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Patricia Galvao-Ferreira  
*University of Windsor, Faculty of Law*

Mario Mancilla

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# Indigenous Environmental Rights and Sustainable Development: Lessons from Totonicapán in Guatemala

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By Patricia Galvao Ferreira and Mario Mancilla

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## Introduction

International Environmental Law (IEL) has been slow to incorporate the social dimension of sustainable development. In this chapter, we seek to unpack the process of integration of international human rights norms and IEL.<sup>1</sup> We place our focus on the integration of Indigenous rights and IEL, by looking at a recent Latin American regional agreement on environmental rights: the 2018 Escazú Agreement.<sup>2</sup> We argue that while Escazú represents an important step towards integrating human rights into IEL, not all human rights have been equally integrated. Indigenous rights were largely left outside the Escazú Agreement.<sup>3</sup> We use a case study from Guatemala to illustrate what this missing integration left unprotected, and to shed light on the persisting dominance of Western/Eurocolonial epistemologies in shaping IEL.

The chapter is structured as follows. In part I we describe the various reasons why Latin America is the perfect context to unpack the nuances relating to the integration of human rights and environmental law and the social dimension of sustainable development. First, environmentalism in the region has historically developed in close proximity with social justice

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<sup>1</sup> On the linkages between human rights and the environment see Kravchenko, Svitlana and John E. Bonive, *Human Rights and the Environment: Cases, Law, and Policy* (Carolina Academic Press, 2008); Atapattu, Sumudu, and Andrea Schapper. *Human Rights and the Environment: Key Issues* (Routledge, 2019); Turner, Stephen J., et al., eds. *Environmental rights: the development of standards* (Cambridge University Press, 2019). See also the Mapping Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, OHCHR, A/HRC/25/53, March 2014.

<sup>2</sup> Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, 4 March 2018, LC/CNP10.9/5. [Escazú Agreement]

<sup>3</sup> While international human rights norms are designed to protect the human rights of all individual human beings, international law concerning the rights of Indigenous peoples seek to address a set of problems that are particular to Indigenous peoples, including protection of their cultural integrity and self-determination, and strong connection with land and natural resources. Anaya, S. James. *International Human Rights and Indigenous Peoples*, (Austin: Wolters Kluwer Law & Business, 2009); Anaya, S. James. *Indigenous Peoples in International Law*. 2nd ed. (New York, NY: Oxford University Press, 2004); MacDonald, Fiona & Ben Wood, *Potential Through Paradox: Indigenous Rights as Human Rights*, 20(6-7) *Citizenship Studies* (2016) 710-727; Kulchyski, Peter Keith. *Aboriginal Rights Are Not Human Rights: In Defence of Indigenous Struggles*. Semaphore Series, (Winnipeg: ARP Books, 2013).

activism. Second, Latin American countries went through a wave of adoption of new constitutions in the 1980s, 1990s and 2000s, which allowed many of them to incorporate substantive environmental rights (such as the right to a healthy environment and rights of nature) at the highest level of domestic legal systems. Third, alongside substantive environmental rights, Latin American countries have also incorporated a series of Indigenous rights in their constitutions. Despite these advances in constitutional law, implementation of both environmental rights and Indigenous rights have proved elusive in the region, leading social groups to look for international law mechanisms to complement efforts to make norms effective on the ground.

In part II we analyze the Escazú Agreement, which has been rightly lauded as an important step forward in the integration of human rights and environmental law in Latin America.<sup>4</sup> Escazú's procedural environmental rights (right to access to environmental information, participation in environmental decision-making and access to environmental justice), and reaffirmation of a region-wide substantive right to a healthy environment, are expected to offer new legal and political tools to social groups in Latin America seeking to push governments to give effect to constitutionally recognized substantive environmental rights. We argue, however, that Escazú missed the opportunity to fully integrate Indigenous rights into the substantive and procedural provisions of this Agreement. In part III we use a case study of alternative Indigenous water governance systems in Totonicapán, Guatemala to illustrate the type of cosmovision that justifies Indigenous environmental rights being integrated into international environmental rights agreements.

The chapter argues that in order to contribute to a more comprehensive theoretical understanding of the many nuances of the social dimension of sustainable development, IEL scholars should engage more systematically with emerging national and international research on Indigenous alternative perspectives on environmental governance. The approach highlighted here is distinct from existing discussions related to environmental justice and Indigenous peoples, which highlights the disproportionate environmental impacts Indigenous peoples suffer as a racialized social group, because of their close cultural and existential interaction with the environment. The aim is to move from treating Indigenous peoples as victims of environmental racism, to appreciating their active role in shaping alternative forms of natural resources management and environmental stewardship that better integrate the social dimension of sustainable development.

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<sup>4</sup> Olmos Giupponi, Belen. "Fostering environmental democracy in Latin America and the Caribbean: an analysis of the Regional Agreement on Environmental Access Rights." *Review of European, Comparative & International Environmental Law* (2019); Barritt, Emily. "Global Values, Transnational Expression: From Aarhus to Escazú." *Research Handbook on Transnational Environmental Law* (Edward Elgar) forthcoming (2019). Available at SSRN: <https://ssrn.com/abstract=3371093>.

We recognize that this is just a first exploration of the theme, which deserves more scrutiny and further empirical research. We intend this exploratory work to be an invitation to other environmental law scholars to engage in more systematic conversations with the scholarship on Indigenous Rights and Indigenous legal traditions, when carrying out research on the social dimension of sustainable development, particularly the cutting-edge work Indigenous law scholars in the Americas are undertaking.<sup>5</sup>

#### I. Environmental Rights and Indigenous Rights in Latin America: The Unfinished Process

Latin America is a perfect illustration of the importance of paying close attention to the social dimension of sustainable development, as the economies of Latin American countries are largely reliant on natural commodities including minerals, oil and gas, and agricultural products. These economic sectors produce a heavy environmental footprint which affects a region that has rich biodiversity and ecosystems.<sup>6</sup> Diversity is also a hallmark of the Latin American population. There are around 42 million Indigenous peoples of various ethnicities living in the region,<sup>7</sup> alongside descendants of Europeans, Africans and Asians that came as settlers, immigrants or slaves during colonial times or more recently. On the other hand, income inequality in the region remains high despite important gains in economic growth and improvements in social indicators (like life expectancy and literacy rates) in the last decades.<sup>8</sup> The region also ranks high with regard to various other inequality indicators including measures of political influence and voice, and health and education outcomes.<sup>9</sup>

A substantial part of Latin America's economic elites relies on the exploitation of natural resources for their wealth and political might, while many rural and Indigenous communities

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<sup>5</sup> See, e.g. Joseph, Robert, et al. "The Treaty, Tikanga Māori, Ecosystem-Based Management, Mainstream Law and Power Sharing for Environmental Integrity in Aotearoa New Zealand—Possible Ways Forward."— the Māori and Indigenous Governance Center, Te Piringa-Faculty of Law at the University of Waikato, 2019. Borrows, John. "Seven Gifts: Revitalizing Living Laws Through Indigenous Legal Practice." *Lakehead Law Journal* 2.1 (2016): 2-14. McGregor, D. 2014. Lessons for Collaboration Involving Traditional Knowledge and Environmental Governance in Ontario, Canada. *AlterNATIVE, An International Journal of Indigenous Peoples*. 10 (4): 340-353; Walkem, Ardith. "nd. Indigenous Peoples water rights: Challenges and opportunities in an era of increased North American integration." *Canada and the New American Empire*. Centre for Global Studies, University of Victoria, BC. November (2004); Rauna Kuokkanen, "Restructuring Relations: Indigenous Self-Determination, Governance, and Gender." Oxford: Oxford University Press. 2019. For a series of publications on Indigenous water governance in Canada see the Decolonizing Water project, online: <http://decolonizingwater.ca/category/articles-and-reports/>

<sup>6</sup> OECD (2018), "Biodiversity Conservation and Sustainable Use in Latin America: Evidence from Environmental Performance Reviews," OECD Environmental Performance Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/9789264309630-en>.

<sup>7</sup> The World Bank. 2015. *Indigenous Latin America in the Twenty-First Century*. Washington, DC: World Bank.

<sup>8</sup> Economic Commission for Latin America and the Caribbean (ECLAC), *Social Panorama of Latin America, 2018 (LC/PUB.2019/3-P)*, Santiago, 2019.

