interest. This tendency is demonstrated both at the international law level—it took 20 years to finally have the UNDRIP adopted—and at the policy and politics level. Forced evictions, killing of Indigenous people, criminalization of rights and environmental defenders and exclusion from governance and decision making are still pressing issues today, notwithstanding the *recognition* of Indigenous rights and Indigenous knowledge at the international level. It looks like the (neo-)colonial power accepts the collective rights of Indigenous peoples only if this recognition does not undermine the legal, political, and economic framework of the power structure itself (see also Coulthard, 2017).

The politics of recognition, framed in a purely liberal discourse, tend to reproduce the very configuration of the colonial power. My aim here is not to deny the importance of Indigenous knowledge, whether configured as "traditional", "ecological" or "ancestral". Indigenous knowledge is extremely important for many reasons, as it reverberates the experiences, culture and cosmologies of collectives whose survival is threatened by ongoing paths of neo-colonization. It offers fundamental insights of ecological value and understanding of nature and relationships with the non-human. But I believe that in trying to protect this system of knowledge, States, international decision-makers and even academics should be thoughtful around the risks of a possible reproduction of the colonial power asymmetries, where Westernized stakeholders give importance and accord recognition to cultures and systems of knowledge configured as antithetic to a capitalistic, white, rational system. In other words, where recognition is conceived as something that is granted to a subaltern group by a main, dominant group, this recognition fails to modify the overall structure of power that *firstly* caused the misrecognition (see again Coulthard, 2017).

Therefore, politics of recognition per se do not necessarily guarantee Indigenous self-determination or grant the existence of Indigenous customary law as a legal system in coexistence with other, positivistic systems. What does so, are politics of meaningful participation and co-creation of law and policy in both the national and international context. This approach can be also defined as *legal pluralism*, or the coexistence of more than one legal order in the same juridical and political space. International law and governance have progressively constructed

the category of "Indigenous peoples" sometimes contributing to rooting stereotypes or "traditional" characteristics that are synonymous of "authenticity" (Sieder, 2012). However, through the narratives of Indigenous knowledge around climate mitigation and adaptation and biodiversity conservation, "we dream an old dream whose roots stretch back to the Garden of Eden and beyond. [But] The future lies not in the discovery of a philosopher's stone long buried in the minds of tropical forest peoples, but in the slow, patient work of assembling solutions from the myriad sources scattered throughout the world" (Redford, 1991).

If law and governance does not take into account these crucial considerations, the risk is the creation of an institutionalized reiteration of colonial logics of recognition where Indigenous law is seen as contraposed to Westernized legal and social systems. Yet, another approach is possible, as we are aware of the existence of meaningful politics that explicitly deal with legal pluralism and effective participation of Indigenous peoples in law and governance. This approach, that can be defined as "decolonial", includes the actualization of the right of Indigenous peoples to self-determination, ultimately made operational through participation and FPIC, and other procedural guarantees on the access to justice. Therefore, a theory of climate justice that encompasses Indigenous peoples' interests within the broader climate law and governance framework should be based on these crucial principles—self-determination, procedural and participatory rights—in order to realize a paradigmatic shift towards a truly "sustainable" and "zero emissions" new world.

Indigenous Peoples, Climate Change and Colonialism

Rethinking Vulnerability

Indigenous peoples are deemed as extremely vulnerable to climate change, because of several reasons directly connected to the environmental fragility of ancestral lands and ecosystems, existing patterns of marginalization and poverty and spiritual attachment to the land and geographical

landscapes that are a risk of disappearance due to slow-onset climate impacts.[36] This vulnerability is due to a variety of particular conditions that draw upon Indigenous peoples' traditional livelihoods and their special connection and dependence on environments' natural resources (Mearns & Norton, 2010). In relation to climate change, vulnerability is generally understood as an integrated approach that takes into account not only environmental and geographical hazards but also economic, social and cultural impacts.[37] However, as I will argue later in the section, the vulnerability approach—or even victimization approach—that is generally attached to Indigenous peoples both in climate governance and in academic literature is rarely tied up or contextualized in a colonial or neo-colonial setting. These premises are necessary to properly contextualize the case study presented in the next subsection.

Indigenous peoples are generally threatened by patterns of poverty, violations of their rights as their living conditions are worsened by deforestation, land degradation and pollution, and political and economic marginalization. According to ILO, climate change multiplies and worsens these vulnerabilities and exacerbates development challenges, posing Indigenous peoples at a unique degree of weakness (ILO, 2017, p. 7).[38] According to this approach, there are at least six key vulnerability factors that are increasingly being worsened by climate change.

The first relates to patterns of poverty and inequality affecting Indigenous peoples'. It has been estimated that climate change will increase of 100 million the worldwide number of people living in poverty

[36] United Nations Permanent Forum on Indigenous Issues. *Backgrounder: Climate change and indigenous peoples,* PFII, available at https://www.un.org/esa/socdev/unpfii/documents/backgrounder%20climate%20change_FINAL.pdf, last accessed February 2021.

[37] World Food Programme. *Vulnerability Analysis and Mapping: A Tentative Methodology*. Available at: https://docs.wfp.org/api/documents/WFP-0000040024/download/, last accessed February 2021.

[38] It is interesting to note that the ILO, in this report, does not mention "colonialism" and colonial practices not even incidentally. In addition, despite mentioning that "Indigenous peoples are not just "victims" or "subjects of development"; they are fundamental partners and crucial agents of change for achieving effective climate action, sustainable development and green growth" (ILO, 2017, p. 23), the ILO decided to put the word "victims" in association to "Indigenous peoples" in the very title of the report. This choice appears peculiar since there is wide consensus about the important role of Indigenous peoples as actors in climate change mitigation and adaptation, as evidenced throughout the book.

by 2030, while climate disasters will exacerbate inequality and diminish economic growth.[39] Indigenous peoples are already among the poorest of the poor, accounting for the 15% of poor even though they represent the 5% of global population (World Bank Group, 2003). Climate disasters will result in diminishing of crops, destruction of traditional livelihoods, change of rainfall patterns and resource scarcity, just to mention few of the effects (Hallegatte et al., 2016).

The second vulnerability factor revolves around the erosion of natural assets. Indigenous peoples' traditional livelihoods, employment and subsistence are based on the preservation of forests and related natural resources.[40] Deforestation not only contributes to the increase of global emissions but also threatens Indigenous peoples' traditional livelihood. In addition, the impacts of climate change on forests will lead to a depletion of carbon stocks, resulting in a growing threat for both Indigenous peoples and people worldwide.[41] Indigenous peoples reside in and take care of about 22% of global forest surface which accounts for the 80% of the world's biodiversity (World Bank Group, 2008, p. 18). As argued previously, Indigenous culture, spirituality and knowledge are deeply connected to the environment: ancestral forest are places inhabited by ancestors and spirits (Durning, 1992, p. 28). Climate change impacts add tension to the already existing issue of the identification of rights to land, territories and resources. This is due to increasing lack of access to natural resources and related conflicts, but also to conservation policies that aim at protecting forests and biodiversity, which tend, as we shall see further in the book, to exclude Indigenous access to their ancestral lands.

[39] World Bank website, available at http://www.worldbank.org/en/topic/climatechange/overview, last accessed September 2022.

[40] Over 1.6 billion—including more than 2000 indigenous cultures—are dependent on forests for their survival. See Sustainable Development Goals website, available at https://sustainabledevelopment.un.org/topics/forests, last accessed February 2021.

[41] For the IPCC, "Examples that could lead to substantial impact on climate are the boreal-tundra Arctic system (medium confidence) and the Amazon Forest (low confidence). Carbon stored in the terrestrial biosphere (e.g., in peatlands, permafrost, and forests) is susceptible to loss to the atmosphere as a result of climate change, deforestation, and ecosystem degradation (high confidence). Increased tree mortality and associated forest dieback is projected to occur in many regions over the 21st century, due to increased temperatures and drought (medium confidence). Forest dieback poses risks for carbon storage, biodiversity, wood production, water quality, amenity, and economic activity" (Interngovernmental Panel on Climate Change, 2014, p. 15).

Thirdly, most Indigenous peoples live in areas highly subjected to climate change and global warming impacts. Indeed, they live in fragile ecosystems such as tropical forests, polar areas, small islands, coastal regions and semi-arid zones that are particularly affected by climate change (Mearns & Norton, 2010). For example, Indigenous peoples living in the Artic are extremely vulnerable to climate change because of the ice melting (UNESCO, 2009, pp. 156–163). Similarly, communities living in SIDS (Small Islands Developing States).[42] where the IPCC has forecasted "Risk of death, injury, ill-health, or disrupted livelihoods in low-lying coastal zones and small island developing States and other small islands, due to storm surges, coastal flooding, and sea level rise", will likely face relocation when coastal areas will be submerged (IPCC, 2014, p. 17). In Latin America and the Caribbean, the raining pattern will be consistently modified together with the regularity of seasons. This will impact negatively Indigenous peoples who rely on traditional agriculture and on availability of fruit and game (Kronik & Verner, 2010).

The fourth factor builds on migration and forced displacement. Extreme climate change impacts are likely to cause the relocation of Indigenous groups because of erosion and flooding, as in the case of the village of Kivalina in Alaska.[43] Forced migrations represent the worst-case scenario of climate injustice, and they can be a consequence of both sudden and slow-onset environmental disasters. Climate-induced migration can be interpreted like an extreme form of adaptation strategy, and it can imply loss of cultural identity, discrimination and resource conflicts in the destination areas, exploitation of labour force in the next setting and other social and environmental problems (Farbotko et al., 2016). Recently, Pacific Island States have expressed their concerns over the current climate crisis since they fear the islands would be uninhabitable by 2030 due to sea level rise.[44] Eventually, people living on those islands will have to flee

[42] See generally *Fact Sheet: Indigenous Peoples in the Pacific Region*, Permanent Forum on Indigenous Issues (PFII), n.d., http://www.un.org/en/events/indigenousday/pdf/factsheet_Pacfic_FINAL.pdf, last accessed September 2022.

[43] For more information on this case, please consult "US climate resilience toolkit" at https://toolkit.climate.gov/case-studies/relocating-kivalina, last accessed September 2022.

[44] See Nady Bay Declaration, 30th July 2019, available at https://www.documentcloud.org/documents/6226356-Nadi-Bay-Declaration-on-Climate-Crisis-2019.html, last accessed March 2021.

as the global ice coverage is already melting at unprecedented levels—causing a sea level rise of 0.5 mm in just a month.[45] Sea level rise and its impact on people living in small island States and coastal areas would likely be one of the major causes of climate-induced displacement.

The fifth vulnerability type relates to gender inequality. Indigenous women and girls play an important role to ensure food security in their communities, although they suffer from marginalization both inside and outside their communities (UNFPA, UNICEF, UN Women, ILO, OSRSG/VAC, 2013). Climate change is likely to worsen the already difficult situation of Indigenous women that faces discrimination, exploitation and violence, since they are more vulnerable to socio-economic risks related to environmental-induced migration (UN-Habitat, 2011, p. 2).

Finally, the last factor concerns the problem of the lack of inclusion of Indigenous peoples in the draft of public policies and international climate change negotiations. Indigenous peoples, whose rights have been internationally recognized and protected through ad hoc instruments—as will be outlined in the next chapter—and whose vulnerability to climate change is particularly severe—are in need of adequate protection and enforcement of their rights. In the words of the Special Rapporteur, Indigenous peoples' rights must be addressed and respected in international agreements.[46] Without participation and inclusion of Indigenous peoples in global climate governance, measures for mitigation and adaptation to climate change would not be effective. Consultation procedures with Indigenous peoples with the aim to obtain their consent are key elements of a fair and just climate governance process.

Even though these vulnerability factors are important in order to understand and problematize the magnitude of climate change impacts on Indigenous communities, what is needed is also a reflection on the context within which these impacts take place by giving particular consideration to the phenomena of colonization of the atmosphere, extractivism and the relegation of Indigenous peoples in determined

[45] Independent, Greenland's ice sheet melting so fast it has caused global sea levels to rise 0.5 mm in just a month, available at https://www.independent.co.uk/climate-change/news/greenland-ice-sheet-melting-how-much-b2131500.html, last accessed September 2022.

[46] See UN Special Rapporteur Website: http://unsr.vtaulicorpuz.org/site/index.php/en/press-releases/61-clima-change-hrc, last accessed September 2022.

geographical areas. When we affirm that Indigenous peoples are more vulnerable than other communities to climate change impacts, we need to ask ourselves what the underlying causes of such particular vulnerability are. In this section, I argue that what we call "vulnerability" results from legacy of colonial and capitalistic approaches to the use of the atmosphere and other natural resources.

The exclusion of colonial legacy from studies on vulnerability to climate change, together with framing and perpetuating Indigenous livelihoods and knowledge as "traditional"—as argued in the previous section—brings the risk to replicate colonial dynamics. On the contrary, colonial and neo-colonial patterns should be duly considered when approaching the issue of Indigenous peoples' vulnerability to climate impacts. In this respect, the first aspect that should be considered is the geographical space upon which Indigenous peoples depend for their livelihoods. The discursive production around Indigenous peoples as "local" and deeply attached to a certain territory is rooted in confinement policies in the so-called Indigenous reserves, which dates back to colonial periods. This discourse fosters the Western imaginary which believes that Indigenous peoples are more "traditional" and "local" than other people in the same nation or State. But the reality is that that way of being "local" has been politically constructed, and has resulted in the marginalization of Indigenous peoples both geographically and socially (Peters, 1996). The way settlers have constructed their urban spaces on Indigenous lands, and how they have progressively confined Indigenous peoples in other areas should be taken into consideration when determining scales vulnerability and fragility of ecosystems. A decolonial approach to climate vulnerability studies should at least make these important premises instead of depicting Indigenous peoples as prisoners of their "traditionality" and geographical localization which makes them "victims" of climate change.

The geographical confinement of Indigenous peoples to certain areas is relevant, in certain cases, for the difficulties in climate change adaptation strategies insofar they prevent Indigenous peoples that once were nomad communities to migrate to different spaces and lands. A parallel can be drawn on this matter between Indigenous nomadic peoples and ancient human societies: it has been documented by several anthropology

scholars that ancient societies were resilient to environmental and climatic changes because of the possibility to migrate and conduct a nomadic lifestyle (see generally McAnany & Yoffee, 2010). This feature characterized also certain Indigenous societies. As an instance, Russian Indigenous peoples' mobility and livelihoods were greatly affected first by mid-seventeenth century colonization, and later by the Soviet regime and its willingness to include non-native and native communities in the collective effort for the economic development of the Union. The Soviet regime obliged Indigenous peoples to resettle and to become sedentary, abandoning their mobility strategies as responses to climatic changes (Crate, 2013). Another example of this sort is represented by the Iñupiat community in Shishmaref, Alaska. Previous flexibility to environmental shift and unexpected hazards allowed the community to adapt to unexpected changes. Today, the relatively immobile infrastructure and development requires Indigenous people to be sedentary, despite the severe climatic changes happening in their territories. The state of Alaska and federal government agencies are attempting to work with the Iñupiat community on a planned relocation, but there is no clear process for community relocation in response to changing ecological contexts (Marino, 2012).

Another issue that a decolonial approach to the study of vulnerability should take into consideration relates to the practices of colonization of the atmosphere and the responsibility of Western private actors that act in participation or with the approval of States. I am referring here to the crucial role played by the so-called Carbon Majors in the undiscriminated emissions of Green House Gases (GHGs). The Carbon Majors are a group of 90 GHGs emitters—mostly fossil fuel companies like Saudi Aramco, Chevron and Exxonmobil—that are responsible for the 63% of the carbon dioxide and methane emitted between 1751 and 2010.[47] If the atmosphere is to be considered a common shared by human beings and non-human entities, the use of this important resource by few corporations exacerbates the inequality dimensions of climate change, and calls for the application of the principles of climate justice for redress (Borràs,

[47] This data is available on the website "Climate Accountability", at https://climateaccountability.org/carbonmajors.html, last accessed September 2022.

2019). This aspect is particularly relevant in the litigation context and is more broadly addressed in Chap. 6.

An aspect that is connected to the role of Carbon Majors and extractive industries and should be included in the vulnerability discourse relates the logic of extractivism that directly affects Indigenous peoples and other communities situated in mining areas. Not only Indigenous peoples are affected by the effects of the colonization of the atmosphere, but they are also afflicted by the extractivism of fossil fuels and other non-renewable resources perpetrated by corporations in their ancestral territories. If that is the case, Indigenous peoples come to suffer *both* from climate change impacts and polluting activities connected to mining and fossil fuel extraction. This is the case, as an instance, of the argument concerning Chevron-Texaco's operations in Ecuador that largely affected the area of Lago Agrio and Indigenous and other local communities in the area.[48] Similarly, the ice melting in the Arctic sea is opening up large reserves of oil and gas, opening up passages that were previously blocked and enabling the start of a new era of extractivism in the area, which is home to Indigenous peoples like the Inuit (Cameron, 2012).

Finally, I would like to make a reference to another way of contextualizing vulnerability that is somewhat indirectly related to climate change impacts, but it is instead related to climate governance. Indigenous peoples might be negatively impacted by development projects that aim at mitigation or adaptation objectives. The creation of protected areas in order to create what can be defined as "carbon stock", for example, might lead to forced evictions of Indigenous peoples from their ancestral lands. As an instance, the (NGO) Survival International has recently denounced forced evictions of 300 Samburu families in the name of forest conservation in Kenya.[49] These important aspects, that here it is without doubt worth citing, are more broadly discussed in Chap. 4.

[48] For further information on this case and the court trials, visit UDAPT website (Union of the People Affected by Texaco-Chevron Operations), at http://texacotoxico.net/#inicio, last accessed March 2021.

[49] See Cultural Survival Website, at https://www.culturalsurvival.org/news/samburu-communities-laikipia-kenya-face-threat-eviction, last accessed March 2021.

The discussion put forward here on vulnerability and its most contentious underpinnings deserves attention in a climate justice perspective, as it underlines important ethical aspects related to the profound causes of vulnerability of Indigenous peoples to climate change impacts. The notion of climate justice, as constructed in this chapter, might help in the shaping of a new climate regime in which Indigenous peoples are protagonists of the global governance, not only as "victims" and "locals" but also as powerful agents of change. This should be done within a legal pluralist framework, in which traditional knowledge is vested with as much importance as Westernized science, which implies respect of Indigenous peoples' right to self-determination. This important right and its progressive construction and *recognition* in international law constitute the focus of the next chapter.

The next section will present a case study derived from my experience in the Peruvian Amazon, where I encountered leaders and representatives of Yanesha Indigenous communities. This case will be analysed through a climate justice approach and by linking the impacts of colonization to the specific vulnerability of Yanesha communities to climate change.

Contextualizing Climate Change and Colonialism: The Yanesha Peoples of the Palcazu Valley in Peru

This section explores the main outcomes of the on-site fieldwork I have realized in Peru in collaboration with Chirapaq, the Peruvian Indigenous cultural centre.[50] Chirapaq is an Indigenous NGO operating in Peru in the last 30 years. Its aim is to promote "the assertion of identity and the acknowledgement of Indigenous rights in the exercise of citizenship, with particular commitment to Indigenous children, youth and women".[51] Since 2014, Chirapaq holds a consultative status within the Economic and Social Committee of the United Nations, while its President Tarcila Rivera Zea is member of the UN Permanent Forum on Indigenous Issues.

[50] Research results have been partially published in the journal Diritto e Processo (Giacomini, 2020a, 2020b).

[51] For further information, see generally: Chirapaq website, available at: http://chirapaq.org.pe/en/, last accessed September 2022.

I have spent in Peru a total of six weeks in the period of October and November 2018. During that time, I have investigated for my project on climate change in the area of the Palcazu Valley in the Amazon Forest, with the participation of Yanesha representatives living adjacent to the village of Iscozacin, close to the Yanesha Reserve. The research project aimed at collecting relevant information on the effects of climate change in the Selva Central area in Peru through the instauration of an iterative dialogue with Yanesha representatives, and in linking the research results to a broader framework which takes into consideration colonial patterns in the Peruvian amazon and the participatory aspect of justice. The research also helped in assessing adaptation and forest conservation strategies put in place in Yanesha communities. Before going into the details of the fieldwork, I will provide anthropological details on Yanesha people, details on the history of the colonization of the Peruvian Amazon and political narratives around its exploitation, and climate change impacts in Peru.

Yanesha people have inhabited their ancestral territories since immemorial time. Traditionally, they have been dwelling mainly in the mountainous area of the Palcazu region in the Amazon. However, several communities have been relocated in the "lower" part of the Palcazu Valley due to colonization and investments in the area.[52] At the moment, they inhabit the districts of Chanchamayo (Junín), Oxapampa (Pasco) and Puerto Inca (Huánuco). Even though in traditional colonial literature they are regarded as Amazonian communities, the significant research of the anthropologist Richard Chase Smith demonstrated that, on the contrary, they are closely related to Andean cultures. In the documentary *RROMUEPATSRO: Mapeando el mundo histórico-cultural de los Yanesha*, *Perú*, Chase Smith and the Chief Espiritu Bautista show, thanks to decades of fieldwork in the ancestral territories, how closely related Yanesha people were to the surrounding territory from the Andes to the Pacific Ocean (Instituto del Bien Comun, 2010).

[52] There are two main inhabited areas in the Palcazu valley, one defined as "lower"—characterized by tropical forests and subtropical transition areas—and the other defined as "higher"—characterized by high altitude subtropical forests (Valadeau, 2012).

The official statistics of the Peruvian government report around 12,000 members as pertaining to the Yanesha community—although around 7000 of them are resident in their ancestral territories.[53] Because of the migration to the cities and their closeness with inhabited centres such as Iscozacin, nowadays they are at risk of cultural and linguistic losses in a logic of adaptation to more Westernized customs (Chirapaq, 2019). This process of loss of Yanesha culture manifests, for example, with changes in clothing preferences, relegating the use of the *cushma*, the traditional robe, only in traditional ceremonies and official meetings (Santos Granero, 2009).

According to Chase Smith and Granero, the Yaneshas were related to other ancestral people in the Amazon and Andean area before the arrival of the Spanish (Chase Smith, 2004). Such connection was demonstrated through the comparative study between the ancient Yanesha and Andean mythology and tales, and by linguistic studies that witnessed the use of common words in Yanesha and other Andean languages. The first ethnographic documents mentioning the Yanesha date from the sixteenth century, when the first Christian missions came into the territory (Santo Granero, 2015). While the purpose of this section is not to give a comprehensive historical review of the events that took place in the Yanesha territories—which has been extensively documented by the aforementioned authors—it is important to mention that the Yanesha have not suffered a consistent and systematic dislocation compared to other peoples subject to colonization processes. In fact, even if in the nineteenth century the affluence of European and Andean colonizers provoked the relocation of Yanesha communities towards the Iscozacin and Pachitea basins, they were able to maintain their close cultural relationship and practices with the ancestral territory (Chase Smith, 2004).

The consideration of such complex relationship is paramount if we wish to understand the importance of the sacred territories in Yanesha culture. The multifaceted traditional environmental knowledge, which has been orally transmitted through the centuries and combines mythology, medicine and rituals, makes the Yaneshas one of the main

[53] Ministerio de cultura de Peru – Base de datos pueblos indígenas, at *bdpi.cultura.gob.pe*.

contributors in witnessing how climate change is impacting their ancestral territories. But before delving into the perceptions of Yanesha people in relation to climate change impacts in the Amazon, it is necessary to understand how Yanesha perceive their sacred landscape, which is completely different from the Westernized, positivistic conception of the environment as a mere resource that serves different purposes. In fact, in environmental law and governance forests are usually conceived as providers of "ecosystem services",[54] such as in the case of the highly criticized Reducing Emission from Deforestation and Forest Degradation (REDD) programmes.[55] In Indigenous views, forests are much more than an easy way to provide ecosystems services or amass carbon credits. They represent a source of biodiversity and oxygen and they can represent homes, source of food, water and shelter. Not only are forests crucial for the reproduction of Indigenous peoples' traditional livelihoods, but they are also fundamental for their cultural practices and religious beliefs.

Understanding the narratives that Indigenous communities have developed around the environment is key to appreciating their conception of natural resources, as this is holistically entrenched holistically in their culture and spirituality (Reo, 2011). Only after having gained this understanding, we can discern the different threats that climate change poses for traditionally living communities.

Yaneshas perceive their ancestral lands in a holistic manner, whereas geographical space is understood as a continuum with human beings. For example, in Yanesha traditional medicine, plants that are used to cure illnesses and aches are considered far more than pharmacological objects (Valadeau et al., 2010). They are deemed as hidden, invisible human beings embodied in the forms of plants since immemorial times. In Yanesha cosmology, humans were transformed due to the willing of the gods to serve human needs (Santos Granero, 1998). In this sense, human

[54] For an account of the critics to the concept of "ecosystem services", refer to Schröter et al. (2014).

[55] The question of avoided deforestation as a commodification of forests for carbon credits was reintroduced, after the initial exclusion from the Clean Development Mechanism in favour of afforestation and reforestation measures, by the Coalition for Rainforest Nations. It posed great emphasis on the economic opportunity deriving from the conservation of forests and their proposal was reiterated by various state and non-state actors such as the World Bank Group and Norway (Stephan, 2012).

beings and plants are considered as different manifestations of life in a mutually reinforcing relationship (Valadeau et al., 2010). Therefore, the medicinal practices in Yanesha culture reflect the interconnection between plants, humans and diseases. These last are interpreted as a manifestation of an etiological agent which has caused the sickness, aimed at creating physical trouble to a specific person.

Such deep interconnection with natural elements makes Yanesha's forest management well-known for being totally sustainable and respectful of the environment. This can be clearly explained if we consider that in Yanesha mythology the geographical space is interpreted as a "sacred landscape" (Santos Granero, 1998). The ancestral territories are embedded with historical and cultural significance, as the geographical space is where ancestors disappeared or hid, becoming natural elements such as mountains and rivers. The Yaneshas still conserve an extensive body of oral literature that narrates the origin of the natural landscapes. Such narratives have been documented in the aforementioned documentary *RROMUEPATSRO: Mapeando el mundo histórico-cultural de los Yanesha*, *Perú*, and in other audio-visual productions distributed by the Instituto del Bien Común.[56]

Since the 1970s, thanks to geographic information system (GIS) technology, it has been possible to track and document the geographical sites that, according to the Yanesha mythology, were directly related to their powerful ancestors. For example, it is narrated that the Yanesha ancestor Yato' Pap hid inside a big mountain above the Paucartambo river. It is believed that from there, he still looks after his grandchildren, the shamans.[57] The mapping of the Yanesha territory evidenced the existence of more than 2000 geographical, historical and natural resources sites (Chase Smith, 2004). Such georeferencing demonstrates the importance of the landscape and ancestral territories in Yanesha culture. The collective memory of the Yaneshas contributes in renewing the importance of sacred ancestral territories through rituals, songs and narrations, as the

[56] Instituto del Bien Común, *Where Our Ancestors Once Tread: Mapping the Historical-Cultural Space of the Yanesha People*. A four-part film series, at *ethnovisions.net*.

[57] Ibid.

traditional iconography is deeply embedded into the Amazonian and Andean landscapes.

This profound reverence for natural and geographical elements is reflected in the traditional management of forests and natural resources typical of the Yanesha people. When visiting the *chacras* ("fields") where Yanesha people grow cocoa, cotton, yuca and other plants, it is almost impossible to realize that the land has been modified by human actions. This is because the ancestral cultivation practices of the Yanesha prescribe a total respect for the natural environment without altering the landscape.[58] This ancient way of producing food and other resources is nowadays defined as agroforestry (Miller & Nair, 2006), and it is being promoted in the Palcazu area to contrast the colonial practices of monoculture which have triggered soil degradation and high rates of deforestation (Ministerio del Ambiente del Peru, 2011).

This complex system of ancient ecological knowledge and the profound relationship that Yanesha people have with their ancestral lands and territory is an element that constantly emerged during my visits to the communities. However, these complex cosmologies and conceptualization around the Amazon as sacred landscape strike against the backdrop of States' conception of the forest as resource for exploitation or environmental conservation, and of Amazonian peoples as "savage to civilize". In the next paragraphs, I will summarize how the post-colonial Peruvian government has perpetrated and enacted the colonial discourse around the Amazon and its people within an extractivist and neo-colonial framework. As explained in the aforementioned section, such context which progressively "evolved" around politics of recognition is needed to understand why Amazonian peoples like the Yanesha are considered vulnerable also for what regards the impacts of climate change.

The Peruvian Amazon is now enclosed into conservationist objectives which aim at achieving sustainable development through the preservation of tropical forests—at least in certain areas. But the Amazon has been at the centre of the political discourse since the 1960s for what

[58] Visit Pro Naturaleza website for information on Yanesha traditional cultivations, at *pronaturaleza.org*, or watch the documentary *Producción de Cacao en Sistemas Agroforestales en Palcazu, Perú*, *youtube.com* for a documentary on the sustainable production of cocoa in Yanesha communities.

regards its *development* and *exploitation.* The balance between these two opposed values—conservation and exploitation—and the decisions undertaken by the Peruvian government has important consequences on the people who have inhabited the Amazon since pre-colonial times. The presence of Indigenous peoples in the Amazon—like the Yaneshas—make the objective of conservation and exploitation a complex issue. It would be desirable that the populations who reside there reach levels of well-being at least similar to those of other people in the country, or to have the same opportunities. This dilemma between preservation and development of the Amazon area is a challenge for politics and transcends national borders: any decision taken by Peruvians will have effects on the planet as a whole, apart from the direct impacts that concern the local populations.[59]

The political narratives around the Peruvian amazon from the 1960s until today are thoroughly described in the book *Amazonía peruana y Desarrollo económico* (Barrantes & Galve, 2014). In this and the following paragraphs, I am proposing a reconstruction of such narratives based on this book, which are relevant to understand the complexities of colonial practices that have affected Yanesha people and that ultimately have increased their vulnerability to climate change impacts. The main conclusion stemming from the analysis of such political discourses is that the discourses on the Amazon since the mid-twentieth century have been based on two premises. First, following the classic state-national construction pattern, the idea that the Amazon was a rich territory that had to be colonized and to gain vital space, even more so as it was "uninhabited" and had huge resources. Second, the idea that the Amazon was fundamentally a homogeneous geographical unit, an approach that responded to the absence of consolidated political bodies (in the form of provinces or regions) until the end of the twentieth century. Both premises, for their part, started from a certain notion of the exoticism of the Amazon, cultivated since ancient times by the first European explorers (Salman, 2014, pp. 22–23).

[59] Peruvian borders in fact enclose a large portion of the amazon forest. More than 60% of the Peruvian territory is covered in forest. Global Forest Watch website https://www.globalforestwatch.org/dashboards/country/PER/, last accessed September 2022.

Facing both premises, two long-term initiatives have been the stakes of the Peruvian governments. One of a social nature, first around the colonization and then around the expansion of the road network, and other economic, that has favoured extractivist formulas. More recently, at the end of the twentieth century, the projects aimed at the development of the Amazon will rediscover the presence of native communities, their cultural particularities and their situation of dramatic deficiencies, which will have strong implications for the social and educational policies of governments.[60] The geographical regions of Peru were at first evaluated by the post-independence governments according to two criteria. The first classified them according to their vicinity to national administrative centres, particularly Lima. The second criterium relates to the degree of connection with the Creole and mestizo inhabitants of the coast: in the Andes lived "the semi-civilized Indians", while in the Amazon lived the "savages to civilize". The "civilized" category was given to Indigenous peoples who had accepted the domination of the colonial state—and later republican—and its institutions, particularly the Church. While this book is not exhaustive with regard to the complexity of all the social processes linked to the Amazon territory that occurred in the historical period between the evolution of the republic and the consolidation of the Peruvian State in the twentieth century, I would like to draw the readers' attention to the middle of last century. In fact, at that time occurred a great advancement of technology and the process of integration of the Amazon to the consolidated urban centres of the coast and the Andes.

For example, during the government of Belaunde (1963–1968), the "developmental" postulates of the Alliance for Progress promoted by the US President John F. Kennedy were promoted in relation to the Amazon.[61] These principles aimed at promoting integration and economic development in Latin America, particularly among the sectors that were

[60] In general, several authors highlight the early constitution in the discourses of the Peruvian elites of a certain hierarchy of the country's geography on the basis of a double-folded division (Ames, 2010; Orlove, 1993), the colonial segmentation around the "republic of Spaniards" and the "republic of Indians". In simple terms, certain territories existed in Peru which harboured certain social castes, and this idea was not disputed in its full extent after the independence process from 1821 to 1824.

[61] For further info on Alliance for Progress, please visit https://www.jfklibrary.org/learn/about-jfk/jfk-in-history/alliance-for-progress#:~:text=Kennedy%20called%20the%20Alliance%20for,on%20March%2013%2C%201961%2C%20to, last accessed March 2021.

potential "breeding grounds" for left-wing insurrectional movements, that appeared in several countries trying to emulate the Cuban revolution.[62] Despite this progressive project, Belaunde's vision was based on the premise that the Amazon was an inhospitable place, implicitly inhabited by "savage tribes" to be controlled and integrated. In this way, the State promoted the colonization of the coastal and Andean population, a process that was accompanied by the Armed Forces. It also promoted the so-called policy of "colonizing roads" through the construction of the Marginal Highway of the Jungle (today known precisely as *Carretera Fernando Belaunde Terry*).

The Amazon was then conceptualized as a resource to cope with the extractivist needs of the country. In 1968, the coup d'état led by the Armed Forces, which overthrew President Belaunde, led to the imposition of a nationalist program, based on the industrialization of the country through monopolization of exploitation of natural resources (in particular oil). Emphasis was given to the national and State-based exploitation of oil in the forest in the department of Loreto in the Amazon. In 1977, the first barrel of oil from the Loreto would finally reach the port of Bayóvar. However, the military government was also important for the recognition of Indigenous property over the lands. In 1974, the government approved the Native Communities Law for the Jungle, which recognized Indigenous communities as owners on the lands on which they settled, and the character of "inalienable, imprescriptible and unattachable". But this decree-law would be amended in 1978, in the second phase of the military government (1975–1980), led by Francisco Morales Bermúdez, through the promulgation of Decree Law 22175. The new decree limited the scope of the previous legislation. The government introduced a differentiation between two types of land based on their productivity purpose: agriculture and forestry. The first would remain the property of the communities—through the title granted by the Regional Agricultural Directorate, while the second would

[62] The politician had previously raised this idea in his writings, mainly in the book *The Conquest of Peru by the Peruvians* (Belaunde, 1959). Under this logic, the expansion of state presence required the advancement of the country's road network.

be given in concession through transfer-for-use arrangements granted by the Ministry of Agriculture.

The legal titling of Yanesha territories took place in this context: in 1974, the Yanesha federation obtained the legal recognition of their ancestral territories from the Peruvian government and the creation of the protected areas such as the Yachana-Chemillen reserve.[63] However, the agrarian reform measures that were applied in many cases did not improve the conditions of access to land for Indigenous peoples as they had been displaced long before. In other cases, because the expropriated lands were handed over to the workers who were occupying them at the time. In general, it is important to remember that in the 1970s, the number of Indigenous legal claims over their land was very limited: it came from those Indigenous settlements most affected by processes of colonization where the families perceived with anguish the threat of displacement (Chirif & Pedro, 2007).

After the military government, Belaunde was elected again, and resumed its colonial politics in the Amazon as land that should be converted in agricultural resource. He also started a first cultural colonization by promoting a campaign for the bilingual education in the Amazon, where most ethnic groups that did not speak the two major languages of the country (Spanish and quechua). This politic of recognition shows that the Amazon was traditionally seen as a territory "uncivilized", whose inhabitants were to be assimilated to the linguistic traditions of the Westernized world.

In the elections of 1985, Alan García, first president of the Peruvian Aprista Party (PAP), was appointed president. During his first government (1985–1990), the Amazon disappeared from political narratives, except to verify the reparation and enlargement of some roads (including the Marginal de la Selva), and the exploitation of gas near the area of Aguaytía, in Ucayali. However, Garcia made great effort in terms of

[63] By the time legislation on Indigenous communities came in force, the distributions of land in the areas most affected by colonization, especially the central part of the forest (Perené, Villa, Rica, Satipo, Chanchamayo and Oxapampa) and south-central (high Urubamba), were already defined with characteristics that we know today, that is, of Indigenous settlements isolated and confined to minimal space (Chirif & Garcia Hierro, 2007).

energy policy, for example, through the grant of a special fee regime to oil companies and the exploitation of natural gas in the region of Cuzco.

The Garcia government ended up in the midst of a serious economic and institutional crisis, aggravated from the advance of the two main subversive and terroristic groups: *Sendero Luminoso* (Shining) Path and *Movimiento Revolucionario Tupac Amaru* (MRTA). It is in this context that Alberto Fujimori (1990–2000) became president against the figures associated with the parties that had power in the 1980s. The immediate challenge for Fujimori in the Amazon was a political-military one. The MRTA in the 1980s had gained importance in the northern Amazon. Also during the 1980s, the so-called coca boom had colonized the Amazon forest: hectares dedicated to coca cultivation doubled during the first Garcia government. Both phenomena (terrorism and drug trafficking) began to reinforce themselves in a mutual way, notwithstanding Garcia implemented a policy of forced eradication, evicting the population from the Amazon. Thus, Fujimori government focused on the need to recover territories in the hands of the MRTA, such as the Huallaga and del Mantaro in Junín. Finally, when the MRTA was defeated, the 1990s would see two important milestones regarding the Amazon: first, the promotion of foreign private investment in extractive industries and, second, new amendments to the ownership and use of forest land in the Amazon. In fact, in 1993, the Congress approved by Legislative Resolution No.°26253 the ILO Convention 169. This agreement became a matter of dispute 15 years later, because of its implications for the use of native territories by the extractive industries (Morel, 2014, p. 34).

The following government held by Alejandro Toledo committed to the institution of political space specifically directed to Indigenous peoples. Thus, during its administration, the Andean Amazonians and Afro-Peruvians Peoples' Council was established in 2002, which would then be the basis for approval in 2004 of the National Institute for the Development of Andean, Amazonian Peoples and Afro-Peruvians (Indepa) with their own legal personality. The politics of recognition lead to the approval of the law that protects intellectual property and the ancestral knowledge of Indigenous peoples, and the approval of the law on the protection of Indigenous peoples in voluntary isolation. The second Garcia government, started in 2006, would be characterized by the

eruption of protest movements against what were perceived as "liberalizing" attempts at land ownership of Indigenous communes.[64] Such protests occurred because in mid-2008, the government reformed the property laws of native lands. This reform took place in the context of the signing of the free trade agreement with the US, which, in its annexes, required compatibility of the amendment of Peruvian legislation forest matter. The new decrees were perceived by the native communities as promoters of the incursion of extractive industries into their territories, either through reduction of the areas considered as forest heritage, the quorum for the sale of communal land or abandonment of the regime land ownership which, since the 1970s, has been protecting the communities in the Amazon These legal instruments were finally repealed following the protests in the province of Bagua, department of Amazonas, in June 2009, where 33 people died. The high number of dead in that protest polarized the country and gave a renew political protagonism to Amazon native organizations. In reaction to these important protests, the Peruvian government under the presidency of Humala finally adopted the consultation law based on the provisions of ILO Convention 169.[65]

Nowadays, the Amazon areas and its native people still need to face the prejudices that were constructed during the colonial time—which refers both to the European and Peruvian colonization. Myths around the conceptualization of the Amazon forest, such as its perceived territorial and geographical homogeneity, the virginity of the forest, and the myth of Indigenous peoples as agents against development are still difficult to eradicate. Political narratives and collective imaginary that tend to both deconstruct and reconstruct the Amazon ecosystem and Indigenous peoples tend to replicate the very colonial conceptualization of the forest. In fact, today large areas of forest are threatened by ongoing deforestation and soil degradation: in the years 2001–2016, almost two million of

[64] During his second period, García expressed his thinking on the Amazon through the so-called *Artículos del perro del hortelano*, published in the daily El Comercio since 2007. In these articles, the president highlights the importance of privatization processes. The president focuses his criticisms on indigenous associations and communities, "unreal owners" unable to invest in their lands and to allow others with greater resources—large private companies—to invest in their territories.

[65] The Indigenous peoples' rights to consultation and FPIC are further analysed in Chap. 5 on participatory rights.

hectares were lost (Jacquelin-Andersen, 2018, p. 166).[66] Forests in Peru are also devastated by illegal mining, which provokes deforestation and mercury contamination in the soils (Sierra Praeli, 2019). Deforestation is one of the leading causes of climate change and if its trends remain unaltered, the consequences will be devastating for both people and the environment.

The general environmental context evidences that Peru is one of the world's most affected countries in terms of climate change effects: 67% of its environmental disasters are related to climate impacts (Ministerio del Ambiente, 2016). In the first half of 2017, floods and mudslides left a toll of 28,784 victims, 38,382 homes destroyed, and 43,718 hectares of lost crops (Jacquelin-Andersen, 2018). Peru is globally ranked as the third country at risk of climate change disasters and second in the Latin American ranking (Brooks & Adger, 2003). In addition, it is the South American country that experiences the highest level of water scarcity: 70% of its population resides in the desertic coastal region where only 2% of water is found. In this area, the river runoff is crucial, and it is due to the Andes' yearly glacial melt.[67] Moreover, Peru is characterized by very high rates of socioenvironmental conflicts, that would likely be mutually reinforced by the climate change impacts described (Defensoría del Pueblo, 2018). Out of the 197 conflicts reported in February 2021, 128 were of socio-environmental nature (Defensoría del Pueblo, 2021). In the region of Pasco—the geographical area where I conducted my fieldwork—in February 2021, there were seven active cases of socioenvironmental nature, mostly linked to mining activities in the area (Defensoría del Pueblo, 2021, pp. 78–81).

My field research aimed at investigating which impacts of climate change are significant for Yanesha communities, and how they are perceiving such changes from their unique perspective.[68] This research witnesses how climate change is impacting Yanesha communities living in the Amazon Forest with data collected on field. During my stay in the Peruvian amazon, I visited nine communities and completed a total of 12

[66] See generally: Peruvian Ministry of the Environment website at *bosques.gob.pe*.

[67] Ibid.

[68] Please refer back to the Methodology section in Chap. 1.

interviews—although I prefer to refer to them as "dialogues"—with Yanesha representatives. I was concerned with understanding how communities are coping with climate change and if the government is interested in helping them in the adaptation process.

The dialogues, as outlined in the methodology section, resulted in a free and relaxed process, and I was happy to listen to all they felt comfortable in sharing with me. However, throughout our dialogues I followed a specific pattern based on the following list of questions: (1) Is your community perceiving a change in the climate? If yes, since when? (2) What are the consequences of these changes in your community's life? (3) Is the quantity of the food you can produce decreasing? (4) Have you registered an increase in the mortality of animals? (5) Have you registered an increase in illnesses? (6) How is the community adapting to climate change? (7) Is the government or the region helping your community?

Each Yanesha representative interviewed has affirmed that the climate and the meteorological conditions have consistently changed in the past ten years. They do not have knowledge about the causes that led to this increase in temperature, but they have a very clear perception of the changes that are occurring in their territories. Their traditional livelihoods are deeply dependent on the regularity of seasons since they rely on agriculture, fishing and breeding. Native communities have a clear perception of the changes that are occurring in seasonal patterns, frequency of rain and daytime temperature.

The first effect that they perceive is the increase in temperature during the warm season. They have affirmed that the sun is burning their skins and it is impossible to work in their *chacras* after 11 am—while before it was not like this, they could work all day without problems. The diminution of hours worked in the *chacras* has a direct consequence on the production of food, which, of course, is decreasing.

The second climatic modification that they perceive is the changing in the rainfall pattern, which causes abrupt temperature changes. They affirmed that when it rains, it becomes suddenly cold and people in their communities—especially children—have been suffering many diseases such as high temperature, cough, diarrhoea and cold. They affirmed that before it was not like this and they could better control the appearance of

these illnesses. Also, the changes in temperature have been causing illness and death among their livestock which, in turn, has led to a decrease of the food available (mainly poultry and eggs). The increased rainfall causes major troubles in an area that is normally afflicted by floods in the raining season-normally, when rivers grow, it can become impossible to use the road, as it would be flooded; as a result, the area cannot be accessed from Iscozacin or other villages. Their cultivations often get rotten or develop illnesses because of the excessive rain, leading to a further decrease of the food stocks and of the cotton plants available.

Finally, several Yanesha representatives have reported a change in the so-called *indicadores* (indicators). In the Palcazu area and, in general, in the areas where Yanesha communities live, the consideration of seasonal indicators is important when tracking current environmental changes. The characteristics of the different seasons were, until recently, easily acknowledged by the Yaneshas. The two main seasons traditionally recognized in the annual cycle are the dry season (*charo*) and raining season (*huapo*) (Valadeau, 2018). However, the seasons and the meteorological events are no longer respecting the traditional patterns, while the *indicadores* that determined the different productive activities in the Yanesha communities are changing as well. The indicators are, for example, the singing of certain birds which normally announce the beginning of the dry season, or the animal sounds from the forest which mark the right time for hunting. Such indicators are nowadays not working like before. According to the Yaneshas, it is like the animals are not behaving according to the meteorological seasons.[69]

The research results are summarized in the Tables 2.1 and 2.2.

In another part of our conversation, I asked how communities are coping with these changes. Some representatives answered me that they are selecting the plants that better survive the rain, isolating those that caught some illnesses, burying them in deep holes in the ground. Buenos Aires community is currently restoring traditional aquaculture in order to have better access to food.

All individuals interviewed have affirmed that nobody from the government or the region is helping them to face these changes. Chirapaq,

[69] Ibid.

Table 2.1 Perceived climatic changes in Yanesha communities

Community name/ perceived climatic changes	Higher temperatures (compared to 10 years ago)	Increased quantity of rain (raining season)	Lower temperatures in association with rain
San Pedro	1	1	1
Santo Domingo	1	1	0
Nueva Aldea	1	1	1
Loma Linda-Laguna	1	1	0
Santa Rosa de Chuchurras	1	1	0
Shiringamazu (3 sectors)	1	1	1
Buenos Aires	1	1	0
Siete de Junio – Villa America	1	1	1
Santa Rosa de Pichanaz	1	1	0
Total "yes"	**9**	**9**	**4**

they told, is the only organization that is helping them through the realization of micro development projects. However, they expressed that there is an ongoing governmental conservation project in the area, which involves them directly. The Forest Programme of the Ministry of the Environment (MINAM) is operative in the Oxapampa province and the Palcazu area since July 2017.[70] The programme aims at conserving forests through the direct involvement of Yanesha Indigenous communities. A total of 293 families located in Alto Iscozacin, Buenos Aires, Santa Rosa de Pichanaz and Shiringamazu y Santa Rosa de Chuchurras are receiving economic incentives (67,800 soles in 2017) for the conservation of 6780 hectares of forest—which makes 10 soles (around 2 pounds) for a hectare.[71] This lack of fair compensation has been criticized by some of the Yanesha representatives I interviewed. Although the conservation of the forests, respect for nature and preservation of biodiversity is inherent to their culture, some representatives of the Yanesha communities believe that the economic compensation is not

[70] See Peruvian Forest Programme in Oxapampa Province, available at MINAM website: *bosques.gob.pe*.

[71] Ibid.

Table 2.2 Climate change impacts in Yanesha communities

Community/Climatic impact	Fewer hours worked in the *chacras*	Decrease in food availability	Diseases' outbreak	Increase in illness/mortality of livestock	Damages to cultivation	Decrease in availability of water (dry season)
San Pedro	1	1	0	0	1	0
Santo Domingo	1	1	0	0	1	0
Nueva Aldea	1	1	1	1	1	
Loma Linda-Laguna	1	1	1	1	0	0
Santa Rosa de Chuchurras	1	0	1	1	1	0
Shiringamazu (3 sectors)	1	1	1	0	1	1
Buenos Aires	1	1	0	0	0	0
Siete de Junio – Villa America	0	0	1	1	0	0
Santa Rosa de Pichanaz	0	1	0	0	1	0
Total "yes"	**7**	**7**	**5**	**4**	**6**	**1**

adequate.[72] In fact, the colonization of the area that occurred after the construction of the road and the contact with villages such as Iscozacin has brought them new necessities that did not exist before, like buying sugar, salt and clothes. Availability of money is becoming nowadays essential in Yanesha communities, but there are very few opportunities for them to gain it.

The Yanesha people case is not isolated. On the contrary, many Indigenous peoples all over the world, from Antarctica to Australia, are being negatively impacted by climate change. In the worst-case scenario, traditionally living communities are at risk of loss and culture and identity, relocation and food scarcity due to the permanent modification of the environmental conditions.[73]

This case study demonstrated that the quest for climate justice cannot ignore the specific colonial context that shaped—and continues to shape—the way Indigenous peoples live nowadays. The specific vulnerabilities that characterize Yanesha people—lack of electricity and running water, lack of health services, inaccessibility of roads and other relevant deficiencies—are the result of the colonial process and the absence of consideration and help by the government. Climate change impacts *worsen* and *exacerbate* such already difficult conditions but cannot be considered a unique and sole cause of vulnerability. Therefore, a decolonial approach to climate law and governance is needed, an approach that deliberately acknowledges ongoing patterns of colonialism in the design of law and policy. This crucial conclusion represents the general framework in which the next chapters are inscribed: an interpretation of law and legal remedies in light of the need of a decolonization of climate law and governance.

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[72] Such compensation is yearly around ten Peruvian soles for each hectare of forest.

[73] International and national climate litigation cases are progressively being brought by Indigenous peoples before tribunals under these premises. See also: chapter on climate litigation Inter-American Commission on Human Rights (IACmHR). (*The Arctic Athabaskan Council, Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada*, 2018; *Petition To The Inter-American Commission on Human Rights Seeking Relief From Violations Resulting from Global Warming Caused By Acts and Omissions of the United States*, 2005; Un Human Rights Committee, *Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change*, 2019).

Conclusion

Climate justice is the frame of reference of this book, and the following chapters are to be interpreted in light of the theoretical approaches expressed in this chapter. The notion of climate justice has been constructed in the first part through an analysis of the different theories that have contributed to the definition of what constitutes climate justice. In particular, traditional Western theories such as distribution, recognition, participation, and the capabilities approach have been considered alongside decolonial theories in the definition of climate justice. In addition, the chapter has problematized the issue of the recognition of Indigenous knowledge and customary law, warning about the risks of idealizing and constructing an image of the "Indigenous" based on Western ideals. In the second part, the chapter has presented, through the analysis of a case study, the relevance of the interrelation between vulnerability, colonialism and climate change when we discuss climate justice. The chapter has evidenced how such aspects are strictly interrelated and should be duly considered in their interdependence.

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3

The International Legal Framework: Human Rights and Climate Change

> [N]ot all forms of human violation stand addressed by the languages of human rights. Nor do all violated people have equal access to the languages of human rights; having access to a growingly common human rights language is not the same thing as marshalling the sure power to name and redress human violation. Impunity for human—and human rights—violation coexists with human rights implementation and enforcement.
>
> Baxi, 2006

Introduction

The climate justice framework set up in the previous chapter is the lense through which all the other chapters should be read and understood. This chapter has the objective of lying down the basic international legal framework that defines the interaction between human rights and climate change. It aims at doing so from the point of view of critical legal studies, as pointed out in the methodology section of the introduction. In the first part are analysed the so-called human rights-based approaches to climate change from a critical perspective that questions the very nature of human rights and their limitations in pretending to have

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universal, non-biased value. This part of the chapter starts with a critical overview of the conceptualization of human rights, discussing the promise of universal inclusion of the human rights paradigm. It then analyses more closely the interrelation between human rights and climate change, and it focuses especially on the difference between substantive, participatory and procedural rights. The second part of the chapter narrows the focus of the investigation to environmental human rights, firstly by providing a critical overview of the right to a healthy environment, and then by elaborating the justice focus of some substantive rights vis-a-vis climate change impacts.

Human Rights-Based Approaches to Climate Change

The Paradox and the Inclusive Promise of Human Rights-Based Approaches to Climate Change

In recent years, the scope of interest and inspiration for international climate change law has been progressively widening from centring around scientific developments to prioritizing human rights and associated implications of climate change. This chapter explores the potential benefits—and the inherent flaws—of using a theoretical human rights framework when analysing the impacts of climate change for the protection of Indigenous peoples and the advancement of climate justice. This type of analysis has been made possible because the recognition of the interlinkage between human rights and environment degradation has progressively developed in the past decade and now it is widely recognized at the international level. However, this recognition has taken place within a Westernized legal paradigm, which conceptualizes the relationship between human beings and the environment in hierarchical terms, whereas nature is always seen as functional to human centredness.

It now widely demonstrated that climate change has the potential to jeopardize the enjoyment of fundamental human rights and human capabilities such as the right to life, the right to property and adequate

housing and the right to a livelihood. Small island communities will risk extinction as their island-nations will be completely submerged by rising seas. Other communities, especially Indigenous peoples, are already facing the loss of their traditional ways of life, their culture and their ancestral lands due to the negative implications of climate change impacts (Williams, 2012).

Before delving into the application of human rights-based approaches to the climate change realm, some general premises on the conceptualization of human rights are due in light of the Indigenous pursue of climate justice. These premises are necessary to understand why, in principle, human rights law bear limits in its application if not supported by a decolonial discourse that aims at deconstructing human rights by understanding their intrinsic attachment to only *certain* manifestation of the human. In Baxi's words, the future of human rights does not lie in their creation—intended as their recognition in international and domestic law—but in their *decreative* potential and in the emergence of many existing human rights worlds aimed at protecting specific categories (e.g. Indigenous peoples) (Baxi, 2006, p. 2). In order to understand the potential of human rights as a tool to achieve justice in the context of climate change, we firstly need to ask ourselves "who is represented as 'human' in this discourse? Whose struggles have been given voice through the rhetoric of recognition of human rights?".

Human rights were firstly conceived in moral philosophy rather than law.[1] The prevailing philosophical underpinning behind human rights has remained essentially unaltered since the seventeenth century. Such rights are conceived as intrinsically inalienable from all human beings and also as constituting a deontic postulate upon which all human rights law is based. This aspect can be considered challenging as the extent of application and codification of human rights norms struggles to constitute a universal postulate, despite the Western effort to build up a general framework applicable to all States and nations. Because of this, human rights theorization and recognition in law has brought to a large process of creation of different types of human rights. These differentiations reflect changes in society, and different systems of philosophical and

[1] Sen defines human rights as "ethical pronouncements" with political connotations (Sen, 2009).

political thought: just let us consider the difference between first generation rights—civil and political—and the so-called third generation rights—such as environmental human rights. If, on the one hand, this process of progressive recognition is useful to protect those who are considered more vulnerable in particular societal circumstances—women, people with disability, children—on the other hand, this lack of clarity leaves human rights subject to change according to different ethical and political views.

Such contested universality originates from the history of the conceptualization of human rights itself. According to Baxi, the history of theorization of human rights distinguishes between two main ages: modern and contemporary. The "modern" human rights paradigm was based on an exclusionary criterion forged upon a conceptualization of human rights intended as "the gift of the West to the Rest"—and for "gift" we might perhaps intend colonization and enslavement of people based on politics of assimilation and, subsequently, recognition as human beings. There are three types of claims that support this thesis: a strong claim which argues that human rights could have originated only in Western culture; a double-folded weak claim which contends that human rights are the rightful historical product of Westernized civilization and that human rights have been spread all over the world from the West (Baxi, 2006, p. 34). The contemporary age of human rights begun with the end of the Second World War and the emergence of the Universal Declaration of Human Rights, and if fostered a logic of inclusion rather than exclusion from the conceptualization of the human.[2] The principle of self-determination, attached to all human beings, and the constant emergence of dialogues between classes of oppressed and decision-makers, has led to the existence of a multitude of production of rights: rights of women, rights of children, rights of Indigenous peoples and other minorities and so on. In the contemporary era of human rights then, all forms of cruelty

[2] In the modern conceptualization of human rights, the recognition of what constituted a "human" was based on the criteria of capacity of reason and autonomous moral will. This conceptualization excluded slaves, Indigenous peoples, women, impoverished and the insane from being considered human and, therefore, entitled to human rights. Such an exclusion justified colonization and imperialism in order to accomplish a civilizing mission, which would ultimately turn the "non-human" into "human" through practices of assimilation.

and institutionalized state racism are banished, by virtue of a counterreaction to the horrors faced in the global war and an increased awareness of the need to take human sufferings "seriously".

In light of the history of the conceptualization of human rights, it is crucial to determine whether and, if yes, in what measure, the modern human rights paradigm has influenced the contemporary paradigm. According to Grear, the influence of the modern human rights paradigm in its theorization of human rights still underpins contemporary human rights' ideological structure. Taking inspiration from Baxi, she argues that multinational corporations—in way similar to Western civilizers of the modern human rights paradigm—have colonized the language of human rights: "[n]ot only do corporations possess legal personality and the capacity to be endowed with rights contractual, proprietary and (in the United States) constitutional but they increasingly invoke the language and concept of 'human' rights to defend their corporate interests" (Grear, 2007).[3] This colonization is ultimately allowed because of the very contemporary conceptualization of human rights. Human rights law, as previously argued, has been constructed in the Western world and it is conceived as a rational paradigm, a disembodied ideal that exists in a separate way from the body and bodily representations. In other words, law has progressively constructed itself as a "legal disembodiment", pure rationality in dialectic contrast with the different manifestations of the human. However, since law is, by definition, rational, and Western philosophy twisted maleness with reason, it consequently derives that disembodied reason is inextricably associated with being male, rational and white (Grear, 2015).

Legal theory should engage with the oppressive structure that has characterized the birth and the spread of the conceptualization of human rights as the manifestation of Westernized legal disembodiment. A way of doing so consist in adopting a markedly anticolonial and decolonial approach to human right theorization, especially if the ultimate goal of the normative action is to undergo a quest for Indigenous climate justice.

[3] This point resonates with Baxi's thought: "The emergent paradigm insists upon the promotion and protection of the collective human rights of global capital in ways that 'justify' corporate well being and dignity even when it entails gross and flagrant violation of human rights of actually existing human beings and communities", as cited by (Grear, 2007).

Such an approach should start with the acknowledgement of the intrinsic *paradoxes* of using a flawed human rights approach, characterized by a corporate spill-over effect in the normative content of human rights, to protect the interests of Indigenous communities which are, in principle, negatively affected by the climate colonization perpetrated by multinationals. Human rights need to be attached to the different bodily manifestations of the human—Indigenous peoples, women, children and other marginalized groups, reimaging and repairing the fracture and the oppressive structure that has been created through the adoption of a dualistic view that separates body/mind, male/female, human/nature. Only through this paradigmatic shift, a decolonization of legal theory, aimed at giving voice and representing the interests of the people that human rights wish to protect, would be possible.

For instance, contemporary human rights law brings the promise of an inclusive approach—that has manifested so far with the proliferation of a huge number of ad hoc human rights treaties dedicated to the different manifestations of the "vulnerable". Such an inclusive approach has been realized through logic of progressive recognition of the different vulnerable groups as pertaining to the category of the human and, therefore, deserving special protection—which was somewhat not sufficiently guaranteed by previous legal instrument such as the Universal Declaration. An inclusive approach should be also based on non-Western traditions of human rights, and re-discover conceptualizations of the human as they were before Western colonization "gifted" the notion of human rights though conquest and subjugation.

Since "all nations and peoples [should] come to human rights as equal strangers", cultural humbleness remains a basic presuppose for intercultural communication and participatory parity (Baxi, 2006). For instance, we could start by interrogating ourselves how non-Western, Indigenous traditions perceived the meaning of being human, and how does this perception influence the relationship with the environment in all its natural manifestations. A re-construction around the conceptualization of human rights and the meaning of being human, which takes into account non-Westernized approaches, might indeed lead to a truly inclusive approach in human rights law and, therefore, in human-rights based approaches to climate change.

For example, for the Pasto Indigenous peoples (Colombia), the human–nature relationship is opposed to the Western construction of land as a commodity of individual possession, whose main orientation is commercialization within the economic structure. The world is perceived as the sum of many complementary parts that need each other, where human beings are one of those parts, and they exist in relation with one of those parts, not as an opposed and dualistic entity. In Pastos' cosmovision, the relationship between humans and lands is at the same time conceived as dualistic and three-dimensional: the Andean territory assumes a dual current: it is feminine and masculine, it is cold and warm, it is dark and it is light, composed of the top and the bottom parts, the inside parts and the outside parts; at the same time, the ancestors conceived and understood the territory, in three parts: the world below; where the ancestors are, the world in the middle, where the living beings live and the family and community activities develop; and the world above, which is the celestial space, place of the gods (González Gonzalez, 2013). These parts interrelate with each other, in a mutually enhancing relationship where the one *is* the other. Indigenous wisdom conceptualizes being human not only in collective terms, as all humans are part of the same community, but also in cosmic terms insofar it recognizes the interdependence between humans and Mother Earth.

Another example of this non-dualistic conceptualization of the human as opposed to nature can be drawn from Mapuche wisdom (Chile and Argentina). Mapuche peoples say: *Kom kiñe meu muten deumaley, pu anti, pu pilli, pu wanglen, pu che, ka pu mapu* ("all is made of the same material, the sun, the soul, the stars, the people, and the earth"). The close relationship and bond between the Mapuche and their environment have led them to a permanent search for equality and reciprocal and harmonious coexistence, making this search their only reason for being, or project of common life, culture and principles. The laws or codes, and the different systems of organization, are a means and instrument to achieve this purpose. Therefore, for the Mapuche, the persistent search for balance and harmony in the *Nag-Mapu* (the different manifestations of existence) is the constant search for their own balance and harmony, which undoubtedly provides a personal wellbeing at emotional, spiritual, physical and

mental levels, as well as collective, social, cultural and religious well-being (Gavilan Pinto, 2011, p. 80).

Human rights-based approaches to climate change carry the promise of fostering a multicultural dialogue and participation of Indigenous peoples in law and governance. The participatory rights in climate governance have the potential of including Indigenous knowledge in design climate solution and of realizing environmental and climate self-determination also through the warranty of access to justice and remedy. But such an inclusion *must* necessarily entail a decolonial approach to climate governance in order to revert the paradigm of recognition of Indigenous peoples, by which they are just "invited at the table" of State decision-makers that *allow* such participation. Indigenous knowledge and cosmovisions are living traditions that are already speaking, and listening to these voices should be based on the renunciation to the epistemic presumption of centrality and exclusivity typical of the Westernized world. The Western conception of what it means to be human is not but one of the many philosophies and epistemologies present on planet Earth.

Human Rights, Climate Change and International Law

The decolonial approach and Indigenous climate justice principles constitute the background against which law and governance should be evaluated in their potential of changing the current paradigm. However, it is necessary also to consider what type of justice is possible to achieve within the current legal framework in order to understand ways of ameliorating and changing from within the existing system. Human rights-based approaches to climate change present some important advantages as they can work as powerful indicators to understand the impact of climate change on human communities, they constitute catalyst for action to protect human communities and the environment, and they can promote participation of Indigenous and local communities in the design of climate governance, including development projects. Therefore, this and the next section are drafted in the language of human rights, describing the link between these last, the environment and climate change. This type of understanding is needed in order to analyse, later on in the book,

how Indigenous peoples are being protected by the current legal regime against the negative impacts of climate change, and what are the steps to be undertaken in a climate justice perspective.

The interaction between climate change and human rights is now widely accepted in law, governance and academic doctrine, despite the fact that environmental protection and human rights have evolved in international law as two separate legal regimes (see generally Knox, 2009; Sinde, 2007; Boyle, 2012; Badrinarayana, 2010). This section explores the potential benefits of using a theoretical human rights framework when analysing the impacts of climate change for the protection of human rights. The recognition of the interlinkage between human rights and environment degradation has progressively developed in the last decade and now it is widely recognized at the international level. To do so, it is first necessary to make a reference to the principles of environmental law that have human rights implications, and then to analyse how climate change, by altering the environment through extreme and slow-onset events, threatens human rights.

The reference to international environmental law is due because international climate change law has primarily evolved in that legal regime, and not as a human rights issue. For this reason, in legal instruments, climate change problems and its impacts on human beings have been addressed mainly through international environmental law instruments (Atapattu, 2016). Humphreys refers to this trend as "path depedence", which indicates that the study of climate change was originally meant to be exclusively entrenched within the physical science paradigm, and not the socio-legal (Humphreys, 2010, p. 4). Only gradually did the social sciences become interested in this problem and its implication for human societies. On the other hand, human rights organizations tend not to take up such scientific questions framed by hypothesis or based on scenarios, given that reasoning in terms of future harms does not reflect the *modus operandi* of human rights analysis.

Because of the aforementioned considerations, before taking into consideration the interaction between climate change and human rights, it is important to consider the main provisions and principles of international environmental law which are essential in defining the obligations of States towards the environment and, consequently, towards people under their jurisdiction. The core principles of international environmental law

set important standards for both the respect of the environment and human rights. These principles are

1. sovereignty over natural resources and the responsibility not to cause damage to the environment of other States or areas beyond national jurisdiction (do no harm);[4]
2. cooperation, notification and consultation;[5]
3. sustainable development and inter and intra-generational rights of future generations;[6]

[4] The no harm principle, applied in an environmental context, appears for the first time in the 1941 Trail Smelter case (*US v. Canada*). In this case, the court established that "no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or the persons therein". The principle was then confirmed by the ICJ in the Corfu Channel case (*UK v. Albania*). Following the adoption of Resolution 1803, this principle has been considered a corollary of the principle of permanent sovereignty over natural resources. This principle was limited by the duty not to cause damage to other states and only in 1972 with the Stockholm Declaration was the link made between the sovereignty principle and the responsibility not to cause damage (Principle 21). The Stockholm Declaration went beyond the idea of transboundary harm, since it also referred to the obligation not to cause damage "to the environment of other States or areas beyond the limits of national jurisdiction" (See generally: Dupuy & Viñuales, 2018).

[5] The duty to cooperate is a general duty well established in international law. In environmental law, this duty has taken different forms including a duty to cooperate in a spirit of global partnership (duty for the states to respect the global commons) and a duty to cooperate in a transboundary context (establishment of minimal requirements of cooperation in a transboundary context through norms such as notification and consultation with and prior informed consent of states potentially affected by an environmental activity). The principle of cooperation seems to have substantive meaning because it encompasses principles and concepts. In international environmental law, the duty of cooperation has been translated into requirements of information exchange, joint evaluation of environmental impacts of certain activities and the consultation of the secretariat of an environmental treaty of particular relevance to the case (Dupuy & Viñuales, 2018).

[6] Sustainable development is the general principle affirming that human development, and the use of natural resources, must be conducted in a suitable manner. Sustainable development was defined at the 1992 UN Conference on Environment and Development in Rio de Janeiro as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". There are at least four main elements that are encompassed within the general principle of sustainable development: (1) inter-generational equity; (2) sustainable use of resources: (3) equitable use or intra-generational equity; (4) integration of environmental and developmental needs (Sunkin et al., 2002, pp. 45–49).

4. preventive principle;[7]
5. precautionary principle;[8]
6. polluter pays principle;[9] and
7. principle of common but differentiated responsibilities.[10]

Climate change has only been officially framed as having an impact on human rights recently. This acknowledgement has arisen because the impacts of climate change in terms of extreme weather events threaten the lives of millions of people and force small island communities to relocate as sea levels rise and their lands disappear. The health effects of climate change are also increasingly recognized, inter alia, by public health institutions (Haines & Patz, 2004). These health effects have the potential to exacerbate the already-existing inequities between the richer and the poorer countries (see generally Coleen et al., 2018).

[7] The preventive principle aims at minimizing the possible environmental damage that will derive from an activity and that action should be taken before such damage occurs. At an international level, the application of this principle is particularly significant as states commit themselves to avoid causing environmental pollution within their domestic borders in addition to not causing environmental damage in areas beyond their national jurisdiction. An example of this principle can be found in Article 194 of the 1982 Convention on the Law of the Sea which obliges the signatories to prevent pollution of the marine environment (including in areas beyond national jurisdiction).

[8] The precautionary principle is different from the preventive principle. The precautionary principle can be used to reverse the burden of proof: the activity must be proven not to cause pollution before it is implemented. This principle applies when there is scientific uncertainty, as stated in Principle 15 of the Rio Declaration ("where there are threats of serious or irreversible damage lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation") (Dupuy & Viñuales, 2018).

[9] This principle provides that the costs of environmental pollution should be paid by the state that has caused the damage. This principle can have a specific and a general application. In the first case, we refer to rules governing civil and state liability for environmental damage due to hazardous activities (some examples are the 1992 Convention on Civil Liability for Oil Pollution Damage and the 2000 European Commission White Paper on Environmental Liability). In the case of general application, its meaning relates more to the fact that all economic activities that affect the environment should be accounted for in the pricing system for goods and services resulting from such an activity. This process is called the "internalisation of environmental costs" (Sunkin et al., 2002).

[10] The CBDR principle aims to distribute the efforts required for the management of global environmental problems among states on the basis of their historical responsibilities and respective capabilities. This principle highlights the development needs of less developed countries and their lower contribution to current environmental problems such as climate change. Developed countries regard this principle as a tool to ensure the participation of developing countries in the management of global environmental problems. The CBDR principle was first enshrined in principle 7 of the Rio Declaration. It is also embodied in the UNFCCC and in the Convention on Biological Diversity (Dupuy & Viñuales, 2018).

Climate change law operates under a framework-protocol approach. This has been discussed widely in the academic literature (Atapattu, 2016). This approach has the advantage of flexibility but lacks precise obligations and enforcement mechanisms in cases of non-compliance. For example, the United Nations Framework Convention on Climate Change (UNFCCC) adopted at the Rio Conference in 1992 does not enforce strict obligations. Such obligations were only made reality with the entry into force of the Kyoto Protocol in 2005. The protocol, in applying the principle of common but differentiated responsibilities, divided its member States into two different groups: "Annex I" and "non-Annex I" countries. The first group is made up of industrialized countries that are historically responsible for major GHG emissions. The second group comprises of Small Islands Developing States and the least developed countries, including also the developing economies of China, Singapore and India.

The Annex I countries agreed to reduce their emissions by 5% compared with their emission levels in 1990 by the end of the first commitment period.[11] The Kyoto Protocol was considered an unprecedented achievement for the objective of lowering of the global levels of GHGs (Almer & Winkler, 2017). However, the withdrawal of the US in 2001 undermined the effectiveness of the Kyoto Protocol because from that moment, it lacked the participation of the most significant GHG emitters. The US argued that there was scientific uncertainty regarding climate change and that they were not available to commit to the Kyoto Protocol obligations if other States such as China and India were not bound by the same obligations (Hunter, 2009, p. 610). Yet, even if the Kyoto Protocol constituted an advancement in climate change policy, it did not include any reference to human rights issues. In fact, the concept of "vulnerability" spelled out in its drafting referred only to States and not to individuals.

In the post-Kyoto era, the Bali action plan of 2007 was adopted "to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative

[11] Kyoto Protocol, Art. 3. This obligation could be fulfilled jointly or individually, since the Protocol envisaged four flexibility mechanisms: joint implementation, emission trading, the bubble and the clean development mechanism. (see also Nicelli & Ramdas, 2013).

action".[12] The Plan set out four main issues to be discussed in future negotiations: mitigation, adaptation, financing and technology. Developing and industrialized countries agreed to adopt national mitigation measures though this was contentious in the case of developing and high-polluting countries such as China.[13] The Bali Action plan recognizes that "the needs of local and Indigenous communities should be addressed when action is taken to reduce emissions from deforestation and forest degradation in developing countries".[14] It constitutes a first, meaningful step in pinpointing the problems caused by reducing emissions in Indigenous lands through forest conservation.[15]

The 2009 Copenhagen Accord was the first agreement to be reached after the adoption of the Bali Action Plan and it was expected to establish new global climate change governance for the post-Kyoto period. However, the Copenhagen outcome was a disappointment in this sense (Hunter, 2010; Montini, 2010). Rights language is not contemplated in the Copenhagen Accord, even though the UN Report on the link between human rights and climate change had already been released at the time. [16] It looks like there has been a step back from the results achieved with the Bali Action plan in terms of recognition of Indigenous communities needs in climate change governance. According to Rajamani, the accord faced severe legal and procedural challenges. It included only 29 States, leaving out the majority of the United Nations Framework Convention on Climate Change signatories. Also, the legal nature of the accord is uncertain as it is neither a Conference of the Parties (COP) decision nor an agreement. Instead, it is a document with political value, with no binding value over ratifying States (Rajamani, 2010).

