

Overview of the Advisory Opinion of the Permanent Peoples' Tribunal Session on Human Rights, Fracking, and Climate Change

The Permanent Peoples' Tribunal Session on Human Rights, Fracking and Climate Change conducted hearings during the week of May 14-18, 2018. That week, ten judges from nine countries heard oral testimony, reviewed written and video-recorded testimony from four preliminary tribunals held in the months prior, and reviewed fourteen *amicus curiae* briefs submitted by attorneys and organizations in five different countries and seven different US states. The Tribunal's Advisory Opinion was released on April 12, 2019.

The following provides highlights of the advisory opinion in regard to (a) human rights and fracking, (b) human rights and climate change, and (c) nature's rights with respect to fracking, and climate change.

(a) HUMAN RIGHTS AND FRACKING

Unconventional gas and oil extraction, especially the technique of hydraulic fracturing, or "fracking," violates the human rights to water, to health, to security of person, and to information and participation. The violations are intrinsic to and necessitated by the technologies of fracking itself.

The Right to Water, articulated in the Convention on the Elimination of All Forms of Discrimination Against Women (Article 14 h), and in the Convention on the Rights of the Child (Article 24 c), is "the right of everyone to sufficient, safe, acceptable and physically accessible and affordable water for personal and domestic uses." If drinking water from the well of a private residence or community, or if a river, stream, lake or other water source from which a community draws its drinking water, is contaminated or compromised by hydraulic fracturing operations, that is an encroachment on this right.

The Tribunal recognized that because water is essential to life, the right to clean water is foundational to the exercise of all other rights. But they found that fracking undermines the right to water in several ways:

- By profligate use of clean water – billions of gallons of fresh water each year – which it contaminates with hundreds of chemicals and ultimately removes permanently from the earth's hydrologic cycle.
- By the contamination of surface waters and aquifers. "Through its explosive disruption of subsurface geological layers," the Tribunal writes, "fracking . . . unavoidably spreads heavy metals and radioactive substances into water sources and other locations." (2) "[S]urface spills and backflow of hydraulic fracturing fluids and problems with lining and slurry seals, which allow the migration of gas to freshwater aquifers, represent the greatest threats to water resources, although not the only ones." (8)

"Of the 240 chemicals used or created during the fracking process whose biological effects on humans have been studied, 157, or 65 per cent are reproductive or developmental toxins. . . . Substances universally used in the fracking system, such as benzene, toluene, ethylbenzene, xylenes, polycyclic aromatic hydrocarbons and endocrine-disrupting chemicals are uncontroversially associated with developmental problems in infants, children, and young

adults.” (20) Many are known carcinogens. More worrisome, “another 781 chemicals used in fracking lack toxicity data altogether.” (20) These have become, the Tribunal observes, “deadly, large-scale experiments in poisoning humans and nonhumans that the fracking industry is currently conducting in violation of the Nuremberg Code.” (20)

- By contributing to climate change, which damages fresh water through saltwater invasion of freshwater lakes and farmland subsoils, serious and prolonged droughts, melting of glaciers, destruction of ecological systems that purify water, etc. The systems by which the Earth continually replenishes fresh water are transfigured by climate change into systems that despoil and deplete fresh water.

The Right to Health is articulated in the Universal Declaration of Human Rights (Article 25), the International Covenant on Economic, Social and Cultural Rights (Article 12), the Aarhus Convention (Preamble), the Convention on the Rights of the Child (Article 24), and the United Nations Declaration on the Rights of Indigenous Peoples (Article 24, 2). Any practices that compromise the environment or cause conditions injurious to health are an encroachment on this right. Adverse health impacts resulting from exposures to fracking processes and infrastructure include respiratory, cardiovascular, dermal, carcinogenic and neurologic effects, as well as miscarriages and birth anomalies, particularly for pregnancies conceived or carried during periods of exposure.

In reviewing the extensive testimony from individuals and families whose health has been severely impacted by proximity to fracking operations, the judges heard stories of fear, desperation and outrage, and recognized in those accounts clear violations of people’s right to health. “The evidence is clear that the unconventional oil and gas extraction (UOGE) industry has violated . . . the right to health.” (44) Further, those who are most directly affected are often vulnerable individuals, families and communities already struggling with health issues. The judges note that “health has been always a sensitive indicator of the power relations in a society” (26), so it should not come as a surprise that the right to health is one of the rights most clearly undermined by fracking operations carried out by highly capitalized transnational fossil fuel corporations and the government agencies that fail to adequately regulate them. The Tribunal concludes that UOGE operations often dramatically exacerbate the already existing “inequalities in the access to the human right to health.” (27)

Violations of the right to health, the Tribunal found, are closely linked to other human-rights violations, including, most critically, the right to information. “Fracking policies and practices systematically violate the right to adequate information upon which to give informed consent as well as the right to be informed of the risks and the possibilities of prevention regarding all aspects of bodily and mental health.

