

# **TIME TO WAKE UP!**

## **Pushing the Boundaries in the Americas to Protect the Most Vulnerable**

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### ABSTRACT

It is time to wake up and push for the protection of the environment and against climate change. Vulnerable communities around the world are living in polluted, highly toxic, and unsustainable environments. It is time to protect them through a human rights-based framework. This article proposes that the Inter-American right to a healthy environment provides the possibility of protecting the human rights of the most vulnerable in the Americas by providing a rights-based framework for them to vindicate their environmental human rights. This article focuses on vulnerable populations who have been historically marginalized and discriminated against and/or who are reliant on the natural resources in their environments. This article posits that the “greening” of human rights, which is the traditional approach to the protection of environmental human rights, is not sufficient to protect vulnerable non-indigenous communities. The “greening” of human rights has been effective in the protection of indigenous and tribal populations but has left non-indigenous populations without protection. It is for this reason that we, as a society, must think creatively about environmental human rights advocacy, and create a system that moves forward the development of the right to a healthy environment. We must hold States responsible for their actions and for their support of corporations who exploit natural resources and populations living in them. If we know that so much human suffering is already happening due to environmental harm and climate change, why are we continuing on this path?

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## TABLE OF CONTENTS

INTRODUCTION .....	125
I. BACKGROUND ON INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS .....	131
II. ORIGINS OF THE RIGHT TO A HEALTHY ENVIRONMENT.....	135
III. ENVIRONMENTAL HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS .....	141
A. <i>Interconnectedness of the Environment and Human Rights</i> .....	141
B. <i>“Greening” of Human Rights</i> .....	143
IV. THE RIGHT TO A HEALTHY ENVIRONMENT AS A NORMATIVE TOOL TO PROTECT VULNERABLE POPULATIONS.....	151
A. <i>Obligation of Prevention</i> .....	159
B. <i>Precautionary Principle</i> .....	161
C. <i>Obligation to Cooperate</i> .....	161
D. <i>Procedural Obligations</i> .....	162
E. <i>Working Group Criteria and Vulnerable Populations</i> .....	165
1. Environmental Racism and Discrimination: Afro-Descendants and Immigrant Communities.....	166
2. Endangering the Environment Without Due Regard to Protection and Conservation: Campesinos .....	171
3. Disproportionate burden of Climate Change: Coastal Communities.....	173
CONCLUSION .....	174

This is the time to wake up. This is the moment in history we need to be wide awake . . . . And yet, wherever I go, I seem to be surrounded by fairy tales. Business leaders, elected officials all across the political spectrum spending their time making up and telling bedtime stories that soothe us, that make us go back to sleep. These are ‘feel-good’ stories about how we are going to fix everything. How wonderful everything is going to be when we have ‘solved’ everything. . . . [But] it’s time to face the reality, the facts, the science. And the science doesn’t mainly speak of ‘great opportunities to create the society we always wanted.’ It tells of unspoken human sufferings, which will get worse and worse the longer we delay action . . . . Stop telling people that everything will be fine, [when in fact,] as it looks now, it won’t be very fine.<sup>1</sup>

— Greta Thunberg

## INTRODUCTION

As a society we have continually prioritized economic growth over protection of the environment. We have let corporations and governments decide our planet’s future as they make decisions based on their own greed. Corporations purchase land, atmospheric space, underground minerals, animals, fish—really anything that money can buy—without regard for the human and environmental suffering they create.<sup>2</sup> After all, “everything we take for ourselves we take from someone else.”<sup>3</sup> The idea that corporations and governments can take from and destroy the environment—without having serious lasting effects on the environment and on people—is fiction.

Climate change has real and devastating environmental consequences. A 2020 United Nations study confirmed that climate change has already had catastrophic effects on “socio-economic development, human health, migration and displacement, food security, and land and marine ecosystems.”<sup>4</sup> For vulnerable persons and communities, the effects of climate change are undoubtedly devastating. Children, low-income people, people with disabilities, pregnant people, and underrepresented groups are at particularly high risk of contracting diseases or other health conditions and lack access to basic resources as a result of environmental degradations due to climate change.<sup>5</sup>

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1. Greta Thunberg, Speech to Members of Congress (Sept. 20, 2019) (transcript available at <https://www.independent.co.uk/voices/greta-thunberg-congress-speech-climate-change-crisis-dream-a9112151.html> [<https://perma.cc/GEA8-J3MJ>]).

2. George Monbiot, Opinion, *Capitalism is Destroying the Earth. We Need a New Human Right for Future Generations*, GUARDIAN (Mar. 15, 2019), <https://www.theguardian.com/commentisfree/2019/mar/15/capitalism-destroying-earth-human-right-climate-strike-children> [<https://perma.cc/5W27-949T>].

3. *Id.*

4. *Flagship UN Study Shows Accelerating Climate Change on Land, Sea and in the Atmosphere*, UN NEWS (Mar. 10, 2020), <https://news.un.org/en/story/2020/03/1059061> [<https://perma.cc/N9U2-2FTW>].

5. Natalie McGill, *Vulnerable Populations at Risk from Effects of Climate Change: Public Health Working to Find Solutions*, NATION’S HEALTH (Nov./Dec. 2016), <https://www.thenationshealth.org/content/46/9/1.1> [<https://perma.cc/QXJ4-UMSX>].

Communities living in arid environments will be unable to rely on their natural environment without facing major obstacles, as the destruction of extreme flooding and rising sea-levels takes its toll.<sup>6</sup> In the Americas from 2000 to 2013, devastating hydro-meteorological events such as typhons, hurricanes, flash floods, droughts, and coastal storm surges led to serious human and economic losses.<sup>7</sup> Most concerning are the increasing temperatures and droughts affecting the region. Scientists are concerned that the increased frequency of extreme droughts in the Amazon will lead to the region's "tipping point" and the destruction of the Amazon forest.<sup>8</sup>

Similarly, Mexico, Central America, and the Caribbean have experienced increasingly powerful hurricanes and tropical storms that are devastating the environment and creating severe human health effects.<sup>9</sup> In the Caribbean, the rising sea temperatures are projected to lead to catastrophic hurricanes, resulting in flooding, landslides, the destruction of homes, loss of basic resources, and increasing health conditions.<sup>10</sup> For the communities that live near and fish coastal waters, increasing sea-level is projected to destroy their environment through the erosion of shorelines, the inundation of low-lying areas, and the contamination of freshwater aquifers.<sup>11</sup> The Mesoamerican reef of Central America and Mexico has already suffered from these consequences. There, coral bleaching has led to a loss of biodiversity, and in turn, a loss of marine life that could have fed many communities.<sup>12</sup> Additionally, climate change has affected access to freshwater sources,<sup>13</sup> which has led to increasing vector-borne diseases, including dengue and malaria, as well as other transmittable diseases.

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6. *How Will the Global South Pay for Climate Change Damage?*, NEW INTERNATIONALIST (May 3, 2019), <https://newint.org/features/2019/05/03/how-will-global-south-pay-climate-change-damage> [<https://perma.cc/A4RP-B5GX>]. See also UN NEWS, *supra* note 4.

7. World Wildlife Fund Guat., *Climate Change Impacts in Latin America* (2020), [https://www.wfca.org/en/our\\_work/climate\\_change\\_and\\_energy/climate\\_change\\_impacts\\_la](https://www.wfca.org/en/our_work/climate_change_and_energy/climate_change_impacts_la) [<https://perma.cc/5WP4-N7XA>].

8. *Id.*

9. Emilio Sempris, *Climate Change and Freshwater in Latin America and the Caribbean*, UN CHRONICLE (June 27, 2013), <https://www.un.org/en/chronicle/article/climate-change-and-freshwater-latin-america-and-caribbean> [<https://perma.cc/R48T-TJKN>].

10. *Id.*; see also Jorge Familiar, Vice President, World Bank, Address Woodrow Wilson Center's Turn Down the Heat: Confronting the New Climate Normal Event, *Climate Change Impacts in Latin America and the Caribbean: Confronting the New Climate Normal* (Dec. 2, 2014), <https://www.worldbank.org/en/news/speech/2014/12/02/climate-change-impacts-in-latin-america-and-the-caribbean-confronting-the-new-climate-normal> [<https://perma.cc/7VNM-4LVZ>] (discussing expected destructive impacts from global temperature rises).

11. M.C. SIMPSON ET AL., U.N. DEVELOPMENT PROGRAMME, QUANTIFICATION AND MAGNITUDE OF LOSSES AND DAMAGES RESULTING FROM THE IMPACTS OF CLIMATE CHANGE: MODELING THE TRANSFORMATIONAL IMPACTS AND COSTS OF SEA LEVEL RISE IN THE CARIBBEAN 24–25 (2010) [<https://perma.cc/C2MW-X9GK>].

12. COMMONWEALTH MARINE ECONOMIES PROGRAMME, CARIBBEAN MARINE CLIMATE CHANGE REPORT CARD 7–11 (2017), [https://unfccc.int/sites/default/files/resource/83\\_caribbean-marine-climate-change-report-card-2017.pdf](https://unfccc.int/sites/default/files/resource/83_caribbean-marine-climate-change-report-card-2017.pdf).

13. Sempris, *supra* note 9.

The spread of these diseases will continue to increase as the availability of freshwater decreases.<sup>14</sup>

If we know that so much human suffering is already happening due to the environmental harm caused by climate change, why are we continuing on this path? If we do not act now, we will continue to feel the effects of climate change. The most vulnerable will become poorer, will have less access to health and natural resources, and will be increasingly marginalized. As former Secretary General of Amnesty International Kumi Naidoo, a fierce advocate of the environmental human rights movement, has said, “[t]here are no human rights on a dead planet. There are no humans on a dead planet.”<sup>15</sup> Now is the moment in time where we need strong intervention through “legitimate, far reaching, and ultimately, effective judicial measures” to protect the environment.<sup>16</sup> We have to think creatively and radically to develop new normative tools to protect the environment, and to protect those most affected by environmental harm and climate change.

This article proposes that the Inter-American System for the Protection of Human Rights (Inter-American System) must recognize that there is a right to a healthy environment and use this right as a normative framework in order to protect the human rights of vulnerable persons facing environmental harm in the Americas and the Caribbean. There is a growing global movement advocating for the express and autonomous right to a healthy environment.<sup>17</sup>

The Inter-American System has recognized the right to a healthy environment since 1988 through Inter-American instruments and jurisprudence on the rights of indigenous and tribal communities.<sup>18</sup> The Additional Protocol to the

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14. Familiar, *supra* note 10.

15. Kumi Naidoo, *Human Rights and the Climate Crises: International and Domestic Legal Strategies*, 25 UCLA J. INT’L L. & FOREIGN AFF. 1, 5 (2020) (quoting friend and global trade union movement leader, Sharan Burrow).

16. Louis J. Kotze, *In Search of a Right to a Healthy Environment in International Law*, in THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 136, 142 (John H. Knox & Ramin Pejan eds., 2018) [hereinafter Kotze, *In Search of a Right*].

17. The mandate of the United Nations Special Rapporteur on human rights and the environment was created by the United Nations Human Rights Council in 2012 with Resolution 19/10. The mandate seeks to: examine human rights obligations in relation to the right to a safe, clean, healthy and sustainable environment; promote the best environmental practices in policy making; promote the global recognition of the right to a healthy environment; conduct country site visits; and respond to human rights violations in relation to environmental human rights. U.N. OFF. OF HIGH COMM’R ON HUM. RTS., *Overview: Special Rapporteur on Human Rights and the Environment*, <https://www.ohchr.org/en/Issues/environment/SREnvironment/Pages/SREnvironmentIndex.aspx> [https://perma.cc/7R6L-SRLE] (last visited Apr. 1, 2021).

18. Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 11, Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156, 165 (1989) [hereinafter Protocol of San Salvador]; *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001); *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005);

American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) and the Court's Advisory Opinion on the Environment and Human Rights (OC-23/17) have built on the recognition of that right for the Americas.<sup>19</sup> The Protocol and Advisory Opinion on the Environment and Human Rights clarify that the right to a healthy environment is a viable framework for protection. As later discussed, both the Protocol and the Advisory Opinion can be the beginning of a new chapter in the protection of the environment in the Inter-American System of Human Rights.

Past Inter-American jurisprudence protecting the environment has done so through the "greening" of human rights. This approach attempts to protect the environment by using existing human rights (not focused on the environment) as indirect mechanisms to protect the rights of persons and communities affected by environmental risk or harm.<sup>20</sup> The "greening" of human rights is not exclusive to the Inter-American System. The European Court of Human Rights has taken this approach and protected human rights affected by environmental harm through the rights to life, property, privacy, and information.<sup>21</sup> However, this approach lacks the ability to anchor arguments in the actual environmental risk or harm that is affecting populations or in the harm that is likely to occur in the foreseeable future. Moreover, this approach is limited in that provable harm must be traced back to the environmental injury that is affecting the right to property, or life, for example. Establishing this connection or causation is quite challenging, especially since environmental harm can often be largely attributed to aggregate harm that has developed over time and causes long lasting intergenerational effects on the population.<sup>22</sup>

The vast protection of the environment in the Inter-American System has occurred as a result of the indigenous rights movement. This movement has been instrumental in fighting for environmental protections, as indigenous communities' survival is greatly jeopardized by the environmental harm that

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Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

19. Protocol of San Salvador, *supra* note 18; 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 Arts. 4(1) and 5(1) in relation to Arts. 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017) [hereinafter Advisory Opinion OC-23/17].

20. Professor Alan Boyle explains "greening" as thinking of "human rights and the environment within the existing framework of human rights law in which the protection of humans is the central focus." Alan Boyle, *Human Rights or Environmental Rights? A Reassessment*, 18 FORDHAM ENVTL. L. REV. 471, 473 (2006).

21. *Budayeva v. Russia*, 2008-II Eur. Ct. H.R. 267; *L.C.B. v. United Kingdom*, 27 Eur. Ct. H.R. 212 (1998); *Öneryildiz v. Turkey*, 41 Eur. Ct. H.R. 20 (2004).

22. Comm. on the Rights of the Child, Report of the 2016 Day of General Discussion: Children's Rights and the Environment, at 7–8 (2016), <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2016/DGDOutcomereport-May2017.pdf> [<https://perma.cc/T2FR-3VML>].

results from extractive and highly polluting industries.<sup>23</sup> The indigenous rights movement has paved the way for recognition of the relationship between human populations and their natural environment.<sup>24</sup> “[T]he wisdom, and the experiences of indigenous peoples around the world are critically important for us to make progress.”<sup>25</sup> Additionally, indigenous and tribal jurisprudence has been critical to establishing that environmental harm leads to a multitude of human rights violations, including the rights to culture, identity, and language.<sup>26</sup> The recognition of environmental human rights in the indigenous context has also solidified procedural rights, such as free, prior, and informed consent.<sup>27</sup> Procedural rights have been critical in the protection of the right to a healthy environment. They ensure that individuals and communities are able to have access to participatory rights and justice in the context of environmental human rights. The recognition of environmental human rights is critical for the non-indigenous communities that rely on their natural environment, or are disproportionately affected by climate change, as their voices go similarly unheard. Unfortunately, the gains that the indigenous rights movement has made with the framework to protect the environment, which stems from the increase in the recognition and protection of rights, is not likely to protect all non-indigenous vulnerable populations that experience similar environmental harm or risk. While there is an undeniable link between indigenous communities and their natural environment, the protection of the environment must be expanded to protect other groups. Many non-indigenous vulnerable communities similarly have their right to a healthy environment violated because of who they are, where they live, and how they live. They too will suffer from climate change because of their vulnerability, a vulnerability which results from marginalization and disenfranchisement. Thus, in order to protect non-indigenous vulnerable communities, the “greening” of human rights will not be sufficient.

Finally, the environmental disasters that we face now are different from those we have faced in the last couple of decades. The extensive and

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23. *Maya Indigenous Cmty. of Toledo District v. Belize*, Case 12.053, Inter-Am. Comm’n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶ 150 (2004).

24. The Inter-American Court has understood a “tribal people” as those who are “not indigenous to the region, but that share similar characteristics with indigenous peoples, such as having social, cultural, and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions.” *Indigenous Peoples Cmty. of African Descent Extractive Indus.*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II. doc. 47/15, ¶ 30 (Dec. 31, 2015) (quoting *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 132–33 (June 15, 2005)) [hereinafter *Indigenous Peoples Cmty. of African Descent Extractive Indus.*].

25. Naidoo, *supra* note 15, at 6.

26. *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 222 (Mar. 29, 2006).

27. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 142 (Aug. 31, 2001).

inter-generational harm that we face requires us to rethink old approaches and adopt new ones that properly address the challenges in this new era of increasing climatic crisis. In the words of Louis J. Kotzé, “It is highly likely that we will only be able to advance the international human rights agenda in a comprehensive, holistic, and ultimately effective and sustainable way, if we elevate environmental concerns to be incorporated more explicitly into the canon of binding international human rights.”<sup>28</sup> Naidoo like Kotzé has emphasized the need to think differently about the legal mechanisms we use to protect the right to a healthy environment and to address the climate crisis. He urges that “we need to be more analytical and intellectually astute in terms of trying to understand the nuances of the rule of law.”<sup>29</sup> Naidoo’s comment emphasizes that we have not sufficiently pushed the normative boundaries to where we need because we continue to find ways to protect environmental human rights, for humans and for the environment itself. More creative work needs to be done. It is critical that we think of new ways to use legal instruments to fight against the ticking clock of climate change.

This article is divided into four substantive parts. Part I provides a background for the Inter-American System for the Protection of Human Rights. This Part sets forth the foundational concepts and the procedural understanding of the regional human rights system in the Americas and the Caribbean. It discusses the judicial and quasi-judicial resources that victims of human rights violations may use to vindicate their human rights. Additionally, Part I explains the important regional treaties on which this article’s discussion rests.

