



# La Oroya Population v Peru: The Right to Development and the Right to a Healthy Environment Before the Inter-American Court of Human Rights

CASE NOTE

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## ABSTRACT

The Inter-American Court of Human Rights (IACtHR) has recently adopted the judgment on the case of La Oroya Population v Peru, condemning the Peruvian state for violations of several human rights, including the right to a healthy environment. The violations were caused by the contamination of the air, water and soil produced by the mining-metallurgical activities in the La Oroya Metallurgical Complex (CMLO), and the failure of Peru to regulate and supervise the activities of the CMLO. This case shows one of the challenging aspects of the right to development (RTD), meaning, when an important development project that advances some of the rights of the population by producing economic growth, also causes human rights violations, especially to the right to a healthy environment.

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## 1. INTRODUCTION

The Inter-American Court of Human Rights (IACtHR) has recently adopted the judgment on the case of *La Oroya Population v Peru*, condemning the Peruvian state for violations of several human rights, including the right to a healthy environment.<sup>1</sup> The violations were caused by the contamination of the air, water and soil produced by the mining-metallurgical activities in the La Oroya Metallurgical Complex (CMLO), and the failure of Peru to regulate and supervise the activities of the CMLO.<sup>2</sup>

As it will be explained in the fourth section of this case study, this case shows one of the challenging aspects of the right to development (RTD): Development projects, regardless of their perceived economic promise,<sup>3</sup> carry substantial implications for human rights,<sup>4</sup> especially for the environment.<sup>5</sup> Or, to put it more simply, a similar scenario would be the construction of a new dock that would generate electricity and provide employment opportunities for residents, but it would also necessitate the flooding of an ecosystem or town.

To provide a framework, the case study will first refer to the international framework that defines the RTD. Second, the article will go through the case law of the IACtHR that refers to the RTD. Unlike the African Charter on Human and Peoples' Rights (Banjul Charter),<sup>6</sup> neither the American Convention on Human Rights (ACHR)<sup>7</sup> nor the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)<sup>8</sup> contain a provision that expressly recognizes the RTD. However, this has not stopped the Judges of the IACtHR from using the Declaration on the Right to Development<sup>9</sup> as a legal basis for their argumentation on some judgments.

In this sense, to methodologically identify the relevant judgments of the IACtHR, the author used the new case law database of the IACtHR which allows one to look for keywords.<sup>10</sup> After looking for 'Declaration on the Right to Development' and 'Right to Development', the author found nine relevant results contained in dissenting and concurring opinions. Those votes will be analysed in the third part of this case study to trace the path of the Judges' reasoning that led to the Oroya case, which addresses the interplay between the RTD and the right to a healthy environment.

## 2. THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW

At the international level, the UN General Assembly (UNGA) adopted in 1986 the Declaration on the RTD. Article 1.1 of the Declaration indicates that 'every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental

freedoms can be fully realized'. Furthermore, the right also implies the 'full realization of the right of peoples to self-determination', especially over natural wealth and resources.<sup>11</sup> From that definition, three core components can be inferred:<sup>12</sup> 1) the active, meaningful, and informed participation of the population;<sup>13</sup> 2) the equitable benefit from the fruits or proceeds of development,<sup>14</sup> and 3) the self-determination over the natural resources.<sup>15</sup> In simple words, the RTD is an individual and collective human right focused on ensuring everyone can benefit from development and participate in the development process.

At the regional level, the Banjul Charter is the only legally binding document that, so far, contains the RTD.<sup>16</sup> Article 22 of the Charter establishes that all people 'shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'.

The two institutions that conform the African System of Protection of Human Rights had interpreted the obligations of States regarding the RTD. In this sense, whenever there are development projects that might affect communities, the States -primary duty bearers-<sup>17</sup> have the obligation to consult the communities,<sup>18</sup> to obtain their free, prior, and informed consent,<sup>19</sup> to ensure mutually acceptable benefit sharing -which includes just compensation-,<sup>20</sup> and, more generally, to 'creating conditions favourable to a people's development'.<sup>21</sup>

With that framework, the next section will analyse how the IACtHR has interpreted the RTD.

## 3. THE CASE LAW OF THE IACTHR ON THE RTD

Over the past twenty years, some judges of the IACtHR have used the RTD in their legal argumentation when drafting their votes. In this sense, the nine judgments that contain relevant votes identified through the methodology described in the introduction can be grouped into two categories: those that cite the UN Declaration and those that explicitly address the RTD.

