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Enforcing the Business and Human Rights regime: Contributions from the Inter-American Human Rights System

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1. Introduction

The purpose of the paper is to explore how the interpretation of the American Convention on Human Rights (ACHR) by the Inter-American Human Rights System (IAHRS) may contribute to the enforcement and implementation of business & human rights (BHR) norms and policies in states party to the American Convention on Human Rights (ACHR).¹ The IAHRS has fostered legal and policy changes² in fields related to transitional justice, freedom of expression, political rights,³ and prosecution of gross human rights violations at the national level,⁴ among other fields.⁵ We believe that, in parallel to the adoption of National Action Plans on BHR and the discussion of due diligence or forced labour legislation in the Americas, the IAHRS may contribute to shape state regulations and business conducts alike.

For almost 20 years, different bodies of the Organization of American States have addressed the impact of business activities on human rights.⁶ At first, positive effects were identified and possibilities for replicating good practices were showcased.⁷ However, as cases related to BHR were brought to the IAHRS, it showed significant negative impacts that were not being prevented or were not being remedied by states.⁸ In recent years, the IAHRS has also acknowledged the role of private entities in the occurrence of such violations.

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¹ *American Convention on Human Rights*, 22 November 1969, 1144 U.N.T.S. 123, 9 I.L.M. 99 (entered into force 7 July 1978).

² See Ludovic Hennebel, Hélène Tigroudja, *The American Convention on Human Rights: A Commentary* (Oxford: OUP, 2022).

³ See V. R. Rescia, M. D. Seitles, 'The Development of the Inter-American Human Rights System: An Historical Perspective in a Modern Day Critique' (2000) 16(2) N.Y.L. Sch. J. Hum. Rts. 593.

⁴ See Alexandra R. Harrington, 'Internalizing Human Rights in Latin America: The Role of the Inter-American Court of Human Rights System' (2012) 26 Temp. Int'l & Comp. L.J. 1.

⁵ Christian Steiner, Patricia Uribe (eds), *Convención Americana sobre Derechos Humanos: Comentario* (Bogotá: Fundación Konrad Adenauer, 2019).

⁶ For example, see Organization of American States, *Promotion and protection of human rights in business*, General Assembly, XLIV-O/14, AG/RES. 2840 (4 June 2014).

⁷ Alejandra Gonza, 'Integrating Business and Human Rights in the Inter-American Human Rights System' (2016) 1 Business and Human Rights Journal 357.

⁸ See Inter-American Commission on Human Rights, *Business and Human Rights: Inter-American Standards*, CIDH/REDESCA/INF.1/19 (Washington: IACHR), 2019.

The IAHRs is progressively developing standards that recognize the region's history, its need for development, while acknowledging the shrinking regulatory space of the state.⁹ This all has its impact on the BHR field, particularly vulnerable groups that are most affected by business activities.¹⁰

The first part of the paper will oversee how the Inter-American Court of Human Rights (IACtHR) has incorporated BHR norms in its decision, particularly the UN Guiding Principles on Business and Human Rights (UNGPs).¹¹ The second part will look on how the expansion of the case law of the IACtHR towards the protection of social and environmental rights could impact the framing of BHR decisions within the IAHRs. We will conclude our paper with a brief identification of the cases that will be decided by the IACtHR in the next few years, particularly those related to Indigenous Peoples, the environment, arms trade and climate change.

2. Brief history of IAHRs bodies and BHR

It is worth mentioning that the issue of BHR has been present throughout the work of the IAHRs, regardless of the existence of a global or regional guidelines framework or principles on BHR.¹² For example, the Inter-American Commission on Human Rights (IACHR) started to report on situations in the Americas in the 1970's. In their first annual reports, the IACHR was already documenting the exploitation and expropriation of Indigenous lands by states to benefit private business. Since then, the IACHR has continuously included the dispute over the tenure of Indigenous land as a possible scenario of human rights violations.¹³ The adoption of thematic reports and the creation of the Special Rapporteurship on Social, Economic, Cultural, and Environmental rights has contributed to strengthen the BHR agenda within the IAHRs.¹⁴

In the case of the IACtHR, the first decision that has a specific BHR element is the *2001 Awas Tingni vs. Nicaragua*.¹⁵ In this decision, the IACtHR expanded the notion of private property, as recognized on Art. 21 of the ACHR, to include the right to communal property

⁹ See: Juan E. Méndez & Catherine Cone, 'Human Rights Make a Difference: Lessons from Latin America, in Dinah Shelton (ed) *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013) at 955-980.

¹⁰ See Cesar Rodriguez-Garavito, 'Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields' (2011) 18 Ind. J. Global Leg. Stud. 263.

¹¹ Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Human Rights Council, 17th Sess, A/HRC/17/31 (21 March 2011).

¹² See Office of the High Commissioner on Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (Geneva: OHCHR), 2011.

¹³ Gonzalo Bustamante, 'The Right to Consultation and Free, Prior and Informed Consent in Latin America: The Governmentality of the Extraction of Natural Resources' (2015) *Hors-Série Revue Québécoise de Droit International* 179.

¹⁴ See: Inter-American Commission on Human Rights, *Business and Human Rights: Inter-American Standards*, CIDH/REDESCA/INF.1/19 (Washington: IACHR, 2019).