Part II discusses the origins of the right to a healthy environment. This Part discusses and maps the history of the right to a healthy environment in international environmental law, in States’ constitutions, and finally in the Inter-American regional system. This Part explains that domestically the right to a healthy environment is widely recognized, and that it is slowly being recognized in different regional and international venues. This Part also clarifies the importance of an international and regional right to a healthy environment.

Part III discusses environmental human rights in the Inter-American System for the Protection of Human Rights. This Part explains how the environment and human rights are interconnected and that this understanding has long been recognized in regional Inter-American jurisprudence. This Part also discusses the “greening” of human rights, which is the traditional approach to the protection of human rights in the context of environmental degradation and harm. This Part explains that while the “greening” of human rights has been the majority view, this approach does not adequately address the needs of vulnerable non-indigenous populations.

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28. Kotze, *In Search of a Right*, *supra* note 16, at 144; *see also* Louis J. Kotzé & Anél du Plessis, *Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa*, 3 J. CT. INNOVATION 157, 158 (2010).

29. Naidoo, *supra* note 15, at 4.

Part IV discusses the landmark Inter-American Advisory Opinion on the Environment and Human Rights (OC-23/17). This Part explains in detail how the Court recognized that the right to a healthy environment is an autonomous and justiciable right that serves as a normative tool to protect environmental human rights. This Part outlines the major interpretations of this advisory opinion, and how vulnerable communities may navigate the regional human rights system with it. Part IV explains the international obligations outlined in the decision and the specific normative criteria that build on the interpretation of the right to a healthy environment.

Finally, this article concludes by emphasizing that the right to a healthy environment must be used as a normative framework for vulnerable communities. Specifically, vulnerable communities are those that have been historically marginalized or are dependent on the natural resources that may be endangered due to environmental degradation and climate change.

## I. BACKGROUND ON INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

The Inter-American System for the Protection of Human Rights is responsible for monitoring, preventing, and protecting against human rights violations.<sup>30</sup> Its primary judicial and quasi-judicial organs are the Inter-American Commission on Human Rights (Inter-American Commission or Commission) and the Inter-American Court of Human Rights (Inter-American Court or Court). Both bodies are complementary to State domestic courts in the Americas and the Caribbean and are responsible for the protection of human rights, by monitoring the implementation of international human rights norms by member States. The Commission and the Court both rely on the Inter-American normative framework composed of regional Inter-American instruments,<sup>31</sup> which may be international or regional bodies from other systems that provide guidance when interpreting novel international concepts.<sup>32</sup> As a human rights instrument, the

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30. The Inter-American System of Human Rights is composed of the Inter-American Court and Commission of Human Rights under the Organization of American States. The Organization of American States is the regional organization of the Americas. The OAS is composed of the General Assembly, Meeting of Consultation of Ministers of Foreign Affairs, the Permanent Council, the Inter-American Council for Integral Development, the Inter-American Judicial Committee, the Inter-American Commission on Human Rights, the General Secretariat, the Inter-American Specialized Conferences, and the Inter-American Specialized Organizations. *Introduction*, INTER-AM. COMM'N H.R. 1, <https://www.oas.org/en/iachr/mandate/Basics/introduction-basic-documents.pdf> [<https://perma.cc/VTR8-YRL9>] [hereinafter *Inter-American System Introduction*].

31. *Id.* at 2.

32. Article 64 of the American Convention provides that “The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.” Organization of American States, American Convention on Human Rights art. 64, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (entered into force July 18, 1978) [hereinafter

American Convention on Human Rights (American Convention or Pact of San José) is interpreted in light of evolving international legal norms.<sup>33</sup>

The Commission is an autonomous organ of the Organization of American States (OAS) and has the purpose of promoting and protecting human rights in the American hemisphere.<sup>34</sup> It is a quasi-judicial body with three main pillars: the individual petition system, monitoring of human rights, and the development of thematic areas.<sup>35</sup> The Commission carries out these three main areas of work through petitions and hearings on cases, precautionary measures, and thematic and country reports.<sup>36</sup> Through its work, the Commission monitors and addresses State obligations to protect human rights without discrimination.<sup>37</sup> The Commission may also issue precautionary measures in serious and urgent situations where irreparable harm will occur.<sup>38</sup> State obligations arise out of Inter-American instruments, such as the American Declaration of the Rights and Duties of Man (American Declaration),<sup>39</sup> the American Convention,<sup>40</sup> and specialized instruments such as the Additional Protocol of San Salvador.<sup>41</sup> The Commission and the Court have both recog-

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American Convention].

33. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S 331, 8 I.L.M 679 (entered into force Jan. 27, 1980).

34. *What Is the IACHR?*, INTER-AM. COMM'N H.R., <https://www.oas.org/en/iachr/mandate/what.asp> [<https://perma.cc/KK7U-R6UX>] (last visited Feb. 3, 2021) [hereinafter *What Is the IACHR?*]; *Rules of Procedure*, Art. 1(1), INTER-AM. COMM'N H.R., <https://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp> [<https://perma.cc/VTP2-QSGZ>] (last visited Feb. 3, 2021) [hereinafter *IACHR Rules of Procedure*].

35. *What Is the IACHR?*, *supra* note 34; see American Convention, *supra* note 32, at art. 33.

36. *IACHR Rules of Procedure*, *supra* note 34, at ch. V; see also Indigenous Peoples Cmtys. of African Descent Extractive Indus., *supra* note 24, ¶ 25.

37. Indigenous Peoples Cmtys. of African Descent Extractive Indus., *supra* note 24, ¶ 25.

38. *IACHR Rules of Procedure*, *supra* note 34, at art. 25.

39. The American Declaration on the Rights and Duties of Man was adopted on May 2, 1948, and it establishes that “the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality.” American Declaration on the Rights and Duties of Man, Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, Mar. 30-May 2, 1948, *reprinted in* Inter-Am. Comm'n H.R., *Basic Documents Pertaining to Human Rights*, OAS/ser.L/V/II.4 rev. 9 (2003) [<https://perma.cc/U2SD-RF8C>] [hereinafter American Declaration].

40. The American Convention on Human Rights, the Pact of San José, was adopted on November 22, 1969, and it came into force on July 18, 1978, *Inter-American System Introduction*, *supra* note 30. As of June 30, 2010, 24 OAS Member States had signed onto the Pact of San José. American Convention, *id.*

41. The Inter-American regional instruments include the: American Declaration on the Rights and Duties of Man, *supra* note 39; the American Convention on Human Rights, *supra* note 32; the Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, 25 I.L.M 519 (entered into force Feb. 28, 1987); the Additional Protocols to the American Convention on Economic, Social, and Cultural Rights, Protocol of San Salvador, *supra*

nized that while the American Declaration is a declaration and not a treaty, it is a source of international obligations for OAS members.<sup>42</sup> The Commission's work evolves to interpret international and regional norms in a manner most advantageous to the protection of human rights.<sup>43</sup>

The Court is the primary judicial human rights body in the Inter-American System, with the power to adjudicate contentious cases and to issue advisory opinions on issues of interpretation concerning the American Convention and other Inter-American instruments.<sup>44</sup> It also has the power to grant provisional measures in cases where there is "irreparable harm" to persons in their enjoyment of human rights protected under the American Convention.<sup>45</sup> The Court has jurisdiction to hear cases against States that have accepted the jurisdiction of the Court.<sup>46</sup> The Court may hear contentious cases, where victims of human rights abuses claim that they suffered violations of rights protected under the American Convention.<sup>47</sup> The Commission or State parties must refer the contentious case to the Court in order for the Court to hear it.<sup>48</sup> Contentious cases can be referred to the Court in two ways—by a State party or the Commission. The Commission refers a case to the Court by having petitioners submit petitions. The Commission then evaluates whether the procedural grounds of admissibility have been met, including the exhaustion of local remedies, and whether there is a valid allegation of a human rights violation.<sup>49</sup> When the Commission finds a case

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note 18; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém do Pará," June 9, 1994, 1438 U.N.T.S. 63; the Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, 33 I.L.M. 1529 (entered into force Mar. 28, 1996); and the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, June 7, 1999, AG/RES. 1608 (XXIX-O/99) (entered into force Sept. 14, 2001).

42. *Inter-American System Introduction*, *supra* note 30, at 3 (citing James Terry Roach & Jay Pinkerton v. United States, Case 9647, Inter-Am. Comm'n H.R., Report No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev. 1 ¶¶ 46–49 (Sept. 22, 1987); Annual Report of the IACHR 1986–87; Rafael Ferrer-Mazorra v. United States, Case 9903, Inter-Am. Comm'n H.R., Report No. 51/01, OEA/Ser.L/V/II.11 (2001); 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, Inter-Am. Ct. H.R. (ser A) No. 10, ¶¶ 35–45 (July 14, 1989) [hereinafter Advisory Opinion OC-10/89]).

43. "[T]he Court has considered that, when referring to its authority to provide an opinion on 'other treaties concerning the protection of human rights in the States of the Americas,' Article 64(1) of the Convention is broad and non-restrictive." Advisory Opinion OC-23/17, *supra* note 19, ¶ 17 (quoting American Convention, *supra* note 32, at art. 64(1)).

44. *IACHR Rules of Procedure*, *supra* note 34; American Convention, *supra* note 32, at arts. 62–63.

45. American Convention, *supra* note 32, at art. 63.

46. As of June 30, 2010, there were 21 State parties to the American Convention of Human Rights, recognizing the Court's contentious jurisdiction and the international obligations arising out of it. See *Inter-American System Introduction*, *supra* note 30.

47. See American Convention, *supra* note 32, at arts. 61–62(3).

48. *Id.* at art. 61(1).

49. *Id.* at arts. 44, 46(1); see Robert E. Norris, *Bringing Human Rights Petitions before*

admissible, it acts as a fact finder, gathering oral and written statements, compiling reports, and conducting *in loco* investigations.<sup>50</sup> Throughout this process, the Commission may request information from the petitioner and respondent State. Once the Commission has gathered the facts, it may serve as a mediator to negotiate a friendly settlement of the dispute.<sup>51</sup> It is in the Commission's discretion to pursue friendly settlement between parties.<sup>52</sup> If the parties are not able to reach a settlement, the Commission is tasked with preparing a report that includes the facts, the allegations, its suggested proposals, and its recommendations for the case.<sup>53</sup> After the Commission issues the report, the Commission or the respondent State may refer the case to the Court.<sup>54</sup>

When the Commission refers a case to the Court, it acts as the petitioner's advocate and argues the case in front of the Court.<sup>55</sup> In other words, when a case is heard by the Court, it has already passed the Commission's scrutiny on admissibility and the merits.<sup>56</sup> The Court then reviews the admissibility (*i.e.*, procedural juridical grounds) and then the merits (*i.e.*, whether there has been a violation of a right protected under the American Convention and other applicable instruments).<sup>57</sup>

Additionally, the Court has advisory power to issue opinions on how the American Convention should be interpreted.<sup>58</sup> This power has been critical in establishing the scope of the Commission's power and in moving forward into new areas of law within the protection of human rights.<sup>59</sup> It is this very power that recognized the importance of the autonomous and independent right to a healthy environment in the Inter-American System through its Advisory Opinion on the Environment and Human Rights (OC-23/17).<sup>60</sup>

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*the Inter-American Symposium International Human Rights*, 20 SANTA CLARA L. REV. 733, 738 (1980).

50. American Convention, *supra* note 32, at arts. 41(c), 48(1)(d-e).

51. The American Convention provides that "the Commission shall place itself at the disposal of the parties concerned with a view of reaching a friendly settlement of the matter." *Id.* at art. 48(1)(f); *see also IACHR Rules of Procedure*, *supra* note 34, at art. 40(1).

52. Velásquez Rodríguez v. Honduras, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1, ¶¶ 45-46 (June 26, 1987); *see* Fairén Garbí & Solís Corrales v. Honduras, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 2, ¶¶ 50-51 (June 26, 1987).

53. American Convention, *supra* note 32, at art. 50.

54. *See id.* at art. 51(1). If the case is not submitted to the Court, the Commission may issue an Opinion. *Id.*

55. *Petition and Case System, Information Brochure*, INTER-AM. COMM'N H.R. ¶¶ 13-14 (2010), <https://www.oas.org/en/iachr/docs/pdf/HowTo.pdf> [<https://perma.cc/XHU3-JL6N>].

56. American Convention, *supra* note 32, at art. 48(1)(a).

57. *IACHR Rules of Procedure*, *supra* note 34, at art. 36.

58. American Convention, *supra* note 32, at art. 64(1); *see also* Advisory Opinion OC-10/89, *supra* note 42.

59. Mónica Pinto, *The Role of the Inter-American Commission and Court of Human Rights in the Protection of Human Rights: Achievements and Contemporary Challenges*, 20 HUM. RTS. BRIEF 34, 34 (2013).

60. *See* Advisory Opinion OC-23/17, *supra* note 19, ¶¶ 46-47.

## II. ORIGINS OF THE RIGHT TO A HEALTHY ENVIRONMENT

The right to a healthy environment has been recognized directly and indirectly since the 1970s. The Stockholm Declaration on the Human Environment (Stockholm Declaration) is one of the most important instruments of environmental protection in international law. According to Professor Louis B. Sohn, the 1972 Conference on the Human Environment (Stockholm Conference) was one of the most successful international environmental law conferences, resulting in the Stockholm Declaration.<sup>61</sup> During the Stockholm Conference, the Stockholm Declaration was adopted nearly unanimously and contained twenty-six principles that sought “to inspire and guide the peoples of the world in the preservation and enhancement of the human environment.”<sup>62</sup> The Stockholm Declaration played a particularly important role in the creation of a global legal framework to protect the environment.<sup>63</sup> It asserted that “[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”<sup>64</sup> Notably, it recognized the existence of a right to a healthy environment and examined the core questions relating to the scope of the right, its content, the identity of right-holders and duty-bearers, implementation of the right, and facilitation of its broader recognition under international law.<sup>65</sup>

The number of international multilateral environmental agreements began to surge in the 1970s and 1980s. These international treaties, declarations, and resolutions support the idea that there is a strong connection between human rights and the environment. They have served as an institutional and legal platform for the recognition of the right to a healthy environment. For example, the Rio Declaration acknowledges the importance of recognizing the interrelated nature of the environment, human beings, and the ability to engage in sustainable development.<sup>66</sup> Furthermore, it identifies the important link between the environment and the quality of life of individuals and communities.<sup>67</sup> This nexus between the environment and the ability of individuals

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61. Louis B. Sohn, *Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L.J. 423, 423 (1973).

62. Veit Koester, *From Stockholm to Brundtland*, 20 ENVTL. POL'Y & L. 14 (1990) (quoting U.N. Conference on the Hum. Env't, *Stockholm Declaration*, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972) [hereinafter Stockholm Declaration]).

63. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

64. See Stockholm Declaration, *supra* note 62, at 4.

65. See Ctr. for Int'l Env'tl. Law, *UNEP Compendium on Human Rights and the Environment: Selected International Legal Materials and Cases* (2014); Stockholm Declaration, *supra* note 62.

66. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992), at princ. 1 [hereinafter Rio Declaration].

67. *Id.* at princ. 8.

and persons to live with a high quality of life is at the center of how advocates conceptualize the right to a healthy environment.

Domestically, it is evident that the right to a healthy environment is being widely prioritized. “Constitutions are where societies establish the values that are to guide political and social discourse for generations to come, and also where those values are protected by incorporating them as constitutional obligations or rights.”<sup>68</sup> Constitutional environmental provisions have been adopted and incorporated throughout Latin America, Europe, Asia, and Africa.<sup>69</sup> These provisions reflect a range of substantive and procedural rights, such as the right to information, participation, access to justice, and sustainable development, among others.<sup>70</sup> Most countries around the world have created

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68. DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* 4 (2012) [hereinafter BOYD] (citing RICHARD P. HISKES, *THE HUMAN RIGHT TO A GREEN FUTURE: ENVIRONMENTAL RIGHTS AND GENERATIONAL JUSTICE* (2008)).

69. *Id.* at n.2 (quoting MICHAEL BOTHE, *CONSTITUTIONAL ENVIRONMENTAL LAW IN EUROPE* (1993)). In the Ugandan Constitution, environmental protections are conceptualized broadly, recognizing Ugandan’s reliance on natural resources and the close relationship between environmental protection and poverty in developing nations. Report of the Uganda Constitutional Comm’n, Analysis and Recommendations, ¶ 26.39. The Argentinian constitution recognizes that the right of all persons and future generations to a “healthy environment fit for human development.” CONSTITUCIÓN NACIONAL [CONSTITUTION] Aug. 22, 1994, Pt. II, art. 41 (Arg.). Similar to the Argentinian Constitution, the South African Constitution explicitly recognizes the right to a healthy environment for present and future generations and takes it further in that the South African government has the affirmative duty to ensure its fulfillment. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1996, ch. 2, art. 24.; *see also* Kotzé & du Plessis, *supra* note 28. The Italian Constitution explicitly recognizes the right to a healthy environment. Article 117 provides that the State has the duty to protect the environment and ecosystem. COSTITUZIONE DELLA REPUBBLICA ITALIANA [CONSTITUTION] Dec. 2012, art. 117(s) (It.). In France, the Constitution incorporates the Charter for the Environment, and states that “[s]tatutes shall . . . lay down the basic principles of . . . the preservation of the environment.” LA CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE [CONSTITUTION] Oct. 4, 1958, art. 34 (Fr.). India’s Constitution recognizes the duty of the State to protect the environment but expands this duty to all Indian citizens. “It shall be the duty of every citizen of India . . . to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.” CONSTITUTION OF INDIA Dec. 9, 2020, pt. IV, art. 48A, pt. IVA, art. 51(A)(g). Although the Indian constitution provides that the environmental rights contained in it are not enforceable, Indian courts have found that the right to a clean environment is indeed enforceable based on its relationship to the protection of the right to life. *Id.* at pt. IV, art. 37, art. 48A; *see also* Peggy Rodgers Kalas, *Environmental Justice in India*, 1 ASIA-PAC. J. ON HUM. RTS. & L. 97, 108 n.51 (2000). Similarly, in Nigeria, provisions protecting the right to a healthy environment are not justiciable, however, the right to a healthy environment is expressly correlated to other human rights. As such, the Nigerian constitution provides that a failure to protect the environment may lead to violations of individual human rights. CONSTITUTION OF NIGERIA 1999, ART.20; UCHENNA JEROME ORJI, *Nigeria: Right to a Clean Environment: Some Reflections*, 42 ENV’T. POL’Y & L. 285, 286 (2012).