The first group shows a common indicator. The Judges use the UN Declaration on the RTD to argue in favour of the interdependence and indivisibility of civil, and political rights, and economic, social, and cultural rights (ESCR). On the concurring opinions, the Judges use paragraph ten and article 6 of the UN Declaration to highlight the reciprocal dependency and non-hierarchy between those two sets of rights.<sup>22</sup>

The second group, namely, the one that contains the 'right to development', also shows a common indicator, all deal with human rights violations committed against Indigenous people.<sup>23</sup> In the first three opinions, the Judges only used the RTD as a demonstration of the collective

aspect of human rights when speaking about Indigenous people.<sup>24</sup> Hence, the right was not a central aspect of the deliberation but a tangent argument to argue the collective dimension of rights.<sup>25</sup> On the fourth opinion, the RTD occupies a more important role. Judge Ferrer MacGregor uses Article 22 of the Banjul Charter to demonstrate the existence of the right to self-determination of Indigenous and tribal peoples in international law.<sup>26</sup>

From this examination, two preliminary conclusions can be observed. On the one hand, neither the UN Declaration nor the RTD has been used significantly, meaning, to construct the legal argument on the existence of the RTD or its justiciability before the IACtHR. On the other hand, the RTD has been mainly named on cases related to violations of Indigenous communities.

#### 4. LA OROYA POPULATION V PERU

The case of La Oroya Population v Peru is significant for four reasons. First, it explicitly recognizes the right to a healthy environment. Second, it explores the relationship between the right to a healthy environment and development. Third, it addresses development without involving violations of Indigenous peoples' rights. Finally, three of the judges extensively analysed the RTD as a central part of their argumentation in their concurring opinion.

To provide some factual context, the CMLO was created in 1922 to melt and refine polymetallic concentrates.<sup>27</sup> At that time, and until 1993, Peru did not have specific legislation regarding environmental control and pollution prevention in the mining-metallurgy sector.<sup>28</sup> Furthermore, CMLO was the biggest metallurgic in South America and, for one century, the majority of the minerals of the continent passed through it to be treated.<sup>29</sup> It also became the main source of employment for the population of La Oroya.<sup>30</sup> CMLO is of such importance for the Oroyan population that a group of workers recently bought the company, after thirteen years of being non-operational.<sup>31</sup>

But that is only one side of the story. As it was recognized by the IACtHR,<sup>32</sup> the CMLO also caused several human rights violations, including the violation of the right to a healthy environment,<sup>33</sup> due to the contamination of the air, water and soil which resulted in La Oroya being one of the ten most contaminated cities in the world by 2006.<sup>34</sup> In this sense, Peru failed in its obligations to regulate and supervise the activities of the CMLO.

Regarding the right to a healthy environment, since the Protocol of San Salvador only allows for two rights to be justiciable before the IACtHR,<sup>35</sup> for other ESCR to be claimed, the Court has to interpret Article 26 of the ACHR in conjunction with the Charter of the Organization of American States (OAS Charter). That was the logic followed by the Court to interpret that it had jurisdiction over the violation of the right to a healthy environment by the Peruvian state.<sup>36</sup>

In this context, the majority of the Court recognized the existence of the RTD and State's obligations arising from the UNGA framework.<sup>37</sup> In addition, the majority reasoned that 'States have the obligation to promote sustainable development for the benefit of people and communities to achieve their economic, social, cultural and political well-being, but they must comply with it within the framework permitted by human rights, and in particular the right to a healthy environment'.<sup>38</sup>

On their side, Judges Pérez Manrique, Ferrer MacGregor and Mudrovitsch went one step further in their concurring opinion by analysing the existence and scope of the human right to sustainable development.<sup>39</sup> To this end, they take the definition of the RTD from the UN Declaration,<sup>40</sup> because, they argue, 'sustainable development is, first of all, development'.<sup>41</sup>

In this context, they explicitly recognized the RTD as a human right. Consequently, according to their logic of reasoning, when States are faced with decisions related to production, or development, they hold 'the obligation to harmonize and, where appropriate, weigh, on the one hand, the current benefits and, on the other, the present consequences and future projections, foreseeing the degree of impact and benefits in each case'.<sup>42</sup>

All in all, Judges Pérez Manrique, Ferrer MacGregor and Mudrovitsch came to a similar conclusion as the majority of the Court, meaning, that the benefits of a development project cannot outweigh the negative impacts on the environment. However, they went beyond and recognised the existence of a right to development.

#### 5. CONCLUSION

Until March 2024, the RTD has been timidly cited by some of the Judges of the IACtHR to sustain their legal argumentation on the indivisibility and interdependence of civil and political rights, and ESCR. Furthermore, it seems that, for the Judges of the IACtHR it has been easier to call upon the RTD when speaking about the rights of Indigenous peoples, because of the provision present in the Banjul Charter that recognises this right. However, the Oroya case comes to break these patterns of timidly speaking about the RTD, in a case in which there are no Indigenous victims of human rights violations.