<sup>9</sup> De Ferranti, David, et al. *Inequality in Latin America: Breaking with History?* The World Bank, 2004.

still depend on environmental services and environmental goods to survive. Historically, international financial institutions and donor countries, particularly the US, have promoted legal reforms or have intervened to facilitate international trade of natural commodities from the region, to the benefit of national and international economic elites, even if it meant supporting or overlooking military interventions or authoritarian regimes. Too often these military governments and authoritarian regimes in Latin America have stripped Indigenous peoples of access to their ancestral lands and their associated environmental benefits, threatening their existence and well-being,<sup>10</sup> or promoted environmental degradation in rural communities, resulting in their impoverishment. In Latin America, inequitable access to land, natural resources and environmental benefits has been, throughout history, linked to social injustice.<sup>11</sup>

The combination of plentiful land and resources-based economic potential with forced social exclusion helps to explain the extraordinary number of environmental conflicts in the region, with Indigenous peoples being particularly affected due to their intrinsic and close relationship to the land and the natural environment. These environmental conflicts often turn violent in a context of institutional mechanisms that are inadequate to mediate disputes and to ensure accountability for rights violations. The origins of weak and captured institutions in Latin America can be traced to a legacy of extractive colonization,<sup>12</sup> followed by periods of civil wars and authoritarian regimes. Latin America has consistently ranked as the leading region in documented killings of environmental defenders compiled by Global Witness since 2012, and this reality is not improving. The region is responsible for more than half of environmental defenders killed globally in 2018, many of them members of Indigenous nations.<sup>13</sup>

Guatemala alone saw a jump from three environmental defenders killed in 2017 to 16 killings in 2018, making it the most dangerous country for environmental defenders, in *per capita* terms.<sup>14</sup> Violence against environmental defenders in Guatemala today, including Indigenous

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<sup>10</sup> Continuing a process of violence and dispossession against Indigenous peoples that began during colonial times. Peter Bille Larsen, "The 'New Jungle Law': Development, Indigenous Rights and ILO Convention 169 in Latin America." *International Development Policy | Revue internationale de politique de développement* 7.7.1 (2016).

<sup>11</sup> David V. Carruters (ed). *Environmental Justice in Latin America: Problems, Promise and Practice*, MIT Press, 2008.

<sup>12</sup> Acemoglu, Daron, and James A. Robinson. *Why nations fail: The origins of power, prosperity, and poverty*. Crown Books, 2012.

<sup>13</sup> Global Witness, "Enemies of the State? How Governments and Business silence land and environmental defenders." Report July 2019, online: <https://www.globalwitness.org/en/campaigns/environmental-activists/enemies-state/>

<sup>14</sup> Id.

leaders, is part of a broader scenario of extremely high violence rates that many authors<sup>15</sup> link to the brutal civil war (1960-1996) that had its roots in the CIA orchestrated deposition of democratically elected president Jacobo Arbenz in 1954.<sup>16</sup> Indigenous peoples have been particularly affected by violence in Guatemala. In 1999, a Truth Commission released a 10-volume report, *Guatemala, Memoria del Silencio* (Guatemala, Memory of Silence), documenting the killing of 200,000 civilians during the civil conflict, mostly by the government. These killings included massacres and *scorched earth* anti-insurgency operations that decimated whole villages.<sup>17</sup> The report concluded that the Guatemalan military had conducted genocide against four ethnic groups of Mayan Indigenous peoples because their villages had been primarily targeted by the military for *scorched earth* operations and other massacres (83% of their victims were from these four Indigenous groups).<sup>18</sup>

Yet Latin America is also characterized by the resilience, the strength, and the innovation of its inhabitants. A critical mass of social movements, non-governmental organizations, academics, progressive courts and politicians have continuously fought for social, economic and environmental justice in the face of this challenging geopolitical and institutional context. Latin Americans have systematically resorted to international law as one of many tools to help in domestic efforts to create national legal regimes to promote social justice, economic inclusion and environmental protection.<sup>19</sup> Following decades of systematic human rights violations and environmental degradation in the name of economic development under post-colonial authoritarian regimes, many countries in Latin America transitioned to democracy in the 1980s

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<sup>15</sup> Deborah J. Yashar, "High Violence in Post-Civil War in Guatemala" in Yashar, *Homicidal Ecologies: Illicit Economies and Complicit States in Latin America*. Cambridge University Press, 2018. Beatriz Manz, "The continuum of violence in post-war Guatemala." *Social Analysis* 52.2 (2008): 151-164.

<sup>16</sup> Roddy Brett, "Peace without social reconciliation? Understanding the trial of Generals Ríos Montt and Rodríguez Sánchez in the wake of Guatemala's genocide." *Journal of Genocide Research* 18.2-3 (2016): 285-303. Manolo Vela Castañeda, "Los pelotones de la muerte: la construcción de los perpetradores del genocidio guatemalteco. México, D.F.: El Colegio de México, Centro de Estudios Sociológicos 2014; Daniel Rothenberg, Special double issue: Guatemala, the Question of Genocide, *Journal of Genocide Research* 18, no. 2/3 (2016). Online: <https://www.tandfonline.com/toc/cjgr20/18/2-3?nav=toCList>

<sup>17</sup> Comisión para el Esclarecimiento Histórico. *Memory of Silence: The Guatemalan Truth Commission Report*. New York: Palgrave Macmillan, 2012

<sup>18</sup> Ben Kiernan, "Wall of Silence: The Field of Genocide Studies and the Guatemalan Genocide," in Nik Brandal and Dag Einar Thorsen (eds.), *Den dannede opprører*. Bernt Hagtvvet (The Refined Rebel: Bernt Hagtvvet), Oslo, Dreyer, 2016, pp. 169-98. Prudencio Garcia, "El Genocidio de Guatemala a la luz de la Sociología Militar," SEPHA, Madrid, 2005

<sup>19</sup> Víctor Abramovich, "From Massive Violations to Structural Patterns: New Approaches And Classic Tensions in the Inter-American Human Rights System (September 1, 2009)," *Sur International Journal on Human Rights*, Vol. 6, No. 11, December 2009. Available at SSRN: <https://ssrn.com/abstract=1706715>

and 1990s. These transitions represented a critical juncture that enabled the adoption of new progressive constitutions in the region.<sup>20</sup>

The new democratic constitutions in Latin America enshrined basic guarantees to protect and to promote human rights, including civil and political rights like freedom of association and expression, and prohibition against torture, as well as socio-economic rights such as right to health and education. In tandem with the adoption in the late 1970s and 1980s of the first international environmental law declarations recognizing the importance of protecting the environment and promoting sustainable development, a process of “greening” of Latin American constitutions also took place.<sup>21</sup> Many constitutions incorporated explicit environmental rights for the first time - including the right to a healthy environment,<sup>22</sup> and some even recognized rights of nature (meaning rights of non-human elements of the natural world like rivers, lakes, forests).<sup>23</sup> Environmental rights are here understood as proclamations or obligations of states to respect, to protect and to promote the rights of individuals, of groups, or of non-human elements of nature to live under environmental conditions that are conducive to a healthy and productive existence.<sup>24</sup>

The new constitutional wave in Latin America has also advanced on another front, with the formal recognition of ethnic and cultural diversity as important values to be protected at the higher legal level. Organized Indigenous movements and their allies in many countries in Latin America had been participating in processes for the inclusion of constitutional guarantees to protect their specific rights at the national level,<sup>25</sup> in parallel to global efforts to create an

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<sup>20</sup> Brazil adopted a new constitution in 1988, Colombia in 1991, Paraguay in 1992, Ecuador in 1998 and 2008, Peru in 1993, Venezuela in 1999, Bolivia in 2009. Other countries introduced major reforms to their existing constitutions, including Argentina in 1994, Mexico in 1992, and Costa Rica in 1989. Guatemala adopted a new constitution in 1995, still during civil war. Juan F., Gonzalez-Bertomeu, and Roberto Gargarella, eds. *The Latin American Casebook: Courts, Constitutions, and Rights*. Routledge, 2016.

<sup>21</sup> R Brañes, *El Acceso a La Justicia Ambiental en América Latina* (UNEP Mexico 2000).

<sup>22</sup> Boyd, David R. "The constitutional right to a healthy environment." *Environment: Science and Policy for Sustainable Development* 54.4 (2012): 3-15. S Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Human Right to a Healthy Environment Under International Law' (2002) 16 *Tul Envtl L J* 65, 72-73.

<sup>23</sup> Joel Colon-Rios, "The Rights of Nature and the New Latin American Constitutionalism." *NZJPIL* 13 (2015): 107.

<sup>24</sup> This working definition of environmental rights builds on the definition proposed by Shelton in 2010: “the term ‘environmental rights’ ... refers to any proclamation of a human right to environmental conditions of a specified quality.” Descriptive terms for environmental quality referenced by Shelton included “safe, healthy, ecologically sound, adequate for development.” Dinah Shelton, ‘Developing Substantive Environmental Rights’ (2010) 1 *J of Human Rights and the Env* 89.

