The Interamerican Association for Environmental Defense, AIDA, is a non-governmental organization whose mission is to strengthen people’s ability to guarantee their individual and collective right to a healthy environment, via the development, implementation and effective enforcement of national and international law.

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BUILDING STRATEGIES FOR LITIGATING CASES BEFORE THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS
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Since concern with the environment emerged on the global agenda in the 1960s, the link between environmental conditions and human well-being has been a central focus of legal action. At the concluding session of the first international conference on the human environment, held in Stockholm, Sweden in 1972, the human rights-environment linkage was reflected in the preamble of the concluding Declaration, wherein the participating states proclaimed that:

Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. . . . Both aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.

Principle 1 of the Stockholm Declaration further established a foundation for linking human rights and environmental protection in law, declaring that “Man 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.” In Resolution 45/94, the UN General Assembly recalled the language of Stockholm, stating that all individuals are entitled to live in an environment adequate for their health and well-being.

While international meetings were engaged in exploring the links between human rights and environmental protection, developments in law and policy at the national level moved even more quickly. Some 130 constitutions in the world, including nearly all amended or written since 1970, specify State obligations to protect the environment or a right to a particular quality of environment. About half the constitutions take the rights-based approach and the other half proclaim State duties.

The advantages of rights-based approaches to environmental protection are several. First, because human rights are maximum claims on society, elevating a clean environment to a right raises it above a mere policy choice. Rights are inherent attributes that must be respected in any well-ordered society. The moral weight attached to a rights label exercises an important compliance pull on members of society. Second, all legal systems establish a hierarchy of norms. Constitutional or human rights guarantees usually are at the apex and “trump” conflicting norm of lower value. Thus, to include respect for the environment as a constitutional right, or international human right, ensures that it should be given precedence over other legal norms that are not rights-based. Third, the
emphasis on rights of information, participation and access to justice encourages an integration of democratic values and promotion of the rule of law in broad-based structures of governance. Thus, ensuring these rights is not only a means to produce decisions favorable to environmental protection, but can reinforce respect for human rights, the rule of law and democratic values more generally. Fourth, a rights-based approach allows utilization of international petition procedures to bring international pressure to bear when governments lack the will to prevent or halt severe pollution that threatens human health and well-being. In many instances, petitioners have been afforded redress and governments have taken measures to remedy the violation.

Constitutional rights to a safe and healthy environment are increasingly being enforced by courts. In India, for example, a series of judgments between 1996 and 2000 responded to health concerns caused by industrial pollution in Delhi. In some instances, the courts issued orders to cease operations. South African courts also have deemed the right to environment to be justiciable. In Argentina, the right is deemed a subjective right entitling any person to initiate an action for environmental protection. Colombia also recognizes the enforceability of the right to environment. In Costa Rica, a court stated that the rights to health and to the environment are necessary to ensure that the right to life is fully enjoyed. Courts have found the necessary laws and means of interpretation to give effect to the guaranteed rights.

The present manual gives lawyers the tools needed to assert human rights claims when environmental conditions fall below the standards necessary to maintain well-being in their societies. Within the Inter-American System of Human Rights, such claims have been particularly important for minority groups, especially indigenous peoples and the urban poor. This work is critical to achieving environmental justice and improving living conditions not only for the present generations, but for those generations yet to come.

Dinah Shelton
Commissioner, Inter-American Commission on Human Rights
Manatt/Ahn Professor of International Law
The George Washington University Law School
Introduction to the English-Language Edition

IDA is pleased to introduce the English-language edition of this Guide, which is now also available in Portuguese. The purpose of this publication is to promote the use of the Inter-American System of Human Rights for addressing environmental degradation that causes human rights violations. Within this guide we provide the legal strategies and arguments necessary to use the System effectively and properly. The Spanish-language edition was well received by many lawyers and environmental advocates. We therefore decided it was important to translate the Guide into English and Portuguese to cover the three most widely spoken languages in the hemisphere.

The contents of this publication are essentially the same as the original edition, but with the inclusion of a few key updates and improvements. The updated version includes the most relevant cases that were decided from the end of 2007 (when we were finalizing the first version) through the end of 2009. Unfortunately, these updates do not incorporate the latest modifications to the Inter-American Court and Commission's Rules of Procedure, as these were released in December 2009, when the present translation was already in its design stage. Therefore, we recommend that readers review the latest changes to the Rules of Procedure, which can be accessed from the official websites of the Commission and Court.*

The translation and revision of this Guide have been a challenging task requiring nearly as much work as the original publication. For this reason, we are extremely grateful to every person and institution that has helped us with this immense undertaking and allowed us to reach a wider audience. In particular, we would like to thank Roxanne Turnage and the CSFund/Warsh-Mott Legacy for their constant support and initiative to fund these translations. Without their support, we would not have been able to accomplish our goals in this project.

We would like to give special recognition to Katherine Allen, Ari Hershowitz, Holly Mikelson, Adele Negro, Jay Osbourne and Jonathan Smith for their excellent work in helping us translate this guide. We would also like

to thank Alejandra Roman and Jonathan Smith for their collaboration in the
technical revision of the text, particularly the footnotes and to Emily Goldman
for proofreading the final text. Finally, we are particularly indebted to
Jacob Kopas, who fastidiously revised the translation and took on the task of
updating it, Astrid Puentes, who coordinated the translations and the entire
team at AIDA for their support and work.

Our goal with this publication and our work in general, is to strengthen
people’s capacity to defend their individual and collective right to a healthy
environment through the proper development, implementation and fulfill-
ment of domestic and international law. With the publication and wide-
spread distribution of the English-language edition of the Guide, we hope to
significantly advance this goal.

Manuel Pulgar-Vidal
President, AIDA
The American hemisphere was the first region in the world to recognize the human right to a healthy environment in a clear and binding manner through the adoption of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights of 1988 (Protocol of San Salvador). In addition, several States in the region have joined in recognizing this right within their constitutions. Given the obvious relationship between the environment and the protection of human rights, the acknowledgment of this right offered hope that environmental conditions and ultimately the quality of life, would improve for millions of people in the Americas.

Nevertheless, almost two decades since the recognition of the right to a healthy environment, the environmental situation in the region remains far from ideal. Unfortunately, evidence of this is both varied and extensive: ranging from the negative effects of large infrastructure projects on indigenous, Afro-descendant and rural communities in Argentina, Brazil, Colombia, Chile and Paraguay, to the Inuit indigenous communities of Alaska whose survival is threatened by the impacts of climate change on their environment.

This list also includes Central America, where the excessive use of pesticides in banana and pineapple cultivation has severely polluted the soil and water. Such pollution, further aggravated by the lack of adequate control over the use of pesticides and poor waste disposal techniques, has resulted in devastating health effects for thousands of workers and their families. Another important example is air pollution in urban areas such as Mexico City and São Paulo, where rates of respiratory illnesses and other related health effects are much higher compared to those in cities with fewer automobiles and better air quality. The case of *Community of La Oroya v. Peru* characterizes the implications that environmental degradation has on human rights. In La Oroya, the lack of effective regulation over a multi-metal smelter, which operates in the city of La Oroya and emits large quantities of air pollutants, has resulted in not only an environmental problem but also a severe public health problem.

To a large extent, these circumstances arise as many States, in the pursuit of development, do not adequately evaluate the environmental impact that infrastructure, industrial, or mining projects have on people and their environment.

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This situation allows the implementation of such projects to gravely affect the life, physical integrity and health of the population, causing serious short-, medium- and long-term consequences for the countries’ sustainable development. In particular, the victims of these situations are often from systematically disadvantaged or excluded populations, such as indigenous and Afro-descendant communities, children, women, rural populations and the urban poor. In the case of these groups, such irresponsible development further aggravates their already deteriorated living conditions.

The reality in the Americas shows that the recognition of the right to a healthy environment as a human right, in and of itself, is not (and has not been) sufficient to ensure its effective protection. Recognition is just the first step. States must demonstrate a commitment to guarantee, respect and protect this right. They must also implement measures to ensure that new activities to promote development and those that are already underway, do not affect the environment to such a degree that they destroy ecosystems or prevent people from enjoying the conditions of a dignified life.

The recognition of the right to a healthy environment implies the existence of guarantees and access to effective recourses and remedies, before all the branches of the State: legislative, administrative and judicial. However, if these domestic remedies prove ineffective, alternatives exist through international mechanisms that allow the oversight and protection of rights enshrined in international treaties.

In the American hemisphere, the natural alternative is the Inter-American System for the Promotion and Protection of Human Rights (IASHR). Created within the framework of the Organization of American States (OAS), this system has the specific purpose of guaranteeing the enjoyment of the human rights recognized in the American Convention on Human Rights and the other human rights treaties within the System. The oversight mechanisms in the Inter-American System offer an attractive option that has not been sufficiently utilized in cases in which environmental degradation violates human rights.

For this reason, the Inter-American Association for Environmental Defense (AIDA) has decided to publish the following Guide. Our goal is to promote the knowledge of the Inter-American System for the Protection of Human Rights, through a publication that also highlights the legal and strategic elements that can be implemented in human rights violations relating to environmental degradation.

We hope that this publication will be a useful tool for the communities, organizations, lawyers and authorities that deal with these cases from different perspectives. Furthermore, we trust that it will contribute to the effective presentation of cases before the Inter-American System and thus improve the protection of human rights for all people in the Americas.
The Guide: a joint effort and a work in progress

There have been few cases presented before the Inter-American System relating to violations caused by environmental damage and almost all of these involve the rights of indigenous communities.

This limited amount of litigation is not due to a lack of interest, nor to an absence of potential cases. Rather, it is a result, in part, of the lack of knowledge about existing human rights mechanisms on the part of the affected communities, advocates and environmental organizations. It is also due to the failure of human rights lawyers and organizations to recognize the environmental aspects in the cases they are representing, thereby missing the opportunity to apply a more holistic approach to the development of their legal arguments.

In addition, the complexity of situations involving environment degradation, as well as the institutional difficulties many organizations and groups that work with these subjects suffer, have limited the use of international mechanisms for the protection of the environment.

With the goal of overcoming this situation, AIDA and our participating organizations, in conjunction with other groups, organized a series of workshops with environmental and human rights lawyers. The aim of these workshops was to facilitate the sharing of knowledge and experiences related to cases in which environmental degradation implied a violation of human rights. We sought to increase the participants’ understanding of the IASHR and to collaborate in identifying legal strategies that offer effective judicial protection and improve the quality of life for people affected by environmental degradation in the region.

The workshops took place in Panama City, Lima, Mexico City and Buenos Aires, where we were fortunate to gather environmental and human rights lawyers from non-governmental organizations along with officials from the Inter-American Commission on Human Rights. The experience was, without a doubt, very enriching. The presentations from experts, the examination of case studies and the participatory discussions held during the workshops allowed us to explore and resolve doubts with respect to the opportunities and deficiencies of the Inter-American System in addressing cases of human rights violations caused by environmental degradation.

Due to time limitations, the impossibility of reaching all those interested in these topics and the need to further study, advance and disseminate the topics presented in discussion, we decided to prepare this publication.

It is important to mention that the following Guide is not an academic study regarding the Inter-American System. While we discuss these protection mechanisms, we also try to provide practical elements that will contribute to the identification, preparation and submission of cases before the System in which human rights violations are connected to environmental destruction. We hope that environmental and human rights advocates use the issues discussed in this Guide, combined with their experiences in advocacy and a
rigorous case-by-case analysis, to implement successful strategies that serve to develop jurisprudence and further the adequate protection of the rights of individuals and communities.

With this in mind, this Guide is not “written in stone.” It does not claim to be an exhaustive checklist to be followed down to the letter when litigating before the Inter-American System. Nor does it claim to guarantee the success of any individual case. Instead, we suggest to those who consider presenting a petition before the Inter-American Commission that they evaluate the issues discussed herein and that they adapt the strategies and suggestions provided to the necessities of each given situation, with the goal of determining the best options possible.

We also wish to mention that while we designed this publication with an eye toward litigation in the IASHR, the strategies and elements we review are applicable both to domestic litigation and the presentation of cases before other international mechanisms. Domestic judicial systems are the ideal fora for the resolution of controversies and therefore we wish to highlight the importance of utilizing domestic courts as part of a systemized advocacy strategy before presenting claims to international bodies.

We hope that this Guide contributes to strengthening the work of the thousands of people dedicated to human rights and environmental advocacy, particularly those who, from different positions, work defending the rights of people and their surrounding environment.

The need to promote environmental issues in the Inter-American System

Clearly, when domestic courts do not offer adequate solutions, it is necessary to recur to international fora for the effective protection of human rights when they are violated or threatened. The IASHR consists of two distinct organs that guarantee the protection of the rights recognized in the American Convention and other human rights treaties of the System: the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights. Although the jurisprudence of the Inter-American System is extensively developed in regards to the protection of civil and political rights, this is not so for cases related to environmental degradation. Therefore, there exists great potential for developing this area of jurisprudence.

Thus far in the Inter-American System, the majority of the cases related to environmental harm have involved indigenous communities and the defense of their rights and territories. Without discounting the importance of the collective rights of indigenous peoples to their traditional territories and natural resources, there remain a variety of environmental concerns that affect other disadvantaged groups that also require attention.

Among other dire environmental conditions that are rife throughout the hemisphere are those of additional vulnerable groups that equally suffer from
pesticide contamination, the inappropriate implementation of infrastructure projects, the poor management and disposal of waste (both residential and toxic), air pollution in cities, the poor quality and limited availability of water and the lack of control over industries which are often located near poor or disadvantaged communities. These populations require an advance in the jurisprudence of the Inter-American System that will establish clear standards for the protection of the right to a healthy environment for the region.

Such a development will depend in part on the ability of organizations and litigants familiar with the system to present environmental cases in a consistent and strategic manner that can convincingly demonstrate the existence of human rights violations. In addition to this, however, the advancement of jurisprudence in these cases requires that the IASHR be flexible and offer answers to environmental concerns through a gradual recognition that such cases also imply the violation of the human rights of individuals and communities.

Much is left to be done and the work and experience of both human rights and environmental defenders will play a fundamental role in the completion of this task. By developing cases from this dual perspective of human rights and environmental protection, we can contribute to filling the conceptual gaps that presently exist in the Inter-American System.

We address some of these gaps in this publication, including impediments to the direct protection of the right to a healthy environment in the Inter-American System due to the difficulty of proving damages, the complexity of these cases, the multiplicity and indeterminacy of the victims and the collective nature of the damages. We also seek to contribute to the discussion on these issues by offering practical tools that can be applied in the litigation of environmental cases before the IASHR.

Our objective in AIDA is not to encourage the massive litigation of environmental cases before the Inter-American System, but rather to promote the strategic use of this System when the lack of domestic responses necessitates recurring to international mechanisms of protection. With this goal in mind, we seek to motivate paradigmatic and well-founded cases that will both promote the increased protection of individual cases and also help advance the resolution of future environmental cases within the IASHR.

Contents of the Guide

In this Guide we develop the theoretical elements and basic strategies necessary for the litigation of environmental cases from a human rights perspective in the Inter-American System. Chapter 1, developed by Romina Picolotti, Sofia Bordeneave and Daniel Taillant of the Center for Human Rights and Environment (CEDHA) and by AIDA, describes why a case of environmental degradation can be approached as a human rights case, the connections between the perspectives of environmental and human rights and evidence of their close relationship. Additionally, it makes reference to the advantages offered by casework from a comprehensive perspective, with the goal of finding solutions that can respond
better to the needs and circumstances presented in practice.

This chapter also discusses the advantages of exploring new legal avenues in cases that require judicial protection. In this way, advocates can combine the legal actions available through ordinary environmental law with those available in human rights law, which generally offer rapid, albeit temporary, responses when urgent action is required. Furthermore, this would allow principles of environmental law to enrich human rights law and thus provide better solutions to environmental concerns. One such example discussed within is the use of the precautionary principle to avoid irreparable harm to the environment and human rights.

Chapter II, prepared by Fernanda Doz Costa, a lawyer from CEDHA and Astrid Puentes, Co-Director of AIDA, describes the general structure and operation of the IASHR. In this chapter we make an effort to present the most important elements of the System in a concise manner in order to provide our readers with a general overview of how the IASHR operates. It also includes additional reference that readers may consult to reinforce their knowledge. We also discuss the organizational structure of the System, its legal framework and the applicable procedures used by the Inter-American Commission and the Court for the presentation of individual petitions, the publication of thematic and country reports, on-site visits and formal hearings.

Chapter III is a contribution by Víctor Rodríguez, member of the Inter-American Institute of Human Rights (IIHR), who analyzes the jurisprudence of the Inter-American Commission and the Court relevant to the protection of the human rights affected by environmental degradation. Among the highlights of this chapter include a review of the advances in the protection of indigenous peoples’ rights, which connect the rights to property and cultural survival—one of the great developments of the system—and which can serve as precedent for future cases. Another key element discussed in this chapter is the potential for the direct judicial review of the right to a healthy environment in the Inter-American System. To accomplish this, Rodríguez recommends using not only Inter-American Court jurisprudence, but also documents presented by the Commission and other bodies of the system such as the OAS General Assembly. While these documents often recognize the link between human rights and environmental harm, they have not had a great impact on the development of jurisprudence, due in part to the lack of flexibility in the System and also in part to the severely limited number of petitions regarding environmental issues presented before the IASHR.

Chapter IV was prepared by Christian Courtis, with collaborations by Fernanda Doz Costa, both experts in human rights advocacy with a focus on economic, social and cultural rights. As the right to a healthy environment is not directly reviewable in the IASHR, this chapter describes strategies to gain access before the Inter-American Commission by associating environmental damages with the violation of other rights, such as the right to life, physical integrity, health, equality and the access to justice and due process. Given that these cases particularly affect disadvantaged groups—such as women and chil-
Chapter V recommends several practical strategies for advocating cases of environmental degradation as human rights violations. The first part, written by Martin Wagner of Earthjustice and Astrid Puentes of AIDA, describes strategies for selecting and developing cases and discusses the practical criteria that should be used—in addition to legal considerations—in reviewing cases. In this respect, this chapter highlights the importance of proper case selection when petitioning before the Commission, different criteria to consider in the study and evaluation of cases and other additional factors including the legal, political and economic aspects involved in preparing a case. Wagner and Puentes also evaluate different methods of accessing the Inter-American System, including evaluating the appropriateness of presenting an individual petition or a request for precautionary measures. The chapter also includes the prerequisites that each of these procedures demand, with an eye toward litigating cases of violations due to environmental damages.

Human rights violations resulting from environmental degradation present particular factors that lawyers should take into consideration when designing and implementing litigation strategies, preferably prior to presenting an international petition. Wagner and Puentes discuss these factors in the second part of Chapter V, which include the difficulty of identifying victims, different requirements for the exhaustion of internal remedies and additional legal actions that potentially exist under environmental law.

In this respect, it is necessary to evaluate and utilize all available domestic recourses—both administrative and judicial—when advocating for the protection of human and environmental rights, given the potential that these offer for the adequate protection of rights. Moreover, the development of litigation strategies domestically contributes to the strengthening of national legal systems, which is highly needed in Latin America.

Another factor that the final section of Chapter V analyzes involves the complexity of handling evidence in environmental cases and the necessity of translating scientific language to language readily understandable by non-scientists. This is particularly important so that those who are not scientists may study environmental cases in the Commission and Court, understand the implications these cases have on human rights and evaluate available responses. Finally, the chapter analyzes the problems that arise when determining the methods and time frame for repairing damages, while calling attention to the difference that exists between civil and political rights cases and environmental cases.

In the final part of the Guide we present our conclusions and include an appendix with practical reference materials to aid in the preparation of cases and facilitate further research.

We would like to thank those who participated in each one of our workshops,
whose questions, discussions and contributions were essential for the quality of our Guide. This publication was possible due to the active contributions of our participating organizations—CEDARENA, CEDHA, Earthjustice, Ecojustice Canada (previously the Sierra Legal Defence Fund), ECOLEX, FIMA, *Justicia para la Naturaleza* and SPDA—together with the invaluable work of Sofía Bordenave, Christian Courtis, Fernanda Doz Costa, Samantha Namnum, Romina Picolotti, Astrid Puentes, Víctor Rodríguez, Daniel Taillant, Martin Wagner and the collaboration of additional people in different countries of the hemisphere, including María Giménez, Gladys Martínez and María del Pilar Sarria. We appreciate enormously the detailed editing done by Juan Carlos Gutiérrez, professor of human rights in the masters program at the *Universidad Iberoamericana* and FLASCO in Mexico and consultant of the Office of the High Commissioner on Human Rights of the United Nations in Mexico. We are equally indebted to the lawyers at the IIHR, the *Universidad de Costa Rica* Law School and the support group of the environmental law program of UNITAR and in particular to professors Dinah Shelton and Arturo Carrillo, of George Washington University and Francisco Soberón, well-known human rights advocate in Peru, whose contributions in legal and strategic matters contributed significantly to improving this publication.

We hope this publication will contribute to the work of those who confront situations in which adverse environmental conditions violate human rights. The continual use and improvement of the issues presented here will be the best compensation for the work we invested in the preparation of this Guide. Accordingly, we welcome all criticism and comments that may arise from reading this document, which we feel will help to strengthen the struggle to achieve the effective and universal protection of human rights.
Linking Human Rights and the Environment

Environmental degradation has been seen and understood, historically and politically, as a problem that only affects environmental resources or a problem of the “green agenda.” Yet environmental degradation caused by systematic economic activities (both public and private) affects the quality of life of individuals and entire communities. Most commonly, those affected are indigenous groups and/or groups that are marginalized or particularly vulnerable. Generally, environmental deterioration is characterized by continuous effects that multiply over time and transcend the extent of the original harm, in turn infringing upon multiple human, collective and individual rights.

Nevertheless, these issues and the link between environmental degradation and its impacts on the social sphere (and, more precisely, its link with the violation of individual and communal rights) have yet to be sufficiently studied.

The first section of this chapter describes the principal reasons for this disassociation between human rights and the environment. Later sections will examine why and how these two issues should be understood as interrelated and intimately connected. In this chapter and in greater detail in the rest of this publication, we will explain the linkage between our societies and the environment. We will also explore how victims of environmental degradation and their advocates can utilize more effective mechanisms that provide better access to justice and increase the chances that their rights will be protected.

The first reason for this disassociation is that environmental, conservationist or “green” issues are treated by specialized political and technical State agencies and are disassociated from the law. They are seen as outside the general competency of judicial bodies and disconnected from the remedies usually afforded to individuals in states of emergency, such as those related to health, physical integrity and personal safety. “The environment” as an issue

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*This chapter was written by Fernanda Romina Picolotti and Sofía Bordenave, with contributions from Jorge Daniel Taillant from the Center for Human Rights and Environment (CEDHA) and the Interamerican Association for Environmental Defense (AIDA).

†In October 2002, CEDHA presented a report to the Inter-American Commission on Human Rights, gathering together cases to establish analytical bases for the relationship between human rights and the environment. The present section about types of infringements of rights was taken from this document. Sofía Bordenave & Romina Picolotti, *Informe sobre derechos humanos y ambiente en América* [Report on Human Rights and the Environment in the Americas] (Ctr. for Human Rights and Env’t., 2002).
is constantly relegated to a low-priority position on the political agenda and judicial institutions rarely examine this issue as they would the protection of other rights of individuals and communities. In addition, few countries have legal practitioners sufficiently qualified in environmental matters to be able to establish the links between these issues and their impact on human rights. All these factors have clearly affected the level of environmental protection in the Americas.

Yet another reason is the lack of systematized information about these types of cases. This is most likely due to the fact that only recently have organizations begun to incorporate the human rights and environment perspective into their work. Even today, most cases are brought solely as human rights or as environmental cases, but rarely as both. Yet for these types of cases, efforts to integrate the two spheres are essential in order to find solutions that more closely address the reality of environmental degradation in the hemisphere.

A third reason for the disassociation of environmental and human rights issues is the fact that States commonly address environmental and social issues as two separate realms. This not only produces discrepancies in their political and scientific agendas, but also a physical separation of both personnel and budgets, such that environmental issues and social or human rights issues are generally isolated from each other. This also explains why the solutions to the problems of one issue, such as judicial protection mechanisms, rarely incorporate elements and dynamics of the other, despite their clear potential to complement each other.

Several legal systems are gradually starting to incorporate a human rights and environment perspective—as evidenced by the numerous domestic constitutions and laws establishing the right to a healthy environment as an individual and collective right. However, this development has yet to translate into effective systems and mechanisms that guarantee the human rights of those affected by environmental degradation. The challenge, then, is to turn this recognition of the human right to a healthy environment into a reality.

Though concrete advances towards the linkage of human rights and the environment may have occurred recently, they are based on declarations and international treaties that have been emerging for decades. International environmental law has been gradually developing, starting with important declarations like those from the United Nations Conference on the Human Environment in Stockholm in 1972. Then followed various multilateral environmental agreements of the 1980s and 1990s created in response to the increasingly severe destruction of natural resources. Consequently, there is currently a long list of international legal instruments that state or imply the link between the “green agenda” (the environment) and human rights.

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For example, in Latin America and the Caribbean, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela all establish this right in their constitutions or at least make reference to a State obligation to care for and protect the environment.
Regrettably, many of these advances in international law have been dependent on the goodwill of State authorities and their implementation is susceptible to the prioritization and political pressures of national governments. The creation and application of effective international enforcement mechanisms is thus a prerequisite for increasing the effectiveness of these agreements.

In contrast, in some instances environmental law has improved access to domestic mechanisms of justice. Nevertheless, these mechanisms do not always address the special characteristics of environmental harm and thus do not effectively lead to comprehensive remedies for a given situation. This is yet another aspect that needs strengthening through the development of the link between human rights and the environment.

The development of international human rights law, when compared to environmental law, exhibits results that are quite different and more promising with respect to effective mechanisms of protection. Civil and political rights, although generally not recognized by repressive governments, have advanced significantly in terms of justiciability. International and domestic legal mechanisms were created permitting individuals to take a State to court and demand that it fulfill its obligations to protect the rights enshrined in human rights treaties. Under this system, the State and respective judicial actors (judges, attorneys and public prosecutors) have recognized and promoted the implementation of human rights and local tribunals generally have responded favorably to this prioritization. Such a developed system is needed for cases in which environmental degradation is so severe that it compromises other human rights.

**A. Significance of the Human Rights-Environment Link and Strategies for Making it a Reality**

The link between human rights and environmental protection is not simply a strategy for organizations to appear before international tribunals or enjoy more legal options for their cases. The relationship between human rights and the environment entails a realistic reevaluation of sociopolitical issues and the adoption of a holistic perspective on the living conditions of most societies in the Americas. This perspective views our society and its surroundings as an interrelated system, not as independent parts.

The integration of these visions is definitive and follows an ideal of dignity and justice in society, given that it is not possible to attain these ideals in an environment that does not offer adequate living conditions for the individual. In this sense, the undeniable problems of poverty and inequality that affect all of Latin America and the world demonstrate the importance of adequately protecting economic, social and cultural rights (ESCR)—and not only civil and political rights—as ESCR are affected by issues that are endemic not only to totalitarian or abusive regimes. Factors such as poverty, water pollution, unsanitary living conditions, the latent exposure to dangerous wastes, untreated wastewater and air pollution all seriously affect the
quality of human life, yet remain systematically present in the lives of millions of persons on the continent.

Taking on this vision of human rights tied intimately to the environment implies, above all else, the adoption of a new perspective on these social conflicts: a unified outlook that draws from the law and reality, with the goal of finding more comprehensive solutions. As an example, one would adopt through environmental issues an ecological vision that encourages thinking about our surroundings in terms of processes and systems, wherein each element that affects human beings and each domain of our lives (economic, political, social, cultural, environmental, etc.) is important and implies rights and duties.

The duty to respect the rights of future generations also plays a fundamental role in this analysis. The environment and environmental change operate under a timeframe that could easily exceed the lifetime of a single person and thus could affect many generations. Rather than pursuing immediate and urgent actions—generally associated with the demands of civil and political human rights—it is essential to seek mid- to long-term solutions in the struggle for better environmental management. This does not mean disregarding the implementation of urgent measures to avoid irreparable harms when situations exist that threaten life, health, or personal safety, for example. In these situations, one could equally implement either the measures of environmental law or those established in human rights law, depending on the suitability of the available mechanisms. Nevertheless, actions taken to prevent mid- to long-term violations of human rights from environmental harms could reduce or even prevent the occurrence of those types of emergency situations.

This vision integrating human rights and the environment is not only necessary but also useful. First, the incorporation of environmental issues strengthens human rights laws as they allow for the application of new legal principles and extend the scope of human rights guarantees to equally important areas that previously went ignored or neglected. It also allows for the more effective protection of human beings, generates preventative and remedial solutions for future harms and establishes policies and legal mechanisms to ensure the enjoyment of the right to a high-quality environment.3

Second, human rights law can introduce essential principles into environmental law such as non-discrimination, progressive development, the need for public participation and access to information,4 and the protection of vulnerable groups. The application of these and other principles can enrich the search for solutions to environmental problems.

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4 In this sense, promoting and pressuring governments to produce regular reports about the state of the environment, statistics, national or regional reports and reports on international obligations will help to advance public access to information. NGOs can produce alternative reports that call attention to different or divergent information concerning a specific subject matter, if necessary.
For environmental advocates to begin using these tools in their daily practice, they must first begin to familiarize themselves with human rights concepts. The discourse used to present a problem defines the perspectives from which the problem is seen. Thus, one of the fundamental steps in establishing the link between human rights and the environment is to start applying the language of human rights to environmental issues and causes. The translation of certain environmental conflicts into human rights terms allows, among other things, the determination of just how these norms should be applied and makes possible the conceptualization, empowerment and prioritization of affected victims.5

The intersection of human rights and the environment also provides new conceptual tools that permit a better understanding of the problems faced and, consequently, creates more effective responses to these problems. This link has created, for example, the category of environmental refugees, a term that unites both a human rights concept, generally associated with military conflicts and also the environmental issue that caused the exile or forced displacement. This category allows for the understanding and discussion of victims of environmental catastrophes who, like refugees from war-torn areas, must abandon their homelands, relinquish their communities and be in a state of defenselessness.

The concept of environmental defenders is another category that arises from the linkage of these two aspects. They resemble traditional human rights defenders in that they can at times suffer the same types of persecution and danger from their work to denounce violations of rights. The link between environmental issues and human rights thus provides effective responses for these types of situations.

B. Links between Human Rights Law and Environmental Law

Having reviewed the factual link between the enjoyment of human rights and the quality of the environment, we still must investigate this relationship from the point of view of the law. Of course, such investigation is not merely theoretical; on the contrary, it involves conceptualizing tangible legal connections that could reciprocally strengthen the possibilities for the protection of the environment and human rights. The effectiveness of this integration depends in large part on the clear identification of these links.

First, the existence of international human rights law and the duty of all States to respect, promote and protect human rights are both evident and

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5 The current high-degree of reception to human rights discourse allows for complaints of environmental degradation that also allege that human rights violations have a larger impact in society.
clearly recognized as essential and integral elements of the United Nations.\(^6\) In regards to other areas of law, human rights are hierarchically superior to other treaties or conventions, which cannot derogate the essence of human rights norms, especially those considered *jus cogens* (preemptive international law). This is so thanks to the express recognition by States once they sign the United Nations Charter,\(^7\) as well as the systematic and repeated custom of States being subject to these obligations.

In addition to this, there are regional systems, such as the Organization of American States (OAS), which provides protection for the human rights enshrined in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. The Inter-American Commission on Human Rights (IACHR) oversees compliance with the Declaration and Convention and applies different procedures depending on the status of ratification of a particular State, as will be explained in the following chapter.

The affinity between human rights law and environmental law is such that the predominance of human rights law does not imply, at least in a majority of cases, a conflict with environmental law, but rather complements it. The basic point connecting these two arenas is the recognition of the right to a healthy environment as a human right. Though this right still lacks content and has not been interpreted at the international level, it will be this complementary relationship of these two areas of law and not one of dominance or separateness, that will have the greatest impact and be most effective at the practical level.

Human rights law’s express recognition of the existence of the human right to a healthy environment\(^8\) reaffirms and strengthens our conclusion with respect to the linkage of these two areas. It has further important consequences, such as the incorporation of environmental issues into the normative system of human rights, allowing for environmental issues to be viewed through this new set of norms. As a result, environmental law could incorporate the principles of rights, including the possibility of direct judicial enforcement.\(^9\)

This is better understood if we examine the characteristics of environmental regulations that can also serve as a basis for complementing these two areas

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\(^7\) The Charter of the United Nations makes reference to human rights in various articles. Article 1, Paragraph 3 mentions that one of the purposes of the organization is “[t]o achieve international co-operation in . . . promoting and encouraging respect for human rights and for fundamental freedoms.” U.N. Charter art. 1, para. 3. The Preamble also states that “[w]e the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights . . . .” U.N. Charter pmbl.


\(^9\) See Chapter IV for a further discussion about the possible enforcement of the right to a healthy environment within the Inter-American System of Human Rights.
of law. In effect, environmental laws regulate elements that already relate to the exercise of fundamental rights. This happens in cases concerning the right to participation and information in environmental issues, or the special protection of vulnerable groups like indigenous or Afro-descendant communities. This situation implies that those specific norms could also be considered human rights norms, thereby opening new areas of doctrine that will, in practice, reinforce the double protection of human rights and the environment.

C. State Obligations Regarding Human Rights and Special Considerations in Environmental Cases

We have already analyzed the foundation of the relationship between environmental law and human rights law. Now we must consider how this connection can be manifested and what its potential consequences are, in an effort to visualize the effects of this linkage in the protection of rights.

This situation also entails an adjustment of the way in which the obligations derived from the respective legal mandates should be satisfied. In other words, this legal juxtaposition affects not only environmental issues (giving them a broader legal framework), but also objective rights (adapting them to the reality of the situation and to other norms that affect them). In the end, the decision of which law to apply to a specific case will depend on a comprehensive interpretation of both areas and the evaluation of which law would result in the greater protection of individuals and their rights.

Now we must pose the opposite question: how do environmental cases affect the way States comply with their human rights obligations? To help answer this, we will first set forth what these obligations are and then how they can be adjusted for environmental cases.

◆ As per Article 29 of the American Convention on Human Rights, an environmental regulation cannot affect a human right in such a way that produces a standard of protection weaker than there would be if the regulation did not exist. Thus, human rights law is a “floor” above which environmental regulations could strengthen the protection of those rights, but never restrict or diminish them.

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10 “Human rights norms” are understood as the legal norms regulating the exercise of fundamental rights. The Inter-American Court of Human Rights has stated that an adequate interpretation of Article 64 of the American Convention on Human Rights allows for the existence of “international human rights norms” within a certain body of law whose principle objective is not the protection of these rights. See Advisory Opinion OC-1/82, “Other Treaties” Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), 1982 Inter-Am. Ct. H.R. (Ser. A) No. 1, ¶ 34 and Resolution 1 (Sept. 24, 1982).
First of all, “the safeguard of the individual in the face of the arbitrary exercise of the power of the State is the primary purpose of the international protection of human rights.”11 This is likewise the fundamental obligation of the State: to guarantee the enjoyment of recognized rights. This is a guarantee that no person under the State’s jurisdiction finds him- or herself deprived of those elements that respective legal instruments recognize as essential to human dignity (life, health, healthy environment, housing, etc.).12 In addition, this obligation establishes limits to the exercise of power, both for actions and omissions, since States must not only avoid infringing upon these rights, but also actively try to secure them. Such goals should be the ultimate objective of any State action.