Additionally, the judges call attention to “the dramatic scarcity of well-designed and publicly debated Health Impact Assessments (HIAs)” during the planning and permitting stages leading up to implementation of fracking operations, including those that will be sited and conducted near private properties, family homes, neighborhoods or communities. The disturbing scarcity of such HIAs “corresponds, beyond any reasonable doubt, to public and private policies which violate the obligation to the due and timely transparency for all interventions which directly affect the life conditions of human groups.” (28) Failure to anticipate and consider health impacts constitutes a failure of governments’ human rights obligations and a direct threat to people’s right to health.

The Right to Security of Person is articulated in the Universal Declaration of Human Rights (Article 3) and in the International Convention on Civil and Political Rights (Article 9).

Injury, loss, or other adverse impacts, or threat of such impacts resulting from fracking practices would be a breach of this right; impacts that make it impossible for people to stay in their homes constitute a breach as well.

According to the Advisory Opinion, the right to security of person is abrogated when fracking activities, materials or infrastructure threaten the physical, economic, familial and social well-being of individuals and communities. The Opinion quotes the Permanent Peoples' Tribunal 2014 judgment regarding the chemical disaster in Bhopal, India.

“The exploration and exploitation of resources carried out by these companies usually leads to the displacement and uprooting of local communities; the endangering of water sources, food security and biodiversity of entire regions; the altering of traditional forms of life while causing chronic health problems; the undermining of sacred lands of indigenous peoples; and a frequent ignoring of indigenous peoples' rights to participation, to consultation, and to free, prior and informed consent in relation to activities that will have substantial impacts on their way of life. These activities thus increase human rights violations and give rise to a rising and systematic criminalization of environmental and community activists and human rights defenders.” (90)

Referring throughout to a plethora of fracking processes, materials and infrastructure that pose documentable threats to the physical, economic and social well-being of individuals and communities, the Opinion cites multiple ways that fracking undermines the right to security of person. Fracking is a clear example of what the Opinion refers to as “blind extractivism,” “as the industry remains removed from any considerations of sustainable use of natural resources and respect for the environment or for the communities surrounding the operation site.” (90)

The Right to Information and Participation is articulated in the Rio Declaration on Environment and Development (Principle 10), in the Aarhus Convention (Article 1), and in the United Nations Declaration on the Rights of Indigenous Peoples (Article 18). Failure of governments to provide ready access to information about plans, processes, materials, ingredients, regulatory procedures, Environmental Impact Assessments, Health Impact Assessments, planned health-effects monitoring, planned effectiveness studies, Human Rights Impact Assessments, etc. at minimal cost and in a timely manner is an encroachment on the rights to information.

The Tribunal finds that “fracking policies and practices systematically violate the right to adequate information upon which to give informed consent.” (29) They go further: “Possibly the most consistent finding of all the presentations of cases . . . has been the generalized, planned exclusion of the human communities involved from any information and adequate discussion on the planned and ongoing fracking activities.” (30) This is an unacceptable “violation of the right to informed participation.” (14) Worse, because “the fracking system is organized around the violation of this right, it is impossible for it to respect other rights. . . That impossibility in turn precludes the possibility of eliminating or even meaningfully controlling those impacts in the absence of a ban on fracking.” (14)

Because UOGE prompts so much protest and resistance, the fracking industry employs multiple techniques to “debilitate and lower the costs of local resistance.” (20) The Tribunal identifies several

methods used by industry to block such protests, each of which is a violation of the right to informed participation:

- *Secrecy*. The fracking industry systematically uses the law to “suppress information about potential or actual ecosystem effects. Witness after witness testified that [they] don’t even have a right to know what is being forced into the ground.” (20-21)
- *Silencing*. “Gag orders, non-disclosure agreements and strategic lawsuits against public participation are . . . routine across the fracking frontier.” (21)
- *Bullying*. “Less formal means of biasing or preventing the public discussion of information about fracking’s ecosystem effects include physical intimidation, informal censorship of information presented by fracking critics, false advertising, deliberate failure to investigate complaints, . . . the subversion, manipulation and marginalization of those procedures for public participation in decision-making that are still required by law. . . and entrenched patterns of intellectual bullying.” (22)
- *Collusion with government*. Those who might resist fracking development are hamstrung by laws that favor the industry, many of which are, “. . . largely written and lobbied for by the very corporations that the laws are ostensibly to regulate.” And in fact, many of the government regulatory agencies that might restrain fracking or defend human rights are controlled, or even staffed, by corporate interests, a practice called ‘regulatory capture.’ (23- 24)
- *Systematic suppression of protest*. “What is clear here,” the Tribunal finds, is that “resistance and open protest generate new waves of [rights] violations, this time of civil and political rights: . . . to liberty and security, to a fair trial, to freedom of expression and assembly, and association.” (30).

The Tribunal explains how these methods of widespread violation of the right of informed participation are allowed to continue. “The mega corporations, more wealthy than many nation states and seen almost universally . . . as essential ‘growth machines’ providing ‘development,’ have gained a dominant position viz a viz states . . . In effect, they have established a new form of sovereignty or quasi-sovereignty. They do not derive sovereignty from the people nor do they exercise their power on behalf of the people. Rather they operate, according to law, in the interests of the corporation and its major shareholders. Too often this means they are in conflict with the interests of the citizenry and nature, even of the governments who are beholden to them.” (53)

The Opinion concludes that “all state and sub-state jurisdictions must . . . guarantee to all citizens . . . access to all relevant information, [and] the opportunity to prepare and participate in decision-making procedures, particularly those directly affected by projects that may negatively affect their rights or those of the environment . . . ” (58)

(b) HUMAN RIGHTS AND CLIMATE CHANGE

The United Nations Environment Programme 2015 report, “Climate Change and Human Rights,” distinguishes three kinds of duties required of States to meet their human rights obligations: “1) the duty to **respect** human rights, a negative obligation which requires states to refrain from taking actions that would interfere with or curtail the enjoyment of human rights; 2) the duty to **protect** human rights against violations by third parties; and 3) the duty to **fulfill** human rights, a positive obligation, which requires states to undertake measures to ensure the realization of rights for all members of society.” All three kinds of duties bear on States’ obligation to protect against climate change, particularly with

respect to State actions that license, permit, monitor and subsidize fossil fuel industry extraction, infrastructure and distribution practices.

In this context, the Tribunal found that climate change entails substantial human-rights violations, in several important respects:

The right to life, referenced in several human rights instruments including in the Universal Declaration of Human Rights (Article 3) and in the International Covenant on Civil and Political Rights (Article 6), imposes an affirmative obligation on States to protect citizens from conditions that pose an imminent threat to their lives. When governments fail to take measures to moderate, inhibit or reverse climate change, or to help populations adapt to it, they are failing to meet their human rights obligations.

The Tribunal's Advisory Opinion acknowledges that its analysis is taking place "in a historical context in which climate change is the main global threat to the survival of the human species and consequently to the exercise of all human rights." (76) It quotes from the UN High Commission on Human Rights report, titled "Understanding Human Rights and Climate Change," noting that "the human rights which are most affected by climate change include the right to life . . . , the right to food, the right to water" and the right to other necessities essential for life. (p31)

The Opinion highlights the Declaration on Human Rights and Climate Change and cites several of its provisions directly related to the right to life, including Article 4, "All human beings have the right to a planetary climate suitable to meet equitably the ecologically responsible needs of present generations without impairing the rights of future generations to meet equitably their ecologically responsible needs." The Opinion further recommends "That State and sub-state jurisdictions should consider adopting the Declaration on Human Rights and Climate Change and making its standards and provisions part of public policy at all levels." (60)

The right to an adequate standard of living, articulated in the Universal Declaration of Human Rights (Article 25, 1) and in the Convention on the Rights of the Child (Article 24, 2, c) among other instruments, means that all persons and families must be guaranteed access to the basic preconditions for a healthy life including secure access to nourishing food, clean water, shelter from the elements, and adequate clothing, as well as medical care and necessary social services.

