

Territoriality and borders in the Aymaras of Tarapacá in Chile. A space on the edge of current law

Territorialidad y fronteras en los aymaras de Tarapacá en Chile. Un espacio al borde del derecho vigente

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Abstract

The historical formation of the border inhabited by the Aymara communities of the Tarapacá region in northern Chile has been configured with culturally diverse territorialities. Since Spanish colonization and later by the nascent republics, borders have marked the dynamics of the population. However, its inhabitants maintain practices based on ancestral mobility related to other historical spatial divisions as part of their territoriality, an aspect expressly protected in current law. The objective of this work is to relate the configuration of the border area from the Aymara cosmopraxis, assuming this reality from the concept of territoriality that regulates cross-border indigenous communities in the international legal structure. From genealogy as an analysis strategy, complemented through legal dogmatics, it is proposed that the State acts by homogenizing the cross-border space, which places it in an area of legal non-compliance. Cases are considered from the beginning of the 21st century to 2023.

Keywords: Aymara territoriality, cross-border relations, indigenous law, international agreements.

Resumen

La formación histórica de la frontera habitada por las comunidades aymaras de la región de Tarapacá en el norte Chile se ha configurado de territorialidades diversas culturalmente. Desde la colonización española y posteriormente por las nacientes repúblicas, las fronteras han marcado las dinámicas de la población. No obstante, sus habitantes mantienen prácticas basadas en una movilidad ancestral relacionada a otras divisiones espaciales históricas como parte de su territorialidad, aspecto protegido expresamente en el derecho actual. El objetivo de este trabajo

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es relacionar la configuración de la zona de frontera desde la cosmopraxis aymara, asumiendo esta realidad desde el concepto de territorialidad que regula las comunidades indígenas transfronterizas en la estructura jurídica internacional. Desde la genealogía como estrategia de análisis, complementada con la dogmática jurídica, se propone que el Estado actúa homogeneizando el espacio transfronterizo, lo que lo sitúa en una zona de incumplimientos jurídicos. Se contemplan casos desde inicios del siglo XXI a 2023. Palabras clave: territorialidad aymara, relaciones transfronterizas, derecho indígena, convenios internacionales.

Introduction: the principle of Aymara territoriality and the configuration of a border zone in the nation-state

The particular relationship of indigenous populations with their territory has historically been the object of a distinct legal treatment, especially in the recognition of the continuous process of the sociocultural appropriation of their inhabited geography (Tort Donada, 2000). This territoriality, manifested as symbolic and material representations, unfolds in space through the installation of power relations with a transversal evocation of memory (Abercrombie, 2006).

However, the structures imposed, from the conquest to the emergence of the modern state, have impacted indigenous logics in global terms. From the reductional policy implemented by Viceroy Toledo, through the installation of urban centers of European inspiration, to the emergence of new States and their borders in the nineteenth century, these practices were associated with an economic complementarity that made life possible, which enabled the beginning of a continuous process of adjustments and concessions (Glave, 2017).

In this scenario, to which a debate was added at the beginning of the 1990s on the increasing demand for autonomy and self-determination (Bengoa, 2000), a legal remedial process associated with the historical demands of indigenous peoples is still being developed, ranging from the intentions contained in declarations to the binding instruments for the States (Cavallo, 2017). The foregoing has been materialized in the progressive elaboration of a particular legal *corpus* that complemented by interpretations of modern international jurisdictional bodies, has consolidated various binding tools for the States.

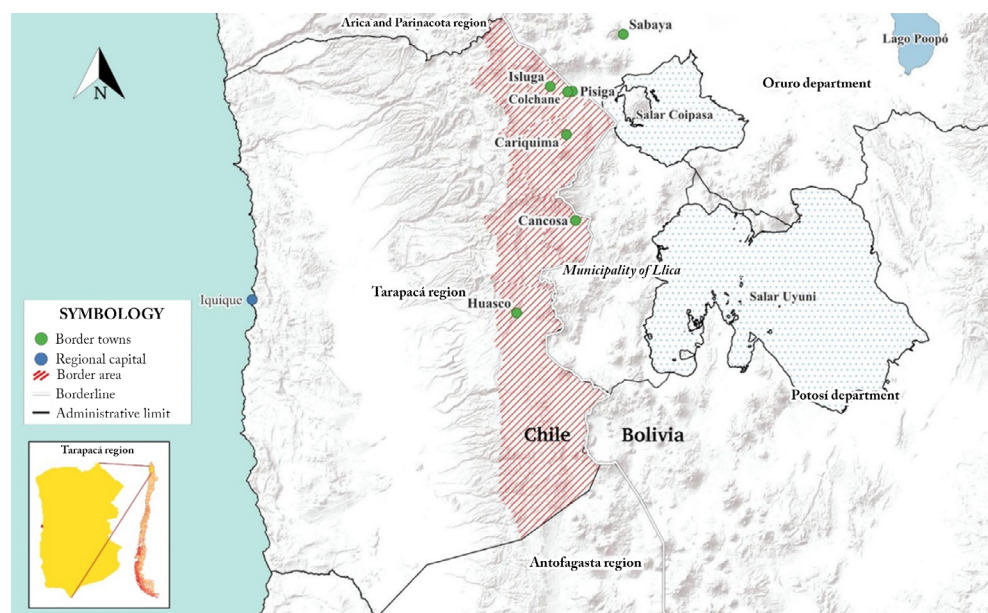
In this context, the protection of indigenous territory has been recognized and reinforced as a vital element on whose protection the exercise of its other guaranteed rights depends. In this sense, the Inter-American Court of Human Rights has developed a concept for weighing indigenous territoriality that indicates the following:

(...) it is understood that the natural resources found in the territories of the indigenous and tribal peoples that are protected in the terms of article 21 are those natural resources that they have traditionally used and that are necessary for their own survival, development and the continuity of the lifestyle of said town. (Corte Interamericana de Derechos Humanos, 2007, para. 122)

From this perspective, the protection of indigenous territory imposes duties on the States that oppose the notion that a border line can be based on ties that go beyond modernity.