Of course, the State actions necessary to achieve this task will vary according to circumstances. Nevertheless, each State has a duty “to organize the governmental apparatus and, in general, all the structures through which public power is exercised”13 in order to fulfill these obligations. This entails the obligation that the organization and use of State power should not itself be harmful to these rights, but rather should seek to guarantee their enjoyment.

Under this set of ideas, there exists both the obligation to abstain and to respect.14 This first obligation refers to the duty to avoid harming a right. The latter is an obligation to take positive actions to allow the enjoyment of a right, generically labeled as an obligation to “guarantee.”15 This duty to guarantee rights can be subdivided according to whether the State action directly or indirectly effectuates the right; that is, if the action is taken to prevent third parties...
from interfering in the enjoyment of a person’s rights, or rather if the action is taken to actively seek the fulfillment of the required right. This creates the obligations to guarantee and adopt measures, or more precisely, to protect and fulfill.

This obligation to fulfill consists of the duty to “adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right” in question. In turn, this can be further divided into three sub-categories: to facilitate, to provide and to promote. The obligation to facilitate requires States to adopt positive measures that enable individuals and communities to enjoy their rights by strengthening “people’s access to and utilization of resources and means to ensure their livelihood.” The obligation to provide implies that whenever an individual or group is unable, for reasons beyond their control, to enjoy a right, the State must fulfill that right directly. Finally, the obligation to promote requires States to take actions, when necessary, to create, maintain and restore the adequate enjoyment and exercise of a right.

As stated in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, “the obligations to respect, protect and fulfill each contain elements of obligation of conduct and obligation of result,” which must be undertaken immediately or shortly after the coming into force of the treaty that recognizes the obligation. This obligation also requires a State to act or refrain from acting, depending on whether the desired result requires State action or not.

Evidently, to comply satisfactorily with the aforementioned obligations—as well as with others that we will introduce later—States must supply themselves with information about the different factual and legal situations that concern and affect the enjoyment of rights. This in itself is another obligation: to monitor the realization of rights in a consistent manner such that the State is “thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction.”

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16 UNCESCR, General Comment No. 14: The right to the highest attainable standard of health, supra note 12, ¶ 33.
17 Id. ¶ 37.
18 UNCESCR, General Comment No. 12: The right to adequate food (Art. 11), supra note 12, ¶ 15.
19 See id.
20 UNCESCR, General Comment No. 14: The right to the highest attainable standard of health, supra note 12, ¶ 37. These actions can be varied: support investigations, disseminate information, adopt educational measures, etc.
22 The obligation to “respect” is typically that of non-action, although this does not mean positive action is required (e.g., statutory sanctions that restrict the discretion of the police force to detain persons). However, a State cannot relieve itself of responsibility by simply alleging that it is doing something; State responsibility is automatically generated by the infringement of a right by actions attributable to the State. On the other hand, the obligations to “protect” and “fulfill” are usually those of taking positive actions.
The obligations we present here are in abstract or general terms because their fulfillment is not dependent on any special condition, but rather is required by mere membership in the international community. These general obligations are expressed differently depending on the situation and right in question, giving rise to specific or concrete obligations. In turn, all of these duties complement the obligations of all other rights. In contrast with the previous obligations, we may label these as conditional duties, given that they depend on a given fact pattern. We will further analyze these other concrete human rights obligations in the next chapter. The responsibility of States with regard to cases in which human rights are violated by environmental degradation will be discussed in detail in Chapter IV.

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25 See, e.g., UNCESCR, General Comment No. 13: The right to education (Art. 13), supra note 12, ¶ 49 et seq.; UNCESCR, General Comment No. 14: The right to the highest attainable standard of health, supra note 12, ¶ 34 et seq.

26 In this sense, these are general obligations.

27 For example, the obligation to “adopt internal legislation” becomes abstract the moment that it is compatible with international human rights law. However, since this is nothing more than a manifestation of the obligations to “respect,” “protect,” and “fulfill,” it remains latent, regaining legal relevance once, for example, legislation that is not in accordance with international law is sanctioned. Obviously, this distinction between “simple” and “conditional” is conceptual: the conditions needed for the execution of these conditional obligations present themselves daily and in practically all of the nations of the world.
This chapter describes the link between the environment and human rights and the difficulties and challenges presented by this holistic and systematic vision of socio-environmental issues. It also presents the advantages of uniting these two branches of law, which have evolved separately, in order to achieve more effective and real protections. This strategy is relevant in that it allows for the synthesis and strengthening of the mechanisms that protect people from the risks and real impacts brought about by environmental degradation.

We have sought to demonstrate how human rights law, with its basis in international and national norms and jurisprudence, can be applied to environmental cases. The uniting of these two branches offers a potentially strong tool to defend a range of rights broader than that which courts typically address. More than just a solution, this linkage offers a new opportunity and a new way of thinking about litigation and the protection of persons affected by environmental degradation.

It is important to remember that the deterioration of the environment affects both individual and collective rights and implies State responsibility for human rights violations domestically and internationally. This responsibility applies not only to the actions or omissions of the executive branch of a government, but also to those of the judicial and legislative branches.

Finally, we must reiterate the importance that environmental and social issues (including human rights) be understood as interrelated and intimately connected and that the laws and legal mechanisms available for one can and should be used to strengthen those of the other. This perspective will effectively contribute to the achievement of new, heightened protections of all human rights, including environmental rights.
The Inter-American System for the Protection of Human Rights*

This chapter describes in general terms the structure and operation of the Inter-American System of Human Rights (IASHR). It is written as a general guide for readers of this publication, especially environmental lawyers who may not be very familiar with international human rights defense mechanisms. Understanding the Inter-American System will provide a better grasp and therefore a more effective use, of the rest of the material in this publication. For more in-depth information on the Inter-American System’s operation and the themes described here, please refer to the legal framework outlined below, as well as the existing jurisprudence and doctrine.

Since its creation, the Organization of the American States (OAS) has agreed that one of its main objectives is the protection of human rights. It has advanced this commitment through a variety of instruments, including the American Declaration of the Rights and Duties of Man (1948), the American Convention on Human Rights (1969) and the Additional Protocol of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988). The Inter-American Commission on Human Rights (IACHR; 1959) and Inter-American Court of Human Rights (1969) were created as part of the System in order to ensure compliance with the obligations made by countries in the Americas.

The function of the IACHR is to promote respect for human rights and to act as an advisory body to the OAS on this subject. In carrying out its func-

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* This chapter was written by Fernanda Doz Costa and Astrid Puentes, lawyers for CEDHA and AIDA, respectively.

1 Charter of the Organization of American States, Apr. 30, 1948, Preamble, OEA/Ser.GCP/INF.3964/96 rev. 1, 1 (“Confident that the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent... of a system of individual liberty and social justice based on respect for the essential rights of man.”).


tions, the IACHR, located in Washington, DC, evaluates and investigates petitions alleging violations of human rights and submits reports on the human rights situation in Member States of the OAS. The IACHR consists of seven Commissioners who are elected from a list of candidates presented by Member States. These Commissioners work in their personal capacity and do not represent their individual governments.

In order to strengthen human rights protection in the region, the American Convention on Human Rights created the Inter-American Court of Human Rights, located in San José, Costa Rica. The Court is an autonomous institution with primarily advisory and judicial functions. It consists of seven judges whose objective is the application and interpretation of the American Convention. For a case to be brought before the Court, the Member State against whom the case is brought must have explicitly recognized the Court’s jurisdiction. To date, 22 out of 35 OAS Member States have done so.

In accordance with its judicial function, the Court reviews cases of human rights violations presented either by Member States of the American Convention or by the IACHR. The Court determines if there have been any violations of the American Convention and if so, issues a judgment regarding the State’s responsibility and establishes appropriate reparations. In its advisory function, the Member States and bodies of the OAS may request from the Court an interpretation of the American Convention or other treaties with respect to the protection of human rights in the American States.

A Legal Framework of the IASHR

There are two principal legal frameworks in the Americas for the protection of human rights, the application of which varies depending on the treaties that the States have ratified within the OAS. The first framework includes OAS principles for the respect of human rights that are required of all Member States, pursuant to the obligations set forth in the OAS Charter and the American Declaration. The second, based on the American Convention, is more complete
and extensive in its protection mechanisms and only applies to States that have ratified the treaty. This second framework is more effective when the State in question has recognized the jurisdiction of the Inter-American Court and even more so if the State is a party to the additional protocols of the American Convention or to the other human rights treaties in the System.13

We briefly describe each of these instruments below in order to provide context for the legal framework applicable to human rights cases in the Americas. Then, we will outline the various procedures and available options for cases involving environmental harm that also violates human rights.

1. The OAS Charter
The OAS Charter is an international treaty ratified by 35 American States14 whose principal objective is to “achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration and to defend their sovereignty, their territorial integrity and their independence.”15 By the same token, the Charter establishes general obligations between States as well as the principles that govern the OAS and other principles that ideally should be guaranteed to all citizens in the hemisphere.

It is important to point out that the articles provided in the Charter, including those related to economic, social and cultural matters, form a body of law that cannot be directly reviewed by international tribunals, although it can contribute to the interpretation of those obligations and rights that it describes. As such, the Charter’s value is merely interpretive. The first international instruments in the OAS to fully recognize human rights were the American Declaration and the American Convention, which we discuss below in addition to other treaties.

2. American Declaration of the Rights and Duties of Man
The American Declaration of the Rights and Duties of Man (hereinafter the Declaration) was adopted at the same time as the OAS Charter and details the human rights applicable to all people. Given that it was not adopted in the form of an international treaty, its content is not binding in and of itself.16

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14 The States that have ratified the Charter of the OAS are Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela.
15 Charter of the Organization of American States, supra note 1, art. 1.
16 FAÚNDEZ LEDESMA, supra note 11, at 32.
Nonetheless, this does not mean that the rights it contains are merely recommendations, as “many of the rights enshrined have the character of international custom.” In addition, all States should respect the human rights recognized in the Declaration without regard to their political organization (federal or centralized), as the existence of a federal system is no excuse for failing to comply with international obligations.

3. The American Convention on Human Rights

The American Convention on Human Rights (hereinafter the Convention) has been ratified by 25 of the 35 Member States of the OAS, thereby committing them to respect and protect the rights contained therein. The Convention significantly strengthens the protection of human rights in the Americas through the regulation of more than a dozen rights enshrined in its 82 articles. In addition, it establishes a dual structure within the OAS, divided between States that have ratified the American Convention and those that have not.

The American Convention was greatly influenced by the European Convention on Human Rights, the American Declaration and also the International Covenant on Civil and Political Rights, although some of the articles of the American Convention provide more ample protection than those of its predecessors. Among the most important developments worth highlighting in the Convention are the legally binding nature of the human rights and obligations contained therein, the requirement that States not violate the rights of

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19. The following States have ratified the American Convention on Human Rights: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela, available at: http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm.
individuals and the obligation to adopt necessary and reasonable measures to protect the free exercise of individual rights.20

Despite progress in the recognition of civil and political rights, the same did not occur with economic, social and cultural rights or with solidarity rights, including the right to a healthy environment. The incorporation of these rights in the Convention is limited to a generic mention in Article 26 related to the progressive development of ESCR. Specifically, this Article states:

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.21

The possibility for the direct enforcement of ESCR by the IACHR is only available through Article 19(6) of the Additional Protocol of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, which only covers the right to education and trade union association. As such, the justiciability of these rights, including the right to a healthy environment, must be achieved by presenting such violations in connection with directly enforceable rights (e.g. the right to life) and through the development of case law to expand the content of those rights. The guide describes this strategy in Chapters IV and V.


4. Protocol of San Salvador

Given the sparse treatment of economic, social and cultural rights in the American Convention, in 1988 several States of the OAS signed the Protocol of San Salvador. The Protocol entered into force ten years later and, to date, nineteen States have signed it, fourteen of which have also ratified it. The importance of the Protocol is undeniable, as it “represented the pinnacle of a global awareness for the American continent, parallel to similar progress within the sphere of the United Nations and the European system, in favor of more effective procedures for the international protection of economic, social and cultural rights.” This progress was critical for environmental matters, as the Protocol expressly recognizes the right to a healthy environment (Article 11), thus establishing itself as the first international instrument to do so.

Although the recognition of ESCR did represent important progress, there is need for further development in their effective enforcement and justiciability. In fact, as was previously mentioned, the Protocol only recognizes the possibility of direct enforcement by individual petition for trade union rights (Article 8) and the right to education (Article 13). The rest of the rights in the Protocol, including the right to a healthy environment, presently are only directly enforceable by arguing them in connection with other rights recognized in the American Convention or other treaties in the system, as described further below.

5. Other Instruments of the Inter-American System and International Treaties

In addition to the American Convention and Declaration, the Inter-American System contains other treaties and instruments on a variety of matters and

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Article 11.
Right to a Healthy Environment

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.

2. The States Parties shall promote the protection, preservation and improvement of the environment.
whose obligations are directly enforceable against the States that have ratified them. These treaties include the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on the Forced Disappearance of Persons, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women and the Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities.26 These regional instruments serve not only to place concrete, binding obligations on States, but also as interpretive tools to expand the content of the rights included in the American Convention and Declaration.

At the same time, petitioners litigating before the Inter-American System can refer to the texts and interpretations of the universal system of human rights, namely: the Universal Declaration of Human Rights,27 the International Covenant on Civil and Political Rights and its optional protocols, the International Covenant on Economic, Social and Cultural Rights,28 as well as the general declarations made by the bodies that enforce these treaties. Other treaties that are relevant and which protect specific, vulnerable groups include the Convention on the Rights of the Child,29 the Convention on the Elimination of All Forms of Discrimination Against Women,30 the International Convention on the Protection of All Migrant Workers and Members of their Families and the conventions of the International Labor Organization (such as Convention 169, which recognizes rights for indigenous and tribal peoples).31

Through its jurisprudence, the Inter-American System has established itself as an evolving system, in which its rights and norms should be interpreted in accordance with its greater legal context at the moment of interpretation. As a result, in addition to other conventions in the Inter-American system, the Commission and the Court can apply the full body of international human rights law to concrete cases. Therefore, the treaties and conventions mentioned above, together with others related to environmental protection, can be highly useful in advancing human rights protections in cases of environmental damage. We develop this strategy more thoroughly in Chapter 5, in the section dealing with litigation strategies.

26 The texts of these documents can be found at: Basic Documents Pertaining to Human Rights in the Inter-American System, supra note 2.
6. Jurisprudence of the Inter-American Court and Inter-American Commission on Human Rights

Finally, the legal framework and the content of the rights established in the Inter-American System develop and evolve thanks to the case law produced by its organs. The decisions of the Inter-American Court, either from their holdings in contentious cases or from their Advisory Opinions, hold particular weight in this sense.

The Court can emit Advisory Opinions when States or other organs of the OAS request an interpretation of the legal framework of the Inter-American System. The Court has also determined that Advisory Opinions “have undeniable legal effects” for all Member States as well as the other organs of the OAS, thereby creating another mechanism for the development of the Court’s jurisprudence.

With respect to the Commission, its resolutions and publications are also important sources for legal interpretation and should be used readily in litigating cases. The reports and recommendations that the Commission prepares do not only apply to the cases and countries under analysis, but also constitute important elements for the development of jurisprudence in the Inter-American System. In this respect, the Commission contributes effectively to the constant evolution and interpretation of the human rights in the Inter-American System.

Applicable procedures for actions before the Court and the Commission are established in the Statutes and Rules of Procedure of each of these bodies. These rules have in turn been fleshed out and clarified through the jurisprudence of the respective body.

B. OPTIONS FOR ACCESSING THE IASHR

The Inter-American System of Human Rights may be engaged in a variety of ways, depending essentially on two factors: (1) whether the State has ratified the Convention; and (2) whether it has recognized the jurisdiction of the Inter-American Court and Commission. In this sense, it is important to clarify that to gain access to the Inter-American System, a plaintiff (the “petitioner”) must first present an individual petition to the Inter-American Commission. Alternatively, a Member State that has recognized the competence of the Commission may present a communication before that body to initiate a case.

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33 Alternatively, a Member State that has recognized the competence of the Commission may present a communication before that body to initiate a case.
rights in a particular State or even in regional matters, it is possible to ask the Commission to conduct special hearings, carry out on-site investigations and/or prepare special reports. Finally, the Commission prepares an annual report for the General Assembly of the OAS evaluating the regional human rights situation which may refer to both general and individual situations.

When an friendly solution has not been reached in a contentious case before the Commission, or if the Commission finds a State responsible for violations and that it has not implemented the Commission’s recommendations, the Commission has two options. First, it may publish a report on the case in the annual OAS report, or it may submit the case to the Inter-American Court, provided that the State has recognized the Court’s jurisdiction. In the latter case, the Court must review the case, make a determination of the State’s responsibility or lack thereof and, when appropriate, order remedies for damages caused.

Below, we briefly describe a variety of approaches to engage the Inter-American System and the relevant procedure of each one. It is worth reiterating that this is not a detailed analysis of the operation of the Inter-American System, which would exceed the scope of this publication. Instead, we provide a general overview of the System’s procedures to create a basis for understanding future chapters in this guide and the strategic litigation of environmental cases from the human rights perspective.

1. Individual Petitions

The American Convention and Statutes and Rules of Procedure of the IA-CHR and Court regulate the procedures for reviewing individual petitions in the System. In this section we first analyze the requirements for the admission of a petition, followed by an overview of the stages in the process.

Legal Standing

For the violation of any of the rights established in the American Declaration and Convention, as well as for select rights in other inter-American human rights treaties:

Any person or group of persons, or any nongovernmental entity legally recognized in one or more Member States of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

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35 American Convention on Human Rights, supra note 3, art. 44; see also Rules of Procedure of the Inter-American Commission on Human Rights, art. 23, revised Nov. 13, 2009.
Therefore, the standing doctrine for individual petitions is quite broad, allowing for the direct representation of victims of presumed human rights violations or through a third-party representative, who could be designated in the petition or in a separate document. The entity presenting the petition is referred to as the “petitioner,” and the person or group who has suffered or is suffering a human rights violation is the “presumed victim.” If the victim presents the petition directly, these will be one and the same. Petitions can also be initiated by the Commission on its own motion if it considers that a case meets the requirements to do so.36

While legal standing in the Inter-American System is broad, a petition can only be made on behalf of natural persons. The System has been created to protect human rights whose beneficiaries can only be human beings.37 Therefore, a legal entity, such as a company or an NGO, cannot be a victim before the System, although individual members can be victims if they have had their rights violated. This requirement differentiates the Inter-American System from the European System of Human Rights, where legal entities do have legal standing and can request direct protection of their rights.38

With respect to victims, it is worth clarifying that there are no additional restrictions to standing with regard to the age, nationality or citizenship status. The only condition is that they have suffered violations of rights enshrined in the American Convention for which one of the Member States of the OAS is responsible.

Another essential requirement for presenting a petition is the individualization of victims. Both the Commission and the Court have determined clearly that to engage the protection of the Inter-American System, it is necessary to identify the victims, although in some cases their identity may be concealed from the State for reasons of security. In the case of groups of persons, ideally each victim should be individually identified. However, when this is not possible, the victims must be “identifiable,” or rather, there must exist at least the possibility of identifying them. For this reason it is often not feasible to present individual petitions in the name of very large or diffuse groups of people.39

36 Id. art. 24.
37 American Convention on Human Rights, supra note 3, art. 1.2 (“For the purposes of this Convention, ‘person’ means every human being.”).
39 See, e.g., Community of San Mateo de Huanchor and its Members v. Peru, Case 504/03, Report No. 69/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1, ¶ 42 (2004); Inter-American Court of Human Rights, Provisional Measures, Matter of Pueblo Indígena de Sarayaku regarding Ecuador, Consideration 9 (July 6, 2004); Inter-American Court of Human Rights, Provisional Measures, Matter of Pueblo Indígena de Kankuamo regarding Colombia, Consideration 9 (July 5, 2004); Inter-American Court of Human Rights, Provisional Measures, Matter of the Communities of Jiguamiandó and Curbaradó regarding Colombia, Consideration ¶ 9 (Mar. 6, 2003); International Court of Human Rights, Provisional Measures, Matter of the Peace Community of San José de Apartadó regarding Colombia, Consideration 8 (June 18, 2002).
In addition, States can also present complaints of human rights violations carried out by other States. These complaints are called “communications” and proceed only if the State against whom the complaint is filed has specifically recognized the competency of the Commission for this kind of communication. If the State has not recognized this general jurisdiction, the Commission will notify the State against whom the claim was made, giving it the opportunity to recognize the jurisdiction for the investigation of the particular case that is the object of the communication. Once jurisdiction has been accepted, communications follow the same procedure before the Commission as individual petitions.

Personal Jurisdiction

Only the Member States of the OAS can be sued before the Inter-American System. As was previously mentioned, this system was created as a supra-national body to protect individuals from violations committed by their own States. As such, neither individuals nor companies nor private organizations can be sued before the Inter-American System. The petition must always be brought against a State.

This does not imply that only States violate human rights or that the actions of individuals and companies do not have repercussions for the enjoyment and exercise of those rights, especially with regard to environmental impacts. However, before the Inter-American System, only States can be held legally accountable for the actions or omissions that cause these violations. Therefore, if an individual, company or other actor is directly responsible for violations of human rights, a petitioner must demonstrate the existence of collaboration, tolerance or acquiescence of State agents in the commission of the deed, or that the State failed to carry out its obligations to control the responsible parties.

In all cases, the procedure for individual petitions begins with the Commission. After completing the process, if the Commission finds that the State has not adequately repaired the violation, the Commission may submit the case before the Court, granted that the State against whom the claim has been made has recognized the Court’s jurisdiction. If the State has not recognized the Court’s jurisdiction, the process ends before the IACHR with the publication of a final report (Article 51 report), which includes the IACHR’s conclusions regarding the claim presented and recommendations to the State in question.

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40 American Convention on Human Rights, supra note 3, art. 45.
41 Id.; see also FAÚNDEZ LEDENA, supra note 11, at 368.
42 American Convention on Human Rights, supra note 3, arts. 46-51.
a) Requirements for the Presentation and Admissibility of Petitions

I. HUMAN RIGHTS PROTECTED

The central requirement for individual petitions is the identification of an enforceable human right which may have been violated by the State and which is recognized in the American Convention, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, or one of the other Inter-American treaties. These treaties include the Additional Protocol of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on the Forced Disappearance of Persons, and the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women. The State against whom the petition has been made must have ratified the relevant treaty; otherwise the obligations are not reviewable by the Commission or Court.

In any case, the human rights enshrined in the American Declaration and the obligations of the OAS Charter are binding on States Parties by virtue of being member of the OAS. As such, even if a State has not ratified the American Convention or other treaties of the Inter-American System, individual petitions may be brought before the IACHR based on the American Declaration and Charter.

II. FORMAL REQUIREMENTS

An individual’s petition must contain all of the information deemed necessary for the Commission to review and investigate the its allegations. If any of these requirements is missing, the Commission may ask the petitioner to provide clarifications or additional information. If this is not done or is impossible, the Commission will declare the petition inadmissible and reject it.

In addition, in order to adequately document and support a case, litigants should submit all available evidence of the alleged violation in the petition. For cases in which the petitioners do not have access to all the available information, it is helpful to identify the existence of additional documents or other evidence that will help substantiate the violation. The Commission may then request this information from the State.

In cases of human rights violations for environmental damage, careful documentation of cases is essential. Chapter V describes in greater detail the kind of information that should be included and the form in which it should be presented.

43 Protocol of San Salvador, supra note 22, art. 19.6.
44 Rules of Procedure of the Inter-American Commission on Human Rights, Art. 23 revised Nov. 13, 2009; Inter-American Convention to Prevent and Punish Torture, supra note 13, art. 16.
45 Inter-American Convention on Forced Disappearance of Persons, supra note 13, Art. XIII.
46 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, supra note 13, art. 12.
47 FÁÑNEZ LEDESMA, supra note 11, at 241.
III. REQUIREMENTS FOR ADMISSIBILITY

For an individual request to be admitted before the Commission, it is important that the petitioners allege facts in a clear and straightforward manner and that these facts clearly demonstrate one or more human rights violations. Without this description, the Commission may reject the communication or request more information, causing long delays in the process.\(^{48}\) It is also necessary that the violation occurred after the ratification date of the American Convention or other treaty allegedly violated. Otherwise, this obligation is not enforceable unless the State recognizes the Court’s jurisdiction for the particular case, which is very unlikely, or in the case of a few exceptions in the jurisprudence of the System.\(^{49}\)

\(^{48}\) American Convention on Human Rights, supra note 3, art. 47 (“The Commission shall consider inadmissible any petition or communication... if: b. the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention.”); Rules of Procedure of the Inter-American Commission on Human Rights, Art. 34 revised Nov. 13, 2009 (“The Commission shall declare any petition or case inadmissible when: a. It does not state facts that tend to establish a violation of the rights referred to in Article 27 of these Rules of Procedure.”).

\(^{49}\) For example, certain violations of human rights whose implementation was begun before ratification of the American Convention on Human Rights, such as the forced disappearance of persons, may still be admissible in the IACHR by virtue of the continued violation doctrine.
The other requirements are set forth in Article 46 of the American Convention:

- Article 46: (1) Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:
  a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
  b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
  c. that the subject of the petition or communication is not pending in another international proceeding for settlement; and
  d. that, in the case of Article 44, the petition contains the name, nationality, profession, address and signature of the person or persons or of the legal representative of the entity lodging the petition.

As the majority of these requirements are self-explanatory, we will focus our discussion on the requirement to exhaust domestic remedies, which is more complex.

**Exhaustion of Domestic Remedies**

The first of the admissibility requirements, the exhaustion of domestic remedies, is probably the site of the most controversy in any case, given that a State may present a variety of legal defenses. Therefore, petitioners, if possible, should actively demonstrate before the Commission that they have pursued and exhausted all available and applicable remedies, by describing all legal actions taken and their final resolutions. As a defense, the State may argue that the victims failed to exhaust domestic remedies by demonstrating the existence of other available legal or administrative actions. The Commission will review this issue and make a finding. In the case that the IACHR concludes that domestic remedies were not exhausted, it will declare the petition inadmissible and reject the case.

The exhaustion of available domestic remedies is important not only as an admissibility requirement, but also for the timely and effective resolution of a case. First, these domestic remedies, whether administrative or judicial, can sometimes be much more effective in resolving a controversy than submitting it before an international body, including the Inter-American System. National authorities are closer to the case and may have better knowledge and skills to more quickly prevent, halt, or remedy any given human rights violation. Also,
the proper use of available domestic remedies facilitates the operation of the national justice system that, in principle, should protect individuals when a violation occurs.

Moreover, the exhaustion of remedies is also important because it gives the State an opportunity to remedy the violation within its own jurisdiction, before the issue is vented in international fora. Although the State may have acted improperly or failed to act, domestic courts or administrative agencies may have the potential to remedy the resulting human rights violation. Moreover, domestic litigation may be less costly and provide measures and solutions more suited to the reality of the victims’ circumstances.

Finally, exhaustion of remedies may help to strengthen existing institutions and legal remedies. Even when national litigation is unsuccessful, it can draw public attention to a problem, which can help generate pressure for a satisfactory settlement of a conflict and highlight the need for legal or judicial reform. Given the value of these possible remedies, it is important to seize the opportunity to strengthen domestic solutions to environmental controversies. Such opportunities could otherwise be lost if a case is brought directly before international courts without first appealing to existing internal protection mechanisms.

Thus, those working on human rights cases, including those involving environmental damage, should first evaluate all domestic options to determine whether the existing recourses offer effective protection and reparations for the alleged violations. As part of this analysis, it is important to evaluate the available actions in all domestic courts (constitutional, environmental, civil and administrative) that may have jurisdiction. Only if it is not possible to utilize these remedies should petitioners go directly before the Inter-American System as an alternative.

Inter-American jurisprudence indicates that domestic remedies ought to be simple, fast and effective and that a petitioner should exhaust those remedies which could “correct the violations alleged.”50 The Court has held that first of all, these remedies must be suitable to address the infringement of a legal right,51 considering that “a number of remedies exist in the legal system of every country, but not all are applicable in every circumstance.”52 Second, the Court requires that the resources be effective, i.e. that the action is “capable of producing the result for which it was conceived.”53 Therefore, the State’s obligation cannot be fulfilled simply with a favorable court judgment, but also requires the effective implementation of such a judgment.

52 Velásquez-Rodríguez v. Honduras, supra note 50, ¶ 64.
53 Id. ¶ 66.
For example, in Velásquez-Rodríguez v. Honduras, the Court concluded that the writ of habeas corpus, criminal complaints and other available actions were not effective in the case at hand and therefore were not required in order to exhaust domestic remedies. The Court reached this conclusion because (1) the remedy did not produce the effect for which it was created (physical production of the person believed to be missing); (2) as a result of State policy, this remedy did not produce positive results; (3) the deciding authorities were not impartial; and (4) the people bringing these actions were often subjected to harassment of various sorts. Therefore, the Court considered that there existed an exception to the exhaustion of domestic remedies, as the available remedies were ineffective in cases of forced disappearances.

The exception to the requirement to exhaust domestic remedies for cases of extreme poverty is particularly relevant, as in many cases access to the legal system is too costly for victims and is therefore not a realistic option for protection. This applies not only to the existence of court costs, but also when the victims must make considerable effort to access the courts (for example, when traveling large distances, spending significant sums of money, or other circumstances).

Finally, it is worth adding that the exhaustion of domestic remedies requires proof of a final decision that puts an end to the case without the possibility of further appeals. Reaching an interlocutory or provisional decision is not sufficient. An exception exists when it is not possible to reach a final decision because of an unjustified delay, the lack of impartiality or independence, or the hostility of the courts, making litigation impossible.

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The rule requiring exhaustion of domestic remedies envisions three exceptions according to Article 46 of the Convention:

a) lack of legal due process, b) lack of access to available resources or the impossibility of exhausting the available resources and c) unwarranted delay in the judicial decision. In addition, two other exceptions have been incorporated through case law: first, when an individual is indigent and cannot afford legal services and the government does not provide them; and second, when there is a general fear among lawyers to provide the necessary legal assistance, making it practically impossible to have access to counsel. This last situation is related especially to dictatorial regimes and massive human rights violations.

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64 Id. ¶¶ 67-81.
65 FÁNDEZ LEDÉSMA, supra note 11, at 293.
b) Procedure for Individual Petitions before the IACHR

It is important to keep in mind that the majority of the proceedings before the IACHR are managed by the Executive Secretariat, which is a permanent office comprised of the Executive Secretary and several attorneys. The Secretariat manages case files and makes recommendations to the Commissioners so they can make critical decisions during the ordinary period of sessions regarding the admissibility and merits of a case and also the transmission of a case to the Court.

When the IACHR receives a petition, it reviews the procedural requirements for admission, any supporting evidence and may also request additional information or clarifications from the petitioners. Once a petition has been received, the Commission asks the State to provide information regarding the case, giving it two months, or shorter if necessary, to respond. The IACHR either reviews the State’s report or, if it has not received such information, continues its investigation.

If the petition meets the formal requirements, the Commission will accept it according to Articles 46 of the Convention and 37 of the Rules of Procedure of the IACHR. If not admissible, the Commission declares the petition inadmissible under Article 47 of the Convention, thereby concluding the process.

At the stage of admissibility, the Commission does not consider the merits of the petition, which relate to the analysis and conclusions with respect to the human rights violation, the State’s responsibility, and remedies for damages. Only if the case is first admitted does the process continue and the Commission review the merits of the controversy. If it is not accepted, the decision is not appealable and the process is considered terminated.


After analyzing the positions of the parties, the IACHR declared the petition “inadmissible” in accordance with Article 47 of the American Convention, considering that the petition was abstract and did not individualize specific victims. The Commission notified the parties as to its decision, published a report on inadmissibility and included it in its Annual Report to the General Assembly of the OAS.

During the evaluation of the merits contemplated in Article 38 of the IACHR Rules of Procedure and Article 50 of the American Convention, the Commission evaluates all of the evidence presented and may request additional information if necessary. The parties may also send additional briefs, as

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56 The proceedings of individual petitions before the IACHR is described in detail in the American Convention on Human Rights, supra note 3, arts. 43-51; and the Rules of Procedure of the Inter-American Commission on Human Rights, arts. 23-50 revised Nov. 13, 2009; see also Fajardo, supra note 11, at 240-590.
needed, such as comments with respect to the evidence and allegations of the other party. During this part of the process, petitioners must prove the facts alleged, demonstrate that these facts constitute a violation of human rights and demonstrate the State's responsibility.

The Commission may make on-site visits to the place where the presumed violation occurred, or is occurring and also may request that both parties attend a hearing to present or clarify information. These hearings can also be requested by one of the parties—the State or the petitioners—which is the most common form of requesting a hearing.

During the hearings, parties may present witnesses, experts, or audiovisual documentation to support their arguments. The hearings are very important occasions as they often provide the first opportunity for a victim's claims to be heard by high-level State officials and in the presence of an international body. Petitioners wishing to request hearings should do so at least 50 days before the beginning of a period of ordinary sessions.

Once a petition is accepted, the Commission can also propose that the parties resolve the issue through a friendly settlement procedure, contemplated in Articles 48(f) of the Convention and 41 of the IACHR Rules of Procedure. This procedure allows the parties to share information and reach a settlement on how to remedy a human rights violation. A friendly settlement can take place at any time during the process, provided that the parties agree and that the Commission continuously monitors the settlement.

While a friendly settlement may not have the same political force as the reports of the Commission or judgments of the Court, it may be faster and more effective in resolving the alleged human rights violation. A friendly settlement may include agreements related to the State’s responsibility such as public recognition of the violation, reparation and compensation for damages and guarantees that the State will not repeat the violation. These agreements are important as they may ensure the meaningful protection of rights and allow for an improvement of the situation in the future.

When the parties have reached an agreement on a friendly settlement, this is communicated to the Commission, which then verifies that the agreement respects the rights and interests of the victims. Once the agreement has been approved, it is published and puts an end to the process. The petitioners and the IACHR may follow up on the implementation of the agreement; if the State fails to implement some elements of the agreement, the Commission may insist on their implementation. If necessary, the Commission may also reopen the case and continue the individual petition process.

If the parties do not reach a friendly settlement, the IACHR continues to process the case. Once the merits review stage is concluded, the IACHR prepares a report, including a detailed analysis of the facts which it considers proven, a determination on whether a human rights violation took place and if so, what rights were violated and to what extent. The report also includes the Commission's recommendations to the State and a deadline for completing these recommendations. In accordance with Article 50 of the Convention, the report on the merits of the case is confidential and its content is not to be published or made known other than to the parties in litigation. The IACHR communicates to the petitioners that it has issued its report, possibly provid-
ing them with the relevant sections of the report. If the State has accepted the Court’s jurisdiction, the Commission will also request the State’s opinion and that of the victims or their families concerning the possible presentation of the case to the Court (Article 43 of the Rules of Procedure of the IACHR).

At this stage, the State should inform the Commission concerning the steps it has taken to comply with the recommendations of the merits report. If the Commission and the victims are satisfied with the actions of the State, the process ends. Otherwise, if the State has not recognized the jurisdiction of the Court, the Commission can publish a final report, which we describe in the following section. If the State has recognized the jurisdiction of the Court, the Commission may submit the case to the Court in a procedure that we will examine briefly in later sections of this document.