¹⁵ IACtHR, *Case of the Mayagna (Sumo) Awas Tingni Community* (2001), Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 79.

of Indigenous Peoples.¹⁶ Since then, the IACtHR has adopted several decisions that have expanded the ACHR to recognize rights that would protect Indigenous Peoples against extractive projects in their territory.

For example, in the 2007 *Saramaka vs Suriname* decision, the IACtHR in the consolidated the requirements of the right to consultation and when a consent from Indigenous Peoples would be required. In 2012, the IACtHR recognized in the *Sarayaku vs. Ecuador*¹⁷ case that Indigenous Peoples are collective subjects under international law, which would significantly affect how the Court awards collective reparations. In 2020, in the *Lhaka Honhat vs. Argentina* case¹⁸, the Court recognized Indigenous Peoples' right to water, food and cultural identity linked to the territory, ordering the Argentinian government to resettle peasants and migrant workers out of Indigenous land.¹⁹

In between, there are approximately 35 other decisions regarding the breach of Indigenous rights by the state. Many of these decisions were released before the adoption of the UNGP in 2011. Due to the volume and relevance of these cases, the BHR cases before the IAHRs have mostly focused on extractive industries and Indigenous Peoples.²⁰ As it will be seen in the next section, this “extractivization” of the cases has slowly shifted in the past few years with cases dealing with forced labour, the privatization of public services and environmental regulations.

3. The incorporation of BHR in decisions of the IACtHR

The first time the IACtHR expressly mentioned the UNGP was in the *Kaliña Lokono v. Suriname* decision in 2015.²¹ This case discussed, among other issues, the lack of recognition of collective ownership that led to the issuance of individual land titles in favour of non-indigenous people and the granting of concessions and licenses for mining operations in part of indigenous ancestral territories. The Court adopted the formulation that states should take all appropriate measures to prevent, investigate, punish and remedy, through adequate policies, abuses committed by business enterprises and that it is the responsibility of states to protect human rights against violations committed by third parties, including business enterprises.²²

¹⁶ Corte Interamericana de Derechos Humanos, *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos N° 11: Pueblos Indígenas y Tribales* (San José, Corte IDH, 2015).

¹⁷ IACtHR, *Case of the Kichwa Indigenous People of Sarayaku (Ecuador)* (2012), Merits and Reparations, Inter-Am. Ct. H.R. (Ser. C) No. 245.

¹⁸ IACtHR, Inter-Am. Ct. H.R., *Indigenous Communities of the Lhaka Honhat (Our Land) Association (Argentina)* (2020), Merits, Reparations and Costs (Ser. C) No. 400.

¹⁹ IACtHR, *Indigenous Communities of the Lhaka Honhat (Our Land) Association (Argentina)* (2020), Merits, Reparations and Costs (Ser. C) No. 400, paras. 202-254.

²⁰ Dinah Shelton, ‘The Inter-American human rights law of indigenous peoples’ (2013) 35(2) *University of Hawaii Law Review* 937.

²¹ IACtHR, *Case of the Kaliña and Lokono Peoples (Suriname)* (2015), Merits, Reparations and Costs (Ser. C) No. 309.

²² IACtHR, *Case of the Kaliña and Lokono Peoples (Suriname)* (2015), Merits, Reparations and Costs (Ser. C) No. 309, para. 224.

Although the reference to the UNGP consists of only two paragraphs, it is relevant as it brings to the IAHRs a framework that speaks to it intimately. The exploitation of human and natural resources at the expense of people in this continent is nothing new.²³ The UNGP is the leading framework that seeks to establish the obligations of the State and the responsibilities of companies when their activities impact human rights. The IAHRs, in turn, is created to ensure the realization of human rights by states. Therefore, it is necessary to highlight whenever a situation of violation and the appropriate conduct of each of the parties involved (state and business) comes to light.

In 2016, in a ruling on a case of slave labour, the case of *Hacienda Brasil Verde Workers vs Brazil*,²⁴ the Court has briefly mentioned that the State has a duty to adopt measures to weaken the demand that fuels labour exploitation through forced labour, debt bondage and slavery.²⁵ Although the Court does not expressly mention the UNGP, this was the first case dealing with forced labour and the social factors that enable people to work under servitude.

Workers of the Fireworks Factory vs Brazil

In 2020, the IACtHR decided on a case related to health and safety in the workplace. The case focused on the living and working conditions of persons in a firework factory case in Brazil. The case of the *Workers of the Fireworks Factory in Santo Antonio de Jesus and their families v. Brazil*²⁶ is important as it showed how companies may use their dominant position to establish their businesses in places that are difficult to access and to supervise by state regulatory bodies. The judgement, however, does not engage with the UNGP but the separate opinion by Judge Eduardo Ferrer Mac-Gregor, opens, for the first time, the need to engage the issue of BHR.²⁷

Judge MacGregor correctly identifies that the main issue on the case (regarding BHR) is the Court's conclusion that all violations founded were due to the State's omission or inaction. Indeed, the state should adopt measures to prevent the violations, which includes the elaboration of laws and the supervision of its compliance.²⁸ He points out to the fact that it is the first case in which the application of the content of the Guiding Principles is harmoniously adapted to the States' obligations to respect and protect

²³ See Special Rapporteur on the Rights of Indigenous Peoples, *Report of the Special Rapporteur on the rights of Indigenous Peoples: Extractive industries and Indigenous Peoples*, 1 July 2013, A/HRC/24/41.

