

COLLECTIVE HUMAN RIGHTS: PUBLIC HEALTH V. STRUCTURAL AND ECOLOGICAL VIOLENCE (THE EXAMPLE OF ECUADOR V. COLOMBIA)

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I. INTRODUCTION

“Public health and safety are not simply the aggregate of each individual’s interest in health and safety Public health and safety are community or group interests.”¹ Human collective rights are not present in many legal instruments. Those that exist can be claimed to be explicitly collective and may be in direct conflict with public health mandates. For instance the “right to development” hides the real question that should be asked, that is, what is “development” and also “whose development” is promoted.²

The conflict with public health and vulnerable populations is easy to anticipate: the “ecological model of public health”³ is gaining acceptance in public health, as do the multiple etiologies of what Paul Farmer terms

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1. Don Beauchamp, *Community: The Neglected Tradition of Public Health*, 15 HASTINGS CENTRE REP. 28, 29 (1985).

2. See Bhupinder Chimni, *The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels*, 1 LAW & DEV. REV. 1, 3 (2008); see also LAURA WESTRA, ENVIRONMENTAL JUSTICE AND THE RIGHTS OF ECOLOGICAL REFUGEES 79–94 (2009) [hereinafter *Ecological Refugees*].

3. Benjamin M. Meier, *Employing Human Rights of Global Justice: The Promise of Public Health in Response to Insalubrious Ramnifications of Globalization*, 39 CORNELL INT’L L.J. 711, 743 (2006).

“structural violence,”⁴ and what this author has defined as “Ecoviolence.”⁵ Both concepts continue to gain “consensus among public health scholars.”⁶ This we can consider the collective right to public health as a formal restraint to the consequences of globalization:

It is at the collective level—the level at which globalization operates—that human rights must respond. By transmitting human rights discourse from individual to collective human rights, human rights can combat globalization’s insalubrious effects, giving states the discursive tools required to fulfill the public right to health through public health systems.⁷

When the collective human right to health comes in direct conflict with geopolitical regimes that favour powerful Western countries and multinational legal individuals, rather than given primacy to the protection of vulnerable populations, the results of globalization and its policies may engender disastrous consequences for impoverished people, especially for Indigenous peoples, as we shall see in the case discussed below.

First, and in order to lay the groundwork for the conclusions reached, this paper will start by discussing the real meaning of public health and the right to health itself.

II. WHAT IS THE REAL MEANING OF THE RIGHT TO HEALTH?

The term “public health” refers generally to the obligations of the government to fulfill the collective rights of its peoples to the “conditions in which people can be healthy.” Whereas medicine focuses primarily on individual curative treatment in clinical settings, public health—a form of social medicine—protects and promotes the health of entire societies⁸

4. See generally PAUL FARMER, *PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS AND THE NEW WAR ON THE POOR* (2003); see also PAUL FARMER, *INFECTIONS AND INEQUALITIES: THE MODERN PLAGUES* (1999).

5. See generally LAURA WESTRA, *ECOVIOLENCE AND THE LAW* (2004) [hereinafter *Ecoviolence*].

6. Meier, *supra* note 3, at 743–44; see also Illian H. Meyer & Sharon Schwartz, *Social Issues as Public Health: Promise and Peril*, 90 AM. J. PUB. HEALTH 1189, 1189 (2000).

7. Meier, *supra* note 3, at 747.

8. *Id.* at 739; see also INST. OF MED., *THE FUTURE OF PUB. HEALTH* 7 (1988); note that the 1986 Ottawa Charter for Health Promotion, added “health promotion” to “health protection” World Health Organization [WHO], *Ottawa Charter for Health Promotion*, WHO/HPR/HEP/95.1 (Nov. 21, 1986); see also John Raeburn & Sarah Macfarlane, *Putting the Public into Public Health: Towards a*

Dealing, as it does, with society and communities, public health requires regulations and legal instruments to implement the collective rights it supports. Hence, states are charged with the implementation and regulation of public health. But not all public health models lend themselves equally to the facilitation of the protection of citizens. Benjamin Meier traces the history of public health through the development of three main periods, each with a different emphasis.⁹ But the “microbial model” of public health, prevailing until after the Second World War,¹⁰ eventually gave way to the “behavioural mode” of disease, lasting until the early nineties.¹¹ Finally, the rise of the “ecological model” has led researchers to examine structural underlying determinants of health.¹²

The “microbial model,” for instance, with its emphasis on objective conditions, lends itself far better to government controls than the “behavioural model,” where suggestions/regulations originate from a government office may well conflict with individual freedoms, as it has happened for a long time with tobacco regulations.