On the contrary, the 2010 Cancun Agreement saw UNFCCC signatories agree to a new voluntary commitment which would set the world on track to limit the increase in global temperatures to 2°C (or possibly

[12] See Decision 1/CP.13, Bali Action Plan, in United Nations Climate Change Conference, Dec. 3–15, 2007, Report of the Conference of the Parties on its Thirteenth Session, U.N. Doc FCCC/CP/2007/6/Add.12008.

[13] Developing countries contested that their high levels of emissions where necessary to undertake their economic development goals, and that they were entitled to such economic growth just as the western countries (Atapattu, 2016).

[14] Bali Action Plan, FCCC/CP/2007/6/Add.1* 14 March 2008.

[15] This problem is more specifically addressed in Chap. 4.

[16] Human Rights Council, Resolution 7/23 Human Rights and Climate Change, A/HRC/RES/7/23, 2008.

to 1.5°) compared with pre-industrial levels (Monjon, 2012). Signatories also committed to the creation of a climate fund and to the adoption of the adaptation framework in an additional UNFCCC document. The Cancun Agreement contains the first explicit reference to human rights.[17] The agreement also recognizes the need to engage with a broader range of actors and stakeholders in climate negotiations, noting that "gender equality and the effective participation of women and Indigenous peoples are important for effective action on all aspects of climate change".

An Adaptation Framework (CAF) was also adopted at Cancun. This is based on the principles of a country-driven, gender-sensitive, participatory and fully transparent approach.[18] The CAF also requires that in adaptation programs, due consideration is taken of vulnerable groups, communities and ecosystems, and that such consideration is guided by the best available science and Indigenous knowledge, while stakeholders participation is ensured.[19]

Other human rights-related post-Kyoto developments were undertaken at the Conference of the Parties in Durban[20] (2011), Doha[21] (2012), Warsaw[22] (2013) and Lima (2014). The Lima Call for Climate

[17] "*Noting* resolution 10/4 of the United Nations Human Rights Council on human rights and climate change, which recognizes that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, Indigenous or minority status, or disability", UNFCCC Report of the COP16, FCCC/2010/7/Add.1.

[18] Ibid, para 12.

[19] UNFCCC, Cancun Adaptation Framework, 2011, at https://unfccc.int/process/conferences/pastconferences/cancun-climate-change-conference-november-2010/statements-and-resources/Agreements, last accessed September 2022.

[20] At the COP17 in Durban, the state parties agreed for the institution of a Green Climate Fund to assist the poorest countries to tackle the worst effects of climate change. See also: Launching of the Green Climate Fund, available at: https://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf, last accessed September 2022.

[21] At Doha, parties decided to extend the Kyoto commitments for a second period (2013–2020), meaning that the division between Annex I and Non-annex I countries was intended to remain for another eight years. The amendment of the Kyoto Protocol set a new target for the emissions reductions at 18%. See also: Doha Amendment to the Kyoto Protocol, available at https://unfccc.int/process/the-kyoto-protocol/the-doha-amendment, last accessed September 2022.

[22] At Warsaw COP the Warsaw International Mechanism for Loss and Damage was established. This instrument was aimed at guaranteeing a system of protection for those most vulnerable peoples against damages caused by extreme weather events and slow-onset events. A funding of $280 million was pledged for the Warsaw Framework for REDD+ programme.

Action was adopted at the latter. The annex to this document refers to human rights and the rights of Indigenous peoples.[23] It also mentions the historic responsibility of industrialized countries, climate change education, participation and access to information.[24] Also, a reference is made to climate migration in the context of the International Mechanism for Loss and Damage.[25] This mechanism is relevant for vulnerable and developing countries in the Alliance of Small Island States and the Least Developed Countries Group, who had been arguing for its adoption in previous negotiations (Goswami, 2012). The mandate for Loss and Damage, already adopted in the 2013 Warsaw COP, includes in its objectives "enhancing knowledge and understanding", "strengthening dialogue, coordination, coherence and synergies among relevant stakeholders", and "enhancing action and support, including finance, technology and capacity-building, to address loss and damage associated with the adverse effects of climate change".[26]

With the acclaim of the Paris Agreement in December 2015 at COP21, a new emission-reduction obligation was established with the objective to keep the increase of global temperatures "well below" two degrees Celsius. The agreement requires all the parties to outline and communicate their post-2020 climate actions, referred to as their National Determined Contributions (NDCs) (see generally Savaşan, 2019). The NDCs constitute the core enforcement mechanism of the Paris Agreement to achieve the long-term objective of reduced emissions and environmental sustainability. To the surprise of the international community, former President of the US Barack Obama signed the Paris Agreement in September

[23] "*Stressing* that all actions to address climate change and all the processes established under this agreement should ensure a gender-responsive approach, take into account environmental integrity / the protection of the integrity of Mother Earth, and respect human rights, the right to development and the rights of Indigenous peoples", Lima Call for Climate Action, available at https://unfccc.int/files/meetings/lima_dec_2014/application/pdf/auv_cop20_lima_call_for_climate_action.pdf, last accessed September 2022.

[24] Ibid.

[25] Ibid.

[26] UNFCCC, *Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013. Addendum. Part two: Action taken by the Conference of the Parties at its nineteenth session*, FCCC/CP/2013/10/Add.1, 2013.

2016.[27] A number of other States continued to ratify the agreement following the US, even after the number of signatories required for enforcement was achieved (Blau, 2017, p. 29). Unfortunately, the Trump administration withdrew the US from the Paris Agreement, arguing that it would undermine the US economy, putting the country at a permanent disadvantage in the global economy (Zhang et al., 2017). The newly elected president of the US, Biden, decided to reinstate the Agreement setting a 2030 GHGs emission reduction target. This decision is important since the US is one of the major global polluters, and its collaboration is needed in order to reach an effective reduction of GHGs emissions at the global level.

The contents and objectives of the Paris Agreement are interlinked with the Sustainable Development Goals (SDGs), particularly with Goal 13.[28] The SDGs are based on human rights assumptions: their aim is to advance the enjoyment of human rights as environmental sustainability is pursued (Saiz & Donald, 2017). The rising global consciousness about climate change in the post-Kyoto era inspired the inclusion of climate change provisions within the SDGs. This helped to lay the groundwork for the Paris Conference in December of the same year. Indeed, it is possible to highlight many similarities between the SGDs and the Paris Agreement (Sindico, 2016).

First, the reference to international cooperation whereby richer countries should help developing countries in adaptation to and mitigation of climate change is included in both. Second, Goals 13, 14 and 15 refer to climate change whilst the Paris Agreement includes provisions on

[27] Tim Phillips, Fiona Harvey and Alan Yuhas, *Breakthrough as US and China Agree to Ratify Paris Climate Deal*, The Guardian, September 3, 2016: https://www.theguardian.com/environment/2016/sep/03/breakthrough-us-china-agree-ratify-paris-climate-change-deal#:~:text=The%20United%20States%20and%20China,the%20battle%20against%20global%20warming, last accessed September 2022.

[28] The SDGs have been instituted after the end of the Millennium Development Goals' period, in 2015. These goals evolved into a new series of 17 objectives to be reached at a global level by 2030. For more information, visit https://sustainabledevelopment.un.org/, last accessed April 2021. Goal 13 ("Take urgent action to combat climate change and its impacts") establishes a series of objectives which are climate-related, such as strengthening resilience, integrating climate change into national policies and planning and the mobilization of at least $100 million per year to be destined for the adaptation of developing countries. See also: https://sustainabledevelopment.un.org/sdg13, last accessed September 2022.

"sustainable lifestyles",[29] "sustainable development",[30] and "sustainable management of forests".[31] In this way, the Paris Agreement recognizes that sustainable development is key to the reduction of poverty through non-market approaches to the economy[32] and through responsible management of natural resources (Blau, 2017). Thus, it can be concluded that there is an overlap among the objectives of the SDGs and those of the Paris Agreement and the latter can be considered the operational instrument through which the SDG provisions on climate change may hopefully be reached by 2030.

The human face of climate change—represented by the environmental impacts on human wellbeing and fundamental human rights—might lead us to assume that the harm caused by the changing climate would be considered under the general protection framework of environmental human rights case law. This jurisprudence does indeed address harm caused *within* borders. However, the jurisprudence falls short in addressing problems of global scale and cross-boundary issues such as climate change (McInerney-Lankford et al., 2011). In any event, human rights law applies in a vertical manner: from the state to those individuals within its jurisdiction. Thus, applying human rights law to climate change issues poses several challenges from legal and practical perspectives at the horizontal and global level because of its individualistic enforcement basis.

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[29] "*Also recognizing* that sustainable lifestyles and sustainable patterns of consumption and production […]", *Paris Agreement*, Preamble.

[30] "This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development", Ibid, Art. 2.

[31] "Parties are encouraged to take action to implement and support, including through results-based payments, the existing framework as set out in related guidance and decisions already agreed under the Convention for: policy approaches and positive incentives for activities relating to reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries", Ibid, Art. 5 para 2.

[32] Non-marked based approaches have the objective of enhancing the cost-effectiveness of mitigation actions and promoting mitigation actions while contributing to sustainable development of the implementing countries. They provide emissions reductions with an international dimension that requires cooperation for implementing action at other levels. See Article 6, Section 8 of the Paris Agreement.

Despite these issues, it has been argued that there might be legal ground for a climate change argument under human rights law. For example, Caney clearly affirms that giving rights to an individual is affirming that this individual "has interests which are sufficiently weighty to impose obligations on others". These fundamental interests might be jeopardized by the negative effects of climate change. This poses ethical questions such as the right of a person not to suffer from climate change impacts. Caney argues that climate change, in threatening health, nutrition, subsistence and other fundamental interests, is sufficient to pose obligations on States and institutions. Caney writes that "persons have fundamental interests in health, subsistence and supporting themselves and that the duty to protect these interests from dangerous climate change is not unreasonably demanding on the appropriate would-be duty bearers" (Caney, 2008). Based on this argumentation, the obligation of States to respect, protect and fulfil human rights claims should be applied to environmental and climate change issues via substantive and participatory rights.

Substantive Rights, Procedural and Participatory Rights and Related Challenges

Thus far, potential environmental rights have been described in different fashions: procedural and participatory, substantive or stand-alone rights to a healthy environment (Shelton, 2015). Procedural and participatory human rights to in environmental governance would reflect international human rights in addressing the right to information, the right to actively participate in decision-making processes and the right to remedies. These rights form part of the so-called environmental democracy rights and are codified in the regional Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted in 1998 by the European Economic Commission (also known as the Aarhus Convention). This instrument seeks to apply the normative content of Principle 10 of the Rio Declaration through the

establishment of Environmental Impact Assessment procedures.[33] Participatory rights refer to the right to participate in decision-making. In environmental governance, arrangements are made by public authorities to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment. Similarly, climate governance promotes participatory approaches that are central to negotiate conflicting values and to enable local and Indigenous knowledge to managing several aspects of climate change (Sprain, 2016). Specific aspects and modalities of Indigenous participation in climate governance are further addressed in Chap. 4.

In general, participatory rights are important because they imply the actual contribution of all social actors in social and political decision-making processes that hypothetically affect the communities in which they live and work. In Peru, for example, the government has approved in April 2018 the Climate Change Framework Act (in Spanish, *Ley Marco sobre Cambio Climático*). This Act has the objective of integrating climate change planification in the three levels of government—legislative, judicial, executive—promoting the inclusion of adaptation and mitigation measures in development planning, investments and governmental management.[34] It also establishes a multisectoral competence framework, where each public entity at national, subnational and

[33] The Environmental Impact Assessment (EIA) was first established as an obligation by the US in 1969 through their National Environmental Policy Act. It was then incorporated into national laws of other states and also in Principle 17 of the Rio Declaration ("Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority"). The obligation to conduct an EIA derives from the formal source where the obligation derives from (treaty, custom, general principles); the spatial scope of the requirement (national, transboundary, global); and the specific content of the obligation. The duty to conduct an EIA is codified in the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context. The Espoo Convention establishes for state parties the duty to conduct an EIA before authorizing activities that may have a "significant adverse transboundary impact" (Dupuy & Viñuales, 2018; Montini, 2013).

[34] Congreso de la Republica, Ley N. 30754, *Ley Marco sobre Cambio Climatico*. See generally MINAM (Peruvian Ministry of the Environment) website. https://sinia.minam.gob.pe/documentos/ley-marco-cambio-climatico, last accessed April 2021.

regional level should define and report actions undertaken for adaptation and mitigation.[35]

Indigenous peoples are key actors in this process, as the objective of the Act is to involve and promote participation and capacity building of actors from public and private sectors in the development of governmental strategies to contrast climate change.[36] The Act establishes general requirements for the development and implementation of climate change policies with a particular focus on Indigenous peoples both as agents of change and beneficiaries of adaptation and mitigation funds.[37] Indigenous Knowledge and alternative views concerning harmonic development strategies that respect nature should be incorporated into the design and implementation of climate change strategies.[38] They are also recognized as important stakeholders in the conservation of forests and in the reduction of emissions derived from forest degradation.[39] According to the Act, the inclusion of Indigenous Knowledge should be done through a transparent, participative and inclusive process that aims at respecting nature while implementing adaptation and mitigation strategies.[40]

Still, Indigenous participatory rights in climate governance hold the potential of realizing the decolonization of the law at the international and local level. The operationalization of a theory of climate justice should take into consideration the participation and cooperation with Indigenous peoples and other groups as fundamental to achieve a true global climate governance. The double-sided consideration of Indigenous peoples in climate governance, both as vulnerable communities and as holders of valuable ecological knowledge, should foster practises of democratic and inclusive participation. Meaningful participation of Indigenous peoples in climate governance should then be part of a broader decolonization process, which cannot be separated from an actual respect of their right to self-determination and from the actual control over their territory through instruments such as legal entitlement

[35] Ibid.

[36] Ibid., Article 2 section 2.2.

[37] Ibid.

[38] Ibid., Articles 3 and 4.

[39] Ibid., Article 17.

[40] Ibid., Articles 4 and 17.

to ancestral lands and respect of FPIC. Recovery of Indigenous right to self-determination and control over their national territories are crucial elements of a decolonization of Indigenous peoples' participatory rights in climate governance.

Similar national provisions reflect the normative content of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (also known as the Escazu Agreement).[41] The agreement, opened to signatures in 2018, has now been ratified by 12 countries, and entered into force on the 22 April 2021. This binding agreement aims at the effective application of Principle 10 of the 1992 Rio Declaration on Environment and Development, which establishes that "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level".[42] In a way similar to the Aarhus Convention, the Escazu Agreement focuses on the relations between States and individuals (Medici Colombo, 2018). It contains important provisions related to Indigenous peoples.[43] Indeed, in implementing the provisions of the Escazu Agreement, States should respect Indigenous peoples' rights as prescribed in national and international law, including participatory and procedural rights: "Each Party shall ensure the public's right to participation and, for that purpose, commits to implement open and inclusive participation in environmental decision-making processes based on domestic and international normative frameworks".[44] However, it is interesting to note that in the

[41] Economic Commission for Latin America and the Caribbean (ECLAC), *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, 2018.

[42] UNGA, *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3–14 June 1992) Annex I Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. I).

[43] Article 5, "Access to Environmental Information", Section 4: "Each Party shall guarantee that the above-mentioned persons or groups in vulnerable situations, including Indigenous peoples and ethnic groups, receive assistance in preparing their requests and obtain a response"; and in Article 7, "Public participation in the environmental decision-making process", Section 15: "In the implementation of the present Agreement, each Party shall guarantee that its domestic legislation and international obligations in relation to the rights of Indigenous peoples and local communities are observed", Economic Commission for Latin America and the Caribbean, *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean,* 2018.

[44] Article 7.

drafting process, the inclusion of a reference to Indigenous cosmovision in the Preamble has been erased as per the final version of the Agreement (Medici Colombo, 2018).

An important aspect of participatory and procedural rights in climate governance refers to the operationalization of the Indigenous peoples' rights to participation, consultation and FPIC in the context of climate mitigation and adaptation projects. This operationalization should be interpreted within the broader framework of the Indigenous peoples' rights to self-determination, in its declination that empowers Indigenous peoples to freely determine their means of development. Such participatory rights are relevant, for example, in the designing of the Green Climate's Fund (GCF) mitigation and adaptation projects, in the case they are to be implemented in Indigenous lands and territory. These aspects are further analysed in Chap. 5, where specific issues concerning consultation, FPIC are addressed.

Substantive rights refer to human rights implications of climate change and the potential inferences for States' towards individual and communities under their jurisdiction. Substantive rights refer to right to life, food, health, adequate housing, freedom of movement, displacement, self-determination, culture and equality. Such rights might be negatively affected by the impacts of climate change, in the case of both extreme weather events—such as a hurricane—or slow-onset impacts—such as progressive flooding of islands or ice thawing. However, it is difficult to establish the specific States' obligations that derive from violation of substantive rights due to climate change impacts, as I will argue in Chap. 6 in the section regarding climate litigation.

In the lights of the above-described interlinkage between climate change and human rights, human rights-based approaches to climate governance, although they are limited because of their intrinsic flaws discussed in the previous section, are useful for at least three reasons. First, they can work as indicators to track how climate change is impacting important aspects of human life and the surrounding environment. Second, they can establish States' liability for not having reduced GHGs emissions and, therefore, for causing impacts on fundamental human rights. Through the application of human rights-based approaches to climate change is therefore possible to access remedies and pursuit justice

and reparations for negative impacts and depletion of environmental assets. Third, they can foster Indigenous participation in climate governance and decision-making, although in a way that can be described as limited. As argued later on in the book, power and hierarchy challenge meaningful participation of marginalized groups, because the determination of who participate and how reflects the marginalization patterns that are present in a society. Therefore, participation in climate governance is a *wicked* problem, that needs to be addressed through a decolonial and egalitarian approach to participation (Sprain, 2016).

Human rights-based approaches are a fundamental instrument that people and communities presently have to seek redress from climate harm. One of the advantages of applying a human rights-based approach to climate change impacts is certainly the argument that the international obligation to respect, fulfil and protect human rights should be applied to individuals and communities facing such impacts (Payne, 2012). The human rights-based framework identifies duty bearers and right-holders, pinpoints the substantive and procedural rights that are being threatened by climate change and reveals the roles that States should play in protecting communities and individuals in the face of climate change. The existence of human rights-based approaches to climate change has deeply transformed the way in which the interaction between human beings and environment is theorized. As an instance, in environmental law, the prevention principle is central. The goal is to enact a priori dedicated provisions that regulate all activities that may cause environmental damage. On the contrary, the focus in human rights law is centred on remedies for violations of human rights and not on prevention measures (Atapattu, 2016, p. 49). One of the interesting aspects about the interaction between environmental law and human rights law is that compensation may be sought for environmental damages that cause a violation of human rights (see generally Lipton et al., 2018).

Thus, the advantage of using a human rights-based approach to climate issues is that a potential plaintiff could be entitled to seek a remedy not only at the national level but also at the international level. Indeed, there has been a shift in focus towards victim-centred climate litigation strategies so as to put a human face to climate change. Most importantly, this shift has produced a rejection of the "aggregative consequentialist

assumption". This assumption states that the best climate change policy is the one that benefits the majority of people, even if it allows some individuals to suffer severe environmental harms (Bell, 2013). On the contrary, using a human rights-based approach at a global level would shift the policy bias towards the protection of the rights of each individual. Furthermore, the climate litigation strategy derived from a human-rights based approach can put a strong emphasis on the problem of climate change and also influence international negotiations (Hunter, 2009). The Inuit Petition filed against the US in 2005 constituted a landmark case, even though it was dismissed prima facie by the IACmHR.[45] Prior to this case, climate change was generally regarded as an exclusive problem of future generations. As a result of this important petition, climate change has been framed as a human rights problem for the first time. This has generated a new interest and a renovated approach to the issue (Tsosie, 2013). The 200 pages petition describing the devastating effects of climate change helped the international community to understand that climate change is happening in the present and its effects are already tangible. Such aspects are further considered in Chap. 6, which analyses Indigenous challenges in accessing Westernized legal systems and in framing their claims within the earlier-described human rights systems.

Although many still deny that climate change is human-caused (one need only think of President Trump's claims and the withdrawal of the US from the Paris Agreement), human rights-based climate change litigation is solidifying the once abstract perception of future rising sea levels. It is helping us embark upon strategies to deal with problems such as relocation of communities as a form of adaptation. Climate litigation thus demonstrates the trend towards increased consideration for climate change impacts: when an Inuit expresses his concerns regarding the survival of his peoples, this focuses the attention on human problems rather than aseptic data on GHGs concentrations (Hunter, 2007).

[45] Petition to the Inter-American Commission on Human Rights Seeking Relief From Violations Resulting from Global Warming Caused By Acts and Omissions of the United States, 2005. The plaintiffs claimed: "The impacts of climate change, caused by acts and omissions by the United States, violate the Inuit's fundamental human rights protected by the American Declaration of the Rights and Duties of Man and other international instruments. These include their rights to the benefits of culture, to property, to the preservation of health, life, physical integrity, security, and a means of subsistence, and to residence, movement, and inviolability of the home".

There are also many challenges in the use of this approach. First, the identification of who pays for the climate change related breaches of human rights law is challenging. This identification is difficult given the global scale of the phenomenon and the impossibility of establishing a direct causal link between the violation, as a global problem, and the responsible entity. Second, it is difficult to determine how to distribute the costs of adaptation and mitigation. At the international level, it has been argued that industrialized countries should bear the brunt of the costs in financing international cooperation projects of adaptation and mitigation to climate change, given their historical responsibility in GHGs emissions levels. Third, a human rights framework can be critiqued for using an anthropocentric approach to environmental and climate protection (Redgewell, 1996; Vermeylen, 2017). This critique has to do more with the philosophical underpinnings of law and governance rather than focusing on the practical challenges of human rights-based approaches to climate change, but it deserves special attention as it fosters the understanding of how human rights are conceived in relation to the environment, and proposes a radical reconsideration of human-centred legal systems.

Anthropocentrism, also in its legal meaning, attributes value to the natural and non-human world only because and as long as it serves human needs. Environmental law and its principles are strictly connected to an anthropocentric vision of nature and the environment. Respecting nature is not seen as intrinsically valuable per se but it insofar as provides indirect protection to and promotes the survival of humankind.[46] For example, a healthy environment is configured as essential because it fosters the enjoyment of many other basic human rights. From this perspective, environmental law is firmly interconnected with the protection of human rights, and it is dominated by the "self-interested" motives of people rather than a genuine interest in protecting nature in itself (Hulme,

[46] See, for instance, the affirmation outlined in paragraph 1 of the Stockholm Declaration: "Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth […] Both aspects of man's environment, the natural and the manmade, are essential to his well-being and to the enjoyment of basic human rights-even the right to life itself", *Declaration of the United Nations Conference on the Human Environment, Stockholm 1972.*

2013). Even though, as it will be argued later in the book, in more recent years, there has been a new approach in environmental law that acknowledge the intrinsic value of nature and its entitlement to rights, the conception of environmental and climate change law has been largely developed based on the Western anthropocentric approach. Similarly, theorists of wildlife law and deep ecology philosophy demonstrate that the human rights-based framework does not attribute intrinsic value to nature and does not take into consideration rights-bases approaches of nature (Nash, 1990). The reaction to this conception is framed as "non-anthropocentrism", as theorized in environmental ethics. On the one hand, it entails the mere denial of the anthropocentric approach (McShane, 2007), but, on the other hand, it goes further from being a denial of the axioms of anthropocentrism.

Non-anthropocentrism, at least the epistemological theories hereby considered, does not constitute itself as a "centredness" theory: it does not wish to replace the centre of legal ethics, the human, with another centre, nature.[47] According to Philippopoulos-Mihalopoulos, who developed a critical environmental law methodology, the debate that polarizes eco/anthropocentricity, human/nature should be outclassed by virtue of a legal approach that considers a "middle" position as the starting point for the creation of the law and the reconfiguration of the relationship between human and nature. This polarization is not, in fact, taken over by human-rights based approaches, insofar as "environmental human rights discourses, since they are perhaps most acutely characterised by the tension between protecting the human centre while not divorcing this centre from an environmental consciousness" (Philippopoulos-Mihalopoulos, 2013). Thus, a decolonization of human rights-based approaches should not replace the anthropocentrism with another centred theory, but consider the existence of human beings in an epistemological and ontological continuum where human bodies, non-human bodies and natural elements are part of a same surface which "cuts across

[47] However, there are many non-anthropocentric legal theories that tend to substitute the anthropocentric approach with an earth-centred approach. The purpose of this approach is to realize a paradigmatic shift where human beings are not anymore at the centre of legal universe, and rights of nature are promoted by the recognition of legal personhood to natural elements (Aragão & Taylor, 2016; Boyd, 2017).

animate and inanimate objects, bodies, discourses, and so on. This continuum is not equivalent to a flat ontology or the ecocentric unity of the world" (Philippopoulos-Mihalopoulos, 2011).

This particular view of non-anthropocentric conceptualizations of law and governance resonates with Indigenous conceptualization of humanhood in relation to nature and natural elements, insofar as in a considerable number of ancestral cosmovision human beings are conceived within an existential continuum with other humans, plants, animals and the unanimated world. However, at present, the critical legal debate is mainly polarized between anthropocentric conceptions of law and governance, that see the necessity of protecting the environment as a means to satisfy human needs, and ecocentric approaches that tend to shift the centre of the epistemological and ontological system, recreating the hierarchical order that they wish to demolish. A true decolonial approach should then not aim at shifting the centre and creating a new pyramidal order, but to build a new circle of care in which the interdependence and interconnectedness between all manifestation of the existence is the epistemological foundation for legal action.[48]

Environmental Rights and Climate Change

Indivisibility of Human Rights and the Environment: The Right to a Healthy Environment

Bearing in mind the conclusions of the previous section, this part of the chapter focuses on specific environmental rights in light of their violations that can be triggered by climate change impacts. As has been already affirmed at the beginning of the chapter, human rights violations due to climate change impacts can enhance positive actions towards the protection and preservation of the environment, which include efforts to diminish pollution and GHGs emissions. If we momentarily leave aside the epistemological and ontological considerations regarding the centredness and hierarchical divisions between human and nature, environmental

[48] These aspects are further analysed in Chap. 6.

rights represent perhaps a point where anthropocentric and non-anthropocentric approaches can converge in the realization of their objectives. The "theory of the convergence" reflects on the fact that both approaches tend to serve and recommend the same practical behaviours and policies that ultimately will contribute to preserving human and environmental health, even though via very different ethical rationales: "if two theories have the same practical implications, then we shouldn't spend our time in worrying about their theoretical differences (*sic*)" (McShane, 2007). Thus, environmental human rights appear to be a practical example of the application of this convergence theory, whereas their objectives are the realization of a safe, clean and healthy environment, and, at the same time, protection and fulfilment of fundamental human rights such as the right to life, health and food.

The link between the enjoyment of (anthropocentric) human rights and the environment has been proven earlier to be obvious. However, scholars are divided on the issue of recognizing stand-alone environmental rights (Sands, 1993; Lewis, 2012; United Nations High Commissioner for Human Rights, 2011; Gearty, 2010). Some scholars recognize that the existing human rights framework is not enough adequate for a meaningful protection of environment-related human rights. They argue for the creation of a distinct and independent right to a healthy environment (Shelton, 1991). Others argue that this might constitute an anthropocentric approach to environmental protection, while another position is represented by scholars who disagree with this vision and rather insist for the creation of a right to healthy environment under international law (Atapattu, 2016, p. 51).

Following the 1992 Rio Declaration which connects the concept of a quality environment with dignity and wellbeing, in the 1990s, the UN Sub-Commission on Discrimination and Protection of Minorities selected a special rapporteur to produce a study on the relationship between human rights and the environment (U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1994). Subsequently, the UN General Assembly adopted a resolution on the need to ensure a healthy environment for the wellbeing of individuals (UN General Assembly, 1990). This stated that "a better and healthier environment can help contribute to the full enjoyment of human rights

by all". The language used in this resolution is rather soft, which prevents the definition of specific indications about the enforcement of environmental rights. In relation to this point, a different type of language can be found in the already mentioned Aarhus Convention, which in granting procedural environmental rights creates an explicit link to a substantive right to a healthy environment.[49]

The appointment of Ms Ksentini as special rapporteur on Human Rights and the Environment in 1990 caused a significant shift in efforts to link environmental protection and human rights. Ms Ksentini authored four reports and a set of draft articles on human rights and the environment. These identify the fundamental principles that bind States to environment protection. She also discussed the international human rights norms applicable to environmental issues as well as those contained in regional treaties such as the African Charter and the additional protocol to the American Convention. A provision was dedicated to Indigenous peoples in the draft principles on human rights and the environment produced by Ms Ksentini (Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities 1994). These award Indigenous peoples the rights to control and access their territories, lands and natural resources; and to maintain their traditional way of life. Also, the principles state that Indigenous peoples "have the right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea-ice, wildlife or other resources". These principles, although non-binding, are an important advancement in the recognition of Indigenous peoples' rights to the preservation of their lands and territories.

Following resolution 19/10, the Human Rights Council (hereinafter HRC) established the mandate for an Independent Expert on Human Rights and the Environment in 2012. John Knox was appointed to the position. His mandate included producing studies on the human rights obligations related to the environment. This involved identifying best practices, challenges, and protection gaps related to the full realization of

[49] "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention", Aarhus Convention, Article 1, Objective.

human rights obligations involving the enjoyment of a safe, clean, healthy and sustainable environment.[50]

In resolution 28/11, the HRC recognized the need to clarify some aspects of the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.[51] Accordingly, the Special Rapporteur drafted Framework Principles which "set out the basic obligations of States under human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment".[52] Thus, the Framework Principles do not aim at describing all the human rights obligations that can currently be challenged on environmental issues. It seems that their goal is simply to describe the main human rights obligations that apply in the environmental context in order to facilitate their practical employment and further development.[53] Nonetheless, the Framework Principles clearly establish a theoretical connection between a safe, clean, healthy and sustainable environment and the enjoyment of human rights.[54]

The substantive aspects of the right to healthy environment include "safe climate, clean air, clean water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems".[55] Climate change, atmospheric pollution, extreme weather events and other men-caused disasters are, thus, likely to trigger a violation of the right to a healthy environment for which States can be deemed responsible and therefore, pursed in court. In its 2017 advisory opinion in response to some interpretative issues raised by Colombia, the Inter-American Court

[50] Overview of the mandate, available at https://www.ohchr.org/en/special-procedures/sr-environment, last accessed September 2022.

[51] UNHRC, *Human Rights and the Environment*, Resolution 28/11, 7 April 2015, available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/28/11, last accessed April 2021.

[52] UNHCR, *Framework Principles on Human Rights and the Environment*, 2018.

[53] UNHCR, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 19 July 2018, A/73/188.

[54] Ibid, Framework Principles 1 and 2.

[55] UNGA, 74th session, Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 15 July 2019, A/74/161.

on Human Rights (IACtHR) recognized the existence of an unquestionable relationship and interdependence between the protection of the environment and the protection of other human rights. It also stressed the fact that numerous human rights are vulnerable to environmental degradation, and this vulnerability results in a series of environmental obligations for States to ensure that they comply with their duties to respect and promote those rights. In a relevant paragraph, the IACtHR stresses that the human right to healthy environment holds both individual and collective connotations: [i]n its collective dimension it constitutes a universal value that is owed to both present and future generations; while, due to its individual dimension and its relationship to other rights, such as the right to health, life or personal integrity, its violation may have direct or indirect repercussions on the individual (IACtHR, 2017). This aspect on the existence of a collective dimension of human rights in relation to the environment is extremely relevant in light of States' obligations towards the protection and respect of Indigenous peoples' rights, as further discussed in Chap. 4.

There are few doubts that some basic human rights require the enforcement of a right to a healthy environment in order to be effective, but lot of work should be done to guarantee their effective protection, respect and fulfilment. This can be done only through legal codification and enforcement measures. Much progress has been made in the past four decades in the development of the human right to a healthy environment by regional human rights bodies, national constitutions and national judiciaries. Further, a total of 155 States have recognized this right at a constitutional level.[56]

[56] HRC, Resolution adopted by the Human Rights Council on 8 October 2021 48/13. The human right to a clean, healthy and sustainable environment, A/HRC/RES/48/13, 18 October 2021, at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/289/50/PDF/G2128950.pdf?OpenElement, last accessed September 2022.

However, these developments have not yet produced a hard law source of law at the international level.[57] The only exception to this general trend is the San Salvador Protocol to the American Convention on Human Rights, which entered into force in 1999 and has been ratified by 16 states. The Protocol, in Article 11, explicitly recognized the right to a healthy environment, but without further specifying and defining its normative contents.[58] Because of this lack of legal codification at the international level, the recognition of the right to a healthy environment at the UN level would serve as a catalyst for the protection of human rights and the environment in relation to climate change impacts, making this right universal in the case of large, or global, adoption. In order to give a start to this process, the Special Rapporteur has recommended three possible options: the creation of a new international treaty such as the proposed Global Pact for the Environment; a new optional protocol to the International Covenant on Economic, Social, and Cultural Rights, similarly to what has been done in the Inter-American system; or a General Assembly resolution focused on the right to a healthy environment.[59] Climate change and its related impacts on human rights may facilitate development in this sense, in light of recent developments in

[57] The European Parliament has recently interpellated the Commission around the steps that have been taken towards the recognition of a right to healthy environment at the global level. In fact, the Parliament has called for the EU to promote global recognition of the right to a safe, clean, healthy and sustainable environment at a global level (see European Parliament recommendation of 9 June 2021 to the Council on the 75th and 76th sessions of the United Nations General Assembly (Texts adopted, P9_TA(2021)0278)). In addition, the Parliament has called for the Union to take action to introduce the right to a safe and healthy environment in the Charter of Fundamental Rights of the European Union and to fully comply with Article 37 thereof. The Parliament has also underscored the importance of close cooperation with states and all relevant institutional actors involved in ensuring the proper implementation of human rights and environmental provisions and that the EU should lead the initiative to recognize a similar right internationally. See also: European Parliament resolution of 19 May 2021 on the effects of climate change on human rights and the role of environmental defenders on this matter (Texts adopted, P9_TA(2021)0245); European Parliament resolution of 9 June 2021 on the EU Biodiversity Strategy for 2030: Bringing nature back into our lives (Texts adopted, P9_TA(2021)0277).

[58] Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights, 1988.

[59] Ibid, para 46–48.

climate litigation that have been framed within a human rights-based approach.[60]

As for any other substantive environmental right, it can be argued that the right to a healthy environment is essentially anthropocentric. In fact, its ethical underpinnings have a strong focus on the human centredness of such a right, whereas the environment needs to be healthy, safe and clean to satisfy human needs. Law and governance have been recently called to interrogate themselves about their effectiveness and legal meaning in practice, since it is clear that efforts made so far to protect the environment and environmental rights are clearly deficient. The state of the environment is continuously deteriorating, as pointed out by UNEP at the 2019 session of the United Nations Environmental Assembly: at the moment, the world is not adequately working towards the achievement of the environmental objectives set out in the Sustainable Development Goals.[61] Nor the gaps and deficiencies in regulatory regimes, environmental principles, and enforcement measures are being addressed and resolved.[62] Therefore, a radical rethinking of the conceptual underpinnings of anthropocentric law and governance are needed, insofar as the contraposition between anthropocentric and non-anthropocentric legal philosophies goes far beyond the mere mutual negation of their respective founding ethical values. It is about acknowledging the fact that the current legal regime is not sufficiently adequate to deal with the current global environmental crisis, and perhaps accepting that the consideration of alternative, non-Westernized values is needed in order to re-create the awareness of the continuum between humans and the non-human world.

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[60] See, for instance, Supreme Court of Colombia, *Demanda Generaciones Futuras v. Minambiente*, Decision of 5 April 2018; Lahore High Court, *Leghari v. Federation of Pakistan*, W.P. No. 25501/201, Decision of 4 April 2015; Lahore High Court, *Maria Khan* et al. *v. Federation of Pakistan* et al., No. 8960 of 2019; Superior Court of the Judicial District of Bogotá, *Demanda Generaciones Futuras v. Minambiente*, 2018.

[61] United Nations Environment Assembly of the United Nations Environment Programme, GEO-6 Key Messages, UNEP/EA.4/INF.18, para 4.

[62] See the report UN Secretary-General, 'Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment' UN Doc A/73/419.

Climate Change and the Right to Life, Food, Health, Water and Other Fundamental Rights: An Issue of Justice

Climate change is one of the faces of the current global environmental and human crisis. That climate change has the potential to jeopardize the enjoyment of fundamental human rights has been officially recognized has a matter of fact by the UN Resolution 7/23 of the HRC, which is considered the first document in which the human rights-climate change link was expressly recognized.[63]

With this resolution, the HRC requested the High Commissioner to produce a report on human rights and climate change. This was released in 2009.[64] The report defines the obligations that the human rights regime imposes on States in the context of climate change. However, it does not raise the possibility of applying the human rights framework to adaptation measures. The report also falls short because it raises problems such as climate-displaced persons without proposing solutions. The report argues for the necessity of political solutions rather than new legal instruments.[65] Problematically, this could justify the non-existence of a regime of special protection for people forced to leave their home countries due to the negative impacts of climate change.

However, the report also shows very positive aspect for example, in the way it addresses the problem of climate change as a justice issue. The report notes the unequal burden of climate change.[66] It argues for the

[63] "[C]limate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights". HRC, *Resolution 7/23 Human Rights and Climate Change*, 2008, available at https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_23.pdf, last accessed September 2022.

[64] HRC, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, A/HRC/10/61, 2009, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement, last accessed September 2022.

[65] Ibid, para 60.

[66] As also described in article 3 of the UNFCCC.

necessity of giving it an operational meaning.[67] The "unequal burden" refers to the fact that "while the developed nations have contributed the most to climate change over the past two centuries, it is the developing nations and their peoples who stand to suffer the most extreme consequences of rising sea levels, rising temperatures, and other human-induced environmental shifts" (Climate Change Justice and Human Rights Task Force, 2014).

Climate change raises a number of similar ethical questions which could be addressed within a justice framework. The need for global and coordinated action to tackle climate change derives from the scale of the problem and from the disconnection between cause and consequence: those who will suffer the most from climate change impacts, including Indigenous peoples, are the ones who contributed less to the emissions in the atmosphere.[68] Climate injustice is perceived through generations, since the impacts we experience today and that our children will experience in the future derive from consumption and production choices taken decades ago.

Humpreys has identified four main co-existing justice claims in relation to climate change and its ethical implications: corrective justice, substantive justice, procedural justice, and formal justice or rule of law. Such claims for justice are relevant in—but not limited to—the context of litigation, as they can inform the basis to seek redress and justice for climate harm. The first claim relates to situations of tort-like litigation where there is an injury and, thus, a requirement to desist from the harmful activity and compensate the victim for the damages caused. The substantive justice claim regards the problem of global GHG emissions, and it would perceive the occurrence of injustice even if there was no law

[67] The unequal burden of the effects of climate change is reflected in Article 3 of the UNFCCC (referred to as "the equity article"). It stipulates that parties should protect the climate system "on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities"; that developed countries "should take the lead in combating climate change and the adverse effects thereof" and that full consideration should be given to the needs of developing countries, especially "those that are particularly vulnerable to the adverse effects of climate change" and "that would have to bear a disproportionate or abnormal burden under the Convention" Giving operational meaning to the "equity principle" is a key challenge in ongoing climate change negotiations.

[68] From 1970 to 2008, over 95% of deaths related to extreme weather events occurred in developing countries (Intergovernmental Panel on Climate Change, 2012).

prohibiting the polluting activity and the actors were acting in good faith. This claim is also relevant to the problem of developing countries that wish to follow a high-emission, Western-like development model and demand not to be disadvantaged by the reduction in the use of fossil fuels demanded by global climate change governance. This claim demands the application of the polluter pays principle, in the sense that it questions who is responsible and should pay for the negative effects of global warming. The procedural justice claim aims to build a mechanism that will ensure a fair solution to these dilemmas, assuring that the concerns of the different stakeholders are taken into account. Finally, the formal justice claim relies upon a strict reading of the existing legal norms, even though they are not adequate to address "new" problems such as climate change. Many livelihoods depend on carbon-based economies and this carbon-dependence has been regarded as a legitimate prerogative that cannot be overridden in favour of a global goal without adequate compensation. This last claim "warns against the elimination of private rights in the public interest except under the strictest necessity and against retroactive penalisation of actions that were legal at the time they were taken" (Humpreys, 2009).

In order to frame the climate justice issue in right-based terms, we need to consider how climate change indirectly affects human rights. Climate change impacts are life-changing; far worse than any environmental problem already experienced so far. For example, Arctic ice caps are already melting at unprecedented levels and many Small Island States are projected to be submerged by water soon.[69] We will now consider how these changes affect fundamental human rights.

Right to Life

The right to life is a norm of *ius cogens* internationally protected by the Universal Declaration of Human Rights, the two covenants and the three regional human rights treaties.[70] Moreover, the Council has affirmed that

[69] See NASA website: https://climate.nasa.gov/vital-signs/arctic-sea-ice/, last accessed April 2021.

[70] European Conventions, African Charter and Inter-American Convention.

the inherent right to life cannot be interpreted in a restrictive way.[71] This means that a failure by States to prevent, minimize or remedy life-threatening environmental harms within their territorial jurisdiction, could constitute a violation of the right to life (McInerney-Lankford et al., 2011). States have, therefore, positive obligations toward the right to life. This means that they should ensure that measures are taken to guarantee the survival of all individuals in face of climate threats.

The IPCC, in its fifth assessment report, has stated that "[c]limate change will amplify existing risks and create new risks for natural and human systems".[72] Previous to that, in 2009, the HRC (council) affirmed:

> A number of observed and projected effects of climate change will pose direct and indirect threats to human lives. […] climate change will affect the right to life through an increase in hunger and malnutrition and related disorders impacting on child growth and development, cardio-respiratory morbidity and mortality related to ground-level ozone. Climate change will exacerbate weather-related disasters which already have devastating effects on people and their enjoyment of the right to life, particularly in the developing world. For example, an estimated 262 million people were affected by climate disasters annually from 2000 to 2004, of whom over 98 per cent live in developing countries.[73]

The report also argues that between 1980 and 2000, tropical cyclones killed approximately 250,000 people and affected 120 million people annually. Between 2000 and 2004, about 260 million people suffered climate disasters. About 98% of these people were living in developing countries.[74]

Furthermore, climate change was recognized as a threat to international peace and security in a 2009 UN Resolution.[75] By exacerbating

[71] Human Rights Committee, General Comment No 31, CCPR/C/21/Rev.1/Add. 1326 May 2004.

[72] IPCC, Intergovernmental Panel on Climate Change (IPCC) (2014): Climate Change: Impacts, Adaptation, and Vulnerability: Summary for Policy Makers. https://www.ipcc.ch/report/ar5/wg2/summary-for-policymakers/, last accessed September 2022.

[73] HRC, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, supra note 64.

[74] Ibid, para 23.

[75] UNGA, *Climate change and its possible security implications*, A/64/350, September 2009.

existing problems like water and food scarcity and disease prevalence, climate change has the potential to increase the risk of conflict not only at the inter-state level but also at the global level. States at severe climate change risks have started, in the past ten years, to report their dramatic problems before the international community. For example, the Maldives's 2008 submission to the OHCHR in preparation of the 2009 Report highlights their difficult situation. The Maldives and its population are at severe risk of submersion underneath rising sea levels. They argue that "the extinction of their State would violate the fundamental right of Maldivians to possess nationality and the right of the Maldives people to self-determination".[76]

Right to Food

International human rights law protects the right to food.[77] The SDGs also include the objective of reaching "Zero Hunger" by 2030. However, "795 million people are estimated to be chronically undernourished as of 2014, often as a direct consequence of environmental degradation, drought and loss of biodiversity. Over 90 million children under the age of five are dangerously underweight. And one person in every four still goes hungry in Africa".[78]

Climate change will worsen this already dire situation. Drought, flooding caused by extreme weather events, and slow onset events, such as desertification and changing rainfall patterns, all imperil natural and agricultural ecosystems.[79] In the next 50 years, a rise of 600 million is expected to the number of people facing malnutrition, particularly in Sub-Saharan

[76] Human Rights Committee, *Submission of the Maldives to the Office of the UN High Commissioner for Human Rights*, September 2008.

[77] Article 11 of the International Covenant on Economic Social and Cultural Rights. Also refer to Committee on Economic Social and Cultural Rights, Substantive issues arising in the implementation of the International Covenant on Economic Social and Cultural Rights: General Comment 12 (Twentieth session, 1999), E/C.12/1999/5.

[78] SDG Zero Hunger Website, available at http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-2-zero-hunger.html, last accessed September 2022.

[79] OHCHR (2009): *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, UN Doc. A/HRC/10/61, para 15 and 17.

Africa due to the change in global temperatures and a consequent decrease in food production.[80] Article 2 of the UNFCCC enshrines the importance of ensuring the availability of adequate food.[81] This provision recognizes the importance of lowering GHGs emissions before climate change threatens dramatically food production. Indeed, the IPCC has projected that all aspects of food production will potentially be affected by climate change. For example, the farming of wheat, rice and maize in tropical and temperate regions will be detrimentally impacted by rising temperatures of 2°C or more above late twentieth-century levels (Intergovernmental Panel on Climate Change, 2020, pp. sections A2.8, A5.4–A5.5).

Right to Health

Article 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR) protects the right to enjoy the highest attainable standard of physical and mental health. This right is intimately connected to the other mentioned rights and includes the enjoyment of, and equal access to, appropriate health care and goods, services and conditions that enable a person to live a healthy life. This provision also attributes positive obligation to States such as reducing infant mortality, improving hygiene conditions, preventing epidemics and providing health services to people. The right to health has also been elaborated in General Comment 14 by the Committee on Economic, Social and Cultural Rights (CESCR).[82]

Climate change impacts human health in many different ways. Interference with both health care provision and the provision of services that are underlying determinants of health, such as through extreme weather events leading to the destruction of health centres, preventing

[80] UNDP, Human Development Report 2007/2008, available at http://www.hdr.undp.org/sites/default/files/reports/268/hdr_20072008_en_complete.pdf, last accessed April 2021.

[81] "[T]o ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner", UNFCCC, Article 2.

[82] CESCR General Comment No. 14: *The Right to the Highest Attainable Standard of Health (Art. 12)*, E/C.12/2000/4.

transit and cutting off water and electricity. The UN Special Rapporteur on the right to health has identified global warming as one of the three main obstacles to achieving adequate access to safe water and sanitation. The rapporteur also notes that climate change is likely to impact the normal hydrological cycle causing droughts and floods. Thus, he criticizes the failure of the international community to take steps to tackle the health impacts of climate change, noting that this endangers the lives of millions of people.[83] Malnutrition and deaths due to extreme weather events are projected to rise along loss of work capacity and labour productivity.[84] These projections have also been recognized in the OHCHR Report which predicts climate change to affect the health and livelihood of millions of people, especially in the regions of Sub-Saharan Africa, South Asia and the Middle East.

Right to Water

Right to water refers to the right to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic uses, such as drinking, food preparation, and personal and household hygiene. The Committee on Economic, Social and Cultural Rights elaborated the nature of the human right to water in General Comment 15, stating that it refers both to freedoms and entitlements. The freedoms are to maintain access to existing water supplies and the right to be free from interference (freedom from contaminations). The entitlements revolve around the

[83] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/62/214, August 2007.

[84] "Until mid-century, projected climate change will impact human health mainly by exacerbating health problems that already exist (very high confidence). Throughout the twenty-first century climate change is expected to lead to increases in ill-health in many regions and especially in developing countries with low income, as compared to a baseline without climate change (high confidence). Health impacts include greater likelihood of injury and death due to more intense heat waves and fires, increased risks from foodborne and waterborne diseases and loss of work capacity and reduced labour productivity in vulnerable populations (high confidence). Risks of undernutrition in poor regions will increase (high confidence). Risks from vector-borne diseases are projected to generally increase with warming, due to the extension of the infection area and season, despite reductions in some areas that become too hot for disease vectors (medium confidence)", IPCC, *supra* note 72.

right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.[85]

The right to water is an essential human right which underpins the enjoyment of other fundamental rights such as the right to life, the right to an adequate standard of living, the right to health and the right to food. Climate change is projected to diminish the quantity of available water in most dry and subtropical regions within the twenty-first century. This will lead to intensifying competition for water use between sectors such as agriculture and domestic use. Conversely, the available water will increase in high altitude regions due to the melting of glaciers (Intergovernmental Panel on Climate Change, 2020).

The OHCHR report also recognizes that climate change will have impacts on water supplies, worsening already-existing stresses on water resources and negatively impacting the 1.1 billion people that already do not have access to safe drinking water. In fact, extreme climate and weather events, including droughts, heavy precipitation and floods, as well as rising sea levels, can result in salinization or contamination of water resources. Climate change will likely impact the lives of those women and children that are responsible for water collection over long distances thus lowering the chances of them spending their time in education.[86] In general, climate change will worsen the existing conditions that lead to water stress. These conditions include overpopulation, environmental degradation and poverty. Conflicts for water resources will become more and more likely to happen, making water scarcity a good reason for finding ways to cooperate through adaptation strategies (Van der Molen & Hildering, 2005).

Other Human Rights at Stake

Climate change will have an impact on many fundamental human rights in addition to those described earlier. It will affect the rights to adequate

[85] CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11, 2002.

[86] OHCHR, *supra* note 79.

housing and livelihood; self-determination; culture and property; freedom of movement; and the right not to be displaced.

The right to adequate housing is encapsulated in the more general right to an adequate standard of living and the right to live somewhere in security, peace and dignity. This includes factors such as security of tenure, protection from forced evictions, availability of services, quality of materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.[87] Developing countries are disproportionately affected—and will be more affected in the future—by severe weather conditions such as typhoon events that would destroy homes and urban settlements. Poor home infrastructures in developing countries also heighten their vulnerability to such weather events. The 2009 report of the Special Rapporteur on Housing recognized these risks through discussion of the impacts of climate change on urban settlements, human mobility and Small Islands Developing States.[88] Further, if coastal communities that depend upon fishing for their livelihoods are forced to move inland due to climate change, their traditional livelihood will be jeopardized. Providing for alternative livelihoods should be part of adaptation plans, paying attention to the new site people are relocated to in order to guarantee similar livelihood as the one they were conducting before, thus respecting their right to culture.[89]

The negative effects of climate change also impact the right to self-determination. This right is enshrined in Article 1 of the two Covenants and also in UNDRIP. According to these legal instruments, all peoples are entitled to freely dispose of their natural resources and in no case should they be deprived of their means of subsistence. While Indigenous right to self-determination, especially in relation to FPIC, constitutes the core argumentation of next chapter, here it is worth mentioning that climate change clearly threatens this right by virtue of the impacts described earlier. This is especially true in the case of Small Islands

[87] UN, Committee on Economic, Social and Cultural Rights (CESCR) (1992): General Comment No. 4. On the right to adequate housing. UN Doc. E/1992/23.

[88] UNGA, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, A/64/255, August 2009.

[89] Ibid.

Developing States which are likely to disappear due to rising sea levels (Willcox, 2016). This situation jeopardizes their right to freely determine the peoples' future and their right to self-determination, and prescribes positive obligations for States in order to redress harmful impacts of androgenetic climate change.[90] The right to self-determination is, of course, not only impacted in the case of disappearing small island States, but in a myriad of other ways. For example, in the Hawai'i, Indigenous right to self-determination is compromised by severe alterations of the natural environment upon which communities depend for their cultural and physical survival, such as floods, coastal erosion, changes in water runoff and impacts on ancestral fishponds (Sproat, 2016). At the same time, these impacts will cause the loss of cultural and property rights insofar as extreme weather events and slow onset events will change the geography and the landscape in which Indigenous peoples reside.

In connection to this point, it is clear that the freedom of movement and the right not to be displaced will be threatened by climate change. This is because severe weather events can lead to a permanent situation in which people cannot access certain areas or they may be forced to move from where they are settled. Recent reports predict that millions of people across the world will be required to relocate as a result of rising seas, flooding, drought and increased storms. In this context, climate change's impacts, "while problematic for all peoples, fall disproportionately on Native peoples in the regions such as the Arctic and Pacific, where the environment is closely tied to indigenous lifeways" (Tsosie, 2013). Climate change will cause relocation of entire Indigenous groups. While migration can be interpreted like an extreme form of adaptation strategy, forced relocation due to climate change impacts can imply loss of cultural identity, discrimination and resource conflicts in the destination areas,

[90] "Sea level rise and extreme weather events related to climate change are threatening the habitability and, in the longer term, the territorial existence of a number of low-lying island States. Equally, changes in the climate threaten to deprive Indigenous peoples of their traditional territories and sources of livelihood. Either of these impacts would have implications for the right to self-determination […] while there is no clear precedence to follow, it is clear that insofar as climate change poses a threat to the right of peoples to self-determination, States have a duty to take positive action, individually and jointly, to address and avert this threat. Equally, States have an obligation to take action to avert climate change impacts which threaten the cultural and social identity of Indigenous peoples", see *supra* note 79.

exploitation of labour force and other social and environment-related problems (see generally Odedra Kolmannskog, 2008).

The "climate refugee" debate is rapidly gaining momentum in both policy, governance and legal doctrine. The term "climate refugee", which is generally used to describe people forced to flee from their homes because of severe weather events attributable to climate change, is gaining increasing use in international agencies and governance. For example, the case of people living in the Carteret Islands in Papua New Guinea perhaps represents the most cited case of climate refugees. They are already being resettled to the bigger island of Bougainville, as rising sea levels are predicted to submerge their islands (Campbell & Warrick, 2014). A similar destiny is predicted for people living in Kiribati and Tuvalu, and in some low-lying countries such as Bangladesh. Even though climate migration prediction estimates are describing apocalyptic future scenarios, the international human rights realm seems somewhat not adequate to deal with such massive movements of human population.[91] In fact, in international law, the terminology that refers to "environmental refugees", "climate induced migrants" and "climate displaced people" is deprived of any legal meaning. It follows that it is impossible to legally establishing that a certain type of human migration is exclusively due to climate change and that, therefore, migrants should be recognized as refugees. To do so, it would be necessary to establish the causality between emissions and a specific environmental harm or disaster—which is particularly difficult given that the number of empirical studies on this subject is relatively small (Kniveton et al., 2008). Climate migration cannot indeed be seen as a single phenomenon to be discussed in universal terms, as several different scenarios, geographical, social and cultural, should be considered in its definition (Kälin, 2010, p. 88). Also, climate migration is likely to be gradual, encompassing a slow-onset movement of people as living conditions in a territory become more and more unsuitable to

[91] The most well-known climate refugee estimate was produced by Professor Myers from Oxford University in 2005, who argued that by 2050, about 200 million people will likely be forced to flee their homes due to extreme weather events, disruptions, flooding and drought. This prediction has become the accepted model for many neo-Malthusian climate refugee theorists, as predicted massive human migrations would cause problems of relocation, resource conflicts and collective security problems (see generally Brown, 2008).

human life. Such migration will first take place in proximal geographical spaces rather than in international and cross-borders contexts (Laczko & Aghazarm, 2009).

Finally, there are several political constraints that would prevent the existence of a climate refugee status. Indeed, awarding the status of refugee to climate migrants can be problematic because it shifts political attention to the victim and not to the causes of the environmental damage, which is global warming, governments' failure to contain emissions and climate injustice. Furthermore, in cases such as Tulun and Nissan Atolls of Bougainville, extreme population pressure on atolls was a problem before the issues related to climate change (Bayliss-Smith, 1974). Thus, reducing the causes of migration to climate change is a simplification that does not consider the complexities of environmental, demographic and social realities. This does not mean that climate change should be de-linked from present and future problems of human migration especially in Small Islands Developing States, where the rising sea levels will inevitably force the population to move (Myers & Kent, 1995). However, multiple factors such as unsustainable governance choices, inadequate development policies, demographic pressure and other non-environmental issues contribute to the migration flows (Luetz & Hausia Havea, 2018).

Subsequently, it follows that it is impossible to legally establishing that a certain type of human migration is exclusively due to climate change and that, therefore, migrants should be recognized as refugees based on such a premise. To do so, it would be necessary to establish the causality between emissions and a specific environmental harm or disaster—which is particularly difficult, given that the number of empirical studies on this subject is relatively small (Kniveton et al., 2008).[92]

Thus far, specific environmental rights show great potential in creating obligations for States toward the respect and protection of human dignity

[92] However, it should be noted that relevant carbon emissions studies are undergoing an important phase of production at the moment, and they include studies such as: Heede R. *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010*; SpringerLink 2013 and the Carbon Majors Report, available at https://climateaccountability.org/carbonmajors.html, last accessed April 2021.

and wellbeing and toward an *indirect* protection of the environment. The theory of the convergence seems reaching its full potential of realization thanks to human rights-based approaches to climate change because of their capacity to realize an actual enforcement of international climate law at the local level. However, this realization necessarily finds its application in a paradigmatic system which is based on Westernized epistemological premises: the division between human and nature, soul and materiality, Global North and Global South. Indigenous cosmovisions and customary laws are not envisaged as part of this system, a system that eventually Indigenous peoples would necessarily need to approach when framing their claims before national or international courts. The ethical legal questions regarding the adequacy of such system to address complex issues related to climate justice then becomes fundamentally relevant. Thus, it is necessary to investigate what are the legal and governmental means that aim at protecting Indigenous peoples' rights from an historical-normative perspective, and how these specific rights have emerged through colonialism, ethnocide and subjugation by taking a stance against the multiple challenges that Indigenous peoples and their ancestral territories had to endure through the centuries.

Conclusion

The present chapter has laid down the first cluster of legal norms that are the subject of this book, namely human rights-based approaches to climate change. It has done so by adopting a critical perspective on human rights, questioning their very nature as they are characterized by both an exclusionary and inclusionary paradox. It has done so in order to demonstrate that Indigenous peoples had to undergo a long quest in order to have their humanity first, and then their rights recognized in Western and Westernized legal system. The chapter has argued that this quest is still ongoing, as demonstrated by the progressive enlargement of the array of human rights protected in the context of climate change. The chapter has therefore dealt with the incorporation of environmental and climate concerns into human rights, demonstrating how the indivisibility of human rights and the environment is essential in establishing how climate change can provoke severe violations of human rights.

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4

Indigenous Peoples in International Law and Governance

Introduction

After having presented the international legal framework for what regards the interaction between human rights and climate change, this chapter aims at introducing and highlighting the criticalities of the protection of Indigenous peoples' rights in contemporary law and governance. This chapter completes the overview of the complex legal systems that interacts for what concerns Indigenous peoples rights in the context of climate change. The chapter is divided into two parts. The first part aims at reconstructing the genesis and the emergence of ad hoc instruments of human rights specifically dedicated to Indigenous peoples. The necessary premise for this reconstruction is the investigation of how colonial and decolonial thought has shaped and influenced modern law and contemporary law. The paradox and the inclusive promise of human rights discussed in the previous chapter strongly emerges in the next sections, which put in evidence how Indigenous peoples have undergone an historical period of colonial horror in which they were not considered human beings, to a new epoch were international ad hoc law protects their rights. Thus, the chapter adopts a particular focus on the

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conceptualization of Indigenous collective rights. The chapter then focuses on international human rights and environmental instruments dedicated to Indigenous peoples, and to the role of international courts in protecting their rights. The second part of the chapter introduces a crucial theme of the climate justice discourse: the role—and the limits—of Indigenous participation at the international level for what regards climate change governance. It describes the different Indigenous fora through which Indigenous peoples can participate, and also discusses he actual power that such fora and initiavies hold in influencing climate policies.

The International Protection of Indigenous Peoples' Rights

Political Doctrines of Colonization and Decolonization Adopted Within International Law

The previous chapters have described the interrelation between justice, climate change and human rights. In particular, Chap. 2 has emphasized how Indigenous human rights, alongside other categories of rights such as women's and minorities' rights, have undergone a struggle to emerge and gain recognition within the liberal legal system. Thus, this section focuses on such struggle, by evidencing how political doctrines of colonization have primarily shaped the legal recognition of Indigenous peoples. Parallelism can be drawn between such theories and contemporary patterns of neo colonization and the will to deny and erase Indigenous culture perpetrated by settler States by virtue of national interests ultimately connected to the exploitation of natural resources. Such an analysis is useful to understand past and current patterns of exclusion of Indigenous peoples from national and international governance. The climate justice theory put forward in Chap. 1 has outlined how crucial is to guarantee participatory and procedural rights that would involve Indigenous peoples in climate governance in order to realize a paradigmatic shift towards an ecologically inspired governance. Such participatory rights, even

though acknowledged by law, are constantly ignored or jeopardized by the liberal and capitalistic logic of States that tend to deny Indigenous governmental legitimacy because of a constant tension between national development interests and the inviolability of Indigenous lands and territories. In fact, if on the one hand, international law acknowledges Indigenous rights, on the other hand, these rights are constantly violated by States' practice (as affirmed in the Introduction in relation to the constant killing of environmental and human rights defenders).

In order to better understand the challenges and the complexities of Indigenous peoples' rights and titles to territory, it is necessary to consider the legal impositions and injustices of colonization and the contemporary legacy of such theories. Upon encountering native people in the Americas, new legal doctrines followed that shaped the interrelations between the colonizers and the colonized. Theories of subjugation served as the theoretical basis permitting the conquest of territories, enslavement of the people inhabiting them and physical and cultural genocide. This history imparts meaning upon current laws which, on their face, provide legal protection for Indigenous peoples (Marcelli, 2009). This section provides a general overview of political doctrines of colonization, pinpointing to the major theories that contributed to shaping international law and the relationship between States' sovereignty and Indigenous nations.

At the time of colonization, public international law, in addition to defining the relationships between sovereign States, constituted an instrument to deny Indigenous peoples their rights. Political doctrine justified centuries of occupying ancestral lands and legitimized the inequality of power, use of force, coercion and legal subterfuges. As I will argue in Chap. 5, this model of non-consensual occupation and exploitation of Indigenous lands and territories, which began in the sixteenth century, is still resonant today, since it exists in new forms embodied, for example, in contemporary resource extractivism. Today, marginalization of Indigenous peoples by States continues through different means of coercion backed up with new justifications. For example, in this sense, we can consider the last arrangements of the Bolsonaro's government for the Indigenous lands in the Brazilian Amazonia (Le Tourneau, 2019; Stewart et al., 2021). The fact that Europeans had access to the American

continent in 1492 for the first time (I will not use the word "discovered" as it denotes a Eurocentric conception of this phenomenon) amplified European cultural views. Until then, Europeans divided the world into Christians and non-Christians (namely, Muslims). A new categorization of peoples began to emerge with the voyage to America: the *Indios*. The encounter between the Native Americans and the Europeans raised a series of questions: Could it be considered legitimate to wage war against them even though they never attacked Europe? Was colonization and the establishment of international trade to be considered legitimate? Was it fair to enslave those people?

The answers to these questions were essential in shaping international law. The conquest of America has been described as a "legal enterprise". Legitimization through law was essential for Europeans to assert sovereignty and land claims over Indigenous territories. Medieval legal doctrine was relied upon for justification of the colonial initiative. In 1492, Columbus proceeded to officially declare the Bahamian islands as territories of the Spanish Crown given the barbaric nature of the peoples he encountered (Fenton, 1995). Columbus' claim was not legitimate under the Church doctrine because it had not been authorized by the Pope. Subsequently, the Spanish Church provided a series of new bulls asserting the legal ownership of any land in which its people were sent to spread Christianity (Falkowski, 1992). The practice of the papal bull, a type of decree issued by the Pope, was well-established at the time of the Crusades. Thus, spreading the Christian religion became the justification for colonization: bulls issued in 1493 (*Inter Caetera*) and in 1529 (*Inter Arcana*) granted to Spain and Portugal power over the American lands (see generally Williams, 1990).[1]

[1] However, the Catholic church prohibited the enslavement of Indigenous peoples in 1537 through the Papal bull *Sublimis Deus* promulgated by Pope Paul III. The bull reads: "the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and have no effect".

The first treaties dividing spheres of legitimate conquest were signed by Portugal and Spain in 1494.[2] Colonial practices such as forced labour, shipment of slaves and the *encomienda*[3] caused the death of most of the islands' populations within less than two decades. For the first time, this led to critique of Spanish colonial practices, particularly those of Francisco de Vitoria and of Bartolome de las Casas (Williams, 1990, p. 85). Both Vitoria and Las Casas were members of the so-called Spanish School of Salamanca, which refers to the group of Spanish historians of the sixteenth century. The Spanish School happened to be contemporary to the European conquest by Spain; therefore, it aimed at critically considering the extent of the legitimacy of the presence of the Spanish conquerors in the Americas, and the legality of the subjugation of the natives (see generally Alves & Moreira, 2013). It is crucial, in this book, to consider how Vitoria and Las Casas theories have contributed to shaping the political doctrines of colonization at that time. This is because their theories somewhat resemble, in their rationale, the politics of recognition analysed in Chap. 1, and substantially differ from the theories put forward in the nineteenth century that justified the ethnocide and subjugation of Indigenous peoples to the colonial domination. In the view of Vitoria and Las Casas, natives' rights seemed natural law derived and pre-existing from the state-centred concept and authority. This vision seems to resonate with contemporary Indigenous claims for their right to self-determination and political independence from the State upon which their territories were encroached, in a way that challenges positivist law. However, I think that the argumentation put forward by de Vitoria and Las Casas should be heavily contextualized, putting in into perspective with the historical time when it was generated, and not applied as *tout court* political defences of contemporary Indigenous rights, because of

[2] Respectively, Treaty of Tordesillas and the Treaty of Saragossa.

[3] *Encomienda* refers to a system used by the Spanish colonial government in the New World to reward conquerors. After the conquest of Mexico and Peru in 1500, conquerors were awarded the lands occupied by the Native Americans. The native inhabitants were defined as *encomendados* ("commended" or "entrusted") to the Spanish. They were expected to pay tribute to and work in the local fields or mines. Thus, the encomienda system was essentially a form of institutionally authorized slavery. See also: Riggs T. Gale Encyclopedia of U.S. Economic History, "Encomienda", Farmington Hills, MI, 2015.

the promotion of principles that justified conquest if certain conditions were met.[4] In fact, it is not possible to affirm that early sixteenth century publicist shared the same values and conceptual frameworks as modern and contemporary scholars.

De Vitoria (1483–1546) is regarded by several scholars as the "father of international law" because of its theoretical contribution to the definition of "nation" to which international law applies (e.g. see McKenna, 1932; Scott & de Vitoria 2000; Beneyto & Corti Varela, 2017; Hernandez, 1991). On the one hand, he rejected the use of papal grants as a basis for the legitimate occupation of the territories in the Americas. This consideration laid the ground for affirming that the refusal of the natives to submit themselves to the dominion of the Pope and the Christian princes could not to be considered a legitimate basis for war because wars had to be necessarily framed as defensive and not punitive in their nature (see generally Vitoria et al., 1917). On the other hand, Vitoria seemed to confer rights to the Native Americans to freedom, territory and self-governance. However, he argued for a lawful basis by which they and their lands might come into possession of the Spanish colonizers, identifying a series of criteria for the legitimate basis for title to territory. Vitoria proposed seven principles in the *De Indis*.[5] These sufficiently justified conquest, claiming that if the Native Americans did not express their consent, and if there were no grounds for a just war, claims of possession over Indigenous peoples' territories could not be justified. Thus, this theory seemed to enable Spain to initiate trade without subjugating the natives. Under Vitoria's theory, the Indios had no right to oppose the free travelling of the colonizers in their territories.

Las Casas (1484–1566), who directly experienced the horrors of the Spanish colonies in the Americas, held a very different view on the legitimization of conquest through just war compared to Vitoria, diverging from

[4] In literature, many authors regard Vitoria and Las Casas as defenders of the rights of Indigenous peoples, and limit their consideration to those parts of the theory that recognize Indigenous peoples their rights, making them pioneers of the recognition of Indigenous rights in the contemporary era (see generally: Henderson, 1985; Stone, 1965; Davies, 1985). On the contrary, as put forward in the section, their theories served as well to justify conquest and subjugation, that is, the idea of the "just war", as described further on.

[5] "(1) Imperator est dominus mundi; (2) Auctoritas Summi Pontificis; (3) Ius inventionis; (4) Barbari nolunt recipere fidem Christi; (5) Peccata ipsorum Barbarorum; (6) Electio voluntaria; (7) Speciale donum Dei", (Beneyto & Corti Varela, 2017, p. 119).

the limitations prescribed by Vitoria's seven principles. In Las Casas' views, "[a]ll the races of world are men […] all have understanding and will and free choice […] Thus the entire human race is one" (as cited in Carozza, 2003). On this view, the only way to gain title over territory is uncoerced choice. In *De thesauris*, Las Casas affirmed that the Spanish jurisdiction in the Americas could not be considered legitimate. Thus, he rejected the thesis that war against the Indios was justifiable due to their lack of rationality and the fact that they were born as natural slaves (Marks, 1990). Las Casas denied that the Spanish had any legitimate power over the natives since the natives did not express their consent for their territories to be encroached by colonizers. The historical-normative contents of the Indigenous right to express or withhold their consent constitutes the focus of Chap. 5.

The English later followed the example of the Spanish. Henry VII (1457–1509) asserted that England had a right to conquer, occupy and possess the lands of the non-Christians (although, in his views, England exercised a form of Christianity considered "true" and not biased by the papal authority) (see generally Chrimes, 1972). He commissioned the explorer John Cabot to realize this conquest by claiming new lands. Competing claims on land began to emerge among English, Spanish, Dutch, Portuguese and French settlers (for a reference see Trelease, 1997). This provoked a decline of the papal bulls as instruments for legitimate occupation of new lands. Subsequently, the peace of Westphalia in 1648 established agreements of the modern territorial nation-States and the principle of sovereign equality. However, this did not translate into a new approach to the territorial colonies.

The post-Westphalian conception of natural rights set new criteria for the recognition of nations and, evidently, Indigenous societies did not meet these requirements.[6] The "state" had become the entity that defined

[6] Natural rights are those that are not dependent on the laws or customs of any culture or government, and so are universal and inalienable. In the post-Westphalian order, Locke's philosophy was of great inspiration for the definition of what does constitute a society. Even though Locke took inspiration of "natural law" from reports of society among Native Americans, whom he regarded as natural peoples who lived in a "state of liberty", he still defined their political organizations "not a state of licence". In his conception, the government should provide what he claims to be basic and natural given rights for its citizens. But Indigenous peoples at the times were not considered citizens of the newly born nation states. In its views, an individual obtains the citizenship of a particular nation by availing himself with the facilities provided by that country. Indigenous peoples, by not being able to use such facilities, were therefore not considered citizens and not holders of natural rights. See generally Finnis, 2011.

nations, but Indigenous forms of power fell short of the European conception of state organization. Thus, Indigenous peoples could not be defined as subjects of rights since they did not belong to a nation state.[7] For example, in Locke's conception, a claim on a territory was to be considered legitimate if a form of political society was absent (Tully, 1990). This political theory contributed to the legitimization of European conquest and subjugation of indigenous territories (see generally Finnis, 2011).

