

The Report committee for Anne Marie Egerstrom  
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**International Law and Resource Extraction:  
The Reconstruction of Indigenous Identity in Cajamarca, Peru**

APPROVED BY  
SUPERVISING COMMITTEE:

Supervisor: \_\_\_\_\_

Amy Liu

\_\_\_\_\_  
Daniel Brinks

**International Law and Resource Extraction:  
The Reconstruction of Indigenous Identity in Cajamarca, Peru**

by

Anne Marie Egerstrom, B.A.

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**International Law and Resource Extraction:  
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by

Anne Marie Egerstrom, M.A.

The University of Texas at Austin, 2017

SUPERVISOR: Amy Liu

Why has there been a sudden upsurge in the politicization of indigenous identities in Latin America? Drawing upon constructivist assumptions of ethnic identity, I find that ILO 169 and the rights contained in the United Nations Declaration on the Rights of Indigenous Peoples have been accompanied by a re-construction of indigenous identity in Cajamarca, Peru. Communities that are vulnerable to the deleterious effects of natural resource extraction and have historically identified as non-indigenous, despite having an indigenous identity in their identity repertoire, have re-constructed their indigenous identity as part of a strategy to maintain tenure over traditional lands, but only after the fact that power and rights have been awarded to these communities by international bodies of law and national legal frameworks alike. That is, bodies of law can activate an indigenous cleavage under a condition of grievance.

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From 1980 onward, an international legal framework developed to grant special rights to indigenous communities has taken root. The International Labor Organization's Indigenous and Tribal Peoples Convention, 1989 No. 169 (hereinafter ILO 169) and the United Nations Declaration of the Rights of Indigenous Peoples (hereinafter UNDRIP), broadly grant indigenous communities the right to participate in the procedures governing resource extraction enterprises, promote the collective rights and self-determination of indigenous communities, and see these communities and their members as the subjects of rights rather than solely as objects of government policies. This positive development is circumscribed by the context of inequality in which these legal frameworks operate, the lack of specificity in the procedural requirements of the laws, and their inability to encompass all indigenous communities in their definition of "indigenous". Despite these shortcomings, these international bodies of law have prompted a reconstruction of indigenous identity — albeit at a very local level. Both ILO 169 and UNDRIP require that the community that is experiencing the grievance be the one to make its claims against the state or a corporate enterprise. These pro-indigenous bodies of law, as limited in their effects as they may be, have enabled a reconstruction of indigenous identity around legal procedure and environmental stewardship that, as a consequence of procedural requirements, is local in nature. That is, the politicization of an indigenous cleavage does not require a national indigenous identity or a national indigenous movement. The dynamics of making a claim under ILO 169 or UNDRIP imply that politically visible indigenous issues can be raised from regional and local venues.

More so than previously in history, the territories held by indigenous communities are a site of contention. Much of what is left of the world's natural resources is now in the territories

of indigenous peoples (Anaya 2013), making the lands of indigenous communities commercially valuable to the state. In the name of “development” or the “general interest”, the state has resorted to expropriation and other administrative measures to gain jurisdiction over the land and the resources that have historically belonged to these communities. Indigenous communities have a *sui generis* relation to the lands they occupy; the physical and spiritual interdependence that exists between these communities and their land, water, and territory, makes the preservation of land tenure and the ecological integrity of indigenous lands necessary to ensure the community’s survival and cultural integrity (Westra 2008). Mining and other extractive enterprises produce irreversible damage to the environment, when not conducted in a sustainable fashion. Latin America is particularly vulnerable to unsustainable extraction processes, because in many countries development relies upon the exploitation of these natural resources. For policy makers, more rapid extraction seems to suggest more rapid development. Unsustainable extractive enterprises divert rivers, contaminate water with chemical pollutants, run the risk of toxic leaks and chemical spills that can affect water and soil quality, require deforestation that threatens biodiversity, and generate immense amounts of heavy metal waste that once leached into the soil affect agricultural production for centuries years to come. Indigenous communities that live in close proximity to the mine are directly affected by the industrial run-off which can result in contaminated water supply or the loss of fertile land, threatening the community’s right

to health and and healthy environment<sup>1</sup>. Communities that are displaced by extractive activities face marginalization, food insecurity, job insecurity, and worse poverty than they were in to begin with.

While these immediate and after-the-fact threats presented by extractive industries are the domain of UNDRIP, the 1989 convention of the International Labor Organization Concerning Indigenous and Tribal Peoples, also known as ILO 169, refers to the fundamental rights of consultation and participation enjoyed by indigenous peoples. The objective of ILO 169 is to achieve agreement or consent when it comes to any government action or policy that may affect or change the status of these communities (ILO C169). That is, ILO 169 is concerned with the process prior to the establishment of an extractive project on or in the vicinity of indigenous territory and is best illustrated by the idea of Free Prior and Informed Consent. The concept of Free Prior and Informed Consent (hereinafter FPIC) contained in UNDRIP and ILO 169, is specific to the relocation of indigenous peoples from their lands, the loss of cultural and intellectual property, and of lands, territories and resources. FPIC must be prior in the sense that it must precede the adoption of any legal or administrative measures that might affect the lands, territories, resources, and status of indigenous communities. ILO 169, also states that these consultations must be had in good faith, must occur through appropriate state procedure, and

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<sup>1</sup> See case of Kuna Indigenous People of Madungandi and Embera Indigenous People of Bayano and Their Members v. Panama, Judgement of November 13, 2012, Merits, Inter-American Court of Human Rights, Report 125/12, C12.354, where the IACHR discusses that the construction of the Bayan Hydroelectric Complex and the Pan American Highway have flooded and consequently destroyed the territory inhabited ancestrally by the Kuna and Embera peoples of Bayano, which led to an increase of diseases in the indigenous communities, gravely impacted the communities traditional way of life, and had a harmful impact on traditional forms of subsistence. See also, case of Yakye Axa Indigenous Community v. Paraguay, Judgement of June 17, 2005, Merits, Reparations and Costs, Inter-American Court of Human Rights.

must not exclude the representatives of those indigenous people affected. The specific references to land, in conjunction with the special relationship indigenous peoples have with their land, and the threat their land is currently under from the neoliberal regime, has made the fulfillment of ILO 169 and FPIC a common call of indigenous collective action.