Simultaneously, the consecration of the right to cultural identity has recognized these human groups as distinct ethno-cultural collectivities whose identities are closely linked to their ancestral territories (Comisión Interamericana de Derechos Humanos [CIDH], 2021). As discussed below, such works have often coincided with border strips inhabited by indigenous communities that exhibit a prestate mobility through these spaces, although their territories have been fragmented by the limits of the respective national states to which they belong (Del Popolo, 2017, p. 256 et seq.). In this case, the Aymara people are historically present in northern Chile, southern Peru and central western Bolivia (Figure 1).

Figure 1. Location of the Aymara population on the borders of Tarapacá and Oruro



Source: own elaboration

The guarantee of self-determination for indigenous peoples has delegitimized any form of colonialism and established, as a standard, their right to live amid their own political institutions, a reparative measure with a historical perspective (Anaya, 2005). This recognition of guarantees linked to the indigenous territory has diachronically achieved greater specificity, which translates into a catalog of duties that regulate the relationship among the variables State, territory and indigenous community.

The first provisions were aimed at guaranteeing indigenous territoriality through a collective right to property and access to the resources that allow life. From the conjugation of all these variables, a notion of indigenous territoriality was built, which orients the legal structure to a pluralist interpretation (Espinoza Collao, 2021). Along these lines, a property right is established, the attributes of which extend both to the

ancestrally occupied lands and to the natural resources that allow life. In this sense, the Inter-American Court of Human Rights has ratified that this right extends to "... those natural resources that they have traditionally used and that are necessary for their own survival, development and the continuity of the lifestyle of said people." (Corte Interamericana de Derechos Humanos, 2007, para. 122).

These instruments have delved into increasingly specific aspects, ultimately reaching the reality of indigenous peoples living in border areas, a factor linked to the preexistence of an ancestral mobility necessary for the effective exercise of their territoriality. Although this reality is usually associated with the independence movements that installed the current American states at the beginning of the 19th century, it should be remembered that these borders were adjusted to fit the logic of the western legal principle *uti possidetis*, whereby for the limits previously installed in the colonial distribution, it is even possible to postulate that these had their origin in much older indigenous spatial divisions.¹ This antecedent is relevant, above all, to identifying practices and otherness where there are historical continuities.

The consecration of these rights is manifested as a recognition that there are different ways of experiencing the border and reports subaltern realities that go beyond the relationships with States, experiences that are often unknown and whose sociability are ignored due to the strategic value that any State assigns to a border strip (Serje de la Ossa, 2017). This approach considers the historical relationships of those who inhabit these geographies and the construction of their ancestral territorialities as the basis of their cultural identity. The inhabited area is perceived diachronically as an area of appropriation where the way of living in the landscape is manifested in its territorial dynamics (Aliste Almuna, 2010).

Territoriality and border

The social production of the border, based on approaches in the social sciences (Núñez et al., 2017), is expressed in lived space, reflected in elements that are not necessarily physical and that derive from the relationship between a territory and the human group that inhabits it in which its own subjectivity stands out. The absence of correspondence between these variables in a space of asymmetric power relations will necessarily lead to conflicts over rights for the subordinate. It is about subjectivity, as a determining element in spatial differentiation, which is associated with ways of conceiving the environment and acting in it (Zusman, 2013) that give meaning to past actions, thoughts and materialities, permeated by visions of the present (Zusman, 2013, p. 53). It is suggested that this statement is key for understanding the course of

¹ The Monarchy ordered, early on, the study of indigenous customs to report these antecedents of decision-making. Thus, for example, the Royal Decree of December 20, 1553, ordered the Audiencia to obtain information from the old Indians in each province on the authority of the native chiefs and the succession of chiefdoms. In the same way, the Compilation of the Indies of 1680 indicated the following:

we ordain and command that the laws and good customs, which the Indians formerly had for their good government and police, and their uses and customs observed and kept after they are Christians and which do not meet with our Sacred Religion, nor with the laws of this book and those which they have made and ordained anew, be observed and executed. (Compilation of Laws of the Kingdoms of the Indies, Book Two, Title One, Law IV)

Latin America, as from these predominant senses, a hegemonic historical territoriality is defined and imposed (Hevilla & Molina, 2010; Porto Gonçalves, 2001) to the detriment of the subordinate ones, such as the case of native populations. Hegemonic territoriality is understood as the prevailing strategies that influence or control people and phenomena through the provision of resources and the delimitation of this border space (Benedetti, 2014).

Although this process constitutes an important delimiting element, it is still unstable, as the territoriality to which it aspires is never complete. It is always opposed by other wills of territorialization (Cornago, 2015; Porto Gonçalves, 2001). However, within the power relations present on the border strips, the policies of territorial containment, which have affected said indigenous subjectivities, have historically been a constant on this side of the world (Haesbaert, 2013). These expressions of bordering, which control accessibility limits through their devices, although they are a dynamic reality, are configuring certain roughnesses through different elements (Benedetti, 2014).

In general, the South American border areas were disputed by the nascent republics and different indigenous nations in multiple cases (Benedetti, 2014). With the aim of revalidating hegemonies within the framework of geopolitical claims (access to land and sea routes, territorial extensions, strategic resources, etcetera), the goal was to install a state presence in certain border territories, often with the arrival of settlers sponsored by a civilizing and modernizing discourse, toward the confines of the State, via strategies of the colonization of the borders (Lanteri & Martirén, 2020).

In response to this debate, at the end of the 20th century, the international legal debate emerged, among other elements of contestation or discussion (Del Popolo, 2017). In the international legal structure, these borders have been observed as obstacles to the integral development of indigenous communities, insofar as they affect the territorial dynamics of ancestral mobility, kinship ties and economic ties that sustain their territoriality (CIDH, 2021), making it difficult to guarantee various rights, which are weighed against other legal values, such as security, resource extraction and national sovereignty; these are typically prioritized over the interests of minority groups.

Specifically, the absence of appropriate measures by the States has been observed in the particular situation of the Aymara indigenous communities, despite the existence of binding international commitments that promote these duties.

In the case of Chile, according to current regulations, there are four cross-border indigenous peoples: the Aymara, Atacameños, Diaguitas and Mapuches. For the Aymara communities that inhabit the high Andean space of the Tarapacá region, these state borders have always altered their exercise of immemorial rites and customs related to their use of the territory and their access to resources that make up their ethnic identity (Álvarez et al., 2020). These violations had been intensified as of 2013, the result of diplomatic litigation involving Bolivia and Chile, the most relevant of which extended through 2013 to 2018 and beyond due to a maritime controversy (Ovando Santana & Ramos Rodríguez, 2020) and, later, via the effects of the COVID-19 pandemic, restrictive measures on border transit, coupled with a migratory crisis whose area of greatest tension still lies precisely in the areas of development of the Aymara territoriality bordering the current commune of Colchane in the Tarapacá region (De Marchi Moyano & Alvites Baiadera, 2022).

