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Power and Resources

Can Climate Change Be Fought in International Human Rights Courts?

The Potential and Limitations of the Law with Regard to Climate Change Issues

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The environment and climate change are increasingly posing key challenges for the courts. Their judgements can send out important signals. However, not least in the international context, it is clear that these institutions wield varying degrees of influence – and it is difficult to implement their verdicts.

"Climate change is a threat to global security that can only be dealt with by unparalleled levels of global co-operation. It will compel us to question our economic models and where we place value; invent entirely new industries; recognise the moral responsibility that wealthy nations have to the rest of the world; and put a value on nature that goes far beyond money."[1] This statement was made by British naturalist and filmmaker Sir David Attenborough, in a moving speech to the UN Security Council on 23 February 2021.

Meanwhile, both nationally and internationally, climate change and environmental issues are at the top of the political agenda. On 8 October 2021, the UN Human Rights Council, in a resolution, announced the importance of recognising a clean and healthy environment as a basic human right. Many people, however, feel that politicians are still not doing enough. Hence, activists have sought to not only sue companies but also states in a bid to force them to take action on climate change (a phenomenon known as climate lawsuits). These lawsuits are no longer uncommon and have a good chance of success, as shown by last year's decision by Germany's Federal Constitutional Court.[2] In its ruling, the Court's First Senate stated that parts of the German Climate Change Act of 12 December 2019 are incompatible with fundamental rights. What is particularly surprising and somewhat controversial is the reasoning behind the decision of Germany's supreme court. Article 20a of Germany's Basic Law obliges the state to protect the natural foundations of life, "mindful also of its responsibility towards future generations". From this, the judges derived a generational right. This means that inadequate climate policies today could curtail the rights of future generations.

International human rights courts have a key role to play when it comes to climate-related issues and disasters, given that they transcend borders. There are three of these courts in existence: the European Court of Human Rights (ECtHR) established in Strasbourg in 1959; followed 20 years later by the Inter-American Court of Human Rights (IACHR) in San José (Costa Rica); and, after the turn of the millenium, by its African counterpart in Arusha (Tanzania), which delivered its first judgement in 2009.[3] The Latin American region has been a pioneer in the area of climate litigation. Due to a lack of specific proceedings before the African Court of Human and Peoples' Rights to date, this article will focus on cases brought before the Inter-American and European Courts of Human Rights. The article will thereby examine what role international courts can and should play with regard to climate change.

Proceedings before the Commission and Court in the Inter-American System of Human Rights

In Latin America, the legal discourse on environmental law is shaped by what is now a sizeable number of national lawsuits and court decisions. Among the most famous are the judgements of Colombian courts (from 2016 and 2018) on the independent legal character of the Río Atrato River and the Colombian rainforest. The impact of these groundbreaking decisions has been felt far beyond the country's borders. In recent years, Brazil has also seen an increase in the number of court cases relating to climate disputes.[4]

Indigenous protest against gas flaring in the Ecuadorian Amazon: In the past, the Inter-American Court of Human Rights has, in several cases, derived a right to a healthy environment from the right of indigenous communities to "progressive development". Source: © Johanna Alarcon, Reuters.

But let us begin by looking at the inter-American human rights system. With the Commission on the one hand and the Court of Human Rights on the other, it comprises two institutions that are tasked with monitoring human rights as stated in the American Convention on Human Rights (ACHR). The Commission predates the Court and, unlike the Court, deals with individual and collective petitions. The ACHR was adopted as a regional and multilateral treaty in 1969 and has been in force since 1978. The Convention itself does not contain any specific provision on the right to a healthy environment. It is only in the Additional Protocol of San Salvador (from 1988, in force since 1999) that the "right to a healthy environment" is mentioned in Article 11. However, this may not be invoked before the Inter-American Commission or the Court. Such an assertion only applies to the right to education and trade union rights under Article 19(6) of the Additional Protocol.

The Inter-American Court of Human Rights identifies the right to a healthy environment as a human right.

