

12 Confronting extractivism

The Inter-American Human Rights System and indigenous rights in Latin America

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Introduction

Across Latin America, where extractivism remains the dominant model of development, the surge in socio-environmental conflicts in recent decades constitutes a distinct challenge to the rule of law and basic governability. From lithium extraction in Chile, hydro-electrical projects in Brazil, oil exploitation in Ecuador, to gold mining in Colombia and Guatemala, the typically private-driven, export-oriented extraction, and exploitation of land and natural resources has generated widespread opposition by local communities, with governments regularly responding to popular resistance with repression and violence. The region's indigenous and Afro-descendent communities are particularly affected, given the significance of land and natural resources for their livelihoods, and in many contexts, their collective survival.

In this context, the Inter-American Human Rights System (IAHRS), consisting of the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR), has become increasingly involved in conflicts over land and natural resource extraction. While the IAHRS has explicitly recognized the importance of the extractive industry for economic development, it has developed human rights standards that seek to regulate projects, as well as obligations of both states in the region and external actors to respect and guarantee human rights. The Commission has emphasized the state's duty to adopt "appropriate and positive steps with due diligence to prevent, investigate, punish and redress human rights violations that result from the execution of these projects," including adopting an appropriate regulatory framework (IACHR, 2015b, 2016). The IACtHR, for its part, has been in the vanguard of the international development of indigenous rights as they pertain to land and natural resources. In a series of landmark cases, the Court has recognized the notion of collective rights of indigenous communities to ancestral lands and natural resources based on their importance for the distinct cultural identities of these communities. Moreover, the Court has recognized the right of indigenous communities to consultation and participation in all matters that could directly affect them.

These jurisprudential developments notwithstanding, tensions remain between, on the one hand, the preservation of cultural identity and traditional values of indigenous peoples through the protection of their right to lands and natural resources, and, on the other hand, economic development projects and extractive industries. Despite cyclical shifts in electoral politics during recent decades, characterized by alternating right- and left-wing governments, the extractive mode of development endures in Latin America. This phenomenon, termed the “extractivism consensus” by Svampa (2015), transcends ideological and political divides and reveals a deeply ingrained commitment to resource extraction as a primary driver of economic growth. However, resistance to extractivism persists in Latin America. This resistance is often manifested in disorderly and occasionally violent public protests, fuelled in part by the perceived inadequacy of formal protections. Repressive state responses to protests have made Latin America stand out as the deadliest region for environmental defenders.

In parallel, a trend of increasing recognition for international rights of prior consultation and indigenous land and territorial rights has emerged amongst regional states. Notably, the IAHRs has played a vanguard role in developing these international human rights standards and policy guidelines. For groups able to leverage the IAHRs’s norms and standards, the System presents a unique transnational opportunity structure for communities to contest domestic public policies and development projects. These developments highlight the complex tensions between formal legal advancements, on the one hand, and the lived experiences, on the other hand, of communities on the ground, where the extractive frontier continues to expand (Picq, 2020).

This chapter examines how the IAHRs has navigated the tensions between the protection of local communities, particularly indigenous people, and large-scale extractivism promoted and supported by governments. It explores the transnational dimensions affecting the governability for development by examining the IAHRs’s engagement with conflicts arising from tensions and trade-offs generated by development projects affecting indigenous and local interests and rights. It is divided into three main parts. The first part provides a contextual overview of extractivist trends in Latin America with the aim to identify the main drivers of extractivism in the region and how they affect local communities, including indigenous people. The second part discusses how the IAHRs has engaged with the human rights implications of extractivism in Latin America, with specific focus on the development of what we term a tripartite regulatory framework emphasizing the obligations of states to ensure the *effective participation* of affected communities, to elaborate a prior and independent *environmental and social impact assessment*, and to ensure the *sharing of reasonable benefits* with affected communities. The third part develops a tentative assessment of the effectiveness of the IAHRs in its engagement with the human rights implications of extractivism.

Extractivism in Latin America: The (un)rule of law and the allure of development*The extractive imperative*

In Latin America, recent decades have witnessed an intensification of extractivism as the dominant development model, taking a contemporary form as a private-sector-driven, export-orientated strategy for exploiting and extracting natural resources (Farthing & Fabricant, 2018). Extractivism expanded during the political shift to the left in the first decade of the 2000s, further deepening the extraction-based development model in the region (Burchardt & Dietz, 2014). Extractivism generated substantial revenues for governments to fund social spending and public infrastructure investments, consolidating political support among traditionally disadvantaged sectors of Latin American societies. However, while seeking to fulfil promises of poverty reduction and inequality mitigation without resorting to forceful fiscal redistribution, Latin American governments have not only left the core dynamic of resource extraction unchanged but also further entrenched the perception of nature as a collection of exploitable resources for modernization (Arsel et al., 2016).