I. Report of the IACHR

If the State has not accepted the jurisdiction of the Court and the time for compliance with the merit report’s recommendations has elapsed, the IACHR transmits the document to both parties to request their opinion about the level of compliance with its recommendations. In accordance with Article 51 of the Convention, the process of the case concludes with the publication of the final report, or with the transmission of the case to the Court. In the first case, the IACHR publishes the report on the merits in addition to its conclusions concerning the State’s compliance with these recommendations, or lack thereof. The final report is public and may be included in the Annual Report of the IACHR, which the Commission presents to the General Assembly of the OAS.

The publication of a report showing that a State has violated human rights and has not complied with the recommendations of the IACHR can have a significant political impact. The report can cause the State international embarrassment for being identified as violating human rights and failing to live up to international commitments. The political effect can oftentimes be accompanied by difficulties before international credit agencies or in bilateral relations with other countries in the region. Therefore, even if the recommendations of these reports and the conclusions do not have enforceability mechanisms, compliance can be achieved through international political pressure. Finally, after the publication of the report, the IACHR can continue to monitor its content through public compliance hearings, by requesting additional information and by demanding the total compliance with its recommendations.

II. Proceedings before the Court

For those States that have recognized the Court’s jurisdiction, if the State does not comply with the Commission’s recommendations and if the Commission does not publish its report, the case must be submitted to the Court, unless an absolute majority of the members of the Commission vote against submission. The decision to submit the case to the Court can be taken by the IACHR or

by the State itself, and initiates the formal proceedings before this body. The Inter-American Court is the judicial body that finds whether there was any human rights violation for which the State is responsible and, if so, how the damage will be remedied.

This process follows a more formal procedure than the process before the IACHR. It is regulated in the American Convention and in the Rules of Procedure of the Court and includes both written and oral phases in which the victims and their representatives can participate. The process before the Court is divided into three stages: preliminary objections, merits and remedies. Under the Rules of Procedure in force before June 2001, it was the Court’s practice to publish a separate opinion for each stage. Now, the Court emits one opinion that includes every aspect of the case, although remedies are sometimes treated separately. In addition, the Court has adopted the practice of issuing opinions monitoring the effective compliance of its decisions.

The decision of the Court on cases is final and cannot be appealed. However, parties may request interpretations of a decision within 90 days of its publication. In its opinion, the Court decides on the existence of any human rights violations and the responsibility of the State for these. In the event that the State is found responsible, the Court fixes remedies for damages, including material reparations to pay the victims or their families, moral reparations and other forms of reparation or guarantees of non-repetition.

Despite the fact that the Court does not have mechanisms to force compliance with its decisions, States, by virtue of the principles of international human rights law such as the pacta sunt servanda (treaty compliance based on the principle of good faith), do abide by these decisions and there is no doubt that the decisions are legally binding.

The Inter-American Court of Human Rights first underscored the special nature of human rights treaties in its Advisory Opinion No 2. In that opinion, the Court emphasized the difference between the traditional multilateral treaties and modern treaties concerning the protection of human rights.

In particular, the Court held that:

“…modern human rights treaties in general and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other con-

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58 Id.
59 The proceedings of individual petitions before the Court are explained in the American Convention on Human Rights, supra note 3, Arts. 57, 61-63, 66-69; Rules of Procedure of the Inter-American Court of Human Rights, Arts. 20-59 revised Nov. 28, 2009.
60 American Convention on Human Rights, supra note 3, Art. 67.
61 Id. Art. 62.1.
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

PETITIONS
Initial Processing and Admissibility Procedure

Petition sent to the IACHR

Petition registration and acknowledgment of receipt (Arts. 26 to 29-IACHR Rules of Procedure)

Initial processing by the Executive Secretariat

If not all requirements are met: Request for more information from petitioner (Arts. 26.2 and 29.1 b)

Response of the petitioner

Initial requirements met

Initial requirements not met

Transmittal of petition to the State and request for response on admissibility claims; 2 month deadline extendible for up to 3 months (Art. 30.3)

Transmittal of State response on admissibility to petitioner

Case is archived

Parties are notified

Yes

No

Secretariat makes finding on admissibility grounds (Art. 30.6)

Secretariat can request additional observation in writing or in a hearing (Art. 30.5)

Registration and opening of the case (Art. 37.1 & 37.2)

Admissibility Report approved

Case presented to the Working Group Admissibility (Art. 36)

Preparation of Admissibility Report

Admissibility denied; publish report on inadmissibility

En exceptional cases, admissibility and merits are examined together (Art. 37.3)

Admissibility Report approved

Case presented to the Working Group Admissibility (Art. 36)
Environmental Defense Guide: Building Strategies for Litigating Cases Before the Inter-American System of Human Rights

Registration and Opening of the Case

Notifications to the parties and proposal for friendly settlement

Petitioner submits claims on the merits (3 months) (Art. 37.1)

Petitioner's claims transmitted to the State for reply (3 months)

Requests for hearings (Art. 37.5 and 64)

Decision on the merits (Art. 43)

Request for additional information

Settlement agreed upon: Friendly settlement report (Art. 40.5)

Settlement not agreed upon: Friendly settlement procedure

No response or no friendly settlement is reached. The procedure on merits continues

Proposal for a friendly settlement

Friendly settlement is reached

Procedure on the Merits
Decision on the Merits and Submission to the Inter-American Court

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tracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.

Reparations for violations can be enforced through domestic law and they should ideally seek the integral or *in integrum* reparation of the victims. When this is not possible, other means of compensation should be requested.

2. Precautionary Measures and Provisional Measures

On occasion, human rights violations occur in situations of such seriousness or urgency that it is necessary to take immediate measures to prevent irreparable harm. In these cases, the victims or their representatives can request from the IACHR (or even the Commission on its own motion) the declaration of precautionary measures requiring a State to take protective actions to halt or prevent the occurrence of an irreparable harm.

Granting of such measures by the IACHR does not constitute any prejudgment on the merits of the case. Its goal is fundamentally to prevent irreparable harm to human rights. During the review of the request for precautionary measures or during its execution, the IACHR can ask for information from the interested parties about any matter related to the adoption and monitoring of the measures.

This kind of measure is particularly important in the protection of the environment, considering that environmental harms present a very high risk of causing irreparable damage. The jurisprudence of the Commission and of the Court have reaffirmed the preventative function of precautionary measures in the protection of rights such as the rights to life, personal integrity and health, particularly in cases that deal with environmental damages. For example in *Pueblo Indígena de Sarayaku v. Ecuador*, both the Commission and the Court requested precautionary and provisional measures for the protection of an indigenous community affected by irresponsible oil drilling operations in Ecuador.

The Commission also granted precautionary measures to guarantee life and personal integrity in *Community of San Mateo de Huanchor and its Members v. Peru*, whose rights were threatened by a near-by mine tailings dump containing

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toxic waste. More recently and also in Peru, the Commission granted precautionary measures in *Community of La Oroya v. Peru*, to guarantee their rights to life and integrity, affected by the contamination from a multi-metal smelter.

On August 17, 2004 the IACHR granted precautionary measures in the case of Oscar González Anchurayco and members of the San Mateo de Huanchor Community:

“Available information indicates that the living conditions, health, food, farming and livestock of five indigenous *campesino* communities, comprised of more than 5,000 families, would be severely affected by deposits from an open-air mine in the vicinity of the Rimac River... In view of the risks to the beneficiaries, the Commission granted precautionary measures to protect the life and personal safety of Oscar González Anchurayco and the members of the Community of San Mateo de Huanchor. IACHR, *Annual Report of the Inter-American Commission on Human Rights 2004*, ch. III, ¶ 44, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (Feb. 23, 2005).

Traditionally, precautionary measures have been utilized before the Commission to protect the life and physical integrity of victims, witnesses or petitioners, or of any other person who might be threatened as a result of a proceeding before the Inter-American System. In addition, the IACHR has granted precautionary measures to protect the right to health, considering that the value of this right is intrinsically related to ensuring the right to life and personal integrity, rights that tend to be threatened by environmental pollution. On various occasions, the IACHR has even ordered that the beneficiary of these measures be given adequate medical treatment.

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66 *Community of San Mateo de Huanchor and its Members v. Peru*, supra note 39. Specifically, the IACHR requested that the State of Peru initiate a medical care program with a special focus on children; prepare an environmental impact study for the proper disposal of the toxic waste; adequately prepare and transport the waste; prepare a timeline for the IACHR to monitor compliance with these measures; and inform the community and its representatives of the implementation of these measures.


68 The IACHR has granted precautionary measures, inter alia, in favor of patients of a hospital in Paraguay, given that the sanitary and security conditions were inhuman and degrading, posing a threat to the physical, mental and moral integrity of the patients. IACHR, *Annual Report of the Inter-American Commission on Human Rights 2003*, ch. III, ¶ 60, OEA/Ser.L/V/II.118, Doc. 5 rev. 2 (Dec. 29, 2003). The Commission also granted precautionary measures in favor of hundreds of persons deprived of liberty in Guatemala, because the sanitary conditions in which detained youth were kept generated an imminent risk to their health. IACHR, *Annual Report of the Inter-American Commission on Human Rights 2003*, ch. III, ¶ 50, OEA/Ser.L/V/II.118, Doc. 5 rev. 2 (Dec. 29, 2003).

In principle, a request for precautionary measures should clearly identify and individualize the intended beneficiaries who seek protection. Nonetheless, the Commission and the Court have established an exception to this principle for cases in which all members of a community present a similar level of risk. In these situations, although the individualization of the victims is not required, it should be possible to identify the potential beneficiaries. The possibility of requesting precautionary measures to protect a community is particularly useful in environmental cases where the victims are generally whole communities. However, the Court in some cases has obligated the State to provide information in order to identify and determine the intended beneficiaries and the exact scope of the measures.

Similarly, the IACHR has recognized the State obligation to protect those persons who are particularly vulnerable. This can be alleged in cases that involve people who are especially sensitive to pollution, such as children and adolescents. Another situation where this may apply is where a community suffers public health problems due to pollution from a private company that is also an important source of work for the community. This unequal bargaining position that the company holds over the local population increases their vulnerability by putting at risk their employment if they protest the company’s polluting practices.

The persecution of environmental defenders is another reason for granting precautionary measures. The IACHR has granted many measures to protect defenders of human rights, journalists or any other person who is threatened because of their statements or political activity. Similarly, the IACHR has also issued various resolutions to protect people who dedicate themselves to defending natural resources or the environment:

- On December 22, 2006, the IACHR asked Honduras to adopt urgent measures to guarantee the life and physical well-being of Father Andrés Tamayo, Santos Efain Paguada, Victor Manuel Ochoa, René Wilfredo Gradiz, Macario Zelaya and Pedro Amado Acosta, all leaders of the Environmental Movement of Olancho (EMO) in Honduras.
- On August 8, 2002, the Commission granted precautionary measures to protect 12 Saramaka tribes living along 58 tributaries of the upper Suriname River affected by the granting of numerous forestry and mining concessions and by road construction in Saramaka territory, all of which was taking place without consultation with the tribes. These activities posed an immediate potential and irreparable threat to the cultural and physical integrity of the

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71 Inter-American Court for Human Rights, Provisional Measures, Matter of Urso Branco Prison regarding Brazil, Decides ¶ 1(c) (Apr. 22, 2004).

Saramaka people. The Commission asked the State to adopt the measures necessary to halt logging and mining concessions and permits and other activities related to the territory occupied by the tribes.

- On November 8, 2001, precautionary measures were granted for the protection of the life and physical integrity of Teodoro Cabrera García and Rodolfo Montiel Flores, who had just been freed from jail. According to the petitioners “many people were denied their rights, including life” because they belong to the peasant environmental organization of the Sierra of Petatlán, in the state of Guerrero, Mexico.

- On October 31, 2005, the IACHR granted precautionary measures to the members of the Madreselva Collective in Guatemala because its members had been defamed, intimidated threatened and attacked as a result of their activities to defend and protect the environment.73

If the State does not comply with the Commission’s precautionary measures and the seriousness and urgency of the situation persist, the Commission may request that the Court grant provisional measures.74 Both the Commission and the Court review the compliance with provisional measures. In this process, the petitioners play an essential role by constantly providing information about State compliance with these measures, thereby pressuring the State to fulfill its obligations.

3. Reports

The Commission submits an annual report to the General Assembly of the OAS in which it describes its activities as well as the human rights situation in the hemisphere.75 This includes a summary of the Commission’s decisions, including those regarding precautionary measures, recommendations to the States and final reports on contentious cases. In addition, the Commission may also prepare reports or studies with respect to the human rights situation in a particular country or with respect to a specific issue.76

The IAHCHR has produced reports on the situation of street children, discrimination against women, the failure to protect indigenous peoples, the situation of migratory workers and refugees and the situation of human rights defenders in the Americas.77 In preparing these reports, the Commission collects information in a variety of ways, including from reports prepared by NGOs and other members of civil society, official data from States, the press or other documentation that it receives in the exercise of its functions. In addition, the Commission can arrange on-site visits in order to gather the necessary information.

74 American Convention on Human Rights, supra note 3, Art. 63.2.
75 Id. Art. 41.g; see also Rules of Procedure of the Inter-American Commission on Human Rights, Arts. 56-58 revised Nov. 13, 2009.
77 IACHR Reports can be found at: www.cidh.org.
Given the publicity and attention that reports receive, they are an important mechanism for the Commission to study a particular human rights issue, whether in an individual State or throughout the hemisphere. In these reports, the Commission has specifically cited the impact on human rights caused by environmental pollution, for example with respect to indigenous communities affected by oil extraction activities or by the development of infrastructure mega-projects. Such reports are an important tool that can be of strategic use to organizations in highlighting systematic human rights violations resulting from environmental damages.

By sending information to the IACHR to include in its reports, advocates may be able to educate the Commission regarding a certain issue, highlight the importance of an issue, or call attention to it, thereby prompting a more extensive investigation. In addition, once the conclusions and recommendations are published, advocates can use these to further an issue within a State, by designing implementation strategies for the Commission's recommendations. Finally, reports are very useful to advance new or problematic issues and sensitize people to them, such as the direct connection between environmental degradation and many human rights violations.

In addition to these reports, States that have ratified the Protocol of San Salvador must present periodic reports on the measures adopted to ensure progress with respect to the rights enshrined in this instrument. These reports are transmitted to the Inter-American Council for Integral Development (CIDI), the successor body to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture mentioned in the Protocol. CIDI presents an annual report with the summary of the reports of the States to the OAS General Assembly. Although the Commission does not participate in the preparation of these reports, it does receive copies and can cite them within its own reports.

4. Special or Thematic Hearings

Another option for accessing the Inter-American System and presenting human rights problems related to environmental degradation is to request a special hearing. A special hearing is similar to those for individual petitions...
described earlier, except that they deal with a general situation in relation to a State or a particular theme and not an individual case or controversy.\footnote{\textit{Rules of Procedure of the Inter-American Commission on Human Rights, Art. 59 revised Nov. 13, 2009.}}

Special hearings are developed in the framework of the two sessions that the Commission has each year and must be requested far in advance (50 days before the beginning of the session). In general, the Commission holds its sessions in its offices in Washington, DC, unless the Commission decides to hold a special period of sessions in another country. The time allocated for special hearings is very limited, 45 minutes total, of which the petitioners have approximately 30 minutes for their presentation. It is therefore essential that the organizations requesting the hearing are very well prepared and strategically choose the points they will highlight.

Use of this mechanism is particularly advisable in the case of massive human rights violations, in especially complex situations, or in those situations where it is very difficult to attain enough information to litigate an individual case. Within the hearing, organizations can report on a particular situation, provide substantiating evidence and request that the IACHR make recommendations to the State(s) in question. Special hearings can be equally useful in reactivating or raising the profile of cases that are being litigated on a particular issue, but have been delayed or have not yet reached a final resolution.

While hearings may be public and in some cases are broadcast on the IACHR’s website, the Commission does not, in general, issue reports with recommendations stemming from these hearings. Nonetheless, the hearing mechanism is a way to sensitize the IACHR to particular problems and to propose actions to improve the situation. Organizations can also submit information and documentation that could serve the IACHR as support for a later thematic report, or even for the resolution of cases. Therefore, hearings are an additional tool through which organizations can present a situation of human rights abuse stemming from environmental damages, highlight its importance and provide pressure to a given State to take appropriate measures.

5. On-site Visits

In order to adequately carry out the Commission’s functions and in accordance with Article 40 of the Rules of Procedure and Article 18(g) of the Statute of the IACHR, the Commission may travel to different States in order to investigate the general situation of human rights and/or aspects related to specific situations. These visits are known as on-site visits and may be initiated by invitation of a State or on the motion of the Commission. During these visits, the consent and collaboration of the State is essential.\footnote{\textit{Statute of the Inter-American Commission on Human Rights, O.A.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88, Art. 18.g (Oct. 31, 1979).}}
To ensure a proper on-site observation, the State must grant the Commission certain necessary concessions, including the commitment “not to take any reprisals of any kind against any persons or entities cooperating with or providing information or testimony to the Special Commission.” 84

The IACHR names a Special Commission for the on-site visit and designates the number of members and the Commission’s Chairman. Citizens or residents of the State in which the on-site observation takes place may not participate in the Special Commission.85 The agenda of the Special Commission generally is prepared well in advance, in order to identify and coordinate the necessary meetings with government officials and with civil society members and organizations. Depending on the nature of the visit, the IACHR may meet with trade unions, NGOs, victims, grassroots organizations, professionals and members of the business community, among others. Generally, at the end of a visit the IACHR issues a report with conclusions and recommendations to the State. This is published in the IACHR annual report, which is later presented to the OAS General Assembly.

Given resource limitations and the limited powers of the Commission, on-site visits have been very useful “as methods of fact-finding, but also as opportunities to prevent and correct situations that affect the general validity of human rights.”86 In addition, these observations can be an important instrument for political pressure and mobilizing public opinion. This, in turn, can motivate States to address human rights situations. Having an international commission visit a State can have domestic repercussions that could be used strategically to raise awareness of violations based on environmental causes which might otherwise go unnoticed or ignored by the State in question.

Because of these possibilities, when facing a situation of serious human rights violations, organizations may request that the IACHR carry out a verification mission in order to understand the primary sources of the allegations. According to one human rights victim who met with the Commission as part of an on-site observation in Argentina: “This visit created great expectations. Finally we were going to be listened to. Our testimony was taken into account and the people who came gave quite an accurate opinion of the situation, despite what the government now says.”87 The exact results of such visits vary and their effectiveness depends on the complexity of the problem and the willingness of the State to address the situation, among other factors.

85 Id. arts. 51, 52.
86 Edmundo Vargas Carreño, Las observaciones in loco practicadas por la Comisión Interamericana de Derechos Humanos [In Loco Observations performed by the Inter-American Commission on Human Rights], in Homenaje a la Memoria de Carlos Dunghie de Arrachies [Tribute to the Memory of Carlos Dunghie de Arrachies], Included in Materiales del “Curso sobre litigio ante el sistema interamericano de derechos humanos,” supra note 63.
87 Testimony of one of the mothers of disappeared persons, who met with a Special Committee of the IACHR in September 1979 as they were conducting an in loco observation. cited in Jean-Pierre Bouquet, Las Locas de la plaza de Mayo [The Maj Women of the Plaza de Mayo] 161 (1983).
OBLIGATIONS OF THE STATE
Ratification of international human rights treaties creates a commitment by States Parties to respect and guarantee rights recognized in these international instruments through the adoption of measures necessary to make them effective. Thus, the goal of these treaties is to respect and guarantee the rights enshrined therein. In addition, based on the principle of *pacta sunt servanda* of the Vienna Convention on the Law of Treaties of 1969, States Parties must comply with these obligations in good faith. Vienna Convention on the Law of Treaties, May 23, 1969, Art. 26, 1155 U.N.T.S. 33.

C. STATE OBLIGATIONS FOR THE PROTECTION OF HUMAN RIGHTS
In accordance with the American Convention, States must respect and guarantee the rights recognized therein for all people without discrimination. These obligations are expanded by the principle that human rights must be interpreted in conformity with national laws and other international treaties ratified by the States. In addition, States must implement all domestic legal measures that are necessary to ensure the effective respect for human rights, in accordance with Article 2 of the Convention.

Within the jurisprudence of the Inter-American Court, a State’s obligation to protect and guarantee rights includes both negative and positive obligations. Negative obligations include abstaining from taking actions that could violate rights, while positive obligations require a State to take positive actions to effectively ensure that these rights are respected and, if they are not, to investigate and punish violations, thereby avoiding impunity.

Additionally, according to the Court, the obligation to guarantee human rights:

…implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.

The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation – it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.

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89 American Convention on Human Rights, supra note 3, Art. 29.
90 Velásquez-Rodríguez v. Honduras, supra note 50, ¶ 172.
Finally, it is important to note that this obligation applies to all branches of the government—the executive, legislative and judiciary—as well as other independent entities. For example, if a person filed a complaint to protect a legally recognized right and received a favorable judgment that was not properly carried out, the State would be responsible for not fulfilling its obligation to effectively guarantee that right. In this case, the person could present his or her case before the Inter-American System of Human Rights, provided that it meets the established requirements for admission.

When a State fails to recognize its obligation to effectively protect and guarantee human rights, this failure generates international responsibility and, as a result, the obligation to repair the damage. In these cases, when national systems are not effective in correcting violations, victims can petition the Inter-American System. It is important to clarify that while States must protect all the rights recognized in the international instruments that they have ratified, only some of these are directly enforceable, such as civil and political rights. Economic, social and cultural rights are enforceable only through their link to other justiciable rights. The right to a healthy environment is one of those rights that can only be enforced indirectly, as we explain in more detail in the following chapters.
He right to a healthy environment, though recognized as a human right in international doctrine and instruments, has yet to be widely developed in practice. Although many environmental defenders have made good use of important activist and political strategies, they have yet to document extensively the right to a healthy environment in specific cases before the Inter-American System of Human Rights.

In the Americas, the primary treaty that refers to a healthy environment as a human right is Article 11 of the Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter the Protocol of San Salvador).\(^1\) In contrast, the American Convention on Human Rights does not recognize this right directly, referencing it instead through a comprehensive interpretation of Article 26,\(^2\) which recognizes the duty of treaty Member States to respect economic, social and cultural rights.

A broad review of cases tried by both the Inter-American Court and the Inter-American Commission on Human Rights reveals first that neither body has held on individual cases regarding violations of the environment. However, alternative approaches do exist in cases involving violations of this right, even if tangentially.

Almost systematically, cases related to the rights of indigenous and tribal peoples are those that most directly involve environmental violations. This connection is not coincidental. When seen from the indigenous worldview, the idea of “property” is based on factors related to the collective property rights of indigenous peoples, as well as their perception of territory as a holistic concept that includes cultural and religious elements. Such a vision creates a sense of belonging that transcends mere spatial boundaries and differs greatly from the classic Western view, which is more focused on property as merely a factor of economic production.

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Specifically, the recognition of indigenous territory as a collective right set forth in Article 13(2) of the International Labor Organization Convention 169 on the Right of Indigenous Peoples and Tribes in Independent Countries (hereinafter ILO Convention 169) recognizes not only the right to the specific territory an indigenous or tribal community inhabits, but also the land that they “traditionally use or occupy.” These rights include specific provisions for the conservation and sustainability of indigenous peoples’ territories. One such example is Article 7(4) of ILO Convention 169, which incorporates environmental concerns. Specifically, it provides that “[g]overnments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.” Thus, the protection of the environment is a fundamental collective right for indigenous and tribal peoples.

Rather than attempting to establish a doctrinal basis for the right to a healthy environment as a human right, this chapter has a more practical goal: the systematization of cases and situations where the Inter-American System has produced precedents that can encourage civil society and environmental organizations to create initiatives for protecting the environment. This aim incorporates a clear understanding that the true protection of the right to a healthy environment is not limited to a legal strategy, but rather entails a comprehensive approach in which political advocacy goes hand-in-hand with legal actions. This will lead to the possible creation of public policies that guarantee a healthy environment and an improved quality of life for people.

A. THE RIGHT TO A HEALTHY ENVIRONMENT IN THE INTER-AMERICAN SYSTEM

The right to a healthy environment often implies, among other important factors, the sustainable management and moderated exploitation of the environment, with a focus on the protection and conservation of the natural resources, flora and fauna that are necessary for promoting a healthy human habitat. A few of the numerous examples of violations of the right to a healthy environment include: the indiscriminate destruction of forests and biodiversity; the pollution of rivers and lakes; activities and bad management practices that cause soil erosion; highly polluting industrial operations; the use of inappropriate methods to exploit natural resources, including the degradation of marine resources; and agricultural settlements that threaten watersheds and cause community water shortages.

The Inter-American System, despite its lack of a comprehensive and specific treaty mechanism for environmental protection, recognizes the importance of the environment in a way that transcends a simple acknowledgement of yet

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3 Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 13(2), June 27, 1989, 169 I.L.O. 1989 (hereinafter ILO Convention 169) (“The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.” (emphasis in the original)).
4 id. art. 7(4).
another human right. Article 15 of the Inter-American Democratic Charter identifies environmental protection as one of the objectives of democracy:

The exercise of democracy promotes the preservation and good stewardship of the environment. It is essential that the States of the Hemisphere implement policies and strategies to protect the environment, including the application of various treaties and conventions, to achieve sustainable development for the benefit of future generations.5

Nevertheless, none of the human rights treaties within the Inter-American System allow for the direct review of the human right to a healthy environment in individual cases. Although the 1988 Protocol of San Salvador recognizes the right to a healthy environment as a human right, its wording is quite general, as set forth in detail in Article 11.

Under the protection framework provided by the Protocol of San Salvador, the right to a healthy environment is understood as a collective right and therefore among the economic, social and cultural rights. However, if we take into account the indivisible nature of human rights,7 it is clear that environmental protection, given its extent and level of abstraction, transcends the limits of classical subjectivity as an individual right. Therefore, this right can also be understood as a social right that affects national collectives or groups in special situations such as indigenous peoples, which could potentially encompass all of humanity and its future generations. The full extent of the right to a healthy environment is so broad that no particular individual could have a “sense of ownership” over the right. Thus, this right is sometimes referred to as a diffused interest, although it is inevitable that in certain specific cases it can also take on a truly individual nature.

The protection framework contained in the Protocol of San Salvador fills a gap left by the American Convention on Human Rights. The American Convention failed to enumerate a specific list of economic, social and cultural rights (hereinafter ESCR), apart from the vague and ambiguous wording in Article 26, which states the following:

6 Protocol of San Salvador, supra note 1, art. 11.
7 “Universality and indivisibility” were universally recognized in the 1968 Proclamation of Teheran and reinforced in the Vienna Declaration during the 1993 World Conference on Human Rights.
Thus, the final wording in Article 26 does not expressly enshrine a list of economic, social and cultural rights and the task was left to be addressed later by the Protocol of San Salvador.

Unfortunately, Article 26, the only norm of the American Convention that refers to ECSR, has not been developed fully by Member States or by the oversight mechanisms of the Inter-American System. It appears the school of thought within constitutional law that views ESCR as “programmatic rights,” has had a strong influence on the perception of these rights, thereby preventing their direct enforcement and justiciability in the System. As a result, the jurisprudence from the few cases in which the Inter-American Court has held on ESCR, particularly in the area of labor rights, has been repeatedly directed towards the violation of individual rights and not violations of ESCR.

This practice has led to the protection of collective rights being generalized through a legal “back door”—the principle of equality and non-discrimination—rather than through direct judicial review. However, more important than seeking new means of implementing civil and political rights in the defense of ESCR is understanding the indivisibility of human rights as transcending the established classification or categorization of human rights.

The extreme marginalization of individuals—or even worse, of already vulnerable groups—renders unsustainable the position that economic, social and cultural rights are merely “lofty goals” or programmatic rights. This mainstream position, so often imposed to the disadvantage of effective human rights protection, becomes increasingly unsustainable when faced with the global trend toward recognition of the universality and indivisibility of these rights.

In fact, other regional initiatives to promote environmental protection have already incorporated these recent trends that inter-relate human rights with the environment. Some examples of these efforts are:

- Resolution 1819, “Human Rights and the Environment” of the OAS General
Assembly. This resolution states that:

The effective enjoyment of all human rights, including the right to education and the rights of assembly and expression, as well as full enjoyment of economic, social and cultural rights, could foster better environmental protection by creating conditions conducive to modification of behavior patterns that lead to environmental degradation, reduction of the environmental impact of poverty and of patterns of unsustainable development, more effective dissemination of information on this issue and more active participation in political processes by groups affected by the problem.

Along these lines, it resolved:

1. To underscore the importance of studying the link that may exist between the environment and human rights, recognizing the need to promote environmental protection and the effective enjoyment of all human rights.

2. To request the General Secretariat to conduct, in collaboration with other organs of the Inter-American System, a study of the possible inter-relationship of environmental protection and the effective enjoyment of human rights.

3. To instruct the Secretary General to report to the General Assembly at its thirty-second regular session on the implementation of this resolution.

Resolution 1896, “Human Rights and the Environment in the Americas” of the OAS General Assembly. Following the initiative of Resolution 1819, it states:

1. To remain seized of the issue, paying special attention to the work being carried out by the relevant multilateral fora in this area.

2. To encourage institutional cooperation in the area of human rights and the environment in the framework of the Organization, in particular between the Inter-American Commission on Human Rights and the OAS Unit for Sustainable Development and Environment.

Presently, there is an OAS-level debate on the preparation of a draft Declaration on the Rights of Indigenous Peoples, which will have ramifications for environmental protection across the board. The connection between environmental protection and the ownership, exploitation and transfer of indigenous ancestral lands has been widely debated in this forum. These discussions have contemplated the importance of establishing the right to a healthy environment due to the presence of highly polluting facilities that risk the life and

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11 Id.
12 Id.
14 Id.
health of indigenous populations. Indigenous people are often more vulnerable as they sometimes do not have the same access to mechanisms for asserting their rights as do other individuals. In addition, given the special relationship that indigenous people have with their territories, this type of abuse in the exploitation of natural resources is an assault against their right to develop autonomously.\textsuperscript{15}

The stance that indigenous organizations have taken in these negotiations is especially relevant. They agree that the final text of the Declaration must recognize indigenous populations as the group with the greatest concern for the rational use of natural resources and the preservation of the environment. Therefore, indiscriminate deforestation, the pollution of rivers and other areas, as well as the extinction of wild fauna must be viewed as violating the human rights of indigenous peoples.\textsuperscript{16}

In September 2007, after decades of debate on the global stage of the United Nations, the UN General Assembly finally approved the United Nations

\begin{quote}
The United Nations Declaration on the Rights of Indigenous Peoples,\textsuperscript{17} regarding the relationship between Indigenous Peoples and the environment, adopted by the General Assembly in September, 2007, states the following:

Article 25. Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 29. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.
\end{quote}


\textsuperscript{16} Inter-American Commission on Human Rights. Id.

Declaration on the Rights of Indigenous Peoples virtually unanimously.18 Furthermore, even though it is a United Nations instrument, it can also be invoked and used as an interpretation document to protect human rights in the Inter-American System.

In effect, in the Inter-American System, both the Inter-American Commission and the Inter-American Court can use these international instruments, not to declare violations to articles or rights consecrated in them, but rather as an interpretive tool for developing jurisprudence.19 In other words, the Commission and Court can utilize these specialized UN treaties and declarations to create doctrine, expand and develop the human rights enshrined in the American Convention and strengthen the legal basis of their judgments or reports.20

This regional and international contexts provide frameworks from which to better understand the doctrine and jurisprudence of the Inter-American System regarding the environment.

The following documents constitute some of the main UN international instruments—treaties as well as resolutions and recommendations emanating from international institutions—that can be used as a source for documenting and advocating on behalf of environmental cases:


18 See Press Release, U.N. General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Forward’ towards Human Rights for All, Says President, U.N. Doc. CA/10612 (Sept. 13, 2007). During the voting, there were 11 abstentions and four countries voted against the resolution (United States, Canada, Australia and New Zealand).
19 See American Convention on Human Rights, supra note 2, art. 29(b) (“No provision of this convention shall be interpreted as... restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party”).
20 Indeed, both the Inter-American Commission and Court have used this interpretive power to develop their jurisprudence in different areas; in the example of indigenous peoples’ rights, see Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/VII.117, doc. 1, rev. 1 ¶¶ 124-32 (2002); Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, at ¶¶ 125-131 (June 17, 2005) and cases cited within.
B. INTER-AMERICAN JURISPRUDENCE ON THE ENVIRONMENT

1. Precedents set by the Inter-American Commission

Within the Inter-American System, the Inter-American Commission is the body that has produced the greatest number of reports and resolutions on the right to a healthy environment. However, the majority of this jurisprudence has focused on general situations in countries and more commonly, on cases involving the rights of indigenous peoples.\(^\text{21}\)

The oldest precedent goes back to the 1972 resolution on the issue of “Special Protection of Indigenous Peoples: Plan to Combat Racism and Racial Discrimination,” in which the Commission proclaimed that “for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the States.”\(^\text{22}\)

The Inter-American Commission has subsequently broadened this concept of a comprehensive protection of indigenous peoples’ rights in separate country reports (e.g. Reports on Ecuador and Brazil) and in individual petitions for violations of human rights set forth both in the American Declaration and Convention. The Yanomami Report represents one such case.\(^\text{23}\)


\(^{23}\) Yanomami v. Brasil, supra note 21.
Likewise, the Commission has incorporated environmental concerns in the context of the right to development, which is understood as the freedom of the State to exploit its natural resources, including granting concessions and opening up to international investment. Under this framework, the Commission has held that States must have appropriate regulations in place to implement the standards currently in force, such that environmental problems do not translate into violations of human rights protected by the American Convention.

Thus, in its Report on the Situation of Human Rights in Ecuador, the IACHR developed an environmental doctrine that set forth the following:

Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation [sic] of physical wellbeing. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.

… The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes and judicial recourse.

… Domestic law requires that parties seeking authorization for projects which may affect the environment provide environmental impact assessments and other specific information as a precondition.

… [I]ndividuals must have access to judicial recourse to vindicate the rights to life, physical integrity and to live in a safe environment ….

… The norms of the Inter-American System of Human Rights neither prevent nor discourage development; rather, they require that development take place under conditions that respect and ensure the human rights of the individuals affected. As set forth in the Declaration of Principles of the Summit of the Americas: “Social progress and economic prosperity can be sustained only if our people live in a healthy environment and our ecosystems and natural resources are managed carefully and responsibly.”

In its 1997 Report on the Situation of Human Rights in Brazil, the IACHR, referring to the Yanomami people, concluded that:

Their cultural and physical integrity, as well as the integrity of their lands are, however, under constant threat and attack by both individuals and private groups who disrupt their lives and usurp their possessions…

… [The] integrity [of the Yanomami] as a people and as individuals is under constant attack by both invading prospectors and the environmental pollution they create. State protection against these constant pressures
In another country report, this one concerning Colombia, the IACHR signaled the following:

In the course of 2004, the situation of violence besetting the indigenous peoples in Colombia continued to worsen; they continue to be victims of massacres, selective executions, forced disappearances, forced displacement from their ancestral territories, forced recruitment, loss or contamination of their food sources, food blockades, accusations and threats to their autonomy. The seriousness of the situation has led the United Nations Special Rapporteur to indicate that in some cases their survival as peoples is threatened.