In this sense, it is proposed that despite the reported antecedents and the legal commitments adopted, the Chilean State has been violating current law through its practices and public policies, thus compromising its international responsibility. It expresses this by not implementing particular and distinct measures that guarantee the transit and continuity of cultural, economic and kinship ties through the borders, in short, by not securing the survival of the cultural identity of the Aymara indigenous communities that inhabit the northern borders of the national territory.

In this context, the objective of this work is to diachronically analyze the scope of the configuration of a border area inhabited by the Aymara people of the Tarapacá region in northern Chile. It is based on the premise that through this coexistence of different subjectivities, territorialities have been formed in continuity, complementarity and dispute. It is thus the colonization by the Spanish Crown and later by the nascent republics of the borders populated by the Aymara where we must highlight the territorial disputes resulting from the complex settlement of the latter. This discussion concerns the configuration of Aymara territoriality in this border space, an area of particularities made invisible by the State, even though the current law has taken charge of its regulation because the latter, if not assumed, implies a flagrant violation of internationally guaranteed indigenous rights. In addition, this work discusses how cross-border cooperation, which involves indigenous communities, is enacted by different South American states and rendered a counterpoint concerning the experiences on the continent. Next, the Bolivian-Chilean situation in this border area is analyzed, highlighting the limitations that the Chilean State imposes on a millenary activity that is nevertheless updated through the tensions and opportunities that the border offers for its recognition.

To theorize regarding the border, the genealogical perspective is adopted (Cornago, 2015, p. 225 et seq.). This study therefore deploys a study procedure based on the investigation of disparate archives and records of the past, which can unravel what has happened and is happening on the northern Aymara border. Therefore, this study concerns

(...) showing the ways in which, through the changing relations of power throughout history, but always in a contentious way, some ways of knowing, saying, or doing, together with the forms of subjectivity that they are their own (...) they have prevailed over others. (Cornago, 2015, p. 225)

Genealogy, as a strategy for analyzing the disposition of these populations on the border and the state responses in different periods, seeks to understand how throughout history these other forms, discourses and practices that also claim this task on the margins have been omitted. Thus, genealogy “places the emphasis on the singularity of events, as well as on silenced discourses” (Aguirre, 2001, p. 206). Therefore, to confront the subjectivities present on the border, different sources are investigated to interpret this trajectory, which allows relating specific cultural practices to the exercise of power (Aguirre, 2001, p. 206).

This proposal is complemented by a methodology that uses legal dogmatics due to their link with the existence of current norms in national and international law. From this normative set flows the binding character that gives meaning to the research, since these norms must be articulated from a critical perspective with the values and principles

that are identifiable from the described subjectivities. This normative structure reveals, at the same time, the need to resort to jurisprudential analysis to address the interpretations made by international courts, especially the Inter-American Court of Human Rights, whose standards are relevant, given the control of conventionality that has been progressively carried out by the supreme courts on the continent.

Considering that the knowledge of modern practices does not rest exclusively on archives but also on semantics and oral stories deposited in the memory of the focal population, the collection and analysis of different sources of written and oral information is conducted. In addition, the ethnographic method is used to make visible the transitions and continuities of the practices linked to Aymara territoriality, to collect some antecedents from oral sources with a view toward defining the historical and modern contexts regarding territoriality. Finally, secondary sources are used from the legal, anthropological and historical literature to complement the contextualization of the sociopolitical and historical scenario on which the construction of the studied territories is based.

Borders and peripheries as drivers of conflict among the Aymara people of northern Chile

As noted above, the Aymara indigenous people are historically distributed within the territories of Peru, Bolivia and northern Chile; in modern times, their presence has also extended significantly to other realities. As Albó (2000) indicates, in the rural Aymara communities of these countries, there is a common worldview and symbolic culture identified with the Andean culture whose existence has followed paths with local variants due to the interference of political reality in each space.

This territorial distribution and its boundaries can be recognized early in colonial antecedents, which later lasted through the American independence movements under the legal logic of Western occupation. The objective of these distributions and spatial linkages in the south-central Andean region derived from a search for measures to improve the territorial control of resources and effectiveness in the evangelization of the native population (Durnston, 1999).

The high Andean area of Tarapacá was established, early, as a border area between the townships of Arica and Carangas in the 16th century. In this context, Hidalgo Lehedé (2004) points out that the Isluga River was designated the boundary between these two townships, a line that currently continues to establish the boundary between Chile and Bolivia. This distribution historically defined the Aymara territoriality of Tarapacá and was the model followed when the new independent state of Peru was created in 1821 and of Bolivia in 1825.

However, it is possible to argue that these boundaries are based on spaces previously installed under indigenous logic. In this sense, it has been indicated that the partition and fixation of these borders was not arbitrary but must have had, as prior references, the indigenous partialities associated with chiefdoms, according to the argument that otherwise, they would have generated “endless disputes in all border sections” (Larraín Barros, 1975, p. 273). From the Hispanic chronicles, it is known that in

Inca times, there was a demarcation policy based on the use of *saywas* and *Apachetas*² to define spaces of ancient indigenous manors. Indeed, it is still possible to appreciate references, as demarcation points, to *apachetas* that establish the lines of demarcation between States, which maintain old demarcation practices that exhibit indigenous sacredness across territory (Espinoza Collao, 2022; Sanhueza Tohá, 2004). In the same sense, Bertonio (1984) defines, in his early Aymara vocabulary, *sayhua chuta* as a raised marker or line for the division of land.

However, the political meaning of colonial borders altered these pre-Hispanic structures of occupation based on vertical or multisited archipelagos, which weakened old cultural and economic ties (Bouysson-Baillay & Chacama R., 2012). For example, Paz Soldan (1878) indicates that during the seventeenth century, the colonial authorities granted territories and established boundaries and markings, at the request of the indigenous authorities in Chiapa and Tarapacá, related to the sectors of Cariquima and Isluga that included spaces in different ecological zones.

