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SYMPOSIUM ON UN RECOGNITION OF THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT

FROM THE "GREEN TURN" TO THE RECOGNITION OF AN AUTONOMOUS RIGHT TO A HEALTHY ENVIRONMENT: ACHIEVEMENTS AND CHALLENGES IN THE PRACTICE OF UN TREATY BODIES

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Since the end of the 2010s, some of the UN human rights treaty bodies have affirmed and enhanced states' obligations in relation to the environment. This "green turn," deeply influenced by the jurisprudence of the regional human rights tribunals and the work of UN Special Procedures, raises the question of the potential recognition of an *autonomous* right to a healthy environment—that is, a free-standing right that is not primarily derived from existing human rights. The claim of this essay is that in the absence of a clear mandate from states to the treaty bodies to monitor the implementation of the right, its symbolic affirmation will have only limited impact. Inspired by the discussions at the Council of Europe on the adoption of a new Protocol to the European Convention of Human Rights, states at the UN level should go further and work toward a binding protocol. However, this raises the difficult issue of connecting the right to civil and political rights, to economic, social, and cultural rights, or to a specific instrument such as the Convention on the Rights of the Child. Ultimately, this essay reflects the shortcomings of the binary approach separating human rights into hermetic categories.

The Silence of the Core Human Rights Treaties

Among the nine core UN human rights treaties, only the Convention on the Rights of the Child has a provision dedicated to protection against "the dangers and risks of environmental pollution" and the right to an education "directed to . . . the development of respect for the natural environment."[1] The International Covenant on Economic, Social and Cultural Rights (ICESCR)[2] refers indirectly to environmental protection as one of the progressive steps to be taken by states to "achieve the full realization of [the] right [to health]": to this end, it envisages the "improvement of all aspects of *environmental and industrial* hygiene." The other treaties, including the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of Discrimination against Women (CEDAW), do not address environmental questions.

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[1] Convention on the Rights of the Child, Arts. 24(2)(c), 29, Nov. 20, 1989, 1577 UNTS 3.

[2] International Covenant on Economic, Social and Cultural Rights, Art. 12(2)(b), Dec. 16, 1966, 993 UNTS 3. The Committee monitoring the ICESCR will be designated as the CESCR.

The relative indifference of universal human rights treaties toward environmental rights has very recently been redressed by the jurisprudence affirming that states have obligations in relation to the environment connected to existing rights such as children's rights, the right to life, the right to privacy, and the right to health. However, due to external as well as internal resistance, treaty bodies have not taken the approach of the Inter-American Court of Human Rights and have failed to recognize the right as an *autonomous* one.

The "Green Turn" in the UN Treaty Bodies' Practice

The "green turn" in the practice of the UN treaty bodies is obvious, although not coordinated, not shared by all organs, and not fully consolidated. This movement has three layers: the introduction of environmental concerns in the drafting of General Comments/Recommendations; the inclusion of issues related to pollution, climate change, or projects that have harmful environmental consequences in the reviews of the reports of states parties; and the adoption of decisions and views[3] based on individual communications. Each of these sources has a direct influence on the development of environmental human rights law.

First, with regard to the practice of drafting General Comments and Recommendation, recent years have been marked by growing attention to states' obligations to reconcile human rights with environmental protection. The Human Rights Committee (HRC) paved the way with its General Comment No. 36 on the right to life, enshrining the *right to life with dignity* and affirming states' obligation to protect and prevent risk from pollution, industrial accidents, or harmful consequences of climate change. With this approach, the HRC broadened states' positive obligations under the right to life, including outside their territory.[4] Other treaty bodies such as the CEDAW Committee,[5] the Committee on Economic, Social and Cultural Rights (CESCR),[6] and the Committee on the Rights of a Child (CRC) have gone further, drafting General Comments and Recommendations focused on climate change.[7] Even if states may be reluctant to accept the use of such Comments as a normative tool,[8] the authority of these soft law instruments should not be underestimated. For example, the Inter-American Court of Human Rights has relied heavily on General Comments adopted by treaty bodies.