Nevertheless, the Court has ruled on the violation of the right to a healthy environment on several occasions. This has been done in cases involving indigenous peoples, based on the following reasoning: the "right to a healthy environment" must be considered as part of the right to "progressive development" (Article 26 ACHR) because, under the Charter of the Organisation of American States, member states are obliged to ensure "integral development" for their peoples. Similarly, the IACHR has previously linked the violation of the right to a healthy environment to the violation of the right to life, to personal or collective integrity, and to other economic, social, cultural, or environmental rights.

This is well illustrated in the case of Lhaka Honhat v. Argentina. In this 2020 case brought before the Court, the latter held that Argentina had violated an indigenous group's right to a healthy environment, cultural identity, food, and water.[5] In doing so, the IACHR based its decision on Article 26 of the ACHR, namely on economic, cultural, and social rights.

A document of particular relevance to the climate debate in the Americas is the Inter-American Court's Advisory Opinion on the Environment and Human Rights. This document, running over 100 pages, dates from 2017. Such an opinion may be requested by any member state in order to clarify the interpretation of an article of the ACHR. Once issued, the Court's advisory opinion is binding. This request, which was made by Colombia, dealt with questions regarding the right to life and to humane treatment. In its judgement, the Court clearly identified the right to a healthy environment as a human right. In addition, the document sets out in detail the various obligations of states, such as mitigating serious environmental damage, drawing up emergency plans, and providing for public participation. Another important element is the provision of effective legal pathways in order to review member states' environmental policies.

In the Americas, environmental law is key to guaranteeing collective, not just individual, rights. This applies particularly to cases involving indigenous peoples, Afro-American populations, or rural communities. According to the IACHR, there is an inseparable link between the environment, territory, and natural resources. These must be preserved to ensure the survival of the people who use the environment. Thus, from the perspective of the IACHR, there is a close link between guaranteeing the right to a healthy environment, on the one hand, and the life, integrity, and health of indigenous peoples, on the other. This includes other related human rights, such as the right of access to water, education, and culture.

Besides ordering financial compensation for damage caused by the defendant, the Court

also applies a holistic approach to reparations; i.e. in addition to compensation of the damage, this includes ensuring it is not repeated, as well as the imposition of judicial or administrative sanctions on those responsible. In this manner, the IACHR obliges states to take a broad range of actions. This includes remediation of the environmental damage caused; amending and/or repealing certain laws and policies related to the environment or aspects of environmental protection; initiating legal proceedings against responsible officials or economic actors; a public apology for the damage caused to victims and their families; and relocation of those affected to areas similar to those that are now contaminated or otherwise affected.

The inter-American system is setting the pace with regard to environmental case law.

This wide range of possible verdicts gives an indication of how difficult it is to enforce these rulings in practice. The IACHR recognises the fact that the implementation of judgements in climate lawsuits, and also other cases, is the weakest point in the system, and that in some cases implementation is not even attempted. Hence, in 2015, the IACHR established a separate department to monitor compliance with its judgements. Over the last few years, this has made it possible to track all cases that are in the implementation phase. While the establishment of this unit certainly represents a step forward, it does not replace the will of governments to actually implement judgements. It must also be taken into account, of course, that ensuring compliance with environmental reparations is a hugely complex task.

An intense judicial debate is currently underway about cases of this kind. To illustrate this, we will consider a few cases that are currently pending before the Court and the Commission.

A current lawsuit, which has been pending before the IACHR since 2020, relates to the Tagaeri and Taromenane peoples, regarding potential rights violations by Ecuador.[6] These are two indigenous and reclusive groups that

Devastating flames: Citing the deadly 2017 forest fires, six Portuguese children and youths have sued their country and 32 other states before the European Court of Human Rights, invoking their right to life. Source: © Pedro Nunes, Reuters.

are isolated from the outside world. Some experts speak of "ecosystemic" peoples because close contact with the environment is necessary for their survival. Mining companies have encroached upon their territory. It will be interesting to see how the IACHR rules on this case.

One of the most recent climate lawsuits, still awaiting a ruling by the Inter-American Commission, was filed by a group of Haitian minors in early 2021. They claim a violation of their rights by a toxic landfill in their neighbourhood, exacerbated by the effects of climate change. They base their arguments on the rights of the child (Article 19 ACHR) and the right to live in a healthy environment (Articles 4 and 26 ACHR).