In effect, in recent years the pressure exerted by illegal armed groups on indigenous territories, both because of their strategic importance in military and economic terms, in connection with the trafficking and cultivation of illegal drugs and the exploitation of natural resources or their use in roads, mining and hydroelectric energy…These populations and their community councils continue to be affected by [supply] blockades, constant acts of harassment and violence, forced kidnappings and displacements. Also, the enjoyment of their collective territory is constantly threatened by the deforestation and [planting] of African oil palm.26

The IACHR also addressed the issue of the exploitation of resources and trespass on indigenous territories in the cases of Yanomami v. Brazil27 and Mayagna Awas Tingni v. Nicaragua.

In addition, the IACHR has achieved other important conceptual developments regarding the environment and indigenous property rights by integrating other international human rights instruments, such as ILO Convention 169 and the American Declaration.

One such example is the case of the Mayan Indigenous Communities of the Toledo District v. Belize.28 In its report on the merits in the case, the Commission systematized all Inter-American System precedents regarding the property rights of indigenous peoples:

More particularly, the organs of the Inter-American System of Human Rights have acknowledged that indigenous peoples enjoy a particular relationship with the lands and resources traditionally occupied and used by them, by which those lands and resources are considered to be owned and enjoyed by the community as a whole and according to which the

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25 IACHR, Report on the Situation of Human Rights in Brazil, supra note 21, ch. VI, ¶ 82.
27 Yanomami v. Brazil, supra note 21.
use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly.29

The Inter-American Court addressed this issue in the following way:

For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations. 30

Another step forward was achieved when the IACHR integrated the “right to consultation” as a component of indigenous communities’ rights to property and natural resources. On that occasion, the Commission indicated that the application of the American Declaration to the situation of indigenous communities involved:

…the taking of special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality and with fair compensation.31

One of the IACHR’s most important precedents relating to the environment and the collective property rights of indigenous peoples is the case of the Mayan Indigenous Communities of Toledo. This case is an example of how, through a broad interpretation, a human right that has not been directly recognized can be protected using related standards and principles. As a preliminary matter, it is important to note that the Commission based its analysis in this case on the American Declaration of the Rights and Duties of Man, as Belize is not party to the American Convention on Human Rights.

The case centers on the violation of the rights to ancestral land and natural resources of the Mopan and Ke’kchi Maya people of the Toledo District in northern Belize. The main violation results from the impact on land traditionally used and inhabited by the Mayan people when the State awarded timber and oil concessions in their territories. The Commission’s ruling was broad in respect to the right to the environment and to material damage:

Based upon the information presented [i.e. environmental expert reports and other evidence], the Commission concludes that the logging conces-
Emissions granted by the State in the Toledo District have caused environmental damage and that this damage impacted negatively upon some lands wholly or partly within the limits of the territory in which the Maya[n] people have a communal property right. The Commission also considers that this damage resulted in part from the fact that the State failed to put into place adequate safeguards and mechanisms to supervise, monitor and ensure that it had sufficient staff to oversee that the execution of the logging concessions would not cause further environmental damage to Maya[n] lands and communities.32

As a consequence, the Commission found that the State’s failure to respect the Mayan people’s communal property rights to land that they have traditionally used and occupied had been exacerbated by environmental damage caused by logging concessions, which in turn has affected the community’s members.33

This precedent incorporates the importance of protecting the environment, albeit from the perspective of indigenous communities and their collective property rights. Subsequently, the IACHR issued a report on the admissibility of another petition with a similar focus, this one concerning the Community of San Mateo de Huanchor and its Members v. Peru.34 In this case, the alleged violation was related to mining activity; specifically the effects suffered by the members of this community as a result of the pollution produced by a nearby toxic waste dump.

This case examines, among other human rights violations, the progressive development of economic, social and cultural rights (Article 26 of the American Convention reviewed above). At the same time, the Commission adopted precautionary measures for the protection of the life and physical integrity of members of the San Mateo de Huanchor community due to a public health crisis provoked by the pollution. The community had been exposed to mining tailings containing lead residues and other harmful substances, threatening irreparable damage to the neurological functioning and psychological development of community members.

Finally, the IACHR has also reviewed violations of the right to a healthy environment within the context of friendly settlement procedures.

A friendly settlement was reached in Petition No. 4617/02, detailed in Report No. 30/04 on Mercedes Julia Huenteao Beroiza et al. v. Chile.35 The petition dealt with the consequences of the Ralco Hydroelectric Plant Project, developed by the company Empresa Nacional de Electricidad S.A. (ENDESA). The petitioners were members of the Mapuche Pehuenche people of the Upper Bio
Bio Sector in the Eighth Region of Chile. On October 5, 1993, the ENDESA Company received approval for the construction of a hydroelectric plant in Ralco, the area where the petitioners lived.

The petitioners and the Chilean State adopted a friendly settlement that the IACHR ratified and which included the following provisions:

• Strengthen indigenous participation in the Upper Bio Bio Indigenous Development Area (ADI).

• Agree on mechanisms designed to ensure the participation of indigenous communities in the management of the Ralco Forest Reserve.

• Put in place measures to foster development and environmental conservation in the Upper Bio Bio sector.

• Agree on mechanisms to ensure that indigenous communities are informed, heard and taken into consideration in follow-up and monitoring of the environmental obligations of the Ralco Hydroelectric Project.

• Strengthen economic development in the Upper Bio Bio sector, in particular in its indigenous communities, through mechanisms acceptable to the petitioners.

• Agree on mechanisms to facilitate and improve tourism development of the reservoirs in the Upper Bio Bio for the benefit of indigenous communities.

• Agree on binding mechanisms for all State organs to prevent the construction of future megaprojects, in particular hydroelectric projects, on indigenous lands in the Upper Bio Bio.36

2. Precedents set by the Inter-American Court on Human Rights

For contentious cases, the likelihood that the Inter-American Court on Human Rights will make a ruling on ESCR has diminished. However, in recent years it is evident that through a progressive interpretation and given the invisibility of human rights, the Inter-American System is tending towards the full protection of ESCR, including the right to a healthy environment. Some of its judgments provide evidence for this trend, including the cases of Villa- gran Morales v. Guatemala 37 and Baena Ricardo et al. v. Panama.38 Unfortunately, in the latter case, although dealing with the issue of trade union freedom, the Court focused only on the right to assembly contained in the American Convention. The judgment did not make reference to Article 26 and how it has been interpreted and incorporated by a variety of sources.

Until recently, the Inter-American Court has not had the opportunity to develop much jurisprudence on the environment beyond a few tangential is-

36 Id. ¶ 33.
38 Baena Ricardo et al. v. Panama, surpa note 9.
sues related to three specific cases on indigenous peoples. However, in 2007 the Court published its ground-breaking case of the *Saramaka People v. Suriname*. In that case, the Court recognized Afro-descendant, indigenous and tribal peoples’ collective rights to the natural resources they have traditionally used and establishes special procedural guarantees to make these rights effective. We review these important developments in the Court’s jurisprudence after an examination of the three cases leading up to this decision: *Mayagna Awas Tingni v. Nicaragua, Yakye Axa v. Paraguay* and *Sawhoyamaxa v. Paraguay*.

On August 31, 2001, the Inter-American Court issued its historic first ruling on the rights of indigenous peoples in the case of *Mayagna Awas Tingni v. Nicaragua*. First, the Court recognized indigenous peoples as possessing distinct rights as collectives and not just as groups of individuals with rights. Second, it recognized the right to collective property and the obligation of the State to provide titles to indigenous peoples’ territories and effective legal resources to guarantee this right.

In its ruling, the Inter-American Court found that the Nicaraguan State had violated the rights of the Mayagna community when it issued a timber concession to a transnational company within the community’s traditional territory without the community’s consent. The Court also found a violation when the State ignored the constant demands of the Awas Tingni people to demarcate their territory. The Court stated that Article 21 of the American Convention on Human Rights, which recognizes the right to private property, also includes “the rights of members of the indigenous communities within the framework of communal property.” With this ruling, the Court set an important precedent for the protection of indigenous rights in the international system by affirming that indigenous territorial rights are not based on the existence of a formal property deed issued by the State, but rather on the “possession of the land” by communities, rooted in their own customary law, values, customs and mores.

The Court also recognized the importance of the relationship between indigenous communities and the land, stating that “[i]ndigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival.”

However, the community’s property rights continued to be seriously threatened by ongoing illegal logging as well as by the settlement, forestry and ag-

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42 *Awas Tingni Case*, supra note 30, ¶ 148.
43 See id. ¶ 151.
44 Id. ¶ 149.
Agricultural activities of non-indigenous migrants in the community’s ancestral territory. These threats continued despite the Inter-American Court ruling obligating the Nicaraguan State to protect the integrity of the community’s lands and resources against the actions of third parties. The measures were meant to guarantee the effective enjoyment of the community’s property rights until a formal deed could be produced. Despite repeated complaints from the community, the Nicaraguan State had been lax in implementing effective measures to guarantee the community’s rights or to prevent irreparable harm to its natural resources and its members’ lives, health and welfare.

This situation prompted the community to resort again to the Inter-American Court, which, in a resolution dated September 6, 2002, decreed provisional measures in favor of the community. The resolution formally demanded that the Nicaraguan State “adopt, without delay, whatever measures are necessary to protect the use and enjoyment of property of lands belonging to the Mayagna Awas Tingni Community and of natural resources existing on those lands,” and that the State “investigate the facts set forth in the claim… so as to discover and punish those responsible.”

_Yakye Axa Indigenous Community of the Exnet-Lengua People v. Paraguay_ is a more recent Inter-American Court case. In this case, the Court held that the Paraguayan government violated the human rights of the members of the Yakye Axa Indigenous community (of the Exnet-Lengua People) by not guaranteeing their ancestral property rights, among other violations. The Commission argued before the Court that since 1993 the community’s petition to recover their territory had been in process “but no satisfactory solution has been attained… this has made it impossible for the Community and its members to own and possess their territory and has kept it in a vulnerable situation in terms of food, medical and public health care, constantly threatening the survival of the members of the Community and of the latter as such.”

The Paraguayan government was in partial agreement with the complaint but only insofar “as it relates to the guarantee of the progressive development of economic, social and cultural rights set forth in Article 26 of the American Convention, but with the caveat that this development is affected by the State of Paraguay’s own limitations as a relatively lesser developed country.”

In another judgment regarding Paraguay, _Sawhoyamaxa v. Paraguay_, the Court found identical violations to the right to collective property of another

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45 Id. ¶ 173.3.
47 Inter-American Court of Human Rights, Provisional Measures, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Decisions 1 & 4 (Sept. 6, 2002).
48 Yakye Axa Indigenous Community, supra note 20, ¶ 242.
49 Id., ¶ 2; The Inter-American Court on Human Rights held in the case of Yakye Axa that the fact that Paraguay did not guarantee the right to property “had a negative effect on the right of the members of the Community to a decent life, because it has deprived them of the possibility of access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses.” Id., ¶ 168.
50 Id., ¶ 2.
indigenous community of the Enxet people.\(^5\) In this regard, the Court, reiterating its previous doctrine, held that:

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\ldots\text{the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving therefrom, must be secured under Article 21 of the American Convention. The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because they form part of their worldview, of their religiousness and consequently, of their cultural identity.}\(^6\)
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The Court also held that the current situation in which community members found themselves—that is, living conditions insufficient for survival due to the impossibility of accessing their ancestral land—was putting their lives at risk.\(^5\)

Both the \textit{Yakye Axa} and \textit{Sawhoyamaxa} cases contain an important aspect that should be noted by advocates seeking to litigate \textit{ESCR} before the Inter-American Court. Although the Court did not hold in either case for a direct violation of \textit{ESCR}, the Court did use violations of the right to collective property and the right to life to order reparations that addressed \textit{ESCR}, such as access to clean water, food, health care, schools and sanitary facilities.\(^5\) These reparations have since become an important means for both communities to demand such rights before the Paraguayan government. In this way, advocates for \textit{ESCR}, including the right to a healthy environment, can incorporate such rights by requesting special reparations for violations of other rights that are directly reviewable by the Court.

Although the three cases discussed above represent significant advances in indigenous peoples’ rights, the case most relevant to the protection of the environment is the Court’s recent judgment in \textit{Saramaka v. Suriname}. Here, the Court found that Suriname had violated the collective property right of the Saramaka, a tribal people of Afro-descendants,\(^5\) by granting logging and gold mining concessions on their ancestral territory without a process of consultation.\(^5\)


\(^{52}\) \textit{Id.} ¶ 118; the Inter-American Court also clarified the its doctrine on the rights of indigenous communities to their land in \textit{Sawhoyamaxa}, holding that “1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; 2) traditional possession entitles indigenous people to demand official recognition and registration of property title; 3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and 4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality.” \textit{Id.} ¶ 128.

\(^{53}\) See id. ¶¶ 148-80.

\(^{54}\) \textit{Yakye Axa Indigenous Community, supra note 20, ¶ 221; Sawhoyamaxa Indigenous Community v. Paraguay, supra note 41, ¶¶ 229-33.}
In finding a violation of the Saramaka people’s right to their natural resources, the Court held that Article 21 necessarily included the protection of “those natural resources traditionally used and necessary for the very survival, development and continuation of [indigenous and tribal] peoples’ way of life.”

Furthermore, the Court held that if Suriname grants concessions for the exploitation of these resources to third parties, it must provide for three safeguards:

First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan … within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment.

The Court further elaborated that to “ensure the effective participation” of the interested peoples, a State also has a duty to “actively consult” with said peoples. Although Suriname is not a Member State to ILO Convention 169, the Court held that such consultations must be held “in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.” A State must also initiate consultations from the early stages of the development project and that the people interested must be aware of possible health and environmental risks.

Finally, in what is perhaps the most significant advance in the case, the Court held that there exist cases in which a State would have to obtain the free, prior and informed consent of the tribal or indigenous peoples affected:

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57 Id. ¶¶ 124-58.
57 Id. ¶ 122.
58 Id. ¶ 129.
59 Id. ¶ 133.
60 It is important to note that while in the previous cases of Awas Tingni, Yakye Axa and Sawhoyamaxa, the Inter-American Court relied on article 29(b) of the American Convention to interpret the rights of the indigenous communities involved according to the rights embodied in the ILO Convention 169, in Saramaka, the Court held that the Saramaka people had such rights even though Suriname was not a party to this Convention. Instead, the Court held that such rights exist through an interpretation of the American Convention in light of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Id. ¶¶ 92-95. Therefore, advocates may utilize the jurisprudence in the above cases even if the State they are litigating against is not a party to ILO Convention 169.
61 Id. ¶ 133.
62 Id.
... [T]he Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty not only to consult with the Saramakas, but also to obtain their free, prior and informed consent, according to their customs and traditions.63

The Court has also held on the right to access to information, which, although not related to indigenous or tribal peoples, is very relevant to the protection of environmental rights. In Claude Reyes et al. v. Chile,64 the Court reviewed this right enshrined in Article 13 of the American Convention and the right to judicial protection set forth in Article 25. The facts of the case involve the State’s refusal to provide the petitioners with all the information that they required from the Foreign Investment Committee regarding the Trillium timber company’s timber extraction project in Chile’s twelfth region, the Condor River Project. The Court agreed with the IACHR that the State’s refusal was made without providing a valid justification as required under Chilean law, thereby denying them of their right to information. Furthermore, the Court held that the State further violated their rights by not providing an effective legal remedy to contest the denial of their right to information.

In its decision, the Court highlighted the importance of open access to relevant public information for environmental protection. The Court found that the information was of public interest as it related to a foreign investment contract between the State, two foreign companies and one Chilean receiving company for an industrial forestry project, the environmental impact of which generated much public debate.65 Given that the State denied access to information relevant to public interest without the required justification and there did not exist effective judicial measures to contest this denial, the Court held that the State had violated the petitioner’s human rights and ordered reparations.

3. Precautionary and Provisional Measures

One procedure that is particular relevant to environmental advocacy is the power of the Inter-American Court and IACHR to adopt precautionary measures when necessary to prevent irreparable harm to life and personal integrity. Through jurisprudential developments, both the Court and the Commission have expanded the scope of these measures to prevent harm not only to human beings, but also to non-human entities. These mechanisms are referred to as “precautionary” measures when they are adopted by the IACHR and “provisional” measures when adopted by the Inter-American Court. Their legal basis is found in Article 63(2) of the American Convention, which establishes that:

In cases of extreme gravity and urgency and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration.

63 Id. ¶ 134.
65 Id. ¶ 130.
With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

Measures adopted by the Commission and Court have proved to be an exceptionally important mechanism for protecting both potential evidentiary material before the Court and the life and personal integrity of witnesses involved in Court proceedings.

The Court’s extensive experience in granting provisional measures has enabled it to expand these protections in order to address certain problems in their implementation. One such example is the Court’s ability to grant provisional measures regarding matters not before the Court. The Court’s authority to rule on such matters has been described as a major step forward in procedural mechanisms for the protection of human rights. This ability is significant, as it enables the protection of rights even before the IACHR process has concluded. However, it is important to note that in such cases, the Court lacks the proper evidence with which to weigh the gravity and urgency of the situation and therefore often grants a high presumptive value to the Commission’s factual determinations in its request.

The IACHR may also adopt protective measures when the case is under its jurisdiction. When doing so, it examines the same prerequisites as the Court in the aforementioned provisional measures. However, in the case of the Commission these measures are known as “precautionary.”

The adoption of precautionary measures by the IACHR or of provisional measures by the Court, is very important for cases involving the protection of a healthy environment. It would be utterly futile to bring a petition for grave environmental damages that imply imminent and irreparable future harm if advocates did not use these procedural mechanisms to prevent such harm.

Likewise, it is important to keep in mind the use of precautionary or provisional measures not only to protect and avoid harm to the environment, but also to protect environmental defenders. This is especially important given the increasingly urgent situation of many advocates who receive threats to their physical and psychic integrity and, in some cases, have died as result of their advocacy efforts.

In terms of preventing environmental damage in relation to a victim’s physical and psychological integrity, it is worth citing the precautionary measures adopted by the IACHR in San Mateo de Huanchor Community v. Peru.

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67. One serious case was that of Ingrid Washinawatok, member of the Menominee Nation indigenous community and recognized for her work in humanitarian issues; Lahe’ e Gay, Director for the Pacific Cultural Conservancy International in Hawaii and Terence Freitas, environmentalist. All were from the United States and were kidnapped on February 25, 1999 when they were traveling from Saravena (Arauca) to the Cubará Municipality (Boyacá), where the Asociación de Cabildos y Autoridades Tradicionales (Association of Indigenous Councils and Traditional Authorities) of the Colombian U’wa indigenous community was headquartered. Their bodies were found in the Venezuelan town of Victoria, with multiple bullet wounds and signs of having been tied up and blindfolded. The three victims defended the environment of the U’wa People’s ancestral territory and were in Colombia participating in cultural exchange activities. See Press Release, Inter-Am. C.H.R., No. 5/99 (Mar. 8, 1999). In December 2001, the Secretary of the IACHR decided to create a Human Rights Defenders Functional Unit in the Office of the Executive Secretary to coordinate the activities of the Executive Secretariat in this field.
The Commission requested that Peru report on the following measures for adoption: the creation of a medical assistance and health care program for San Mateo de Huanchor's residents, especially its children, in order to identify those people possibly affected by pollution from mining tailings and to provide them with long-term medical care; the completion of an environmental impact report; treatment and transfer of the tailings to a safe and secure site that will not leak; and the participation of the affected community and its representatives in the implementation of these measures.68

It is also important to mention the precautionary measures that the IACHR granted to protect the inhabitants of the Peruvian city of La Oroya, who were harmed by severe pollution from a metal smelting plant. In this case, the Commission determined that pollution levels in the city and the lack of medical care threatened the rights to life, health and personal integrity of the city's residents and thereby requested that the State provide treatment and specialized medical diagnosis.69

The Commission accepted another request for precautionary measures in Mercedes Julia Huenteao Beroiza et al. v. Chile, with the goal of avoiding irreplaceable harm to the rights of the alleged victims of the Ralco hydroelectric dam project and to maintain the status quo of the situation in question.70 The latter of these measures was designed to prevent the company from flooding lands inhabited by the alleged victims, as a consequence of the dam construction.

In the case of Moiwana v. Suriname, the IACHR adopted similar precautionary measures to protect twelve Saramaka clans living in 58 settlements in the upper Suriname River.71 The Commission requested the State to adopt the necessary measures to suspend forestry and mining concessions and permits, as well as other activities impacting the land occupied by the clans, until the Commission had the opportunity to decide on the merits of the case.

For its part, the Inter-American Court also has adopted provisional measures, upon the request of the Inter-American Commission, to address environmental problems in cases involving indigenous communities, although without specifically identifying them as environmental protections. This occurred in a petition before the Commission regarding the indigenous people of Sarayaku in Ecuador, who were affected by a joint venture agreement with the Argentine company Compañía General de Combustible. The contract authorized the exploration and exploitation of oil on Block 23, a 200,000-

hectare plot of land in the Pastaza Province of Ecuador, sixty-five percent of which is comprised of ancestral lands of the Kichwa de Sarayaku indigenous people. The State authorized the contract without consulting the Sarayaku people and without obtaining their informed consent.

Finally, the Court has also adopted other similar measures in relation to the Kankuamo indigenous people,72 the Jiguamiandó and Curbaradó communities73 and the Paz de San José de Apartadó community,74 all in Colombia and, as cited previously, in the case of *Mayagna Awas Tingni v. Nicaragua*.75

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72 Inter-American Court of Human Rights, Provisional Measures, Matter of Pueblo Indígena de Kankuamo regarding Colombia (July 5, 2004).
73 Inter-American Court of Human Rights, Provisional Measures, Matter of the Communities of Jiguamiandó and Curbaradó regarding Colombia (Mar. 6, 2003).
74 Inter-American Court of Human Rights, Provisional Measures, Matter of the Peace Community of San José de Apartadó regarding Colombia (Nov. 24, 2000).
75 Inter-American Court of Human Rights, Provisional Measures, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua (Sept. 6, 2002).
This chapter suggests several possible strategies for litigating environmental defense cases before the Inter-American System of Human Rights (IASHR).

As explained in Chapters 2 and 3, the right to a healthy environment, apart from an occasional mention without further development, is not recognized as binding by the instruments of the Inter-American System on Human Rights. Therefore, this chapter suggests an approach to framing environmental issues through the use of indirect litigation strategies, and by alleging violations of rights other than environmental rights. Related to this problem, particularly given the association of environmental rights with “social rights,” is the absence in the IASHR of a practice of litigation or of any significant development in doctrine or jurisprudence in the area of economic, social and cultural rights.

1 Namely, Art. 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights [hereinafter Protocol of San Salvador], Nov. 17, 1988, O.A.S. T.S. No. 69, establishes that: “1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation and improvement of the environment.” However, it is important to note that the Protocol does not include this right among those considered justiciable before the Inter-American Commission and Court, see, id., art. 19(6).

It is worth mentioning the inclusion of an environmental clause in the Inter-American Democratic Charter, art. 15, O.A.S. G.A. Res., Special Sessions in Lima, Peru, OEA/Ser.G/CP-1, (Sept. 11, 2001) (“The exercise of democracy promotes the preservation and good stewardship of the environment. It is essential that the States of the Hemisphere put into effect policies and strategies to protect the environment, including application of various treaties and conventions, to achieve sustainable development for the benefit of future generations.”). Although the Democratic Charter is not a directly binding treaty and therefore lacks an enforcement mechanism, the Inter-American Court on Human Rights has referred to this Charter when interpreting the obligations of the American Convention. See, e.g., Herrera Ullio v. Costa Rica, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 115 (July 2, 2004); Ricardo Canese v. Paraguay, 2004 Inter-Am. Ct. H.R. (ser. C) No.111, ¶ 85 (Aug. 31, 2004) [both in relation to the freedom of expression in a democratic system]; Yatama v. Nicaragua, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127, ¶¶ 193, 207, 215 (June 23, 2005) (noting the “essential element of representative democracy” of the political rights, the need to promote and encourage democratic participation and the strengthening of political parties and other political organizations).


3 In the area of economic, social and cultural rights in general, see Víctor Abramovich & Christian Courtis, Los Derechos Sociales como Derechos Enforceables [Social Rights as Enforceable Rights] ch. 3 (2002).

4 See, id., at 47-64; François Ewald, L’Etat providence, Grasset, (1985); Walter De Gruyter, A Concept of Social Law, in Dilemmas of Law in the Welfare State 40-57 (Günter Teubner ed., 1986).
Although the number of such cases is gradually increasing, nevertheless the Inter-American Commission and Court have been rather timid in directly enforcing these rights. A number of the strategies described in this manual are intended to highlight those indirect mechanisms that the Inter-American System has utilized to examine claims stemming from social rights violations. This is not to say that ESCR cannot be conceptualized as enforceable rights, nor that violations of these rights cannot be brought directly before the Inter-American System, even if, until now, there has been little progress in this respect. Rather, given the current state of these cases before the System, a legal action based solely on the invocation of ESCR could result in failure. Therefore, it is necessary to argue violations of ESCR with indirect strategies that have proven more viable. These indirect litigation strategies will be discussed in greater detail later on in this chapter.

The strategies we present in this chapter—which are not exhaustive—fall under two basic categories. First are the procedural or instrumental rights and principles applicable to any legal right or State regulation. Examples of these are the right to due process of law, the right to adequate judicial protection, the principal of equal protection under the law, the prohibition against discrimination and the right to information, among others. Although these rights and principles have been traditionally linked to the model of civil and political rights (that is, individual rights and freedoms from State intervention), they are in fact a set of rules and principles applicable to the legal field as a whole, including economic, social, cultural and environmental rights. The (limited) progress shown by the IASHR in this area has consisted in extending the application of a number of the rights and principles to labor and procedural rights. Thus, they could also be applied to environmental rights.

For that reason, the developments that connect economic, social and cultural rights to environmental rights, although valuable conceptually, are quite ineffective from an international litigation standpoint. Regarding the interconnection between environmental rights and the rights to adequate housing, food, health and water, see, United Nations Committee on Economic, Social and Cultural Rights (UNCESCR), General Comment No. 4: The right to adequate housing (art. 11(1) of the Covenant), ¶¶ 8, 11 (1991) reprinted in General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies 19-24, U.N. Doc HRI/GEN/1/Rev.8 (May 8, 2006) [hereinafter UN Compilation]; UNCESCR, General Comment No 12: The right to adequate food (art. 11), ¶¶ 7, 12-13, 26, 28 (1999) reprinted in UN Compilation, supra, at 63-70; UNCESCR, General Comment No 14: The right to the highest attainable standard of health (art. 12), ¶¶ 4, 11-12, 15-16, 27, 34, 36, 50, 51 (May 11, 2000) reprinted in UN Compilation, supra, at 86-105; UNCESCR, General Comment No 15: The right to water (arts. 11 and 12 of the Covenant) (2002) reprinted in UN Compilation, supra, at 105-122.

For more information regarding this subject, see Julieta Rossi, Mecanismos internacionales de protección de los derechos económicos, sociales y culturales, in, Derechos sociales: instrucciones de uso 355-368, (Víctor Abramovich, María José Añón & Christian Courtis eds., 2003). Clearly, the possibilities offered by the instruments of the Inter-American System are much better than the ones defined effectively by its organs, up to now. In order to analyze some of these possibilities, see, Christian Courtis, La protección de los derechos económicos, sociales y culturales a través del artículo 26 de la Convención Americana sobre Derechos Humanos, in Protección Internacional de los Derechos Humanos: Nuevos Desafíos 1-66, (Christian Courtis et al. eds., 2005); Denise Hauser, La protección de los derechos económicos, sociales y culturales a partir de la Declaración Americana sobre los Derechos y Deberes del Hombre, in id., at 123-146.

The most promising legal basis for the enforceability of ESCR is that advanced by the Committee on Economic, Social and Cultural Rights. However, this Committee does not have the power to receive complaints or individual petitions. See, UNCESCR, General Comment No 3: The Nature of States Parties’ Obligations (art. 2, para. 1 of the Covenant) (1990), reprinted in UN Compilation, supra note 5, at 15-18; UNCESCR, General Comment No 9: Domestic Application of the Covenant (1998), reprinted in UN Compilation, supra note 5, at 55-58; see also the general comments cited supra note 5.
Secondly, there are cases where ESCR can be linked with civil and political rights whose justiciability is not in question. These cases involve the invocation (or contextual interpretation) of a civil or political right to address obligations that would also arise from ESCR, including environment rights.

We wish to highlight the fact that, although the System is now comprised of numerous human rights treaties that both the Commission and the Court frequently use for interpretive purposes, litigation before the System continues to revolve around the American Convention on Human Rights. Furthermore, it is useful to bear in mind that the organs of the Inter-American System of Human Rights tend to draw inspiration from their counterparts in the European System (the European Court of Human Rights and the former European Commission on Human Rights) and from the standards established by the bodies of the Universal System of Human Rights.

As a result, a number of the suggestions we present are based on decisions already adopted by the organs of the Inter-American System, while others employ doctrine from the European System. Although not formally adopted by the Inter-American Commission or Court, this doctrine is useful due to the similarity in structure between the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights and the frequency with which the Inter-American bodies consult the legal precedents established by their European counterpart.

As we describe later, the Inter-American Court may also refer to other international treaties and law for interpretative criteria, depending on the context of each case under examination. This interpretative power of the Court might allow for the introduction of international environmental law in cases of environmental harm through one of the indirect strategies suggested in this manual. Therefore, this may be the way to apply interpretative principles specific to environmental rights, such as the Precautionary Principle.

Moreover, for a claim to proceed it must comply with all the formal and material requirements for admissibility of petitions before the Inter-American Court as described in Chapter 2 of this guide: exhaustion of domestic remedies; not having been presented before another international body; filing within the required deadline; existence of specific and identifiable victims, even if other individuals are also harmed by the situation; the existence of a harm; and State responsibility arising from an action or omission which entails a

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8 For a more extensive discussion of this point, see Human Rights, Sustainable Development and Environment, (Antonio A. Cançado Trindade, ed., 1995); José Juste Ruiz, Derecho Internacional del Medio Ambiente (1999).

9 To compare two different perspectives, see Patricia Jiménez de Parca y Maseda, El Principio de Prevención en el Derecho Internacional del Medio Ambiente (2001); El Principio de Precaución en Medio Ambiente y Salud Pública: De las Definiciones a la Práctica, (Jorge Riechmann & Joel Tickner eds., 2002). See also, ABRAMOVICH & COURTIS, supra note 3, at 240–244.
violation of one or more rights enshrined in the American Convention. In this regard, it is important to underscore the necessity of avoiding the idea that the Inter-American Commission is a “court of last resort” when filing a case. In other words, the claim should not be based solely on the incorrect application of national laws by domestic courts. In such cases, part of the challenge facing the litigant is to establish that the alleged actions or omissions constitute specific violations of the rights and obligations of the State as set forth in the American Convention.

What follows are a few specific recommendations on how to litigate environmental cases before the System.

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10 See, e.g., Christian Courtis, La eficacia de los derechos humanos en las relaciones entre particulares [The effectiveness of human rights in relations between individuals], in Revista Iberoamericana de Derechos Humanos 3, (2005).


13 See, Diego Rodríguez-Pinzón, La Comisión Interamericana de Derechos Humanos [The Inter-American Commission on Human Rights], in Derecho Internacional de los Derechos Humanos [International Rights of Human Rights] 199-202 (Claudia Martín, Diego Rodríguez Pinzón and José A. Guevara B., eds., 2004).
A. PROCEDURAL PRINCIPLES AND RIGHTS AND THE FEASIBILITY OF PROTECTING ENVIRONMENTAL RIGHTS

As previously mentioned, the American Convention on Human Rights includes several procedural rights that are applicable to any other State law or regulation. We highlight several below which may be invoked when environmental rights are infringed.

1. Due Process of Law

One of the options for the indirect protection of environmental rights is the use of due process rights as the standard to evaluate State actions that can damage the environment either directly or indirectly. The focus of this strategy is to challenge State measures that have been adopted without the necessary compliance with the law. Examples of these include authorizing public works, permitting the felling and clearing of forests, authorizing activities by individuals which can harm or pose a threat to the environment, allowing the distribution of toxic or dangerous products, granting pollution permits, etc.

This can also include the denial, restriction, or violation of the right to a hearing before decisions are made that are likely to result in environmental damage. Other such rights include the right to judicial review of administrative decisions; the right to present evidence of the detrimental impact an action has on the environment; the right to obtain prior information regarding the safety of goods or services, or for a project being authorized; the right to request the suspension of an action until legal requirements have been met, for instance, the preparation of an environmental impact report or assessment prior to the adoption of the action at issue, etc.

Article 8.1 of the American Convention states that:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal or any other nature.

The expression “or any other nature” clearly includes environmental rights and obligations. The evolution of the interpretation of Article 8 of the Convention by the Inter-American Court favors this strategy. First, the Court has broadened the application of this interpretation to non-criminal matters (under Article 8.1). It has also further extended its application to administrative or other proceedings that may infringe rights. Along these lines, the Court has stated:

Although Article 8 of the American Convention is entitled “Judicial Guarantees” [in the Spanish version—“Right to a Fair Trial” in the English version], its application is not strictly limited to judicial remedies, “but rather the procedural requirements that should be observed in order to be able to speak of effective and appropriate judicial guarantees” so
that a person may defend himself adequately in the face of any kind of act of the State that affects his rights.\textsuperscript{14}

Thus, the Court, in accordance with the European Court of Human Rights, has applied the clause in Article 8(1) to proceedings on constitutional,\textsuperscript{15} civil\textsuperscript{16} and labor law,\textsuperscript{17} nationality and citizenship matters,\textsuperscript{18} and also to administrative proceedings.\textsuperscript{19}

Having established that Article 8(1) is applicable to judicial and administrative proceedings regarding rights of all kinds, we must next analyze the scope of this article.\textsuperscript{20} The text of Article 8(1) expressly mentions the following aspects: the right to a hearing (right to be heard); the right to a competent, independent and impartial judge; the establishment by law of the judicial authority prior to the existence of the action under examination (the so-called right to a "natural judge"); and the right to the issuance of a decision settling the claim within a reasonable time period. However, we must still further define the expression "due process rights" as used in the above-referenced provision. To this effect, the Inter-American Court has indicated that the expression should be understood in relation to the rights specified in Article 8(2), which would consequently be applicable, where appropriate, to non-criminal administrative and legal proceedings.\textsuperscript{21} "Due process rights" include the right to cross-examination, the right to procedural equality, the right to an attorney, the right to present evidence, the right to a well-founded judgment and the right to the enforcement of a judgment.\textsuperscript{22}

\begin{itemize}
  \item In summary, for the litigation of environmental cases, as with cases of economic, social and cultural rights, it is necessary to clearly define the alleged procedural violation with respect to the environmental measures adopted by the State, or with respect to environmental controversies that have been settled in either administrative or judicial proceedings.
\end{itemize}

\textsuperscript{15} Id., ¶¶ 67-85.
\textsuperscript{16} Id., ¶¶ 67-85.
\textsuperscript{17} Id., ¶¶ 67-85.
\textsuperscript{18} Id., ¶¶ 67-85.
\textsuperscript{19} Id., ¶¶ 67-85.
\textsuperscript{20} Id., ¶¶ 67-85.
\textsuperscript{21} Id., ¶¶ 67-85.
\textsuperscript{22} Id., ¶¶ 67-85.
2. Effective Judicial Protection

Another possibility for the protection of environmental rights within the Inter-American System is to claim violations of the right to judicial protection, recognized in Article 25 of the American Convention on Human Rights, which affirms:

Article 25. Right to Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:
   a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State;
   b. to develop the possibilities of judicial remedy; and
   c. to ensure that the competent authorities shall enforce such remedies when granted.

