

The Protection of the Environment in Regional Human Rights Systems Outside Europe I: The Inter-American Human Rights System

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ABSTRACT

The Inter-American human rights system plays a crucial role in advancing the doctrine of environmental protection in human rights law, particularly by recognising the environmental rights in binding human rights instruments and allowing for their interpretation through the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). This chapter analyses the normative and jurisprudential framework for the protection of the environment in the Inter-American human rights system, and maps the current challenges of the interpretation of the right to a healthy environment.

KEYWORDS

IACtHR, human rights, environment, climate change, indigenous rights, right to a healthy environment

1. Introduction

The Inter-American human rights system plays a crucial role in advancing the doctrine of environmental protection in human rights law, particularly by recognising the environmental rights in binding human rights instruments and allowing for their interpretation through the Inter-American Commission on Human Rights (hereinafter the IACHR or the Commission) and the Inter-American Court of Human Rights (hereinafter the IACtHR or the Court). This framework draws significant inspiration from the evolving jurisprudence of other human rights adjudicatory bodies, such as the European Court of Human Rights (the ECtHR), the African Court of Human and Peoples' Rights (the ACtHPR), and various United Nations treaty bodies, whilst also

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developing its own unique solutions that may, in turn influence their interpretation as well.

This chapter explores the development of the Inter-American human rights doctrine of environmental protection, with a special focus on the interpretation of the autonomous right to a healthy environment. The analysis begins with a description of the normative framework of the Inter-American human rights system and the position of environmental protection therein, followed by a discussion of the first cases in which the Commission and the Court addressed the issue of environmental protection. The Court's doctrine regarding environmental protection reached a milestone in 2017 with the adoption of *Advisory Opinion OC-17/23* on human rights and the environment, recognising the justiciability of environmental rights. Since then, this approach has been confirmed in contentious cases involving indigenous peoples, and more recently, in the environmental litigation of non-indigenous communities. The chapter concludes with an analysis of the IACtHR's evolving jurisprudence on climate change, highlighting the Court's increasing role in shaping the international doctrine of States' human rights obligations in this context.

2. The Bogotá Declaration, the American Convention on Human Rights, and Their Relevance for Environmental Protection in the Inter-American System

The American Convention on Human Rights (ACHR) or the so-called 'Pact of San José' was adopted on 22nd November 1969 in San José, Costa Rica as an instrument of the Organization of American States (OAS).¹ The Convention was a major breakthrough in the development of the Inter-American human rights framework, as it was the first binding human rights treaty in the region, and the second major regional human rights treaty in the world.² Prior to the adoption of the ACHR, members of the OAS adopted the American Declaration of the Rights and Duties of Man, also known as the Bogotá Declaration on 10th June 1948,³ which is considered the world's first international human rights instrument, even preceding the Universal Declaration of Human Rights (UDHR).⁴ Although formally non-binding, the Bogotá Declaration is

1 American Convention on Human Rights 'Pact of San José', Costa Rica, 22 November 1969, Organization of American States, UNTS vol. 1144, no. 17955.

2 The first regional human rights treaty, the Convention for the Protection of Human Rights and Fundamental Freedoms or the European Convention on Human Rights opened for signature on 4 November 1950 in Rome, Italy, in the framework of the Council of Europe. See: UNTS vol. 213, no. 2889. The third binding regional human rights treaty, the African Charter on Human and Peoples' Rights or the Banjul Charter was adopted on 27 June 1981 in Nairobi, Kenya under the Organization of African Unity. See: UNTS vol. 1520, no. 26363.

3 American Declaration on the Rights and Duties of Man, adopted by the 9th International Conference of American States, New York, United States of America, 10 June 1948, E/CN.4/122.

4 The Universal Declaration of Human Rights was adopted as a General Assembly resolution on 10 December 1948. See: A/RES/217 A (III).

usually considered a source of inspiration for the IACHR, due to it being the only Inter-American human rights document in existence until the Convention entered into force in 1978.⁵ Although the IACtHR may primarily interpret the Convention, its Article 64(1) provides that the member states of the OAS may consult the Court ‘regarding the interpretation of the Convention or of other treaties concerning the protection of human rights in the American states’. This provision necessarily raises the question of whether the Bogotá Declaration could be considered as a treaty and consequently, whether the Court may interpret its provisions as well. The legal status of the Declaration was addressed in *Advisory Opinion OC-10/89*, in which the Court affirmed that although the Declaration could not be regarded as a treaty *strictu sensu* under international law, it served as a source of international obligations for the member states of the OAS, based on their earlier conduct by authorising the IACHR to monitor the rights set forth in the Declaration.⁶ Nonetheless, the Bogotá Declaration has a limited impact on the Court’s environmental jurisprudence, primarily because of the absence of any reference to environmental protection or environmental rights therein.

The American Convention, which drew significant influence from the normative framework of its European counterpart, the European Convention on Human Rights (ECHR),⁷ also embraces collective (economic, social, and cultural) rights under Chapter III. However, the ACHR does not explicitly enshrine any environmental right either, arguably for the same reason: at the time of the adoption of these conventions (in 1950 and 1969 respectively), the theoretical framework outlining the interrelationship between environmental protection and human rights had not yet evolved to a level that could be adequately reflected in a human rights convention.⁸ Albeit the ACHR contains no explicit reference to environmental rights, the IACtHR, much like the ECtHR, has developed its environmental jurisprudence through the evolutive interpretation of other rights enshrined in the Convention, while also reflecting the specificities of Latin American societies.

2.1. The Role of the Inter-American Commission on Human Rights in Developing the Environmental Standards of the Inter-American Human Rights System

Environmental protection first appeared in the context of the protection of indigenous peoples’ rights in the Inter-American human rights systems. One of the earliest cases involving environmental protection was the *Yanomami* case before the IACHR in 1985. The Yanomami Indians, an indigenous population in Brazil, faced a number of threats to their health and life due to the construction of a highway through their native lands, resulting in the displacement of native villages. The invasions were

5 Cerna, 2009, pp. 1212–1213.

6 Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, IACtHR, 14 July 1989, paras. 43–45.

7 Steiner and Alston, 2000, cited in Goldman, 2009, p. 867.

8 See the chapter of Gyula Bándi in the present volume.

carried out without prior and adequate protection for the safety and health of the Yanomami Indians, which led to deaths caused by epidemics of influenza, tuberculosis, measles, and venereal diseases. The Commission pronounced the violation of several rights recognised in the Bogotá Declaration, such as the right to life, liberty and personal security (Article I), the right to residence and movement (Article VIII), and the right to the preservation of health and to well-being (Article XI).⁹ Although the Commission recognised the violation of human rights of indigenous peoples, it did not establish a direct connection between environmental degradation and the violation of the Declaration. Nonetheless, the case is remarkable for being among the first indigenous cases involving environmental issues.¹⁰

The recognition of land rights was accentuated in *Maya Indigenous Community of the Toledo District v. Belize*, in which the Commission found a violation of rights enshrined in the Bogotá Declaration for the State's failure to protect the lands traditionally used and occupied by the indigenous community. Namely, the government granted logging and oil concessions on the Mayan lands, which caused substantial environmental harm and brought long-term and irreversible damage to the natural environment upon which the indigenous community depended.¹¹ From the perspective of the development of the Commission's approach to environmental protection, the *Maya* decision is remarkable for recognising the Maya peoples' communal property rights to the lands. The Commission further pointed out that the violation of property rights was also exacerbated by environmental damage that severely affected the Mayan communities.¹² The Commission encountered numerous other cases regarding the impact of the violation of indigenous peoples' property rights on the environment, however given that such cases were later referred to the Court, they will be discussed in the next subchapter.

Another aspect of environmental protection is the question of climate change and its impact on human rights. One of the earliest rights-based climate change cases in the world was the so-called 'Inuit petition' before the IACHR in 2005, filed in the name of all Inuit of the Arctic regions of the United States and Canada.¹³ The petitioners, seeking relief from violations resulting from global warming, caused by acts and omissions of the United States, referred to the violation of several rights guaranteed in the Bogotá Declaration, including the Inuits' right to the benefits of culture (Article XIII) to use and enjoy the lands they had traditionally occupied and the right to use and enjoy their personal, intangible and intellectual property under the right to own private property (Article XXIII), the right to the preservation of health (Article XI), the right to life, liberty and personal security (Article I), the right to residence and movement (Article VIII), and the right to the inviolability of the home (Article IX). The

9 Resolution no. 12/85, Case no. 7615, Brazil, 5 March 1985, IACHR.

10 Scott, 2000, pp. 214–216.

11 *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, 12 October 2004, IACHR.

