

THE RESTRICTED ENVIRONMENTAL JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND POSSIBLE INNOVATIONS ON URBAN ENVIRONMENTAL PROTECTION

Adriani Marques França Tavares¹

Centro Universitário of Anápolis (UniEVANGÉLICA)

Mariane Morato Stival²

Centro Universitário de Anápolis (UniEVANGÉLICA)

Sandro Dutra e Silva³

Centro Universitário de Anápolis (UniEVANGÉLICA)

ABSTRACT

The purpose of this article is to analyze the limited environmental protection of the Inter-American Court of Human Rights (ICHR), which is limited to issues involving indigenous and ancestral communities and the possible extension of the Court's environmental jurisprudence to include urban environmental protection. Although there are rules in the inter-American System that recognize the right to a healthy environment as a human right, there are no actions in the Court involving environmental problems in cities, such as pollution, garbage, environmental disasters, among other topics. The ICHR has made an indirect interpretation of the right to the environment, which is viewed reflexively. For the development of this article, the methodology used is the bibliographic, and legislation, theory, cases and national and international documents on the subject will be used.

¹ Master's degree student in Environmental Sciences in the Postgraduate Program in Society, Technology and Environment, UniEvangélica. Specialization in Tax Law. Degree in Law from UniEvangélica. Professor at Law Courses of Faculdade Evangélica de Goianésia (FACEG) and Faculdade Anhanguera of Anápolis

² Doctoral degree in Law from Centro Universitário de Brasília (UniCEUB), with Doctoral internship at Université Paris I (Sorbonne). Post-doctoral student in Environmental Sciences in the Postgraduate Program in Society, Technology and Environment, UniEvangélica. Master's degree from UniCEUB. Supervisor and Researcher at the Law Research Nucleus of the Law Course and Professor of the Master's Program in Environmental Sciences of UniEvangélica. Visiting Researcher of Université Paris I (Sorbonne) and European Court of Human Rights.

³ Post-doctoral degree in History from Universidade de Brasília and from University of California (UC). Master's degree in History from Universidade de Brasília (UnB). Doctoral degree in Sociology from Universidade Federal de Goiás (UFG). Professor at Universidade Estadual de Goiás and at the Graduate Program in Natural Resources of the Cerrado (Master's and Doctoral degrees in Environmental Sciences). Professor at UniEVANGÉLICA, acting at the graduate Program in Society, Technology and Environment (Master's degree in Environmental Sciences).

The environmental issue is still a delicate discussion as it always faces the economic issue and there is hardly a possibility of balance. However, the indispensability of the right to a healthy environment is unquestionable, having support in several national and international norms and documents.

Keywords: innovation in environmental jurisprudence; Inter-American Court of Human Rights; restrictive interpretation of environmental protection; urban environmental protection.

*A RESTRITA JURISPRUDÊNCIA AMBIENTAL DA CORTE
INTERAMERICANA DE DIREITOS HUMANOS E POSSÍVEIS
INOVAÇÕES SOBRE PROTEÇÃO AMBIENTAL URBANA*

RESUMO

O presente artigo tem por objetivo analisar a restrita proteção ambiental na Corte Interamericana de Direitos Humanos (Corte IDH), a qual é limitada a questões envolvendo comunidades indígenas e ancestrais e a possível ampliação do alcance da jurisprudência ambiental da Corte para abranger a proteção ambiental urbana. Embora haja no sistema interamericano normas que reconhecem o direito ao meio ambiente sadio como um direito humano, não há ações na Corte envolvendo problemas ambientais nas cidades, como poluição, lixo, desastres ambientais, dentre outros temas. A Corte IDH tem realizado uma interpretação indireta do direito ao meio ambiente, o qual é visto de forma reflexa. Para o desenvolvimento deste artigo, a metodologia utilizada é a bibliográfica, onde será a utilizada a legislação, teoria, casos e documentos nacionais e internacionais sobre o tema. A questão ambiental ainda é uma discussão delicada pois sempre se defronta com a questão econômica e, dificilmente, há uma possibilidade de equilíbrio. Todavia, a imprescindibilidade do direito ao meio ambiente sadio é inquestionável, possuindo amparo em diversas normas e documentos nacionais e internacionais.

Palavras-chave: *Corte Interamericana de Direitos Humanos; inovação na jurisprudência ambiental; interpretação restritiva da proteção ambiental; proteção ambiental urbana.*

INTRODUCTION

The right to the environment has been recognized indirectly in the decisions of the Inter-American Human Rights System. Moreover, the whole environmental jurisprudence of the Inter-American Court of Human Rights is restricted to environmental damage that affects indigenous or ancestral communities. Therefore, there are no decisions in the International Court referred to environmental problems that occurred in the urban scenario, such as pollution cases, problems involving waste disposal, contamination, destruction of urban properties in the event of environmental tragedies, and other serious environmental problems.

International Environmental Law has demonstrated a considerable evolution in terms of the profusion of international standards that guarantee protection to the environment. There are a large number of laws and actors on the scene of International Environmental Law working to ensure a healthy quality of life. International Courts such as the International Court of Justice and the European Court of Human Rights have developed a wide and varied environmental jurisprudence that has been a reference for other foreign and national International Courts.