The nation state model achieved a peak of political buy-in by the time of the Enlightenment. Emmerich de Vattel (1714–1767), the international lawyer who greatly contributed to the political philosophy of its time, thanks to the book *The Law of Nations*, formulated an influential theory on inter-state relationships. In Vattel's view, which were largely inspired by Grotius' philosophy, States were regarded as individuals and by the principle of state sovereignty, States were subjected only to the laws they agreed to. The concept of natural law that underpinned sixteenth's century legal theory was replaced by a State-centred, positivistic law. According to this view, Indigenous nations could not qualify as sovereign States because of the lack of European-like political organization. In fact, in Vattel's views, only certain Indigenous nations such as the Aztec constituted an example of centralized power and therefore should not have been subjected to colonial practices (De Vattel, 2008). Even though ambivalent, this political legal theory underpinned the realities of European colonization, which needed to justify and legalize the acquisition of land belonging to nomad tribes in the United States. This double-standard, which on the one hand legitimized certain Indigenous societies as states, and denied the same status to others, resulted in an ambiguous acknowledgement of Indigenous societies: on the one hand, Vattel recognized certain native organizations as having state-like power and controlling a territory, while on the other hand, he asserted that in absence of such political organization, European colonizers had the right to claim native uncultivated, unused lands. However, this conception based on sovereignty and effective control of land was totally abandoned in

[7] Ibid.

nineteenth-century theories of international law in favour of other justifications for colonial conquest.

The European colonial project reached its peak in the nineteenth century. At a time when the "sun never set" in the British Empire, European colonial powers explicitly denied rights to Indigenous peoples. This approach followed the advent of so-called social Darwinism which viewed the human race as engaged in a survival of the fittest (see generally Daunton & Halpern, 1999). Social darwinism fuelled the spread of early theories on racism which regarded white men as superior to the other manifestations of the human. Indeed, the classification of the Indios as savage, irrational and inferior spread at the end of the eighteenth century. This shifted political thought towards a deliberately racist discourse and a conquest model of colonization. For example, history scholars refer to the occupation of the African continent as the "scramble for Africa" (Fage, 2013). This shift relied on the doctrine of *territorium nullius*: ancestral lands, which were not used for agriculture or permanently inhabited, were considered abandoned and suitable for conquest and imposed territorial claims.[8]

There was concern during the "scramble for Africa" that there may be an escalation of conflict between colonizing nations. This fear was inspired, in part, by competing interests in the Congolese colony which had been turned into a personal dominium by the King of Belgium, Leopold II. For this reason, the Berlin Conference in 1885—also known as the West African Conference—was summoned by the German chancellor Otto Von Bismarck. The conference resulted in a new General Act which established the principle of effective occupation as a legal underpinning for the construction of colonial empires (Fitzmaurice, 2012). This conference led to the arbitrary division of Africa into different regions based on spheres of interest and effective occupation. This was intended to dissuade colonizers from the practice of occupying lands in

[8] "Only such territory can be the object of occupation as is no State's land, whether entirely uninhabited, as e. g. an island, or inhabited by natives whose community is not to be considered as a State. […] natives may live on a territory under a tribal organisation which need not to be considered a State proper" (Oppenhaim, 1920, p. 383).

name and not in practice. Additionally, the conference officially recognized Leopold's International Congo Society as the king's private property. This confirmed that the principle of territorium nullius was the new international legal standard for the formation of colonial empires.[9]

Protectorates were another form of territory occupation pursued by the colonial powers. This type of colonization derived from agreement with native chiefs "inhabiting unoccupied territory" to establish a "protectorate" of a state member of the family of nations. These agreements were merely "steps taken to exclude other powers from occupying the respective territories" giving a de facto title on the lands and thus preluding competing effective occupations (Oppenhaim, 1920, p. 388). The supposedly "uncivilized" nature of the inhabitants enabled the protecting state to acquire sovereignty over the land in a way that was legally acceptable to the international community. The British *indirect rule* doctrine used the institution of protectorates to exercise control over African territories without assuming the burden of their full administration (Fage, 2013).

Among the different theoretical and legal justifications for colonization, the doctrine of guardianship and trust (applied by the British colonial power through its "civilising mission") was the first to recognize legal personality of Indigenous people, albeit in a limited fashion. Under this

[9] Sir Traver Twiss (1809–1897) was among the legal theorists that justified the existence of king Leopold's personal empire in Congo, contributing to the theorization of the *territorium nullius* principle. In his view, although a form of political organization already existed in the lower Congo region, the tribal organizations did not exercise any effective sovereign power: those territories were then to be considered legitimately occupied by the colonial powers. The major concern of the internationalists after the Berlin Conference was then to provide legal justification of the occupation of those territories that possessed a certain degree of political organization (even if very limited on a European view). Ferdinand Martitz, professor of international law, in his report about the doctrine of the effective occupation applied the *territorium nullius* principle to colonization, further developing what had already been theorized by Twiss: "All regions are considered to be territorium nullius which do not find themselves effectively under sovereignty […] no matter whether the region is inhabited or not […] It is an exaggeration to speak of the sovereignty of savage or semi-barbarian peoples". Moreover, "international law does not recognize rights of independent tribes". This theory differed from the *terra nullius* one (which became popular in the beginning of the twentieth century in debates about the polar region), since it prescribed that Indigenous peoples could be entitled to property rights, but no sovereignty rights. See also: Dorsett and Hunter (2010)).

paternalistic conception of trusteeship, Indigenous peoples were considered like children, lacking any capacity for rationality or reasoning and, therefore, unable to make decisions regarding their own affairs. They were considered incapable of independence in the modern world, requiring the help of stronger nations until they acquire the necessary capacity to govern themselves. They needed time to form part of the more "developed races". However, as indicated earlier, this doctrine also attributed some autonomy to Indigenous tribal customs and traditions to supplement Britain's indirect rule.

The doctrine of guardianship characterized the Great War and post-war periods. Following the First World War, naturalistic conceptions of society and the use of *ius gentium* were totally abandoned in favour of a positivist conception. This positive conception allows European States to decide who is part of the new world order, thus eliminating the problem of natural law in which sovereignty was associated with natural societies. "[P]ositivism, combining powerfully with a stadial theory of sovereignty, has been seen as the epistemology of the liberal apology for empire" (Fitzmaurice, 2012).

This doctrine of guardianship was reiterated in the post-war context, specifically through the mandate system of the League of Nations.[10] Article 23 of the covenant embodies this vision of civilized countries with a responsibility to take care of native peoples.[11] This effectively translates into a training towards civilization in order to ensure the progressive participation of native people in governance of their territories. Following the Second World War, and with the emergence of the UN system, the

[10] A League of Nations mandate was a legal status for ex-colonial territories transferred from the control of one country to another following World War I, or the legal instruments that contained the internationally agreed-upon terms for administering the territory on behalf of the League of Nations. After World War II and following the creation of the United Nations system, it was stipulated at the Yalta Conference that the remaining Mandates should be placed under the trusteeship of the United Nations, subject to future discussions and formal agreements (Anghie, 2002).

[11] "[U]ndertake to secure just treatment of the native inhabitants of territories under their control", Covenant of the League of Nations, 1919, art. 23.

doctrine of guardianship continued. It was included in Chapters XI[12] and XII[13] of the UN Charter. This idea of Indigenous peoples as lacking any capacity for self-governance, requiring a competent public authority to act on their behalf, persisted. Later in the chapter, the doctrine of guardianship will emerge again regarding the legal rationale for the creation of the first international law instrument specifically dedicated to Indigenous peoples, the International Labour Convention n. 107 (1957), which regarded these lasts as transient societies that had to be guided towards Westernized values.

The process of acknowledging Indigenous peoples as autonomous, freeing them of colonialist coercion, did not commence until the advent of the global decolonization project and the consequent application of the principle of self-determination to European colonies (Whelan, 1992). Article 1 of the UN Charter enshrines the principle of self-determination of all peoples. This works as the basis for the revindication of political,

[12] "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

(a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
(b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement", *1945 Charter of the United Nations*, Chapter XI Declaration regarding Non-Self-Governing Territories, Art. 73.

[13] "The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

(a) to further international peace and security;
(b) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement" *1945 Charter of the United Nations*, Chapter XII International Trusteeship System, Art. 76

administrative and economic independence of all those nations that were subject to the system of trusteeship. This process of decolonization began with a recognition of newly independent States based on colonial borders as opposed to the cultural diversity of the peoples inhabiting them. Nonetheless, Indigenous peoples struggled for many years to become independent actors in both national and international laws because of the tension between the newly formed States which were based on the previously established borders, and the existence of multiple nations within a same State that developed competing territorial and resource claims.

This struggle eventually found recognition in the nascent international human rights law regime which accords special protection to Indigenous peoples, excluding the use of force and coercion as methods to promote their integration in national contexts. However, it has not been an easy or straightforward process to achieve legal recognition for and respect of Indigenous peoples' self-determination and wider rights. On the contrary, as this book will demonstrate, this process is still ongoing amongst previous colonized nations and much remains to be done for its effective realization at national levels in some Indigenous territories. As pointed out in the previous chapter, this difficulty needs to be addressed starting with considering and addressing the inherent problems of the international human rights realm itself. One such problems lays in the tension between the atomized, Westernized individual that contemporary human rights norms wish to protect, and the multiple other embodiments of the human that somewhat seems not to correspond to this individual, such as Indigenous peoples. An important difference between "classical" international human rights law and the law which accords protection to Indigenous peoples, resides—but it is not limited to—in the existence of collective rights. Accordingly, the next section will analyse the collective dimensions of human rights that is traditionally attached to Indigenous peoples (as opposed to individual rights), explaining why this was the chosen method to offer protection to Indigenous peoples under international and national human rights law.

Individual and Collective Rights

The classical legal doctrine of international law asserts that, since human rights have only an individual dimensions, communities cannot be direct holders of rights.[14] They might be entitled to other types of protection, but not human rights. Therefore, it appears that contemporary human rights law failed to provide adequate protection for Indigenous peoples and other minorities who face continued threats to their ancestral lands and natural resources stemming from climate change effects to the environmental impacts of the logging or oil industry, for example. As a matter of fact, Indigenous peoples need to be protected collectively from such threats that pose risks to their livelihoods, environment, health and culture. This collective dimension of human rights is needed because they have historically been dispossessed of their lands and territories based on the premise that they could not assert individual property rights, even though they have inhabited the colonized continents for centuries. Continued and collective access to their ancestral lands is crucial for their cultural and physical survival, but at the same time, it cannot be asserted their ownership of a territory in the traditional Western legal meaning. Therefore, it came as the necessity of creating a collective dimension of human rights specifically dedicated to Indigenous peoples.

At the early stages of contemporary international human rights law, it appeared that there was no adequate inclusion of Indigenous peoples as collective holders of rights. Nor it was granted to Indigenous peoples any special consideration as particular holders of human rights because of the historical injustices and ethnocide they have been subjected to. However, as the next section will describe more in depth, a new legal doctrinal approach begun to emerge in the decades that followed the decolonization—which is generally indicated as the 1960s. According to Åhrén, in the 1990s emerged a new political theory which was in stark contrast with the individual liberalism that characterized the early conceptualization of international human rights law. In fact, the atomized liberal

[14] Generally, it should be remarked that certain individual human rights can be adequately protected only if their collective dimension is guaranteed. For example, the freedom of association can be realized only if a group of people is enabled to interact and, therefore, the collective dimension of the association is protected.

individual was not—and could not be—defined and influenced by its allegiance to a particular cultural or social group. The liberal nation-state needed to be culturally homogenous and guarantee an environment where all individuals have potentially access to the same possibilities and lead the life they wish—in a way similar to what has been preached in Rawls' veil of ignorance theory (Åhrén, 2016, p. 43). Against this backdrop, multicultural legal theory, even though resting of liberal premises, seeks to accommodate the diversity of the different embodiments and cultural practices of the human collectives. Such theory argues that individuals also need their collective cultural dimensions to satisfy their "basic yearning to belong". Multiculturalists argue that individual liberalism needs to break from its constraints and acknowledge a collective dimension of human rights (Åhrén, 2016, p. 50).

However, even before the appearance of multicultural legal theory, a very important collective right had been included in fundamental international human rights instruments: the right of all peoples to self-determination. Article 1, common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, reaffirms the right of all peoples to self-determination already enshrined in the UN Charter, and lays upon State parties the obligation to promote and to respect it. This affirmation needs, of course, to be contextualized in the decolonization framework, as it does not necessarily aim at promoting secessionism within existing States, but it does enable peoples under colonial subjugation to be free from coercion.[15] The international community recognized that individual rights were difficult to be guaranteed in contexts where collective freedom from the colonial dominion was yet to be reached.

Here, a relevant question is whether a collective should be considered differently to other subsets of individuals within society and if so, why. For example, what makes "Indigenous peoples" as a collective different to "workers" as a collective, in law? Of course, each group and their rights

[15] The principle of self-determination and decolonization inspired pan-African authors and political theorists. For example, Fanon, French West Indian from the colony of Martinica, was an important political philosopher and psychiatrist who was concerned with the psychopathology of colonization. In his book, *The Wretched of the Earth*, he argued that decolonization and liberation from the oppression necessarily needed to be a violent process because of the inherent tension between settlers and natives.

have a distinct, special character. It is worth to remark here how the term "Indigenous" has traditionally been utilized during colonialism in a depreciative way, to separate the "white and civilized" from the "other". From the merely linguistic point of view, this term simply refers to the fact that an individual is a "native" in a certain geographical place, and therefore it could be argued that we all are "Indigenous" from somewhere. However, in sociological, legal and historical accounts, this term has been attached to those segments of the population that distinguish themselves from the general population of a State that has been subject to historical processes of foreign occupation or colonization. Because of the distinctive characteristics of Indigenous peoples, first and foremost their pre-colonial existence and their collective attachment to ancestral territories, political legal theory has answered the question regarding the legitimacy of recognition of their collective rights.

Miller shares this perspective. He argues that collective rights for Indigenous peoples have a unique character compared to those held by members of society more broadly. Miller contends that groups such as national minorities have rights that are specifically ascribed to them and not to others, and Indigenous peoples hold a minority in their respective States. On Miller's view, we should distinguish between a category of persons, understood to mean all those people who fit a particular description, such as being under twenty-one or having red hair, and group proper, understood to mean a set of people who by their shared characteristics think of themselves as forming a distinct group. Miller argues that "group consciousness" might help distinguishing a collective of peoples such as national minorities from other groups merely grouped due to some characteristics (Miller, 2002).

Jovanović provides a comprehensive conceptualization of Indigenous peoples' rights as collective and representing minority interests within States. Jovanović notes that most scholars define collective rights through the "exercise criterion" which States that these rights can be defined by virtue of who is exercising them. Thus, on this conception, collective rights are to be enjoyed jointly by definition. Dinstein is one such view. He asserts that "collective human rights retain their character as direct human rights. The group which enjoys them communally is not a corporate entity and does not possess a legal personality" (Dinstein, 1976).

However, Jovanović points out that individual rights can be exercised indirectly by minors and mentally disabled persons with the help of a legal practitioner. Other individual rights—like the right to assemble or strike—can only be exercised jointly. Thus, the fact that some rights can only be exercised jointly does not imply that they do not have the nature of individual rights. At the same time, the fact that some rights are considered individual does not mean that they cannot be wielded collectively (Jovanović, 2012, p. 114). Similarly, Buchanan claims that there are two types of collective rights which are exercised differently. "Non-individual group rights" can be wielded by a group for collective decision making or by a third agent. "Dual-standing rights" can be exercised by any individual who is a member of the relevant group, or the right may be wielded collectively by some collective mechanism (Buchanan, 1994). For Buchanan, a collective right can be exercised in three ways: jointly (like the right to self-determination); through a representative body or agent; or individually.[16]

Jovanović contends that "entities, such as 'national minorities', already exist as such, based on "objective criteria", and they are not mere bodies of associated individuals. For example, an objective criterion relates to acceptance of the existence of minorities as factual issue, not a legally established one. Hence, if the existence of a minority group is based on objective criteria, a State is obliged to safeguard its rights. The objective criteria then might help identify those groups who are eligible to be potential right-holders as non-reducible collective entities pre-existing law and holding specific rights (Jovanović, 2012, p. 126).

However, the objective criteria are not sufficient to define collective identities. Indigenous peoples, for instance, tend to self-define as members of a specific community, adopting for example the legal criteria of tribal membership. The Indigenous self-identification criteria might not coincide with the state's definition of who is Indigenous. This is true for States, including Australia, Canada, New Zealand, the US and Peru, where the concept of "indigeneity" has, since colonial times, provoked a

[16] As prescribed by Article 11 Paragraph 2 of the Framework Convention for the Protection of National Minorities "The Parties undertake to recognise that every person belonging to a national minority has the right to display in his or her minority language signs, inscriptions and other information of a private nature visible to the public".

fracture between state criteria and ancestral communities and tribes' self-identification. This trend of the settler States raises a series of ethical questions: is it fair that a settler government should establish who is Indigenous and who is not, thus dictating the conditions for official recognition of tribe membership? Is it ethically acceptable for a government to restrict indigeneity to a series of established criteria which cannot vary over time? These questions are extremely relevant in the context of litigation, insofar as Indigenous peoples can claim to be entitled of determined collective rights only if the State has undergone a process of legal recognition of their indigeneity, which includes legal entitlement to ancestral territories.

In fact, according to Gover, the legal concept of indigeneity, with its associated rights and protections, does not correspond necessarily to the criteria of tribal membership. This is because indigeneity is defined by settler governments, which attach specific anthropological, cultural and political characteristics to Indigenous collectives, while tribal membership is defined by the members of the collective themselves (see generally Gover, 2011). Similarly, Jovanović contends that collective rights should not rest only on definitions and distinctions amongst collectives but should also be grounded on the notion of value collectivism. This would rely upon the general character of collective interests which are genuine and inherent to determined groups, regardless of the legal recognition of a state. On this issue, Stavenhagen argues that governments generally do not readily accept the term "Indigenous", as they reject the conceptual construct that accompanies the use of this term. That is, governments of post-colonial States do not wish to put in evidence the original occupation of the territory, with its implications of original rights, and the characterization of state sovereignty as a form of colonialism. India, for example, rejects that the Adivasis of the tribal regions (concept introduced by the British colonizer) are more Indigenous than the Hindu population of millenarian presence in these areas. The same is true in Bangladesh with regard to the relations between the Bengali population and the communities in the Chittagong region. In Sri Lanka, both Sinhalese and Tamils dispute the original occupation of the island, but the state officially recognizes the existence of Aboriginal Vedas (Stavenhagen, 1992).

Finally, it should be pointed out that collective rights are characterized by an inter-generational dimension. This is particularly relevant when it comes to Indigenous collective land rights, insofar as current generations of Indigenous peoples are responsible for the same natural resources that will pass to their children and grandchildren. Thus, Indigenous territories should not be classified as "properties", like in classical Western law, but rather as cultural heritage (Yupsanis, 2011). In fact, generally Indigenous peoples regard themselves as custodians and stewards of lands and natural resources, with the objective of passing intact such resources to the future generations (Mihi et al., 2019). This particular aspect of collective rights resonates with the principles of climate justice, inter-generational equity and sustainable development because of their reference to the rights of future generations to enjoy and use the same environmental resources that current generations are enjoying at present. These important principles establish an obligation to preserve and protect planet Earth as common resource for present and future generations, setting the ground for important ethical debates on whether future generations hold specific environmental rights.[17] Again, environmental law and human rights appear to be deeply intertwined in the pursuit of climate justice also for what regards the collective dimension of human rights—a dimension that, in the end, seems not only connected to Indigenous peoples but to all humanity and future generations.

Having clarified these important aspects regarding the collective nature of Indigenous peoples' rights, the next sections focus on the struggle of the emergence of Indigenous rights in international law because of the legacies of colonialism and because of the distinctiveness of Indigenous collectives compared to the (proclaimed) cultural, social and political homogeneity of contemporary States. This analysis is important to critically consider how the climate justice dimension of Indigenous participatory rights has begun to be addressed in international law, as Indigenous

[17] This important and complex issue has been widely debated in academic literature (e.g. see Herstein, 2008; Gosseries, 2008; Norton, 1982; Weiss, 1990). However, it seems that the rights of future generations are gaining momentum also in climate litigation such as in: *Juliana v. United States* (2015); *Future Generations v. Colombian Ministry of the Environment and Others* (2018); *Mathur,* et al. *v. Her Majesty the Queen in Right of Ontario* (2019); *Neubauer,* et al. *v. Germany* (2020); *PSB* et al. *v. Brazil* (2020); *Maria Khan* et al. *v. Federation of Pakistan* et al. (2018).

peoples have progressively transitioned towards the recognition of a collective—but smudged—participatory right in international climate governance.

Indigenous Peoples and International Human Rights Law

This section aims at describing how Indigenous peoples' rights have been progressively codified in international human rights law instruments, according to the legal and doctrinal narratives that are more commonly taken into consideration by legal scholars. However, after having provided such information, this section aims at adding some critical instruments to analyse and consider the logic of recognition and the inherent flaws on international human rights law in a climate justice perspective with regard to Indigenous peoples. This consideration will pave the way for the critical consideration of human rights-based climate litigation upon which Chap. 6 focuses.

Before focusing on the "ad hoc" international norms that aim at specifically protecting Indigenous rights, it is worth mentioning that some of those rights can be derived from general instruments of international law. The Charter of the United Nations protects the right of all peoples to self-determination and to be free from colonial subjugation. This right, as explained later on in the section, assumes a different connotation for Indigenous peoples, as it is not generally intended as a secession right, but it entails a broader meaning for Indigenous peoples which includes autonomy and self-government. Self-determination is a right that preexists the creation of the current American States and does not derive from its recognition in international and national law. Therefore, it is a fundamental right for the effective enjoyment of other rights. Article 27 of the ICCPR protects the right of persons belonging to minorities not to be deprived from enjoying their culture. This article, while lacking the collective dimension that instead characterizes Indigenous rights, can be applied to Indigenous peoples' claims insofar as they constitute minoritarian groups within their settler States. Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination

(1969) contains provisions that can be relevant for Indigenous peoples. Article 14 of the Convention establishes the possibility for individuals to fill a claim before the Committee on the Elimination of Racial Discrimination (CERD) against the State where a racial discrimination took place. Of course, this option is possible only if the State has previously accepted the competence of the CERD "to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party".[18] Finally, it should be mentioned the UN Declaration on the Rights of Minorities (1992). In fact, Indigenous peoples generally constitute minorities, ethno-racial groups often culturally and geographically segregated and marginalized, representing "others" compared to the general or creole population. This Declaration establishes positive obligations for States to "protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity".

The contemporary international law specifically directed at protecting Indigenous rights reflects the search for a new relationship between Indigenous minorities and settler States. This contrast and tension still heavily characterize the current situation, for example, in several Latin American countries. International law, as I have argued in the section on the political thought of colonization, was initially developed to support the subjugation forces that occupied the land of Indigenous peoples, enslaving, killing or marginalizing the inhabitants. However, the eurocentrism collapsed as a consequence of several process happening at the international level: the decolonization process (initiated also through the advent of the United Nations), which gave global voice to the struggles and the voices of peoples that had been oppressed, the rising in the global arena of new, non-allineated countries, and the US-Russia polarization. Even though the rhetoric of international law remained State-centred, new non-state actors begun to appear on the global political stage. Individuals, international organizations, NGOs, labour unions and transnational corporations started to be considered as legitimate participants in

[18] United Nations, International Convention on the Elimination of All Forms of Racial Discrimination (1969), Art. 14.

international legal debates, contributing to the shaping of international law. Anaya argues that the legal discourse witnessed a re-emergence of the classical-era naturalism philosophy, but free from the Eurocentric perspective. International law was still State-centred, but now was concerned about individual and group rights, with the aim of securing peace, stability, respect of human rights, enhancing the competency of international law even in spheres that were previously considered only a State's prerogative (Anaya, 2004, p. 50).

How this renewed international legal framework influenced the question of the legal treatment of Indigenous peoples? The expansion of international law scope, together with the moderation of the doctrine of state sovereignty, opened a totally new era for the recognition of Indigenous peoples' rights at the international level. It should be remembered, of course, that Indigenous peoples are entitled to all the rights contained in the two international covenants—ICCPR and ICESCR—and they can demand their compliance from the relevant authorities. However, as I have already argued in Chap. 3, these rights seem somewhat not sufficient to effectively promote respect of Indigenous peoples' demands and required the emergence of a new, ad hoc, legal paradigm. However, it seems that international law has let Indigenous rights go beyond what has been recognized for minorities or racial-discriminated groups.

Niezen has identified four different aspects that contributed to the development of a framework aimed at the protection of Indigenous peoples' rights in the post-war period: (1) a greater receptiveness at the international level for the protection of minorities to contrast the legacy of Fascism and Nazism; (2) the dismantling of European colonies and the principle of self-determination applied in the decolonization process; (3) the failure of the assimilationist policies that used education as a tool for the elimination of cultural differences and for the subjugation of Indigenous peoples; (4) the rise of an indigenous "middle-class" that worked together with the civil society and NGOs, bringing the Indigenous claims to the attention of the global community (Niezen, 2003a, 2003b, pp. 9–10).

Indigenous peoples did not wish to be considered anymore objects of the law, but subjects actively participating in the politics and law-making. The principles affirmed with the 1948 Universal Declaration on Human Rights, affirming the equality and dignity of peoples in all nations, together with the abandonment of the States' grip on political repression, let the indigenous groups organize themselves, creating social movements for the acknowledgement of their rights. The flourishing of the contemporary Indigenous international movement, however, dates back to the 1970s, ten years after the decade of decolonization.

Before that period, ILO was the main international organization that deployed a specific legal regime aimed at the protection of indigenous peoples. ILO, at the beginning, was serving the interests of the colonial power: in the 1920s, it contributed to drafting a regulation around "the power to compel natives to perform work in connection with plantations and other undertakings carried on for profit" to be enacted in Burundi.[19] After the Second World War, ILO changed its scope and approach, making the first efforts in applying the new-born international human rights standards to Indigenous peoples. The preoccupying semi-slavery conditions in which Indigenous peoples were forced to work drawn up the interests of ILO, which promoted studies and expert meetings on this issue,[20] but without considering the direct participation and involvement of Indigenous peoples. The major outcome of this process was ILO Convention No. 107 of 1957.[21] This Convention reflected the philosophy of the assimilationist approach, aligned with the logic of guardianship and paternalism, which regarded Indigenous peoples not able to

[19] ILO Legislative Ordinance No 52 of November 7, 1924.

[20] A 1946 study on indigenous populations contends that "the aboriginal groups in many regions stagnate in conditions of economic destitution and pronounced cultural and technical backwardness, which severely limit their productive and consumptive conditions. This is due to the primitive conditions in which they are obliged to earn their living, to the lack of educational stimuli and opportunities and to the almost complete absence, in some areas, of welfare services and measures for social and labour protection" (as cited in Niezen, 2003a, 2003b, p. 37).

[21] ILO Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Entry into force: 02 Jun 1959).

freely determine their future and means of development.[22] Assimilation was indeed considered the first step towards the acknowledgement of full citizenship rights in the newly born independent countries, following the pattern of a culturally homogenous nation-state. The Convention did a first attempt in promoting the respect of Indigenous rights, improvements in social and economic conditions, acknowledgement of property rights and customary law, but it considered Indigenous societies as transient entities, to be incorporated in the nation in a long-term perspective (Anaya, 2004, p. 55).

The contemporary legal regime for the protection of Indigenous rights is the result of activities undertaken in the last few decades. As mentioned before, in the 1970s, there has been a proper rise in the Indigenous international movements, concretized in a series of international conference and direct appeals to the global community. The 1977 Conference on Discrimination against Indigenous Peoples in the Americas, held in Geneva, organized by the Sub-Committee on Racism, Racial Discrimination, Apartheid and Decolonization reunited representatives from more than 50 NGOs and 60 spokespeople for Indigenous communities. The conference was useful in bringing to the attention of the global community the challenges and discrimination issues faced by Indigenous peoples, making their problems protagonists of the international scene. In 1981 a similar conference always held in Geneva, on the problem of Indigenous peoples and land, established a more firm and stable participation of native communities at the UN, evidencing the problem of dispossession of land and forced assimilation, arguing for the need of the restoration of ancestral land property. In 1982, the Working Group on Indigenous Populations (WGIP) was created, becoming the largest group in the UN addressing human rights issues, greatly contributing at giving voice to Indigenous representatives at an international level.

All these subsequent events, together with the increased participation of Indigenous peoples in international debates, drew attention to the outdated character of the provisions of the ILO Convention 107. In 1986,

[22] The paternalistic approach of the Convention is reflected in Article 2 Para. 1 "Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries".

ILO summoned a Meeting of Experts which included representatives of the World Council of Indigenous Peoples. The Meeting recommended to carry on a revision of the Convention No. 107, on the basis that its language was obsolete and the pursuing of an integrationist approach was destructive, meaning that it would have led to the extinction of Indigenous ways of life and culture. It was necessary, though, a revision of the Convention with a renovated approach which would take into account Indigenous peoples' claims through the application of policies of pluralism, self-sufficiency, self-management and ethno-development.[23]

ILO Convention 169 entered into force in 1991 after the ratifications by Norway and Mexico. At present, it has been ratified by 24 states, the majority from South America. Although the precise reasons for this lack of ratifications are difficult to ascertain, it can be argued that in African and Asian States there is an issue revolving around "indigeneity" and the application of the term "Indigenous peoples" to determined groups. During discussions at ILO, China affirmed that there are no Indigenous groups within its borders, while the Indian representative argued that "the tribal peoples in India were not comparable in terms of their problems, interests and rights, to the indigenous populations of certain other countries" (as cited in Domínguez, 2018). In general, countries that fail to identify the existence of Indigenous peoples within their territory would be reluctant in signing off a binding agreement that provides for binding obligations such as the right to consult and to obtain consent.[24]

The objective of Convention 169 is outlined in the Preamble: "Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the

[23] Report of the Meeting of Experts, para. 46, ILO Conference 75th session 1988.

[24] This affirmation does not mean that at the local level, Indigenous rights have not been codified. Gilbert has documented this trend in African States: "The new constitution of Kenya, adopted in 2010, recognizes 'historically marginalized groups', including indigenous communities. The constitution of Cameroon also mentions indigenous peoples, and in Burundi the constitution provides for special representation of the indigenous Batwa people in the National Assembly and the Senate. In 2010, the Central African Republic became the first African country to ratify the ILO Convention No. 169; and in 2011, the Republic of Congo became the first African country to adopt a specific law on the promotion and protection of the rights of indigenous populations" (in Gilbert, 2017).

framework of the States in which they live". Convention 169 includes provisions aimed at the promotion of several Indigenous peoples' rights, in particular the right to cultural integrity (Art. 5), land and resource rights (Art. 7), and a requirement for Indigenous peoples' consultation before the implementation of any measure that might affect them (Art. 6). This last aspect is extensively treated in Chap. 5 on participatory rights.

This Convention is considered the first international legal response to Indigenous peoples' claims. It has a binding nature, which has meant that the States had to find a compromise in its drafting among all the different positions expressed towards the conferment to special rights to Indigenous peoples. Given the very nature of this compromise, the Convention has been criticized by several advocates of Indigenous peoples' rights since its form and language did not seem to impose strict obligations on States (Anaya, 2004, p. 59). One of the issues that was debated concerned the assertion of collective rights, in contraposition to the dichotomy state/individual that was envisaged in the Convention 107. The acceptance and inclusion of the collective nature of Indigenous peoples rights (encompassed in the Convention 169 in Art. 13: "[…] governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, […] in particular the collective aspects of this relationship") had the potential of challenging the notion of States' sovereignty, but it was finally included in Convention 169.

The main debate revolved around the issue of self-determination and the use of the term "peoples" instead of "populations" for the identification of the beneficiaries of the Convention. This issue derived from the different legal meanings attached to the two words. States and governments were unwilling to use the term "peoples" as it implies an implicit reference to the right of self-determination and equal rights of peoples (as outlined in Article 1 of the UN Charter), which can be associated to a right to independent statehood. This would challenge the States' authority in many ways, among which the control over territories, lands and subsoil resources. The compromise that was eventually reached during the negotiations was to adopt the term peoples in the Convention, but an additional clause was added to the text: "The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may

attach to the term under international law".[25] Finally, Niezen pointed out that this Convention presents limitations to the initiation of a complaint procedures by Indigenous peoples, since they cannot file a complaint on their own. This is due to the tripartite structure of ILO—States, corporate, labour—which makes it difficult to find an entry point for a complaint (Niezen, 2003a, 2003b, p. 8). In sum, it has been argued that the Convention did not meet Indigenous expectations and that it has been considered a failed occasion to properly address Indigenous peoples' rights.

If the concept of self-determination was excluded in the drafting of the Convention 169, the most recent development in international law have produced what we can call the self-determination based normative framework on Indigenous rights.[26] Indigenous peoples have always formulated their claims referring to self-determination as the key element to exercise many of their rights, given that all peoples should be equally entitled to control their own destinies. Eventually, this claim was endorsed in the UNDRIP, the most complete document in terms of the highest standards of protection granted to native communities. Although it might be regarded as a non-binding document, it is drafted in the language of rights, strengthening the existing contemporary law provisions aimed at

[25] ILO Convention 169, Art 1.3.

[26] The issues revolving around the right to self-determination have been extensively debated in the academic literature. In the years of the UN decolonization project, the self-determination discourse was strictly linked to the right of a people that had been subject to colonization to constitute itself as a nation and as an independent state (which is also known as the blue water thesis). After the decolonization, indigenous communities were not considered as "peoples" for the purposes of the right to self-determination, given the fact that the principle of territorial sovereignty could not be overridden: self-determination allowed for independence only people whose territory is under the control of a foreign entity. The scope of the right to self-determination has progressively evolved in the subsequent decades, shifting from the minimalist approach (self-determination = independence from the state, applied in the context of colonization) to a maximalist approach. In this last case, self-determination is seen as an umbrella right, linked to the capacity of the full enjoyment of other fundamental human rights. For indigenous peoples, the right to self-determination means to be in control of their lives and their future, it means the right to fully and effectively participate in the political and civil life of their country and also not to be posed under coercion or subjugation. For indigenous people, self-determination is a right and a principle, which has to do with fairness and redress of the many historical injustices which they have been victim of. For a full understanding of these issues, see generally: Anaya, 2004; Thornberry, 2002; Xanthaki, 2007; Knop, 2002; Ghanea & Xanthaki, 2005; Jennings, 2011; Cadin, 2015.

the protection of Indigenous peoples.[27] However, Indigenous peoples were not enabled to vote within the negotiations, but had the status of observers, which included that they were able to participate and make recommendations. The adoption of the UNDRIP came in 2007 as the final outcome of a process initiated in 1985, when the WGIP declared its intention to produce a Declaration to be adopted by the UN General Assembly. This very lengthy process has seen the participation and involvement of indigenous organization worldwide, while States have gradually withdrawn from the drafting process, reluctant to participate in dialogues about the provisions discussed, in particular those about the right to self-determination and sovereignty over lands and natural resources.[28] The UNDRIP reflects the "broadening of the human rights framework in order to cater to new philosophical and legal perspectives", making the multiple sources of law relevant for the protection of Indigenous peoples' rights (Doyle, 2015, p. 106). Indeed, this instrument recognizes multiple sources of Indigenous law and custom: Indigenous philosophies and views, treaties and agreements between Indigenous peoples and States, historical claims and their remedies, all based on the principle of equality of all peoples.

UNDRIP bases its premises on the already existing international human rights law fundamental provisions,[29] recognizing the Indigenous peoples' right to self-determination in at least three different articles.[30]

[27] During the voting procedure a number of states made it clear that they do not regard UNDRIP as a legally binding document. For example, Canada, which eventually supported UNDRIP, in its statement affirmed that "[t]he Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws", as cited in Nykolaishen (2012).

[28] For a full and detailed understanding of the drafting process of the UNDRIP and how the indigenous claims have been incorporated, see generally: (Thornberry, 2002; Xanthaki, 2007).

[29] "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law", UNDRIP, Art. 1.

[30] "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development", Art. 3, "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions", Art 4, "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards", Art. 34.

The Indigenous right to self-determination of Article 3, which has been widely discussed in literature, seems to essentially differ from what was initially intended in the Universal Declaration—a right to be independent from colonial subjugation and to be free of constituting an independent state. As Anaya points out, in academic literature several authors argue for the existence of such difference between internal and external self-determination (Anaya, 2004, p. 105). In this sense, for Indigenous peoples, the right to self-determination is intended as an *internal* type of right. This means that Indigenous peoples are not entitled to secession from the State they live in, but to freely determine, inter alia, their political representatives and their means of development. However, Anaya presents an alternative framework of "constitutive and ongoing self-determination" right, which "instead identifies two phenomenological aspects of self-determination that apply throughout the spectrum of multiple and overlapping spheres of human association, and that both have implications for the inward- and outward-looking dimensions of units of human organization", which are constitutive self-determination and ongoing self-determination. The last "requires a governing order under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis" (Anaya, 2004, p. 104 onwards). Thus, the right to self-determination appears to be deeply entrenched to participatory rights, which are fundamental, as argued in this book, for the realization of climate justice in practice. This aspect is interrelated with the strong participatory right represented by FPIC, which also applies to environmental and climate governance and to adaptation and mitigation projects implemented in Indigenous territories. These aspects constitute the focus of Chap. 5.

It is worth to note that in the drafting process, it was decided to make no reference to the Convention 169, inasmuch it had very few ratifications and therefore it could not be considered a universal document.[31] Nonetheless, UNDRIP, as Convention 169, identifies the right to belong to an Indigenous peoples based on the criterion of self-identification, adding a collective element in the determination of an Indigenous identity in accordance with the traditions and customs of the community

[31] See UN Doc E/CN.4/1996/84, 4 January 1996.

(Art. 9). Collective rights and respect for the legal pluralism are indeed one of the main features of this Declaration, first of all stating that native communities are entitled to rights as *peoples*. Indigenous communities are vested with the power "to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs" respecting the inherent limits of international human rights law (Art. 34). Similarly, Indigenous people are entitled to the full participation in the political social and economic life of the State (Art. 5) and in the decision-making process through their designed representatives (Art. 18). Many provisions are dedicated to the protection of Indigenous peoples. In these norms clearly resonates the echo of the many historical injustices native communities have been victim not only at the time of colonialism but also through the assimilation policies of the newly independent States: right to life and security (Arts. 7 and 8 envisage a collective right to freedom and the prohibition of genocide),[32] prohibition of forced removal of Indigenous children (Art. 7) and rights of Indigenous women (Arts. 21 and 22). Other articles are dedicated to the cultural and linguistic identity, non-discrimination and right to education and to use the traditional medicine and knowledge (Arts. 14, 15, 24 and 31), resulting in a celebration of the diversity and richness of different cultures.

Finally, the provisions on land and resources constitute a very important part of the UNDRIP, given their controversial implications that States wanted to avoid, as I was previously arguing in this section. References to land rights are present throughout UNDRIP, which recognizes the particular spiritual attachment that Indigenous communities have with their lands and territory. Already in the Preamble, the need for the protection of Indigenous territories is deemed as an urgent issue, as land is linked to political, economic and social structures and it is therefore fundamental for the enjoyment of basic human rights.[33] Land rights

[32] The Convention to genocide could not be applied to indigenous peoples. See also Stavenhagen (1992)).

[33] "Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources", Preamble.

are indeed present in Art. 8 (prevention of the cultural genocide), Art. 10 (prohibition of eviction), Art. 30 (interdiction of military activities) and in Art. 12 (access to sites with religious meaning). The UNDRIP goes further compared to the ILO Convention in underlying the special link that Indigenous peoples have with their territories, and it does so in establishing the requirement for FPIC before the implementation of any measure that might affect them, their territories or their resources (Arts. 19 and 32) or before that any relocation might take place (Art. 10).

UNDRIP is considered a unique *sui generis* instrument of international law that despite its initial conception as having a non-binding legal nature has been used as an important instrument for the affirmation of Indigenous peoples' rights. At present, several scholars argue that UNDRIP, or at least some of its provisions, are indeed part of customary international law and therefore, legally binding.[34] According to the Expert Commentary of the International Law Association (2012) such provision are the right of self-determination, the right to autonomy or self-government, the right to the restitution of ancestral lands in order to fulfil the rights of Indigenous peoples to their traditional lands and territories, and lastly the right to reparation and redress for wrongs they have suffered, including rights relating to lands taken or damaged without their FPIC (see also Esterling, 2021).

The authoritative nature of the document has been demonstrated through its use made by the UN bodies (e.g. the Committee on the Elimination of Racial Discrimination, the HRC's Universal Periodic Review Process, the Special Rapporteur and the Permanent Forum and the Expert Mechanism on the Rights of Indigenous Peoples) and by different institutions of the UN, that have incorporated many of its provisions in their specific policies (FAO's Environmental and Social Management Guidelines, the International Fund for Agricultural Development Indigenous Peoples Assistance Facility). More importantly,

[34] The most prominent scholars who promote this approach or that at least some of the provisions regarding Indigenous rights as customary international law are Anaya and Wiessner. See generally Anaya (2004) and Wiessner (1999). In particular, they convincingly affirm that the rights that have reached status of customary international law are rights to demarcation, ownership, development, control and the use of lands that Indigenous peoples have traditionally owned or otherwise occupied and used (Anaya & Williams Jr, 2001).

indigenous peoples use UNDRIP to sustain their claims and demands towards the States, arguing for the respect and application of the norms enshrined in its articles as principles of general law.

Finally, at a regional level, it is crucial to mention the American Declaration on the Rights of Indigenous Peoples (ADRIP). It has been adopted in 2016 by the Organization of American States (OAS), after 17 years of negotiations. The Declaration echoes in many ways UNDRIP, but also introduces new provisions regarding the peoples in voluntary isolation and those affected by armed conflict.[35] The rights enshrined in the Declaration constitute "the minimum standards for the survival, dignity, and well-being of the indigenous peoples of the Americas".[36] The right to self-determination, as a result, appears to be revoking the provision contained in UNDRIP, as it refers to the right to self-determination of Indigenous peoples in "in matters relating to their internal and local affairs".[37] Moreover, ADRIP contains provisions on consultation and FPIC,[38] right to land, territories, resources and protection of the environment[39] and also treaty and agreements rights.[40]

At the regional level, we find important instruments that also are used by international courts to protect Indigenous peoples' rights. I am referring to the African Charter on Human and Peoples' Rights (AfCHPR) and to the American Convention on Human Rights (ACHR). The first instrument is relevant to Indigenous peoples as it protects the rights of *peoples*, therefore adding a collective dimension to the individual rights protected by the AfCHPR. The African Commission on Human and Peoples' Rights (AfCmHPR) and the African Court on Human and Peoples' rights (AfCtHPR), established by the AfCHPR and by the Protocol 1 to the AfCHPR, respectively, are the bodies that protects human rights through their complaint mechanism, which empowers them

[35] OAS, *American Declaration on the Rights of Indigenous Peoples*, 2016, Articles XXVI and XXX.

[36] Ibid, Article XLI.

[37] Ibid, Article XXI para 1.

[38] Ibid, Article XIII para 2; Article XXVIII para 3; Article XXIII para 2; Article XXVIII para 3; Article XXIX para 4.

[39] Ibid, Article VI, Article XIX para 3 and 4; Article XXV.

[40] Ibid, Article XXIV.

to receive individual and inter-State complaints alleging human rights violations. The AfCmHPR has affirmed that the right to self-determination can be applied to Indigenous peoples, and it covers a right to self-government and to preserve their distinctive cultures.[41] The other relevant regional instrument, the AmCHR, has been extensively applied by the IACtHR and by the IACmHR to protect Indigenous peoples' rights. The specific jurisprudence relating to the protection of Indigenous rights is addressed later on in this chapter and in Chap. 6 on climate litigation.

In conclusion, it can be affirmed that international human rights law had a crucial role in setting important standards for the protection of Indigenous peoples' rights, and in fostering settler States' responsibility for creating the conditions that would enable the enjoyment of such rights. The setting of such standards has happened within the context of the current international law system, where States' logic of recognition has been an important rationale for the unfolding of the legal instruments that aim at acknowledging special rights to Indigenous peoples—such as the collective ownership of ancestral lands. International human rights law is not the only legal regime that aim at protecting Indigenous rights: the next section focuses on how international environmental law provides legal norms specifically dedicated to Indigenous peoples.

Human Rights Dimensions of Environmental Law

International human rights law is not the only legal source relevant for the protection of human rights, as this section will demonstrate. Indigenous peoples' rights have been recently included in provisions contained in instruments of international climate and environmental law, more specifically in the Paris Agreement and in the CBD, the Protocol attached to this last, and ad hoc guidelines. Therefore, it is now widely acknowledged that international environmental and climate law has an important human right dimension, by virtue of the progressive recognition of the interlinkage between human rights and the environment that

[41] AfCmHPR, Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples, Adopted at 41st Ordinary Session (May, 2007) 27.

has already been described earlier in the book. According to such environmental human right dimension, Indigenous peoples seems to have been attached a double categorization: on the one hand, they are narrated to be as one of the most vulnerable categories to the effects of climate change and environmental degradation, therefore they are considered victims in need of a special protection and recipients of adaptation and mitigation projects. On the other hand, they are considered important heralds of relevant Indigenous knowledge that can used to protect the environment and the biodiversity together with Westernized science. This bivalent consideration realizes itself in climate change governance and other practical tools that aims at rebalancing the injustice of exclusion of Indigenous peoples from climate governance and the negative impacts of climate change on Indigenous peoples. However, these instruments fail to explicitly acknowledge the problems inherent to the legacy of colonialism, and generally make no reference to these problems as such, leaving to States a quite large margin of appreciation in the actualization of international law provisions in practice.

Nonetheless the greater role of Indigenous peoples in climate change issues, both as vulnerable groups and bearers of valuable knowledge, the Paris Agreement gives them very little relevance. A reference to indigenous peoples is made in the Preamble,[42] where for the first time in an international environmental treaty, human rights are incorporated in a provision. In this part of the Preamble obligations of international human rights law should be respected by virtue of their *ius cogens* value and also by virtue of the obligations derived from "respective" treaties. This paragraph envisages the invite to protect Indigenous peoples' rights, together with the rights of other vulnerable categories. This specific reference, which goes beyond the general obligation to respect human rights, is due to the lobbying activity undertaken by different groups during the negotiations of the Agreement (Klein et al., 2017, p. 116). Indigenous peoples

[42] "*Acknowledging* that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and con-sider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity", Paris Agreement, Preamble.

are also considered in Article 7 paragraph 5, which provides ground for the implementation of adaptation measures, recognizing the potential role of Indigenous knowledge in adaptation strategies to climate change. This recognition resulted in the institution of a platform for exchange of experiences, as established in the Decision 1/CP.21 paragraph 135 and at the COP22 in Marrakesh (Report FCCC/CP/2016/10, para 167).[43]

The 1992 CBD and the Nagoya Protocol, which are both extensively treated in Chap. 5 in relation to the Indigenous peoples' consent requirement, provide an obligation for States to protect and encourage indigenous peoples and local communities in the sustainable use of biological resources. Also, they establish a requirement for approval expressed by Indigenous peoples concerning the use of their traditional knowledge, plus the equitable sharing in the benefits deriving from the application of such knowledge. These specific norms testify the increased cross-fertilization between human rights law and environmental law, recognizing the rights of Indigenous peoples and local communities over their ancestral territories, qualifying benefit-sharing procedure not only as a safeguard or just as a compensation measure but also as a partnership (Morgera, 2019). The CBD, although not shaped in the language of human rights, provides an important obligation which protects and encourages Indigenous peoples in the use of biological resources in accordance with their traditions and customs that are compatible with conservation requirements (Art. 10c). This provision should be read in conjunction with Article 8j that provides the obligation to obtain the approval and consent of Indigenous peoples before the use of their traditional knowledge and the equitable sharing of the benefits resulting from the utilization of such knowledge. Voluntary guidelines have been adopted for the operationalization of the CBD provisions. These

[43] "*Recognizes* the need to strengthen knowledge, technologies, practices and efforts of local communities and indigenous peoples related to addressing and responding to climate change, and establishes a platform for the exchange of experiences and sharing of best practices on mitigation and adaptation in a holistic and integrated manner", UNFCCC, Decisions Adopted by the Conference of the Parties, FCCC/CP/2015/10/Add.1, para. 135.

guidelines not only apply to States but also to businesses, and some of them are relevant for what concerns Indigenous peoples.[44]

Benefit-sharing has the potential of consistently expanding the scope of Environmental Impact Assessment (EIA) and consultation/consent practices, triggering a culturally appropriate and iterative dialogue between indigenous peoples and the State. Thus, being not just a procedural safeguard, it moves beyond this "defensive approach" towards a "transformative collaboration in light of indigenous understandings" (Morgera, 2019). Human rights law does not provide obligations regarding benefit sharing:[45] this makes the CBD and the Akwe: Kon Guidelines the main instruments to be addressed when it comes to provide a strong legal basis in the decisions of courts and other bodies that have made use of standards prescribed by international biodiversity law.[46]

In conclusion, it looks like these and many other aspects relating to the benefit sharing deriving from the use of traditional indigenous resources, such as profit-sharing, job creation for communities, improvement of the conditions under which the "ecosystem stewards" develop and maintain their practices, are better outlined in biodiversity law than in human rights law, narrating the positive contribution of Indigenous peoples to the global environmental project. However, both international human rights law and biodiversity law prescribe means for the support of Indigenous peoples' rights through EIA, the respect of environmental and social standards, the FPIC, procedural and participatory rights and fair and equitable benefit sharing, contributing to the shaping of a legal

[44] The full list of relevant guidelines includes: Akwé: Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities; The Work Programme on Protected Areas; Mo'otz Kuxtal Voluntary Guideline; Addis Ababa Principles and Guidelines on the Sustainable Use of Biodiversity.

[45] The ILO Convention 169 does entail provisions on the participation of indigenous peoples in development plans, but this has led to consider only monetary benefits deriving from the profits of the extractive industries. As pointed out by Anaya (UN Doc. A/HRC/15/37) benefit sharing is not only about pecuniary compensation, but it needs to go beyond this restrictive approach.

[46] See for an instance: Inter-American Court of Human Rights (IACtHR), *Case of the Saramaka People v. Suriname*, Judgment (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs), 12 August 2008, para 129 and CERD, *Concluding observations on the combined thirteenth to fifteenth periodic reports of Suriname*, (2015) UN Doc. CERD/C/SUR/CO/13–15, para. 26.

regime which would aim at securing the protection of native communities against the negative impact of environmental degradation and biodiversity loss.

The human right dimension of climate change appears totally fragmented and scattered throughout different law systems that interact, overlap and sometimes contradict each other, as the double-folded narrative around the role of Indigenous peoples both as victims and saviours of humanity thanks to their knowledge has demonstrated. The instruments here analysed fail to explicitly link environmental degradation, loss of biodiversity to the neocolonial practices of pollution of Westernized States and their capitalistic models of development. In order to emerge in this complex legal discourse that aims at protecting environmental rights, Indigenous peoples had to re-invent their culture to make it coincide with the Westernized ecological approaches. This new framework can be defined as "ethnoecologism" or "ecoethnicity", and it has especially characterized Indigenous narratives of the Latin American continent (Nazarea, 2016). The Indigenous ecological discourse had to be "reinvented" to match the Western ecologism, which is different in its nature and theoretical underpinnings. In fact, Western ecology derives from the awareness of an imminent disaster or catastrophe: climate change and its impacts, loss of biodiversity and severe environmental degradation, just to mention a few. In Indigenous views, the ecosystems and natural element hold a spiritual meaning and protecting the environment assumes a totally different connotation. However, the logic of recognition has operated also in the environmental human rights realm, making it necessary for Indigenous peoples to find ways to enter the political discourse and match they own cosmovisions with Westernized ecologies in order to put forward the necessity of protecting their land rights and knowledge.

In fact, Indigenous peoples have argued in different international fora how their environmental management is sustainable ("sustainable" being a Westernized word and concept). Therefore, identifying themselves as "guardians of the forest" has called for having their territorial rights and other fundamental rights protected in order to help the State reaching its environmental and climate protection targets. In international fora, the ethnoecologism discourse has proved to be a winning strategy as demonstrated by the inclusion of Indigenous peoples' rights in several

instruments of international environmental law and biodiversity conservation. With such affirmations, I am not denying the validity and importance of Indigenous wisdom and their fundamental role as conservationist of biodiversity, but I am pointing to the fact that the logic of recognition and acceptance into the Western legal realm has made necessary for the ethnoecologism to emerge, coupling and re-inventing Indigenous knowledge in order to match definitions of "sustainability", "conservation" and also "vulnerability to the impacts of climate change" that are ultimately embodied in international law.

Jurisprudence of International Courts

The previous section has highlighted how the international legal system has recognized, developed and created ad hoc instruments and rights for Indigenous peoples. However, this legal codification seems not sufficient to effectively protect and respect the rights of Indigenous peoples. This is because the existence of an internationally codified norms does not mean that States *will not* violate those norms. The problem lies in how norms are—or are not—applied in specific national contexts, and in how justice is administered. Therefore, we have witnessed a growing number of Indigenous peoples' claims brought before international human rights bodies in order to demand justice for the wrongdoing of the States—often co-opted by mining and petrol corporations. This section aims at providing an overview of the most important Indigenous jurisprudence in different regional systems, which was fundamental for the enforcement of both human and environmental rights. Specific Indigenous climate litigation cases are not described in this section, but are rather discussed in Chap. 6 because of their innovative and peculiar nature.

International human rights courts have provided, through their decisions, relevant enforcement of internationally protected indigenous peoples' rights and international customary law. The judicial work of the IACtHR, the IACmHR, the ACHPR and European Courts and Commissions on human rights had a significant impact in national legislation and public policies, contributing to the operationalization of the provisions enshrined in the Convention 169 and the UNDRIP. In this

section are highlighted the main achievements and legal enforcements of the courts and commissions with regard to Indigenous peoples' claims, noting the positive contributions they have made towards the achievement of justice for those native communities that have been evicted or deprived of essential human rights. Before entering in the details of the judicial decisions, it is important to make a premise on the main challenges faced by Indigenous peoples when presenting an application before human rights judicial institutions.

For marginalized Indigenous communities, making a complaint before an international human rights court can be extremely difficult. First of all, they need to satisfy the requirement of the exhaustion of local remedies. This accomplishment might take several years, and they might occur into costs that are simply unbearable if they are not supported by a dedicated fund or an NGO. Second, the collective nature of their claims might be sometimes difficult to address in countries where the collective nature of rights is not legally supported. Also, they might not necessarily have the legal background to successfully file a complaint and they might require a representative, such an NGO or another association which can advocate for their demands before a court. Such entity, which has to be economically accessible or work pro bono, needs to have the legal expertise to file such a complaint first before the national authorities and then before the international judicial bodies. Finally, what is intrinsically challenging for an Indigenous community is to provide the burden of proof of the alleged violations. The complex legal process that these peoples must go through requires them to prove that they are legitimately entitled to their rights. The enjoyment of rights for Indigenous peoples is, most of the time, intrinsically linked to their ancestral territories that they have inhabited since time immemorial. For this reason, courts ask Indigenous peoples to prove their property rights and to document their customary land tenure, authenticating their continuous and traditional attachment to the territory in dispute. But how can they be able to document such an entitlement, when their property rights rely on Indigenous customary law and have been passed in an oral form from generation to generation?

Gilbert has extensively analysed the question of Indigenous land rights and customary land tenure, investigating also the challenges faced by

Indigenous communities when applying before national and international courts (Gilbert, 2018; Gilbert & Begbie-Clench, 2018). He argues that, even though colonization has not extinguished Indigenous peoples' rights to land, they are still forced to prove their continuous and traditional attachment to the land in court proceedings, generating paradoxically a process of authenticity which is also against the provisions of a human rights–based approach to cultural rights, which has on the contrary supported an evolutionary approach to property rights. Indeed, often the problem of this authenticity process lies in the different nature of property rights prescribed by the Western legal system and by the Indigenous customary land tenure. Indigenous access to land often entails multiple and different layers of legal overlapping, flexible rights, notion of space-sharing and non-exclusive access to land. The nomadic use of land is often translated by Western law into a de facto non-possession of such territories resulting in a difficult and disturbing documentation process for Indigenous peoples if they wish to appeal a case before a court (Gilbert, 2012). Thus, the main solution and effort required to Indigenous peoples is to map their territories to have access to national and international litigation, through a collective participatory process that incorporates customary law in the Western meaning of land rights (without the guarantee that such mapping would be accepted by the judicial bodies).

The issues around the legal entitlement of Indigenous lands are scattered throughout all the litigation processes that have brought Indigenous communities against a state or a private company, given the intrinsic connection that customary land tenure has with the enjoyment of other fundamental rights. Starting with the consideration of the European human rights system, the European Court of Human Rights (ECtHR) is competent to address complaints made by Indigenous peoples like the Inuit, the Saami and other Russian groups. Actually, quite a relevant number of Indigenous complaints have been made to the ECtHR, but only very few of them have passed the merits stage. In the *Alta case*,[47] the first Saami

[47] European Commission on Human Rights, Application no. 9278/81 and 9415/81 (joined), *G. and E.* v. *Norway*, 3 October 1983.

application was submitted to the Commission, the violations were not interpreted as undermining the Saami cultural rights and freedoms, but rather as a minimal interfering with their economic life (reindeer herding was, for the Commission, an economic activity carried out in a "comparatively small area which will be lost by the Applicants"[48] due to the construction of the Alta dam). In the *Johtti case*[49] and in the *Handölsdalen case*,[50] the Court expected the Saami peoples to have already established their ancestral territorial rights through their domestic jurisdiction.[51] In the latter case, the Court affirmed the issue of the burden of proof of the territorial rights of Indigenous peoples had not to be asserted by the judicial body, "including its probative value or the burden of proof. These matters are therefore primarily for regulation by national law and the national courts".[52] This approach of the ECtHR is very far from what can be expected by an international court dealing with Indigenous peoples' rights. In a partly dissenting opinion on the *Handölsdalen case*, Judge Ziemele, in citing also two articles of UNDRIP, asserted that Sweden both denied the Sami villages effective access to court and that the length of domestic proceedings was unreasonable.[53] She underlined that the Sami villages had to pay important legal costs, as Sweden approach had failed to take into account the rights and particular circumstances that arise in Indigenous peoples' communities. As a result, Indigenous peoples were enormously disadvantaged in the legal process because the burden of proving land rights relied exclusively on their shoulders. Moreover, also CERD remarked its preoccupations on this case when addressing

[48] Ibid.

[49] ECtHR, *Johtti Sapmelaccat ry and Others against Finland*, 2005.

[50] ECtHR, *Handölsdalen Sami Village and Others v. Sweden*, 30 March 2010 (application no. 39013/04).

[51] Timo Koivurova, *Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects*, in International Journal on Minority and Group Rights, Koninklijke Brill NV, Leiden, The Netherlands, 2011.

[52] ECtHR, *Handölsdalen Sami Village and Others v. Sweden.*

[53] Partly Dissenting Opinion of Judge Ziemele, supra note 50.

Sweden in its concluding observations.[54] Indigenous peoples have had not much protection through the EU system and have generally preferred devolving their claims to the HR Committee.[55]

Indigenous peoples' rights have been approached in a different way by the Inter-American system. The Court and the Commission have been the authors of landmark decisions on Indigenous peoples' claims, interpreting Convention 169 and other human rights treaties in an evolutive manner which assured the application of the maximum protection standards for the plaintiffs. The Inter-American human rights system has largely contributed to fostering the protection of Indigenous peoples' rights, broadening the scope of international human rights law to the respect of collective rights to culture and land. The rulings of the IACtHR have been incorporated in national legislations and adopted by tribunals in Latin America, becoming the minimum standards for the protection and enforcement of the rights enshrined in the American Convention (Herencia Carrasco, 2015). Important and well-known decisions related to the violation of Indigenous peoples' rights are the *Awas Tingni v.*

[54] "[T]he Committee reiterates its concern regarding such land disputes. It is particularly concerned about past court rulings which have deprived Sami communities of winter grazing lands. It is also concerned about de facto discrimination against the Sami in legal disputes, as the burden of proof for land ownership rests exclusively with the Sami, and about the lack of legal aid provided to Sami villages as litigants […] The Committee recommends that the State party grant necessary legal aid to Sami villages in court disputes concerning land and grazing rights and invites the State party to introduce legislation providing for a shared burden of proof in cases regarding Sami land and grazing rights. It also encourages the State party to consider other means of settling land disputes, such as mediation", CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination, Committee on the Elimination of Racial Discrimination, Seventy-third session consideration of Reports Submitted by States Parties under Article 9 of the Convention* (28 July–15 August 2008), (Sweden), para. 20.

[55] HR Committee cases: Kitok v. Sweden, 1988, Communication No. 197/1985; U.N. Doc. CCPR/C/33/D/197/1985; Chief Bernard Ominayak and Lubicon Lake Band v. Canada, 1990, CCPR/C/38/D/167/1984; Ilmari Länsman et al. v Finland Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994) Apirana Mahuika et al. v New Zealand Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000). Poma v Peru CCPR/C/95/D/1457/2006 (2009).

Nicaragua,[56] *Maya Communities of Belize v. Belize*,[57] *Sarayaku v. Ecuador*[58] and *Saramaka v. Suriname*.[59] This jurisprudence is analysed more in depth in Chap. 5 for what concerns the emergence of a substantive content for the FPIC requirement in relation to any measure affecting Indigenous peoples' rights and livelihoods. In addition to these cases, other relevant Indigenous applications have been made to the IACtHR. *Yakye Axa v. Paraguay*[60] (2000), *Sawhoymaxa v. Paraguay*[61] (2006) and *Xakmok Kasek v. Paraguay*[62] (2010), all related to the relocation of the Indigenous groups in the Chaco paraguayano area. The Court affirmed the applicability of the international right law dispositions enshrined in Convention 169 related to the right to land, affirming that whether a relocation is taking place, Indigenous peoples have the right to receive other land with the same quality and value. The IACtHR also stressed the importance of land as a vehicle for the replication of Indigenous culture, cosmovision, religion and cultural identity. Generally, we can affirm that the Indigenous applications and the IACtHR decisions have revolved around violations of the right to property (individual and collective) due to the dispossession of the ancestral lands in favour of a private firm, with the consequence of the forced relocation of the Indigenous peoples.

The contribution of the IACtHR to the enforcement of Indigenous peoples' rights goes beyond the "classical" human rights perspective.

[56] IACtHR, *Case Mayagna (Sumo) Awas Tingi Community v Nicaragua*, judgment of 1 January 2000 (Preliminary Objections), Ser C No 66; judgment of 31 August 2001 (Merits and Reparations), Ser C No 79.

[57] IACtHR, *Maya Indigenous Communities v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 78/00, OEA/Ser.L/V/II.111, doc. 20, rev. (2000).

[58] IACtHR, The Kichwa Peoples v. Ecuador, Petition 167/03, Inter-Am. C.H.R., Report No. 62/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004).

[59] IACtHR, Case of the Saramaka People v Suriname, Saramaka People v Suriname, Preliminary objections, merits, reparations and costs, IACHR Series C no 172, IHRL 3046 (IACHR, 2007), 28th November 2007.

[60] IACtHR, Case Comunidad Indígena Yakye Axa v Paraguay, judgment of 17 June 2005, Ser C No 125, para 188 and Case Masacre de Plan de Sánchez v Guatemala, judgment of 19 November 2004.

[61] Case of the Sawhoyamaxa Indigenous Community v Paraguay, Sawhoyamaxa Indigenous Community of the Enxet-Lengua people v Paraguay, Merits, reparations and costs, IACHR Series C No 146, IHRL 1530 (IACHR, 2006), 29th March 2006.

[62] IACtHR, Xákmok Kásek Indigenous Community v. Paraguay (Ser. C No. 214), 2010.

Elements of cultural appreciation, participatory parity and legal pluralism are scattered throughout the aforementioned decisions. This last aspect is particularly evident in the sound set of principles established for reparations and that goes far beyond the mere pecuniary compensation (Citroni & Quintana Osuna, 2012). Reparations have focused on specific identities of Indigenous peoples and collective rights with particular emphasis on the moral damage suffered. For example, in the case *Masacre Plan de Sanchez v. Guatemala* (2004), the IACtHR ordered the establishment of a public ceremony to officially admit its responsibility in the massacre delivering an apology to the victims and their families. Also, it ordered to translate into the local language relevant abstracts of the judgement and to provide free medical and psychological support to people affected by the massacre.[63] Similarly, in the decision *Moiwana v. Suriname* (2005), it established the obligation for the state to publicly recognize its international responsibility and to apologize in the presence of the Indigenous leader and high-ranking state authorities.[64] The case *YATAMA v. Nicaragua*[65] (2005) represents an important case for it concerns participatory rights of local communities in government. The IACtHR sentenced that Indigenous peoples should not be forced, in order to participate to the political life of their country, to organize themselves in structures that are contrary to their traditions and customary laws. Therefore, it invited the state to reform its Electoral law allowing the effective participation of Indigenous communities in respect of their traditional forms of organization. More recently, in the case *Lhaka Honhat v. Argentina* (2020), the IACtHR issued a judgement in which it declared the international responsibility of the Argentine Republic for the violation of diverse rights of 132 Indigenous communities of the Salta province, organized under the Lhaka Honhat Association.[66] This has been the first time the Court has condemned Argentina for the violation of the rights of Indigenous peoples. The case applies to the claim for recognition of land ownership by Indigenous Communities belonging to the Wichí

[63] IACtHR, *Masacre Plan de Sanchez v Guatemala*, judgment of 5 May 2004 (Merits), Ser C No 105; judgment of 19 November 2004 (Reparations), Ser C No 116.

[64] IACtHR, *Case Comunidad Moiwana v Suriname*, judgment of 15 June 2005, Ser C No 124.

[65] IACtHR, Case *YATAMA v Nicaragua,* judgment of 23 June 2005, Ser C No 127.

[66] IACtHR, *Lhaka Honhat Association (Our Land) v. Argentina*, judgement of 6 February 2020.

(Mataco), Iyjwaja (Chorote), Komlek (Toba), Niwackle (Chulupí) and Tapy'y (Tapiete) peoples within the Argentinian province of Salta, on the border with Paraguay and Bolivia. They argued that Argentina had violated the obligations to respect, protect and adopt necessary measures to ensure the effective enjoyment of the right to communal property, based on, inter alia, the exploitation of fossil fuels in the Indigenous territory. The Court determined that the State violated the rights to cultural identity, a healthy environment, and adequate food and water, due to the lack of effective measures to prevent adverse impacts.[67]

Finally, Indigenous peoples' rights have been addressed through the international human rights African system. One of the most important claims brought before the AfCmHPR is the *Ogoni case*[68] which alleged violations of economic, social and cultural rights of people damaged from the activities of the Dutch Shell and Nigerian Petroleum Company in the area of the Niger's delta. The activities of the oil companies brought not only a huge environmental degradation which involved contamination of soil, water and air but also contributed to developing a climate of terror under which the Ogoni people were forced to live. The Nigerian government and its military indeed had a role in the support of the irresponsible oil practices perpetrated by the two companies, attacking and burning several Ogoni villages with the aim to capture the supporters of the Movement for the Survival of the Ogoni people in the period 1993–1996. The complainants alleged several violations of rights protected by the African Charter, namely those protected by Articles 2, 4, 14, 16, 18, 21 and 24. The Commission acknowledged the violation of several substantive rights. First of all, the right to health and to a clean and safe environment enshrined in Articles 16 and 24: the Commission found that the State not only was directly involved in the contamination of the environment and the related health problems of the Ogoni people but also was

[67] In order to ascertain the violation of the right to a healthy environment, the Court relied on its interpretation of the right to a healthy environment its Advisory Opinion 23/17 of 2018. It thus included the right to a healthy environment among the rights protected by Article 26 of the American Convention, which in turn relies on the obligation of States to achieve the integral development of its peoples arising from Articles 30, 31, 33 and 34 of the IACHR.

[68] Communication 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR)/Nigeria, 27 October 2001.

responsible of placing the military power at the disposal of the oil company.[69] Also, the government did not produce any previous impact assessment or either informed the Ogoni about the possible damages. Furthermore, the Nigerian government violated Article 21 which provides for the right of all people to freely dispose of their natural resources, by facilitating the destruction of the Ogoni Land. Other violations concerned the right to adequate housing. This right is not present in the AfCHPR, but the Commission argued that it was derived from a combination of Articles 14, 16 and 18. Finally, the violations were committed also regarding the right to food, a right not enshrined in the Charter but resulting from the interaction of Articles 4, 16 and 22.[70] This decision is considered a landmark case in the African system because it recognized the link between human rights and the environment. In the Decision, the Commission recommended the Nigeria government to protect fully the environment, undertaking a clean-up of contaminated lands and rivers, and stop the attacks against the Ogoni people.[71] Unfortunately, the situation in the Nigeria keeps being dramatic on this aspect, with the problem of oil spill still present and still affecting the environment and the people living there.[72]

Another interesting case regarded the Endorois people of Kenya, which in 1974 had been evicted from their ancestral lands in the Lake Bagoria area for the creation of a natural reserve. The government did not provide any compensation to the Endorois peoples evicted, continuing the denial of access to their lands while arresting Endorois leaders in an arbitrary manner. The case was brought before the AfCmHPR in 2003 and few years later the judicial bodies recognized the violation of Articles 1, 8, 14, 17, 21, 22 of the Charter. On the theme of the forced eviction, a more recent decision (2017) has come from the AfCtHPR and regarded the forced relocation of the Ogieks in Kenya. The AfCtHPR assessed the violation of a number of articles of the Charter, affirming the right of the

[69] Ibid, para 61.

[70] Ibid, para. 66.

[71] Ibid, "Holding".

[72] See generally: Amnesty International, *Negligence in the Niger Delta: Decoding Shell and Eni's Poor Record on Oil Spills*, 2018, available at https://www.amnesty.org/en/documents/afr44/7970/2018/en/, last accessed May 2021.

Ogieks to have access to their lands and to express their consent before a relocation takes place (Giacomini, 2018).

Overall, the jurisprudence of international human rights courts has proved to give effect and enforcement to the provisions prescribed by international law, contributing to the creation of a legal regime that respects Indigenous peoples' collective rights. The cases brought before the international courts testify the many human rights violations Indigenous communities have been exposed to, which were caused not only by their State but also by private corporations, like in the Ogoni case. The jurisprudence has provided for the enforcement of fundamental rights of Indigenous communities such as property and land rights, right to adequate housing, right not be forcibly removed, the requirement for FPIC and environmental rights. These claims evidence the inherent tension between Indigenous communities' will to freely determine their future and means of development and the principle of State sovereignty. This tension is utmost present in the international climate change realm and, as the next section will demonstrate, is at the core of the issue of under-representation of Indigenous issues in international fora and decision-making.

The Participation of Indigenous Peoples in International Fora

Participation from Local to Global

Chapter 2 has explained how a theory of justice applied to climate change issues suggest that participatory rights are key to avoid the logic of recognition of Indigenous peoples' rights. Thus, it is paramount to investigate and understand how Indigenous participatory and procedural rights are being progressively realized at the international level for what concerns climate governance. The decolonization of international climate negotiation has gone a long way since the first UNFCCC COP took place, but as this chapter intends to demonstrate, there are still multiple challenges in ensuring a meaningful participation of Indigenous peoples in climate governance and in the realization in practice of Indigenous

environmental claims. Before explicitly dealing with participation of Indigenous peoples in the UN system, this section aims at providing an account on how Indigenous voices have re-emerged after having been silenced by colonialism, and at giving an account on some of their political organizations that have drafted declarations and adopted principles. What this section wishes to demonstrate is that participation of Indigenous peoples should not be framed as "inviting Indigenous leaders at the table of Westernized nations", but as a collaborative effort to find solutions that include Indigenous views in climate law and governance.

The acknowledgement of the existence of legal pluralism, and not the logic of State-centred recognition of Indigenous rights, should then be at the core of the advancement of climate justice. However, the dilemma of the interaction between sovereign States and Indigenous nations is at the core of current challenges in all aspects of governance. For what regards climate change, these two positions somewhat appear as something that cannot be reconciled, as Western capitalism and Indigenous cosmovisions seem to stand at the two opposite sides of the spectrum, the one trying to find mild solutions that would allow the survival of the current economic system, the other requiring a paradigmatic change. In order to understand how we came to this particular configuration of the relations and exchanges between actors so diverse in the international system—States, minorities, Indigenous peoples—it is necessary to have a brief *excursus* on the meaning of globalization for the international system and how has this led to a reinforcement of Indigenous identities.