Another case still pending before the Commission involves the Athabascan people of northern

Canada, who have linked the fragmentary regulation of carbon emissions by Canada to climate change and, more specifically, to above-average temperature increases in their settlement areas. In this case, the indigenous people perceive a causal link between the lax legal situation and the violation of their rights to culture, property, health, and the foundations of their self-sustaining economy.

It can thus be said that the Inter-American Court and Commission have already built up a comprehensive body of environmental case law, so the inter-American system is setting the pace in this respect. Nature is already recognised as a legal subject, with simultaneous reference to certain human rights. For the time being, it remains uncertain whether the observed enforcement deficit of the IACHR will also continue to be a determining factor with regard to climate lawsuits.

Cases before the European Court of Human Rights

The European Court of Human Rights has not yet issued a judgement on a climate lawsuit. This is mainly due to the fact that neither the European Convention on Human Rights (ECHR) nor any additional protocol stipulates the right to a clean environment. Unlike national courts, the ECtHR is limited to ensuring compliance with the obligations that states have assumed under the Convention in a manner that is binding under international law. For climate lawsuits, this means specifically that, in principle, the Court can only consider whether the dangers caused by climate change impair existing Convention rights to the extent that this can be judicially ascertained and evaluated by the Court; and furthermore to what extent this impairment is attributable to the defendant state under international law. For the ECtHR, however, the ECHR is a "living instrument". This means that the Court always interprets the Convention on the basis of current social and economic conditions.[7] It has already demonstrated this in more than 360 decisions on environmental law issues. For environmental law, this means that the Convention must be consistent with the relevant norms of international law. In this manner, all relevant international rules and regulations that apply to relations between parties are taken into account.

The transformation that is so sorely needed can only be achieved at the political level.

Several climate lawsuits are currently pending in Strasbourg.[8] Firstly, there is the case of a group of senior women in Switzerland who think that their country should increase efforts to combat climate change. Specifically, they claim that Switzerland is experiencing more frequent heatwaves due to climate change, and that they are at heightened risk because of their age, as evidence shows that excess mortality rates are higher for elderly women during heatwaves. Another lawsuit has been filed by climate activists who are opposed to new oil drillings in Norway, claiming its effects will adversely affect their livelihood. However, the case that has drawn the most attention is a lawsuit filed by six children and youths from Portugal against their own as well as against 32 other countries. The case relates to a huge forest fire in 2017 in which over one hundred people lost their lives. The plaintiffs believe global climate change was partly responsible for the devastating wildfires. Because of the deaths, their suit is primarily based on the right to life, guaranteed in Article 2 of the ECHR. The lawsuit seeks, on the one hand, to force the countries sued to improve their national climate targets, and, on the other hand, to oblige their internationally active corporations to reduce emissions. The plaintiffs are not alone regarding their high expectations of this lawsuit. A ruling in their favour, however, would require the Court to change its current practice.

The ECtHR awards "just satisfaction" to injured parties in accordance with Article 41 of the ECHR.[9] To date, the Court has limited this to

monetary compensation in the form of damages. Unlike the IACHR, it has not made any judgements relating to performance,[10] such as a ruling that specifically mandates a reduction of emissions.

The Limitations of Climate Lawsuits: What Can the Courts Actually Achieve?

To sum up, the IACHR and ECtHR have adopted different options and approaches in terms of both prerequisites and consequences. It remains to be seen how the ECtHR's climate jurisprudence will develop. However, with particular reference to the resolution of the UN Human Rights Council, it is important to stress that environmental protection and human rights should be treated as inseparable. The IACHR has pointed the way forward in some recent cases. Perhaps European judges will look across the ocean at what their American colleagues are doing, even though, of course, their experiences cannot all simply be seamlessly transferred to Europe, given that their legal systems are different.