Recognizing this, the Opinion cites the 2015 UN High Commission on Human Rights report's affirmation that the right to an adequate standard of living, among "the human rights which are most affected by climate change," (31) includes the right to life, the right to self-determination, the right to development, the right to food, the right to water and sanitation, the right to health, the right to housing, the right to education, the right to meaningful and informed participation, the rights of those most affected by climate change and the rights of future generations." (31) The Opinion further acknowledges the growing legal recognition "that the enjoyment of human rights cannot be separated from a healthy and safe environment." (46)

This right to an adequate standard of living requires governments to take affirmative measures to prevent conditions – such as climate change, environmental pollution, the spread of disease and malnutrition, etc – that would hinder citizens' access to these most fundamental necessities. The Tribunal judges cite John Knox, United Nations Special Rapporteur on Human Rights and the Environment, who says that it is the duty of states to take active steps to protect people's right to a

healthy environment. Governments, he says, must “ensure a safe, clean, healthy and sustainable environment in order to respect, protect, and fulfill human rights.” (74)

In addition to affirming the right to an adequate standard of living for all those alive today, the judges further recognize that “this issue also involves more directly than any other cases in the history of the PPT, the rights of future generations.” (76)

The rights of Indigenous peoples to their traditional lands and resources and to self-determination are articulated in the United Nations Declaration on the Rights of Indigenous Peoples (Article 26): “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired,” and governments are required to “give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned.”

The Tribunal recognized that those customs and traditions are central to the exercise of peoples’ rights. The Opinion recognizes that: “In the indigenous cosmivision, . . . territory is linked to the sacred, to the space of social reproduction, physical survival, work, solidarity, and in general to the exercise of . . . autonomy.” (57)

The Opinion quotes an Indigenous representative speaking in an earlier PPT Session. “The land, which was given to us from the beginning, is what sustains our coexistence, our *raison d’être* as native Indigenous peoples. In that territory there are the norms that we must fulfill as representatives of a specific culture. Each and every one of the places of our history are components of what we call ancestral territory, a sacred space that nourishes, strengthens and gives us existence on this planet. Therefore, this space belongs to each and every one of those peoples to whom the Spiritual Mother entrusted them with specific missions, which we must protect. The territory is where Laws and History are written; without them we would not be peoples with different cultures.” (57)

A substantial collection of testimony, submitted by Alaskan human rights attorney Robin Bronen, concerned the dramatic impacts of sea level rise and the loss of near-shore sea ice on several small, highly vulnerable native villages along Alaska’s northwest coastlines. Most of these villages, highly dependent on the sea, are located directly on the shoreline, so as near-shore sea ice has melted earlier in the spring, it no longer protects them from storms coming in from the west. Their shoreline is eroding into the sea and buildings that had been protected from storms in the past are now suffering serious damage. Several of these communities have been forced to decide whether it will even be possible to stay on ancestral lands. This illustrates a range of serious human rights concerns including, among others, the right to life, the right to an adequate standard of living, the right of Indigenous peoples to their traditional lands and resources, and the right of Indigenous peoples to self-determination.

(c) THE RIGHTS OF NATURE, WITH RESPECT TO FRACKING AND CLIMATE CHANGE

Earth jurisprudence, the articulation of the rights of nature, is a growing area in international law and the law of nations. The Tribunal makes the case for the protection of nature’s rights on two grounds:

The first is the *instrumental* value of nature: a healthy environment is a necessary condition for the protection of all other human rights. The Opinion doubts “whether justice can be achieved as long as the defense of humans and of nonhumans, and the homes of each, are legally separated,” (16) and

concludes that “it is now an acknowledged fact that the enjoyment of human rights cannot be separated from a healthy and safer environment.”(44) The reverse is also true: full protection of human rights is a necessary condition for a healthy environment. John Knox, United Nations Special Rapporteur, is quoted: “States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect, and fulfil human rights,” and “states should respect, protect, and fulfil human rights in order to ensure a safe, clean, healthy, and sustainable environment. “(74)

The second ground is the *intrinsic* value of nature. Citing an opinion by the InterAmerican Court on Human Rights, the Tribunal argues that protecting nature and the environment is essential “not only because of its connection with a utility for the human being, . . . but because of its importance for the other living organisms with whom the planet is shared, also deserving of protection in themselves.”(45) Nature and its components – “forests, rivers, seas, and others” (45) -- have intrinsic worth, which should be acknowledged and protected by full rights. All parties should, as articulated in Ecuador’s Constitution, “fully respect the existence and the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes.” (81)

The right of Mother Earth to life and to exist is articulated in the Universal Declaration of the Rights of Mother Earth (Article 2, a, o) and in the national constitution of Ecuador (Article 73). The latter affirms that “The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems, and the permanent alteration of natural cycles.” This means that if the lives of rights-holders – which include species, ecosystems, natural cycles and the earth itself – are compromised as a result of contamination or destruction by fossil-fuel extraction methods and/or by climate change, that abrogates this right.