ILO 169 and UNDRIP offer the potential to alter collective action strategies by creating the incentive to activate the indigenous cleavage within an institutionalized setting. In areas where there is a legal harm and a claim to territory, communities that would historically identify as peasant communities now claim ILO 169 and UNDRIP rights and are identifying as indigenous in front of state actors. In areas where FPIC procedural rights are in place — even if not fully respected— indigenous communities have been given participation in state processes that could affect them. While the effectiveness of this participation seems questionable, participation may well be better than the prior condition of political exclusion. The presence of these procedural rights has activated the ethnic cleavage and has been accompanied by calls for environmental stewardship. The reconstruction of ethnic identity that has accompanied the formalization of pro-indigenous rights has prompted a reconstruction of ethnic identity that emphasizes the indigenous community's relationship to their territory, land, and water in connection the protection of their human rights, indigenous rights, and cultural rights, even in places where this cleavage has been historically latent.

Peru provides an illustration of this theory. Despite having one of the largest indigenous populations in Latin America, indigenous identification has been historically low in Peru, and indigenous movements of consequence have been largely absent from the record (Yashar 1998). Bolivia and Ecuador, its northern Andean neighbors, have both formed indigenous movements of



political consequence, but none of this political activism by indigenous communities in neighboring countries has diffused with much impetus. The collective action that existed in Perú on the part of indigenous communities has generally failed to translate into a politics where indigenous issues are part of the policy spectrum, which has reinforced the exclusion of indigenous issues in the political discussion. Indigenous identity, therefore, has remained latent rather than activated, despite the historical presence of grievances experienced by the numerous communities that could identify and mobilize under an indigenous identity.

Moreover, indigenous communities in Perú faced unique challenges that contributed to the suppression of indigenous identity. Agrarian reform failed to relieve social tensions and landless indigenous peasants were incentivized to migrate to urban areas where wages were higher and employment opportunities were greater than in the highlands. This rural-urban migration expanded the identity repertoire of indigenous peoples, heightening the fluidity of ethnic identity and providing indigenous peoples with identity options that avoided the negative connotations and inherent inferiority associated with the word *indígena* in their political and social context. Additionally, the rise of Shining Path in Peru, along with its internal war in the 1980's, lay a heavy toll on the communities of indigenous peasants and fractionalized indigenous communities even further. The confluence of these factors created a context of low indigenous identification and the high degree of fractionalization precluded a consequential mobilization by complicating the process of collective action. The persistence of these conditions has made Perú a country in which scholars least expect the political activation of the indigenous cleavage.

However, recent developments challenge this assumption. The rights contained in ILO 169 and the United Nations Declaration of the Rights of Indigenous Peoples, along with the

rights given in Perú's Constitution that have a pro-indigenous tone, have enabled a reconstruction of indigenous identity. This reconstruction of indigenous identity has given communities that are newly identifying as indigenous and communities that have always identified as indigenous political visibility at state, regional, and international levels where it had previously been denied to them by historical conditions of economic, political, and social marginalization. Without forming a national indigenous movement, the indigenous cleavage is becoming politically active. Regional and local indigenous movements are emerging to stand up against the state as communities make legal claims against state policies and corporate practices, specifically referencing ILO 169, and or UNDRIP. The pre-existing fractionalization in Peru does not preclude indigenous mobilization, rather the procedures encompassed in ILO 169 and UNDRIP promote this regional dynamic, enabling the politization of an indigenous cleavage where it otherwise might not be mobilized. Without the development of a stronger indigenous rights framework both at the national and international level, these localized movements would not be claiming indigenous status, but rather, are more likely to remain organized around other identity cleavages. Moreover, it is difficult to imagine any way that these communities might organize against the state and private corporations in a fashion that actually engages these parties in some sort of communication, given the existence of a protection gap and the immense political, social, and economic inequality that exists between these central neoliberal actors and the descendants of pre-hispanic nations, whether they identify as peasants or mine workers.

Understanding how and why this construction of ethnic identity around legal procedure came about, and understanding the benefits and the shortcomings of this construction is increasingly important, not only to the study of indigenous identity but to our understanding of

human rights, legal procedure, and the economic practice of resource extraction. Equally as important, the case of the construction of indigenous identity in Peru also illustrates some of the problems that arise from a politics of inclusion and exclusion evoked by the term indigenous.

To illustrate how the international legal framework of indigenous rights has prompted a reconstruction of indigenous identity that emphasizes the indigenous community's relationship to their territory, land, and water in connection the protection of their human rights, indigenous rights, and cultural rights, this paper will proceed in four broad sections. The first section will outline the analytical framework under which this argument functions by evaluating theories of ethnic identification. The second section will provide the relevant legal and analytical definitions and will identify the practical, legal, and theoretical problems associated with assuming these definitions. The third section will delve into the broader implications of the intersection of ethnicity, natural resource extraction, the state, and international legal bodies. The fourth section will closely examine the reconstruction of indigenous identity in Perú around indigenous rights.

