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Health Law, International Health Law, Comparative Health Law, Health Policy, Health Cases, Medical and Biomedical Law

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Editorial – Volume 1 – nº 02- 2023

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CLIMATE CHANGE AND THE RIGHT TO HEALTH IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS [1]

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Abstract

The environment we inhabit constitutes an important determinant of public health. One of the most pressing contemporary issues of international relations is climate change, whose effects extend towards the full enjoyment of the right to health. Over the past three decades, the international climate change regime has made several attempts to frame state's legal obligations concerning climate-related risks. Normative discourses have long conflated human rights, the environment, and public health, however, legal practice has only recently started pondering about climate-sensitive risks to global health. In this sense, the Inter-American System of Human Rights has become an interesting forum to inquire the legal duties states have on public health due to the negative impacts of climate change, specifically with regards to the Advisory Opinion 23/17 and Resolution 3/2021 dictated within the Inter-American System of Human Rights.

Keywords: Right to health, climate litigation, Advisory Opinion OC-23/17, Resolution 3/2021, Inter-American System of Human Rights, climate change regime.

Introduction

The relation between the global phenomenon of *climate change* and the right to health is a topic currently under discussion within the international legal studies. Whereas in other fields such as international relations or international security the effects of the gradual, sustained, and widespread increase in global temperatures have clearly been characterized in terms of a *risk*, a direct or indirect *threat* to human health, or even as a *threat multiplier* of the many factors that impinge upon public health, legal scholarship has been

unable to provide a clear response on the relation between both.

Over the years there has been an increasing recognition of climate-sensitive risks to public health. There are many ways in which the adverse effects of climate change affect the natural and human environments, the water and food we consume, the sanitary conditions of the spaces we inhabit, the morbidity and mortality of diseases, contribute to extreme weather events, as well as, ultimately, the conditions necessary for the full enjoyment of the highest attainable standard of physical and mental health that legal scholarship defines as the *right* to health. The weather is a basic element of our reality that determines the well-being of persons, communities, and the planet. No matter how evident that may seem, however, the long-overdue and fragmented responses to the challenges climate change poses on the right to health are far from evident.

Firstly, there are different values in competition when responding from different places to this intersection. Two areas of law that often come together to address the impacts of climate change on public health are *Human Rights* and *Climate Change* law. Both promote the well-being and protection of common values of the international community, however, emphasizing in either anthropocentric, eco-centric or

holocentric interests –that is, on people, nature, or the planet. The international climate change regime has developed in order to promote the protection of the climate *per se*; conversely, international human rights law endeavors to protect people individually on their own rights (Huichi Sancho, 2014).

Secondly, both issue areas have been addressed through a human rights-based approach. The international system is characterized as an *anarchic* space, in the sense that there is no entity that stands above sovereign states. This implies a basic premise of freedom of action whereby each state is equally powerful to decide how to proceed in both its domestic and international affairs, which often becomes a problem when pursuing common goals at the international level. Human rights discourse, however, provides the normative foundations to frame and direct governmental action. Hence, when it comes to human rights it contributes with universal legal frameworks that legitimize and frame cooperative actions, establishing *legal commitments* and *standards* in health policies, programs, and practices (Gostin & Meier, 2020) or reminding governments their duties (Riedel, 2011). Regarding climate change, it provides a complementary source of *legal obligations* that entices government action towards the examination of environmental laws, policies, and assumptions (Phelan, 2020,

p 429). Nevertheless, both regimes operate in parallel (Cullet, 2016), and do not necessarily converge.

Thirdly, international institutions have found difficulties framing climate change impacts on the international agenda. Within United Nations fora States have attempted the *securitization* of climate change by presenting this challenge in terms of human security. Security is one of those evolving concepts that has both widened and deepened over time –far exceeding its traditional focus on sovereign States waging war or engaged in armed conflicts—including new actors, issue areas, and instruments to solve conflicts. Hence, securitizing climate change would prompt to stop thinking in the terms of costs and benefits proper to political discussion, while providing a sense of threat and urgency proper to the Security Council or international agreements that take priority in the universal agenda (Gupta & Bosch, 2021; Bustreo & Doebbler 2020).