For purposes of environmental litigation, it is important to underscore that State obligations under Article 25 are not limited to the protection of the rights set forth in the American Convention, but also encompass other rights recognized by domestic constitutions and law. This means that if environmental rights are legally or constitutionally recognized, it follows that the absence of effective judicial protection (i.e., the lack of a simple and prompt remedy or, by default, of any other effective recourse in the face of a violation of those rights) constitutes a violation of the Convention.

The Inter-American Court has also advanced in developing the scope of the right to judicial protection. Most of its decisions in cases regarding a wide range of rights recognized in the Convention have also included rulings on the infringement of the right to judicial protection. This is hardly surprising considering the exhaustion of domestic remedies is an admissibility requirement for the System. If the Court determines that domestic remedies have been exhausted and that an article of the American Convention has been violated, then this almost necessarily entails a finding that neither “simple and prompt remedies” nor “effective recourses” existed within domestic jurisdictions, or, if they did exist, were not effective.25


24 See Medina Quiroga, supra note 20, at 358-383 (2005), Medina rightly points out that the Court has not yet established a clear line of action for the application of Articles 8 and 25 of the Convention.

25 As stated before, the Court has not always agreed with this idea. See, id., at 361-362.
For the Court to find a violation of the right to judicial protection, a claim must also allege a violation of a *fundamental right recognized in the State’s Constitution or law*. That is, the right to effective judicial protection is violated if there exists no prompt, simple or effective remedy against the violation of another fundamental right, or in other words, where there is no effective judicial protection against the violation of fundamental rights recognized specifically by domestic laws. This leads us to examine the actual scope of the phrase: “fundamental rights recognized in the Constitution and in law.” The burden of proof falls on the party alleging the violation, who must prove that domestic law—either in the Constitution or in legislation—establishes the fundamental right to a healthy environment and that this fundamental right has not received effective judicial protection. This issue merits further commentary.

Firstly, a litigant must prove that these rights exist under domestic law. However, an analysis of domestic constitutional and legal principles is not foreign to the jurisprudence of the Inter-American Court, which has already established some precedent in this regard.26

Secondly, if the current constitutional system regarding the incorporation of international treaties is inspired by the unitary principle (as is the case in most Latin American countries), such treaties also become part of domestic law. At the same time, the rights included in these treaties can be considered fundamental rights pursuant to Article 25 of the American Convention, even if no international mechanism is provided for filing individual or collective petitions. This means that environmental litigants can invoke international treaties recognizing fundamental environmental rights that have been ratified by the State against which the petition is filed. The jurisprudence of the Inter-American Court of Human Rights also takes into consideration the existence of other treaties ratified by the State when interpreting that State’s obligations arising from the American Convention.27

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26 It is important to distinguish between cases in which the Court analyzes a domestic rule because it is challenged for being contrary to the Convention, from those cases in which the tribunal invokes domestic provisions in order to prove that even if the domestic law provided adequate legal rules, these were not applied or were ineffective. For more information on the latter, see, for example *Constitutional Court v. Peru*, *supra* note 14, ¶¶ 76, 79 & 91 (invoking the Peruvian Constitution and the right of habeas corpus protection); *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 23, ¶¶ 116–121, 150 & 153 (invoking the Nicaraguan Constitution, Statute of Autonomy of the Regions of the Atlantic Coast, that sets forth the authority to delimit the territories of the indigenous communities in the Atlantic Coast and undertake land reform); *Tibi v. Ecuador*, 2004 Inter-Am. Ct. H.R. (Ser. C) No. 114, ¶¶ 132–133 (Sept. 7, 2004) (invoking the Ecuadorian Constitution and the guarantees recognized by the Criminal Procedure Code); *Yakye Axa v. Paraguay*, *supra* note 19, ¶¶ 70, 74–75, 79, 111–112 & 138 (invoking the Paraguayan Constitution and the legal rules that regulate the official registration process of indigenous communities and ownership of their lands); *Yatama v. Nicaragua*, *supra* note 1, ¶¶ 161, 202–203 (invoking the electoral law and the Statute of Autonomy of the Regions of the Atlantic Coast); *The Girls Yean and Bosico v. the Dominican Republic*, 2005 Inter-Am. Ct. H.R. (Ser. C) No. 130, ¶¶ 148–149 (Sept. 8, 2005) (invoking the Dominican Republic Constitution and Civil Code).

Thirdly, the Court has also given broader consideration of other rights that are not specified in the Convention, but which are nevertheless protected by Article 25. For example, in *Ivcher Bronstein*, the Court examined the rights of the victim as a shareholder of a television company among the violated rights that were not protected by domestic laws. In *Baena Ricardo*, the Court found that domestic laws did not sufficiently protect the right against an unfair dismissal. In *Constitutional Court*, the Court found a lack of sufficient protection for judicial independence. In *Five Pensioners*, the Court held that the infringement of the right to effective judicial protection violated the rights of the victims under a court-ordered protective measure.

3. The Right of Access to Information

Another possible litigation strategy that has proved successful for the protection of ESCR and can be applied to environmental issues involves alleging a violation of the right of access to information or of the State’s obligation to provide information. This subject is particularly relevant in environmental matters, as it has become common practice in the region to require an environmental impact assessment or report (in some cases, a socio-environmental report) before beginning construction work or before granting permits for activities or projects that may be detrimental to the environment. Therefore, it would be possible to allege a violation of the right of access to information if the government fails to comply with the obligation to require an environmental impact assessment or report, or, having done so, refuses to make it public. Moreover, this right would also include access to environmental information held by the government.

A variant of this strategy can be used for cases in which the State is required to give prior notification or provide information it has in its possession. This requirement would apply when such notification or information constitutes a necessary component of a right (such as the rights to life, physical integrity and the protection of privacy and family life) and serves as a positive measure to prevent infringement of that right.

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29 *Baena Ricardo v. Panama*, supra note 17, ¶¶ 140–141.
30 *Constitutional Court v. Peru*, supra note 14, ¶¶ 72-75.
32 For more information regarding access to information and social rights in general, including specific references to environmental matters, see Víctor Abramovich & Christian Courtis, *Acceso a la información y derechos sociales [Access to Information and Social Rights]*, in *Derechos Sociales: Instrucciones de Us*, supra note 6, at 321-340.
Although the right of access to information—in particular, access to public information—is not explicitly stated in the text of the Convention, the Inter-American Court has held that the right is contained in Article 13(1). In so doing, the Court established early on that “those to whom the Convention applies not only have the right and freedom to express their thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds.” Implied in this right is, furthermore, “a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.” The Court has also stated that:

In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication. It includes the right of each person to seek to communicate his own views to others, as well as the right to know opinions and news from others. For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.

It goes on to state that:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a conditio sine qua non for the development of political parties, trade unions, scientific and cultural societies and in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.

Another indication in this regard is the weight given by the Inter-American Court to the right to criticize public officials and debate matters of public interest, which it considers to be fundamental components of democracy. Thus, the Court in Herrera Ulloa, citing precedents from the European Court of Human Rights, signaled that:

It is logical and appropriate that statements concerning public officials and other individuals who exercise functions of a public nature should

33 Article 13 is entitled “Freedom of Thought and Expression,” and explicitly refers to the freedom of everyone “to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”


35 Advisory Opinion OC-5/85, supra note 34, ¶ 30 (emphasis added).

36 Id., ¶ 32 (emphasis added); see also Herrera Ulloa v. Costa Rica, supra note 1, ¶ 110; Canese v. Paraguay, supra note 1, ¶ 79.

37 Advisory Opinion OC-5/85, supra note 34, ¶ 70 (emphasis added); see also Herrera Ulloa v. Costa Rica, supra note 1, ¶ 112; Canese v. Paraguay, supra note 1, ¶ 82.
be accorded, in the terms of Article 13.2 of the Convention, a certain latitude in the broad debate on matters of public interest that is essential for the functioning of a truly democratic system.\textsuperscript{38}

It further states that the “democratic control exercised by society through public opinion encourages the transparency of State activities and promotes the accountability of public officials in public administration, for which there should be a minimum margin for restrictions on political debates or debates on matters of public interest.”\textsuperscript{39}

To that effect, it is relevant to recall the recent judgment rendered by the Court in \textit{Claude Reyes et al. v. Chile}. In that case, the Court affirmed that restricting access to information without any justification, when such information guarantees public oversight of government transactions (specifically involving the development of natural resources), constitutes a breach of Article 13 of the Convention regarding access to information.\textsuperscript{40}

\begin{itemize}
\item On the basis of these precedents, it can be said that access to public information is a fundamental component of the right to seek and receive information, insofar as: a) public information is encompassed within the expressions “any information whatsoever” and “thoughts expressed by others”; b) public information is an essential requirement for expressing criticism of government, for democratic oversight through public opinion, transparency in government activities and the ability to hold government officials accountable for their public administration; and c) all information regarding projects that might have adverse impact on the environment is of public interest.
\end{itemize}

In addition, the IACHR has adopted a similar perspective regarding this right. In support of its Special Rapporteur on Freedom of Expression, the Commission approved the Declaration of Principles on Freedom of Expression, Article 4 of which establishes that:

Access to information held by the State is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.\textsuperscript{41}

\begin{footnotes}
\item[38] 
Herrera Ulloa \textit{v. Costa Rica}, supra note 1, ¶ 28 (emphasis added); see also, id., ¶¶ 125–127 & 129, Canese \textit{v. Paraguay}, supra note 1, ¶¶ 98 & 103.

\item[39] 
Herrera Ulloa \textit{v. Costa Rica}, supra note 1, ¶ 127 (emphasis added); see also, Canese \textit{v. Paraguay}, supra note 1, ¶ 97.

\item[40] 

\item[41] 
\end{footnotes}
As previously mentioned, the Inter-American Democratic Charter, to which the Court had recourse for the interpretation of several cases including *Herrera Ulloa* and *Ricardo Canese*, sets forth in Article 4 that:

Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights and freedom of expression and of the press are essential components of the exercise of democracy.\(^42\)

The European Court of Human Rights interprets Article 10\(^43\) of the European Convention on Human Rights—the equivalent of Article 13(1) of the American Convention—in a more restrictive manner. Its applicable doctrine holds that the provision does not grant individuals the right of access to information, nor does it impose on the State an obligation to provide it.\(^44\) The European Court, however, has reached holdings similar to those of the Inter-American Court by other means. For example, the European Court has stated that, regardless of the assertions in Article 10, the protection of rights under the European Convention may require that a State adopt positive measures in situations entailing risk. Such measures could include the provision of information to potential victims. In other cases, the European Court has stated that, as a component of distinct rights set forth in the European Convention, the State has the obligation to grant individuals access to information in its power.\(^45\)

It is interesting to note that many of these cases involve environmental problems. For example, *Guerra et al. v. Italy* dealt with the exposure of the population of Manfredonia, Italy to toxic gas emissions from a factory whose operation

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\(^{42}\) Inter-American Democratic Charter, *supra* note 1, art. 4.

\(^{43}\) Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4, 213 U.N.T.S. 222, entered into force Sept. 3, 1953 [hereinafter European Convention]. It establishes: "Freedom of expression. 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".


\(^{45}\) See Gaskin *v.* United Kingdom, 12 Eur. Ct. H.R. 36, ¶¶ 38, 42 & 49 (July 7, 1989) (obligation to allow access to information to State-held information as a vital element to the right to respect private and family life, Art. 8 of the ECHR); *Guerra et al. v. Italy*, 26 Eur. Ct. H.R. 357, ¶¶ 58-60 (Feb. 19, 1998) (obligation to provide information as an element of the right to respect private and family life, Art. 8 of the ECHR); *L.C.B. v. United Kingdom*, 27 Eur. Ct. H.R. 212, ¶¶ 36-38 (June 9, 1998) (obligation to provide information as an element of the right to life, art. 2 of the ECHR); McGinley and Egan *v.* United Kingdom, 27 Eur. Ct. H.R. 1, ¶¶ 86, 97-98 (June 9, 1998) (obligation to allow access to State-held information as an element of due process of law, art. 6.1 of the ECHR and as the right to respect private and family life, art. 8); *Tinnelly & Sons et al. and McElduff v. United Kingdom*, 27 Eur. Ct. H.R. 249, ¶¶ 72-79 (July 10, 1998) (obligation to allow access to State-held information as an element of due process of law, art. 6.1 of the ECHR); *Roche v. United Kingdom*, 42 Eur. Ct. H.R. 30, ¶¶ 157-169 (Oct. 19, 2005) (obligation to allow access to State-held information as an element of the right to respect private and family life, art. 8 of the ECHR).
had been approved by the government. At the time it granted permission, the government, in fact, possessed information regarding the environmental risks of that operation. The European Court found the Italian government responsible for failing to inform the population of the dangers to which it was being exposed.

At issue in *L.C.B. v. United Kingdom* was the extent of the State’s obligation to notify anyone who may have been exposed to nuclear radiation. In *McGinley and Egan v. United Kingdom*, the issue was whether to allow access to information held by the State to anyone who may have been exposed to radiation, or, as in *Roche v. United Kingdom*, to chemical weapons tests.

Similarly, one might argue that in certain cases the lack of consultation in activities that can affect the environment (at least with indigenous and tribal communities) constitutes a violation of the American Convention. In this vein, the Court has suggested that respect for the political rights (as recognized in Article 23 of the American Convention) of certain groups must take into account the particular characteristics of their political organization and collective values, especially in regards to indigenous peoples and communities.

In other cases, the Court has used Convention 169 of the International Labor Organization to interpret the scope of the rights recognized by the American Convention when these are applied to an indigenous or tribal people.

Included in Convention 169 is the right of indigenous and tribal peoples to prior consultation, a right with unquestionable political roots. Article 6(1)(a) states that consultation should occur “through appropriate procedures and, in particular, through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.” Such consultations “shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.” It seems that for prior consultation to be undertaken in “good faith” and in a “form appropriate to the circumstances,” the State must, at a minimum, provide sufficient information to affected peoples on “the legislative and administrative measures that might affect

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50 Yatama v. Nicaragua, supra note 1, ¶¶ 202-218; see also Saramaka People v. Suriname, 2007 Inter-Am. Ct. H.R. (Ser. C) No. 172 (Nov. 28, 2007) (holding that the State of Suriname has the obligation to consult with the tribal Saramaka people under articles 21 and 1.1 of the American Convention).
51 See Yakye Axa v. Paraguay, supra note 19, ¶¶ 95-96, 127, 130, 136, 150-151 (connecting the rights to collective property, due process and judicial protection involving claims for the regularization of indigenous collective title); see also Saramaka People v. Suriname, supra note 50.
53 Id. art. 6(2).
them directly.”54 In addition, the Inter-American Court has held that previous environmental and social impact assessments are required as a safeguard for protecting the rights of indigenous and tribal communities when their natural resources are threatened by a development or extraction project.55

4. Right to Equal Protection and the Prohibition against Discrimination

In accordance with the Convention, another means of protecting environmental rights is by alleging a violation of the right to equal protection of the law. The prohibition against discrimination set forth in Article 1(1) of the Convention refers to the “rights and freedoms recognized therein.”56 Therefore, in order to invoke this right, litigants must identify one or more of the rights recognized by the Convention and which has been the basis of discrimination. As we will see, this can include rights of the Convention that are linked with environmental rights. However, Article 24 of the Convention, which establishes the principle of equality before the law, does not refer exclusively to the rights protected by the Convention, but rather it is applicable to any law.

The article affirms that:

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.57

Thus, the prohibition against discrimination becomes entirely applicable to all domestic laws that govern environmental rights. Indeed, such discrimination is tantamount to an aggravated violation of the principle of equality. In its Advisory Opinion OC-4/84, the Court laid the foundations for its interpretation of Article 24 of the Convention,58 even if it has not yet developed broad jurisprudence on the matter. Nevertheless, in recent years the Court has made some progress on this matter.59

54 Some domestic courts have considered violations to the right to consultation of indigenous communities and peoples before granting concessions for the exploitation of the environment that affect their historic and ancestral lands. See, e.g., Colombian Constitutional Court, Judgment SU-39/1997 (Feb. 3, 1997); see also ABRAMOVICH & COUR-TH, supra note 3, at 239-240. A general overview of the Colombian constitutional jurisprudence of indigenous consultation rights, including comments of the cited judgment, can be found in CAMILO BORRERO GARCÍA, MULTICULTURALISMO Y DERECHOS INDÍGENAS [MULTICULTURALISM AND INDIGENOUS RIGHTS] 103-143 (2003) [for the text of the judgment SU-39 of 1997, see id. at 122-133]. For more information on the Argentinean case, see Supreme Court of Argentina, Hoktek T’oi Community of the Indigenous Wichí People v. Provincial Environmental Secretariat (Sept. 8, 2003).

55 See Saramaka People v. Suriname, supra note note 50, ¶ 129.

56 At any rate, the Court has also broadened the application framework of the prohibition against discrimination, considering it as jus cogens, see Advisory Opinion OC-18/03, Juridical Condition and Rights of the Undocumented Migrants, 2003 Inter-Am. Ct. H.R. (Ser. A) No. 18, ¶¶ 97-101.


The doctrine of the Court on this issue is expressed in the following paragraphs:

The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenrous character.

Precisely because equality and nondiscrimination are inherent in the idea of the oneness in dignity and worth of all human beings, it follows that not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity. The European Court of Human Rights, “following the principles which may be extracted from the legal practice of a large number of democratic States,” has held that a difference in treatment is only discriminatory when it “has no objective and reasonable justification.” [Eur.Court H.R., Case relating to “Certain Aspects of the Laws on the Use of Languages in Education in Belgium” (Merits), Judgment of 23rd July 1968, p. 34.] There may well exist certain factual inequalities that might legitimately give rise to inequalities in legal treatment that do not violate principles of justice. They may in fact be instrumental in achieving justice or in protecting those who find themselves in a weak legal position. For example, it cannot be deemed discrimination on the grounds of age or social status for the law to impose limits on the legal capacity of minors or mentally incompetent persons who lack the capacity to protect their interests.

Accordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason, or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a State when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic, or in conflict with the essential oneness and dignity of humankind.

Although it cannot be denied that a given factual context may make it more or less difficult to determine whether or not one has encountered the situation described in the foregoing paragraph, it is equally true that, starting with the notion of the essential oneness and dignity of the human family, it is possible to identify circumstances in which considerations of public welfare may justify departures to a greater or lesser degree from the standards articulated above. One is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case a certain margin of appreciation in giving expression to them.60

Certain precedents of the United Nations Human Rights Committee—compliance mechanism for the International Covenant on Civil and Political Rights—provide additional guidelines, as the Committee has applied Article 26 of the Covenant to rules governing rights outside the instrument.  

How can the principle of equality and the prohibition against discrimination be used to protect environmental rights? In this chapter we suggest that the notion of *unequal distribution of environmental sacrifices* (or “environmental discrimination”) should be developed. This doctrine would apply in situations in which, through the creation of legal standards and administrative sanctions, there exists an unequal distribution of environmental damages. Although not articulated as such, this is the reasoning underlying a key decision of the European Court of Human Rights in *López Ostra v. Spain*, analyzed below. In that case, a family suffered harm because its home was located near a toxic waste-treatment facility built with State permission. There the European Court affirmed that:

> [D]espite the margin of discretion left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town’s economic well-being—that of having a waste-treatment plant—and the applicant’s effective enjoyment of her right to respect for her home and her private and family life.  

In other words, even if an entire community may benefit from the development or operation of a specific project, the impact on the claimant’s individual well-being far outweighs the collective benefits and therefore merits particular consideration. On these grounds, a State may be responsible for the damage suffered by certain individuals or social groups when the State has granted permits for works that have an adverse impact on the environment, such as dam construction, installation of toxic-waste dumps, etc. This line of reasoning is even more applicable if the community derives no benefit from the activity and only suffers harm, as in cases of illegal contamination, biodiversity destruction, exhaustion of non-renewable resources, etc. The argument will have even greater relevance when it can be shown that the affected persons or communities belong to an ethnic, cultural or linguistic minority, or live in poverty.  

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61 International Covenant on Civil and Political Rights, art. 26, 6 I.L.M. 368, December 19, 1966 [hereinafter “IC-CPR”], is similar to Article 24 of the American Convention and declares: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.” From this rule, the Human Rights Committee has considered, for example, that social security systems which establish different treatment to married women are in violation of the principle of equality set forth in Article 26. See United Nations Human Rights Committee, Zwaan de Vries v. Netherlands, Communication Nº 182/1984; United Nations Human Rights Committee, Broeks v. Netherlands, Communication Nº 172/1984.


63 For an overview on the application of the principle of equality and prohibition of discrimination for the protection of social rights before domestic tribunals, see Akramovich & Courtis, *supra* note 3, at 169-179.
such cases, it may also be possible to allege discrimination on the grounds of race, language, national or social origin, economic status or any other social condition.  

When private individuals or companies are the cause of environmental damage, the claimant has the burden to prove that such activity was authorized, tolerated or mismanaged by the State. For this situation to implicate State liability in terms of the principle of equality and the prohibition against discrimination, it must be alleged that the State has allowed or tolerated excessive privileges for certain private entities to the detriment of others; in other words, the State has failed to guarantee “equal protection of the law.”

B. LINKING JUSTICIABLE CIVIL AND POLITICAL RIGHTS WITH ENVIRONMENTAL RIGHTS

As mentioned earlier, there are cases in which the protection of environmental rights is inextricably connected with civil and political rights that are widely recognized as judiciable. The Inter-American Court has made progress in this area, stressing the close relationship that exists between certain civil and political rights and ESCR. Many cases, therefore, may provide a valuable opportunity to expand this relationship to include environmental rights and thereby guarantee their protection.

1. Right to Life

Another means of connecting the rights protected by the American Convention with environmental rights is by linking the latter with the right to life. In this sense, an infringement of environmental rights can be “translated” as a threat or risk to the right to life. These cases may involve the authorization or approval by a State of activities leading to toxic waste discharges, exposure to radiation or gases, water contamination and indiscriminate deforestation, among others. If sufficiently serious, the situation can be argued as a violation of the right to life.

64 See American Convention, supra note 57, art. 1(1). For more information regarding unequal sacrifices of the indigenous communities and peoples after the subsidizing of projects by the World Bank, see James Anaya, Indigenous People in International Law 118-119 (2005).

65 However, not all cases that involve environmental issues deal with the protection of environmental rights. For example, in Baena Ricardo et al. v. Panama, supra note 17, the Inter-American Court protected trade union rights by the broad interpretation of the freedom of association, consecrated in Article 16 of the American Convention. The interrelation between freedom of association and environmental rights seems unlikely, to say the least.
The Inter-American Court has advanced along these lines in other ways as well. Following the lead of the United Nations Human Rights Committee and the European Court on Human Rights, the Inter-American Court has affirmed that the right to life is not only upheld with the State’s negative obligations, but also requires compliance with positive obligations. Therefore, a State can violate the right to life by omission, i.e., by failing to adopt measures for the protection of the right. Such a violation can either occur when services are not provided, or it can exist through complicity, consent or indifference towards the actions of individuals that result in harm to the life or physical integrity of victims. In *Yakye Axa v. Paraguay*, the Court sums up its doctrine on the matter as follows:

This Court has maintained that the right to life is a basic element of the American Convention, as the fulfillment of all other rights depends on the protection of that first right. When the right to life is not respected, all other rights disappear, since the holder of those rights is no more. Given this fundamental nature, restrictive approaches to the right to life are not acceptable. In essence, this right not only includes the right of all human beings not to be arbitrarily deprived of life, but also the right to the non-generation of conditions that prevent access to a dignified life or make such access difficult.

One of the State’s undeniable obligations as a guarantor with the aim of protecting and guaranteeing the right to life is to generate minimum living conditions that are compatible with human dignity and to not create conditions that make difficult or preclude human dignity. In this respect, the State has the duty to adopt positive, concrete measures aimed at fulfilling the right to a dignified life, particularly for persons who are in a vulnerable, at-risk situation, which must be addressed as a priority.

In many cases, the Court has highlighted the relationship between the right to life and the right to health. It has concluded that the lack of provision of services such as health care, potable water and sanitation and the necessary conditions guaranteeing the right to food may constitute violations of the rights to life and physical integrity, as discussed below. In *Moiwana Community v. Suriname*, the Court ruled that the State’s noncompliance with its duty to investigate a violation of the right to physical integrity (in this case, the massacre of a victimized indigenous community) constituted a violation of its obligation to guarantee the right to physical integrity. Moreover, the Inter-Ameri-
can Court held that the relationship between the indigenous community and its traditional lands takes on a vital spiritual, cultural and material importance for the case. Any measures that prevent the community from maintaining contact with its ancestral lands would harm its identity and cultural integrity and therefore constitute a violation of Article 5(1) of the American Convention.\(^{71}\)

Thus, in order to take advantage of this doctrine, it would be necessary to show that either the life or physical integrity of an individual (or group of persons) is likely to be put at risk by measures adopted by the State, or as a result of the authorization, tolerance or indifference of the State towards the activities of private entities. This presumption would also include the failure—if serious enough—on the part of the State to adopt measures that prevent its agents from causing harm to the environment, or to control the activities of private entities that would adversely affect the environment.

2. Right to Physical Integrity**

This broader approach to the right to life may also be taken with other rights that are protected by the Convention. For example, the right to physical integrity (Article 5 of the Convention) presumes that the treatment an individual receives from the State, or from third parties acting with State acquiescence, should be free from torture or cruel, inhumane or degrading punishment.

Traditionally, a violation is considered to have been committed if agents of the State beat individuals or expose them to treatment that is harmful to their condition and dignity as human beings. On the other hand, the State’s failure to act may place, or allow the placement of, a person or group of persons in cruel, inhumane or degrading conditions. For example, it can be argued that where communities are deprived of basic health care as a result of government negligence, a State is violating their right to physical integrity. Similarly, a State would be committing a violation if, for example, it failed to control the mining operations of private entities, thereby allowing a reckless activity to endanger the health of nearby residents.\(^{72}\)

In this way, it can be affirmed that the right to physical integrity contains the essential elements of the rights to health, food, education, a healthy environment, social security and even the right to work. The IACHR has recognized that:

\[\ldots\text{the essence of the State obligation to comply with legal protection is to guarantee the social and economic aspirations of its people, giving priority to their needs for health, food and education. Prioritizing the “right to survive” and “basic needs” is a natural consequence of the right to personal security.}\]  \(^{73}\)

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\(\text{71 Id.} \quad 101-102.\)

\(\text{** This section was written by Fernanda Doz Costa, Argentinean human rights expert and lawyer from the Universidad Nacional de Tucuman and holder of a Master’s Degree in Human Rights from New York University.}\)


\(\text{73 IACHR, Annual Report 1988, \# 322, OEA/Ser.L/V/II.74, Doc. 10, rev. 1 (Sep. 16, 1988).}\)
3. The Right to Property of Indigenous and Tribal Peoples

The right to property of indigenous and tribal peoples is highly relevant to the defense of environmental rights in Latin America. The cultural relationship between indigenous communities and their land usually implies an over-arching worldview that regards their ancestral lands and natural resources as spiritual and sacred. Included in this vision is the importance of maintaining their means of subsistence through traditional forms of farming, hunting and fishing. Needless to say, the preservation of the environment and biodiversity are of utmost importance for the cultural survival of these communities. Thus, a complaint may be brought before the Inter-American Commission if the State adopts measures or permits or tolerates activities of private entities that damage the environment in a way that also endangers the ancestral lands of indigenous or tribal peoples.

In this vein, the Inter-American Court of Human Rights, in what may be its most activist period of interpretive development, has stated that the right to property as set forth in Article 21 of the American Convention on Human Rights should be interpreted to protect the communal or collective right of indigenous peoples. This interpretation takes into account the context of indigenous peoples and communities, as well as other international standards such as ILO Convention 169. Similarly, it establishes that the right to historic or ancestral lands must be respected so that indigenous communities may carry out their traditional subsistence activities and preserve their particular worldview, culture and special relationship with their land. The Court has developed this doctrine in four cases: Awas Tingni v. Nicaragua, Moiwana v. Suriname, Yakye Axa v. Paraguay and Sawhoyamaxa v. Paraguay, although prior cases and other applications of the same doctrine do exist. In addition, the Court

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76 Article 21 establishes verbatim: “Right to Property: 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.” American Convention art. 21, supra note 57. For more information on the origins of the Inter-American System regarding the case of the indigenous communities and peoples, see Isabel Madariaga, Sistema Interamericano de Derechos Humanos, Pueblos Indígenas y derecho de Propiedad. Breves antecedentes [Inter-American System of Human Rights, Indigenous Villages and the Right to Property], in Protección Internacional de los Derechos Humanos: Nuevos Desafíos, supra note 6, at 209-228.

77 Awas Tingni v. Nicaragua, supra note 23, ¶¶ 142-155.

78 Moiwana v. Suriname, supra note 70, ¶¶ 125-135.

79 Yakye Axa v. Paraguay, supra note 19, ¶¶ 123-156.


has expanded the protection of collective property to include tribal communities that share similar cultural characteristics with indigenous peoples.\(^2\)

In *Awas Tingni*, the Court explained that:

Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.\(^3\)

In *Yakye Axa*, the Court affirmed that:

The culture of members of indigenous communities corresponds to a particular way of life of being, viewing and acting in the world, that grows out of their close ties to their traditional lands and the resources found there, not only as their main form of subsistence, but also as an integral part of their cosmovision, religiosity and ultimately, their cultural identity.\(^4\)

In *Sawhoyamaxa Community*, the Court ruled:

…that the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving therefrom, must be secured under Article 21 of the American Convention. The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because they form part of their worldview, of their religiousness and consequently, of their cultural identity.\(^5\)

\(^2\) *Saramaka People v. Suriname*, supra note 50.

\(^3\) *Awas Tingni v. Nicaragua*, supra note 23, ¶ 149. For more information on the case, see the essays published in *El Caso Awas Tingni v. Nicaragua, Nuevos Horizontes para los Derechos Humanos de los Pueblos Indígenas [The Case of Awas Tingni v. Nicaragua, New Horizons for the Human Rights of Indigenous Peoples]* (Felipe Gómez Isa ed., 2003).

\(^4\) *Yakye Axa v. Paraguay*, supra note 19, ¶ 135.

\(^5\) *Sawhoyamaxa v. Paraguay*, supra note 80, ¶ 118.
Of particular interest when underscoring the connection between the communal property rights of indigenous peoples and communities and environmental rights, is the resolution of the Inter-American Court on provisional measures in the case of the *Indigenous Community of Sarayaku*, adopted on June 17, 2005. In that case, in addition to the relationship between the State and the indigenous community, the role of a private oil company was also at issue. The State granted a concession for oil exploration and drilling on the ancestral lands of the Sarayaku community without prior consultation. As part of their exploration activities, agents of the oil company not only placed explosives on community land—thereby blocking access to the river which supplied the needs of the inhabitants—but also physically attacked members of the community. The State failed to adopt measures to halt the company’s actions and did not investigate the assaults nor punish the perpetrators. Among other safeguards, the Inter-American Court ordered the State to adopt the necessary measures:

… to enable the members of the Sarayaku Indigenous People to carry out their activities and use the natural resources that exist in the territory where they are settled; specifically, the State must adopt those measures tending to avoid immediate and irreparable damage to their lives and personal integrity as a result of the activities of third parties who live near the community or who exploit the natural resources within the community. In particular, the State must remove the explosive material placed in the territory where the Sarayaku Indigenous People are settled, if this has not already been done.

4. The Right to Freedom of Movement and Residence

Another right that can prove useful for cases of environmental damage is the right to freedom of movement and residence as set forth in Article 22 of the American Convention on Human Rights. Its application can be important in cases where inhabitants of an area are forcibly displaced or are unable to continue living in their chosen place of residence as a result of damage caused by water and soil pollution, illegal deforestation or logging, discharge of toxic waste and similar activities.

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86 *Sarayaku v. Ecuador*, Provisional Measures, supra note 11, ¶¶ 8, 9, 11, 12, 13, & decision 1(b).

87 *Id.*, decision 1(b); *see also, id.*, decision (d) (regarding free movement of members of the community in the river Borbonaza).

88 American Convention art. 22, supra note 57 ("Free Movement and Residence: 1. Every person lawfully in the territory of a State Party has the right to move about in it and to reside in it subject to the provisions of the law. 2. Every person has the right to leave any country freely, including his own. 3. The exercise of the foregoing rights may be restricted only pursuant to law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others. 4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.").
In Moiwana Community v. Suriname, the Inter-American Court further developed its interpretation of Article 22 of the Convention, basing its ruling on precedents of the United Nations Human Rights Committee. The Court held that the State’s failure to provide the conditions and means for an indigenous community to return voluntarily to their lands in a safe and dignified manner, after suffering displacement on the heels of a massacre, constituted a violation of Article 22. The Court emphasized that those conditions included conducting effective criminal investigations to put an end to the ongoing situation of impunity regarding the massacre perpetrated against the community. Once again, the Court underscored the particular relationship between the community and the traditional lands from which it had been displaced.89

Similarly, the Court highlighted this relationship in its resolution on provisional remedies in Indigenous Community of Sarayaku v. Ecuador.90 There, as previously mentioned, the right to freedom of movement of community members was violated as a result of oil exploration by a private company, which had adverse impacts on their territory.

C. THE POTENTIAL USE OF ARTICLE 11 OF THE PROTOCOL OF SAN SALVADOR IN ENVIRONMENTAL CASES

In a number of cases, the Inter-American Court of Human Rights has employed the Protocol of San Salvador as an interpretative standard for obligations stemming from the American Convention on Human Rights. As previously mentioned, Article 11 clearly recognizes the right to a healthy environment. Even if this cannot be directly invoked as a justiciable right, it can be introduced under appropriate circumstances as an interpretative standard to determine the scope of obligations arising from other rights enshrined in the American Convention. This, in fact, was the case in Yakye Axa.91

In Baena Ricardo v. Panama, the Court invoked Article 8(3) of the Protocol of San Salvador on trade union rights, in order to interpret Article 16 of the American Convention (freedom of association) in the context of mass layoffs of union workers.92

In Five Pensioners v. Peru, the Court referred to Article 5 of the Protocol of San Salvador to interpret Article 21 of the American Convention (right to property). As its title indicates, the issue in this case was the scope of the victims’ rights to pension benefits.93

89 Moiwana Community v. Suriname, supra note 70, ¶¶ 107-121.
90 Sarayaku v. Ecuador, Provisional Measures, supra note 11, ¶¶ 12, 13, decision 1(a) & (d).
91 Yakye Axa v. Paraguay, supra note 19, ¶ 163.
92 Baena Ricardo v. Panama, supra note 17 ¶ 159.
In “Juvenile Reeducation Institute” v. Paraguay, the Court once again referenced the Protocol of San Salvador in its interpretation of the scope of the State’s obligation to guarantee the right to life and physical integrity, as well as to protect children in detention. On this occasion, it made particular reference to the right to education as set forth in Article 13 of the Protocol of San Salvador.\textsuperscript{94} Similarly, in the case of Yean and Bosico, the Court interpreted Article 19 of the American Convention in light of the Protocol of San Salvador. The Court held that the rights of the child included the obligation of the State to provide free primary education to all children in an environment and in conditions that are conducive to full intellectual development.\textsuperscript{95}

Given these trends, the most significant case in this context is Yakye Axa. In issuing its interpretation of the State’s obligations with respect to the right to life of the members of the indigenous Yakye Axa community, the Inter-American Court affirmed that:

In the instant case, the Court must establish whether the State generated conditions that worsened the difficulties of access to a decent life for the members of the Yakye Axa Community and whether, in that context, it took appropriate positive measures to fulfill that obligation, taking into account the especially vulnerable situation in which they were placed, given their different manner of life (different worldview systems than those of Western culture, including their close relationship with the land) and their life aspirations, both individual and collective, in light of the existing international corpus juris regarding the special protection required by the members of the indigenous communities, in view of the provisions set forth in Article 4 of the Convention, in combination with the general duty to respect rights, embodied in Article 1(1) and with the duty of progressive development set forth in Article 26 of that same Convention and with Articles 10 (Right to Health); 11 (Right to a Healthy Environment); 12 (Right to Food); 13 (Right to Education) and 14 (Right to the Benefits of Culture) of the Additional Protocol to the American Convention, regarding economic, social and cultural rights and the pertinent provisions ILO Convention No. 169.\textsuperscript{96}

As has been noted, the Court has referenced Article 11 of the Protocol of San Salvador for the interpretation of other rights, although without further doctrinal development. Therefore, it will largely be up to litigants to highlight those cases in which, by virtue of the alleged environmental damage, the rights recognized in the American Convention should be interpreted in light of the right to a healthy environment, as established in Article 11 of the Protocol of San Salvador.