The persistent appeal of extractivism notwithstanding, its actual development record in Latin America has been highly uneven, at best. The allure of resource wealth for national development often prioritizes centralized benefits, potentially overlooking or neglecting the concerns and hardships faced by rural communities directly impacted by extraction activities. Most notably, the surge of extractivism, such as large-scale mining, in recent decades has led to significant encroachment on protected lands and indigenous territories (Kröger & Lalander, 2016). Extractivist activities often fuel tensions and conflicts in regions and communities where they take place (Avilés, 2019). These impacts have been exacerbated in recent years with the expansion of extractivism in Latin America encompassing not only traditional sectors such as oil, gas, and mining, but also extending to novel extractive frontiers related to renewable energy, often under the guise of “green extractivism” (Hernandez & Newell, 2022).

Popular resistance to extractivism

The expansion of extractivism has been accompanied by widespread resistance and a surge in socio-environmental conflicts in Latin America (McNeish, 2018). On some estimates, over half of the world’s conflicts over extractivist activities are taking place in the region (Özkaynak et al., 2015). Much of the resistance tends to be articulated locally, by communities directly affected and people whose livelihoods, health, and cultures are threatened by large-scale extractivist projects (Tetreault, 2015). Communities affected by extractivism often deploy a combination of strategies and diverse legal and institutional avenues (Bebbington et al., 2018; Kingsbury, 2021). Domestically, rule-of-law strategies

encompass domestic litigation within national courts (Auz, 2022), leveraging legal advancements pioneered by Latin American environmental constitutionalism (Gómez-Betancur et al., 2022). Internationally, efforts range from lobbying foreign governments and multinational companies, to shareholder activism, transnational NGO mobilization, and engagement with development banks, the United Nations system, and the IAHRs. Resistance to extractivism is not contained in formally institutionalized spaces, however. Communities across the region have regularly engaged in transgressive forms of contention, including street blockades and occupation of extractive companies' facilities. Some communities, such as the Mapuche in Chile, have developed "indigenous forms of 'collective bargaining by riot' by attacking the local extractivist network" (Schmalz et al., 2023).

Communities resisting extractivism encounter inherent difficulties in generating effective resistance at a scale that might affect government policy. However, with increasing intensification of conflicts over extractivism, resistance has nationalized in some contexts, and new political spaces for human rights-based resistance have emerged (Picq, 2020). There have even been tentative attempts to move away from extractivism in parts of Latin America, following resistance and collective mobilization against extractivist projects by communities (Spalding, 2023). For example, highly contentious anti-mining social movements in El Salvador led to the adoption of a law banning all metal mining in the country (Edenhofer, 2022).

Individual examples of successful resistance to extractivism do not change the fact, however, that the effectiveness of social mobilization is often highly limited. For example, Orihuela et al. (2022) have found that "successful resistance represents only 2–5% of the total universe of Peru[vian] mining conflicts." Moreover, there is no regional mass movement against extractivism, as was the case with the regional coordination of social movements mobilizing against neoliberalism in the 1990s (Almeida, 2014). The effectiveness of collective mobilization against extractivism in Latin America is also increasingly constrained by a shrinking political space, due to the escalation of repressive measures adopted by governments (Raftopoulos, 2017). The criminalization of social protest and violence against environmental defenders has made Latin America a high-risk region for collective mobilization against extractivism (Lakhani, 2020).

Violence is, however, not necessarily the principal obstacle to anti-extractivism mobilization. Any assessment of the impact of contentious collective action against extractivism needs to recognize the inherent limits of any policy change "without durable shifts in the structures that keep development models that prioritize the large-scale extraction of natural resources in place" (Silva et al., 2018). Moreover, the development needs facing communities and individual members thereof, combined with the economic benefits promised by extractivist companies, can undermine collective resistance. Contentious collective action often prioritizes conventional economic concerns and resolutions over environmental

justice goals, leading to conflicts being settled through compensation schemes and financial agreements (Orihuela et al., 2022). As a result, community resistance may co-exist, however uneasily, with social acceptance in many contexts (Carrasco, 2016). Compensation programmes often face significant limitations, however. Though purporting to directly compensate affected individuals and communities and secure their support, these initiatives frequently disregard the fundamental demands of many community-based resistance movements to exercise their “right to effectively exercise autonomy over the decision to accept or reject extractive projects” (Tetreault, 2020). The common disconnect between extractivist projects and affected communities highlights the often-irreconcilable objectives and demands of extractivism as a development model on the one hand, and local community needs and aspirations on the other hand.

That said, extractivism encompasses a diverse array of practices, some of which engender significantly greater local resistance compared to others. The level of resistance is often contingent upon the scale of the environmental degradation associated with the extractive activity relative to the potential socio-economic benefits that may accrue to the affected community. In contexts characterized by robust and impartial rule of law, it may be possible to construct broad-based coalitions of support and minimize environmental harms, thereby achieving a mutually beneficial outcome. Conversely, in situations where the regulatory system is weak or susceptible to capture, resistance is likely to be significantly amplified, resulting in unacceptable societal costs.¹

The Inter-American Human Rights System, indigenous rights, and extractivism

In a regional context of local mobilization against extractivism combined with limited opportunities for communities to challenge extractivism at home, the IAHRs has developed a set of human rights standards and principles with a view of strengthening the scope of obligations states have to respect and guarantee human rights at stake in extractivist activities. This part of the chapter examines how the IAHRs has navigated the tensions between the protection of local communities, particularly indigenous people, on the one hand, and large-scale extractivism promoted and supported by governments, on the other hand. While the IAHRs recognizes the importance of extractivist activities for regional economies, the IAHRs has sought to address the negative impacts of extractivism on human rights through the development of a set of primarily procedural obligations of states to respect and guarantee human rights.