Fourthly, international law has only recently been confronted with legal inquiries about the relation between climate change and the right to health. Despite an abundant corpus of international declarations –some establishing timid connections while encouraging further studies and analysis of this intersection, others soundly ascertaining this relation—the absence of legally binding instruments stating clearly defined

international obligations on the matter has brought forth a new trend of *judicialization* of climate change concerns. A process also known as *climate litigation*.

Even though climate change is a topic of ample legal interest, the question of its justiciability remained unanswered until recently. As of 2021 the different stances taken by the Human Rights Council and the High Commissioner on Human Rights revealed a lingering debate on whether a clear recognition of the conditions under which human rights have been violated because of climate change should be made (Gupta & Bosch, 2021, p. 552). Legal questions about a current or potential dispute may be brought to an international tribunal, which will make use of its advisory or contentious jurisdiction (Bustreo & Doebbler, 2020, p. 104); in non-justiciable security issues that transcend the domestic borders of a State, the involved parties may try to find solutions in regional or international organizations (Altwicker, 2021, p.81). There has been a trend of climate litigation whereby states request domestic and international judicial organs the clarification of the international obligations concerning climate related impacts, and the relation between human rights and environmental degradation.

In the following sections, this work will engage with the interrelation between climate change and the right to health. At the international level there have been many attempts to frame this connection in order to promote subsequent intergovernmental cooperation, hence, the first section will address health concerns made from the environmental and human rights regimes. Moreover, the international climate change regime has developed specific interlinkages with the right to health, that will be addressed in the second section. In the third section we will engage with the right to health under the Inter-American System of Human Rights, analyzing "Resolution 3/2021. Climate Emergency. Scope of Inter-American Human Rights Obligations", issued by the Inter-American Commission on Human Rights, and the Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia to the Inter-American Court of Human Rights, regarding *State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity*. The last section concludes with some final remarks.

1. Health concerns from environmental and human rights regimes

At the global level, there is an ample number of international instruments referring to the connection between public health and environmental determinants, which only recently started exploring its connection with *climate change*. Ever since the first international conference about environmental issues took place in Stockholm, back in 1972, the interconnectedness between health and nature became an established assumption in subsequent international discourse, for an ambivalent relation was proclaimed where "man is both creature and moulder of his environment" and "the natural and man-made [environment], are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself" (paragraph 1 Stockholm Declaration). The 2012 Outcome document of the United Nations Conference on Sustainable Development, celebrated in Rio de Janeiro, also highlighted the importance of the environmental component for public health, inasmuch as it is considered one core determinant of the population's health (paragraph 138, Rio+20). The United Nations Environment Assembly adopted in December 2017 a resolution on environment and health whereby the international community affirms the strong interlinkages between environment and

health (paragraph 1, UNEP). Likewise, the United Nations body for assessing the technical and socio-economic knowledge on climate change, the International Panel on Climate Change (IPCC), has been stressing since its first report from 1990 the disruptive potential that climate change poses to public health, across its different levels of implementation by stating that:

> *Major health impacts are possible, especially in large urban areas, owing to changes in availability of water and food and increased health problems due to heat stress spreading of infections. Changes in precipitations and temperature could radically alter the patterns of vector-borne and viral diseases by shifting them to higher latitudes, thus putting large populations at risk.*

Human rights instruments have also tried to determine the ways in which climate change affects the full enjoyment of human rights, such as the right to health (Riedel, 2011). The 1945 United Nations Charter stipulates in its article 55.b that the creation of stability and well-being of the international community requires the promotion of solutions of international economic, social, health, and related problems. Nevertheless, it has only been since the Human Rights Council adopted on 28th March 2008 its resolution 7/23 on *Human rights and climate change*, requesting the Office of the United Nations High Commissioner for Human Rights to conduct a detailed analytical study on the relationship between climate change and

human rights, that international organs have adopted a series of resolutions addressing this linkage. The Council considered that climate change "poses an immediate and far-reaching threat to people and communities around the world" (Resolution 7/23 March 2008), that "climate change-related impacts have a range of implications both direct and indirect, for the effective enjoyment of human rights" (Resolution 10/4 March 2009), that a human rights-based approach to climate change can be conducive to better policy making in national and global health areas (Resolution 18/22 September 2011), that States urgently need to address human rights concerns within the international climate change regime forging a stronger interface and cooperation between the human rights and climate change communities (Resolution 26/27 July 2014), but it was only in 2015 that the Council considered there is a need for a panel discussion and analytical study on the adverse impact of climate change on State's efforts to progressively realize the right to health (Resolution 29/15 July 2015).