However, even with the serious environmental problems in the American continent, the Inter-American Court of Human Rights has not advanced in its jurisprudence in order to cover various environmental cases, only addressing indigenous issues.

Thus, the present article intends to analyze this narrow interpretation that the Inter-American Court of Human Rights has made in relation to the right to the environment and the possibility of expanding this jurisprudence regarding environmental matters, aiming to cover urban environmental problems such as pollution, improper disposition of the garbage, irregular occupations, among others.

For this purpose, the research presents a study on the Inter-American Human Rights System, bringing, in a succinct way, its structure and components, investigating the American Convention on Human Rights with regard to its omission in relation to social, economic and cultural rights. Besides, it verifies the Inter-American Court of Human Rights' restricted interpretation of the right to the environment and explores a possible expansion of its environmental jurisprudence to cover problems that have occurred in the urban environment. In this context, socioenvironmental disasters in Mariana and Brumadinho are used as possible cases.

The methodology used for the development of this article, from the conception of ideas and throughout the development of the work is qualitative, seeking, from the reading of legislation, theory, jurisprudence and articles, to investigate subjective aspects related to the possibility of expanding environmental protection at the Inter-American Court of Human Rights.

Exploring the possibilities of the problem through an exploratory and descriptive study is sought, with survey, analysis and interpretation of information found in international legislation, such as the Pact of San José (Costa Rica) and the Protocol of San Salvador.

With regard to the socio-environmental disasters that occurred in Mariana and Brumadinho, in addition to scientific articles, research was carried out on reports from working groups on Human Rights and Mining and documents from the Brazilian Institute for the Environment and Renewable Natural Resources (Ibama) and Organization of American States (OAS).

The intention is to present the limitations of the Inter-American Court's environmental jurisprudence and the possibility of extending it to cover possible urban environmental problems, since the legislation of the Inter-American System recognizes the right to the environment and allows for a broader and more effective interpretation.

1 THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

An analysis on international jurisprudence reveals two perceptible approaches to environmental human rights. The first is the recognition that environmental degradation can result in the violation or deprivation of existing human rights, such as the right to life, health or culture. A second approach is its international regulation in multiple international standards (VARELLA; STIVAL, 2017).

Established after the World War II, the modern understanding of International Human Rights Law can be seen as a consequence of the atrocities and violations committed and the conviction that these barbarities could be avoided if there was an international system of protection to human rights. Thus, Flávia Piovesan (2009, p. 213) affirms that “the international legitimacy of a State is increasingly dependent on the way in which domestic societies are politically ordered.” The author also clarifies:

The idea that the protection to human rights should not be reduced to the reserved domain of the State is strengthened, since it reveals a subject of legitimate international interest. In this way, there is prediction of the end of the era when the way in which the State treated its citizens was conceived as a problem of domestic jurisdiction, consequence of its sovereignty.

The conception of International Human Rights Law is based on the 1948 Universal Declaration of Human Rights. In its contemporary aspect, human rights are universal, given their extension, since the condition of being a person is enough to enjoy them; and indivisible for establishing a reciprocal interdependence between civil and political rights and social, economic and cultural rights (PIOVESAN, 2009). Thus, civil and political rights are interrelated with social, economic and cultural rights, and there is no guarantee for the first without the last.

Over the years, international human rights have become a fundamental and mandatory normative category, which have to be respected at all times and in all places. It is evident that national states have slowly incorporated into their systems the institutional mechanisms for protection and defense of basic human rights, as well as their recognition. In this way, the structuring and maintenance of the Democratic State impelled States to recognize the importance of human rights and take on the burden of protection, creating the European, American and African Systems (BICUDO, 2003).

Economic, social and cultural rights, together with civil and political rights, are part of Human Rights. As a means of protecting human rights, there are global and regional systems. Among the regional ones, the European, Inter-American and African systems stand out (PIOVESAN, 2004).

The global normative System, of general scope, is composed through the preparation of several International Treaties, and the regional systems seek to meet its peculiarities. The global and regional systems are not dichotomous, but complementary. At the international level, they make up the instrumental universe for the protection to human rights, inspired by the values and principles of the Universal Declaration.

The Inter-American System created through the American Convention on Human Rights is based on the Universal Declaration of Human Rights, which determines that freedom, equality and dignity are inherent in every human being, and the State have to provide conditions for them to exercise their civil, political, economic, social and cultural rights.

The American Convention on Human Rights (ACHR), also called the Pact of San José, Costa Rica, was adopted in San José at the Inter-American Conference on Human Rights, on November 22, 1969. Brazil

only became a signatory on July 9, 1992, ratifying it on September 25, 1992, and it has been promulgated by Decree no. 678 of November 6, 1992 (BRASIL, 1992).

It is a regional system of protection that, among other topics, establishes the obligation of the signatory States with regard to the progressive development of economic, social and cultural rights. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights were established to be in charge of the system.

In accordance with article 41 of the American Convention, the Inter-American Commission on Human Rights, an autonomous body, has seven members, with a four-year term renewable for another four years and whose main function is to promote the observance and defense of human rights. It is also the responsibility of the Inter-American Commission on Human Rights to receive complaints about violations of fundamental rights by acts or omissions practiced by the States (CIDH, 1969).