12 Rodríguez-Pinzon, 2005, pp. 113–116.

13 Petition No. P-1413-05, 16 November 2006, IACHR.

petition was remarkably progressive for its time, as in 2005 it already drew attention to the vulnerability of indigenous peoples caused by the climate crisis. The petition appeared before the adoption of the major catalyst for climate change litigation, the Paris Agreement.¹⁴ However, in the absence of clear human rights obligations in the context of climate change, the Commission found the petition inadmissible, which is arguably a questionable approach from today's perspective, particularly in light of the UN Human Rights Committee's (UN HRC) decision in the *Torres Strait Islanders* case in 2022.¹⁵

Furthermore, several environment-related petitions are pending before the IACHR at the time of the conclusion of the present chapter, including the 'Athabaskan petition' initiated by indigenous peoples of the Arctic,¹⁶ and the petition seeking to redress violations of the rights of children in Cité Soleil, Haiti.¹⁷ Both petitions could have a profound impact on the development of the Inter-American human rights system's approach to environmental protection. Firstly, the 'Athabaskan petition' may give the Commission an opportunity to clarify the environmental perspective of the rights enshrined in the Bogotá Declaration. This clarification would be particularly relevant for Canada, which is not a party to the ACHR, therefore, its citizens are limited to seeking remedies for human rights violations exclusively through the Commission on the basis of the rights enshrined in the Bogotá Declaration. The implications of this case could also extend beyond the confines of the petition, as it could set a precedent for other environment- or climate-change-related cases also for alleged violations by

14 Paris Agreement, 12 December 2015, UNTS vol. 3156, no. 54113. On the role of the Paris Agreement in climate change litigation, see: Voigt, 2023, p. 237.

15 In *Daniel Billy and Others v. Australia*, also known as the *Torres Strait Islanders* case, the UN Human Rights Committee adopted a landmark decision in the context of human rights protection of indigenous peoples against the adverse impacts of climate change. The Committee found the violation of Articles 17 (right to private and family life) and 27 (the right of minorities to enjoy their own culture) for Australia's failure to adequately protect Torres Strait Islanders against the adverse impacts of climate change. See: *Daniel Billy and Others v. Australia*, UNHRC, 22 September 2022. See also: Sancin, 2024; Feria-Tinta, 2022. While there is no formal obligation of the IACHR to implement UN treaty bodies' approaches, cross-fertilisation of different human rights courts and bodies holds particular significance in climate change litigation, as it represents a highly dynamic and evolving area of legal development, which, at the same time, requires global solutions. See: Feria-Tinta, 2024.

16 Petition to the Inter-American Commission on Human Rights seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples resulting from Rapid Arctic Warming and Melting caused by Emissions of Black Carbon by Canada, 23 April 2013. For a comparative overview of the 'Inuit petition' and the 'Athabaskan petition' in light of legal developments in the field of climate change and human rights, see: McCrimmon, 2016.

17 Petition and Request for Precautionary Measures to the Inter-American Commission on Human Rights, Six Children of Cité Soleil, Haiti and Sakala Community Center for Peaceful Alternatives Petitioners concerning violations of the American Convention on Human Rights, 4 February 2021.

the United States, who did not ratify the ACHR either,¹⁸ yet it is one of the highest-emitting countries in the world.¹⁹ Furthermore, the petition concerning the children in Cité Soleil draws attention to the long-standing environmental injustices arising from toxic trash disposal in the residential district of Port-Au-Prince, which causes short and long-term health harm to the inhabitants of the area, including children. The petition would give opportunity to the IACHR to elaborate on the standards of the ACHR regarding protection against toxic waste treatment also for non-indigenous peoples.

2.2. The First Environmental Cases of the Inter-American Court of Human Rights

The IACtHR, established in 1979, has two main functions according to the ACHR: adjudicatory in contentious cases submitted by States Parties or the Commission, and advisory jurisdiction in inquiries made by OAS Member States or organs. Both functions are particularly relevant in the development of environmental protection in the Inter-American human rights system.

The environmental perspective initially emerged within the Court's jurisprudence on indigenous rights, by broadening the Commission's early conclusions. The *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* was the Court's first high-profile case interpreting Article 21 of the ACHR (right to property) in the context of indigenous peoples' rights, and adopted in 2001.²⁰ The members of the community contested the government's permission to cut trees in the indigenous lands without prior consultation with them. The government argued that the indigenous communities had no title to the land, however it was the government itself that did not demarcate the lands belonging to indigenous peoples despite their continuous efforts since the 1950s. The Court emphasised the autonomous meaning of 'property' in Article 21 of the ACHR, which also included the rights of members of the indigenous communities within the framework of communal property, and highlighted that property of such lands did not merely mean a matter of possession, but a material and spiritual element, which they must fully enjoy. The Court emphasised that indigenous peoples' customary law must be considered when interpreting the right to property under Article 21. Consequently, possession of the land by indigenous communities should be sufficient to establish property rights under the American Convention, even in the absence of

18 See: The status of ratification of the ACHR [Online]. Available at: <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800f10e1> (Accessed: 18 January 2025). The accession of the United States to the ACHR has been pending since its signature in 1977. Arguments against ratification are based on federalist and sovereignty concerns, as well as opposition to the interpretation of certain specific matters in international human rights law, such as abortion or the death penalty. See: Diab, 1992. While environmental and climate change litigation shows a growing tendency in the U.S., such litigation remains at the domestic level, as the IACtHR does not have jurisdiction over the United States. The only recourse for U.S. citizens in the Inter-American human rights system is through the IACHR on the basis of the Bogotá Declaration.

19 UNEP, 2015, p. 24.

20 See: Anaya and Grossman, 2002.

formal recognition.²¹ Although the judgment is primarily remarkable for establishing the indigenous communities' title to the lands that traditionally belonged to them, the aspect of environmental protection appeared in the expert opinions, which emphasised the dependence of indigenous peoples on nature and consequently, and the importance of measures that avoid environmental damages.²²

The Court developed its approach to the title of lands traditionally belonging to indigenous communities in the context of concessions for mining and logging in the case of the *Saramaka People v. Suriname* in 2008. In this case, in addition to ordering the State to delimit, demarcate and grant collective title over the territory, the Court also ruled that the State shall grant the members of the Saramaka people legal recognition of collective juridical capacity.²³ In this judgment, concerns over the degradation of the environment were accentuated, and the State was ordered to perform prior environmental (and social) impact assessments,²⁴ and to pay just compensation for damage, including material and immaterial damage regarding the Saramaka people's spiritual connection with the territory, and the distress endured.²⁵

The Court embraced a similar approach in *Kichwa Indigenous People of Sarayaku v. Ecuador*. The case concerned the violation of the Kichwa indigenous people's collective rights to consultation, to indigenous communal property, and to cultural identity (Articles 13 and 21 of the ACHR), *inter alia* due to oil exploration activities authorised by Ecuador on the ancestral lands without prior consent.²⁶ Exploration activities caused significant environmental damage which was carefully addressed by the Court in ordering comprehensive reparations that extend well beyond compensation for pecuniary and non-pecuniary damage, also including measures of restitution (removal of explosives and reforestation of the area), guarantees of non-repetition, and satisfaction, such as a public act of acknowledgment of international responsibility and the publication and broadcasting of the judgment.²⁷ Such measures, particularly the obligation of restitution, underscore the IACtHR's forward-looking approach to compensation, which is a key strength of environmental protection in the Inter-American human rights system. In fact, this was the first time that the Court conducted a proceeding at the site of the events of a contentious case,²⁸ allowing the delegation of judges to observe the conditions and gather first-hand evidence to determine the necessary measures. Therefore, the *Kichwa* case significantly contributed to the IACtHR's jurisprudence regarding environmental protection, even though the Court did not explicitly address the role of a healthy environment under the rights

21 Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of 31 August 2001, IACtHR, paras. 148–151.