The Inter-American Human Rights System: Origins, development, and mandate

The IAHRs has its origins in the creation of the Organization of American States (OAS) and the adoption of the American Declaration on the Rights and Duties

of Man in 1948. While the IACHR was created in 1959 with a general mandate to promote human rights in the region, it took OAS member states until 1978 to agree on a legally binding American Convention on Human Rights. With the entry into force of the Convention, the IAHRs adopted the institutional structure that has remained to this day, composed of a Commission and a Court.

The IAHRs was created and experienced its initial development in a region marked by the Cold War and long periods of repressive and authoritarian rule, from the 1950s to the mid-1980s. During this period, the IAHRs primarily sought to identify general patterns of human rights violations rather than focusing on individual cases. However, with the general return to democracy in Latin America, the System turned its attention to the challenge of improving the quality of democratic rule and efforts to address human rights challenges in a regional context where electoral democracy has made significant advances but also where there continue to be widespread human rights abuses. Since the introduction of the right of individual petition, the system has become more responsive to regional human rights challenges; although the capacity of domestic litigants to turn to the regime varies considerably between countries in the region (Engstrom & Low, 2019). The institutional limitations and political constraints facing the IAHRs notwithstanding, the System has developed ambitious human rights norms that, to a significant degree, draw from regional legal traditions of expansive formal constitutional rights protections.

The IAHRs and extractivism

Over the course of several decades, the IAHRs has gradually developed its engagement with the human rights impacts of extractive activities. In 1997, the Commission published a report on Ecuador that addressed the situation of extractive industries and their impact on human rights in the country (IACHR, 1997). The Commission stressed its concerns about the potential human rights violations that could result from the planned oil exploitation activities in the traditional lands of the Huaorani people and threats to their very existence (IACHR, 1997). Following this initial report, the IACHR's concern with respect to extractivism has intensified as it has sought to develop legal standards through a series of thematic reports, including a 2015 report on indigenous peoples, Afro-descendent communities, and natural resources (IACHR, 2015a) and a 2019 report on indigenous and tribal peoples of the Pan-Amazon region (IACHR, 2019).

The IAHRs has also responded to extractivism in the region through the adoption of so-called interim measures, with the aim to prevent the occurrence of irreparable human rights violations or to put an end to ongoing human rights violations (Saldarriaga González, 2019). The IACHR has issued such measures with respect to extractivist activities on several occasions. One particularly noteworthy example was the Commission's adoption of interim measures in *Belo*

Monte in 2011, related to the construction of a hydroelectric dam in the Xingu River Basin, in Pará, Brazil. The Brazilian government under then-President Dilma Rousseff responded strongly by suspending its annual contribution to the Commission and by withdrawing its former Human Rights minister Paulo Vannuchi's candidacy to become a member of the Commission. In response to the backlash, the IACHR toned down its approach and requested broader measures, including that Brazil "adopt measures to protect the lives, health, and physical integrity of the members of the Xingu Basin indigenous communities in voluntary isolation and to protect the cultural integrity of those communities," as well as measures to protect the health and property rights of the communities (OAS, 2009). It is also relevant to note that when the IACtHR faced a similar request in *Ngöbe*, also related to the construction of a hydroelectric dam (in this case in Panama) within the affected community's ancestral lands, it declined to order interim measures, citing a lack of evidence.

It is in its standard-setting role, however, that the IAHRs has left its distinctive imprint in its response to the multiple negative impacts of extractive activities on human rights. Through its primary focus on the development of procedural obligations of states, the IAHRs has sought to balance the need of many (nearly all) Latin American societies for development through extractive activities against the obligation of states to uphold their commitments under international human rights law (IACHR, 2015a, 2019). The IAHRs's engagement with extractivism has been particularly noteworthy in relation to its development of indigenous rights.

The IAHRs and indigenous rights

The IAHRs has developed an internationally prominent approach to the rights of indigenous people. Most notably, the IAHRs has recognized the right of indigenous peoples to own and control their land as a fundamental aspect of their self-determination. The System has established guidelines to safeguard these lands, including the demarcation of territories, granting of land titles, prevention of illegal use by third parties, and preservation of natural resources (IACHR, 2019). Furthermore, the IAHRs has acknowledged the integral connection between indigenous peoples' land and natural resources and their means of subsistence and livelihood (e.g., *Lhaka Honhat* and *Yakye Axa*). The IACtHR's jurisprudence has been particularly influential in the System's development of indigenous rights. The Court has advanced notions of the rights of indigenous people to demand free, prior, and informed consent to any major development and economic projects affecting their livelihoods. The Court has recognized indigenous peoples' right to consultation and participation in all matters that could directly affect them, particularly regarding the recognition of their communal property rights over their ancestral lands and natural resources that they have traditionally used. Additionally, the Court has interpreted the scope of

these rights in a broad manner, including the protection of the right of members of indigenous communities to enjoy their own culture and traditional practices, as different peoples (Fuentes, 2017).