The Inter-American Court of Human Rights, composed of seven judges coming from the member States of the Organization, elected for a period of six years and renewable for another six, has jurisdiction to hear any cause submitted to it, regarding interpretation and application of the provisions of the ACHR, provided that the States Parties relating to the case have recognized or recognize the aforementioned competence.

The Convention has been written in a very timid manner, not innovating much beyond what was already contained in the Universal Declaration of Human Rights, but it clearly demonstrates the intention of effective protection to rights, and may cause States to be held responsible for any omission (ESSE, 2012). It does not expressly establish the right to the environment, which is recognized in the Additional Protocol of San Salvador in a categorical way. As stated by Marcelo Dias Varella (2003, p. 65):

The American Convention on Human Rights does not expressly address the right to the environment, and this topic is addressed in the Protocol of San Salvador, which, however, did not guarantee the right to submitting individual petitions for direct protection to the environment.

This is an additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights, approved on November 17, 1990, in San Salvador. Preambulary, the Protocol of San Salvador recognizes the close relation between civil and political rights and economic, social and cultural rights, which form an indissoluble whole.

Cançado Trindade (1994, p. 48) explains:

The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, approved and signed in San Salvador, El Salvador, at the XVIII OAS General Assembly on November 17, 1988, represented the culminating point of awareness – which arose not only at the global level, but also, from the years 1979-1980, at the regional level of the OAS – in favor of more effective international protection to economic, social and cultural rights. The 1988 Protocol initially stipulates (article 1) the obligation of the States Parties to adopt measures (internally and through international cooperation) “to the maximum of the available resources and taking into account their level of development,” in order to obtain “progressively and in accordance with internal legislation” the “full effectiveness” of the rights established in the Protocol.

An extensive list of economic, social and cultural rights is presented in the Protocol of San Salvador, involving the following: right to work; union rights; right to social security; right to health; right to a healthy environment, food, education and culture; right to constituting and protecting the family, child, the elderly and disabled people.

Thus, in parallel with the conventions protecting civil and political rights, immediately enforceable, there was creation of treaties that addressed economic, social and cultural rights, whose implementation could not be immediate, but progressive, depending on the level of development of each State (TEIXEIRA, 2011).

There are countless fields in which the American Convention on Human Rights has to direct a closer look and more effective action, as a focus on jurisprudence, since social, economic, political and environmental problem are fundamental aspects for the survival of the current and future generation, besides being fundamental factors of human dignity. In the case of the right to the environment, which will be addressed later, concern already exists at a global level; however, greater attitude is still necessary on the part of human right bodies.

2 THE OMISSION OF THE AMERICAN CONVENTION ON HUMAN RIGHTS IN RELATION TO SOCIAL, ECONOMIC AND CULTURAL RIGHTS

Promoting the application of Human Rights provided for in the 1948 Universal Declaration of Human Rights and aiming at their mandatory observance, in 1966, the International Covenant on Civil and Political Rights

and the International Covenant on Economic, Social and Cultural Rights emerged.

The 1966 International Covenant on Economic, Social and Cultural Rights encompasses the following: right to work; right to form unions; right to strike; right to social security and assistance; women's rights during motherhood; children's rights; right to a minimum structure that allows for a dignified life, including food, clothing and housing; right to mental and physical health; right to education; and right to participation in the country's cultural and scientific life.

These rights lead to the State's need for action, which has to assume obligations, and it consequently entails expenses. In the words of Modell (2000, p. 109), "One thing is to guarantee freedom of expression; another is to eradicate illiteracy among an entire population." Thus, in the American Convention on Human Rights, the group of economic, social and cultural rights, unfortunately, was in the background, being in charge of only one article.

Therefore, the American Convention on Human Rights, despite widely establishing civil and political rights, presents only one article referring to social economic and cultural rights, which reveals the right to progressive development. Cançado Trindade (1994, p. 31) states: "Consequently, the American Convention contains only one article devoted to economic, social, and cultural rights, limited to providing for their progressive development." The author also points out:

The dichotomy between civil and political rights and economic, social and cultural rights has been established since the preparatory work for two United Nations Pacts and especially in the decision taken by the General Assembly in 1951 to elaborate not one but two instruments that respectively dealt with the two categories of rights. It was based on the idea that civil and political rights were subject to "immediate" application, requiring obligations of abstention by the State, while economic, social and cultural rights were implemented by rules capable of progressive application, requiring positive obligations (TRINDADE, 1994, p. 32).

It was up to the Protocol of San Salvador to list second-generation rights, highlighting the types of social rights and incorporating them into the Inter-American System; the Protocol of San Salvador became the main standardization of the Inter-American System when it comes to economic, social and cultural rights.

In order to make decisions effective, the Protocol of San Salvador contemplates, in addition to a procedure of periodic reports, the possibility of

individual petitions, which will be considered, as a rule, by the Inter-American Commission on Human Rights in cases of violation of the rights of workers in their union organization and violation of the right to education. It is also the responsibility of the Inter-American Commission on Human Rights, authorized by this Protocol, to give its opinion, guide and propose suggestions and recommendations concerning the economic, social and cultural rights of the signatory States (TEIXEIRA, 2011, p. 25).