Recently, a number of scholars from Anthony McMichael,¹³ to Jonathan Patz,¹⁴ to Susser and Susser,¹⁵ all emphasized “environmental conditions,” including air, climate, water, and food particularly as all the areas are under attack in various ways through globalization and climate change.

In the final analysis, “environmental conditions” or even a “healthy environment” are to be taken into consideration and even coupled, at times, with human rights. Yet the vagueness of both expressions remains: what is a “healthy environment?” A sustainable one, or one that simply produces well for the present is not enough, unless strict conditions are in place for the protection of areas of integrity of a sufficient size to support long-term health. In General Comment No. 14, Article 12.2(b), “the right to healthy

More People-Centered Approach, in GLOBAL PUBLIC HEALTH: A NEW ERA 243, 243–45 (Robert Beaglehole ed., Oxford Univ. Press 2003).

9. Meier, *supra* note 3, at 740–44.

10. *Id.* at 741.

11. *Id.* at 742.

12. *Id.*

13. See generally Anthony J. McMichael, *The Health of persons, Populations and Planets: Epidemiology Comes Full Circle*, 6 INT’L SOC’Y FOR ENVTL. EPIDEMIOLOGY J. 633 (1995); ANTHONY J. MCMICHAEL, PLANETARY OVERLOAD (1995).

14. See generally Jonathan Patz et al., *Impact of Regional Climate Change on Human Health*, 438 NATURE 310 (2005).

15. See generally Mervyn Susser & Ezra Susser, *Choosing a Future for Epidemiology: II. From Black Box to Chinese Boxes and Eco-Epidemiology*, 86 AM. J. PUB. HEALTH 674 (1996).

natural and workplace environments”¹⁶ is discussed and it mentions that “the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental conditions that directly or indirectly impact upon human health.”¹⁷

In addition, even under “industrial hygiene,” the Comment only calls for “the minimization, so far as is reasonably possible, of the causes of health hazards inherent in the working environment,” without any attempt to define the meaning of “reasonably practicable,” or to explore why any hazard in the work place should be considered to be “reasonable” at all.¹⁸ No. 16 in the same document, addresses the details of Article 12.2(c), “the right to prevention, treatment and control of diseases,” but environmental safety is the only environmental reference, as a “social determinant of good health.”¹⁹

Thus, even in a document entirely devoted to “Substantive Issues regarding the Implementation of the ICESCR,”²⁰ as recently as 2000, the question of the ecological conditions of the environment is not discussed as a separate issue, in order to achieve clarity: for instance both HIV/AIDS and gender issues receive far more attention, than what might constitute an impermissible alteration of local ecologies in any given area.

No. 27 on “Indigenous Peoples” is the paragraph that comes closest to this goal, as it states, inter alia: “the vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected” and further it adds, “the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.”²¹

The second cited paragraph represents a significant understatement, as it belittles what amounts to an ongoing crime against humanity.²² As

16. U.N. ESCOR, 22nd Sess., at 5, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

17. *Id.*

18. *Id.*

19. *Id.*

20. *See generally* U.N. Doc. E/C.12/2000/4, *supra* note 16.

21. *Id.* at 8.

22. *See generally* Patricia M. Wald, *Genocide and Crimes Against Humanity*, 6 WASH. U. GLOBAL STUD. L. 621 (2007); Steven Ratner, *Can We Compare Evils? The Enduring Debate on Genocide and Crimes Against Humanity*, 6 WASH. U. GLOBAL STUD. L. 583 (2007); Wolfgang Sachs, *Environment and Human Rights*, 137 WUPPERTAL INST. FOR CLIMATE, ENV’T, ENERGY 1 (2003); LAURA WESTRA, ENVIRONMENTAL JUSTICE AND THE RIGHTS OF INDIGENOUS PEOPLES (2007).

Indigenous communities severed from their territories and the practice of their traditions, for the most part, cannot survive as peoples.