The first landmark case in this respect was the Court's 2001 ruling in *Awás Tingni*. This was the first case by an international tribunal that recognized the rights of indigenous people to communal property of their traditional lands. The Court argued that this right was protected under Article 21 (right to property) of the American Convention. Since the adoption of the landmark ruling in *Awás Tingni*, the IACtHR has developed extensive indigenous rights jurisprudence. In *Saramaka* concerning mining and logging activities on the lands of the Saramaka people, a tribal community in Suriname, the IACtHR issued its first ruling where it expressly analyzed the tensions that arose from extractive projects. Since that initial ruling, the IACtHR has adjudicated another case from Suriname (*Kaliña*), as well as cases from Ecuador (*Sarayaku*), Honduras (*Triunfo de la Cruz, San Juan*), Guatemala (*Maya Q'eqchi'*), and Argentina (*Lhaka Honhat*), finding States responsible for failing to ensure human rights protections in the context of extractive projects. The IACtHR's jurisprudence on the topic is likely to develop further as it currently (at the time of writing this chapter, March 2024) has several high-profile cases on its docket concerning Colombia (*U'wa*), Ecuador (*Tagaeri y Taromenane*), and Peru (*La Oroya*) still pending final decisions. The IACtHR has also developed legal standards regarding extractivism through an advisory opinion on the right to a healthy environment, in which the Court explicitly recognized the autonomous status of the right (Mardikian, 2023). Moreover, a final decision on an advisory opinion on human rights and climate change, which is likely to address extractivism, is still pending before the Court.

The IACtHR has progressively expanded its interpretation of the scope of protection of the right to property to include the protection of the "close ties of indigenous peoples with their traditional lands and the native natural resources thereof, associated with their culture, as well as any incorporeal element deriving therefrom" (*Sawhoyamaya*). The basic rationale of the IACtHR's jurisprudence regarding indigenous land rights is that special positive measures are required on behalf of the members of indigenous communities "to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States" (*Saramaka*). This is to ensure the protection and preservation of the physical and cultural survival of indigenous people. The Court has acknowledged the communitarian character of collective land tenure among indigenous communities; in the process, departing quite dramatically from the classic concept of the (individual) right to property. The Court's notion of communal property rights does not merely include a right to traditional lands, but also a right to natural resources that indigenous communities have traditionally used within their territories (*Kaliña*).

The application of communal property rights in practice has occasionally been contentious. The IACtHR, for instance, recently faced a challenge in which different representatives of the same indigenous community presented conflicting demands concerning the scope of their communal land rights claims. Although the IACtHR acknowledged the existence of multiple leadership claims within the community, the Court ultimately favoured the representation of the leadership that had been involved in the proceedings since the initial submission of the petition to the IACHR (*Maya Q'eqchi'*, para.44). Recognizing its limitations in resolving the internal leadership dispute, the IACtHR emphasized dialogue within the community and with the state concerned and prioritized finding an effective remedy with full participation of the community, rather than getting involved in competing claims within the community (*Maya Q'eqchi'*, para.343).

It is important to note that for the IAHRs, the right to property is not absolute, including for indigenous peoples. For example, in its efforts to balance potential conflicts between human rights law and the benefits associated with extractive activities, the IAHRs has developed a proportionality test (*Saramaka*) that seeks to balance the risks and benefits of extractive activities with human rights concerns. Moreover, the IACtHR has also sought to strike a balance between indigenous property rights and those of third parties. For example, in *Yakye Axa, Sawhoyamaxa, and Xákmok Kásek*, the traditional land rights claims of indigenous communities conflicted with existing land holdings of Mennonite groups (Correia, 2021). In all three cases, while the IACtHR ordered Paraguay to return ancestral lands to the indigenous communities, the Court added that if the lands were in private hands and “objective and reasoned” motives existed to be unable to return the lands to the community, Paraguay would be obliged to give the affected indigenous community alternative lands selected with community approval. This was the case with the Yakye Axa community, who agreed to alternative lands on the condition that the state built an adequate road to those new lands (*Yakye Axa*, 2022).

Tripartite regulatory framework: Consultation, impact assessment, and allocation of benefits

Overall, the IAHRs has emphasized a set of primarily procedural approaches to address the human rights implications of extractive activities. First, the IAHRs’s most extensively developed procedural obligation concerns the right to an adequate consultation process. Most extractivism conflicts addressed by the IAHRs focus on whether indigenous peoples’ consultation rights were adequately protected. The IAHRs understands consultation rights as protecting both indigenous communities’ lands and their right to participate in public affairs (*Kaliña, Maya Q'eqchi'*). In *Saramaka*, the Court established, for the first time, a state duty of consultation. For the Court, the state duty to ensure adequate consultation means that the Saramaka People must be included in discussions concerning

any development, investment, exploration, or extraction plans within their territory. The Court ruled, in addition, that given the large-scale character of the extractivist activities on Saramaka lands, no extractive activities should have been allowed without consent from the Saramaka people. This ruling further contributed to addressing the application of indigenous rights standards to Afro-descendent communities, such as the Maroons in Suriname, even though these communities may have distinct relationships with land compared to indigenous peoples (*Saramaka*, para.79; Dulitzky, 2010).