The American Convention does not clearly establish protection to the these rights, to which the Protocol of San Salvador refers, even though it emphasizes the responsibility of States by means of its article 26. As already mentioned, this international document lists a series of so-called social rights: work, social security, protection to the family, the elderly, child, culture, and the balanced environment (PIOVESAN; IKAWA; FACHIN, 2011).

The Inter-American Court of Human Rights has very few cases where economic, social and cultural rights prevail. As Monique Matos (2015, p. 274) expresses:

The study of cases judged by the Inter-American Court involving violations of the right to the progressive development of ESCR, provided for in art. 26 of the ACHR, however, reveals a repeated and unjustified failure to analyze requests for declaration of violation. Only cases involving ESCR violations in groups subject to conditions of vulnerability, such as indigenous peoples and children, have violations of such rights examined by the Inter-American Court, thus hampering the development of a legal culture for strengthening ESCR in the Inter-American System.

Considering social rights, the Inter-American Court of Human Rights' jurisprudence basically protects them only indirectly and under a civil perspective, since its decisions revolve around three typologies, namely: the positive dimension of the right to life; the implementation of the principle of progressive social rights, and issues concerning the indirect protection to social rights. Monique Matos (2015, p. 269) points out:

The analysis of the decisions rendered in the cases judged by the Inter-American Court involving ESCR points to a recurrent failure to analyze the violation of the right to the progressive development of economic, social, and cultural rights, which has only occurred when groups in a situation of special social vulnerability are involved.

It is noted that, even if there is a violation of article 26 of the American Convention on Human Rights, which determines progressive development, the Inter-American Court of Human Rights' jurisprudence has neglected

matters involving violations of social, economic and cultural rights that do not correspond to cases concerning conditions of social vulnerability.

3 THE ENVIRONMENT AT THE INTER-AMERICAN COURT OF HUMAN RIGHTS

On November 15, 2017, the Inter-American Court of Human Rights published an important Advisory Opinion (OC-23/17) on Environment and Human Rights. The Advisory Opinion reaffirmed that human rights depend on the existence of a healthy environment, and the Court determined that States have to take measures to prevent significant environmental damage to individuals inside and outside their territory. In other words, if pollution can cross the border, there can also be legal liability. This insight briefly reviews the history of the consultative process before discussing its main implications (CIDH, 2017).

This Advisory Opinion originated at the request of Colombia in March 2016, for clarifications regarding the State's responsibility for environmental damage that violated the American Convention on Human Rights.

The request of Colombia was motivated by a desire for greater legal certainty about possible ramifications of its planned offshore activities in the Caribbean Sea, as well as concerns about the potential environmental degradation cause by its neighbors' new infrastructure projects and other actions with a major impact on the environment (CIDH, 2017).

The consultative process gave the Court an opportunity to provide detailed guidance on the interaction between International Human Rights Law and International Environmental Law. For the first time, the Court recognized the existence of a fundamental right to a healthy environment under the American Convention, which demonstrated a late position.

First, the Court recognized the existence of an "autonomous" right to a healthy environment under the American Convention. Faced with the problem of environmental degradation, inter-American institutions had previously addressed this issue in terms of its impact on other human rights, since the Convention does not expressly refer to the environment. The right to a healthy environment is recognized in article 11 of the Protocol of San Salvador, but this article is not used in individual petitions (STIVAL, 2018).

Second, the Court clarified the extraterritorial objective of the American Convention regarding environmental matters. The Court established

that the term “jurisdiction” encompasses any situation in which a State exercises authority over a person or subjects the person to its effective control, whether within or outside its territory.

It also reiterated that States have a duty to avoid significant damage to the environment of other States or to global heritage. It specified that States should regulate, supervise and monitor activities under their jurisdiction that could cause significant damage to the environment; conduct environmental impact assessments; prepare contingency plans to minimize the possibility of environmental disasters, and mitigate any significant damage to the environment according to the best science available (STIVAL, 2018, p. 68).

In OC-23/17, the Court recognized the existence of an irrefutable relation between the protection to the environment and the realization of other human rights, due to the fact that environmental degradation affects the effective enjoyment of other rights. In addition, the Court emphasized the interdependence and indivisibility between human rights, the environment and sustainable development, since the full enjoyment of human rights depends on a favorable environment (CIDH, 2017).

Based on this close connection, the Court noted that several human rights protection systems recognize the right to a healthy environment as a right in itself. This results in a series of environmental obligations for States to ensure that they comply with their duties to respect and guarantee these rights (PIOVESAN; IKAWA; FACHIN, 2011).

In the Inter-American Human Rights System, the right to a healthy environment is explicitly recognized in article 11 of the Protocol of San Salvador, which specified the following: “1. Everyone shall have the right to live in a healthy environment and to have access to basic public services; 2. The States Parties shall promote the protection, preservation and improvement of the environment” (CIDH, 1999). This right have also to be considered included among economic, social and cultural aspects, which are rights protected by article 26 of the American Convention. The human right to a healthy environment is an individual and a collective right, and constitutes a universal value that favors present and future generations. In the individual context, it refers to its relation with the right to health, life, and even physical integrity. Environmental degradation can cause irreparable damage to humans. Therefore, a healthy environment is fundamental to humanity existence (VARELLA, 2003).

Environmental degradation violates not only specific rights of the

individual, but mainly affects the primary condition for the realization of these and any other rights: life. Despite some doctrinal discussions, the existence of a human right to a healthy environment has already been recognized and affirmed as such by international law, both through concrete norms and through soft law or national jurisprudence (SONELLI, 2014).