This judgment signifies an important advancement in the RTD. First, the majority of the IACtHR recognized the existence of the RTD and the consequent obligations of States.<sup>43</sup> Second, the fact that three of the seven Judges of the IACtHR interpreted the RTD on their joint concurring opinion shows a shift from the very first judgment that speaks about the RTD. While for the last 20 years, the RTD was tangentially named in the opinions of one or two judges, in the Oroya case, almost half of the Judges of the IACtHR spent several paragraphs speaking about the RTD.<sup>44</sup>

In their concurring opinion, the three Judges conveyed a powerful statement: ‘The right to development—including economic development—cannot be achieved at all costs, without consideration of the costs and risks of the activity. On the contrary, it is necessary that any policy in this regard be limited or defined in relation to the principle of intergenerational equity and sustainable development’.<sup>45</sup> Ultimately, this reaffirms the idea that when analysing a development project, States should not only consider the economic growth,<sup>46</sup> but the RTD encompasses three other facets that must be considered: social, political, and cultural development.<sup>47</sup>

The La Oroya case establishes an important precedent for legal practice and policy development regarding the RTD. It highlights that States have an obligation to promote development while ensuring compliance with human rights, particularly the right to a healthy environment. The Court’s recognition that development cannot be achieved “at all costs” reinforces the need for policies to balance economic, social, cultural, and political development. This ruling may drive future legal frameworks to integrate the principles of intergenerational equity and sustainability, ensuring that the benefits of development projects do not outweigh their long-term environmental and social impact.

## NOTES

- 1 *La Oroya Population v Peru* Series C No 511 (IACtHR, 27 November 2023), 393.
- 2 *Idem* 1.
- 3 Arjun Sengupta, ‘Conceptualizing the right to development for the twenty-first century’ in *Realizing the Right to Development* (United Nations 2013), 80–81.
- 4 Irene Hadiprayitno, ‘Development Hazard: A Violation-based Approach to the Right to Development’ (2017) 3(1) *The Chinese Journal of Global Governance*, 33–35.
- 5 Elsbé Boshoff, ‘Rethinking the premises underlying the right to development in African human rights jurisprudence’ (2022) 31(1) *Review of European Community & International Environmental Law*, 33–34.
- 6 Article 22 of the Banjul Charter [*African Charter on Human and Peoples’ Rights* (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (Banjul Charter)].
- 7 *American Convention on Human Rights* (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36, 1144 UNTS 123 (ACHR).
- 8 *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (adopted 17 November 1988, entered into force 16 November 1999) OAS Treaty Series No 69 (Protocol of San Salvador).
- 9 *Declaration on the Right to Development*, UNGA Res 41/128 (4 December 1986) (Declaration on the RTD).
- 10 IACtHR, ‘Jurisprudencia de la Corte IDH’, <<https://jurisprudencia.corteidh.or.cr/>> accessed 12 April 2024.
- 11 Article 2.1 UN Declaration on the RTD.
- 12 Roman Teshome, ‘The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?’ (2022) 22(2) *Human Rights Law Review*, 8–10.
- 13 UNGA ‘Right to development. Report of the Special Rapporteur on the right to development’ (2 July 2019) UN Doc A/HRC/42/38, 14–39.
- 14 *Idem* 56.
- 15 UNGA ‘Reinvigorating the right to development: A vision for the future. Report of the Special Rapporteur on the right to development, Surya Deva’ (4 August 2023) UN Doc A/HRC/54/27, 11.
- 16 Karin Arts and Atabongawung Tamo, ‘The Right to Development in International Law: New Momentum Thirty Years Down the Line?’ (2016) 63(3) *Netherlands International Law Review*, 226.
- 17 Serges Kamga, ‘The right to development in the African human rights system: the Endorois case’ (2011) 44(2) *De Jure*, 391.
- 18 *The African Commission on Human and Peoples’ Rights vs Republic of Kenya* App no 006/2012 (ACHPR, 26 May 2017), 210; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* App no 276/2003 (ACmHRP, 4 February 2010), 291.
- 19 *Idem* 291.
- 20 *Idem* 296.
- 21 *Idem* 298.
- 22 *Suárez Peralta v Ecuador* Series C No 261 (IACtHR, 21 May 2013) Concurring opinion of Judge Ferrer MacGregor, 25; *Canales Huapaya et al v Peru* Series C No 296 (IACtHR, 24 June 2015) Concurring opinion of Judges Caldas and Ferrer MacGregor, 5; *Yarce et al v Colombia* Series C No 325 (IACtHR, 22 November 2016) Concurring opinion of Judge Ferrer MacGregor, 14; *Lagos del Campo v Peru* Series C No 340 (IACtHR, 31 August 2017) Concurring opinion of Judge Ferrer MacGregor, 9.
- 23 *Yakye Axa Indigenous Community v Paraguay* Series C No 125 (IACtHR, 17 June 2005) Partly concurring and partly dissenting opinion of Judge Fogel, 28; *Xákmok Kásek Indigenous Community. v Paraguay* Series C No 214 (IACtHR, 24 August 2010) Concurring opinion of Judge Vio Grossi, 24; *Kichwa Indigenous People of Sarayaku v Ecuador* Series C No 245 (IACtHR, 27 June 2012), 231; *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v Guatemala* Series C No 440 (IACtHR, 6 October 2021) Concurring opinion of Judge Ferrer MacGregor, 25–26.
- 24 *Yakye Axa Indigenous Community v Paraguay* Series C No 125 (IACtHR, 17 June 2005) Partly concurring and partly dissenting opinion of Judge Fogel, 28; *Xákmok Kásek Indigenous Community. v Paraguay* Series C No 214 (IACtHR, 24 August 2010) Concurring Opinion of Judge Vio Grossi, 24; *Kichwa Indigenous People of Sarayaku v Ecuador* Series C No 245 (IACtHR, 27 June 2012), 231.
- 25 This should not be diminished, because it is one of the innovations brought by the RTD: Sakiko Fukuda-Parr, ‘The Right to Development: Reframing a New Discourse for the Twenty-First Century’ (2012) 79(4) *Social Research*, 841.
- 26 *Maya Kaqchikel Indigenous Peoples of Sumpango et al v Guatemala* Series C No 440 (IACtHR, 6 October 2021) Concurring opinion of Judge Ferrer MacGregor, 25–26.
- 27 *La Oroya Population v Peru* Series C No 511 (IACtHR, 27 November 2023), 67.
- 28 *Idem* 68.
- 29 France 24 Español, ‘Perú: la polémica por reapertura de complejo metalúrgico en La Oroya’, <<https://www.youtube.com/watch?v=GXRLlpOhl9A>> accessed 14 April 2024.
- 30 Actualidad Ambiental, ‘Informe especial: Cinco puntos para entender el caso del Complejo Metalúrgico de La Oroya’, 18 July 2016 <<https://www.actualidadambiental.pe/informe-especial-cinco-puntos-para-entender-el-caso-del-complejo-metalurgico-de-la-oroya/>> accessed 14 April 2024.
- 31 Gestión, ‘Complejo Metalúrgico de La Oroya reinicia operaciones tras 13 años paralizado’, 18 October 2023 <<https://gestion.pe/economia/empresas/complejo-metalurgico-de-la-oroya-reinicia-operaciones-tras-13-anos-paralizado-noticia/?ref=gesr>> accessed 14 April 2024.
- 32 *La Oroya Population v Peru* Series C No 511 (IACtHR, 27 November 2023), 393.
- 33 Recognized through Article 26 ACHR read in conjunction with Articles 30, 31, 33 and 34 of the OAS Charter and Article 11 of the San Salvador Protocol. See: *La Oroya Population v Peru* Series C No 511 (IACtHR, 27 November 2023), 115–116.
- 34 *Idem* 76.

