CASO PUEBLO INDÍGENA U'WA Y SUS MIEMBROS V. COLOMBIA

Presented by the representation of the victims and decreed by the Inter-American Court of Human Rights by Resolution issued on March 13, 2023.

Expert Opinion

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Object of the expert opinion:

This expert opinion is proposed to the court to contribute to three main elements of international human rights law that are relevant to the court case. These are:

(1) to contribute elements of analysis from international and comparative law on the complementary nature of the collective rights of indigenous peoples and the right to a healthy environment;
(2) as well as the importance of recognizing and guaranteeing the role of peoples in the protection of nature and the interrelation of nature with indigenous peoples and their ways of life;
(3) as well as the possible measures of collective redress in favour of the U'wa Nation in such context.

1: COMPLEMENTARY NATURE OF THE COLLECTIVE RIGHTS OF INDIGENOUS PEOPLES AND THE RIGHT TO A HEALTHY ENVIRONMENT

The case of the U'wa community reaches the Court at a time when there is an emerging consensus at the international level that the right to a healthy environment constitutes a key element of international human rights law. Indeed, this is probably the first case that will test the reality of the resolution adopted by the United Nations (UN) General Assembly in 2022 recognising access to a

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healthy and sustainable environment as a universal right.[2] Although the right to a healthy environment is universal and applies to all, it is also recognising and acknowledging that indigenous peoples are specially concerned. This is affirmed both in international legal documents and in the jurisprudence of this Court.

- Article 29 (1) of the UN Declaration on the Rights of Indigenous Peoples (to which Colombia voted in favour) states: "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination."
- Article 19 of the American Declaration on the Rights of Indigenous Peoples states: "Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the rights to life and to their spirituality, cosmovision, and collective well-being."

These rights have been affirmed in several international law documents since then. For example, the Inter-American Commission on Human Rights (IACHR) and the Office of the Special Rapporteur for Economic, Social, Cultural, and Environmental Rights (REDESCA) recently affirmed, in the context of the climate emergency, that "States must adopt measures to ensure that the climate crisis does not affect or jeopardize the effective protection of the human rights of indigenous peoples, Afro-descendant, tribal or peasant communities such as life, personal integrity, freedom of expression, protection of family life, water, food, the healthy environment, or communal property, among others."[3] In another recent example, a 2021 policy briefing by the UN Special Rapporteur on the environment noted: "Respecting and protecting human rights, especially the rights of Indigenous Peoples and other rural rights holders, is an obligation under international law and an effective, equitable and cost-efficient conservation strategy that should be applied to all efforts to safeguard nature."[4] As explored below, this is of significant relevance to the situation of the U'wa and the case examined by the Court at two levels. First it underlines the unique position for the Court to further enforce the fundamental complementarity between the rights of indigenous peoples and the right to a healthy environment as key human rights issue (explored in section 1.1.) and the role that governments, in this case Colombia, have to play when the natural environment is being negatively impacted by a third party (section 1.2.).

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[2] UN General Assembly Resolution adopted on the 28th of July 2022; see also Human Rights Council's Resolution 48/13 of October 8, 2021 - recognizing that the right to a clean, healthy and sustainable environment is a human right.

[3] Inter-American Commission on Human Rights and the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights, *Climate Emergency: Scope of Inter-American human rights obligations*, Resolution No. 3/21 (2022), para 23.

[4] Policy Brief No. 1- Human rights-based approaches to conserving biodiversity: equitable, effective and imperative - A policy brief from the UN Special Rapporteur on Human Rights and the Environment, David R. Boyd - August 2021, p. 3.

1.1. The complementarity of the right to a healthy environment and indigenous peoples' human rights

There are strong legal precedents from the Court highlighting the fundamental complementarity of the right to a healthy environment and indigenous peoples' rights. This complementarity between indigenous peoples' rights and the rights to a healthy environment was developed and explained in great detail in the 2020 ruling of the Court concerning the ***Indigenous Communities Members of the Lhaka Honhat Association v. Argentina.***[5] This case provides strong analysis on the interconnections between the rights to a healthy environment, indigenous community property, cultural identity, food, and water based on Article 26 of the American Convention on Human Rights – significantly the Court ruled that:

- States have obligations to respect the right to a healthy environment and prevent violations of that right;
- States' obligations extend to the private domain to prevent and protect individuals from third parties infringing upon their right to a healthy environment;
- To fulfil these obligations, States must build adequate systems to check and control the activities of private individuals and public entities; and
- Overall, States must take into account vulnerabilities in light of the principles of equality and non-discrimination (at [207-209]).