The rules of the Inter-American Human Rights System recognize the right to a healthy environment as a human right; however, specific articles are not used in the construction of the legal arguments of the Inter-American Court. The Inter-American Court has followed a tendency to ground environmental cases, giving preference to civil rights. The environment is considered indirectly and there is no clear protection to this right.

4 THE POSSIBLE EXTENSION OF THE INTER-AMERICAN COURT'S ENVIRONMENTAL JURISPRUDENCE IN CASES OF URBAN ENVIRONMENTAL PROTECTION

It is well known that one of the major current global problems refers to impacts on the environment due to the increase in the population, which is the owner of the environmental good. Environmental protection is increasingly evolving, from being an exclusive protection function to becoming an administration function (VARELLA, 2003).

Urban impacts on natural ecosystems can have unforeseen effects on the city residents' health and well-being. Understanding how ecosystems provide services, who benefits from them, what happens when an ecosystem changes and how ecosystems can contribute to greater resilience, therefore, is important for the development of sustainable cities (SCHONARDIE, 2014, p. 12).

Cities are paramount in the lives of countless people, and a socially fair, ecologically sustainable and economically productive environment have to be created in this context. Education is a vital part of making this happen and local authorities can collaborate to integrating biodiversity and, with it, the ability to live in a sustainable way.

Considering that, by 2010, urban residents will make up 70% of the planet's population, and that a similar percentage of those people will be under 18, Education for Sustainable Development should be seen as a crucial strategy to enable individuals to make decisions informed at all levels of urban life, promoting lifestyle changes that integrate the multiple values of biodiversity (SCHONARDIE, 2014, p. 47).

It is observed, therefore, that cities have great potential in generating innovations and governance instruments, and can take the leadership in

terms of sustainable development.

City life has been the subject of intense debate in recent decades. Global trends point to problems involving social, demographic, economic, political, and environmental contexts, demonstrating the complexity of the current urban scenario. However, legislation, plans and centralization, towards urban discussion, did not answer conflicting questions within the socio-spatial context and did not contribute to the access to the legal real estate market.

If most of the global environmental problems originate in cities or in their ways of living, it is difficult to achieve sustainability at a global level without making cities sustainable. It is in cities that the social, economic and environmental dimension of sustainable development converges most intensely (SCHRIJVER, 2008).

Thus, it becomes necessary for cities to be thought, managed and planned according to a sustainable development model. For the purposes of this study, sustainable development is understood as the development that allows commanding the needs of the present, without compromising the response to the needs of future generations, through the integration of environmental, social and economic component (SCHONARDIE, 2014).

The environment in any aspect analyzed, whether urban, rural or natural, has a close relation with all other human rights, deserving essential care and legal protection. However, despite the intense concern and need, the Court's decisions are still limited with regard to the environment, and it becomes even scarcer with regard to the urban environment.

In analysis on the Inter-American Court of Human Rights' jurisprudence, D'AVILA (2014) argues that of the 286 cases considered, only four contemplated environmental protection, and only reflexively. They are the following: case of Afro-descendant communities displaced from the Cacarica River Basin (Genesis Operation) V. Colombia; case of the Kichwa Indigenous People of Sarayuku V. Ecuador; case of the Saramaka People V. Suriname, and case of the Mayagna (Sumo) Awas Tingni community V. Nicaragua. He affirms that:

Based on an extensive interpretation of human rights – especially the rights of indigenous and tribal communities – to property, cultural heritage, circulation and residence, life and judicial protection – the Court has justified decisions that obliquely protect environmental goods, corroborating the thesis of indivisibility, interrelationship and interdependence among all human rights (D'AVILA, 2014, p. 37).

The Inter-American Court of Human Rights' decisions related to the environment are basically restricted to indigenous problems and do not even use the rules of the Convention and of the Protocol of San Salvador in their foundations, and only indirectly their considerations are limited to the right to the environment, reflexively. A possible innovation would encompass observation of the urban environment directly considering its protection (STIVAL; SILVA, 2018).

The Inter-American Court's omission can be justified by the lack of filing lawsuits on the urban environmental theme, case in which it is assumed that there is a lack of information and/or guidance, and that even if there is evidence of an offense to rights relating to the urban environment, the court restricts to observance of victims' requests (STIVAL; SILVA, 2018).

Similarly to other International Courts, the European Court of Human Rights has interpreted the right to the environment in a comprehensive and effective way with regard to cases of violation of environmental protection. Its work involves cases of polluting activities in its various modalities, the right to information and popular participation in environmental licensing procedures, protection to environmental areas in the event of irregular occupations, and guarantee of property rights.

The jurisprudence of that Court, for example, can contribute to the Inter-American Court's jurisprudence, in the sense of broadening its normative scope to cover cases of possible urban environmental problems and not only issues related to indigenous lands. Even in the case of different legislative and cultural sources and different urban planning processes in cities, there is an identity of urban environmental problems in the European and inter-American contexts. Thus, it is possible to use the environmental decisions of one Court at the other. The Inter-American Court may seek parameters from the European Court in order to diversify its environmental jurisprudence. It would be a major innovation in environmental matters in the Inter-American System.