22 Ibid. Expert opinions of Charles Rice Hale and Roque de Jesús Roldán Ortega.

23 Case of the Saramaka People v. Suriname, Judgment of 28 November 2007, IACtHR, para. 174.

24 Ibid., para. 158.

25 Orrellana, 2008, pp. 845–846.

26 Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Judgment of 27 June 2012, IACtHR.

27 Ibid., paras. 279–340.

28 Verdonck and Desmet, 2017, p. 477.

guaranteed in the ACHR, let alone self-standing environmental rights. Nonetheless, the Court implicitly embraced an ecological approach to indigenous rights by developing the doctrine of restitution and other reparation measures for environmental damage, which has been enhanced in its subsequent case law.²⁹

3. Environmental Rights Before the Inter-American Court of Human Rights: The Right to a Healthy Environment and Its Justiciability

3.1. The Right to a Healthy Environment in Advisory Opinion OC-17/23

As presented above, environmental protection was first embraced in the Inter-American human rights system in the context of indigenous people's rights, particularly under property rights as enshrined in Article 21 of the ACHR. However the right to a healthy environment has been part of the Inter-American human rights system since the adoption of the Protocol of San Salvador (the Protocol or the PSS) in 1988,³⁰ which recognised this right along with other economic, social, and cultural rights. Article 11 of the Protocol states that

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.

While the rights enshrined in the PSS were not directly justiciable before the Commission or the Court, with the exception of the right to unionisation (Article 8(1(a) of the PSS) and the right to education (Article 13 of the PSS),³¹ the right was not referred to in the key judgments either as a source relevant to the interpretation of other rights

29 See, for instance, Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and Their Members V. Panama, Judgment of 14 October 2014, IACtHR; Case of the Kaliña and Lokono Peoples V. Suriname, Judgment of 25 November 2015, IACtHR; Case of the Xucuru Indigenous People and its Members v. Brazil, Judgment of 5 February 2018, IACtHR.

30 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 'Protocol of San Salvador', 17 November 1988.

31 Ibid., Article 19(6).

in connection with the environmental aspects of the cases.³² Whether the Court has jurisdiction over the rights enshrined has long been discussed in scholarly works³³ primarily focusing on the interpretation of Article 26 of the ACHR. Article 26 lays down the duty of progressive development in the field of economic, social, and cultural rights, by providing that

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

The IACtHR first rendered economic, social and cultural rights justiciable under Article 26 in *Lagos del Campo v. Peru* in connection with labour rights,³⁴ and concluded that the rights named in this Article form an integral part of the American Convention, regarding which Article 1(1) establishes general obligations. Earlier case law, such as *Acevedo Buendía et al. v. Peru* suggests that economic, social and cultural rights have been indirectly protected under the civil and political rights enshrined in Articles 3–25 of the Convention,³⁵ reflecting the IACtHR's emphasis on interdependence and

32 Scarce exceptions could be the Case of the Yakye Axa Indigenous Community v. Paraguay and the Case of Kawas Fernández v. Honduras. In the first example, the complaint concerned the State's failure to acknowledge the property rights of the community over their ancestral land, including the alleged violation of the right to life by depriving communities of traditional means of livelihood. Regarding the alleged violation of the right to life, the Court had to establish whether the environmental conditions negatively affected the community members' right to life. To this aim, the Court considered the existing international corpus juris regarding the special protection required by indigenous communities, in view of certain rights guaranteed by the Protocol, such as right to health (Article 10), right to a healthy environment (Article 11), right to food (Article 12), right to education (Article 13), and right to the benefits of culture (Article 14). See: Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of 17 June 2005, IACtHR, para. 163. The Case of Kawas Fernández, the Court dealt with the murder of the president of an organisation fighting for the improvement of the quality of life, including the protection of environment in the Bahía de Tela region in Honduras. Although the primary focus of the judgment was on the protection of the right to life (Article 4), prohibition of arbitrary deprivation of life (Article 4(1)), right to humane treatment (Article 5), right to physical, mental and moral integrity (Article 5(1)), the Court also addressed the link between environmental protection and human rights, as well as the right to a healthy environment as incorporated in Article 11 of the PSS. See: Case of Kawas Fernández v. Honduras, Judgment of 3 April 2009, IACtHR, paras. 148–149.

33 For an overview of the diverse approaches, see Ruiz-Chiriboga, 2013, pp. 165–168.

34 Case of Lagos del Campo v. Peru, Judgment of 31 August 2017, IACtHR, paras. 142–154.

35 Case of Acevedo Buendía et al. ('Discharged and Retired Employees of the Comptroller') v. Peru, Judgment of 1 July 2009, IACtHR, para. 101.

indivisibility between first- and second-generation human rights,³⁶ also embraced by the PSS.³⁷

The Court thoroughly addressed the justiciability of environmental rights under the ACHR in *Advisory Opinion OC-23/17*. The request focused on state obligations regarding the environment and human rights in a cross-border context, namely when there is a danger that major infrastructure projects may have severe effects on the marine environment.³⁸ The request provided the Court with an excellent opportunity to articulate its position regarding the role of human rights law in environmental protection issues in a comprehensive and systemic manner.³⁹ The Court recognised the ‘undeniable relationship’ between the protection of the environment and the realisation of human rights, acknowledging that environmental degradation and climate change negatively affect the enjoyment of human rights. Additionally, the Court summarised the human rights affected by environmental degradation, particularly the right to a healthy environment, the right to life, personal integrity, private life, health, water, food, housing, participation in cultural life, property, and the right not to be forcibly displaced.⁴⁰ As pointed out above, the Court addressed the environmental aspect of these rights in its earlier case law, however it had not extensively interpreted the right to a healthy environment as enshrined in Article 11 of the Protocol, even if it briefly referred to it. Therefore, the advisory opinion marked the first occasion for the Court to elaborate on the content and nature of the right, significantly building on the international *corpus iuris* and the jurisprudence of other regional human rights courts.

The Court recognised both the collective and individual dimension of the right to a healthy environment, noting that the former embraces a universal value that is owed to present and future generations. This approach builds on the theory of intergenerational equity, which aims to address the problems of unsustainable development and environmental degradation and induce future-oriented decision-making, by proposing that each generation shall bequeath the planet to future generations in at least as good a condition as they had received it. The doctrine, as proposed by Edith Brown

36 Feria-Tinta, 2007, p. 443.

37 The preamble of the Protocol of San Salvador provides that ‘Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified’.

38 The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17 of 15 November 2017, IACtHR.

39 For a comprehensive overview of Advisory Opinion OC-17/23, see Feria-Tinta and Milnes, 2016, p. 64.

40 Advisory Opinion OC-23/17, para. 66.

Weiss, has so far limited recognition in public international law,⁴¹ thus its implicit recognition certainly demonstrates the forward-looking approach of the IACtHR. On the other hand, the individual dimension arises when the violation has a direct or indirect impact on an individual in connection with other substantive rights. This dimension has been scarcely addressed by the IACtHR prior to the adoption of the Advisory Opinion, which primarily focused on the collective aspect of environmental protection in connection with other human rights in indigenous cases. In contrast, the environmental jurisprudence of the IACtHR's European counterpart, the ECtHR primarily embraces the individualistic approach to environmental protection, and owing to the strict victim status criteria, the collective dimension is so far, relatively less elaborated.⁴²

Furthermore, not only did the IACtHR consider the anthropocentric dimension of the right to a healthy environment, but also recognised its ecocentric aspect. Namely, the Court explicitly stated that the right to a healthy environment 'protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves', not because of the benefits they offer for humans, but for their intrinsic value. This argument is embedded in the theory of rights of nature, which propose the recognition of legal personality to elements of nature or the environment.⁴³ This tendency is particularly tangible in Latin American States, including Bolivia, Colombia, and Ecuador.⁴⁴

The Court significantly built on universal human rights instruments to elaborate on the vulnerability aspect of the right to a healthy environment, emphasising that the effect of environmental degradation may impact certain groups with greater intensity, including indigenous peoples, children, people living in extreme poverty, minorities, women, people with disabilities, and displaced people.⁴⁵ The vulnerability aspect has been a key element in the IACtHR's environmental jurisprudence. As evidenced by the cases discussed above, the Court has frequently addressed matters involving indigenous peoples, consistently considering their vulnerable status as a decisive factor for determining violations.