Since the 2007 *Saramaka* ruling, the IACtHR has developed an extensive case law on the issue of consultation. In 2012, the Court found that indigenous communities had to be consulted “from the first stages of the planning or preparation of the proposed measure, so that the indigenous peoples can truly participate in and influence the decision-making process” (*Sarayaku*). In 2015, it further specified that consultations must be continuous and ongoing throughout each stage of a development project’s implementation (*Kaliña*). In a 2023 ruling, the IACtHR emphasized that consultation processes must be culturally appropriate and linguistically accessible to the affected indigenous community. Additionally, indigenous communities must be provided with sufficient information to enable meaningful participation (*Maya Q’eqchi’*). The IAHR’s approach to consultation rights has progressively evolved towards ensuring that the participation of the indigenous peoples is effective (IACHR, 2015a) and not mere formalities (IACHR, 2019, p. 10).

A second procedural state obligation developed by the IAHR concerns prior environmental and social impact assessment. The IACtHR recognizes that conducting thorough impact assessments is crucial to ensure that restrictions on indigenous communities’ property rights do not jeopardize their very survival as distinct peoples. For the Court, impact assessments have become a cornerstone of consultation processes, ensuring participating indigenous communities have the information necessary for meaningful engagement (*Triunfo de la Cruz*, paras 179–180). The Court, however, has not defined the specific standards for these assessments. The Court has only indicated in *Triunfo de la Cruz* that impact assessments should comply with relevant international standards, respect cultural traditions, and be completed before granting concessions or licenses. This requirement aims to ensure communities are informed about projects and can effectively participate in decision-making processes.

In the Court’s jurisprudence, the assessment of environmental and social impact is closely tied to the responsibility of states to protect the right to a healthy environment (Tigre & Urzola, 2021). In its advisory opinion on the matter, the Court held that states must regulate and supervise activities that have the potential to cause harm, conduct environmental impact assessments, and take steps to mitigate any damage caused by extractive industries. For the Court, an environmental impact assessment is essential in determining whether an action would result in “significant harm” to human rights, including the right to life,

personal integrity, and a healthy environment. Based on this advisory opinion, if an environmental impact assessment shows that significant harm would occur due to an extractive activity, then it should not be carried out. This link between environmental and human rights illustrates how the Court has contributed to the “greening” of human rights in indigenous cases (Sena, 2020; Tigre et al., 2021). The Court may further develop its position on the scope of state obligations with respect to the adoption of environmental protections, building on its indigenous rights jurisprudence. For example, *La Oroya* was decided by the Court at the end of 2023, though at the time of drafting this chapter, its ruling had not yet been published (IACtHR, 2023). The case concerns the negative consequences of contamination to the environment, health, and life produced by a mining and metallurgical industry in Peru. The Commission argued before the IACtHR that Peru had failed to adopt adequate regulations, permitted the emission of highly harmful substances, and had failed to supervise and monitor the industry’s activities. It further argued that Peru failed to ensure a progressive development duty insofar as it favoured drastic flexibilities on its standards of air quality without reason. This case presents the IACtHR with an opportunity to develop legal guidelines related to environmental restrictions on extractive activities, extending beyond those affecting indigenous communities.

A third duty identified by the IAHRs concerns the allocation of reasonable benefits derived from extractive activities for affected communities. In *Saramaka*, the IACtHR ruled that this protection arose from the legal principle prohibiting the deprivation of property without just compensation. The IACtHR affirmed that “benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the Saramaka people” (*Saramaka*, para. 140). Both in *Saramaka* and *Kaliña*, Suriname was found liable for failing to guarantee that the communities impacted by extractive activities had access to reasonable benefits. While the IACtHR has consistently upheld the right to reasonable benefits, it has refrained from offering a clear definition of the term.

In summary, the IAHRs has prioritized procedural obligations to uphold the rights of indigenous peoples during the development and implementation of extractive activities in the region. The IACtHR’s stance on consultation rights as part of the right to participation suggests a potential expansion of these standards and regulatory frameworks to non-indigenous groups. The IACtHR has increasingly established that consultation rights are independently protected under the American Convention as part of the right to participation. This would broaden the scope of the right beyond its traditional association with the 1989 International Labour Organization (ILO) Convention 169 on Indigenous and Tribal Peoples (IACHR, 2015a). Developing the notion of an independent right to consultation that is not contingent on the victim’s membership in an indigenous community could broaden the applicability of these regulations beyond indigenous cases.

The IACtHR has been particularly explicit in its extension of procedural protections for non-indigenous communities with respect to environmental impact assessments, which are mandatory in any instance of extractive activities that may pose a threat to the life, livelihood, and right to a healthy environment of people (IACtHR, Advisory Opinion on the Environment).

Towards an assessment of the effectiveness of the IAHRs

The IAHRs has become increasingly engaged with the human rights implications of extractivism in Latin America. However, how effective is the IAHRs in addressing extractivism? Clearly, extractivism poses a complex test of the institutional effectiveness of the IAHRs, given the substantial political and socio-economic stakes involved. Extractive industries often wield significant influence, making it difficult for the IAHRs to enforce protections for vulnerable communities and environments.