### **Constructivism and Indigenous Mobilization**

An indigenous identity is a subset of ethnic identities. That is, an indigenous identity is a specific type of ethnic identity that refers specifically to those ethnic groups or communities that existed in a given territory prior to colonization. The construction of indigenous identity can be analyzed within a constructivist framework. An emphasis on the social construction of identity is especially important in Peru, where identification with an indigenous identity relates intimately to the political and social processes and structures indigenous peoples have confronted and still confront.

Constructivist theories of ethnic identity emphasize the historical construction of identity, community, and meaning. Underlying constructivism is the assumption that ethnic identities can change over time (Chandra 2012). Individuals often shift the identity categories that describe them, sometimes as a product of political and economic phenomena (Posner 2005; Monroe et. al 2000). When an ethnic identity becomes salient, that ethnic category becomes “activated”; it is also possible to find newly activated ethnic categories that appeared not to have existed before (Weiner n.d., cited in Geertz 1973). That is, it is possible to activate a latent identity. Constructivism thus posits that the relationship between ethnicity, politics, and economics is fluid. Ethnic identities are primary when identified with, purposive in the sense that they provide a basis for social organization, and evolving, as identity holders interact with the social environment around them (Posner 2005).

By this standard, indigenous identities are also historically constructed and can change over time. Although a community has not mobilized as an indigenous community before, this should not exclude the community — if it shares certain descent-based attributes — from being categorized as indigenous and mobilizing as such. This implication is especially important for those individuals who no longer use a pre-hispanic language and or live in areas where *mestizaje* has occurred for longer periods of time, but do share certain descent-based attributes. Indigenous *mestizos* or *cholos*, can still ascribe to an indigenous identity, even if they have not done so previously in their lifetime. However, the more important question is what explains the motivations of these communities to seek to activate the indigenous cleavage when they otherwise would not have done so?

According to constructivism, assertions of ethnicity are underscored by a group's desire to achieve dignity (Varshney 286, 2007; Horowitz 1985). Given that "dignity" is broadly defined, constructivism must be placed within a social, political, and economic context. The context in which this reconstruction of indigenous identity is occurring is primarily characterized by inequality. The one obvious inequality is that of political, social and economic power, that exists between indigenous peoples and the dominant social group — and, in consequence, the state. Historically, indigenous communities in Latin America have comprised the lowest rung on the social and economic ladder and were — until recently — often legally defined as second-class citizens. Most of Perú's Indians were not even enfranchised until 1985, when illiterate sectors of the population were given right to vote. Access to education, health care, clean water, and electricity, is difficult to come by in many indigenous communities — even for those that are not secluded. According to INEI's 2008 Home Census, 32.05% of Peru's Quechua population, 25.86% of the Aymara Population, and 46.96% of the indigenous non-quechua non-aymara population live in extreme poverty.<sup>2</sup> States have also failed to demarcate indigenous land, or have failed to enforce and implement grants to land that have been given in the past. That is, the state assumes it has the power to extinguish land titles and has usually done so with indigenous territories. This stands in contrast to the legal protection to private property given by the state to its non-indigenous citizens. Such inequality places indigenous communities in a heavily disadvantaged position from the very beginning: the state neither protects these communities and their rights nor does it play an active job in trying to improve their social, political, and economic

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<sup>2</sup> Censo INEI Vivienda, 2008, INEI.

standing. This leaves indigenous communities vulnerable to state, corporate actors, and national and international market forces that seek to encroach upon or expropriate indigenous territory.

The second aspect of inequality under which FPIC operates is that between the host state, which indigenous peoples are citizens of, and global economic actors, such as corporations, the World Bank and the IMF. Scholars of Latin American, Asian, and African development have stressed the existence of structural, political, and economic inequalities as a result of imperialism and the expansion of capitalist hegemony “in the context of a world system” (Carnoy 1984; Gunder Frank 1978, Cardoso and Faletto 1971). Resource extraction in Latin America, Africa, and Asia by developed states such as Canada, Australia, and the United States, amongst others, results in underdevelopment. Underdevelopment is characterized by a highly unequal wealth distribution both among extractor states and host states, and the citizens of the host states. Foreign debt held by Latin American states in the 1980s and the 1990s resulted in further incursions into Indian territories in rainforest regions, and adjustment programs encouraged the privatization of communal lands (Brysk 10, 2000). Economic need and the desire for economic growth leads states to invite third parties to provide the capital require to extract valuable resources, however, the historical record shows that interaction between the periphery and developed, capitalist countries does not necessarily lead to democratic outcomes, but rather to inequality, exploitation, dependency and hence underdevelopment.

Implicit in the second characteristic of the context in which FPIC operates is the pressure to extract massive amounts of resources. The current neoliberal paradigm requires a continuous supply of oil and mineral resources to maintain afloat. This pressure makes states and corporate actors very interested in indigenous lands, resulting in expropriation for the acquisition of

valuable natural resources. Some of those lands that have not been expropriated have been damaged by deforestation and erosion, mercury contamination from gold mining, and oil spills — few among many possibilities — as a consequence of natural resource extraction.

These conditions of inequality produce a real and immediate threat to indigenous territory, culture, and livelihood presented by continuing resource extraction within conditions of immense asymmetry. This provides a specific grievance that can now be addressed through legal procedure in both domestic and international courts. Grievance, the literature notes, is often a powerful catalyst for collective action (Cederman et. al 2008). Indigenous actors, have therefore pursued legal strategies of organization, where such a strategy had previously not been an option. Some indigenous communities are therefore taking it upon themselves to learn to engage in such a procedure, if they do not chose to hire a non-indigenous lawyer to represent their claims in front of a government court or international legal body. Even when they do, the decision to claim their international rights in a court of law speaks to the changing strategies and images indigenous communities are willing to adopt to challenge state practices and policies (Rodriguez-Garavito 2011). While the reconstruction of ethnic identity around an institutionalized legal framework has given marginalized ethnic communities a voice in the political process, it is insufficient to bring about desired outcomes efficiently.