Regarding these border areas and their spatial distributions, although, materially, they may have had historical continuities, the meanings assigned to these fragmentations were diverse, since they rested on their complex and varied characters of symbolism. Thus, there are limits and segmentations that remained in the memory of the population for a long time, which not only contemplated temporary mobility but also other territorialities, which still maintain such cultural expressions in the area (Lima & González, 2014). In the case of the Aymara, the paradigm of conceiving the inhabited space as an interrelated and complementary whole for life, with cross-border reaches, generated counterpoints with the notions of modern control and sovereignty (Álvarez et al., 2020).

In the incipient Peruvian Republic, this area maintained its peripheral and border situation, as it did not qualify as a productive space that contributed to the national economy, i. e., the new power paid little attention to it (Castro Castro, 2017). Its initial exploitation of the guano industry and the subsequent development of saltpeter mining activity distanced this state from the high Andean region of Tarapaque, whose only use derived from the presence of indigenous workers from the border area. This allows us to postulate the relevance of reciprocity or *Ayni* Aymara in local economies as an indispensable element in the subsistence of these communities; likewise, it explains the circumstances of why state logics are incorporated into their daily lives.

The assignment of new political units and the establishment of these borders initially led to conflicts between Aymara communities on both sides. Thus, it has been indicated that in 1810, Diego Mamani, native chief of Isluga, began a process of claiming demarcation against the indigenous community of Carangas, both then separated by the border between Chile and Bolivia (Paz Soldan, 1878). Next, at the State level, in the Peruvian Republic, the constant problems that existed among these populations were increased.

Once the Chilean domain was installed in 1880, the fate of the high Andean area of Tarapacá did not change; it maintained residual public attention, focused on the normalization of saltpeter production and on the installation of the administrative apparatus in the areas that contributed to the production of this mineral.

² Bertonio (1984) defines *sayhua chuta* as a raised cairn or stripe for the division of lands and *sayhua que-llinca* as the end of the land. In the same sense, the term *apacheta* means a pile of stones, which wayfarers make and worship out of superstition.

Strategically, the presence of the Chilean State was linked to this space through the development of a series of censuses for quantifying the population; until well into the twentieth century, there was a total absence of public agencies, “neither schools, nor civil registry offices nor notary’s offices nor police detachments were authorized” (Castro C., 2008, p. 223).

These nascent state borders added new elements after the war, and the identifications with winners and losers were accentuated, especially after the implementation of Chilean devices on the border area where the Bolivian and Chilean Aymara converge. During this time, for example, the conflicts between the inhabitants of Llica in Bolivia and those of Cariquima, now in Chile, included differences over the animals that crossed the line, and the continuity of problems over territorial rights acquired other nuances (Castro C., 2008). The relevance of these borders is unknown, as is whether the assignment to new nationalities is the origin of these conflicts or if they responded to the existence of other historical ethnic variables, such as diverse border lines, where these lawsuits result from disparate territorial temporalities. The truth is that these state borders inserted new assignments, which created incipient differences among the Aymara, now Bolivians, Peruvians or Chileans.

The presence of the Chilean State in the area intensified during the military dictatorship of Pinochet, and standards were established in public policies, especially in the regionalization that began in 1974, linked to national security and inspired by classical geopolitics in its fixation on borders (Château, 1978; Ovando Santana & González Miranda, 2019; Santana U., 2013) and its correlation in the Chileanization of the high Andean space. According to Van Kessel (1990), the strategy to be followed was the militarization of the mountain range and the municipalization of the Andean community, both factors associated with external and internal defense. The implementation of this strategy altered the ties of the cross-border Aymara communities, no longer symbolically, but materially, via the installation of minefields and military contingents throughout the border between Bolivia and Peru, which claimed the lives of some shepherds looking for their cattle along ancestral trails, while the continuous control of people and merchandise hindered traditional traffic in the area.

In addition, geopolitical strategies focused on the northern borders were highlighted at that time (Santana U., 2013, p. 26 et seq.), consisting of public policies that registered and located the Aymara communities, marked by their habitual displacement. Consequently, they affected their mobility into regions beyond the border. In the criticisms of these tendencies, e. g., denying the mobility of these communities called “ethnic points” or cultures alien to being national, it is highlighted that they tended to be considered inhabitants circumscribed to limited areas, culturally homogeneous, solitary and static (Sohn, 2014). In short, mobile territories, such as those inhabited by the Aymara, claim local contexts always via the creation of transnational places. One of the consequences of this premise is that it reveals the discursive constructions of territories and diverse identities, in addition to the association between the political and the personal (Sohn, 2014).

However, the continuity of these cross-border links is deemed a risk to the loyalty to the State, which is why this common past should be erased (Carmona Caldera, 2006). According to the view of the regime, not only is the indigenous population made invisible but any multinational sense, as has been stated, should be excluded because it constitutes a risk to self-defined national security.

This historically peripheral and border situation of the high Andean Aymara populations in Tarapacá has produced different effects on their subjectivity: *a)* the continuity and preservation of uses and customs with greater scope than in the lower areas, where the Chileanization process has been intensified; *b)* a complementarity of the local economy with services and the supply of essential goods for life from the neighboring Bolivian Aymara towns; and *c)* similar complementarity in the cultic activities according to Andean sacredness. These flows were instantiated early in this area among populations that share similarities in their worldviews and cultural identities.³

However, this territorial complementarity outside the State is the result of immemorial practices that are situated in a moral-religious dimension related to the sacredness with which the space is inhabited on both sides of the border. The continuity of these ritual practices is associated with processes of adaptation of the population and their relationships over time, whereby it has been called cosmopraxis (De Munter, 2010).

In this way, it is possible to recognize an area in which the population has coupled different structures to survive and develop in an adverse environment, a scenario in which mobility and the complementarity of resources in all dimensions are essential. Thus, memory reports a journey not only oriented by modern borders but also by geographical separations that respond to ancient patterns of mobility but are adjusted to other normative spaces. In this sense, the State defines indigenous peoples as pre-existing groups in the national territory that preserve their own ethnic and cultural manifestations, as they are areas of multiple overlapping borders or “those borders whose territorialities are produced by settlements of populations, prior to the conventional tracing of its borders—and these do not respect the limits of those originally occupied territories—” (Díez Torre, 2016, p. 14). Furthermore, in them, the limitations of modern state sovereignty coexist with other territorial configurations and their own disputed territorialities, which precisely accounts for these particularities, generated by preexistence.