The ECHR becomes more comfortable and is more open to environmental issues, especially cases about the urban environment. As a result of this fact, a better dialogue between the ECHR, the Commission and the Inter-American Court could remove divergences or even bring together convergences involving the right to a good quality of urban environmental life (SONELLI, 2014).

An opportunity for the Commission and the Inter-American Court to analyze urban environmental problems would be in the socio-environmental tragedy that occurred in Mariana, for example. In the Mariana case, an event of violations of fundamental rights stands out. Eventual internationalization of the Mariana case, with the formalization of cause against the Brazilian State before the Inter-American System can innovate if the violation of the right to environmental quality of life is raised by the parties and not only the indication of violation of human rights, from the environmental tragedy, as has been happening in inter-American jurisprudence.

Mariana disaster, on November 5, 2015, was due to the collapse of the Fundão dam, which is the responsibility of the mining company Samarco Mineração S/A. According to a report by Ibama (2018), approximately 45 million cubic meters of tailings were released into the environment, covering 666.2 km of water courses. The polluting material reached the Santarém dam, the district of Bento Rodrigues and continued until the coast of Espírito Santo. Regarding socio-environmental damage, 19 lives were lost in the tragedy. The aforementioned document found that:

In addition to human losses, the disaster severely affected the lives of populations residing in the Rio Doce River Basin – and continue threatening the maintenance and continuity of the way of life of traditional peoples and communities –, the disaster severely compromised the regional economy and destroyed agriculture, livestock, trade, services and fishing activity across the hydrographic basin, in addition to public and private infrastructure in the cities affected (IBAMA, 2018, p. 11).

According to a survey carried out by the Brazilian Institute of the Environment and Renewable Natural Resources (Ibama), in 2015, with respect to the damage caused by the rupture of the dam, there were major losses to public services and agricultural activities, generating great economic damage, including problems of electricity generation and water supply, in addition to the huge environmental loss related to fauna and flora (IBAMA, 2018).

It is observed that the performance of the Inter-American Court in this tragedy in Mariana would be a good opportunity for it to recognize the right to the environment in other aspects such as urban problems in the cities affected, using the parameters of interpretation of the ECHR's environmental jurisprudence. Thus, the Inter-American Court could create a new type of more comprehensive environmental jurisprudence, contemplating possible urban themes.

The populations affected by the tragedy in Mariana still cope with the damage resulting from the disaster. There are vulnerabilities regarding health, public services, water quality and housing availability. The offense to human rights and the urban environmental disorders, with a clear violation of the environmental quality of life of the people affected, which still persists despite numerous lawsuits, demonstrates insufficiencies with regard to the measures adopted, besides state omission (LACAZ; PORTO; PINHEIRO, 2017).

Before any positioning in Brazil, international bodies already showed some concern about the environmental disaster in Mariana, especially in relation to the violation of the population's right to information. The United Nations Organization, in a statement made a month after the tragedy exposed, by means of a report elaborated after the visit of a working group to the place, the gravity of the situation, emphasizing, among others consequences, the urban environmental ones (STIVAL; SILVA, 2018).

In 2016, in a hearing held in Santiago, Chile, 15 civil society organizations denounced Brazil to the Organization of American States (OAS), and among the grounds, it is the lack of participation of those affected in the agreement of reparation for the victims of the disaster in Mariana, signed between companies and the governments of the states of Minas Gerais, Espírito Santo and Federal Government (OLIVEIRA, 2016).

In January 2019, Brumadinho, Minas Gerais, was affected by a tragedy involving the collapse of dams in Brazil. On January 30, 2019, through the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights, the Inter-American Commission on Human Rights expressed its opinion on the case, expressing its deep concern, and observing the pressing need for mitigating and restoring actions in relation to the environment and people involved, by the Brazilian Government and the responsible company (OAS, 2019).

As a result of state omission and negligence, the absence of effective solutions and remedial measure, in addition to the lack of punishment for the crimes committed, in May 2019, members of civil society made complaints to the Inter-American Commission on Human Rights (CAETANO, 2019).

The ineffectiveness and slowness of State actions give rise to a real violation of Human Rights, which authorizes complaints at international spheres, specifically before the Inter-American Court of Human Rights, supported by the Inter-American Human Rights System, and all that is

required is the exhaustion of domestic resources.

State Power is directly liable for the safety and integrity of its people. “Thus, in the event of an internal failure to take administrative or judicial measures, either by the companies responsible or by the government, it is possible to internationalize the case in the ICHR against the Brazilian State for violation of the mentioned human rights” (STIVAL; SILVA, 2018, p. 224).

It appears that, even in a timid way, these two cases that present a serious situation of violation of fundamental rights due to an environmental tragedy generated in the Inter-American System an innovative interest in turning its attention to environmental issues outside its model of interpretation of the right to the environment. The limited vision of the right to the environment only in cases involving indigenous people can gain new contours, in the sense of covering possible urban environmental problems.

The internationalization of cases such as those of Mariana and Brumadinho in the Inter-American Human Rights System can provide opportunities and expand the way of recognizing the right to the environment, transforming the Inter-American Court’s environmental jurisprudence, which currently only indirectly contemplates the right to a healthy environment, in a more comprehensive and effective way.