Given the context of threat, inequality, and a newly granted participation, the construction of indigenous identity is well explained by realistic group conflict theory. Realistic group conflict theory posits that social identities are a by-product of intergroup stratification. Indigenous communities have been historically marginalized, socially, politically and economically, and therefore fulfill the precondition of stratification. In order to produce identification, a third party

has to categorize individuals. This function is now fulfilled by the international and domestic bodies of law that grant specific rights to those communities who fit the requirements to qualify as “indigenous”, but has been previously been fulfilled by different state apparatuses that have sought to suppress indigenous populations since colonial times. The difficulty of identifying as “indigenous” in Latin America, is that the category has historically connoted a low-prestige group. Individuals avoid identifying with low-prestige groups, because doing so lowers their self-esteem (Monroe et. al 2000). As a result, of such connotation and of the ethnic intermixing that is natural of Latin America, people who do share indigenous descent-based attributes, might seek to downplay these to not be or feel at a disadvantage. However, when people do come to terms with membership in and decide to identify with low-prestige groups, they may attempt to gain entry in the dominant group, or they may interpret their group’s traits as a badge of pride, or they may engage in collective action designed to raise their group’s status. Historically, the case has been the former, but in more recent history, since indigenous rights have been given by international bodies, the latter has become more common.

ILO 169 and UNDRIP have increased the likelihood of indigenous people interpreting their group’s traits — specifically their relationship with the land they inhabit — as a source of pride, and have motivated indigenous communities to engage in collective action that is aimed to raise their group’s status, but nevertheless often falls short of the goal. Yashar (1998) and Hechter and Okamoto (2001) both agree that preexisting networks are necessary conditions for the creation of organizational capacity required to sustain collective action. In the case of Latin America’s indigenous peoples, the immediate community and peasant unions provide the preexisting networks that allow for the transformation of identity in the face of a specific



grievance. Yashar argues that democratization has expanded political opportunities, thereby allowing the development of civil society. In this case, the development of an international legal framework has permitted the participation of indigenous communities within state institutions. Neoliberalism, specifically the practice of resource extraction, has become synonymous with the culpable state under international law, and therefore has enabled indigenous communities to target the state and corporate actors for retribution and guarantees.

### **Complicated Cultural Politics**

ILO 169 and UNDRIP seek to achieve agreement or consent when the rights of indigenous communities to health, territory, and livelihood overlap with state pressures to extract mineral resources. The concept of FPIC, contained in both UNDRIP and ILO 169, is specific to the relocation of indigenous peoples from their lands, the loss of cultural and intellectual property, and of lands, territories, and resources. FPIC must be prior in the sense that it must precede the adoption of any legal or administrative measures that might affect the lands, territories, resources, and status of indigenous communities. ILO 169 also states that these consultations must be had in good faith, must occur through appropriate state procedure, and must not exclude the representatives of those indigenous people affected. The specific references to land, in conjunction with the special relationship indigenous peoples have with their land, and the threat their land is currently experiencing from the normal processes of the neoliberal regime, have made the fulfillment of ILO 169 and FPIC a common call of indigenous collective action.

FPIC, as expressed in ILO 169, does not provide a specific timeframe for the consultations, nor are there any regulatory frameworks to oversee the compliance of FPIC goals.

It is the responsibility of each state to manage its FPIC processes as it sees fit, and it is the responsibility of judges to interpret ILO 169 with the strength and breadth they wish to give it. Consent, as suggested by FPIC, could mean that the indigenous group in question be able to veto a project or policy that after the period of discussion, information gathering, and consultation, it finds it cannot approve because it violates the rights of the community or changes its status considerably. Consent, therefore, requires consultation. However, most courts have been reticent to give indigenous communities the power to veto a project or policy. Consent in FPIC is limited, vague, and resembles involvement or participation more so than it does a process in which indigenous communities have decisive power to successfully protect their rights.

Indigenous communities therefore are required to participate in the process of FPIC, but this participation is truncated by the courts' unwillingness to grant the process with the tools necessary to empower these communities and the absence of regulatory frameworks within which FPIC is expected to function. FPIC consent requires consultation, and both FPIC consent and consultation ought to require full prior disclosure of all relevant information presented in a language that is fully understandable by those affected by the project or policy. Oftentimes, there are domestic law requirements for FPIC. The existence of these domestic requirements is a very weak and general positive for indigenous communities.

By ILO 169 and UNDRIP, FPIC applies only to those legal and tribal communities that have been recognized by the state and have no access to proper judicial remedies domestically. FPIC litigation has become an important aspect of indigenous communities' collective action repertoire, but the participation FPIC awards is only marginally effective. However, some participation is better than no participation. The political marginalization of indigenous

communities has improved if only by a small degree. The problem with FPIC is not only the context within which it functions, but the natural vagueness of the language it uses to protect indigenous communities. In order to put FPIC in effect, the court must be able to make the distinction between indigenous and non-indigenous and legitimate and illegitimate claims as well as it must be able to draw a conclusion about the indigenous community making a legitimate claim having access to sufficient and effective regulatory frameworks to address the threat domestically.

The definition of *indigenous*, whichever is assumed, comes with a set of limitations and complications. Van Cott (2005, 2) and Madrid (2012, 6) define indigenous peoples as noted by the United Nations Sub-commission on the Prevention of Discrimination and Protection of Minorities:

“Indigenous communities, peoples, and nations are those which, having historical continuity with pre-invasion and pre-colonial societies that developed on their territories, considered themselves distinct from other sectors of societies now prevailing in those territories or parts of them (United Nations 1986, para. 379).”