The process of globalization led to a twofold process: on the one side, States have made "global" their economies, internationalized markets, production systems, culture and lifestyle; on the other side, local realities and identities, including ethnic and minority identities, have re-emerged and started to advocate for their rights, reaffirming their cultural, religious and ethnic identities. This is because Indigenous communities, who have lived isolated and marginalized, came to face the wave of globalization and the confrontation with the State and non-State actors that wished to bring "development" and "civilization" in their territories—in

a way similar to what I have described in Chap. 2 regarding the Yanesha people of the Peruvian Amazon and the narratives around the development of the forest. In this way, many Indigenous peoples have been obliged to face new customs, development economics institutions and structures and the Westernized world. In order to contrast this globalizing wave, the emerging of defined and precise Indigenous identities was needed more than ever. It is like the new world order was asking minorities to identify and define themselves, while the idea of a homogeneous Nation-State was progressively crumbling because of the implications of the end of the Cold War and the fragmentation of the Soviet Union in different, independent States. This fragmentation and the emerging of new national identities required the UN to accept that the classical idea of State-nation was not anymore applicable to all countries. Member States had to acknowledge the existence of States without clearly defined borders, inhabited a multiplicity of ethnic groups and minorities demanding legal recognition or a certain degree of autonomy.

Indigenous peoples, confronted with the globalizing intents of the new world order, had necessarily to start a process of explication and definition of their identities and cultures in contrast to the other ethnic groups in order not to be submerged by this homogenizing wave that demanded their inclusion and interrelation not only with the other citizens present in the same countries, but also with all peoples of the world. Indigenous peoples were asked to define themselves in order to gain legal recognition and land entitlement, to build their identity and differences from the majority of citizens and from other Indigenous groups. These identity discourses required Indigenous peoples to translate their cosmovisions and systems of knowledge into means of communication that could be understood by Westernized actors, as I have already argued in relation to Indigenous knowledge. Indigenous peoples organized themselves as collectives and organizations and build their alliance with the environmental protection discourse that made its way in environmental governance and became a globally recognized narrative where Indigenous peoples are known as “guardians of the forests”.

The constitution of well-defined and structured ethnic groups requires legal recognition, right to participation to the political life of the country and legal entitlement to lands. Examples of politics of Indigenous legal recognition can be drawn in all continents where colonization played a role. Starting with Latin America, as demonstrated in Chap. 1, the new wave of colonization that started in the 1960s and that regarded those Indigenous groups that lived mostly isolated in remote regions such as the Amazon had the results of fostering Indigenous demands for recognition that culminated in the founding of local federations, organizations and alliances. One such examples is the Shuar Federation in Ecuador. Shuar peoples lived in isolation until the 1970s, when they were subjected to a re-education effort by the Salesian church. From its beginnings, the Shuar Federation demanded the State to recognize ethnic diversity and openness to difference, and they also demanded a reform of the traditional State in a multi-ethnic and multinational State (Altmann, 2013). Another example is represented by Kuna people in Panama, who established a General Congress that has the purpose of resolving disputes within the community. In 2000, the Congress adopted an act on Tourism, in order to preserve the fragile ecosystem and to foster respect of Kuna's customs and spiritual beliefs.[73] The legal plurality of Indigenous cultures has also been recognized at the constitutional level, let us think, for example, at the Plurinational State of Bolivia, which Constitution recognizes the Indigenous right to self-determination,[74] or Colombia, where

[73] Kuna's Statute on Tourism can be accessed here: https://www.gunayala.org.pa/Reglamento%20de%20Turismo.htm, last accessed September 2022.

[74] Article 3 of the 2009 Bolivian Constitution reads: "Given the pre-colonial existence of indigenous and aboriginal peasant nations and peoples and their ancestral domination over their territories, their self-determination is guaranteed within the framework of the unity of the State, which consists of their right to autonomy, self-government and culture, the recognition of its institutions and the consolidation of its territorial entities, in accordance with this Constitution and the law" (translated from Spanish by the author).

Indigenous peoples are legally entitled to political participation, self-government and a certain degree of governmental autonomy.[75]

Other examples come from the African context, although, as demonstrated by the almost total absence of ratifications by African States of Convention 169, the recognition of Indigeneity by African governments is a complicated matter. For example, representatives of Ogiek people in Kenya have organized themselves in the Ogiek Welfare Council, and its mission is "to fight for the constitutional rights of the Ogiek people, to promote their well-being and to preserve their environment, culture and identity".[76] In Nigeria, the Movement for the Survival of the Ogoni People (MOSOP) was founded in 1990 to promote democratic awareness, protect the environment of the Ogoni People, seek social, economic and physical development for the region, protect the cultural rights and practices of the Ogoni people, and seek appropriate rights of self-determination for the Ogoni people.[77] In South Africa, the ǂKhomani San Communal Property Association, a form of collective trust allowed by the Communal Property Associations Act (No 28 of 1996), has been recognized in 1999 after the ǂKhomani San community lodged a claim for the restitution of 400,000 hectares of land in the Kalahari Gemsbok Park. The ǂKhomani Cultural Landscape is also protected by the United

[75] The Constitution of Colombia, in Article 171 regarding the composition of the Senate, establishes that there will be an additional number of two senators elected in a special national constituency by indigenous communities, and one for the Chamber of Deputies. In Article 246, it is recognized that Indigenous authorities may exercise jurisdictional functions within their territorial scope, in accordance with their own rules and procedures, provided that they are not contrary to the Constitution and laws of the Republic. It further established that the law shall establish the forms of coordination of this special jurisdiction with the national judicial system. In Title IX are defined the ways by which Indigenous territories should be organized and recognized by the Colombian state, in particular that the "formation of indigenous territorial entities shall be subject to the provisions of the Organic Law on Territorial Planning, and their delimitation shall be made by the national Government, with the participation of representatives of indigenous communities, previous authorization of the Commission for Regional Planning" (translated from Spanish by the Author).

[76] Ogiek Welfare Council website at http://www.ogiek.org/indepth/owc-org-profile.htm, last accessed May 2021.

[77] For further information, consult the MOSOP website: http://www.mosop.org/, last accessed May 2021.

Nations Educational Scientific and Cultural Organization (UNESCO) as World Heritage site because it is "uniquely expressive of the hunting and gathering way of life practised by the ancestors of all modern human beings".[78]

For what regards the Australian continent, it is worth mentioning here that the National Congress of Australia's First Peoples was the national representative body for Aboriginal and Torres Strait Islander Australians. The Congress was announced in November 2009 and set up as a limited company, but it was forced out of operation in 2019 because of its "significant level of debt" and "unsustainable structure".[79] At the moment, a reference point is represented by the National Aboriginal and Torres Strait Islander Legal Services, an organization which advocates at the national level for the rights of Aboriginal and Torres Strait Islander peoples within the justice system and works to ensure that they have equitable access to justice.[80]

Finally, in Asia the Asian Indigenous Peoples' Pact is an umbrella organization which, since 1992, re-unites 46 members from 14 countries in Asia with 18 Indigenous peoples' national alliances and 30 local and

[78] For further information consult the UNESCO website at https://whc.unesco.org/en/list/1545/, last accessed May 2021.

[79] It appears that the Australian government, in 2013, cut funding to the National Congress of Australia's First Peoples. See also: National Indigenous Times, Australia's only national body for Indigenous Australians under administration, 18 June 2019, at https://www.nit.com.au/australias-only-national-body-for-indigenous-australians-under-administration/#:~:text=The%20National%20Congress%20of%20Australia's%20First%20Peoples%2C%20the%20only%20national,to%20a%20lack%20of%20funding, last accessed May 2021.

[80] Access to justice and criminal offence for Aboriginal people is an issue in Australia. Indigenous peoples represent almost the majority of prisoners in Western Australia. In order to provide a more just administration of justice, the Magistrates Courts institute Aboriginal Courts, specialized courts dealing with Indigenous Australian offenders. This shows a distinctiveness from the usual procedures involved in criminal court. The court allows the involvement of the Australian Aboriginal and Torres Strait Islander communities in the sentencing process. Elder members of the local community to be involved in and express their views upon the particular crime and to be part of the sentencing process. In large part, the institution of these new types of Aboriginal Courts can be seen as a belated response to the recommendations of the Royal Commission into Aboriginal Deaths in Custody issued in 1991. The Commission was introduced as a consequence of the alarming rise in the number of deaths in custody of Aboriginal people in the jails and prisons around Australia (Harris, 2004).

sub-national organizations.[81] There are also examples of semi-autonomous Indigenous territories, like the Chittagong Hill Tracts (CHTs) region in Bangladesh. In this region, the head people and chiefs can exercise judicial authority–especially in relation to Indigenous peoples' personal or family' law matters. This autonomy is expressly recognized in a number of laws, and the general courts of law are now prevented from judging matters that fall within the jurisdiction of the Indigenous CHTs chiefs and head people, except for the more significant criminal offences (Roy, 2005).

The increased political participation of Indigenous peoples' associations and autonomous governments in their respective countries fostered and increased participation of Indigenous NGOs, Indigenous Peoples' Organizations (IPOs) and representatives also at the international level.[82] The globalization of Indigenous movements and claims encouraged the creation of a basis of common interests that were ultimately concretized in Indigenous lobbying and awareness-raising activities. Indigenous peoples have created alliances on the basis of common claims, such as their land titling rights, environmental claims and issues of climate justice and biodiversity conservation. In this sense, the globalization has contributed to joining efforts of Indigenous organizations that were isolated within their national contexts, creating a global Indigenous movement. This movement can be considered global because it includes the views and leaderships of Indigenous representatives from all continents, including Asia and latterly also Africa, whose marginalized peoples, notwithstanding the problematic acknowledgement of Indigeneity in their continent, have managed to make their voices heard. This global movement is, of course, built on IPOs as well, such as the World Council of Indigenous

[81] The Asian Indigenous Peoples' Pact reunites the main Indigenous organizations present in the continent, for instance, the Ainu Indigenous Peoples Council (Japan), Naga People Movement for Human Rights (Northeast India), Nepal Federation of Indigenous Nationalities (Nepal), Bawm Indigenous Peoples Organization (Bangladesh), Papora Indigenous Peoples Association (Taiwan/China), Indigenous Peoples Network of Malaysia (Malaysia), and Cordillera Peoples' Alliance (Philippines).

[82] Issues surrounding Indigenous customary law and constitutional recognition of Indigenous peoples are further explored in Chap. 6 in relation to the Nagoya Protocol and biodiversity conservation.

Peoples (WCIP), the Indigenous World Association, the International Indian Treaty Council (IITC), the Asia Indigenous Peoples Pact, the Inuit Circumpolar Conference (ICC) and the International Alliance of the Indigenous and Tribal Peoples of the Tropical Forests (IAITPTF), a global alliance of Indigenous peoples fighting deforestation and climate change.[83] The objective of international IPOs is mainly to gain access to UN governance, as demonstrated further in the chapter, in order to seek redress from the wrongdoings of the respective States and make them lawfully accountable. In fact, the bottom-up approach in international governance led to the adoption of UNDRIP, a declaration with far-reaching application that its adoption ultimately demonstrates how Indigenous peoples' voice became, from a matter related only to the internal issues of settler States, an important global interest.

The UN System: The Establishment of the Permanent Forum on Indigenous Issues

In the UN system, Indigenous peoples' issues had been on the agenda for many decades, as a consequence of the decolonization and of renovated interest in the protection of minorities. This lengthy process of progressive recognition of Indigenous peoples' rights culminated, as discussed earlier, with the adoption of the UNDRIP in the Second Decade of the World's Indigenous Peoples. However, the essentially State-centred structure of the UN system makes challenging the effective and rightful participation of Indigenous nations in the international governance system. This is true, as argued later on in the section, also with regard to climate governance negotiations.

International meetings started to focus on Indigenous peoples' rights at in the 1970s, in response to the many Indigenous movements that were flourishing at the time. Before that time, for the League of Nations, Indigenous peoples' matters had to be approached only from the

[83] The IAITPTF is an important actor for the Indigenous global movement on climate justice. In fact, in 2011, it adopted the Oaxaca Action Plan of Indigenous Peoples, a programmatic document which contains recommendations for States in climate governance, including proposal on participation in climate finance.

perspective of States' internal affairs and not in international governance (see generally Niezen, 2003a, 2003b).[84] Nevertheless, Indigenous peoples started to organize meetings at the international level, outside the UN system: the 1960s would be a fundamental decade as the Indian National Youth Council (established in 1961) grouped members of over 60 different tribes, issuing a Declaration of Indian Purpose (MacDonald & Gillis, 2017). In 1977, the International NGOs Conference on the Discrimination against Indigenous Peoples in the Americas allowed the direct participation of Indigenous peoples and the coordination among their different demands (Nagara, 2003). The UN Working Group on Indigenous Issues was established in 1982 and its distinctiveness relied on its receptiveness to the participation of IPOs and NGOs. This open model of participation resulted in a great increase in the number of Indigenous peoples participating in conferences, which lead in the long run to the drafting and approval of UNDRIP in 2007. In the same year, the working group was reformed in 2007 and became the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP). EMRIP is mandated to provide advice and expertise to the HRC, while also providing recommendations for the practical application of UNDRIP. Seven independent experts, appointed by the Council, communicate regularly and hold an annual meeting on the rights of Indigenous peoples. EMRIP holds an annual meeting which mobilizes representatives from Indigenous nations, IPOs, state governments, NGOs, civil society organizations and academics.

The number of Indigenous NGOs accredited at the UN has indeed multiplied since the creation of the Working Group, challenging the principle of sovereignty of States and introducing, through their lobbying efforts, new principles of international law such as the right to

[84] The institution of the League of Nations after the First World War, with President Wilson's promise of self-determination for nations and the rights of minorities, was the first real favourable circumstance to create international concern around the rights of Indigenous peoples. However, the League's Member States denied unrepresented peoples access to the forum, preventing effective Indigenous lobbying at the international level. As an instance, Levi General Deskaheh, chief of the Younger Bear Clan of the Cayuga Nation and spokesman of the Six Nations of the Grand River Land near Brantford, Ontario, from 1923 to 1924 led an unsuccessful but symbolic effort in Geneva to obtain a hearing at the League of Nations concerning a dispute with Canada over tribal self-government (Niezen, 2003a, 2003b, p. 31).

self-determination for native communities. The role of Indigenous peoples as "norm entrepreneurs" has proved to be fundamental for settler States to accept Indigenous claims and for the establishment of their rights at the international level (Finnemore, 1998). However, this whole process and the IPOs' effort has been remarkable since States were reluctant—and sometimes still are—to challenge the State-centric approach well-established in international politics (Lindroth, 2006). Organizations such as the Sami Council, which is a UN actor since the 1980s, the Inuit Circumpolar Conference and the Russian Association of Indigenous Peoples of the North, Siberia and the Far East have proved to be fundamental and influential actors in the international arena (Tennberg, 2010).

Indigenous peoples have sometimes organized and participated in parallel events and conferences taking place in occasion of large UN events. For an instance, in 1995, it was held the Fourth World Conference on Women set up by the conference Secretariat with the technical support of the United Nations Development Programme (UNDP). By the time the conference closed, it had adopted the Beijing Declaration and Platform for Action, a progressive plan for advancing women's rights. As a defining framework for change, the Platform for Action made comprehensive commitments under 12 critical areas of concern.[85] At the same time, the NGO Forum adopted the Beijing Declaration of Indigenous Women, a sort of counter-document that criticized certain aspects of the Platform for Action and pointed forward Indigenous views that were not included in the UN document. The Indigenous declaration reads:

> [I]t [the Platform for Action] does not acknowledge that this poverty is caused by the same powerful nations and interests who have colonized us and are continuing to recolonize, homogenize, and impose their economic growth development model and monocultures on us. It does not present a coherent analysis of why is it that the goals of 'equality, development, and peace', becomes more elusive to women each day in spite of three UN conferences on women since 1975. While it refers to structural adjustment programs (SAP), it only talks about mitigating its negative impacts, not questioning the basic framework undergirding SAPs. It even underscores

[85] See also UN Women website, at https://beijing20.unwomen.org/en/about, last accessed May 2021.

> the importance of trade liberalization and access to open and dynamic markets, which to us, pose the biggest threat to our rights to our territories, resources, intellectual and cultural heritage.[86]

The tension between IPOs' claims and settler States became evident in the negotiations for the establishment of the UN Permanent Forum on Indigenous Issues (PFII). The Forum was established on 28 July 2000 with the mandate to deal with Indigenous issues related to economic and social development, culture, the environment, education, health and human rights.[87] However, its establishment was not a straightforward process and highlighted many conflicts concerning Indigeneity, self-determination and codification of rights. Governments demanded for a clear definition of "Indigenous peoples"—meaning that they wished to have control on who is entitled to the special rights granted to native communities and who is not. Indigenous peoples are generally of the view that any attempt to definition coming from governments is not acceptable as it represents a legacy of colonialism and, therefore, a violation of their right to self-determination.[88] The government's approach seemed in contrast with what had been established by the Martínez Cobo Study, where the working definition of Indigenous peoples was deemed to be dependent on the self-identification criteria of native communities: in other words, native communities themselves should decide upon their affiliation to an Indigenous people. A similar position was held by IPOs during the negotiation for the PFII establishment, arguing that instead of a definition, States had to rely on general criteria such as historical continuity, self-identification and group membership. In any case, they contended, a definition of Indigenous peoples should not have been a requirement for the establishment of the PFII (Lindroth, 2006).

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[86] NGO Forum, UN Fourth World Conference on Women, Beijing Declaration of Indigenous Women Huairou, Beijing, peoples Republic of China, 1995. Available at https://lib.icimod.org/record/9913, last accessed May 2021.

[87] UNGA, Resolution 2000/22, 2000.

[88] The Sami Council demanded why, of all people of the world, they should have been subject to a definition. See generally: Statement of the Sami Council at the International Indigenous Meeting, 1999, Geneva.

The second area of disagreement between IPOs and States regarded the question of self-determination rights and the political status of the forum. The attitude of States is reflected in the name itself of the forum—Indigenous "issues" and not Indigenous "peoples". The US indeed always referred to "Indigenous groups" to avoid any link with the self-determination right as established by the International Covenants, in open contrast with the political claims of IPOs. Similarly, there were problems in the definition of the political status of the forum and reluctance in considering IPOs as having equal representative power as States have. IPOs demanded recognition as nations, together with corrective and restorative justice measures in order to re-gain the rights lost through the colonization process (García-Alix, 2003).

The result of this process was the establishment of an international forum having eight members from governments and eight members from IPOs. The PFII is entitled with high political status in the UN since it is a subsidiary body of the United Nations Economic and Social Council.[89] The PFII, although having some structural weaknesses deriving from the negotiation process described earlier, has proved to be a very important political arena that stimulated the participation of IPOs and the re-shaping of international relations between States and non-State actors. It contributed to the advancement on Indigenous claims on climate justice. In fact, the 7th session of the PFII (2008) was dedicated to "Climate change, bio-cultural diversity and livelihoods: the stewardship role of indigenous peoples and new challenges". In the conference report, the PFII adopted a series of recommendations to States in relation to climate governance and the role of Indigenous peoples, such as the need for scientists, policy-makers and the international community to "undertake regular consultations with indigenous peoples so that their studies and decisions will be informed by indigenous peoples' traditional knowledge and experiences".[90] During the same session, the President of Bolivia Evo Morales, who is regarded as the first Indigenous president of the country, released a

[89] See generally: PFII website, available at: https://www.un.org/development/desa/indigenouspeoples/membership2023-2025.html, last accessed May 2021.

[90] Permanent Forum on Indigenous Issues Report on the seventh session (21 April–2 May 2008) Economic and Social Council Official Records Supplement No. 23, E/C.19/2008/13.

statement on how to remedy the "10 sins of capitalism", which included a paradigmatic shift towards a non-capitalist economy, the development of clean, nature-friendly energy and the respect for mother earth.[91]

In conclusion, it can be affirmed that the UN system, which was created in a way that protected a State-centred model of governance, had to face the fact that Indigenous peoples, through an international organizing effort, demanded participation and inclusion. Confronted with the claims of Indigenous organizations, States necessarily had to agree in creating global instruments and global fora to made Indigenous voices heard. This aspect is relevant also for the participatory achievement in climate change and biodiversity conservation, which the next section will discuss.

From Exclusion in Climate Governance to the International Indigenous Peoples Forum on Climate Change

As argued in Chap. 3, human rights and climate change law have developed, until relatively recently, as two separate legal regimes. This characteristic has made more difficult to "put a human face" to climate change and to allow the participation of non-State actors in international debates and decision-making. The UNFCCC is the current international agreement for climate change governance and its COPs are the official negotiating fora for collective decision-making of the Convention. The objective of the Convention is to "stabilise greenhouse gas concentrations in the atmosphere at a level that prevents dangerous interference with the climate system".[92] Initially, Indigenous peoples were not considered relevant actors in the international climate change debate, which resulted in their historical political marginalization in climate negotiations (Mihlar,

[91] Mision Permanente de Bolivia antes Naciones Unidas, Statement by H. E. Evo Morales Ayma, President of the Republic of Bolivia, 7th Session Permanent Forum on Indigenous Issues, available at https://www.un.org/esa/socdev/unpfii/documents/statement_morales08.pdf, last accessed May 2021.

[92] UNFCCC, Art. 2.

2008). However, inclusion of Indigenous peoples in international climate change governance is fundamental for several reasons: they live in ecologically fragile areas, facing the impacts of climate change; they are the custodians of valuable knowledge deemed important in the development of adaptation strategies and, finally, key mitigation strategies are to be implemented in their territories—such as "reducing emissions from deforestation and forest degradation in developing countries, and the role of conservation, sustainable management of forests, and enhancement of forest carbon stocks in developing countries", known as REDD+.[93]

Inclusion of Indigenous peoples in the UNFCCC has not been a straightforward process. To determine the extent of this progressive inclusion, it is important to analyse and consider which legal and political discourses have been considered legitimate by the UNFCCC in shaping and determining the global strategy against climate change (Haas, 2002). Such analysis is fundamental for the determination of which narratives, wording, framing and cultures have been privileged and which grade of importance has been given to Indigenous peoples' issues in climate governance. Consideration of the "history of participation" of Indigenous groups in the COPs is also an important indicator to track the past and current point of recognition and legitimization of traditional knowledge as a key component of climate change governance.

In the text of the UNFCCC, there is no explicit reference to Indigenous peoples. However, Article 4 prescribes all parties to consider the challenges of developing countries arising from the effects of climate change and the impacts of implementation of response measures.[94] UNFCCC sets the obligation for States to support social groups living in areas such as Small Island States or areas at risk of desertification, through international cooperation measures such as transfer of knowledge and technology.

[93] REDD+ projects are supported by climate finance. As argued in Chapter 5, the Green Climate Fund does release financial resources to countries that have reached emission reduction targets and applied for REDD+ programme.

[94] UNFCCC, Article 4, para. 8.

Indigenous peoples' representatives participated in the COPs since 1998, but only with observer status.[95] This meant that they could observe meetings and side events, make statements and participate in lobbying activity. IPOs released several statements on their concerns and dissatisfactions on the lack of specific policies dedicated to the implications of climate change for native communities (International Union for the Conservation of Nature, 2008). Only in 2001, IPOs were added in the UNFCCC as "constituencies", giving them slightly more recognition and capacity to make observations at the COP meetings at the discretion of the chairperson. In 2005, at the COP in Montreal, a first mention was made to Indigenous peoples' issues in relation to climate change. Such reference revolved around adaptation planning, in accordance with key strategies adopted with the Marrakesh Accords in 2001.[96] In the 2005 COP, the International Alliance of Indigenous and Tribal Peoples of Tropical Forests called for the necessity to "provide the necessary support to Indigenous Peoples from developing and developed countries for our full and effective participation in all levels of discussion, decision-making and implementation, and ensure that the necessary funding be provided to guarantee such participation and strengthen our capacities" (International Union for the Conservation of Nature, 2008).

Prior to the 2005 mention, there had not been another explicit reference to Indigenous peoples in climate COPs. Traditional knowledge was only referred in two documents as a source of information and adaptive capacity.[97] Decision 2 of the Montreal COP made direct reference to the problems occurring in the Arctic, identifying adaptation as a priority and recognizing the importance of TEK for adaptation. However, from COP11 in Montreal until COP16 in Cancun, no official text covered

[95] UNFCCC, Observer Status, available at https://unfccc.int/process-and-meetings/parties-non-party-stakeholders/non-party-stakeholders/overview/admitted-ngos, last accessed May 2019.

[96] UNFCCC, *Report of the Conference of the Parties on its eleventh session, held at Montreal from 28 November to 10 December 2005*, FCCC/CP/2005/5/Add., 2006.

[97] UNFCCC, COP7 Decision 2 FCCC/CP/2001/13/Add.1 and Decision 28 FCCC/CP/2001/13/Add.4.

Indigenous issues as pertaining to adaptation (Ford et al., 2016). However, the Bali COP in 2007 provided ground to express criticism by Indigenous peoples. They organized a protest outside the negotiations to denounce their status of marginalization in international climate change talks. The protest was initiated because a delegation of Indigenous peoples was forcibly excluded from participating in negotiations (Mihlar, 2008). In 2008, the International Working Group on Indigenous Affairs organized a conference in preparation for the 7th session of the United Nations Permanent Forum on Indigenous Issues as well as the COP 2009 in Copenhagen. The objective of the Conference was to discuss the impacts of climate change on Indigenous peoples and how global accords, political processes and restrictive regulations hamper Indigenous peoples in their aim to respond and adapt to climate change. The Conference also looked at how indigenous peoples' contributions to current discussions on these critical issues can be guaranteed. In the final document, the participants listed the legal and institutional barriers that prevent Indigenous peoples to cope with climate change. Such barriers include "the lack of involvement of indigenous peoples in decision making processes as well as design and implementation of initiatives to address climate change at the national, regional and international level".[98] At the bottom of the document, a series of recommendations were drafted, starting with the necessity of promoting inclusion and participation of Indigenous peoples in the conception, design and implementation of sustainable solutions to combat

[98] PFII, Conference on Indigenous Peoples and Climate Change, Copenhagen, 21–22 February 2008 MEETING REPORT Submitted by the International Work Group for Indigenous Affairs (IWGIA), E/C.19/2008/CRP. 3.

10 March 2008.

climate change, as established by the principles enshrined in Agenda 21 and Article 18 UNDRIP.[99]

COP16 in Cancun (2010) is considered a decisive moment for the beginning of the inclusion of Indigenous peoples in the UNFCCC.[100] Climate change adaptation strategies emerged as a critical point of global climate governance, with a shift to a purely Westernized scientific approach to adaptation to one which values local and Indigenous knowledge. Since then, consideration of Indigenous peoples' views in the

[99] Agenda 21 (1992), adopted at the Earth Summit in Rio, is a comprehensive plan of action to be developed globally, nationally and locally by organizations of the United Nations System, governments and major groups in every area in which human impacts on the environment and the promotion of sustainable development. Agenda 21 is grouped into four sections: (1) Social and Economic Dimensions is directed towards combating poverty, especially in developing countries, changing consumption patterns, promoting health, achieving a more sustainable population, and sustainable settlement in decision making. (2) Conservation and Management of Resources for Development includes atmospheric protection, combating deforestation, protecting fragile environments, conservation of biological diversity (biodiversity), control of pollution and the management of biotechnology and radioactive wastes. (3) Strengthening the Role of Major Groups includes the roles of children and youth, women, NGOs, local authorities, business and industry and workers; and strengthening the role of Indigenous peoples, their communities and farmers. (4) Means of Implementation includes science, technology transfer, education, international institutions, and financial mechanisms. The Agenda 21, at para 26.3, letter b, reads: "[In full partnership with indigenous people and their communities, Governments and, where appropriate, intergovernmental organizations should aim at fulfilling the following objectives:] Establishment, where appropriate, of arrangements to strengthen the active participation of indigenous people and their communities in the national formulation of policies, laws and programmes relating to resource management and other development processes that may affect them, and their initiation of proposals for such policies and programmes" and again, at paragraph 26.5: "United Nations organizations and other international development and finance organizations and Governments should, drawing on the active participation of indigenous people and their communities, as appropriate, take the following measures, inter alia, to incorporate their values, views and knowledge, including the unique contribution of indigenous women, in resource management and other policies and programmes that may affect them".

[100] In the Preamble, the COP noted "resolution 10/4 of the United Nations Human Rights Council on human rights and climate change, which recognizes that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status, or disability". See UNFCCC, Report of the Conference of the Parties on its 16th session, held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1.

UNFCCC has progressively expanded.[101] However, in climate change negotiations, IPOs still constitute a tiny portion of the total of NGOs admitted observers. Currently only 64 out of 2133 UNFCCC NGOs are defined as Indigenous, which denotes a under representation of Indigenous interests compared to other non-governmental stakeholders such as environmental or research and independents constituencies.[102] Last statistics available tell us that in COP22, only 2.2% of NGOs were IPOs. However, the fact that few IPOs participate in climate change negotiations might not be synonymous of little influence in outcomes. For example, it should be taken into account their actual degree of activism (Miranda & Aponte, 2010). Nevertheless, several scholars argue that Indigenous peoples are still purposefully excluded, remaining at the sidelines of official negotiations, also through the use of a high-technical language (Degawan, 2008; Schroeder, 2010). For example, the global coalition of IPOs and environmental NGOs "Climate Justice Now!" founded in Bali in 2007 called for several fundamental measures to combat climate change, such as "leaving fossil fuels in the ground" and "radically reducing wasteful consumption, first and foremost in the North, but also by Southern elites" (Tokar, 2018). After more than ten years, such proposals and such radical shift from a Westernized conception and use of the environment to a fair distribution and use of environmental resources are still far from being put into practice.

Betzold and Flesken offer an interesting analysis of the underlying causes of this lack of participation of IPOs in climate negotiations by comparing their participation in the CBD processes (Betzold & Flesken, 2014). Historically, CBD negotiations have registered a progressively higher participation and involvement of IPOs compared to the UNFCCC. This difference is ascribed to several reasons. First of all, for Indigenous peoples, climate change and biodiversity conservation are not two separate concepts, since the environment is comprehensively understood in terms of resources it can offer. Thus, for Indigenous peoples,

[101] UNFCCC website, *Admitted NGOs*, available at https://unfccc.int/process/parties-non-party-stakeholders/non-party-stakeholders/admitted-ngos, last accessed September 2022.

[102] Ibid.

impacts of climate change and biodiversity loss should not be considered as two distinct problems, but rather as the two sides of the same coin. Thus, what explains the "participation bias" of IPOs in CBD negotiations relies on the indirect impacts of response measures on Indigenous rights, land and livelihoods. Indigenous territories have indeed been the object of conservation measures, as preservation of biodiversity is intended as creation of protected areas and untouched wilderness. Similarly, REDD+ projects imply a shift in the control of forests, from local communities to the government. Such top-down imposition on Indigenous communities required a high participation of IPOs in international negotiations in order to limit the States' control over Indigenous ancestral lands for conservation purposes.

Another factor that explains the difference in the number of IPOs attending the CBD and UNFCCC COPs is the level of institutional openness which differs consistently between the two institutions. While in the latter a real inclusion and consideration of Indigenous peoples started only in the mid-2000, the CDB working groups on Article 8j and related provisions gave the opportunity to Indigenous representatives to co-chair meeting as early as 1997, including them in decision-making processes. This difference can be also explained through the analysis of the grade of IPOs *meaningful* participation, expertise required, complexity of negotiations and costs: resources used for the participation of an IPO in a CBD negotiations would hardly be spent to participate also in UNFCCC processes.

Recent developments in the UNFCCC are leading to higher participation of IPOs. In 2008, the International Indigenous Peoples Forum on Climate Change (IIPFCC) was established as the caucus for Indigenous representatives participating in the UNFCCC. Its mandate is to coordinate and deliberate issues relevant for the IPOs, to be discussed during COPs.[103] In 2015, at the COP21 in Paris, it was created the Local Communities and Indigenous Peoples Platform "for the exchange of experiences and sharing of best practices on mitigation and adaptation in

[103] See generally IPFCC website: http://www.iipfcc.org/who-are-we, last accessed May 2021.

a holistic and integrated manner".[104] In the multi-stakeholder workshop held in November 2018, IPOs have submitted their views on the mandate of the Platform, requiring a full and effective participation.[105] The Platform had its first meeting at mid-June 2019 together with the organization of a thematic in-session workshop on enhancing the participation of local communities.[106]

Regarding more recent developments in the UNFCCC COP context, it is worth mentioning in this section the difficulties Indigenous peoples have faced in accessing COP26 in Glasgow, UK. This global meeting was held in the times of the COVID-19 pandemic that once more have shown how the world is socially and economically divided, and how participation privileges are distributed. The COP26 coalition, which includes Indigenous movements, vulnerable communities, trade unionists and global movements of youth strikers, contested that up to two-thirds of those it was helping to travel to Glasgow have renounced to the trip, because of a combination of visa and accreditation problems, lack of access to COVID-19 vaccines and ever-changing travel rules. In fact, most countries from the so-called Global South either do not have access to vaccines or they have vaccines which are not approved in Europe and in the UK (e.g. Sinovac or Covaxin).[107] However the COP organizers amended this condition by recognizing all COVID-19 vaccines as valid for the participation in the COP.[108] In addition, it was granted participation to more than 500 fossil fuels lobbyists, outnumbering every other

[104] UNFCCC. *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015*, FCCC/CP/2015/10/Add.1, para 135.

[105] "It was emphasized that the engagement of LCs and IPs in the international climate policy processes should be effective, inclusive and balanced. Participants stressed that LCs and IPs participation in the UNFCCC process should be guided by the principles1 proposed by the indigenous peoples organizations […] Many participants re-iterated the right and need for full and effective LCs and IPs participation. Participants also noted that the Platform is only as effective as the level of participation from Parties, LCs, IPs and relevant organizations", UNFCCC. *Report of the multi-stakeholder workshop: Implementing the functions of the Local Communities and Indigenous Peoples Platform*, 8 November 2018.

[106] UNFCCC, Decision 2/CP.24, para 22.

[107] Refer to official UK website of approved vaccines for travel: https://www.gov.uk/guidance/countries-with-approved-covid-19-vaccination-programmes-and-proof-of-vaccination, last accessed September 2022.

[108] See COP26 website at: https://ukcop26.org/the-conference/an-inclusive-cop26/, last accessed September 2022.

country's delegation.[109] Because of these reasons, COP26 has been claimed to be one of the most exclusionary climate meetings ever. In an interview to *The Guardian*, Indigenous representatives have argued that "little has changed inside the UN-led negotiations, while outside environmental destruction continues unchecked in their communities and the impact of the climate crisis is getting worse" (Lakhani, 2021).

Among the most important decisions adopted at COP26 that concern Indigenous peoples, there is the monetary pledge of $1.7 billion for protecting the forests, led by the governments of Norway, the UK and the Netherlands.[110] Moreover, among the agreements reached and confirmed in the document, there is the halt in deforestation by 2030 promised by over 100 countries and the investment fund of over $100 billion by 2023 for the least developed countries. On the issue of deforestation, the doubts about the actual feasibility of this agreement remain strong. Among the signatory countries, we can find Bolsonaro's Brazil, denounced last October by some NGOs at the International Criminal Court in The Hague for "crimes against humanity", as already pointed out in the introduction of this book. The deadline for the halt in deforestation objective is fixed for 2030, a time judged insufficient from the environmentalist movements and the native populations, who are asking, backed up by the IUCN, for 80% of the Amazon to be protected within 2025.[111]

COP26, together with the other initiatives discussed in this chapter, demonstrates that meaningful participation and inclusion of Indigenous peoples' views is still a challenging matter in the UNFCCC context. The State-centred nature of such institution allows participation of Indigenous representatives only if they are constituted as an NGO, and just as observers. Contrary to this approach, in national contexts, often Indigenous groups might be considered as *nations*, having their own language,

[109] This data analysis was provided by Data analysis of the UN's provisional list of named attendees by Corporate Accountability, Corporate Europe Observatory (CEO), Glasgow Calls Out Polluters and Global Witness. See also Corporate Accountability Website, at https://www.corporateaccountability.org/media/release-fossil-fuel-lobbyists-outnumber-any-country-delegation-to-cop26/, last accessed September 2022. For the list of participants, consult the Provisional list of registered participants at COP26: https://unfccc.int/sites/default/files/resource/PLOP_COP26.pdf, last accessed September 2022.

[110] Glasgow Climate Pact, FCCC/PA/CMA/2021/L.16, 13 November 2021.

[111] See Amazon Watch website at https://amazonwatch.org/news/2021/0910-iucn-approves-indigenous-peoples-global-call-to-action-to-protect-80-of-the-amazon-by-2025, last accessed September 2022.

culture, traditions, juridical system and territory, as explained with reference to the Plurinational State of Bolivia. However, participation in international negotiations can be limited for issues of power asymmetries between local communities and States that claim for the respect of the principle of national sovereignty. Indigenous communities end to be excluded from those same structures that—on paper—should aim at their inclusion. On the one hand, such structures can require their inclusion for the implementation of projects or for the use of Indigenous knowledge, while on the other hand, the dynamics of injustices and marginalization tend to be constantly reproduced.[112] Thus, Indigenous groups are also at risk of the so-called participation paradox, which means that they risk to lose their culture specificity when entering into Western participation mechanisms and dynamics (Brugnach et al., 2017). In order to be rightfully considered, they might spend much of their time disconnected from their communities, which may, in turn, cause distrust and misrepresentation of Indigenous interests, and, in general, the need to undertake a translation effort of their cultural practices and cosmovision into the official languages of international talks.

This chapter has argued that Indigenous peoples have undergone different phases of representation in the UN system, starting with a position of absolute exclusion in international debates and decision-making. The prerogatives of statal sovereignty, together with colonial legacies and the logic of recognition, have made difficult the participation of Indigenous

[112] For example, let us just consider the outcomes of the COP24 in Katowice (2018). Only few indigenous representatives were credentialed within their own government, while more than 100 were only observers. One of the key priorities for IPOs was the inclusion of human rights and indigenous peoples' rights in the "Paris Rule Book", a document aimed at guiding the application of the Paris Agreement. They had little opportunity to participate in the drafting of the book, which did not include references to human rights and to the rights of Indigenous peoples, contrary to what expressed in the Preamble of the Paris Agreement. However, COP24 represented also a victory for IPOs since it was established the Facilitative Working Group (FWG) to develop a workplan for the "Local Communities and Indigenous Peoples Platform", thanks to its three functions related to knowledge, capacity for engagement, and climate change policies and actions. It also established the FWG with an equal number of Indigenous and State representatives, seven each, while additional places will be held open for the future participation of "Local Communities" when they are better defined and decide to become engaged. See also: Cultural Survival website at: https://www.culturalsurvival.org/news/cop-24-katowice-concludes-historic-victory-and-some-disappointments-indigenous-peoples, last accessed September 2022 and the Facilitative Working Group Website: https://unfccc.int/LCIPP-FWG, last accessed May 2021.

peoples in all aspects of international governance, including climate governance. Ex-colonial state governments often perceive the participation of Indigenous peoples as a threat to their sovereignty, and therefore have tried to reduce the relevance of Indigenous nations in the international realm—as demonstrated by the discussions surrounding the name of PFII and the refusal of using the term "peoples". The tension between Indigenous self-determination and State sovereignty is still a central issue in the international decision-making on climate change. But participatory parity, and not the logic of recognition, is key to achieve climate justice and redress of historical iniquity. The progressive opening of international law to the promotion of Indigenous rights, the development of legal tools that include Indigenous knowledge as an important instrument for biodiversity conservation, and the creation of international fora to allow Indigenous participation show the willingness of States to consider non-State actors as important stakeholders in the international law making. However, this participation remains subdued to Westernized models of governance, in which legal pluralism remains still void of practical application at the international level.

Conclusion

In this chapter has been analysed a second important cluster of human rights crucial for the scope of this book: Indigenous peoples' rights in international law. Such analysis has taken its premises from the consideration of political doctrines of colonization and decolonization, explaining their crucial influence in the denial, and then recognition, of Indigenous peoples' rights. This explanation has been made coherently with the considerations expressed in the previous chapter around the paradox of human rights, demonstrating how Indigenous peoples' rights have rapidly gained momentum in the last decades especially for what concerns instruments international human rights law. The chapter has consequently focused not just on the recognition of Indigenous peoples' rights in law but also on the significance of the collective dimension of human rights and on the relevance of the environmental dimension for the rights of Indigenous peoples. To provide a consistent demonstration of these last points in practice, the chapter

has analysed relevant jurisprudence of international human rights courts dealing with Indigenous peoples' rights, giving special relevance to the decisions of the Inter-American system.

In its second part, the chapter has focused on issues that are relevant to the climate justice discourse: participation of Indigenous peoples in climate governance. It has demonstrated how Indigenous peoples' voices in the climate governance realm have rapidly been empowered in the last decade, while in the past they have been traditionally, and totally, excluded. The chapter has demonstrated that the institution of bodies such as the PFII are important steps in the inclusion of Indigenous claims and knowledge in relation to climate change. A meaningful participation and consideration of Indigenous peoples' views in the UNFCCC context is yet to be realized in a governance model that is essentially State-centric and that perpetuates asymmetries of power, exclusion and marginalization. Meaningful and participatory parity of Indigenous peoples is a key mechanism in climate governance, and one of the most relevant ways to realize an effective shift towards effective ways to contrast climate change. Thus, the next chapter will deal specifically with Indigenous peoples' participatory rights and the role and status of Indigenous customary law.

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5

Participatory Rights, Conservation and Indigenous Customary Law

Introduction

This chapter presents a focus on a central aspect of climate justice: participation, consent and the existence of legally pluralistic societies. It wishes to present key issues concerning these important aspects in relation to Indigenous peoples. The first part of the chapter is dedicated to the Indigenous peoples' right to consultation and consent in international law and practice. It gives an overview of consultation and FPIC procedures in international law, adopting an approach that wishes to underline how meaningful consent procedures also include participation of Indigenous peoples in the development and design of projects and other measures that have the potential to impact their lands. The chapter focuses on both international human rights law and international environmental law provisions related to FPIC and consultation. The chapter also provides an overview of Indigenous guidelines and critiques to the conceptualization of FPIC, highlighting critical points that still need to be overcome. After, two examples from the practice in the operationalization of FPIC and consultation are provided. They both regard Peru, but from two very different point of views. The first concerns the case of a

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project implementation by the GCF in the Indigenous lands of Datém del Maranon, and the redress provided by the IRM for lack of adequate implementation of FPIC standards. The second case, which reinforces the legal background of the first regarding the evident difficulties in implementing FPIC in Peru, concerns the genesis of the Peruvian consultation law which was adopted in 2011 after violent protests. The second part of the chapter concerns the participation—or the total lack of participation—of Indigenous peoples in forest conservation, institution of protected areas and the status of Indigenous customary law in relation to environmental protection. In particular, the chapter will contrapose those types of colonial conservation that resulted in evictions of Indigenous peoples from their territories and lands to the ICCAs, which are bottom-up generated conservation projects led and carried on by Indigenous communities.

Right to Consultation and to FPIC

Differences Between Consultation and Consent: Two Different Standards in International Law?

A relevant pillar of human rights-based approaches to climate change concerns participatory and procedural rights. The right to be informed, to participate in the decision-making process and to give or withhold consent for Indigenous peoples is a substantial requirement when it comes to extractive concessions or implementation of development projects, including climate change mitigation and adaptation initiatives. In order to understand the importance of FPIC as a substantive participatory requirement, we should consider that the tension between the existence of Indigenous nations, with the existence of customary legal regimes, and States' interests in resource exploitation, which was typical of the colonial era, is still resonant today. It might have changed form, as now it is represented by ideas such as "interest of the nation" and "public use" channelled through development projects, extractive concessions, ecological zoning or windfarms. The model of non-consensual extraction and use of resources can be challenged through the legal requirement of

FPIC. It not only represents the opportunity to give or withhold consent, but it also prescribes actual participation and involvement of Indigenous peoples in governments' decisions and plans, and it is therefore intimately interconnected to their right to self-determination as outlined later on in this section.

Consent from Indigenous peoples is not only to be sought in the case of development projects of extractive concessions. FPIC is required prior to the approval of any project that may affect the lands, territories and resources that Indigenous peoples customarily own, occupy or otherwise use. This requirement is widely acknowledged in academic literature, as we shall see in this chapter, and also by international cooperation programmes (e.g. see: Food and Agricultural Organization, 2016). The FPIC right regards projects aimed at mitigation and adaptation to climate change might have negative externalities that could affect Indigenous peoples' livelihoods and more generally, their territorial and human rights. For example, the creation of a protected area to combat deforestation and reduce greenhouse gas emissions might impede access to essential forestry resources for Indigenous peoples, affecting their right to food, water, or other essential assets. Alternatively, as argued later in the chapter, the creation of conservation areas might indirectly lead to the eviction of entire native communities. Thus, the right to participate in the development of projects at early-stage levels must be granted to Indigenous peoples.[1] They should be able to contribute to the drafting of projects; they must be informed on the potential implications, risks and benefits, and consulted; and, finally, their consent should be sought before the implementation of any measure.

Thus, FPIC is a powerful means for the redress of historical and modern injustices inflicted to Indigenous peoples, including climate injustice. Because of its strong interlinkage with the right to self-determination, it has the potential to go beyond the logic of recognition and ensure effective and fair participation in governmental decisions on issues that might affect Indigenous peoples (Hanna & Vanclay, 2013; Perera, 2016; Verbeek, 2012). In the context of climate change, FPIC comes into play when conservation, adaptation and mitigation projects are to be

[1] This was established by the IACtHR already in 2007 through the *Saramaka case*.

implemented in Indigenous territories, or when private or public entities need to access Indigenous knowledge on genetic resources. For this reason, this chapter unravels the many facets and lawful implications of FPIC for Indigenous peoples by differentiating processes of consultation and consent in light of the right to self-determination.

However, it seems that in the operationalization by settler States of international law provisions there are two approaches to consent-seeking procedures because of the legal ambiguity situated into the conceptualization of consultation and consent (Papillon et al., 2020). The difference between consultation and FPIC in international law instruments has a pivotal role in understanding how legal norms have been applied at the national level. As it will be ascertained further on in the section, the fact that there is no legally acknowledged definition of FPIC makes it difficult to discern among legal consent-seeking procedures and mere consultation processes. The objective of these section is to highlight that when consultation is not coupled with FPIC, the participatory process is inherently flawed and inadequate as a tool that can promote the relationship between Indigenous peoples and settler States. Thus, I will start by reconstructing the genesis of both FPIC and consultation, drawing upon the important differences that exist between them. The relevant sources for the scope of definition of FPIC and consultation at the international level are divided into *hard law*, *regulations*—which are endowed with a certain amount of binding force because of their financial implications, for instance, specific policies of the World Bank Group or the Green Climate Fund and *soft law*.[2]

The notion of "informed consent" is rooted in bioethics and legal medicine, and it is generally defined as voluntary agreement given by a patient or a patient's responsible proxy for participation in a study, medical operations, surgery or any invasive procedure. Among the various sources quoted in the doctrine of informed consent, the 1947 Nuremberg Code and the World Medical Association's Declaration of Helsinki[3]

[2] For a detailed analysis of the GCF Indigenous peoples policy and how endorsed with a certain among of conditionality upon the disclosure of financial resources, see my article published in 2020 (Giacomini, 2020).

[3] World Medical Association. *Declaration of Helsinki – Ethical Principles for Medical Research Involving Human Subjects*, 1964.

provide fundamental regulations about the duties of doctors.[4] In the Declaration of Helsinki, we can find: "Clinical research on a human being cannot be undertaken without his free consent after he has been fully informed; if he is legally incompetent, the consent of the legal guardian should be procured".[5] Informed consent can be defined as an autonomous authorization of a medical intervention and participation in research (De Marco & Stewart, 2016). Its essential criteria are that the patient has both knowledge and comprehension, that consent is freely given without duress or undue influence and that the right of withdrawal at any time is assured.[6] Interestingly, these consent characteristics which are part of the ethical code for doctors are resonant in the international human rights law concerning FPIC.

The emergence of the contemporary FPIC requirement for activities that could affect Indigenous peoples' lands and cultural, social, intellectual, religious and spiritual rights dates back to the 1980s as it was part of the ideology of Indigenous peoples' movements for self-determination.[7] Goodland affirms that the first appearance of this concept was due to issues relating to involuntary Indigenous peoples' displacement (Goodland, 2004). The Convention n.107 did address Indigenous peoples' rights concerning traditionally inhabited territories but without mentioning consultation procedures. As outlined in Chap. 4, the Convention n.107 was considered obsolete in relation to the emergence of the new Indigenous claims. After the revision carried out in 1986, Convention 169 established the obligation for States to consult Indigenous peoples in order to obtain their consent concerning a variety of matters likely to affect them directly. It established that Indigenous peoples should be consulted regarding the adoption of legislative and

[4] The Nuremberg Code is part of the judgement against the Nazi doctors who conducted experiments on persons in concentration camps. The Code provides guidance on permissible medical experimentation and gives greater emphasis on the importance of informed consent in human-subject research, defining it as essential. See also Miller (1997)).

[5] World Medical Association, supra note 3.

[6] Council for International Organizations and Medical Science in collaboration with the World Health Organization, *International Guidelines for Ethical Review of Epidemiologic Studies*, Geneva 1991.

[7] Doyle provides a complete account of earlier instances and the history of FPIC (Doyle, 2015, pp. 13–44).

administrative measures, the formulation, application and evaluation of national development programs and the authorization to any exploration or exploitation concession about natural resources in Indigenous territories.[8] Convention 169 also draws upon the central principles that must be respected in consultation procedures, in particular the good faith principle and that consultation procedures should aim at obtaining consent from the Indigenous communities or, at least, reaching an agreement.

In Convention 169, the right to consultation is enshrined in Article 6(1), which states that governments shall

- consult the peoples concerned, through appropriate procedures and through their representative institutions, whenever consideration is being given to legislative or administrative measures which may directly affect them;
- 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 of their concern; and
- establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

Here, the use of the word "consult" suggests a much more nuanced approach compared to FPIC.[9] Indeed, consent is regarded as a stronger concept that might imply that Indigenous communities have the power

[8] ILO Convention 169, arts. 6, 7, 15.

[9] At the time of negotiations for the draft of Convention 169, a consensus should have been sought among three different views concerning Indigenous peoples' consent: a substantive consent requirement (obtaining consent constituted an essential principle and a required outcome); no consent position (consent was rejected); strong procedural consent requirement (where consent was sought, procedural protections requiring public inquiry were necessary before a decision could be overridden). Countries such as Bolivia and Canada opposed the vesting of Indigenous peoples with ownership of subsoil resources, while Argentina argued that the inclusion of the word "consent" would make it difficult to ratify the Convention. Colombia and Australia, on the contrary, supported the vision that consent requirements did not violate the principle of State's sovereignty over natural resources. Colombia, in particular, argued for the need to interpret the provisions of Article 15(2) not as giving power to States to proceed with extractive industries, regardless of their impacts on their ancestral lands and resources. The addition of "informed" and "free" came as an answer to Colombia's requests (Doyle, 2015).

to veto a project that might constitute a serious threat to the enjoyment of fundamental rights. Consultation, on the contrary, suggests only the guarantee of procedural mechanisms of consultation with Indigenous peoples that might be affected by the implementation of development or other projects, but without endowing them with authentic decisional power (Schilling-Vacaflor & Flemmer, 2016). This approach was further clarified in the 2011 Report of the Committee of Experts on the Application of Conventions and Recommendations, which stated that the initial proposed wording "seek the consent of the peoples concerned" for Article 6 has been substituted with an additional paragraph 2 to Article 6: "The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures". The Report also adds the statement by a representative of the International Labour Office pronounced during the second discussion of the drafting of paragraph 2, reporting that it "had not intended to suggest that the consultations referred to would have to result in the obtaining of agreement or consent of those being consulted, but rather to express an objective for the consultations".[10]

As the interpretation of this article raised a series of debates and questions, in 2013, the ILO published the handbook *Understanding the Indigenous and Tribal Peoples Convention* aiming at clarifying the contents of Convention 169. It affirms, relating to Article 6, that Indigenous peoples must be endowed with the right to be consulted without providing them with a veto power: "As stipulated by Article 6(2), consultations must be undertaken in good faith and with the objective of obtaining agreement or consent. In this sense, Convention 169 does not provide Indigenous peoples with a veto right, as obtaining the agreement or consent is the purpose of engaging in the consultation process and is not an independent requirement" (International Labour Organization, 2013). Certainly, endowing Indigenous people with a veto power could constitute a menace for firms, governments and other entities interested in

[10] The 2011 Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), Report III (Part 1A), General Report and observations concerning particular countries, pp. 784–785.

implementing projects in Indigenous territories, restraining the possibilities for new endeavours. As already mentioned, at the moment only 24 countries have ratified ILO Convention 169, giving it binding power.[11] The perception that the ILO Convention 169 did undermine the power of States and provided Indigenous peoples with relevant decisional power prevented its ratification by many States (Doyle, 2015, p. 91). The limited ratification of the Convention suggests that some States still regard it from this perspective, although, as will be argued later on in this section, the ILO office and supervisory mechanisms have affirmed that no veto right is provided in article 6. From such particular conditions and from the fact that ILO Convention 169 is considered the main binding instrument in terms of Indigenous peoples' rights derives the translation of the consultation approach into constitutional law principles, which will imply, as we will see later on with the enforcement in Peru, the avoiding of a meaningful realization of FPIC.[12]

In the implementation procedures of ILO Convention 169, the ILO Committee of Experts on the Applications of Conventions and Recommendations (CEACR) is the body that supervises and verifies the application of the legal instrument in State practice. In its 2009 Report, the CEACR published Observations that regarded, among the other countries, also Peru:

> The Committee urges the Government to adopt the necessary measures, with the participation and consultation of the indigenous peoples, to

[11] The last country that has ratified Convention 169 is Germany, in June 2021. Although Germany is not a country where Indigenous peoples reside, it has done so "as a strong expression of solidarity for the protection of indigenous and tribal peoples' rights". See ILO website at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314, last accessed July 2021.

[12] According to Doyle, there are four different tendencies of interpretation for the Convention: (1) misinterpretation by some States of the compatibility of its provisions with a substantive consent requirement; (2) the gap between the ILO supervisory body's hesitancy to acknowledge that a substantive consent requirement can be derived from the Convention and the interpretation of the Convention by international human rights courts that have adopted an extensive and progressive approach; (3) the Convention is not updated to deal with current threats that Indigenous peoples are facing in the context of natural resource extraction; 4) a new interpretative frame deriving from the acknowledgement made by the UN General Assembly that Indigenous peoples are vested with the right to self-determination and the ILO should protect their substantive and procedural rights.

> ensure (1) the participation and consultation of the Indigenous peoples in a coordinated and systematic manner in the light of Articles 2, 6, 7, 15 and 33 of the Convention; (2) the identification of urgent situations connected with the exploitation of natural resources which endanger the persons, institutions, property, work, culture and environment of the peoples concerned and the prompt application of special measures necessary to safeguard them. The Committee requests the Government to supply information in this respect, together with its comments on the communications received.[13]

However, the consultation requirement of Convention 169 requires the application of the principle of good faith to its provisions. Such interpretation, which entails the substantive requirement for consent from Indigenous peoples, has been fostered by ILO supervising bodies which have stressed the need to deploy efforts to try to achieve consensus on procedures, to facilitate access through broad information and to create a climate of mutual trust that is conducive to productive dialogue between the parties.[14] This approach confirms that the question of a substantive consent requirement cannot be limited to the veto issue. However, the main weakness of Convention 169 is the absence of any reference to Indigenous peoples' right to self-determination, which is deeply interlinked with cultural, participatory and property rights. Consequently, there is no explicit mention of the requirement for consultation *prior* to the implementation of any activity that might affect Indigenous peoples' rights, but just a general requirement to "establish means for the full development of these peoples' own institutions and initiatives".[15] The

[13] ILO Conference, 98th Session, 2009, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, p. 686.

[14] See also International Labour Organization/Organización Internacional del Trabajo, *Informe del Comité encargado de examinar la reclamación en la que se alega el incumplimiento por Guatemala del Convenio sobre pueblos indígenas y tribales, 1989 (núm. 169), presentada en virtud del artículo 24 de la Constitución de la OIT por la Federación de Trabajadores del Campo y la Ciudad (FTCC)*, GB.294/17/1, GB.299/6/1 (2007), para.53

[15] The "prior" requirement might be derived from by Article 15, but only in relation to the specific case when the settler State is the owner of subsoil resources in an Indigenous land. In this case, the "governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands".

Convention requires States to base their relationships with Indigenous peoples on cooperation and, for some purposes, good-faith negotiations and consent. Taken together, these provisions may bear a resemblance to the right to self-determination in some practical applications.

UNDRIP complements the consultation and consent provisions of Convention 169 by integrating the right to self-determination in its body.[16] UNDRIP was born as an instrument of soft law with no binding effect on ratifying States, that has become considered as expressing some principles of customary international law as pointed out in Chap. 4. The document is in fact regarded as the most referred text concerning Indigenous peoples' rights, its provisions being enforced in the Inter-American system. UNDRIP established a political compromise and as well an important means of exerting pressure on States (Hanna & Vanclay, 2013). UNDRIP strongly asserts the right to self-determination of Indigenous peoples, whereas in Article 3, it affirms that "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". Interpretations of UNDRIP should be done in the light of *jus cogens* and *erga omnes* obligations.

UNDRIP, differently from Convention 169, defines the three main characteristics of "consent"—sometimes coupled with "consultation"—which are Prior, Free and Informed in relation to situations in which Indigenous peoples should exercise their right, reflecting the normative

[16] This is affirmed also in the ILO handbook *Understanding the Indigenous and Tribal Peoples Convention*, 1989 (No. 169): "The provisions of UNDRIP and Convention No. 169 complement each other. However, UNDRIP addresses additional subjects that were not included in Convention No. 169, such as the militarization of indigenous lands and the protection of traditional knowledge. UNDRIP expressly affirms indigenous peoples' right to self-determination, while Convention No. 169 does not include such a provision. Convention No. 169 explicitly provides for rights to participation, consultation and self-management for indigenous peoples" (International Labour Organization, 2013).

framework's evolution that followed the adoption of Convention 169.[17] UNDRIP draws upon the circumstances that require Indigenous peoples' consent: relocation (Art. 10); impact on culture and intellectual property (Art. 11); adoption and implementation of legislative or administrative measures (Art. 19); exploitation of lands, territories and natural resources (Art. 27); disposal of hazardous waste (Art. 29); and development planning (Art. 32). UNDRIP is the most recent and important outcome for what concerns FPIC at the international level, since it broadly protects Indigenous peoples' rights on the subject, ordering States to provide reparations in cases of damage or loss to Indigenous peoples of any intellectual, spiritual or material good in case they did not express their consent.[18] At the regional level, it is worth mentioning that the American Declaration on the Rights of Indigenous peoples also protects the right to FPIC in Article 2 on the cultural integrity, Article 18 on health rights, Article 23 on the participatory rights, Article 28 on cultural heritage and intellectual property, and Article 29 on the right to development.

UN Human Rights bodies have also helped in shaping the definition and the enforcement of Indigenous peoples' right to consultation. The UN Human Rights Committee, which can receive individual

[17] The 19th preambular paragraph affirms: "Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned". Therefore, Indigenous peoples shall be consulted on effective measures that: Combat prejudices and discrimination toward indigenous cultures and promote tolerance, understanding and good relations among Indigenous peoples and other sectors of the society (art.15.2); and protect indigenous children from economic exploitation or carrying out any hazardous or harmful work (art.17.2). More broadly, Article 19 provides: "Article 19. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." Subsequently, the duty to consult indigenous peoples, and thus their right to be consulted through appropriate procedures and in particular through their representative institutions, is foreseen prior to using their lands or territories for military activities (Art. 30.2), and—in good faith, that is, with the aim of obtaining their FPIC—prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water, or other resources (Art. 32.2).

Finally, indigenous peoples shall be consulted by States on the effective measures to be taken to: facilitate the exercise and ensure the implementation of their right to maintain and develop cross-border contacts, relations and cooperation (Art.36.2); and achieve the objectives of the Declaration (Art.38).

[18] UNDRIP, Art. 11.

applications by countries that have ratified the ICCPR, has made several recommendations to States concerning the violation of the right to consultation.[19] Although the Committee has called for the necessity to consult Indigenous peoples on legislative and administrative measures that could affect them, the violation of Art. 27 ICCPR has been ascertained only when the consequences of the interference of the State are so severe that Indigenous peoples, as a minority, are deprived of their right to fully enjoy their own culture.[20] It seems that violation of Article 27, in relation to consultation processes, is found only when the survival of the Indigenous culture is at stake as a consequence of serious damage to Indigenous territories and natural resources.

The UN Committee for the Elimination of Racial Discrimination (CERD) is the body empowered to address States with general recommendations on the application of certain dispositions of the International Covenant on the Elimination of Racial Discrimination (ICERD). So far, the CERD jurisprudence related to individual applications concerning Indigenous peoples and consultation rights is not significant, but it has made individual, non-binding recommendations to States on this subject. These recommendations have tried to address Indigenous peoples' rights by recommending States to adapt their legislation to secure an adequate right to land, territories and natural resources, participating in their exploitation, administration and conservation (Morris et al., 2009).[21] On the right to consultation, in the 2004 Final Observation on Surinam, CERD recommended that the State implement adequate procedures to reach, if possible, an agreement. Finally, in General Recommendation 23 (1997), which is centred on combating discrimination against Indigenous peoples, calls upon States not to adopt any

[19] UN HR Committee: *Anni Äärelä y Jouni Näkkäläjärvi v. Finlandia*, U.N. Doc. CCPR/C/73/D/779/1997 (2001); *Länsmann et al. v. Finlandia*, U.N. Doc. CCPR/C/52/D/511/1992 (1994); *Apirana Mahuika et al. v. Nueva Zelanda*, U.N. Doc. CCPR/C/70/D/547/1993 (2000); *Ángela Poma Poma v. Peru*, U. N. Doc. CCPR/C/95/D/1457/2006 (2006).

[20] "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.", Art. 27 ICCPR, 1966.

[21] See also: CERD, *Final Observation on Surinam*, cedr/C/64/CO/9, 28 April 2004, par. 11-12; Decision 1 (67) on Surinam, cedr/C/DEC/SUR/4, November 2005, par. 4.

decision related to Indigenous rights and interests without informed consent.[22]

The UN Committee on Economic, Social and Cultural Rights (CESCR) also made final observations concerning consultation rights. For an instance, in its final observation to Ecuador[23] and to Colombia,[24] it called for States to reach full consent of Indigenous peoples regarding measures that affected them before the realization of exploitation projects on their territories, following the disposition of Convention 169.

Finally, it is important to underline the work of the UN Special Rapporteur on the Rights of Indigenous Peoples and the outcomes of the PFII. The institution of the Special Rapporteur aims to investigate and suggest ways to protect and enforce Indigenous peoples' rights through the production of reports and visiting missions to relevant countries. It presents its annual report to the HRC and it makes recommendations to States specifically directed to improve the conditions of Indigenous peoples. The Special Rapporteur has made several recommendations to States concerning the right to consultation and its practical effects in compliance with Convention 169. In the 2003 Special Report:

> "Human Rights and Indigenous Issues", in the conclusions, the Rapporteur argued that "Free, prior, informed consent is essential for the human rights of Indigenous peoples in relation to major development projects, and this should involve ensuring mutually acceptable benefit sharing, and mutually acceptable independent mechanisms for resolving disputes between the parties involved, including the private sector".[25]

Other provisions related to FPIC are contained in the 2007 Report following adoption of the UNDRIP, taking into account the definition of FPIC provided by PFII.[26] The PFII, during its Fourth Session in 2005,

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[22] Ibid.

[23] CESCR, *Final Observation to Ecuador*, par.12, 2004.

[24] CESCR, *Final Observation to Colombia*, par. 33, 2001.

[25] UN Special Rapporteur on the Rights of Indigenous Peoples, Human rights and Indigenous issues, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65, Commission on Human Rights Fifty-ninth session*, E/CN.4/2003/90, 2003.

[26] UN Special Rapporteur on the Rights of Indigenous Peoples, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Rodolfo Stavenhagen, *Human Rights Council Fourth session*, A/HRC/4/32, 2007.

and the REDD Programme with its Guidelines on FPIC have helped in shaping the concept of FPIC as an instrument of fair treatment of Indigenous peoples in the context of development and resource intervention. According to the definitions given by the two aforementioned organizations, *Free* is intended as "the absence of coercion, intimidation or manipulation. It also refers to a process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed". *Prior* means that "consent is sought sufficiently in advance of any authorization or commencement of activities, at the early stages of a development or investment plan, and not only when the need arises to obtain approval from the community". *Informed* refers "to the nature of the engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process" and *Consent*, finally, "refers to the collective decision made by the rights-holders and reached through the customary decision-making processes of the affected Indigenous Peoples or communities" (Food and Agricultural Organization, 2016).

Following the annual meeting, the PFII also publishes reports about the conditions of Indigenous peoples worldwide and about the compliance of States' national laws with international human rights standards and PFII recommendations. In relation to FPIC, the Forum has recommended to put into practice consultation procedures where legislative and administrative measures are likely to directly affect Indigenous peoples, since FPIC works as a fundamental principle to assure conservation and access to their territories. The PFII also recommended to States the incorporation of FPIC provisions into their domestic law and development policies.[27]

The jurisprudence of the Inter-American system is indispensable for the actual definition and enforcement of Indigenous peoples' right to FPIC. The two international institutions tend to apply the higher standards of rights' protection enshrined in consent procedures protected by ILO Convention 169 and also by UNDRIP. They affirmed the right of

[27] For example, see UNPFII Report on the ninth session (19–30 April 2010) E/2010/43-E/C.19/2010/15; Report on the 11th session (7–18 May 2012) E/2012/43-E/C.19/2012/13; Report on the twelfth session (20–31 May 2013), E/2013/43-E/C.19/2013/25.

Indigenous peoples to use and inhabit their traditionally owned land and the right to give or withhold their consent to the implementation of activities affecting their lands and territories, without considering if the State has provided Indigenous peoples with a formal property title (for recent instances of FPIC implementation see generally: Papillon et al., 2020; Newman, 2020; Eisenberg, 2020; Wright & Tomaselli, 2019; Zaremberg & Torres Wong, 2018).

This body of jurisprudence has been essential in shaping the actual meaning of FPIC, which draws upon two aspects closely interconnected: the Indigenous peoples' right to collective property and the legal recognition of their traditionally owned lands and the right to self-determination and culture. Indeed, it is not possible for Indigenous communities to give or withhold their consent in consultation processes if their property—formal and informal—and self-determination rights are not a priori acknowledged. As the IACmHR emphasized, a proper implementation of FPIC requires a solid understanding of concepts of cultural integrity, property, equality and self-determination in States' customary law and practices. Furthermore, the IACtHR contributed to the definition of legal standards for the implementation of FPIC. From the analysis of FPIC case law presented in the next paragraph, these legal standards can be summarized in three essential criteria: (1) consultation should be undertaken in respect of the principle of good faith; (2) the procedures should be culturally adequate with the aim of reaching an agreement; (3) the consultation should be prior, informed and culturally appropriate.

Among the various cases brought before the IACtHR, four of them are considered as landmark consent case law: *Awas Tingni v. Nicaragua*,[28]

[28] In this lawsuit, in the 1990s, the Awas Tingni community was affected by the granting of logging concessions on their territories to a multinational corporation. The loggers caused several serious damages to the environment, together with a wide range of social problems deriving from their presence. The Court, although without making explicit reference to the word "consent", found that the State had violated the property rights of the Awas Tingni and that those rights were intrinsically linked to the enjoyment of cultural rights connected to the use of traditional lands. The Court considered the principle of self-determination as a means to fulfil the preservation of the cultural heritage and the demarcation of the territory. See also: IACtHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* Judgment of August 31, 2001.

Maya Communities of Belize v. Belize,[29] *Sarayaku v. Ecuador*[30] and *Saramaka v. Suriname*.[31] More recently, the IACtHR has address FPIC and consultation in two other cases concerning Brazil and Argentina.[32] This case law is central for the enforcement of the internationally acknowledged Indigenous peoples' right to their traditional land and resources. The two institutions of the Inter-American system obliged States to its actual respect, prescribing a definite recognition of FPIC in domestic law. In particular, the IACtHR in the Sarayaku case was undoubtedly clear about the mandatory requirement of consultation procedures where Indigenous peoples' rights might be at stake.[33]

Most importantly, the Court in this case affirmed that States must comply with its obligations "under the principles of international law and its own domestic law, to adopt all necessary measures to guarantee the participation of the Sarayaku People",[34] international standards regarding consultation procedures, and adapt their domestic legislation in order to generate an adequate dialogue with Indigenous peoples,[35] guaranteeing satisfactory consultation procedures in every phase of planning and

[29] In Maya v. Belize, the Indigenous community filed a suit to the IACmHR regarding the arbitrary concession of oil exploitation on their lands and territories without their consent, claiming violation of their rights concerning property, equality, judicial protection and self-determination. In the preliminary report, the IACmHR argued that free and informed consent was necessary for the determination of scope and existence of property rights. See also: IACHR, Report n. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District v. Belize*, October 12, 2004; Case 12.053, IACmHR Preliminary Report No. 96/03 (24 October 2003).

[30] See also: IACtHR, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of June 27, 2012.

[31] This case regards the right of Saramaka Indigenous peoples to their land which had been encroached by mining concessions obtained by companies without their consent. The Court found the State to have committed violations of the IACHR by failing to recognize and protect the right of Saramaka peoples to their territory and resources, their access to justice and to guarantee such fundamental rights, see also: IACtHR, *Saramaka People v. Suriname*, Judgment of November 28, 2007.

[32] Cases *Xucuru Indigenous peoples v. Brazil* (2018) and *Lhaka Hohnat v. Argentina* (2020).

[33] "[N]owadays the obligation of States to carry out special and differentiated consultation processes when certain interests of Indigenous peoples and communities are to be affected is an obligation that has been clearly recognized […] so that the consultation may be understood as an appropriate and effective interaction with other State authorities, political and social actors and other third parties concerned". IACtHR, *supra* note 30, para. 165, "The State's obligation to guarantee the right to consultation of the Sarayaku People".

[34] Ibid., para. 232.

[35] Ibid., para. 166.

implementation of a project that may affect the territory Indigenous peoples rely on.[36] This case is also interesting since the IACrtHR reaffirmed what it has previously established in the *Awas Tingni case*. The court recognized and affirmed the importance of ancestral lands and territories for the Sarayaku people, stressing, *inter alia*, how their collective land tenure, although it does not conform to a Western conception of property rights, deserves equal protection under the Inter-American Convention.[37] The Court also argued that continuative access, control and use of ancestral territory is necessary to the maintenance of Indigenous peoples' lifestyle and cultural identity, social structure, economic system, custom, beliefs and traditions.[38] Consequently, given the "intrinsic connection that Indigenous and tribal peoples have with their territory, the protection of property rights and the use and enjoyment thereof is necessary to ensure their survival".[39]

Finally, in the *Saramaka* case, the Court reiterated the essential consultation criteria (principle of good faith, culturally appropriate procedures, objective of reaching an agreement) and established important standards regarding FPIC. Not only it maintained that "the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Saramaka territory"[40] and that "Saramakas must be consulted, in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community".[41] Is also established that "the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions".[42]

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[36] Ibid., para. 167.

[37] Ibid., para 145, "The obligation to guarantee the right to consultation in relation to the rights to communal property and cultural identity of the Sarayaku People".

[38] Ibid., para. 146.

[39] Ibid.

[40] IACtHR, *Saramaka People v. Suriname*, para. 129, "Safeguards against restrictions on the right to property that deny the survival of the Saramaka people".

[41] Ibid., para. 133, "Right to consultation, and where applicable, a duty to obtain consent".

[42] Ibid. On IACtHR jurisprudence also see Cittadino and Tomaselli (2021)).