²⁴ IACtHR, *Case of the Hacienda Brasil Verde Workers (Brazil)* (2016), Preliminary Objections, Merits, Reparations and Costs (Ser. C) No. 318.

²⁵ IACtHR, *Case of the Hacienda Brasil Verde Workers (Brazil)* (2016), Preliminary Objections, Merits, Reparations and Costs (Ser. C) No. 318, para. 318.

²⁶ IACtHR, Inter-Am. Ct. H.R., *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families (Brazil)* (2020), Preliminary Objections, Merits, Reparations and Costs (Ser. C) No. 407.

²⁷ Inter-Am. Ct. H.R., *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families (Brazil)* (2020), Preliminary Objections, Merits, Reparations and Costs (Ser. C) No. 407, Individual opinion from Judge MacGregor.

²⁸ Inter-Am. Ct. H.R., *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families (Brazil)* (2020), Preliminary Objections, Merits, Reparations and Costs (Ser. C) No. 407, Individual opinion from Judge MacGregor, para. 9.

provided for on the American Convention. This is clearly a case where it was expected from the State a conduct (supervision of application of existent legislation) that did not occur, and despite the fact that States ‘non-compliance is not measured against the full effectiveness of the measure.. it is expected that significant results are produced and that there has been an evolution between the initial situation and the current situation... and such progress should be measurable.²⁹

This vote amplifies the notion that legislative measures that recognize and protect rights are not enough in the absence of an ‘institutional apparatus that has competence over these laws’³⁰ and ensure that the legislation is implemented.³¹ It is worth mentioning that the judge concludes that ‘the obligations of oversight, supervision or inspection are particularly relevant, because they are means that allow the authorities or institutions to monitor the activities of private entities in relation to rights that the State recognizes and has undertaken to ensure.’³²

Miskito Divers vs. Honduras

Some more detail is given by the Court on the decision of the case of *Miskito Divers vs. Honduras*, in 2021.³³ The Court begins by recognising the territory occupied by the Miskito and the poor living conditions of the members of the community. These living conditions make them vulnerable to be exploited by businesses as their survival depend on the provision of services by the State, and the assessment is that it is rather deficient since public facilities are not within the reach of this population.³⁴

The Court clarifies the means of subsistence of the population. They are highly dependent on divers for lobster and shrimp hunting;³⁵ and the start of activities begin at around 14 years of age. There is no doubt or ignorance either about the consequences of carrying out this activity in the conditions in which it is done on site nor the involvement of the Miskitos population. There are 9000 divers; 98% of these Miskitos; 97% have already

²⁹ Inter-Am. Ct. H.R., *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families (Brazil)* (2020), Preliminary Objections, Merits, Reparations and Costs (Ser. C) No. 407, Individual opinion from Judge MacGregor, para. 16.

³⁰ Inter-Am. Ct. H.R., *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families (Brazil)* (2020), Preliminary Objections, Merits, Reparations and Costs (Ser. C) No. 407, Individual opinion from Judge MacGregor, para. 18.

³¹ Inter-Am. Ct. H.R., *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families (Brazil)* (2020), Preliminary Objections, Merits, Reparations and Costs (Ser. C) No. 407, Individual opinion from Judge MacGregor, para. 19.

³² Inter-Am. Ct. H.R., *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families (Brazil)* (2020), Preliminary Objections, Merits, Reparations and Costs (Ser. C) No. 407, Individual opinion from Judge MacGregor, para. 19.

³³ IACtHR, Inter-Am. Ct. H.R., *Case of the Buzos Miskitos (Lemoth Morris et al.) (Honduras)* (2021), Judgement (Ser. C) No. 432.

³⁴ Inter-Am. Ct. H.R., *Case of the Buzos Miskitos (Lemoth Morris et al.) (Honduras)* (2021), Judgement (Ser. C) No. 432, para. 29.

³⁵ Inter-Am. Ct. H.R., *Case of the Buzos Miskitos (Lemoth Morris et al.) (Honduras)* (2021), Judgement (Ser. C) No. 432, para. 31.

suffered consequences related to decompression; and 4,200 are partially or totally disabled.³⁶

The absence of the State is felt, by this population, not only by the impossibility of enjoying basic services. There is another absence, which concerns the absence of the state to protect this population in their relationship with their employers. There is protective legislation for this activity,³⁷ but the lack of inspection is so extensive that, sometimes, the divers receive part of their remuneration in money, and another part in drugs that keep them willing to perform their work.³⁸ There is no training for the activity, which could prevent accidents; or reparation for those who have suffered damages;³⁹ the working conditions are precarious, there are no safety conditions; and sometimes debt servitude is present. The Inter-American Commission also points out the informality of the work, done with defective equipment and without maintenance.⁴⁰ In short, the protection of the rights of these people, as human and as workers, is non-existent.

Although the parties reached an agreement, and the State acknowledged its responsibility, the Court has seen fit to make considerations regarding the living and working conditions of this population. It is precisely in the considerations on labour that we can find contributions from the Court to the issue of BHR, as it discusses the obligations of the State to ensure rights when companies and indigenous people are involved.