\textsuperscript{94} “Juvenile Reeducation Institute” v. Paraguay, supra note 66, ¶¶ 148, 172 & 174.
\textsuperscript{95} The Girls Yean and Bosico v. Dominican Republic, supra note 26, ¶ 185.
\textsuperscript{96} Yakye Axa v. Paraguay, supra note 19, ¶ 163.
D. PROTECTING THE ENVIRONMENT FOR ESPECIALLY VULNERABLE GROUPS.**

For various economic, political, social and cultural reasons, certain groups of people are more vulnerable to human rights violations than others. Thus, although all persons are equal under the law, in reality there are occasions in which not all people enjoy the same rights under equal conditions. Human rights law and jurisprudence have made it necessary to provide special protection, where needed, to certain groups in situations of greater vulnerability. Consequently, the right to equal protection, the principle of nondiscrimination, or the right of all people to participate in the public sphere in general conditions of equality, necessarily implies that States must implement certain positive measures to guarantee the nondiscriminatory enjoyment of all rights. A State cannot simply refrain from the introduction of discriminatory regulations in its domestic laws.

Positive nondiscrimination measures (affirmative action) are upheld in the interpretation of the rights and obligations recognized in the American Convention. Specifically, Article 2 of the Convention establishes the duty of States to adopt legislative or other measures as may be necessary to give effect to the rights and freedoms recognized in the Convention. Therefore, the obligation to respect rights (Article 1(1)), interpreted in accordance with the obligation to adopt measures (Article 2) and in keeping with the nondiscrimination principle (Article 24), would impose on the State the obligation to adopt the positive measures required to reduce inequalities.97 Thus, for example, positive measures may be necessary to protect those individuals most likely to develop illnesses as a consequence of living in the shadow of a polluting industrial site. Such measures could include access to diagnostic services and medical treatment, improvement of production procedures, pollution reduction and relocation of the site.

The adoption of special measures for the defense of vulnerable groups, in relation to ESCR, stems from the doctrine of the UN Committee on ESCR, which can be cited when bringing claims before the Inter-American System. For example, the obligation to protect the most vulnerable, least-protected groups during periods of economic adjustment is included in General Observations Nos. 2 and 3 of the ESCR Committee.98 General Observation No. 4 on

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97 Cf Velásquez-Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (Ser. C) No. 4, ¶ 166 (July 29, 1998) ("The second obligation of the States Parties is to 'ensure' the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction, in light of a positive obligation, under Article 1.1. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are legally capable of ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."); see also, Godínez-Cruz v. Honduras, 1989 Inter-Am. Ct. H.R. (Ser. C) No. 5, ¶ 175 (Jan. 20, 1989).

the right to adequate housing99 as well as No. 7 on forced evictions100 establish the need to provide special protection for vulnerable groups, such as the elderly, children, the physically disabled, people living with HIV, those with chronic medical problems or who suffer from mental illness, victims of natural disasters and people living in high-risk areas. Special measures for the protection of vulnerable groups or persons are also recognized in the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights.101

The Inter-American System also takes into account the obligation to provide special protection, where needed, for groups of persons in particularly vulnerable situations, such as children, indigenous communities and women, as discussed below. Special protection of this sort can be requested in environmental cases in which a vulnerable group has suffered particular harm, as long as it can be argued that the differentiated treatment requested is fair and proportional.

1. Special Protection of Children and the Family and Respect for Privacy and Family Life*

The American Convention on Human Rights specifically recognizes the rights of the child to protection (Art. 19), as well as the right to protection and respect for family life (Arts. 11 and 17(1)). These rights can also be linked to civil and political rights when arguing environmental cases in which children or family life are affected. Under this argument, the State must adopt measures not only to avoid environmental damages that resulted in undue interference in the life of children and families, but also to create basic, environmental conditions compatible with the human dignity for all children and families.

The Inter-American Court has also indicated that the obligation to protect the child as set forth in Article 19 of the Convention involves both negative and positive duties.102 In “Street Children” (Villagrán Morales et al) v. Guatemala, the Court for the first time held that obligations arising from the duty of the State to adopt special measures for the protection and assistance of minors should

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99 UNESCR, General comment No. 4: The right to adequate housing (article 11 (1) of the Covenant), E/1992/23 (1991), reprinted in UN Compilation, supra note 98, at 19.
100 UNESCR, General comment No. 7: The right to adequate housing (art. 11 (1) of the Covenant): forced evictions, E/1998/22, annex IV, reprinted in UN Compilation, supra note 98, at 46.
be interpreted in the light of the Convention on the Rights of the Child.\textsuperscript{103} The Court also identified measures to prevent children from being thrust into poverty or from being deprived of the minimal conditions needed to live with dignity and enjoy the full and harmonious development of their personality.\textsuperscript{104} Further measures signaled by the Court stressed nondiscrimination, special assistance for children without families, the guarantee of the child’s survival and development and the social rehabilitation of all abandoned or exploited children.\textsuperscript{105} This reasoning may also extend to cases in which the State, either through the adoption of certain measures or the lack of oversight, places groups of people including children in environmentally hazardous situations.

As previously mentioned, in \textit{López Ostra v. Spain}\textsuperscript{106} and \textit{Guerra et al. v. Italy},\textsuperscript{107} the European Court of Human Rights has signaled the relationship between the protection of family life and the protection of environmental rights. The rulings in these cases were based on Article 8 of the European Convention on Human Rights and Fundamental Freedoms, similar to Article 11.2 of the American Convention.\textsuperscript{108} The American Convention further reinforces this right in its Article 17(1).\textsuperscript{109}

In \textit{López Ostra}, the European Court examined the case of an individual and her family who lived near a treatment facility for liquid and solid waste, the construction and operation of which had been approved and subsidized by the local government. The petitioners claimed that fume emissions, repeated loud noises and strong odors made the conditions of family life unbearable and caused serious health problems.\textsuperscript{110} The Court ruled in favor of the petitioner, asserting that:

Naturally, severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.\textsuperscript{111}

\textsuperscript{103}“Street Children” (Villagrán-Morales et al.) v. Guatemala, supra note 66, ¶¶ 194-195.
\textsuperscript{104}Id. ¶ 191.
\textsuperscript{105}Id. ¶ 196.
\textsuperscript{108}Article 8 of the European Convention, supra note 43, establishes: “Right to private and family life: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. (emphasis added). Article 11 of the American Convention, supra note 57, states: “Right to Privacy: 1. Everyone has the right to have his honor respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks”. (emphasis added). Note the similarity between the highlighted segments. The Inter-American Court analyzed a violation of the Article 11(1) in \textit{Gomez Paquiyauri Brothers v. Peru}, supra note 66, ¶¶ 180-182.
\textsuperscript{109}American Convention, supra note 57, art. 17 (“Rights of the Family: The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”).
\textsuperscript{111}Id. ¶ 51.
In *Guerra*, the European Court stated that:

…although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life.\footnote{Guerra et al. v. Italy, 26 Eur. Ct. H.R. 357, ¶ 58 (Feb. 19, 1998).}

Specifically in relation to the positive obligations of the State with respect to family life and after taking into consideration the environmental disruption caused by the emission of toxic fumes from the fertilizer plant, the Court held:

… that severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely […]. In the instant case the applicants waited, right up until the production of fertilizers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.\footnote{Id. ¶ 60.}

2. Special Protection for Women***

Women sometimes find themselves in situations of vulnerability that may require the implementation of special measures for their protection. As with other vulnerable groups, it is essential to determine whether the facts presented in these cases necessitate the implementation of special measures. These claims can be further bolstered by citing international treaties relating to women’s rights, such as the Convention on the Elimination of All Forms of Discrimination Against Women.\footnote{Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13, December 18, 1979.}

Within the Americas, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women\footnote{Inter-American Convention for the Prevention, Punishment and Eradication of the Violence Against Women (Convention of Belém do Pará) art. 9, 33 I.L.M. 1534, June 9, 1994.} specifically recognizes the vulnerability of women in the hemisphere to violence (Article 9). Moreover, it mandates that States Parties refrain from discriminating against women and that they adopt appropriate legislative measures to prevent violence against women (Article 7). Additionally, it promotes the development and implementation of programs and measures for the greater protection of women subjected to violence (Article 8).

\footnote{*** This section was written by Samantha Namnum, Coordinator of Strategic Projects, Centro Mexicano de Derecho Ambiental, CEMDA (Mexican Environmental Law Center).}
Special protective measures for women are also relevant to environmental cases, considering that “due to women’s daily interaction with the environment, they are more seriously affected by environmental degradation.” The exact impacts vary according to the circumstances, including increased harm due to air and water pollution as well as pesticides and toxic substances. Women may be forced to work harder to find clean water and firewood for their households, resources whose availability is limited by increasing deforestation and erosion.

The Inter-American Commission has also acknowledged the vulnerability of women in reports prepared by the Special Rapporteur on the Rights of Women. If, in addition to the human rights violations previously indicated, the rights of women are adversely affected by environmental damage, advocates can request the special protection of women in vulnerable situations in order for the situation to be dealt with more effectively.

3. Indigenous Communities

The indigenous communities of the hemisphere are particularly vulnerable because of the social and economic circumstances in which they live. Moreover, as their cultural survival is directly dependent on their natural resources, they are even more vulnerable to environmental damage on their lands. Therefore, when indigenous communities suffer from the effects of environmental degradation, specific reference should be made to their vulnerable situation. As a group, they are entitled to benefit from special protective measures beyond those already mentioned with respect to human rights such as the right to collective property.

The Commission has expressly recognized this situation in a number of reports, through the review of several contentious cases mentioned above and through the creation of the Special Rapporteurship on the Rights of Indigenous Peoples. Furthermore, the Court has ruled on the need to offer special protection to indigenous communities existing in situations of particular vulnerability. Specifically, the Court has held that:

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117 Id.
*** Section written by Astrid Puentes Riaño of AIDA.
117 Id.
*** Section written by Astrid Puentes Riaño of AIDA.
120 Documents and activities of this Rapporteurship are available for consult on the Internet at: http://www.cidh.org/indigenas/Default.htm
As regards indigenous peoples, it is essential for the States to grant effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values and customs.\(^\text{121}\)

Similarly, the United Nations General Assembly recently adopted the Declaration on the Rights of Indigenous Peoples.\(^\text{122}\) Among other things, the Declaration expressly recognizes both the individual and collective rights of indigenous peoples, prohibits all forms of discrimination, particularly in relation to their indigenous identity and recognizes their autonomy and self-determination on their lands. Moreover, it recognizes their right to effective mechanisms to protect them from forced displacement or being deprived of their traditional lands and natural resources. These rights may be useful for the interpretation of indigenous peoples’ rights in the Inter-American System and to ensure their effective enforcement.

The Inter-American System does not yet have a separate declaration recognizing the rights of indigenous communities. In 1989, the OAS General Assembly recognized the importance of granting special protection to these communities and requested that the IACHR prepare and present a draft declaration. In 1997, after an extensive consultation process, the Commission submitted the Draft American Declaration on the Rights of Indigenous Peoples. The document explicitly recognizes the rights of native peoples, their importance within the States of the Americas, the need for their special protection and the importance of eradicating the poverty that affects that and improving their well-being.\(^\text{123}\)

Although the OAS General Assembly has not yet approved the Draft American Declaration on the Rights of Indigenous Peoples, the Commission has already referred to the rights enshrined in the document in its reports.\(^\text{124}\) As such, it can serve as an additional instrument to obtain special protection for these communities, or for environmental cases in which indigenous people have been adversely affected.

4. Environmental Refugees****

Environmental refugees constitute the fourth group considered vulnerable in this study. It is comprised of:

… those individuals who have been forced to leave their traditional habitat, whether temporarily or permanently, as a result of a marked environ-

\(^{121}\) Yakye Axa v. Paraguay, supra note 19, \(\S\) 63.


\(^{123}\) IACHR, Draft American Declaration on the Rights of Indigenous Peoples (Feb. 26, 1997).


**** This section was written by Samantha Namnum, Coordinator of Strategic Projects, Centro Mexicano de Derecho Ambiental, CEMDA (Mexican Environmental Law Center).
mental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life. By ‘environmental disruption’ is meant any physical, chemical and/or biological changes in the ecosystem (or the resource base) that render it temporarily or permanently unsuitable to support human life.125

Throughout history, the displacement of large groups of people as a consequence of environmental degradation has been an under-recognized reality. Nevertheless, a number of factors today have intensified environmental pressures on human communities, among them the exhaustion of natural resources, irreversible environmental destruction, overpopulation and over-consumption. These factors have led to forced, mass migrations of people from their places of origin in search of other opportunities for survival and development. These displacements result in violations of individual human rights, such as the rights to life, freedom of movement, property, work and health. They also spur the loss of cultural characteristics and identity in affected communities.

In this regard it is worth noting the opinion of Inter-American Court judge Cançado Trindade, when he affirmed that:

With the uprootedness, one loses, for example, the familiarity with the day-to-day life, the mother-tongue as a spontaneous form of the expression of the ideas and sentiments, and the work which gives to each person the meaning of life and sense of usefulness to the others, in the community wherein one lives. One loses the genuine means of communication with the outside world, as well as the possibility to develop a project of life. It is, thus, a problem which concerns the whole human kind, which encompasses the totality of human rights, and, above all, which has a spiritual dimension which cannot be forgotten, with all more reason in the dehumanized world of our days.

… The problem can only be adequately confronted bearing in mind the indivisibility of all human rights (civil, political, economic, social and cultural).126


…owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, owing to such fear, is unwilling to return to it.127

126 Inter-American Court of Human Rights, Provisional Measures, Matter of Haitians and Dominicans of Haitian Origen in the Dominican Republic Regarding the Dominican Republic, Resolution No 2, Concurrent Opinion of Judge A.A Cancado Trindade (Aug. 18, 2000).
This definition does not include internally displaced people or those forcefully displaced for environmental reasons. This omission has left environmental refugees outside the legal framework of the Convention on the Status of Refugees and outside the mandate of the UN High Commissioner for Refugees, the only UN agency providing international help and support to refugees.

The situation of environmental refugees is expected to worsen in the coming years, as environmental deterioration progresses. In fact, estimates put the number of refugees due to global climate change alone at 200 million people by the year 2050.\textsuperscript{128} To this number we must also add, for example, all those who are adversely affected by environmental degradation resulting from such infrastructure projects as the construction of highways and dams.\textsuperscript{129} Refugees fleeing the contamination of their environment due to inadequate or inappropriate disposal of solid or dangerous waste products are further swelling these ranks.

In this scenario, it is very likely that the victims of human rights violations caused by environmental degradation are or will, in many cases, become environmental refugees. It is therefore an element of vulnerability for this group that should be taken into account when engaging the Inter-American System, whether through individual petitions or requests for precautionary measures. This strategy could help prevent entire groups of people from becoming environmental refugees.

5. Other adversely affected vulnerable groups

In addition to the groups discussed above, it is possible that other groups require special protection in view of their vulnerable conditions. This would be the case for groups such as migrants, displaced persons, peasants, people of African descent, those suffering from illnesses and persons deprived of liberty. Depending upon the facts of a particular case, these groups could warrant special protections. Therefore, litigants should strongly emphasize this situation before the Commission and the Court so that these bodies may respond in accordance with the needs of these groups, as they have done thus far.

\begin{itemize}
  \item In the Inter-American System the link between human rights and the environment reveals a virtually uncharted territory, where almost everything remains to be developed. Environmental defenders are obliged, therefore, to select situations in which violations of the rights recognized in the Inter-American System are evident and can be linked to situations of environmental harm. Litigants must make a significant effort to argue cases, where possible, by using the criteria and doctrine already created by the System or by other systems with similar standards of protection.
\end{itemize}


\textsuperscript{129} The World Commission on Dams estimates that between 40 and 80 million people around the world are displaced by the construction of large-scale dams. \textit{World Commission on Dams, Dams and Development: A New Framework For Decision Making} 6 (2000).
A. STRATEGIC ELEMENTS TO CONSIDER

Cases filed with the Inter-American System of Human Rights (IASHR) should not be viewed in isolation. In addition to the rights of individual victims addressed in each one, these cases allow the Inter-American Commission and Court to interpret and develop the standards applicable to human rights law that will provide jurisprudence for future cases.

Therefore, it is extremely useful to have guidelines for selecting cases to present before the IASHR to ensure that litigation is conducted strategically by fulfilling the objectives of the case while also advancing regional jurisprudence. Potential litigants will also find it useful to consider the possibilities and consequences that their case entails for the advancement of the rights enshrined in the Convention.

In addition, litigants should consider beforehand the political, economic and procedural factors involved in each particular case. Although the legal aspects of a case are critical, these additional factors are relevant as well and in fact, can be determinative of the legal strategies employed. The criteria specified above are especially important for environmental cases, as they are relatively new issues to the IASHR and the relevant jurisprudence is just beginning to be developed.

This point should be taken into consideration regardless of how the IASHR is engaged. As explained in Chapter II, advocates can access the IASHR through different mechanisms, either through individual cases (petitions or precautionary measures), through the investigation of regional or national human rights issues, or through country or thematic reports and on-site visits. In general, precedents in the IASHR are established by Judgments and Advisory

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* Chapter written by Martin Wagner, Managing Director of the International Program of Earthjustice and Astrid Puentes Riaño, Co-Director of AIDA.

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**Strategic elements to consider:**

- Possibilities and consequences for a solution to the problem and for the interpretation and/or development of standards
- Political, economic, social and procedural factors
Opinions issued by the Court and Resolutions issued by the Commission. In addition, the Commission’s rulings on precautionary measures and its admissibility, merits, country and special reports, are also sources of jurisprudence for interpreting human rights standards in the region.

1. Case Selection – Step by Step

A) Admissibility Requirements

For a case to be brought before the Inter-American Commission, petitioners must first show that there has been a violation of one of the human rights that are recognized in the Convention for which a Signatory State is responsible. The case must also meet the formal requirements for admissibility under Article 46 of the Convention. This means that petitioners must demonstrate that they have exhausted all available domestic remedies, that the petition has been filed within six months of the notification of a final decision domestically and that there are no pending international proceedings related to the case.¹

When a case is related with environmental matters, as we have previously mentioned, the IASHR cannot directly review the right to a healthy environment (Article 11, Protocol of San Salvador) in contentious cases. Instead, litigants must argue that an environmental impact also violates other rights recognized in the Convention or in the American Declaration. Therefore, determining which indirect mechanism to use is essential for presenting allegations of rights violations in a consistent manner.

We explain in detail possible arguments for linking environmental damage to other human rights in the next section of this chapter.

B) Characteristics of the Case

The second aspect to bear in mind is the case’s particular political and social characteristics. Such considerations include the severity of the alleged violation, the victims’ status and the possibility that any intervention by the Commission and the Court could lead to a real improvement in the situation.

Political Conditions

The political circumstances surrounding a case are directly related to its eventual outcome. They determine how a State reacts to litigation and whether the Commission is willing to accept a case. In politically sensitive situations, it is important to emphasize legal factors over political ones, to present irrefutable evidence of human rights violations and to identify reasonable measures and requests that could remedy the situation.

¹ For more information on admissibility requirements, please refer to Chapter II.
In contentious cases, petitioners present a case before the system intending to solve an entire set of human rights problems associated with environmental degradation because of the lack of legal alternatives domestically. It is worth noting that although legal action can contribute to this end, it is just one of a whole series of measures necessary to solve this kind of problem. Therefore, it is essential that advocates seek other measures to address or resolve a given situation. This approach will avoid false expectations and over estimations of the the Inter-American System’s capacity to respond and allow petitioners to take full advantage of its true potential.

As part of this strategic analysis, it is important to examine the positions the State and the System have taken on the underlying issue of the case in other national and international fora. Evidence of these positions can be found in jurisprudence and in the participation of their representatives in multilateral conferences, among other venues. In this way, it will be possible to identify in advance the best way of presenting an issue and to anticipate the State’s likely response. If political aspects are not taken into consideration and current political conditions are unfavorable, litigation will probably hinder attempts to solve the problem and advocates could lose a valuable opportunity for dialogue and discussion.

On the other hand, if petitioners know in advance that the State is likely to react strongly or negatively, they can include information on this reaction in the case before the Commission. This is particularly important when there are clear indications of pressure or harassment as a result of, or in connection with, the litigation. This has occurred on many occasions in cases of civil and political human rights violations and it is increasingly evident in cases of environmental degradation that violates human rights.

In addition, litigants should consider the potential reaction of other national and international groups or organizations involved in environmental issues and the possible support that these groups could lend. In situations in which many potential actors are involved in an issue, forming coalitions with experienced and reputable environmental organizations is highly recommended.

Engaging the media can also strengthen the response to problematic situations and advance legal strategies before the system. This kind of support can be highly positive by making an issue more visible and encouraging public debate. At the same time, publicity provides better protection for the victims, for example in cases of at-risk children and persons in detention who require specialized health care, just to mention two examples.

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3 Id., at 190.
Social Conditions

Harm resulting from environmental degradation often directly affects people and communities. In order to demonstrate collective harm in a case, petitioners should make sure that, ideally, the entire community, or at least the majority of those affected, are in agreement with the filing of domestic and international legal proceedings and are adequately informed. This is essential from the political and legal point of view, as the position of the community determines the outcome of negotiations and the effectiveness of measures for addressing the problem.

Preparing for litigation requires intensive work on the part of the representing organization and the community itself. Open channels of communication and the strong support and commitment of the participants are fundamental. These factors may also contribute to the identification of appropriate measures for resolving the situation. In contrast, the community’s opposition to legal action, even to its own detriment, could obviously hinder the process. In such cases, only the individuals who agree with the litigation should join as plaintiffs.

An effective litigation strategy should include presenting the Commission with clear requests for concrete measures that are reasonably enforceable and within the scope of its mandate. If the case reflects a systematic pattern of human rights violations, litigants should also state this in the petition. In other words, advocates should present evidence demonstrating that their case is just one of many in the State and that addressing the individual case is critical for resolving a more generalized problem. This is an important factor as it enables the Commission to benefit not only the victims in a particular case, but also other individuals in similar situations.

Priority Environmental and Human Rights Issues for the Inter-American System

The Commission has already identified several human rights issues as top priorities and has created Special Rapporteurships to investigate these issues further. Currently, the Commission has seven Rapporteurships, including those on freedom of expression, the rights of women, the rights of migrant workers and their families, the rights of indigenous peoples, the rights of persons deprived of liberty, the rights of the child, the rights of Afro-descendants and against racial discrimination and a unit for human rights defenders. Thus, when the viability of a case is under study, it is advisable to identify the rapporteurships related to the issues involved, evaluate any documents they may have developed and mention these in petitions and briefs. This can lead to a better understanding of the case and can also help expedite the procedures.

For example, the Union of Human Rights Defenders references the risk taken by those working for the defense of human rights and the environment. Inter-American Commission on Human Rights (IACHR), Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser. LV/II.124 (March 7, 2006).
Moreover, in environmental cases, there are often difficulties in gaining access to information or with corruption on the part of government officials responsible for monitoring activities that cause environmental degradation. Litigants should also mention these situations in petitions to the Commission as elements that could constitute harassment, threats or denial of access to justice, depending on the individual case.

Effects on Human Groups Human Groups in Vulnerable or Unfavorable Situations

Another key element in preparing a petition is the identification of the affected persons, particularly if they are members of communities in vulnerable situations, such as low-income communities, small farmers, indigenous people, Afro-descendants and children—who are especially susceptible to pollution or environmental degradation. The identity of the victim is also important when substantiating a case and requesting special measures, including emergency protective measures.5

In cases involving groups whose rights have not been fully developed in the Inter-American System, petitioners can use the jurisprudence on rights for similarly situated groups. For example, in the case of an Afro-descendant community, petitioners can argue that because a community shares important characteristics with indigenous peoples, decisions affecting the latter could also be applied for the protection of the former’s rights. In Saramaka People v. Suriname involving Afro-descendant peoples affected by timber and gold exploitation, the Inter-American Court has already accepted this reasoning, holding that those communities have rights to collective property, prior consultation and prior environmental and social impact studies.6

When the victims of human rights violations related to environmental degradation are from small farming communities, some protections put in place specifically for indigenous peoples might apply, such as the importance of natural resources for their way of life and their heavy dependence on natural resources for survival. In cases involving small farming communities and others for which no case law exists, litigants must be particularly careful to demonstrate that there is a serious violation of human rights.

c) Advantages to Engaging the Inter-American System

When determining whether to file a case with the Inter-American System, potential litigants must weigh the costs and benefits, particularly the time and effort required. First of all, as stated earlier, the Inter-American System provides for effective protection if the situation cannot be resolved after pursuing all possible domestic remedies. This is the principal advantage that the IASHR offers and therefore should be the main factor in determining whether to access the System.

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5 The protection of groups in vulnerable situations has been an element of special consideration by the IACHR and the Court and their caselaw on this matter is described in Chapters III and IV.

Secondly, filing a case before the IACHR opens up various avenues for engaging in dialogues with the State for addressing an issue. Because the Commission has the authority of an OAS agency, it can intervene as an “independent facilitator,” which makes it possible to seek solutions to the underlying issues in a case. This position also allows the Commission to help prevent, or at least control, any pressures or threats against victims domestically.

These opportunities for negotiation arise throughout the development of the case, especially during formal and informal meetings with the Commission and during the friendly settlement process. On these occasions, litigants can discuss and negotiate with the State and reach formal agreements under the oversight of the Commission. These are all positive outcomes that can emerge from litigation before the System and which can often provide an adequate solution to a conflict. It is worth mentioning that a friendly settlement is a complex process that, once begun, must be followed closely to verify the State’s compliance with its provisions. If the State fails to comply, litigants can request a special hearing or pronouncement from the Commission.

Advocates can also use the IASHR to request access to certain environmental information that the State has in its possession. Recently, the Inter-American Court of Human Rights held in Claude Reyes v. Chile on the rights of petitioners seeking information from the Chilean government regarding the investors in an infrastructure project that would have an environmental impact. Since the State systematically refused to disclose the information, the victims turned to the Commission to protect their rights. After exhausting the mechanisms available through the Commission to no avail, the petitioners took their case to the Court. In its judgment, the Court held that denying access to information in the public interest without good cause violates the freedom of expression, which includes the right to seek, receive and impart information.

In addition, States may be persuaded to produce the information necessary to evaluate a situation or an environmental impact. This possibility is particularly important for environmental cases, because in many cases it is possible to prove that environmental damage can, or is, violating human rights, but not the magnitude of the damage and possible mitigation measures.

The Commission also has the power to issue a pronouncement on an issue in the form of a published report. For States that have not recognized the jurisdiction of the Court and for cases that have not been submitted to the Court, the publication of the report on the merits is the final stage of the process. The Commission can also monitor compliance with its report and its recommendations and if these are ignored, the Commission may issue a statement insisting on their compliance. Although the recommendations of the Commission are quasi-jurisdictional, they have important political relevance and most States therefore tend to adhere to them.

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9 American Convention, supra note 7, arts. 50 & 51.
When States have accepted the jurisdiction of the Court, its judgments are fully binding on them and its orders for reparations (including damages and non-compliance provisions) are enforceable under domestic law. The Court also monitors compliance with cases through resolutions and hearings.

States must file reports on their compliance with the terms of judgments and provisional measures issued by the Court and with the recommendations of precautionary measures and reports on the merits issued by the Commission. Petitioners should also continue reporting compliance or non-compliance to the agencies of the System so that they can closely monitor the situation. Moreover, in cases of partial compliance, litigants can request resolutions demanding compliance on remaining points.

Another advantage of the Commission is the flexibility in its procedures. This can be especially helpful in complex cases where protection is not available through traditional domestic legal proceedings. Although the procedure for litigation in the IACHR is established in the Convention and the Commission’s Rules of Procedure, there is some latitude in requesting precautionary measures and agreements in friendly settlements, which can be tailored to the needs of an individual case. Through these mechanisms, victims have obtained important advances through the Commission, such as the suspension of activities in indigenous territories affected by oil production and the diagnosis and treatment of individuals affected by severe environmental pollution.

Litigation before the Inter-American System can also provide the possibility of changing domestic laws and regulations that violate the Convention. In its judgments, the Court has ordered the amendment of domestic laws that are inconsistent with the Convention as a measure to ensure that violations are not repeated. This was the case in the matter of Claude Reyes et al. v. Chile, in which the Inter-American Court examined Chilean

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10 Id., art. 68.
11 Rules of Procedure of the Inter-American Court of Human Rights, art. 69, revised Nov. 28, 2009.
law on the freedom of expression and access to information and concluded that they were not sufficient to protect these rights. The Court therefore determined that “Chile must adopt the necessary measures to guarantee the protection of the right of access to State-held information and these should include a guarantee of the effectiveness of an appropriate administrative procedure….”

**D) Evaluating the Amount of Work and Funds Required**

Case selection also involves considering the amount of work required to prepare, present and follow up on matters brought before the IASHR. This analysis should include evaluating the human and financial resources necessary, such as the requirements for maintaining adequate communication with the victims, the evidence that needs to be gathered, the requirements for following up on the case and other needs. Another consideration is the time it may take to litigate a case. Sometimes litigation can last eight to ten years, counting procedures before both the Commission and the Court of Human Rights.

Working on cases requires meetings and hearings with the Commission (in Washington, DC) or the Court (in San José, Costa Rica) to discuss the case with the State, present evidence and witness testimony, among other proceedings. The petitioners are responsible for paying the expenses involved. The victims or the organizations advising them will undoubtedly not have the necessary funds at their immediate disposal, but if this factor is taken into consideration when deciding whether to use the system, there can be sufficient time for fund-raising.

In addition to the effort described above, litigating cases before the Inter-American System requires constant coordination with victims, updating them on the situation of their case and communicating additional information to the Commission or Court. These activities are critical for proper handling of the case before the System and above all for ensuring that the litigation contributes to the effective protection of the victims’ rights.

After considering the elements described here, including a thorough analysis of the situation and the many factors involved, advocates may conclude that filing a case with the IASHR is not the best course of action. This may be true when, for political reasons, a case is not likely to prosper within the System, or when it is impossible to remain in contact with the victims, documentation is scarce or extremely difficult to find, resources are lacking, logistics are problematic or follow-up on the petition is impossible, among other prohibitive factors. All of these possibilities pose a great risk of losing a case, leaving the victims unprotected or establishing a negative precedent in the System.

In these situations, when it is impossible or unfeasible to resort to the Inter-American System, advocates should consider other avenues of protection. Deciding not to make use of the IASHR is important not only because of the implications for the case at hand, but also because of the bad precedent it could
set for similar situations in the future. Sometimes these obstacles are temporary and the best decision may be to wait until the right case comes along or the conditions are in place for resorting to an international body.

2. Establishing Jurisprudence for the Direct Protection of the Environment in the IASHR

Considering the universality of human rights and the importance each one has for individuals, ideally all of them should be justiciable, including the right to a healthy environment. Otherwise, continuing to treat the enforceability of human rights differently would mean placing some above others in a hierarchy of importance, thereby undermining the universal guarantee of protection. Advancing the recognition of a right is a valid objective for filing a case with the IASHR and potential litigants should consider it among other strategic elements. This is especially true with regard to the development of Article 26 of the Convention, as discussed in Chapters III and IV.

Moving towards the direct justiciability of the right to a healthy environment is viable by its very nature, given that respect for this right is essential for guaranteeing human dignity and life. Moreover, according to the rules for interpreting the rights of the Convention, these standards should be dynamic, meaning that guarantees can be expanded to ensure the protection of individuals. In fact, the Court considers human rights treaties to be “live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.” Considering that human activities affecting the environment pose a growing risk to the enjoyment of human rights, the direct enforceability of this right is precisely one of the requirements for confronting this trend.

Along these lines, strategic litigation is essential for firmly establishing the environment as a human right and providing better protection of other related rights. As stated in Chapters III and IV, the bodies of the OAS have already recognized the link between the environment and the enjoyment of the right to life and other human rights. The jurisprudence of both the Commission and the Court also recognize this link, particularly for vulnerable groups such as indigenous communities.

Strengthening and developing these elements is essential for making sure that recognition of the environment is a constant, not only in the minds of indigenous communities but also those of other groups. For this reason, when presenting environmental cases before the Inter-American System, petitioners should link this right with others and seek pronouncements from the Commission and the Court to entrenched the recognition of this right in their jurisprudence. Therefore litigants should explicitly refer to the right to a healthy environment.

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15 American Convention, supra note 7, art. 29.
environment, even though it must be linked to the violation of other, directly enforceable rights in order for the case to be admissible. When doing so, it is imperative that petitioners present their arguments and evidence clearly and also take much care in selecting cases.

3. Individual Petition vs. Precautionary Measures in an Environmental Case

In Chapter II, we described existing options for activating the Inter-American System in an individual case of human rights violations. Intervention by the Commission is possible through the presentation of a formal petition for human rights violations. It may also intervene by granting precautionary measures in serious and urgent situations when irreparable harm may be done, even if no petition has been filed. It is worth noting that although exhausting domestic remedies is not a procedural requirement for granting precautionary measures, it is advisable to explore available actions in the national court system and exhaust those channels in urgent cases (e.g. constitutional actions, claims filed with a Human Rights Ombudsman, etc.). If successful, these actions could be effective means of protecting rights.

The option of requesting precautionary measures is particularly important in cases of environmental degradation that violates human rights. Such measures can help avoid irreparable damage by preventing or suspending activities that infringe on human rights. In these situations, litigants should present clear evidence showing the serious implications that the activity, action or omission by the State has for human rights and also the urgency needed to stop or prevent irreparable harm to human rights. The Commission is particularly strict about these two elements, without which it will not grant precautionary measures.

Advocates should base their request for measures on international human rights law and in environmental cases, they can support these arguments with principles, obligations and requirements of environmental law. For example, the Precautionary Principle, enshrined in the Declaration of Rio of 1992\(^\text{17}\) and regarded by many as part of Customary International Law, offers significant elements for establishing the need and the type of measures that States should adopt in such cases. In particular, it provides the possibility of implementing restrictive actions even when there is no scientific certainty regarding the environmental damage that an activity could cause.