This definition identifies indigenous peoples as a subset of ethnic groups who descend from and identify with the original or first inhabitants of a specific region. The necessary attributes for indigenous status are descent and self-identification as part of a distinctive, non-dominant, subgroup within the national territory. However, the problem with this definition arises with defining “historical continuity”. Stavenhagen suggests that historical continuity can be established not only through self-identification but also through the use of a pre-hispanic language (2002). Both the issues of self-identification and the use of an indigenous language limit the breadth of the definition.

Self-identification as indigenous is not a straightforward issue, especially where historical political and social processes have complicated identification with an indigenous identity in Latin America. *Mestizaje* refers to the biological process of mixing between people of European and indigenous descent that began in the colonial era, and the cultural process of assimilation whereby indigenous people suppress their native customs and begin to identify as *mestizos*, that is, of mixed descent. *Mestizaje* has had two major consequences in Latin America. *Mestizos* have come to represent the demographic majority in Latin American countries as self-identification as *mestizo* has risen both due to the negative associations with the word *indígena* and the source of indigenous identity which is very often specific and localized in ways census data fail to capture (Sanborn 2015, 6). *Mestizaje* has therefore blurred the lines of ethnic identification, as individuals who self identify as *mestizos* can very well be indigenous peoples and might self-identify as indigenous if their regional indigenous category was included in the census instead of the generic term *indígena*. Additionally, there are those of indigenous descent and appearance who have adopted *mestizo* identities, who are colloquially classified as *cholos* in the Andean region. That is, the identity repertoires of peoples of indigenous descent and speakers of indigenous languages is broader and more complex than the legal definition acknowledges.

Use of an indigenous language, on the other hand, is empirically easy to measure. However, certain state policies, such as voting requirements or education policies, and social processes, like *mestizaje*, have reduced the prevalence of indigenous languages among indigenous communities. In other words, deriving indigenous status solely from the use of an indigenous language could leave out individuals and communities that do not speak the language but nevertheless share certain descent based attributes that might lead them to identify with the

indigenous identity that exists within their identity repertory under specific political circumstances.

The definition of *indigenous* could better take into account the cultural, linguistic, demographic, and other changes that communities have experienced as results of processes that have been encouraged or imposed by the dominant sectors of society. In other words, language might have been lost as a result of *mestizaje* or voting requirements that have incentivized indigenous people to learn the language of the dominant majority. When census data only looks at the use of an indigenous language, then communities that could identify as indigenous are labeled as *mestizo*, which limits the community's ability to make claims on the basis of indigenous status, if we assume self-identification does not require the use of an indigenous language. Alternatively, when individuals are asked for their ethnic identification, they might still identify as *mestizo*, because the options provided by the survey exclude the particular indigenous community or tribe these individuals identify with or because there are specific benefits to ascribing to a mostly *mestizo* identity on a day to day basis. Moreover, the social and cultural practices that are traditionally understood to be indigenous have evolved as a result of modernization encroaching upon these communities and government programs that specifically aim to suppress — if not eliminate — the indigenous cleavage. That being said, self-identification or descent-based attributes ought to be the only necessary conditions for qualifying as an indigenous person.

While the threat posed by natural resource extraction to these communities is presently obvious, and their use of ILO 169 ought to be straightforward, the vague terminology within ILO 169 and UNDRIP complicate the matter. Firstly, ILO 169 is not explicit about what it means

when it refers to consent and consultation, nor does it give a specific timeline. Additionally, ILO 169's definition of "indigenous peoples" is not fully equipped to take into account the historical evolution of culture, economy, and language experienced by indigenous communities as sectors of a non-dominant group. Considering that the definition of "indigenous" provided by ILO 169 can be limiting in certain instances, it follows that the communities that claim ILO 169 be relatively well versed in what the procedure necessitates, but they must also emphasize the characteristics that allow them to claim such rights and access to FPIC and legal procedure.

### **Peru: The Limits of Cultural Politics**

Peru has been identified by the literature as the country with, historically, the lowest levels of indigenous mobilization in Latin America (Yashar 1998; Becker 2008). Peru's trajectory from colonial times to modernity, however similar it may be to Latin America's political and economic hubs of colonial times, is subtly different in ways that have limited the development of a national indigenous movement as the ones that exist in Mexico, Ecuador, and Bolivia. The indigenous cleavage in Peru has been strongly suppressed by the government, which has somewhat succeeded at organizing its indigenous peoples along class and occupational cleavages. Despite low levels of indigenous identification, indigenous identity in Peru is highly localized. While the localized nature of indigenous identification in Peru impedes the formation of a national indigenous movement, it does not do the same for the sort of community action required to mobilize around ILO 169 and UNDRIP and to make claims in a court of law. The political opportunity structure that was not awarded by modernization — which Yashar credits as the catalyst for national indigenous movements elsewhere in Latin America — is given by the

articulation of an international body of indigenous rights and the incorporation of these rights in state constitutions.

Indigenous communities in Perú, as in other Andean countries, are not a unitary set of actors. They are divided amongst highland Indians and lowland Indians, each with different historical experiences. This cleavage has been described as cross-cutting (Brysk 2000), however, these two groups of indigenous communities live in markedly different conditions as a result of their interaction or lack thereof with a white hispanic culture. Highland indigenous communities can now be described as mountain peasants, and have been the longest involved with Hispanic states and markets. Lowland Indians, inhabit jungle areas, sometimes still function as hunter gatherer communities, and have been least in contact with the Western world. Like the majority of Latin American indigenous populations, Peru's Andean indigenous communities are impoverished, rural highland peasants, with some knowledge of both Spanish and a pre-hispanic language, and syncretistic religious, cultural, and economic practices (Brysk 2000, 6). Some of these highland communities have migrated to urban centers and work in various low-skill jobs in order to send back money and goods to their families. The cultural and biological intermixing of cultures over time illustrates the variation between highland communities, which might not still make use of a pre-hispanic language or traditional modes of dress and religion as often as the definition might demand them to, and lowland communities, who exist in a more insular capacity and more easily fit the preconceived notions of indigeneity.