The Court notes the negative and positive obligations of States. The latter involves its obligation to organize its apparatus to ensure the enjoyment of rights;⁴¹ this obligation extends beyond the relations between State agents and persons under its jurisdiction, and encompasses the duty to prevent third parties, in the private sphere, from violating rights"(44). The Court notes that the State is not always responsible for violations committed by private entities, since there is no automatic attribution of responsibility. Even so, all State authorities have the duty to adopt all possible measures to guarantee these rights.⁴²

³⁶ Inter-Am. Ct. H.R., *Case of the Buzos Miskitos (Lemoth Morris et al.) (Honduras)* (2021), Judgement (Ser. C) No. 432, para. 31.

³⁷ Inter-Am. Ct. H.R., *Case of the Buzos Miskitos (Lemoth Morris et al.) (Honduras)* (2021), Judgement (Ser. C) No. 432, para. 37.

³⁸ Inter-Am. Ct. H.R., *Case of the Buzos Miskitos (Lemoth Morris et al.) (Honduras)* (2021), Judgement (Ser. C) No. 432, para. 33.

³⁹ Inter-Am. Ct. H.R., *Case of the Buzos Miskitos (Lemoth Morris et al.) (Honduras)* (2021), Judgement (Ser. C) No. 432, para. 34.

⁴⁰ Inter-Am. Ct. H.R., *Case of the Buzos Miskitos (Lemoth Morris et al.) (Honduras)* (2021), Judgement (Ser. C) No. 432, para. 34.

⁴¹ Inter-Am. Ct. H.R., *Case of the Buzos Miskitos (Lemoth Morris et al.) (Honduras)* (2021), Judgement (Ser. C) No. 432, para. 43.

⁴² Inter-Am. Ct. H.R., *Case of the Buzos Miskitos (Lemoth Morris et al.) (Honduras)* (2021), Judgement (Ser. C) No. 432, para. 45.

The Court cannot hold private entities responsible, however, it has referred to the activities of private business to justify how the State is responsible for the duty to regulate and supervise the practice of economic activities that pose a risk to the life and integrity of individuals.⁴³ The IACtHR expressly mentions the UNGP, setting out the content of each of its three pillars.⁴⁴ It expressly establishes that States must regulate economic activities so that they ensure respect for the human rights recognized in the Inter-American system. Following the UN Guiding Principles, in order to comply with its mentioned obligations, States should adopt measures that ensure that companies a) adopt policies for the protection of human rights; b) adopt due diligence processes for the identification, prevention and correction of human rights violations, as well as to ensure decent and dignified working conditions; and c) adopt processes that facilitate the remediation of violations that result from their activities, especially if the victims are poor people or belonging to vulnerable groups.⁴⁵

All these express mentions of the UNGP are positive given that the Court's decisions affect not only States but are also the object of study by academics and reflection by civil society. Thus, the clarification of their content is relevant. The Court goes further and affirms that states should 'actively' encourage companies to adopt good governance practices to comply with human rights standards. Asserting that States must adopt conduct - 'actively' encourage - is important because it establishes the positive obligation of the State. The incentive can come through legislation that sanctions deviant conduct or the omission of companies, but it can also occur through positive incentives. Likewise, it is positive that the Court is crystal clear in indicating that the State's actions should aim at making companies adopt good corporate governance practices, including by ensuring the participation of all stakeholders.

However, the mention of the term "good practices" refers to voluntary conduct adopted by companies, and the purpose of the Court's dedication to the topic is precisely to clarify that the State should adopt measures that lead to the respect of human rights by companies.⁴⁶ Thus, using the nomenclature that is linked to the voluntarism of companies can open space for some confusion, or even for interpretations that rule out the need for companies to effectively adopt such conducts.⁴⁷

Another issue that seems relevant to us is that the Court fails to mention that the corporate conducts that are to be fostered through responsible state action must

⁴³ Inter-Am. Ct. H.R., *Case of the Buzos Miskitos (Lemoth Morris et al.) (Honduras)* (2021), Judgement (Ser. C) No. 432, para. 46.

⁴⁴ Inter-Am. Ct. H.R., *Case of the Buzos Miskitos (Lemoth Morris et al.) (Honduras)* (2021), Judgement (Ser. C) No. 432, para. 47.

⁴⁵ Inter-Am. Ct. H.R., *Case of the Buzos Miskitos (Lemoth Morris et al.) (Honduras)* (2021), Judgement (Ser. C) No. 432, para. 49.

⁴⁶ See Penelope Simons, 'International law's invisible hand and the future of corporate accountability for violations of human rights' (2012) 3:1 *Journal of Human Rights and the Environment* 5.

⁴⁷ See Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) 14 *Journal of Human Rights* 237.

necessarily be linked to the company's main economic activity. For us, it is of utmost importance to vocalize that good practices that are not directly related to the company's activity, although beneficial and welcome, are not sufficient and cannot replace the necessary conduct that addresses the negative impacts of that activity. By only affirming that States should encourage companies to adopt good governance practices, the Court also excludes good practices that are not directly related to governance, but are directly related to environmental and human rights issues.

Thus, the possible interpretation is that the state should encourage companies to ensure, for example, gender and racial representation in their governance bodies. This can undoubtedly be reflected in the conduct adopted by companies and it is a welcome development. However, it falls far short of vehemently affirming that the State should encourage corporate conduct that does not violate human rights when it comes to the displacement of people for large projects, to give one example.