In the aforementioned Advisory Opinion, the IACtHR provided a comprehensive interpretation of the interrelationship of human rights and the environment and elaborated state obligations deriving from the right to life and personal integrity in the context of environmental protection. The Court developed the substantive obligations based on the jurisprudence of human rights judicial and quasi-judicial bodies,

41 Brown Weiss, 1989. On the status of the recognition of intergenerational equity in public international law, see: Krajnyák, 2024, pp. 12-18.

42 Article 34 of the ECHR limits the scope of applicants to those who claim to be a victim of a violation. The ECtHR tends to carefully examine the victim status in environmental cases, and denies standing from those who do not meet this criteria. See, for instance, *Cordella and Others v. Italy*, Judgment of 24 January 2019, ECtHR.

43 See: Nash, 1989.

44 Advisory Opinion OC-23/17, para. 62. See also: Espinosa, 2015, p. 608.

45 Advisory Opinion OC-23/17, para 67. See also: Gear, 2011, p. 23.

including its own case law and that of the IACHR, as well as the ECtHR, the ACtHPR, the African Commission on Human and Peoples' Rights (ACHPR), UN human rights treaty bodies; and other international tribunals, such as the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS). Such obligations include the obligation of prevention, the application of the precautionary principle, and the obligation of cooperation.⁴⁶

The obligation of prevention includes the duty to regulate, the duty to supervise and monitor, the duty to require and approve environmental impact assessments, the duty to prepare a contingency plan, and the duty to mitigate if environmental damage occurs. Furthermore, the Court noted that the precautionary principle, drawing significantly from the *Case of Pulp Mills on the River Uruguay*,⁴⁷ obliges States to protect the rights to life and to personal integrity in cases where it is plausible that an activity may cause serious and irreversible environmental harm, even in the absence of scientific certainty. The obligation to cooperate is a customary norm recognised by the ICJ in the *Nuclear Tests cases*,⁴⁸ the *Advisory Opinion on the legality of the threat or use of nuclear weapons*,⁴⁹ and the abovementioned *Pulp Mills* case. However, in contrast with the other two environmental obligations, the duty to cooperate is an obligation between States, that are not primarily directed towards individuals. The Court defined these duties in three categories, namely the duty to notify, the duty to consult and negotiate with potentially affected States, and the duty to share information. The interpretation of the duty of cooperation was particularly important, as it is explicitly enshrined in Article 26 of the ACHR (progressive development), and the PSS.

Remarkably, the Court also established procedural obligations to ensure human rights in the context of environmental protection. These consist of access to information, public participation, and access to justice in environmental matters. This categorisation is based on Principle 10 of the Rio Declaration on Environment and Development, stating that

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.⁵⁰

46 Advisory Opinion OC-23/17, paras. 127–210.

47 *Pulp Mills on the Riveer Uruguay*, (Argentina v. Uruguay), Judgment of 20 April 2010, ICJ.

48 *Nuclear Tests* (Australia v. France), Judgment of 20 December 1974, ICJ.

49 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996.

50 Rio Declaration on Environment and Development, Rio de Janeiro, 3–14 June 1992, Principle 10.

This provision has been a source of inspiration for two regional conventions: the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters adopted under the aegis of the United Nations Economic Commission for Europe (UNECE) in 1998 (the so-called Aarhus Convention), and the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (the Escazú Agreement), adopted with the support of the Economic Commission for Latin America and the Caribbean (ECLAC) in 2018. Although the initiative to prepare a binding treaty on Principle 10 in the region was at the negotiation stage at the time of the adoption of *Advisory Opinion OC-17/23*, it is remarkable that the IACtHR had already integrated its core values into the Inter-American human rights framework before the adoption of the treaty, and well before its entry into force in 2021. In addition, the IACtHR significantly built on the ECtHR's jurisprudence referencing the Aarhus Convention in matters involving procedural environmental rights.

The importance of procedural environmental rights in human rights litigation is shown by the high number of cases in which the ECtHR references both the Rio Declaration and the Aarhus Convention, even when addressing Respondent States that had not ratified the Convention.⁵¹ The key reason for this lies in the universal acceptance of procedural rights and their embeddedness in international environmental law and human rights law. Procedural rights are enshrined in the ACHR in Articles 13 (freedom of thought and expression), 8 (right to a fair trial), and 25 (right to judicial protection), among others, and therefore could also be used in connection with environmental matters. This was the case, for instance, in *Claude Reyes et al. v. Chile*, in which the applicants relied on the abovementioned procedural rights of the ACHR for the state authorities' failure to provide them with the information they requested about a planned deforestation project. Although the claim did not touch upon substantive environmental issues, the Court established procedural guarantees of access to State-held information of public concern.⁵² The procedural aspect also appeared in indigenous cases, such as in the case of *Kaliña and Lokono Peoples v. Suriname*, in which the Court found a violation of the right to judicial protection regarding the right to the free access to information of the members of the indigenous community, along with the violation of substantive rights, which is similar to the other indigenous cases discussed above.⁵³

Therefore, it could be concluded that the IACtHR incorporated procedural standards in its environmental jurisprudence, even in the absence of a binding universal or regional convention on procedural environmental rights in the region at the time, primarily based on soft law documents of the United Nations (Principle 10 of the Rio

51 See, for instance, *Taşkın and Others v. Turkey*, Judgment of 10 November 2004, ECtHR, para. 99.

52 *The Case of Claude Reyes et al. v. Chile*, Judgment of 19 September 2006, IACtHR, paras. 81–103. See also: Chavez, 2013, p. 513.

53 *The Case of the Kaliña and Lokono Peoples v. Suriname*, Judgment of 25 November 2015, IACtHR, para. 268. See also: McKay, 2018, p. 31.

Declaration and its subsequent reaffirmations at the Johannesburg World Summit on Sustainable Development in 2002, the Rio+20 Conference on Sustainable Development in 2012, the Bali Guidelines on the implementation of Principle 10), and the ECtHR's Aarhus-based jurisprudence. Although it may be too early to assess the impact of the Escazú Agreement on the IACtHR's jurisprudence, it is expected play a key role in strengthening the protection of environmental defenders. Notably, the Escazú Agreement is the first binding treaty in the world to contain specific provisions on human rights defenders in environmental matters⁵⁴ that sheds light on the critical situation of environmental defenders in Latin America. According to Global Witness, Latin America has been the most dangerous region for defenders, with nearly 90% of the globally recorded killings taking place in the region.⁵⁵ So far, the murder of environmental defenders has been individually addressed in a few cases like *Kawas Fernández v. Honduras*⁵⁶ or *Luna López v. Honduras*.⁵⁷ Both judgments considered environmental defenders and human rights defenders and emphasised the State's obligation to take positive measures to protect their right to life. However, the majority of such murders remain unpunished, and only a small number of such cases reach the Court⁵⁸ that could establish some reparations, such as measures of rehabilitation and guarantees of non-repetition. Therefore, strengthening the protection of environmental defenders will remain one of the most pressing challenges of environmental protection in the Inter-American system, and will be addressed in the pending *Advisory Opinion on the Climate Emergency and Human Rights*.⁵⁹

The recognition of the interrelationship of human rights and the environment, as well as the Court's comprehensive interpretation of the right to a healthy environment, embracing both its collective and individual dimensions and defining its inherent substantive and procedural aspects, in *Advisory Opinion OC-17/23*, marks a

54 Article 9 of the Escazú Agreement reads as follows:

'1. Each Party shall guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity.

2. Each Party shall take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights, taking into account its international obligations in the field of human rights, its constitutional principles and the basic concepts of its legal system.

3. Each Party shall also take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer while exercising the rights set out in the present Agreement.' See: UNTS vol. 3388. See also: Pánovics, 2021, p. 23.

55 Global Witness, 2023.

56 See *supra* 32.

57 The Case of *Luna López v. Honduras*, Judgment of 10 October 2013, IACtHR.

58 *Lehne Cerrón*, 2024.

59 Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, 9 January 2023, IACtHR. See also: International Service for Human Rights, 2024.

historic milestone in the development of human rights law. It is the first time a human rights court has addressed the relationship between environmental protection and human rights in a systematic way, building on decades-long tendencies in universal and regional human rights adjudication. In addition to systematising States' human rights obligations in relation to environmental protection, the Advisory Opinion went beyond the previous interpretation of Article 11 of the Protocol by pronouncing its justiciability under Article 26 of the ACHR. Referring to the *Lagos del Campo* judgment mentioned above, the Court extended the protection to the right to a healthy environment, as it is also included among the economic, social and cultural rights that are protected under Article 26.⁶⁰ This implies that after the adoption of the Advisory Opinion, Article 26 could be invoked in cases concerning the degradation of the environment, without alleging the violation of the right to life or the right to personal integrity.⁶¹ Therefore, the Court did not pronounce the direct justiciability of Article 11 of the Protocol, but instead the justiciability of the right to a healthy environment as a right pertaining to economic, social and cultural rights, and thus protected under Article 26.