Scholars suggest that political policies and institutions can affect the strength and existence of ethnic group boundaries (Nagel 1994; Horowitz 1985; Lijphart 2004; Reilly 2002). In the case of Perú, this assertion proves true. The lack of a modern state to replace the collapse

of corporatism, Sendero Luminoso's war, the exclusivity of voting requirements, the absence of specific indigenous categories in Perú's census, and the late introduction of universal suffrage all succeeded at organizing indigenous communities around class lines rather than ethnic lines. The cleavages activated by the Peruvian government have succeeded at suppressing a national indigenous identity. Therefore when indigenous identity does emerge, it does so at very localized levels, which is exactly what ILO 169 and UNDRIP both empower and constrain, as localized identification specifically demarcates the community that is suffering a harm and giving rise to a claim.

Yashar identifies the rise of a modern, liberalized state in the 1980s as critical to the rise of indigenous movements. Under the corporatist state, the state succeeded in suppressing indigenous identity and organizing indigenous communities along class lines. The policy back then was one of integration of indigenous communities with the state and the rest of its citizens. In Peru, no modern state has emerged to replace the collapse of corporatism (Paredes 2008). This has continued to strengthen class cleavages rather than ethnic cleavages. With the end of the haciendas in 1978 and the agrarian reform project that the military government decided to undertake in the late 1970s, indigenous communities remained organized through peasant cooperatives, which had the effect of dividing indigenous peasants' interests and motives. Peasant leaders were coopted by the democratic government that followed the military government, which centralized *peasant* demands. This effectively instilled a lack of trust among indigenous peasants, their communities, and their organization. Furthermore, Sendero's War in 1980 -1985 had devastating consequences for the ability of indigenous peasants to organize collectively. Most of Sendero's victims were outspoken indigenous leaders. This created distrust



outside the boundaries of the local community and it closed off spaces of political association and discourse, as the government restricted rights (Mealy et. al 2012).

Indigenous identity has been further suppressed by state census policies and the late development of universal suffrage in Perú. Prior to 1979, literacy requirements prohibited most indigenous peoples from taking part in electoral processes. These literacy requirements placed an emphasis on acculturation, driving down identification with indigenous culture, as indigenous peoples became further associated with second class citizenship. As part of the state's emphasis on integration and acculturation, indigenous categories have been largely absent from Perú's census data in the 1970's and the 1990's (Paredes 2008). It is only very recently that Perú has reincorporated questions that deal explicitly with ethnic identification. Once it was determined that the application of ILO 169 necessitated a way to differentiate indigenous communities from non-indigenous communities, the government became interested in collecting this data. The 2007 census identified indigenous populations in Peru, but was widely criticized for being unrepresentative. The 2017 national census will include self-identification questions that should allow a better understanding of the ethnic context in Peru. The active suppression of indigenous identity by past state policies, however, constrained identification along indigenous lines and strengthened class based identifications.

Peru ratified ILO 169 in 1994 and incorporated the same law to the Peruvian Constitution in August 2011. The promulgation of ILO 169 provided some of the regulations necessary to define ILO 169 procedure more concretely: that consultations be held directly with the members of the indigenous peoples affected by economic activities developed in their territories. Third parties could become informed about the indigenous communities their project would affect by

consulting the national government which has an official database counting 52 native cultures, of which 28 are in the amazon and 4 are in the highlands. This government database seeks to answer the question of who is legally indigenous. However, the information contained in this database was gathered in the 2007 census, which sought to include ethnic and cultural information in all of Perú's regions. Indigenous and international organizations alike have denounced the census for not traveling sufficiently far and wide enough to capture all of Peru's indigenous communities appropriately in the census. Moreover, the objective criteria used to determine indigenous status included speaking an indigenous or native language and living on communal lands recognized by state agencies — a factor which is meant to reflect historical continuity. Both of these criteria have been shown above to be unnecessarily limiting. The third objective criteria used to determine indigenous status is self-identification. Self-identification is the only criteria that finds support in the Peruvian Constitution, which states that indigenous peoples and communities are those who self-identify as indigenous and are pre-existent to the Peruvian state (Peruvian Constitution Art. 2, § 19).

Indigenous self-identification is a particularly complex issue in Perú. Public opinion surveys suggest that Perú has a population that self-identifies as indigenous that is as high as 24.6% (World Values Survey 2006), but they also suggest that self-identification is as low as 7% (LAPOP 2008). The variation is in part due to the way the questions and the surveys are formulated and in part due to the availability of answers that allow survey respondents to identify with the specific indigenous group that they identify with (Sulmont 2012). Indigenous identification in surveys seems to increase when questions about place of origin native language, parents' native tongue, and customs practiced at home are included and when survey respondents

are allowed to identify as Aymara, Quechua, Uraina, and so on. Moreover, existing surveys are not able to capture the situational context in which self-identification occurs. The issues of self-identification, the use of limiting criteria, and the way the government survey was constructed deny official recognition to many highland communities that exist in a capacity to claim indigenous status. Indigenous status is therefore not measured with an acknowledgement of the 500 year long process of transformation most indigenous communities have undergone. Most of these communities have ceased to exist in the more isolationist capacity preferred by the Peruvian state and instead exist in conditions that reflect historical, political, and technological entanglement with a dominant Hispanic culture. That is, the government is currently unwilling to recognize that these communities have been transformed by Spanish colonial presence, the birth and evolution of the Peruvian State, capitalism, and neoliberalism alike.