<sup>25</sup> Ricardo Verdum (ed), “Povos indígenas: constituições e reformas políticas na América Latina”/Indigenous Peoples: constitutions and political reform in Latin America, INESC, 2009; Gabriel B. G. de Oliveira Filho, "Novo Constitucionalismo Latino-Americano: o Estado Moderno em Contextos Pluralistas/New constitutionalism in Latin America: The Modern State in Pluralistic Contexts, *Revista Culturas Jurídicas* 1.1 (2014). Alcida Rita Ramos (ed) , “Constituciones nacionales y pueblos indígenas”, Editorial Universidad del Cauca, 2014; Farid Samir Benavides

international framework for Indigenous rights.<sup>26</sup> The constitutional incorporation of Indigenous rights in Latin America has happened progressively over the decades. Raquel Yrigoyen Fajardo argues that the process can be divided in three phases.<sup>27</sup> The first phase, of multicultural constitutionalism, happened in the 1980s when countries like Guatemala, Nicaragua and Brazil elevated cultural and ethnic diversity to the constitutional level, recognizing specific Indigenous rights like the right to cultural identity.<sup>28</sup>

The 1990s inaugurated the second phase, of pluricultural identity. Many Latin American constitutions<sup>29</sup> adopted during this decade have reinforced the right to cultural identity, while further developing the concept of “multiethnic nation” and “pluricultural state,”<sup>30</sup> by for example recognizing the collective dimension of cultural identity. During the second phase some constitutions also formally incorporated legal pluralism, recognizing certain autonomy rights like the authority of Indigenous peoples to create their own institutions based on their customs and legal traditions. The third phase, more recent, is reflected in the constitutions of Ecuador (2008) and Bolivia (2009). It includes the constitutional recognition of more transformative demands from Indigenous peoples proposing truly “pluricultural states.” Here Indigenous peoples are not merely acknowledged as “diverse cultures” within a post-colonial state, but rather as original nations with rights to participate in the configuration of all state structures.<sup>31</sup>

The parallel development of human rights, Indigenous rights and environmental rights in Latin American constitutions illustrates the fact that concerns with environmental objectives and social justice have developed in tandem in the region.<sup>32</sup> Thus, the social dimension of

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Vanegas, "Movimientos Indígenas y Estado Plurinacional en América Latina," *Pensamiento Jurídico* 27 (2010): 239-264.

<sup>26</sup> Peter Bille Larsen, "The 'New Jungle Law': Development, Indigenous Rights and ILO Convention 169 in Latin America." *International Development Policy | Revue internationale de politique de développement* 7.7.1 (2016).

<sup>27</sup> Raquel Z. Yrigoyen Fajardo, "Aos 20 anos da Convenção 169 da OIT: balanço e desafios da implementação dos direitos dos Povos *Indígenas* na América Latina/On the 20<sup>th</sup> anniversary of 160 ILO Convention: balance and challenges for implementation of Indigenous rights in Latin America", in Verdum, supra note x.

<sup>28</sup>This move contrasted to earlier legal regimes that officially promoted assimilation. Influenced by global negotiations leading to the 1989 ILO Indigenous and Tribal Peoples Convention.

<sup>29</sup> E.g. Colômbia 1991 México 1992 Peru 1993 Bolívia 1994, 2004 Argentina 1994 Equador 1998 Venezuela 1999. Verdum, at page. Verdum.

<sup>30</sup> Fajardo, supra note x, at 26.

<sup>31</sup> Uprimny, Rodrigo. "The recent transformation of constitutional law in Latin America: Trends and challenges." *Law and Society in Latin America*. Routledge, 2014. 105-123.

<sup>32</sup> Some authors contrast Latin American environmentalism, which has since colonial times developed inextricably linked to social justice struggles, to the history of environmentalism in settler colonial states like the US, or in Western European colonial powers. Environmentalism in these latter countries only developed a closer link to social justice struggles in a later stage, with the advent of environmental justice movements. Carruters, supra note x; Roberts, J. Timmons, and Nikki Demetria Thanos. *Trouble in Paradise: Globalization and Environmental Crisis in*



sustainable development, and environmental justice, discussed in the framing chapter of this book, have been at the center of the political agenda for social and environmental movements, and Indigenous peoples organizations in Latin America for decades, even if not always clearly articulated as such. The constitutional recognition of rights is however just the first step in a long fight for social justice, and not necessarily the most difficult one. Looking at constitutional environmental rights, Gellers argues that the barriers to their adoption can be relatively low, as they are often aspirational, and worded broadly.<sup>33</sup> Constitutional environmental rights can encourage legislative action, but they offer no guarantees of comprehensive implementation. The same happens to constitutional recognition of human rights and Indigenous rights. Implementation depends on the strength of legislative and administrative institutions and judicial mechanisms that have often been lacking.

For politicians in a number of developing countries, constitutional rights offer a mechanism to score political points with domestic social movements and international donors, without necessarily leading to the costly (politically and financially) phase of implementation. This reality has led social groups in Latin America to invoke national courts and the Inter-American Human Rights System to give effect to constitutionally recognized environmental rights and Indigenous rights, as well as to clarify their scope and application in the light of regional human rights obligations. At the national level, this movement has led to a number of important judicial decisions on complex environmental issues,<sup>34</sup> including on climate change,<sup>35</sup> that are

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Latin America, Routledge 2003; Daniel Faber, *Environment under Fire: Imperialism and the Ecological Crisis of Latin America*. Monthly Review Press, 1993

<sup>33</sup> Joshua C. Gellers, *Explaining the Emergence of Constitutional Environmental Rights: A Global Quantitative Analysis*, 6 *J. Hum. Rts. & Env't.* 75 (2015)

<sup>34</sup> E.g. in 2011 an Ecuadorian court ruled that the Vilcabamba River had a right to flow, a right that had been violated by road development, ordering that the River and its flow be restored to health. *Vilcabamba River v. Provincial Government of Loja*, Provincial Justice Court of Loja, No. 11121-2011-10 (30 March 2011). In 2006 Argentina's Supreme Court ordered a comprehensive environmental response, including clean up and restoration of the Matanza-Riachuelo River basin, a heavily polluted area of Buenos Aires. The decision came in response to a lawsuit presented by a group of low-income residents based in part on section 41 of the Argentine Constitution, which guarantees a right to a "healthy and balanced environment fit for human development." UNEP *Environmental Rule of Law: First Global Report*, at 160(2019); For a comprehensive discussion on the environmental rights jurisprudence in Latin American courts and in the Interamerican System see Organization of American States, *Environmental Rule of Law: Trends from the Americas*, OAS, 2015, online: [http://www.oas.org/en/sedi/dsd/EnvironmentalRuleOfLaw\\_SelectedEssay\\_English.PDF](http://www.oas.org/en/sedi/dsd/EnvironmentalRuleOfLaw_SelectedEssay_English.PDF); See also John H Knox and Ramin Pejan, eds. *The human right to a healthy environment*. Cambridge University Press, 2018.

<sup>35</sup> In 2018, the Colombian Supreme Court has recognized the Amazon River ecosystem as subject of rights, in the context of a lawsuit alleging that the lack of adequate governmental action to control deforestation and the associated contributions to climate change and environmental degradation violated the right to a healthy environment and rights of nature recognized in the Colombian constitution. An earlier decision by the Colombia constitutional court had already granted legal rights to the Atrato River (Rio Atrato) in 2016. Paola Villavicencio Calzadilla, 'A Paradigm Shift in Courts' *View on Nature: The Atrato River and Amazon Basin Cases in Colombia*, 15/0

contributing to the development of national and global environmental rights. The jurisprudence on Indigenous rights in national courts has not been as forthcoming.<sup>36</sup>

Latin American countries have officially embraced the mantra of balancing the three dimensions of sustainable development– the social, the economic and the environment - and they have incorporated important constitutional guarantees in relation to environmental rights and Indigenous rights in their national legal regimes. In practice, however, economic interests often continue to displace environmental goals and the rights, values and interests of Indigenous peoples that have unequal political power vis-à-vis economic elites. A persistent gap between constitutional guarantees and the creation, implementation, and enforcement of effective laws and policies on environmental rights and Indigenous rights may explain why, despite these normative advances, violent environmental conflicts and severe environmental degradation continues to be a reality on the ground in Latin America, with Indigenous peoples being particularly affected.