In addition, although the attacks against Indigenous and local communities are the most obvious and visible examples of the consequences of globalized “development” leading to what I have termed “ecocrimes,”²³ Section 27 of the Comment does not go beyond the obvious.²⁴ Affluence and dwelling in more developed towns and cities may serve to insulate people in general, to some extent, from the effects of ecological disintegrity. Although environmental disasters may destroy even that precarious balance, as we saw in the United States in the aftermath of Hurricane Katrina, with its legacy of internally displaced persons (IDPs) with all the health hazards that condition entails.²⁵

Yet most of the grave health difficulties with the corresponding human rights breaches arise from conflicts over resources, or if we seek out the original cause, from the disintegrity, biotic impoverishment, and other consequences of negligent use.²⁶ Essentially, we can only continue to deplete the biotic diversity and the ecosystemic processes of areas and regions, at our own peril. Also, because those who destroy or gravely affect natural systems, and those who bear the brunt of the destruction, belong to different groups of people. This is increasingly a foundational issue of justice and human rights.²⁷

A recent article published by *The Lancet* argues that the Universal Declaration of Human Rights (1948) “laid the foundations for the right to the highest attainable standards of health”²⁸ and concludes that “right-to-health features are not just good management, justice, or humanitarianism, they are obligations under human rights law.”²⁹

In addition, Gostin cites the International Sanitary Regulations (ISR) adopted by the member states of the World Health Organization (WHO)

23. See generally *Ecoviolence*, *supra* note 5.

24. U.N. Doc. E/C.12/2000/4, *supra* note 16, at 8.

25. See generally *Ecological Refugees*, *supra* note 2.

26. Peter M. Vitousek, et al., *Human Appropriation of the Products of Photosynthesis*, 36 BIOSCIENCE AM. INST. BIOLOGICAL SCI. 368, 368 (1986); Paul L. Angermeler & James R. Karr, *Biological Integrity Versus Biological Diversity as Policy Directives*, 44 BIOSCIENCE AM. INST. BIOLOGICAL SCI. 690, 690 (1994).

27. See generally LAURA WESTRA, ENVIRONMENTAL JUSTICE AND RIGHTS OF UNBORN AND FUTURE GENERATIONS: LAW, ENVIRONMENTAL HARM, AND THE RIGHT TO HEALTH (2006); *Id.* at 135–60, defining “ecojustice,” by the inclusion of intergenerational and intragenerational issues, and specifically, by recognizing that the most vulnerable groups must be included in that definition.

28. Gunilla Backman et al., *Health Systems and the Right to Health: An Assessment of 194*, 372 THE LANCET 2047, 2047 (2008).

29. *Id.*

pursuant to the WHO's Article 21 powers.³⁰ Since 1969, these regulations were renamed International Health Regulations (IHR).³¹ In 2005, they were fundamentally revised to include many global pandemics, such as HIV/AIDS, SARS, avian flu, Marburg, and even bioterrorism.³² Article 1 of the IHR defines a public health risk as follows: "a likelihood of an event that may adversely affect the health of human populations, with emphases on one which may spread internationally or may present a serious and direct danger."³³

But it is not only infectious diseases that fit well within that definition. Also, not only an "event," but ongoing practices that may, and do so as has been demonstrated, affect the health of human populations, as well as present "a serious and direct danger." This definition fits the results of ecological degradation, hazardous pollution, climate change, and industrial activities including those aimed at "development," particularly extractive and mining operations.

The public health effects that follow are based on solid and abundant evidence, and the research of the WHO itself, the European Environmental Agency (EEA), and of scientists too numerous to name. Hence, at least the current way these activities are practiced and their effects, should fall under the heading of evident and clear threats to public health and should form part of the responsibility of states to oversee, correct, mitigate, or even eliminate these threats. Figure 1 in this article only shows the "underlying determinants of health (e.g. water, sanitation, food, shelter and education)," without any references to the negative aspects of globalized living that form the real "underlying determinants" of ill health and abnormal development.³⁴