Another significant case is the 2015 ruling of the Court in the case of the ***Kaliña and Lokono Peoples v. the Republic of Suriname***.[6] In this case, the Court made some relevant statements on general requirements contained in international environmental law and in terms of its complementarity with human rights law –highlighting that the right to a healthy environment is "an essential human right related to the right to a dignified life," including "in light of the existing international *corpus iuris* on the special protection required by members of indigenous communities."[7] Significantly, the Court concluded that "respect for the rights of the indigenous peoples may have a positive impact on environmental conservation", and as the Court noted: "indigenous peoples may play an important role in nature conservation, since certain traditional uses entail sustainable practices and are considered essential for the effectiveness of conservation strategies." (para. 173) Moreover, the Court highlighted the complementary between international human rights and international environmental law – notably international biodiversity law and indigenous' human rights, noting that "**the rights of**

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[5] *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v. Argentina*, Inter-Am. Ct. H.R. (February 6, 2020).

[6] *Case of the Kaliña and Lokono Peoples against the Republic of Suriname*, Inter-American Court of Human Rights, February 4, 2015.

[7] Ibid, para. 172.

the indigenous peoples and international environmental laws <u>should be understood as complementary</u>, rather than exclusionary, rights." [8]

These two precedents concerning the Indigenous Community Members of the Lhaka Honhat Association in Argentina and the Kaliña and Lokono Peoples in Suriname are particularly relevant to the case examined by the Court concerning the pleadings of the U'wa community since they highlight States' obligations to protect indigenous peoples' rights to a healthy environment, as well as the complementarity between human rights law and international environmental law. It also highlights the emerging consensus on the fact that recognising collective land rights of indigenous peoples leads to better environmental sustainability - indigenous peoples' distinctive livelihoods and traditional ecological knowledge contribute significantly to low-carbon sustainable development, biodiversity conservation, and genetic diversity, etc. In this regard, the IACHR and REDESCA have jointly affirmed that States must respect and guarantee without any discrimination meaningful participation of indigenous peoples in the "design of action plans, public policies, norms and / or projects directly and indirectly related to the fight against climate change" and that "[s]uch participation should take into account an intercultural approach and adequately incorporate traditional and local knowledge on mitigation and adaptation and respect the duty of accommodation in the final decision."[9]

Overall international human rights institutions have largely supported the view that environmental sustainability and the respect of indigenous peoples' human rights are closely intertwined and complementary. International human rights law jurisprudence clearly highlights that environmental issues are indeed fundamentally interconnected with the human rights of the concerned communities, and cannot be cast aside as a separate issue.

Going further it is worth highlighting that the Court, in its advisory opinion of 2017 concerning the relationship between human rights law and the environment, also noted:

> "The Court considers it important to stress that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right."[10]

This opens another relevant angle in this case. Indeed, the U'wa community in their pleadings have highlighted that the degradation of the environment is not only having an impact on their livelihoods, but also their cultural connections to their territories. Here it is worth highlighting that the judiciary of Colombia, and notably its Constitutional Court and Supreme Court, have been pioneers in

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[8] Ibid, see para. 174-80 where Court cite several environmental treaties: *e.g.*, Convention on Biological Diversity, Arts. 8(j) and 10(c); Principle 22 of the Rio Declaration on Environment and Development (emphasis added).

[9] Inter-American Commission on Human Rights and the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights, *Climate Emergency: Scope of Inter-American human rights obligations*, Resolution No. 3/21, (2022), para 24.

[10] Advisory Opinion, November 15, 2017, OC-23/17, Inter-Am Ct HR (Ser A) No 23, para 62.