Those indigenous communities recognized by the government, and even those that are not, are mobilizing around an indigenous identity where they otherwise might not have, specifically referencing violations to ILO 169 the FPIC process. Indigenous organizations that acknowledge the historical changes experienced by both lowland and highland indigenous communities have surfaced in Peru and have taken an active role in articulating an organization strategy that will facilitate a national indigenous movement towards self-determination — a phenomenon that has never been given attention to in Peru. The *Pacto Unidad de Organizaciones Indigenas y Campesinas*, United Pact of Indigenous and Peasant Organizations, (hereinafter PUOIC) was founded in 2014. PUOIC holds that the generic definition of indigenous or original peoples, must be understood to be composed by a diversity of communities that organize and express themselves as peasant communities, agrarian federations, or otherwise, and self-identify

as indigenous. PUOIC has proposed to the Peruvian government a series of minimum principles for the application of FPIC and have also called upon the Inter-American Court to Distinguish between consultation and consent. PUOIC's minimum principles stress an indigenous vision of development where the government takes a more active role in improving the basic life conditions of indigenous communities, upholding indigenous right to property and to judicial protection, and prioritizing environmental protection over economic development. Since its foundation, PUOIC has amassed support from 80 indigenous delegates from different communities and has actively supported communities in FPIC negotiations and resource extraction related protests. The popularity of these organizations stress the fluid character of self-identification and challenges categorical ethnic boundaries by illustrating how individuals can ascribe to more than one ethnic category. These ethnic categories coincide with the rural-urban cleavage. That is, a campesino may be both indigenous and mestizo and can invest in his or her indigenous cultural heritage despite having lost the use of an indigenous language.

Despite ratifying ILO 169 in 1994, the Peruvian government enacted a series of presidential decrees in 2009 that were aimed at promoting and regulative extractive industry activities in the Amazon (Goulden 2008). Foreign and domestic companies obtained permits for petroleum, biofuel, and hydroelectric projects on indigenous people's lands and 58 out of 64 oil concessions overlaid with lands titled or used by officially recognized indigenous peoples (Informe Alternativo 2015). Officially recognized indigenous communities could more readily claim violations of FPIC in a court of law, whereas communities in the highlands had a more difficult time engaging with the legal process once concessions to extract resources were given to corporations. Indigenous communities only began engaging with the state more successfully

after ILO 169 had been incorporated to the Peruvian constitution. Between the date of ILO 169's incorporation and September 2015, 27 FPIC processes were officially initiated, all of which were taken to the conclusions required by the law. Only two of these processes, however, have resulted in the implementation of the consensual agreement (Informe Alternativo 2015). The FPIC processes initiated by highland communities are often encountered by the argument that "the government data base of indigenous peoples does not include this population, therefore they may not exercise the right of prior consultation" (Informe Alternativo 2015).

The Conga Mine case is particularly illustrative of the reconstruction of indigenous identity that has occurred since the adoption of ILO 169. The Conga Mine is located in the department of Cajamarca in the Peruvian highlands. Cajamarca was one of the places of earliest Spanish settlement in Peru and was the location where Atahualpa, the last emperor of the Inca empire, was killed by the Spanish conquistadores. This lengthy interaction with a hispanic dominant culture, from Spanish colonization to the present Peruvian state, has expanded the identity repertoire of communities in Cajamarca and in communities with similar historical processes. Only one community of 988 inhabitants is designated as indigenous in the Peruvian government's database — suggesting that only 0.07% of Cajamarca's population is indigenous and that this population exists in a remote geographic location on Ecuador's border (INEI 2007). However, more than 100 communities in Cajamarca are registered with the government as campesino communities, which implies that they are of indigenous descent and have the capacity to identify as indigenous in certain contexts<sup>3</sup>.

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<sup>3</sup> See Peru's National Database of Indigenous People: <http://bdpi.cultura.gob.pe/lista-de-pueblos-indigenas>

Mineral Yanacocha, owned by Newmont Mining Corporation, Compañía de Minas Buenaventura, and Corporacion Financiera Internacional, began construction of the Conga Mine project in 2010 after President Humala declared that consultation was not necessary in the Peruvian highlands, because the communities were not indigenous communities but peasant communities. Mineral Yanacocha's presence in Cajamarca, however, is long lived. For over 20 years Mineral Yanacocha has extracted gold along the northern Andean mountain range with little regard to environmental concerns. The Conga mine, a five billion dollar investment that is to produce a gold and copper extraction site, is located at the convergence of 5 major river basins and threatens to alter Cajamarca's surface water drainage system. What is more, is that prior to the Conga Mine, Cajamarca's communities had not risen up to protest or press charges against Mineral Yanacocha's operations, despite the enormous environmental damage these had already created.

In 2011 the communities of Cajamarca protested the construction of the Conga mine for the lack of consultation in its environmental impact process. The protest movement began in collaboration with GRUFIDES, a Peruvian NGO with indigenous undertones that promotes compliance with human and environmental rights. GRUFIDES activists helped organize CONCAMI and ORPIAN-P members in Cajamarca to pursue legal action in front of the Interamerican Court of Human Rights and national courts of law. ORPIAN was founded in late 2010 during the initial unrest that led to organized protests and represents the interests of the indigenous peoples of Perú's northern Amazon and the Cajamarca department. While the government only recognizes three indigenous towns, ORPIAN recognizes over 300 indigenous towns in its jurisdiction. The protests escalated and on July 4, 2012, President Humala declared a

state of emergency in the districts of Celedín, Hualgayoc, and Cajamarca. The military was brought in to control protestors, which resulted in the incarceration of many of the movement's leaders. On September 3, 2012 the state of emergency was lifted— a month before Minería Yanacocha announced it would temporarily suspend the project.