70. *See* Erin Daly and James R. May, *Learning from Constitutional Environmental Rights*, in DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF*

specialized environmental institutions as a way to domestically protect the right to a healthy environment.<sup>71</sup> The regulation of environmental matters on the domestic level generally involves a regulatory scheme, environmental law enforcement, incorporation of environmental matters to decision-making, and general environmental education.<sup>72</sup> The form of domestic environmental regulation varies. In some States, environmental ministries are created; in others, there are specialized agencies or commissions.<sup>73</sup>

The right to a healthy environment has been widely recognized, and more than one hundred States have included the right in their national constitutions.<sup>74</sup> In the Americas, there has been a constitutional transformation of environmental law to include substantive and procedural protections.<sup>75</sup> Some prominent examples of constitutional protection of environmental human rights are Brazil, Colombia, Costa Rica, and Argentina. These countries have been at the forefront of protecting participatory rights in the environmental rights context.<sup>76</sup> While Brazil has seen an increase in human rights abuses and environmental destruction under Bolsonaro—with deforestation at the epicenter of the environmental fight—it has a comprehensive constitutional legal framework to protect the environment. Because of that legal framework, Brazil has been successful in protecting its environmental constitutional provisions through the use of specialized agencies and through meaningful public and civil society participation in those processes.<sup>77</sup> In Argentina, domestic environmental law was amended to include a range of substantive regulations to clean water and industrial waste, as well as to include procedural rights of information and participation for the population.<sup>78</sup> Additionally, the Argentine Constitution expressly recognizes the right “to a healthy and balanced environment” that protects future generations.<sup>79</sup> Notably, it also provides for a governmental obligation to preserve the environment.<sup>80</sup>

Domestic enforcement of constitutionally protected environmental rights has been successful in States where there are specialized agencies that

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CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT 42, 44 (2018).

71. *Domestic Environmental Law*, ORG. OF AM. STATES 1 (last updated Feb. 23, 2007), <http://www.oas.org/dsd/tool-kit/documentos/moduleii/domestic%20environmental%20law.pdf> [<https://perma.cc/LG8W-AZCH>].

72. *Id.*

73. David R. Boyd, *Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 17, 28 (John H. Knox & Ramin Pejan eds., 2018) [hereinafter Boyd, *Catalyst*].

74. *Id.* at 18–33.

75. *Id.* at 26–27; see also Boyd, *supra* note 68, at 233–52.

76. Boyd, *Catalyst*, *supra* note 73, at 30.

77. *Id.* at 27–28.

78. *Id.* at 27.

79. CONSTITUCIÓN NACIONAL [CONSTITUCIÓN] Aug. 22, 1994, Pt. II, art. 41, (Arg.).

80. *Id.*

can review compliance with environmental protections.<sup>81</sup> Such compliance is able to occur because the public and affected communities can meaningfully participate in this review process.

Although these environmental constitutional protections have been useful in protecting substantive and procedural rights in relation to the environment, there are serious shortcomings with this approach that encourage us to think about environmental human rights protections, both regionally and internationally. First, under this approach, countries are incentivized to protect economic interests, which may require sacrificing environmental health and safety. For example, the Brazilian government has engaged in aggressive deforestation practices through slash-and-burn that completely destroys critical rainforest, but also displaces and endangers fauna living there.<sup>82</sup> Additionally, the aggressive deforestation through slash-and-burn has created extremely dangerous air pollution for the population in the Amazon region.<sup>83</sup> In 2019, there were “2195 hospitalizations due to respiratory illness attributable to the fires.”<sup>84</sup> This approach has been based on the prioritization of economic interests despite clear information about the health and environmental effects of this practice.

Similarly, in Perú, the Camisea Natural Gas project prioritized the revenue-generating aspects of the project over the rights of the Matsigenka indigenous communities.<sup>85</sup> The Camisea Natural Gas project has generated high revenues for the Peruvian Government, and in turn, the Government has protected the Camisea Natural Gas project in the name of the country’s economic prosperity.<sup>86</sup> However, this economic success has had devastating effects on Perú’s environment and particularly on the rights of the Matsigenka-Nanti indigenous peoples.<sup>87</sup> Their natural environment, including the rivers, fish stock, and other basic sources of sustenance have been jeopardized by the environmental destruction caused by this project.<sup>88</sup> Their survival has been

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81. Boyd, *Catalyst*, *supra* note 73, at 26–27.

82. HUMAN RIGHTS WATCH, AMAZON ENVTL. RESEARCH INST. & INST. FOR HEALTH POLICY STUDIES, “THE AIR IS UNBEARABLE:” HEALTH IMPACTS OF DEFORESTATION-RELATED FIRES IN THE BRAZILIAN AMAZON 8–9, 11 (2020), [<https://perma.cc/LS4C-EGYX>].

83. *Id.* at 16–17.

84. *Id.* at 21.

85. Boyd, *Catalyst*, *supra* note 73, at 35 (citing THE SARDAR SAROVAR DAM PROJECT: SELECTED DOCUMENTS (Philippe Cullet ed., 2007); STEPHEN J. TURNER, A SUBSTANTIVE ENVIRONMENTAL RIGHTS: AN EXAMINATION OF THE LEGAL OBLIGATIONS OF DECISION MAKERS TOWARDS THE ENVIRONMENT (2009)); *see also* David Hill, *Pioneer Gas Project in Latin America Fails Indigenous Peoples*, GUARDIAN (June 2, 2016), <https://www.theguardian.com/environment/andes-to-the-amazon/2016/jun/02/pioneer-gas-latin-america-indigenous-peoples> [<https://perma.cc/AN8U-R3MU>] [hereinafter Hill, *Pioneer Gas*].

86. Hill, *Pioneer Gas*, *supra* note 85; David Hill, *Isolated Indigenous Communities at Risk*, ECOLOGIST (May 17, 2019), <https://theecologist.org/2019/may/17/isolated-indigenous-communities-risk> [<https://perma.cc/UH2H-T7QV>] [hereinafter Hill, *Isolated Indigenous Communities*].

87. Hill, *Isolated Indigenous Communities*, *supra* note 86.

88. *Id.*

endangered by this and other development projects on their indigenous lands. The Matsigenka-Nanti are an isolated indigenous community, susceptible to any changes in their natural environment, including exposure to modern-day illnesses and viruses.<sup>89</sup> However, the Peruvian Government has continued to promote the exploitation of indigenous lands in the name of economic progress.

Second, States can be directly involved in the violation of environmental human rights by polluting communities, suppressing participatory rights in relation to environmental matters, and denying access to justice to affected communities. Historically, environmental human rights defenders have been targeted for their advocacy efforts to protect the environment and the rights of vulnerable communities.<sup>90</sup> Human rights defenders and environmental human rights defenders have been subjected to a range of human rights abuses, including being the “target of executions, torture, beatings, arbitrary arrest and detention, death threats, harassment and defamation, as well as restrictions on their freedom of movement, expression, association and assembly. Additionally, such human rights defenders have been the victims of false accusations and unfair trials and convictions.”<sup>91</sup> For example, Berta Cáceres, a Honduran indigenous environmental human rights activist, was killed in March 2016 for her work in rallying the indigenous Lenca people and waging a grassroots campaign to halt a dam development project in indigenous territory in Honduras.<sup>92</sup> Cáceres continued her work to protect the Lenca community despite enduring repeated and targeted acts of violence—including gender-specific attacks.<sup>93</sup> Her murder is directly linked to her environmental human rights defense work and identity as an indigenous woman.<sup>94</sup> Many others, like Cáceres, have lost

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89. *Id.*

90. U.N. Off. of the High Comm’r for Hum. Rts., *Human Rights Defenders: Protecting the Right to Defend Human Rights, Factsheet No. 29*, 10–13 (Apr. 2004).

91. *Id.*

92. *Berta Cáceres’ Murder: UN Experts Renew Call to Honduras to End Impunity*, U.N. Office of the High Comm’r for Human Rights (Apr. 11, 2016), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19805> [<https://perma.cc/3VM4-Z4PE>] [hereinafter *U.N. Experts Renew Call to Honduras*]; *Berta Cáceres, 2015 Goldman Prize Recipient, South and Central America*, THE GOLDMAN ENVTL. PRIZE, <https://www.goldmanprize.org/recipient/berta-caceres> [<https://perma.cc/BZ99-XJFG>] (last visited Feb. 16, 2020).

93. See *U.N. Experts Renew Call to Honduras*, *supra* note 92.

94. *Id.* The list of the United Nations experts that condemned the murder of Berta Cáceres: Eleonora Zielińska, Chairperson of the Working Group on the issue of discrimination against women in law and in practice; Victoria Tauli-Corpuz, Special Rapporteur on the rights of indigenous peoples; Michel Forst, Special Rapporteur on the situation of human rights defenders; Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association; David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Dubravka Šimonovi, Special Rapporteur on violence against women, its causes and consequences; John Knox, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; and Baškut Tuncak, Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous

their lives or have been victims of human rights violations as a result of their work to protect their communities from environmental harm.<sup>95</sup> Persistent threats, such as those faced by Cáceres, highlight the need to provide environmental human rights defenders with heightened protections so that they can safely engage in their work. Their status as defenders places them at particular risk of being targeted by both State and non-state actors. Direct State involvement in the suppression of environmental human rights efforts is another reason why it is critical to use the human rights framework at the regional and international level.

Third, States can be directly and indirectly involved in the violation of environmental human rights, by creating an atmosphere of impunity. Non-state actors, mainly corporations, are allowed to engage in environmentally disastrous activities without being held accountable. For example, Samir Flores Soberanes, an indigenous Náhuatl environmental activist and radio journalist from Amilcingo Morelos, Mexico, was killed because of his activism against private corporations for their environmental impact in his community.<sup>96</sup> Soberanes and others in his community fought against the Morelos Integral Project, a partnership between the Mexican Government and Spanish and Italian energy companies seeking to construct and manage a natural gas pipeline and two thermo-electric plants.<sup>97</sup> These projects have led to significant pollution of air, water, and land resources.<sup>98</sup> These companies act with impunity and with the support of the government. “Deep down, the logic of the state . . . continues to prioritize private projects.”<sup>99</sup> This example is like so many others, where private corporations act with impunity to harm the environment and to exacerbate climate change. Additionally, government and non-state actors silence activists in order to continue environmental dirty work without the obstacles created by activists.

While the international community has not uniformly recognized the right to a healthy environment, many individuals have expressed the importance of doing so. Kennedy Cuomo, Executive Director of the Robert F. Kennedy Memorial Center for Human Rights, stated that the international community could “not foresee the enormity of the ecological degradation and the consequent necessity for human rights norms to encompass environmental

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substances and wastes.

95. CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW [CIEL] & ARTICLE 19, SUBMISSION TO THE U.N. SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS DEFENDERS 1–2 (2016), [https://www.ciel.org/wp-content/uploads/2016/07/EHRD\\_24June2016.pdf](https://www.ciel.org/wp-content/uploads/2016/07/EHRD_24June2016.pdf) [<https://perma.cc/AZ4B-KXRU>].

96. José Benjamín Montaña, *Impunity Reigns in the Murder of Samir Flores*, LAT. AM. NEWS DISPATCH (Feb. 20, 2020), <https://latindispatch.com/2020/02/20/impunity-reigns-in-the-murder-of-samir-flores> [<https://perma.cc/FH76-PTP2>].

97. *Id.*

98. *Id.*

99. *Id.* (statement of Jorge Aguilar, head of communications at the Centro de Derechos Humanos Fray Francisco de Vitoria, a Mexico City-based human rights organization).

considerations.”<sup>100</sup> Others have similarly recognized the enormity of the existential challenge that climate change represents.<sup>101</sup> Global warming has, and will continue to have, implications that threaten the full enjoyment of human rights.<sup>102</sup> This is especially concerning for vulnerable persons and populations, such as women, children, minorities, immigrants, and other disenfranchised groups living in environmentally hazardous conditions.

Because vulnerabilities can be exacerbated by State action or omissions relating to environmental degradation and climate change, looking at regional and international protections is even more important. The right to a healthy environment in the Inter-American System is a tool that can be used to protect and promote environmental human rights in the Americas.

### III. ENVIRONMENTAL HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

#### A. *Interconnectedness of the Environment and Human Rights*

The connection between human rights and the environment is not a surprising one. The enjoyment of human rights depends on a person’s ability to live free from interference, and to be protected. The interdependence of human rights and the protection of the environment is manifested in the full and effective enjoyment of the rights to life, the highest attainable standard of physical and mental health, adequate standard of living, adequate food, clean water and sanitation, housing, culture, freedom of expression and association, information and education, participation, and effective remedies.<sup>103</sup> The

100. Kerry Kennedy Cuomo, Exec. Dir., Robert F. Kennedy Mem’l Ctr. For Hum. Rts., Keynote Address at the Yale Law School Earth Rights and Responsibilities Conference: Human Rights and the Environment Common Ground 227 (Apr. 3, 1992).

101. António Guterres, Sec’y Gen., Keynote Address at the R20 Austrian World Summit (2018), <https://news.un.org/en/story/2018/05/1009782> [<https://perma.cc/GX9B-5CRF>] (“Climate change is, quite simply, an existential threat for most life on the planet—including, and especially, the life of humankind.”).

102. U.N. Rep. of the Office of High Comm’r for Human Rights on the Relationship Between Climate Change and Human Rights, ¶ 20, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

103. John H. Knox (Special Rapporteur on Human Rights and the Environment), *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶ 10, U.N. Doc. A/HRC/37/58 (Jan. 24, 2018) [hereinafter *Framework Principles*, Knox Report A/HRC/37/58 (Jan. 24, 2018)]; see Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 1, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention]; African Charter on Human and Peoples’ Rights art. 24, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter Banjul Charter]; Protocol of San Salvador, *supra* note 18; Arab Charter on Human Rights art. 38, adopted May 23, 2004, <https://digitallibrary.un.org/record/551368?ln=en#record-files-collapse-header> [<https://perma.cc/4RNB-U2CL>]; Ass’n of S.E. Asian Nations, ASEAN Human Rights Declaration and Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration art. 28, (2012); U.N. Int’l Covenant on Civ. & Pol. Rts., Human Rights Comm., General Comment No. 36: Art. 6 Right To Life U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

enjoyment of human rights greatly depends on natural resources and healthy ecosystems.<sup>104</sup> Without adequate access to a healthy environment, other critical aspects of a person or a community's life and survival are compromised or made impossible.<sup>105</sup>

Domestic, regional, and international courts and tribunals have found that environmental harms can result in human rights violations. Specifically, regional human rights systems, like the Inter-American System, have done extensive work to protect human rights when they were violated due to environmental harm and degradation.<sup>106</sup> Such violations have taken place with respect to the rights of the family and private life, right to healthy working conditions, right to humane treatment and freedom from torture, and the right to development.<sup>107</sup> The courts in the legal systems that expressly recognize a right to a healthy environment have found that there are a host of interrelated human rights and violations in the areas of the right to life, housing, food, standard of living, rights of the child, and reproductive rights.<sup>108</sup>

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for many human rights, such as the right to health and the right to life itself. It is hardly necessary to elaborate on this, as damage to the environment can impair and undermine all of the human rights spoken of in the Universal Declaration and other human rights instruments.<sup>109</sup>

In addition, the indigenous rights movement has anchored much of the work done to promote environmental justice in the international human rights framework. Indigenous movements have paved the way for the understanding that human rights are closely interconnected and interdependent, and that

104. John H. Knox (Special Rapporteur on Human Rights and the Environment), *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶¶ 3, 5, U.N. Doc. A/HRC/34/49 (Jan. 19, 2017) [hereinafter Knox Report A/HRC/34/49 (Jan. 19, 2017)].

105. *Id.* ¶¶ 4, 7.

106. *Mayagna (Sumo) Awastingu Cmty. v. Nicaragua*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001); *Maya Indigenous Cmty. of Toledo District v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶ 150 (2004); *Mossville Env't Action Now v. United States*, Petition 242-05, Inter-Am. Comm'n H.R., Report No. 43/10 (2010).

107. *Martínez v. Spain*, App. No. 61654/08, ¶¶ 40-42 (Mar. 10, 2012); *Cmty. of San Mateo de Huanchor v. Perú*, Petition 504/03, Inter-Am. Comm'n H.R., Report No. 69/04, OEA/Ser.L/V/II.122 doc. 5 rev. 1, ¶ 2 (2004); *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 2, 73(61) (Mar. 29, 2006).

108. *See Fadeyeva v. Russia*, 2005-IV Eur. Ct. H.R. 255; *Soc. & Econ. Rts. Action Ctr. v. Nigeria*, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 47, 50-51 (May 27, 2002); *Kawas-Fernández v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 196, ¶ 148 (Apr. 3, 2009).