In this context, many social movements and non-governmental organizations in the region have continued to resort to international regimes as additional legal and political tools to help in the domestic efforts to improve implementation of environmental rights in the region. In 1988, the Additional Protocol in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador)<sup>37</sup> officially recognized a substantive right to a healthy environment, adding this environmental right to the other treaty obligations under the American Convention of Human Rights.<sup>38</sup> The Inter-American Human Rights System has developed a significant body of jurisprudence on environmental rights<sup>39</sup> and Indigenous rights.<sup>40</sup>

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Law, *Environment and Development Journal* (2019), p. 1-11, available at <http://www.lead-journal.org/content/19001.pdf>

<sup>36</sup> Rachel Sieder, “Indigenous peoples’ rights and the law in Latin America,” in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples’ Rights*, (Routledge, 2016); Economic Commission for Latin America and the Caribbean (ECLAC), *Indigenous Peoples in Latin America*. ECLAC, 2014.

<sup>37</sup> Article 11 states that ‘everyone shall have the right to live in a healthy environment and to have access to basic public services’. It also states that ‘the state parties shall promote the protection, preservation and improvement of the environment’. Additional Protocol to the ACHR on Economic, Social and Cultural Rights (San Salvador) 17 November 1988, in force 16 November 1999; 28 ILM 156 (1989).

<sup>38</sup> American Convention on Human Rights (1969) OAS Treaty Series No 36; 1144 UNTS 123. [American Convention].

<sup>39</sup> Marcos A. Orellana, *Derechos Humanos y Ambiente: Desafíos para el Sistema Interamericano*. 2007, online: <https://www.ciel.org/reports/derechos-humanos-y-ambiente-desafios-para-el-sistema-interamericano-de-derechos-humanos-november-2007-orellana-jornadas-de-derecho-internacional-of-the-organization-of-american-states-organiza-2/>; Dinah Shelton, Legitimate and Necessary: Adjudicating Human Rights Violations Related to Activities Causing Environmental Harm or Risk, 6 J. Hum. Rts. & Env't. 139 (2015).

<sup>40</sup> The Indigenous rights jurisprudence of the ICHR goes back to 2001, with the *Mayagna (Sumo) Awas Tingni v. Nicaragua* case. The IACHR provided a good summary of the most relevant cases related to Indigenous rights in the context of environmental protection in Advisory Opinion 13, *supra* note x.

As part of this process, social groups have successfully advocated for the adoption 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 Escazú Agreement. Escazú has renewed hopes for improving environmental justice in the region. But how well does it integrate the specific environmental concerns of Indigenous peoples? We turn to this next.

## II. The Escazú Agreement: Whose Environmental Rights?

During the 2012 *United Nations Conference on Sustainable Development (Rio + 20)*, Latin American and Caribbean (LAC)<sup>41</sup> countries launched negotiations for a regional treaty to operationalize Principle 10 of the 1992 Rio Declaration, which sets out three access or procedural rights considered fundamental to sound environmental governance: access to information, public participation in decision-making and access to justice.<sup>42</sup> The procedural rights of Principle 10 are part of international human rights law, and have been recognized in regional human rights treaties and in national legal systems.<sup>43</sup> However, before Escazú, Principle 10 had only been operationalized at a regional level by European Countries under the *UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention)*.<sup>44</sup>

During the negotiation of the agreement, Latin American countries drew lessons from the Aarhus Convention, but purposely created a regional instrument that would be more representative and responsive to the realities of the region.<sup>45</sup> Besides procedural rights, Escazú includes a clear enunciation of the substantive right to a healthy environment, which most countries in the region had already incorporated domestically at the constitutional level. The Agreement also adopts a novel provision focused on a problem that is particularly significant in the region: systemic violence against environmental defenders. However, Escazú does not reflect another issue that is particularly salient in the region: the environmental rights of Indigenous peoples. This is despite a regional context where environmental issues have been so inextricably linked to all types of social justice struggles, the large number of Indigenous peoples in Latin America, the seriousness of environmental conflicts involving Indigenous

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<sup>41</sup> I use Latin American countries for short, although recognizing that Caribbean Countries are often treated separately from other Latin American countries for their particularities, which I deem are not relevant for to the topic of this chapter.

<sup>42</sup> Giupponi, note x supra.

<sup>43</sup> See chapters 6 and 8 of Atapattu & Schapper, supra note x; see also chapters 6, 7 and 8 in Kravchenko and Bonive, supra note x.

<sup>44</sup> *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)*, 2161 UNTS 447; 38 ILM 517 (1999).

<sup>45</sup> Barritt, note x supra.

peoples, and the parallel development of substantive environmental rights and Indigenous rights in Latin American constitutions and by the Inter-American Court of Human Rights.

The “Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters”<sup>46</sup> was signed on 4 March 2018 in Escazú, in Costa Rica. The Escazú Agreement will enter into force after eleven (11) ratifications.<sup>47</sup> It is a landmark in environmental justice in Latin America, because it is the region’s first legally binding treaty on procedural environmental rights.<sup>48</sup> Substantive environmental rights like the right to a healthy environment seek to guarantee the enjoyment of environmental conditions of a certain quality.<sup>49</sup> Procedural rights seek to ensure that the interests of individuals and groups potentially affected by decision-making that affects the environment will be taken into consideration in national or international procedures, and that environmental decisions are subject to accountability.<sup>50</sup>

Escazú, much like the Aarhus Convention, is structured around three procedural rights which are also part of international human rights law: (a) access to information; (b) public participation in decision-making; and (c) access to justice. Articles 5 and 6 respectively address access to environmental information and the generation and dissemination of this information. Guided by the principle of maximum disclosure, Article 5 imposes an obligation to create a legal regime to provide public access to all environmental information in a Party’s “possession, control or custody.”<sup>51</sup> Article 5.6 provides a non-exhaustive list of exceptions that Parties may adopt. Any other exception needs to be narrowly tailored and justified. Authorities denying access to environmental information in concrete cases must present reasons. Parties are also required to provide opportunities for applicants to challenge denials.

Unlike Aarhus, Escazú took into account social and economic barriers to access to information, including provisions requiring Parties to avoid prohibitive costs and to provide assistance, so

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<sup>46</sup> Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, 4 March 2018, LC/CNP10.9/5. [Escazú Agreement]

<sup>47</sup> Article 21. States decided for a meticulously negotiated Agreement that admits no Reservations (Article 23). As of 20 August 2019, seventeen countries had signed the Escazú Agreement, with one country (Guyana) ratifying it. ECLAC, Observatory on Principle 10 in Latin America and the Caribbean, online: <https://observatoriop10.cepal.org/en/treaties/regional-agreement-access-information-public-participation-and-justice-environmental>

<sup>48</sup> Barrit, *supra* note x.

<sup>49</sup> Shelton, *supra* note x.

<sup>50</sup> Peters, Birgit. "Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention." *Journal of Environmental Law* 30.1 (2017): 1-27.

Jerzy Jendroska, "Introduction Procedural Environmental Rights in Theory and Practice. In Jerzy Jendroska & Magdalena Bar (Eds.), *Procedural Environmental Rights: Principle X in Theory and Practice* (Cambridge, 2018)

<sup>51</sup> Escazú Agreement, Article 5.

that persons or groups in vulnerable situations are able to access environmental information.<sup>52</sup> Thus, Escazú was alert to the need to take into consideration the economic and political reality of many social groups in the region that may benefit the most from environmental access rights, but do not have the material means to obtain this information.

Article 6 presents a non-exhaustive list of types of information Parties are mandated to generate, collect, publicize and disseminate in a systematic, timely, and comprehensive manner. This list includes texts of international treaties and agreements, reports on the state of the environment, scientific reports and studies, and information on the use and conservation of natural resources and ecosystem services. Despite advances in the recognition of the importance of traditional Indigenous knowledge in international law, including agreements like the Convention on Biological Diversity, Article 6 does not explicitly require the generation, collection and dissemination of information on traditional knowledge related to sustainable use and conservation of natural resources. Article 6 is equally silent on information on Indigenous alternative systems of environmental governance based on ecocentric cosmovisions.

Article 7 requires states to ensure the public's right to participation in environmental decision-making processes. States shall create open and inclusive mechanisms for public participation, based on domestic and international normative frameworks. The provision indicates which types of decision-making processes would require participation: projects and activities that could have a significant impact on the environment or the conservation, use and management of natural resources, activities that are subject to environmental impact assessments, as well as activities that are subject to other environmental permitting processes.<sup>53</sup> The scope is limited to administrative decisions, and does not encompass law-making processes. The Convention acknowledges socio-economic barriers to participation in environmental decision-making, establishing that Parties will provide support to enable the participation of vulnerable persons or groups that are directly affected or potentially affected by the decisions by, for example, providing information in various languages.