The Tribunal found that “a large and convincing quantity of evidence clearly demonstrated . . . the devastating effects on ecosystems resulting from corporate and State violations of the rights of nature under laws – international down to the local – including the moral, existential right to justice, i.e. the right of the planet to be protected and thereby survive along with its inhabitants.”(54) Fracking violates nature’s rights to exist in a number of ways, the Tribunal concludes, some violently evident, some more subtle and long-lasting:

- *Fracking destroys and disrupts ecosystems, kills plants and animals, and fragments their habitats.* “More than one million frack wells across the US, occupying at the surface alone a land area more than three times the size of Yellowstone National Park, together with thousands of kilometers of new pipeline corridors, . . . compressor stations, liquefaction plants, container ships, and so forth” (19) irredeemably destroy ecosystems, the Opinion states. “Taken together, these characteristics entail that fracking’s ecosystem impacts will always be enormous in scale.” (19) Destruction is an essential part of fracking; gouging, drilling, paving, deforesting, poisoning, polluting, bulldozing are what fracking does. Without environmental destruction, fracking is impossible.
- *Fracking makes a significant contribution to carbon-dioxide pollution and thereby to global warming and ocean acidification that harm ecosystems.* Fracking techniques have dramatically increased the amount of natural gas entering the global market, keeping down the price of fossil fuels and maintaining its economic competitiveness against renewal energies – decreasing the likelihood that the temperature increase of the world can be contained to 1.5 degrees. Moreover, the methane released in the recovery process is a potent greenhouse gas, approximately 80 times more potent than carbon dioxide, undermining any claims that natural

gas is a 'cleaner' fuel. As the climate is disrupted, so are the lives and prospects of plants and animals, challenged by drought, flood, changing rhythms, and an ocean habitat increasingly hostile to many of its creatures.

The right of Mother Earth to regenerate its bio-capacity and to continue its vital cycles and processes free from human disruptions is articulated in the Universal Declaration of the Rights of Mother Earth (Article 2) and in the National Constitution of Ecuador (Article 71). The latter affirms that "Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes. All persons, communities, peoples, and nations can call upon public authorities to enforce the rights of nature." This means that if the capacity of Nature to regenerate and continue vital processes is compromised as a result of human disruptions by fossil fuel extraction methods and/or by climate change, that abrogates this right.

The right of Mother Earth and all beings of which she is composed to maintain its identity and integrity as a distinct, self-regulating and interrelated being is articulated in the Universal Declaration of the Rights of Mother Earth (Article 2, 1, d). The Tribunal found that the practices of unconventional oil and gas extraction, including fracking, violate that right in ways substantive, procedural, and conceptual.

- *Substantive violations of nature's right to maintain its identity and integrity.* "Technical features of fracking, such as the breaching of geological boundaries," the Tribunal found, "makes inevitable . . . devastation of hydrological systems, increased earthquake damage, erosion, land subsidence, sedimentation, [and] aquifer damage." (20) The disruption and destruction extend far from the well sites themselves, by means of roadways, pipelines and pipeline clearances, compressor stations, injection wells, frack-sand mines, cyclone fences, fragmentation of ecosystems and wildlife migration routes, and so forth.
- *Procedural and conceptual violation of nature's right to integrity.* The Tribunal found that fracking procedures "define ecosystems in ways that deny their integrity, by fragmenting them [and] ignoring interconnections. . . ." (18) These procedures include granting permits to alter or damage *parts* of the landscape, one after another, each by a different permitting process, and often by a different regulatory agency – the water in a river, perhaps, or an aquifer, a farmplot or forest, an endangered species, a historical community, a neighborhood – without considering the ecocultural community as a whole. Further, these rights violations are inherent in fracking procedures. "Violations of rights are generally planned and implemented intentionally," the Opinion states, "as well as being hidden when possible and denied when exposed." (70)

The Tribunal therefore recommends "that ecocide be given similar recognition as genocide in international law through a Universal Declaration from the United Nations" (57); that international efforts be launched or strengthened to "integrate international human rights regimes . . . with the rights of nature" (45); that the worth of ecosystems and their components be recognized, applying the precautionary approach to all permitting of unconventional oil and gas extraction; that nature's rights be included in more state constitutions; and that punitive damages be imposed on nonstate actors that violate rights of nature, using the damages to restore, or "make whole," the ecosystem or geological system.