109. *Gabčíkovo-Nagymaros Project (Hung./Slovk.)*, Judgment, 1997 I.C.J. 7, 91-92 (Sept. 25) (separate opinion by Weeramantry, V.P.).

protection of the environment is inseparable from impacted communities. Specifically, indigenous communities have fought to protect their right to make free, informed, and prior decisions about their land, natural resources, and ecosystem, and their ability to preserve the environment for future generations.<sup>110</sup> The indigenous rights movement has also fought to protect its ancestral land, religion, property, culture, health, food, housing, and freedom from discrimination.<sup>111</sup> In its past decisions, the Commission has drawn parallels between the discriminatory treatment of indigenous communities and other vulnerable groups, including racial minorities, in relation to their vulnerability to environmental harm.<sup>112</sup> Human rights movements have learned a great deal from the indigenous rights movements, as they have embraced a holistic view of the interconnectedness of the environment and the full and effective enjoyment of human rights.

### B. “Greening” of Human Rights

The “greening” of human rights refers to the protection of human rights when the violation arises out of environmental degradation, harm, or interference.<sup>113</sup> In jurisprudence involving the “greening” of human rights, courts find that environmental harm has resulted in the violation of human rights, such as the rights to life, property, culture, health, water and sanitation, prior and informed consent, among others.<sup>114</sup>

According to Alan Boyle, an international law scholar, the Inter-American System has utilized three distinct approaches to the protection of environmental human rights.

The first approach is essentially anthropocentric . . . it amounts to a “greening” of human rights law, rather than a law of environmental rights. The second comes closer to seeing the environment as a good in its own right but, nevertheless one that will always be vulnerable to tradeoffs against other similarly privileged but competing objectives, including the right to economic

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110. *Mayagna (Sumo) Awas Tingni Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 79; see also *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005).

111. *Mayagna (Sumo) Awas Tingni Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 79; Ctr. for Minority Rts. Dev. v. Kenya, Communication 276/2003, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 162 (Feb. 6, 2010); *Maya Indigenous Cmty.*, Inter-Am. Comm’n H.R., Report No. 40/04.

112. See *Mossville Env’t Action Now v. United States*, Petition 242–05, Inter-Am. Comm’n H.R., Report No. 43/10 (2010).

113. “Greening” of human rights refers to how “human rights bodies have interpreted universally recognized rights, such as rights to life and health, to require States to take steps to protect the environment on which the enjoyment of such rights depends.” John Knox, *Greening Human Rights*, OPEN GLOBAL RTS. (July 14, 2015), <https://www.openglobalrights.org/greening-human-rights> [<https://perma.cc/95Z5-HTQL>].

114. *Mayagna (Sumo) Awas Tingni Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 79; Ctr. for Minority Rts. Dev. v. Kenya, Communication 276/2003, Afr. Comm’n H.P.R.; *Maya Indigenous Cmty.*, Inter-Am. Comm’n H.R., Report No. 40/04.

development. The third approach is the most contested. Not all human rights lawyers favor the recognition of third generation rights, arguing that they devalue the concept of human rights, and divert attention from the need to implement existing civil, political, economic, and social rights fully.<sup>115</sup>

The “greening” and mainstreaming of human rights in environmental policy and its regulation in international, domestic, and local agencies has been essential for the effective implementation of human rights protections with respect to the environment.<sup>116</sup> The “greening” of human rights has enabled courts to protect human rights in relation to environmental harm.<sup>117</sup> The mainstreaming of human rights in environmental legal frameworks has occurred through the adoption of international agreements, declarations, guidelines, principles, and domestic legislative frameworks, such as the Bali Guidelines for the Development of National Legislation on Access to Information, the Rio Declaration on Environment and Development, and the Kyoto Protocol.<sup>118</sup> The European Court of Human Rights has been instrumental in establishing this connection between human rights and the environment, especially in relation to the rights to life, privacy, and property.<sup>119</sup> The Inter-American System for the Protection of Human Rights and the African System on Human and Peoples’ Rights have made the connection, and gone further to explicitly recognize the right to a healthy environment.<sup>120</sup> The Inter-American System,

115. Boyle, *supra* note 20, at 472 (footnotes omitted).

116. John H. Knox, *Constructing the Human Right to a Healthy Environment*, 16 ANN. REV. L. & SOC. SCI. 79, 84–86 (2020).

117. Soc. & Econ. Rts. Action Ctr. v. Nigeria, Communication 155/96, Afr. Comm’n H.P.R., ¶ 67 (May 27, 2002); Öneriyildiz v. Turkey, 41 Eur. Ct. H.R. 20 (2004), ¶ 118; Report on the Situation of Human Rights in Ecuador, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.96 doc. 10 rev. 1 (1997); Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, Decision, Eur. Comm. Soc. Rts., ¶ 221 (Dec. 6, 2006); Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 95, 158 (Nov. 28, 2007); Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 143, 156 (June 17, 2005); *Maya Indigenous Cmty.*, Inter-Am. Comm’n H.R., Report No. 40/04, ¶ 153; Fadeyeva v. Russia, 2005-IV Eur. Ct. H.R. 255, ¶ 134; Taşkın v. Turkey, 2004-X Eur. Ct. H.R. 179, ¶ 126; López Ostra v. Spain, App. No. 16798/90, ¶ 58 (Dec. 9, 1994).

118. See United Nations Env’t Programme [UNEP], *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters*, UNEP Doc. SS.XI/5 (Feb. 26, 2010) [hereinafter Bali Guidelines]; Rio Declaration, *supra* note 66.

119. Powell Rayner v. United Kingdom, App. No. 9310/81 (Feb. 21, 1990); Hatton v. United Kingdom, 2003-VIII Eur. Ct. H.R.

120. Protocol of San Salvador, *supra* note 18, at art. 11. The 1981 African Charter on Human and Peoples’ Rights provides: “[a]ll peoples shall have the right to a general satisfactory environment favorable to their development.” Banjul Charter, *supra* note 103, at art. 24. Additionally, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women, adds that women “shall have the right to live in a healthy and sustainable environment.” Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, art. XVIII, July 11, 2003, <https://au.int/en/treaties/>

which has explicitly recognized the right through Protocol, has adjudicated human rights claims relating to the environment primarily through the “greening” of human rights.

The “greening” of human rights in the Inter-American System ensures that the protection of human rights continues as is, without recognizing the right to a healthy environment as the main vehicle of change, but rather as part of other human rights protected under the American Convention.<sup>121</sup> This means that in order to find that human rights violations have occurred and to hold States responsible, there must be a recognition that there was a violation of a human right protected under the American Convention.<sup>122</sup> Some of the rights that have been critical in the protection of the environment are the right to life (Art. 4), judicial guarantees (Art. 8.1), freedom of religion (Art. 12), freedom of expression and right to information (Art. 13), and the right to property (Art. 21).<sup>123</sup> The vindication of these human rights has been used as a proxy to protect rights affected by environmental degradation, where judicial or participatory processes are not provided to address the environment degradation itself. For example, the right to property in the context of indigenous ancestral lands has been used as a proxy to protect the right to the natural resources, land, and natural environment of indigenous communities.<sup>124</sup> Similarly, the right to effective remedies has been used in the context of environmental harm when communities had a right to free, prior, and informed consent before the commencement of development or exploitative projects on their land.<sup>125</sup> The “greening” approach has sought to protect environmental human rights within the human rights framework.

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protocol-african-charter-human-and-peoples-rights-rights-women-africa [https://perma.cc/TP7T-Y4JQ].

121. Knox, *Greening Human Rights*, *supra* note 113.

122. Valerio de Oliveira Mazzuoli & Gustavo de Faria Moreira Teixeira, *La protección jurídica del medio ambiente en la jurisprudencia de la Corte Interamericana de Derechos Humanos*, 4 IUS HUMANI L.J. 193, 211 (2015).

123. See *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005) (discussing Article 4, the right to life); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 177 (Nov. 28, 2007) (discussing Article 8.1, the right to judicial guarantees); *Plan de Sánchez Massacre v. Guatemala*, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 47 (Nov. 19, 2004) (discussing Art. 12, the right to religion); *Claude Reyes v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006) (discussing Article 13, the right to information); *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005) (discussing Article 21, the right to property).

124. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001); *Kaliña & Lokono Peoples v. Suriname*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309, ¶ 129 (Nov. 25, 2015).

125. *Maya Indigenous Cmty. of Toledo District v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶ 150 (2004); *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct.

Traditionalists argue that environmental rights are protected by the “greening” of human rights since there is a proven legal and juridical framework that is effective in protecting human rights.<sup>126</sup> Oliveira Mazzuoli and Moreira Teixeira, professors at the Federal University of Mato Grosso in Brazil, have posited that the “greening” of human rights is currently the best avenue to protect environmental human rights.<sup>127</sup> They assert that the recognition of the right to a healthy environment on its own must not be pursued because it has been demonstrated to be ineffective.<sup>128</sup> I disagree with this position. The Inter-American Court and Commission need to reconsider their approach and embrace the right to a healthy environment as a justiciable right as it began to do with the landmark case, *Comunidades indígenas miembros de la Asociación Lhaka Honha* and the Advisory Opinion OC-23/17.<sup>129</sup> These two decisions will be discussed in detail later in the article.

Additionally, Mazzuoli and Teixeira argue that the environmental human rights Inter-American jurisprudence cannot be universally applied since these cases illustrate an analysis that is centered on the cultural and historical experience of the Americas.<sup>130</sup> I agree with this point. Indigenous communities have a collective experience of colonization, occupation, repression, and suppression of their right to self-determination.<sup>131</sup> Latin America’s indigenous peoples are diverse and comprise an estimated 45 million inhabitants representing the largest indigenous population in the world.<sup>132</sup> The violence perpetrated against indigenous peoples has been deeply rooted in state-sponsored policies that preserve power structures based on their exploitation and exclusion.<sup>133</sup> Indigenous peoples have experienced high levels of discrimination and exclusion, including the taking of their land, territories, and natural resources.<sup>134</sup>

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H.R. (ser. C) No. 245 (June 27, 2012); *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 217; *Garífuna Punta Piedra Community v. Honduras*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 304, ¶ 325 (Oct. 8, 2015).

126. Oliveira Mazzuoli & Moreira Teixeira, *supra* note 122, at 207–08.

127. Valerio de Oliveira Mazzuoli & Gustavo de Moreira Teixeira, ‘Greening’ the Inter-American Human Rights System, 33 L’OBSERVATEUR DES NATIONS UNIES 299 (2012).

128. Oliveira Mazzuoli & Moreira Teixeira, *supra* note 122, at 36.

129. Advisory Opinion OC-23/17, *supra* note 19; *Indigenous Cmty. of the Lhaka Honhat (Our Land) Ass’n v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 400 (Feb. 6, 2020).

130. Oliveira Mazzuoli & Moreira Teixeira, *supra* note 122, at 207.

131. U.N. Dep’t of Econ. & Soc. Affs., *State of the World’s Indigenous Peoples*, 1, U.N. Doc. ST/ESA/328 (2009).

132. RICHARDO CHANGALA, INT’L FUNDERS FOR INDIGENOUS PEOPLES, DEFENDERS OF INDIGENOUS RIGHTS IN LATIN AMERICA: A BRIEFING FOR FUNDERS 2 (2018), <https://internationalfund.org/security-briefs/defenders-of-indigenous-rights-in-latin-america-briefing-for-funders> [<https://perma.cc/MSW8-MDR2>].

133. *Id.* (citing COMM’N FOR HIST. CLARIFICATION CONCLUSIONS & RECOMMENDATIONS, GUATEMALA: MEMORY OF SILENCE (1999)).

134. *Id.*

They have also been deprived of their right to prior and informed consultation, and have been violently criminalized and killed for defending their rights.<sup>135</sup> “We, the Indigenous Peoples are discriminated, relegated to living a life of misery and dispossession under a system that has destroyed whole communities and besides that, they repress and murder us,” said the indigenous leader of the Guatemalan Highlights Farming Committee (Comité Campesino del Altiplano), Cristina Ardón.<sup>136</sup> The struggle of indigenous communities in the Americas to protect their environment is focused on challenging State policies and practices that silence and disenfranchise them. The indigenous relationship to the land and environment is one that transcends their habitat.<sup>137</sup> It is an understanding that there is a union of the indigenous peoples and the different elements that the natural environment provides, such as water, air, and fire.<sup>138</sup> It is for this reason that international, and especially Inter-American, jurisprudence has recognized the intrinsic relationship between indigenous rights and human rights protecting the environment.<sup>139</sup>

Some of the most important Inter-American indigenous rights cases that have paved the way to protecting the environment and establishing the connection between the environment and human rights are *Mayagna Awas Tingni v. Nicaragua*, *Yakye Axa v. Paraguay*, *Sawhoyamaya v. Paraguay*, *Xámkok Kasek v. Paraguay*, and *Sarayaku v. Ecuador*.<sup>140</sup> These decisions established the

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135. *Id.*

136. *Id.*

137. See Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights*, 31 AM. INDIAN L. REV. 675, 675 (2006) (quoting statement of Sheila Watt-Cloutier, Chair of the Inuit Circumpolar Conference) (“What is happening affects virtually every facet of Inuit life—we are a people of the land, ice, snow, and animals. Our hunting culture thrives on the cold. We need it to be cold to maintain our culture and way of life. Climate change has become the ultimate threat to Inuit culture.”).

138. Jorge Calderón Camboa, *Pueblos Indígenas y Medio Ambiente en la Jurisprudencia de la Corte Interamericana de Derechos Humanos: Un Desafío Verde [Indigenous Peoples and the Environment in the Jurisprudence of the Inter-American Court of Human Rights; A Green Challenge]*, 1, 1 (2007), [http://www.oas.org/dil/esp/curso\\_derecho\\_pueblos\\_indigenas\\_sistema\\_interamericano\\_julio\\_2012\\_material\\_referencia\\_Jorge\\_calderon\\_gamboa.pdf](http://www.oas.org/dil/esp/curso_derecho_pueblos_indigenas_sistema_interamericano_julio_2012_material_referencia_Jorge_calderon_gamboa.pdf) [<https://perma.cc/Y9YP-AY6V>].

139. *Id.*; Oliveira Mazzuoli & Moreira Teixeira, *supra* note 122, at 207–08.

140. In *Mayagna (Sumo) Awas Tingni v. Nicaragua*, the Court recognized the rights of the Mayagna (Sumo) Awas Tingni indigenous community to their ancestral land. The recognition that indigenous communities have a collective right to property was a foundational recognition of what other cases would continue to develop. The decision was critical for establishing the relationship between indigenous peoples and their natural environment. *Mayagna (Sumo) Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001). In *Yakye Axa Indigenous Community v. Paraguay*, the Inter-American Court recognized the interdependence between the Yakye Axa indigenous community and their ancestral lands. The Court recognized that there was not only a connection between the community and their lands, but that having their ancestral lands and natural environment protected was imperative for their physical and cultural survival. *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and

collective right to property and its connection to the natural environment.<sup>141</sup> The right to property includes the communal use and enjoyment of the land and its natural resources.<sup>142</sup> The natural resources in indigenous lands have been recognized as essential for the physical, economic, social, and cultural survival of indigenous peoples.<sup>143</sup> Specifically, in *Yakye Axa v. Paraguay*, the Court recognized that indigenous communities had a right to use and enjoy their ancestral lands as they traditionally have.<sup>144</sup> The access, use, and enjoyment of their lands includes the recognition that clean water sources with access to fishing, forests with harvesting opportunities, the natural habitat with animals, and

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Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005). In *Sawhoyamaxa Indigenous Community v. Paraguay*, the Court found that Paraguay failed to acknowledge and recognize the property rights of the Sawhoyamaxa community to their ancestral land. The Sawhoyamaxa had been displaced from their lands and had been relegated to living in a small area next to the highway. There, the community lacked access to basic services, such as water, vegetation, animals to hunt, sanitation, and health. The Court ordered Paraguay to return ancestral lands to the Sawhoyamaxa community and provide basic services for their well-being. *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006). Similarly, in the case of *Indigenous Community Xámok Kásek v. Paraguay*, the indigenous community had lost access to their ancestral lands and as a result, members of the community had been deprived of basic resources to survive physically and culturally. The Court ordered that Paraguay return the indigenous Xámok Kásek ancestral lands that had been previously converted to Protected Wild Area by Paraguay. The Court recognized that the State could not make decisions about the community's ancestral lands without their participation and decisions regarding their lands. The Court recognized the important link that the ancestral lands had to the community and the survival of the Xámok Kásek cultural identity. *Xámok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, (Aug. 24, 2010). In the case of *Kichwa Indigenous People of Sarayaku v. Ecuador*, Ecuador had granted exploration rights to an Argentinean company in Kichwa de Sarayaku indigenous lands. The Court held Ecuador responsible for violating the indigenous Kichwa de Sarayaku community's consultation rights (free, prior, and informed consent), and rights to their indigenous lands, cultural identity, life and personal identity. *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012).

141. *Mayagna (Sumo) Awás Tingñi Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 79; *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125; *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146; *Xámok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214; *Kichwa Indigenous People of Sarayaku*, Inter-Am. Ct. H.R. (ser. C) No. 245. In these cases, the Court also recognized the connection between the environment and the rights to life, expression, information, and consultation.

142. *Mayagna (Sumo) Awás Tingñi Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 148.

143. *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125; *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146; *Xámok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214.

144. The Court said: "The culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity." *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 135.

use of other natural elements to the land is essential for the full and effective enjoyment of their right to property.<sup>145</sup> As part of guaranteeing that members of an indigenous community are included in decisions made about their lands and natural environment, the Court has recognized the right to be consulted, and the State obligation to obtain free, prior, and informed consent.<sup>146</sup>

The right to be consulted and provide consent requires the State to provide accessible and understandable information in order to make appropriate decisions during the consultation process.<sup>147</sup> This consultation process must take place within the cultural and traditional parameters of the particular indigenous community participating in the consultation process.<sup>148</sup> This process is critical for indigenous and traditional communities because it recognizes that their participation is essential.