The jurisprudence of Inter-American systems helped in the setting of legitimate criteria for consent procedures and in its enforcement, whereas States had failed in granting Indigenous peoples their right to be consulted. This jurisprudence has been central for what concerns the establishment of at least three legal standards regarding consultation and FPIC:

1. Clear establishment of the interlinkage between Indigenous peoples, property of ancestral territories and fundamental rights
2. Actual obligation for States to engage with Indigenous peoples in consultation processes when they are directly affected by any legislative and administrative measures throughout the whole implementation of the project
3. Acknowledgement of the importance of Indigenous customary law and traditions in the consultations processes, together with effective participation of designated Indigenous authorities.

The rulings of both bodies within the Inter American system are clear and strong regarding the right of Indigenous peoples to consultation and consent. They in fact contributed to the advancement of consultation as international customary law, which indeed would seem to be having established mandatory requirements for consultation and also for FPIC.[43]

However, several political barriers persist for the actual implementation of such rights in the national laws and practices of States. Indigenous peoples often have unequal bargaining power in dialogue with the State, private corporations and firms, which entails lack of access to adequate information, training and experience, impossibility of economic alternatives to resource extraction and difficult access to the judicial system. In

[43] For an early account on FPIC and customary international law, see Ward (2011). The Author affirms that "[t]he Inter-American system has some of the most substantive jurisprudence on the right to consultation and consent, but it is regionally focused and only the rulings of the Inter-American Court are considered binding. Ultimately, all of these developments have limited impact in developing customary international law". In a more recent article, it has been contrarily affirmed that "FPIC has been protected in the different human right systems created both at the un level and on a regional level. The case law emanating from these systems has contributed to establishing customary international norms to guarantee FPIC". The systems include the IACtHR, the UN Human Rights Council, the Expert Mechanism on the Rights of Indigenous Peoples, the UN Special Rapporteur on Indigenous and specialised monitoring mechanism such as the ILO Tripartite Committee (Giupponi, 2018).

the absence of true equality within national borders, Indigenous peoples are likely not to be consulted when it comes to the implementation of extractive or other development projects that may be relevant for the economy of the country. As the analysis of the Peruvian legislation and enforcement will demonstrate now and again even with the existence of a national law regarding consultation, Indigenous peoples are still not informed of extractive measures affecting their territories and rights.

What has emerged from this analysis of the main international legal instruments concerning consultation and consent procedures for Indigenous peoples is that FPIC is a far stronger concept compared to consultation, and they should be jointly realized in order to guarantee meaningful participation of Indigenous peoples in decision-making processes. This difference poses several questions about the effects and implications regarding parties involved, in particular on the validity and harmonization of legislative and administrative measures that are the subject of consultation. Thus, two different legal outcomes should be considered on this topic, namely the effects of consultation procedures, with the objective of reaching an agreement or consent, and those of consent-seeking procedures. In the first case, Indigenous peoples have the right to be informed and to express their opinion as a condition for the realization of a project or other measures likely to affect them, possibly participating in the drafting of projects, with a view to give their consent to the proposed activities. In the second case, seeking consent from local communities implies a higher standard of protection for Indigenous peoples' rights, since not only do they should be informed, but they should actively participate in the decision-making processes and ultimately give their consent prior to the implementation of any measure that has the potential to affect them directly. FPIC is deeply intertwined to the right to self-determination of Indigenous peoples, and to the possibility of participating in the process through their customary law systems and institutions. These different conceptualizations result in a legal ambiguity first, and then in political obstructionism in the application of a stringent consent requirement, for example, for what concerns the influence of Indigenous peoples' claims in the realization of administrative and legislative actions—as demonstrated later on in the section on Peruvian national legislation. The realization of justice and redress of historical

responsibilities can only take place when Indigenous peoples participate in decision-making as equal to other nations and States, and not as a subordinate group that has the only option to accept certain conditions.

Consent, Traditional Knowledge and Benefit-Sharing

As outlined in Chap. 4, Indigenous peoples' rights and FPIC are not only enshrined in international human rights instruments, but they are also considered an essential part in international environmental law treaties. In this specific case, consent refers to the obligation to adopt national legislation on consent with a view to obtaining it as prescribed by the international legal instrument such the CBD and the Nagoya Protocol. The way to ensure implementation of this requirement is through a general Prior and Informed Consent (PIC) procedure or a specific PIC procedure (Dupuy & Viñuales, 2018, pp. 76–77).

Thus, this section considers international environmental norms specifically directed at Indigenous peoples and consent-seeking procedures, highlighting some critical aspects on historical epistemic inequality related to the interplay between the intrinsic characteristics of Indigenous knowledge and Westernized legal regimes on consent and benefit sharing. These norms derive from legal provisions enshrined in the CBD, which is regarded as the first legal instrument addressing the vital worldwide importance of conserving biodiversity for economic and socially sustainable development to the benefit of all humanity. The CBD emerged in an historical context where the meaning of the environmental crisis was clear, a crisis deeply entrenched with the destruction of the environment and biodiversity operated by the destructive practices of capitalism (for a history of the CBD, refer to Le Prestre, 2017). Its three main objectives are listed as such: conservation of biological diversity, sustainable use of its components and fair and equitable benefit-sharing arising from the use of genetic resources. In the CBD preamble, Indigenous peoples' close relationship with biological resources was recognized, acknowledging the role of Indigenous knowledge, the importance of the role of women for biodiversity conservation and the role of sustainable use of natural

resources and biodiversity conservation in the eradication of poverty.[44] Article 15[45] CBD expressly mentions the consent requirement for access to genetic resources and Mutually Agreed Terms (MATs) for both access to genetic resources and benefit sharing (Tobin, 2013).[46] However, this article only refers to principles of national sovereignty over natural resources without establishing consent procedures for Indigenous and local communities, which is addressed in Article 8(j) CBD.

The international biodiversity conservation regime is extremely relevant in the context of climate change. In fact, climate change poses a fundamentally different threat to biodiversity conservation compared to other factors. Climate-related extinctions are one such example: the distribution and abundance of many species is expected to be progressively altered. Predictions of climate-induced population extinctions are backed by geographic range shifts that correspond to climatic warming areas. As an instance, climate-related reductions in water availability or increased water withdrawal reduce freshwater biodiversity. It has been estimated that rivers with reduced discharge, up to 75% of local fish biodiversity would be en route to extinction by 2070 because of combined changes in climate and water consumption (Xenopoulos et al., 2005). From the point of view of international law, although climate change and biodiversity conservation have evolved as two separate legal regimes, there has been increasing acknowledgement of the deep interlinkage between the two. The legal and policy repercussions of the impacts of climate change on biodiversity, as well as of mitigation and adaptation measures, have been progressively addressed by the CBD. This approach was evident at the tenth CBD COP held in Nagoya in 2010, where several issues related

[44] CBD, 1992, Preamble: "Recognizing the close and traditional dependence of many Indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components, recognizing also the vital role that women play in the conservation and sustainable use of biological diversity and affirming the need for the full participation of women at all levels of policy-making and implementation for biological diversity conservation".

[45] "Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party", CBD, 1992, Article 15(5).

[46] "Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party", Art. 15(5)

to climate change were discussed and Parties agreed to a decision on climate change and biodiversity, with a particular focus on ecosystem-based approach to adaptation (Morgera, 2011).[47]

The third CBD's objective—fair and equitable benefit sharing from the use of genetic resources—called for the creation of another legal instrument for its implementation, aimed at instituting an international regime to promote and safeguard the sharing of knowledge related to genetic resources among the different stakeholders involved, including Indigenous knowledge.

Benefit-sharing is included in Article 15(7), which requires each Party to adopt adequate legislative, administrative or policy measures with the ultimate goal to share "in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources". Even though this provision seems dedicated only to the inter-State dimensions, Article 8(j) prescribes that benefit-sharing applies also to the utilization of traditional knowledge, practices and innovations of Indigenous communities, since access to these resources might affect Indigenous peoples' rights.[48] Thus, benefit sharing is inevitably linked to the right to land, to consultation and to the right to natural resources on the lands of Indigenous communities or that they occupy, and it is extremely relevant because, for example, bioprospecting and associated

[47] According to the CBD website, "The ecosystem approach is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way. Application of the ecosystem approach will help to reach a balance of the three objectives of the Convention. It is based on the application of appropriate scientific methodologies focused on levels of biological organization which encompass the essential processes, functions and interactions among organisms and their environment. It recognizes that humans, with their cultural diversity, are an integral component of ecosystems". See also: https://www.cbd.int/ecosystem/, last accessed June 2021.

[48] However, this article contains very important limitations. According to Cittadino, these limitations concern the use of technical language, which contributed to a generalised lack of implementation; the lack of an obligation to adopt national legislations; the fact that benefit-sharing is only referred to the utilization of traditional knowledge, which creates a normative gap for the situations in which access to Indigenous natural resources occur in the framework of the CBD (Cittadino, 2019, p. 218).

modern technologies correlated to genetic resources[49] can increase the market value of Indigenous knowledge, making it a commodity for States, businesses and corporations (Cittadino, 2019, p. 176).

In the context of benefit-sharing, it is necessary to remember that also Convention 169 prescribes that States are the recipients of the duty to satisfy the right to benefit-sharing for Indigenous peoples when it comes to extractive projects. But, before the entry into force of the Convention 169 and the CBD, it was a practice by developed States to extract genetic resources from the territories of developing States, without sharing the benefits of marketing the product created from the use of those resources (Schroeder, 2009a).

As evidenced in Chap. 4, several meetings by the Conference of the Parties were held in the years following the adoption of the CBD in which the voice of Indigenous peoples was heard. They have been represented by the International Indigenous Forum on Biodiversity, formally recognized as advisory body in the 1998 COP. With specific regard to benefit-sharing, the 2004 COP had the mandate of elaborating and negotiating an international regime for access to benefit sharing deriving from the use of genetic resources and for the implementation of provisions contained in Article 8(j). The creation of this regime included the

[49] Bioprospecting is defined as the systematic search, classification and research for commercial purposes of new sources of chemical compounds, genes, proteins, microorganisms and other products with current or potential economic value, found in biodiversity. Thus, bioprospecting is the legalized action of access to genetic and biochemical resources in addition to facilitating the fair and equitable sharing of benefits. However, bioprospecting can lead to some problems, for example, the destruction of ecosystems through the creation of monocultures of certain plants to have a reserve of them in order to carry out biological prospecting. Thus, bioprospecting is the exploration of biological diversity and associated traditional knowledge to facilitate the selection and extraction of genetic and biochemical resources, which can result in commercial products. It can entail the processes of illegal extraction of genetic and biological resources—as it occurred for centuries—and it is sometimes still carried out without the approval of the legitimate owner communities and that lead to the monopoly on intellectual property by pharmaceutical international corporations (Castillo, 2009).

establishment of minimum procedural requirements for PIC.[50] The COP also created the Ad-Hoc Open-Ended Intersessional Working Group on Art. 8(j) and Related Provisions. The Working Group was active in bringing Indigenous claims to the attention of the COP, resulting in the inclusion of Indigenous views in guidelines instruments (Bonn Guidelines, 2004 Ake:kon Guidelines, 2010 Tkarihwaie:ri Code of Ethical Conduct, 2016 Mo'otz Guidelines). The issue regarding consultation and consent was one central theme of such negotiations. There are two main reasons why consent is essential when accessing Indigenous knowledge on genetic resources: the first draws upon consideration of economic character and respect for Indigenous peoples' self-determination rights to pursue economic and cultural development;[51] the second regards respecting the fairness principles outlined in the CBD, which requires permission from owners and benefit-sharing arrangements (on rationales for benefit sharing see generally Morgera et al., 2014).

The outcome of the COP negotiations around the operationalization of Article 8(j) was the Nagoya Protocol. It was adopted in 2010 and ratified in 2014 during COP12 in South Korea. The Protocol

> aims to provide legal certainty and transparency for users and providers of genetic resources, specific obligations for compliance, a framework for domestic legislation or regulatory requirements such as the prior and

[50] "Each Contracting Party shall, as far as possible and as appropriate […] (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices", CBD, Article 8(j).

[51] "Authors Ten Kate and Laird (1999) have estimated the annual value of products derived from genetic and biological resources—including extracts, combination molecules, and enzymes that are used in pharmaceutical products, botanical medicines, agro-industrial crops, horticulture, cosmetics, and crop protection products—at approximately $500 billion to 800 billion USD. If, hypothetically, 10 percent of this amount derives from the use of traditional knowledge, then the original, traditional products and Indigenous Peoples' traditional knowledge would have an approximate value of $50 billion to 80 billion USD per year. Calculating 10 percent of the $50 billion USD as the value of Indigenous knowledge at the global level would add up to $5 billion annually from gross sales. In a commercial scenario, if Indigenous Peoples were paid even 10 percent of this $5 billion USD, it would add up to $500 million a year from net sales, an amount that would be useful in solving the basic needs of Indigenous Peoples" (Teran, 2016).

> informed consent and the adherence of contracts to mutually agreed terms. Compliance with the provisions of the protocol and its required conditions for access to genetic resources ensures fair and equitable benefit sharing with the provider party and with Indigenous Peoples when accessing their traditional knowledge, innovations, and practices that are associated with genetic resources. (Schroeder, 2009b)

The instrument is relevant for Indigenous peoples since it aims to regulate the access to Indigenous knowledge and practices associated with genetic resources. It is very interesting to note that in the CBD realm, therefore also in the Nagoya Protocol, legal instruments used to refer to "Indigenous and local communities" and not to "Indigenous peoples", in contrast with UNDRIP provisions and the right of self-determination. This was a peculiar choice given the strong focus that PIC procedures have in relation to access to genetic resources and benefit-sharing. This terminology seemed to deprive Indigenous peoples from their qualification of being "nations", with a de facto participatory parity with settler States in the negotiations and establishment of Mutually Agreed Terms for access and benefit-sharing. This issue has been finally addressed at COP12, where the term "Indigenous peoples and local communities" was adopted.[52]

Provisions regarding PIC for Indigenous and local communities are contained in Article 6 and 7 of the Protocol. Article 6 on the Access to Genetic Resources establishes in paragraph 2:

> In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior and informed consent or approval and involvement of Indigenous peoples and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources" and also in paragraph 3 letters (c) and (f): "[…] each party requiring prior informed consent shall take the necessary legislative, administrative or policy measures, as appropriate, to:

[52] Citing Cittadino, "Concerning the interpretation of the locution 'indigenous and local communities' included in the CBD, the last CBD COP has adopted decision xii/12 establishing that the new terminology 'indigenous peoples and local communities' will be adopted in "future decisions and secondary documents'. Although excluding any implications for the purposes of contextual interpretation pursuant to Article 31(2), (3)(a) and (b) of the VCLT [Vienna Convention on the Law of the Treaties], the decision explicitly recognises the relevance of the new terminology for the purposes of systemic interpretation under Article 31(3)(c) of the VCLT".

> […] (c) provide information on how to apply prior and informed consent; (f) […] set out criteria and/or processes for obtaining prior informed consent or approval and involvement of Indigenous and local communities for access to genetic resources.

The Nagoya Protocol aims at the realization of a fair and equitable participation in the benefits derived from the utilization of genetic resources and traditional knowledge, upon the adoption of MAT, addressing the gaps of Article 8(j).[53] The Protocol establishes an obligation for the State to issue administrative regulations and to create public policies in order to allow for a sharing of benefits with Indigenous communities, respecting their customary laws. To achieve the implementation of this right, the COP adopted the Bonn Guidelines, which are a voluntary instrument intended to assist States in implementing the right to fair and equitable benefit-sharing for commercial or other purposes.

According to Cittadino (2019), Article 5(2) of the Protocol offers a better protection compared to the human rights framework concerning benefit-sharing, insofar as benefit-sharing in the Nagoya Protocol does not require any restrictions to Indigenous established rights but is triggered when genetic resources are utilized. In other words, it seems that in international human rights law, benefit-sharing applies to legitimize.

Article 6 adds relevant legally binding provisions that were not contemplated in the CBD as regards access to genetic resources held by Indigenous and local communities and PIC. The minimal procedural requirements enshrined in Article 6.3.c-f leave to States a considerable discretionary power since it is Parties who must specify in their domestic legislation how to apply PIC, however providing a transparent written decision by the competent national authority (Art. 6.3.d). It seems that States' procedural requirements will vary significantly from one national legislation to another. These requirements are relevant for the utilization

[53] In Article 5(5) the Nagoya Protocol establishes that "[e]ach Party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Such sharing shall be upon mutually agreed terms".

of Indigenous peoples' traditional knowledge on genetic resources: "Parties are under an obligation to provide potential users of genetic resources with information on how to apply for community PIC when Indigenous and local communities have established rights to grant access to their genetic resources", but "this requirement should be implemented by taking into consideration the customary laws, protocols and procedures of Indigenous and local communities, as with their effective participation" (Morgera et al., 2014, p. 167). Article 7, on the "Access to Traditional Knowledge Associated with Genetic Resources", establishes that "traditional knowledge that is held by Indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these Indigenous and local communities", calling for an obligation for Parties to develop domestic measures on the access to genetic resources through an ad hoc community PIC requirement. In order to implement the procedures on access to knowledge on genetic resources held by Indigenous peoples, the full and effective participation of the interested communities is required, ensuring appropriate consideration of their customary laws.[54] Because of the relevance of Indigenous customary law for the purposes of this book, this last aspect is dealt with in a separate section later in the chapter. For the purposes of this section, it is crucial to understand the functioning of benefit-sharing as a means to counterbalance the appetites for access to genetic resources of developed countries that could exploit without measure Indigenous knowledge.

Notwithstanding the existence of this wide range of norms aimed at regulating consent-seeking procedures when accessing Indigenous knowledge, historical epistemic inequality persists. Indigenous knowledge has rapidly gone through the different passages typical of the logic of recognition, that have recognized it as worth of attention moving from an original position that discredited Indigenous practices as not "scientific" under

[54] These principles had already been outlined in the CBD Akwe:Kon Guidelines, which spell out PIC specifications, namely the consideration of the rights, knowledge and practices of Indigenous and local communities, the respect for customary law, traditions and language and the allocation of sufficient time and the provision of appropriate information, and in the Tkarihwaie:ri Code of Ethical Conduct, where it affirms that consent should not be forced or manipulated and it is the right of Indigenous and local communities to freely choose their own representatives.

the Western paradigm. Indigenous knowledge has been deemed useful for biodiversity conservation and sustainability, following Westernized logics that define, quantify and give an economic value to something intangible that is embedded in social relations and inextricably linked with the ecosystems. It seems clear that in the context of biodiversity conservation, the Westernized epistemic system is still at the top of the hierarchical order, insofar as it conceptualizes Indigenous knowledge as a property, as something that can be produced, stored, controlled and accessed (Widenhorn, 2014). But Indigenous knowledge does not need necessarily to be an object of ownership. This knowledge has been used by Indigenous peoples as an element of cultural identification; many of it has a sacred character and its commercialization represents for some peoples a great spiritual and moral violence. Indigenous traditional knowledge is promoted in databases with a view to its preservation and conservation. This proposal may be contrary to Indigenous cultures, as it fragments the holistic conception of knowledge, by which knowledge is inextricably associated with ancestral land and spirituality. Furthermore, systematizing Indigenous knowledge in databases is undoubtedly the first step in giving Western marketing value to knowledge, which must be clearly stated so that peoples and communities are fully aware of the significance of cataloguing (Castillo, 2009). This colonial approach to Indigenous knowledge underscores how Indigenous cultures become disembodied entities, alienated from their original context, in a continuation of historical injustices that objectivize Indigenous peoples and makes them "useful" to pursuing Western objectives.

Indigenous Critiques and Guidelines to the Operationalization of FPIC

This section aims at demonstrating that worldwide Indigenous communities have not entirely accepted the legal body of norms concerning FPIC since it relies upon Western conceptions of property rights, participation, timing and ruling. When facing Indigenous peoples in negotiations and consent-seeking procedures, stakeholders should consider that they are carrying out a dialogue with nations that have their own vision

on Westernized concepts and rights that have been imposed on them. Non-Westernized legal systems can differ considerably from standard legal patterns generally considered appropriate by States. For example, the concept of property rights enshrined in FPIC is rooted in Western legal notions and strongly vouches for respect of the principle of non-alienation of a formally owned property without consent. Indigenous peoples might have a different conception of "formally owned property", since their societies are often characterized by a collective dimension of property that is not formalized in written agreements.[55] Or, if we consider nomadic tribes, the application of the legal concept of property is even more problematic. Thus, the application of FPIC remains challenging in contexts characterized by a lack of clearly defined legal identities and in informally governed Indigenous groups, which lack adequate access to legal defence necessary to assert property rights effectively (McDermott & Mahanty, S., 2013). The inclusion of Indigenous views and claims in the building process of FPIC legislation should be considered mandatory in both domestic and international law in order to respect their right to self-determination. However, even if FPIC procedures seem respected and well-defined on paper, they can be used to countermine Indigenous authority and to perpetuate colonialism.[56]

Doyle and Cariño conducted a series of interviews to Indigenous representatives from the Asia-Pacific, Latin America, Africa and North America regions about their perspective on FPIC (Doyle & Cariño, 2013). What emerged from these conversations with Indigenous peoples is that their vision consistently differs from the Western standards of

[55] According to Westra, "requirements for FPIC or Consultation tend to apply only to 'recognized' or 'titled lands', thereby excluding approximately three-quarters of the lands that traditionally are owned and are presently claimed by Indigenous peoples", (Westra, 2008, p. 93).

[56] Dunlap has evidenced how FPIC procedures carried out in Mexico for a wind project in Juchitán de Zaragoza in 2014 resulted in approval even though the population expressed concerns over the implementation of the project. This particular consultation, instead of reinforcing the right to self-determination of the people concerned, resulted in substantial political and economic asymmetry between State, corporate and elite interest and Indigenous fishermen and farmers. The consultation was carried out in a violent context where "[i]nsults, public threats, intimidation and fights during and after the consultation were frequent […] Intimidation and opposition were funded by the wind companies directly and indirectly through political functionaries known as caciques (local political bosses), who serve as project intermediaries between wind companies and the land" (Dunlap, 2018).

consultation and consent procedures. Indeed, in Indigenous views, certain characteristics of FPIC should be rethought when applied on the ground. They should include concepts of Indigenous claims and needs, providing native communities with effective decisional power over their lands and territories. FPIC not only entails a right which can determine the full control of ancestral lands and territories, but it is also regarded as a process which operationalize the right to self-determination, making Indigenous peoples able to accept or reject any development plan, in accordance with their customary law.[57] In addition, Indigenous peoples argued for putting a greater emphasis on the principle of good faith and equality among stakeholders, highlighting their right to be free from any coercion or intimidation and for the acceptance of the outcome of consultations (Doyle & Cariño, 2013).

Indigenous representatives suggested alternative guidelines for the implementation of FPIC. First of all, they called for inclusive participation of all the different parts of their society in the consultations, in accordance with customary law and practices, whereas States often consider only certain centres of Indigenous authority despite some domains being controlled by different governing structures from the ones delegated to consultations. The FPIC process should go through all the relevant structures to be considered legitimate. Also, is the community who should decide upon the means of engagement with its representatives and that should be done in a time considered appropriate. Additionally, FPIC must be required in each stage of the implementation of a project, in accordance with communities' laws and procedures, and must entail all Indigenous communities whose rights might be directly and *indirectly* affected (especially regarding impacts on water resources, culturally significant areas and relocation).

Indigenous peoples consider timing as a problematic issue since they believe "timetables are a non-Indigenous concept". Time framing and

[57] A similar view can be found in the CBD *Report of the International Indigenous and Local Community Consultation on Access and Benefit Sharing and the Development of an International Regime*, whereas it affirms in para. 27 "the concept of free, prior and informed consent is not merely a procedural right, but a right linked to Indigenous peoples' material rights to lands, territories and resources, property, culture and self-determination […] Clearly, the right to FPIC encompasses a right to say 'no'".

deadlines are regarded as an impediment to a deep and full understanding of the project requiring FPIC. Indigenous peoples might have a different conception of "time" compared to its Western meaning. Capacity building in consent-seeking procedures is also considered of central importance: Indigenous peoples ask for information to be delivered in a simple and clear language in order to reach actual and meaningful involvement in negotiations. Indigenous peoples also demand the necessity of an actual inclusion in the drafting of impact assessments and benefit-sharing policies. Environmental, social and human rights impact evaluations should be carried out with the participation of Indigenous communities since they know from direct experience the possible impacts of a project on their lands and livelihoods. Similarly, they should be involved and receive an adequate sharing in the benefits deriving from the exploitation of natural and genetic resources. In addition, they underline that unless actual recognition of their rights, culture, ways of life and customary laws and traditional use of resources is realized, no access and benefit-sharing regime should be guaranteed.[58] Benefit-sharing arrangements are strictly dependent on FPIC, since no such regime should be implemented without the consent of Indigenous peoples. Benefit sharing, in Indigenous views, not only refers to economic compensation but also can be delivered in forms of employment, education and infrastructure provision. Indeed, cultural support might be considered more appropriate since monetary compensation tends to be over-emphasized at the expense of socio-cultural elements. Benefit-sharing, on the contrary, should address the support of traditional livelihoods, food security and the restoration of lands. Finally, they argue for the creation of grievance procedures, redress mechanisms and recognition of authorities able to monitor and enforce the provisions contained in FPIC agreements.

Indigenous views on FPIC refer to a different conception of property rights, ownership of natural resources and designated authorities participating in the process. Indigenous legal and social systems vary substantially from those of Western societies. Such differences require a full

[58] CBD, *Report of the International Indigenous and Local Community Consultation on Access and Benefit Sharing and the Development of an International Regime—Note by the Executive Secretary*, UNEP/CBD/WG-ABS/5/INF/9 UNEP/CBD/WG8J/5/INF/13, 19 September 2007, let. A para. 15.

understanding by States, firms and other entities that wish to engage with Indigenous communities in order to obtain their consent for the implementation of a project or the use of their genetic resources. Dialogues carried out in consent-seeking procedures must take into account the connection that Indigenous peoples have with nature and with its resources. For example, for some Indigenous communities, the attempt to give a commercial value to nature would be meaningless. In addition, stakeholders should respect the right of Indigenous peoples to say "no" to a project, which requires the correct implementation and enforcement of FPIC.

Even with the existence of a strong participatory requirement like FPIC, enshrined in international human rights norms, it looks like the logic of recognition imposed by settler States still tends to prevail. A meaningful implementation of the FPIC requirement has to do more with politics and political empowerment rather than international law: it is usually in the concrete application of the requirement that the legal provisions get lost and are not thoroughly applied. Settler States often do not recognize Indigenous institutions as equals, and this is especially evident in relation to Indigenous customary law and legal pluralism. This aspect is dealt why in the last section of the present chapter. The next two sections will provide two concrete examples from Peru, one regarding the implementation of GCF project in the region of Datém del Marañón, the other focusing on the consultation law at the national level. These two case studies demonstrate that, even with the existence of stringent requirements at the international level, the actual implementation of consent-seeking procedures is impeded by competing interests of governments and private firms over Indigenous territories.

Climate Finance, Participation and Redress: The Independent Redress Mechanism of the Green Climate Fund and the Peruvian Project

Information for, and participation and consent of, Indigenous peoples is fundamental in the context of climate change adaptation and mitigation actions when they are to be implemented in ancestral territories. International Financial Institutions (IFIs) such as the Global Environmental Facility (GEF) and the Green Climate Fund (GCF) have

adopted special internal policies to safeguard human rights and Indigenous peoples' rights.[59] The existence of safeguards that ensure participation and consent has a special relevance in the context of climate justice, insofar as they provide a means for contributing to the actualization of climate justice by including Indigenous perspectives in climate adaptation and mitigation projects. The participation of communities in the definition and the possibility to give their consent to the implementation of climate-related project are fundamental for achieving climate resilience in a way that is fair, just and participative. In fact, the Paris Agreement states that "[p]arties may be affected not only by climate change, but also by the impacts of the measures taken in response to it." The issue of the adverse impacts of climate policies and finance is a problem that must be addressed by IFIs that dedicate their funds to the implementation of mitigation and adaptation projects.

Large climate-related mitigation or adaptation projects, such as the construction of solar power or wind power networks, hydroelectric dams wind farms, should include the consideration of several factors at the project design level. Such factors include the identification of affected people, information, consultation and participation of the public, environmental and social impact assessments, protection of natural habitats, respect of Indigenous people's rights, prevention of involuntary

[59] The World Bank has been adopting, since the 1980s, several regulations that elaborate specific standards and procedures aimed at regulating its internal functioning and implementation of projects, some of them specifically directed to Indigenous peoples and consultation procedures. The discussed Operational Policy (OP) 4.10, which replaced the OP 4.20 (1991) and sets standards regarding consultation procedures. The OP does not recognize FPIC but rather applies the lower standard of consultation, defined by the WBG as "free prior and informed consultation resulting in broad community support". In previous negotiations, Indigenous peoples had demanded the establishment of their right to FPIC, expressing serious concern for its lack in the OP draft, but their proposals were not included in the outcome. The WBG has recently updated its provisions regarding FPIC through the adoption of the new Environmental and Social Standards (ESS), operative from October 2018. Section 7, expressly dedicated to "Indigenous Peoples and Sub-Saharan African Historically Underserved Traditional Local Communities", includes a paragraph that refers to FPIC and the circumstances in which it is required. The ESS recognize the important link between Indigenous peoples and their lands and natural resources, and the key role ancestral lands play in sustainable development practices. In turn, it is important to recognize, respect and preserve Indigenous culture and knowledge. Ensuring the full respect of human rights, establishing a relationship based on meaningful consultation and obtaining FPIC are now among the objectives of the WBG, which promotes the participation of Indigenous peoples also in the phase of project design and in implementation arrangements.

resettlement and due diligence of the financing institution which must monitor, oversee and ascertain that all the aforementioned issues are taken into account.

In order to deal with these and other issues, IFIs' policies do operate as internal soft law that defines guidelines and practices of IFIs in relation to project designing, implementation and monitoring. This section pays specific attention to the GCF and one of its three independent unit—the Independent Redress Mechanism (IRM). The IRM deals with redress and justice-seeking procedures in the case of adverse impacts of a mitigation or adaptation project. The IRM can address adverse impacts that have already occurred or may occur in the future. Complaints can be filed by individuals or communities impacted by climate change mitigation or adaptation projects funded by the GCF. This specific focus is relevant to this book insofar as they concern redress-seeking procedures aimed at protecting Indigenous peoples' interests where consultation and consent were not sought and obtained as prescribed by the GCF's own IP Policy. The GCF's IP policy reflects many aspects of international human rights law and other important standards.

The GCF was established in 2011 by the UNFCCC to disburse funds for the implementation of low emission and climate resilient projects developed by public and private sectors, mainly in developing countries. The GCF was created during the 16th meeting of the COP in Cancun, Mexico, and it was envisaged to spend half of its fund for adaptation projects, half of which in Least Developed Countries, African States and Small Islands Developing States (SIDSs), and the other half on mitigation measures.[60] The GCF provides funding through loans, grants, equity or guarantees to its Accredited Entities (AEs) that are responsible for implementing the projects. AEs can be Direct Access Entities, such as national and regional entities or international entities (e.g. FAO and UNDP).[61] It also pursues a country-ownership policy, which means that it recognizes the need to ensure that developing country partners exercise ownership over climate change funding and integrate it within their own

[60] Green Climate Fund website: https://www.greenclimate.fund/home, last accessed June 2021.

[61] The list of Accredited Entities is available at https://www.greenclimate.fund/about/partners/ae, last accessed June 2021.

national action plans. In order to do so, countries appoint a National Designated Authority (NDA) that acts as the interface between the government and GCF. The NDA must approve GCF projects within the country, ensuring that it operates in harmony with existing national policy.[62]

Before the adoption of the Indigenous Peoples Policy (IPP) in February 2018, the GCF had been disbursing huge amounts of money to developing countries without having an *ad hoc* policy dealing with Indigenous peoples issues such as project involvement since early stages.[63] Thus, there was less guidance through the IFCs and as such greater risks of Indigenous peoples' rights violations (Tebtebba Foundation, 2017). These risks, as we shall see in this section, have been significantly reduced by the IPP, provided it is properly followed and implemented by the GCF and its AEs. The importance of the involvement and consent of Indigenous peoples when it comes to the implementation of climate projects became clear with the adoption of the first GCF-financed project in Peru in 2015, as it trigged the activation of the IRM complaint procedure.

The governing instrument for the Green Climate Fund at paragraph 69 stipulated that "[t]he Board will establish an independent redress mechanism that will report to the Board. The mechanism will receive complaints related to the operation of the Fund and will evaluate and make recommendations."[64] The ground for this Independent Redress Mechanism (IRM) was mainly laid during two GCF Board meetings in 2014. Adopted at the 6th Meeting of the Board in Bali (Indonesia, 19–21 February 2014), Decision B.06/09 (Annex V) endorses the terms of reference of the different control mechanisms of the GCF: the Independent

[62] GCF's Guidelines for enhanced country ownership and country drivenness at https://www.greenclimate.fund/document/guidelines-enhanced-country-ownership-and-country-drivenness, last accessed June 2021.

[63] Before the IPP, there were interim Environmental and Social Standards adopted by the GCF. These were the same as the International Finance Corporation's interim Performance Standards. One of such standards deals directly with Indigenous peoples and the need for FPIC. As such there were basic Indigenous peoples' related performance standards in place. The GCF IPP has enhanced and strengthened such standards. See also: IFC website at https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/performance-standards, last accessed September 2022.

[64] Governing Instrument for the Green Climate Fund, available at https://www.greenclimate.fund/sites/default/files/document/governing-instrument.pdf, last accessed September 2022.

Evaluation Unit—for periodic assessments of the GCF's operations—the Independent Integrity Unit—for fraud and corruption—and the IRM—complaint mechanism. In 2017, the IRM's mandate and terms of reference were updated by the GCF Board.[65] The IRM serves five functions: processing requests for reconsideration of funding decisions when funding is denied by the Board; processing complaints by persons affected by GCF funded projects; provides advisory reports; capacity building; and outreach.[66] This section focuses on the complaint function and the first case that that IRM worked on.

The IRM, as other grievance mechanisms present in multilateral banks (e.g. the Inspection Panel and the Compliance Advisor Ombudsman of the World Bank and the International Finance Corporation respectively, and the Independent Consultation and Investigation Mechanism of the Interamerican Development Bank) provides services of accountability and redress related to the implementation of GCF projects. This function is extremely important because people affected by the adverse impacts of development projects funded by the GCF's climate finance have few possibilities to trigger the legal responsibility of the executive agencies that direct the flows of climate finance. This is true especially for projects implemented by international financial institutions that generally have immunity from legal liability and judicial proceedings (see generally Reinisch, 2013). Currently, it looks like providing access to an accountability mechanism has become good practice in international development institutions. One of the roles of Independent Accountability Mechanisms (IAMs) of development banks is to evaluate, upon request of people affected or likely to be affected by the bank's activities, whether the bank has complied with its own internal environmental and social safeguards and standards—for example, its policies or procedures on information disclosure, human rights obligations and Indigenous peoples.

The GCF FP001 project in Peru, which was the first to be approved by the Board, provides interesting insights about the issue of FPIC in relation to Indigenous peoples and the implementation of climate change

[65] See the IRM Terms of Reference (ToR) at https://irm.greenclimate.fund/document/irm-tor, last accessed September 2022.

[66] IRM functions and processes are listed and explained at https://irm.greenclimate.fund/about/functions-processes, last accessed June 2021.

adaptation projects. The Implementing Entity (IE) is the Peruvian Trust Fund for National Parks and Protected Areas (Profonanpe). Their proposal regarded the wetland management with the participation of Indigenous peoples in the province of Loreto in the eastern Amazon region. It is the first GCF project relevant to Indigenous communities.[67] It constitutes an important case study in relation to the need for the GCF to develop strong monitoring compliance and grievance mechanisms in relation to the respect of Indigenous peoples' rights and FPIC as provided by international human rights instruments such as UNDRIP. The project aims at reducing deforestation and carbon emissions in the Datém region, through work with the local government and 120 native communities. It also has the objective of strengthening protected areas already existing while creating new ones, together with support strategies for developing land use plans and ecological zoning.

The project is implemented in an area which is home to eight Indigenous communities, and it clearly has impacts on their access to land, resources and consultation rights. This project raised a series of immediate questions about its consistency with the obligation of the GCF and the State towards Indigenous peoples (Tebtebba Foundation, 2017). The implementation of the project raised many concerns regarding consultation procedures from various NGOs, among them Interethnic Association for the Development of the Peruvian Rainforest. The organization wrote a letter to the GCF in June 2015, expressing its general opposition to Profonanpe as a recipient of economic funds.[68] AIDESEP argued that Profonanpe, in past experiences, had not complied with Indigenous peoples' claims since it traditionally focused on conservation of natural parks. Also, it contended that actions aimed at the conservation of forests in Indigenous territories should be implemented by an Indigenous-lead organization and, therefore, Profonanpe was not the

[67] GCF Project FP001, *Building the Resilience of Wetlands in the Province of Datém del Marañón*, Peru, available at https://www.greenclimate.fund/document/building-resilience-wetlands-province-datem-del-mara-n-peru, last accessed June 2021.

[68] AIEDESEP, Fondos climáticos deben implementarse de forma intercultural y directa con PP. II—Caso Fondo Verde del Clima, 15 June 2015, available at http://www.aidesep.org.pe/noticias/fondos-climaticos-deben-implementarse-de-forma-intercultural-y-directa-con-ppii-caso-fondo, last accessed June 2021.

ideal candidate for such a task. In the same period, the Council of the Federation of Achuar Nationality in Peru (FENAP) rejected the invitation by PROFONANPE to attend a meeting in the Achuar territory, since they traditionally disallowed any project that was in conflict with the "Plan de Vida", the Achuar culture and philosophy. FENAP also stated that it disagreed with any project that could undermine Indigenous rights or imply the State's control over native resources.[69]

The project raised a series of issues in respect of consultation procedures and Indigenous peoples' participatory rights. Profonanpe declared that it had support from all affected communities and organizations. But there was no clear evidence that they had discussed with affected communities the details of the project and its potential impacts. Effective compliance with FPIC requirements was considered questionable in this case (actually, the proposal was made available only in English, making it difficult to understand for native communities). It seemed that there was no evidence that the full scope and nature of the project, together with its positive and negative impacts, had been explained to native communities or their consent obtained (Tebtebba Foundation, 2017, pp. 38–39).[70] Nevertheless, according to the report of the Independent Technical Advisory Panel of the GCF, Profonanpe had consulted with 80 communities and 21 organizations. These consultations were realized in only two weeks, and it seemed there were inconsistencies with the real number of communities consulted, while other concerns regarded the lack of grievance mechanisms and institutional role for the Indigenous peoples involved (Tebtebba Foundation, 2017, pp. 38–39).

During the Board Meeting held in 2015, when the project was approved, attending NGOs and IPOs argued that Indigenous peoples

[69] Consejo Directo de la Federación de la Nacionalidad Achuar del Peru (FENAP), statement "Acta de San Lorenzo" 14 June 2015; FENAP (Federación de la Nacionalidad Achuar de Perú) letter to PROFONANPE, 22 June 2015 (Tebtebba Foundation, 2017).

[70] This position was also reiterated by FENAP presidency, which affirmed "PROFONANPE has never consulted with or obtained the free, prior, and informed consent of the Achuar People of the Pastaza River basin within the jurisdiction of FENAP, to either enter our territory or carry out projects within the Achuar zone".

had to give their FPIC before implementation.[71] In that case, the Secretariat stressed that, since Profonanpe is an NGO, it did not have the obligation to respect the consent requirement. Also, it argued that the documentation provided was sufficient to understand that meaningful consultations had been carried out with the Indigenous peoples affected.[72] This position was in conflict with the highest human rights standards and best practices that require an extensive interpretation of consent-procedures, requiring that all affected communities are consulted, with appropriate timing and on the basis of full information, prior to the implementation of a project. Also, NGOs are obliged as any other entity to comply with GCF Interim Standards[73] that reflect international human rights norms among which is the principle of FPIC. This means that Profonanpe, as an entity receiving funding from the GFC, was obliged to respect the FPIC requirement in implementing its project. The very fact that the Secretariat did not insist and verify the accomplishment of this requirement was a symptom of an urgent need for the GCF to adopt an ad hoc policy to ensure full respect of Indigenous peoples' rights.

[71] "Many Board members raised the need to clarify the consultation process, pointing out that a letter had been received from an Indigenous organization claiming that they had not authorized Profonanpe to work in their area. Board members further emphasized that, because the project targets vulnerable Indigenous communities, it was important that the stakeholder consultation process was complete and well-explained, and that the associated risk was well dealt with through the management plan", see also: GCF, *Report of the eleventh meeting of the Board*, 2–5 November 2015, GCF/B.11/25, 29 February 2016, para. 263.

[72] Ibid., para. 267.

[73] According to the International Finance Corporation Performance Standards which have been adopted by the GCF, FPIC must be sought in case of projects that might imply

a. impacts on land and natural resources subject to traditional ownership or under customary use;
b. relocation of IPs from lands and natural resources subject to traditional ownership or under customary use; and
c. use of cultural resources for commercial purposes. See also IFC, Performance Standard 7: Indigenous Peoples January 1, 2012, para. 13–17; this obligation is also contained in the Adaptation Fund Social and Environmental Standards to which PROFONANPE agreed to be subject to. See also: Adaptation Fund, Guidance document for Implementing Entities on compliance with the Adaptation Fund Environmental and Social Policy at https://www.adaptation-fund.org/wp-content/uploads/2016/07/ESP-Guidance_Revised-in-June-2016_Guidance-document-for-Implementing-Entities-on-compliance-with-the-Adaptation-Fund-Environmental-and-Social-Policy.pdf, last accessed June 2021.

Moreover, as it will be evidenced in the next section, in Peru, the level of engagement with Indigenous peoples had been problematic in the past years, especially for what was regarded as FPIC and participatory rights. In the report "The Green Climate Fund Readiness and Indigenous Peoples", it emerged that the institutional framework for the implementation of GCF projects in Peru is still incomplete. MINAM (the Ministry of Environment), which is the former NDA, adopted at that time the Green Growth document that envisages engagement with the GCF only for private sector projects while it does not take into consideration Indigenous peoples (Martone, 2017). The current NDA for Peru is the Ministry of Finance (MEF) and it has not adopted, for the moment, any engagement policy concerning native communities. In addition, it should be noted that the Peruvian Ministries engaging with Indigenous peoples—such as the Ministry of Culture—are not relevant for GCF projects because they do not have financial expertise. During a workshop held by Chirapaq, IPOs argued for the need for the MEF to adopt intercultural approaches to finance policies. Native communities also criticized the excessive State-centred design of GCF programs and their bias toward the private sector, with the risk of implementing projects in the absence of effective guarantees on Indigenous peoples' rights.[74]

The Peru project demonstrated how the GCF Secretariat did not understand comprehensively the operative implications of FPIC and the relative issues concerning participatory rights for Indigenous peoples. The way the accredited entity conducted the consultations also fuelled conflicts among IPOs, highlighting the need to clarify the nature and effectiveness of stakeholder consultation processes. But eventually, it provided an occasion for the GCF to develop and adopt rigorous environmental and social safeguards together with an ad hoc policy specifically aimed at the protection of Indigenous peoples' rights, where FPIC is one of the leading principles.

Because of the very relevant implications that this project held for Indigenous peoples' participatory rights, it triggered the IRM's

[74] Ibid.

preliminary inquiry—a self-initiated investigation function—in early 2019.[75] According to the IRM report, in August 2018, as a result of routine monitoring of the press, the IRM came across three published articles raising concerns about the Peru project FP001, and that these articles were raising concerns regarding the project.[76] The IRM, in reviewing the documentation available during the first phase of the investigation, noted that at the 11th Board Meeting, the disbursement of the funds was agreed upon a condition which encompassed that the AE "clarify which indigenous organizations wish to participate in the project to obtain clear written consent from their representative organizations in order to ensure that the project is only implemented in the territories of the indigenous organizations that have provided their clear consent to the project", and that the AE "provide the opportunity for the participating indigenous organizations to take part in project design in dialogue with the accredited entity".[77] With regard to the documents provided, the IRM found that some of them were incomplete in certain respects: "[i]n relation to a quarter of the consent documents, there were either missing signatures or missing details regarding who had consented. In a small percentage of documents, there were no signatures at all, and in one document the signature page appeared to be on a different type of paper to the attached meeting minutes".[78]

Following interviews with GCF Secretariat members and Profonanpe, the IRM ascertained that FPIC was considered a standard to be respected,

[75] A self-initiated investigation—or *suo moto*—is a proceeding initiated under para 12 of the IRM's Terms of Reference (TOR) if the IRM receives information from a credible source that a GCF project or programme has or may negatively impact a community or person. See also: GCF/B.16/20: Updated terms of reference of the Independent Redress Mechanism, at https://www.greenclimate.fund/document/gcf-b16-20, last accessed September 2022.

[76] The articles which the IRM refers are "The Green Climate Fund and Free, Prior and Informed Consent and a Call for the Adoption of an Indigenous Peoples Policy: The Lessons from a Wetland Project in Peru" and "El Fondo Verde para el Clima y el Consentimiento libre, Previo e Informado y un llamado para la Adopción de una Política sobre Pueblos Indígenas: Las Lecciones de un Proyecto de Humedales en el Perú" both published by Tebtebba and Forest Peoples Programme in December 2015, and the report published by the Rights and Resources Initiative in October 2017 titled "The Green Climate Fund: Accomplishing a Paradigm Shift? Analysis of the GCF Approach to Safeguards, Indigenous Rights, and Participatory Processes".

[77] Independent Redress Mechanism IRM Initiated Proceedings: C-0002-Peru 8 May 2019, at https://irm.greenclimate.fund/sites/default/files/case/irm-initiated-proceedings-c-0002-peru.pdf, last accessed September 2022.

[78] Ibid.

however that communities were unlikely to be able to reach out to the complaint mechanism to file a complaint. The interviews also evidenced that in the area of project implementation, there had been issues concerning collective land titling and it was concerning that these struggles had not been taken into consideration in the project proposal in relation to the possible impacts related to the creation of a protected area. Regarding the missing signatures, Secretariat staff explained that in some cases, members of the community refuse to sign documents for "historical reasons", or they did not bring identity documents, or they were not able to write their name. These explanations are the demonstration of an existing legacy of colonial practices in the area of the project. It also testifies the fact that full and meaningful participation was not achieved because Indigenous communities had necessarily to fit into Westernized procedural practices, such as signing documents that were perhaps also presented in a highly technical language. In fact, from the IRM report, it emerges that "no specific questions appeared to have been asked by the Secretariat in relation to the incomplete consent documents. Profonanpe also explained that it hadn't received any specific guidance from the GCF on how to conduct consultation processes or obtain free prior informed consent".

Following this assessment, the IRM decided that prima facie there was ground for starting an investigation but opted to commence a dialogue procedure with the Secretariat as a first step towards finding efficient and urgent solutions. In fact, the IRM noted the incompleteness of some of the consent documentation, the lack of questions on the record raised by GCF staff, and the absence of adequate justifications for the incompleteness within the GCF record, indicated the lack of due diligence which could pose a significant reputational risk to the GCF. The IRM held two meetings with the Secretariat staff and agreed on several remedial actions, while it was ascertained that the Secretariat was already implementing some important measures—for example, the development of an Indigenous Peoples Implementation Guideline under the Indigenous

Peoples Policy adopted in February 2018.[79] After this discussion, the Secretariat agreed to set up four time-bond undertakings, the progress of which has been monitored by the IRM.[80]

The most contentious part of the project was the creation of a conservation area—*Áreas de Conservación Ambiental* (ACA, Area of Environmental Conservation). The IRM requested the preparation of a legal report in order to assess whether the creation of an environmental conservation area in Datem del Marañón could have negative implications for the land rights of Indigenous peoples. The document, commissioned by Profonanpe, was made available in April 2020, and it concluded that the creation of ACA for the GCF project "would not prevent any potential future effort by the indigenous peoples to secure titles and rights to lands included in the ACA". But it also evidenced that "the existence of an ACA could make the process of physical-legal guarantee of the communal territory more difficult and complex, as well as make compatible a proposal of demarcation different from the communal one even when there is no occupation (population settlement) or direct use of the territory by any native community, since the indigenous peoples claim for themselves the totality of the territories in the Province of Datem del Marañón".[81]

Before the publication of the report, the GCF staff conducted fact-finding site visits in December 2019. The staff was able to verify the

[79] The GCF Indigenous peoples' policy acknowledges that Indigenous peoples often have identities and aspirations that are divergent from mainstream groups in national societies and are disadvantaged by traditional models of mitigation, adaptation and development. The Policy is an instrument that will support GCF actions in consolidating Indigenous peoples' views into its decision-making since the early stages of project development. With this in mind, FPIC is a guiding principle of the Indigenous Peoples Policy. See also GCF website at https://www.greenclimate.fund/document/indigenous-peoples-policy, last accessed September 2022.

[80] The Secretariat agreed to (a) produce a guidance note on FPIC requirements, particularly addressing FPIC documentation requirements; (b) include a section dealing with the risk categorization of projects involving IPs in the guidance note on environmental and social screening; (c) obtain an assessment from a suitably qualified and experienced expert in land titling of indigenous communities in the Peruvian context, which examines potential impacts of the creation of the Áreas de Conservación Ambiental (ACA) on collective land rights of Indigenous people who are part of the project and their ongoing or future efforts to register title to those land rights; (d) ensure that the consent documentation submitted by Profonanpe for the establishment of the ACA is complete and compliant with the guidance.

[81] Legal Opinion on the implementation of environmental conservation areas, available on the IRM website at https://irm.greenclimate.fund/sites/default/files/case/opinion-legal-aca-abril2020-english-260420202.pdf, last accessed June 2021.

status of the processes of consultation and how consent was provided by representatives of the Kandhozi tribe. In the last progress report available (June 2021), the GCF staff noted the importance of understanding land issues affecting Indigenous peoples in the project area, together with the advancement of self-government revindications. Thanks to interviews to Indigenous representatives, the GCF staff ascertained that the establishment of ACAs did not impair the struggle to land titling; however, it emerged that Indigenous peoples would have wished for more control over the conservation area. Therefore, it was reported that "[t]he mission team considers that potential opposition to ACAs could be borne out of this notion of independently governed indigenous territories more than the concept of ACAs and land tenure rights themselves". The GCF requested Profonanpe "to consider the most relevant modality to secure community management of resources that can achieve the project expected results (emissions reductions) such as ACAs, traditional or indigenous conservation areas (TICAs) or otherwise and adapt the consultation and FPIC processes accordingly".[82]

Because of the COVID-19 pandemic that affected the world from the beginning of 2020, the process of consultation for the creation of an ACA in the area has slowed down. In-person meetings and participation have been discouraged, together with site-mission visits or any other activity that implies gathering together or travelling inside or outside countries. Therefore, the Secretariat is still waiting for FPIC documentation in relation to the creation of the ACA since Profonanpe in June 2021 has declared the impossibility of providing the documents due to current restrictions in place.

This particular IRM case has demonstrated the centrality of Indigenous participation at the early stages of climate project design and approval. It is crucial that IFIs give the possibility to potentially affected individual and communities to access complaint mechanisms in cases where environmental and social policies are not thoroughly respected in order to seek justice and redress. Climate justice dimensions not only concern participatory rights at

[82] Progress report IRM-Secretariat Agreed Actions for the Preliminary Inquiry of FP001, available at https://irm.greenclimate.fund/sites/default/files/case/first-secretariat-progress-report.pdf, last accessed June 2021.

the climate negotiations level but also imply the participation of affected or potentially affected individuals and communities at the early stages of climate-related project design and implementation. The creation of environmental conservation areas is a crucial theme for Indigenous peoples, insofar the institution of such geographically demarcated areas might lead to exclusion of Indigenous communities from accessing vital resources and have implications on their territorial rights and customary legal regimes. The last part of this chapter indeed focuses on this very important topic in relation to biodiversity conservation and climate change.

The next section adopts a specific focus on Peru with regard to consultation and FPIC, demonstrating how at the local level such matters are still highly debated. As outlined through the IRM case, implementation of climate-related project at the local level necessarily needs to take into account national circumstances and legal provisions with regard to Indigenous peoples. The next section aims at explaining why in Peru the concept of FPIC is of difficult application, considering the multiple Indigenous struggles and conflicts that have finally brought the government to adopt a consultation law.

The Enforcement of Consent Procedures in National Legislation: Example from Peru

An actual enforcement of the right to FPIC might be central in Latin America, since Indigenous presence is relevant—in Peru, around the 30% of people self-identifies as native or Indigenous, or Afroperuvian.[83] In many South American countries, the domestic legal recognition of Indigenous peoples' rights is considered avant-garde, especially for what concerns the actual involvement of native communities in decisional processes. Nevertheless, it is also a continent where the economy is largely based on exploitation of natural resources, which turns into States' bias towards extractive industries. Indeed, in Peru, as discussed later in the section, mining is the major economic activity in terms of GDP. Therefore, large parts of traditional Indigenous inhabited territories—even if

[83] Consult INEI website at https://censo2017.inei.gob.pe/resultados-definitivos-de-los-censos-nacionales-2017/, last accessed September 2022

recognized as protected areas—are often given in concession to industries without obtaining an effective FPIC from or even conducting consultation of Indigenous peoples who physically occupy those territories or have a spiritual attachment to those lands. To this extent, consultation procedures are of central relevance to avoid the emerging of social and also economic conflicts within the very borders of a State: a possible solution might be to harmonize domestic law with the programmatic contents of international human rights law, adapting the national norms at least to the standards contained in Convention 169. This is the case in Peru and Bolivia, which were the first Latin American countries to adapt their national legislation to the consultation standards (Schilling-Vacaflor & Flemmer, 2016). In the present case study, Indigenous protests and mobilizations fostered the actualization of the international duty to consult in the form of a national consultation law.

In the last years, Peru has promoted the development of economic activities and private investments especially in the Amazon and Andean areas, territories that have been traditionally inhabited by Indigenous peoples since the pre-colonial period. The pressure on Indigenous peoples in those areas has increased dramatically as the portion of national territory dedicated to extractive activities has begun to enlarge. In the 1990s, 1.8% of the total surface of Peru was under concession for extractive activities. In 2004, 13% of Indigenous land was given in concession to oil and gas industries and in 2008 this percentage rose to 70%. These permits were especially granted in the Amazon area. Nowadays, 16% of Peru's lands are exploited by the mining industry (Lust, 2014).

The history of marginalization of Indigenous peoples in Peru is rooted in the colonial legacy of the country since the dominant class was directly deriving from the descendants of the Spanish *conquistadores* and native peoples were considered as slaves and workforce. After independence, Indigenous subjugation and marginalization did not disappear, but continued disguised by a new system of labour exploitation "that solidified the servile condition of the Indigenous peoples, providing the justification for the spoiling of their territories" (Salmón, 2013). With the advent of the statesman Simon Bolivar, in 1825, forced Indigenous labour was prohibited. Indigenous ownership of lands was also recognized, but in practice, in the following decades, marginalization of Indigenous

communities continued through spoliation of territories and politics of assimilation, neglect of Indigenous rights, identities and cultures. In the 1960s, the reactionary government of Velasco Alvarado and its agrarian reform renamed Indigenous peoples as "rural and peasant communities", making them lose their previous legal category in name of a paternalistic and assimilationist approach. So, Indigenous peoples had to fit into denominations created artificially in order to obtain entitlements to lands, such as provided by the Law of Agrarian Reform (1969) and the Law of Native Communities and Agricultural Promotion of the Jungle (1974), which introduced also the denomination of "native communities".[84] Indigenous peoples of Peru now regard themselves as *campesinos* or "natives", since the adjective "Indigenous" might be perceived as obsolete or racially connotative (Salmón, 2013).

The so-called investment-shock in Peru, characterized by a massive increase of mining concessions, led to the emergence of social conflicts that affected Indigenous peoples' ancestral territories and lands (Del Rosario Sevillano Arévalo, 2010, p.19). The President Alan Garcia, whose politics were openly threatening native communities' rights, in the beginning of 2000s enacted legislation and implemented development projects that had high costs in terms of social impacts.[85] Hydrocarbon and deforestation programmes were realized especially in the Amazon region, in territories where Indigenous peoples lived or used natural resources. This situation caused the flourishing of conflicts between local communities, government and corporations. The Peruvian monitoring system registered 80 social conflicts in June 2006[86] while five years later, 217 conflicts were reported, more than half characterized by socioenvironmental factors.[87]

[84] Gobierno del Peru. *Ley de Comunidades Nativas y de Promoción Agropecuaria de Regiones de Selva y Ceja de Selva*, arts. 6–10, June 18, 1974.

[85] In a famous article published in 2007, Garcia even questioned the existence of Indigenous peoples, writing that native peoples have been invented by environmentalists, who "have created the figure of the 'uncontacted' native jungle dweller; that is, unknown but presumed, and thus millions of hectares cannot be explored, and Peru's petroleum must remain underground while the world is paying US $90 per barrel. They prefer that Peru continue importing its oil and getting poorer", in Alan García, *El síndrome del perro del hortelano*, EL COMERCIO, Oct. 28, 2007.

[86] Defensoría del Pueblo del Peru, 2006, (as cited in Schilling-Vacaflor & Flemmer, 2013).

[87] Defensoría del Pueblo del Perú 2011 (as cited in Schilling-Vacaflor & Flemmer, 2013).

The lack of normative integration of Indigenous peoples' rights and sovereignty over their resources into Peruvian law was caused by the absence of a true harmonization with the legal contents of ILO Convention 169. As a result, Peruvian native communities have experienced a considerable reduction of their access to and property of traditionally owned natural resources and of their right to be consulted over the implementation of extractive projects in their ancestral territories.

The most violent conflict exploded in 2007 in Bagua, following the approval of the Free Trade Agreement with the US, which committed Peru to adapting its legislation in favour of new trading arrangements. President Garcia passed almost 100 legislative decrees in 2008 without any prior consultation, while native communities openly rejected the Agreement fearing that it would favour the arrival of multinational companies, threatening their traditional livelihoods and the environment (Salmón, 2013). Some of these decrees, like the Wildlife and Forestry Law and the Law establishing the Special Temporary Regime of the Formulation of Rural Property, explicitly affected Indigenous peoples' rights. Furthermore, the government failed in providing the treaty with adequate information regarding legal safeguard standards for Indigenous traditional knowledge, biological diversity and access to legal environmental justice (Ruiz Muller, 2006).[88]

The Ombudsman, the Commission of Andean Peoples, Amazon and Afro-Peruvians, the Environment and Ecology Commission of the Republic of the Congress and the CEACR of the ILO openly objected these decrees arguing against the lack of engagement with native communities in consultation processes.[89] The Interethnic Association for the Development of the Peruvian Rainforest (AIDESEP) had an important role in the organization of conferences and actions for the respect of native communities' consultation rights and gained great support from the Peruvian people, establishing a resistance movement to Garcia's

[88] United States-Peru Trade Promotion Agreement (with annexes, understandings, and related exchange of letters as amended by Protocol of Amendment to the United States-Peru Trade Promotion Agreement), arts. 18.1-18.5, US-Peru, Apr. 12, 2006.

[89] ILO CEACR, *Peru: Individual Observation on the Indigenous and Tribal Peoples Convention 1989*, 699 (Sess. 97, 2008); ILO CEACR, *Peru: direct solicitation on the Indigenous and Tribal Peoples Convention 1989* (Sess. 80, 2009).

government. In August 2008, with the help of AIDESEP and other Indigenous organizations, several protests were conducted which included resistance to the installation of oil companies, culminating with the kidnapping of officials and blockades of the major highway crossings in order to resist the private investments in the forest. The government declared a state of emergency while starting to establish roundtable discussions with Indigenous leaders. But the outcome of such discussions was not considered satisfactory and AIDESEP stand aside from the negotiations, calling on all native communities in Peru for active resistance. As a consequence, from April 2009, leaders from 1350 Amazon communities gave rise to resistance movements. This protest culminated in a demonstration of force by the Peruvian police, which forcibly removed protesters along the Fernando Belaunde Terry highway in Bagua province on June 5, 2009. This confrontation, also known as *Baguazo*, lead to the death of 24 members of the police and ten civilians, 200 people injured and 83 under arrest.[90] The protest was fundamental to strengthening the "historically weak Indigenous movement" and to bring to the attention of the international community the problems in Peru connected to the mining industry and to the absence of consultation procedures with Indigenous communities (Schilling-Vacaflor & Flemmer, 2013).

In response to this situation, the Congress of the Republic abolished the decrees that affected native communities and initiated a process of negotiations with Indigenous organizations in order to reach an agreement on how to implement consultation rights.[91] President Garcia acknowledged having made a mistake in adopting the decrees without consultation with native communities. The organization in charge of negotiating with the government was the National Coordination Group for the Development of Amazonian Peoples (GNCDPA), which had its

[90] Defensoría del Pueblo del Peru, 2 July 2009; U.N. Office of the High Commissioner on Human Rights, *Report of the situation of human rights and fundamental freedoms of Indigenous people (Mission to Peru): Observations on the situation of the Indigenous peoples of the Amazon region and the events of 5 June and the following days in Bagua and Utcubamba provinces*, para. 21, U.N. Doc. A/HRC/12/34/add.8, 2009.

[91] Congreso de la Republica, *Proceso de Consulta Previa, Libre e Informada a los Pueblos Indígenas del Proyecto de Ley Nª 4141/2009-PE en el Marco del Convenio 169 de la OIT de la Comisión Agraria*, available at http://www.congreso.gob.pe/comisiones/2010/agraria/ley_forestal/objetivos.htm (Salmón, 2013).

first session on 22 June 2009. Four thematic working groups were established. The working group charged with preparing a draft *Ley de Consulta* (consultation law—Law No. 29785) was *Mesa 3* and it based its work on the proposal presented by the Ombudsperson. The new draft law proposed by *Mesa 3* contained new provisions aimed at the establishment of a veto power for native communities if extractive projects were considered dangerous for the environment and its natural resources. The draft included a more inclusive definition of Indigenous peoples, comprising "peasant communities" and "communities living in voluntary isolation" (since, as we discussed earlier, various legislation adopted before and after decolonization had provoked a multitude of legal denominations for Peruvian native communities), together with the right to be consulted also on measures having *indirect* effects on their traditional livelihoods.[92] The draft law was submitted to the Congress on April 2010 and a much shorter version (only 20 articles, compared to the 42 proposed in the draft) was approved in May 2010. President Garcia vetoed the proposed law and sent it back to the Congress, objecting that "national interest" should be the priority and that native communities of the Andes and coastal regions should not have the right to prior consultation, since they could not be defined as Indigenous. Also, he stated that this right pertained only to those communities holding a formal land property title.

The *Ley de Consulta* was then approved under the presidency of Ollanta Humala, who was elected president in July 2011, after a campaign in favour of Indigenous peoples' rights.[93] However, the Congress did not invite Indigenous organizations into the legal proceedings for the adoption

[92] AIDESEP, CCP, CNA, CONACAMI and CONAP, *Carta a la Defensoría del Pueblo. Promulgación de Ley de Consulta, necesidad impostergable. Solicitamos exprese opinión institucional*, 2010.

[93] During his final speech before the elections, Humala stated: "En nuestro gobierno se va aplicar la Ley de Consulta, serán las comunidades las que decidan, la opinión de las comunidades tendrán carácter vinculante, si las comunidades no ven por conveniente la construcción de un proyecto, no se hará, nosotros siempre hemos defendido la voz del pueblo en los diferentes lugares del país, y en eso nos ratificamos. Para nosotros la voz del pueblo es la voz de Dios"and "[I]f the communities are not in agreement with projects that affect their environment and the development of human rights, such as the hydroelectric project of Inambari, those projects will not be carried out. The voice of the community is of essential importance; if I become President, it will be for your votes, and we will defend that voice", see also *Ollanta cerró campaña electoral en Puno*, NOTICIAS SER, Apr. 6, 2011, available at http://www.noticiasser.pe/06/04/2011/puno/ollanta-cerro-campana-electoral-en-puno.

of the law. After its promulgation, President Humala carried out a consultation with Indigenous representatives on the contents of the Regulating Norm. It was an important decision in terms of a political détente in favour of Indigenous peoples. They were able to express their views delegating their voices to the "Unity Pact", an alliance of five institutions (AIDESEP, CCP, CNA, CONACAMI and ONAMIAP[94]). Nevertheless, according to Schilling-Vacaflor and Flemmer, the Congress meetings presented several problems regarding the imbalance of power between State representatives and Indigenous organizations, together with linguistic issues—the language used in negotiations was too technical and legalistic. For these reasons, AIDESEP, CONACAMI, CNA and ONAMIAP decided to withdraw from the negotiations, arguing also that the *Ley de Consulta* had not been modified or replaced taking into consideration Indigenous claims and requests that had been proposed by *Mesa 3*.[95] Only two native organizations—CONAP and CCP—took part in the last stage of the negotiations, which lead to the approval of the Regulating Norm although several critical points had not been solved. Also, the ministries did not incorporate the provisions previously agreed with Indigenous organizations, that were considered legally binding, committing a breach of the *Ley de Consulta* itself. Thirteen new provisions, some of them in disagreement with Indigenous views, were also introduced without the approval of the participating institutions.[96]

The Peruvian *Ley de Consulta* is widely inspired by the contents of Convention 169.[97] Convention 169 was adopted by Peru in 1995 and

[94] Respectively, Peasant Confederation of Peru, National Agrarian Confederation, National Coordinator of Communities Affected by Mining, National Organization of Andean and Amazonian Women of Peru.

[95] AIDESEP, CNA, CONACAMI, FEMUCARINAP and ONAMIAP, *Acta del Encuentro Nacional de evaluación interna del borrador del reglamento de la Ley de Consulta Previa*, at www.conacami.pe/2012_02_01_archive.html, last accessed September 2022, 2012.

[96] Coordinadora Nacional de Derechos Humanos, *Informe de Observación del Proceso de Consulta Previa del Reglamento de la Ley del derecho a la consulta previa a los pueblos indígenas u originarios, reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT), Ley N° 29785*, Peru, 2012.

[97] The full name of the Law is "Law on the Indigenous and traditional peoples' right to prior consultation, as recognized in the International Labour Organization Convention n.169" (translation from the original in Spanish by the Author.

elevated to constitutional status,[98] influencing the interpretation of constitutional law concerning Indigenous people, ensuring the approach already established in Article 3[99] of the Peruvian Constitution and in the 4th Final and Transitional Disposition.[100] The Constitutional Court has stated that human rights treaties function as parameters of constitutionality for the rights and freedoms provided by the Constitution.[101] Furthermore, Article 5 of the Constitutional Procedural Code, Initial Title, provides that the jurisprudence of international courts is considered part of the Code and, as a result, the decisions of the IACtHR are invested with binding power. The jurisprudence of the Peruvian Constitutional Court can be considered as the first attempt to firmly recognize the right to be consulted in legal practice, especially with the decision n.00022-2009-PI. It established relevant rules on the contents of consultation: the court developed a general framework arguing that the right to consultation is not questionable where Indigenous peoples' rights are at stake due to the impacts of any legislative or administrative measure, but by no means are the consultation outcomes translatable into a veto power (Rivero & Pinto, 2012).

Therefore, from a legal perspective, we can affirm that in Peru's domestic law, the concept of consultation has been applied rather than FPIC. The principles regarding consultation procedures developed by the Constitutional Court are included in Law n.29785 (2011), the *Ley de Consulta*. Apparently, it seems it has been designed to open a new era of dialogue with Indigenous peoples after the presidency of Garcia, in order to avoid other dramatic uprisings such as the *Baguazo* and redressing conflicts through administrative means. This initiative was aimed at avoiding new social-environmental conflicts through the democratic participation to the national governance of all native groups, in a legally

[98] Constitutional Court of Lima, *Decision of the Constitutional Court No. 0025-2005-PI/TC*, 1995.

[99] Article 3 of the Peruvian Constitution establishes a scheme for human rights protection even though they are not included in the constitutional text, permitting that the doctrine, the jurisprudence and the convention related to human rights law are considered with constitutional status.

[100] The 4th Disposition establishes that the constitutional law concerning human rights should be interpreted following the principles enshrined in the Universal Declaration on Human Rights and the other international instruments on the matter ratified by the State.

[101] Constitutional Court of Lima, *Decision of the Constitutional Court No. 0047-2004-AI/TC*, 2006.

acceptable way. Furthermore, the law had the function of filling the existing gap concerning the lack of enforcement of Convention 169 for what regards consultation and Indigenous participation. However, the newly adopted *Ley de Consulta* was substantially identical to the bill that had been vetoed by President Garcia, containing 20 articles and 4 final complementary dispositions. Its regulatory norm was published on 3 April 2012 and contained 30 articles and 16 complementary, transitory and final dispositions.

The Law recognizes Indigenous and native peoples' right to consultation (Art. 2), with the aim of reaching an agreement or consent (Art. 3) between the State and the affected communities. Article 4 lays down the essential principles on which consultation is based: opportunity, appropriate information, multiculturalism, flexibility, reasonable time, good faith and absence of coercion or conditioning. Articles 5, 7, 10, 19 and 20 refer to the definition of the subjects to be consulted, identifying criteria for their legal acknowledgement, while Articles 6, 9, 19, 20 outline the participation procedures, establishing that Indigenous peoples must participate in the consultation process through their officially acknowledged institutions and organizations which must be accredited in advance by the Vice-Ministry of Intercultural Affairs. Article 9 concerns the legislative measures that are the object of consultation, establishing an obligation for the State to identify those measures that could affect directly the collective rights of Indigenous communities. If Indigenous communities do not agree with the identification of a measure recognized by the executive power, they can challenge the decision before the Vice-Ministry of Intercultural Affairs. Finally, Article 15 regards the Decision, which is the legal act that puts an end to the consultation process. A decision by the State must be well-reasoned, taking into consideration the outcomes of intermediate negotiated agreements even if no final agreement has been reached.

Even though the legislation cannot be considered a perfect application of FPIC requirement as prescribed by UNDRIP (the Indigenous right to self-determination is missing from the law), it has led to some improvements whereas before, prior consultations were scarcely or never implemented. At least it helped to clarify responsibilities and some minimal procedural standards. This law, in creating a new space for dialogue with

Indigenous peoples, was believed to help avoiding the escalation of new socioenvironmental conflicts between native communities, government and firms. Demonstrations as occurred in Bagua were by no means isolated events, but they had been continuously happening where native communities were affected by the presence of mining companies, since they did not have appropriate ways to redress their claims in a peaceful way.[102] Now, several years after the adoption of the *Ley de Consulta*, Peru is still characterized by high-rated socioenvironmental conflicts (which should not be considered synonymous with "violence") related to native communities, mining operations and environmental degradation. According to the last report available on the Defensoría del Pueblo's website, in February 2018, 89 active socioenvironmental conflicts were reported, of which 65.3% were due to mining activities and 13% to hydrocarbon extraction.[103] Some of these cases concern the lack of implementation of consultation procedures, which means that government and firms should enforce in a better way the provisions of the *Ley de Consulta*.[104]

Since 2013, several consultations have been carried out, starting with the case of Maijuna-Kichwa. In the period of 2013–2016, a total of 24 consultations was realized, promoted by 8 national institutions and 3 regional institutions (Loreto, Ucayali and Cusco). Eight consultations concerned the oil sector, and they were conducted by Perupetro S.A., the State firm responsible for concession of mineral resources exploitation and extraction. In 2015, this responsibility was transferred to the Ministry of Energy and Mining (MINEM). Other consultations were carried out for governmental decisions regarding intercultural health, the bilingual education plan, and the forestry and wildlife law (Sanborn et al., 2016).

The application of the *Ley de Consulta* in practice has not been a straightforward process. In June 2016, eight consultations required major

[102] Ibid.

[103] Defensoría del Pueblo, *Reporte de Conflictos Sociales No. 168*, February 2018, available online: https://www.defensoria.gob.pe/wp-content/uploads/2018/07/Reporte-Mensual-de-Conflictos-Sociales-N-168-Febrero-2018.pdf, last accessed September 2022.