Andean cosmopraxis: some cross-border experiences of the Aymara communities

The modern materialities that account for the existence of this border area are unattainable. For example, a series of experiences that collect the Andean cosmopraxis and that particularly emphasize the importance of the territory as a nonhuman agent have been highlighted (Piñones Rivera et al., 2018). This refers to the fact that the experience of people with their territory allows them to be considered agents, a matter that naturalism, which supports all westernized public interventions, treats in metaphorical terms. In this regard, the canon of modern historicity has produced politics as an issue among humans after denying the ontological copresence of other sociocultural formations (Álvarez et al., 2020).

³ In this sense, Cereceda (2010) postulates that there are Aymara communities in Bolivia that are linked to the Aymara community of Isluga in Chile.

For Aymara communities, on the contrary, territorial entities exceed human historicity but participate in it through a complex repertoire of forms of reciprocity that goes beyond the nature/society distinction established by naturalism (Piñones Rivera et al., 2018, pp. 215-216 et seq.). In this context, an Aymara shepherd living in the Salar del Huasco area relate how they usually observe the presence of *yatiris* or Bolivian healers on the Charcollo hill, located in the middle of said saltmarsh, who come to perform the ceremony of rain or *ch'uwa ch'ujxata* (story by Pedro Lucas, compiled by the author, 2022). This consists of a prayer that is carried out in sequence in different *achachilas* and *mallkus*, both concepts linked to the tutelary hills located indistinctly in Bolivian and Chilean territory (Choque & Pizarro, 2013). This can be identified as a continuity of the Aymara principle of living territoriality as an interrelated whole that disregards the border lines installed by the State. This discourse continues to operate, although it makes invisible the value of modern borders and their devices for controlling movement.

On the other hand, Cereceda (2010) describes the ceremony of mooring the winds or *soqos* performed by the Chipayas, who inhabit the border area between Chile and Bolivia and are linked to the current Aymara community of Isluga in the Tarapacá region. In this case, the origin of the winds is associated with the northern coast of Chile, according to which a series of articulated acts are carried out in territories in both countries. Along the same lines, the transit of the Chipayas to Chilean territory in search of job opportunities has not ceased, filling the gaps left by the national Aymara population as a result of migrations to the large coastal urban centers. These cycles have been associated by Wachtel (2001) with the transit of old caravans that from time immemorial descended in a constant cycle of merchandise exchange. Likewise, González Miranda (2016) identifies an important presence of indigenous populations, associated with the saltpeter cycle, in the Tarapacá region.

Both experiences install particularities in this space; they distance themselves from what has been called the dualistic ontology, a phenomenon that predominates in modernity and that separates “the human and the nonhuman, nature and culture, individual and community, ‘us’ and ‘them’, mind and body, the secular and the sacred, reason and emotion” (Escobar, 2015, p. 29). It subordinates otherness and homogenizes other possible worlds.

In another context, it is possible to identify a calendar of festivities located outside state borders; thus, among the Aymara community of Chusmiza-Usmagama located in the Tarapacá region, there is to this day the custom of the dark dance founded in that town that consists of attending the festival in the Escara sanctuary, located in Bolivia, across cycles of three years. Conversely, musicians and dancers from Bolivia participate in the various Andean festivities that have been celebrated in Chile since time immemorial (Díaz, in press).

Another activity that manifests historical mobilities across border spaces is linked to the cultural expression associated with musical bands, an insertion apparatus for the indigenous population in Chile and Bolivia. The parallel emergence in the Andean countries of the brass bands at the beginning of the 20th century and their insertion as an indispensable musical expression in patron saint festivals and other manifestations of worship installed a flow of relationships in the Andean indigenous communities on the border areas. Amid the absence of local musicians in the neighboring towns of Bolivia, musicians and bands from this country were used, which established a relationship that lasts to this day. Díaz Araya (2009) reports different examples from the

early twentieth century in which authorization was only requested from local authorities such as subprefects, district inspectors or police officials for the entry of Bolivian bands, who crossed the border on foot or on bicycles, transporting their instruments to attend these events. This connection currently transcends borders in different private celebrations with public notoriety, some with a long historical date, such as those referred to above or the *fiesta mayor de la tirana*. The latter is marked transversely by cross-border relations in aspects that extend beyond the musical but always with a high indigenous component that involves social, economic and parental interaction apart from the territoriality defined by modernity (Díaz Araya et al., 2022).

On the other hand, the coca leaf that occupies a central place in Andean religiosity, the cultivation of which is criminalized in Chile, is currently being transferred—in the shadows—from Bolivia and has established a permanent and significant cross-border commercial activity. This, although the current law on indigenous matters protects the cultural identity sustained among other aspects in its religiosity, has only recently had its use recognized in Chile, by jurisprudence, as a cultural activity typical of the Andean world. However, the exculpation continues to be based on the legal figure of the culturally conditioned indirect prohibition error and not the recognition of a right as a cause of justification (Tribunal Oral en lo Penal de Arica, 2015). From this perspective, border and state control constitute a high-risk obstacle for the continuity of cultural practices.

These vital pilgrimages within their worldview, for agricultural and livestock cycles, are kept apart from the times and seasons that order the Western world. Life is ordered by complementing, by repairing territorialities and by integrating a much broader landscape. In this order, the States only add risks to these times (Burman, 2011). In all cases, there are transversal constructions, products of liturgical exchanges, political conciliations and the need for adaptations for survival. Thus, each cycle marks the memory expressed in the present as an area where interdependent spaces intercede in its modern manifestation.

The temporal and spatial continuity of these practices places this reality within the orbit of the customary law to which a State must resort to resolve situations that afflict the indigenous peoples that inhabit border areas (Corte Interamericana de Derechos Humanos, 2005, 2008, 2014). In another sense, the belonging to the Aymara people of the populations located on both sides of the borders and the cycle of reciprocal dependence, historically installed, links their actions in a particular legal framework that establishes duties to the States, which require adopting specific measures that eliminate obstacles to the development of these relationships and allow their continuity, prevalently.