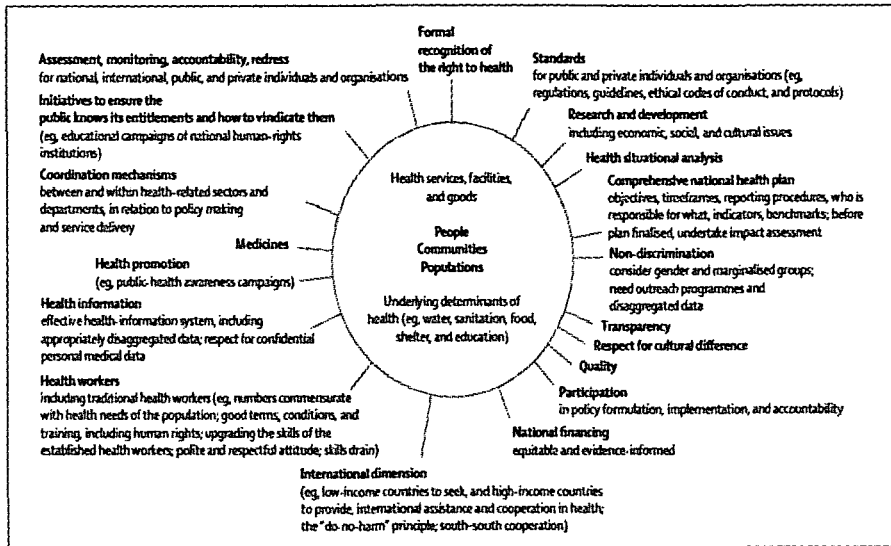
30. LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW* 246 (2nd ed., University of California Press 2008).

31. *Id.*

32. *Id.*; see also David P. Fidler, *From International Sanitary Conventions to Global Health*, 4 CHINESE J. INT'L. L. 325, 325 (2005); Michelle Forrest, *Using the Power of the World Health Organization: The International Health Regulations and the Future of the International Health Law*, 33 COLUM. J.L. & SOC. PROBS. 153, 156-62 (2000); Allyn L. Taylor, *Controlling the Global Spread of Infectious Diseases: Toward a Reinforced Role for the International Health Regulations*, 33 HOUS. L. REV. 1327, 1328 (1997).

33. International Health Regulations, WA 32.1, at 9 (2nd ed. 2005), available at <http://www.who.int/ihr/9789241596669/en/index.html> (last visited Feb. 16. 2010).

34. Laura Westra, *Collective Human Rights: Public Health v. Structural and Ecological Violence (The Example of Ecuador v. Colombia)*, 16 ILSA J. INT'L & COMP. L. 1 (2010).



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Figure 1: Right-to-health features of a health system underpinned by legal obligations based on general comment 14: preliminary working model

If we accept the claims advanced by *The Lancet* article and the general sense of Gostin's authoritative work, then the right to health appears to be a collective right "par excellence," or the clearest example of a collective right no one can refuse to consider primary and basic. It is a collective right not only to health care after the fact of various chemical and hazardous exposures, a degraded and unproductive environment, anthropogenically produced climate change, desertification leading to famine, and the like, but to the right to health and normal human development as such before being exposed to the litany of harmful situations listed above.

It is unfortunate that neither legal scholars, nor experts in public health declare clearly the obligation of states, and of other non-state actors to work to promote public health through prevention. First, preventive measures serve to reduce significantly or even eliminate the suffering of millions who either have not chosen the source of their health problems (such as cigarette smoking), or have not consented to the situations that engender those problems. Second, it is far more equitable to reduce or prohibit altogether the activities that cause the harms, than it is to attempt to redress the harms, once they have occurred. Third, many of the harms, after they have been imposed on a population, are incalculable. Abnormal births or children

born only to acquire grave diseases, both mental and physical, are clear examples.³⁶

The conflict between the human collective right to health and globalization and its effects on Indigenous peoples will be the topic of the next section.

III. PLAN COLOMBIA AND THE INDIGENOUS PEOPLES OF THE COLOMBIA/ECUADOR BORDER REGION

Relying partly on Vitoria's naturalist theory of International law, Brazil recognized the right to primordial occupation of land. While, under the pre-1988 Constitution, lands occupied by "forest dwelling aborigines" were part of the "patrimony of the Union," i.e. property of the federal government, those lands were inalienable, and it was prescribed that the Indians "shall have permanent possession of them, and their right to exclusive usufruct of the natural resources and of the useful things therein existing [was] recognized."³⁷

Although the passage above refers to Brazil rather than Colombia, or Ecuador, the status of the latter in relation to the governments of their respective countries are similar, although Colombia, for instance, has the additional problem that Wissner terms the "fog of war with narcoterrorism."³⁸ Still, Colombia's Constitution has a new "unit of protection for human rights, accion de tutela,"³⁹ as well as the constitutional recognition of their collective property rights, the official protection of native languages and dialects, a guaranteed share in oil and mining royalties, and respect for their cultural identity through the national education system.⁴⁰

Yet, despite their protected position within the country, the United States and the Colombian governments established a contract to combat the illegal drug trade in the area. The agreement, labeled Plan Colombia,

36. See generally P. Grandjean & P.J. Landrigan, *Developmental Neurotoxicity of Industrial Chemicals*, 368 *THE LANCET* 2167 (2006).

37. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 *HARV. HUM. RTS. J.* 57, 75 (1999); see also *Constituicao Federal [C.F.] [Constitution]* art. 8, art. 4(4), art. 198 (Braz.).

38. Wiessner, *supra* note 37, at 81.

39. *Id.* at 80.

40. *Id.*

involved the eradication of illegal coca crops in Colombia, using Roundup, an aerial herbicide produced by the American company Monsanto.⁴¹

Can we consider this “plan” an effect of development? Perhaps not in principle; but neocolonialism or the economic/political power of a stronger and richer state against a poorer and weaker one, is indeed a major aspect of globalized development. The problem is that “glyphosate,” the major component of Roundup, cannot be directed only to the coca plants slated for eradication, as it is sprayed aerially. The United Nations Commission on Human Rights⁴² states “reports indicate that the mixture likely contains herbicide concentrations that are more than five times greater than levels [permitted] for aerial application.”⁴³

Because the airplanes fly over the border region between Colombia and Ecuador, the Indigenous population of Ecuador is constantly at risk, far more than the coca growers of Colombia. In addition, the Indigenous peoples of this impoverished region have little or no access to health care or other social services.⁴⁴

The position of the U.S. agencies in this regard is that any possible negative results caused by their activities would be more than compensated by their extensive financial contributions, in the name of social and economic development.⁴⁵ Can these activities be considered in any way as forms of “advancement” or as positive “development” for the affected countries? The health and the very physical survival of the Indigenous communities around the border area and Ecuador are gravely at risk, as are the basic necessities of their survival, their crops and their water, both of which are affected.⁴⁶ The violations of human rights are obvious and the U.N. High Commissioner for Refugees recognizes the reality of the situation:

41. Grace Livingstone, *Comment & Debate: Colombia's Desert War: The Assault on Cocaine Funded by the U.S. is Wiping Out Everything—Apart from Coca Plants*, THE GUARDIAN, Mar. 12, 2009, at 30.

42. See generally U.N. Econ. & Soc. Council [ECOSOC], Comm. On Human Rights, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World*, U.N. Doc. E/CN.4/2002/40 (Jan. 24, 2002).

43. U.N. Econ. & Soc. Council [ECOSOC], Comm. On Human Rights, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World*, U.N. Doc. E/CN.4/2002/NGO/36 (Jan. 24, 2002).

44. K. LARRY STORRS AND NINA M. SERAFINO, ANDEAN REGIONAL INITIATIVE (ARI): FY002 ASSISTANCE FOR COLOMBIA AND NEIGHBORS (2001) 1, 9.

45. *Id.*

46. John Oldham & Rachel Massey, *Health and Environmental Effects of Herbicide Spray Campaigns in Colombia*, 2002 INST. SCI. & INTERDISC. STUD. 1, 3.

Ecuador is arguably Colombia's most vulnerable neighbor and has suffered profound effects from both Colombia's internal conflict and Plan Colombia. Problems on the border include drug-related violence, increased rates of crime, kidnappings, the forced migration of Ecuadorians from their homes, effects on human health and the environment from the aerial spraying of coca that drifts across the border, and food insecurity.⁴⁷

Hence, it is Indigenous peoples who have been gravely affected, not "drug lords." Even Plan Colombia (U.S./Colombia Project) has not achieved its goals, other than to promote and enrich Monsanto (a United States based multinational corporation), as it is often the case, at the expense of the health, safety and cultural integrity of the affected and displaced persons in the local Indigenous communities. These activities and their results are in direct conflict with the mandates of the U.N. Declaration of the Rights of Indigenous peoples under Article 7, ensuring them, "life, physical and mental integrity, liberty and security of person."⁴⁸ In addition, the survival of the traditional culture should be equally protected, as all activities that might affect their lands or resources are in violation of Indigenous rights.⁴⁹

Nor is this particular case unusual or the first "attack" on Indigenous Rights and survival, as oil companies have also carried out their "development" in the region for some time with grave effects on the health of the local populations, especially in Ecuador and the Amazon region.⁵⁰

Despite the efforts of the U.S. government to maintain secrecy, the substance sprayed was identified as glyphosate herbicide, manufactured by Monsanto under the brand name Roundup. Although it has now been established that it is in fact Roundup SL, "considerably more toxic than Roundup Ultra."⁵¹ The health effects have been studied for some time:

47. JUDITH WALCOTT, THE ECUADOR-COLOMBIA BORDER: HISTORICAL LINKS, CURRENT EVENTS, AND FUTURE POSSIBILITIES, 5 (2008).

48. Report on the Human Rights Council, June 19–30, 2006, *United Nations Declaration on the Rights of Indigenous Peoples*, art. 7, U.N. Doc A/61/53 (June 29, 2006).