recognising the interaction between the human rights of local communities (especially indigenous peoples) and the rights of the natural environment. In a very significant decision of 2016, the Constitutional Court ruled that the right to physical, cultural and spiritual survival of indigenous peoples (territorial and cultural rights) are intrinsically connected to the rights of nature, in this case a river, and that the well-being of the river was connected to the protection and recognition of the rights of the concerned indigenous communities.[11] This decision from the Constitutional Court of Colombia is particularly relevant to the case of the U'wa who have also highlighted in their pleadings the cultural connections to their natural environment highlighting the concept of Mother Earth, and the oil being the blood of Mother Earth. From this perspective, the Court is in a unique situation to enhance and embrace such pioneering jurisprudence connecting indigenous peoples' rights and the right to a healthy environment, putting an emphasis on the fact that the right to a healthy environment is an autonomous right (as highlighted by the Court statement above) which is protecting nature in itself. This is an argument put forward by the U'wa who have highlighted that it is not only about their benefits and rights, but about nature's rights. So far international human rights courts have not yet fully supported this line of argumentation, apart from the Court in its advisory opinion in 2017. It is a unique situation since interestingly the case is against the government of Colombia, which not only requested the advisory opinion of the Court on these issues, but also whose judiciary and highest courts have led the way in connecting indigenous rights, the rights to a healthy environment and the right of nature.

1.2. The impact on the rights to healthy environment done by third parties

Another relevant element concerns the **impact on the environment done by a third party on indigenous territories,** leading to the violations of their rights. As noted by the Court in the Kaliña and Lokono Peoples case, governments must "ensure the effective ownership of the indigenous peoples and refrain from taking steps that could lead to State agents, or third parties acting with their acquiescence or tolerance, adversely affecting the existence, value, use or enjoyment of their territory (...)" and "ensure the right of the indigenous peoples to control and to own their territory without any type of outside interference by third parties;" and "ensure the right of the indigenous and tribal peoples to control and to use their territory and natural resources."[12]

In this case the Court observed that although the adverse impact on the environment and, consequently, on the rights of the indigenous peoples, were carried out by private agents, the government had obligations under the American Convention to protect indigenous peoples from the acts of these private actors. The lack of protection of indigenous peoples and their environment constituted in itself a violation of the Convention. Relevantly for the situation faced by the U'wa, the Court also referred to the UN *Guiding Principles on Business and Human Rights*, adopted by the UN Human Rights Council, noting that "States must protect against human rights abuse within their

[11] Sentencia T-622 de 2016 - Recurso natural: Río Atrato, Corte Constitucional, Acción de Tutela, 10 de noviembre de 2016. Link: https://www.corteconstitucional.gov.co/relatoria/2016/t-622-16.htm - See also: Sentencia 4360 de 2018 - Recurso natural: Amazonas (Sujeto de derechos), Corte Suprema de Justicia, 5 de abril de 2018, Radicado No. 11001-22-03-000-2018-00319-01. Link: https://cortesuprema.gov.co/corte/wp-content/uploads/2018/04/STC4360-2018-2018-00319-011.pdf .

[12] *Case of the Kaliña and Lokono Peoples* , op.cit. para. 132 citing *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*; *Saramaka People v. Suriname;* and *Sarayaku v. Ecuador.*

territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."[13] One of the relevant points here is that the jurisprudence of the Court gives weight to these 'Guidelines' highlighting the existing obligations of the government to act on environmental damages under the American Convention even when resulting from action of private third parties.[14]

Conclusions on point 1

Overall, there are strong precedents highlighting the interconnection between indigenous peoples' fundamental rights to land, culture and a right to a healthy environment in the jurisprudence of the Court which have strong resonance with the case of the U'wa community. By not recognising their fundamental rights over their land and territories, the government of Colombia has not only violated indigenous rights to property, but also their fundamental right to a healthy environment. Moreover, as noted by the Court in previous cases international environmental law and human rights of indigenous peoples are complementary. The fact that some of the damages to the environment are the results of actions or omissions of private third party does not alter the obligations of the government under the American Convention. Overall, there is an obligation on the government to protect **the right to environmental integrity** – as defined by the Inter American Commission on Human Rights (IAComHR) in its 2009 report[15] – as part of the implementation of the American Convention, with a specific focus on upholding the rights of indigenous peoples and their rights to a healthy environment.

2: THE INTERRELATION OF NATURE WITH INDIGENOUS PEOPLES AND THEIR WAYS OF LIFE

The importance of recognizing the role of indigenous peoples in the protection of nature forms an important element of the human rights of indigenous peoples. This is strongly embedded in the jurisprudence of the Court as well as several precedents from international human rights institutions. There are three particular elements of this connection that are relevant in this case, namely (1) right to cultural integrity which includes spiritual connections to nature protected under freedom of religion; (2) right to a dignified life which includes protection of nature; (3) rights of indigenous peoples to self-determination and to directly participate in decision-making related to their territory, including national parks.