Environmental impact assessments (EIAs) are an important source of information prior to, during, and after the consultation process.<sup>149</sup> EIAs provide information about the possible risks and consequences of environmentally impactful projects.<sup>150</sup> For example, EIAs may include information about the socio-economic impacts of a water resource development project that would change the hydrological regime of a river.<sup>151</sup> EIAs also predict the likely aggregate effects of a project on existing environmental degradation in the area.<sup>152</sup> The Court has recognized that EIAs are critical to ensure minimal impact on communities being affected by environmentally damaging or hazardous projects.<sup>153</sup> Professor Calderón Gamboa correctly asserts that EIAs must consider the aggregate impact over time in conjunction with existing and future projects.<sup>154</sup> This view is incredibly important not only for particular development or exploitative projects that have an aggregate effect, but also for

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145. *Id.* ¶¶ 164, 167; *Saramaka People, v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 122, 126 (Nov. 28, 2007).*

146. *Saramaka People, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 133.*

147. *Claude Reyes, v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 76–77, 87 (Sept. 19, 2006); see Gomes Lund v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 201 (Nov. 24, 2010).*

148. *Saramaka People, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 134.*

149. *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 160, 163 (June 27, 2012).*

150. ALAN GILPIN, ENVIRONMENTAL IMPACT ASSESSMENT: CUTTING EDGE FOR THE TWENTY-FIRST CENTURY 2 (1995).

151. HUSSEIN ABAZA, ET AL., ENVIRONMENTAL IMPACT ASSESSMENT AND STRATEGIC ENVIRONMENTAL ASSESSMENT: TOWARDS AN INTEGRATED APPROACH 6 (2004), [https://wedocs.unep.org/bitstream/handle/20.500.11822/8753/Environmental\\_impact\\_assessment.pdf?sequence=3&am%3BisAllowed=](https://wedocs.unep.org/bitstream/handle/20.500.11822/8753/Environmental_impact_assessment.pdf?sequence=3&am%3BisAllowed=) [<https://perma.cc/VVK3-L68C>].

152. *Id.*

153. *Kichwa Indigenous People of Sarayaku, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 204–06.*

154. Calderón Camba, *supra* note 138, at 8.

projects that over time have aggregate effects that contribute to the acceleration of climate change.<sup>155</sup>

The Court has also been able to expand protections under the traditional peoples' framework. The Court used this framework to expand its understanding and analysis of tribal or traditional peoples. In *Saramaka v. Suriname*, the Court recognized that traditional peoples who have ancestral ties to the land and live in traditional ways by relying on their natural environment for economic, spiritual and cultural survival, are protected under the collective right to property framework.<sup>156</sup> Similar to indigenous communities, traditional peoples have the right to have their lands demarcated and a collective title over the territory.<sup>157</sup> Additionally, they have a right to be consulted about development and exploitative industries in their territory.<sup>158</sup> This approach to protect traditional peoples resembles that of the indigenous rights framework.<sup>159</sup>

The protection of a people's environmental rights lies at the heart of their relationship to the land. The Court reasoned that similar to other Maroon cases (such as *Moiwana*), the *Saramaka* community constituted a tribal community that had "a profound and all-encompassing relationship to their ancestral lands."<sup>160</sup> The *Saramaka* case was vital in establishing that traditional peoples can benefit from the indigenous rights framework. The *Saramaka* or "Saamaka" people are a tribal Maroon people who live in Suriname and are descendants of self-liberated African slaves.<sup>161</sup> The *Saramaka* won their freedom and territory from the Dutch in 1792.<sup>162</sup> Since then, they have maintained their identity and traditional Maroon *Saramaka* "Saamaka" culture with an "egalitarian social structure and a hunter and gatherer subsistence economy."<sup>163</sup>

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155. Professor Hari Osofsky has explained that a variety of exploitative and highly polluting industries such as coal-fired power plants, illegal logging and forest-clearing, industrialization of farmlands, and other contaminant development projects have contributed to greenhouse gas emissions and are a driver of climate change. Hari M. Osofsky, *The Geography of Emerging Global South Climate Change Litigation*, 114 AJIL UNBOUND 61, 63–64 (2020).

156. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 124, 214 (Nov. 28, 2007).

157. *Id.* ¶¶ 115, 214.

158. *Id.* ¶ 214.

159. *Id.* ¶ 45; see *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 132–33 (June 15, 2005).

160. *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 85 (quoting *Moiwana Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 132–133)).

161. Maroon people are afro-descendants from formerly enslaved Africans who have kept their traditional ways of living. Richard Price, *Saramaka People v. Suriname: A Human Rights Victory and its Messy Aftermath*, CULTURAL SURVIVAL (July 29, 2012), <https://www.culturalsurvival.org/news/saramaka-people-v-suriname-human-rights-victory-and-its-messy-aftermath> [https://perma.cc/N6JK-FE67].

162. *Id.*

163. Cheryl White, *Legacy of Slavery and Indentured Labor*, MAROON HERITAGE (Oct. 31, 2016), <https://maroonheritage.com/legacy-of-slavery-and-indentured-labour-by-cheryl-white> [https://perma.cc/2KFF-V4VF].

They also engage in spiritual practices that reaffirm their close relationship to their natural environment and ancestors.<sup>164</sup>

The forest is like our local market; there we obtain our medicines, our medicinal plants. There we hunt for food [meat]. The forest truly constitutes our entire life. When our ancestors escaped to the forest, they had nothing with them. There they learned how to survive, what plants to eat, how to manage their needs once they arrived at the forest. This is our entire way of living.<sup>165</sup>

The protection of the Saramaka culture through environmental rights was possible through the “greening” of human rights, since it established that protecting the environment was indivisible from protecting the human rights of the traditional community. This prioritization has gone on to protect many other indigenous and tribal peoples who have and continue to suffer from extreme poverty and deprivation of access to their ancestral land and natural resources.<sup>166</sup>

The Commission and Court’s efforts to protect these vulnerable groups is imperative for their survival. The Court and Commission must continue to protect indigenous and traditional peoples because injustice against them continues, despite their efforts. In the following Part, I will discuss the protection of the environment in the Inter-American Human Rights System, and the importance of considering new tools for advocacy beyond the limited “greening” approach.

#### IV. THE RIGHT TO A HEALTHY ENVIRONMENT AS A NORMATIVE TOOL TO PROTECT VULNERABLE POPULATIONS

As discussed earlier, the protection of human rights in the Inter-American System is anchored in the American Convention and the American Declaration on the Rights and Duties of Men.<sup>167</sup>

The protection of the environment has been viewed as a pre-condition to the enjoyment and fulfillment of other human rights.<sup>168</sup> Many of these

164. Price, *supra* note 161.

165. *Saramaka People, v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 82 (Nov. 28, 2007)*.

166. The situation of indigenous peoples in many parts of the world continues to be critical: indigenous peoples face systematic discrimination and exclusion from political and economic power; they continue to be over-represented among the poorest, the illiterate, the destitute; they are displaced by wars and environmental disasters; the weapon of rape and sexual humiliation is also turned against indigenous women for the ethnic cleansing and demoralization of indigenous communities; indigenous peoples are dispossessed of their ancestral lands and deprived of their resources for survival, both physical and cultural; they are even robbed of their very right to life. *State of the World’s Indigenous Peoples, supra* note 131, at 1.

167. American Convention, *supra* note 32; American Declaration, *supra* note 39.

168. Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II., doc 56/09 ¶ 190 (2009) [hereinafter Indigenous and Tribal Peoples’ Rights].

rights have been violated, such as the rights to life, health, property, culture, and access to culture, where environmental degradation is present.<sup>169</sup> As mentioned above, many human rights violations relating to the environment have been anchored in the protection of the indigenous communities that have strong ties to their ancestral land and natural environment. Much of the work that has been done to push forward environmental human rights is anchored in the American Convention and other Inter-American instruments.

The Inter-American human right to a healthy environment is explicitly recognized as an autonomous and independent right. Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) provides that “[e]veryone shall have the right to live a healthy environment and to have access to basic public services.”<sup>170</sup> To ensure the full and effective enjoyment of this right, States must protect, preserve, and improve the environment.<sup>171</sup>

The right to a healthy environment has both an individual and a collective dimension.<sup>172</sup> The individual dimension protects an individual when environmental degradation directly or indirectly may cause irreparable harm to the individual’s human rights.<sup>173</sup> For example, if the environment in which the individual lives has been degraded, and they suffer or may suffer from health conditions, their life is or may be jeopardized or affected, or their personal integrity is threatened, then the individual has a claim under the individual dimension of the right to a healthy environment.<sup>174</sup> The collective dimension protects the human rights that they enjoy because of their identity as a group or collective.<sup>175</sup> For example, children can be a collective group that is particularly affected by environmental degradation because of the danger that pollution poses in their physical development or because of their uncertain future in the face of climate change.<sup>176</sup>

While the right to a healthy environment has not been widely used in the litigation of contentious cases in the Inter-American System, it has been recently interpreted in the Inter-American Court’s Advisory Opinion (OC-23/17 or the Advisory Opinion) and was later used in the case *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat v. Argentina*.<sup>177</sup> The Inter-

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169. Dinah Shelton, *Derechos Ambientales y Obligaciones en el Sistema Interamericano de Derechos Humanos* [Environmental Rights and Obligations in the Inter-American Human Rights System], 6 ANUARIO DE DERECHOS HUMANOS 111, 115 (2010).

170. Protocol of San Salvador, *supra* note 18, at art. 11.

171. *Id.* at art. 11(2).

172. Advisory Opinion OC-23/17, *supra* note 19, ¶ 59.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*; Comm. on the Rights of the Child, *supra* note 22.

177. Advisory Opinion OC-23/17, *supra* note 19, ¶ 59; Indigenous Cmty. of the Lhaka Honhat (Our Land) Ass’n v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am.

American Advisory Opinion OC-23/17 on the Environment and Human Rights is a critically important decision on the protection of the environment and the human right to a healthy environment.<sup>178</sup> This Advisory Opinion provides critical guidance on the justiciability of the right to a healthy environment: “This Opinion constitutes one of the first opportunities that the Court has had to refer extensively to the State obligations arising from the need to protect the environment under the American Convention.”<sup>179</sup>

In 2016, Colombia requested the Inter-American Court of Human Rights provide guidance on legal questions relating to State obligations under the American Convention. Colombia’s question related to environmentally harmful activities that may harm habitats essential to the full and effective enjoyment of human rights.<sup>180</sup> When considering environmental harm, Colombia asked the Court to consider its obligations in relation to protecting the environment as essential for people’s subsistence and development.<sup>181</sup> Colombia expressed concern with the severe environmental degradation of the marine and human environment.<sup>182</sup> Colombia specifically asked the Court to consider the situation of the Wider Caribbean Region and the coastal and marine environments.<sup>183</sup> It asked what international obligations States owe to victims of human rights abuses resulting from environmentally harmful activities.<sup>184</sup> While some of the questions presented by Colombia were specific to the Coastal Wider Caribbean Region, others were sufficiently broad to concern the international community, and especially other countries in the Americas.<sup>185</sup>

Additionally, Colombia asked the Court to consider obligations arising from international customary law and international treaties.<sup>186</sup> Colombia asked the Court to provide guidance as to the international obligation “concerning prevention, precaution, mitigation of damage, and cooperation between the

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Ct. H.R. (ser. C) No. 400 (Feb. 6, 2020).

178. Advisory Opinion OC-23/17, *supra* note 19, ¶ 46. The Inter-American Court has the jurisdiction to interpret any article of the American Convention and any other instrument that may concern “the protection of human rights” in the Americas. *Id.* ¶ 16. The Court has the jurisdictional authority to interpret the American Convention, and as part of that authority, to also interpret other treaties relating to the protection of human rights in the Americas. *Id.* ¶ 17. Furthermore, the Court can interpret treaties or other instruments irrespective of States being or having the right to be member-states to the instrument. *Id.*

179. *Id.* ¶ 46.

180. *Id.* ¶¶ 1–2.

181. *Id.* ¶ 2.

182. *Id.*

183. The Court affirmed that it is an autonomous judicial body and while it may interpret authority outside of the Inter-American System, it is under no obligation to be bound by an International Court of Justice decision. *Id.* ¶¶ 1–3, 25–26 (quoting *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 61 (Oct. 1, 1999)).

184. *Id.* ¶ 3.

185. *Id.* ¶ 1–2.

186. *Id.* ¶¶ 1–3.

States potentially affected.”<sup>187</sup> This question was critical as it allowed the Court to consider integrating international environmental legal principles from outside of the Inter-American System for the protection of human rights.<sup>188</sup> In essence, the Court was asked to consider a growing body of law in environmental human rights that supports the further interpretation of the right to a healthy environment in the Inter-American System. In doing so, the Court invoked its authority to interpret the international obligations arising out of the American Convention, in light of relevant international environmental and human rights cases, reports, and expert findings.<sup>189</sup> As it has affirmed over the years, the Court asserted its power to interpret human rights instruments in light of evolving interpretations of international law.<sup>190</sup> The Court’s evolutive interpretation of international human rights is authorized by Article 29 of the American Convention and rules of interpretation under the Vienna Convention on the Law of Treaties.<sup>191</sup> As such, the Court can consider emerging norms and ongoing developments in international human rights and international law to interpret human rights instruments pertaining to the Americas.<sup>192</sup>

In considering the evolving practice in environmental human rights, the Court recognized the interrelationship between the environment and human rights, expressing that the degradation of the environment results in the impediment of the realization of human rights.<sup>193</sup> To this point, the Inter-American Commission has emphasized that “several fundamental rights require, as a necessary precondition for their enjoyment, a minimum environmental quality, and are profoundly affected by the degradation of natural resources.”<sup>194</sup> In its Advisory Opinion on the Environment and Human Rights, the Court affirmed this, which is critical for the recognition that the protection of the environment is essential for the protection of a variety of human rights in and outside of the indigenous context.<sup>195</sup>

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187. *Id.* ¶ 1.

188. *Id.* ¶¶ 98–100.

189. *Id.* ¶ 17; *cf.* Advisory Opinion OC-10/89, *supra* note 42, ¶ 42; Entitlement of Legal Entities to Hold Rights Under the Inter-American Human Rights System (Art. 1(2), in relation to Arts. 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) American Convention on Human Rights, and Arts. 8(1)(A) & (B) Protocol of San Salvador), Advisory Opinion OC-22/16, Inter-Am. Ct. H.R. (ser. A) No. 22 (Feb. 26, 2016), ¶ 81; “Other treaties” subject to the consultative jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1 (Sept. 24, 1982).

190. Advisory Opinion OC-23/17, *supra* note 19, ¶¶ 42–43; Indigenous Cmty. of the Lhaka Honhat (Our Land) Ass’n v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 400, ¶ 197 (Feb. 6, 2020).

191. Advisory Opinion OC-23/17, *supra* note 19, ¶ 43.

192. Advisory Opinion OC-10/89, *supra* note 42.

193. Advisory Opinion OC-23/17, *supra* note 19, ¶ 47.

194. Indigenous and Tribal Peoples’ Rights, *supra* note 168, ¶ 190.

195. Advisory Opinion OC-23/17, *supra* note 19, ¶ 48 (citing *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 164 (June 17, 2005)); *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations

In recognizing that the environment is essential for the protection of human rights, the Court considered the work of the former United Nations Special Rapporteur John Knox.

“Human rights are grounded in respect for fundamental human attributes such as dignity, equality and liberty. The realization of these attributes depends on an environment that allows them to flourish. At the same time, effective environmental protection often depends on the exercise of human rights that are vital to informed, transparent and responsive policymaking.”<sup>196</sup>

In the Advisory Opinion, the Court emphasized that the protection of the environment is critical for indigenous and tribal communities because of the close relationship that these communities have to their land, the resources found in the territory, and the role that the land and natural resources play in their survival, development, and way of life.<sup>197</sup> The Court further recognized that, because of their dependence on the land, they are particularly vulnerable to environmental degradation, and this requires that their environment be protected.<sup>198</sup> The Court stated that “all human rights are vulnerable to environmental degradation, in that the full enjoyment of all human rights depends on a supportive environment.”<sup>199</sup> This premise of the interconnection between the environment and vulnerability was central for this work and the Court’s interpretation of the protection of the human right to a healthy environment. This recognition expands the groups of persons affected by environmental harm to include a variety of vulnerable groups.

This connectivity is meaningful because the Court has a long precedent of considering environmental harms as injuries in the rights to health, personal integrity and life.<sup>200</sup> The interrelationship between the environment and indig-

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and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 118 (Mar. 29, 2006); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 121–22 (Nov. 28, 2007); *Kaliña & Lokono Peoples v. Suriname*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309, ¶ 125 (Nov. 25, 2015).

196. John H. Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶ 10, U.N. Hum. Rts. Council, U.N. Doc. A/HRC/22/43 (Dec. 24, 2012) [<https://perma.cc/PM6P-4XSL>] [hereinafter *Report of the Independent Expert*]. Similarly, some instruments that regulate the protection of the environment refer to human rights law. See Rio Declaration, *supra* note 66; see also Stockholm Declaration, *supra* note 62.

197. Advisory Opinion OC-23/17, *supra* note 19, ¶ 48.

198. *Id.*

199. *Id.* ¶ 54 (citing *Report of the Independent Expert*, *supra* note 196, ¶ 19). Similarly, the International Court of Justice has emphasized that “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.” *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8); *Gabčikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, 1997 I.C.J. Rep. 7, ¶ 112 (Sept. 25).