49. *Id.* art. 8.

50. ANDRES M. ACOSTA, COUNTRIES AT THE CROSSROADS: ECUADOR 11 (2008), available at www.freedomhouse.org/uploads/ccr/country-7169-8.pdf (last visited Mar. 8, 2010); see also *Aerial Herbicide Spraying Violates the Human Rights of Peasant and Indigenous Communities in Colombia and Ecuador*, NEWSWIRE, Jan. 15, 2002, at 1; see also David Tenebaum, *Pesticides Coca-Killing Controversy*, 110 ENVTL. HEALTH PERSP. A236 (2002); Judith Wolcott, *Spraying Crops, Eradicating People*, 26 CULTURAL SURVIVAL Q. 1, 1-11 (2002); <http://www.culturalsurvival.org/home> (last visited Mar. 8, 2010); Inter-Am. C.H.R., *Report on the Situation of Human Rights in Ecuador*, Chapter IX, O.A.S.Doc.OEA/Ser.L/V/II.9b (April 24, 1997).

51. Oldham & Massey, *supra* note 11, at 1–2.

Aerial Spraying has a significant negative effect on the lives of large numbers of people, particularly the rural poor in Colombia. There is strong evidence linking spraying with serious human health effects; large-scale destruction of food crops; and severe environmental impacts in sensitive tropical ecosystems. There is also evidence of links between fumigation and loss of agricultural resources, including fish kills, and sickness and death of livestock.⁵²

The Indigenous Cofan people of the Putumayo province complained to their health department of “dizziness, diarrhea, vomiting, itchy skin, red eyes, and headaches,”⁵³ after the spraying and similar reactions were reported in Ecuador near the Colombia border in the Sucumbio Province, as well as, in Mataje, Esmeraldas.⁵⁴

In September 2001, the Ecuadorian Indians who live near the Colombian border, filed a class action suit against Dyn-Corp Corporation, the company in charge of the spraying in Colombia.⁵⁵ The physical and monetary damages were evident, as was and is, the loss of cultural integrity and identity of these people, many of whom had to abandon their homes. Aside from the question whether this sort of globalized industrial activity can be stopped, or at least “humanized,” i.e. modified to respect human rights, these events raise a number of other questions related to human collective rights, which will be addressed in the next section.

A. Humanized or Indigenized Development? Lacunae in Law

“[O]ne can paradoxically have a democratic state grudgingly concede on substance rather than principles and an undemocratic state pro-actively concede on principles rather than actual protection.”⁵⁶ Having considered the public health disasters reported in the previous sections, the next question that arises is, what does international law have to say about such transnational activities? According to Pentassuglia, there have been three “movements” in the legal history of minority protection.⁵⁷ The first one arose after the disintegration of three multinational empires, i.e. Austria-

52. *Id.* at 2.

53. *Id.* at 3.

54. *Id.* at 4.

55. See generally Complaint for Equitable Relief and Damages, *Arias et al. v. DynCorp*, 517 F. Supp. 2d 221 (D. D.C. 2007) (No. 01-1908).

56. Gaetano Pentassuglia, *Evolving Protection of Minority Groups: Global Challenges and the Role of International Jurisprudence*, 11 INT’L COMMUNITY L. REV. 185, 188 (2009).

57. *Id.* at 187–91.