In this part of the chapter, we explore three areas that highlight the IAHRs's potential and limitations in effectively addressing extractivism in Latin America. First, we address the formal and informal constraints on access to the IAHRs for affected communities, which constitute formidable barriers to the IAHRs's ability to fundamentally challenge extractivism. Second, the nature of the IAHRs's response to communities affected by extractivism is far from transformational. Particularly, the IAHRs's primarily procedural approach to state obligations to regulate extractivism raises persistent concerns regarding the efficacy of participation and consultation mechanisms, as well as the processes for calculating and distributing "shared benefits" from extractivist projects. This highlights not only the issue of weak enforcement of existing state obligations but also the normative limitations of the IAHRs's framework in terms of offered protections. Third, the IAHRs's effectiveness is undeniably challenged by problematic state responses embedded within the enduring political economy of extractivism in the region.

Mobilizing the IAHRs

The IAHRs constitutes a distinct international opportunity structure for groups and communities that seek to challenge extractivism in Latin America (Engstrom & Low, 2019). The System can be used to expose human rights violations caused by extractivist activities. Communities can leverage the institutional mechanisms of the IAHRs, such as friendly settlement procedures, to negotiate with states over specific extractivist projects. The IAHRs provides standards and norms to frame social and political debates on the desirability of extractivism. The System can promote the interests of politically and economically marginalized groups that would otherwise have few opportunities to be heard in their domestic political systems. The jurisprudence of the IACtHR can strengthen litigation efforts before domestic courts by providing litigants and judges with judicial standards

to articulate demands and legitimize judicial decisions. The IAHR also offers groups and communities opportunities to pursue regional and international networking and build alliances with groups facing similar circumstances in other parts of the region.

Accessing the IAHR can be challenging, however. The use of the IAHR requires legal know-how and the ability to navigate complicated institutional avenues. Proceedings before the IAHR are also lengthy and costly. It should also be noted that in many countries in Latin America, the risks associated with human rights work remain considerable. Human rights activists seeking to challenge extractivist projects in many parts of the region face regular and widespread low-level police harassment, political vilification, paramilitary violence, and threats of assassination. As a result, the capacity of actors to access and to mobilize the IAHR is highly unequal.

Using the IAHR is particularly challenging for traditionally marginalized groups, such as indigenous communities. Beyond the resource constraints facing indigenous groups and their representatives before the IAHR, there is also the need to be able to formulate claims and struggles in the human rights language and terms recognized and accepted by the System (Loperena, 2020). In addition, only a minuscule number of cases reach a final judgement by the IACtHR in a timely manner. While the increasing number of petitions to the Commission has translated into a significantly increased caseload for the IACtHR, the Court deals with a handful of cases on an annual basis.

Considering these multiple constraints and the obstacles to mobilizing the IAHR, how useful is the System for struggles against extractivism, and particularly those of indigenous communities? In the first instance, it is crucial to acknowledge the extensive expertise indigenous communities have acquired in international law through continuous mobilization, often through transnational networks and alliances. Indigenous people regularly leverage their rights, particularly those related to consultation and self-determination. Through legal victories at the IACtHR, indigenous communities have established significant legal precedents, securing judgements that compel states to formally recognize indigenous territorial authority. The landmark case of *Sarayaku* exemplifies the Court's role in upholding the right to free, prior, and informed consent. The Court issued a binding decision against Ecuador for its failure to consult the Sarayaku people before allowing a foreign oil company to operate on their ancestral lands. Even in highly inhospitable conditions and against the odds, indigenous groups seek to leverage the IAHR in their struggles against often existential threats, as demonstrated in the Wayúu's pursuit of water rights "law-fare" in Colombia (Vidal Parra, 2019). In this particular case, the IACHR issued precautionary measures in favour of the elderly, women, and children that suffer the consequences of the water rights claims, which have led to a Constitutional Court decision aimed at protecting their rights (*Wayúu*). The IACHR recently monitored this situation through an on-site visit (IACHR, 2022).

In other words, human rights strategies, including those seeking to deploy the IAHRs, have become critical tools in the political contestation surrounding indigenous and environmental issues, particularly as natural resource extraction emerges as an increasingly controversial development model (Raftopoulos, 2017). This highlights that, though far from guaranteeing rights, international human rights institutions, such as the IAHRs, have the potential to legitimate claims, raise public awareness, and increase the costs of non-compliance for governments (Anagnostou & Mungiu-Pippidi, 2014). This also demonstrates how human rights advancements depend on the capacity of social movements and human rights advocates to mobilize international human rights law and institutions to effectively pressure domestic authorities for the implementation of change. While the IAHRs by itself is not sufficient, it can be strategically utilized as part of a broader campaign for change, potentially serving as a catalyst for tangible improvements at the local level, even in cases where state authorities demonstrate resistance to the IAHRs.

The IAHRs' (mildly) reformist critique of extractivism

Another area highlighting the potential and limitations of the IAHRs's approach to extractivism concerns the character and scope of the obligations that it seeks to impose on states. The IAHRs has privileged the development of mainly procedural types of state obligations. The growing recognition of extractivism's detrimental impacts has prompted policy concerns urging improved natural resource governance. Such policies typically seek to enhance the regulatory frameworks through the adoption of transparency and accountability measures for extractive projects, increase "stakeholder engagement" via strengthened civil society participation in oversight, and combine with targeted social investments in extractive regions to mitigate social unrest.