This approach was criticised by two separate opinions. Judge Eduardo Vio Grossi disagreed with establishing the justiciability of the right to a healthy environment under Article 26, and pointed out that Article 26 did not recognise economic, social and cultural rights. Instead, according to the Judge, Article 26 established the States' obligation to adopt measures to progressively ensure the full realisation of the rights implicit in the standards of the Charter of the OAS, which however, does not recognise environmental rights. Furthermore, Judge Vio Grossi highlighted that this right was justiciable at the domestic level if it was established in the domestic laws of States Parties, otherwise there was no consensus about its justiciability at the international level, and thus it was contrary to the principle that 'no State can be taken before an international court without its consent'.⁶²

Furthermore Judge Humberto Antonio Sierra Porto pointed out that the request for the advisory opinion did not address the justiciability of the right to a healthy environment under Article 26. In fact, the questions raised concerned the interpretation of state obligations regarding the right to life (Article 4) and to personal integrity (Article 5) in environmental matters. According to the Judge, establishing the justiciability of the right to a healthy environment or any other economic, social and cultural right exceeded the competence of the Court.⁶³ Such arguments were also presented by both Judges in separate opinions of the *Lagos del Campo* case, which established the precedent of the justiciability of the rights enshrined in the Protocol of San Salvador. Indeed, once the Court pronounced the justiciability of economic, social and cultural rights under Article 26 in *Lagos del Campo*, it would be difficult to justify why this

60 Advisory Opinion OC-17/23, para. 57.

61 Pane, 2024, p. 11.

62 Advisory Opinion OC-17/23, Concurring Opinion of Judge Eduardo Vio Grossi, para. 4.

63 Advisory Opinion OC-17/23, Concurring Opinion of Judge Humberto Antonio Sierra Porto, para. 8.

approach could not be extended to the right to a healthy environment. As Judge Sierra Porto highlighted in the partially dissenting opinion regarding *Lagos del Campo*, the extension of the scope of Article 26 was purely based on the evolutive interpretation method, which is only one method of interpretation among the many others that exist in international law, including literal interpretation, systematic interpretation, and teleological interpretation.⁶⁴

However, it could also be argued that the IACtHR does not merely interpret the ACHR, but plays a crucial role in advancing transformative constitutionalism in the region,⁶⁵ aiming to promote deep social change through legal interpretation, which is particularly relevant for Latin America, a region suffering from violence, exclusion, and weak institutions.⁶⁶ Hence, the Court tends to emphasise the interdependence between civil and political rights and economic, social and cultural rights, which is, as mentioned above, embraced by the Protocol of San Salvador. Thus, it could be argued that this context justifies the IACtHR's approach to establishing the justiciability of the rights enshrined in the Protocol through Article 26 of the ACHR, even in the absence of an explicit provision on it.

Notwithstanding the fact that advisory opinions are non-binding, the relevance of *Advisory Opinion OC-17/23* is immeasurable in the field of human rights and environmental protection. Its impact surpasses the usual function of an advisory opinion and extends far beyond the scope of the request that arose from Colombia's concerns regarding the construction of new infrastructure projects in the Wider Caribbean Region. For recognising the right to a healthy environment as an autonomous right and establishing States' core substantive and procedural obligations in the matter, the Advisory Opinion has been used as a point of reference for other human rights jurisdictions, including the ECtHR⁶⁷ and the UN HRC,⁶⁸ and it is expected to be considered in the advisory opinion on climate change pending before the ICJ.⁶⁹ At the same time, it has set a precedent in the Inter-American human rights jurisprudence regarding the justiciability of environmental rights under Article 26 of the ACHR, a matter that the Court was later called to address in a contentious case shortly after the adoption of the Advisory Opinion.

64 The Case of *Lagos del Campo v. Peru*, supra 34. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, paras. 21–25.

65 Mardikian, 2023, pp. 950–951.

66 von Bogdandy and Urueña, 2020, p. 405.

67 See, for instance: *Verein KlimaSeniorinnen and Others v. Switzerland*, Judgment of 9 April 2024, ECtHR, para. 225.

68 See the *Torres Strait Islanders* decision cited above. Supra 15, para. 3.4.

69 Request for Advisory Opinion 'Obligations of States in Respect of Climate Change', 12 April 2023, ICJ. See also: Nedeski et al., 2023, p. 301.

3.2. *Lhaka Honhat v. Argentina: Breach of the Right to a Healthy Environment Under Article 26*

On 6th February 2020, the IACtHR handed down a landmark ruling in the case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*. The case was initiated by an association of communities belonging to various indigenous groups within the province of Salta in Argentina, close to the border between Chile and Bolivia. The case concerned illegal logging activities on the ancestral lands of indigenous communities, whose righteous property claims over the lands had not been recognised. These illegal activities resulted in deforestation and the loss of biodiversity, strongly affecting indigenous communities whose traditional way of life is based on hunting, gathering, and fishing.⁷⁰

The claim was presented before the IACtHR in 2019, after the Commission found the State's non-compliance with its earlier report adopted in 2012, declaring the violation of the rights of the communities and ordering the State to provide reparations.⁷¹ The Court's judgment focused on three major aspects: the right to indigenous communal property; the rights to movement and residence, meaning the right to a healthy environment, adequate food, water and to take part in cultural life; and the rights to judicial guarantees and protection.⁷² Given the complexity of the judgment, this section will focus on one specific aspect of it, namely, the violation of the rights guaranteed in Article 26 of the ACHR regarding the right to a healthy environment. Notably, the judgment marked the first time the IACtHR analysed the right to a healthy environment in a contentious case.

Allegations of the violation of the right to a healthy environment first arose under Article 22 of the ACHR (the right to freedom of movement and residence). The applicants argued that the installation of fencing, the introduction of cattle, and illegal logging by third parties (non-indigenous settlers) degraded the environment, destroyed the herbaceous and arboreal vegetation, and ruined the irrigation and regeneration capacity of the land. Remarkably, the Court noted that Article 22 was

70 Marciante, 2022, pp. 2994–2995.

71 The environmental aspect of the case was not accentuated in the Commission's report, given that it was adopted in 2012, a few years before the IACtHR established the justiciability of the right to a healthy environment under Article 26 of the ACHR in Advisory Opinion OC-17/23. See: Report no. 2/12, Case 12.094, Indigenous Communities of the Lhaka Honhat (Our Land) Association, Merits, Argentina, 26 January 2012, IACHR.

72 In addition to pronouncing a violation of Articles 21 (right to property), 23(1) (right to participate in government), 26 (progressive development), and 8(1) (right to a fair trial), the Court established various forms of reparations, including the obligation to delimit, demarcate and grant a title of ownership over the territory for the 132 indigenous communities; the obligation to refrain from implementing any actions negatively affecting the indigenous communities; the removal of the criollo population, along with the dismantling of fences and the removal of their livestock from the indigenous territory; and the implementation of actions to provide permanent access to drinking water. See: *The Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Judgment of 6 February 2020, IACtHR, IX. Operative Paragraphs. See also: Carrasco, 2024; Zombory, 2023.

not applicable in the case but accepted the arguments to be considered under Article 21 (right to property) and in relation to the rights contained in Article 26.

In addition to the right to a healthy environment, the Court also addressed the right to adequate food, water, and participation in cultural life under Article 26, building significantly on ‘the international *corpus iuris*’, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the work of the Committee on Economic, Social and Cultural Rights (CESCR), the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and its earlier jurisprudence, particularly *Advisory Opinion OC-17/23*.⁷³ Interestingly, the Court examined the right to water, even if the representatives of the indigenous communities had not alleged its violation. The Court justified this approach by invoking the *iura novit curia* principle which empowers it to examine the potential violations of provisions not explicitly raised by the parties.⁷⁴ This ensures that the Court can consider relevant legal aspects even when the parties may not have had the opportunity to articulate their position regarding the supporting facts. This practice is extensively applied in the Inter-American system for various reasons,⁷⁵ primarily because the Inter-American human rights doctrine aims to promote compliance with the full range of human rights through the case system, meaning that there is a strong emphasis on the interrelation between the rights enshrined in the ACHR and the Protocol, as well as rights pertaining to the international *corpus iuris* often recalled in the judgments.