2.1. The right to cultural integrity and freedom of religion

The right to cultural integrity represents a strong anchor of the rights of indigenous peoples under the American Convention of Human Rights. On many occasions, the Court has emphasized that the close relationship between indigenous peoples and their lands must be recognized and understood as the

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[13] Ibid, para. 224 *citing* UN Guiding Principles on Business and Human Rights, Principle 1.

[14] On this see also *Suárez Peralta v. Ecuador*. Judgment of May 21, 2013. Series C No. 261, para. 129, 132.

[15] Inter American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources* (2011), para. 190 and ss.

fundamental base of their culture, spiritual life, *integrity*, economic survival and cultural preservation.[16] In several cases the Court made references to the need to protect the cultural integrity of indigenous peoples in relationship with nature.[17] For example in *Sarayaku v. Ecuador*, the Court highlighted that "lack of access to the territories and their natural resources may prevent indigenous communities from using and enjoying the natural resources necessary to ensure their survival, through their traditional activities; or having access to their traditional medicinal systems and other socio-cultural functions, thereby exposing them to poor or inhumane living conditions, to increased vulnerability to diseases and epidemics, and subjecting them to extreme situations of vulnerability that can lead to various human rights violations, as well as causing them suffering and harming the preservation of their way of life, customs and language" (para. 146 & para. 147). The Inter-American Commission has also often referred to the need to protect and respect the 'socio-cultural integrity' of indigenous peoples.[18] For example, the Commission has noted that: 'extractive concessions in indigenous territories, in having the potential of causing ecological damage, endanger the economic interests, survival, and cultural integrity of the indigenous communities and their members (...).'[19]

An important element of the right to cultural integrity concerns the connection with spirituality. In the Mayagna (Sumo) *Awas Tingni* case, the Court directly identified the religious element of land for indigenous peoples. The Court held that: *"the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of... their spiritual life.... For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy."*[20] Indeed, the American Declaration on the Rights

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[16] I/A Court H.R, *Yakye Axa Indigenous Community v. Paraguay*, judgement of June 17, 2005 (Series C, No. 125) para. 51.

[17] See: I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay (Merits, Reparations and Costs) Judgment of June 17, 2005. Series C No. 125, paras. 147 and 203; Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano v. Panama, Ser. C No. 284, para. 143.

[18] IACHR, Third Report on the Human Rights Situation in Colombia. Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, February 26, 1999, Chapter IX, para. 37. IACHR, Report on the Situation of Human Rights in Brazil, Doc. OEA/Ser.L/V/II.97, Doc. 29 rev. 1, September 29, 1997, para. 47.

[19] IACHR, 'Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System' (2009) OEA/Ser.L/V/II. Doc. 56/09 at para. 206.

[20] I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*. Judgment of August 31, 2001. Series C No. 79, para. 149. This approach has been repeatedly adopted by the Inter-American Commission and Court and in subsequent jurisprudence: see *Maya indigenous community of the Toledo District v. Belize* Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004), para. 155; I/A Court H.R., *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, paras. 101 and 103; I/A Court H.R.,*Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 131, I/A Court H.R., *Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146., para 119; I/A Court H.R., *Saramaka People v Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para 90; I/A Court H.R., *Xákmok Kásek Indigenous Community v Paraguay*. Merits, Reparations and Costs. Judgment Merits and reparations. Judgment

of Indigenous Peoples in its Article XIII on the Right to cultural identity and integrity states: "Indigenous people have the right to recognition and respect for all their ways of life, cosmovisions, spirituality, uses, customs, norms, traditions, forms of social, economic, and political organization; forms of transmission of knowledge, institutions, practices, beliefs, values, dress, and languages, recognizing their inter-relationship as established in this Declaration." (para. 3) Indigenous worldviews and relationship with nature have started to be recognised in international human rights law. For example, in a case concerning communities in Ecuador the Court recognised that '[a]ccording to the worldview of the Sarayaku People, their land is associated with a set of meanings: the jungle is alive and nature's elements have spirits (*Supay*), which are interconnected and whose presence makes places sacred.'[21]