The difficulties establishing the necessity of consultation in the Conga Mine Project illustrate the limits of ILO 169. The communities that mobilized were not those identified as indigenous in the government's database. The government only identified the Aguaruna community as worthy of indigenous designation and hence FPIC processes, while both the popular movement and the legal proceedings against Conga Mine were largely enacted by Caxamarcas, Huambos, Bracamoros, Acuntas, Coremarcas, Llaucas, Cutervos, Chachapoyas, Nehipes, Tomependas, Mandingas, and Cañares (Conclusiones y Acuerdos 2014). The large number of peasant communities claiming indigenous status in Cajamarca suggests that these individuals did not identify as indigenous in Peru's 2007 national census — if their presence was captured by the census at all. What is more, these communities did not claim indigenous status, despite the long presence of Mineral Yanacocha, until special rights were awarded to communities designated as indigenous. The role of NGO's like GRUFIDES in giving these communities education and access to legal resources is important to the reconstruction of indigenous identity that is occurring in places like Cajamarca.

What is notable, is that this reconstruction process of indigenous identity in Cajamarca did not wane once the limits of the mine's construction and operation were defined by violent local opposition. Rather, representatives of Cajamarca's indigenous peasant communities organized the First Regional Assembly of Indigenous Communities on December 27, 2014.

During this assembly the communities published a document of conclusions and agreements which reaffirms the indigenous identity of these peasant communities. The document was signed by 200 representatives of indigenous and indigenous peasant communities and speaks of an indigenous cosmovision, stressing the unique relationship and dependence indigenous communities have with their lands. Additionally, the document emphasizes the need for government and compliance with ILO 169 (Conclusiones y Acuerdos 2014, 9). The communities also commit themselves to strengthening the communities by investing in legal resources and education (Conclusiones y Acuerdos 2014, 10).

The widespread appeal of this document in Cajamarca, a department where peasant communities have traditionally identified as mestizo speaks to this reconstruction of indigenous identity that has accompanied the enactment of pro-indigenous bodies of law. Moreover, the exclusion of peasant communities from FPIC consideration illustrates the under-inclusiveness of the legal definition of indigenous utilized in ILO 169. The contextual nature of self-identification and the diverse variety of living conditions indigenous communities exist in, problematize the ability to establish a bright line rule for the determination of indigenous status. This problem of determination affects such communities' abilities to bring forth claims that produce even a minimum dialogue between the parties. While the Conga Mine ceased operation and any further construction has stopped indefinitely, these results were not achieved through legal procedure. The federal government stood by its position to deny FPIC to Cajamarca's communities. Thus, it was the steady flow of local, grass-roots opposition, organized around demands for FPIC and a protection of an indigenous cosmovision that was able to protect further encroachment on the lands of these communities and individuals.



## **Conclusions**

ILO 169's FPIC is demonstrably not specific enough in its definition of procedural requirements nor is it inclusive enough in its definition of indigeneity to capture the contextual nature of self-identification and the diversity of living conditions enjoyed by indigenous communities, even within subnational units, such as Peru's department of Cajamarca. Nevertheless, FPIC and pro-indigenous legislation have empowered a reconstruction of indigenous identity at a very local level. The requirements for FPIC do stipulate that a specific, organized community bring the grievance forward in a court of law. Through this requirement, communities that have received legal information by NGO's or through other means can organize to defend their rights to land, clean water, and health. Such pro-indigenous legislation has activated the indigenous cleavage in Peru where it had been previously suppressed. Peru's highly fractionalized and localized networks of indigenous peasant communities have prevented the formation of a strong national indigenous movement, however this condition does not preclude the activation of an indigenous cleavage and community organization on the basis of indigenous claims.

These legal developments surrounding indigenous communities are illustrative of the complexity of finding a legal definition of indigeneity that is neither over-inclusive nor under-inclusive. If indigenous status were to be awarded only to those who self-identify as indigenous on the census, which given the highly negative connotations with the word indigenous in Peru and the multiple identities an individual can identify with, then many communities who should be given indigenous status based on their use of a pre-hispanic language would not be given

government recognition as indigenous. However, if government recognition as indigenous were only given to those individuals who speak a pre-hispanic language, then communities of indigenous descent, who are part of the non-dominant sectors of society and have existed under conditions of *mestizaje* for longer periods of time than most other communities and have largely lost the practice of language, would also not be given indigenous status, even when they might self-identify as indigenous at any given point in time. There is a need for a more flexible definition of what it means to qualify as indigenous that takes into account the historical processes that indigenous communities and their descendants undergo, and the varied and malleable identity repertoire and individual can hold. Perhaps, the best solution, is a definition that lacks clearly specified requirements and leaves more room for judicial interpretation.

The lack of self-identification surveys and the biased nature of Peru's national census information make formal statistical analysis of these communities difficult. However, developments in Cajamarca suggest that even in areas with historically low levels of indigenous identification, such a cleavage can become re-activated when a grievance is present and a tool is made available by which to remedy this grievance. That is, when under threats, such as resource extraction, communities that have the capacity to identify as indigenous have an incentive to do so when the law awards certain protections to those communities designated as indigenous. ILO 169 has given local indigenous communities visibility at state, regional, and international levels, where it had previously been denied to them. The activation of the indigenous cleavage can be seen as a response to the exclusive and deceptively pro-indigenous language of FPIC, which grants an opportunity to participate in the dominant culture's political processes even if in a limited way that does not allow these communities to secure their property rights or their cultural

rights. The activation of the indigenous cleavage in Perú not only shows that bodies of law can activate an indigenous cleavage, but also that the international environment, even if it be a highly unequal neoliberal one, can affect the course of ethnic mobilization.

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