In the case of the World Health Organization, even though this organization has been in contact with the IPCC works since 1993, collaborating in the drafting of the 1996 document "Climate change and human health" and pushing for the introduction of the health-dimension to the climate agenda

(WHO, 1998), it is also since 2008 that this organ has endeavored to study and analyze in detail the risks of climate change for human health, developing workplans and specific plans of action (WHO, 2008; WHO, 2009).

Moreover, and despite the international consensus about the real threat climate change poses to public health –the World Health Organization describes climate change as the biggest global health threat of the 21st century, the Secretary General of the United Nations deems the unprecedented rise in global temperatures to mark the beginning of an era of global boiling, turning the *potential* risk into an *actual* danger— from a legal perspective none of the aforementioned instruments possess a legally binding force that contributes to shape interstate relations. However important they may be, declarations made at the international level are usually framed in political terms that contribute to promote further cooperation and the development of normative discourses, but which do not to delimit the scope and purview of what is deemed a legitimate course of action for States. Moreover, the specific inquiry upon a State's legal obligations to protect, respect and fulfill people's right to health from the negative impacts of climate change is but a recent concern.

2. Health concerns from the international climate change regime

Both global health and climate change are complex issue areas that demand the cooperation of members from the international community. Climate change is often described as a *wicked*, *polycentric*, and *multidimensional* problem that requires the joint endeavors of as many actors as possible to halt and reverse the rising temperatures worldwide, for greenhouse gas emissions generate externalities on territories located beyond the places where they were produced, impinging upon the quality of global commons such as air and oceans in a manner that highlights the limitations of a territorially based notion of sovereignty. On the other hand, global health is conceived as the current conceptualization of public health in a globalized world, where the existence of external factors that promote interconnectedness -such as migratory flows, international trade, or global tourism- influence what happens inside the borders of a country, demanding responses not just from a single State, but from a collectivity of subjects of international law and actors of the international community. The recent covid-19 pandemic is enough proof of that.

In both cases the isolated actions of one or a few States soon prove to be insufficient, hence, actions through international and global structures are required. But the particular form under which state cooperation ought to proceed is far from self-evident. Whether through temporary or permanent, deep or shallow forms of collective action, states ponder among many alternatives to solve different international problems (Keohane & Victor, 2016). In some cases, a formally structured international organization is preferred while in others it could be a less formalized and more flexible forum of cooperation, at times only a single international agreement can be reached while others a more complex structure emerges from what no one deemed at the time could prosper to the extent it would in the future. The global response to the climate change issue is one example of the latter.

What is currently known as the international climate change regime –that is the combination of principles, rules, procedures, and practices that revolve around one issue area, through both formal and informal structures of cooperation— started as the concern of the scientific community in an initial report that expressed a rather unsettling phenomenon of sustained and generalized increase in global temperatures (Meyer, 2016). However, from a public policy perspective, this issue rapidly

turned from a mere objective problem unknown to most to a core policy issue of the United Nations agenda. During the 1992 Earth Summit celebrated in Rio de Janeiro, one of the four key documents adopted alongside the famous Rio Declaration on Environment and Development, the Convention on Biodiversity, and Agenda 21 was the *United Nations Framework convention on Climate Change* (UNFCCC).