The Court comes close to this when it adopts the conclusions of the IACHR⁴⁸ in the sense that it is within the sphere of responsibility of companies to adopt preventive measures to protect the human rights of their workers and measures that prevent negative impacts on the communities in which they operate or on the environment. This reflects the need, pointed out in the Guiding Principles, to adopt due diligence processes.

In the area of reparations, the Court's position of relying on the Latin American standards established by the DESCA Rapporteurship and affirming that States must adopt measures to ensure that transnational corporations are held accountable for the human rights violations they commit, or when they benefit from the activities of national companies that are in their chain of production, is relevant.⁴⁹

Martina Vera Rojas vs. Chile

Finally, in the 2021 case of *Vera Rojas and others vs Chile*,⁵⁰ it was disputed the State's duty related to a child human right to homecare health treatment. The child suffered from a chronic illness and had been in homecare for years before the private entity suspended its services. Once again, the Court has stressed that the State also has a duty to prevent that third parties violate rights.⁵¹ The Court has mentioned the UN Guiding Principles on Business and Human Rights and made reference to what it had already affirmed in the *Buzos Miskitos Case*.⁵²

⁴⁸ Inter-Am. Ct. H.R., *Case of the Buzos Miskitos (Lemoth Morris et al.) (Honduras)* (2021), Judgement (Ser. C) No. 432, para. 51.

⁴⁹ Inter-Am. Ct. H.R., *Case of the Buzos Miskitos (Lemoth Morris et al.) (Honduras)* (2021), Judgement (Ser. C) No. 432, para. 52.

⁵⁰ IACtHR, *Case of Vera Rojas et al. (Chile)* (2021), Preliminary Objections, Merits, Reparations and Costs (Ser. C) No. 439.

⁵¹ IACtHR, *Case of Vera Rojas et al. (Chile)* (2021), Preliminary Objections, Merits, Reparations and Costs (Ser. C) No. 439, para. 83.

⁵² IACtHR, *Case of Vera Rojas et al. (Chile)* (2021), Preliminary Objections, Merits, Reparations and Costs (Ser. C) No. 439, paras. 41-111.

Particularly important, in our view, was the statement that businesses must adopt conduct that respects human rights, and the state is obliged to ensure, through regulation, that they prevent their activities from causing or contributing to human rights violations. There is no additional contribution to what had already been stated in the *Buzos Miskitos* case, which can also be attributed to the timing of the decisions, as both were published in October 2021.

In our view, one of the reasons that may explain the Court's greater willingness to address the issue in the case of *Buzos Miskitos* was the publication, in 2020, of the Report called *Inter-American Standards on Business and Human Rights*, by the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights. These cases show how the Court has come to acknowledge the role of private entities in the occurrence of human rights violations.

The purpose of this section was to highlight how the IACtHR has progressively incorporated the BHR field in its case law. Most of these cases emphasize on the protection of civil rights such as the rights to life, non-discrimination, personal security (integrity) or property, while recognizing the strong connection with social rights as work and health. In the next section, we will focus on how the IACtHR has incorporated the BHR lens, particularly the UNGP, when addressing cases related to the protection of the environment,

3.- Environment, Business and Human Rights in the case law of the IACtHR

The purpose of this section is to explore the impact that Advisory Opinion No. 23 on The Environment and Human Rights⁵³ and the *Lhaka Honhat* case⁵⁴ may have for the protection of the environment but also for the duty of states to protect communities from the adverse impact that businesses might have on their right to a healthy environment. In the absence of specific BHR legislation in Latin America, particularly mandatory human rights due diligence, the decisions of the IACtHR provide a legal ground where affected communities might seek protection of their environmental rights.⁵⁵

Advisory Opinion on Environment and Human Rights

In November 2017, the IACtHR released its Advisory Opinion (AO) No. 23 on the environment and human rights. This decision established the extent of the obligations of states to protect the rights to life and personal integrity, *vis-à-vis* infrastructure projects that will have an impact on the environment of individuals and communities, as well as

⁵³ IACtHR, *The Environment and Human Rights (Colombia)* (2017), Advisory Opinion 23/17, Inter-Am. Ct. H.R. (Ser. A) No. 23.

⁵⁴ IACtHR, *Indigenous Communities of the Lhaka Honhat (Our Land) Association (Argentina)* (2020), Merits, Reparations and Costs (Ser. C) No. 400.

⁵⁵ Roman Girma Teshome, 'Provision of Remedies for Violation of Economic, Social and Cultural Rights: A Comparative Study of the United Nations, Inter-American and African Human Rights Systems' (2020) 28(2) *African journal of international and comparative law* 298-318.

principles on how to interpret the ACHR in relation to international environmental obligations of states.⁵⁶

The first part of the AO identifies the main elements of the right to environment,⁵⁷ concluding that this right is protected under Article 26 of the ACHR. This article refers to the progressive nature of economic, social, and cultural rights, which also includes the right to a healthy environment, as established in Article 11 of the San Salvador Protocol.⁵⁸

The second part of the Advisory Opinion focuses on jurisdiction and responsibility for transboundary harms,⁵⁹ as well as outlining the duties of states to protect the environment.⁶⁰ The Court concludes that these obligations include the duty to prevent environmental damages,⁶¹ the need to use the precautionary principle to protect the life and integrity of persons,⁶² the establishment of inter-state cooperation mechanisms,⁶³ and the adoption of procedural rights (access to public information, public information, and access to justice).⁶⁴

The IACtHR uses the ACHR and other Inter-American instruments to determine the scope of these environmental obligations on the state, in addition to specific International Environmental instruments.⁶⁵ This means that not only the IACtHR recognizes that a claim may be brought against a state for a breach on the right to environment but also that the Court may use environmental instruments like the Rio Declaration on Environment and Development, the Convention on Biological Diversity or the Paris Agreement on Climate Change, among others, to assess the responsibility of states for environmental damages as well as any reparations deemed necessary.⁶⁶

⁵⁶ Christopher Campbell-Durufflé, Anopama Atapattu Sumudu, 'The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law' (2018) 8(3-4) *Climate Law* 321-337.