Regarding the right to a healthy environment, the Court noted that States did not only have the obligation to respect it, but also the obligation to adopt positive measures, also including the prevention of violation.⁷⁶ This obligation also extends to third parties or non-State actors, as illustrated in *Lhaka Honhat*, given that the environmentally harmful activities had been carried out by private parties, the so-called ‘criollos’, namely non-indigenous farmers who had settled on the indigenous lands in the early twentieth century. To determine the attributability of the environmental harm to the State, the Court assessed whether the State had been aware of the activities performed by the third parties and concluded that the State had taken certain actions, however ineffective. This established the State’s responsibility for the harm that had occurred and pronounced the violation of the right to take part in cultural life related to cultural identity, a healthy environment, adequate food and water, established in Article 26 of the ACHR, in relation to Article 1(1), establishing the obligation to respect rights.⁷⁷

This finding represents the most controversial aspect of the judgment, as it was decided by a three vs three vote, with the President of the Court casting the deciding vote.⁷⁸ Judges Eduardo Vio Grossi, Humberto Antonio Sierra Porto and Ricardo Pérez

73 Ibid., paras. 202–254.

74 Ibid., para. 200.

75 Shelton, 2013, pp. 199–202.

76 Supra 72, para. 207.

77 Supra 72, para. 370(3).

78 The Court was composed of six judges, as Judge Eugenio Raúl Zaffroni, an Argentine national, did not take part in the procedure according to Article 19 of the Rules of Procedure of the Court.

Manrique contested the justiciability of environmental rights under Article 26 and expressed their concerns in partially dissenting opinions.⁷⁹ Judge Vio Grossi argued that the Convention does not explicitly enshrine such a right and cautioned against the Court's expansive interpretation, emphasising adherence to the original text and the established interpretation criteria under the Vienna Convention on the Law of Treaties (VCLT).⁸⁰ Judge Sierra Porto reiterated his position regarding the extensive interpretation of Article 26 in *Lagos del Campo* and raised concerns about legal certainty and the limits of such interpretation. According to the Judge, these concerns are illustrated in the Court's application of the *iura novit curia* principle regarding the right to water, as this right is not enshrined in the Charter of the OAS or in the Protocol of San Salvador. Instead, the Court deduced its existence from the international *corpus iuris* consisting of declarations and other soft law documents, which may not justify the extension of the Court's jurisdiction to recognise new rights.⁸¹ Furthermore, Judge Pérez Manrique proposed an alternative solution for the justiciability of environmental rights based on the 'thesis of simultaneity'. Namely, the Judge suggested environmental rights to be addressed under Article 21 (right to property) instead of Article 26, which according to him, would better embrace the indissoluble relationship between the land and the enjoyment of environmental rights.⁸²

The dissenting opinions of the *Lhaka Honhat* judgment highlight that the justiciability of the right to a healthy environment is a subject of debate among the Judges, stemming from interpretative dilemmas primarily between evolutive interpretation,⁸³ and the traditional interpretative methods established in the VCLT. The strongest criticism opposing the justiciability of environmental rights, and economic, social and cultural rights enshrined in the PSS, is articulated by Judges Vio Grossi and Sierra Porto, who argue that the Court's broad interpretation and flexible application of the

79 For an analysis regarding the dissenting opinions, see: Lima, 2020, pp. 516–518.

80 Article 31 of the VCLT ('General rules of interpretation') provides that:

'1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.'

See also: Supra 72, Partially dissenting opinion of Eduardo Vio Grossi, para. 9.

81 Supra 72, Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, paras. 8–10.

82 Supra 72, Partially dissenting opinion of Ricardo C. Pérez Manrique, paras. 13–14.

83 See: De Pauw, 2017, p. 3.

iura novit curia principle may undermine legal certainty and the principle of state consent. On the other hand, arguments in favour, as expressed by Judge Pazmiño Freire,⁸⁴ emphasise the interdependence and indivisibility of civil and political rights with economic, social and cultural rights that should be interpreted in light of the international *corpus iuris*. Although the justiciability of environmental rights under Article 26 appears to have been settled, with the majority of Judges affirming it in *Advisory Opinion OC-17/23* and *Lhaka Honhat*, a thought-provoking alternative that was proposed by Judge Pérez Manrique, namely addressing environmental concerns through the lens of the right to property. This approach could arguably provide a broader scope and content to States' obligations, while also grounding its jurisdiction on an indisputably justiciable right.

3.3. A New Type of Environmental Cases? Recent Developments in the IACtHR's Contentious Case Law

The Inter-American jurisprudence reached a further milestone on 22nd March 2024, with the adoption of the judgment in the case of the *La Oroya Population v. Peru*, the first case involving the violation of the right to a healthy environment in a non-indigenous context.⁸⁵ The claim revolved around the long-standing environmental degradation and health crises in the La Oroya district in Peru, one of the world's most polluted areas due to the operation of the La Oroya Metallurgical Complex, dedicated to the smelting and refining of metals with high levels of lead, copper, zinc and arsenic. The company's activity significantly contributed to the severe contamination of air, water and soil that caused serious alterations in the victims' quality of life, particularly for vulnerable groups such as children, women, and the elderly.

The complexity of the judgment is shown by the declaration of the violation of several rights, including the right to a healthy environment and health under Article 26, the right to life (Article 4), the right to life with dignity and the right to personal integrity (Articles 4 and 5), the rights of the child (Article 19), the rights of access to information and to participate in government (Articles 13 and 23), and the right to judicial protection (Article 25).⁸⁶ Thus given the focus of the present chapter, the following paragraphs will be dedicated to the judgment's implications regarding the right to a healthy environment.

Building on *Advisory Opinion OC-17/23* acknowledging the procedural and the substantive aspects of the right to a healthy environment, the Court took an additional step and defined the elements of the substantive dimension of environmental protection, including air, water, food, the ecosystem, and the climate, among others. In this sense, the Court referred to *Lhaka Honhat*, which pronounced that the environment should be protected even in the absence of certainty or evidence of the risk

84 Supra 72, Concurring opinion of Judge Patricio Pazmiño Freire, paras. 8–9.

85 Viveros-Uehara, 2024.

86 The Case of La Oroya Population v. Peru, Judgment of 27 November 2023, IACtHR, X. Operative Paragraphs [originally available in Spanish, translated by the author].

to individuals, which, however, did not prevent the violation of other human rights as a consequence of environmental damage. Regarding air pollution, the Court pronounced that the right to breathe air whose pollution levels do not constitute a significant risk to the enjoyment of their human rights, is a matter which the States are obliged to establish laws, regulations and policies that regulate air quality standards that do not constitute health risks; to monitor air quality and inform the population of possible health risks; and to carry out action plans to control air quality that includes the identification of the main sources of air pollution, and implement measures to enforce the standards of the quality of air.⁸⁷

Remarkably, this was the first major pollution case comparable to the ECtHR's vast case law on industrial pollution, including cases referenced in the judgment, such as *Fadeyeva v. Russia*,⁸⁸ *Okyay and Others v. Turkey*,⁸⁹ or *Cordella and Others v. Italy*.⁹⁰ In the absence of any explicit environmental right in the ECHR,⁹¹ the ECtHR developed a 'sub-right of an environmental character'⁹² primarily under the right to respect for private and family life (Article 8 of the ECHR). As illustrated by the cases mentioned above, the ECtHR has a well-established practice of considering industrial pollution claims under Article 8⁹³ until the adoption of *Cannavacciuolo and Others v. Italy* on 30 January 2025, in which the ECtHR, when examining the relevant international law and practice, referred to the *La Oroya* judgment of the IACtHR,⁹⁴ and pronounced the violation of Article 2 for a comparably widespread and large-scale pollution phenomenon in the 'Terra dei Fuochi' area of South Italy.⁹⁵ While the ECtHR rarely cites the IACtHR's judgments,⁹⁶ referencing *La Oroya* certainly underscores its universal relevance in adjudicating environmental cases under human rights law.