Second, when they review states parties' implementation of the human rights treaties, treaty bodies increasingly request information on policies to mitigate climate change. The CESCR and the CEDAW Committee almost systematically raise the question,[9] but the practice of other treaty bodies, including the HRC, is inconsistent. For example, the HRC included a detailed paragraph on climate change in the most recent List of Issues it sent to Brazil,[10] but made no reference to climate change, pollution, or other environmental issues in the List of Issues it sent to Colombia.

Finally, the "green turn" is illustrated by the adoption of important decisions and views of the HRC and the CRC based on individual communications. General Comment No. 36 of the HRC provided grounds for the adoption of

[3] In the treaty bodies' terminology, "decisions" refer to decisions only on admissibility, while "views" are those decisions adopted both on the admissibility and the merits of an individual complaint.

[4] Human Rights Committee, General Comment No. 36, paras. 26, 62 (2019).

[5] CEDAW, General Recommendation No. 37 (2018) (on the gender-related dimensions of disaster risk reduction in the context of climate change).

[6] CESCR, General Comment No. 26 (2022) (on land and economic, social, and cultural rights).

[7] CRC, Draft General Comment No. 26 on Children's Rights and the Environmental with a Special Focus on Climate Change.

[8] *Id.* (France).

[9] CEDAW/C/NOR/QPR/10 (Norway); CEDAW/C/CRI/Q/8 (Costa Rica).

[10] CCPR/C/BRA/Q/3, para. 15 (Brazil). See also before the CERD for the same state, CERD/C/BRA/Q/18-20, para. 30.

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its first-ever pollution case, *Cacéres v. Paraguay* in 2019,[11] followed in 2021 by a similar case, *Benito Oliveira et al. v. Paraguay*.[12] General Comment No. 36 also helped to inform the HRC's 2019 decision on *refoulement* in the context of climate change, in *Teitiota v. New-Zealand*. Although the HRC found a non-violation of the right to life, the decision clarified states' obligations in this context.[13] More recently, in 2022, the Committee adopted views in another important case, *Billy et al. v. Australia*,[14] dealing with the state's failure to protect the right to privacy and the right to culture of members of Indigenous communities from climate change. For its part, the CRC adopted landmark decisions in 2021 in the *Sacchi and Others* cases against five state parties to the Convention on the Rights of the Child,[15] which contribute to the understanding of victimhood and jurisdiction in relation to climate change.

These cases call for three observations. First, at this stage of evolution of the treaty bodies' jurisprudence, there is no recognition of an *autonomous* right to a healthy environment. As mentioned above, the HRC has linked the harmful consequences of pollution and climate change to the right to privacy and family life, the right to life, and the protection of culture. Therefore, its position is similar to the jurisprudence of the European Court of Human Rights (and different from the Inter-American case law) in that it does not depend on the right to a healthy environment as such. Potential claimants need to make a claim based on an existing right protected by the ICCPR. I must add that for many reasons linked to the formalism of the HRC and its longstanding interpretations of the ICCPR, it is doubtful that this position will change without the adoption of a binding instrument (i.e., a third Protocol) in favor of the right.

Second, the cases illustrate the importance of treaty bodies using external sources to provide evolutionary interpretations of their own treaties. This is often a point of controversy between states parties and the organs, and between members of the organs themselves. In general, states are not in favor of importing decisions and interpretations from regional bodies, as illustrated by states' input to the CRC on its draft General Comment No. 26. Nevertheless, in the recent cases before the HRC and the CRC, the jurisprudence of the Inter-American Court of Human Rights has been absolutely decisive. The CRC used the Court's Advisory Opinion No. 23 on Environment and Human Rights to adjudicate the question of states' extraterritorial obligations, while in *Billy et al. v. Australia*, the HRC extensively referred to the Inter-American jurisprudence when dealing with the rights of Indigenous communities. *Billy et al.* also raised another interesting question: to determine Australia's human rights obligations under the ICCPR, should the HRC use the 2015 Paris Agreement on climate change as a source of interpretation? The Committee is less reluctant than before to refer to such external instruments, so there would be no objection in principle to refer to another commitment of the relevant state. However, in this specific case, authors' counsel failed to convince the Committee of the added-value of the normative combination of instruments.