The right to participation includes explicit references to Indigenous peoples and local communities.<sup>54</sup> Article 7.15 states that Parties “shall guarantee that its domestic legislation and international obligations in relation to the rights of Indigenous peoples and local communities are observed.” The requirement that Parties shall comply with their national laws and international obligations related to Indigenous peoples, though vague, is an important one. Most Latin American countries are Parties to ILO Convention 169, United Nations Declaration

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<sup>52</sup> Escazú Agreement, Article 5.3, Article 5. 17.

<sup>53</sup> Escazú Agreement, Article 7.

<sup>54</sup> Article 7.15 for example “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.”

on the Rights of Indigenous Peoples (UNDRIP) and the 2016 American Declaration on the Rights of Indigenous Peoples. UNDRIP and the 2016 American Declaration both establish the right of Indigenous Peoples to free, prior and informed consent (FPIC) in relation to any project affecting their lands, territories and natural resources.<sup>55</sup> There have been many debates over the actual meaning and scope of FPIC. Indigenous groups contend that many governments are failing to live up to their commitments to properly implement FPIC in concrete cases. Parties could have used Escazú as an opportunity to elaborate on the nature and scope of FPIC obligations in the context of environmental decision-making projects that affect Indigenous Peoples, but they failed to do so.

Perhaps the most important provision of Escazú is Article 8, on access to justice in environmental matters. Many countries in Latin America had already adopted laws on access to environmental information and public participation, but those laws were not being fully implemented or enforced. Article 8 provides that Parties shall ensure access to “judicial or administrative mechanisms to challenge and appeal, with respect to substance and procedure” related to access to environmental information and public participation in environmental decision-making. If Parties fail to provide legal remedies for cases of lack of implementation of these rights, they may now be declared in breach of international obligations. That clarifies the jurisdiction of the Inter-American Commission and the Court to hear cases related to violations of the Escazú provisions, facilitating justiciability through this Inter-American system.<sup>56</sup> By elaborating on specific Indigenous rights like FPIC, Escazú would have facilitated greater access to national and international justice for Indigenous peoples.

Article 9 of the Escazú Agreement is a Latin American innovation, responding to the reality in the region. The provision establishes that “Each Party shall guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity.” Article 9 also includes measures to prevent, investigate, and punish any violence or threat of violence against environmental defenders. Under existing national and international human rights law, Latin American countries are already under the obligation to protect citizens exercising freedom of expression and freedom of association from all types of violence and threats related to their civil and political activities, and to impose liability on wrongdoers. The reality of persisting violations of these rights to the detriment of environmental defenders led Latin American countries to agree on the need for this provision in order to offer more access to justice tools to counter this trend.

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<sup>55</sup> Mauro Barelli (2012) Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead, *The International Journal of Human Rights*, 16:1, 1-24

<sup>56</sup> Giupponi, at 140.

By adopting a binding regional instrument on environmental access rights, Latin American countries have moved international environmental law forward, following the steps of the Parties to the Aarhus Convention in Europe. But it would be wrong to consider Escazú merely as a treaty providing for procedural rights. The core of Escazú may be the three access rights, but the Agreement is also important because it includes a substantive environmental right. Article 4 (1) guarantees “the right of every person to live in a healthy environment and any other universally-recognized human right related to the present Agreement.”

Many countries in Latin America had already included the right to a healthy environment in their constitutions. The right is mentioned in the Protocol of San Salvador and has also been articulated by the Inter-American Court in several cases. Yet the clear reaffirmation of this substantive right to a healthy environment in a legally binding international agreement brings coherence to the system, reinforces the embeddedness of this substantive environmental right in the region, and grants more political power to those currently fighting for the implementation of this right in domestic courts and to avoid regressive legislation during a global moment of rising authoritarianism that did not spare Latin America.

Here again, Parties failed to use Escazú as an opportunity to explicitly integrate existing international Indigenous rights to the environmental rights framework. The link between Indigenous peoples’ rights, environmental stewardship, and sustainable development has been emphasized in Principle 22 of the 1992 Rio Declaration, which states that: “Indigenous people and their communities...have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and accordingly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”<sup>57</sup>

Article XIX of the 2016 American Declaration on Indigenous Rights articulates the intersection between Indigenous rights and the right to a healthy environment. It is worth reproducing section 1 of this article to highlight its particularities.

**Article XIX. Right to protection of a healthy environment**

1. Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the right to life, **to their spirituality, worldview** and to **collective** well-being. (emphasis added)

Article XIX also protects Indigenous peoples’ rights to conserve, restore, and protect the environment and to manage their lands, their territories and their resources in a sustainable way. It requires states to establish and to implement programs to assist Indigenous peoples with the conservation and protection of their territories, without discrimination. The

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<sup>57</sup> 1992 Rio Declaration, Principle 22.

articulation of a more specific version of an Indigenous right to a healthy environment that defines “healthy” to clearly include their cosmovision, spirituality and attention to collective rights and concerns is important. It gives Indigenous peoples more leverage to have their special forms of relationship with the natural world and alternative ways to manage natural resources legally recognized and respected, and less prone to be overruled by dominant Western anthropocentric views of sustainable development when conflicts arise.

The Inter-American Court of Human Rights (IACtHR) has also recognized the special link between indigenous rights and environmental rights in a series of cases brought by Indigenous and tribal populations before the Inter-American System, following the failure of their countries to give effect to domestic indigenous rights. The IACtHR has recently revisited and expanded this jurisprudence when it issued its landmark Advisory Opinion 23 (Opinion) on *Environment and Human Rights* on 15 November 2017.<sup>58</sup> The Opinion followed a request from Colombia that was involved in a dispute with Nicaragua over maritime boundaries, related to Nicaragua’s plan to build a large infrastructure project (a canal linking the Caribbean Sea to the Pacific Ocean) that would likely impact vulnerable marine ecosystems shared by the two countries.<sup>59</sup>

The request allowed the IACtHR to consider the scope of human rights obligations resulting from transboundary environmental harm at length, including an unequivocal recognition of the existence of an “autonomous” right to a healthy environment under the American Convention.<sup>60</sup> While issuing its Advisory Opinion 23, the Court also took into consideration a petition that a group of Indigenous peoples had filed before the Inter-American Commission against Nicaragua, denouncing the violations of their Indigenous rights due to the same canal construction.<sup>61</sup> The Court reviewed the various cases it had already decided in relation to

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<sup>58</sup> Inter-American Court of Human Rights, Advisory Opinion oc-23/17 Requested by the Republic of Colombia, ‘Environment and Human Rights’, 15 November 2017; in Spanish only. For analyses of Advisory Opinion 23 see: Feria-Tinta, Monica, and Simon C. Milnes. "International Environmental Law for the 21st Century: The Constitutionalization of the Right to a Healthy Environment in the Inter-American Court of Human Rights Advisory Opinion 23," *ACDI* 12 (2019): 43; Campbell-Durufilé, Christopher, and Sumudu Anopama Atapattu, "The Inter-American Court’s Environment and Human Rights Advisory Opinion: Implications for International Climate Law." *Climate Law* 8.3-4 (2018): 321-337; Papantoniou, Angeliki, "Advisory Opinion on the Environment and Human Rights." *American Journal of International Law* 112.3 (2018): 460-466; Banda, Maria L. "Inter-American Court of Human Rights’ Advisory Opinion on the Environment and Human Rights." *Am. Soc’y Int’l L.: Insights* (2018).

<sup>59</sup> Request for Advisory Opinion OC-23, Inter-Am. Ct. H.R. (Mar. 14, 2016), available at [http://www.corteidh.or.cr/solicitudoc/solicitud\\_14\\_03\\_16\\_ing.pdf](http://www.corteidh.or.cr/solicitudoc/solicitud_14_03_16_ing.pdf)

<sup>60</sup> Advisory Opinion 23, para 32 to 38.