The most recent case before the ECtHR illustrates the limits of the courts when it comes to climate lawsuits. The ECHR is a typical international law treaty from the 1950s, with a focus on its individual member states. However, 33 countries are being sued in the Portuguese case. This already raises complicated issues of admissibility. The doctrine of exhaustion of legal remedies applies in international courts. This means that national courts are the first point of legal recourse, and international courts can only get involved as a last resort. But is it reasonable to require individuals to file so many complaints in so many different countries? Is it not more practical to bundle them into one proceeding before an international court? After all, environmental damage does not stop at national borders. Climate change is a global problem and its impact has a global dimension. How much can one state actually achieve? Reducing emissions in one country feels like a drop in the ocean. Isolated measures by individual countries seem to achieve little in practical terms. As such, national climate lawsuits in general could be called into question. However, a departure from the doctrine of exhaustion of legal remedies seems unthinkable. International courts would not have the capacity to handle the workload if national courts were no longer the first point of recourse. Even under current conditions, the ECtHR has been struggling to cope with the deluge of complaints for decades. Regardless of this, every country has to play its part in combating climate change.

However, for the time being, a court ruling will not save a single tonne of CO_2. The global task to reduce carbon emissions is too great for a national or international court to accomplish. The transformation that is so sorely needed can only be achieved at the political level. Climate change policy cannot be entrusted to judges who lack the necessary expertise and resources. However, as shown by the recent ruling by Germany's Federal Constitutional Court, such landmark court decisions can send out an important signal. They also ramp up the political pressure. Climate judgements can, therefore, have a crucial knock-on effect. Even though the majority of climate lawsuits are heard in national courts, the IACHR and ECtHR can send out clear signals and highlight potential solutions, either through their declarations or through stipulating specific actions in their judgements. It should come as no surprise that climate litigation is set to increase at every level as the effects of climate change become ever more evident.

– translated from German –

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1 Attenborough, Sir David 2021: Sir David Attenborough on Climate and Security – Security Council Open VTC, United Nations via YouTube, 23 Feb 2021, in: https://youtu.be/u7I5Ala6KYc [21 Apr 2022].
2 Federal Constitutional Court 2021: Beschluss des Ersten Senats vom 24.03.2021, 1 BvR 2656/18, Rn. 1-270, BVerfGE 157, 30-177, Klimaschutz, in: https://bit.ly/3L9j7D1 [21 Apr 2022].
3 Regarding discussions on climate change in the African context, see the "Ogoni vs. Nigeria" case.
4 These include a class action lawsuit filed by 71 NGOs against the Environment Ministry requesting that the National Climate Change Policy be updated. London School of Economics and Political Science, Grantham Research Institute on Climate Change and the Environment: Laboratório do Observatório do Clima v. Minister of Environment and Brazil, 26 Oct 2021, in: https://bit.ly/395gdBw [9 Jun 2022].
5 Corte IDH 2020: Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina (Judgement of 6 Feb 2020), in: https://bit.ly/3K2INQs [28 Mar 2022].
6 Corte IDH 2020: Pueblos Indígenas Tagaeri y Taromenane vs. Ecuador (background report dated 30 Nov 2020), in: https://bit.ly/3Mkhu5J [19 Apr 2022].
7 Praetor Verlag, Europäische Menschenrechtskonvention: Methodik der Konventionsauslegung, in: https://bit.ly/3jXvKW7 [19 Apr 2022].
8 ECtHR: Claudia Duarte Agostinho et al. v. Portugal et al., 39371/20; ECtHR: Verein KlimaSeniorinnen Schweiz et al. v. Switzerland, 53600/20; ECtHR: Unknown v. Austria (filed 25 Mar 2021); ECtHR: The People v. Arctic Oil (filed 15 Jun 2021).
9 Article 41 ECHR: "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party." ECtHR 2013: European Convention on Human Rights as amended by Protocols Nos. 11, 14 and 15 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, S. 25, in: https://bit.ly/3LYOtwV [4 May 2022].
10 Similarly, the Practice Direction only mentions the theoretical possibility ("only in extremely rare cases") that the Court could "consider a consequential order aimed at putting an end or remedying the violation in question." ECtHR 2007: Just satisfaction claims, in: https://bit.ly/3LL9Q4m [4 May 2022].