This connection between indigenous cultural rights, spirituality and land rights is also a strong feature of international human rights law. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) gives indigenous peoples the right "to maintain, protect and have access in privacy to their religious and cultural sites..."[22] More broadly, the right to freedom of religion has been interpreted positively by international human rights institutions such as the UN Human Rights Committee (HRC). On many occasions the HRC has highlighted that freedom of religion should not be interpreted narrowly, highlighting that the right to freedom of religion in the ICCPR: "protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms 'belief' and 'religion' are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions."[23] In some of its individual decision, the HRC also highlighted "that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various practices integral to such acts."[24]

This has been particularly the case regarding indigenous peoples' spiritual connections with their lands and territories. The African human rights institutions, both the Commission and the Court, have elaborated on this element highlighting that in the case of indigenous peoples a spiritual connection to their land and the environment should be recognised as part of their right to freedom to practice religion. In the *Endorois* decision, the African Commission stated "*Religion is often linked to land, cultural beliefs and practices, and... freedom to worship and engage in such ceremonial acts is at the*

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of August 24, 2010. Series C No. 214, para 86; I/A Court H.R., *Kichwa Peoples of Sarayaku Community v Ecuador*, Merits and reparations. Judgment of June 27, 2012. Series C No. 245, para. 149.

[21] *Kichwa Indigenous People of Sarayaku v Ecuador,* Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, para.57 (June 27, 2012). para 57.

[22] UN Declaration on the Rights of Indigenous Peoples, Article 12.

[23] United Nations Human Rights Committee, General Comment No. 22, Article 18, *The right to freedom of thought, conscience and religion*, July 30, 1993 (CCPR/C/21/Rev.1/Add.4), para. 2.

[24] *Boodoo v. Trinidad and Tobago*, (2002) Human Rights Committee Communication No. 721/1996, UN Doc. CCPR/C/74/D/721/1996.

centre of the freedom of religion."[25] In this case the Commission found that the eviction of the concerned indigenous community from their lands rendered it "*virtually impossible for the Community to maintain religious practices central to their culture and religion*" (emphasis added).[26] More recently, in a case concerning the Ogiek community of Kenya, the Africa Court on Human and Peoples' Rights ruled: "(...) the Court is of the view that given the link between indigenous populations and their land for purposes of practicing their religion, the evictions of the Ogieks from the Mau Forest rendered it impossible for the community to continue its religious practices and is an unjustifiable interference with the freedom of religion of the Ogieks."[27] These cases have clearly indicated that spiritual values and practices connected to their ancestral territories and its natural resources form part of the right to freedom of religion of indigenous peoples; and form part of their wider right to cultural integrity.

Based on these international norms and jurisprudence, it is submitted that the U'wa's beliefs and spiritual practices are protected by Article 12 of the American Convention protecting freedom of conscience and religion and constitute an important element of their fundamental right to cultural identity. As stated in their application to the Court, the U'wa have a distinct belief connected to their ancestral territories, including its natural resources, notably oil. From the above, it is abundantly clear that the U'wa are an indigenous group whose religion is intimately tied with the land, and therefore require special protections. By leaving private actors undermining/damaging their relationship with their natural environment, the government of Colombia not only violated their right to cultural integrity, but also their right to freedom of religion.

2.2. The right to a Dignified Life

Another relevant anchor concerns the right to a dignified life, which has been examined in several precedents of the Court when it comes to indigenous peoples' rights and their relationship with their environment. For example, in the case of the Kaliña and Lokono Peoples of Suriname, the right to a dignified life and its connections to indigenous cultural connections to nature was a key element of the ruling. As noted:

> "[T]he Court has emphasized the importance of the protection, conservation and improvement of the environment contained in Article 11 of the [Protocol of San Salvador] as an essential human right related to the right to a dignified life derived from Article 4 of the Convention in light of the existing international *corpus iuris* on the special protection required by members of indigenous communities . . ."[28]

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[25] African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication 276/2003 (hereinafter: Endorois Case), para. 166.

[26] *Endorois,* para. 173.

[27] African Court on Human and Peoples' Rights, App. 006/2012 – *The African Commission on Human and Peoples' Rights v. Republic of Kenya* (2017), para. 169.

[28] *Kaliña and Lokono Peoples v. Suriname*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309, para. 172, 181 (November 25, 2015) (emphasis added).