The final remark has to do with the right-holders of the potential right to a healthy environment. Contrary to the practice of the European Court of Human Rights, the HRC and CRC have addressed environmental questions in relation to *specific categories* of persons: children; Indigenous communities; and peasants' communities. This element is critical, because it has allowed the HRC to ground its extensive interpretation of the right to privacy and home and cultural rights on the special vulnerability of such groups to pollution, the use of toxic products, and the harmful consequences of climate change. It does not mean that in the future, the Committee could not extend its

[11] CCPR/C/126/D/2751/2016 (2019).

[12] CCPR/C/132/D/2552/2015 (2021).

[13] CCPR/C/127/D/2728/2016 (2019).

[14] CCPR/C/135/D/3624/2019 (2022).

[15] CRC cases against Argentina (Communication No. 104/2019); Brazil (Communication No. 105/2019); France (Communication No. 106/2019); Germany (Communication No. 107/2019); Switzerland (Communication No. 95/2019); and Turkey (Communication No. 108/2019) decided in 2021.

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approach to "every person," but the ties between the affected vulnerable communities and the environment facilitated the conclusion reached by the Committee. In addition, in *Benito Oliveira*, the Committee deliberately eluded the question of the *collective* dimension of the rights at stake, as the authors of the communication were also representatives of the Indigenous community affected by the pollution. Therefore, there was no need to open the question of the community itself as a right-holder. However, in their observations, the authors called for such a recognition by referring to other jurisprudence of the Inter-American Court of Human Rights,[16] which would have raised strong opposition by Committee members reluctant to granting standing to groups and minorities.

Resistance: Evolutionary Interpretation Versus State-Consent Based International Lawmaking

In general, civil society, most international lawyers in the field, and Western media have applauded the "green turn" in the practice of the treaty bodies. In contrast, the vast majority of the critical decisions adopted by treaty bodies on grave violations of human rights, including enforced disappearances, forced labor, obstetrical violence, freedom of peaceful assembly, or sexual violence, do not receive as much interest. This disparity in treatment is worth studying in its own right. However, I will focus in this part on resistance from states parties, and also by some members of the treaty bodies themselves, to the "green turn," and more importantly, to the potential recognition in their jurisprudence of an autonomous right to a healthy environment without a clear legal basis to do so.

The resistance of states to the movement echoes what Philip Alston explains in his contribution.[17] States are concerned by the interpretive process used by treaty bodies and the legal implications of the expansion of their obligations, especially through extraterritorial jurisdiction. They are also upset by the perceived encroachment by these bodies on their sovereign authority to *make international law.* The classical organization of formal sources of international law is disrupted: non-judicial bodies use soft law and many different external sources, including regional courts' decisions and UN declarations, such as the 2007 Declaration on the Rights of Indigenous Peoples and the 2018 Declaration on the Rights of Peasants and Other People Working in Rural Areas. States' reactions are visible in the observations they send in response to individual complaints, and the input they provide on draft General Comments. As an illustration, Paraguay (in *Cacéres*) and Australia (in *Billy et al.*) stressed that the HRC had no material jurisdiction over matters dealing with the environment. Along the same lines, in relation to a reference in the CRC Draft General Comment No. 26 to "unprecedented environmental crises," France warned against the creation of new rights and obligations, "at risk of offending against the consent of the States."[18] Similarly, Canada expressed its concern "that the Draft General Comment in some instances suggests obligations that go beyond what States Parties agreed to be bound to when adhering to the Convention."[19] The United States was even more explicit in its reply to a List of Issues sent by the HRC, it "reject[ed] any suggestion that the rights enshrined in the Covenant encompass the enjoyment of particular environmental conditions, including those related to climate change and its effects . . . . Such an interpretation would be beyond the text of the Covenant and the intent of the negotiators that created the Covenant."[20]

This resistance from states may also be shared internally by some treaty body members, who are trapped by the "binary approach" to rights that Alston describes. The binary approach is not only the basis of the two Covenants of 1966; it is also the basis for the two monitoring bodies: one dedicated to economic, social, and cultural rights and

[16] Entitlement of Legal Entities to Hold Rights Under the Inter-American Human Rights System, Advisory Opinion OC-22/16 (ser. A) No. 22 (Feb. 26, 2016) (in Spanish).