The UNFCCC is an international agreement that settled the basic principles of the global response to climate change, recognizing the common but differentiated responsibilities principles according to which each country should be made responsible in accordance with the extent they had contributed to the current climatic crisis (art. 4 UNFCCC). This instrument marked the beginning of a series of periodic conferences known as the Conferences of the Parties (COP), rules of procedures, and decisions creating an expanding global governance structure. Most commitments made back then, however, supposed the adoption of domestic policies, such as *inter alia* programs, national inventories of anthropogenic emissions, or technology transfers in order to mitigate and adapt to the adverse effects that on the natural and managed ecosystems, socio-economic systems or on *human health* and welfare (art. 1 UNFCCC). That is, the international climate change regime

recognized from its inception the interlinkages between climate change and health.

Considering the UNFCCC was only a *framework* agreement, further instruments were needed to regulate the complete standards State Parties would have to abide. First came the 1997 Kyoto Protocol, which encountered arduous opposition during its implementation due to construing the principle of common but differentiated responsibilities as only demanding the commitment of the 39 industrialized nations that were members of the OECD back in 1992 –usually known as the countries of the Annex 1 list. The difficulties in implementing this protocol delayed 8 years its entry into force, to a date proximate to the deadline set to review their commitments in 2012, this prompted states to devise a new instrument to replace it that would be better suited to promote climate action. After many negotiations and failed attempts to produce a successor to the Kyoto Protocol, in 2015 the international community adopted the Paris Agreement.

The only reference to the right to health made in the Paris Agreement can be found in its preamble. On the eleventh paragraph the Parties acknowledge climate change is a common concern of humankind, for which they should, when taking action to address climate change, respect, promote and

consider their respective obligations on human rights, *the right to health*, etc. No further mentions are made in its preamble nor in its operative text.

Asides from these references found in the UNFCCC and Paris Agreement, both legally binding instruments which conform the international climate change regime, there are other *softer* statements of importance for global health. During COP26, that took place on November 2021 in Glasgow, United Kingdom, the international community set for the first time a health programme whereby the right to health became a central topic of discussion within this regime through the inclusion of a *Climate resilient health systems* and a *Sustainable low carbon health systems* initiative. During COP27, held on November 2022 in Egypt these health sector climate actions have been joined by a series of side events organized by the World health Organization, to promote transnational networks to further engage in this interconnection.

One of the biggest challenges the international climate change regime has had to confront is how to establish an adequate mechanism to promote further state action in compliance with their objectives. Adding a new dimension to climate change discussions in the form of *climate change & health* represents both an opportunity as well as an additional

concern to what is by definition a slow process of gradual and incremental advances (Allan, 2019; Falkner, 2016). This is the reason why a human rights-based approach has been employed for addressing both of these issues.

3. Health concerns in the Inter-American System of Human Rights

3.1. Right to health in the Inter-American System

Within the American continent, the right to health has been recognized in various international documents. Back in 1948 the *American Declaration of the Rights and Duties of Man*, adopted in the city of Bogotá, Colombia, stated in its article XI that "every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources". Considering this document was adopted decades before environmental issues became a universal concern, it is no surprise to find no explicit reference to either environmental or climatic impacts on human health.

This declaration was conceived from its genesis as a non-legally binding instrument, holding a political character, nevertheless legal scholars deem it of historical relevance given

its influence in subsequent international agreements such as the 1948 *Universal Declaration of Human Rights*, 1966 *American Convention on Human Rights*, and 1988 *Protocol of San Salvador*; it is also considered of legal relevance due to its applicability by the Inter-American Commission in cases where American States have not ratified the more recent regional agreements (Paul, 2016).

There are two regional agreements that establish the international obligations of American States. The main instrument is the 1966 American Convention on Human Rights, also known as Pact of San José, which was drafted having into consideration the American, European, and international covenants that were being negotiated at the time (Neuman 2010). Given its focus on liberal issues related to civil and political rights, no explicit mention is made to the right to health nor to a healthy environment. According to its article 77, however, this list of rights and freedoms may gradually be expanded with the adoption of subsequent protocols. Thusly, on November 17th, 1988, the State Parties to the American Convention signed the *Additional protocol to the American Convention on Human Rights in the area of economic, social and cultural rights*, also known as Protocol of San Salvador. Considering its emphasis on social issues, this international

agreement does provide for a right to health, in the following terms:

> *Article 10. Right to health. 1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. 2. In order to ensure the exercise of the right to health, States Parties agree to recognize health as a public good.*
>
> *Article 11. Right to a healthy environment. 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment.*

As of 2023, out of the 35 States that comprise the Organization of American States only 25 have ratified the Pact of San José, and only 16 have ratified the Protocol of San Salvador. The scope of these conventional obligations that bind the American region has been clarified by means of advisory opinions expressed by the Inter-American Commission of Human Rights. Despite the fact that these decisions are not legally binding, they serve as auxiliary means to precise the content of international obligations (Vio Grossi, 2018) while providing authoritatively interpretations that cannot be ignored by states when elaborating, revising or implementing their policies (Bustreo & Doebbler, 2020, p. 104). Two such instruments are of particular relevance to the legal relation between climate change and the right to health.

3.2. Advisory Opinion OC-23/17

The first instrument that ought to be mentioned is the Advisory Opinion 23/17 requested by the Republic of Colombia and issued by the Inter-American Court of Human Rights on November 15th, 2017. The Republic of Colombia made a formal submission to the Court on March 2016, inquiring how should the Pact of San José be construed regarding other international environmental agreements that refer to specific areas of protection. This submission formulates a battery of questions that extend beyond the objectives of this article, but the Court's decision manages to establish a clear relation between human rights and the environment –some of these issues engage with questions of jurisdiction, transboundary environmental harm, the precautionary principle, the autonomous character of the right to a healthy environment, and the interconnectedness between environmental protection and other human rights, such is the right to health (Sticca, 2018).

According to the Court,

> *110. (…) health requires certain essential elements to ensure a healthy life; hence, it is directly related to access to food and water. In this regard, the Court has indicated that health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. Thus, environmental pollution may affect an individual's health.*

In the process of construing the scope of the right to a healthy environment, the court deems environmental degradation –e.g., negative effects of climate change—to be harmful to the right to health. The human right to a healthy environment can be interpreted under two diverging valuations of what ought to be protected, which leads to the question of what is being protected whenever the right to a healthy environment is mentioned. Is protecting the environment –climate, rivers, seas, etc.—a value *in itself* or is it that protecting ecosystems or the biosphere matters because it contributes to the protection of other values such as human health? The Court determines both are correct. Human rights are characterized as interconnected and interdependent, this entails that although the human right to a healthy environment is an autonomous right, its detriment also impinges upon other substantive rights such as the right to health (paragraph 62, 64).

Paragraph 62 remarks that “the full enjoyment of all human rights depends on a suitable environment”, which is why states should address environmental damage inflicted upon the –particularly vulnerable to environmental degradation—right to health (paragraphs 64, 66). Moreover, while explaining this point it highlights in a footnote that a healthy environment is

among the *elements* required to adequately ensure human health:

> *Footnote 210. These essentials include food and nutrition, housing, access to clean potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.*

3.3. Resolution 3/2021

The second instrument that ought to be mentioned is Resolution 3/2021 entitled *Climate Emergency: scope of Inter-American human rights obligations*, adopted by the Inter-American Commission on Human Rights on December 31st, 2021. Contrary to what happened in the advisory opinion, where the Court dealt with the broad and unspecific subject of *human rights &* the environment, this instrument expressly addresses the impacts of climate change with the intention of ascertaining the conventional human rights of American States. Not only does this instrument claims an interconnection between climate change and the right to health, it goes further by recognizing in its introductory section:

> *(…) a directly proportional relationship between the increase in greenhouse gas emissions into the atmosphere and the frequency and intensity of meteorological changes, which implies the amplification of risks to societies, people and natural systems* (p. 4)
>
> *(…) the Commission recalls that climate change directly affects the right to a healthy environment, which has been recognized as an autonomous and*

> *justiciable human right by the jurisprudence of the organs of the Inter- American Human Rights System* (p. 5)

A clear correlation is established between climate change and the right to health, together with a broader valuation of the legal interests that will be protected (those of persons, societies, and nature). In a similar fashion to the tenor of the resolutions adopted by the Human Rights Council since 2016, the Commission emphasizes the different impact climate change causes to individuals and groups in vulnerable situations, such as children, elderly people, women, migrants, etc.

