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U'WA INDIGENOUS PEOPLE VS. COLOMBIA: POTENTIAL APPLICATIONS OF THE ESCAZÚ AGREEMENT

By Ariana Lippi*

THE PEOPLE WHO KNOW HOW TO SPEAK¹

In April 2023, the Caño Limón–Coveñas pipeline (CLC) in the Samoré block of the Arauca state of Colombia gushed hundreds of gallons of crude oil onto the U'wa indigenous territory. The spill was caused by a guerrilla group attack on the Occidental-owned pipeline—one of dozens that happen each year since the CLC was constructed in the mid-1990s—as an act of sabotage.² Though the intent of these attacks is to cause financial and political damage to the State as a byproduct of the ongoing armed conflict, the resulting pollution most affects the land and health of the U'wa people. The U'wa have long opposed the pipeline crossing their territory and have cried out for environmental justice as they watch the land and their way of life die around them.³ For almost 30 years, the U'wa have led advocacy campaigns, filed domestic lawsuits, and have protested to garner support for their case, and to seek justice and greater autonomy of their land.⁴ However, attempts to protect their rights and enforce corporate accountability at the national level have proven ineffective as the state's interests often align with corporate ones to further profit maximization for both parties.⁵ With a lack of success at the national level, they've turned to the international community.

Within days of the CLC pipeline attack in April, the U'wa and their representatives appeared at the Inter-American Court of Human Rights (IACHR) for a public hearing in their case against the Colombian government which they have fought for years to secure.⁶ In *The U'wa Indigenous People vs. The State of Colombia*, the U'wa are defending their rights to self-determination as indigenous peoples, to collective property, to culture, to free, prior and informed consent, to life and personal integrity, to a judicial remedy, freedom of expression and their right to access to information.⁷ The U'wa are also claiming a lack of effective protection of their ancestral property rights, and that the execution of projects related to oil, mining, tourism, and infrastructure inhibit the rights formerly mentioned.

Though the case is ongoing, and results are still to be seen, it in many ways sets a precedent for indigenous communities in Latin America seeking redress for environmental and cultural injustices. With Colombia's recent ratification of The Escazú Regional Agreement (the Agreement herein) in 2022,⁸ this case presents a unique opportunity for implementation of the Agreement and greater accountability within existing domestic legislation.

PETROLEUM, PERMITS & PROTESTS

The 1990s were a dramatic time for policy change in Colombia. In 1991⁹, the new Constitution (still in effect today) was passed and created the legal framework for sweeping changes in the country, especially for privatization and civil rights—two topics which have proven to come in conflict with each other in the country over the following decades. The Colombian government began to take on a more neoliberal posture in their policies and heavily engaged with the private sector in ways that have had lasting and devastating consequences for many, including the U'wa indigenous people. At this time, the US-based Occidental Oil Company (Oxy) began to pursue exploratory operations in Colombia, and in 1995 they were granted the necessary permits to drill in their desired territory—the Samoré block.¹⁰ There was immediate backlash and dissent from the U'wa who claimed that Oxy and the Colombian government had not fulfilled their obligation to engage in a consultation process with the U'wa prior to issuing the permits, and many threatened to commit suicide as their ancestors did when the Spanish invaded their lands 500 years prior.¹¹

The U'wa swiftly pursued legal recourse in 1995. Under the 1991 Constitution indigenous peoples were guaranteed full ownership rights over traditional and ancestral lands in the form of *reguardos* (reservations), which the U'wa claimed that the Oxy Company was violating with their oil operations. Their case reached The Colombian Constitutional Court which is the premier authority on constitutional guarantees. While the Court initially sided in favor of the indigenous group, the decision was overruled by the Council of State when Oxy made clear

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that there would be a financial loss to the tune of \$14 billion if they refused the company.¹² This outcome outraged many in the U'wa community who then launched "large-scale protests and occupations of oil company installations on their land, which the Colombian State violently [and in many cases lethally¹³] repressed."¹⁴ This led to a series of unsuccessful follow-up meetings between representatives from the U'wa and the State. The result was that Oxy had essentially bypassed the proper domestic accountability due to the government's alignment with private interests and pursued operations in direct violation of the rights of the U'wa. This engendered a great sense of injustice for the U'wa who decided to pursue international legal avenues of recourse.