Hungary, Prussia, and the Ottoman Empire.⁵⁸ The second “movement” uses international human rights “as a substitute for minority rights,” as it occurs post-World War II.⁵⁹

From the point of view of this work, this approach appears to represent a “wrong turn,” and one from which we have not yet recovered despite the increasing number of instruments intended for the protection of “minorities,” many of which remain within the ambit of individual rights, but some of which are indeed concerned with “people.” Pentassuglia puts it well: “The human rights approach of the time was meant to remove ‘ethnic particularism’ from the code of rights available to everyone.”⁶⁰

The terminal aspect of the conflict between individual and collective rights can be found here: human rights without any provision for specific communities is what informs, for instance, operations such as the Plan Colombia spraying of Monsanto’s Roundup. No doubt, just as the U.S. State Department’s response to the Indigenous claimants indicated, the small print describing the conditions of use for the product were quite detailed and worthy of study. The scientific review article cited by the State Department as justification for the spray campaigns assess the hazards from “present and expected conditions of use” of glyphosate herbicides.⁶¹ However, the term “present and expected conditions of use” of glyphosate implies adherence to the manufacturer’s recommendations. For example, the Manufacturer’s label for Roundup Ultra warns against applying the herbicide “in a way that will contact workers or other persons, either directly or through drift.”⁶² The label also calls for the removal of livestock before spraying and waiting periods of two to eight weeks before harvesting crops or using sprayed areas for grazing.⁶³ The label warns against contact of the “herbicide with foliage, green stems, exposed non-woody roots or fruit of crops . . . desirable plants and trees, because severe injury or destruction may result.”⁶⁴ These conditions are not met in Colombia, where airplanes apply herbicides over acres at a time with no prior warning to land

58. *Id.* at 187.

59. *Id.*

60. *Id.*

61. GARY WILLIAMS ET AL., *REGULATORY TOXICOLOGY AND PHARMACOLOGY* 117, 117 (2000).

62. Monsanto, *Roundup Ultra*, Sample Label (1999), http://www2.hawaii.edu/~defrenk/pdflecturenotes/HORT_481_Lab_HANDOUTS/herbicide_labels_proj1/Roundup%20Ultra%2010%2012%2001.PDF (last visited Feb. 25, 2010).

63. *Id.* at 3.

64. *Id.* at 1.

owners. In the United States, such a failure to follow the label instructions would be violation of federal law.⁶⁵

Even if we consider the use of Roundup permissible in the general sense, it is worth noting that after a recent case in the Canadian Province of Quebec where a small town in that province eliminated the use of pesticides⁶⁶ for health and environmental reasons, at least in areas where it can be monitored by the United States Environmental Protection Agency (USEPA) or the Canadian Environmental Protection Act, the province of Ontario has eliminated the use of pesticides/herbicides for cosmetic use.⁶⁷ But the mode of application in Colombia offers no protection to vulnerable people. The specific conditions and lifestyle of the affected populations eliminates any hope that the required safeguards might be in place.

In fact it appears that the domestic legal structure, as well as the social and health services infrastructure, are, in practice, totally unable to deal with the actual problems created by the spraying operations, despite Constitutional guarantees, as we shall see below. Therefore, this is just one obvious practical aspect of the need for specific minority/community rights where the actual “face” of the affected group would be understood and respected. The current regimes arising from non-specific human rights “movement” are somewhat more focused, as “the third movement was to be defined precisely by minority related standard setting as a way of integrating minority provisions into the international framework of human rights, beyond cases of gross abuse.”⁶⁸

A number of international instrument have tried to do justice to Indigenous communities and other local minorities, culminating with the Declaration on the Rights of Indigenous Peoples (UNDIP) and passed by the U.N. General Assembly in 2007, despite the opposition of several countries such as the United States, Canada, Australia, and New Zealand, and the abstention of eleven other countries.⁶⁹ Today we are clearly living in an era following the “third movement,” where the UNDIP declaration and the 2005 Plan of Action define all possible future instruments.⁷⁰

The third movement is the basic ground of the “fourth movement” envisioned by Pentassuglia, one which has the potential to ensure that not

65. *Id.*

66. 114957 *Canada Ltée v. Town of Hudson* [2001] 2 S.C.R. 241 (Can.).

67. An Act to amend the Pesticides Act to prohibit the use and sale of pesticides that may be used for cosmetic purposes, Statutes of Ontario ch. 11 (2008).

68. Pensassuglia, *supra* note 56, at 188.

69. G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007).

70. See The Secretary General, *In larger freedom: towards development, security and human rights for all*, delivered to the General Assembly, U.N. Doc. A/59/2005 (March 5, 2005).

only international law, but also domestic instruments, may help to focus on and define the full extent of protection needed for minorities and Indigenous communities. For any “movement” to succeed in ensuring protection for traditional and Indigenous communities, it is necessary that the connection between the ecological conditions of the territories they occupy and their health and survival must be explicitly acknowledged and codified in law.