The Court ruled that "the State must have adequate mechanisms to implement these criteria as a means of guaranteeing the right to a dignified life and to cultural identity to the indigenous and tribal peoples in relation to the protection of the natural resources that are in their traditional territories."[29]

Moreover, in its 2017 advisory opinion, the Court analysed State obligations for protecting the environment under the American Convention highlighting that States must adopt positive measures to ensure their "access to a dignified life—which includes the protection of their close relationship with the land—and to their life project, in both its individual and collective dimension."[30] The Court also stressed that the protection of the environment is a "condition for a dignified life; in this way, pollution and development projects can jeopardize *vida digna*."[31] As noted in several submission by the victims, the lack of protection of U'wa community's relationship with their ancestral lands and territories has seriously undermined their capacity to maintain a 'dignified life'. The ongoing pollution and environmental degradation taking place in their ancestral territories is seriously undermining their right to a dignified life as protected under the American Convention.

2.3. Indigenous Peoples, National Parks, and self-determination

One of the issues in this case relates to the creation of the "El Cocuy" Natural Park within the traditional territory of the U'wa.[32] This raises some issues regarding the participation of indigenous peoples in the creation and management of nature reserves, or national parks. This is not a new issue for the Court, as there are very strong precedents from the aforementioned case of the Kaliña and Lokono peoples concerning the establishment of natural protected areas on indigenous territories. As noted by the Court "in principle, the protection of natural areas and the right of the indigenous and tribal peoples to the protection of the natural resources in their territories are compatible," and "emphasize[d] that, owing to their interrelationship with nature and their ways of life, the indigenous and tribal peoples can make an important contribution to such conservation."[33] But the Court highlighted "the need to ensure the compatibility of the safeguard of protected areas with the adequate use and enjoyment of the traditional territories of indigenous peoples."[34] The Court also went into detail regarding participation focusing on "the criteria of a) effective participation, b) access

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[29] Ibid, para. 181.

[30] The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, para. 48.

[31] Ibid, para. 109 and 117.

[32] As noted by the IAComHR in its conclusions on the case "by creating the "El Cocuy" Natural Park, the State granted its administration and management to the National Directorate of Natural Parks and not to the traditional authorities of the U'wa People. This, in spite of the fact that the entire park is located within their territory and that their authorities are the ones who have the ancestral knowledge to be able to determine if the entrance of visitors can affect their spiritual balance and cultural subsistence. The Commission therefore concluded that the State has violated the collective property and participatory rights of the U'wa People."

[33] Kaliña and Lokono case, op. cit., para. 182.

[34] Ibid, para. 173.

and use of their traditional territories, and c) the possibility of receiving benefits from conservation (...)."[35] More generally, it concluded that "the State has violated the victims' rights to collective property, cultural identity and participation in public matters, mainly by preventing their effective participation, and the access to part of their traditional territory and natural resources (...)."[36] Significantly, the Court highlighted that "the participation of the indigenous communities in the conservation of the environment is not only a matter of public interest, but also part of the exercise of their right as indigenous peoples 'to participate in decision-making in matters which would affect their rights, [...] in accordance with their own procedures and [...] institutions'."[37]

Moreover, there have been some significant jurisprudence to support the further interpretation of the meaning of participation in such contexts, notably highlighting the key importance of the right to self-determination. As noted by the Court in the case concerning the Lhaka Honhat Association in Argentina: **"the adequate guarantee of communal property does not entail merely its nominal recognition but includes observance and respect for the autonomy and self-determination of the indigenous communities over their territory."**[38] Likewise, in the case concerning the Kuna Indigenous Peoples of Madungandi and Embera Indigenous People of Bayano in Panama, the Inter-Am. Com. H.R also highlighted that such mechanism for participation should include and respect "the rights of indigenous peoples that are associated mainly with the right to self-government according to their traditional uses and customs."[39]

There are strong echoes on these points from international human rights institutions, which are analysed in great detail in a 2016 UN report of the Special Rapporteur on the rights of Indigenous peoples highlighting that the creation of protected areas without the consultation and consent of indigenous peoples or local communities violate their fundamental human rights, notably their self-determination.[40] Likewise, several recent individual decisions adopted by the UN Human Rights

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[35] Para. 181, see also para. 192: where the Court concluded that "to ensure compatibility between the protection of the environment and the collective rights of the indigenous peoples, in order to: (a) ensure access to and use of their ancestral territories for their traditional ways of life in the nature reserves, and (b) provide the means for them to participate effectively in the objectives of the reserves; mainly in their care and conservation, and (c) to participate in the benefits derived from conservation."

[36] Ibid, para. 198. (emphasis added).

