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Human rights approach to the protection of the environment and future generations

EXPERIENCES FROM THE INTER-AMERICAN COURT OF HUMAN RIGHTS ON ENVIRONMENTAL PROTECTION AND FUTURE GENERATIONS

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The Inter-American System, which covers more than 600 million people in the Americas, has approached the issue of Environmental Protection through different avenues of interpretation, both indirect (through the protection of civil and political rights) and direct (as an autonomous right), but always, through orders of comprehensive reparation that seek to remedy environmental damage.

The topics that I will explore during the presentation are:

I. Indirect Approaches through the protection of civil and political rights

II. ESC**E**R Approach: as an Autonomous Right.

III. Climate Emergency and the Rights of Nature

IV. Final Reflections.

I. *Indirect approaches through civil and political rights* **(2001 – 2016)**

Since the 1969 American Convention on Human Rights does not explicitly mention the right to a healthy environment and the Inter-American Court cannot rule on alleged violations of this right under the San Salvador Protocol on ESCER, the Inter-American jurisprudence has safeguarded various aspects of environmental

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protection from its inception, through its interpretation of civil and political rights under the American Convention, in at least two different ways:

1) **First, through the protection of Procedural Rights,** for example:

i. Environmental defenders´ rights to personal integrity, freedom of association and political rights (e.g. *Kawas Fernández Vs. Honduras, Luna López Vs. Honduras)*;

ii. The right to access information on environmental matters, as part of the right to freedom of expression (e.g. *Claude Reyes et al. Vs. Chile)*;

iii. The protection of the environment due to its public utility, when interpreting the right to private property in cases of expropriation (e.g. *Salvador Chiriboga Vs. Ecuador)*

iv. The adoption of Provisional measures to protect natural resources, based on the right to personal integrity and the right to an effective remedy (e.g. *Asunto de las Comunidades del Jiguamendó y del Curbaradó respecto Colombia).*

2) The **SECOND** avenue in this indirect approach was through the Court´s interpretation of ***Substantive rights,*** *which was developed* ***in Cases on the rights of Indigenous and Tribal Peoples***.

- ***The right to life with dignity***

In the Paraguayan Cases (*Yakye Axa, Sawayamaxam and Xakmok Kasek*, on the deprivation of the communities' ancestral territories and their situation of poverty and survival conditions), the Court stated that the right to life cannot be interpreted narrowly. This right includes not only the right of all human beings not to be deprived of life arbitrarily, but also the right to not be subjected to conditions that impede or hinder access to a **dignified existence**. Therefore, there is a duty for States to adopt positive and concrete measures aimed at satisfying **the right to**

life with dignity, especially in the case of persons at risk who must be prioritized by the State.

In those cases, under the scope of the obligation to guarantee the right to a dignified life, the Court studied whether, in fact, the State had implemented measures for the Communities with the purpose of ensuring the rights to a healthy environment, food, health, education and the benefits of culture, all mentioned in the San Salvador Protocol (ESCR) and based on standards of the UN Committee on ESCR. However, the only violation declared was in relation to Article 4 of the American Convention on the right to life.

In the Case of the *Kaliña and Lokono Peoples v. Suriname* (2015), (in which the State had denied Indigenous Peoples access to natural reserves), the Court recognized the complementarity between environmental rights and the rights of Indigenous and Tribal Peoples, who have, in general, played an important role in the conservation of the environment.

Additionally, (in the cases of *Saramaka, Sarayaku, Punta Piedra, and Kaliña and Lokono*), the Court developed important standards on the execution of Environmental and Social Impact Assessments when projects for the extraction of resources can threaten the environment.

Those territorial cases were mainly examined under Articles 21 (on the right to property) and 23 (on the right to public participation) of the American Convention.

Moreover, for the collection of evidence of environmental damage, the Court has conducted *on-site visits*; received expert witnesses, and used new technologies, such as satellite imaging in order to monitor gradual deforestation.

Also, as measures of ***comprehensive reparation*** in cases using this indirect approach, under the category of rehabilitation, the Court has ordered that States

rehabilitate lands affected by environmental degradation; carry out public awareness campaigns on the work of environmental defenders, as well as enact changes in the law to provide access to information in cases related to the environment.

II. Environmental Rights as autonomous Rights (ESCR Approach) (2017 – to present)

In the judgment of *Lagos del Campo v. Peru* (August 2017), for the first time, the Inter-American Court opened up a new paradigm with the recognition of the direct justiciability of Economic, Social, Cultural, and Environmental Rights (DESCA), based on an interpretation of Article 26 of the American Convention (in conjunction with the American Charter).

Following this precedent, in December 2017, through its ***Advisory Opinion No. 23*** on the **Environment and Human Rights**, the Court recognized the *right to a healthy environment* as an autonomous right protected under Article 26 of the American Convention (and Article 11 of the San Salvador Protocol), even though this right can also be affected when other rights are violated, such as the substantive rights to: life, personal integrity, the right to not to be forcibly displaced, among others; as well the procedural rights that we already mentioned.

The Court stated that the right to a healthy environment "constitutes a universal value"; that it "is a fundamental right for the existence of humankind," and that "as an autonomous right, […] it protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of certainty or evidence of a risk to individuals.

The Court also stressed that Nature and the Environment must be protected not only in connection to their usefulness to human beings or due to the effects that their degradation may have on the rights of specific persons, but because of their

importance to all other living organisms with whom the Planet is shared, and who merit protection in their own right.