In addition to the right to clean air, the IACtHR also examined the right to water in connection with the right to a healthy environment. The Court distinguished between the right to water as a substantive facet of the right to a healthy environment and an autonomous right to water. Regarding the first facet, the Court noted that it protects bodies of water as elements of the environment that have value in themselves as a universal interest, as well as for other living organisms, including humans. The second facet, the right to water as an autonomous right recognises the crucial role of water for humans and their survival, and thus protects its access, use, and exploitation

87 *Ibid.*, paras. 118–120.

88 *Fadeyeva v. Russia*, Judgment of 9 June 2005, ECtHR.

89 *Okyay and Others v. Turkey*, Judgment of 12 July 2005.

90 *Cordella and Others v. Italy*, Judgment of 24 January 2019.

91 Kobylarz, 2025, p. 23.

92 *Pavlov and Others v. Russia*, Judgment of 11 October 2022, ECtHR, Concurring opinion of Judge Serghides, para. 9.

93 Peters, 2022, p. 189. See also: Kotiuk, Weiss and Taddei, 2022, p. 122.

94 *Cannavacciuolo and Others v. Italy*, Judgment of 30 January 2025, ECtHR, para. 185.

95 *Ibid.*, para. 467.

96 An exception could be *Verein KlimaSeniorinnen and Others v. Switzerland*, supra 67, paras. 225–227.

by human beings.⁹⁷ Most importantly, the Court noted that the right to a healthy environment includes both the right to clean air and the right to water, which bears the obligation of States to protect against violation thereof by third parties based on the principle of prevention and precaution. The Court embraced the UN Guiding Principles on Business and Human Rights,⁹⁸ the major soft law document establishing recommendations for private parties (businesses) regarding human rights and pronounced that companies themselves also have responsibilities to respect human rights and act with due diligence, regardless of their size, sector, operational context, ownership, or structure.⁹⁹

Lastly the judgment also demonstrates that the IACtHR is in alignment with recent developments regarding environmental protection in human rights by referring to the recognition of the right to a clean, healthy and sustainable environment by the UN General Assembly in Resolution 76/300,¹⁰⁰ and recognising the *jus cogens* nature of the prohibition of illegal and arbitrary conduct that causes serious, extensive, long-lasting and irreversible damage to the environment.¹⁰¹ The Court therefore considers such obligations at the same level as other *jus cogens* norms in public international law, such as prohibition in the use of force, genocide, slavery, apartheid, crimes against humanity, and forced disappearances, among others. The impact of defining *jus cogens* norms regarding environmental protection constitutes a ground-breaking development not only in human rights law and international environmental law but in public international law in general, as its pronouncement in a binding judgment of a human rights court indisputably strengthens the position of States' international obligations regarding the protection of the environment.¹⁰² According to Judges Pérez Manrique, Ferrer Mac-Gregor Poisot and Mudrovitsch, the *jus cogens* nature of these environmental norms could be deduced from the definition of *jus cogens* norms itself, which based on the International Law Commission's concept, are norms that

reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law.¹⁰³

Furthermore, they are

accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified

97 Supra 86, para. 124.

98 UN Guiding Principles on Business and Human Rights, HR/PUB/11/04.

99 Supra 86, paras. 109–111.

100 A/RES/76/300.

101 Supra 86, para. 129.

102 Environmental *jus cogens* norms had earlier been proposed by scholars, however, it has not been pronounced by any court until the *La Oroya* judgment. See: Kotzé, 2016, p. 241.

103 Ibid., Conclusion 2 [3].

only by a subsequent norm of general international law having the same character [...],¹⁰⁴

The Judges pointed out in their concurring opinion that the obligation to protect the environment as a form of *jus cogens* crystallises or reflects the fundamental value of the international community of recognising the environment as the support of States and a *sine qua non* for their existence. The Judges referred to a vast number of international legal sources recognising state obligations for environmental protection, including the abovementioned UN General Assembly resolution, which, as pointed out in the concurring opinion, did not create a new right, but rather declared a pre-existing reality, which had previously been developed in multiple international instruments.¹⁰⁵ However, it has to be highlighted that the right to a healthy environment is currently not recognised in binding UN human rights treaties, and even the cited Resolution is a soft law document, which may not establish binding norms for the States. Nonetheless, the Judges argued that the UN General Assembly is the most representative body of the international community and therefore its acts are suitable to be considered for *opinio iure sive necessitatis*.

The arguments for recognising the *jus cogens* nature of States' obligation to protect the environment could be compared with the reasons raised in favour of recognising the justiciability of environmental rights, as both argumentations strongly build on the evolutive interpretation and the principle of systemic integration.¹⁰⁶ The IACtHR's progressive approach significantly advances the doctrine of environmental protection in human rights law and has a growing impact on the jurisprudence of the ECtHR. However, in the author's opinion, certain affirmations extend beyond the scope of competence of the Inter-American system, and require support primarily from the ICJ, particularly in questions revolving around the *jus cogens* nature of certain norms, as they may also carry significant implications towards public international law.

4. Climate Change and the Inter-American Human Rights System

Since the adoption of the Paris Agreement in 2015, there has been a growing emphasis on the development of the climate change jurisprudence of courts at domestic, regional, and international levels.¹⁰⁷ Rights-based climate litigation, a special sub-category of climate change litigation, aims to address the negative impact of climate

104 ILC, Peremptory norms of general international law (*jus cogens*), A/CN.4/L.967, Conclusion 3 [2].

105 Supra 86, Concurring opinions of Judges Ricardo C. Pérez Manrique, Eduardo Ferrer MacGregor Poisot and Rodrigo Mudrovitsch, paras. 76–88.

106 Systemic integration as a treaty interpretation method is established in Article 31(3)(c) of the VCLT cited above, that requires the consideration of the relevant rules of international law in interpreting an international treaty. See: Rachovitsa, 2017, p. 557.

107 See: Setzer and Higham, 2024, p. 10.

change on the enjoyment of human rights.¹⁰⁸ Human rights adjudicatory bodies have encountered their first cases of climate litigation, including the UN HRC and more recently, the ECtHR. As pointed out above, the Inter-American Commission on Human Rights was among the first human rights forums to encounter climate change claims, however, the ‘Inuit petition’ was inadmissible based on the standards of the time.

Since then, both the IACHR and the IACtHR have addressed the impact of climate change on the enjoyment of human rights. In the aforementioned *Kawas Fernández* case, the Court acknowledged that the adverse effects of climate change impair the enjoyment of human rights.¹⁰⁹ Although the claim did not involve questions regarding climate change, the fact that the Court mentioned it along with environmental degradation as a factor negatively affecting the realisation of human rights, demonstrated the Court’s complex approach. Furthermore, *Advisory Opinion OC-17/23* reiterated this position and reflected on developments within the United Nations.¹¹⁰ However, the Advisory Opinion was adopted before the recognition of the right to a clean, healthy and sustainable environment in the UN, and the first landmark climate change cases of human rights adjudicatory bodies, such as *Torres Strait Islanders* and *Verein KlimaSeniorinnen*.

Furthermore, in 2021 the Commission adopted *Resolution 3/2021* titled ‘Climate Emergency: Scope of Inter-American Human Rights Obligations’, which confirmed that the right to a healthy, balanced and pollution-free environment is also applicable in the context of climate change, and based on *Advisory Opinion OC-17/23*, is justiciable before the Court. The *Resolution* addresses the climate emergency in nine titles, namely: (I) the centrality of the rights approach in the construction of climate change instruments, policies, plans, programs, and norms on climate change, (II) human rights in the context of environmental deterioration and the climate emergency in the Americas, (III) the rights of individuals and groups in situations of vulnerability or historical discrimination in environmental and climate matters, (IV) the rights of indigenous peoples, tribal communities, Afro-descendants and peasants or those working in rural areas in the face of climate change, (V) the rights of land and nature defenders, (VI) the rights of access to information, public participation and access to justice in environmental and climate matters, (VII) the extraterritorial obligations of States in environmental and climate matters, (VIII) the responsibility of companies to respect human rights and remedy possible violations thereof in the environmental and climate context, and (IX) the fiscal, economic and social policies for a just transition.¹¹¹ The influence of the Escazú Agreement – which entered into force in the same year as the *Resolution* was adopted, is particularly tangible, since the Commission dedicated an entire section to environmental and climate defenders. Additionally, it could also be concluded that the Commission endorsed the obligations deriving from

108 Savaresi and Auz, 2019, pp. 246–249.

109 *Supra* 32, para. 148.