At the center of the discussion is the legal purpose of strengthening cultural identity, a fundamental right of the collective nature of indigenous communities, which “must be respected in a multicultural, pluralistic and democratic society” (Corte Interamericana de Derechos Humanos, 2012b, paragraph 215). In short, it imposes the obligation on the States to guarantee indigenous peoples their participation in matters that affect their values, uses, customs and forms of organization, which favors the control of their own institutions and ways of life in general, even if they violate a modern border that divides their respective territories.

The particular regulation of cross-border indigenous communities in current law: some South American experiences, including the Chilean case

The situation of cross-border indigenous communities has been the subject of particular legal regulation. In 2023, a set of international legal instruments has established specific rights for this indigenous population that normatively globalize this reality. While in the context of the right of internal elaboration, except for the Constitution of Colombia, these can only be observed in the Latin American constitutional reforms at the beginning of the 21st century.

In the national legal reality, the existence of specific norms occurred exclusively with the incorporation of these international instruments only in the 21st century,⁴ while in domestic legislation, both the Constitution and the rest of the legal structure still maintain absolute silence, a position that is consistent with the lack of particular considerations by the State.⁵

One of the first instruments to address this matter was Convention 169 of the International Labor Organization (ILO), incorporating section VII, called “Contacts and cooperation across borders” in its article 32; it establishes the duty of the governments to adopt appropriate measures, “including through international agreements, to facilitate contacts and cooperation between indigenous peoples across borders, including activities in the economic, social, cultural, spiritual and environmental spheres”.

This instrument is the most relevant to the matter of indigenous rights, given the large number of States that have ratified it; because of its recurrent use in national and international jurisprudence, especially in Latin America (Aylwin, 2014), it allows us to identify the purpose of the norm protection of the continuity of the historical ties of these cross-border communities, establishing a burden on the State consisting of eliminating the obstacles that the border establishes. According to the dictionary of the Royal Spanish Academy, the natural meaning of the verb to facilitate is “To make the execution of something or the achievement of an end” easy or possible. *Contrario sensu*, the impediment or obstruction of relationships operates as an action contrary to the objective spirit of the norm.

The referral to the conclusion of international agreements is part of a recurring practice in international law, oriented as a particular measure to facilitate mobility by resorting to political agreements with a regional or bilateral scope

⁴ The ILO Convention 169 of 1989 only came into force in Chile in 2009, after 20 years of debates and appeals.

⁵ Article 14 of the draft constitution (2022), rejected in the exit plebiscite, contained the following provision:

Chile declares Latin America and the Caribbean a priority area in its international relations; commits itself to maintaining the region as a zone of peace and free of violence; promotes regional, political, social, cultural, economic and productive integration among States; and facilitates cross-border contact and cooperation among indigenous peoples.

(Mondardo, 2021)⁶. In this sense, the Economic Commission for Latin America and the Caribbean (Cepal et al., 2020) has highlighted the special measures adopted by the Ministries of Health of Colombia and Peru, which have established a Binational Committee for the treatment of border populations with an emphasis on indigenous peoples, an initiative created in 2020 under the Andean Health Organization. Thus, Costa Rica and Panama have entered into an agreement to grant entry facilities for the Ngöbe-Buglé indigenous people for coffee harvesting activities, in accordance with sanitary protocols.

Along these lines, measures such as the creation of neighborhood transit cards were implemented in general by the Chilean State through Decree 944 in 2010. Through this legal instrument, the category of border area inhabitants was created, which favors distinct transits among the inhabitants of contiguous border towns and faster access with respect to other migratory subjects. However, less than a year after it came into effect, this rule was repealed by Exempt Decree 993 of March 31, 2011, as indicated, due to problems affecting its legality. However, several years later, it was only an answer exclusively for the common borders with Argentina,⁷ excluding as of the date of this writing, with a clearly discriminatory sense, all the Aymara communities that inhabit the extreme north of the country.

In general terms, in the case of the Aymara communities of Tarapacá, conventional routes have been prevented since Chile interrupted its diplomatic relations with Bolivia in 1962 due to the issue of the Lauca River, which hindered the conclusion of agreements between both States. These ties have been further affected by the lawsuit filed by the Bolivian government against Chile in the Hague Tribunal (2013-2018) based on the unresolved expectations of Chile to provide Bolivia a negotiated outlet to the sea after 1904.⁸ This has significantly impacted the exercise of ancestral traditions and customs typical of the border area, compromising the international responsibility of the State in the face of noncompliance with international commitments contracted.

For its part, the Declaration on the Rights of Indigenous Peoples of the United Nations Organization of 2007 establishes in its article 36 that the peoples divided by borders between States have “the right to maintain and develop contacts, relations and cooperation, including activities of a spiritual, cultural, political, economic and social nature, with its own members, as well as with other peoples, across borders”. It also establishes that the States, in consultation and cooperation with indigenous peoples, shall adopt effective measures to facilitate the exercise and ensure the

⁶ In the same way, the conclusion of pacts and associativities among the indigenous peoples themselves is observed. For example, in 2007 the Cross-Border Network for the Defense of Ancestral Territories (Red Transfronteriza para la Defensa de los Territorios Ancestrales) was established, bringing together indigenous communities from Peru, Ecuador, Brazil and Bolivia. For their part, the Bribri, Cabécar, Kéköldi, Ngobe and Naso which are transboundary communities between Panama and Costa Rica, make up the Union of Transboundary Indigenous Peoples (Unión de Pueblos Originarios Transfronterizos) for the defense of their common territory.

⁷ Decree 215. Promulgates the agreements with the Argentine Republic on neighboring border transit and the one that replaces Annex I thereof. Published November 4, 2014. <https://bcn.cl/3g6ry>

⁸ The Treaty of Peace and Friendship of 1904, signed by Bolivian and Chilean authorities, ended the state of war between the two countries after the War of the Pacific in 1879. Among its contents, it establishes the definitive cession of all territories occupied by Chile, which in practice left Bolivia without an outlet to the Pacific Ocean. The subsequent negotiations undertaken by Bolivia have always sought to remedy this situation without positive results.

application of this right. The meaning of this norm specifies the different forms of relationships that are established in these fractional communities by installing duties very similar to the Agreement.