In addition to the Precautionary Principle, there are other equally relevant principles that could be cited in support of a request for precautionary measures before the Commission. One example is known as the Principle of Prevention and refers to taking adequate measures for mitigation when an environmentally risky activity with known consequences is undertaken. Another example is the obligation to evaluate environmental damage before authorizing an activity that could potentially cause severe damage to the environment.18

Among the possible precautionary measures that litigants can request are the production or publication of essential information on environmentally harmful activities, since this information could be necessary for determining the impact of such activities and the proper way to mitigate and control that impact. This obligation is also recognized in international environmental law. Principle 10 of the Declaration of Rio, for example, refers to participation and access to information, which in turn is connected with access to legal guarantees (Article 8 of the Convention) and adequate legal protection (Article 25). The Court also recognized this in its judgment in Claude Reyes et al. v. Chile.19

Precautionary measures are by definition temporary and are usually granted for six months, with the possibility for an extension if the situation persists. In this regard, they are effective for cases in which actions are urgently needed to avoid human rights violations or suspend the infringement of human rights. When requesting precautionary measures, in addition to describing the severity and urgency of the situation, it is important for the petitioners to clearly identify the specific measures that must be implemented.

After granting the measure, the IACHR will monitor its compliance. During this phase, it is vitally important for the petitioners to provide updated information to the Commission. Thus, if the State does not implement the recommended actions and if the serious and urgent situation persists, the Commission can request that the Inter-American Court of Human Rights grant provisional measures.20

Lastly, it should be noted that if advocates are seeking to implement long-term actions, to establish State responsibility and/or reparations for the damage to human rights caused by environmental degradation, they should submit an individual petition, provided that domestic legal systems do not offer adequate protection. Unlike precautionary measures, the petition process examines the merits of a case. If the matter cannot be resolved before the Commission, or if the State fails to comply with the final report on the merits, the IACHR can turn to the Court, as long as the State has accepted its jurisdiction. Then the Court can issue a judgment ordering the State to meet its obligations.21

18 Id., Principle 17.
19 Claude Reyes et al. v. Chile, supra note 8.
20 American Convention, supra note 7, art. 63.2.
21 Id., arts. 51 & 61. Regarding Commission and Court proceedings, see also Chapter II on the Overview of the IASHR.
4. Strategies for Introducing Principles of International Environmental Law in Cases Filed with the IASHR

Turning to other sources of international human rights law to interpret the obligations arising out of the American Convention and the associated treaties is particularly useful in environmental cases, as it helps fill gaps in Inter-American jurisprudence. These other instruments (treaties, conventions, declarations) create international environmental obligations for States that can be relevant for human rights law. For example, if cross-border damage occurs, the obligation under international law not to cause damage to the jurisdiction of other States is relevant to the interpretation of the human rights violations arising from such damage.

Incorporating other standards for the recognition of human rights within the Inter-American System is extremely important not only for determining obligations in specific cases, but also for developing jurisprudence and advancing the effective enjoyment of rights. In this way, it can strengthen the efficacy of the System. In fact, the Court adopts an “evolutionary” view of the Convention, in the sense that it recognizes the possibility that over time, the Convention will cover a wider variety of rights as conditions in the region change.

As it seeks to enhance its efficacy, the Court can invoke other treaties relating to the protection of human rights, even if they are not part of the Inter-American System. In an Advisory Opinion, the Court confirmed that it “has the power to interpret any treaty as long as it is directly related to the protection of human rights in a Member State of the Inter-American System.” Against this backdrop, international environmental treaties may also be brought to bear on environmental cases if litigants provide clear evidence of their relevance for the protection of human rights.


23 Melish, supra note 2, at 146.

24 Id.


26 Id., ¶ 21.
Another argument for including the obligations contained in other treaties is the provision of Article 29(b) of the Convention, which holds that the interpretation most favorable to the individual should be applied. Under this principle, if domestic legislation or other international treaties outside the Inter-American System provide broader parameters for the defense of human rights, they should take precedence. This interpretation ensures that the protection of human rights is as consistent as possible from one case to the next. Thus, when the Convention or the System’s jurisprudence is limited and there are instruments with better guarantees, the broader approach will be adopted in order to protect human rights to the utmost extent. It should be pointed out that although the Commission and the Court may use interpretation to give content to rights set forth in the Convention, they may not sanction a State on grounds other than those provided for in an instrument of the Inter-American System for the Protection of Human Rights.

The Commission has also expressed the need to include other international instruments in interpreting the rights of the System. Specifically, the Commission recognized that “provisions … including the American Declaration, should be interpreted and applied in context of developments in the field of international human rights law … and with due regard to other relevant rules of international law applicable to Member States against which complaints of human rights violations are properly lodged.” In Coard v. United States, the Commission cited international humanitarian law when interpreting the obligations of the Declaration, ruling “it would be inconsistent with general principles of law for the Commission to construe and exercise its Charter-based mandate without taking into account other international obligations of Member States which may be relevant.” In fact, the Court even acknowledged “that a treaty can concern the protection of human rights, regardless of what the principal purpose of that treaty might be.”

The Court applied this line of reasoning in the Yakye Axa case, when it referred to ILO Convention 169 (directly incorporated into domestic law) in its analysis of the violation of the right to effective judicial protection and guarantees in connection with Article 1.1 of the Convention. In its opinion, the Court cited Convention 169 when interpreting the provisions of Article 21 of

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27 Melish, supra note 2, at 151.
the American Convention with respect to private property. The provisions of Convention 169 helped the Court expand upon and interpret the rights of the indigenous community and the State’s obligations to protect these, thus providing a broader solution for repairing the rights violated.

The Commission has also considered other international treaties in interpreting human rights in the Inter-American System, including those related to environmental issues. In Sarayaku v. Ecuador, it referred to the requirement for prior consultation set forth in ILO Convention 169 as a mechanism for interpreting and enforcing Article 26 of the Convention. In addition, in a report on the rights of indigenous communities in Ecuador, the Commission cited a number of different environmental treaties that stipulate the obligations of the State, including the Rio Declaration on Environment and Development and the Convention on Biological Diversity. It also referred to the World Charter for Nature when discussing the importance of the link between the environment and human rights.

The jurisprudence of both the Commission and the Court points to the possibility of expanding the interpretation and protection of human rights by referring to the obligations set forth in other international environmental treaties and instruments. It is an option that can strengthen protection by expanding on and contributing to the development of human rights, particularly in cases related to environmental issues.

5. Monitoring Commission Reports or Court Judgments

One of the objectives of litigation before the Inter-American System is to obtain a pronouncement in the form of a resolution issued by the IACHR or a judgment issued by the Court. Clearly, if a State ignores a decision or recommendation, in practice the protection of human rights becomes an illusion and the decision has no impact. For this reason, after decisions are handed down, both the Court and the Commission need to receive reports regarding a State’s compliance.

32 Id., ¶ 127.
33 Kichwa People of the Sarayaku Community v. Ecuador, supra note 12, ¶ 49.
35 Id.
36 American Convention, supra note 7, art. 41(c) & g.
37 For more details regarding the proceedings and decisions taken by IASHR bodies, see Chapter II.
To strengthen and facilitate this effort, litigants and victims should monitor compliance with Commission decisions and Court judgments and file reports with these bodies. If a State fails to adhere to the recommendations or judgments of the System, the Commission or the Court can be asked to issue a pronouncement on the matter and to exhort the State to comply. The role of litigants is essential in this process and can help ensure the effectiveness of decisions. It must not be forgotten that even though each case in the Inter-American System is important, the sheer volume of cases in the System makes individual follow-up difficult. Therefore, the active participation of the victims and petitioners is crucial.

6. Other International Protection Instruments

The Inter-American System is one option for dealing with human rights violations resulting from environmental degradation, but there may be other alternatives, depending on the situation. For this reason, before making the final decision about filing a petition with the Commission, advocates should explore other available venues and determine their chances for producing a successful outcome in a case.

A) Alternative Venues for the International Protection of Human Rights

Other international human rights bodies have mechanisms for considering complaints or claims from individuals or groups of persons. Among them are the UN Human Rights Council,38 the Convention on Elimination of Racial Discrimination,39 the Convention against Torture,40 the Convention on the Elimination of All Forms of Discrimination against Women41 and UNESCO.42

Advocates can send communications to these bodies on human rights violations that have been committed, are currently being perpetuated or that have a strong chance of occurring. To be accepted for consideration, a communication must generally meet the following standards: “reliability of the source; the internal consistency of the information received; the factual details included

38 For more information on the UN Human Rights Council, including procedures for submitting petitions, consult http://www.ohchr.org/english/bodies/hrcouncil/.
in the information; and the scope of the mandate itself” of the convention or treaty alleged to have been violated. Another consideration is that the State against which the complaint is filed must have ratified the treaty alleged to be violated; otherwise, the obligations are not enforceable against it.

In this regard, it is worth mentioning some of the oversight mechanisms established to monitor compliance with the treaties of the United Nations System. They include the Human Rights Committee (adopted by virtue of the Optional Protocol to the International Covenant on Civil and Political Rights), the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women, in accordance with its Additional Protocol. All of these bodies accept individual communications from private parties, provided that the State involved has ratified the corresponding protocol or agreed to have individual communications presented against it.

b) Other International Fora

If the above human rights mechanisms are not viable, other fora exist at the international level that can also be approached in cases of environmental degradation. Below is a list of the most important and most frequently used venues for addressing problems related to environmental degradation.

I. The World Bank and the Inter-American Development Bank

If a case involves serious environmental impacts stemming from a project with World Bank financing, it is possible to request the Bank to form an Inspection Panel to investigate the situation. The World Bank may establish a panel on the request of two or more individuals affected by the implementation of a project it financed if: (1) one of the applicable policies of the Bank has been violated during the implementation of the project; (2) the matter has been brought to the attention of the Bank’s administration and no response has been forthcoming; and (3) no more than 95% of the total loan has been disbursed. Some of the policies relevant to environmental cases are: environmental and social assessments, natural habitat, pest management, forests, dam safety, human rights, indigenous communities and voluntary resettlement. Complaints filed with the World Bank must refer specifically to the manner in which one of these policies was disregarded during the project.

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46 The Operational Policies of the World Bank are available at: http://go.worldbank.org/3GJl3EECP0.
Inspection Panels have the power to conduct independent investigations, make recommendations and recommend the adoption of measures in connection with a project that has violated Bank policies. The implementation of the measures recommended by Inspection Panels depends on the Executive Directors of the World Bank, who make the final decision in the matter. One of the greatest criticisms of these Inspection Panels is that the Bank has too much discretion regarding the results of their investigations. This is particularly problematic considering that those presumably responsible for the alleged policy violations (the Executive Directors who approved the project) are the same ones who must determine whether violations took place and if so, what actions should be taken to repair the damages. Consequently, this system does not have a truly independent mechanism for monitoring the Inspection Panel’s recommendations. For this reason, although Inspection Panels may be one option, it is not very clear that they can have a positive impact for a given situation. Potential claimants should take this fact into consideration when deciding whether to engage this forum.

The Inter-American Development Bank (IADB) also has an Independent Investigation Mechanism created in 1994 and currently under revision. The mechanism was established to examine complaints arising out of the design, analysis or execution of current or proposed IADB operations. Its structure is similar to that of the World Bank’s Inspection Panels, with a few exceptions. For example, in the World Bank, the Board of Directors elects the members of the Inspection Panels for five-year terms. In the IADB, the President of the Bank creates a list of 15 experts in consultation with the Bank’s Directors from which the individuals who will investigate the claim are selected. Similar to the World Bank, the final decision about whether to take corrective or preventive measures lies with the IADB’s Executive Director, who is also in charge of the approval and implementation of projects. Therefore, no truly independent authority makes these decisions.

The lack of a permanent group of investigators to look into claims of violations of IADB policies is one of the weaknesses of this system. This, combined with the discretion the Executive Director has to comply with the mechanism’s recommendations, demonstrates that the IADB also lacks a truly independent procedure.

48 Id.
49 Demanding Accountability, supra note 45, at 258-266.
51 Id.
52 Demanding Accountability, supra note 45, at 274.
II. Free Trade Agreement Instruments

Finally, it is also possible to turn to the citizen participation committees established by free trade agreements when environmental standards are disregarded. Examples of these committees include the Joint Public Advisory Committee that was established in the Canada-Chile Free Trade Agreement on Environmental Cooperation\textsuperscript{53} and the North-American Commission for Environmental Cooperation.\textsuperscript{54} Claims presented to these committees must be related to compliance with domestic environmental standards or to the States’ international obligations under the agreement in question.

These committees offer the possibility of achieving a certain level of compliance and improvement in the implementation of environmental standards by governments. However, experience with these mechanisms shows that governments can exert a great deal of influence on the results, which compromises the effectiveness of these mechanisms in protecting the environment or human rights. One example of the heavy political influence on the results of these investigations is the fact that the committees must obtain the consent of the State involved before issuing a report.

When deciding whether to present a case in the Inter-American System, advocates should examine alternative mechanisms for addressing cases of severe environmental degradation. Although many of these options do not have legal mechanisms for enforcing compliance, they can have a major political impact and therefore provide effective solutions. Finding the right mechanism to ensure success involves a case-by-case analysis with due consideration, as noted earlier, for the case’s particular legal, political, economic and social characteristics.

- Alternative avenues for protecting

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<td>• UN Human Rights Council</td>
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<td>• Convention on Elimination of Racial Discrimination</td>
<td>• Inter-American Development Bank</td>
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<td>• Convention against Torture</td>
<td>• Citizen participation committees associated with free trade agreements</td>
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<td>• Convention on Elimination of All Forms of Discrimination against Women</td>
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B. SPECIAL CONSIDERATIONS FOR LITIGATING ENVIRONMENTAL CASES BEFORE HUMAN RIGHTS BODIES

This part of the guide describes the particular features of cases involving human rights violations caused by environmental degradation or matters related to environmental issues. These characteristics should be considered when identifying and developing legal strategies in the Inter-American System. They include the identification of victims, which domestic legal remedies must be exhausted, evidence of violations, establishing State responsibility and requesting reparations.

Accordingly, it is extremely important to consider these differences in planning legal strategies to ensure a successful outcome in a particular case and the possibility of replicating this result in similar situations. The foregoing is also important because environmental cases often have unique characteristics that must be adapted to the particularities of human rights law.

1. Identification of Victims

Identifying victims is undoubtedly one of the key elements in preparing a case and it can be addressed from both a human rights and an environmental law perspective. Mechanisms for protecting civil and political human rights traditionally protect individuals and therefore legal actions are geared to individual protection. In environmental law, on the other hand, violations can also be collective in nature, so there are domestic legal actions that are also collective in terms of both entitlement and legal standing. These two perspectives can create difficulties when pursuing a case of human rights violations arising out of environmental damage, given problems in “translating” the disparate concepts of victimhood. This section discusses these differences and offers approaches for overcoming difficulties when litigating environmental cases before human rights bodies.

A) INDIVIDUAL VICTIMS VS. COLLECTIVE VICTIMS

Environmental damage usually affects not just one person but also an entire community. Therefore, in many jurisdictions the environment is an indivisible public good to which there is a collective right[^55] with collective legal actions for

[^55]: See, e.g. the Constitution of the Federative Republic of Brazil, art. 5; Political Constitution of Costa Rica, art. 50; Political Constitution of Colombia, art. 79; Constitution of the Oriental Republic of Uruguay, art. 47; and the Constitution of the Bolivarian Republic of Venezuela, art. 127.
enforcing it. This perspective assumes that activities that affect the environment also affect the entire community. However, it is worth noting that only under certain circumstances do these cases amount to a violation of human rights.

When damage occurs, whom it harms depends on a variety of factors and in cases of environmental degradation the task of identifying victims is often difficult. Obstacles include the lack of education and information, the socioeconomic level of the person or persons involved, inadequate medical services and little or no access to judicial protection for filing complaints. Advocates should evaluate each of these factors on a case-by-case basis when preparing a case of human rights violations caused by environmental degradation. Often the victims of environmental damage do not even know they have been harmed, making their adequate defense particularly challenging.

Unlike human rights law, environmental law in many countries views the environment as a collective good and provides for the collective protection of victims. This approach might be appropriate for severe environmental damage affecting individuals and entire communities, as was the case with the nuclear explosion in Chernobyl (Ukraine, 1986), the Exxon Valdez oil spill (U.S., 1989) or the Bhopal disaster (India, 1989). In each of these cases, it was eventually possible to identify some of the people who were harmed, but never all of them. The magnitude, duration and characteristics of the damage precluded such a comprehensive identification of victims. In addition, individual human rights are not the only ones infringed by environmental damage; often the entire community’s rights are affected. Therefore, it is the community, collectively, that is the victim of the damage and it should be entitled to pursue the matter in the court system collectively.

In contrast to those systems that regard environmental rights as collective, human rights law, including within the Inter-American System, is largely based on individual rights. Therefore, the protection of these rights requires that an individual person be identified or identifiable as the victim of a violation. Groups of persons can also be protected, as long as the members of the group are properly identified or can potentially be identified. Therefore, it is often not possible to protect human rights collectively or in the abstract.

56 It is important to clarify that in the Exxon Valdez case, even though a collective impact can be argued, US legislation in general does not recognize collective rights.

57 American Convention, supra note 7, art. 1(2) (“For the purposes of this Convention, ‘person’ means every human being”).

58 See, e.g., San Mateo Huanchar v. Peru, supra note 13, ¶ 41; Inter-American Court of Human Rights, Provisional Measures, Matter of Pueblo Indígena Sarayaku regarding Ecuador, Consideration 9 (July 6, 2004); Inter-American Court of Human Rights, Provisional Measures, Matter of the Jiguamiandó and Curbaradó Communities regarding Colombia, Consideration 9 (June 18, 2002); Inter-American Court of Human Rights, Matter of Comunidad de Paz de San José de Apartadó regarding Colombia, Consideration 7 (Nov. 24, 2000); see also Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 16, ¶ 2.
However, this does not mean that environmental rights cannot be protected. As mentioned previously, in cases of environmental degradation with collective victims, petitioners must simply identify at least one victim of the violation of the human right in question.

The first time the IACHR considered a petition with collective victims was for claims of torture, humiliation and abuse suffered by prison inmates in Brazil.\textsuperscript{60} The case sought protection for hundreds of people incarcerated in Brazilian prisons, who claimed multiple human rights violations perpetrated under similar circumstances by the same government actors. Considering the similarities the Commission found in the hundreds of abuse claims filed by inmates, it decided to treat the case as a general one, since it met the guidelines for this type of situation: the victims constituted an identifiable group based on similar circumstance or situation, the violations arose out of a particular incident or a common fact and the violations involved the same right or related rights.\textsuperscript{61} By applying these criteria, the Commission and the Court have repeatedly admitted cases of human rights violations against communities, ordering the “protection of a group of people not previously named, but who are identifiable and whose identity can be determined.”\textsuperscript{62}

This first distinction—individual vs. collective entitlement of rights—could result in an environmental case that has been litigated collectively in the domestic court system (by means of a collective or class action, for example) and therefore the victims have not been identified individually. In such cases, if litigants wish to pursue other avenues for protection, such as the IASHR, they must either individually identify the victims or show that it is possible to do so, for the case to be admissible.


\textsuperscript{62} Matter of Pueblo Sarayaku regarding Ecuador, supra note 58, Consideration 9.

\begin{figure}[h]
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\caption{Individually identifying every victim in an environmental case is a highly complex and perhaps even impossible task. Therefore, advocates must make a special effort when bringing actions before international tribunals to identify the victims of the harm alleged, or at least a portion of those victims.}
\end{figure}
2. Domestic Remedies for Environmental Cases

A) Identifying the Right Domestic Remedy for Environmental Cases

Another requirement for the admissibility of petitions before the Inter-American System is the exhaustion of all adequate and effective domestic remedies for human rights protection. As explained in Chapter II, the identification and use of available domestic remedies is particularly important for effectively protecting rights, as many of these remedies, if effective, may be able to resolve situations of human rights abuse.

With respect to the exhaustion of domestic remedies, the effective use of these actions is especially important for addressing and solving situations of environmental degradation that violates human rights. Although it may seem obvious, it is worth remembering that merely filing a case before a domestic court does not exhaust domestic remedies. Advocates must diligently pursue the case through the judicial system and make a real effort to find a lasting solution to the problem. Only if the national judicial system has been unable to provide the protection sought can litigants then access the jurisdiction of international human rights tribunals.

The availability of adequate and effective means of protecting human rights is fundamental to the Rule of Law and to democracy itself. However, the availability of these remedies does not mean it is easy to exhaust them. In fact, this is one of the most complex procedural requirements for the admission of cases in the IASHR, because it can be interpreted in many different ways. Therefore, it is equally important in environmental cases to undertake a care-

63 American Convention, supra note 7, art. 46(a).
ful analysis of available domestic remedies for defending rights, in both human rights and environmental law.

Determining what options are available also means examining different areas of law and not just constitutional law. Thus, if action can be taken under administrative law, or other areas of law that provide effective avenues for resolving the situation, advocates should pursue these actions before turning to the IASHR.

The requirement to exhaust domestic remedies before resorting to the IASHR is the same in cases of human rights violations caused by environmental degradation as it is in other cases before the System; there are no specific requirements. However, since there may be several remedies available in the domestic system, it is important to analyze these and give them full consideration in determining which ones must be exhausted. In addition, the remedies available in environmental cases often have their own characteristics that potential litigants must consider before presenting for a particular case, whether before domestic or international courts.

With respect to judicial actions, a single incident may be grounds for multiple actions as environmental pollution can affect people in different ways and to different degrees. The actions available to litigants will also be a function of the severity of the impact and the urgency of each case. Thus, the same situation of pollution in a community can lead to both constitutional and collective civil actions at the same time. Consequently, the type of case that a litigant files will depend on the specific circumstances of the case and the possible remedies that each area of law can offer.

The Inter-American Commission has held that remedies should be simple, quick and effective and that only those “suitable for protecting the violated legal situation” must be exhausted.66 Regarding the suitability of the remedies to be exhausted, the Court has also stated that “a number of remedies exist in the legal system of every country, but not all are applicable in every circumstance.”67 Environmental law remedies that advocates pursue domestically should also fulfill these prerequisites.

Moreover, potential litigants should only exhaust those remedies that are able to resolve the human rights violation and hold the State liable for the consequences. According to the IACHR, if there are additional legal actions that can determine the responsibility of State agents or to obtain compensation and such actions cannot adequately prevent or repair a violation, they need not be exhausted before resorting to the Inter-American System.68 It should be added,

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67 Velásquez Rodríguez v. Honduras, supra note 66, ¶ 64.

however, that in cases in which the actions of private parties violate human rights, the Commission has shown an interest in seeing cases filed directly against such parties for the exhaustion of domestic remedies. For this reason, it is advisable to examine all available legal and administrative actions before presenting a petition before the IASHR.

In environmental law there are some remedies that are suitable for protecting human rights under certain circumstances and therefore advocates should make an effort to exhaust these before filing a case with international tribunals such as the Inter-American Commission or Court. In particular, these include constitutional actions, class actions, suits to annul concessions or authorizations for projects that have caused environmental damage, actions for compensation or damages and criminal actions.

For environmental cases, in addition to law suits to protect human rights, it is worth investigating possible remedies under environmental law for protecting rights, such as:

- constitutional actions ("amparo" actions, injunctions, "popular" actions)
- class actions
- suits to annul concessions or authorizations for projects that have caused violations
- actions for compensation or damages
- criminal actions

It should be noted that additional legal actions for environmental cases may exist, but if these are not effective or are impossible to use, they do not have to be exhausted. According to the general rules of the IASHR, as explained in Chapter II, exhausting remedies is mandatory unless there are no available legal actions, there are obstacles to pursuing such remedies, there is unwarranted delay in rendering the final decision, the victim is indigent or it is impossible to obtain legal counsel.  

When determining which domestic remedies to exhaust, potential litigants should first analyze the situation at hand and the possible outcomes of each of the available actions. A remedy may be formally applicable, but if it obviously does not offer an adequate solution, it cannot be considered suitable or effective and therefore it need not be exhausted.

69 American Convention, supra note 7, art. 46(2).
71 Oscar Iván Tabares Toro v. Colombia, supra note 66 ¶ 25.
In addition, for the case to be admitted to the Inter-American System, the desired result of the domestic action must be the same as, or consistent with, that of the petitions before the Commission. This is in keeping with the principle that the IASHR is subordinate to national legal systems. However, this does not preclude using legal actions for protecting environmental rights and then “translating” these into human rights terms so that it can be brought before the Inter-American System. We will describe this strategy in greater detail further on.

Finally, when analyzing the effectiveness of domestic remedies, potential litigants should also consider the complexity and the time required for bringing a case. In other words, a domestic remedy that takes an excessive amount of time to reach a final conclusion when urgent measures are needed would not have to be exhausted. In any event, consideration will also have to be given to the time required to litigate a case before the Commission.

In the next section there will be a brief discussion of some legal actions that may be appropriate for exhausting domestic remedies in environmental cases: “amparo” actions (writs of injunction), class actions, “popular” actions and actions for annulment.

I. Amparo Actions

Amparo actions, or writs of injunction, are legal remedies established to protect fundamental rights enshrined in the Constitution or international instruments in a simple and brief judicial proceeding. This type of action is generally intended to stop or prevent a situation that poses an imminent threat to human rights. It is typically given priority over other matters before a court and it is significantly faster than other legal actions, since its purpose is to provide a rapid and effective response. Amparo actions, as they are emergency actions, tend to have only temporary effects and other actions may be required for medium- or long-term solutions.

It is often possible to obtain a quick result from amparo actions, as they have a more efficient procedure than regular ones and therefore could be a good option for dealing with human rights violations caused by environmental damage. For example, amparo actions have been used to enforce environmental protection standards against an industry, to suspend a heavily polluting activity that was causing health or environmental problems and to prevent the start of a project that endangered life until the necessary studies could be conducted. It is also possible to use amparo actions to force the State to disclose essential information or to conduct impact studies regarding a particular project.

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72 Editor’s Note: Amparo or tutela actions are constitucional actions common to nearly all civil law systems in Latin America, but are quite rare in Common Law legal systems. However, many of the strategies presented in this section are also applicable to writs or actions for injunctions that are based in constitutional law. Accordingly, we have decided to include this section in the English-language edition of this guide so that advocates can draw parallels between amparo actions and other legal actions available in their particular jurisdiction.

73 Advisory Opinion OC-9/87, supra note 66, ¶ 32.
It should be remembered that *amparo* actions or writs of injunction should, in theory, be filed on behalf of a certain person or group of persons whose fundamental rights need protection. Therefore, *amparo* actions can protect an individual’s right to a healthy environment, but not a collective right. We describe other possible actions for protecting collective rights below, such as people’s actions or even collective *amparo* actions. In the case that *amparo* actions are the most suitable for exhausting domestic remedies, there should be no problem identifying the victims for the IACHR, as this will already have been required in domestic case.

Although environmental degradation may have a collective impact, *amparo* actions can protect the persons most seriously or most obviously affected. If *amparo* actions do not yield positive results, advocates can present the case before the IASHR to seek adequate protection. In this way, by litigating a representative case, advocates can establish precedents that can improve the situation in similar cases involving human rights violations due to environmental degradation.

In countries that recognize the environment as a collective human right, such as Argentina, Costa Rica, Chile, Ecuador and Peru, collective *amparo* actions can be filed for environmental cases. The procedure is the same as for individual *amparo* actions, but the standing is significantly broader: any person or organization seeking to protect collective human rights that are being threatened can file such an action. These actions do not require proof of harm to an individual or specific interest to be admissible. Rather, litigants must demonstrate a collective impact, which expands the possibilities this kind of action offers for environmental protection in the case of human rights violations.

If collective *amparo* actions filed at the national level do not effectively protect the collective right to a healthy environment and it becomes necessary to turn to the Inter-American System, petitioners must individually identify the victims, or at least demonstrate the possibility of identifying them. Otherwise, the petition will not be admissible, since there is no mechanism for protecting unspecified victims. In addition, filing a collective *amparo* action exhausts domestic remedies not only for the individuals filing the suit, but also for all other members of the group that holds the right. It is therefore not necessary to present separate *amparo* actions for each individual person. The Court held this way in *Awas Tingni v. Nicaragua*, in which the petitioners filed two *amparo* actions on behalf of the Awas Tingni community, thereby exhausting domestic remedies for all the community’s members.75

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75 Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 16.
In some countries, *amparo* actions only produce a temporary effect if there is no other judicial action available to protect the human rights involved.\(^76\) Potential litigants must clearly take this temporary nature into account. Although such actions could be effective in quickly halting a human rights violation or preventing an imminent threat of harm, they do not always offer a lasting solution to the problem of human rights violations caused by environmental harm.

In either case, it is important to remember that the Inter-American System can only accept cases in which the damage or threat is presented in terms of rights protected domestically. In addition, these rights must also be enforceable within the IASHR. In other words, although in most domestic court systems an *amparo* action can be pursued to directly protect the right to a healthy environment, it would not be viable in the Inter-American System unless tied to other enforceable rights, as has been explained in previous sections.

### II. Other Judicial Actions

#### 1. Popular Actions or Public Civil Actions

Popular actions (*actio popularis*) and public civil actions are civil suits created by some constitutions for the protection of collective rights or interests. They are applicable to environmental issues in jurisdictions where the environment is recognized as a collective right. In Latin America, such actions have been developed in Brazil\(^77\) and Colombia,\(^78\) and have been especially useful for environmental protection by enabling the suspension of polluting activities.

Among the advantages that these actions offer for environmental protection are: a) broad standing to file suit, since any person can take legal action without having to demonstrate a particular interest, thereby exhausting available domestic remedies for the entire class; b) specific procedures that are simpler than those of ordinary actions; and c) the possibility of directly challenging activities that affect or may affect the environment.

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\(^76\)Political Constitution of Ecuador, art. 95; Political Constitution of Colombia, art. 86.

\(^77\)National Congress of Brazil, Law No. 7.347, July 24, 1985.

Broad standing to take legal action also means, in practice, that any person belonging to the affected class can file a collective action and could thereby exhaust domestic remedies for the entire class. Popular actions may be the ideal choice for protecting human rights in environmental cases because they have such a specific subject matter and can effectively protect the right threatened. Therefore, these actions may be ideal for exhausting domestic remedies before presenting a petition to the Inter-American System.

Unlike *amparo* suits, which sometimes provide only temporary solutions, litigants can bring civil or popular actions to sue directly the source of the pollution and reach a final solution to a problem. Therefore, such actions may be more efficient in protecting human rights threatened by environmental damage. For example, through civil or popular actions it is possible to evaluate the design or implementation of Environmental Impact Assessments by identifying or demanding the use of measures to mitigate damages caused by activities such as oil drilling, agrochemical production or hazardous waste disposal.

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Some advantages of popular actions for environmental protection are:

a) Broad standing to file suit, since any person can take legal action without having to demonstrate a particular interest, thereby exhausting available domestic remedies for the entire class;

b) Specific procedures that are simpler than those of ordinary actions; and

c) The possibility of directly challenging activities that affect or may affect the environment

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2. **Class or Group Actions**

Class or group actions, which are in the early stages of development in Latin America, are designed to protect the rights of persons harmed by a single incident, person or entity. Such actions were created in some countries with a view to improving access to justice and freeing up court dockets. They are appropriate for cases in which damage has been suffered as a result of the same incidents or circumstances but individual lawsuits are difficult due to problems in gathering evidence, the complex nature of the litigation or inadequate individual monetary compensations. Therefore, in class or group actions the effort of gathering and presenting evidence is shared, as are legal proceedings. The

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79 For example, in the United States, class actions are consecrated in the Federal Rules of Civil Procedures of the United States, Rule 23, whereas in Colombia, they were consecrated by the Congress of the Republic of Colombia in the *Ley de Acciones Populares y de Grupo* [Public Interest and Group Claims Law] arts. 46-67, Diario Oficial, No 43357 (Aug. 6, 1998).


persons affected can join the lawsuit at any stage, even after judgment has been issued and can benefit from any damages that are awarded.\textsuperscript{82} Class or group actions may also be resolved in settlement agreements approved by the judges presiding over the litigation.\textsuperscript{83}

These actions are filed quite frequently in the United States for the purpose of recovering damages resulting from the defective design or mislabeling of products and even in cases of discrimination suffered by the same group of persons.\textsuperscript{84} In environmental cases, they can be brought to obtain compensation for damage caused by pollution, including endangerment of health or life. This is true of the many lawsuits filed against the tobacco companies and asbestos producers because of the impact on human health.\textsuperscript{85}

Therefore, if this type of action is allowed in the national court system, it could be another alternative for people to obtain relief from human rights violations due to environmental degradation. Advocates should evaluate these actions on a case-by-case basis, especially when seeking compensation for damages. Furthermore, if such a suit is unsuccessful, it can be asserted that domestic remedies have been exhausted. Similarly, if this available alternative is ignored and an action is filed with the IASHR without exhausting that remedy first, the case could be rejected on admissibility grounds.

\section*{3. Compliance Actions}

Compliance actions, which force a State authority to adhere to a rule or administrative act, are also allowed by many constitutions.\textsuperscript{86} Any person has standing to file a compliance action\textsuperscript{87} against any act or omission by State authorities provided that it is imminent,\textsuperscript{88} meaning that the obligation and the failure to fulfill it are clear.\textsuperscript{89} As a requirement for admissibility, the compliance action must be preceded by a written request to the competent State authority to fulfill the obligation so that refusal to comply can be documented.\textsuperscript{90}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{82}See, e.g., Congress of the Republic of Colombia, Ley de Acciones Populares y de Grupo [Public Interest and Group Claim Law] arts. 46-67, Diario Oficial, No 43357, (August 6, 1998); Federal Rules of Civil Procedures of the United States, Rule 23.
\item \textsuperscript{83}The Paths of Civil Litigation, supra note 80, at 1808; Congress of the Republic of Colombia, Ley de Acciones Populares y de Grupo [Public Interest and Group Claims Law] art. 61, Diario Oficial, year CXXXIV, No 43357, (Aug. 6, 1998).
\item \textsuperscript{84}Burnham, supra note 81, at 229.
\item \textsuperscript{85}The Paths of Civil Litigation, supra note 80, at 1814.
\item \textsuperscript{86}See, e.g., the Political Constitution of Peru, art. 200(6); the Political Constitution of Colombia, art. 87.
\item \textsuperscript{87}Constitutional Procedure Code of Peru, art. 67; Congress of the Republic of Colombia, Law 393/1997, arts. 1 & 4, Diario Oficial No. 43.096 (July 30, 1997).
\item \textsuperscript{88}Congress of the Republic of Colombia, Law 393/1997, art. 8, Diario Oficial No. 43.096 (July 30, 1997).
\item \textsuperscript{89}Constitutional Court of Peru, Final Judgment 168-2005-PC/TC (Oct. 7, 2005).
\item \textsuperscript{90}Congress of the Republic of Colombia, Law 393/1997, art. 8, Diario Oficial No. 43.096 (July 30, 1997); Congress of Peru, Ley de Habeas Data y Acciones de Cumplimiento [Habeas Data Law and Compliance Actions], Law No. 26301, art. 5(c) (May 3, 1994).
\end{itemize}
\end{footnotesize}
In fact, the IACHR has concluded that compliance actions are an ideal mechanism for exhausting domestic remedies. This decision emerged from the evaluation of the admissibility of _La Oroya Community v. Peru_, in which the petitioners claimed that a compliance action exhausted domestic remedies, while the Peruvian government argued that an _amparo_ action should have been filed. The IACHR ruled in favor of admissibility, stating that “taking into account the nature of the acts and rights alleged, the description of the compliance action according to the cited rules and the Constitutional Tribunal’s interpretation, the Commission finds that such action is an ideal mechanism for resolving the situation in question.”