<sup>61</sup> This petition was still pending by the time the IACtHR issued its Opinion. Centro de Asistencia Legal a Pueblos Indígenas (CALPI), “La CIDH abre el Caso de los Pueblos Indígenas y Afrodescendientes en contra del Canal Interoceánico de Nicaragua,” (2018), online <https://kaosenlared.net/la-cidh-abre-el-caso-de-los-pueblos-indigenas-y-afrodescendientes-en-contra-del-canal-interoceanico-de-nicaragua/>



Indigenous peoples' land rights and the right to a healthy environment, reiterating the link. In the Court's words:

“[I]n cases about territorial rights of Indigenous and tribal peoples, this Court has made references to the interrelation between a healthy environment and human rights protection, considering that Indigenous collective ownership is associated with the protection and access to resources located in [Indigenous] peoples' lands, as those natural resources are necessary for the very survival, the development and the continuity of the life style of said peoples.”<sup>62</sup>

Importantly, the IACtHR has taken a step toward an ecocentric approach to sustainable development advanced by many Indigenous peoples, as opposed to the prevailing anthropocentric approach, when it held that the right to a healthy environment includes the legal protection of components of nature (like rivers, forests, seas and living organisms) *per se*. Under this interpretation, a state may breach international law if it causes significant harm to nature, even if there is no harm to individuals. The Court emphasized the strong link between the right to a life with dignity and the protection of the ancestral lands and natural resources of Indigenous peoples. The Advisory Opinion established that states must adopt positive measures to ensure life with dignity to vulnerable Indigenous peoples, including protection of the close relationship they maintain with land, and their cosmovision, both in the individual dimension, and the collective dimension.<sup>63</sup>

When Latin American States were negotiating the Escazú agreement, they were cognizant of both the international soft law and the Inter-American jurisprudence on the special link between Indigenous rights and environmental rights. Yet, Escazú includes very few specific references to Indigenous peoples' rights. This was not for lack of discussion. According to Giupponi, Ecuador proposed the inclusion of explicit references to the ILO Convention 169, the 2007 UN Declaration on Rights of Indigenous Peoples and the 2016 American Declaration on Indigenous Rights but the proposal was rejected.<sup>64</sup> There was also a proposal to include an explicit reference to the various “cosmovisions of [Latin American] peoples which was dropped.<sup>65</sup> In contrast, the list of principles guiding the Agreement includes the *pro persona* principle, according to which treaty provisions must be “interpreted in favour of the individual, who is the object of international protection....<sup>66</sup>”

Empirical research is needed to shed light on why this integration was rejected in Escazú. It may be due to lack of political agreement on the scope of binding international Indigenous rights, insufficient social pressure, trade-offs, or very likely a reflection of the uphill battle Indigenous

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<sup>62</sup> Paragraph 48. Own translation from the official version in Spanish.

<sup>63</sup> At 48.

<sup>64</sup> Giupponi.

<sup>65</sup> Preliminary document Escazu Agreement, Sixth Version (n 64) Preamble.

<sup>66</sup> Giupponi, at 141.

peoples still face to have their alternative normative systems recognized in the face of hegemonic Western-based domestic and international legal orders. For whatever reason, Indigenous rights were integrated only marginally into Escazú in 2018, indicating that the dominant Western-centric view that emphasizes human over nature and individual rights over collective rights still prevails, despite the gains by Indigenous peoples in other fronts.

To be clear, the absence of more explicit and clear articulations of Indigenous peoples' rights in Escazú does not exempt Latin American countries from complying with the commitments and obligations they already recognize under existing domestic and international Indigenous peoples' rights. ILO Convention 169 applies to all Latin American countries that signed and ratified this legal document. The same importance given to the integration of existing broader human rights norms into environmental legal regimes should be equally applied to existing Indigenous rights.

States are required to comply with domestic and international human rights obligations in the context of environmental protection and natural resources management, independent of explicit enunciation of this intersection. Yet, over time the need for clear and more explicit integration of human rights regimes and environmental law, with further elaboration of the meaning and scope of environmental rights, came to be recognized. This integration promotes legal coherence and certainty and empowers those fighting to give effect to these rights on the ground.

The meaning and scope of Indigenous environmental rights (both substantive and procedural) should also be clarified under environmental law. We argue, therefore, that Escazú missed an opportunity to consolidate this integration, reflecting the reality in the region that places Indigenous peoples at the center of environmental justice struggles.

In the next section we use the community-based water management system of Mayan Indigenous peoples in Totonicapán, Guatemala, to illustrate the importance of this integration in order to ensure the protection of alternative Indigenous cosmovisions of sustainable development in Latin America.

### III. Indigenous Environmental Rights: the Totonicapán Water Governance Experience<sup>67</sup>

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<sup>67</sup> This section is based on an analysis of Guatemala's legal framework to manage water resources, as well as on a series of informal interviews with individuals with in-depth knowledge of Totonicapán's participatory water management systems. The interviews were conducted by the co-author Mario Mancilla between the 13 and 16 of December 2018, with the following individuals: Santos Augusto Norato, former president of the 48 cantones; Roberto Chuc, expert in natural resources management and resident in a neighboring municipality, who has worked for several non-governmental organizations in the region; Robins López, community forestry expert from CARE, who works in partnership with the 48 cantones.

The Guatemalan legal framework for water is a tale of incomplete regulation, formal adoption of a human right to water, and token commitments to consider the social dimension of sustainable development. This framework fails to muster the political will to implement the necessary environmental regulations to make this right and commitments a reality on the ground. There are several water conflicts in Guatemala between Indigenous peoples and the Guatemalan postcolonial state that highlight the clash between different visions of sustainable water management. The gradual formal incorporation of water rights in the Guatemalan legal system has proved so far insufficient to mediate these conflicts anchored in very different cosmovisions related to water resources.

a. Guatemala's Post-colonial legal framework

The Guatemalan Civil Code, influenced by Franco-Roman law, has historically regulated all aspects of water governance in the country.<sup>68</sup> The current Civil Code was adopted in 1963.<sup>69</sup> Unlike previous iterations, the current Civil Code creates two distinct legal regimes for water management: a private regime and a public regime. The current Civil Code creates a regulatory system for "private water." The 1963 Code established that a new law regulating public waters was to be adopted. More than five decades later, Guatemala lawmakers have yet to achieve consensus to approve a water law.<sup>70</sup> In the absence of a law regulating the management of public water, the provisions of the 1933 Civil Code apply.<sup>71</sup> These provisions treat water as an object or thing (res), subject to property rights. The legal treatment of water does not consider the resource as it relates to biodiversity, social organization, culture, and life more generally.

In other words, much like the system Spain imposed on Guatemala as a colony in the eighteenth century, the only value attached to water under the 1933 (and the 1963) Civil Code is an economic value. The Code does not recognize any other value – social, moral, religious, ecosystemic - for people and nature. Water resources are legally treated as dissociated from the broader hydrological system or the biosphere. As a result, all water conflicts are to be resolved by deciding who has the legal property rights over the water resources. In the wake of the approval of more progressive new constitutions in Latin America in the 1980s, following democratic transitions away from dictatorships and civil conflicts, Guatemala's 1985

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<sup>68</sup> Bertomeu Sanchez, Salvador, and Tomás Serebrisky. "Water and Sanitation in Latin America and the Caribbean: An Update on the State of the Sector." Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 10 (2018).

<sup>69</sup> The first iteration of the Civil Code was adopted in 1887 and modified in 1882 and 1926. The second iteration of the Civil Code was adopted in 1933.

<sup>70</sup> Several water bills have been presented since 1985, but none have been approved due to opposition from both civil society and the private sector, the former advocating for full recognition and respect of indigenous rights, and the latter lobbying for less restrictive regulations to decrease business costs. D'Andrea, Ariella. "Legal pluralism and customary water resources management in Guatemala." *Water international* 37.6 (2012): 683-699.

<sup>71</sup> Chapters II, III, IV and V of Titles II; Chapters II and III of Title VI of the 1933 Civil Code.

Constitution represented a seminal change in the legal treatment of water resources, away from the economic model.<sup>72</sup> Articles 127 and 128 of the Constitution provide as follows:

Article 127: Water Regime

All waters belong to the public domain and are inalienable and imprescriptible. Their exploitation, use, and enjoyment are granted in the form established by law in accordance with the social interest. A specific law will regulate this matter.

Article 128: Exploitation of Waters, Lakes, and Rivers

The exploitation of the waters of lakes and rivers for agricultural, livestock, tourism, or any other purpose contributing to the development of the national economy is at the service of the community rather than of any specific individual, but the users are obliged to reforest the banks and corresponding trenches as well as to facilitate access roads.<sup>73</sup>

In principle, these Constitutional provisions have abrogated the Civil Code's legal treatment of water as a mere object or economic commodity, introducing values such as social interest into the water regime, and giving priority to community interest over individual interest.

Unfortunately, the Constitution (approved during the civil conflict but following the regional wave of new constitutions) delegates the development of a new water regime to a specific law, to be discussed and passed by the legislature. Thirty-four years after the Constitution was adopted, no specific water law has been approved. In practice, the Civil Code still regulates water rights as individual property rights, without reference to social interest and community rights.<sup>74</sup> In 2010, the UN General Assembly explicitly recognized a human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realization of all human rights.<sup>75</sup> Guatemala has thus far not adopted national legislation providing for a human right to water, nor establishing clear priority of water use for domestic purposes over commercial or industrial uses.