110 *Advisory Opinion OC-17/23*, para. 54.

111 *Resolution, 3/2021, Climate Emergency: Scope of Inter-American Human Rights Obligations*, 31 December 2021, IACHR.

the Paris Agreement and their interrelationship with human rights. The significance of this document is reflected in the ECtHR's jurisprudence as well with the *Verein KlimaSeniorinnen* judgment noting that the Resolution had recognised climate change as a human rights emergency.¹¹²

The IACtHR has not encountered a contentious case concerning climate change comparable to *Verein KlimaSeniorinnen* in the European human rights jurisprudence. Nonetheless, the Court tends to address climate change as part of the debate regarding environmental degradation in recent contentious cases, such as *Lhaka Honhat* and *La Oroya*. Notably, in the latter judgment the Court explicitly considered the international climate change framework, particularly the Paris Agreement, to assess the violation of children's rights under Article 19 of the ACHR, and referred to General Comment No. 26 of the UN Committee on the Rights of the Child (UN CRC) highlighting the relevance of the concept of intergenerational equity and the consideration of the needs of future generations.¹¹³ The issue of climate change was raised to consideration in the given case by the Court itself, once again demonstrating its extensive approach based on the *iura novit curia* principle.

While the Court has yet to hear its first contentious climate change case, it is currently preparing a new advisory opinion on the climate emergency and human rights. The advisory opinion, requested on 9th January 2023 by Colombia and Chile, seeks to clarify the scope of state obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law, paying special attention to the differentiated impacts of this emergency on individuals from diverse regions and population groups, as well as on nature and human survival on the planet.¹¹⁴

The questions submitted to the Court were centred around six key issues, namely (I) state obligations derived from the duties of prevention and the guarantee of human rights in relation to the climate emergency, particularly in light of the Paris Agreement, (II) state obligations to preserve the right to life and survival in relation to the climate emergency in light of science and human rights, considering the rights guaranteed in the Escazú Agreement; (III) the differentiated obligations of States in relation to the rights of children and the new generations in light of the climate emergency, (IV) state obligations arising from consultation procedures and judicial proceedings owing to the climate emergency based on Articles 8 and 25 of the ACHR, (V) convention-based obligations of the prevention and the protection of territorial and environmental defenders, women, indigenous peoples, and Afro-descendant communities in the context of the climate emergency, also in light of Article 9 of the Escazú Agreement, and finally (VI) the shared and differentiated human rights obligations and responsibilities of States in the context of the climate emergency,

112 Supra 67, para. 228.

113 Supra 86, paras. 139–143.

114 Supra 59.

considering that the climate crisis has a greater impact on the Caribbean region, some of the impacts being migration and forced displacement.¹¹⁵

The pending advisory opinion has garnered significant attention, as it is one of the three international advisory proceedings concerning climate change, along with requests for advisory opinions from the ITLOS and the ICJ. The ITLOS rendered its Advisory Opinion on 21st May 2024, the first advisory opinion on States' obligations regarding climate change issued by an international tribunal.¹¹⁶ In the Advisory Opinion, initiated by the Commission of Small Island States on Climate Change and International Law (COSIS), the ITLOS addressed the interpretation of the UN Convention on the Law of the Sea (UNCLOS) in the context of climate change and concluded that

States Parties to the Convention have specific obligations under Article 194 of UNCLOS to take all necessary measures to prevent, reduce, and control marine pollution from anthropogenic GHG emissions and to endeavor to harmonize their policies in this connection.¹¹⁷

Such a conclusion will presumably be a reference point for the IACtHR, as according to scientific calculations, the region is likely to be affected by sea level rise and the increase of sea surface temperatures significantly and disproportionately affecting coastal communities. Moreover, the request to the IACtHR also addresses questions of international cooperation and obligations regarding the most affected areas in the region under the theme of shared and differentiated human rights obligations and responsibilities of States in the context of the climate emergency.¹¹⁸

Parallel to the pending advisory opinion before the IACtHR, significant attention is devoted to the much-anticipated advisory opinion of the ICJ.¹¹⁹ The request for an advisory opinion was initiated by the Republic of Vanuatu, a small island State in the Pacific Ocean,¹²⁰ and it was embraced by the UN General Assembly on 29th March 2023, at the sixty-fourth plenary meeting. The advisory opinions of the Court are not legally binding yet being the main judicial organ of the United Nations, they carry 'great legal weight and moral authority',¹²¹ and thus contribute significantly to the development of international law. In the present case, the ICJ is requested to deliver its opinion on two main questions: the obligations of States under international law, particularly climate change agreements, human rights conventions, and customary law; and the

115 Ibid.

116 Silverman-Roati and Bonnemann, 2024.

117 Case no. 31, Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 21 May 2024, ITLOS, para. 243.

118 See: *supra* 115.

119 *Supra* 69.

120 On the background of the Vanuatu initiative, see: Mead and Wewerinke-Singh, 2021, p. 294. See also: Wewerinke-Singh, and Salili, 2020, p. 681.

121 International Court of Justice, Advisory Jurisdiction.

legal consequences under these obligations for States with respect to other (vulnerable) States and peoples and individuals of present and future generations.¹²² Given that a strong emphasis is placed on international human rights instruments, such as the ICCPR, the ICESCR, and the Universal Declaration of Human Rights (UDHR), the ICJ's advisory opinion may support the Inter-American Court's earlier affirmations on the customary nature of States' obligations concerning environmental protection, extending it to obligations to address climate change by legal means.

Although the date of the delivery of the advisory opinions of the ICJ and the IACtHR is not yet known, it can be stated with confidence that they will significantly contribute to understanding States' human rights obligations in light of the climate crisis. The IACtHR is likely to build on the key contentious climate change cases, such as *Torres Strait Islanders* and *Verein KlimaSeniorinnen*, and the advisory opinion of the ITLOS, or the ICJ, in case it will be issued prior to the Inter-American one. Additionally, based on the Court's comprehensive approach endorsed in its recent environmental cases and particularly in *Advisory Opinion OC-17/23*, the impact of the advisory opinion on the climate emergency and human rights could extend far beyond the limits of the Inter-American framework, and could serve as a reference point for other jurisdictions, including the ECtHR.

5. Conclusion

This chapter was dedicated to an analysis of the environmental jurisprudence of the Inter-American human rights adjudicatory bodies, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, both having a crucial role in developing human rights guarantees against environmental degradation. The analysis shows that the first cases with an environmental dimension were centred around indigenous peoples' claims over their ancestral lands invoking collective property rights. Although the right to a healthy environment was introduced in the Inter-American human rights framework with the adoption of the Protocol of San Salvador in 1988, the lack of direct justiciability hindered the applicants from addressing the violation of this right for nearly three decades.

In parallel with the growing international consensus on the recognition of the interrelationship between human rights and environmental protection, and endeavours to recognise autonomous, self-standing environmental rights, the Court rendered a historical advisory opinion in 2017, pronouncing the justiciability of environmental rights under the obligation of progressive development established in Article 26 of the American Convention on Human Rights. Since then, this approach has been confirmed in contentious cases, namely in *Lhaka Honhat v. Argentina*, pronouncing the violation of the right to a healthy environment as an autonomous right for the first

122 See: A/RES/77/276, Recital 14.

time, and in *La Oroya v. Peru*, the first judgment pronouncing a violation of the right for non-indigenous communities.

In addition to the analysis of the IACtHR's environmental case law, a strong emphasis was placed on the Court's role in the development of the doctrine of the right to a healthy environment in the international context. Examples from other jurisprudences demonstrated that the impact of the Inter-American approach to environmental protection extended far beyond the scope of the specific case, and even beyond the Inter-American framework itself. Notably, the Court's key cases have been cited in recent cases of the UN HRC and the ECtHR, owing to the universal values embraced in them that transcend the borders of the region. Notwithstanding the challenges of Latin America and the Caribbean, including the critical situation of environmental defenders, vulnerable groups such as children, women, elderly people and indigenous communities, as well as the regions' exposure to the adverse effects of climate change, the Inter-American Court of Human Rights remains among the most influential actors worldwide in addressing environmental issues.

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