Finally, in its Advisory Opinion, the Court established and developed State Obligations in the face of possible environmental damage, which are: I. the Obligation of Prevention; II. The Precautionary Principle; III. The Obligation to cooperate; as well as IV. Procedural Obligations.

In its next contentious indigenous case: *The Lhaka Honhat Vs. Argentina* of February 2020, now under the Court´s new direct approach, the Court recognized that the State had violated the **rights to a <u>healthy environment</u>**, and to adequate food and water, due to the ineffectiveness of State measures to stop activities that harmed those rights. It held that illegal logging and other activities carried out on the territory by the non-indigenous population affected environmental rights, and had had an impact on their traditional ways of obtaining food and their access to water.

The Court also recognized that the obligation to prevent the violation of environmental rights extends to the "private sphere" in order to avoid corporations violating such rights. "States are bound to use all the means at their disposal to avoid activities under its jurisdiction causing significant harm to the environment." The following measures must be implemented by States for activities that could potentially cause harm: (i) regulation; (ii) supervision and monitoring; (iii) requirement and approval of environmental impact assessments; (iv) establishment of contingency plans, and (v) mitigation, when environmental damage has occurred.

As a means of **comprehensive reparation regarding the environment**, under the category of restitution, the Court ordered, *among other things*, (i) that the State implement an action plan to respond to critical situations of lack of access to

drinking water and remedy its contamination; (ii) and that it recover and prevent further loss of forestry resources.

In the most recent environmental case before the IACHR: *La Oroya Vs. Perú*, the Court declared the international responsibility of Peru for the violation of the human rights of 80 individuals as a consequence of air, water, and soil pollution caused by the metallurgical activities carried out at the La Oroya Metallurgical Complex (CMLO), and by the failure of the state to fulfill its obligations to prevent harm to the environment, health, life, and the integrity of individuals. This is the first case in which the Court has as its central focus..."

The case also allowed for the development of new standards, particularly on the scope of obligations regarding the protection of the environment and health, with a specific focus on air and water quality regulations. It also established broad measures of reparation aimed at compensating for the damages caused by polluting activities and preventing future environmental harm, which marked an important step in understanding how the effects of human activities on nature should be remedied.

The Court also declared that by virtue of the principle of inter-generational equity, 'the right to a healthy environment is established as a universal interest for both present and future generations,' which imposes 'the obligation on States to respect and guarantee the enjoyment of the rights of children and to refrain from any conduct that endangers their rights in the future' (para. 141)."

Among other measures, the Court ordered the State to carry out a baseline assessment to determine the extent of air, water, and soil pollution in La Oroya and to define the actions required to restore the contaminated areas (para. 333), with the aim of restoring nature.

III. Climate emergency and rights of Nature

Currently, the Inter-American Court of Human Rights (IACHR) is considering an Advisory Opinion (OC-32) on the 'Climate Emergency and Human Rights,' aimed at determining the scope of States' obligations in the context of the environmental crisis. The request is framed 'from a perspective that considers the differentiated impacts that this emergency has on people from various regions and population groups, on Nature, and on the survival of humanity on our planet.'

In this process, the Court received over 250 amicus curiae submissions and held public hearings in Barbados and Brazil in 2024, fostering significant dialogue with participants. The Court is expected to issue its ruling early next year.

Among other key issues, in my point of view, the San José Court should: 1) go beyond the European Court in establishing a conceptual and autonomous framework for environmental rights, as well as for the rights of Nature, given its jurisdiction over Economic, Social, Cultural, and Environmental Rights (DESCA), under a less anthropocentric and more ecosystemic view, as demonstrated in AO-23, para 62. 2) This decision should also broaden the scope of standing for claims regarding these rights, potentially expanding to individuals, groups, cross-border harms, and even natural entities. 3) The obligations of States may also find direct grounding in existing provisions of the OAS Charter, interpreted in light of Article 26 of the American Convention on Human Rights (ACHR), which could improve their implementation.

Following the precedent set by the *Oroya* case, the Court is expected to delve further into the rights of future generations and address individual duties in the face of the crisis, in accordance with Article 32 of the ACHR. Lastly, it is hoped that the Court's reparations framework will evolve into a more fitting eco-reparations scheme, in alignment with the climate crisis.

V. Final Reflections.

Let me close with these 3 points:

1. "The IACHR Court holds several advantages over other international tribunals: a) it has evolved to declare the justiciability of Economic, Social, Cultural, and Environmental Rights (ESCER), developing specific obligations for both immediate and progressive compliance; b) indigenous peoples' cases have provided exceptional opportunities to analyze socio-environmental complexities, which often involve dilemmas between development, peoples, and Nature; c) the Court has developed a comprehensive reparations system that allows for comprehensive changes, even with a limited number of cases; d) the doctrine of control for conformity with the Convention allows the Court's standards to broadly influence the entire American region, without requiring cases to always reach the Inter-American System of Human Rights (IASHR).

2. Regarding standing before the Court, it is essential to rethink the scope of potential victims, including direct and indirect victims, as well as collective and potential victims. Particularly, recognizing Nature as a rights-holder entity, capable of making claims for harm in its own right, independently of its connection to human beings (as established in para. 62 of AO-23).

3. Finally, the jurisprudence of the IACHR Court can significantly contribute to the broader, and hopefully harmonious, set of international decisions emerging today, which must be urgently implemented for the well-being not only of persons but of the entire planet."

Thank you very much for your attention!

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