> *8. All persons within the territories or within the jurisdiction of the OAS Member States are subject to all the rights contained in the American Declaration of the Duties and Rights of Man and other inter-American and international instruments to which the State concerned is a party. Likewise, the right to a healthy, balanced and pollution-free environment is part of the set of rights that States must guarantee and protect by reason of their obligations at the national and regional levels. This in turn implies, as stated in Advisory Opinion No. 23 of the Inter-American Court, recognizing that this right also protects all components of nature as a legal interest in itself, even in the absence of certainty or evidence about the risk to individual persons. It is about protecting nature and the environment not only because of their connection with a utility for the human being or because of the effects that their degradation could cause on other rights of people, such as health, life, or personal integrity, but also because of their importance for other living organisms with whom the planet is shared, also deserving of protection.*

> *19. Women and girls face greater risks, threats and violations of their human rights, such as life, personal integrity and health, due to the adverse effects of climate change that increase all existing gender inequalities.*
>
> *20. Faced with migrant workers and others who mobilize for reasons directly or indirectly associated with climate change, States must guarantee (…) access to the right to health associated with climatic or meteorological phenomena to all people without discrimination based on national origin or any other reason prohibited under the contexts of human mobility.*
>
> *21. (…) children and adolescents have the right to enjoy a healthy environment and to live on a planet equal to or in better conditions than their ancestors. States should ensure that the impacts of climate change do not threaten their rights to life, personal integrity, and health because of their special sensitivity to temperature changes and vector-borne diseases.*
>
> *22. To reduce the impacts of diseases associated with climate change on the health of people who are older adults and people who are in a situation of disability, it is necessary for States to develop plans and policies for preventive care in medical care specifically on this type of risk, and to generate training programs for their caregivers or family members in case of emergencies or disasters caused by climate change.*

4. Final remarks

Whenever a public problem is framed as an *international issue* the ensuing question becomes how to promote the active collaboration and cooperation of the international community.

Neither a global threat such as climate change nor the provision of environmental conditions for global health can be solved by the isolated actions of one or a few states. Hence, the need to find proper international mechanisms to incentivize collective action.

Over time the international climate change regime has incorporated different dimensions into its fora, with the purpose of bringing legitimacy, participation, transparency, and accountability as well as a sense of urgency and threat that would stir up climate action. The linkages between the gradual, sustained, and widespread increase of global temperature and the right to health has served to that purpose, for the most part under the guise of a human rights-based approach.

Even though from a scientific standpoint this connection is nothing but obvious –humans inhabit natural and man-made environments that sustain life—from a legal perspective it isn't as clear as it could be. At the universal level there have been attempts to *securitize* climate-related risks to life, health, and nature, yet none of them has prospered. On the contrary, it has been by means of *judicialization* that the scope and purview of states obligations have become clearer. Two examples of this trend have been explained in the previous sections, under the cases of the Advisory Opinion OC-23/17 and Resolution

3/2021, adopted within the Inter-American System of Human Rights.

One additional example that has yet to be adjudicated, is the advisory opinion requested on January 9th 2023 by the Governments of Chile and Colombia to the Inter-American Court of Human Rights. In this submission two Latin-American countries request the clarification of 26 queries about the conventional obligations that bind the region concerning climate change, its causes and consequences. The second set of questions expressed in this document, regarding State obligations to preserve the right to life and survival in relation to the climate emergency, consults about the scope that States should give to their obligations under the Convention vis-à-vis the climate emergency, in relation to the determination of human impacts, including effects on health and on life (Chile y Colombia, 2023, p. 9).

The fact that within a highly formalized regional human rights system States still need to consult an international authority on the scope of *their own* international obligations, regarding the effects of climate change on the right to health reveals the current limitations of understanding about this linkage. Consequently, no matter how obvious this

interconnection may seem to the lay people, to the legal audience it still needs further analysis.

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