There are, however, significant problems with procedural approaches to extractivism, as demonstrated with respect to the IAHRs's emphasis on the rights of consultation of affected communities. Consultation processes, promoted by international actors in both the public and private sectors, have become an integral part of the global governance of extractivism and are at the centre of conflicts over extractivism in Latin America (Schilling-Vacaflo, 2017), particularly involving indigenous communities. Yet, the privileging of procedural guarantees in the form of consultation processes is problematic for several interlocking reasons. First, the general absence of indigenous ownership in consultation processes presents a significant challenge. These processes can potentially function as a "counter-insurrectionary device" that reinforces the existing power imbalances between state, corporate, and elite interests on one hand, and indigenous communities on the other hand. As such, consultation processes may simply serve as a marketing tool for development projects, creating an illusion of genuine dialogue, negotiation, and democratic decision-making (Dunlap, 2018).

A second challenge lies in the difficulty indigenous groups often face in articulating and defending their distinct visions for development and specific demands regarding extractivism. Third, a significant challenge arises from the often-limited outcomes generated by consultation processes. Even when consultation legislation is adhered to, the weakness of state institutions significantly undermines their effectiveness.

In short, there is a substantial implementation gap with respect to the consultation of indigenous people (Wright & Tomaselli, 2019). The frequent failures, whether deliberate or through neglect, of the prior consultation regime leave communities with limited options, often giving rise to disruptive and disorderly protests (Gamu & Soendergaard, 2023). However, some argue that agreements between governments, corporations, and indigenous groups hold the potential for the latter to gain greater control and benefit from extractivism. This would suggest that such agreements may transcend simple categorization as a “neoliberal technology” (O’Faircheallaigh & Babidge, 2023). Indeed, the meaning and application of consultation and participation rights are continuously subject to negotiation in practice.

These potential opportunities for affected communities notwithstanding, the circumscribed nature of consultation rights exposes weaknesses in enforcement capabilities and potential shortcomings in the normative framework of the IAHRs pertaining to the scope of protections offered. The scope of remedies available through the IAHRs remains restricted, preventing it from addressing the deeply entrenched marginalization and exclusion indigenous peoples face in Latin American societies. These limitations are reflected in the Court’s tendency to frame indigenous rights within the narrow normative confines of property rights, sidelining the broader cultural and societal dimensions of such rights for indigenous communities (Antkowiak, 2013). The IAHRs also encounters the inherent tensions between, on the one hand, its efforts to safeguard cultural identity and traditional values through the protection of ancestral lands and resources and, on the other hand, government development priorities that often involve extractive industries.

Despite its many limitations, however, there are opportunities for the IAHRs to develop responses conducive to a more sustainable future. One such emerging response lies in the recognition of the rights of nature and their connection to human rights, exemplified by initiatives such as granting legal personhood to rivers in Colombia (Álvarez-Marín et al., 2021) or forests in Ecuador (Prieto, 2021). The IACtHR has argued that

as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals.

endorsing the tendency “to recognize legal personality and, consequently, rights to nature” (IACtHR Advisory Opinion on the Environment, para.62). Such interpretive frames challenge the anthropocentric paradigm that views nature solely as a resource for human exploitation, potentially offering novel legal frameworks for environmental protection. However, while it is possible that the forthcoming advisory opinion by the IACtHR on climate change will lead to the development of specific obligations of non-state actors on the need to mitigate the impact of extractive activities, it is likely that the Court will refrain from acknowledging nature as rights bearers. This more restrained interpretative framework would partly reflect the Court’s reading of the American Convention’s Article 1.2 that restricts rights bearers to human beings, and partly its moderate position limiting its own competence while potentially deferring to the development of rights of nature by domestic courts in the region. Moreover, practical considerations remain regarding the implementation and enforcement of these rights, particularly in balancing them with legitimate human development needs.

A second area concerns the IAHR’s approach to business and human rights. In 2019, the IACHR published a report that digested its normative framework in response to human rights affected by corporations in the region. In 2021, the IACtHR issued a judgement in *Miskitos*, concerning the lack of supervision and auditing of the extractive fishing industry’s labour conditions of indigenous people. The case established landmark standards concerning business and human rights that address the lack of accountability for the impact of extractive industries (do Amaral & Palacio Revello, 2018). While the IAHR continues to prioritize state obligations over direct corporate accountability, the System has sought to advance notions of state responsibility to prevent, investigate, sanction, and provide remedies for human rights violations committed by non-state actors, including corporations (Cantú Rivera, 2023). Pressures on the IAHR are increasing, however, to develop “more robust standards directly addressing corporations and to integrate the United Nations Guiding Principles on Business and Human Rights [...] into its framework” (Gonza, 2016).

The (hard) realities of the political economy of extractivism

The IAHR also confronts effectiveness challenges given the centrality of the political economy of extractivism for development in Latin America. There are several dimensions to these challenges. First and foremost, the allure of extractivism for governments in Latin America poses a formidable challenge to the IAHR. Governments in the region are confronted with extensive social and economic demands from their electorates. Extractive projects constitute well-trodden pathways towards the generation of resources needed to meet these expectations.