This same instrument establishes in its article 30 that military activities will not be carried out in the lands or territories of indigenous peoples unless a reason of relevant public interest justifies them or they have been freely agreed to by the indigenous peoples concerned, or if the latter have requested them. In both cases, the States will hold effective consultations with the indigenous peoples concerned to define the appropriate procedures, particularly through their representative institutions, before using their lands or territories for military activities. In the reality of the high Andean communities of Tarapaque, this guarantee has been violated by the State and has worsened as a result of the migration crisis (De Marchi Moyano & Alvites Baiadera, 2022; Ovando Santana & Ramos Rodríguez, 2020). In the Aymara community of Cariquima, a military compound has been installed in a space privately owned by the community members without the respective consultation having operated.⁹ This military unit called the Cariquima Patrol Military Base¹⁰ belongs to Regarding the 6th Division of the Army that is based in Iquique, this initiative has provided drinking water and lighting to rural communes in the Chilean highlands and effective surveillance of new threats defined by the authorities, such as smuggling and drug trafficking. The neighborhood leader of Cariquima, Guillermo Moscoso, in the context of this episode indicated doubts in this state initiative. Fundamentally, he highlighted that the right of the Aymara community to border mobility was not being taken into account:

Our community agrees with the protection of borders, but within the commune there are also customs (...) one of those traditions is a fair that is held periodically between the neighboring communities in Chile and Bolivia where basic foods are traded. (Torres Paredes, 2019, p. 2, in Ovando Santana & Ramos Rodríguez, 2020, p. 1542)

On the other hand, the highest authority in the Tarapacá region at the time complemented the above statement by way of consensus, based on the fact that it should “value both the ancestral culture and the need for security”. Finally, the regional councilor Eduardo Mamani expressed a moderate position with the intention of conciliating the parties: “The objective (...) is to bring the Safe Border Plan to the reality of the Aymara people, since there is an ‘ancestral relationship of coexistence’ on the altiplano border” (Torres Paredes, 2019, p. 3, in Ovando Santana & Ramos Rodríguez, 2020, p. 1543). As a result, there was a double violation, in the context of their real right of ownership and with respect to the current international commitments that protect their territory.

⁹ This occurred in the territory of the Aymara community of Cariquima in an area where there is no public property. Background information reported to the author in a letter from the Regional Ministerial Secretariat of National Assets of Tarapacá, in file number AQ-001W0028430, ordinance no. E-79144, background: Law 20.285 on Access to Public Information, dated August 27, 2020.

¹⁰ The town of Cariquima is located in the commune of Colchane, Tarapacá region, and 15 kilometers from the border. With a population of approximately 400 inhabitants, it has a basic education school and a primary health center. On July 28, 2019, this town gained prominence in the press due to President Piñera’s announcement of granting powers to the Armed Forces in border security tasks. The usual argument put forward by the Government has been the need to “increase strength and effectiveness in the fight against drug trafficking and organized crime” (Catena, 2019, in Ovando Santana & Ramos Rodríguez, 2020, p. 1540).

However, beyond this specific case, the American Declaration on the Rights of Indigenous Peoples of the Organization of American States incorporates in its fourth section on “Organizational and political rights”, article XX, numbers 3 and 4, the following:

3. Indigenous peoples, particularly those that are divided by international borders, have the right to transit, maintain, and develop contacts, relationships and direct cooperation, including activities of a spiritual, cultural, political, economic and social nature, with their members and with other peoples.

4. The States shall adopt, in consultation and cooperation with the indigenous peoples, effective measures that facilitate their exercise and ensure the application of these rights.

It also ratifies the prohibition of carrying out military activities among indigenous lands or people unless there is a reason of public interest that justifies it or they entail the participation of the indigenous communities that inhabit said territory, in the same sense of the Declaration of the United Nations.

At the domestic law level, Latin America has been a pioneer in incorporating particular norms on the reality of transboundary indigenous peoples, almost parallel to the entry into force of Convention 169. Thus, Colombia inserted article 96, number two, into its 1991 Constitution, which goes beyond international regulations by inserting the figure of nationality by adoption for indigenous peoples who share cross-border territories, alluding to the reciprocity between States present in international law.

Subsequently, by law, the requirement to speak Spanish is eliminated for transboundary indigenous peoples, provided that they express themselves in any of the official indigenous languages in Colombia. Likewise, it is established that the renunciation of their original nationality will not be necessary for these purposes. These measures are effective in eliminating obstacles that allow fluidity in transit while allowing the continuity of parental ties on both sides of the border line.

Moreover, the same Constitution in its article 289 delegates powers to departments and municipalities located in cross-border areas that facilitate the adoption of measures of “cooperation and integration, aimed at promoting threatening development, the provision of public services and the preservation of the environment”. Notably, the Chilean project of the rejected constituent collected this article 22 years later.¹¹ Undoubtedly, the Colombian Constitution is the guarantor within the orbit of legal instruments, granting broad particular measures for the continuity of a common identity.

¹¹ Article 176/4 states:

International cooperation between autonomous regions and communes. Under the terms established by law, the autonomous regions and communes located in border areas may link up with the bordering territorial entities of the neighboring country, at the same level, through their respective authorities, to establish cooperation and integration programs, aimed at promoting community development, the provision of public services and the conservation of the environment.

The Colombian State, following the sense of international commitments, has promoted bilateral and multilateral agreements that facilitate the relations among these indigenous peoples, for example, the Agreement between Colombia and Ecuador on transit and transportation of people, cargo, vehicles, river vessels, Maritime and Aircraft, passed in 2012, which perfects previous agreements between these two countries. It declares, as its aim, granting “privileged treatment to border integration areas, to compensate for the mitigating effects of the periphery phenomenon”. Along these lines, it incorporates chapter XIII, called “Ethnic groups”, through article 23, which establishes that with the participation of both States and the indigenous border communities, the following will be governed by regulations:

(...) The conditions of mobility with special criteria to improve the quality of life and recognize the customs and traditions of the aforementioned communities, to maintain and develop contacts, relationships and cooperation with other peoples, in particular those that are divided by international borders. (Convenio entre Colombia y Ecuador sobre tránsito y transporte de personas, carga, vehículos, embarcaciones fluviales, marítimas, y aeronaves, 2012, article 23)

This consideration of the participation of indigenous populations in the construction of a border space is in line with international standards, inspired by what has been manifested as the political ethnicity of the consensus (Rouvière, 2014). At present, this derives from a legal variable associated with the query; at the same time, it is expressed as an opening of the political system, marked by recognition and based on the growing pluralization of political activity, characterized by the emergence of transformative forces in search of legitimacy (Connolly, 1995, 2005). The relevance of this observation is clarified by the fact that this pluralization attends to a combination of apparently contradictory demands: the needs for effective border control, political decentralization and regional integration or, as has been indicated, the guarantee of the rights of the indigenous peoples that inhabit these peripheral territories.