In practice, Guatemala's policies and administrative decisions related to water give industry and agribusiness privileged access to water in the name of economic development. The confusing patchwork of progressive but unimplemented constitutional provisions, coupled with outdated

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<sup>72</sup> The Constitution was approved during the civil conflict, as the Peace Accords would be signed only in 1996. Burrell, Jennifer L, "Maya after war: Conflict, power, and politics in Guatemala," (University of Texas Press, 2013).

<sup>73</sup> Own translation. 1985 Constitution of the Republic of Guatemala, with 1993 reforms (In Spanish), online: <http://pdba.georgetown.edu/Constitutions/Guate/guate93.html>

<sup>74</sup> Guatemala's Constitutional Court have decided a few cases declaring the existence of a human right to water and sanitation, as essential elements to guarantee a life with dignity and the realization of other human rights. The social interest should prevail over individual private interests when there is a conflict." (Sentencia del 16-5-17 en el Expediente 308-2017). The lack of a water law gives space for private actors to act in disobedience of the constitutional mandate, as litigating for water rights is an expensive and cumbersome process that is often not accessible to Indigenous groups.

<sup>75</sup> Resolution A/RES/64/292. United Nations General Assembly, July 2010

or non-existent legal regimes, coexist with alternative Indigenous or community water management systems that are more holistic and benefit from strong moral, cultural and spiritual elements. In this context, opposing views related to water have generated constant conflicts between Guatemala's various social groups, in particular the largely poor indigenous communities and the economic elites composed primarily of European-descendants.

The most common types of conflict include:

1. Use of water resources for commercial activities,<sup>76</sup> particularly sugar cane<sup>77</sup> and African palm crops,<sup>78</sup> as opposed to prioritizing communities' access to water in keeping with the human right to water and sanitation.
2. Use of water for electricity generation (dams), for mining activities,<sup>79</sup> and for other industrial purposes, versus protecting water levels to maintain sustainable flows for rivers and lakes.
3. Inequitable access to water. In urban zones, low-income families have less access to drinking water than higher income families, despite paying the same overall taxes, because there is a monthly charge (canon de agua or servicio de agua) that many can't afford. Around three million Guatemalans lacked access to water in 2016.<sup>80</sup>
4. Lack of sanitation systems and wastewater treatment.<sup>81</sup> Infant mortality rates in Guatemala, in great part due to lack of sanitation, are higher than the regional average.<sup>82</sup>
5. Food security. Without adequate access to water, low income communities cannot rely on subsistence farming or on family crops to ensure their food security. Nowadays many families rely on rainfall, which is becoming ever more unreliable due to climate change.

An example of the environmental and social impacts of the lack of a coherent system of water regulations is the pollution of Lake Atitlán. As early as 1996, the Guatemalan government had created the Authority for the Sustainable Management of the Basin of Lake Atitlán, to help coordinate efforts to protect the lake watershed.<sup>83</sup> Despite the existence of this framework, the

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<sup>76</sup> Cfr. <http://www.entremundos.org/revista/politica/crisis-de-agua-y-monocultivos-en-la-costa-sur-de-guatemala/>

<sup>77</sup> Cfr. <https://wrm.org.uy/fr/les-articles-du-bulletin-wrm/section1/guatemala-los-amargos-impactos-de-la-cana-de-azucar/>

<sup>78</sup> Cfr. <https://wrm.org.uy/es/articulos-del-boletin-wrm/seccion2/guatemala-monocultivos-de-palma-y-cana-de-azucar-lesionan-a-comunidades-del-rio-coyolate/>

<sup>79</sup> Cfr. Informe la Minería en Guatemala. ICEFI (Disponible en: [https://icefi.org/sites/default/files/la\\_mineria\\_en\\_guatemala\\_-\\_2da\\_edicion.pdf](https://icefi.org/sites/default/files/la_mineria_en_guatemala_-_2da_edicion.pdf))

<sup>80</sup> Cfr. <https://www.prensalibre.com/guatemala/comunitario/mas-de-500-mil-vecinos-sufren-escasez-de-agua/>

<sup>81</sup> Cfr. Situación del Recurso Hídrico en Guatemala. IARNA (Disponible en: <http://desastres.usac.edu.gt/documentos/docgt/pdf/spa/doc0135/doc0135.pdf>)

<sup>82</sup> Cfr [https://elpais.com/internacional/2015/06/24/actualidad/1435177135\\_432060.html](https://elpais.com/internacional/2015/06/24/actualidad/1435177135_432060.html)

<sup>83</sup> Decreto 133-96 del Congreso. Similar authorities have been created to manage other national lakes: Decreto No. 64-96 (Lake Amatitlan); Acuerdo Gubernativo 697-2003 (Petén-Itza).

contamination of the waters – caused by growing population, chemical contaminants from agricultural activities and tourism in the lake basin – have increased exponentially. In March 2016, a group of Mayan communities from Lake Atitlán, supported by local organizations, filed an official complaint against ten municipalities for the continued environmental pollution of the lake.<sup>84</sup>

The attempts to call attention to the water problems in Lake Atitlán were part of a broader movement by Indigenous communities throughout Guatemala to denounce the many instances where their water resources were being contaminated or undermined by monoculture farming, deforestation, plastic wastes,<sup>85</sup> mines and hydroelectric projects. In April 2016, thousands of indigenous groups and campesinos marched to Guatemala City to demand that the Guatemalan government respect their right to water.<sup>86</sup> At the time of writing this chapter, the government has taken no action to resolve these problems, and Indigenous peoples continue their fight to protect Lake Atitlán's water resources.

This situation contrasts with examples of Indigenous communities' successful management of scarce water resources in other watersheds, as in the case of Totonicapán. The Totonicapan experience illustrates some of the important particularities of Indigenous peoples' relation to nature and stewardship of natural resources based in ecovisions that Escazú failed to recognize.

#### b. Ecocentric Water Regimes: The Totonicapán Experience

Totonicapán is a Guatemalan region that covers an area of about 1,000 square kilometers in the country's western volcanic highlands. More than 95 percent of Totonicapán's approximately 491,000 inhabitants are K'iche', an indigenous Maya population.<sup>87</sup> Totonicapán's climate is moderately dry, and the region has no large rivers or important permanent water bodies like lakes. This climate and topography mean that all significant water resources in Totonicapán come from a forest watershed.<sup>88</sup>

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<sup>84</sup> Abbott, Contamination, supra note x.

<sup>85</sup> Sometimes even when municipal governments take the initiative to protect water resources private interests offer political or legal resistance. One example of municipal initiative resisted by the private sector is the one in San Pedro La Laguna in Lake Atitlán. In 2016 the municipal government approved a regulation prohibiting the commercialization of single use plastics in the city's perimeter to counter plastic pollution. A group of private associations filed a reference case before the Constitutional Court, questioning the legal authority of the municipality to issue such a prohibition. The Court declared the regulation valid, within the powers of the municipal government. Yet this shows the difficulty of countering private interests. Sentencia del 5 de octubre de 2017, Expediente 5956-2016 Corte de Constitucionalidad.

<sup>86</sup> Abbott, Contamination, supra note x.

<sup>87</sup> Instituto Nacional de Estadística, Guatemala. National demographic projections 2019, online: <https://www.ine.gob.gt/ine/poblacion-menu/>

<sup>88</sup> Thomas T. Veblen, Forest Preservation in Western Highlands of Guatemala, 68(4) (1978) 417

The Communal Forest of Totonicapán is recognized as the largest and most well-preserved coniferous forest in all of Central America.<sup>89</sup> Approximately 39,000 hectares of forests support a rich ecosystem that has been communally preserved for centuries in spite of extreme pressures on the land resulting from the high rural population densities<sup>90</sup> and broader economic pressures of a national economy with a strong focus on exporting natural resources. The forest ecosystem functions as a sponge: it absorbs water from the rains, retains this water in the subsoil, and gradually releases it back to the surface in the form of natural springs.<sup>91</sup> This cycle is possible because the surface of the volcanic soil is constituted of permeable material like sand and clay, while impermeable material is found in the subsoil. This is the only source of water for Totonicapán through the six months of the dry season. But the forest has a bigger role that transcends the municipality. The 1,200 water springs found in Totonicapán communal forest are the headwaters for five of Guatemala's major rivers - Samalá, Chixoy, Nahualate, Motagua, and Quiscab, with this last river draining into Lake Atitlán.<sup>92</sup>

The Maya K'iche' peoples of Totonicapán have sustainably managed this forest watershed for hundreds of years. They have adapted their systems along the way, in order to address natural and societal changes that threatened their water resources, considered sacred.<sup>93</sup> In order to protect the watershed, the Maya K'iche' have adopted participatory models of water governance. These communal water management systems function independently from Guatemalan water management systems and they are anchored in a distinct cosmivision.