[17] Philip Alston, *The Right to a Healthy Environment: Beyond Twentieth Century Conceptions of Rights*, 117 AJIL Unbound 167 (2023).

[18] *See* note 7, *supra*.

[19] *Id.*

[20] CCPR/C/USA/5, para. 9 (2021).

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the other to civil and political rights. This normative and institutional separation of rights in different categories may be an important element in the development of the jurisprudence of the HRC in relation to an autonomous right to a healthy environment. To date, its cases have had a specific feature of vulnerability that made it possible to connect the claims to existing rights and jurisprudence, on Indigenous peoples for instance. Should the broader question of recognizing an autonomous right be raised outside this context, internal resistance could be stronger. Some members are not comfortable with the evolutionary interpretation and believe that the Committee should stick to the original material scope of the Covenant. In addition, the binary conception of rights is still widely shared by the experts who consider that environmental questions should be addressed by the CESCR and not by the HRC.

Next Steps for UN Treaty Bodies: Legal Constraints and Potential Evolution

In the extensive positive and negative comments on the jurisprudence of the CRC and the HRC, many legal questions remain unsolved, such as the boundaries of states' territorial/extraterritorial jurisdiction, the applicability of admissibility conditions to environmental litigation, the regime of proof, and the nature of states' responsibility. As stressed by Zyberi in his concurring opinion to *Billy et al.*, the case also illustrates the "limitations of human-rights based litigation."[21]

These limitations are real. The human rights bodies have to deal with their material jurisdiction and the rules applicable to individual petitions. For different reasons, as discussed above, they do not follow the same hermeneutics as the Inter-American Court. Their margin of "legal creativity" or imagination is much less developed, so it is doubtful that they will move toward the recognition of an autonomous right to a healthy environment in the near future.

It is also doubtful that the mere affirmation of the existence of the right by the UN General Assembly will constitute sufficient legal basis for a new right to be added to the core human rights treaties. Indeed, the green turn is only at its very first steps. Many issues related to the construction of a proper legal regime for the right to a healthy environment remained unsolved. In this regard, the pending applications before the European Court of Human Rights in environmental cases,[22] combined with the advisory opinion requests to the International Court of Justice and the Inter-American Court of Human Rights[23] will be critical to provide legal tools to treaty bodies to adapt the admissibility requirements (including victimhood, exhaustion of domestic remedies, and substantiation) to this type of litigation, but also to adopt a more consistent approach to states' jurisdiction, burden of proof, issues of causation, and state responsibility, including *vis-à-vis* the most vulnerable groups or future generations.

Therefore, more than the General Assembly resolution itself, the answers that will be provided by international tribunals will be carefully scrutinized by treaty bodies. This unprecedented momentum poses a dilemma for the European Court of Human Rights and the International Court of Justice. The Tribunals could operate in a mood of self-restraint and judicial modesty, focused on the quest for powerful states' support, or contribute to the "expedition of a response to the climate emergency."[24] This is the path chosen by the Inter-American Court of Human Rights, affirming the unambiguous recognition of the right to a healthy environment as a "universal value . . . [and] fundamental right for the existence of humankind."[25]

[21] CCPR/C/135/D/3624/2019, *supra* note 14, para. 7 (2022) (of Zyberi's opinion).

[22] For the pending cases, see here.

[23] Text available here.

[24] Words used by Chile and Colombia in their request to the Inter-American Court.

[25] Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, Merits, Reparations and Costs, Judgment (ser. C) No. 400, para. 203 (Feb. 6, 2020).

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