CONCLUSION

The right to a healthy environment, listed as a human right, is largely supported by international standards; however, the performance of the Inter-American Human Rights System recognizes it only indirectly and restrictively.

Although there is a set of rules that expressly recognize the right to a healthy environment as a human right, such as the Protocol of San Salvador and, indirectly, the American Convention on Human Rights, the Inter-American Court of Human Rights’ jurisprudence is limited in relation to the right to the environment, and it has indirectly recognized this right only in indigenous cases.

The Inter-American Court favors civil and political rights over social, economic and cultural rights, which may reflect the very omission of the American Convention, which, without further consideration, lists only one article referring to the progressive development of these rights.

The right to the environment, as part of this second category of rights,

can justify the Court's tendency to only recognize it when linked to civil rights. Thus, the Court's decisions regarding the environment are limited and do not directly address urban environmental issues, such as pollution, garbage, basic sanitation, irregular occupations, urban mobility, and violations of the right to information and to community participation.

In contrast, the European Court of Human Rights has a varied and effective environmental jurisprudence involving urban issues and that recognizes the right to quality of life, although there is no express provision for the human right to the environment in its Convention.

The analysis of the collapse of mining dams that occurred in Mariana and Brumadinho in Minas Gerais, as well as their serious consequences, in addition to showing urban environmental issues and violation of fundamental rights from an environmental tragedy, shows itself as an excellent opportunity for innovation and jurisprudential evolution of the Inter-American Court of Human Rights, which, by establishing a dialogue of decisions with the European Court, can directly recognize the right to a healthy urban environment as a human right.

The possible expansion of the Inter-American Court's environmental jurisprudence is a great-relevance topic due to the accelerated urban growth and the serious problems involving violations of the right to a healthy environment, as well as to the relevance in protecting Human rights at international level.

It is emphasized that that the objective would not be to solve the cities' environmental problems, but to contribute to broadening the normative view of the Inter-American Court's jurisprudence on urban environmental problems and, consequently, to confirm the hypothesis that international actions are possible due to the denial of environmental quality of life in Brazil.

REFERENCES

- BICUDO, H. Defesa dos direitos humanos: sistemas regionais. *Estudos Avançados*, São Paulo, v. 17, n. 47, p. 225-236, 2003. Available at: <http://www.scielo.br/pdf/ea/v17n47/a14v1747.pdf>. Access on: Apr. 10, 2019.
- BRASIL. Presidência da República. Casa Civil. Subchefia para Assuntos Jurídicos. *Decreto n. 678, de 6 de novembro de 1992*. Promulga a Convenção Interamericana Sobre Direitos Humanos de 22 de novembro de 1969. Brasília, DF: Presidência da República, 1992.

CAETANO, B. Sociedade civil denuncia Vale na Comissão Interamericana de Direitos Humanos. *Brasil de Fato*, 10 maio 2019. Available at: <https://www.brasildefato.com.br/2019/05/10/sociedade-civil-denuncia-vale-na-comissao-interamericana-de-direitos-humanos/>. Access on: May 15, 2019.

CIDH – COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS. *Convenção Americana de Direitos Humanos*, 1969. Available at: https://www.cidh.oas.org/basicos/portugues/c.convencao_america.htm. Access on: May 13, 2019.

CIDH – COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS. *Protocolo Adicional à Convenção Americana sobre Direitos Humanos em Matéria de Direitos Econômicos, Sociais e Culturais “Protocolo de San Salvador”*, 1999. Available at: http://www.cidh.org/Basicos/Portugues/f.Protocolo_de_San_Salvador_Ratif.htm. Access on: Apr. 18, 2019.

CIDH – COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS. *Opinión Consultiva OC-23/17 – Medio Ambiente y Derechos Humanos*, 2017. Available at: http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf. Access on: May 20, 2019.

D’AVILA, C. D. B. A proteção reflexa do meio ambiente na Jurisprudência da Corte Interamericana de Direitos Humanos. *Revista IIDH*, San José, n. 60, p. 11-38, 2014. Available at: <https://www.iidh.ed.cr/iidh-po/novidades/revista-iidh-60/>. Acesso em 10 abr. 2019.

ESSE, L. G. A Convenção Interamericana de Direitos Humanos e sua eficácia no direito processual brasileiro. *Âmbito Jurídico*, Rio Grande, XV, n. 100, maio 2012. Available at: http://www.ambitojuridico.com.br/site/?n_link=revista_artigos_leitura&artigo_id=11689. Access on: Jan. 8, 2019.

IBAMA – INSTITUTO BRASILEIRO DO MEIO AMBIENTE E DOS RECURSOS NATURAIS RENOVÁVEIS. *Rompimento da Barragem de Fundão*: documentos relacionados ao desastre da Samarco em Mariana/MG, 2018. Available at: <http://www.ibama.gov.br/cites-e-comercio-exterior/cites?id=117>. Access on: May 20, 2019.

LACAZ, F. A. C.; PORTO, M. F. S.; PINHEIRO, T. M. M. Tragédias brasileiras contemporâneas: o caso do rompimento da barragem de rejeitos de Fundão/Samarco. *Revista Brasileira de Saúde Ocupacional*, São Paulo, v. 42, p. 1-12, 2017. Available at: <http://www.scielo.br/scielo>.

php?pid=S0303-76572017000100302&script=sci_abstract&tlng=pt. Access on: Apr. 3, 2019.