- 35 According to Article 19.6 of the San Salvador Protocol, only Trade Union Rights (Article 8.1 San Salvador Protocol) and the Right to Education (Article 13 San Salvador Protocol) can be the subject of individual petitions.
- 36 *La Oroya Population v Peru* Series C No 511 (IACtHR, 27 November 2023), 115.
- 37 *Idem* 244.
- 38 *Idem* 244 (translated by the author).
- 39 *La Oroya Population v Peru* Series C No 511 (IACtHR, 27 November 2023) Concurring opinion of Judges Pérez Manrique, Ferrer MacGregor and Mudrovitsch, 99–124.
- 40 *Idem* 102 and 110.
- 41 *Idem* 110 (translated by the author).
- 42 *Idem* 112 (translated by the author).
- 43 *La Oroya Population v Peru* Series C No 511 (IACtHR, 27 November 2023), 244.
- 44 *La Oroya Population v Peru* Series C No 511 (IACtHR, 27 November 2023) Concurring opinion of Judges Pérez Manrique, Ferrer MacGregor and Mudrovitsch, 99–124.
- 45 *Idem* 117 (translated by the author).
- 46 Sakiko Fukuda-Parr, 'The Right to Development: Reframing a New Discourse for the Twenty-First Century' (2012) 79(4) *Social Research*, 842–843.
- 47 UNGA 'Role of business in realizing the right to development. Report of the Special Rapporteur on the right to development' (12 July 2023) UN Doc A/HRC/78/160, 12.

## COMPETING INTERESTS

The author has no competing interests to declare.

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