Furthermore, the IAHR’s institutional responses to extractivism confront entrenched state interests embedded within the enduring political economy of

resource extraction in the region. As noted by Raftopoulos, while human rights discourses empower social movements and activists to challenge extractivism and critique prevailing development models, their application has yielded limited tangible outcomes (Raftopoulos, 2017). To a significant extent, this limited effectiveness stems not only from state fragility and weaknesses of regulatory frameworks, but also from the willingness of governments to prioritize development objectives and override their commitments to human and environmental rights.

It is also important to recognize that in the IAHRs, as elsewhere, human rights implementation varies with “overall legal infrastructure capacity and government effectiveness of a state” (Anagnostou & Mungiu-Pippidi, 2014). Weak state capacity and dysfunctional domestic judiciaries partly explain the unevenness in state compliance with the IAHRs. The IAHRs’s impact on public policy formulation and implementation depends heavily on its institutionalization within state structures. Effective remedies for human rights violations hinge on whether states have organized their institutions in ways that facilitate such remedies. As Huneeus explains, the more coordination required from national authorities, the lower the levels of compliance with the IAHRs (Huneeus, 2011).

Confronted with these pressures, a persistent challenge for the IAHRs lies in calibrating its response to extractivism. The IAHRs’s engagement with the human rights implications of extractivism underscores the centrality of concerns regarding the rule of law (access to justice, due process) and the rights of historically marginalized groups, particularly indigenous peoples, within the regional human rights agenda. This shift signifies a broader trend in human rights politics in Latin America, characterized by a move away from a focus on traditional human rights abuses perpetrated by state actors as part of deliberate state policies towards increasing concerns regarding the responsibilities of non-state actors, including multinational corporations (*Miskito*).

These trends present significant challenges to the established normative frameworks and institutional mechanisms developed by the IAHRs, designed towards the protection of individuals from state actions. Its basic foundations rest on legal concepts of state responsibility and the assumption that pressure can be applied to states, as they possess the primary levers for improvement. The challenge of extractivism for the IAHRs lies precisely in the extent to which state regulation of extractive activities remains — by a combination of commission and omission — underdeveloped, underlining the limited capacities of states to effectively assume their responsibilities to prevent negative human rights impacts.

Another related challenge for the IAHRs concerns the fact that it is no longer primarily concerned with “naming and shaming” repressive military and authoritarian regimes. It seeks, rather, to engage democratic regimes through a (quasi) judicial process that assumes at least partially responsive state institutions. This raises the question of the appropriate level of deference accorded to (democratic)

states and their prioritized development agendas by the IAHRs. While some critics argue that the IAHRs does not show sufficient deference to local political preferences and solutions (Contesse, 2016), proponents of a more active and intrusive regional human rights system point to the deficiencies of Latin American democracies, both in terms of the degree to which the interests of many groups remain woefully under-represented and in terms of what political systems in the region actually deliver to the people they are supposed to serve.

Conclusion

This chapter has examined the role of the IAHRs in shaping the governance of extractivism in Latin America. It has highlighted the human rights implications associated with the region's dependence on extractive industries. We have noted the key challenge in balancing the potentially contradictory policy objectives of poverty alleviation, reduced consumption, environmental protection, and the demands of politically and economically marginalized groups, particularly in a region with a historical reliance on resource extraction. Crucially, the impacts of extractivism and the promise of local development opportunities vary depending on the specific interests at stake. While negative impacts are multifaceted and experienced heterogeneously across and within local communities over time and space, the commodification of natural resources can also bring the promise of local development.

Specifically, the chapter has examined the IAHRs's engagement with conflicts arising from tensions and trade-offs generated by development projects affecting local interests and rights. The focus has been on how these conflicts affect indigenous communities specifically, given the significant impact of extractivism on their way of life. In its approach, the IAHRs has developed a primarily procedural set of state obligations, which we refer to as a tripartite regularly framework. This framework emphasizes the right to effective participation of affected communities, the requirement for a prior and independent environmental and social impact assessment, and the need to share reasonable benefits with these communities. Furthermore, the System has recognized the concept of collective rights held by indigenous communities over ancestral lands and natural resources, acknowledging their vital importance in preserving the distinct cultural identities of these groups.

The chapter has attempted to be sober about the multiple challenges facing the IAHRs in its engagement with extractivism and indigenous rights. These are, indeed, formidable, both in terms of the realities of the political economy of extractivism and in terms of what the IAHRs can realistically offer communities affected by extractivism. And yet, against the odds, it is quite remarkable the extent to which groups, both indigenous and non-indigenous, have developed strategies and specific tactics that draw on the resources and opportunities provided by the IAHRs in their ongoing struggles against extractivism in Latin

America. The IAHRs can provide prominent political spaces for policy debates and negotiation between the key actors involved in efforts to address the human rights implications of extractivism. The System provides an authoritative set of norms and standards to regulate extractivism, and it adds an additional layer of political pressure, momentum, and urgency to the issue.

Note

- 1 The authors are indebted to Laurence Whitehead for the formulation of this point.

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