200. *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012); *Saramaka People*, Inter-Am.

enous peoples is a clear connection that the Court is able to understand and integrate into indigenous jurisprudence. This approach should be applied in other contexts when populations are dependent on natural resources and have been historically vulnerable to discrimination.<sup>201</sup>

The Advisory Opinion also found that while the right to a healthy environment is an economic, social, and cultural right, it is indivisible from civil and political rights.<sup>202</sup> This finding is important because it recognizes the indivisibility and interconnectedness of the right to a healthy environment with other human rights, including non-derogable rights.<sup>203</sup> This finding leaves little room for States to argue that they are unable to provide structures that protect the right.<sup>204</sup>

Additionally, the Advisory Opinion explicitly recognized that the right to a healthy environment is protected as an autonomous right that it is fully justiciable, setting a critical precedent.<sup>205</sup> “The Court reiterates the interdependence and indivisibility of the civil and political rights, and the economic, social, and cultural rights, because they should be understood integrally and comprehensively as human rights, with no order of precedence, that are enforceable in all cases before the competent authorities.”<sup>206</sup>

As such, the Court recognized that States who are State Parties to the American Convention may be held responsible for violations of Article 11 of

Ct. H.R. (ser. C) No. 172.

201. Indigenous communities “have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the right to life, to their spirituality, worldview and collective well-being.” American Declaration on the Rights of Indigenous Peoples, Inter-Am. Comm’n H.R., OEA/Ser/L/V/II.95 Doc. 6 at art. 19 (1997); *Kichwa Indigenous People of Sarayaku*, Inter-Am. Ct. H.R. (ser. C) No. 245; *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172; U.N. Economic and Social Council (ESCOR), *Analysis on the Duty of the State to Protect Indigenous Peoples Affected by Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/C.19/2012/3 (Feb. 23, 2012).

202. Advisory Opinion OC-23/17, *supra* note 19, ¶ 47.

203. The American Convention provides that there are non-derogable rights that cannot be suspended even in times of war, public danger or emergency. American Convention, *supra* note 32, at art. 27.

204. *Id.*

205. Advisory Opinion OC-23/17, *supra* note 19, ¶¶ 47–48; *see also* The Environment and Human Rights (Arts. 4(1), 5(1), 1(1), and 2 American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶¶ 3, 5, 7, 9 (Nov. 15, 2017) (Sierra Porto, J., concurring) (disagreeing with the majority interpretation of Article 26 as a vehicle for the justiciability of Article 11 of the Protocol of San Salvador); The Environment and Human Rights (Arts. 4(1), 5(1), 1(1), and 2 American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶ 2 (Nov. 15, 2017) (Vio Rossi, J., concurring) (similarly disagreeing with the majority interpretation of Article 26 as a vehicle for the justiciability of Article 11 of the Protocol of San Salvador).

206. Advisory Opinion OC-23/17, *supra* note 19, ¶ 57 (citing *Acevedo Buendía v. Perú*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 198, ¶ 101 (July 1, 2009)).

the Protocol of San Salvador (the right to a healthy environment) through Article 26 of the American Convention.<sup>207</sup> The Court explained that the need to promote and protect the right to a healthy environment in its fullest capacity is essential for the protection of other human rights, and therefore must be recognized as fully justiciable.<sup>208</sup> In considering the right to a healthy environment, the Court said:

This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right.<sup>209</sup>

This is one of the most impactful decisions in the area of environmental human rights, as it creates a vehicle for advocacy by recognizing the justiciability of the right to a healthy environment. Mónica Ferial Tinta has written on the issue of justiciability in the Inter-American System and has posed that the capability of rights being vindicated before courts, meaning that a person can access remedies to rectify harms or injuries, requires a government obligation to vindicate the right.<sup>210</sup> Tinta posits that the “[j]usticiability of rights is about reinstating rights” and “that any person whose rights or freedoms are [therein] recognized are violated shall have an effective remedy.”<sup>211</sup> The possibility of remedying environmental wrongs based on the vindication of the right to a healthy environment is critical, not only to protect vulnerable communities—those who have been historically marginalized and/or are dependent on natural resources that may be endangered—who are facing environmental adversity, but for the protection of the environment itself. Thus, this decision is critical because it allows individuals and communities affected by environmental harm and climate change to bring human rights cases against the government based on those claims. This decision opens the door for non-indigenous populations and communities to use it as a legal vehicle of change and protection.<sup>212</sup>

In the case of polluted environments or climate change, many underrepresented communities or minorities<sup>213</sup> tend to live in poverty, are disproportionately affected by changing environmental conditions such as rising temperatures and sea levels, droughts, changes in precipitation or available freshwater, and higher exposure to toxic chemicals, and lack the autonomy to

207. *See id.* ¶ 57.

208. *See id.* ¶ 47.

209. *Id.* ¶ 62.

210. See Mónica F. Tinta, *Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms & Notions*, 29 HUM. RTS. Q. 431, 435, 441 (2007).

211. *Id.* at 435, 441 (quoting Covenant Art. 2.3(a)).

212. *See* Advisory Opinion OC-23/17, *supra* note 19, ¶¶ 47, 62.

213. “Minority” is used under international law to refer to a group that has shared characteristics and are in non-dominant positions of power.

live in a healthy and sustainable environment. For many, living in poverty or “multidimensional poverty” means that they do not have access to basic needs, such as housing, education, electricity, and clean water.<sup>214</sup> All of these economic, social, and political factors compound complicated historic dynamics of marginalization and discrimination. Communities and groups such as indigenous peoples, Afro-descendants, and campesinos are particularly vulnerable to environmental harm and climate change due to their reliance on the natural environment and their historic marginalization.

The case *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v. Argentina* is an example of precedent-setting litigation that took advantage of the opening provided by the Advisory Opinion and its recognition of the right to a healthy environment. In this case, the petitioners brought the case against Argentina based on the now recognized and justiciable right to a healthy environment.<sup>215</sup> The Court affirmed that through Article 26 of the American Convention, the petitioners (the Lhaka Honhat indigenous community) could be protected under the right to a healthy environment.<sup>216</sup> In the *Lhaka Honhat v. Argentina* case, indigenous lands had been used and degraded by non-indigenous persons for farming and cattle raising.<sup>217</sup> The non-indigenous persons were fencing indigenous lands for their private agriculture through farming and cattle raising.<sup>218</sup> This overuse of the land led to the soil erosion and contamination of the natural resources in the indigenous lands.<sup>219</sup> These practices, which were known by the Argentinian Government, stripped the indigenous community of their right to use and enjoy their lands to carry out traditional indigenous practices.<sup>220</sup> The indigenous communities were no longer able to access clean water, hunt, and gather in their lands, thus threatening their survival.<sup>221</sup> The Court found that Argentina had violated the indigenous communities’ rights to property, judicial guarantees, food, and water, and most importantly, the right to a healthy environment.

The Court ordered Argentina to remediate and compensate the indigenous communities for the harms committed by ensuring that they had access to their lands, were consulted prior to any interference with it, and that the natural resources in it were cleaned where polluted.<sup>222</sup> The Court’s finding that

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214. Organización de las Naciones Unidas para la Alimentación y la Agricultura (FAO), *Panorama de la Pobreza Rural en América Latina y el Caribe 2018*, 14 (2018) [hereinafter FAO Report].

215. *Indigenous Cmty. of the Lhaka Honhat (Our Land) Ass’n v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 400, ¶ 186–209 (Feb. 6, 2020).

216. *Id.* ¶¶ 202–03.

217. *Id.* ¶¶ 287, 314, 330.

218. *Id.* ¶ 287.

219. *Id.* ¶ 280.

220. *Id.* ¶ 282.

221. *Id.* ¶¶ 280–82.

222. *Id.* ¶¶ 310–21.

the right to a healthy environment was violated due to the pollution of indigenous lands was important as it opened the door to imposing international obligations based on environmental injuries grounded on a variety of human rights, including the right to a healthy environment. As the *Lhaka Honhat v. Argentina* case showed, States can be held responsible for violations of the right to a healthy environment.

In terms of international obligations, the Court has outlined in detail how States are to be held accountable for violations of the right to a healthy environment and other human rights such as the right to life and integrity.<sup>223</sup> The Advisory Opinion explained the international obligations in relation to the environment and human rights are the Obligation of Prevention, Precautionary Principle, Obligation to Cooperate, and Procedural Obligations, all of which will be discussed in detail below.<sup>224</sup> These obligations and principles are well-settled principles in international human rights law and international environmental law, where States must be held responsible for failing to protect human rights.<sup>225</sup>

#### A. *Obligation of Prevention*

The Obligation of Prevention provides that States engage in conduct that seeks to prevent the violation of human rights.<sup>226</sup> International environmental law has widely regarded the duty of prevention as a core tenet, where States have the “responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”<sup>227</sup>

This duty to prevent environmental harm has long been recognized under customary international law and regional Inter-American instruments

223. The Court opened the door to these obligations applying to other rights such as the right to a healthy environment, but it stated that it was limiting the discussion for the rights to life and integrity since Colombia had specifically asked the Court to focus on obligations pertaining to those two rights. See Advisory Opinion OC-23/17, *supra* note 19, ¶ 125.

224. *Id.* ¶¶ 125, 127, 181, 211.

225. See Max Valverde Soto, *General Principles of International Environmental Law*, 3 ILSA J. INT'L & COMP. L. 193, 197, 199, 201 (1996) (providing an overview of the Obligation to Prevent, the Precautionary Principle, and the Obligation to Cooperate in international environmental law); see also Rio Declaration, *supra* note 66, at princ. 10 (providing the foundation for procedural obligations in international environmental law).

226. “[T]he obligation to ensure rights is projected beyond the relationship between State agents and the persons subject to the State’s jurisdiction, and encompasses the duty to prevent third parties from violating the protected rights in the private sphere.” Advisory Opinion OC-23/17, *supra* note 19, ¶ 118 (citing “Mapiripán Massacre” v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 111 (Sept. 15, 2005); *Gonzales Lluy v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 298, ¶ 170 (Sept. 1, 2015)).

227. Advisory Opinion OC-23/17, *supra* note 19, ¶ 128 (citing Rio Declaration, *supra* note 66, at princ. 2; Stockholm Declaration, *supra* note 62, at princ. 21).

and jurisprudence.<sup>228</sup> States are responsible for protecting, preserving, and preventing the degradation of the environment both inside and outside of their territory, just as they would with the violation of other human rights.<sup>229</sup> Specifically, States have the obligation to prevent “significant damage,” which is defined as “something more than ‘detectable’ but need not be at the level of ‘serious’ or ‘substantial.’”<sup>230</sup> Within the obligation of prevention, States must regulate, supervise, and monitor State and non-State actions with environmental impact, and specifically with those that have significant risks to human health.<sup>231</sup> States have the obligation to exercise due diligence commensurate with the fragility of ecosystems and the vulnerability of communities.<sup>232</sup> This means that the more an environment or population is at risk, the more due diligence a State must exercise to prevent significant environmental harm from occurring.<sup>233</sup> The obligation of prevention also mandates that States require and approve EIAs, which provide key information to communities about the possible environmental impacts of a project.<sup>234</sup>

In order to prepare for possible environmental harms, States have the duty to establish contingency plans that provide options for communities or persons facing health risks due to environmental degradation.<sup>235</sup> For example, a contingency plan may include a detailed explanation of what might

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228. The customary nature of the principle of prevention has been recognized by the International Court of Justice. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. ¶ 29; *Gabčikovo-Nagymaros Project*, 1997 I.C.J. ¶ 140 (Sept. 25); *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14, ¶ 101 (Apr. 20); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)* and *Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica)*, Judgment, 2015 I.C.J. 665, ¶ 104 (Dec. 16). The International Tribunal for the Law of the Sea (ITLOS) and the Permanent Court of Arbitration (PCA) have also indicated this. *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana v. Côte d’Ivoire)*, Case No. 23, Order 2016/4 of Apr. 25, 2015, ¶ 71; *Iron Rhine Arbitration (Belg. v. Neth.)*, Award, ¶ 222 (Perm. Ct. Arb. 2005); *Indus Waters Kishenganga Arbitration (Pak. v. India)*, Partial Award, at ¶¶ 448–450 (Perm. Ct. Arb. 2013); *Indus Waters Kishenganga Arbitration (Pak. v. India)*, Final Award, ¶ 112 (Perm. Ct. Arb. 2013); *South China Sea Arbitration (Phil. v. China)*, Award, ¶ 941 (Perm. Ct. Arb. 2016).

229. See *Gabčikovo-Nagymaros Project*, 1997 I.C.J., ¶ 140; Int’l Law Comm’n, Rep. on the Work of its Fifty-Third Session, *General Commentary on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, [hereinafter *General Commentary on Draft Articles on Prevention of Transboundary Harm*]; see *South China Sea Arbitration (Phil. v. China)*, ¶ 940 (Perm. Ct. Arb. 2016); Advisory Opinion OC-23/17, *supra* note 19, ¶¶ 118, 134.

230. Advisory Opinion OC-23/17, *supra* note 19, ¶ 136 (quoting *General Commentary on Draft Articles on Prevention of Transboundary Harm*, *supra* note 229, ¶ 4).

231. *Id.* ¶ 141 (citing *Ximenes-Lopes v. Brazil*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶¶ 89, 90 (July 4, 2006); *Gonzales Lluy*, Inter-Am. Ct. H.R. (ser. C) No. 298, ¶¶ 178, 183; *I.V. v. Bolivia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 329, ¶¶ 154, 208 (Nov. 30, 2016)).

232. *Id.* ¶ 142.

233. *Id.*

234. *Id.* ¶ 145.

235. *Id.*

happen in case of environmental harm, including which bodies of the State are prepared to respond to a crisis or situation such as death or injuries, fire or evacuation, incident involving health or safety measures, pollution and release of hazardous pollutants to the environment, etc.<sup>236</sup> Lastly, as part of the obligation of prevention, States must mitigate environmental damage.<sup>237</sup> Mitigation measures must be able to remediate environmental harm or provide ways for communities to safeguard their lives and health when endangered.<sup>238</sup>

### B. *Precautionary Principle*

The Precautionary Principle provides that “[w]here there are threats of serious or irreversible damage,” the State must take measures to protect the environment.<sup>239</sup> Specifically, the Court quotes Principle 15 of the Rio Declaration to assert that a lack of “scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>240</sup>

This recognition is particularly important because it provides an opening for persons or communities to hold States responsible when there is sufficient evidence of serious or irreversible damage, even if there is no “scientific certainty” that the degradation will take place.<sup>241</sup> Specifically, vulnerable communities who have been historically marginalized and have not had access to justice, or have had their participatory rights violated, can use this as a tool for the State to compel protective measures. The Court requires that States “act diligently to prevent harm” and ensure the protection of individuals or communities from severe and irreversible environmental activities.<sup>242</sup>

### C. *Obligation to Cooperate*

The Obligation to Cooperate provides that States must cooperate with other States in the case of “activities, projects or incidents that could cause significant transboundary environmental harm.”<sup>243</sup> The obligation of cooperation is provided for in the American Convention of Human Rights as well as the Protocol of San Salvador.<sup>244</sup> This obligation includes the duty of notification,

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236. See Peter G. Belling, Joint UNEP/OCHA Env't Unit, *Sample of National Environmental Contingency Plan: A Supplement to “Guidelines for the Development of a National Environmental Contingency Plan”*, at 4, U.N. Doc. UNEP/99/15 (May 31, 1996).

237. Advisory Opinion OC-23/17, *supra* note 19, ¶ 145.

238. *Id.*

239. *Id.* ¶¶ 175–76 (quoting Rio Declaration, *supra* note 66, at princ. 15).

240. *Id.* ¶ 175.

241. *Id.*; United Nations Framework Convention on Climate Change (UNFCCC), May 9, 1992, FCCC/INFORMAL/84 1771 U.N.T.S. 107 [<https://perma.cc/KDV5-KC2U>] [hereinafter UNFCCC].

242. *Id.* ¶ 180 (citing Rio Declaration, *supra* note 66, at princ. 15; UNFCCC, *supra* note 241, at art. 3.3).

243. Advisory Opinion OC-23/17, *supra* note 19, ¶ 182.

244. *Id.* ¶ 181 (citing American Convention, *supra* note 32, at art. 26; Protocol of San Salvador, *supra* note 18, at pmbll., art. 1, 12, 14).

which is triggered in cases of environmental emergencies such as natural disasters.<sup>245</sup> Cooperation is particularly important for individuals or communities living in areas that are prone to natural disasters such as hurricanes, flooding, and droughts, and is especially critical where environmental harms can affect multiple States.

#### D. *Procedural Obligations*

Procedural obligations are incredibly important in the protection of environmental human rights. Procedural rights afford individuals and communities the rights to information, public participation, and access to justice.<sup>246</sup> More specifically, procedural protections of the right to a healthy environment include the State's duties: "(a) to assess impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm."<sup>247</sup> These procedural protections arise from international environmental law and echo Principle 10 of the Rio Declaration.<sup>248</sup>

In the context of the Advisory Opinion, the Court reaffirmed its prior findings relating to the right to information, through the *Claude-Reyes v. Chile* case. In *Claude-Reyes v. Chile*, the Inter-American Court recognized that in the Inter-American System, the right to "seek" and "receive" information derives from the right to freedom of thought and expression.<sup>249</sup> The Court found that the State had a positive obligation to provide access to information through the least restrictive measures, due to the importance of access to information in a democratic system. The Court also established a strong connection between the public's right to "seek" and "receive" information and their ability to participate in the democratic process.<sup>250</sup> A subsequent decision, *Gomes Lund v. Brazil*, extended the scope of that right, affirming that the right to information must be timely and without undue delay so that individuals have access to the

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245. *Id.* ¶ 190.