[104] Ibid.

revisions to be carried out by the government in order to implement the agreement. In four of them, this resulted in a lengthy and complicated process. For example, the establishment of a conservation area in Maijuna-Kichwa was approved after two years of struggle with Indigenous peoples involved in the project. Similarly, the establishment of the national park in Sierra del Divisor (in Loreto and Ucayali), after many protests by native communities living in the area, environmental organizations and NGOs was finally approved in 2015 (Sanborn et al., 2016, p. 15). The establishment of conservation areas, as argued later on in the chapter, might imply the violation of the rights of Indigenous peoples (Cittadino, 2019).

The *Ley de Consulta* establishes that the Vice-Ministry of Interculturality is the institution responsible for the coordination of all public policies related to consultation procedures. However, this important responsibility has been delegated to a small office under the authority of the General Direction for Indigenous Peoples' Rights. The Prior Consultation Office in 2015 could count on a staff of seventeen people. Furthermore, the Ministry is a very weak institution in terms of financing, as it receives only the 0.5% of the national budget. It has also been outlined that its weakness is not only the budget but also feeble political power when it comes to negotiations with powerful governmental institutions (Sanborn & Paredes, 2015).

In the first years after the promulgation of the *Ley de Consulta*, very few consultations were realized in mining areas, evidencing that implementation of consultations procedures in the hydrocarbon sector makes clear the underlying contrasts between the government, firms and Indigenous peoples. The first two consultations made by Perupetro S.A. in the areas *Lote* 169 and 195 (Ucayali region in the Amazon Forest) have been criticized since they were hastily carried out, without informing people in an adequate and timely manner on the object of consultation and on the potential implications for their collective rights. The lack of proper consultation was also due to the delay of the Ministry of Interculturality in officially recognizing as "Indigenous peoples" ancestral communities in the Andes, where many hydrocarbon projects are implemented. In 2013, in the governmental database a first general reference was made to Quichua and Aymara peoples living in the Andes area, but the Ministry

did not publish a specific list of Andean people until July 2015. This recognition is fundamental to enforce the right to consultation as provided by the law, since only officially recognized Indigenous communities are able to enjoy this right. The organization OjoPùblico published a report that affirmed that a detailed database was already available since 2012. This database included 60% of Indigenous peoples living in the Andean region, which implies that the Ministry probably paralysed its publication in order to accelerate investments in the area without realizing consultations (OjoPublico, 2015).

Other consultation problems related to the Peruvian Ministry of Energy and Mining (MINEM). The institution Defensoría del Pueblo contested at least five consultation cases, since apparently MINEM accepted as valid a resignation letter to the right to be consulted sent by Indigenous communities.[105] Another practice criticized by the Defensoría was the affirmation of the supposed absence of Indigenous peoples in an area designated to mining activities, even though Indigenous presence was evident. In at least nine similar cases, MINEM authorized the commencement of mining activities in areas inhabited by Indigenous peoples without carrying out consultations.[106] However, at the end of 2015, MINEM announced the implementation of three new consultation processes: one in Parobamba (Cusco) realized between September and November; the second in Santa Rosa de Quikakayan (Áncash), realized between October and November and finally in Cotarusi (Apurímac), between November and January 2016.[107] It also announced the realization of a posteriori consultation for eight cases where it was not realized in prior form, in order to redress the impact of the lack of recognition for Indigenous groups.

In sum, MINEM begun to properly implement Indigenous peoples' consultation rights only at the end of 2015. Since 2012, it has granted at least 159 exploration concessions and 60 exploitation concessions

[105] Defensoría del Pueblo. *Oficio N.° 0249-2014-DP/Amaspi*. Lima, 2014.

[106] Ibid.

[107] MINEM; Informe N.° 906-2015-MEM-DGAAM-PCP-EXPLOR-AURORA-DGAM-DNAM; Informe N.° 907-2015-MEM-DGAAM-PCP-EXPLOR-TOROPUNTO-DGAMD NAM, 2015.

without any consultation with native communities affected.[108] According to the last report[109] available on the *Defensoría del Pueblo* website, from the promulgation of the *Ley de Consulta*, a total of 37 consultations were implemented, 11 of which in the hydrocarbon sector and 12 in the mining sector. Numbers that look small compared to the concessions granted without any consultation.

Many critical aspects have been outlined by Peruvian native communities in relation to the *Ley de Consulta* and its regulatory norm, since several of their requests were not included in the two instruments. Their critiques of the law and its regulating norm in relation to a list of thematic areas are found as follows:

1. *Identification*: in Article 7, the *Ley de Consulta* established that only the direct descendants from native Andean or Amazonian communities, who conserved all their traditional cultural elements, were entitled to the right to be consulted. This provision is believed to exclude some peasant and coastal communities, since all the descendants from the pre-colonial period should be considered native communities (Grupo de Trabajo sobre Pueblos Indígenas, 2012a).
2. *Direct affectation*: Article 1 established that all measures that directly affect Indigenous peoples shall be subject to consultation. But for native organizations the consultations should include also provisions having *indirect* impacts (Grupo de Trabajo sobre Pueblos Indígenas, 2012a).
3. *Responsibility of the Vice-Ministry of Intercultural Affairs*: the Vice-Ministry, as established in Article 19 of the consultation law, is designated to be the institution specialized on Indigenous peoples' rights and consultation. Native organizations have opposed this solution because they believe that such an entity should have higher political status—it should be at least a Ministry—and that employment of Indigenous representatives in its offices should be mandatory. For this reason, they are calling for the creation of an Independent Indigenous

[108] See generally MINEM website: http://www.minem.gob.pe/_detalle.php?idSector=1&idTitular=5945&idMenu=sub5942&idCateg=989, last accessed June 2021.

[109] Defensoría del Pueblo, *El Vigésimo Primer Informe Anual*, 2018, p. 75.

Authority working together with the State's institutions (Grupo de Trabajo sobre Pueblos Indígenas, 2012a);

4. *Elements of unilaterality and centralization*: Consultation proceedings are characterized by a highly State-centred approach, in the sense that the law does not provide for a joint planning process together with Indigenous organizations. The governmental entity in charge of consultation is then able to design the process unilaterally, which means that it is the State who decides which measures are likely to affect Indigenous peoples and which are not (Schilling-Vacaflor & Flemmer, 2016);
5. *Time limits and flexibility principle*: In the Regulating Norm, it is established that the whole consultation process can last for up to a maximum of 120 days. Indigenous organizations do not agree with this vision, but rather with the application of flexibility concerning the timing, which can vary according to the different circumstances of each different community (Grupo de Trabajo sobre Pueblos Indígenas, 2012b);
6. *Suspension of the consultation*: Indigenous organizations, in the draft law negotiations, had called for the possibility of appeal against an ongoing consultation procedure with the effect of suspending the consultation until the dispute has been resolved. But at the time of the adoption, the Regulating Norm was modified in its Article 9, providing no suspensory effect in the case of appeal (Grupo de Trabajo sobre Pueblos Indígenas, 2012a);
7. *Binding force of the agreement and consent*: The law, in Article 15, and its Regulating Norm, in Article 1, established that agreements reached in the consultation process were binding. Indigenous organizations claimed that this disposition could not be considered credible, since the government had not respected what had been established in the negotiations on the Regulating Norm. Also, they argued for the necessity to gain consent from Indigenous peoples where the measures imply realization of megaprojects, disposal of toxic waste, relocation or displacement or other fundamental human rights (Grupo de Trabajo sobre Pueblos Indígenas, 2012a);

8. *Role of the State*: In case no agreement can be reached at the end of the consultation process, both the law and its regulating norm, respectively in Article 15 and Article 23, state that it is the State who decides upon the final decision. This decision should be justified and should secure the respect of the human rights of the actors involved. Indigenous organizations are sceptical that this will happen, given the traditional bias the government has demonstrated for extractive industries. Also, the Unity Pact had previously called for the necessity of not implementing *tout court* a project when it would affect Indigenous peoples' rights. Consultation processes are indeed not only a means of participation for native communities, but they also represent a way to secure the respect of their human rights and sharing of benefits in projects (Schilling-Vacaflor & Flemmer, 2013).

According to the critical analysis of the National Coordinator of Human Rights in Peru, the consultation law and its regulating norm could have started a new process of dialogue with native people, but apparently, this was not the case. The National Coordinator argued that the whole process of negotiations had been characterized by serious deficiencies, like lack of legitimacy due to the scarce participation of national and regional Indigenous organizations, the State's interest in accelerating the process (impacting on the principle of time flexibility) and disregard for what had been previously agreed with Indigenous representatives. In particular, the coordinator stated that some of the dispositions of the Regulating norm had to be considered illegal and unconstitutional: five of its articles did not include what had been previously agreed in the consultation process, reflecting the absence of commitment by the State in respecting compromises agreed with Indigenous peoples (Grupo de Trabajo sobre Pueblos Indígenas, 2012a).

Native organizations argued that provisions about free, prior and informed consultations had to be respected even before the promulgation of the *Ley de Consulta*, since, as previously outlined, Convention 169 has constitutional status and its provisions should be, theoretically, self-executing. For this reason, they contended that Indigenous peoples already had the right to be consulted since 1995 and the State should

nullify all the concessions granted without consulting affected native communities.[110] The Peruvian Constitutional Court seemed to agree with this perspective in the ruling regarding the Wampis population and their right to be consulted on the granting of extractive concessions on their territories. The Court argued that, since the State had ratified Convention 169 in 1995, it had committed to conduct consultations on any administrative and legislative measure affecting Indigenous peoples.[111]

The criticism by Indigenous organizations of the provisions contained in the *Ley de Consulta* and its Regulating norm derives from a context which has demonstrated in many ways the State's bias towards extractive industries and private investments in native territories. As a consequence of these economic policies, the State has chosen to implement in its national legislation the weaker version of consultation rights, harmonizing the *Ley the Consulta* with the consultation standards instead of taking into account the consent provisions contained in the UNDRIP and in the Inter American system's rulings. And in addition, it has lacked implementation of the adopted standards.

The escalation of socioenvironmental conflicts, which have not diminished after the implementation of the *Ley the Consulta*, can be interpreted as a demonstration that this law is not adequately working in terms of conflict prevention or resolution in Peru. The different perspectives and the unresolved tensions about how consultations are being implemented are the reason why such conflicts continue to emerge. Prior consultation could work as an effective method against the rise of such socioenvironmental conflicts, but it must be carried out in a true democratic, participative and multicultural manner which includes Indigenous peoples' claims and perspectives, especially when human rights are at stake. Such problematic aspects should also be duly considered by international

[110] Ibid.

[111] The most relevant argument was outlined in point 49, where the Court affirmed: "We consider that the obligation for the Peruvian state to realize previous consultation every time are involved Indigenous people dates back to 1995 with the entry into force in Peru of ILO Convention 169" and also in point 50, stating: "Even though the Covenant does not establish specific proceedings on how to realize such a consultation, it is certain that provides a clear and sufficient legal framework for an immediate application by the States". See also: *Decision of the Constitutional Court of Lima: Application n. 32365-2014 Kayak Jempekit et al. vs. MINEM, MEM and PeruPetro*, 28 March 2017 (translation from Spanish by the author).

programmes and funds when implementing a project in Peru (or in countries with similar issues) in order to avoid the crystallization of practices that foment environmental injustice. The next part of the chapter specifically addresses similar problems with regard to environmental conservation practices aimed at reducing climate change emissions.

Biodiversity Conservation, Emissions Reductions and Indigenous Customary Law

REDD+, Conservation and Commodification of Forests

The relationship between REDD+ programme and Indigenous peoples has been extensively debated in academic literature (e.g. see: Aguilar-Støen, 2017; Jodoin, 2017; Maharjan & Maharjan, 2017; Poudyal et al., 2020; Raftopoulos & Short, 2019; Wallbott & Florian-Rivero, 2018; Wallbott & Recio, 2018). The aim of this section is to give an overview of the implications of REDD+ projects and the commodification of forests for Indigenous peoples, highlighting the importance of respecting participatory and procedural rights in environmental conservation measures. Environmental conservation and the so-called Nature-Based Solutions policies, in some specific cases, can undermine Indigenous peoples' livelihoods, whereas as conservation is intended by developing agencies as the absence of human beings from a determined geographical area that needs to be protected.[112] Consequently, the creation of conservation

[112] The NGO Cultural Survival has been advocating since several years for a campaign entitled "Decolonize Conservation". More details at https://www.survivalinternational.org/conservation, last accessed September 2022. In particular, Nature-Based Solutions provide a new approach to what used to be called "carbon offset". In this context, "Nature" is considered a capital or an asset, something to give a price and to market. Suppose, for example, that Shell (one of the major supporters of Nature-based Solutions) is emitting an X amount of CO_2 into the atmosphere: in order to be able to claim to meet its commitments, Shell could continue to release exactly the same amount of CO_2, provided it supports at the same time or the creation of a Protected Area that stores the same amount of CO_2 or the planting of a number of trees that are supposed to absorb the same amount. This exchange, of course, takes place in the financial markets through the creation of carbon credits. This is what governments mean by "net-zero" or "zero emissions": they do not aim to bring their emissions to zero, but simply declare to "compensate" those emissions somewhere else. Greenpeace website at https://www.greenpeace.org.uk/news/golden-age-of-greenwash/, last accessed September 2022.

areas aimed at reducing GHGs has sometimes implied the forced eviction of Indigenous peoples from their ancestral territories with a view of commercializing the so-called carbon stocks deriving from reduced emissions. In academic literature, we can indeed find several references to the so called "conservation refugees" (Agrawal & Redford, 2009; Doak et al., 2015; Dowie, 2011; Hoefle, 2020). Therefore, some instances of the REDD+ conservation and other Nature-Based Solutions measures represent a model of conservation that implies the loss of collective property rights for Indigenous peoples.[113] This model is somewhat antithetical to the biodiversity conservation model represented by the institution of community-conserved areas, which is described in the next section.

Conservation of forests as a mean to gain financial resources has progressively been affirmed and legitimized in the UNFCCC context. The meaning of REDD+ has been gradually reshaped, starting from Reducing Emission from Deforestation—as submitted in COP21,[114] to measures against degradation (Reducing Emissions from Deforestation and Forest Degradation), and finally "enhancement of carbon stocks" through afforestation, reforestation and sustainable forest management measures (REDD+). With the Bali Action Plan in 2007, REDD+ became one of the most important elements in climate change governance.

The construction of the discourse around avoided deforestation as an object of economic advantage dates back to the 1960s and 1970s, when forests started to be conceptualized as "carbon sinks" while deforestation started to be accounted in GHGs emissions (Lohmann, 2005). Within the Kyoto Protocol, avoided deforestation measures started to play a

[113] Nature-Based Solutions are also at the centre of the 30 by 30 worldwide initiative for governments to designate 30% of Earth's land and ocean area as protected areas by 2030. This initiative is also part of the Post-2020 Biodiversity Framework analysed later in the chapter.

[114] The question of avoided deforestation as a commodification of forests for carbon credits was reintroduced, after the initial exclusion from the Clean Development Mechanism in favour of afforestation and reforestation measures, by the Coalition for Rainforest Nations. It posed great emphasis on the economic opportunity deriving from the conservation of forests and their proposal was reiterated by various state and non-state actors such as the World Bank Group and Norway (Stephan, 2012).

gradually more important function, although they were excluded from the Clean Development Mechanism. The REDD+ scheme was eventually adopted at COP15, welcomed by industrialized countries that could choose between reduction of emissions and removal of emissions through the purchase of permission credits derived from forest conservation (MacKenzie, 2009). From this perspective, REDD+ carbon market might result in a decentralization of emissions reductions, allowing a country to maintain its business-as-usual: due to interlinks in the carbon market, "a hectare of forest in the Brazilian Amazon not being cut down is suddenly commensurable with the emissions of a coal fired power plant in Britain, a blast-furnace in Germany, a cement plant in India or a wind farm in China" (Stephan, 2012).

For this reason, emission credits deriving from forests conservation raise relevant moral questions. It seems that developed countries are able to generate low-cost emission reductions, irrespective of the processes that have generated such credits. Indigenous peoples have been negatively affected by governmental forest conservation projects, but few organizations and states are still opposing it at the international level—for example, Bolivia,[115] the Indigenous Environmental Network and Friends of the Earth. REDD+ has been criticized because it does not constitute an effective mechanism to combat deforestation, as it permits the use of plantations as a way to gain carbon credits. Furthermore, the use of economic means to reward avoided deforestation does not constitute an effective way to reach the objective of GHGs reductions, as it will permit Westernized economies to have "polluting permissions". Other

[115] "In international negotiations some countries proposed the commodification of nature with the false assertion that it is only possible to take care of and to conserve something that has a price and a owner. Their proposal is to give importance to only one function of the forests, namely absorbing carbon dioxide and to the emission of 'certificates', 'grants' o 'carbon rights' to be commercialized in a carbon market. […] Once again the South will finance the North, since a Northern industry will save money by buying carbon credits from southern forests […] So it will start another stage in the privatization of nature as never seen before, and it will extend to water, biodiversity and what they call 'environmental services'. While we affirm that capitalism is the cause of global warming and destruction of forests and Mother Earth, they look for how to expand capitalism under the name of 'Green Economy' and through commodification of nature", Morales E. *La naturaleza, los bosques y los pueblos indigenas no estamos en venta*. REDD Monitor, 2010 (Translated by the author from Spanish) at http://redd-monitor.org/wp-content/uploads/2010/09/ESP-Presidente-Morales-a-los-Pueblos-indigenas-reunidos-en-Quintana-roo-28.09.10.pdf, last accessed September 2022.

economic solutions should direct investments to direct and community-based forms of conservation, taking into account ecosystem restoration, sustainable management and the rights of indigenous peoples (Hall, 2008).

The reconceptualization of forests as "carbon sinks" and making credits out of conservation does understand forests only in terms of their economic value. Forests are much more than an easy way to make credit. They represent a source of biodiversity and oxygen, and, for Indigenous or local communities, they can represent their homes, their source of food, water and shelter. Not only forests are crucial for the continued existence of Indigenous peoples' traditional livelihoods, but they are also fundamental for culture, beliefs and religious aspects. REDD+ conservation programmes have direct consequences on the access to land and forests for indigenous communities, as "integrity" of environment is intended, in international global governance, as the absence of human beings and human activities in a determined territory (Crabbe & Manno, 2012).

The social impacts of REDD+ projects on Indigenous peoples have been at the centre of multiple levels of concern, from international Indigenous peoples' networks to academic scholars and NGOs.[116] Sixty million Indigenous peoples are almost totally dependent on forests for their livelihoods, which explains the great quantity of debates on REDD+ implications that have been taken place in international fora such as the UNFCCC and the PFII (Eliasch, 2012, p. 9). The opportunity for governments to obtain financial resources out of forests conservation has led to difficult implications for Indigenous peoples, like forced evictions from their ancestral lands. This has been the case of Kenya, where Indigenous inhabitants of the Embobut forest in Western Kenya were forcibly evicted in order to create a conservation area (Atapattu, 2016, p. 116). Forest Peoples Programme made a pressing appeal to the government, urging it to respect human rights when protecting the forest, outlining that forced eviction were not only contrary to international human rights law but also to the Constitution of Kenya which recognizes the right of hunter-gatherer communities to own land.

[116] Global Alliance against REDD, *No REDD papers. Volume one*, Charles Overbeck/Eberhardt Press, Portland, Oregon USA, 2011 at http://www.ienearth.org/docs/No-Redd-Papers.pdf, last accessed September 2022.

Participatory rights, FPIC and respect for the knowledge and rights of Indigenous peoples are indeed the key safeguards elaborated by REDD, starting from the Poznan decision of COP14 when it requested Parties to submit their own views on indigenous issues.[117] Safeguards were seen both as a way to manage risks of not implementing conservation projects, but also as a potential way to secure indigenous rights to land. However, already in the negotiation process on the elaboration of safeguards, the reference to indigenous peoples' *rights* was omitted, causing civil society protests and a call for the recognition of UNDRIP norms on FPIC in the COP14 Decision.[118] After Parties' submissions to the UNFCCC Subsidiary Body for Scientific and Technological Advice, seven safeguards were adopted with the Cancun Agreement, which established that "full and effective participation of relevant stakeholders, inter alia, indigenous peoples and local communities" should be ensured when implementing REDD projects.[119]

However, the verification of the correct implementation of safeguards to ensure social feasibility and respect of environment in REDD+ programmes still remain a substantially country-driven task. In the Durban COP, it was agreed that countries hosting conservation projects have the duty to submit information on the respect of safeguards.[120] This country-driven approach was confirmed by rules establishing the Warsaw Framework, which set for parties to provide summaries on the application of safeguards via the web platform. This model of result-based finance provided for the delivering of payments only when safeguards are respected.[121] But the Framework does not establish any technical review nor any redress mechanism, which has fostered criticism on the actual assessment of respect of human rights.[122] However, the implementation of safeguards can be understood only as a part of the broader REDD+ policy dialogue,

[117] See UN-REDD+ web platform: https://redd.unfccc.int/fact-sheets/safeguards.html, last accessed June 2021.

[118] Chris C. *Rights Struck from Draft Text on REDD*, REDD-Monitor 9 December 2008, available at http://www.redd-monitor.org/2008/12/09/rights-struck-from-draft-text-on-redd/, last accessed June 2019.

[119] UNFCCC Decision 1/CP.16, para 72.

[120] UNFCCC, Decision 12/CP.17, para 3.

[121] UNFCCC, Decision 9/CP.19, para 4.

[122] https://www.climatealliance.org/fileadmin/Inhalte/7_Downloads/Unreddy_EN_2016-02.pdf, last accessed September 2022.

which consists of an emerging transnational network which includes internal guidelines (such as countries' development agendas), policies and voluntary Codes of Conduct of implementing agencies (such as the Nature Conservancy and Flora and Fauna International) (Dehm, 2016). Also, other safeguards have been developed outside the UNFCCC negotiation processes, made of multilateral and bilateral agreements for the support of REDD+ readiness activities (e.g. the safeguards of the Forest Carbon Partnership Facility[123]) (Colchester & Farhan Ferrari, 2007).

Indigenous organizations have framed REDD+ projects as new forms of colonialism or "CO_2lonialism",[124] undermining their right to access to land and control over resources in the name of green economy. REDD schemes would indeed represent a form of "green grabbing", where Indigenous peoples' lands are used to make profits out of a top-down approach to conservation (Fairhead et al., 2012).[125] Other groups, on the contrary, have asserted that REDD+ programmes could benefit indigenous communities by fostering a community-based conservation structure which would grant territorial rights.[126] These two different positions, one of radical reject of REDD+ and the other which sees conservation projects as opportunities for securing land rights to native communities, have brought to a polarization of IPOs opinions on REDD+.

Even though REDD+ could represent both a challenge and an opportunity for Indigenous peoples, participatory rights and FPIC should never be interpreted as a utilitarian instrument to be used by countries in

[123] UN-REDD Programme and Forest Carbon Partnership Facility (FCPF), *Guidelines on Stakeholder Engagement in REDD+ Readiness with a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities*, 20 April 2012, available at http://www.un-redd.org/Stakeholder_Engagement/Guidelines_On_Stakeholder_Engagement/tabid/55619/Default.asp, last accessed September 2022.

[124] Indigenous Environment Network, *REDD: Reaping Profits from Evictions, Land Grabs, Deforestation and Destruction of Biodiversity*, Indigenous Environment Network, 2009; and *No 'to CO2lonialism! Indigenous Peoples' Guide: False Solutions to Climate Change*, Indigenous Environment Network, 2009.

[125] At the COP20 in Lima, a 'Call to Action to Reject REDD+ and Extractive Industries to Confront Capitalism and Defend Life and Territories' was signed by over 100 civil society groups, at https://wrm.org.uy/wp-content/uploads/2014/11/Call-COP-Lima_NoREDD.pdf, last accessed September 2022.

[126] Sena P K, Cunningham M, Xavier B. *Indigenous People's Rights and Safeguards in Projects Related to Reducing Emissions from Deforestation and Forest Degradation: Note by the Secret*ariat, UN ESCOR, Permanent Forum on Indigenous Issues, 12th sess, Agenda Item 5, UN Doc E/C.19/2013/7 (5 February 2013), at https://digitallibrary.un.org/record/745098?ln=en, last accessed September 2022.

order to achieve their objectives. However, FPIC has often been interpreted as a "risk management strategy", while rights have been framed to serve "effectiveness and efficiency objectives" (Dehm, 2016). Framing communities' opposition as an economic risk, or FPIC as a way to ensure monetary advantages does reduce indigenous communities as actors used for their political expediency. In this case, community support is seen as a way for countries to pave the road for "politically correct" forms of forest conservation. The lack of consent interpreted as an economic risk is present in "best practice" manuals on FPIC in REDD+.[127] This utilitarian approach to indigenous peoples' participatory rights is in open contrast with the theoretical rationale of FPIC, which is intended as an iterative and good faith process, aimed at fostering respect of multiple rights, including the right to self-determination. It cannot be reduced to an economic strategy to avoid risk, as it also entails the right to *withhold* consent.

Indigenous and Community Conserved Areas

Biodiversity conservation is central to achieve climate change mitigation, as previously outlined. International and national governance has therefore adopted a strong focus on biodiversity conservation in order to enhance climate mitigation, which implies the creation of environmental conservation areas in order to cut GHGs emissions. In addition, treating biodiversity in a book about climate justice is important because, for Indigenous peoples, biodiversity loss and climate change are two sides of the same coin, and they should not be separated as two different legal and political regimes. As already explained elsewhere in the book, Indigenous knowledge has been inscribed in such conservationist discourse because of its intrinsic philosophy of sustainability that implies a sustainable use of natural resources, conservation of biodiversity and a general respect for

[127] For instance, the policy brief *Free, Prior and Informed Consent in REDD+: Principles and Approaches for Policy and Project Development*, published by the Centre for Forests and People, emphasizes that forest-dependent communities are 'essential to the success of REDD+' and that FPIC processes can assist 'in successfully implementing pre-determined REDD+ objectives (Dehm, 2016).

the environment that Westernized societies seem lacking. Conservation of biodiversity in Indigenous territories and lands is deeply entrenched with the existence of territorial rights, Indigenous customary law and the continued access to natural resources and sacred sites to Indigenous peoples.

Several conservation areas have been traditionally realized through eviction and appropriation of Indigenous lands. In instituting the first protected areas in 1872 (Yellowstone National Park), and in 1890 (Yosemite National Park), the US government violently expelled the Native Americans who lived in and depended on the natural resources in those areas. This tactic was motivated both by the perception of parks as uncontaminated lands and by the economic interests of lobbies that wanted to develop the tourism industry. Native peoples were seen as an obstacle to those interests. From 2003 on, there has been a shift in conservation policies, thanks to the work of the International Union for the Conservation of Nature (IUCN) and the application of provisions inscribed in the Nagoya Protocol.[128]

The Nagoya Protocol promotes the creation of protected areas in relation to biodiversity conservation.[129] This particular feature must be read in conjunction with the provisions that are related to Indigenous knowledge relevant for conservation purposes and to the protection of customary use of biological resources in accordance with traditional practices that promote conservation and sustainable use of resources—as established by Articles 8(j) and 10(c). These provisions bring into being the possibility of creating a decentralized management of biodiversity conservation, where non-State actors such as Indigenous peoples play a key role. Even though the CBD and the Nagoya Protocol are not specific in how the governance of conservation should develop, the phenomenon of Indigenous and Community Conserved Areas (ICCAs) is nowadays an institutional form of conservation widely utilized by settler States.

[128] See also: UNGA, Rights of Indigenous Peoples, A/71/229, 29 July 2016.

[129] Article 8(a) of the Nagoya Protocol reads: "[each Party shall] Create conditions to promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, including through simplified measures on access for non-commercial research purposes, taking into account the need to address a change of intent for such research".

The concept of ICCAs has been introduced by the IUCN, a definition that acknowledges that communities' conservation contributes to the preservation of biodiversity:

> ICCAs are natural and/or modified ecosystems containing significant biodiversity values, ecological services and cultural values, voluntarily conserved by Indigenous peoples and local communities, both sedentary and mobile, through customary laws or other effective means.[130]

In 2003, the IUCN congress held in Durban was perceived as a turning point for what concerns conservation. In fact, in this congress conservation was emphasized how conservation should not be dogmatic and conceptualized as a top-down, but it should include more open and participative approaches (Borrini-Feyerabend et al., 2004). The Durban Accord Action Plan adopted at the conference calls upon countries to promote this conservation approach by ensuring effective means for the engagement of Indigenous peoples, local communities and other local stakeholders in conservation. This step represented an advancement compared to the traditional conceptualization of conservation which excluded Indigenous peoples from accessing their ancestral lands and resources. ICCAs foster an inclusive approach to conservation, promoting the direct involvement of Indigenous peoples, the "major players" in decision-making regarding the conservation site, with a de facto and/or de jure capacity of enforcing regulations.

In 2004, ICCAs were recognized as valid governance category by the World Commission on protected areas. This initiative is in line with provisions contained in the CBD. In fact, Article 10(c) already mentions the importance of respecting and integrating traditional practices into conservation management systems.[131] In the side of the call for achieving inclusive participation and community inclusiveness in conservation, the 7th CBD Programme of Work on Protected Areas (PoWPA) held in Kuala Lumpur in 2005 adopted a directive to enhance and secure

[130] IUCN website, at https://www.iccaregistry.org/, last accessed June 2021.

[131] Article 10(c) calls States parties to "protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements".

involvement of Indigenous and local communities and other relevant stakeholders.[132] More recently, the 2011–2020 Aichi Biodiversity Targets adopted at the 10th Meeting of the Conference of Parties to the CBD in Nagoya in 2010 placed considerable prominence on the role of local and indigenous communities in conservation through participatory approaches.[133] On the CBD website are now available the results of the implementation of the Aichi Targets in State Parties. Regarding target 18, which concerns the full integration and implementation of the CBD for what regards its dispositions, protocols and guidelines in relation to Indigenous knowledge, innovations and practices relevant for the conservation and sustainable use of biodiversity, it is possible to ascertain how many countries have achieved the target. By mid-2017, over 64 countries had recognized the existence of ICCAs, while 28 countries had properly registered in the ICCA registry.[134]

Available data on the implementation of Aichi Targets shows that 64% of countries did not report any data, which includes States that are not parties to the CBD such as the US; among the countries that reported data, 7% registered no progress towards the achievement of the target, while 46% reported an insufficient rate of implementation (which includes Canada, Cameroon, Belize, Chile, Ethiopia and Guatemala). Thirty-six per cent reported a sufficient implementation rate (including Brazil, Botswana, Costa Rica, India and Indonesia), while 5.9% exceeded implementation expectations (e.g. Costa Rica, the Dominican Republic, Jordan, Malaysia and Peru). A general challenge noted in a CBD report

[132] The PoWPA target regarding participation of Indigenous peoples is set out as "Full and effective participation by 2008, of indigenous and local communities, in full respect of their rights and recognition of their responsibilities, consistent with national law and applicable international obligations, and the participation of relevant stakeholders, in the management of existing, and the establishment and management of new, protected areas".

[133] The "Strategic Goal E" of the Aichi targets was "Enhance implementation through participatory planning, knowledge management and capacity building". Target 18, contained in the Strategic Goal, reads: "By 2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels".

[134] See also ICCAs registry, at https://www.iccaregistry.org/en/explore, last accessed June 2021.

was the lack of initiatives and resources for incorporating and reflecting Indigenous knowledge in issues related to conservation.[135]

The Post-2020 Global Biodiversity Framework was discussed and adopted during the 15th COP meeting held in Kunming, China in October 2021 and May 2022.[136] In its decision 14/34, the COP adopted a comprehensive participatory process for the preparation of the post-2020 global biodiversity framework, which included different initiatives related to the inclusion of Indigenous peoples in the process, with a view to move towards the 2050 vision of "living in harmony with nature".[137] In the Annex to the report related to the implementation of Aichi Target 18 are outlined Indigenous peoples' claims and requests for the realization of the next global biodiversity framework. These requests include, inter alia, the use of a human rights-based approach to deal with biodiversity and conservation governance, and the creation of a mechanism that addressed the issues of criminalization of human rights defenders. As an indicator for the respect of the right to self-determination, they choose the level of implementation in State parties of UNDRIP, which again stresses the importance given to this legal instrument for advancing Indigenous rights.[138]

[135] See also CBD, Subsidiary Body on Implementation, Analysis of the Contribution of Targets Established by Parties and Progress towards the Aichi Biodiversity Targets, CBD/SBI/3/2/Add.2, March 2020, available at https://www.cbd.int/doc/c/f1e4/ab2c/ff85fe53e210872a0ceffd26/sbi-03-02-add2-en.pdf, last accessed September 2022, and CBD website at https://www.cbd.int/aichi-targets/target/18, last accessed June 2021.

[136] To access the documents, which also contain the "Kunming Declaration 'Ecological Civilization: Building a Shared Future for all Life on Earth" visit https://www.cbd.int/meetings/COP-15, last accessed September 2022.

[137] The strategic plan 2011–2020 included the objective of "Living in harmony with nature". The plan envisaged that by 2050 "biodiversity is valued, conserved, restored and wisely used, maintaining ecosystem services, sustaining a healthy planet and delivering benefits essential for all people". see also: COP 10 Decision X/2, UNEP/CBD/COP/DEC/X/2, October 2010.

[138] Indigenous claims and requests are summarized in the tables part of the Annex to the document CBD/SBI/3/2/Add.4 published in April 2020. These requests strongly affirm the importance of respecting the right of self-determination of Indigenous peoples and they adopt the narrative of Indigenous peoples as biodiversity defenders and custodians of the environment: "IPLCs are guardians of global biodiversity. With this in mind, we urge Parties to ensure a participatory approach". Through the adoption of this narrative, Indigenous representatives at the CBD called States to enable "100% recognition and protection of our land and territories, as well as their 100% sustainable use".

The Post-2020 draft, however, presents some problematical issues with regard to environmental conservation.[139] According to the draft, "at least 30 per cent globally of land areas and of sea areas" should be conserved through "well-connected systems of protected areas and other effective area-based conservation measures". This aspect is deemed as controversial by IPOs, because conservation and protected areas have often led to evictions, human rights abuses and "green wars".[140] The Marseille Manifesto for the Future of Conservation, a declaration signed by individuals and IPOs, openly criticize this approach of the Post-2020 Global Biodiversity Framework:

> [D]ecades of research and experience have shown that the mainstream approach to biodiversity conservation has had a devastating impact on Indigenous and other local people' lands, livelihoods, and rights. This has largely been based on the flawed thinking that believes in 'nature' devoid of human presence. This single-minded focus has led to a model of conservation that is often violent, colonialist, and racist in approach—seizing and militarizing the land, criminalizing and destroying the ways of life, of Indigenous and local communities, while ignoring their knowledge. This model, despite the pain it causes, has never prevented the destruction of the ecosystems that it claims to be protecting.[141]

Against this backdrop, ICCAs have the potential of representing a counter-discourse to such an approach to conservation. ICCAs can include a great variety of ecological systems, and they can have different

[139] Post-2020 Global Biodiversity Framework draft can be accessed here: https://www.unep.org/resources/publication/1st-draft-post-2020-global-biodiversity-framework, last accessed September 2022.

[140] This aspect has been addressed with concern by different authors. In particular, it has been estimated that if half of the planet would be converted into protected areas, this would result in over one billion people affected, recommending that "the parties to the Convention on Biological Diversity, tasked with negotiating and implementing the post-2020 conservation framework, should apply more holistic, interdisciplinary approaches that take into account social and economic implications across various scales" (Schleicher et al., 2019). Other scholars have focused on studying the militarization and securitization of protected areas (Dwyer et al., 2016; Lombard, 2016), with a focus on "green wars", intended as the violent defence of biodiversity in the context of global conservation (Büscher & Fletcher, 2018). These problems have also been at the centre of the campaign "Decolonize Conservation" promoted by Survival International. More info at: https://www.survivalinternational.org/conservation, last accessed September 2022.

[141] The full text of the Marseille manifesto can be accessed here: https://assets.survivalinternational.org/documents/2019/211013-olon-manifesto-en-es-fr.pdf, last accessed September 2022.

levels of spatial extension. They can be found in terrestrial or maritime settings, and their areas can range from less than one hectare to more than 30,000 km^2 (Oviedo, 2006). The existence of conservation areas is not recent, they have been existing for millennia before they gained legal recognition in the CBD and IUCN system. Conservation areas are, for example, sacred natural sites that have been preserved through centuries and existed long before the arrival of foreign settlers. Such areas sometimes are not even officially recognized by governments, creating a discrepancy between the official interpretations of ICCAs and the reality at the local level.[142] In fact, most of the ICCAs are not formally recognized because of the inherent issues concerning Indigenous land titling, power asymmetries and marginalization, or even political will to enable Indigenous control over natural resources. In addition, where the traditional conservation paradigm is still considered as valid—conservation of natural landscape with no access to communities, with a heavy focus on endangered species conservation—Indigenous ICCAs struggle to fit into this fixed conceptualization (Robson & Berkes, 2010).

These challenging aspects are present in several countries. As an instance, in Chap. 2, I have presented the case of climate injustice that is affecting Yanesha people in the Palcazu valley, Peru. In the dialogues with Yanesha representatives, in addition to their perception on the climatic changes, it emerged their discontent regarding the conservation area that the government established in their ancestral territories. The conservation area, which has an extension of 3,474,470 hectares, was established in 1988 via the adoption of *Resolución Suprema* (Supreme Resolution) n. 0193-88-AG-DGFF. Its main objective is to ensure the supply of wild resources to the Yanesha native communities by reducing external pressure on their territories. It also seeks to ensure the participation of the natives in conservation to promote improvements in their living conditions. Another objective of the conservation area is to protect the sources of rivers and tributary streams on the left bank of the Palcazu River and to serve as a buffer zone for the Yanachaga Chemillén National Park. The conservation area is considered a priority zone for the conservation of the

[142] The ICCA consortium website includes a list of formally recognized ICCAs. Visit: https://www.iccaconsortium.org/, last accessed September 2022.

biological diversity of Peru and, together with the other National Parks, the San Matías–San Carlos Protection Forest and the El Sira Communal Reserve, integrates a proposed area to form the Oxapampa Biosphere Reserve.[143] The reserve has been established "to benefit Yanesha native communities" and this can be considered a particular feature given that in the 1980s, at least in international law, the period of recognition of the importance of biodiversity conservation for Indigenous peoples was still not fully acknowledged.

However, the institution of the Yanesha reserve shed light on some issues regarding conservation. In fact, the Indigenous needs for conservation of biodiversity and the governmental law seem somewhat not perfectly aligned. First of all, the creation of conservation areas in Peru was not a participatory, bottom-up approach, but it was a governmental initiative that was imposed, delegating Indigenous peoples to the "maintenance" of biodiversity and to the control of borders from access of illegal mining and logging companies.[144] This approach seems in contrast with the underlying principle of the constitution of ICCAs, which is by definition established because Indigenous peoples and local communities requested to do so.

Second, there is a problem of lack of economic resources to support communities. What emerged from the dialogues conducted in the Yanesha communities is that the government is delegating to Indigenous peoples the management of conservation areas, for example, avoiding deforestation. As already pointed out in Chap. 2, Yanesha people are receiving a monetary compensation for this service which is far from adequate. Managing such an extensive area, and preventing illegal loggers from accessing it, it is quite burdensome and costly for Yanesha people that also need to survive by employing their time in agriculture activity and other means of subsistence.

Third, there are some issues regarding management plans and different visions on the purpose of conservation that are connected to the above

[143] Peru has a total of ten protected areas at the municipal level: Yanesha, El Sira, Amarakaeri, Ashaninka, Machiguenga, Purús, Tuntanain, Chayu Nain, Airo Pai, Huimeki. See also Peruvian government website, at https://www.gob.pe/institucion/sernanp/colecciones/3247-reservas-comunales, last accessed June 2021.

[144] See also: Peruvian Ministry of the Environment, *Ley de áreas naturales protegidas n. 26834* (2017).

point. Regarding management plans for conservation areas it seems that according to Peruvian conservation areas law not only Indigenous peoples are not receiving financial support, but they are not even supported by the government in the effort of controlling and preventing the access of illegal loggers and mines in the conservation area. The governmental support in delivering such a task is essential, as it is very difficult for Indigenous peoples to fight alone this battle. There is disagreement also on the ultimate finality for conservation areas. For Indigenous peoples, the establishment of a conservation area constitutes a way of obtaining legal recognition of their ancestral territories and preventing illegal access of modern colonizers. For the government, these areas are a part of the national heritage, and they should be subject to careful conservation measures. Consequently, Indigenous peoples need to demonstrate and document how their practices are sustainable and compatible with biodiversity conservation (Nehwing & Wahl, 2004).

There are many other examples of ICCAs all over the world, as reported in the website ICCA consortium, and many others that are not formally recognized as ICCAs but they are definitely Indigenous-led environmental conservation initiatives included in the Protected Planet Initiative, such as the San Matias–San Carlos Forest described in Chap. 2. Among the officially recognized ICCAs in Latin America, there is also the Wampis Nation in Peru and the Kichwa de Sarayaku's *Kawsak Sacha* Living forest. The Autonomous Territorial Government of the Wampis Nation takes care of 1,327,760 hectares of rainforest in an autonomous and coordinated way. This form of territorial governance guarantees the effectiveness, efficiency and sustainability of environmental conservation, which capture around 57 million tonnes of CO_2 a year. This conservation effort is part of the Wampis Strategy, which is inserted in the framework on the Peruvian NDCs.[145] The second example, the Kawsak Sacha *Living Forest*, it an Indigenous-led conservation proposal that "recognizes that the forest is made up entirely of living selves and the communicative relations they have with each other. These selves, from the smallest plants to the supreme beings who protect the forest, are persons (runa) who inhabit

[145] Please access the Wampis Climate Strategy (in English) at this link: https://nacionwampis.com/wp-content/uploads/2021/10/Wampis-Climate-Strategy-final3.pdf, last accessed September 2022.

the waterfalls, lagoons, swamps, mountains, and rivers, and who, in turn, compose the Living Forest as a whole".[146]

In sum, ICCAs can represent a valid model of biodiversity conservation that ultimately contributes to healing the planet and to reducing GHGs emissions. However, these areas should always be realized through a bottom-up approach that ensures the respect of participatory rights and the participatory parity of Indigenous peoples. The aforementioned case evidenced that the tension between the recognition of collective property rights and governmental will to create areas for biodiversity conservation purpose needs to be carefully taken into consideration when establishing a new protected area. Indigenous customary law—the legal systems that govern Indigenous societies—is the law that should autonomously be applied in conservation areas because of its intrinsic connection to ancestral territories.

The Status of Indigenous Customary Law

The existence of Indigenous customary law within settler States constitutes both a challenge and an opportunity. While generally settler States do not appreciate the challenge it may pose to positive law and Indigenous peoples reject the general definition of "customary law" as a colonial imposition that hierarchically distinguishes Indigenous customary law from State-derived law, the notion of Indigenous customary still may serve for strengthening communities claims when facing States and for the inclusion of Indigenous peoples in national and international governance. This is because, as argued further in the section, international law reserves a special place to Indigenous customary law within the biodiversity conservation regime. It is a reductionist approach to consider all existing Indigenous legal systems under the labelling of "customary law". In fact, it is estimated that at present, there are 5000 Indigenous peoples distributed in more than 70 countries, and there are many distinct legal

[146] This discourse resonates particularly with the argumentation around Indigenous anthropomorphism and Rights of Nature discussed in the last chapter. Please refer also to the ICCA registry at https://www.iccaregistry.org/en/explore/Ecuador/pueblo-originario-kichwa-de-sarayaku, last accessed September 2022.

regimes as there are distinct Indigenous peoples.[147] In addition, Indigenous customary law might be used to define the legal regime applied in case of post-conflict situations, failed States and States where different issues may affect the normal functioning of the juridical system (Tobin, 2014, pp. 1–3). Given these multiple facets of the meaning of "customary law", it is important to clarify what we mean by using this term.

Indigenous peoples often reject this notion when applied to their living law and customs. Defining Indigenous law as "customary law" might imply a certain degree of denigration of their legal regimes and subordination to the positive law of the State. This is due to the legacy of colonial and post-colonial regimes and their logic of subordination of Indigenous culture and its consideration as "primitive" and "regressive". Customary law is not, indeed, at the basis of all Indigenous law, which may also be written in written from, positivistic-derived or based on natural law (Borrows, 2010, p. 12). Thus, the term "customary law" has wrongfully been applied to all type of Indigenous peoples' legal system. However, this reference continues to be used by contemporary legal scholars, Indigenous representatives and academics, playing a significant role in international negotiations on the rights of Indigenous peoples. For Tobin, the answer to this question is that

> [i]t does provide the foundations and backbones of the vast majority of [Indigenous regimes]. It is also the one aspect of Indigenous legal regimes that courts have recognized as providing the basis for recognition and enforcement of ancestral rights over their traditional territories, lands and resources. As such it plays a vital role in the definition and protection of the rights of all Indigenous peoples. (Tobin, 2014, p. 9)

Protection and respect of Indigenous customary law is well-established at the international level, even though there is no consensus on the definition of what defines an Indigenous peoples' legal regime. UNDRIP refers to "laws, traditions and customs" in Article 11 and to "due recognition to indigenous peoples' laws, traditions, customs and land tenure systems" in Article 27. It also establishes in Article 31 that Indigenous

[147] UNPFII. *Report of the Secretariat on Indigenous Traditional Knowledge*, E/C.19/2007/10, New York, 2007, p. 12.

peoples have the right "to maintain, control, protect, and develop their traditional knowledge, genetic resources, and intellectual property and requires states to establish effective measures to protect these rights". The term "effective measures", read in conjunction with the other dispositions related to Indigenous customary law, might include the co-operation between settler States and Indigenous customary law in establishing a redress regime which gives due consideration to Indigenous laws and customs.

Convention 169 refers to States' obligations to consider, in application of national laws, with due regard Indigenous "customs and customary laws".[148] However, the most important promise to the consideration of Indigenous customary law have taken place in the international negotiation on access to traditional knowledge and benefit-sharing and in the legal regime established by the Nagoya Protocol. In the CDB Decision VI/10, it is recognized that "indigenous and local communities have their own systems for the protection and transmission of traditional knowledge as part of their customary law". In the same Decision, Parties and governments are invited with the approval and involvement of Indigenous and local communities' representatives, "to develop and implement strategies to protect traditional knowledge, innovations and practices based on a combination of appropriate approaches, respecting customary laws and practices".

In such context, Indigenous peoples have argued that the access regime should be based upon their customary law. The Nagoya Protocol to the CBD, the first binding instrument that formally recognizes the extraterritorial power of Indigenous peoples' customary law, provides an obligation for States to "take into consideration Indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resource".[149] However, the recognition of customary law in the Nagoya Protocol seems problematic for various reasons. With regard to the right over genetic resources, Article 5 provides that benefit-sharing will happen

[148] Convention 169, Article 8.

[149] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Article 12(1).

"in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources". This provision accords a strong decisional power to settler States' national legislations to decide which are rights of Indigenous peoples over resources, and it could be problematic in settler States where Indigenous peoples' rights are not legally protected at the national level. Furthermore, the Protocol does not provide a dispute resolution mechanism or any provision on access to justice. It limits itself at establishing that Parties shall ensure "that an opportunity to seek recourse is available under their legal systems, consistent with applicable jurisdictional requirements, in cases of disputes arising from mutually agreed terms", leaving settler States a lot of discretionary power to decide which mechanisms are enabled to resolve disputes if—for example—a case of biopiracy occurs. Nevertheless, the previously outlined section on the IRM has evidenced how crucial is to have an independent mechanism of conflict resolution when it comes to the implementation of any measure affecting Indigenous peoples' rights.

From a more general perspective, the author of this book agrees with critical legal scholars that evidenced how the inherent problems of the CBD and Nagoya Protocol rely on the very structure of hierarchical power that governs such instruments. The nature and characteristics of what the Western world defines as Indigenous customary law is problematic for what concerns its recognition and inclusion in Western law, that often happen with "translation" of Indigenous oral traditions into Westernized intelligible discourse. Indigenous customary law can be indeed based on oral forms of transmission including songs, myths, prayers and ceremonies that have been transmitted through generations for millennia. It is clear that Indigenous customary cannot be considered as "law" by positivist legal regimes, unless it is reduced in a written form that corresponds to the Western understanding of "truth", and if not, it is therefore excluded or hierarchically considered inferior to State-derived law.[150] In fact, "the positivist understanding of the law precludes the

[150] If we consider a national Court that has to accept orally transmitted laws and myths as evidence of the existence of a law or legal code, we can easily imagine how difficult would be to base a trial on such evidence.

possibility of any law other than positive law" resulting in a silencing of the subject who does not speak in the Western legal language (Vermeylen, 2013). The CBD regime holds the promise of inclusion of Indigenous rights in the legal regime on access to genetic resources and benefit-sharing, but at the same time excludes those Indigenous laws and cosmovision that cannot be translated into Westernized discourses of property, commercialization, monetization of genetic resources and traditional knowledge.

The challenge that the biodiversity regime poses to Indigenous customary law—or in general, the challenge that affects the legal and political system of settler States in which different legal systems coexists—is to what extent non-Westernized law is allowed to be law in practice. It appears that what is needed to be critically rethought is the conceptualization of (positive) law itself, which does not allow for Indigenous law to be external to certain pre-constituted boundaries—for example, Indigenous redress and justice mechanisms are often allowed to work only within the Indigenous community itself. It might be rightfully argued that biodiversity law allows legal pluralism to enter the realm of international law, but for the reasons outlined earlier—oral traditions versus Westernized concept of "truth", for example—it seems like only certain manifestations of Indigenous customary law, such as written provisions, will be considered by settler States as rightful sources of law.[151] Nevertheless, the Nagoya Protocol, as the first binding instrument that acknowledges the extraterritorial power of Indigenous customary law (even though within the boundaries given by settler States' recognition of customary law in the national context), has given international relevance to the de facto existence of legal pluralism.

The meaning and conceptualization of legal pluralism has been extensively treated by several legal theorists (such as Marc Galanter, Sally Falk

[151] For example, in relation to the fact that the Nagoya Protocol fosters an inclusion of Indigenous *communities*' legal pluralism, Cittadino argues that "the Nagoya Protocol embraces a pluralistic notion of indigenous rights. In particular, Article 12 emphasises the role of both community protocols, elaborated by indigenous peoples, and indigenous customary laws in determining States' obligations with regard to traditional knowledge. […]. These explicit references to other legal standards not only contribute to the reinforcement of legal pluralism within the CBD regime, but also confirm the role of customary laws for the identification of indigenous rights" (Cittadino, 2019, p. 343).

Moore, Peter Fitzpatrick, Roger Cotterrell, Gunther Teubner, Boaventura de Sousa Santos, Sally Engle Merry and Masaji Chiba). Legal pluralism commonly refers to the acceptance of the existence of multiple, diverse systems of law that coexist and interact within the borders of a country, a condition generally associated with post-colonial societies (see generally Hooker, 1975). In conclusion to this section, it must be mentioned that the acceptance of legal pluralism by settler States, and specifically of Indigenous law, is part of the broader struggle for justice which aims at asserting the right to self-determination of Indigenous peoples. In addition, the eco-management of ICCAs and associated biodiversity conservation demonstrate that Indigenous law might prevent biodiversity loss and can contribute to mitigating climate change. Legal pluralism challenges the concept of law itself, demanding a critical re-thinking of considering as legal sources only those rules generated by a positivist system. Legal pluralism demands a decolonial approach to law, governance and participatory patterns that would ultimately allow the realization of Indigenous climate justice claims.

Conclusion

Right to consultation and to FPIC is a crucial tool to ensure the respect of Indigenous peoples' right to self-determination, and the continued access to their lands and territories. It is a way to involve Indigenous people in determining their present, their future and the future of their territories and their people, and to prevent illegal actions such as deforestation, evictions and illegal mining are undertaken within their ancestral lands. Yet, as a legal concept, such tools present some ambiguities because the concept of FPIC has not yet been defined in an uncontroversial way—Convention 169 recognized the right to consultation with the aim of obtaining consent, but it does not recognize the right to self-determination, which is key operational concept for FPIC. The chapter has argued that the legal ambiguity between different instruments such as Convention 169, UNDRIP and multiple guidelines and operational tools makes difficult to have a comprehensive concept around Indigenous consent, and this is translated into more or less stringent consultation and consent laws in national practice.

The chapter has evidenced how international environmental law is, in a way, more advanced than international human rights law with regard to participation, consultation and consent procedures. Yet, crucial criticalities remain, as described in the section dedicated to Indigenous critiques to consultation and FPIC procedures. For what regards national law, the case study represented by the Peruvian consultation law has demonstrated that Convention 169 does not automatically translate into legal tools that ensure effective and meaningful participation in legal and administrative decisions that might affect their territories. However, more stringent consent procedures are beings increasingly evoked by binding decision of the Inter-American system, and by some operational tools such as the Indigenous Peoples Policy of the Green Climate Fund, to mention a few. Operationalization of participatory rights is a meaningful expression of climate justice, whereas it contributes to the inclusion of Indigenous peoples and other marginalized communities in climate governance, including for the implementation of green development projects. FPIC and consultation are, at present, the highest standards adopted in international law and policy that guarantee fair and effective participation of Indigenous peoples. However, when such standards are not respected, Indigenous peoples might need to seek redress in courts and other justice and redress mechanisms. In order to complete this overview, the next chapter will focus on additional instances of litigation that involved Indigenous peoples in the climate change context.

In the second part, the chapter has focused on the issues and problems related to participation of Indigenous peoples in forest conservation and protection of biodiversity, concluding that Indigenous-led conservation initiative, such as ICCAs, are an excellent way to realize environmental protection, contrast to climate change, biodiversity conservation and Indigenous self-determination. ICCAs are one example of territorial areas where Indigenous customary law is *the law*, with also the function of helping to protect and restore biodiversity because of its intrinsic connection and embedment with nature. However, the existence of multiple systems of laws within the same State every so often appears problematic by virtue of the tension between the existence of Indigenous nations within settler States.

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6

Climate Change and Litigation: Human Rights as a Tool for Climate Justice

Introduction

This chapter deals with important aspects of the climate justice discourse access to courts, redress, limitations of international human rights courts and the contribution of Indigenous peoples to climate litigation. The chapter is dedicated to the quite recent trend of climate litigation, and the relative cases brought before international and national commissions and bodies by Indigenous peoples concerning the impacts of climate change on their fundamental human rights. Before entering this specific topic, the first two sections will draw upon general conceptualization of climate litigation, with a specific focus on the potential of human-rights based climate litigation in achieving justice and redress.

Climate Litigation and Indigenous Peoples

> Climate change is the ultimate indicator of the extent to which we have violated the laws which govern life—for the first time since our presence on Earth, we humans have destabilised the equilibrium of the whole planet. In essence, this is because of the breakdown in our relationship with our

G. Giacomini, *Indigenous Peoples and Climate Justice*, Energy, Climate and the Environment, https://doi.org/10.1007/978-3-031-09508-5_6

> source of life. As Indigenous shamans say, when we violate Mother Earth, we ourselves become sick and dehumanised. Ecological and social injustices grow. And we end up where we are now—with a myriad of interconnected ecological and social crises. (Hosken, 2011)

Conceptualizing and Quantifying Climate Litigation

The previous chapters have outlined the connection between climate change and the indirect violations of human rights through its negative impacts. It has been evidenced how climate change impacts constitute a case of environmental injustice, whereas the worst consequences are hitting those human communities that have only marginally contributed to GHGs emissions, while issues of participation for marginalized communities in international climate governance persist. The realization of climate justice in practice does take into account not only information and participation as outlined in the previous chapter but also access to justice and the existence of remedies. Recent developments in international law and jurisprudence are on track to tackle climate injustice from a legal perspective, providing, or theorizing, potential remedies for people whose rights have been violated by climate impacts.

This section provides a general conceptualization of climate change litigation, drawing upon the different types of lawsuits that have been brought before courts. After this introduction, it describes the different types of climate liability, especially focussing on the human-rights based type of litigation, exploring how international human rights law is being strategically used in lawsuits. Finally, it focusses on climate change litigation cases brought in international human rights courts by Indigenous peoples, analysing how human rights law has been applied in lawsuits and its potential to ensure liability of settler States for their acts and omissions towards emissions reductions.

Climate change is one of the many facets of biotic impoverishment, which brings direct consequences on human societies, such as reduced quality of life, environmental injustice and political instability (Karr, 2011). Because of such basic human rights implications in recent years, there has been a growing number of cases brought in national, regional and international courts that aim to hold States and private entities

responsible for their acts and omissions regarding climate change policies. Climate litigation is an important tool to increase accountability for failure in the regulation of emissions. Indigenous peoples are using climate litigation to bring States before courts, denouncing important violations of their rights deriving from climate change impacts. Human rights-based climate litigation perhaps holds a promise of justice and redress to those peoples whose rights have been impacted by settler States acts and omissions in climate change governance.

Climate litigation cases have been increasing both in number and typologies of liability. Climate litigation cases are identified in law databases through a keyword labelling system ("climate change", "global warming" "greenhouse gas" "sea level rise" etc.). However, a simple keyword does not automatically identify a climate litigation case, since lawsuits might mention climate change without addressing the enforcement of relevant laws and policies.[1] The 2021 report *Global Trends in Climate Change Litigation* provides an overview of climate change litigation worldwide in the last year (Setzer & Higham, 2021).

Climate change litigation is a relatively new type of lawsuit, whereas environmental cases challenging non-renewable extraction projects have been brought before courts for many years, especially in the US and Australia. But it is in the past decade that a considerable quantity of these cases has been framed as relating to climate change issues (for a review of non-US litigation see Wilensky, 2015).

As per July 2021, climate litigation cases had been brought in more than 39 countries, in addition to cases brought in international human rights systems (IACrtHR, UN Human Rights Committee) and in the European system (EU Court of Justice), for a total of more than 1800 cases worldwide. The US is the country with most climate lawsuits—more than 1300, followed by Australia (115), the EU (58) and the UK (73). The majority of cases are filed by citizens, corporations and NGOs against governments (85% in the US, 81% in the rest of the world), while 80% of cases focuses on mitigation rather than adaptation. This type of litigation directly focuses on predicted climate change impacts on ecosystems, communities and infrastructure, or alleging negative impacts deriving from GHG emissions that have caused problems. Plaintiffs

[1] UNEP, *The Status of Climate Change Litigation – A Global Review*, May 2017.

might either seek to promote climate regulations or oppose existing regulatory measures. However, there are cases at the edge of these two broad categories, for example, those relating to fracking as a mean of exploiting natural gas resources,[2] others where the main argument does not merely rely on a climate law basis, and lawsuits where climate change is a peripheral concern—for example, carbon-trading contracts (Peel & Osofsky, 2015, p. 7).

Plaintiffs that file the lawsuits are generally individuals, NGOs and environmental movements. Their respondents, when not governments, are often the main carbons and oil producers. The transport sector has been at the centre of a case of climate litigation in the UK and India—this sector was not object of litigation procedures in 2019.[3] Cases relating to the financial sector, although they have not been analysed by legal scholars, are present in climate litigation. Finance plays a pivotal role in climate change governance: on the one hand, it contributes to adaptation and mitigation—see, for example, the GCF—on the other hand, it worsens the impacts of climate change when financing high-emissions businesses.[4]

Climate litigation has been conceptualized and categorized by legal scholars who have been investigating its potential influence as a regulatory pathway for States and companies. As suggested throughout the present work, current intergovernmental climate governance instruments might not be necessarily sufficient to ensure the needed responses to climate change impacts in a just and equitable way. Thus, climate litigation might serve as an important instrument to strengthen climate governance and enforce States' obligations in terms of emission reductions.

For the purposes of this chapter is relevant to distinguish between human rights-based climate litigation and other types of climate litigation. Human rights-based climate litigation relies on international and

[2] The relationship between fracking and climate change is quite complex, as it might result in a diminution of coal use in the short term through substitution with gas, but in the long term, it would result in increased emissions. (Howarth et al., 2011).

[3] In the UK, there has been a case of climate litigation for the enlargement of the Heathrow airport in the Court of Appeal (*Plan B Earth v. Secretary of State for Transport*), and in India, courts have issued orders in the areas of tourism and transport to ensure more climate-friendly outcomes (Setzer & Byrnes, 2020, p. 24 and p. 10 respectively).

[4] See, for example, Federal Court of Australia, *Abrahams v. Commonwealth Bank of Australia*, 2017.

national human rights law to ask governments and corporation to reduce emissions on the basis that climate change provokes important violations of human rights. In May 2021, there were as much as 112 cases (out of the 1841 cases) that relied in whole or in part on human rights (Savaresi & Setzer, 2021). This "rights turn" in climate change litigation aims at regulating climate policies, whereas the international legal regime does not provide for enforcement or accountability tools when States do not meet their emissions reductions obligations (Peel & Osofski, 2018). The other types of litigation, namely those concerning non-human rights-based cases, might regard, for example, investor-state dispute settlement; public nuisance; failure to adapt; public assembly; and public trust. This chapter will focus most on human rights-based climate litigation, evidencing how Indigenous peoples are using this tool to pursue climate justice.

Among the hundreds of lawsuits filed in the US, the most well-known and cited example of climate litigation is represented by *Massachusetts v. United States Environmental Protection Agency (EPA)*, the first US Supreme Court decision on climate change matters.[5] It recognized that the Clean Air Act provides the US government with the authority to regulate greenhouse gas pollution, the main contributor to global climate change. The amendments made to the US Clean Air Act in the 1970s provide the legal basis for most of the climate litigation in the US. Recent significant regulations of US motor vehicles stem from the case *Massachusetts v. EPA*, where the Court found that the EPA failed to regulate GHG emissions and requested that it "ground its reasons for action or inaction in the statute". The EPA has, since then, engaged in regulating activities related to the health and welfare impact of motor vehicles and has also set emission limits for power plants (Markell & Ruhl, 2012). However, this new regulatory activity has attracted a wave of anti-regulatory lawsuits which aim to challenge the role of the EPA, but the Supreme Court has not been receptive to such claims (Peel & Osofsky, 2015, p. 7).

[5] *Massachusetts v. EPA, 549 U.S. 497* (2007). For complete documentation visit Columbia Law School website at http://columbiaclimatelaw.com/resources/state-ag-environmental-actions/massachusetts-v-epa/, last accessed September 2022.

Setzer and Vanhala have reviewed existing literature in climate litigation, categorizing the different research trajectories that have been taken by English-speaking scholars (Setzer & Vanhala, 2019). Analysing literature on climate litigation is a useful way to understand present and past trajectories of such lawsuits and the spectrum of litigants bringing cases before courts. In fact, lawsuits attempting to enforce climate action often result in influencing law and policy. Thus, the role of courts could become fundamental in the overall regulatory framework of climate change which includes corporate behaviour. Climate change litigation can be considered "more radical than traditional climate activism", since it tries to "challenge the establishment through the process of the establishment". (Peel & Osofsky, 2015, p. 31). Indeed, early climate litigation research reflects the approach that sees climate litigation as a way to enforce or improve national legislation, given the failure of reaching an effective international binding agreement at the 2009 COP in Copenhagen (Gupta, 2007; Preston, 2011; Vanhala, 2013). This type of approach has been challenged by the adoption of the Paris Agreement, which recognized the fundamental role of national policies and NDCs in shaping future climate governance (Falkner, 2016). At this point, most parties to the Paris Agreement have enacted climate national climate legislation—139 countries have adopted framework law on adaptation and mitigation.

At the opposite end of the spectrum, quite paradoxically, climate litigation can aim to deregulate climate law, generally to the advantage of corporations and businesses. Such cases are actually the first that were collected in climate change litigation databases, and this is where the contemporary climate change litigation momentum began. In the US and Australia in particular, advocates have been using litigation to limit climate action, preventing or stalling climate policies from being implemented. This type of litigation has a direct regulatory effect on national legislation through the traditional power of courts to interpret statutory law and shape constitutional doctrine. For example, antiregulatory claims might be brought when the implementation of an adaptation or mitigation strategy violates constitutional protections: in the US compliance issues with the Commercial Clause are at the heart of arguments against climate-related legislation such as California's Low Carbon Fuel Standard,

Colorado's Renewable Energy Standard, and the Minnesota Next Generation Energy Act (Peel & Osofsky, 2015, pp. 37–39). In these cases, climate litigation uses the norms of the US federal constitution in order to challenge the enforcement of climate law and regulations, including transition to renewables (Markell & Ruhl, 2012).

As previously affirmed, climate litigation can be classified in two main branches: litigation against governments and public bodies and cases against private corporations. Such lawsuits aim to seek enforcement of existing law, increase mitigation ambition and consideration of climate change in environmental policies. For example, the case of *Urgenda Foundation v. State of the Netherlands* is considered a high-profile case in climate litigation literature as an example of litigation against a government, and also an important case of human rights-based climate litigation. The Court recognized the Urgenda Foundation's claims as legitimate and ordered the State to take effective action to address climate change: in October 2018, the Court rejected the government's objections, setting an obligation to reduce emissions by 25%—compared to pre-industrial levels—by 2020 to fulfil its duty of care to protect Dutch citizens against the imminent danger caused by climate change (Bergkamp & Hanekamp, 2015; Butterfield, 2018; Cox, 2016; De Graaf & Jans, 2015).[6] *Juliana v. US* is considered another landmark case and it has been recently discussed (June 2019) before the Ninth Circuit Court of Appeals in Portland (Oregon). In the lawsuit, representatives of youth plaintiffs asserted the violation of the basic human rights to life, liberty and property perpetrated by the government's actions that contribute to climate change.[7] The definitive decision in this case could have a potential impact on the determination of the government's regulatory action to support renewable energies over fossil fuels. Cases such as *Urgenda* and *Juliana* are inspiring the filing of lawsuits based on similar assumptions and objectives, such as *Friends of the Irish Environment v. Ireland*, which argues that the Irish government's approval of the National Mitigation Plan in 2017 violates Ireland's Climate Action and Low Carbon Development Act

[6] See generally: *Urgenda Foundation v. The Netherlands* [2015] HAZA C/09/00456689 (June 24, 2015); aff'd (Oct. 9, 2018) (District Court of the Hague, and The Hague Court of Appeal).

[7] Updates on the case available at the database on Climate Case Chart, available at http://climatecasechart.com/case/juliana-v-united-states/, last accessed September 2022.

2015, the Constitution, and human rights obligations under the European Convention on Human Rights (right to life and the right to private and family life).[8]

Among the human rights-based cases brought against governments, *Future Generations v. Ministry of the Environment and Others* is of particular interest.[9] It was filed by a coalition of 25 plaintiffs in Colombia to stop deforestation in the Amazon rainforest since it was violating existing legislation and fundamental human rights, such as the right to a healthy environment, life, food and water. The Court held that the "fundamental rights of life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem". It further acknowledged the Colombian Amazon as a "subject of rights" in the same manner that the Constitutional Court recognized the Atrato River. The Supreme Court declared that the Colombian Amazon accordingly was entitled to protection, conservation, maintenance and restoration. The Court ordered the government to formulate and implement action plans to address deforestation in the Amazon. This ruling relates to the characteristics of the Earth Jurisprudence already analysed in Chap. 2.

The second general type of climate litigation is represented by those lawsuits brought against corporations, especially those corporations known as "Carbon Majors" of the fossil fuel and cement sector (Ganguly et al., 2018; Savaresi & Hartmann, 2020). In general, these claims are structured on the basis that GHG emissions have largely contributed to climate change, and they argue for increased regulatory control (Hilson, 2010). Litigation against corporations began in the 2000s but, at the beginning, it was mostly ineffective. Starting in 2015, cases began to be framed in terms of scientific certainty, which renewed the opportunity for corporations' liability to be framed in terms of a failure to lower GHG emissions. Plaintiffs are currently trying to hold the fossil fuel industry

[8] See also: *ENVironnement JEUnesse v. Canada* (2018), *Notre Affaire à Tous and Others v. France* (2018), the *People's Climate Case v European Parliament and European Council* (2019). This last case involved also participant from the Saami Indigenous community, see also People's Climate Case website: https://peoplesclimatecase.caneurope.org/who-we-are/, last accessed September 2022.

[9] For full documentation on the case, consult Climate Case Chart at http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/#:~:text=On%20April%205%2C%202018%2C%20the,Amazon%20as%20a%20%E2%80%9Csubject%20of, last accessed September 2022, database at: http://www.lse.ac.uk/GranthamInstitute/litigation/future-generations-v-ministry-of-the-environment-and-others/, last accessed September 2022.

responsible for loss and damage, making them accountable for millions of dollars in climate adaptation costs, as in the case of *Pacific Coast Federation of Fishermen's Associations, Inc. v. Chevron Corp*.[10] This case represents an initiative taken by a commercial fishing industry trade group to hold fossil fuel companies liable for adverse climate change impacts in the ocean waters off the coasts of California and Oregon, which resulted in "prolonged closures" of Dungeness crab fisheries. Other important lawsuits were filed against industries who failed to incorporate climate risks perspectives into investments, for example, in *Conservation Law Foundation, Inc. v. Shell Oil Products US* (2017– pending) and *Sarah Von Colditz against ExxonMobil* (2019–pending).[11]

In conclusion, it can be argued that climate litigation is following five main trends: holding governments to their legislative and policy commitments;[12] linking the impacts of resource extraction to climate change and resilience issues;[13] establishing that particular emissions are the main cause of adverse climate impacts;[14] establishing liability for failure to adapt to climate change;[15] and applying the public trust doctrine and the principle of intergenerational equity to climate change (Michael & Gundlach, 2019).[16] The proliferation of climate change litigation has addressed a variety of different issues, ranging from development initiatives,

[10] For the whole documentation of the lawsuit visit Climate Case Chart: http://climatecasechart.com/case/pacific-coast-federation-of-fishermens-associations-inc-v-chevron-corp/, last accessed September 2022.

[11] Other instances of lawsuits against fossil fuel companies (US) include *State of Rhode Island v. Chevron* (2018), *Santa Cruz v. Chevron Corp.* (2017); *City of Oakland v. BP p.l.c.* (2017); *City of New York v. BP p.l.c.* (2018); *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc.* (2018); and *King County v. BP p.l.c.* (2018).

[12] See, for example: *Leghari v. Republic of Pakistan* (2015); *Urgenda Foundation v. Kingdom of the Netherlands* (2015); *Thomson v. Minister for Climate Change Issues* (2015); *VZW Klimatzaak v. Kingdom of Belgium* (2015); *Greenpeace Nordic Association v. Norway Ministry of Petroleum and Energy* (2017).

[13] Colombian Constitutional Court, *Decision C-035/16 of February 8, 2016*; *Ali v. Federation of Pakistan* (2016).

[14] *Greenpeace Nordic Association and Nature & Youth v. Ministry of Petroleum and Energy* (2017); *Connecticut v. American Electric Power* (2015); *Kivalina v. ExxonMobil* (2008); *Lliuya v. RWE AG* (2017)

[15] *In Re Katrina Canal Breaches Litigation* (2007); *St. Bernard Parish Government v. United States* (2015); *Ralph Lauren 57 v. Byron Shire Council* (2017); *Conservation Law Foundation v. ExxonMobil* (2016).

[16] *Juliana v. United States* (2015); *Environmental People Law v. Cabinet of Ministers of Ukraine* (2009).

to fossil fuels extraction, to Indigenous peoples' rights—as discussed in the last section. Climate litigation has publicly raised the question of States' liability for climate change impacts. The next section highlights the features of States and corporate liability in climate change litigation.

Types of Liability and the Potential for a Human Rights-Based Approach in Climate Litigation

Legal solutions to pursue climate change responsibility in courts are centred on the aspect of liability, which implies that the law may provide redress to those affected by the impacts of climate change and regulate the behaviour of States and private corporations. Liability helps to define the corresponding rights that have been subject of a breach. In the final part, this section will discuss the potential of a human rights-based approach in climate litigation. This approach is useful for the overall objectives of this work, since it reconnects to the assessment of the level of enforcement of environmental human rights and, at last, to Indigenous peoples' climate litigation lawsuits weighed in the next section.