Just two years later, with mounting pressure from the international community following The Indigenous and Tribal Peoples Convention (or C-169) held by the International Labor Organization in 1989,¹⁵ the right to free, prior, and informed consent was established as a fundamental right in Colombia¹⁶ in 1997 by *Sentencia SU-039/97*.¹⁷ That same year, the U'wa filed a petition to the Inter-American Commission on Human Rights alleging that the Government of Colombia violated international human rights law based on the State's failure to recognize and protect U'wa territory, violating their right to consent, allowing extractive projects on U'wa land, violating the U'wa nation's beliefs, and harming their cultural integrity and risking their cultural survival.¹⁸ And there it sat for almost 20 years.

Despite the U'wa's desire to seek justice, it was difficult to get the government to engage in a meaningful way: The Commission's report states that in 1998 "the petitioners repeated their willingness to engage in the dialogue but observed that the government's stated interest in the process did not jibe with the measures it had taken at the national level."¹⁹ The U'wa then carried out extensive mobilization at the grassroots and international levels²⁰ and gained enough traction and visibility to continue their case with confidence in 2015.²¹ In 2016, The Commission ruled in the U'wa people's favor and in 2019 they made a series of recommendations to the Colombian government to guarantee the U'wa's rights.²² Yet, the U'wa provided evidence that these recommendations were not met, and that the government continued to make decisions that violated their territory and their rights. In response, the case was sent by the Commission to the Inter-American Court in 2020 and is now being heard.

MUCH ADO ABOUT ESCAZÚ

The CLC is the largest pipeline in the country, and the outcome of the U'wa case could precipitate a vast wave of environmental justice action in Colombia as well as across Latin America and the Caribbean for indigenous and/or Afro-descendant communities²³. If the U'wa are successful in securing a favorable verdict from the IACHR, the Republic of Colombia may be liable for actions such as compensation; payment of costs and expenses; publicizing the court sentence; public acknowledgement of responsibility; prosecution and punishment of those responsible; and modification of national

legislation.²⁴ However, getting the decision to stick and the government to comply may be the rub.

Strategy – The Colombian state has steamrolled past the Commission's recommendations with a privatized agenda, hellbent on ignoring U'wa cries of injustice. Given this, a strategy that the U'wa and their representatives should employ in the IACHR case is to center their argument regarding their lack of access to information and inability to participate in decision making which has resulted in the loss of autonomy over their land and therefore erasure of their people and culture. The goal of this strategy is to strive for better accountability from the Colombian government and for the longevity of the ruling. They would be able to leverage these claims and marshal new domestic and international protections by incorporating the Escazú Agreement.

Instrument – In 2022, President Gustavo Petro ushered in the ratification of Escazú, and has been outspoken about the energy transition in Colombia, providing greater support for indigenous communities, and advancing environmental justice.²⁵ The U'wa case provides a unique opportunity for the coalescence of these issues and for the government to walk the talk.

The Agreement may serve as a powerful instrument in proving wrongdoing by the government but also for implementation and accountability measures. Though the Agreement was adopted by CEPAL (UN Economic Commission for Latin America and the Caribbean), under Article 29 of the American Convention, the Agreement can be interpreted in a case by the IAHR which:

- a. "has the authority to interpret treaties 'directly related to the protection of human rights in a Member State of the inter-American system, even if that instrument does not belong to the same regional system of protection,'" and;
- b. is "able to interpret the obligations and rights [treaties] contain in light of other pertinent treaties and norms."²⁶

Principles & Provisions – To fulfill principles of "equality and non-discrimination, transparency and accountability...the preventive and precautionary principles...intergenerational equity, maximum disclosure," etc.,²⁷ the Agreement sets out four main objectives:

1. ensure the right of all persons to have access to information (Articles 5) in a timely and appropriate manner (Article 6);
2. to ensure the right of all persons to participate significantly in making the decisions that affect their lives and their environment (Article 7);
3. ensure the right to access justice when those rights have been infringed (particularly for environmental defenders) (Articles 8 and 9), and;
4. to create and strengthen of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development (Article 10).²⁸

These rights are undoubtedly directly related to the U'wa case. The U'wa continue to bring forth new evidence that the government is violating their rights by not being transparent about their plans and allowing Oxy to conduct extractive business on their territory. By being clear that they did not have access to information and were not involved nor had meaningful participation in the decision-making process, they may be able to strengthen their argument and demonstrate a lack of accountability by the government. Through the Agreement, they may also be able to seek justice for those harmed or killed in protests, and protect other community members from future harm, particularly under Article 9(3) of the Agreement which protects human rights defenders in environmental matters, and calls upon States to take appropriate, effective, and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters.²⁹

Additionally, the Agreement mandates that member states harmonize their internal legislation with the standards indicated in this instrument (Article 13). Therefore, the Agreement's principles could likely provide support for overlapping domestic legislation (such as Law 1712 of 2014 on "Transparency and the Right of Access to National Public Information"³⁰) and fill in gaps that have prevented the U'wa from securing justice in the past (such as transparency and accountability).

Fora – Incorporating the Escazú Agreement into a case at the IACHR could possibly be the best outcome for both the U'wa, and Escazú hopefuls. Firstly, regardless of if the U'wa win the current case, they will be able to claim wrongdoing under the Agreement. The unyielding assault on U'wa rights which fall under the jurisdiction of the Agreement, is a clear

area where the principles of Escazú can be applied to protect environmental defenders and prevent prevailing destruction of their land and environment. They should also now be able to advocate differently within the domestic justice system than when they began challenging the government in court due to the ratification of these additional protections. Secondly, the Agreement calls for a regular Convening of the Parties (COP), which would provide a fertile platform for advocacy. The U'Wa and their allies would be able to harness their existing public support, and garner new support and international attention to their case at the COP(s). As a result, Colombia (as a ratifier) could face greater international pressure as to fulfill their duties to the U'Wa under the Agreement. And finally, if the U'Wa are successful in their case and/or they were able to win based on arguments about the violations to the Escazú Agreement, this would increase and enhance legal mechanisms to hold the government accountable for any reparation measures decided by the Court, which they have been historically successful at evading.

CONCLUSIONS

The tenacity and persistence of the U'wa is undeniably admirable. The Republic of Colombia has failed them for decades and is actively repressing their rights, yet they have advanced their case to the highest possible legal entity in the region. While results of both the case and Colombia's implementation of the Escazú Agreement are on the horizon, there is reason to believe that this case could create significant traction and safeguard protections for indigenous communities for generations to come.



ENDNOTES

¹ See The National Indigenous Organization of Colombia, ONIC, <https://www.onic.org.co/pueblos/1154-uwa> (last visited Oct. 15, 2023) (roughly translating "U'wa" to "intelligent people who know how to speak").

² See "Colombia's Cano Limon-Covenas pipeline attacked for ninth time in 2023" REUTERS (Apr. 21, 2023) <https://www.reuters.com/world/americas/colombias-cano-limon-covenas-pipeline-attacked-ninth-time-2023-2023-04-21/> (providing coverage of the ninth attack in 2023 of the Cano Limon-Covenas pipeline); See John A. Cohan, "Environmental Rights of Indigenous Peoples Under the Alien Tort Claims Act, the Public Trust Doctrine and Corporate Ethics, and Environmental Dispute." 20 J. of Env't L. 133, 140 (2002) Resolution https://escholarship.org/content/qt9tb0z10m/qt9tb0z10m_noSplash_3e75e7d254d45ea0578105dd289f44c7.pdf?t=mv6eln (noting the frequent and ongoing problem with groups targeting oil projects in their warfare against the Colombian government).