246. *See id.* ¶¶ 212–41; *see also* Sarah Dávila-Ruhaak, *Making a Case for the Right to a Healthy Environment for the Protection of Vulnerable Communities: A Case of Coal-Ash Disaster in Puerto Rico*, 9 MICH. J. ENVTL. & ADMIN. L. 379, 409 (2020).

247. Dávila-Ruhaak, *supra* note 246, at 408; *see also* Rio Declaration, *supra* note 66, at princ. 10.

248. Rio Declaration, *supra* note 66, at princ. 10 ("Environmental issues are best handled with the 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.")

249. *Claude Reyes, v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 76* (Sept. 19, 2006).

250. *See id.* ¶¶ 76–77, 87.

truth about human rights violations.<sup>251</sup> The rights to information, expression, association, and assembly in relation to environmental advocacy cannot be subject to overbearing or excessive restrictions.<sup>252</sup> States may never restrict the right to information “with excessive or indiscriminate use of force, arbitrary arrest or detention, torture or other cruel, inhuman or degrading treatment or punishment, enforced disappearance, the misuse of criminal laws, stigmatization or the threats of such acts.”<sup>253</sup>

In terms of participation, the Court has clarified that the right to information is essential. Without accessible and understandable information, individuals cannot engage in public participation.<sup>254</sup> Furthermore, States must ensure there is an accessible legal framework whereby the public and affected communities are given the opportunity to comment, directly or through representatives, on the information that the government or private entities have provided.<sup>255</sup> In addition, this process of effective participation must include a variety of stakeholders, including State and non-State actors, private entities, civil society, and affected populations.<sup>256</sup> Special attention must be given to the effective participation of women, gender-minorities, indigenous peoples, and other disenfranchised and vulnerable populations.<sup>257</sup> Additionally, populations with strong ties to the land must be consulted and given the opportunity to provide their free, prior, and informed consent.<sup>258</sup>

Free, prior, and informed consent ensures that affected communities are able to exercise their right to equality under the law, access to justice, property, and other rights in relation to the protection of their culture, religion, and overall preservation.<sup>259</sup> Therefore, States must ensure that all affected communities, and particularly traditional, local, minority, or vulnerable communities, have real and effective participation.<sup>260</sup>

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251. *Gomes Lund v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 219, ¶ 201 (Nov. 24, 2010).

252. See Maina Kiai (Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association), *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, ¶ 22, U.N. Doc. A/HRC/29/25 (Apr. 28, 2015).

253. *Framework Principles*, Knox Report A/HRC/37/59 (Jan. 24, 2018), *supra* note 103, ¶ 13 (Framework Principle 5).

254. Bali Guidelines, *supra* note 118.

255. See Aarhus Convention, *supra* note 103, at art. 8.

256. G.A. Res. 67/210, ¶ 12 (Dec. 21, 2012).

257. *Id.*

258. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 85 (Nov. 28, 2007); see also U.N. Int'l Covenant on Civil and Political Rights, Human Rights Comm., *Länsman v. Finland*, CCPR/C/52/D/511/1992, ¶ 9.5 (Nov. 8, 1994) (finding by the U.N. Human Rights Committee that although the Sami people in Finland did not fit the definition of “indigenous,” they were still entitled to assert community rights to the protection of their land as a minority group).

259. See *Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, doc. 5 rev. ¶ 131 (2002).

260. See *id.* at ¶ 165.

Lastly, the Court expressly provides that all persons have the right to an effective remedy in relation to environmental degradation or harm. An effective remedy is one that can be obtained through competent judicial or quasi-judicial, administrative, or legislative mechanisms.<sup>261</sup> The right to an effective remedy includes: (1) the right to equal and effective access; (2) adequate, effective, and prompt reparations; and (3) access to relevant information regarding harms that could lead to violations of human rights and mechanisms available.<sup>262</sup> “Reparations” for violations of human rights have included restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>263</sup>

In the case of vulnerable communities, the Advisory Opinion provides an opening for the vindication of their human rights, and specifically their right to a healthy environment.<sup>264</sup> Vulnerable communities have historically struggled to enjoy their human rights due to environmental pollution and degradation resulting from extraction or development projects, or due to the effects of climate change.<sup>265</sup> Because vulnerable communities tend to be members of historically disenfranchised communities, they face not only the actual exposure to environmentally dangerous conditions, but also often lack the voice and opportunity to exercise their human rights.<sup>266</sup>

Professor Tendayi Achime, United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance has explained:

A submission received for the present report documented marginalization and exclusion of Haitians of African descent (especially in resource-rich rural areas) from the extractivist industry in Haiti. Government officials

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261. G.A. Res. 217A(III), Universal Declaration of Human Rights, at 73 (Dec. 10, 1948); Int’l Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966, 999 U.N.T.S. 171; see also *Lenahan v. United States*, Case No. 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (2011).

262. G.A. Res. 60/147 § 7 (Mar. 21, 2006) [hereinafter *Basic Principles on Right to a Remedy and Reparation*].

263. See *id.* § 9, ¶ 18..

264. See Advisory Opinion OC-23/17, *supra* note 19, ¶¶ 62–63. Some of the measures that States should take are: “(i) clean-up and restoration within the jurisdiction of the State of origin; (ii) containment of the geographical range of the damage to prevent it from affecting other States; (iii) collection of all necessary information about the incident and the existing risk of damage; (iv) in cases of emergency in relation to an activity that could produce significant damage to the environment of another State, the State of origin should, immediately and as rapidly as possible, notify the States that are likely to be affected by the damage; (v) once notified, the affected or potentially affected States should take all possible steps to mitigate and, if possible, eliminate the consequences of the damage, and (vi) in case of emergency, any persons who could be affected should also be informed.” *Id.* ¶ 172.

265. U.N. Economic and Social Council (ESCOR), *Analysis on the Duty of the State to Protect Indigenous Peoples Affected by Transnational Corporations and Other Business Enterprises*, ¶ 2, U.N. Doc. E/C.19/2012/3 (Feb. 23, 2012).

266. Daniel Barstow Magraw & Lauren Baker, *Globalization, Communities and Human Rights: Community-Based Property Rights and Prior Informed Consent*, 35 DENVER J. INT’L L. & POL’Y 413, 413–14 (2008).

and foreign companies have concluded extractivist agreements without input from the affected communities, perpetuating the historical legacies of racialized exclusion of Haitians of African descent.<sup>267</sup>

It is this exploitative and inequitable power relationship that perpetuates the vulnerability that the Court seeks to repair and explain. It is essential to understand that protecting the environment is critical for the protection of vulnerable communities. The Court has explained that protecting the environment itself was as important as the ecosystem that supports individuals and communities.<sup>268</sup> This core understanding is critical for vulnerable communities who have been voiceless and left outside of participatory processes, and who seek to protect the environment.

Within territories of extraction, indigenous peoples, small-scale farmers, rural communities, women, displaced persons, artisanal miners and fisherfolk, pastoralists, migrant workers, and poor and working-class communities experience the most acute human rights violations as a result of State and corporate conduct in the extractivism economy. For members of these groups, their race, national origin, ethnicity, nationality and gender are important factors in their political, economic and social marginalization in territories of extraction. Politically marginalized groups have few means of protection against extractivist projects that violate their rights or interests when confronted with the militarized States and corporate actors that are a mainstay of the extractivism economy.<sup>269</sup>

This holistic approach is critical for the protection of environmental human rights because there has to be a core understanding that environmental impacts and climate change have effects beyond the discrete area in which projects or actions are taking place.<sup>270</sup>

#### E. *Working Group Criteria and Vulnerable Populations*

The Court relies on the findings of the Working Group on the Protocol of San Salvador for the indicators it created in reference to the right to a healthy environment.<sup>271</sup> The Working Group's indicators are framed as five State obligations to show whether the right to a healthy environment has been violated. These indicators are: "a) guaranteeing everyone, without any discrimination, a healthy environment in which to live; b) guaranteeing everyone, without any discrimination, basic public services; c) promoting environmental protection;

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267. Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), *Global Extractivism and Racial Equality*, ¶ 37 U.N. Doc. A/HRC/41/54 (May 14, 2019) [hereinafter Achiume Report].

268. See Advisory Opinion OC-23/17, *supra* note 19, ¶ 62.

269. Achiume Report, *supra* note 267, ¶ 48.

270. Advisory Opinion OC-23/17, *supra* note 19, ¶ 35.

271. See *id.* ¶ 60.

d) promoting environmental conservation; and e) promoting improvement of the environment.”<sup>272</sup>

These indicators provide concrete criteria that make the right to a healthy environment an enforceable right with specific State obligations.<sup>273</sup> They are to be interpreted within the “availability, accessibility, sustainability, acceptability and adaptability” standard.<sup>274</sup> The indicators are a tool for litigants to prove that their right to a healthy environment has been violated. For example, whether a person lives in a healthy or unhealthy environment can be proven by whether the air they breathe, the land where their house is located, the soil they use for subsistence farming, and the water they drink is clean and safe.<sup>275</sup> Similarly, proving that a person or community does not have access to basic public services is measurable.

### 1. Environmental Racism and Discrimination: Afro-Descendants and Immigrant Communities

Afro-descendants<sup>276</sup> and immigrants live in disproportionately environmentally unsafe conditions and are more vulnerable to climate change.<sup>277</sup> In certain rural communities, these minority communities live near industrial sites, mines, waste sites, and other extremely polluted areas.<sup>278</sup>

It is estimated that there are 200 million Afro-descendants in Latin America, representing one-third of the population in the Americas.<sup>279</sup> A disproportionate number of Afro-descendants live in poverty and are subjected to systematic and persistent racial discrimination. They are one of the most vulnerable populations in the region.<sup>280</sup> In Brazil, Afro-descendants make up approximately 50 percent of the population, and 78 percent of them live in

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272. Org. of Am. States, Working Grp. Protocol of San Salvador, Progress Indicators for Measuring Rights Under the Protocol of San Salvador 97 (2013), [http://www.oas.org/en/sedi/pub/progress\\_indicators.pdf](http://www.oas.org/en/sedi/pub/progress_indicators.pdf) [<https://perma.cc/Q6BW-JQRP>] [hereinafter Progress Indicators].

273. *Id.*

274. Advisory Opinion OC-23/17, *supra* note 19, ¶ 60 (quoting PROGRESS INDICATORS, *supra* note 272, ¶ 29).

275. Indigenous Cmty. of the Lhaka Honhat (Our Land) Ass’n v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 400, ¶ 222–25 (Feb. 6, 2020).

276. Afro-descendants are persons from African descent in the Americas. The term “Afro-descendant” has been used as a broad category to identify and provide rights-based protections to this historically marginalized and vulnerable group in the Americas. See SITUATION OF PEOPLE OF AFRICAN DESCENT, *infra* note 304.

277. Michael Gochfeld & Joanna Burger, *Disproportionate Exposures in Environmental Justice and Other Populations: The Importance of Outliers*, 101 AM. J. PUB. HEALTH S53, S53 (2011).

278. *Id.* at S57.

279. *The Afro-descendant Theme in the Americas*, Organization of American States, <http://www.oas.org/dil/afrodescendants.htm> [<https://perma.cc/D4LK-S5KH>] (last visited Apr. 11, 2021).

280. *Id.*

poverty.<sup>281</sup> Afro-Brazilians are twice as likely to live in poverty than white or non-Black Brazilians.<sup>282</sup> In Colombia, Afro-descendants make up approximately 26 percent of the population, but represent 75 percent of people living in poverty.<sup>283</sup> Similarly, in Ecuador only 7.2 percent of the population is Afro-descendant, but they represent 40 percent of all Ecuadorians living in poverty.<sup>284</sup>

The Quilombolas are community members from a Quilombo, which are communities of former escaped slaves. Many Quilombolas in Brazil do not have access to clean water and sanitation.<sup>285</sup> For example, Quilombo dos Palmares was like other Maroon communities that formerly served as a stronghold for escaped slaves who fought continually for their freedom.<sup>286</sup> Generations of Quilombolas have relied on their natural environment for survival. The Quilombo dos Palmares community lives by relying solely on what the land provides and without access to basic resources such as clean water and sanitation, adequate food, and limited healthcare and education.<sup>287</sup>

While Quilombolas have received titles to their lands, the living conditions in the Quilombos are of extreme poverty. The Quilombolas have expressed their need for government assistance to provide basic resources within their communities, but still retain their cultural ties to their natural environment.<sup>288</sup> Many Quilombolas live in an environment that lacks the proper infrastructure to support the local community. Studies show that Quilombolas depend on small wells and streams in their lands for water.<sup>289</sup> These water sources may be contaminated and lead to waterborne diseases or contamination of food

281. Judith Morrison, *Race and Poverty in Latin America: Addressing the Development Needs of African Descendants*, UN CHRONICLE (2008), <https://www.un.org/en/chronicle/article/race-and-poverty-latin-america-addressing-development-needs-african-descendants> [<https://perma.cc/6RG8-6Z7L>].

282. GERMAN FREIRE ET AL., AFRO-DESCENDANTS IN LATIN AMERICA: TOWARD A FRAMEWORK OF INCLUSION 21 (2018).

283. Morrison, *supra* note 281.

284. *Statement to the Media by the United Nations' Working Group on People of African Descent, On the Conclusion of its Official Visit to Ecuador, 16–20 December 2019*, U.N. HUMAN RIGHTS OFFICER OF THE HIGH COMMISSIONER (Dec. 20, 2019), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25452&LangID=E> [<https://perma.cc/36XJ-2WY3>] [hereinafter *Statement on African Descent in Ecuador* 2019].

285. MÁRCIA ARAÚJO VAN DER BOOR ET AL., SITUATIONAL STUDY OF DRINKING WATER QUALITY IN QUILOMBOLA COMMUNITIES IN THE MUNICIPALITY OF SÃO-LUÍS-GONZAGA, MA, BRAZIL 3 [<https://perma.cc/CVX5-R5S9>] [hereinafter *Situational Study of Drinking Water in Quilombola*].

286. Lúcia Gaspara, *Quilombo dos Palmares*, JOAQUIM NABUCO FOUNDATION LIBRARY (Peter Leamy trans., 2011) (2004), [http://basilio.fundaj.gov.br/pesquisaescolar\\_en/index.php?option=com\\_content&id=836](http://basilio.fundaj.gov.br/pesquisaescolar_en/index.php?option=com_content&id=836) [<https://perma.cc/L7YC-D5XU>].

287. Donna Bowater, *Brazil's Quilombos, Founded by Escaped Slaves, Offer a Window to the Past*, AL JAZEERA (Sept. 20, 2014), <http://america.aljazeera.com/articles/2014/9/20/brazil-s-quilombosfoundedbyescapedslavesofferawindowtothepast.html> [<https://perma.cc/PN2P-QX5G>].

288. *Id.*

289. Situational Study of Drinking Water in Quilombola, *supra* note 285, at 3.

sources.<sup>290</sup> This lack of access to clean drinking water and sanitation due to infrastructure limitations renders their environmental living conditions completely unacceptable.

While Quilombolas have asked the Brazilian Government to provide these basic services, they remain living in uninhabitable conditions. Their living conditions reflect the historical treatment of Afro-Brazilians because “[a]lthough slavery was officially banished in Brazil in 1888, the problems of racial segregation and the lack of access to basic rights like healthcare, education, and basic sanitation for the Quilombola Communities were not resolved, the consequences of which are still noticeable today.”<sup>291</sup> The Quilombolas’ right to a healthy environment has been violated, and the injury can be proven through the quality of the environmental conditions in which they live, the lack of access to systems and infrastructure that can provide clean water and sanitation, and the discriminatory treatment to which they have been subjected.<sup>292</sup>

Similarly, in Esmeraldas, Ecuador, the lack of access to basic services, such as clean water and sanitation, violates the community’s right to a healthy environment. Esmeraldas, a coastal city in the northwest of Ecuador, is primarily Afro-Ecuadorian, and 85 percent of its people live in poverty.<sup>293</sup> In Esmeraldas, only 23 percent of the population has access to basic services, such as clean water and sanitation.<sup>294</sup> The poor living conditions in Esmeraldas is a contrast to its rich natural resources.<sup>295</sup> The combination of rich natural resources and a marginalized local community has led to exploitative and pollutant projects in the area.<sup>296</sup> In Esmeraldas, the deforestation of rich biodiverse forests is due to palm oil cultivation.<sup>297</sup> These environmentally disastrous policies are part of

290. *Id.*

291. The list of human rights violations that Quilombolas suffer is a long one that includes the lack of access to food security, health, education, freedom from discrimination, public participation, and many more. For purposes of this article, I am discussing their lack of access to clean water and sanitation under the Working Group’s five State obligations in relation to the right to a healthy environment. *Id.*

292. The discrimination and inequality experienced by the Quilombolas fits into Special Rapporteur Achiume’s structural racial equality analysis where the historic distribution of power and the experienced racial discrimination clarify that their right to a healthy environment has been violated. Achiume Report, *supra* note 267, ¶ 55.

293. Statement on African Descent in Ecuador 2019, *supra* note 284.

294. *Id.*; *30 Años Sin Servicios Básicos Completos*, LA HORA (Apr. 29, 2018), <https://lahora.com.ec/esmeraldas/noticia/1102153211/30-anos-sin-servicios-basicos-completos>.

295. UN DEV. PROGRAMME, ASSESSMENT OF DEVELOPMENT RESULTS: ECUADOR, EVALUATION OF UNDP CONTRIBUTIONS 14 (2008) [http://web.undp.org/evaluation/evaluations/documents/ADR/ADR\\_Reports/ADR\\_Ecuador.pdf](http://web.undp.org/evaluation/evaluations/documents/ADR/ADR_Reports/ADR_Ecuador.pdf) [<https://perma.cc/5YNM-82WA>].