Along the same lines, the current Constitution of Ecuador deals in a particular way with the reality of its border communities. In article 57, it establishes a series of particular guarantees, among them, number 18, which establishes the duty of the State to “maintain and develop contacts, relations and cooperation with other peoples, in particular those that are divided by international borders”.

In the same way, Bolivia establishes in its Constitution a set of norms that comprehensively addresses the reality of cross-border indigenous peoples. Within the chapter on international relations, article 255 states that the conclusion of international treaties must be governed, among other aspects, by respect for the rights of indigenous “peasant” peoples. Subsequently, in the chapter on State borders, article 264 imposes the duty of the State to establish a permanent policy of “harmonious, comprehensive, sustainable and strategic development of the borders, to improve the living conditions of its population, and especially of the indigenous nations and peoples who are border peasants”. Finally, in the chapter on integration, article 265 establishes the duty of the State to strengthen the integration of its nations and indigenous peasant peoples with the indigenous peoples of the world.

Bolivian-Chilean cross-border relationship with indigenous peoples

Despite the advantageous situation of this reality of indigenous peoples in Bolivia, this has been no improvement in relations between the peoples on each side of the border; this is prevalent in the reality of state relations, an issue that overcomes international commitments, even against constitutional obligations.

The Chilean State, in general, by failing to comply with what is imposed by the current normative structure, favors the obstruction of the ancestral mobility of the cross-border Aymara communities in the Tarapacá region, which seriously affects the continuity of their cultural identity, their link with their own past, the adequate development of their territoriality and the implementation of a series of cross-border initiatives aimed at developing the communities surrounding Tarapacá (Chile) and Oruro-Potosí (Bolivia). This is the case for the Pica-Llica border integration project and the Gran Jacha Qhatthu Sillajhuay Mallku Hito 41, a demand that has been waiting for more than fifteen years to materialize, in particular regard to the enabling of a pedestrian crossing that allows commercial and tourist linkages between the Salar de Uyuni and the commune of Pica (Chile) (see Cabrera, 2022; Riquelme & Ovando, 2022). The trade fairs surrounding Colchane and Pisiga are also notable. Border closure was implemented by the COVID-19 pandemic, which affected the subsistence of both towns.

In general, the State of Chile has not adopted particular measures during the previous ongoing crises that this border area is going through, nor has it collected local demands for greater cross-border integration; this has postponed its resolution for decades, thus following a historical pattern typical of Tarapacá (González, 2012). In contrast, a clearly discriminatory treatment is observed, insofar as if it has imposed special measures¹² in the rest of the country. This absence of specific measures places the cross-border Aymara communities in a situation of special vulnerability, which, as the Inter-American Court has indicated, generates “destructive consequences on the ethnic and cultural fabric” (Corte Interamericana de Derechos Humanos, 2010, 2012a).

Conclusions

Based on the international legal structure, it has been emphasized that the installation of the borders of the current South American States constitutes a material obstacle for the development of indigenous territoriality. Faced with this scenario, in the particular Chilean case, the Aymara border populations have had to permanently adapt their

¹² As mentioned above, in the case of Chilean-Argentine cross-border relations, the Integration Committee between the two countries has implemented the neighborhood card, protected by articles 54 and 55 of Law No. 21325 on Migration and Foreigners (2022). Although this law is national in scope, it allows residence in a border area with a series of facilities for cross-border passage and the avoidance of procedures such as immigration control. Though protected by a bilateral agreement among the Ministry of Foreign Affairs after consultation with the Ministry of National Defence, in the case of Chile and Bolivia, there is no agreement on this specific matter.

customs and rites to maintain the ancestral mobility associated with their territoriality, moving in a space with risks to their life or their freedom and stimulating their abandonment of complementary and liturgical practices fundamental to the continuity of their cultural identity.

This reality is not fortuitous; its origin can be traced as an expression of the policies installed since colonization and promoted over time with the installation of the nation-state, later deepened by the military regime, given its geopolitical view of development, particularly toward the borders. This trend lasted into the beginning of the 21st century due to the indifference of public power to a cross-border agenda that was gaining strength on the continent. Meanwhile, the existence of a binding legal framework is not enough to change this course, as it has established a scenario of multiple breaches by the State. Indeed, in the presence of other logics—such as that embodied in Convention 169—and the recognition of native peoples that inhabit this border area of Tarapacá, the figure of the state has been unable to adjust to these innovations, producing a cognitive dissonance that persists. That is, if the consultation is already problematic for the Chilean State, as it is conceived as an interference with sovereignty, in this border, it has a distinctive stamp that exacerbates the break, given the historical configuration marked by state-centric criteria.

The absence of the particular measures needed by current law, associated with the reality of cross-border indigenous communities, implies a burden for the State that entails the adoption of positive measures to facilitate the continuity of these relations, given their situation of vulnerability, which directly promotes the gradual loss of their cultural identity in a progressive abandonment of their ancestral practices in the face of risks to their protected legal assets. In this sense, the action of the State should strengthen these cultural, spiritual and economic ties to favor a dignified existence and the exercise of many other guaranteed rights.

In contrast, the reality of the cross-border Aymara communities is marked by a clearly discriminatory treatment by the State, which not only omits its obligations; its own actions have impoverished the situation of these communities by eliminating norms that clearly favored their condition. More than 10 years after the derogation of the neighborhood transit card for the Aymara population of northern Chile, this provision has been reinserted for Chile, except for the border regions where the Aymara people live.

The application of measures in accordance with the provisions of the legal framework would facilitate an intercultural dialog between the state structures and those associated with the Aymara indigenous communities, inserting into the national dynamics the respect of transversal rights such as self-determination and the cultural identity that they promote, in addition to the integration mechanisms that facilitate the development of the historical continuities maintained in an adverse scenario.

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