States and public entities such as ministries and regional governments can be pursued in climate lawsuit based on allegations concerning political responsibility for GHG emissions and "climate debt"—which, in turn, give rise to ethical considerations on climate change, as previously argued. This type of liability can be based on public or private law, and it can include review of a decision taken by a public authority (based on the grounds of unlawfulness, excess of power, unreasonableness and procedural deficiency). For example, if a State has ratified specific legislation aimed at reducing GHG emissions, failure by the State to enact such measures can be the basis of court action. Administrative decisions can also be the subject of lawsuits, for example, the incorrect granting of licences or permits for certain types of activities having an impact on the environment (Lord et al., 2011).

Private law, or the so-called climate tort litigation, implies that one person seeks compensation or remedy for a damage suffered due to climate change, responsibility for which typically falls onto an oil company or other industry. Few cases against corporations have been brought on this basis,

while none of them has resulted in success for the plaintiff. For example, in *City of Oakland v. BP p.l.c.*,[17] the Federal District Court in San Francisco, although acknowledging the rightfulness of global warming science, dismissed the lawsuit due to legal challenges in establishing causal liability for climate change.[18] As discussed further on, science plays an important role in climate litigation, and it can be critical in establishing the rightful causality between emissions and specific climate harms. Courts might accept the scientific reports as a basis to establish corporate liability if causation is rigorously challenged (McCormick et al., 2018). Other conduct that must generally be demonstrated by the plaintiff refers to fault (the defendant has acted wrongly or unreasonably), foreseeability (the defendant had up-to-date State of knowledge of GHGs emissions and their consequences) and justiciability (the court has legal mandate to decide on the case).

Other climate litigation cases concern investors, insurers, and commercial entities. This type of liability is defined as "ancillary" as usually the defendant has failed taking into account climate risks and factors in different types of contexts, resulting in damage that could have been avoided if the defendant had acted with due diligence.[19] For example, in the case *Conservation Law Foundation, Inc. v. Shell Oil Products US*,[20] a citizen sued Shell for its failure to incorporate consideration of climate risks into investments, while the *Sarah Von Colditz against ExxonMobil*[21] case represents a complaint against directors and senior officers of Exxon Mobil Corporation for misleading the public concerning climate change and its impacts on Exxon's business. Cases concerning investors, such as *McVeigh v. Retail Employees Superannuation Trust*,[22] aim to require

[17] While this lawsuit is a public nuisance case, it was pursued against a private corporation.

[18] The New York Times, *Judge Dismisses Suit Against Oil Companies Over Climate Change Costs*, https://www.nytimes.com/2018/06/25/climate/climate-change-lawsuit-san-francisco-oakland.html, last accessed September 2022.

[19] Ibid.

[20] For full documentation on this lawsuit, see Climate Case Chart website, available at http://climatecasechart.com/case/5619/, last accessed September 2022.

[21] For full documentation on this lawsuit, see Climate Case Chart website, available at http://climatecasechart.com/case/von-colditz-v-exxon-mobil-corp/, last accessed September 2022.

[22] For full documentation, see Grantham Research Institute website, available at http://www.lse.ac.uk/GranthamInstitute/litigation/mcveigh-v-retail-employees-superannuation-trust/, last accessed September 2022.

improved disclosure of climate risk to investors and shareholders. Indeed, when information disclosure is inappropriate, misleading or lacking in rigor, it can foment risk of climate litigation. The existence of this potential risk can motivate investors to act according to emissions limits and obligations to disseminate information correctly, in order to avoid costs relating to judicial processes.

When a court is faced with establishing a State's or a corporation's liability for the impacts of climate change, the role of scientists in the court is imbued with a pivotal role as it must be ascertained who is responsible for emitting GHGs and the consequent breach of the law. This GHG liability exists, or can potentially be established, in public and private law and can be partitioned in international, administrative and criminal liability (public law) and tort liability (private law) (Faure & Peeters, 2019). Such liability is based on a cause-and-effect relationship between emissions and damage, which is translated, in legal language, into "proof"—for example, large-scale temperature rising or specific weather events (heatwaves, floods, changings in temperature patterns) (Allen, 2011). Establishing a causal relationship between weather and climate is complicated, since climate has been defined by the World Meteorological Organization as deriving from the average of weather conditions considered statistically in a period of 30 years.[23] However, GHGs, as external drivers of climate, might impact weather conditions in timescales shorter than 30 years, while carbon dioxide is predicted to affect the climate for many years, even if all emissions were to be stopped at present (Otto et al., 2018). Consequently, any present emission could take decades before its effects on the climate become evident, while we are still affected by GHGs emitted many years ago.

The area of science termed "event attribution" is rapidly progressing, since the understanding of causes that produce extreme weather events is improving as well as methods to pursue event ascription to human-related causes. Current challenges for this type of science are represented by the exact estimation of how the magnitude of an extreme weather event can

[23] World Meteorological Organization, *Calculation of Monthly and Annual 30-Year Standard Normals*, WCDP-No. 10, WMO-TD/No. 341 (1989); *The Role of Climatological Normals in a Changing Climate*, WCDMP-No. 61, WMO-TD/No. 1377 (2007) (Geneva: World Meteorological Organization).

be attributed to climate change, and its probability of occurrence (Committee on Extreme Weather Events and Climate Change Attribution, 2016). Current event attribution approaches are divided into two groups: those that rely on observational records in order to determine the probability of an event, and those that use model simulations to compare the probability of manifestation of an event in a hypothetic world without human presence and GHG emissions. In general, higher probability of attribution findings is likely for those extreme weather events that are related to rising temperatures, for example impacts of global warming. Attribution science attempts to provide scientific certainty that such changes are due to human activities. However, a detailed explanation of scientific attribution models would be a long, complicated issue and it is not the purpose of the present section. Rather, scientific assumption can be considered the starting point of attributing climate change liability, as probabilistic science can identify trends in occurrence and frequency of extreme weather events and their attribution to human influence (Stone et al., 2009; Stone & Allen, 2005). Climate change can be considered a "disruptive issue", since it requires a different legal approach compared to courts' business as usual: addressing climate change requires dealing with a dynamic and changing environment (Fisher et al., 2017).

Turning to human rights-based lawsuits, they demonstrate that human rights law has the potential to play a key role in climate litigation, since they usually provide assessments of States' actions and omissions that lead to climate change impacts. Increasing recognition of the interlinkage between climate change impacts and the violation of human rights makes fundamental the necessity of remedies to such breaches. States' conduct that contributes to climate change could amount to a violation of human rights and, therefore, it could provide legal scope for access to justice and substantive redress. In international human rights law, the right to a remedy is a substantive right, recognized both in agreements and customs. In fact, while environmental law comes short in addressing damage to property and personal injury, human rights law can provide a remedy to such breaches. The success of a human rights-based climate litigation case depends on how precisely the "victim can substantiate a claim that a duty-bearer has failed to comply with human rights obligations—whether

positive or negative" (Savaresi & Auz, Climate change litigation and human rights: pushing the boundaries, 2019).

However, in domestic climate litigation, there are several obstacles to bringing human rights claims before courts, for example, the previously mentioned hurdle of proving causation and scientific evidence. Furthermore, as already pointed out in a previous chapter in relation to Indigenous peoples and remote-located communities, the costs associated with litigation could be unsustainable for the poorest groups affected by climate impacts (Duffy, 2018, p. 27). It is also possible that people living in remote areas might not be aware of scientific explanations of climate change and of the existence of judicial remedies—which was arguably the case of the Yanesha people in the Peruvian Amazon (Kabir et al., 2016). In addition, if people are located in low-emitting countries, they might find it difficult to identify specific defendants and to discern detailed environmental rights from standard human rights provisions (Wewerinke-Singh, 2019).

At the regional and interregional level, human rights-based litigation faces the same legal requirements of any other case brought before an international court, including exhaustion of local remedies and agreement by the defendant State to be subject to the jurisdiction of the court. However, in climate litigation cases, such requirements could constitute a hurdle in the access to judicial intervention. First, the court must have jurisdiction over the case, which is directly connected to the plaintiffs' requirement to demonstrate prima facie that they are the victim of a human rights violation in the territorial jurisdiction of the defendant State. In the case of climate change impacts, this would require establishing a causal link between the State's climate laws and policies and harm caused by negligence. It would necessitate proof through scientific data—which can be lacking in economically disadvantaged countries.[24] It has been suggested that this burden could shift from the plaintiff to the defendant through the application of the precautionary principle, which

[24] UN-DESA, Data and Statistics for Climate Change Resilience, UN-desa Policy Brief no. 49 (September 2016) available at www.un.org/development/desa/dpad/wp-content/uploads/sites/45/post/WESS2016-PB6.pdf, last accessed September 2022.

prescribes the prohibition of the use of scientific uncertainty as a justification to proceed with a hazardous development (Omuko, 2016).[25]

Human rights-based climate litigation should provide redress for breaches committed by the State, which has the obligation to effectively remedy the violations of human rights, wiping out the consequences of the illegal action. Normally, when a State is found guilty of a breach of human rights law, it must cease the unlawful conduct and establish a guarantee of non-repetition.[26] In climate litigation, this principle could be translated into an obligation to enact and enforce legislation to protect people and their human rights from future climate impacts. States *do* have a duty to protect citizens from hazardous climate change impacts, which has been interpreted in the *Urgenda* case as a "duty of care". In this case, the Court, although not recognizing the alleged human rights violations, made use of human rights standards as an interpretative tool in the analysis of the scope of the duty of care (Peel & Osofski, 2018).

Other typical redress mechanisms in international human rights law include reparations for victims and compensation, *restitutio in integrum*, and satisfaction. In the first instance, considering that climate change will potentially affect millions of people triggers the issues of repartition of responsibility among States that should guarantee reparations. Such reparations usually have a pecuniary nature in international human rights law, indeed regional courts especially have developed a practice of establishing economic compensation for serious human rights violations. In the case of human rights-based climate cases, an approach that prescribes the repartitions of responsibility among States depending on their level of emissions might be a possible solution. For example, in *Lluya v. RWE*, the Higher Regional Court of Essen, Germany, established that it would consider the scientific review of RWE's contributory share of responsibility for causing the melting of the mountain glaciers near the town of

[25] The European Court of Human Rights applied the precautionary principle in the case Tătar v. Romania (application no. 67021/01), where the Court held unanimously that there had been a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights, on account of the Romanian authorities' failure to protect the right of the applicants, who lived in the vicinity of a gold mine, to enjoy a healthy and protected environment.

[26] UN, Responsibility of States for Internationally Wrongful Acts, 2001, art. 30.

Huaraz.[27] However, monetary compensation for the loss of natural habitats is hardly sufficient, or even appropriate. For example, if we consider the importance of the environment in many Indigenous cultures, there will never exist adequate compensation for the loss of culture and identity associated with the destruction of habitats and sacred places (Williams, 2012). Similarly, in many cases, the *restitutio in integrum* of an ecosystem that has been destroyed would not be materially possible. If the breach cannot be addressed by compensation and restitution, the only viable option would be the use of means of satisfaction and remedial justice.[28] Indeed, the destruction of life and livelihood caused by climate change cannot be addressed by monetary means alone, similarly to other historical injustices like colonialism and slavery practices. Moral repair is needed alongside compensation for the cultural and other non-economic losses caused by the impacts of climate change.

Finally, there is another type of climate litigation which can be defined as "just transition litigation". In these cases, "climate change concerns typically play a peripheral or even incidental role. These complaints do not object to climate action in and of itself, but rather to the way in which it is carried out and/or to its impacts on the enjoyment of human rights. In theory, just transition litigation can be brought by individuals and groups to challenge state and corporate actors, before national or international judicial, quasi-judicial or non-judicial fora" (Savaresi & Setzer, 2021). Such types of litigation are increasingly invoked by Indigenous peoples targeting corporations and states, as we shall see in the next section.[29]

In practice, a human rights basis is increasingly being invoked before judges, despite the previously mentioned challenges in establishing

[27] Case no. 2 0 285/15, Essen Regional Court, Germany, 15 December 2016.

[28] As prescribed by the International Law Commission Articles on Responsibility of States, Art. 37. These articles, even though they have no binding nature, are a recollection of international customary law. See also ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001.

[29] The definition of "just transition litigation" might also include complaints and cases such as those related to quasi-judicial mechanisms, like the IRM cases presented in Chap. 5. However, such litigation strand still needs to be clearly defined in contemporary legal doctrine; however, I see that complaints brought before grievance redress mechanism in the context of green development projects could potentially be included in the "just transition litigation".

causation and attribution, such as in the landmark case *Ashgar Leghari v. Federation of Pakistan (Lahore High Court Green Bench 2015)*, where a Pakistani farmer prosecuted the national government for failure to perform on the 2012 National Climate Policy and Framework. The plaintiff alleged a violation of rights connected to climate change impacts and safeguarded under Pakistan's 1973 Constitution, including the right to life (Art. 9), the right to dignity of the person and privacy of home (Art. 14), and the right to property (Art. 23). On September 4, 2015, the Court, citing domestic and international legal principles, determined that "the delay and lethargy of the State in implementing the Framework offend the fundamental rights of the citizens".[30] *Leghari* represents a successful case of human rights-based climate litigation based on suing the government for its failure to act responsibly and build adaptive capacity to ensure a reduction of vulnerability to climate change impacts. The features of this lawsuit represent a model for future rights-based climate litigation, although other courts would probably not be so progressive and receptive as the Pakistani Court (Lau, 1996).

In the Philippines, the Commission on Human Rights is producing an investigation called *Major Carbons Inquiry* which was first requested by Greenpeace Southeast Asia and numerous other organizations and individuals.[31] The aim of the investigation is to assess the impacts of climate change on the enjoyment of fundamental human rights in the Philippines and to determine the related responsibility of major carbon emitters.[32] Other relevant jurisprudence concerning Indigenous peoples' rights affected by climate change is analysed in depth in the next section, such as the 2019 claim brought before the UN Human Rights Committee by eight citizens from the Torres Strait Islands (Cordes-Holland, 2008). Human rights claims have also been brought at the international level,

[30] For full documentation, see Grantham Research Institute website, available at http://www.lse.ac.uk/GranthamInstitute/litigation/ashgar-leghari-v-federation-of-pakistan-lahore-high-court-green-bench-2015/, last accessed September 2022.

[31] For full documentation, see Grantham Research Institute website, available at http://www.lse.ac.uk/GranthamInstitute/litigation/in-re-greenpeace-southeast-asia-et-al-2015-__-commission-on-human-rights-of-the-philippines-2015/, last accessed July 2021.

[32] See commentary by Savaresi A, Setzer J. *The carbon majors inquiry comes to London.* London: Grantham Research Institute on Climate Change and the Environment, 2018, available at http://www.lse.ac.uk/GranthamInstitute/news/the-carbon-majors-inquiry-comes-to-london, last accessed September 2022.

such as in the case of the Inuit's 2005 petition to the IACmHR alleging violations of the human rights of Inuit peoples as a consequence of US policy inaction on climate change. This petition and other lawsuits brought by Indigenous communities are analysed in detail in the next section.

Indigenous Peoples in Climate Litigation

Indigenous peoples' claims in climate litigation have generally been framed in human rights terms, based on the principle of international human rights law that sees States as duty bearers in the context of environmental protection (Gwiazdon, 2018). The *Torres Strait Islanders* and *Inuit* cases, together with the *Athabaskan* case, are all framed using international human rights law as a tool to help reduce the complexity of climate litigation, linking impacts of global warming, severe weather events and environmental degradation to immediate danger and violations of fundamental rights. This section explores how human rights, protected by international covenants and declarations, are considered an important instrument in the advocacy of Indigenous peoples' rights in the climate change context, highlighting flaws and possible success strategies of using such an approach in climate litigation. Having a focus on human rights, this section does not draw upon the outcomes of the *Kivalina* case, although it revolves around an Indigenous community. This is because *Kivalina* is framed as a public nuisance case and does not rely on human rights argumentations.[33]

[33] *Kivalina v Exxonmobil* is a public nuisance case filed in 2008 by the Native Village of Kivalina and the city of Kivalina, located in northwest Alaska. They sought repair from damages arising due to the acts of 24 oil and gas companies, the biggest GHG producers in the US. Kivalina "must be relocated due to global warming and have estimated the cost to be from $95 million to $400 million". At first, a US District Court dismissed the federal nuisance claim for lack of *rationae materie* jurisdiction on the grounds that the claim revolved around a political question, and because the plaintiffs lacked standing. Kivalina appealed the decision to the US Court of Appeals for the Ninth Circuit, which confirmed the decision of the lower court. However, it dismissed the case under a different theory by declaring that Kivalina's nuisance claim was not justiciable because it had been displaced by the Clean Air Act (see generally Péloffy, 2013).

The *Inuit* and the *Athabaskan* cases were both presented before the Inter-American Commission on Human Rights (IACmHR) and they are characterized by similar geographical settings and impacts of climate change which led to violations of Indigenous peoples' human rights. In fact, according to the UN Human Rights Council, the impacts of global warming tend to increase in magnitude according to the vulnerability of the population in a determined geographical setting.[34] The Arctic region is particularly endangered as it is currently experiencing some of the most profound warming in the world, with a dramatic increase in temperature between 2°C and 4°C occurring in the last 60 years.[35] In the Arctic, temperatures are rising as much as two times as fast as compared to the rest of the world's regions.[36] The last IPCC special report states that "[p]opulations at disproportionately higher risk of adverse consequences with global warming of 1.5°C and beyond include disadvantaged and vulnerable populations, some Indigenous peoples, and local communities dependent on agricultural or coastal livelihoods (high confidence). Regions at disproportionately higher risk include Arctic ecosystems".[37]

Both petitions rely on the rights enshrined in the Declaration of the Rights and Duties of Man. The Declaration, although it is a non-binding instrument, it is vested with considerable moral power and it is the only enforceable human rights document against the US and Canada, since

[34] "[T]he effects of climate change will be felt most acutely by individuals and communities around the world that are already in vulnerable situations owing to geography, poverty, gender, age, Indigenous, minority status or disability". U.N. Human Rights Council [UNHRC] Res. 26/27, Human Rights and Climate Change, U.N. Doc. A/HRC/26/L.33, at 3 (June 23, 2014).

[35] See generally IPCC, 2021: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press. In Press.

[36] Ibid.

[37] IPCC, 2018: Summary for Policymakers. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty.

they are not parties to the American Convention.[38] In 2010, the IACmHR stated that "the IACmHR has competence, in accordance with the OAS Charter and with the Commission's Statute, to consider alleged violations of the American Declaration by OAS member States that are not yet parties to the American Convention."[39] This approach was confirmed in two cases, *Marie and Carrie Dann v. US*[40] and *Grand Chief Michael Mitchell v. Canada*,[41] where the IACmHR considered the States subject to its jurisdiction.

Indigenous peoples living in the Arctic whose culture is uniquely dependent on the environment are disproportionately affected by global warming and the dramatic shrinking of the polar ice caps (see generally Maldonado et al., 2016). The Inuit Petition to the IACmHR was filed in December 2005 on behalf of Inuit peoples in the US and Canada.[42] The Petition aimed to drive US actions of climate control because, as exemplified in the circumstances of the Inuit peoples, global warming directly affects the environment and, indirectly, fundamental human rights. Even if the Inuit are present in multiple nation-states and they are all represented in the Inuit Circumpolar Conference, the petition was filed only by those living in the US and Canada as Greenland and Russia are not subject to the authority of the IACmHR.

[38] The 1979 statute of the IACmHR provides the Commission with the authority to uphold the rights protected in the American Declaration, following dispositions contained in Article 1: "2. For the purposes of the present Statute, human rights are understood to be:

a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto;
b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states." See also*: Statute of the Inter-American Commission on Human Rights*, O.A.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88 (1979).

[39] Organization of the American States Secretary-General, *Annual Report of the Inter-American Commission on Human Rights*, OEA/Ser.L/V/J, doc. 5 rev. 1 (Mar. 7, 2011).

[40] *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860 (2002).

[41] *Mitchell v. Canada*, Petition 790/01, Inter-Am. C.H.R., Report No. 74/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003).

[42] For a full account on the Petition documents, see Climate Case Chart website, at http://climatecasechart.com/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/, last accessed September 2022.

The Petition, in its 167 pages, sought to hold the US legally responsible for its acts and omissions that substantially contributed to global warming and, consequently, has severe impacts on the Arctic environment. These impacts, in turn, led to a violation of the Inuit's human rights. Thus, the Petition aimed to demonstrate the US' primarily responsibility for global warming and consequent violation of Inuit's human rights, given its failure in lowering emissions' levels and its primacy in being the world's largest GHG emitter.[43] Global warming is causing a significant depletion of the Arctic environment, and the relationship between the Inuit and their ancestral territories is essentially holistic in nature. Thus, the preservation of the conditions of the Arctic environment is fundamental for the survival of Indigenous culture and knowledge. Accordingly, they argued that permanent environmental changes in the Arctic are directly linked to the violation of their fundamental human rights, particularly the right to home, freedom of residence and movement, the right to property and own means of subsistence. For example, thawing permafrost destabilizes Inuit traditional temporary hunting shelters—the igloos—and triggers unpredictable mudslides, making dangerous traditional ways of life and travel. Also, there has been a lack of the type of snow needed to build igloos, and this condition impairs the ability of young Inuit to learn traditional ways of building hunting shelters causing a loss in the transmission of traditional knowledge.[44] Traditional hunting is also jeopardized because of ice thawing and because animals such as caribou, whales and walruses have changed their behaviours and migration patterns, becoming less available to Inuit hunters. Furthermore, the Inuit cannot store food in traditional ways and access to water resources is at risk as the permafrost is melting away (Abate, 2007).

In sum, a combination of these climate warming effects is highly disruptive for the Inuit's livelihoods and culture, which are customarily embedded in the Arctic environment. Inuit traditional ways of life are

[43] See Section D of the Petition, "BY ITS ACTS AND OMISSIONS, THE UNITED STATES VIOLATES THE HUMAN RIGHTS OF THE INUIT", available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208_na_petition.pdf, last accessed September 2019.

[44] ARTIC COUNCIL, ARCTIC CLIMATE IMPACT ASSESSMENT 66, Cambridge University Press 2004, available at http://www.amap.no/acia, last accessed September 2022.

becoming increasingly impossible to maintain, given the destruction of the ecosystem due to the impacts of global warming. Such impossibility constitutes a violation of their human rights protected under the Declaration of Rights and Duties of Man. In order to apply the Declaration in the complex climate change context, the Inuit Petition relies on multifaceted relationships between environmental protection and human rights at manifold geographical and political scales: the Indigenous peoples' nation-states (dispersed across different countries) challenge national and supranational authorities (the US and an Inter-American Court) (Osofsky, 2009). The Inuit exceeded the judicial boundaries of their nation-state by appealing to a supranational court that has traditionally demonstrated great receptiveness to interlinking environmental harm and Indigenous peoples' rights. Furthermore, the Petition represents an important way of tracking down climate change effects in the Arctic from the point of view of the Inuit, linking the decaying conditions of the environment to the loss of their ancestral culture.

The Inuit demanded corrective justice from the US, which focuses on acting responsibly not to prevent further harm. Such remedies should include effective reduction of GHG emissions, further investigation of the US' contribution to climate change, implementation of plans to enhance protection of the Inuit and their environment, providing assistance through adaptation initiatives and a declaration on US responsibility.[45]

However, in 2006, the IACmHR rejected the Petition with a two-paragraph decision, affirming that: "it will not be possible to process your petition at present because the information it contains does not satisfy the requirements set forth in those Rules […] the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration."[46] No further explanation was given. Yet, one might consider that the Petition failed to expressly link US emissions to the specific effects of global warming in the Arctic. In other words, the Petitioners were not

[45] Inuit Petition, section C para 4, *supra* note 42.

[46] IACmHR, Decision, 16/11/2006, available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2006/20061116_na_decision.pdf, last accessed September 2022.

able to establish specific causation between the US failure to lower emissions and violations of Inuit human rights, and this was cause for the IACmHR to dismiss the Petition without making a determination on the alleged violation of human rights. The Petition has been commended as a tool to gather attention on climate change impacts on the Inuit lands and territories, and as a way to link these impacts to human rights violations, especially after the two hearings on the topic requested by the Inuit (Gordon, 2007). However, it has not resulted, so far, in a change in US emissions reduction policy, especially under the Trump administration.

The Athabaskan Petition, which is currently pending before the IACmHR is, prima facie, similar to the *Inuit* case.[47] Given the lack of detailed explanation for the rejection of the Inuit Petition, the Athabaskan people had to frame their claims without knowledge of how to frame it successfully by avoiding rejection grounds. The Petition, filed in 2013 by Earthjustice, alleges that Canada has failed to adequately regulate black carbon emissions that are causing significant changes in the Arctic environment, which, in turn, violate the Athabaskan's human rights. The Petition, in a similar way compared to the Inuit's, outlines the characteristics of Athabaskan culture and its deep embedment with the environment.[48] The Petition could succeed if, on the one hand, the Athabaskan unambiguously established a specific link between Canada's acts and the violation of human rights, and, on the other hand, if the IACmHR widens its interpretation of the law. (McCrimmon, 2016). Regarding this second possibility, it must be noted that in the already-mentioned Advisory Opinion to Colombia, the IACtHR recognized the important interlinkage between human rights and the environment, and the States' obligations regarding environmental protection.[49] The contents of this

[47] The Arctic Athabaskan Council, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada*, (hereinafter *Athabaskan Petition*) available at http://www.lse.ac.uk/GranthamInstitute/litigation/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-of-the-rights-of-arctic-athabaskan-peoples-resulting-from-rapid-arctic-warming-and-melting-caused-by-emissions/, last accessed September 2022.

[48] Ibid.

[49] IACtHR, Advisory Opinion OC-23/17 of November 15, 2017, Requested by the Republic of Colombia.

Advisory Opinion are very relevant for the Athabaskan and potentially other human rights-based litigation, since the IACtHR recognized clear obligations related to environmental degradation, right to life and to personal integrity.

The Athabaskan people alleged violations of their right to property, culture, health and subsistence (namely Articles XIII, XXIII and XXI of the American Declaration) due to Canada's acts and omissions in limiting the emissions of black carbon. The plaintiffs specified that such omissions have caused the depletion of food resources due to changes in the distribution and availability of animals, loss of traditional culture and hunting methods due to increase in the frequency of extreme weather events and degradation of the Arctic environment.[50] In relation to the right to culture, the Athabaskan petition relies on cases such as *Moiwana v. Suriname*, *Yakye Axa v. Paraguay*, *Sawhoyamaxa v. Paraguay* and *Saramaka v. Suriname*. However, even if in these cases the plaintiffs tried to link damages to the environment to their right to culture, the Interamerican system never established *tout court* violations of this right—while recognizing violations of the right to property, life, preservation of health and wellbeing (Antkowiak, 2013; Fuentes, 2017). Thus, the possibilities that such an allegation would be recognized by the IACmHR appears quite improbable. In relation to the right to property, the Athabaskan argued that impacts include changes to regional topography of cultural meaning, and the compromising of the Athabaskans' ability to make sense of their environment for purposes ranging from subsistence to maintenance of cultural traditions. They contended that Arctic warming, caused by black carbon emissions, has made their lands unfamiliar and less valuable.[51] Furthermore, they argued that increased rainfall intensifies the risk of particularly intense flooding.[52] However, the allegation of the violation of the right to property remains essentially framed within their right to culture.

Finally, the last allegation refers to the right to health and subsistence. Although this right is not present in the Declaration, the Plaintiffs argued

[50] The Arctic Athabaskan Council, *Athabaskan Petition*, Section IV. supra note 47.

[51] Ibid.

[52] Ibid.

that it can be subsumed from the interaction of rights enshrined in Articles XIII, XXIII and XXI. Arctic warming has caused the loss of traditional food resources, clothing and housing, which, in turn, has provoked health issues among Indigenous community members.[53] It has also caused a depletion of water quality and availability, increasing the probability of injuries and diseases.[54] The Interamerican system has previously recognized a violation of the right to subsistence.[55] But such violation, notwithstanding the non-existence of a stand-alone right to subsistence in the Convention, was connected to violation of the rights to life and to property. It seems unlikely that the IACmHR would recognize an independent right to subsistence, given that it is not enshrined in the Declaration. In addition, the Athabaskan interestingly argued that climate change is causing several mental health impairments in the Indigenous community.[56] This approach is novel, and it would require an extensive interpretation of Article XI of the Declaration.[57]

[53] "Shifting to greater consumption of processed, packaged foods available in the Canadian north is not only more expensive but also less healthy, decreasing the quality of Arctic Athabaskan peoples' diets and increasing their risks of obesity, cardiovascular disease and diabetes", the Arctic Athabaskan Council, *Athabaskan Petition*, *supra* note 47.

[54] "As Chief James Allen of Haines Junction, Yukon, observed, new diseases in the water mean Arctic Athabaskans can no longer drink from streams: *We can't drink the water out on the land anymore. People are afraid they'll get beaver fever. Our waters are not as safe as they used to be. You'd walk along and if you're walking along a trail you'd come across a creek you would grab a cup and drink it, drink a few cups and then keep going. But now you have to pack your own water*", Ibid.

[55] See *Mayagna (Sumo) Awas Tingni Community v Nicaragu* and *Xákmok Kásek Indegenous Community v Paraguay*.

[56] "Beyond physical health issues, accelerated warming in the Arctic is affecting Arctic Athabaskan peoples' mental health. Elders' inability to accurately predict the weather, loss of culturally significant sites like cemeteries, more dangerous travel conditions, possibility of damage to homes, and shrinking of habitat that is vital for subsistence are all sources of cultural and psychological stress for Athabaskan peoples, as is an unknown future for culture, language, and identity tied to the land".

[57] Article XI states of the American Declaration states: "Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources".

The Athabaskan Petition, while facing challenges such as the requirement for the exhaustion of local remedies,[58] has the potential of being successful regarding the causal link between black carbon emissions and climate change (De La Rosa Jaimes, 2015). In fact, this approach frames the pollution as a regional issue rather than a global phenomenon, contrary to the Inuit Petition's attempt to attribute exclusive responsibility to the US for the violations of their human rights. The Athabaskan Petition conversely solely focuses on black carbon emissions and their specific consequences in a specified region, including their unique responsibility in causing global warming and the darkening of the colour of the snow which, in turn, causes more heat absorption and warming.[59] Thus, the Athabaskan Petition draws a closer connection between Canada's emissions and violations of Indigenous people's rights.

The last case presented in this section is the Torres Strait Islander Petition to the Human Rights Committee filed in 2019 by ClientEarth on behalf of eight islanders.[60] While the official text of the Petition is still unavailable, it is possible to draw upon some considerations of the case in light of the potential human rights implications of climate change for the islanders.[61] The Petitioners inhabit a group of islands in the northern part of Queensland region, between the Australian mainland and Papua New Guinea. The Petitioners represent the Indigenous community living on the islands, who have inhabited the area for thousands of years. The area is a low-lying region, thus the islands are at risk of sinking due to rising sea-levels like in the case of Tuvalu. At particular risk are around 1500

[58] The Petitioners argued that exhaustion of local remedies is not possible as Canada does not have a comprehensive statute that could be challenged to obtain relief from the human rights violations. In practice, the Athabaskan would have to bring claims before courts in each different province on the existing legislation on black carbon emissions, across the country and also at the federal level. This approach follows the outcomes of case *Hul'Qumi'Num Treaty Group v. Canada*. The Arctic Athabaskan Council, *Athabaskan Petition*, title VI, *supra* note 47.

[59] The Arctic Athabaskan Council, *Athabaskan Petition*, Section IV, *supra* note 47.

[60] Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change, 2019. A domestic legal suit has been filed as well: *Pabai and Guy Paul Kabai v. Commonwealth of Australia*, 2021, available at: http://climatecasechart.com/climate-change-litigation/non-us-case/pabai-pabai-and-guy-paul-kabai-v-commonwealth-of-australia/, last accessed September 2022.

[61] ClienEarth, Torres Strait Islanders FAQ, available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190513_Not-Available_press-release-1.pdf, last accessed September 2022.

people living on the islands of Boigu, Sabai, Masig, Poruma, Warraber and Yam (Green, 2006).

The Torres Strait Petition, the first-ever legal climate complaint brought to an international human rights institution against the Australian government, alleges that the State's acts and omissions in climate change governance are causing important violations of human rights. The legal basis of the Petition is the ICCPR, to which Australia is a signatory. Alleged violations regard the right to culture (Art. 27), the right to be free from arbitrary interference with privacy, family and home (Art. 17) and the right to life (Art. 6). The Petitioners affirm that these rights have been violated by Australia's lack of commitment in setting mitigation targets and plans, and by its failure in implementing adequate coastal defence systems such as seawalls.

There is a strong scientific basis for the affirmation of climate change effects in Australia and in the Torres Strait islands. The 2007 IPCC Report already affirmed with very high confidence that climate change was happening in Australia, where temperatures are between 0.4 to 0.7 warmer compared to 1950s levels.[62] Sea levels have risen by 17 cm in the last century,[63] worrying many Torres Strait Islanders about the inevitability of the disappearance of certain coastal areas. There is evidence that this is happening: for example, since 2007, the ocean has subsumed the coastal road in Masig Island.[64] Unusually high king tides threatened the lives of islanders in 2005 and 2006, causing the destruction of sea walls and flooding houses (Green, 2006).

Even though administrative climate litigation options are available in Australia (as affirmed in previous sections, Australia is the second country in the world in terms of number of climate litigation cases), the Torres Strait Islanders have chosen to frame their claim within a human rights framework. This is because their aim is not to challenge specific administrative acts, but to address the general government policy that has failed to address climate

[62] IPCC, 'Summary for Policymakers' in Working group III, IPPC, *Climate Change 2007*; *Mitigation of Climate Change* (IPCC Fourth Assessment Report, 2007), 1, 5 (Figure SPM.2) ('Mitigation of Climate Change Summary').

[63] IPCC, *Climate Change 2001, Synthesis Report*, pp. 5–6.

[64] The Time, *The Mayor Fighting to Save Her Island Home from Climate Change*, 2019, available at https://time.com/5572445/torres-strait-islands-climate-change/, last accessed September 2022.

change (Cordes-Holland, 2008). However, similarly to the IACmHR, the Human Rights Commitee has no binding power to enforce its decisions, thus its outcomes are more political than strictly legal. The HRC decisions do represent a coherent interpretation of the relevant treaty to which the States parties have chosen to be legally bound. Yet, in the case of a positive decision towards the Torres Strait Islanders' case, historic recognition would be given to the interlinkage between climate change and human rights. It would be a powerful instrument to change the government's behaviour in adopting more stringent climate change commitments.

The ICCPR does not provide for a stand-alone right to a healthy environment. However, this interlinkage has been established in the practice by other human rights bodies as seen with the IACmHR, for example in the 1990 *Report on Ecuador*, where it affirmed that the "realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment"[65] and rights can be violated where "environmental contamination and degradation pose a persistent threat to human life and health".[66] Yet, cases concerning environmental harm have not reached the merits stage before the Human Rights Committee: the case *EHP v. Canada*, although raising serious concerns for the right to life, was considered inadmissible due to failure to exhaust local remedies.[67] The existence of the interlinkage between the right to culture in relation to environmental harm was established in *Ominayak, Chief of the Lubicon Lake Band v. Canada*, where the HR Committee established the connection between environmental harm and the right to enjoy culture for minorities.[68] The violation of the right to privacy, family and home as a consequence of an environmental harm was established in international human rights jurisprudence by the European Court of Human Rights in the case *Lopez Ostra v. Spain*.[69]

Considering the severe climate change impacts that are affecting the Torres Strait Islanders' fundamental human rights, and the possibility of

[65] IACmHR, *Report on the situation of human rights in Ecuador*, OAS Doc OEA/Ser.L/V/II.96, Doc 10, rev 1 (24 April 1997).

[66] Ibid.

[67] *EHP v. Canada*, Communication No. 67/1980, U.N. Doc. CCPR/C/OP/1 at 20 (1984).

[68] *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).

[69] *López Ostra vs. Spain* (Application no. 16798/90).

a future of forced relocation, it would be possible to affirm that Australia has not only negative obligations not to interfere with the enjoyment of human rights, but also positive obligations to give effect to individuals' Covenant rights.[70] The State could be considered liable, for example, for not having ensured appropriate adaptation measures such as the construction of important infrastructure like sea walls in order to protect people from king tides. In light of the positive obligations, islanders might have a strong case against the government of Australia, since it did not adopt appropriate measures to help prevent climate change impacts predicted with high confidence by the IPCC.

Interestingly, not only climate litigation based on regulatory objectives has been at the centre of Indigenous claims. Indigenous peoples have brought cases at the national level for what concerns the "just transition litigation" mentioned in the previous section. It has been evidenced that there is a growing trend of this type of litigation, which targets State and non-State actors such as corporations for breaches in international and national standards that relate to Indigenous peoples' rights. Such complaints might regard the construction of wind farms (Herrejon & Savaresi, 2020).[71] Among such cases, stands the very recent decision of the Supreme Court of Norway. The court in October 2021 in a unanimous decision held that the concession for a windfarm in the Fosen-halvøya (Fosen peninsula) area of Norway violated the right of the Indigenous Sami to exercise their cultural rights because the windmills prevented them from herding reindeer in the area.[72] The affected Sami groups claimed that the windfarm concession violated their human rights under Article 27 of the ICCPR, arguing that the installation of wind turbines would interfere with the winter grazing of their reindeer. In addition, CERD asked the Norwegian government to suspend the concession until the matter had

[70] HR Committee, *General Comment No 31: The Nature of the General Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004).

[71] European Center for Constitutional and Human Rights. Case Report: Wind farm in Mexico–French energy firm.

EDF disregards indigenous rights (October 2020), at https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CASE_RESPORT_EDF_MEXICO_NOV2020.pdf, last accessed September 2022; Comunidad Indígena Zapoteca De Juchitán De Zaragoza: https://prodesc.org.mx/en/the-zapotec-community-of-juchitan-de-zaragoza/, last accessed September 2022.

[72] To access the decision, in Norwegian, consult: https://perma.cc/H3TE-VYCG, last accessed September 2022.

been properly reviewed. However, notwithstanding such objections, the project went ahead and, in 2019, the windmills were put to use. Similar issues have arisen on the occasion of solar energy projects in the US[73] and the construction of hydroelectric dams (Schapper et al., 2020). In other cases brought before the ECtHR, Indigenous peoples have formulated their just transition cases in terms of lack of respect of procedural justice and necessary safeguards, such as the right to remedies, arguing for the need to reconsider the authorization of wind farm projects.[74]

In conclusion of this section, some considerations should be stressed in light of the new trend of couching climate litigation in the international human rights law framework, especially in the case of Indigenous peoples' claims. These considerations relate to the risk of "freezing" Indigenous peoples within an idealized cultural and social category in order to recognize them as legitimate rights-holders. Other considerations draw upon the positive side of human rights-based climate litigation which are related to future possibilities to raise environmental awareness and changing social norms and behaviours.

As outlined throughout the book, international human rights law presents some critical problems that might as well affect litigation outcomes when it comes to protecting Indigenous peoples' rights. First, the pretended universality of human rights—and the fact that human rights are used as a standard for civilisation. Second, the stigmatization and creation of an Indigenous identity inextricably attached to Indigenous peoples—and the burden of proof they need to face when demonstrating traditional possession of ancestral lands. Finally, the essentially anthropocentric approach inherent to human rights law. These aspects clearly emerge in human rights-based litigation and thus, they are relevant also in the climate litigation realm. Regarding the first point, in certain litigation cases, settler States have used a "contested indigeneity" approach to deny the identity of Indigenous peoples and consequently, the fact that they were entitled to specific human rights enshrined in Convention 169 and UNDRIP (Petersmann, 2021). In other cases, the very

[73] See e.g. *Quechan Tribe v. US Dept. of Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010), as pointed out in Herrejon and Savaresi (2020).

[74] *Vecbas.tika Fägerskiöld v. Sweden* ECtHR, Application no 37664/04; and *Others v Latvia*, ECtHR, Application no. 52499/11, as cited in Herrejon and Savaresi (2020).

conceptualization of rights used by the court denote "epistemic injustice" and coloniality, for example, with regard to the concept of property. Indigenous collective attachment to their lands is translated into the concept of "property", that does not correspond to the actual meaning for Indigenous collective and spiritual connection to their ancestral lands (Townsend & Townsend, 2021).

While the aim of this first consideration is by no means to neglect Indigenous peoples as legitimate holders of specific individual and collective rights which draw upon the distinctiveness of their culture, history and traditions, there are some risks in idealizing and freezing what is considered "native communities" in ever-changing human categories. Human rights claims consist of two elements that are strictly interlinked: the discursive approach and the practice to make human rights claim in law. When employed in climate litigation or other legal venues, the human rights discourse is brought into political discussions and activism (Hohmann, 2009). Thus, Indigenous peoples' petitions to international human rights bodies represent the incarnation of bringing a human rights narrative into a legal arena, where human rights arguments are an important tool to enforce the law. For example, in the Inuit case, the speech of Sheila Watt-Cloutier reflects this contemporarily both discursive and legal strategy, framing climate change as a human rights issue.[75]

Yet, it must be noted that this approach, which fosters a romantic view and a very conservative image of Indigenous peoples, has been criticized by some scholars and anthropologists. They have pointed, for example, to the Inuit's dependence on fossil fuels for the snow transport (Hohmann, 2009). Others have criticized the depiction of aspects of traditional

[75] "Climate change is happening very fast in the Arctic. Our hunting culture is literally melting away as ice and snow disappear. […] Rather, we hope our destiny is to light a beacon for the world. I think by now you see these issues are not just about the environment or wildlife; these issues are about children, families, and communities. This is about people-the cultural survival of an entire people-which, of course, are connected to the survival of the planet as a whole …. It is because climate change is a human story that we have connected climate change and human rights. We hope that the language of human rights will bridge perspectives and illustrate the seriousness of global warming. We need to capture the attention and conscience of the world, for climate change is a threat to our entire way of life, and to yours", Sheila Watt-Cloutier, *Connectivity: The Arctic-The Planet: Address on Receiving the Sophie Prize*, Oslo, Norway June 2005, Remarks by Sheila Watt-Cloutier, Chair of the Inuit Circumpolar Conference, at the Award Ceremony for the 2005 Sophie Prize, 2005, available at http://inuitcircumpolar.indelta.ca/index.php?ID=299&Lang=En, last accessed September 2022.

culture as immutable and narrowly defined (see generally Dorais, 1997). However, the strategy of retaining aspects of traditional culture and "using" them in the framing of human rights claims depends on the structure of legal systems which generally tend to acknowledge rights and identity to communities reflecting determined criteria. The emotive appeal to traditional culture is needed when Indigenous peoples want their claims to be heard, and this strategy implies that they are forced to demonstrate that they still have a "traditional culture", or that they have inhabited their territories since time immemorial (as discussed previously regarding Indigenous peoples' access to judicial remedies).

From this perspective, it seems that remedies to climate change impacts are trapped within a static culture paradigm, which can exclude adaptation efforts if they would result in a changing of traditional culture and customs (Borrows, 1997; Sacks, 1995). A culture that, to be recognized as "Indigenous", must remain static to have its rights recognized by the government cannot risk changing and adapting to difficult environmental conditions, or it will risk the loss of its peculiarity and law-established identity: "when the disappearance of the practice equals the disappearance of the right, a claim cannot succeed" (Hohmann, 2009). In other instances, Indigenous individuals or communities refuse to be classified as such, because this would inherently mean that they are "second class citizens", or people that were not able to have an education (Herrejon & Savaresi, 2020).

The second consideration is that human rights argumentations in climate litigation might affect social norms and values by making visible the human dimension of environmental changes. Litigation does not just have the aim of advancing regulation on emissions and adaptation, but it can also raise awareness of climate change impacts, thus influencing social perception (Brulle et al., 2012). Climate litigation might influence public perception in three ways: making the public debate more climate-informed; supporting grassroots climate campaigns; and translating complicated scientific concepts to simpler ones, intelligible by larger audiences (Peel & Osofski, 2018). The Inuit Petition, even though not successful, helped in raising environmental awareness about the problems that climate change is causing in the Arctic. It demonstrated that climate change litigation has important indirect influences that go beyond the judicial

decision of courts since they can help shape social norms and change society's perception of climate change (Jodoin et al., 2020). High-profile cases, such as those presented before international human rights courts, tend to have important influence on the public debate over climate change, fomenting grassroots movements seeking environmental justice (Andrew & Rinkevicius, 2010). The intrinsic value of climate litigation's creative human rights legal strategies is its attempt to regain a human perspective in climate change, understanding and re-creating in legal terms the deep connection between human communities and nature (Osofsky, 2009).

Finally, it must be noted that human rights-based climate litigation essentially relies on an anthropocentric legal model and does not reflect recent changes in constitutional and national laws represented by the emerging RoN approach. Several States, starting with Latin America countries, have created or amended their national constitutions to include RoN into their legal provisions. The next section focuses on this particular emerging feature that is progressively being enacted in global environmental constitutionalism, evidencing how Indigenous cosmovision are intertwined to this legal and philosophical conceptualization.

Conclusion

Climate litigation is an expanding global trend, and it is proving to be a significant tool in ensuring accountability of States and private actors for acts and omissions regarding climate change governance. Indigenous peoples are also trying to use human rights-based climate litigation arguments in order to ensure accountability for States regarding the sever violations of their human rights connected to climate change impacts. While, at the moment, no such cases brought at the Inter-American and UN level has been decided (except for the Inuit case), the chapter has evidenced how international human rights law has been reframed by Indigenous peoples to accommodate new types of breaches connected to the impacts of climate change. However, the case law review hereby presented has evidenced some critical points that still persist within the

international human rights law paradigm in relation to Indigenous peoples. First, the pretended universality of human rights, and the fact that human rights are used as a standard for civilization. Second, the stigmatization and creation of an Indigenous standard identity, and the associated burden of proof Indigenous need to face when demonstrating traditional possession of ancestral lands. Finally, the essentially anthropocentric approach inherent to human rights law that does not take fully into consideration Indigenous cosmovision and their non-Westernized legal standards.

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7

Beyond the Human Rights-Based Approach: Rights of Nature and Ecological Integrity

An equivocation is not just a "failure to understand" […] but a failure to understand that understandings are necessarily not the same, and that they are not related to imaginary ways of "seeing the world" but to the real worlds that are being seen.

—Viveiros de Castro E. (2004b)

Introduction

This last chapter is dedicated to alternative approaches to environmental human rights and their relation to Indigenous peoples, with a view to lay the foundation of future research around the connection between Rights of Nature (RoN) and Indigenous peoples cosmovision, spirituality and beliefs in a decolonial perspective. In particular, this chapter deals with RoN and their supposed interconnection with Indigenous cosmovision, highlighting several potential problematics that arise when translating Indigenous beliefs into Westernized concepts, such as legal personhood, or when such beliefs are automatically recognized as "ecocentric". In addition, this chapter presents a review of global environmental litigation

G. Giacomini, *Indigenous Peoples and Climate Justice*, Energy, Climate and the Environment, https://doi.org/10.1007/978-3-031-09508-5_7

based on RoN, highlighting the most important feature of this particular case law. Finally, the chapter will argue for the need of a critical rethinking of the relationship between human rights and planetary health, and it will lay the foundations for future research on the right of ecological integrity as a non-centredness theory.

Earth Jurisprudence as a Systemic and Epistemic Alternative in the Climate Change Context

Chapter 3 has already put in evidence the necessity of reconsidering the relationship of humankind and nature at the epistemic level because of its crucial repercussions on the creation of law. Previously in the book, it has been argued that a decolonial approach to law and governance should aim at recreating a circle of care in which humans and nature, including non-sentient manifestations, should be considered as mutually nurturing and enhancing. According to these considerations, it is clear that human beings exist as a part of an interconnected community, there is a great need to develop a revolutionary jurisprudence that drastically shifts the anthropocentric perspective we are now emerged in, to a new focus which consider humans as "ecologically embedded beings" (expression borrowed from Woods, 2017).

The rationale for dealing with issues related to Earth Jurisprudence and Rights of Nature in a book that focuses on climate justice, Indigenous peoples and international human rights law is twofold. First, Earth Jurisprudence can explain the failure of contemporary environmental and climate change governance by focussing on the roots of the problem: the dualistic tendency to separate humankind from nature and to set the operational boundaries of humanity outside ecological limitations. Therefore, Earth Jurisprudence proposes a systemic and epistemic alternative to "classical" environmental law. Second, according to many authors, as we shall see in the chapter, such alternative is largely inspired by Indigenous cosmovision and it may be the way forward to restore our broken relationship with planet Earth. Accordingly, RoN and their

relationship with Indigenous peoples are the main focus of this chapter. However, it is important to contextualize RoN in the broader framework of Earth Jurisprudence as the ecocentric emerging philosophy and body of law that ultimately includes also RoN. In fact, Indigenous cosmovisions and religions can be considered as "the bedrock" of Earth Jurisprudence alongside other approaches discussed in this section (Tigre, 2022). In fact, in many Indigenous cosmovisions, humanity is but one of many facets of life, and all such life manifestations are interrelated. Therefore, there is no reason to dominate the non-human world. Such conceptualization resonates with the principles of Earth Jurisprudence, as we shall see further. This approach is important because it argues for the need to go "beyond human rights" in order to realize protection and restorations of human communities and non-human communities alike in a context of promotion of climate justice.

As a matter of fact, this process of challenging dominant and hegemonic axioms of environmental protection such as sustainable development and green economy started to be confronted in past years by several scholars and critical legal thinkers, such as Deep Ecologists, who argued for the need of a new philosophical and legal perspective that could contrast orthodox legal theory (Latour, 1998; Val, 2009; Bennett, 2010; Morton, 2010; Burdon, 2011). Such challenge gave breadth to a new legal and philosophical movement, defined as Earth Jurisprudence. It is commonly believed that these new approaches have been inspired by the philosophical views of Thomas Berry, Cormac Cullinan and Christopher Stone (Berry, 1999; Berry, 2006; Swimme & Berry, 1992; Cullinan, 2008; Cullinan, 2011a, 2011b; Stone, 2010).

Earth Jurisprudence and RoN seek to re-balance the focus of law, from a hierarchical anthropocentric conception to an ecocentric conception where humans are functional for the Earth wellbeing. This can be done by replacing the human utopian dream of dominating, controlling and using Earth for the benefit of the sole humanity—or, rather, for the benefits of a small group of people—with a holistic worldview in which the role of humans is to celebrate and guard the environment. The result of this paradigmatic shift would be a refocus on new ways for global environmental law and governance to support ecosystems, and to understand climate change in a new light.

The Principles of Earth Jurisprudence reflect the idea that humans are only one part of the wider community of other living and non-living beings, and that human welfare and human existence are dependent on the planet. Therefore, "Humans must adapt their legal, political, economic and social systems to be consistent with the Great Jurisprudence and to guide humans to live in accordance with it, which means that human governance systems at all times take account of the interests of the whole Earth community" (Cullinan, 2011a, 2011b). This is due to the fact that, in Earth Jurisprudence, "the Universe is the primary law-giver": law is not a human construct, but it is a rediscovery of what is already embedded in nature. Earth Jurisprudence's theorization of law is in open contrast with theories of law and justice of Western jurisprudence, which considers the non-human world non-essential for the operationalization of law (see generally Graham, 2011). Thus, anthropocentric conceptions of law tend to deem as completely appropriate the nuanced allowance of polluting activities or other highly impacting actions on the environment—for example, no State has so far forbidden the emissions of GHGs although scientific evidence has demonstrated their direct correlation to global warming. They also allow for greening measured of polluting activities, such as the carbon market.

Against this backdrop, Earth Jurisprudence recognizes the Universe as the primary source of law, aims at reshaping completely the relationship between humankind and the planet by substituting the tyranny of indiscriminate exploitation and the "mythology of independence" with a mutually enhancing relationship that benefits both nature and humans (Cullinan, 2011a, 2011b). According to Berry, there are three essential principles that govern this relationship: principle of wholeness, principle of care and principle of lawfulness (Berry, 1999).[1] Law and governance should then re-focus in a way that would support ecosystems and the complex interactions having place in

[1] The first principle applies to every existing institution, and it refers to the interconnectedness of all subjects present in nature. In this conception, nature is not made for human use. The principle of care recognizes that all species should be protected and that every existing being has the right to be, the right to habitat and the right to fulfil its role in the process of Earth community. Human immense powers, used without care, can be highly destructive. Finally, the principle of lawfulness entails the recognition that law is already embedded in nature, thus is discovered, not made. The ethics of care has been also developed by feminist ethical approaches (see generally Donovan & Adams, 2007).

our planet, finding an effective remedy to the ongoing destruction of nature.[2] Thus, advocates for Earth Jurisprudence argue for the subjectification of nature, as opposed to the objectification that it is present in mainstream environmental law. Nature is therefore provided by intrinsic worth, and it is not considered, of course, of worth just in relation to humans' environmental benefits—including rights (Koons, 2008).

Therefore, we could imagine how Earth Jurisprudence could inspire and substantially modify climate governance. This book has widely demonstrated how contemporary climate change governance and related human rights-based approaches are failing, in some instances, to realize both environmental and human rights protection. Yet, we still could be imaging how climate change law and governance could improve and address the root of the problem: the broken relationship between humankind and nature (Wright, 2013). An Earth Jurisprudence interpretation of climate law would investigate and fix the systemic problems at the heart of climate change, such as considering the ecological limitation of the planet and imbuing humankind with a substantial duty of care towards the environment through the imposition of limits to dangerous human activities according to the laws inscribed in the natural environment.

In this context, RoN are to be seen as a way to operationalize Earth Jurisprudence in law and governance. In fact, the term "Rights of Nature" is frequently used to refer to two distinct matters. As a legal philosophy—and underlying principles—they can be referred indeed as Earth Jurisprudence, but as the specific legal provisions meant to categorize such philosophy scholars and practitioners refer to RoN (Kauffman, 2020). However, RoN are a way to codify Earth Jurisprudence, their recognition can lead to some ontological issues especially in relation to Indigenous cosmovision, as the section will argue more in depth. Later in the chapter, I am proposing another way of conceptualizing the principles that are at the basis of environmental and human rights law, and such concepts argue for a critical rethinking of what I define as centredness theories.

[2] According to environmental scientists, human activities are provoking the ongoing sixth mass extinction. See also: UN Environment website, available at https://www.unep.org/news-and-stories/story/warning-sixth-mass-species-extinction-cards, last accessed September 2022.

In fact, Earth Jurisprudence presents itself as a centredness theory, in the sense that its main aim is to promote ecocentrism vis a vis the mainstream anthropocentrism that characterized all systems of laws—not only environmental law. Earth Jurisprudence and ecocentrism, as promoted by Deep Ecologists, offer an alternative to the mechanistic worldviews which consider human beings as the ultimate masters of Nature, in a utilitarian way, and the origin and source of all values. An ecocentric worldview, on the contrary, contends that Nature and all manifestation of life have intrinsic value, and the right to exist and to thrive. While such affirmations consequently led to the debate on RoN addressed in the next section, here I would like to focus on some general scholarly critical debates around the meaning of ecocentrism and Earth Jurisprudence. The first critical consideration that is being advocated relates to the fact that ecocentrism, in its very conceptualization, is in fact utilizing and reproposing the dualistic ontology humankind/nature it seeks to abandon. This point is addressed later in the chapter in relation to the need for a decolonization of RoN. Second, the econcentrism that underlies Earth Jurisprudence is being criticized because it relies on humankind's culture and values to decide that Nature holds *intrinsic* value: it is *us*, human beings, who are recognizing the value and the rights pertaining to the non-human world. Such value statements are paradoxically anthropocentric because they are an expression of what *we* consider valuable: "The spokespersons of ecocentrism play with the idea that an objective, unbiased observer could determine how the value of human dignity would compare with other living beings. But why assume that the typical human tendency to judge things in terms of superior and inferior would have any meaning whatsoever when seen from the standpoint of an impartial observer?" (Burms, 1991 as cited in Drenthen, 2011).

Third, according to ecofeminist values, anthropocentrism is not the problem per se, but gender-biased articulation and androcentric values are the real issues we should be considering even when dealing with environmental and climate problems. For ecologically minded feminist, the anthropocentric dimension of the law is not the direct enemy, but rather the problem relies in gender-biased dimension of our system that depletes both the natural environment and oppresses women (Brown, 1995). In fact, both Deep Ecologists and feminists agree that men have been much

more directly involved in ecological destruction compared to women, pre-capitalist people and non-Western peoples. But feminists contend that the oppressive domination of both women and nature are located in a patriarchal conceptual framework and this connection should be duly taken into account and underpin the centre of the ethical quest (Sessions, 1991).

Fourth, it can be argued that Deep Ecologists, in promoting a radical "ecocentric egalitarianism" would translate ecocentrism in a flat ontology. Such egalitarianism might collapse into nihilism if no distinctions of whose interests should prevail are clarified: for example, if nature interests and human interests have the same importance, it might become possible that extreme politics of human degrowth would be considered morally acceptable in order to preserve the earth's resources.[3] While the points raised here are complex and would require extensive research, in the next section, I will try to answer some of the questions raised from the point of view of the interconnection between RoN, Indigenous cosmovision and the promotion of non-centric theories that argue not for a radical egalitarianism, but for the appreciation of an existential and relational continuum between humankind and nature. I will do so by starting with an analysis of the issues connected to the acknowledgement of legal personality to Nature and its supposed interlinkage with Indigenous cosmovision.

Not Only Human Rights: Indigenous Cosmovision and Rights of Nature

Through the present chapter, I would like to put forward a reflection concerning the fact that non-anthropocentric theories should not aim at reconstructing a "-centric", hierarchical order that replicates the Westernized division between humankind and nature, but at replacing

[3] According to Brown: "Due to my place in the evolutionary-ecological system I cannot value the life of a child in a ghetto tenement and the lives of a family of rats equally. To do so would be to abdicate all value and leave me unable to act. It is a part of the predicament of every species to act from its self-interest and to choose to spare the life of any innocent person over the lives of a family of rats in an expression of this evolutionary imperative" (Brown, 1995).

this system of relationships with a circular form of existential continuum. The advancement of a new type of environmental and human rights law that builds on non-anthropocentric theories might give space to more functional approaches to planetary health. This advancement is being often narrated as inspired by Indigenous cosmovision and RoN; however with some critical points, that will be discussed later in the chapter.[4]

The ontological debate on RoN and decolonization of legal subjectivity is not a very recent one. In fact, it has been debated since the 1970s, when Christopher Stone published *Should Trees Have Standing?: Law, Morality, and the Environment* (Stone, 2010). At that time, this approach seemed like a utopia and many decades were needed before this legal argument was developed both in academia and law. Much of the debate that considered impossible the extension of legal personhood to natural elements revolved around the issue that even if humans are inextricably dependent on the wholeness of nature, it does not per se mean that nature and environmental elements should be personified. This is because having a legal right means that the holder is entitled to address a court when a violation occurs. In this logic, would it make any sense to speak of rights for trees when trees are not legal subjects and, even if they were, they cannot speak to lawyers arguing for remedies? Yet, as I am arguing in this section, the significance of Earth Jurisprudence and RoN goes far beyond the mere debate on legal personhood.

In order to realize and operationalize such paradigmatic shift, RoN are narrated by several scholars as to greatly draw upon Indigenous peoples' views and cosmovision, and such studies pay great attention to Indigenous customs, practices and believes.[5] This is because Indigenous peoples'

[4] Rights of Nature is capitalized because it indicates an ontological entity upon which subjectivity has been imparted in accordance with the rationale of the Ecuadorian Constitution of 2008, the Universal Declaration of the Rights of Mother Earth, the United Nations (UN) "Harmony with Nature" programme, and the Global Alliance for the Rights of Nature.

[5] Thomas Berry recognizes the importance of listening to indigenous peoples' voices: "Indigenous peoples traditionally they live in conscious awareness of the starts in the heavens, the topography of the region, the dawn and sunset, the phase of the moon, and the seasonal sequence. They live in a world of subjects, not a world of objects" (Berry, 2009, p. 88). On the interlinkage between Indigenous culture and rights of Nature, see also Demos (2016, p. 8); Gudynas (2009); Gudynas and Acosta (2011). Indigenous views are believed to have contributed to the shaping of legal instruments that acknowledge rights of nature at the international and national level (O'Donnell et al., 2020).

livelihoods are seen as characterized by an intimate and personal level of relationship with nature, understanding this relationship as mutual nourishment and within a frame of mutual coexistence (Mason, 2011). This way of intending the relationship between humankind and nature is reflected in Indigenous normative organizations: care for the environment is deeply embedded in Indigenous peoples' customary law systems (see generally Parrotta & Ronald, 2012). So, it appears as the current RoN debate and relative legal advancements are deeply influenced by Indigenous views.

An example of how the ecological relationship with nature shapes Indigenous legal systems is found in the concept of *restorative* justice. The infusion of spirituality in Indigenous legal systems derives from cosmovision that consider the natural world as "sacred" (Glenn, 2014, p. 80). For example, in aboriginal culture, law interconnects all humans in a same network together with ancestral spirits, lands, seas and the universe. The focus of Indigenous legal regimes is then aimed at restoration and re-establishment of previous conditions, rather than the application of retributive approaches to justice. The idea of restorative justice resonates with the principle of wholeness in Earth Jurisprudence, which means that justice should aim at restoring the integrity of both human and Earth communities, re-habilitating the wrongdoer in joining again their community in the shortest time possible.[6]

Critical Aspects of Rights of Nature vis-a-vis Indigenous Anthropomorphism

This apparent interlink between RoN and Indigenous cosmologies that is narrated by academic authors here cited should not be considered obvious, but instead it needs to be critically explored.[7] Debates on the real

[6] For example, in Inuit culture, law is designed to ensure the survival of people at the extreme temperatures that characterize Inuit territories. If a member of the community commits an offence, this is understood as an alteration in the relationship with other members of the community. The process of restoration often involves mediation, especially through the participation of elder members, healing, which includes an apology to the group and the person offended and restitution, which prescribes a change in behaviour, rituals and compensation to the victim (Mason, 2011).

[7] For a critical approach to Rights of Nature, refer to Calzadilla and Kotzé (2018).

significance of the attribution of personhood to natural entities are still ongoing, especially for what concerns attribution of legal standing and enforcement of RoN (Athens, 2018). In regard to this aspect, RoN somewhat resemble the transposition of a Western entity, the "legal person", to an entity, Mother Earth, or Pacha Mama or an abstract "Nature", which is not necessarily considered as "subject of rights"—as intended in the Western legal meaning—by Indigenous philosophies: "The rights of nature are presented as a formulation that—perhaps paradoxically—borrows the idea of rights from the West to protect entities that have only ever been recognized ecocentrically in indigenous philosophies" (Tanasescu, 2020). However, it cannot even be affirmed that Indigenous philosophies are genuinely "ecocentric", since, as I am arguing in this section, such philosophies are not expressing a dualistic point of view that separates and hierarchizes humankind and nature. Rather, they are the expression of a holistic relationship with the environment and other natural elements, which should be duly taken into consideration without equalizing Indigenous peoples' claims to the need for the emergence of RoN and ecocentrism.

The problem of legal personhood that has emerged in the context of RoN is seen as a limitation to the operationalization of such rights. In my views, the discourse of RoN should not rely on the assumption that natural elements can become competitors of human rights—for example, in the case a river is invested with legal subjectivity, this could lead to the paradoxical situation of demanding reparations from the river in case of flooding. The RoN discourse does not seem to work if translated in the Westernized legal paradigm.

In fact, the whole rationale of the RoN discourse is not limited to the acknowledgement of personhood—intended in Western legal meaning—to natural elements of the biosphere (Norman, 2018). It is about restoring to the maximum extent possible the integrity of ecosystems that we have damaged and changing our legal systems by re-contextualizing them within an ecological perspective:

> The key issue is not whether or not humans should magnanimously decide to grant legal standing to trees. The real question is whether or not we will be able to correct the distortions inherent in contemporary legal systems that prevent the law from seeing the reality that members of the Earth

> community already have what we humans term "rights". […] if we are to survive, we must one day move beyond denial and recognize our foolishness in choosing to believe that all Nature is our property, that we are entitled to use and abuse it for our own selfish ends. What remains unclear is how much human suffering, how much carnage and destruction of our beautiful planet will it take before we recognize that humans must govern themselves in a way that respects the rights of all other members of the Earth community of which they form an integral part?. (Cullinan, 2008)

RoN, interpreted in an "Indigenous way" rely on ontological assumptions that are related to "human personhood" rather than "legal personhood". I will explain this important difference, which is crucial for the ontological understanding of the meaning of RoN. The fact that rights are being attributed to a general "nature" or to various natural elements such as rivers, and the fact that such intrinsic values are attached to nature, does not resolve per se the anthropocentric perspective that RoN wish to eliminate. Therefore, the idea of these intrinsic values would have no meaning, since to recognize values would mean to have humans who grant them. Where there are no humans, there would be no values (Gudynas, 2011). The "human personhood", on the contrary, is not attached exclusively to human beings. In order to explain this statement, I will make a brief focus on Indigenous animism and anthropomorphism.

First of all, we should bear in mind that the process of colonization entailed also *religious* colonization, and at present Indigenous spirituality and beliefs are seldom entrenched to religious aspects brought in by the Christian colonizers (on this account, refer to De la Cadena, 2010). At the same time, there are peoples who have formally accepted the religious beliefs of the colonizers, but they continue to practice their ancestral rites and religion in the intimacy of their communities (Reguart Segarra, 2021, p. 77). In general, Indigenous belief systems are characterized by animism, which can be translated into the belief that all manifestations of existence have a "soul". Therefore, being a "person" is not just a prerogative of human beings, but "person" is a general category that can manifest in different forms: human person, river person, wind person, in sum, "other-than-human" persons (Hallowell, 1962). For this reason, Indigenous belief systems are characterized by anthropomorphism, which implies that

> *the original common condition of both humans and animals is not animality but, rather, humanity*. The great separation reveals not so much culture distinguishing itself from nature as nature distancing itself from culture: the myths tell how animals lost the qualities inherited or retained by humans. Humans are those who continue as they have always been. *Animals are ex-humans (rather than humans, ex-animals)*. In some cases, humankind is the substance of the primordial plenum or the original form of virtually everything, not just animals. (Viveiros de Castro E. B. 2004b; emphasis in original)

Such anthropomorphism and animism should inform and inspire the way in which RoN are conceptualized, if we wish to foster the ontological narration of their connection with Indigenous cosmovision and spirituality. In fact, according to this ontology, the distinction between humans, animals and natural elements does not exist. Everything in the universe is part of the same existential continuum, and this continuum differentiates itself into different manifestations of life and being. In this sense, it appears evident that the Western "legal personhood" cannot be considered synonymous of the Indigenous "human personhood". This relational ontology is also at epistemological basis of the conceptualization of the right of ecological integrity that I will address in the final section. I suspect that for many Indigenous peoples, RoN do not necessarily imply the recognition of the intrinsic *value* of nature—a very Western concept, as already remarked in the first section. Rather, for Indigenous peoples nature and the environment are indeed just another form of humanity, the space where their ancestor live and continue to live, their brothers and sisters. So, the fact that they might not explicitly state that nature is intrinsically valuable does not impede, in the practice, that respect for the environment and harmony with nature are realized in Indigenous territories. However, future empirical research would be needed to assess this specific point.

Going back to the critical debate upon RoN, another problematic aspect connected to their supposed connection to Indigenous cosmovision is the adoption of only those traits of Indigenous cultures that appear to be particularly inviting and functional, with the exclusion of aspects that could be negatively judged or not deemed useful for this debate

(Pellizzon, 2014). This approach would result in a utilitarian approach to Indigenous cosmovision, aimed at isolating only certain characteristics of Indigenous cultures deemed useful for the development of the RoN project. This critical aspect has been already discussed in Chaps. 2 and 4, in relation to Indigenous knowledge and the re-creation of a contemporary "noble savage myth". In such a process, Earth Jurisprudence lawyers are indeed not inventing anything new, but rather they are re-imagining some aspects of the voices of peoples that have been oppressed and marginalized by past and current forms of colonialism.[8]

Listening to the voices of Indigenous peoples, who are the representatives of somewhat counter-hegemonic approaches to environmental governance, is a fundamental part for the realization of a paradigmatic shift in environmental and climate law. However, this shift cannot result exclusively in embracing RoN, and forcibly—and partially—translating part of Indigenous peoples cosmovision in the recognition of a new legal personhood. Therefore, we must embrace Indigenous cosmologies in their totality, and consider that such holistic philosophies are embedded in the different manifestations of their legal pluralism. Such aspects should be duly considered by legal scholars and decision-makers as matters to be explored within the contemporary debate of RoN. This means acknowledging and redressing the historical imbalances of power, renegotiating sovereignty and recognizing self-determination of Indigenous peoples—which encompasses also spiritual and religious freedom. Thus, the broader Earth Jurisprudence movement should not only entail an ideological, legal and philosophical paradigmatic shift from a neoliberal-positivistic regime to a new order aimed at living in harmony with our planet, but it should also consist in a way to realize a true intercultural dialogue that gives voice to those peoples who have been historically marginalized and oppressed.

This integrated approach to Indigenous cosmovision and RoN should constitute an integral part of climate negotiations and should be included in the design of policies and environmental governance in order to

[8] Other scholars have critically analysed this renewed focus on Indigenous communities in relation to environmental law: refer to Sánchez Parga (2011); Philippopoulos-Mihalopoulos (2011); Mansilla (2011a, 2011b).

reshape the law and how it is applied. This can be done thanks to what has been taking place in environmental governance in relation to Indigenous knowledge. This process, which is arguably already taking place within the limits of international instruments such as the CBD, the institution of ICCAs and through other initiatives such as the UN Programme Harmony with Nature, appears still quite marginal and secondary compared to States' interests in safeguarding their business-as-usual policies.[9] Inclusion of Indigenous cosmovision in climate governance would contribute in guiding processes of environmental awareness, showing the importance of natural conservation to human existence, together with the possibility of living in a truly ecological manner in our planet. According to an Indigenous, decolonial approach, the law *is* inscribed within nature, not positivistic-derived, and it already bears the rules of ecological limitations to human actions. Climatic change and related impacts are teaching us that we should consider the law inscribed in the environment and adapt ourselves to its limits and characteristics.

Rights of Nature in Law and Governance

RoN are not just a philosophical and theoretical conception, but they are increasingly being recognized at the international and national level.[10] In 1982, the UN General Assembly adopted the World Charter for Nature, a non-binding, soft law document that aimed at establishing code of conduct for States for the preservation of the environment. The real effectiveness of the instrument had already been contested during its negotiations by the coalition of South American countries. Such coalition argued that the World Charter "it is therefore yet another link in a chain of documents which, because they contain only principles, lead to a dispersion of efforts, and the absolute lack of objective conditions for the achievement of results that might lead to its being relegated to the archives" (UN/GA, 1983). We would need to wait until December 2009 for the UNGA to adopt Resolution on Harmony with Nature (A/RES/64/196). This resolution requested the Secretary-General to issue a first Report of the

[9] Harmony with Nature website, available at http://www.harmonywithnatureun.org/, last accessed September 2022.

[10] See also Giacomini (2020).

Secretary-General on Harmony with Nature. The following year, Resolution A/RES/65/164 was adopted, which required the Secretary General to host the first Interactive Dialogue of the General Assembly to commemorate International Mother Earth Day. The Dialogues are the UN Harmony with Nature's platform through which high representatives from governments and experts in different fields of Earth-centred law, sustainable development, science and economics share their experiences, lessons learned and institutional responses to various environmental problems such as climate change and biodiversity loss. Their objective is to foster the practical application of the principle of Earth Jurisprudence and Nature-centred law in international and national contexts. Another reference to "Harmony with Nature" is contained in the outcome of the United Nations Conference on Sustainable Development (Rio+20). The document adopted, "The Future We Want", refers to Harmony with Nature in paragraph 39.[11]

More recently, in the already-mentioned Advisory Opinion to Colombia, the IACtHR declared its openness to recognizing the "Rights of Nature". It clearly admitted how crucial is to protect nature because of its importance for other living organisms, rather than for its utilitarianism to on human beings (Glenn, 2014, p. 80). At the international level, it is also worth mentioning the International Rights of Nature Tribunal, an initiative created in 2014 by the Global Alliance for the Rights of Nature, inspired by the International War Crimes Tribunal and the Permanent Peoples' Tribunal. The International Rights of Nature Tribunal has a non-binding nature, and its function is to foster dialogue from people all around the globe around environmental and climate issues, with special attention to Indigenous peoples. Its main source of law is the Declaration on the Rights of Mother Earth and national laws such as those of Ecuador and Bolivia, addressed more in depth below (Maloney, 2016). The last session of the Tribunal to date was held in parallel to the

[11] "We recognize that planet Earth and its ecosystems are our home and that "Mother Earth" is a common expression in a number of countries and regions, and we note that some countries recognize the rights of nature in the context of the promotion of sustainable development. We are convinced that in order to achieve a just balance among the economic, social and environmental needs of present and future generations, it is necessary to promote harmony with nature".