⁵⁷ IACtHR, *The Environment and Human Rights (Colombia)* (2017), Advisory Opinion 23/17, Inter-Am. Ct. H.R. (Ser. A) No. 23, paras. 46-70.

⁵⁸ *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador"*, 17 November 1988, O.A.S. Treaty Series No. 69 (entered into force 16 November 1999).

⁵⁹ IACtHR, *The Environment and Human Rights (Colombia)* (2017), Advisory Opinion 23/17, Inter-Am. Ct. H.R. (Ser. A) No. 23, paras. 71-104.

⁶⁰ IACtHR, *The Environment and Human Rights (Colombia)* (2017), Advisory Opinion 23/17, Inter-Am. Ct. H.R. (Ser. A) No. 23, paras. 105-243.

⁶¹ IACtHR, *The Environment and Human Rights (Colombia)* (2017), Advisory Opinion 23/17, Inter-Am. Ct. H.R. (Ser. A) No. 23, paras. 127-174.

⁶² IACtHR, *The Environment and Human Rights (Colombia)* (2017), Advisory Opinion 23/17, Inter-Am. Ct. H.R. (Ser. A) No. 23, paras. 175-180.

⁶³ IACtHR, *The Environment and Human Rights (Colombia)* (2017), Advisory Opinion 23/17, Inter-Am. Ct. H.R. (Ser. A) No. 23, paras. 181-210.

⁶⁴ IACtHR, *The Environment and Human Rights (Colombia)* (2017), Advisory Opinion 23/17, Inter-Am. Ct. H.R. (Ser. A) No. 23, paras. 211-241.

⁶⁵ Christopher Campbell-Durufflé, Sumudu Anopama Atapattu, 'The Inter-American Court's *Environment and Human Rights* Advisory Opinion: Implications for International Climate Law' (2018) 8:3-4 *Climate Law* 321.

⁶⁶ Angeliki Papantoniou, 'Advisory Opinion on the Environment and Human Rights' (2018) 112:3 *American Journal of International Law* 460.

In conclusion, the Advisory Opinion establishes the general framework of environmental obligations but at the same time, it "Inter-Americanizes" instruments of International Environmental Law to assess the State's compliance with its duty to protect the environment.

The case of Lhaka Honhat vs Argentina

A few years later, in February 2020, the IACtHR rendered the ruling on the case of *Lhaka Honhat vs. Argentina*.⁶⁷ The first part of the ruling restates the IACtHR's standards on the territorial rights of Indigenous Peoples and the state's obligation to delimit and grant a property title to Indigenous communities.⁶⁸ The second part of the decision analyses the allegations of environmental degradation caused by settlers and illegal loggers in the area, as well as the failure of the state to prevent and guarantee the rights of indigenous communities.⁶⁹

The Court examined these facts based on the rights to a healthy environment, to adequate food, to water, and to cultural identity. For the BHR field, this case is of utmost importance as it establishes the interrelationship between Indigenous rights to territory, the environment, and social rights.⁷⁰ This implies that the state has a duty not only to recognize an Indigenous territory but to ensure that it can be used in accordance with the traditions and cultures of its legitimate owners. This implies the duty on the state to adopt the necessary measures to prevent private parties, whether its natural persons or corporations, from using or benefiting from the territory without the authorization of Indigenous Peoples.

In *Lhaka Honhat*, one of the problems was the presence of rural settlers on lands claimed by Indigenous communities; some of whom were rural tenants in a vulnerable situation. The Court found that their economic activities, which included small-scale farming and livestock, had an adverse impact on the rights to food, water and cultural identity of the Indigenous communities.⁷¹

After determining the lack of adequate measures by the state to ensure the exercise of the right to collective property and to guarantee the right to the environment and other social

⁶⁷ IACtHR, *Indigenous Communities of the Lhaka Honhat (Our Land) Association (Argentina)* (2020), Merits, Reparations and Costs (Ser. C) No. 400.

⁶⁸ IACtHR, *Indigenous Communities of the Lhaka Honhat (Our Land) Association (Argentina)* (2020), Merits, Reparations and Costs (Ser. C) No. 400, paras. 99-168.

⁶⁹ IACtHR, *Indigenous Communities of the Lhaka Honhat (Our Land) Association (Argentina)* (2020), Merits, Reparations and Costs (Ser. C) No. 400, paras.186-289.