296. *Id.*

297. Antonio José Paz Cardona, *For Ecuador, A Litany of Environmental Challenges Awaits in 2020*, MONGABAY NEWS (Romina Castagnino & Sarah Engel trans.) (Feb. 5, 2020), <https://news.mongabay.com/2020/02/for-ecuador-a-litany-of-environmental-challenges-awaits-in-2020> [<https://perma.cc/2R77-3RRL>].

Ecuador's ongoing policies to exploit natural environments in favor of fossil fuel energy and other environmentally destructive industries.<sup>298</sup>

After visiting Ecuador, the United Nations Working Group of Experts on People of African Descent noted that the government's lack of monitoring of extractive industries and inaction has led to terrible pollution of the environment in Esmeraldas.<sup>299</sup> The private sector has engaged in environmentally disastrous activities and mistreated the local population with impunity.<sup>300</sup> People working for companies in the area "do not have basic services such as drinking water, electricity, public lighting, sanitary or toilet facilities."<sup>301</sup> Additionally, community members of Esmeraldas drink from the river, and use the river water to bathe and wash their clothes.<sup>302</sup> Because of high levels of water toxicity, people "end up suffering diseases including skin rashes, genital infections and other serious illnesses."<sup>303</sup>

The lack of recognition of Afro-descendants as a vulnerable group has led to historic and continuous exclusion, racism and racial discrimination, and "social invisibility" both in general and in matters of environmental concerns.<sup>304</sup> Afro-descendants are silenced and struggle to assert their rights relating to environmental protections, despite facing disproportionately higher rates of pollution in their environments.

Afro-descendant groups and immigrant communities in the United States suffer from similar environmental racism. They are disproportionately exposed to environmentally harmful environments, and often their quality of air and water is highly contaminated and toxic.<sup>305</sup> In the Chicago neighborhoods of Little Village and Pilsen, air quality tests show that residents live with high levels of heavy metals and asbestos from nearby power plants and industrial facilities.<sup>306</sup> In Little Village, residents face higher health risks due to the contaminated air. Children in Little Village have asthma at much higher rates

298. *Id.* "[T]here are not only deforestation challenges, but also the abandonment of the populations that live in the most intact ecosystems." José Paz Cardona, *supra* note 297 (statement of Manuel Bayón, founding member of the Critical Geography collective).

299. Statement on African Descent in Ecuador 2019, *supra* note 284.

300. Through the extractivism economy, host Government and private corporate actors oversee the destruction of ecosystems, including through water pollution (*e.g.*, mercuric and cyanide pollution), explosions, dust emissions, deforestation, the destruction of biodiversity and food security, and soil pollution." Achiume Report, *supra* note 267, ¶ 50 (citing Indigenous Peoples Cmty. of African Descent Extractive Indus., *supra* note 24, ¶¶ 17, 249).

301. Statement on African Descent in Ecuador 2019, *supra* note 284.

302. *Id.*

303. *Id.*

304. ORG. OF AM. STS.: INTER-AM. COMM'N ON HUM. RTS., THE SITUATION OF PEOPLE OF AFRICAN DESCENT IN THE AMERICAS 2 (2011) [hereinafter SITUATION OF PEOPLE OF AFRICAN DESCENT]; *see also* Achiume Report, *supra* note 267.

305. *See Environmental Issues in Chicago's Little Village & Pilsen Neighborhoods*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/il/environmental-issues-chicagos-little-village-pilsen-neighborhoods> [<https://perma.cc/7UNF-TPVA>] (last visited Apr. 11, 2021).

306. *See id.*

than children in other Chicago neighborhoods.<sup>307</sup> Little Village children are three times more likely to end up in the hospital for breathing issues than children elsewhere in the city.<sup>308</sup> Unsurprisingly, the residents in this neighborhood tend to be primarily low-income immigrants and people without legal-immigration status.<sup>309</sup>

In Flint, Michigan, Black residents were exposed to lead in the water. Forty percent of the residents in Flint, Michigan are low income.<sup>310</sup> In Flint, city officials failed to ensure that the water quality was adequate and acceptable.<sup>311</sup> The water was not treated with anti-corrosives, which led to corrosion of the water pipes.<sup>312</sup> This corrosion caused lead to dissolve in the water used by residents for drinking, cooking, and bathing.<sup>313</sup> The water in people's homes was brown and visibly contaminated, as was noticed by the residents of Flint. "A mother of four, she had first contacted the EPA with concerns about dark sediment in her tap water possibly making her children sick. Testing revealed that her water had 104 parts per billion (ppb) of lead, nearly seven times greater than the EPA limit of 15 ppb."<sup>314</sup> The water in Flint was so contaminated that residents were more likely to develop cancer and other serious health conditions than in other parts of Michigan. Dr. Mona Hanna-Attisha, who worked to expose this environmental crisis, called it "a silent pediatric epidemic."<sup>315</sup> For Flint residents, this health crisis is not an isolated incident. The Black Lives Matter organization has said that "[t]he crisis in Flint is not an isolated incident. State violence in the form of contaminated water or no access to water

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307. John Lippert, *Diesel Trucks Swarm in Chicago Neighborhood Already Plagued by Pollution and Racism*, FORBES (Nov. 27, 2019), <https://www.forbes.com/sites/johnlippert/2019/11/27/diesel-trucks-swarm-in-chicago-neighborhood-already-plagued-by-pollution-and-racism/?sh=6ede6b6a6d8f> [<https://perma.cc/N9ZP-YD2B>].

308. *See id.*

309. "Environmental harms from racism and injustice manifest as immediate and slow violence where communities of color are devalued, extracted from, poisoned through exposure, and systematically deprived of access to resources and health needed for surviving and thriving." LITTLE VILL. ENV'T JUST. ORG., LVEJO STATEMENT ON VIOLENCE, POLICING, AND IMMIGRATION 1 (2018), <http://www.lvejo.org/wp-content/uploads/2018/07/LVEJO-Statement-on-Violence-Policing-and-Immigration.pdf> [<https://perma.cc/9AMH-2WJC>].

310. Michael Martinez, *Flint, Michigan: Did Race and Poverty Factor Into Water Crisis?*, CNN (Jan. 28, 2016), <https://www.cnn.com/2016/01/26/us/flint-michigan-water-crisis-race-poverty/index.html> [<https://perma.cc/FUA7-YCBQ>].

311. *See* Samantha Raphelson, *Flint Residents Confront Long-Term Health Issues After Lead Exposure*, NPR (Oct. 31, 2017), <https://www.npr.org/2017/10/31/561155244/flint-residents-confront-long-term-health-issues-after-lead-exposure> [<https://perma.cc/V4TR-WL9A>].

312. *Id.*

313. *Id.*

314. CNN Editorial Research, *Flint Water Crisis Fast Facts*, CNN (Oct. 14, 2020), <https://www.cnn.com/2016/03/04/us/flint-water-crisis-fast-facts/index.html> [<https://perma.cc/MV2T-XUYX>].

315. Raphelson, *supra* note 311.

at all is pervasive in Black communities.”<sup>316</sup> In sum, residents of Flint have experienced inadequate water quality that results in long-term health conditions. Their exposure to highly polluted water is part of “historical projects of racial subordination,” where the lives of Black communities living in poverty are deeply threatened.<sup>317</sup>

## 2. Endangering the Environment Without Due Regard to Protection and Conservation: Campesinos

Vulnerability arising out of environmental harm and climate change has also impacted campesinos in Latin America, and contributed to their marginalization, poverty, and reliance on the natural environment. Campesino communities are “people of the country,” which includes “poor, predominantly rural dwellers with strong ties to agriculture either as producers, laborers, or more frequently, both.”<sup>318</sup> They live in “resource” poverty conditions that include a “lack of cash income, lack of land, poor quality land, lack of capital, lack of access to institutional resources (credit, technical assistance), lack of access to education, health care, and other resources.”<sup>319</sup> Their relationship with the land exists even when they do not have legal title to it, and they work the land through tenancy and wage labor.<sup>320</sup> This resource poverty leads to power-imbalanced labor relationships with landowners and others (*peón-patrón*)<sup>321</sup> who exploit their vulnerability.<sup>322</sup> This historic and ongoing disenfranchisement continues to perpetuate their lack of access to resources and effective participation in stewardship of the land.<sup>323</sup>

In 2014, campesinos in Nicaragua suffered serious droughts that led to a loss of crops.<sup>324</sup> Similarly, in Colombia, campesinos have sometimes lost 100

316. Martinez, *supra* note 310.

317. See Achiume Report, *supra* note 267, ¶ 14.

318. William M. Loker explains that he uses the term “Campesino” instead of peasant due to the complex relationship that they have to the land and natural environment. The term “campesinos” has been used in Latin America due to the recognition that this group has a particularly strong relationship to the land and their natural environment. See William M. Loker, “Campesinos” and the Crisis of Modernization in Latin America, 3 J. POL. ECOLOGY 69, 71 (1996); Peasant Cmty. of Santa Bárbara v. Peru, Case 10.932, Inter-Am. Comm’n H.R., Report No. 77/11 (2011).

319. See Loker, *supra* note 318, at 71.

320. See *id.* at 72.

321. In Latin America, the term *peón* refers to the rural laborer that worked without labor protections. In some cases, the relationship with the employer (*patrón*) reflected a reality of forced or semi-slave labor. Significantly, the *peón-patrón* relationship is characterized by an imbalance of power and exploitation of the laborer. See Joao Jose Flavio Dos Santos & Reis Gomes, *Quilombo: Brazilian Maroons During Slavery*, CULTURAL SURVIVAL Q. MAG. (Dec. 2001), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/quilombo-brazilian-maroons-during-slavery> [<https://perma.cc/3UJU-57PS>].

322. Loker, *supra* note 318, at 72.

323. See Amicus Curiae in Support of the Petitioners, Santa Barbara Campesino Community v. Perú at 5–6, Inter-Am. Ct. H.R. (2015) (No. 10.932).

324. See Anna Nylander, *Los menos culpables, los más afectados por el cambio Climático*,

percent of their harvests and been cut off from growing native crops such as coffee, maize, and beans.<sup>325</sup>

In areas slowly recovering from decades-long military conflict, campesino peasant farmers in Tolima, Colombia are facing a fresh crisis brought on by a toxic combination of climate change, excessive indebtedness and neoliberal government policies. As the temperature rises and new pests thrive, losses of up to 100 percent of the harvest have meant that many farmers face destitution and bank repossession of their land. At the same time, foreign multinationals and the government have earmarked the region for mineral extraction and mega-hydroelectric projects. In this context, new resistance movements are springing up to defend a campesino culture in danger of extinction, and to reclaim rights to life and land.<sup>326</sup>

These campesinos are facing the consequences of a changing climate, such as growing pests and shifting agricultural conditions and viability.<sup>327</sup> Additionally, governments have adopted neoliberal policies to attract foreign investment that has resulted in the de-regulation of labor and environmental protections.<sup>328</sup> These government positions support extractive and polluting industries that promote and result in the displacement of campesinos. In Colombia, many campesinos say that the Colombian government's policies aim to leave "agricultural lands without campesinos" (*un campo sin campesinos*).<sup>329</sup> Many campesino communities have acquired a crippling debt that has resulted in farm repossession and the loss of titles to agricultural lands.<sup>330</sup> Ultimately, many campesinos have been displaced from fields by their inability to grow crops due to harsh climatic conditions and by the government's prioritization of private interests.<sup>331</sup>

Many campesinos who have worked the land for generations using sustainable techniques are now abandoning them because of governmental interests in "modernity" and industrialization.<sup>332</sup> Highly industrialized agri-

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LA VIA CAMPESINA (June 23, 2015), <https://viacampesina.org/es/los-menos-culpables-los-mas-afectados-por-el-cambio-climatico> [<https://perma.cc/6NKE-2KCA>].

325. Milo Phillips, *Campesinos Against Climate Change: The Fight for Economic Justice in Colombia*, NOVARA MEDIA, (Aug. 7, 2016), <https://novaramedia.com/2016/08/07/campesinos-against-climate-change-the-fight-for-economic-justice-in-colombia> [<https://perma.cc/8Z6H-RJYY>].

326. *Id.*

327. *See id.*

328. "Powerful States and their transnational corporations, and the political elites of weaker States that are territories of extraction, emerge as the clear winners. The populations of these territories of extraction bear the brunt of extractivism economy, too often paying with their very lives." Achiume Report, *supra* note 267, ¶ 5; Phillips, *supra* note 325.

329. *See* Trochando sin Fronteras, *Un campo sin campesinos*, BIO DIVERSIDAD (July 19, 2019), <http://www.biodiversidadla.org/Noticias/Un-campo-sin-campesinos> [<https://perma.cc/8SDR-AY59>].

330. *See* Phillips, *supra* note 325.

331. *Id.*

332. *See* FAO Report, *supra* note 214, at 73.

cultural techniques, such as the use of agrochemicals, in Latin America have significant consequences for the environment.<sup>333</sup> The departure from traditional campesino farming in favor of industrialized farming leads to soil erosion and depletion, loss of soil fertility, drought or poor drought resistance, and loss of biodiversity.<sup>334</sup> States have favored this highly productive farming to ensure increasing profits, at the expense of endangering their populations and violating their human rights.

### 3. Disproportionate burden of Climate Change: Coastal Communities

In the Caribbean, coastal fishing communities have paid the price of regional environmental harm and global climate change. In fact, “[s]ome of the most degraded ecosystems in Latin American and the Caribbean are mangroves, wetlands and coral reefs.”<sup>335</sup> This degradation is significant because the Caribbean coastal marine and land habitats in the region have provided 15 to 30 percent of the world’s fish supply in the last ten years.<sup>336</sup> Additionally, Caribbean nation-states are seeing significant sea-level rise, surface temperature increases, and unprecedented highly destructive hurricanes.<sup>337</sup> These changes are devastating for the survival of coastal fishing vulnerable communities whose livelihood and housing depend on healthy and sustainable coastal environments. Many vulnerable communities will be displaced to other regions, leaving them without stable income, housing, and food sources.<sup>338</sup>

Additionally, the general population will become more vulnerable due to higher incidences of hurricanes and erratic climatic events, increases in vector-borne diseases, such as Malaria and Dengue, malnutrition, diarrhea, heat stress, lack of food and clean water, inadequate access to medical services, psychological depression, and other difficult living conditions in the region.<sup>339</sup> It is estimated that “[b]y 2050, on the current emissions trajectory, all Caribbean islands and low-lying coastal states will experience significant population and infrastructure displacement.”<sup>340</sup> Thus, promoting environmental conserva-

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333. Fermín Koop, *Climate Crisis Threatens Latin America’s Food Production Model*, DIÁLOGO CHINO (Aug. 14, 2019), <https://dialogochino.net/en/agriculture/29623-climate-crisis-threatens-latin-americas-food-production-model> [<https://perma.cc/7L42-2A8H>].

334. *The Hidden Costs of Industrial Agriculture*, UNION OF CONCERNED SCIENTISTS (last updated Aug. 24, 2008), <https://www.ucsusa.org/resources/hidden-costs-industrial-agriculture> [<https://perma.cc/58US-UW44>].

335. U.N. ENV’T PROGRAMME (UNEP), *STATE OF BIODIVERSITY IN LATIN AMERICA AND THE CARIBBEAN 3* (2010), <https://www.cbd.int/gbo/gbo3/doc/StateOfBiodiversity-LatinAmerica.pdf> [<https://perma.cc/C7S3-2MTV>].

336. *Id.* at 4.

337. See Hugh Sealy, *Caribbean Perspectives of the Impact of Climate Change on Environmental Determinants of Health*, Power Point Presentation at World Health Organization Third Global Conference on Health and Climate Change (Oct. 16–17, 2018) [<https://perma.cc/R67T-BZ7W>] [hereinafter Sealy Power Point Presentation].

338. *Id.* at 24.

339. See *id.* at 7, 10–13, 19.

340. *Id.* at 24.

tionism and the improvement of the environment is essential for fishing and coastal communities in the Caribbean, as well as the rest of the population in the Caribbean. The Court has recognized that because environmental degradation and pollution have long-lasting effects that will directly and indirectly impact communities, it is essential that activism supports the protection of vulnerable communities in the face of environmental harm and climate change.<sup>341</sup>

In sum, these five government obligations can be used by vulnerable litigants to present human rights cases where environmental harm and climate change has led to the violation of their right to a healthy environment. The protection of the environment and human rights must recognize that discrimination, systems of oppression, marginalization, and exclusion is a reality that restricts vulnerable populations' access to justice and remediation. The Working Group's criteria recognized by the Advisory Opinion provides a tool that the Court must continue to develop to build a deeper understanding of how populations who are particularly vulnerable to environmental harm and climate change can navigate the human rights system.

The right to a healthy environment opens the door to populations who have been historically vulnerable to discrimination and who may be dependent on natural resources. Consideration of the right to a healthy environment creates a normative vehicle of change for affected vulnerable populations beyond the "greening" of human rights.

### CONCLUSION

Vulnerable communities can use the right to a healthy environment as a normative framework to present their cases to the Inter-American Commission and Court of Human Rights. The Advisory Opinion on the Environment and Human Rights has opened the door to this right, which expands the possibility of protecting the environment and the populations that live and rely on it. While the "greening" of human rights has been the traditional approach to the protection of environmental human rights, the Advisory Opinion and the recent *Lhaka Honha v. Argentina* case show that there is a new path to protecting the rights of vulnerable communities in relation to environmental harm.

This new approach signifies the time to wake up and think creatively about environmental justice issues. Now is the time to push forward for the development of new tools that will protect the environment and those most affected by environmental harm and climate change.

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341. See Advisory Opinion OC-23/17, *supra* note 19, ¶ 2.