[37] Para. 196. Article 23 of the American Convention establishes that everyone must enjoy the rights and opportunities "to take part in the conduct of public affairs...."

[38] *Indigenous Communities of the Lhaka Honhat Association v. Argentina,* Ser. C, No. 400, February 6, 2020, para. 153.

[39] Case 12.354, *Kuna Indigenous Peoples of Madungandi and Embera Indigenous People of Bayano* (Panama), Inter-Am. Com. H.R., Report 125/12 (2012), para. 259 (attributing positive value to the establishment of a legal mechanism for recognition of collective property rights and stating that "it understands that the mechanism cannot exclude rights of indigenous peoples that are associated mainly with the right to self-government according to their traditional uses and customs...").

[40] Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz, UN Doc.A/71/229 (2016). See also recent resolution adopted by the IUCN entitled "Avoiding the point of no return in the Amazon protecting 80% by 2025" highlighting the need to respect and

Committee have also highlighted indigenous peoples' right to internal self-determination and its interrelationship with other rights in the context of management of natural resources.[41]

This jurisprudence is particularly relevant in the context of the U'wa since one of the issues in this case is that the national park has been created without the free, prior, and informed consent of the concerned community, and without respecting their right to self-determination. Although there is an argument made by the government that the park was created before the U'wa *resguardo*, arguably it was not created before their ancestral occupation, and its existence has been ongoing and ratified by the State since the creation of the U'wa *Resguardo*, and since its acceptance of the Court's jurisdiction, without the U'wa's consent. Further, the State has imposed a co-administration arrangement with the U'wa, and therefore exercises control over a significant portion of the U'wa resguardo and ancestral territory, also against the U'wa's will. Hence, both the creation of the park within traditional U'wa territory, and the State's imposition of a co-administration arrangement of the park violates their fundamental right to self-determination and autonomy.

3: POSSIBLE MEASURES OF COLLECTIVE REDRESS IN FAVOUR OF THE U'WA NATION

The different violations of the U'wa collective rights to (1) healthy environment; (2) cultural integrity; (3) self-determination and free, prior, and informed consent, calls for collective means of reparations. The Court has long traditions of being a leader on these forms of collective reparations, and there is no need to repeat here some of the relevant significant possible ways to support these. However, this case offers a unique opportunity for the court to develop further its leading approach to collective reparations for indigenous peoples notably by recognising the need to address the damages done to the U'wa cultural and spiritual connections to their environment.

Reparations for environmental damages are not simply about monetary payments at the outset but should include social reparations such as recognising indigenous cosmovisions and ways of relating with nature. This might include symbolic measures which acknowledge what has been lost and how it is understood by the community. For example, in the 2020 ruling concerning the Indigenous Communities Members of the Lhaka Honhat Association, the Court ordered measures of reparation including actions for access to adequate food and water, for the recovery of forest resources, and to maintain indigenous culture.

In the case of the U'wa the court should call on the government to guarantee the conditions to the U'wa Nation for the implementation of environmental, spiritual and cultural restoration and mitigation measures, based on the clean-up and expansion of the territory, with a view to guaranteeing the reestablishment of its equilibrium, with a guarantee of non-repetition. These measures must be implemented in accordance with the uses, customs and the *'Law of Origin'* of the U'wa Nation.

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protect indigenous peoples' own systems of governance to protect the Amazon (available at: latest motion (129) from IUCN).

[41] See *Tiina Sanila-Aikio vs. Finland*, CCPR/C/124/D/2668/2015, 20 March 2019; and *Klemetti Käkkäläjärvi et al. v. Finland*, CCPR/C/124/D/2950/2017, December 18, 2019.

In terms of the violation of the U'wa's right to free, prior, and informed consent and self-determination with the establishment of the national park on their ancestral territories, it is relevant to refer to the case of the *Xákmok Kásek* community, as the Court had ruled that "the State must adopt the necessary measures to ensure that [its domestic laws concerning the protected area] do not represent an obstacle to the return of traditional lands to the members of the Community."[42] At the same time, the Court should call the government of Colombia to recognize and protect the ownership, use and exercise of self-government and autonomy of the U'wa Nation over the entire area that has been declared a protected natural area (El Cocuy- Zizuma National Natural Park), in accordance with their uses and customs and the U'wa *'Law of Origin'*.

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18/04/2023

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[42] *Xákmok Kásek Indigenous Community*, para. 313.