In fact, many national constitutions today recognize the importance of ecology and environmental protection, at least in principle. However, there is no corresponding movement to connect the ecological integrity of the habitat to the biological integrity of the individual (human) organisms who live there, let alone any effort to devote special attention to the specific vulnerability of any community.

B. A Brief Overview of the Constitutional Protection Available for the Environment in Colombia and Ecuador

“It is the duty of the State to protect the diversity and integrity of the environment to conserve areas of special ecological importance, and to foster the education for the achievement.”⁷¹ This clear commitment is even preceded by several related statements, all of which would appear to be in direct conflict with what is happening on the ground instead. They are:

- 1) Every individual has the right to a healthy environment;
- 2) The laws must guarantee the Community’s participation in the decisions that may affect the environment; and
- 3) The state must also cooperate with other nations in the protection of the ecosystems in border areas.⁷²

If these are constitutional mandates, it is hard to see how the government of Colombia could even enter into Plan Colombia with the United States, let alone permit the human rights violations that ensued.

When we turn to Ecuador’s legal instruments, it is even harder to see how the country’s new Constitution,⁷³ a unique and inspirational document, could allow the country to tolerate the toxic operations taking place at their borders. The Articles approved by Ecuador’s Constitutional Assembly on July 7, 2008,⁷⁴ state the following:

71. CONST. REP. OF COLOMBIA, ch. 3, art. 79.

72. *Id.* art. 79–80.

73. REP. OF ECUADOR CONST. (2008).

74. *Id.*

Rights for Nature

Article 71. Nature or Pachamama, where life is reproduced and exists, a right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. Every person, people, community or nationality, will be able to demand the recognition of rights for nature before the public organisms. The application and interpretation of these rights will follow the related principles established in the Constitution

Article 74. The State will apply precaution and restriction on measures in all the activities that can lead to the extinction of species, the destruction of ecosystems or the permanent alteration of the natural cycles. The introduction of organisms and organic and inorganic material that can alter in a definitive way the genetic patrimony is prohibited.

Article 75. The persons, people, communities and nationalities will have the right to benefit from the environment and from natural wealth that will allow being. The environmental services cannot be appropriated: its production, provision, use and exploitation will be regulated by the State.⁷⁵

Articles 74 and 75 appear to address specifically the problems encountered by the local/traditional inhabitants. Hence, it appears that even the best constitutionally entrenched protection for both the environment and the peoples who depend upon it, are totally insufficient to protect them against a background of corporate and neoliberal state power in a powerful country. That said, for an international instrument to be effective in a national setting, it has to be explicitly included in the domestic Constitution or Charter of each particular accepting country, but the converse does not hold. The Articles cited from the new Constitution of Ecuador should be inserted and explicitly adopted in the international instruments mentioned thus far. Only then can these provisions be appealed to international courts to help curb and redress the sort of abuses we have cited, and other similar, but common situations.

Yet, we must acknowledge that even the Constitution of Ecuador does not explicitly link environmental degradation and disintegrity to human rights, i.e. “people and communities” will have the right to benefit and to achieve natural wealth rather than to the right to the protection of their life and health.

Similarly even the European Court of Human Rights, the only one where one finds some of the few existing cases that link environment and human rights, makes use of Article 8 of the European Charter that is, the

75. *Id.* art. 71–75.

right to one's home and family life, instead of addressing directly the right to life, to one's dignity, and to health.⁷⁶

IV. CONCLUSION

Although the case cited has not been resolved at the International Court of Justice at this time, it is clear that even the best national constitutions are powerless to protect their own citizens against the threats of powerful economic interests and the thrust of globalized trade agreements. The collective human rights to health are gravely at risk, and it appears that it is urgently necessary to promote immediate legal changes at the prescriptive/legislative level, as reliance on either domestic or international instruments and courts is clearly insufficient.

76. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Sept. 3, 1953, 213 U.N.T.S. 222; *see* *Guerra v. Italy*, No. 116/1996/735/932, Eur. Ct. H.R. (1998); *Ostra v. Spain*, No. 16798/90, Eur. Ct. H.R. (1994); *Fadeyeva v. Russia*, No. 5573/00, Eur. Ct. H.R. (2005); *Oneryildiz v. Turkey*, Eur. Ct. H.R. (2002).