³ See *U'wa Indigenous People v. Colombia*, EARTHRIGHTS INTERNATIONAL, <https://earthrights.org/case/uwa-indigenous-people-vs-colombia/> (last visited Oct. 15, 2023) (summarizing the long history of activism within the U'wa community to protect their territory and cultural integrity from occupations of oil company installations on their property).

⁴ See *U'wa People Block Occidental Petroleum (Colombia), 1995-2001*, GLOBAL NONVIOLENT ACTION DATABASE <https://nvdatabase.swarthmore.edu/content/uwa-people-block-occidental-petroleum-colombia-1995-2001> (last visited Oct. 15, 2023) (recapping the legal and advocacy battles undertaken by the U'wa people against the fossil fuel industry starting in the late 1990s and early 2000s).

⁵ See Andrew E. Miller, *The Right to Decide: U'wa Bring Case to Court After 25 Years*, AMAZON WATCH (April 20, 2023) <https://amazonwatch.org/news/2023/0420-the-right-to-decide-uwa-bring-case-to-court-after-25-years> (recounting the coordination between Occidental Petroleum, Ecopetrol, and the Colombian government entered U'wa territory to exploit the oil beneath the land).

⁶ See Information for the case of the U'wa's Indigenous Peoples and its Members vs. Colombia, CORTE IDH, https://www.corteidh.or.cr/docs/tramite/pueblos_indigenas_uwa_y_sus_miembros.pdf (Oct. 21, 2020) (on file with Inter-American Human Rights Court (laying out the U'wa's claim against the state of Colombia at the Court IDH).); See Press Release, Inter-American Commission on Human Rights (IACHR), IACHR refers case on Colombia to the Inter-American Court (Oct. 30, 2020) (on file with author) https://www.oas.org/en/iachr/media_center/PReleases/2020/261.asp (stating that the IACHR referred the case of the U'wa's Indigenous Peoples and its Members against the Colombian government before the Inter-American Court of Human Rights); see *Conclusion to the Case of U'wa v. Colombia*, EARTHRIGHTS INTERNATIONAL https://earthrights.org/media_release/concluyoy-audiencia-del-caso-uwa-vs-el-estado-colombiano/ (last visited Oct. 15, 2023) (noting the end of the case U'wa v. Colombia).

⁷ See *The U'wa Nation Against the State of Colombia*, EARTHRIGHTS INTERNATIONAL <https://earthrights.org/case/nacion-uwa-contra-estado-colombia/> (last visited Oct. 15, 2023) (summarizing the legal claims brought by the U'wa community in U'wa v. Colombia).

⁸ See *Colombia's Congress Ratifies Escazú International Agreement for the Environment*, REUTERS, <https://www.reuters.com/article/colombia-environment/>

colombias-congress-ratifies-Escazú-international-agreement-for-the-environment-idUSKBN2R61D1 (Oct. 11, 2022) (addressing the Colombian Congress's ratification of the Escazú agreement to protect the Andean environment).

⁹ See generally Colombian Constitution of 1991, RAMA JUDICIAL, REPÚBLICA DE COLOMBIA <https://www.ramajudicial.gov.co/documents/10228/1547471/CONSTITUCION-Interiores.pdf> (last visited Oct. 15, 2023).

¹⁰ See James S. Anaya et al. *The Samoré Block Case (Colombia): Observations and Recommendations* (Weatherhead Center for International Affairs Harvard University Nov. 1998) (providing background on the investigation into the conflict between the U'wa community and several oil companies operating in the Samoré Block).

¹¹ See Global Nonviolent Action Database, *supra* note 5 (recounting and paralleling a part of the history of the U'wa people).

¹² See *id.* (noting the original ruling in favor of the U'wa which was overturned after reports provided a monetary estimate of how much the development of the land would earn the Colombian government)

¹³ See generally Cecelia Rodriguez, *Activists Murdered: Three Slain in Colombia Helping U'wa Fight Occidental*, EARTH FIRST!, June 30, 1999, at 1-2.

¹⁴ See *U'wa Indigenous People v. Colombia*, EARTHRIGHTS INTERNATIONAL, <https://earthrights.org/case/uwa-indigenous-people-vs-colombia/> (last visited Nov. 7, 2023).