⁷⁰ Angel Cabrera, Daniel Cerqueira, Salvador Herencia-Carrasco, 'Remarks on the judgment of the Inter-American Court in the Lhaka Honhat vs. Argentina case', (29 July 2020) DPLF Blog, at <https://dplfblog.com/2020/07/29/remarks-on-the-judgment-of-the-inter-american-court-in-the-lhaka-honhat-vs-argentina-case/>

⁷¹ Diego Mejía Lemos, 'The right to a healthy environment and its justiciability before the Inter-American Court of Human Rights: A critical appraisal of the Lhaka Honhat v Argentina judgement' (2022) 31(2) *Review of European Community & international environmental law* 317-324.

rights, the Court established a series of reparation measures, including economic compensation. Among other things, the IACtHR ordered that settlers should leave Indigenous territory within 6 years.⁷² Settlers had three years to leave voluntarily; after this period, the state would have to evict settlers, though only to productive land with access to adequate public services.⁷³

In November 2020, the petitioners filed before the IACtHR a request to interpret a provision of the merits decision,⁷⁴ which ordered the state to adopt the necessary legal measures to guarantee the right of communal property.⁷⁵ In concrete, the representatives of the *Lhaka Honhat Association* asked the IACtHR to clarify⁷⁶ if this form of reparation included the obligation on Argentina to adopt a law on the right to free, prior and informed consultation.⁷⁷

The IACtHR stated that Argentina was responsible for breaching the right to communal property because it did not provide the *Lhaka Honhat Association* the legal title to their territory and it did not consult with them before authorizing the construction of infrastructure projects in their territory.⁷⁸ For the IACtHR, this lack of legal protections contributed to the breach of Indigenous rights. Therefore, the proper fulfillment of the order to adopt the necessary legal measures to protect communal property in Argentina includes the adoption of a law that assures a free, prior, informed, and adequate consultation with Indigenous Peoples⁷⁹.

4.- Relevance of the decisions of the IACtHR for the field of BHR

As stated before, most cases decided by the IACtHR with implications on BHR have focused on extractive industries operating on Indigenous territories.⁸⁰ These decisions have dealt with issues around free, prior, and informed consent, land titles and impact of economic activities to Indigenous ways of life and subsistence.

The cases related to Indigenous Peoples with BHR implications tend to follow a similar pattern: a state authorizes an extractive corporation (usually a mining firm) to begin its

⁷² IACtHR, *Indigenous Communities of the Lhaka Honhat (Our Land) Association (Argentina)* (2020), Merits, Reparations and Costs (Ser. C) No. 400, Operative Paragraph 7.

⁷³ IACtHR, *Indigenous Communities of the Lhaka Honhat (Our Land) Association (Argentina)* (2020), Merits, Reparations and Costs (Ser. C) No. 400, Operative Paragraph 9.

⁷⁴ Inter-Am. Ct. H.R., *Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina (Argentina)* (2020), Interpretation of the Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 420.

⁷⁵ Inter-Am. Ct. H.R., *Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina (Argentina)* (2020), Interpretation of the Merits, Reparations, and Costs, resolution 5.

⁷⁶ Inter-Am. Ct. H.R., *Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina (Argentina)* (2020), Interpretation of the Merits, Reparations, and Costs, para. 2.

⁷⁷ Inter-Am. Ct. H.R., *Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina (Argentina)* (2020), Interpretation of the Merits, Reparations, and Costs, para. 12.

⁷⁸ Inter-Am. Ct. H.R., *Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina (Argentina)* (2020), Interpretation of the Merits, Reparations, and Costs, para. 18.

⁷⁹ Inter-Am. Ct. H.R., *Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina (Argentina)* (2020), Interpretation of the Merits, Reparations, and Costs, paras 24, 29 and 30.

⁸⁰ Nuria Reguart-Segarra, 'Business, Indigenous Peoples' Rights and Security in the Case Law of the Inter-American Court of Human Rights' (2019) 4:1 Cambridge Business and Human Rights Journal at 109-130.

activities without any prior consultation with Indigenous Peoples that live in that area and that are the ancestral owners of that land. These cases demonstrated a trend of dubious practices in how mining permits are obtained, usually through the presentation of false documentation, bribery, or taking advantage of loopholes in regulations.

For the field of BHR, the Advisory Opinion and the *Lhaka Honhat* case provide a minimal set of duties on how to protect the right to a healthy environment, including but not limited to the protection of Indigenous Peoples under the ACHR. The Court also refers to the importance of the UNGP, particularly on issues related to extractive industries. For example, AO 23/17 uses the first pillar of the UNGP to reaffirm the duty of the state to protect the right environment as well as to assure that independent monitoring and accountability mechanisms are in place. This is later restated by the IACtHR in the case of the *Miskito Divers* and in *Martina Vera*.

The Court also makes a brief reference to the second pillar of the UNGP, by stating that businesses must respect, prevent, and mitigate negative human rights impacts caused by their activities. A similar phrasing is later used in *Miskito Divers*. The Advisory Opinion also establishes the duty of states to assure that Environmental Impact Assessments are available so that Indigenous Peoples can make an informed decision on whether to support a development project or not.