#### Conception of water/hydric resources

Totonicapán Maya communities consider water a special entity: it has physical characteristics and manifestations, but it also possesses spiritual character. In fact, the Mayas in Totonicapán have recognized that water has its own Nahual - a form of guardian spirit possessed by each

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<sup>89</sup> USAID Guatemala: "Scene setter for the visit to the Alcaldía Comunal of the 48 Cantones de Totonicapán," (2011, updated 2013), online <https://rmpportal.net/groups/cbnrm/cbnrm-literature-for-review-discussion/48-cantones-de-totonicapan-1>. Elías Gramajo, Sível. Autogestión comunitaria de recursos naturales: estudio de caso en Totonicapán. Flacso, Guatemala, 1997.

<sup>90</sup> Totonicapán is the most densely populated department in Guatemala excluding the capital city.

<sup>91</sup> Totonicapán experiences a pronounced seasonality in precipitation, with more than 90 percent of annual rain falling between April and October. Veblen, supra note x.

<sup>92</sup> USAID Guatemala, supra note x.

<sup>93</sup> The water management systems have developed organically, as part of ancient cultural practices, with no formality, no legal personality associated Western legal systems. With population growth, the need to establish relations with Guatemala's colonial and postcolonial state institutions, which had embraced market economy, there has been a gradual movement towards formalization of the water systems, albeit under Indigenous rules. This formalization has helped in interaction with authorities in various levels of government – municipal, provincial, regional, national – as well as in relationships with neighboring communities. Despite the adoption of some written reports and documents, the Indigenous traditions of oral documentation and the values and beliefs related to water resources persist.

person and by certain natural entities.<sup>94</sup> The Nahual embodies the strength, the character, and the spirit of the person or entity, and it is often materialized as an animal that serves as guide and conscience.<sup>95</sup> The main value attached to water is life itself: water is life, and this is one reason it is considered sacred. Water is not reduced to its chemical composition, in isolation from the rest of the ecology. On the contrary, water can only be understood and conceived in its intimate relationship with natural entities like mountains, hills, rivers, lakes, springs and the forests (including trees, bushes, flowers, other plants, and animals).

Totonicapán Mayas believe that the long-term existence of water is compromised unless all this ecological context is taken into account. According to their cosmivision, certain birds, animals, plants, and flowers are able to announce the arrival and the departure of water because they are part of water and water is part of them.<sup>96</sup> In this sense, water encompasses all: animals, plants, land, and people. Food security and good health (physical and spiritual) for all living beings, including human communities, depend on the existence of sufficient water throughout the year.

Because water is life itself, it cannot be considered a material commodity. Water cannot be reduced to its monetary value, a commodity amenable to sale, exchange, or private ownership. Totonicapán Mayas do recognize that water has an economic value, but this is not the most important value. As water is considered a special entity (sacred, integral and essential for life), it cannot belong to anyone. All community members have both the right to access water and the responsibility to protect it. This strong ancient Maya cosmivision that conceives water not as an economic or material element, but as sacred and integrated into broader ecological systems, is the basis of the governance system the communities have employed to manage water resources, borrowing some elements of the formal postcolonial system but transforming it to fit the Indigenous cosmivision.

#### Water governance system

Totonicapán has an unusual model of participatory institutional organization. The 48 Cantones<sup>97</sup> of Totonicapán are a conglomerate of distinct assemblies and their respective Boards of Directors (Junta Directivas). These assemblies are formed by a group of smaller administrative divisions distributed in all eight municipalities in the Region of Totonicapán.

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<sup>94</sup> The closest concept to a Nahual, from a Western Judeo-Christian cultural tradition, would be a guardian angel. Martínez González, Roberto. "Las entidades anímicas en el pensamiento maya." *Estudios de cultura maya* 30 (2007): 153-174.

<sup>95</sup> Id.

<sup>96</sup> Interview conducted by Mario Mancilla in Quetzaltenango with Santos Augusto Norato, 14-12-18

<sup>97</sup> For an explanation of the administrative structure of Cantons and the history of this name dating back to colonial times see Barrios Escobar, Lina Eugenia, "Tras las huellas del poder local: la Alcaldía Indígena en Guatemala, del siglo XVI al siglo XX (Guatemala: Universidad Rafael Landívar, 2001)



These divisions are charged not only with building, managing and protecting water systems and other collective natural resources and services, but also with addressing social conflicts and delinquency in Totonicapán. The divisions also provide other public services such as preserving traditions and historical documents.

Governance and power structures are based on the K'axk'ol<sup>98</sup> principle of charitable service to the community that entails responsibility and “suffering” with and for others.<sup>99</sup> Those given the honor of being elected to serve do not receive any economic or other monetary benefits. Under this conception, power is based and legitimated by service to others, and authority continues to rest with the community. Those receiving this power have to guide others to do collective work (K'amalb'e) so that the common good is achieved.<sup>100</sup> Leadership roles are based on three principles: (a) political power alternation; (b) unlimited possibilities for the community to withdraw authority; and (c) accountability to the community.

A water committee is delegated the task of building, managing, and maintaining water systems to distribute water for consumption by communities. Because water is considered a collective good, to be shared between all community members who have both the right to water and responsibilities to protect it, water cannot be owned individually. The Totonicapán water management system has succeeded in promoting harmonious social relations and protecting water quality and water access. There is a clear absence of serious conflicts over water among community members but also with external actors, despite the many stressors along the centuries.

Any discussion on the creation of the much-needed overarching water law in Guatemala needs to include international environmental law principles such as sustainability, conservation, and participation, and constitutional principles such as social justice and public trust. It should not only reflect substantive and procedural environmental rights reflected in Escazú, but go beyond them. The process should also include serious discussions on how environmental law frameworks can incorporate Indigenous environmental rights, with their alternative cosmovisions and successful communal management systems that have worked well in places such as Totonicapán. International environmental law agreements can influence processes of

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<sup>98</sup> Norato, Santos Augusto, *Gobernanza del agua en Totonicapán*. Interview 14-12-18

<sup>99</sup> Garía, Manuela; Hernández, Eusebio, *Una Oportunidad de Servir: Conociendo Nuestra Experiencia de Trabajo (2017)*.

<sup>100</sup> Membership in the Assembly or a Board of Directors of the 48 Cantones of Totonicapán is a year-long service. A citizen is expected to complete no more than three terms as a member in a lifetime. This community work usually implies a significant economic burden, and therefore those that serve and the broader community do not take this service lightly. Id.

law-making and administrative and judicial decisions at the domestic level. We believe Escazú was a missed opportunity to integrate Indigenous rights and environmental law.

## Conclusion

The process of integration of human rights and environmental law at the international level represents one important step towards the actualization of the social dimension of sustainable development. This integration should, however, be expansive enough to incorporate not only the universal set of environmental rights now being enshrined in international agreements like Escazú, but also the more specific Indigenous environmental rights that are based on alternative cosmovisions of the natural world and the place of human beings in it. By making only marginal references to Indigenous environmental rights, Escazú does not advance the growing recognition of Indigenous peoples' rights to alternative approaches to sustainable development that seek to better harmonize human relationships with the natural world. By failing to contribute to a more coherent international environmental rights regime that integrates the evolving body of Indigenous rights, Escazú reinforces the dominant Western approaches to international and national environmental law and policy and sustainable development.<sup>101</sup>

Escazú also represents a missed opportunity for Latin America to show leadership in steering international environmental law toward a more pluralistic, ecocentric and biocentric approach, increasingly recognized by Latin American countries at the domestic level, as exemplified by the new constitutions of Ecuador and Bolivia. As Judge Weeramantry observed in 1997, international law needs to draw lessons from traditional societies and diverse cultures, including indigenous peoples, in harmonizing the various dimensions of sustainable development.<sup>102</sup>

Securing more space for alternative legal systems based on different cosmovisions that place nature at the center and not at the margins of human and other living beings' existence may generate more successful experiences of sustainable development like the one in Tonicapán. This is particularly important in countries with very high levels of violent environmental conflicts such as Guatemala.

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<sup>101</sup> Craig M. Kauffman and Pamela L. Martin, "Scaling up Buen Vivir: Globalizing Local Environmental Governance from Ecuador." 14(1) *Global Environmental Politics* 2014.

<sup>102</sup> ICJ, *Gabcikovo-Nagymaros Project*, Separate opinion of Justice Weeramantry, Reports, 1997, p. 107.