¹⁵ "C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)," INTERNATIONAL LABOR ORGANIZATION, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C169,/Document#:~:text=Article%203-,1.,female%20members%20of%20these%20peoples.

¹⁶ See Gloria Amparo Rodríguez, *De la Consulta Previa al Consentimiento Libre, Previo e informado a Pueblos Indígenas en Colombia*, 33, 107 (April 2014).

¹⁷ See generally, CONST. CT. OF COLOMBIA, *Derechos Fundamentales De Comunidad Indígena: Sentencia SU-039/97*, (Feb. 21, 1997), <https://www.corteconstitucional.gov.co/relatoria/1997/SU039-97.htm>.

¹⁸ See *U'wa Indigenous People v. Colombia*, EARTHRIGHTS INTERNATIONAL, <https://earthrights.org/case/uwa-indigenous-people-vs-colombia/> (last visited Nov. 7, 2023).

¹⁹ *U'wa People v. Colombia*, Case 11.754, Inter-American Commission on Hum. R. Report No. 33/15, OEA/Ser.L/V/II.155, doc. 12 (2014-2015).

²⁰ See Andrew Miller, *A Tragedy Foretold? Colombia's U'wa People Facing Violent Eviction*, AMAZON WATCH (April 29, 2014), <https://amazonwatch.org/news/2014/0429-a-tragedy-foretold-colombias-uwa-people-facing-violent-eviction>.

²¹ See generally Andrew Miller, *The Right to Decide: U'wa Bring Case to Court After 25 Years*, AMAZON WATCH (April 20, 2023), <https://amazonwatch.org/news/2023/0420-the-right-to-decide-uwa-bring-case-to-court-after-25-years>.

²² See *U'wa Indigenous People v. Colombia*, EARTHRIGHTS INTERNATIONAL, <https://earthrights.org/case/uwa-indigenous-people-vs-colombia/#:~:text=The%20IACHR%20found%20that%20Colombia,their%20right%20to%20judicial%20protection> (last visited Nov. 5, 2023).

²³ See Press Release, Economic Commission for Latin America and the Caribbean, *Authorities and Experts Highlight the Escazú Agreement's importance for Guaranteeing Human Rights in Latin America and the Caribbean*, (Dec. 10, 2020) (on file with the Economic Commission for Latin America) (noting the impact of the Escazú Agreement on the environmental justice movement in Latin America and the Caribbean).

²⁴ See Damián González-Salzberg, *The Implementation of Decisions from The Inter-American Court on Human Rights in Argentina: An Analysis of the Jurisprudential Swings of the Supreme Court*, 8 SUR INT. J. ON HUM. R. 113, 114 (December 2011) (providing a historical parallel from Argentina to the current case between the U'wa community and the Colombian government).

²⁵ See generally Presidencia de la República, *La Ley de Escazú, sancionada por el Presidente Petro, garantizará la protección de los líderes ambientales y el acceso a información de este sector como un derecho fundamental*, Colombia Potencia de la Vida (Nov. 5, 2022), <https://petro.presidencia.gov.co/prensa/Paginas/La-Ley-de-Escazú-sancionada-por-el-Presidente-Petro-garantizará-acceso-221105.aspx>.

²⁶ Sarah Dávila A. et al, *Escazú Toolkit: Using the Escazú Agreement in Cases Before the Inter-American System*, UIC Law White Papers, November 2022, <https://repository.law.uic.edu/cgi/viewcontent.cgi?article=1024&context=whitepapers>.

²⁷ Economic Commission for Latin America and the Caribbean, *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean* (Nov. 2023), <https://repositorio.cepal.org/server/api/core/bitstreams/7e888972-80c1-48ba-9d92-7712d6e6f1ab/content>.

²⁸ See *id.* (outlining the provision of Art. 10 pertaining to capacity building).

²⁹ See *id.* (outlining the provision of Art. 9 pertaining to protecting human rights defenders).

³⁰ See generally Transparency and the Right of Access to National Public Information, March 6, 2022 (Law No. 2199) (Colom.).