In *Lhaka Honhat*, the IACtHR does not use the UNGP but considers that the duty to protect environmental rights of Indigenous Peoples also applies to private individuals. Therefore, "(...) States have the obligation to establish adequate mechanisms to monitor and supervise certain activities in order to ensure human rights, protecting them from actions of public entities and also private individuals".⁸¹

As per Article 67 of the ACHR, the decisions of the IACtHR are binding and final. The standards set by the Court have significant influence in laws, policies and national litigation in state parties. Under the case law of the Court, the duty to protect includes the need to regulate and prevent adverse impacts on human rights from private activity. Although this principle has been used to determine the scope of Article 1.1 of the ACHR (obligation to respect rights) and Article 2 of the ACHR (domestic legal effects), the application of this norms could take the Court to order different measures of reparations, including -for example- the adoption of mandatory due diligence regulations.

It is important to consider that the decisions included in this paper are not the final word on the right to environment, the protection of dignified conditions of work, the protection of social rights or the protection of Indigenous Peoples. Their importance relies on the fact that these are opening the doors for victims and human rights defenders to engage the IAHRs on issues related to BHR, particularly the UNGP. In these cases, the Court reaffirms the importance of access to justice, access to information and participation of

⁸¹ IACtHR, *Indigenous Communities of the Lhaka Honhat (Our Land) Association (Argentina)* (2020), Merits, Reparations and Costs (Ser. C) No. 400, para. 207.

the public on environmental affairs. Although these rights are protected under the ACHR, the case law of the IACtHR provides binding case law to what the state must do to fulfill these rights.

The case law of the IACtHR on social and environment are filling a legislative gap that currently exists in Latin America. Therefore, a case from the IACtHR could eventually have a form of reparation ordering a state to adopt specific laws related to mandatory due diligence by businesses.

To conclude this section, it is important to highlight the entry into force of the Escazú Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean in 22 April 2021. This treaty will contribute to create a legal framework to make states regulate and protect its population from potential negative impacts of business activities.

This treaty is an ambitious regional effort to create a Latin American and Caribbean framework to protect the environment and to assure that Indigenous Peoples do not get disproportionately affected by economic activities. Although it is early to predict the impact of the Escazú Agreement,⁸² there is no doubt the IACtHR will use this treaty to assess responsibilities of states in relation to the environment, assuring access to information, participation, and access to remedies.

5.- Conclusions and the road ahead

We believe that significant legal change on BHR in Latin America, at least in the short term, will be triggered by the decisions of the IACtHR. As stated in the introduction, the adoption of National Action Plans by some Latin American countries has not materialized in significant legal changes in the region. This does not exclude the possibility that legal change might also happen from the adoption of a Due Diligence Directive by the European Union. But for the purpose of addressing the adverse impacts or violations of human rights perpetrated by private businesses on marginalized groups, the IACtHR is the best positioned to establish concrete state obligations to regulate and prevent such harms.

In the next few years, the IACtHR will decide on important decisions, both contentious cases and advisory opinions, with significant implications on BHR. As a preliminary conclusion, we would like to highlight some of these cases:

- Case of Tagaeri and Taromenani Indigenous Peoples vs. Ecuador: This is the first case where the Court will address the responsibility of the state for breaching the rights of Indigenous Peoples in Voluntary Isolation. This might be the first case the IACtHR may assess the impact of Constitutional economic norms fostering investment to the detriment of Indigenous Peoples living in naturally

⁸² *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement)*, 4 March 2018 (entry into force: 22 April 2021).

protected areas. The hearing of the case took place in August 2022 and a decision is expected in the second half of 2023.

- Case of La Oroya rural community vs. Peru: The case focuses on the impact to the rights to health and to a clean environment of a rural community impacted by the functioning of a smelter in their community, located in the Peruvian Central Andes. For more than 100 years, this smelter has carried its activities without any concern for the environmental degradation and impact to the health of the community. For that reason, people have been forced to leave their ancestral territories as the soil was ruined. Those that stayed have a disproportionate number of inhabitants with cardiorespiratory problems and cancer. The hearing of the case took place in October 2022 and a decision is expected in the second half of 2023.

- Advisory Opinion on the firearms industry and human rights: The IACtHR has accepted the request for an Advisory Opinion by Mexico to study the responsibility of private businesses "engaged in the manufacture, distribution, and sale of firearms, in relation to violations of the protection of the rights to life and humane treatment arising from their negligence when developing their commercial activities", as well the duties of state to regulate such activity. Last year, the Mexican government filed lawsuits against firearms companies in U.S. courts, but these were dismissed. This might be the first time where the IACtHR might have to look closely to activities of private entities to establish state obligations. The IACtHR is accepting the submission of amicus briefs until 10 July 2023, for a decision in early 2024.

- Advisory Opinion on Climate Emergency and Human Rights: The IACtHR has accepted a request for an Advisory Opinion (AO) submitted by Chile and Colombia to determine what are the state duties to address the climate emergency under the ACHR. The questions include issues related to policies to address climate change, access to information, transparency and justice, international cooperation, climate migration and protection of insular and coastal states. The IACtHR is accepting the submission of amicus briefs until 18 August 2023, for a decision in early 2024.

As it can be seen from the cases that have reached the IACtHR, the main legal and policy changes regarding the field of BHR in Latin America will come via the decisions of the IACtHR. This does not condition or limit the possibility for states, particularly those that are party to the ACHR, to adopt laws and policies outside the scope of the IACtHR. However, except for countries adopting National Action Plans, implementation of BHR and the UNGP has been limited. Therefore, it is important for the IAHRs, particularly the IACtHR to continue developing a comprehensive case law that can help states, businesses, and civil society to advocate for BHR norms and policies, including the environment.