COP26 in Glasgow and examined two cases: "False Solutions to the Climate Change Crisis" and "The Amazon as a threatened living entity".[12]

The integration of RoN in national contexts seems to bring an important inclusion of Indigenous cosmovision in laws and regulations. One of the most well-known examples of the acknowledgement of RoN is the 2008 Constitution of Ecuador. It is the first constitution in the world that recognizes legal personhood to Mother Earth. Such set of rights prescribe that Pacha Mama—Mother Nature—"has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes".[13] Concerning the enforcement of such provision, article 72 clarifies that "the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences", while "All persons, communities, peoples and nations can call upon public authorities to enforce the RoN".[14] Thus, in Ecuador, individuals and communities have legal standing to bring cases on behalf of nature in Courts. These provisions are particularly meaningful in a country that has been affected by severe man-made environmental disasters such as the spilling of crude oil in the Amazon operated by Chevron-Texaco (Buccina et al., 2013).

Another example is the Bolivian Mother Earth Law and Integral Development to Live Well (2012). The Law defines "Living Well" (in Spanish, *Buen Vivir*) in relation to climate change and defines the State's legal obligations.[15] According to the law, the state will develop policies,

[12] For decisions and other information refer to the Tribunal website: https://www.rightsofnaturetribunal.org/, last accessed September 2022.

[13] Constitution of Ecuador, 2008, art. 71.

[14] Ibid.

[15] The philosophy of Living Well was primarily included in Bolivian Constitution of 2009 and it is considered one of its founding principles. The origin of this concept has been attributed to the cosmogony of Andean indigenous peoples. It is also widely recognized that Indigenous organizations have been one of the main legal and political operators that have promoted Living Well at the political level. Living Well is commonly understood in legal and political literature as a holistic model of life that has as its backbone the principles of relationality, complementarity, balance and reciprocity. as in the case of RoN, the principle of Living Well is nourished by knowledge that has usually been considered marginal—Indigenous knowledge. The concept of Living Well, therefore, is directly interlinked with traditional ways of understanding the legal knowledge. It also creates a general framework for reinterpreting the relationships between the environment, human beings, development and the economy. A framework that brings political communities closer to biocentric, anti-capitalist and decolonial perspectives (Bonilla Maldonado, 2019).

strategies and legal techniques to mitigate the effects of climate change and adapt to them through strengthening institutional capacities with the purpose of long-term planning. At the same time, the recuperation and strengthening of traditional Indigenous practices that were will also be encouraged (Art. 13.10). This legislation has in fact been greatly inspired by the Andean philosophy and thought, entailing the shift in the consideration of nature as having moral personhood.[16] The law is the representation of the ongoing dialogue with Indigenous communities, a dialogue that recovers their ancient cosmovision and their capacity to understand other species not as objects, but as subjects of law (Martínez & Acosta, 2011). However, awarding rights to nature through the inclusion of Andean philosophies in constitutional law and national laws has been largely criticized by South American scholars who believe that the idealization of Indigenous thought is not the correct instrument to address the dynamics of predatory capitalism (Comaroff & Comaroff, 2008; Mansilla, 2011a; Sanchez-Parga, 2011; Mansilla, 2011b).

Nevertheless, it is difficult to assert that the constitutional provisions in Ecuador awarding RoN are truly overarching principles of environmental governance. This is reflected in the contrast between such provisions and economic development politics based on extractivism. Only in 2007, the year before the entering into force of the new constitution, the government announced that it was planning to build the greatest oil refinery of South America. In order to do so, the government approved the clearing of 3800 hectares of dry forest in the province of Manabi.[17] Even though the refinery was opposed by environmental movements and technical advisory bodies, the great majority of inhabitants of the area supported the project for the possibility of having more than 2000 jobs (Erazo et al., 2009; Fitz-Henry, 2014). Thus, in this case, it seems that the RoN come after the "strategic priorities" for the development of the

[16] Ecuadorean indigenous groups had an important lobbying role during the draft negotiations (Jameson, 2010).

[17] The deforestation is believed to have affected the climate in the area of Manabi. See also: Lozano G. *Ecuador: Deforestación del proyecto Refinería del Pacífico habría afectado el clima en área de reserve*, 2018, available at https://es.mongabay.com/2018/05/deforestacion-refineria-del-pacifico-ecuador/, last accessed September 2022, and *Pacífico Eloy Alfaro Refinery and Petrochemical Complex* at https://www.hydrocarbons-technology.com/projects/pacfico-eloy-alfaro-refinery-and-petrochemical-complex/, last accessed September 2022.

nation.[18] If these strategic priorities include oil refineries, technology and mining, it seems that the RoN will thus always be susceptible to being upended and nullified by the State.

Other example of inclusion of Indigenous cosmovision in legal instruments awarding of RoN are represented by New Zealand's Whanganui River Act (2014), Australia's Te Urewera Act (2014) and Yarra River Protection Act (2017) and Mexico's Environmental Law for the Protection of the Earth (2013). National courts have also played an important role in the affirmation of nature's rights, like in the River Turag Case (2019), where the Court of Bangladesh gave legal status to a river to save it from encroachment. Similarly, the Supreme Court of Colombia awarded legal rights to the Atrato River (2016), to the Andean bear (2017) and to the whole Amazon River ecosystem (2018). In Ecuador, the Provincial Court of Loja recognized the legal personhood of the Vilcamba river (2011), while in India, a court in the northern State of Uttarakhand ordered that the Ganges and its main tributary, the Yamuna, be accorded the status of living human entities (2017).

The acknowledgement of RoN is not limited to the listed countries. It is in fact gaining momentum also in Europe. For example, France in 2018 initiated a constitutional reform to amend the Constitution (1958) and also the Charter of the Environment (2004). The modification consists in over 20 amendments addressing, among others, the rights of the living, animal welfare, the global commons, the crime of ecocide and the principle of non-environmental regression.[19] The European Economic and Social Committee published a study in 2019 entitled "Towards an EU Charter of the Fundamental Rights of Nature", which objective is to set a framework for the legal recognition of the RoN in the EU legal order, as a precondition for a different and improved relationship between humankind and Nature. More recently, in 2021, the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, published a study on RoN in the European context. These institutional initiatives register a renewed

[18] Ecuador National Development Plan, 2007–2010.

[19] Proposal of constitutional amendments available at http://files.harmonywithnatureun.org/uploads/upload716.pdf, last accessed September 2022.

interest in the philosophical and legal debate around RoN and alternatives in environmental governance. In Spain, in early 2022, the *Iniciativa Legislativa Popular* to recognize Mar Menor and his entire basin as a subject with rights was voted and approved in the Congress of Deputies. Mar Menor will have legal personality, thus becoming the first ecosystem in Europe with his own right. In Switzerland, in March 2021, national councillors from different political parties presented an Initiative for the Rights of Nature to the Swiss Parliament requesting the recognition of a right to a healthy environment and RoN.[20]

At the practical level, the interlinkage between Indigenous cosmovision and respect, care and also "sustainable development" has led to important recognitions of Indigenous sovereignty and/or guardianship over lands and territories.[21] The ICCA initiatives discussed in Chap. 6 represent one such approach. Indigenous peoples in some instances can be considered as guardians of natural resources and enforces of environmental law. The guardianship approach has been already put in place in some instances where RoN were legally established. Back in 2017, when New Zealand, followed by India and Colombia, recognized rivers as legal persons with an array of legal rights, such rights were protected through the institution of a board composed by Indigenous and non-Indigenous peoples (see Tanasescu, 2020 on the case of Tu Urewera act). By focusing on specific natural entities, these new instances of RoN culminated in the introduction of new institutional measures, such as the appointment of guardians to act on behalf of the rivers (O'Donnell et al., 2020). Guardianship institutions connected to RoN are a relatively new legal measure created to protect natural resources, and future research and investigation will determine in what measure these practices have led to environmental protection, co-management of natural resources,

[20] For a full account on the global recognition of RoN consult UN Harmony with Nature website at http://www.harmonywithnatureun.org/rightsOfNature/, last accessed May 2022.

[21] The institution of guardianship—that can concern not only Indigenous communities, but also any community of people interested in the wellbeing of the environment—is imbued with crucial differences in comparison with the positivistic duty of care of the State. Guardianship is a bottom-up, highly participatory process that takes into account the legally pluralistic and intrinsically connected to natural elements views of Indigenous peoples.

affirmation of rights of Indigenous peoples over their ancestral lands and territories, and finally to litigation in court and redress of injustices.[22]

Thus, in the political discourse Indigenous peoples are narrated as important stewards of the ecological integrity of the Earth, given their lifestyle traditionally embedded and dependent on the natural environment. In order to accomplish such a role, they need to be able to live and reside in their ancestral territories, and not be forcibly relocated or attacked to gain access to their lands. The World Resources Institute has recently underlined how securing land rights to Indigenous communities can represent a way forward to slow climate change and reach the SDGs.[23] It has been demonstrated that where communities legally own their land, deforestation rates have decreased, while the potential of ancestral forests for carbon storage and emission reduction is truly considerable,[24] Indigenous forestlands hold one quarter of all tropical forest carbon (54,546 million metric tons).[25] Nonetheless, national laws in many countries do not formally recognize customary tenure systems: only 10% of the world's land is legally entitled to Indigenous communities.[26] As it is evident in this data, the discourse of environmental stewardship and guardianship could be strictly connected to a strategy for territorial recognition. And it is a discourse that could represent a winning strategy to

[22] The idea of guardianship resonates with Bosselmann's definition of trusteeship for the governance of global commons. However, the concept of Earth trusteeship is tied to a model of State duty of care towards the citizens and the environment, rather than participation and conservation measures enacted by Indigenous and local communities. In his views, Earth trusteeship represents the practical implications of Earth Jurisprudence. The Hague principles, adopted within the Earth Trusteeship Initiative in 2018, set out the framework for the Earth trusteeship. States, by virtue of the fact that they should be guided by the moral action of people, have a duty to protect planetary health. Earth trusteeship means also that States have positive obligations to protect human rights as part of fiduciary duties that people have entrusted them to do so. In his words, "The global scale of climate change challenges the narrow Westphalian conception of sovereignty and demands a departure from the traditional rule that care for the environment ends at national boundaries" (Bosselmann, 2020).

[23] WRI, *Land Matters: How Securing Community Land Rights Can Slow Climate Change and Accelerate the Sustainable Development Goals*, available at https://www.wri.org/insights/land-matters-how-securing-community-land-rights-can-slow-climate-change-and-accelerate, last accessed September 2022.

[24] Land Rights Now, *Secure Indigenous and community land rights contribute to fighting climate change,* available at https://www.landrightsnow.org/wp-content/uploads/2018/09/Factsheet_Indigenous_and_Community_Land_Rights_and_Climate_Change.pdf, last accessed September 2022.

[25] Ibid.

[26] Ibid.

regain control and access to ancestral lands Indigenous peoples have been deprived with colonization before, and illegal and legal extractivism now.

Rights of Nature in Global Environmental Litigation

RoN, because of their crystallization in legal norms contained in the different instruments presented in the previous section, are actually being invoked in courts' proceedings, or used by national courts in order to foster environmental protection. In this section, I will present some case studies related to litigation, environmental human rights and RoN, with a view to overlook at potentialities and limits of RoN in courts and their potential in a climate justice perspective.

Arguably, it is now taking place an ongoing "greening of climate litigation", inspired by the RoN global movement. RoN are being invoked by plaintiffs in different juridical cases. Such cases are both decided and pending. In *Asociación Civil por la Justicia Ambiental v. Province of Entre Ríos, et al*, a class action filed in the Argentinian Supreme Court against the governments of the Province of Entre Ríos and the Municipality of Victoria City in Argentina, the plaintiffs allege failure to protect environmentally sensitive wetlands.[27] The lawsuit wishes the Court to establish these environmental violations by arguing that the Paraná Delta has its own rights. The plaintiffs are respectively requesting the Court to: declare the "Paraná Delta" an ecosystem essential for the mitigation and adaptation to climate change, as a subject of rights, with particular emphasis on its nature as an essential ecosystem for the entire region; order the requested provinces to draw up and implement an Environmental Territorial Planning and a Plan for the Regulation of Land Use in the Island Territory, as a correlate to the declaration of this ecosystem "at risk from climate change" and the need for its protection for our present and future generations; designate under the orbit of the National State the figure of "guardian" of the Delta Subject of the Paraná, in order to control

[27] Asociación Civil por la Justicia Ambiental v. Province of Entre Ríos, et al., "Asociación Civil Por La Justicia Ambiental y otros c/ Entre Ríos, Provincia de y otros", Argentina, Supreme Court, 7 February 2020. The case is still pending.

the conservation and sustainable use of the wetland in its integrity. The case is still pending before the court, so it is not possible for the moment to witness how the Argentinian Supreme Court will address the recognition of RoN in this particular case.

Another interesting case from the ecocentric point of view is represented by *D. G. Khan Cement Company v. Government of Punjab*, a case decided by the Supreme Court of Pakistan in 2021. In this case, the plaintiff, a cement company owner, challenged a Notification by the Provincial Government of Punjab banning the construction of new cement plants or the expansion of existing cement plants in environmentally fragile zones known as "Negative Areas". The plaintiff argued that the Notification violated their constitutional right to freedom of trade, business, and profession under Article 18 of the Constitution, and that the government proceeded with rush by issuing the regulation without full consideration of scientific impacts. The Supreme Court upheld the Notification, arguing that the construction of cement plans in such areas should be banned with due consideration of the precautionary principle which in turn would protect the rights to life, sustainability and dignity of communities surrounding the project areas. In addition, the Court recognized the need to protect the right of nature itself arguing that "[m]an and his environment each need to compromise for the better of both and this peaceful co-existence requires that the law treats environmental objects as holders of legal rights".[28]

Finally, I would like to point to few "ecocentric environmental litigation" cases pertaining to the Latin American continent, where it seems that RoN are gaining momentum before courts. In the case *Álvarez et al v. Peru*, which is still pending before the Supreme Court of Lima, a group of Peruvian youth filed a suit in 2019 against the Peruvian government, alleging that the government has not taken adequate action to address climate change.[29] The plaintiffs alleged failure of the government to satisfactorily cease deforestation in the Amazon rainforest by adopting

[28] Supreme Court of Pakistan, case no. C.P.1290-L/2019, *D. G. Khan Cement Company Ltd. V. Government of Punjab through its Chief Secretary, Lahore, etc*, Para. 16 "Precautionary Principle, In Dubio Pro Natura & Environmental Legal Personhood".

[29] *Álvarez et al v. Peru*, Superior Court of Lima, available at http://climatecasechart.com/climate-change-litigation/non-us-case/alvarez-et-al-v-peru/, last accessed May 2022.

concrete and effective measures according to the National Policy on the Environment and the National Policy on Forests and Forest Wildlife. The complaint argues that such deforestation is taking place especially in five Amazonian regions: Loreto, Ucayali, Madre de Dios, Amazonas and San Martin. They called the government to recognize the Peruvian Amazon as an entity subject to the rights of protection, conservation, maintenance and restoration.[30] The plaintiffs argue that the situation is worse for Peruvians born between 2005 and 2011, since their future is severely compromised due to the climate crisis. They filed a human rights-based type of claim, asserting that their fundamental right to enjoy a healthy environment has been violated, along with their rights to life, water, and health, rights protected by the Peruvian Constitution.

More interesting cases from this point of view come from Ecuador. The "Sala de la Corte Provincial"—a provincial court in Ecuador—became the first court ever to uphold the constitutionalized RoN. In *Wheeler v. Director de la Procuraduria General Del Estado de Loja* (2011), the litigation resulted from the construction and expansion of a highway in the mountains of southern Ecuador carried out by the provincial government. Such works were not carried out after an environmental impact assessment, secured planning permits for the construction, or planned for the disposal of debris that would inevitably occur. Such debris resulting from the excavation and construction were eventually dumped along the Rio Vilcabamba, narrowing its width and in that way quadrupling its flow. This caused considerable erosion and flooding to the lands downriver when the raining season came. When the provincial government began dumping anew, the landowners sued. The plaintiffs did so by invoking the constitutionalized RoN, as enshrined in the constitution (it empowers "person, community, people or nationality" to exercise public authority to enforce the right, according to normal constitutional processes). This important norm was also reinforced by the other constitutional change in Ecuador which occurred in 2008. In fact, it was provided for an *acción de protección*—a procedural norm that aims to ensure "the direct and efficient safeguard of the rights enshrined in the constitution" by eliminating procedural barriers, such as the traditional requirements

[30] Ibid., Para 5, letter d).

for standing and pleading formalities. In combination, the two constitutional amendments (RoN and *acción de protección*) allow a *tout court* judicial protection of Nature and eliminate many of the procedural obstacles to enforcing such rights (Daly, 2012).

So, the case *Wheeler v. Director de la Procuraduria General Del Estado de Loja* was the first case made on the basis of the actual enforcement of RoN without necessarily implying human rights-based revindications. Although the first petition was denied for failure to name the appropriate parties, the court that finally heard the case in 2011 interpreted the aforementioned constitutional provisions in an expansive way, setting out several important principles on the RoN. The court explained: "[W]e cannot forget that injuries to Nature are 'generational injuries' which are such that, in their magnitude have repercussions not only in the present generation but whose effects will also impact future generations". It further stated that the court recognized that if a conflict between the environment and other constitutional rights would rise, RoN would prevail since a "healthy" environment is more important than any other right. However, notwithstanding this judgement, the actual enforcement of the court's decision was not immediately realized, and the road construction and related debris dumping was not remediated (Daly, 2012).

The reference to the right to a healthy environment might seem related to an anthropocentric conceptualization of the environment, as discussed previously in the book. However, in this context, it can refer to an environment suited to maintain human health, or an environment that is itself thriving and healthy. This second conceptualization might resonate better within the RoN paradigm, since an unhealthy, polluted environment might cause negative effect to all living organisms present in a determined ecosystem. Nonetheless, the general definition of the right to a healthy environment is related to the quality of environmental factors that might affect human health (Tigre, 2017, p. 402).

Another case related to Ecuador is the *República del Ecuador Asamblea Nacional, Comisión de la Biodiversidad y Recursos Naturales*, which came right after the *Wheeler* case.[31] This case differs from cases previously analysed, since it was the government itself that alleged a violation of RoN against private property owners. In fact, the Second Court of Criminal

[31] *República del Ecuador Asamblea Nacional, Comisión de la Biodiversidad y Recursos Naturales*, Session Act No. 66 (15 June 2011).

Guarantees of Pichincha established that illegal mining violated RoN guaranteed by the constitution. As form of reparation, the Court held that the armed forces and the national police should collaborate to enforce the decision. This included the destruction of "all of the items, tools and other utensils that constitute a grave danger to nature and that are found in the site where there is serious harm to the environment". This injunction was indeed enforced by more than 500 members of the military forces, who demolished mining gear through the use of explosive. The government had argued that the destruction of the miners' private property was required because earlier efforts to confiscate the mining materials had not been effective. While this case represents perhaps an excessive example with an enforcement realized through actual destruction of private property, it demonstrates that strong judicial remedies combined with government enforcement can have a striking effect on the ground (Daly, 2012; Collins, 2017).

The case *Manglar Cayapas Mataje v. Camaronera Marmeza* represents another legal suit based on RoN. The ecosystem where the Cayapas–Mataje Ecological Reserve is located has been affected by the operations of the shrimp company Marmeza, generating serious violations of the RoN, as referred to in his application by the Provincial Director of the Ministry of the Environment of Esmeraldas.[32] In the final ruling, the Constitutional Court found that the lack of knowledge of the RoN on the part of the judges caused an affectation to the principle of

[32] In 2010, the Provincial Directorate of the Ministry of the Environment of Esmeraldas issued an administrative act by which it ordered the eviction of the aquaculture activity carried out by the company Marmeza S.A., of the space in which the aquaculture activity of the company overlapped with the Mataje Cayapas Ecological Reserve (REMACA), because there was evidence that the company had extended the occupation space of its aquaculture activity beyond the concession area and within the reserve. Marmeza S.A. proposed an action of protection against the Provincial Directorate of the Ministry of the Environment of Esmeraldas, pointing out that the right to property had been violated. In this regard, the first-level judge accepted the protection action considering that the activities of the company were authorized by the State before the institution of the ecological reserve. In a similar way, the Provincial Court of Justice of Esmeraldas choose to reject the appeal to the judgement of the action of protection No. 281-2011, because it considered that the administrative act violates the rights of property and work of Marmeza, without devoting a single reasoning to the analysis of the impact of human-made activities on mangroves which are protected by the declaration of the ecological reserve and which have been recognised as a fragile ecosystem in Article 406 of the Constitution of the Republic, thereby excluding the encroachment on the rights of Nature (Narváez Álvarez & Escudero Soliz, 2021).

motivation.[33] In a relevant part of the decision, the Court noted that: "the rights of Nature are one of the most interesting and relevant innovations of the current constitution, since it departs from the traditional conception Nature-object that considers Nature as property and focuses its protection exclusively through the right to enjoy a healthy environment, to give way to a notion that recognizes own rights in favour of Nature".[34] The Constitutional Court observed that the judgement of the Provincial Court of Esmeraldas focused initially on the rights to property and work generated by Marmeza, thus not considering the juridical content of the RoN. However, the Court stated: "Being an ecological reserve, the place where the shrimp boat MARMEZA is located, represents a natural heritage area of the State, whose administration is the responsibility of the Ministry of the Environment".[35]

From this last consideration, it follows that the Court decided to emphasize an reductionist approach to the protection of RoN, subjecting the actors to the will of the State power and to environmental zoning derived from conservation areas, such as the ecological reserves, with the result that the protection of the RoN was limited to this area controlled by the State, since the power to determine a protected environmental area is vested in the National Environmental Authority (Narváez Álvarez & Escudero Soliz, 2021).

Finally, and again in Ecuador, in a recent decision, the Constitutional Court concluded that activities that threaten the RoN should not be carried out within the Los Cedros Protected Forest ecosystem, including mining and all types of extractive activities. Water and environmental permits to mining companies must also be denied.[36] The organizations Earth Law Center, Global Alliance for the RoN, and the Centre for

[33] The content of the right to a defence and to a statement of reasons recognized in Article 76 of the Ecuadorian Constitution prescribes that persons are entitled to a number of basic procedural guarantees, including the obligation of public authorities to issue reasoned decisions; that is, judicial decisions are legally certain, mainly for those directly affected by the decisions of the judicial authorities, whereas this right requires that decisions be duly justified.

[34] Corte Constitucional del Ecuador (2015) *Acción extraordinaria de protección interpuesta por el Director provincial del Ministerio del Ambiente de Esmeraldas.* Caso No. 0507-12-EP. Decision No. 166-15-SEP-CC, 20 May 2015, translation in English is by the Author.

[35] Ibid.

[36] Ecuador Constitutional Court, Decision No. 1149-19-JP/21, 10 November 2021.

Biological Diversity filed an *amicus curiae* report in September 2020 before the Ecuadorian Constitutional Court. The report requested the court to protect Los Cedros natural reserve and strongly enforce constitutional provisions that protect RoN including the rights to existing, to restoration, and the rights of the rivers, especially river Magdalena. The court, in relation to RoN, affirmed that "rights of nature protect ecosystems and natural processes for their intrinsic value, thus *complementing* the human right to a healthy and ecologically balanced environment."[37] The ancillary function of RoN to human rights-based approaches is also confirmed in other parts of the decision, which read: "The right to water is closely related to the right to a healthy environment and to the rights of nature, since it is an articulating element of life on the planet"; "[t]he right to a healthy environment under the Ecuadorian constitutional framework and international instruments, not only focuses on ensuring adequate environmental conditions for human life, but also protects the elements that make up nature from a biocentric approach, without losing its autonomy as a human right".

The court, while confirming that the Ministry of the Environment, Water and Ecological Transition violated the RoN that correspond to the Protective Forest Los Cedros and the right to water, has done so by coupling the ecocentric and the anthropocentric approach. In this decision, RoN seem to reinforce human rights approaches, such as the right to a healthy environment. Therefore, human rights and RoN go hand in hand without necessarily prevailing one on top of another. Such an interpretation of the interaction between these two different sets of rights is interesting and will be thought-provoking to analyse, in future investigation, the interplay and the relationship between RoN and human rights in fostering environmental protection and human rights fulfilment.

The few cases here presented demonstrate that certainly there is some potentiality for the application of RoN at the practical level. However, it is still too early to draw some conclusions based on such case law. Even though RoN could be certainly game-changing from the point of view of constitutional environmental rights, their effective impact still has to be seen—in addition to the issues on their conceptualization analysed in the

[37] Ibid. para 337. Translated from Spanish by the author, emphasis added.

previous section. Furthermore, since some cases are still pending, no claim can be made about the effectiveness of the argumentation related to RoN. Future research will need to clarify, inter alia, whether RoN represent an effective means of environmental protection vis-a-vis human rights-based approaches, together with an analysis of the practical interplay between RoN and human rights. Second, it should establish whether RoN constitute an ancillary, narrative way to enshrine anthropocentric approaches to environmental protection. Finally, it should be discussed the significance of the recognition of RoN in national contexts where uncontrolled deforestation is still an ongoing process and where economies are strongly based on mining.[38]

Another point I would like to put forward is whether a possible inspiration could be taken from such RoN-based litigation to inform climate-related claims. The presence of the ecological dimension in climate litigation is perhaps something that could be investigated, in order to determine whether such aspects are present, or whether it is a type of litigation exclusively based on anthropocentric values. While there is no space in the present book for such considerations, in future research, it would be interesting to note if certain climate litigation cases can be ascribed to a perspective close to Earth Jurisprudence or RoN. For example, lawsuits could be brought against private companies or States on the basis that they interfere with RoN in a climate mitigation perspective. For example, in the case *Xstrata Coal Queensland Pty. Ltd. and Others v. Friends of the Earth—Brisbane and Others* (2012), the objection was based on the fact that the emissions of the mine are contributing to climate change and ocean acidification and that the mine is inherently disruptive of natural cycles.[39] In another case, *Baihua Caiga et. al. v. PetroOriental*

[38] At the time of writing, the government of Ecuador aims to double its stagnant oil production in four years. In order to accomplish such objective, and the government will seek to engage the private sector fully through a strategy that would break the quasi-monopoly of the state. The titanic objective has been repeatedly announced by the new President Guillermo Lasso and, although some doubt that it is possible, by the end of the year 2021 demanded the holder of Energy and Non-renewable Natural Resources, Juan Carlos Bermeo, a growth of about 40,000 barrels (8%). See also https://elpais.com/internacional/2021-09-22/ecuador-quiere-extraer-mas-petroleo-para-equilibrar-sus-cuentas.html, last accessed September 2022.

[39] Case documentation available at http://climatecasechart.com/non-us-case/xstrata-coal-queensland-pty-ltd-ors-v-friends-of-the-earth-brisbane-ors/, last accessed April 2022.

S.A. (2020), representatives of the Waorani Nation located in the Miwaguno community in Ecuador, the NGOs Acción Ecológica, Unión de Afectados y Afectadas por las Operaciones de Texaco (UDAPT), and the International Federation of Human Rights (FIDH) filed a constitutional injunction (*acción de protección*) against the Chinese oil company PetroOriental S.A.[40] The plaintiffs argued that the company's gas flaring caused severe constitutional rights violations, specifically because it emits GHG that contribute to climate change. They also argued that such activities violated several rights, including RoN. These cases are marginal compared to the quantity of cases brought under human rights-based approaches, but they would perhaps serve as an inspiration to investigate why the ecological approach has not yet reached a more prominent role in climate litigation.

While such points represent possible ways to conduct further research on the practical and theoretical representations of RoN, in the next section I propose a possible conceptual development that goes beyond the traditional focus anthropocentric/ecocentric in law and governance, in order to suggest an alternative narrative that contemporarily foster human rights and ecological protection.

The Right of Ecological Integrity: A Way Forward Through a Non-centredness Theory

The progressive RoN global movement described in this chapter appears in stark contrast with the proliferation of green documents and regulations and with the even greater number of trade and greenwashing economic policies that at present is labelled under "climate change law and governance". This is because more nuanced environmental approaches guarantee respect of the "business first" strategy, which in the end lets free the continued burning of fossil fuels in the atmosphere. This approach was demonstrated in the previous sections concerning the case of Ecuador, where the acknowledgement of the Rights of Mother Earth was subaltern

[40] Case documentation available at http://climatecasechart.com/non-us-case/baihua-caiga-et-al-v-petrooriental-sa/, last accessed April 2022.

to the decision to build the biggest oil refinery of South America and to the promotion of extractivism as the main economic strategy. This type of bias towards economic activities and profit over ecosystem protection and respect for human rights has created new forms of "ecoviolence" and environmental racism, whereby marginalized communities, like Indigenous peoples, are systematically targeted in the implementation of development projects such as oil drilling, mining extraction or change in forest use—without even obtaining their FPIC.

As argued in the previous section, the legal emergence of RoN, if decolonized and realized through due consideration of Indigenous philosophies and their legal systems, holds the promise of the realization of a paradigmatic shift in the dualistic traditional conception of the binomial humankind vs. Nature. RoN have the potential of realizing a decolonial, legally pluralistic approach to law, if realized within the conditions stated earlier. And this process also passes through allowing other-than-Western ontological discourses to be accepted and widely practiced in settler States.

I have already argued that centredness theories, anthropocentric vis-a-vis ecocentric theories, might result in the replication of a hierarchical order and substitution of an ontological centre with another. Within such context, RoN, coupled with an Indigenous legally pluralistic guardianship and the awareness that they can be inspired by Indigenous animism and anthropomorphism, represent the proposal of a middle position: not anthropocentric, not ecocentric, but a synthesis of these two apparently irreconcilable positions that result from Westernized mindsets and legal philosophies. However, RoN at present do come with the issues that have been problematized within this chapter, and I believe that RoN, together with other rights-based approaches, can be also welcomed as a transitional legal tool that can foster efficient environmental protection and climate adaptation and mitigation.

The question then is what should be considered the final goal of climate change law and governance, assuming that RoN and human rights-based approaches are a transitional tool. The overarching concept that should be at the core of law and governance is, in my views, planetary ecological integrity. It should be considered the limitation to human actions because of the interconnection between all beings present in the

universe in their sentient and non-sentient forms. In this sense, ecological integrity becomes the moral imperative that rewrites the rules and that should guide global and international human rights law and environmental law and governance. It implies a critical rethinking of Westernized capitalistic values that prescribe plundering and exploitation of natural resources, which ultimately are causing climatic change and biodiversity loss. This critical rethinking implies the acceptance that this existential model is deeply incompatible with the limits imposed by planetary health. The acceptance of other-than-Western ontologies and understandings that shape the human relationship with nature would ultimately force the law to take a step back and reconsider its very axioms such as the infallibility of Westernized assumptions and its superiority to Indigenous cosmologies.

Ecological integrity considers as axiomatic that the biological integrity and functions of the human being are dependent on the integrity of the natural environment, and vice-versa. Indeed, without the existence of a thriving environment and without the preservation of the biological functioning of our habitats, it is difficult for us to enjoy a healthy life (see generally Westra, 2016). Yet, we live in a society where developments in medicine, engineering, science and technology make us believe that we can live without taking into account the laws of nature and that we can alter and destroy the earth's biological characteristics without meaningful consequences for our existence. We assume that we will find a way to replace or reconstitute the biological components that we have damaged. This is an illusion, as science demonstrates that the Earth would probably take millions of years to recover from a sixth mass extinction due to the devastating effects of climate change and human presence.[41] This book has suggested that human rights implications should go hand in hand with the awareness of the interconnectedness and the ecological continuum between humankind and nature. It must be recognized that the industrial development, made possible at the expense of the planet and for the economic advantage of the few, has nevertheless produced some advantages for humankind, though at the expense of the many. The

[41] European Commission Website, available at https://europa.eu/rapid/press-release_MEMO-04-27_en.htm, last accessed September 2022.

political and economic ideologies of the industrialized nations have indeed been funded by plundering the resources in the neo colonized countries and economic expansionism without ethical considerations. These policies have moved along the way of previous colonization patterns, reproducing the old dynamics of power disguised as "development" and "superior interest of the nation".

Human societies, on the contrary, need then to take into account their strict dependence and interrelationship with the ecosystems. They need to develop policies, technologies and governance accordingly. Such an approach is being increasingly recognized by legal scholars under various names like "ecological integrity", "ecological health" and "biological integrity", but it is far from being adopted in international climate change governance (see generally Karr, 1991; Nash, 1991; Westra, 1994; Norton et al., 1992).[42] Restoring the ecological integrity of the Earth is the fundamental value that should underpin law and governance in order to return to the original (pre-industrial) conditions of general planetary wellbeing.[43]

Thus, I would like to add a reasoning here starting from the conclusions achieved by Rawson and Mansfield (2018). While they show that "the epistemic community draws on rights in ways that […] link holism and indigeneity to rights as the limits of coloniality" and thus that "RoN paradoxically entrenches colonial modes of existence", they also draw some important conclusions around the viability of non-centredness theories to develop a new system of rights. Scientific knowledge has shown

[42] In law and regulations, integrity arises in several pieces of legislation and non-binding instruments aimed at protecting natural environments and landscapes in the US, Canada and the EU, and in the 2000 Earth Charter, an international declaration of fundamental values and principles ("Protect and restore the integrity of Earth's ecological systems with special concern for biological diversity and the natural processes that sustain life"). However, there is no international binding instrument that aims to protect the ecological integrity of the planet in general, abstract terms. Rather, this approach has been locally adopted for the protection of determined areas.

[43] Quoting Dupuy: "Humankind is engulfed by the planetary environment, even though whole people tend to behave as though they were outside of nature. In antiquity all was sacred, except humankind. Mountains, spring, the winds, and the sea were deified; people did not enjoy any particular rights. With the advent of Judeo-Christian reversed, and Man alone is sacred. Nature having become secularized, has been treated as if it were at man's disposal, indeed as if it were a reservoir of riches subject to unlimited exploitation. Today, we have begun to understand that we cannot retain this dualistic vision" (Dupuy, 1991).

that holism and interconnectedness are the rules governing the Universe, rather than dualism, politics of recognition,[44] exclusion and inclusion:

> The colonial technology of juridical recognition and subject formation is framed as politics catching up with science, which is coterminous with universal indigenous cosmology. This understanding of indigeneity, which naturalizes its liminal position outside and inside modernity, gestures to how the mobilization of "rights" as an "indigenous" alternative to western precepts also naturalizes rights as both inside and outside colonial modes of governance. By grounding juridical recognition in intrinsic value determined by holistic findings of modern science, it is precisely through imbrication between inside and outside the specific legacies of western thought that proponents pose Right of Nature as a universally converging truth. (Rawson & Mansfield, 2018)

I agree, in principle, with this vision, as demonstrated in Chaps. 2 and 3 when addressing issues of recognition and the paradox of human rights. However, I believe that at present, the use of the language of rights, even though within the limits evidenced throughout this book, could constitute a strategy to achieve climate and environmental justice. It appears as a viable way possible way to start decolonizing environmental law and governance in order to protect both nature and humankind. Moreover, I believe it is difficult at the moment to find a word that can be a substitute for "right", and therefore it can be adopted in this transitional phase when we are becoming aware of the inherent problems related to rights-bases approaches. This transition to a deep systemic change can happen if rights are critically examined and essentially decolonized and deprived of their exclusionary and inclusive paradox. For example, the question here is not to replicate hierarchical approaches by criticizing *tout court* anthropocentrism, but rather establishing and ecological continuum between all the different manifestations of life in a critical way when approaching the conceptualization of "rights".

A possible way of re-imagining rights is the development of the right of ecological integrity in law and governance, aimed at reconciling the lost connection with other-than-human beings. In this final part of the

[44] Intended in the sense outlined in Chap. 2.

book, I am reimagining, experimenting and reinventing the language and the meaning of "right", with a view to be though-provoking and to foster academic debate on such an issue. A right of ecological integrity, in my views, represents an all-embracing right that belongs both to human and other-than-human beings in all their existential manifestations, including those elements that are generally considered unanimated, non-sentient in Westernized cultures. I think that such mid-position has also been theorized, in a way, by Garver (2021) through the concept of "naturehood". He theorized the need for this radical shift from RoN to "giving naturehood to people in law", which "means imbuing law with the ecocentric and relational notion that humans are part of nature, not separate from it" (Garver, 2021, p. 97). Again, the importance of the *relational* element between humankind and nature is what inspired me to initiate the theorization of the right to ecological integrity and how the realization that human beings are included in the ecosystems should inspire a new focus of rights-based approaches. Therefore, I think about the right of ecological integrity as a non-centric type of right, but a relational right based on the philosophical foundation that humankind and nature are not separate beings, but they live, thrive and exist one in another.

It is undeniable that some aspects of Indigenous cosmovision and beliefs have contributed to shaping my ideas around the existence of a right of ecological integrity that should underpin the legal rationale of present and future norms about human rights and environmental law. However, I wish to evidence to the fact that this idea genuinely expressed in this page will need further clarification and research in order to become a principle of human and environmental law and governance. Nevertheless, I think it is paramount mentioning that the theory of the right to ecological integrity should not be considered a centredness theory, in light of the consideration expressed throughout the book. Rather, it should be considered a new legal and moral principle that shapes the relationships and bounds within the existential continuum we are part, human beings, non-human animals and all the other existential and ontological manifestations. Such principle can take inspiration from Indigenous cosmovision and ontologies, insofar they constitute meaningful philosophies in which humans and nature are deeply interconnected and interdependent. This

approach, in my views, is very different from the mere translation and adaptation of Indigenous wisdom in viable means of comprehension by Western societies—for example, the debate on legal personhood of natural elements.

Thus, the consideration of the right to ecological integrity as en ethical and ontological value has the potential of reversing the current ideological paradigm that prescribes business first over conservation of biodiversity and preservation of ecosystems. Ecological integrity might be the human and "planetary" right that is genuinely all-embracing, as it can be considered the basis of the existence of life on earth, and the acceptance that we are inextricably bounded to nature in all its manifestations, non-human animals, landscapes and their elements.

Conclusion

Human rights-based approaches regarding Indigenous peoples and climate justice have been described, explored and criticized throughout the book. This conclusive chapter has focused on other-than-human-rights approaches, namely Earth Jurisprudence, RoN and ecological integrity. The rationale for dealing with such approaches in a book dedicated to climate justice and Indigenous peoples arises since RoN and Earth Jurisprudence are being narrated as getting their ontological inspiration from Indigenous cosmovision and knowledge, and they can present viable, non-Western ways to re-interpret climate law and climate justice. However, the chapter has critically analysed the supposed interconnection between RoN and Earth Jurisprudence, concluding that Indigenous cosmovision does not necessarily coincide with an ecocentric approach to law, nor Indigenous anthropomorphism automatically translates into the awarding of legal subjectivity to natural elements. Yet, it has been argued that RoN might represent a relevant transitional element towards a decolonization of climate governance, and an important tool in reconsidering and repairing the broken relationship between humankind and nature. After these theoretical premises, the chapter has focused on the actual legal recognition of RoN in constitutions, laws and legal instruments, and then on the use of RoN in global environmental litigation.

It has been argued that the ecological approach in litigation inspired by RoN could be a crucial element in determining more stringent environmental and climate regulations since it would add a *tout court* environmental dimension to environmental and climate litigation. It has been also suggested such ecological approach could go hand in hand with human rights-based approaches to climate change and future research could determine whether RoN represent an effective means of environmental protection vis-a-vis human rights-based approaches, together with an analysis of the practical interplay between RoN and human rights. The chapter has put forward also that it should need to be established whether RoN constitute an ancillary way to enshrine anthropocentric approaches to environmental protection, together with a study on the significance of the recognition of RoN in national contexts where uncontrolled deforestation is still an ongoing process and where economies are strongly based on mining.

In conclusion, I have suggested a possible way forward through the development of a new theoretical approach to legal theory around human rights, RoN and other ecocentric approaches to environmental protection. Such approach is founded on the principle of ecological integrity, which prescribes a limitation to human actions, given the interconnection between all beings present in the universe, in their sentient and non-sentient forms. In this sense, ecological integrity becomes the moral imperative that rewrites the rules and that should guide global and international human rights law and environmental law and governance. It implies a critical rethinking of Westernized capitalistic values that prescribe plundering and exploitation of natural resources, which ultimately are causing climatic change and biodiversity loss. In this chapter, I propose an imaginative reasoning around the institution of the right of ecological integrity, a non-centredness theory which lays its foundation on relational ontology and Indigenous cosmovision. The right of ecological integrity represents an all-embracing right that belongs both to human and other-than-human beings in all their existential manifestations, including those elements that are generally considered unanimated, non-sentient in Westernized cultures. It should be considered as a different legal and moral principle that bounds together the existential continuum we are part, human beings, non-human animals and all the other existential and ontological manifestations.

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8

Conclusion

Achieving Climate Justice Within a World of Coloniality

The book has shown how, and to what extent, international human rights law can foster the protection of Indigenous peoples' rights in the context of climate change. The perspective offered by climate justice and critical legal studies has helped in putting under a new light the dramatic issues that Indigenous peoples are still facing nowadays because of the legacy of colonialism both at the international and settler States levels. This has been done through a specific focus on legal and participatory approaches to environmental and human rights governance. The notion of climate justice, which was delineated by taking into consideration the main justice theories that contribute to its conceptualization, serves as the lenses through which contemporary struggles of Indigenous peoples can be read. The contemporary climate justice discourse is based on political theories informed by aspects of (re)distribution, participation and recognition. It is also based on theories of capabilities and human rights. Yet, the book has evidenced how crucial is to consider counter-hegemonic discourses of environmental justice that deal with colonialism and

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coloniality when applying the concept of climate justice to contemporary Indigenous struggles. In fact, this book has offered a critique of the concept of recognition, as such concept presupposed that an external entity, such as the settler State, should enable Indigenous peoples and their institutions to exist and have the right to self-determination.

As part of this decolonization project, this book has also offered a reinterpretation of the concept of vulnerability that is often attached to Indigenous peoples with regard to climate change. When academics and practitioners intend to use the concept of vulnerability to advocate or demonstrate the sensibility of Indigenous peoples to climate change, they should reinterpret vulnerability by taking into consideration the concept of colonialism and coloniality, this last intended as the colonial legacy and the contemporary consequences of such historical processes. When dealing with Indigenous peoples and climate change, avoiding the victimization discourse is paramount. In this light, the present work wished to re-interpret the results of the fieldwork conducted during my PhD studies, highlighting how Yanesha people have been subject to colonization practices initiated especially by the settle States in the post-colonization epoch. The book has shown how this "internal colonization" was accompanied by conceptualizations and narratives around the Amazon Forest that were simply antithetical to Indigenous cosmovision. While in national discourses the Amazon was something to tame, to make productive, for Yanesha people, the forest is the place where their ancestors live, a place to protect and respect for present and future generations. And now, the forest and the Yanesha's livelihoods are threatened by climate change impacts that add up to the already-difficult conditions that resulted from colonization processes.

After having set this relevant context, the book has analysed international human rights law and human rights-based approaches to climate change through the climate justice framework designed in Chap. 2. Such framework has highlighted how human right-based approaches to justice enshrine both a paradox and a dilemma. In fact, the book has demonstrated, through a critical legal studies perspective, that contemporary human rights law holds an inclusive promise, concretized in the progressive inclusion in the last decades of minorities and vulnerable groups in the realm of human rights through the adoption of ad hoc instruments.

But at the same time, the international human rights system presents evident flaws when applied to Indigenous peoples' issues. This is because human rights were firstly conceived in a very positivistic-derived and Westernized manner, which excluded Indigenous peoples' cosmovision and their connection with nature from the conceptualization of human rights. Therefore, this book has argued that a paradox stands in international human rights law with regard to Indigenous peoples' issues: rights system based on Westernized dichotomies and epistemologies apply to Indigenous peoples' claims and quest for (climate) justice. The book has suggested that often the international human rights system is not a sufficient means to obtain adequate justice and redress when it comes to Indigenous peoples' rights. This aspect is especially evident in litigation, as Chap. 6 has demonstrated in relation to climate litigation.

Thus, the book has evidenced that is difficult to achieve climate justice in a world of coloniality considering the inherent flaws of human rights-based approaches to climate change. However, the present work has affirmed that, in the contemporary era, such approaches are perhaps one of the few concrete ways by which Indigenous peoples can denounce their predicaments and demand to settler States justice and redress for the negative impacts of climate change. In line with this aspect, and before analysing the status of contemporary climate litigation, the present work has analysed the legal interaction between climate change and human rights, including participatory and procedural rights with regard to Indigenous peoples. The book has presented a spectrum of current possibilities for Indigenous peoples to participate in climate governance, highlighting general trends and related challenges.

In order to apply the human rights discourse to the contemporary issues of Indigenous climate justice, it has been necessary to provide an overview of current international legal instruments aimed at protecting Indigenous peoples' rights—the ad hoc documents previously mentioned. This analysis aimed at evidencing how Indigenous rights have progressively emerged in international law, highlighting the key passages that marked the consideration of Indigenous peoples from being essentially excluded from the realm of humanity—at the times of colonization—to the contemporary legal normative situation that recognizes their quite unique collective rights and the right to internal

self-determination. The progressive acceptance of the existence of Indigenous communities as "peoples" in their respective national contexts—through existential and even physical struggle—resulted in an increased participation of Indigenous peoples in international fora and decision-making venues through institutional agreements such as the PFII. However, the book has demonstrated how this participation is always very nuanced compared to States' participation in international negotiations. This aspect has been demonstrated through the analysis of the difference in the environmental claims put forward by Indigenous peoples, and the legal and policy instruments adopted at the international level. Such difference has been demonstrated to be especially evident for what regards the Westernized conceptualization of the environment. This conceptualization is supported by the perpetuated existence of dichotomies that still tend to consider environmental law as a monistic and axiomatic concept, deeply attached to a separate vision and opposition between humankind and nature.

Because of this, the book has adopted a strong focus on Indigenous participatory rights and FPIC, which can be considered an important pillar of the climate justice discourse that exists both in international human rights law and international biodiversity law. Meaningful participation is a viable way to confront Westernized countries with the fact that other-than-Western cosmovision exist and that such cosmovision should contribute to law and governance. In my views, participatory and consent-seeking procedures represent an important way of operationalizing climate justice, insofar they are aimed at fostering participatory parity of Indigenous peoples within their national contexts by ensuring that Indigenous peoples shall have their will respected with regard to development projects, extractive projects or any other legislative or administrative measures that have the potential of causing negative externalities or violations of human rights. The consent requirement, as prescribed by the international biodiversity conservation regime, would potentially prevent problems such as biopiracy. However, the present work has also revealed some critical aspects related to FPIC, for example, deficiencies in its implementation, and the fact that it is often not even applied by settler States, despite an obligation to do so in international law and practice persists. However, FPIC represents much more than a mere consent

requirement, as its powerful implications prescribe that Indigenous peoples should actually participate at the very early stages of project design, and that no project or legislation should be implemented as a top-down decision on their lands and territories. Since FPIC applies also to green development projects, such the establishment of conservation areas and ecological zoning, this procedural right is relevant for the climate justice discourse, insofar it would avoid such conservation measures that resulted, as an instance, in the forced evictions of Indigenous peoples.

Finally, this book has focused on another crucial pillar of climate justice, namely litigation. While some descriptive sections around the conceptualization and quantification of climate litigation have been presented, the focus has been soon shifted to those lawsuits, presented by Indigenous peoples in the international juridical system, that can amount to landmark cases in human rights-based litigation. The Indigenous peoples Inuits, Athabaskans and Torres Strait Islanders all have in common having presented a lawsuit based on human rights-based approach arguments before international human rights commissions (the IACmHR and the UN HR Committe, respectively). The related chapter has analysed such lawsuits through the climate justice conceptualization constituting the lenses through which it has been made possible to evidence, in practice, how do the inherent flaws in the international human rights system translate into difficulties and hurdles for Indigenous peoples when it comes to accessing the justice system.

In the very last chapter, the book has presented an overview of counterapproaches to human rights-based litigation, with the aim to emphasize how such counter-hegemonic initiatives are progressively emerging in contrast to Westernized anthropocentric rights-based systems. In this final part, which lays down potential future avenues for research, the present work presented the interlinkage between Indigenous cosmovision and the contemporary movement around RoN. However, it has done soon with due consideration of the difficult aspects connected to an identification tout court between Indigenous cosmovision and RoN. Such aspects emerge especially in relation to the translation of Indigenous anthropomorphism into Westernized legal personhood with regard to the awarding of legal subjectivity to natural elements such as rivers, mountains, or an abstract "nature". This chapter proposed an initial

reflection on such critical aspects connected to the conceptualization of Rights of Nature and suggested new ways forward in relation to the supposed interlinkage between such rights and Indigenous culture and beliefs. It also proposed a reflection on the possible meaning around the inclusion of ecological perspectives in environmental and climate litigation. The chapter has finally proposed the conceptualization of a new type of right that would work as a synthesis of Westernized and non-Westernized approaches to human and environmental governance. The right of Ecological Integrity, as a non-centredness theory that goes beyond the anthropocentric/ecocentric dualism, could perhaps represent a validation of that conceptualization of humankind and Nature that sees these two elements as an ecological continuum, but further research would be needed to investigate the implications of this possibility both at the theoretical and practical level.

Ways Forward and Future Avenues for Research

The main idea that this book wishes to convey is that law can be reimagined and decolonized. It wishes to posit Westernized legal systems in front of a mirror, where they could watch themselves from an exterior point of view, and reconsider their values and origins, with the objective of understanding where Westernized law is positioned in our world and how it got to occupy such privileged place. Thus, this book is an invitation for academic and practitioners not to take the law for granted, as an immutable axiom, but always to question its origins and its manifestations, and its bounds even to injustices, colonialism and coloniality. Law is not neutral, but it is the precise results of historical, social and political circumstances, and this feature, in my views, should always be considered when doing research, especially in the context of Indigenous peoples' rights.

This is the reason why the book, in the very last chapter, offers a new idea that has the aim of being thought-provoking and could be potentially fostered by the interaction of Westernized legal system with a

"juridical awareness" that re-positions the law in a relative perspective. The right of ecological integrity conveys such ideas, insofar it wishes to combine Western systems of law with the awareness that our planet already has its own natural laws, and we should consider them in human rights and environmental law and governance.

In order to raise this "juridical awareness", it has been necessary to confront Westernized law with other legal approaches such as Indigenous-inspired philosophies like RoN and ecocentrism. In the end, I believe that RoN and related legal and political movements are not necessarily inventing something new, but simply reconsidering approaches that were easily discarded by the logics inherent to Westernized legal systems, modern technologies and capitalism. In order to do such a confrontation, it is crucial to consider the entanglements between contemporary law, colonialism and coloniality, and climate change, and be aware of this intertwinement notwithstanding the fact that often such processes are seen as something pertaining to the past that has no influence on what the law is today. Yet, the contemporary biodiversity and climate crisis is forcing us to face the fact that perhaps our models of development, including the law governing our systems of knowledge production and application, are not so always true or correct. The struggle of Indigenous peoples to self-determination, autonomous environmental governance and resilience to climate change is precisely mirroring this story, a story of existential denial and the re-emergence of law and governance philosophies that sometimes are narrated as antithetical to Westernized systems.

This reconsideration, this doubt that is slowly growing up in Western law and governance, in my views should inform and direct future research on climate change and environmental law. The precise direction that we should aim is the decolonization of human rights and environmental law and governance in order to cope with the contemporary biodiversity and climate crisis. The starting point of this decolonization process is the awareness that other types of legal system and other practices of environmental governance could significantly contribute to the conservation of biodiversity and in climate change adaptation. While this is already taking place in some forms, as demonstrated by the wide and multiple recognition of Indigenous knowledge in international environmental law, it is always happening within a Westernized legal paradigm that does not

fully address epistemic justice. Climate justice has not only to do with the justiciability of rights and the redress of past and present injustices but has much to do with the acceptance of the coexistence of multiple universes of law, and with the discard of Westernized superiority in environmental and climate governance. Thus, the strong emphasis that this book has posed onto the importance of legal pluralism and Indigenous-led type of environmental conservation it is the first step to address such decolonization.

Future avenues for research around climate justice and the role of Indigenous peoples as actors in climate change adaptation and resilience should depart from the point that Indigenous peoples hold the right to environmental self-determination. And that this right is inextricably intertwined with the existence of legally pluralistic societies, and with the fact that Westernized models of law and governance should take a step back and simply let such counter-hegemonic approaches be. Thus, more effort should be put in the study of Indigenous-led conservation projects, as this type of conservation that is inspired by non-Westernized cosmovision and knowledge would be very much needed in the coming years as the planet Earth is every day much closer to an irreversible climate disaster which effects we are already testifying.

On this note, conservation efforts such as ICCAs play a key role insofar as they are initiatives that stem from Indigenous environmental self-determination, and they could be a way to operationalize the right of ecological integrity which jointly belongs to humankind and Nature. ICCAs could perhaps represent a geographical and ideological space where Indigenous cosmovision is the ideology that leads the relationship between humankind and nature, realizing that ecological continuum that this book as presented as a way to realized decolonial environmental and climate justice.

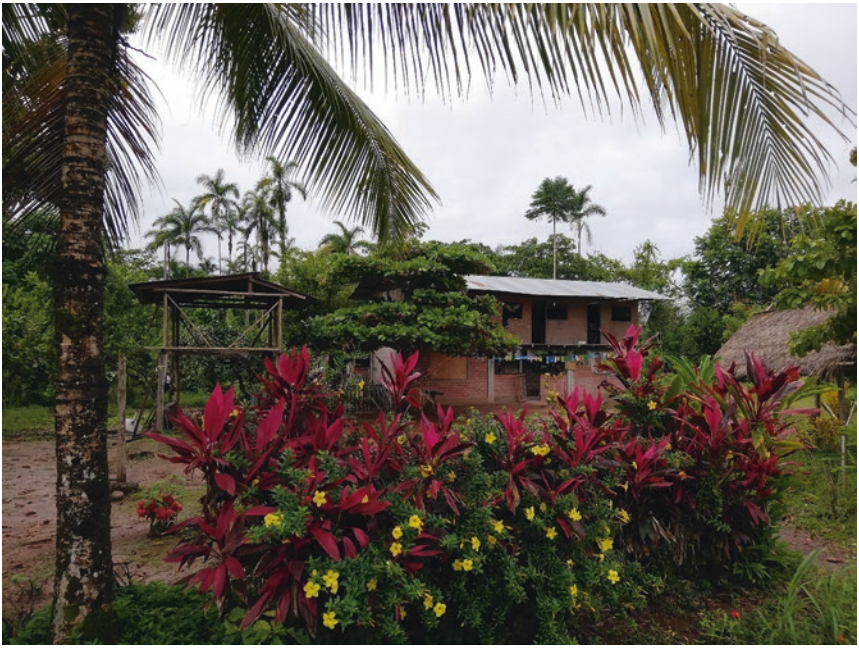
Therefore, new avenues for research could be characterized by a thorough conceptualization of the interlinkage between the right of ecological integrity (intended also as the creation of a new legal paradigm that does not wish to constitute a centredness theory, but rather as a non-anthropocentric philosophy) and environmental conservation efforts lead by communities where this "right"—to use a Western word that can be considered transitional—has been taking place since immemorial

time. Such research could inform new ways to understand how natural elements should not only be considered as "resources", something to own, use and colonize, but something that humankind should take care of. The awareness that our planet—and other planets and elements of the outer space, such as the Moon—is not our to possess, and that it has the "right" to exist and thrive as we do, it has always been a concept that has existed in some forms in all societies, sometimes hidden or forgotten because of the advent of the Westernized legal paradigm and the extractivist model. Therefore, in the current biological and climate crisis, it is paramount that we do reconsider, decolonize, change the ways we think and act in order to reverse—or at least try to reverse—the enormous damage we have caused to human and non-human beings. However, at present, the general tendency of human governance is going in the opposed direction to what I am discussing here, with our planet and outer space elements subject to models of human and environmental governance that are always more and more affected by extractivism, corporate colonialism and denial of existence and rights. Realizing a decolonial approach, in my views, is crucial in our times, and it should be discussed, presented and openly declared, without fear of pronouncing words such as "capitalism", "colonization" or "Ecocide" in our work whether we are scholars, practitioners or defenders.

The law, in this picture, assumes a very important role. The regulatory function of the law is of paramount importance insofar it should reflect moral concerns towards the use and misuse that human societies do of nature and natural elements. Decolonial environmental approaches, as they concern the basis for an ethical consideration of the relationship between humankind and Nature, should constitute the constraints within which human actions are compulsorily inscribed in order to prevent undiscriminated use of nature through extractive and colonizing practices. Future avenues for research and practice should demand and conceptualize how the decolonization of environmental law and human rights could have the potential of realizing a transition towards a non-anthropocentric legal and societal system where the relationship between human beings and nature is restored in a decolonized, non-centred and mutually nurturing way.

Appendix

Pictures from Yanesha Communities, November 2018



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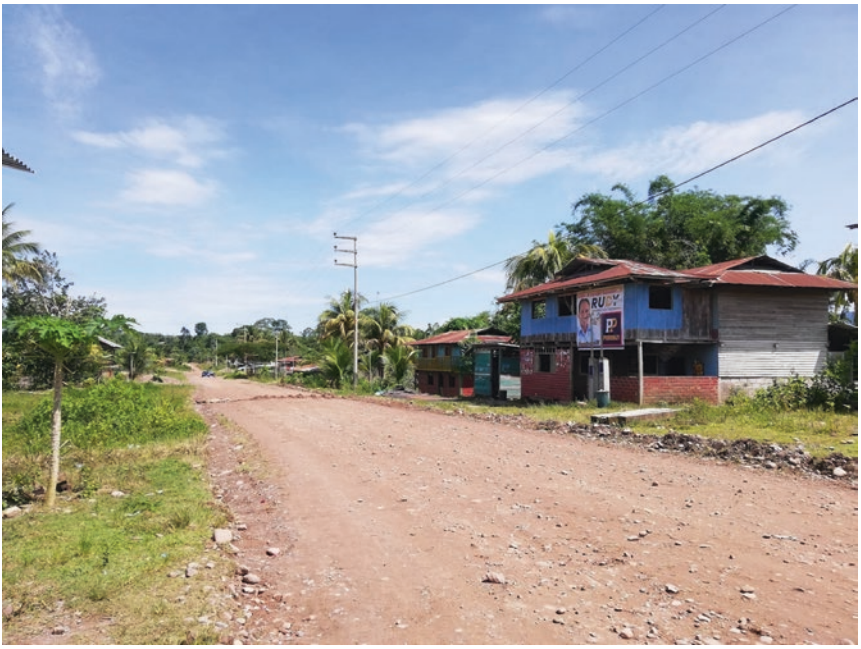

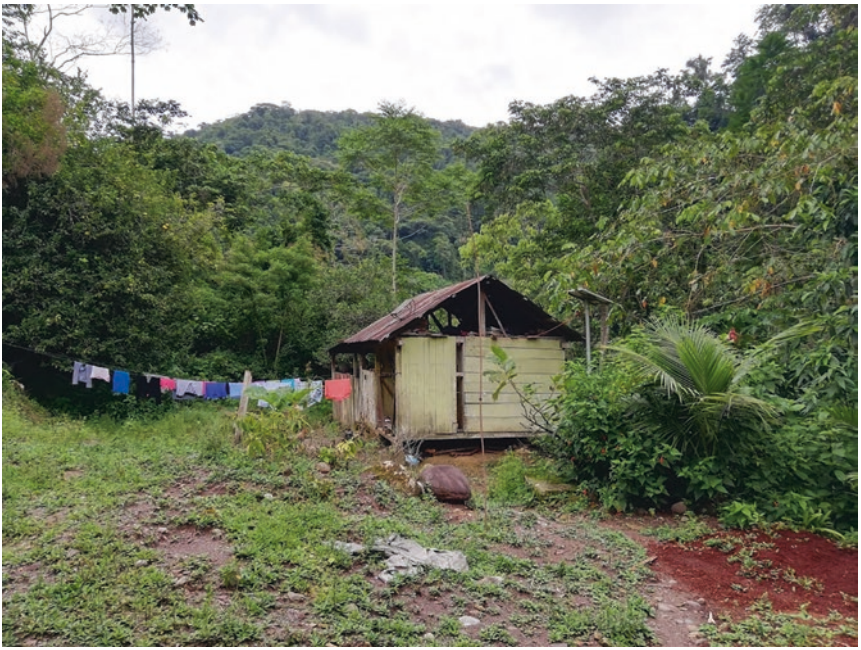

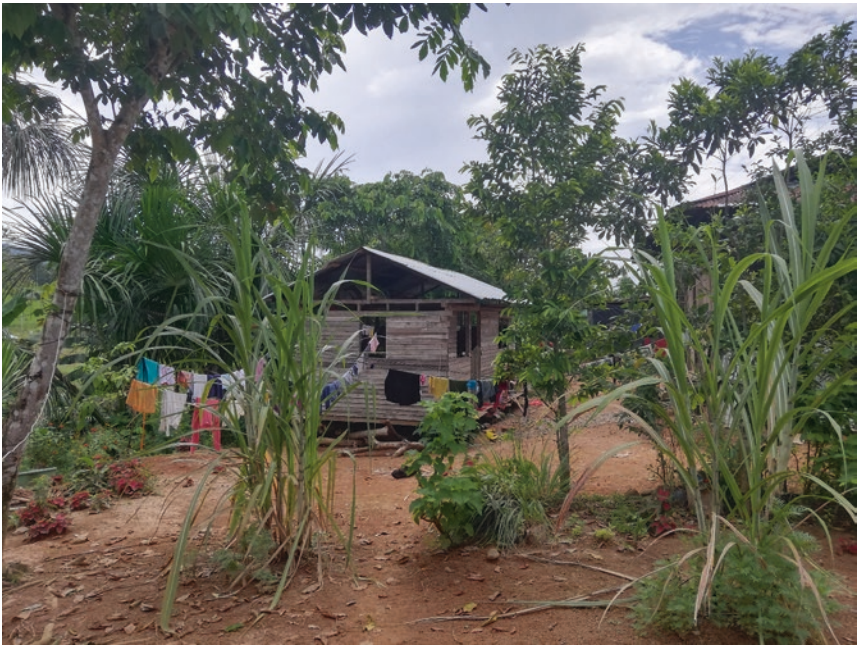

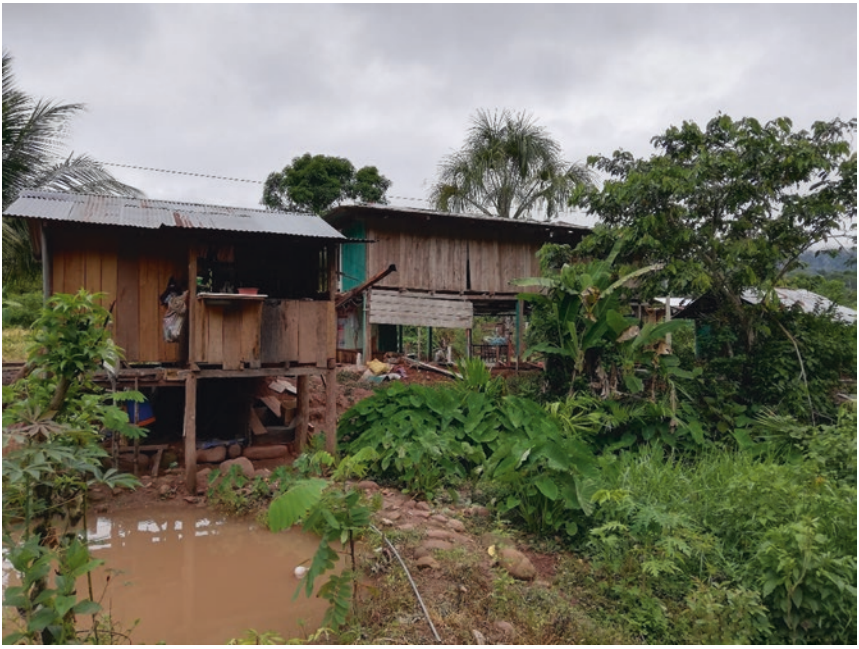

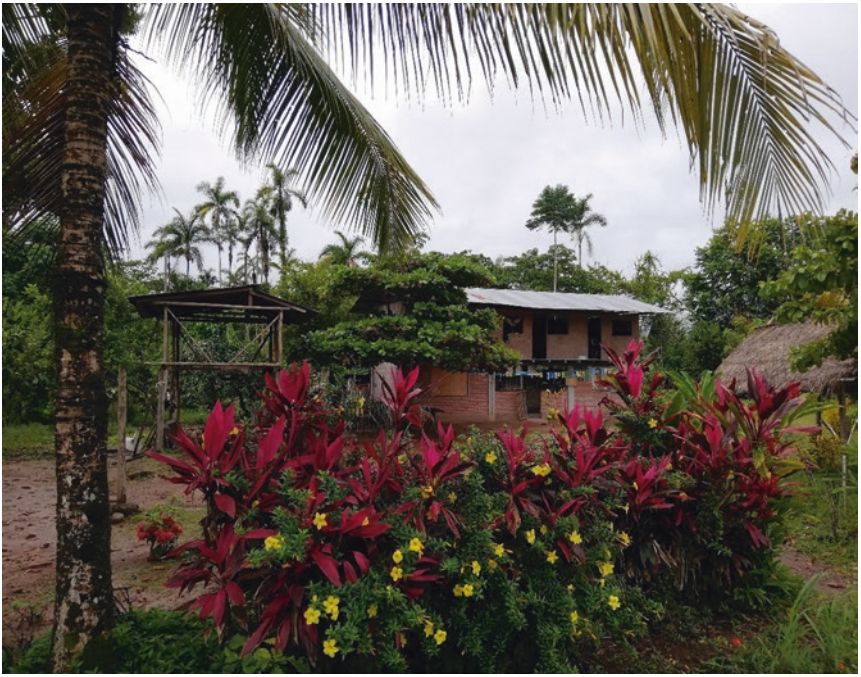

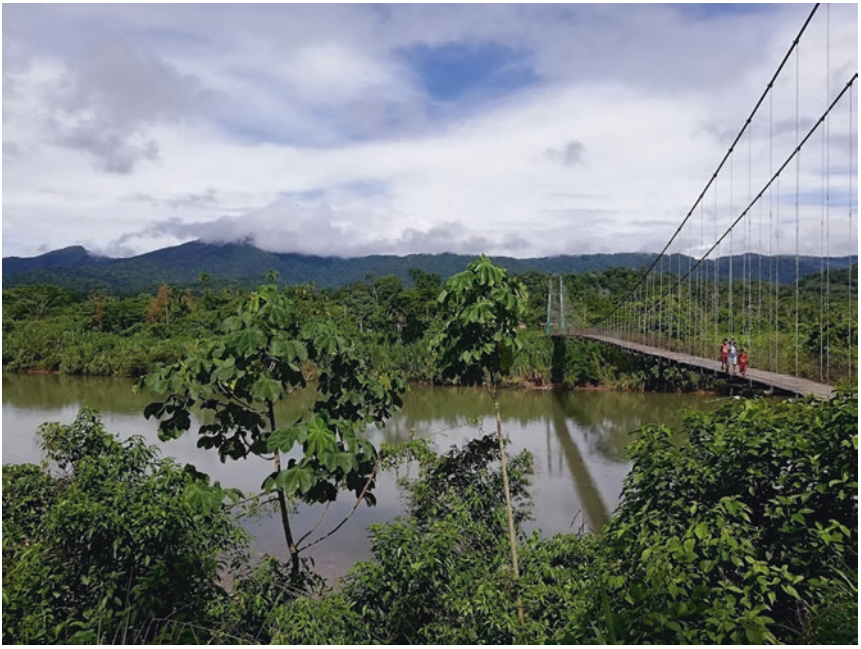

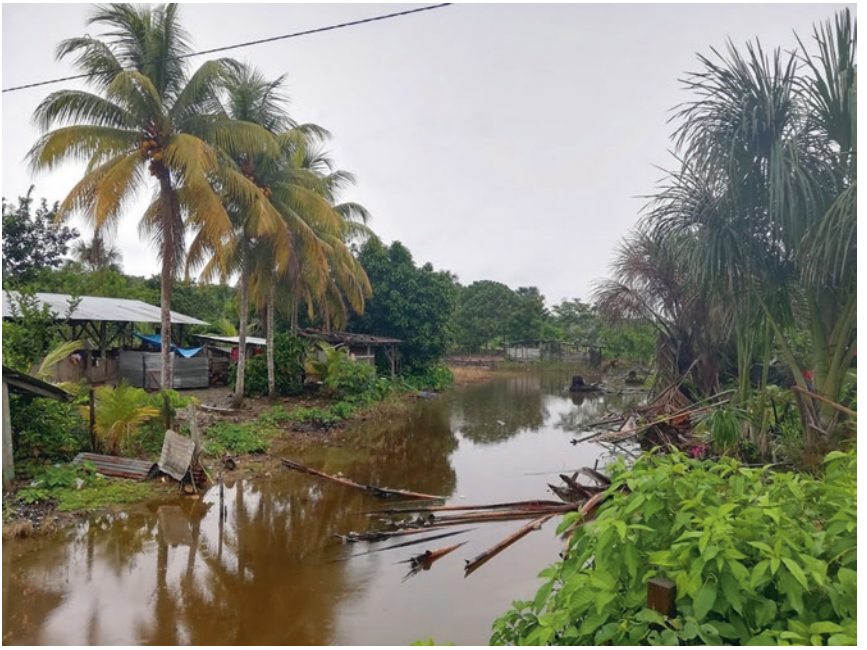

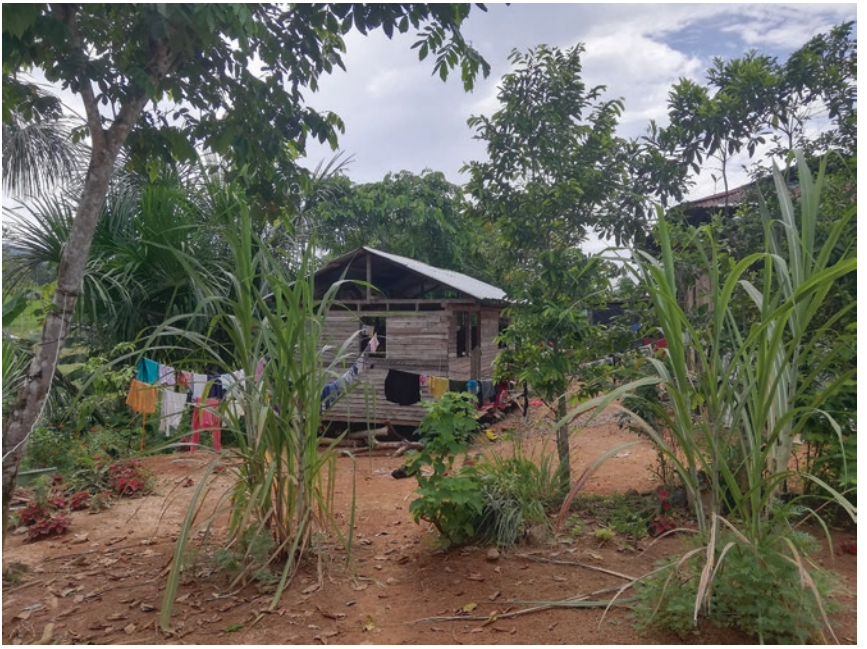

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