MATOS, M. F. S. A omissão da jurisprudência da Corte Interamericana de Direitos Humanos em Matéria de Direitos Econômicos, Sociais e Culturais. *Cadernos do Programa de Pós-Graduação em Direito*, Porto Alegre, v. 10, n. 2, p. 269-294, 2015. Available at: <https://www.seer.ufrgs.br/ppg-dir/article/view/50142>. Access on: Mar. 3, 2019.

MODELL, F. L. Direitos civis e políticos e direitos econômicos, sociais e culturais: dicotomia ou integração? *Revista CEJ*, Brasília, DF, v. 4, n. 10, p. 96-114, 2000. Available from: <http://www.jf.jus.br/ojs2/index.php/revcej/article/viewArticle/250/520>. Acesso em 5 mar. 2019.

OEA – ORGANIZAÇÃO DOS ESTADOS AMERICANOS. Relatoria Especial DESCA da CIDH expressa profunda preocupação pela tragédia humana, ambiental e trabalhista em Brumadinho. *Comunicado de Imprensa 019*, 30 jan. 2019. Available at: <http://www.oas.org/pt/cidh/prensa/notas/2019/019.asp>. Acesso em 18 maio 2019.

OLIVEIRA, A. Comissão Interamericana denuncia Brasil à OEA por Tragédia em Mariana. *El País*, 7 jun. 2016. Available at: https://brasil.elpais.com/brasil/2016/06/07/politica/1465319140_029773.html. Access on: May 18, 2019.

PIOVESAN, F. Direitos sociais: proteção nos sistemas internacional e regional interamericano. *Revista Internacional de Direito e Cidadania*, Erechim, n. 5, p. 201-223, 2009. Available at: www.egov.ufsc.br:8080/portal/sites/default/files/anexos/33285-42418-1-PB.pdf. Access on: May 2, 2019.

PIOVESAN, F. Direitos sociais, econômicos e culturais e direitos civis e políticos. *Sur – Revista Internacional de Direitos Humanos*, São Paulo, ano 1, n. 1, p. 21-48, 2004. Available at: <https://sur.conectas.org/wp-content/uploads/2017/08/sur1-port-flavia-piovesan.pdf>. Access on: Feb. 2, 2019.

PIOVESAN, F.; IKAWA, D.; FACHIN, M. G. *Direitos humanos na ordem contemporânea*. Curitiba: Juruá, 2011.

STIVAL, M. M. *Direito Internacional do Meio Ambiente*. Curitiba: Juruá, 2018.

STIVAL, M. M.; SILVA, S. D. O desastre da barragem de mineração em mariana e os impactos no direito internacional ambiental e brasileiro. *Re-*

vista Direito Ambiental e Sociedade, Caxias do Sul, v. 8, n. 2, p. 205-228, 2018. Available at: <http://www.ucs.com.br/etc/revistas/index.php/direitoambiental/article/viewFile/6235/3504>. Access on: Apr. 8, 2019.

SCHONARDIE, E. F. O fenômeno urbano e o direito à cidade: locus de efetivação dos direitos humanos. In: CENCI, D. R. (Org.). *Direitos humanos, meio ambiente e novos direitos*. Ijuí: Unijuí, 2014. p. 96-116.

SCHRIJVER, N. *The evolution of sustainable development in international law: inception, meaning and status*. Leiden: Brill, 2008.

SONELLI, S. The dialogue between National Courts and the European Court of Human Rights: comparative perspectives. *University of Leicester School of Law Research Paper*, n. 14-12, p. 93-112, 2014. Available from: <https://ssrn.com/abstract=2421034>. Access on: May 9, 2019.

TEIXEIRA, G. F. M. *O greening no sistema interamericano de direitos humanos*. Curitiba. Juruá, 2011.

TRINDADE, A. A. C. La protección internacional de los derechos económicos, sociales y culturales. *Estudio de Derechos Humanos*. 1994. Available at: <https://edisciplinas.usp.br/mod/resource/view.php?id=2322289>. Access on: Feb. 2, 2019.

VARELLA, M. D. *Direito Internacional Econômico Ambiental*. Belo Horizonte: Del Rey, 2003.

VARELLA, M. D.; STIVAL, M. M. Inovação na construção da jurisprudência internacional ambiental: o caso da usina de Belo Monte no Sistema Interamericano De Direitos Humanos e os reflexos no Brasil. *Fronteiras: Journal of Social, Technological and Environmental Science*, v. 6, n. 4, p. 181-203, 2017. Available at: <http://periodicos.unievangelica.edu.br/index.php/fronteiras/article/view/2674/2186>. Access on: May 11, 2019.

Article received on: 06/12/2019.

Article accepted on: 08/21/2019.

How to mention this article (ABNT):

TAVARES, A. M. F. F.; STIVAL, M. M.; SILVA, S. D. The restricted environmental jurisprudence of the Inter-American Court of Human Rights and possible innovations on urban environmental protection. *Veredas do*

Direito, Belo Horizonte, v. 17, n. 37, p. 227-248, jan.-abr. 2020. Available at: <http://www.domhelder.edu.br/revista/index.php/veredas/article/view/1559>. Access on: Month day, year.