### III) Administrative Actions

The admissibility requirement for the exhaustion of domestic remedies refers to any remedy provided by domestic legislation for resolving the situation in question. In this regard, it may be necessary to pursue available administrative remedies, as they might eventually provide an effective means for protecting the human rights involved. However, if administrative actions are available but are not suitable for the protection of the right violated or for attaining the desired objective, petitioners need not exhaust them before turning to the IASHR. Nevertheless, in some cases administrative actions will also be required to exhaust domestic legal remedies and would necessarily have to be filed.

In cases of environmental degradation, potential litigants must first analyze the cause of the problem to identify possible avenues for the protection of victims. For example, the situation may be due to an accident or to the inadequate implementation of an industrial or production process that may be subject to permits or requirements for Environmental Impact Assessments (EIA). In these cases, administrative agencies in charge of environmental licensing, evaluation and monitoring are particularly useful. In principle, States should carry out EIAs for any activity that could have a considerable negative effect on the environment.

An administrative agency’s review of EIA procedures could provide sufficient options for determining environmental damage or reparations. Although exact requirements vary from one country to the next, generally environmental assessment procedures allow citizens access to detailed information on a polluting activity and enable interested parties to present information to authorities so that they can make the appropriate decision about the activity in question.

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92. _Id._, ¶ 63.
94. _Fundez Ledesma_, supra note 65, at 301.
Public hearings for presenting information and giving notice relating to a polluting activity are also an effective method of controlling and preventing environmental damage or threats to health or life that an activity could entail.

If administrative actions are available, they can be even more efficient than legal actions, since environmental authorities often have the necessary technical expertise to require and monitor the actions necessary to resolve a situation. In addition, most administrative actions are filed with the authorities responsible for protecting natural resources and against those directly responsible for the environmental degradation or pollution. Consequently, it is more realistic that mitigation or recovery measures can be efficiently implemented. In particular, States often lack the resources or the technology to implement adequate environmental controls or restoration measures. Therefore bringing an administrative action directly against those responsible for the damages may be an effective means of adequately enforcing such measures.

In addition, bringing administrative actions before presenting a case to the IASHR helps to demonstrate that the petitioners have diligently pursued all avenues provided by the State to remedy the situation.

Moreover, in deciding which type of action to file, due consideration should be given to the time and procedures required and the degree of discretion and independence which administrative agencies possess. If the matter is urgent and administrative procedures are particularly time-consuming, it would be better to pursue other, more effective options that may be available.

It is also important to consider whether administrative discretion is too broad in a given case. For example, if the appropriate authorities are not required to take into account environmental considerations or information provided by parties other than the applicant for the environmental permit, an administrative action would not be effective. This is especially true when an agency lacks independence because it acts as both judge and party (for example, when the authority is both proposing or implementing an activity and monitoring that activity), or when it is clear that the agency granting the permit has a close relationship with the party responsible for the pollution.

- An administrative agency’s review of EIA procedures could provide sufficient options for determining environmental damage or reparations. Although exact requirements vary from one country to the next, environmental assessment procedures generally allow citizens access to detailed information on a polluting activity and enable interested parties to present information to authorities so that they can take the appropriate actions.
- If administrative discretion is too broad in a given case, for example, if the agency is not required to take into account environmental considerations or information provided by parties other than the applicant for the environmental permit, an administrative action would not be effective.
B) Exceptions to the Exhaustion of Domestic Remedies

The general exceptions to the exhaustion of domestic remedies that have been discussed previously also apply to the litigation of environmental cases before the IACHR. Under some circumstances established in the Convention, petitioners do not need to exhaust domestic remedies, for example, when: there is no due process in the legal system for the protection of the right in question; the injured party does not have access to the remedies or cannot exhaust them; or there is an unjustified delay in issuing a decision. The Inter-American Court has also ruled that if it is not possible to access domestic remedies due to the lack of financial resources (indigence) or due to a widespread fear among attorneys who might provide legal assistance, exhausting domestic remedies is not required.

The individual fact pattern of each case will determine whether an exception applies. When arguing an exception in environmental cases, petitioners should consider the harm caused, the measures required to remedy the situation and the possibilities offered by legal actions to provide an effective solution to the problem. In the case that such possibilities do not exist, petitioners must demonstrate this impossibility to the IACHR.

In cases of human rights violations connected to environmental degradation, one possible difficulty that could present itself is the lack of effective remedies that can adequately protect the rights in question. Although environmental protection and the right to a healthy environment are enshrined in the constitutions of 19 OAS Member States, that does not mean that all States have adequate mechanisms in place to guarantee effectively these rights in their courts. In such cases where domestic legislation does not provide for these mechanisms, or if those that exist are insufficient for protecting rights in a particular case, the exception to the domestic remedy requirement applies. Otherwise, this would constitute a denial of the right to adequate judicial protection.

In this regard, it is important to consider the costs and time involved in pursuing and exhausting domestic remedies, as the feasibility of doing so depends on these factors. For example, the Mexican Constitution requires that a bond be posted in *amparo* suits in order to suspend the act causing the alleged violation. There are some exceptions to this requirement, such as when the suspension is ordered *ex officio* (by a court’s own motion) or a life is in danger. However, these bonds can amount to millions of dollars, especially in environmental cases, which effectively bars access to judicial protection in such cases.

97 I/A Court HR, Advisory Opinion OC-11/90, supra note 70, ¶ 31.
98 The countries that support the obligation to protect the environment as public interest or the right to a healthy environment in this hemisphere include: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.
99 Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 16, ¶ 138.
Finally, the mere fact that these actions are complex and time-consuming does not mean that an exception applies; petitioners must specifically allege an unjustified delay when arguing the exception. Proving this exception requires a detailed consideration of the case at hand, including the difficulties and complexities of the particular situation, the actions of the judicial branch and the interest of the victims seeking justice.

3. Determining the Responsibility of the State

In the IASHR, the State’s responsibility for human rights violations caused by environmental degradation is determined on the basis of the obligations set forth in the American Convention and Declaration. With respect to the environment, States have a sovereign right to make use of their natural resources, but that right is limited by their international obligations. These obligations, which are enshrined in international environmental law, complement States’ human rights obligations, and States are equally responsible for fulfilling them.

According to Inter-American Court’s jurisprudence, States are responsible both for the acts or omissions of their agents and for the acts of private parties that violate human rights and which the State has an obligation to protect. In the latter of these cases, if the State does not control the actions of private parties or investigate and sanction violations committed by them, then the State is responsible under international law. These grounds for holding the State liable are particularly relevant in environmental cases. In many instances, the State is not directly responsible for the environmental degradation, but it is responsible for failing to implement or enforce the actions necessary to control the situation and guarantee its citizens’ rights. This was the finding of the Court in Awas Tingni, when it held the State liable for violating indigenous people’s collective property rights by granting permits for the exploitation of natural resources in community areas. Similarly in Saramaka People v. Suriname, the Court found that Suriname was held liable for granting timber and mining concessions that were detrimental to the rights of the Saramaka People.

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102 American Convention, supra note 7, art. 1.
103 On this matter the IACHR stated that “The norms of the Inter-American System of Human Rights neither prevent nor discourage development; rather, they require that development take place under conditions that respect and ensure the human rights of the individuals affected.” IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN ECUADOR, supra note 34, ch. VIII; see also PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW VOL. I, at 186 (1994).
104 Velásquez Rodríguez v. Honduras, supra note 66, ¶ 172.
105 Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 16, ¶ 153.
106 Saramaka People v. Suriname, supra note 6, ¶ 154.
The Commission has stated similarly in a matter involving the human rights of indigenous communities in Ecuador affected by oil production activities carried out by private parties. It averred that “it is the obligation of the State to respect and ensure the rights of the inhabitants of the Oriente and the responsibility of the Government to implement the measures necessary to remedy the current situation and prevent future oil and oil-related contamination which would threaten the lives and health of these people.”\(^{107}\) It further declared that an indigenous community’s human right to collective property is violated when environmentally harmful activities are carried out and a State does not implement effective protective measures.\(^{108}\) The European Court of Human Rights has also ruled that a State may be liable in environmental cases if it fails to regulate private industry sufficiently to guarantee respect for human rights.\(^{109}\)

A) Factors in Determining State Responsibility

To determine a State’s responsibility, the following factors must be proven: the act, the damage suffered, the causal nexus between the action and the damage and the existence of a State obligation to take action or to refrain from acting. As mentioned above, the human rights obligations enshrined in the American Convention are enforceable before the Commission and the Court and can be interpreted in light of the environmental obligations established in the many international treaties ratified by the States.

I. Act Causing Damage

One necessary element for filing a petition with the IACHR is the determination of an act that caused the violation of human rights due to environmental degradation. This determination is another significant difference between environmental cases and other human rights cases, especially considering the magnitude and temporary nature of the damage that can be caused by environmental impacts and the difficulty in identifying a single act as the cause of the violation.

One possible reason for the lack of a direct or proximate cause for the violation of human rights may be the existence of multiple actors whose polluting activities all contribute to the impact on the environment and the persons living in it. Another example of multiple causes is damage that is produced not by a single act, but by a series of accidents or events polluting the environment over a given period of time and which, in turn, may be caused by one or more responsible parties. In these situations, the cause of action alleged in the suit is a combination of multiple events.

The specific identification of the direct or proximate cause of environmental damage is especially difficult when determining responsibility. However,

\(^{107}\) IACHR, Report on the Situation of Human Rights in Ecuador, supra note 34, ch. VIII & Recomendations.


this does not make it impossible to prove State responsibility for human rights violations. Even when it cannot be demonstrated for certain who is directly responsible for the damage, it is sufficient to show that the State violated its positive obligation to protect or guarantee rights, as mentioned previously.

In addition to environmental pollution, other acts can result in human rights violations and are linked to environmental cases. The persecution of whistleblowers or environmental defenders, the denial of access to justice or information and discrimination against vulnerable communities are some of the acts that can undermine the defense of human rights in environmental situations. Petitioners should also allege violations in these situations along with damage from environmental degradation.

II. Environmental Damage that Violates Human Rights

Environmental damage alleged in actions before the Inter-American System must be related to one or more of the human rights recognized in the Convention or another of the System’s instruments. This showing is necessary because there may be serious environmental damage that does not violate human rights and if that is the case it cannot be litigated in the IASHR.

Existing parameters for evaluating environmental impacts at the international, regional and national levels can be very useful for strengthening the argument that the damage in question poses such a great threat that it can be considered a human rights violation. However, human rights violations resulting from environmental damage do not necessarily have to be based on the violation of these parameters. In some cases standards do not exist or are inadequate for effective rights protection.

It is also possible that environmental damage, even severe damage, does not violate human rights. If the damage in question does not affect individuals or a community in such a way that it interferes with their enjoyment of the rights recognized in the Inter-American international legal framework, then it will be difficult to litigate the case before the System. In such cases advocates should seek venues other than the IASHR.

For more information, see, for example, IACHR, Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser. LVII/124 (March 2006).
In this regard, it is important to mention that the absence of studies on activities that can affect the environment, or the presence of some pollutants, can be an element of proof of environmental degradation and therefore of potential threats to human rights. For these cases, the Inter-American System could provide an effective mechanism for protection.

**Manifestation of Damage and Delayed Effects**

When determining the extent of damage in environmental cases, potential litigants should consider the fact that in many instances, environmental impacts take time to become apparent. Even when the damage is known, its impact may increase over time if the necessary measures are not implemented. Think of a pesticide that has a cumulative effect on health or the environment. The damage caused by its use could take years to manifest itself and the greater the exposure to the substance, the greater the damage to human health or the environment. In such situations, epidemiological studies and data on the health of residents in the region or of exposed persons can be useful for showing how environmental damage may be violating human rights. This data can then be compared with previous records from before the polluting activity began or with data from other areas with similar characteristics. Other studies, such as those showing long-term damage caused by exposure to certain substances, can also be very useful for establishing the connection between an activity and a human rights violation. In any case, when there is an activity that may have an adverse impact on the health or lives of individuals, the most advisable course of action is to seek the implementation of preventive measures to avoid the impact.

Thus, it is critically important to identify situations in which delayed environmental impacts may lead to human rights violations so that preventive measures can be taken. It is also vitally important to control and monitor adequately not only the activities that could potentially cause harm but also the conditions of the potentially affected population, in order to stop the damage or prevent its impact from progressing further. This task should be carried out by the State and when it fails to do so, citizens should demand that such measures are taken. If domestic mechanisms are not effective, advocates can seek precautionary measures from the Commission and require the State to implement effective measures to provide adequate protection of any threatened or violated rights.
Deadline for Presenting Petitions

Actions brought before the Inter-American System must be filed within six months of the final decision issued in the domestic legal system. The exceptions to this admissibility requirement are when there are no judicial actions available for the protection of the rights violated, it is impossible to file such actions or there are unjustified delays in a case. The Commission's regulations also provide that judicial or administrative authorities must rule on domestic remedies within a reasonable time frame, taking into consideration the particular circumstances of the case. This six-month period refers to decisions issued on ordinary judicial or administrative remedies in the particular domestic legal system involved.

In exceptional cases, the Commission has admitted petitions after the six-month filing deadline elapsed (and when the normal exceptions did not apply), as the delay in presenting the petition was not significant. When no exceptions apply, the Commission is usually very strict about the filing deadline and untimely filing can provide a State an effective argument for declaring inadmissibility.

In addition, if petitioners brought domestic actions without naming specific victims, for example to protect the collective right to a healthy environment, more time could be required. As mentioned previously, the identification of the victims is necessary for bringing a case before the Commission and this could involve a greater effort in documenting the case. For this reason, it is advisable to identify a group of persons (though not necessarily all of those affected) in whose name the action can be filed, leaving open the possibility of naming additional victims if the case is admitted.

Time is another factor that distinguishes environmental cases from other cases of human rights violations. This applies to the time required not only for the damage to become apparent, but also for the evidence to be gathered. Consequently, potential litigants should give special consideration to the amount of time required to properly document and prepare a case.

III. CAUSAL NEXUS BETWEEN A STATE ACTION OR OMISSION AND DAMAGE

When proving State responsibility in the IASHR, it is essential to demonstrate the causal nexus between the State’s action or omission and the damage leading to the violation of human rights enshrined in the American Convention or Declaration. Given that State responsibility depends on an action or omission, the causal nexus should demonstrate whether the State’s responsibility stems from the action of one of its agents or from its failure to meet an obligation to act or protect human rights.

111 American Convention, supra note 7, art. 46(1)(b).
112 Id., art. 46(2).
114 FAÚNDEZ LEDEMA supra note 65, at 352.
In either case, because States are responsible for guaranteeing the enjoyment of rights, they are also responsible for regulating and controlling the activities of private parties within their jurisdiction that might cause or contribute to human rights violations. Thus, for example, the Inter-American Court has held:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention. […]

The State has a legal duty to take reasonable steps to prevent human rights violations … and to ensure the victim adequate compensation.

This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts …. […]

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.115

Under this doctrine, if State agents cause the alleged pollution or degradation of the environment, the State’s international responsibility is clear. On the other hand, if a private party causes the damage, the State is only liable for its failure to control the activity in question, thereby allowing a human rights violation to occur.

In this regard, the Commission has noted that States have an obligation to regulate the exploitation of natural resources sufficiently so that human rights are not endangered. On this point, the Commission has stated that “social progress and economic prosperity can be sustained only if our people live in a healthy environment and our ecosystems and natural resources are managed carefully and responsibly.”116

Thus, potential litigants should examine whether the State is regulating the activity causing environmental damage. If it is, this is an implicit recognition by the State that the activity is potentially harmful and hence that it has an obligation to control the activity. Additionally, if existing regulations are enforced and there is still damage to human rights, or if the regulations are not

116 IACHR, Report on the Situation of Human Rights in Ecuador, supra note 34, ch. VIII.
being followed, this is also evidence of the State neglecting its duty to protect rights. In either of these cases, the State should be held accountable.

It is also worth citing the jurisprudence of the European Court of Human Rights, which holds that responsibility for violations of the right to life “not only concerns the unlawful taking of life by the use of force by government agents, but also… imposes an obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction.” 117 Among the measures considered necessary are “granting permits, implementation, operation, security and supervision” of the activities.118

According to the European Court, this obligation should be applied to all activities, public or private, which endanger the right to life. In particular, it applies to activities known in advance to be hazardous, such as industrial activities.119 The activities considered hazardous to human beings, as defined by the Court, include toxic emissions,120 nuclear testing and the operation of waste disposal sites.121 This jurisprudence from the European system can be very useful for litigating similar cases before the Inter-American System, such as those involving industrial activities that violate human rights.

Among the measures considered necessary are “granting permits, implementation, operation, security and supervision” of the activities.118

According to the European Court, this obligation should be applied to all activities, public or private, which endanger the right to life. In particular, it applies to activities known in advance to be hazardous, such as industrial activities.119 The activities considered hazardous to human beings, as defined by the Court, include toxic emissions,120 nuclear testing and the operation of waste disposal sites.121 This jurisprudence from the European system can be very useful for litigating similar cases before the Inter-American System, such as those involving industrial activities that violate human rights.

Considering the extent to which industrial and other environmentally harmful activities can affect human rights, States must take even greater care when authorizing and monitoring such activities. Thus, as the IACHR has observed, in cases of human rights violations caused by environmental damage, the existence of environmental assessment procedures cannot, in and of themselves, relieve a State of its responsibility.122 Faced with evidence that human rights were being infringed upon, States must adopt all necessary measures to prevent, mitigate or repair this situation.

IV. Jurisdiction

In international human rights law, there is no doubt that States are responsible for the protection of persons within their jurisdictions.123 In addition, environmental damage can cause cross-border human rights violations if activities in

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118 Id., ¶ 90.
119 Id., ¶ 71.
122 The Commission, when analyzing the affects on the human rights of the indigenous communities in Ecuador, indicated that “the absence of regulations, the inadequate regulation and the lack of supervision on the application of the governing legislation, can create serious problems to the environment that can translate into human rights violations.” IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN ECUADOR, supra note 34, ch. VIII. For this reason and by virtue that the State failed to implement measures for the protection of rights even after identifying the human rights violations, the Commission recommended for the State “to implement the necessary measures to remediate the current situation and prevent all future oil contamination.” Id.
123 American Convention, supra note 7, art. 1(1).
one State produce environmental damage (and the corresponding human rights violations) in another. For this type of harm, customary international environmental law provides that States have an obligation not to cause damage to the jurisdictions of other States.\footnote{Principle taken from a decision in the Trail Smelter Case, British Columbia, Canada, Trail Smelter Case/1937 No. 128. See also SANDS, supra note 22, at 190-194; JUSTER RUIZ, supra note 22.} This obligation is also enshrined in many multilateral environmental treaties.\footnote{See references cited in supra note 22.} Therefore, a State may incur international responsibility for environmental damage caused in its territory that affects the territory or citizens of another jurisdiction. This type of case can arise, for example, as a result of oil spills in border areas, deforestation in shared forests and even air pollution or acid rain. This precept also applies when the damage causes human rights violations, in which case the State where the act or omission occurred can be held accountable by the State where the damage ensued. The Inter-American System is one possible venue for litigating these cases.

If the State where the polluting activities took place does not respond, the State with jurisdiction over the persons affected should intervene to guarantee their protection. If this does not happen, the State where the affected persons live may also be responsible for the failure to guarantee human rights, as explained previously in the section on State responsibility.

In the Inter-American System, the Commission has also admitted cases against States for violations committed in other territories.\footnote{Salas et al. v. United States, Case 10.573, Inter-Am. C.H.R., Report No 31/93, OEA/Ser.L/V.85, doc. 9 (Oct. 14, 1993).} Therefore, petitioners should consider these arguments when environmental pollution in one State affects the human rights of persons living in other jurisdictions.

\section*{b) Proving Damages}

When proving environmental damage that violates human rights, potential litigants must first consider the extent of the harm suffered by the victim or victims. In environmental cases, the extent of harm depends on factors such as the victims’ location or distance from the source of the damage, the degree of vulnerability and the duration, type and time of exposure. For example, a child is more sensitive to lead poisoning than an adult and the harm is even greater if the child suffers from undernutrition.\footnote{World Health Organization, Water-related Diseases, http://www.who.int/water_sanitation_health/diseases/lead/en (2001).}

As mentioned earlier, determining the cause of environmental damage is a complex process, as is proving the existence of this type of impact. Generally, this requires specialized studies or expert opinions from people with extensive...
scientific knowledge. These kinds of evidence are also necessary when demonstrating the damage to human health caused by environmental pollution.

In this connection, the Inter-American Court of Human Rights has adopted the criterion of “competent analysis” (in accordance with standards of logic and experience) for evaluating evidence and does not require any particular formalities in the examination of evidence. However, petitioners must still offer as much evidence as possible and in a clear and orderly fashion to support their arguments.

It is important to remember that the Commission is not a body with extensive scientific knowledge about environmental issues. Therefore, to obtain a favorable decision, scientific language must be translated into readily understandable concepts. Similarly, it is useful to provide evidence developed by recognized authorities in the field, such as reports by scientific institutions like the World Health Organization.

For this reason, in addition to providing information, the petitioners should ensure that the Commission is able to understand the information and its implications for the enjoyment of human rights.

By the same token, it is important to review any scientific evidence submitted to verify that it was produced in a reliable manner and is relevant to the case. Sometimes studies are not directly related to the victims of a particular case, but they can nevertheless be useful for establishing the basis of the situation and its context.

Given the degree of scientific knowledge required in environmental cases, expert opinions or scientific studies will carry more weight than ordinary testimony. Indeed, in environmental cases filed with the Commission and the Court, comprehensive scientific information has made it possible to prove the extent of environmental damage and the corresponding violation of human rights.

For example, in the preparation of the Commission’s 1997 Country Report on Ecuador, advocates provided extensive evidence of the impact of oil exploitation on the Huaorani indigenous people. As a consequence of this information, the IACHR recommended that the State implement steps to counteract the situation and protect the indigenous people’s health and other rights. More recently, the Commission granted precautionary measures for the protection of a group of persons in the city of La Oroya (Peru) who were affected by the severe and systematic pollution generated by the mining operations there. In that case, technical reports showing air pollution in the city, studies on the health risks associated with those levels of pollution and medical documentation on the beneficiaries were crucial for demonstrating to the IACHR that their rights were in imminent danger and precautionary measures were urgently needed.

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128 Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 16, ¶ 88.
129 Id., ¶¶ 88-89.
130 IACHR, Report on the Situation of the Human Rights in Ecuador, supra note 34, ch VIII.
Despite petitioners’ best efforts, sometimes it is not possible to obtain convincing evidence because of technical or financial problems or the lack of access to information. The Court has recognized the difficulty of obtaining evidence in some cases and missing or incomplete evidence will not automatically bar access to the System. In these cases, petitioners can request that the Commission investigate or provide the evidence necessary to prove the violation of human rights. An example of a successful use of this strategy is *U’wa Indigenous Community v. Colombia*, in which the petitioners requested studies to be conducted on the impact of oil production activities in indigenous territory. As a result, important recommendations were made for the protection of the community’s rights. During litigation, it is also possible to request that the State be required to carry out studies to evaluate the extent of environmental pollution.

Finally, in some situations, an absolute scientific certainty about the damage that specific activities or substances can cause may be impossible to prove, even though there exists a risk of serious or irreversible environmental damage. In such cases, international environmental law provides for the Precautionary Principle, according to which States may take protective measures in order to prevent damage in spite of the lack of scientific certainty. When the risk of serious or irreversible damage may affect human rights, even if it is not certain and the intervention of the IACHR is necessary, petitioners should seek any available information that can support their allegations and justify State action. In such cases invoking the Precautionary Principle could be useful.

**c) Effective Domestic Mechanisms for Protecting Rights**

State responsibility for environmental damage resulting in human rights violations may also arise when States do not provide effective mechanisms for protecting rights. In the Inter-American System, the requirement to implement effective mechanisms for protecting rights includes the obligation to adopt domestic legal remedies giving effect to rights and the expressly recognized rights to a fair trial and adequate judicial protection. Therefore, it is imperative that the available domestic mechanisms be effective for resolving a given human rights situation.

National mechanisms should be effective options for protecting and demanding enforcement of rights if necessary and they should include efficient tools for informing the public and enabling it to participate in decisions affecting the environment. Therefore, the right to public participation and to receive

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132 Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 16, ¶ 99.
133 IACHR, Case No. 11.754, Pueblo U’wa v. Colombia.
135 American Convention, supra note 7, art. 2 “the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”
136 Id., arts. 8 & 25. For more information on the content and recognition of these rights in the IASHR, see, El Sistema Interamericano de Protección de los Derechos Humanos, Supra note 59; Fajóndez Leidesha, supra note 65.
sufficient information is recognized internationally in the Rio Declaration and the Aarhus Convention of the European Union, and domestically in the constitutions of American States such as Colombia.

In this way, when environmental damage occurs, potential litigants must not only determine the impact on people, but also review the procedures for permits and authorizations applicable to the activity causing the damage, such as environmental impact studies, concessions and monitoring or follow-up plans. These should also include administrative procedures whereby the affected persons and even any interested party, can intervene to obtain information, request a review of the activity or participate in the decision-making process. If these procedures do not exist or if the authorities refuse to allow those affected or potentially affected to participate or obtain information, a State may be responsible for violating due process rights and judicial guarantees and for failing to adapt its domestic legislation.

4. Reparations

The American Convention provides that when human rights are violated, redress must be provided, to the extent possible, through fair compensation. In general, the compensation should constitute a comprehensive restitution for damages, meaning that the situation must return to the conditions that prevailed before the alleged violation. However, when this is not possible—for example, when the right to life is violated—then the compensation must take another form, including compensatory damages, moral satisfaction and guarantees of no repetition, among others.

The principles of comprehensive reparations for damages also apply to cases of environmental damage. However, reparations in environmental cases are rather complicated, as will be explained below.

A) Direct and Individual Damage vs. Collective Damage

The principle of individualization of victims applies to the reparation of human rights violated by environmental damage. However, there are cases in which reparations require collective compensation. This is true of large-scale pollution affecting the individual rights of large groups of people. Therefore, when

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139 The Political Constitution of Colombia, art. 79 ("Everyone has the right to enjoy a healthy environment. The law will guarantee the participation of the community in the decisions that might affect them"); the Political Constitution of Ecuador, art. 88 ("Any State action that might affect the environment should be previously consulted with the opinions of the community and regarding which it should be kept well informed. The law will guarantee their participation.")
140 American Convention, supra note 7, art. 63.
a case is presented before the Inter-American Commission, it is essential to bear in mind that the resulting decisions could benefit affected persons who are not necessarily parties to the international litigation. Potential litigants should take this fact into consideration when determining what kind of reparations to request.

Another factor that can influence the determination of reparations is that environmental damage can affect people to different degrees. For example, excessive air pollution undoubtedly affects all those who live in the same place, but it could have an even greater impact on sensitive groups such as children, persons with weak respiratory systems and the elderly. In these cases, although there may be collective reparations, effective methods would have to be devised to ensure that these groups are adequately compensated in accordance with the extent to which they were harmed.

It is also important to mention that reparations involve the identification of every possible beneficiary.\textsuperscript{142} When the victims are not individuals but groups of persons, such as indigenous communities, the Court has decided that compensation goes to the community as a whole.

This occurred in \textit{Awas Tingni Community v. Nicaragua}, in which the Inter-American Court ordered the State to implement the necessary measures to protect the indigenous people’s collective property rights and awarded monetary damages to the community for the moral prejudice suffered when those rights were violated. In its decision, the Court ordered the State to pay damages in the form of projects or services with collective benefits. It also required that these projects be carried out by mutual agreement with the community and under the supervision of the Commission.\textsuperscript{143}

Similarly, in \textit{Yakye Axa Community v. Paraguay}, the Court found that the State had violated the rights to a fair trial, judicial protection, property and life. It ordered reparations to the community in the form of restituting their traditional land and providing goods and services until that time. These cases clearly demonstrate the possibility of seeking reparations in the name of a collective in international litigation. In such cases, the identification of the group and evidence of the damage are essential elements.\textsuperscript{145}

\begin{itemize}
\item[(b)] \textbf{Impossibility of Restoring Previous Conditions}
\end{itemize}

On many occasions, unfortunately, human rights violations are entirely irreparable because it is impossible to return to the previous state of affairs. This difficulty also arises in environmental cases, in which the damage may be ir-

\textsuperscript{142} Melish, supra note 2, at 425.

\textsuperscript{143} \textit{Mayagna (Sumo) Awas Tingni Community v. Nicaragua}, supra note 16, ¶ 167; see also, \textit{Saramaka People v. Suriname}, supra note 6, ¶ 194.

\textsuperscript{144} \textit{Yakye Axa Indigenous Community v. Paraguay}, supra note 31, Resolution 6.

reparable by its very nature. Therefore, even after proving State responsibility, turning the clock back to how things were before is impossible. In this case it will be necessary to identify actions that can compensate for the damages and/or prevent greater impacts.

The possibility of stopping serious and systematic environmental damage, or establishing effective measures to mitigate or repair the damage at least partially, is significant. In addition, even when it has not been possible to repair the damage entirely, the official recognition of a human rights violation could be significant for achieving advances in protecting rights.

The measures to implement vary with each case and they may be short-, medium- or long-term. Therefore, when determining the full extent of a State’s responsibility for environmental damage, it is essential to establish efficient mechanisms for monitoring compliance with those measures. The Commission and the Court should take such factors into consideration when verifying States’ compliance with recommendations or judgments.

As for the possibility of obtaining comprehensive reparations, it is important to consider the mandates of the Convention and the regulations under which the Commission and the Court operate. In some instances, the compensation sought may exceed these bodies’ authority to enforce compliance. However, the System’s jurisprudence has developed more and more standards for reparations with a view to resolving human rights situations in a comprehensive manner. Sometimes there may be measures that, while necessary, are too complex to obtain. In environmental cases, this could happen when the State must be asked to develop environmental public policies or allocate budgetary resources for solving the problem.

However, the Inter-American Court has followed through on requests to seek amendments to legislation in order to guarantee the effective protection of rights. For example, in Claude Reyes v. Chile, in addition to ordering compensation of the victims for violating the right to information, the Court ordered the adoption of “necessary measures to guarantee the protection of the right of access to State-held information.” Those measures included appropriate administrative procedures and training for the agencies responsible for disclosing information.

C) Guarantee of No Repetition

As a result of the Inter-American Court of Human Rights decision finding responsibility, a State has the obligation to adopt the necessary measures to guarantee that a human rights violation will not be repeated. This guarantee will require a commitment by the State and the capacity to monitor this commitment by civil society and inter-American organizations. In addition, although
The complexity of identifying and individualizing victims, exhausting domestic remedies, proving State responsibility and establishing reparations for environmental damage are all factors that must be carefully considered by victims, petitioners and judges both domestically and internationally when examining a given case. Consequently, petitioners must meticulously analyze and prepare cases to prove human rights violations caused by environmental degradation. In addition, guaranteeing the effective universal enjoyment of human rights requires the openness of domestic and international venues to further develop jurisprudence and the willingness of States to comply with their obligations.

It is impossible to fully compensate for environmental damage, the guarantee of no repetition offers the possibility of making progress towards the effective protection of the environment, thereby reducing harm in similar cases in the future.
The purpose of this publication is to provide assistance for all those who struggle to defend human rights harmed by environmental degradation. It is written, therefore, to allow our readers—be they from civil society, government agencies or the private sector—to understand it easily and to acquire a broad and detailed familiarity with litigation before the Inter-American System.

Linking environmental protection with human rights is not merely a matter of accessing international tribunals or seeking greater procedural and regulatory mechanisms in specific cases. Rather, it is necessary to have a holistic and systemic grasp of the overall socio-environmental landscape, while bringing together two branches of the law that have evolved in different directions and at a different pace. This linkage is important insofar as it leads to the synthesis and strengthening of mechanisms for the protection of persons who face the risk and impact of environmental degradation in their lives.

The Inter-American System for the Protection of Human Rights provides an opportunity to defend human rights affected by environmental degradation. The potential for that defense is dependent on a broader development of doctrine and jurisprudence. With the aim of fostering a greater understanding of the System, this publication provides a description of those procedural elements that should be taken into account when engaging the System.

The Jurisprudence of the Inter-American System for the Protection of Human Rights on Environmental Matters

An extensive review of the cases examined by the Inter-American Court and Commission on Human Rights reveals that, although the right to a healthy environment is recognized in international instruments as a human right, the jurisprudence on this right lacks development. Among other factors, this situation may result from the fact that the majority of environmental defenders have adopted an activist or political approach, which is an important strategy, to be sure. However, there does not yet exist a broad practice of adequately documenting and filing environmental cases before the IASHR.

The Commission has published a number of reports and resolutions regarding the right to a healthy environment, mostly through Country Reports and cases involving the rights of indigenous peoples. In contentious cases, the language and holdings of the Inter-American Court of Human Rights have also been limited. Nevertheless, it is noteworthy that in recent years there has been a trend towards an evolving interpretation of the right to a healthy environment that takes into account the indivisibility of human rights.
CONCLUSIONS

Litigation Strategies before the IASHR for Cases of Human Rights Violated by Environmental Degradation

Through individual cases, the Commission and the Court interpret and develop standards applicable to human rights law in the Inter-American region, which in turn serve to interpret future controversies. Consequently, presenting a petition not only affects a specific situation, but also has far-reaching implications for the region as a whole. For this reason, it is crucial to establish guidelines for selecting cases to bring before the Inter-American System in order to ensure that legal actions serve as precedents to advance effectively the System’s jurisprudence. These guidelines should consider the specific characteristics of a case, as well as the possibility and consequences, in the event of success or failure, of setting precedent for the interpretation of the rights enshrined in the American Convention.

As it has been reiterated throughout this publication, the right to a healthy environment enshrined in Article 11 of the Protocol of San Salvador is not directly enforceable before the Commission or the Court. Hence, it must continue to be protected through indirect mechanisms by arguing the connection between this right and the violation of other human rights. As such, the choice of which indirect mechanism to use becomes critical, since it defines whether the case will result in the effective protection of those rights and the environment.

The suggestions we offer in this guide, which consist of a non-exhaustive list of indirect litigation strategies, are two-fold. First, advocates can argue from a list of human rights (in particular, those rights designated as civil and political) that contains procedural or instrumental principles applicable to any other right or State regulation. Examples of these are the right to due process of law, the right to adequate judicial protection, the right to equal protection under the law, the principle of non-discrimination and the right to information, among others. As these principles are relevant to the field of law as a whole, they may also be applied directly to cases of environmental degradation in which human rights are harmed.
Secondly, in certain cases petitioners can argue a connection between the environment and fully judiciable civil and political rights. When invoking a civil or political right in this way, advocates can include obligations that would also arise from economic, social and cultural rights (ESCR), including those pertaining to the environment.

When domestic mechanisms do not effectively guarantee rights, recurring to the IASHR may be a viable option for protecting rights, although it is not the only option available. Before bringing a case, potential litigants should identify the various legal, political and economic factors that can affect the outcome. For this reason, the decision to engage the IASHR should form part of a comprehensive strategy that includes an analysis of the likelihood of success or failure, the possibility of setting important precedents and the negative and positive consequences that may result from a decision.

In this regard, a thorough assessment is recommended for highly complex cases involving violations that are difficult to prove or are politically controversial. This would allow petitioners, in the case that a petition is necessary, to present a given situation in a clear and simple manner so that the Commission and the Court can respond effectively.

In environmental cases, it is particularly important to analyze not only the actions of State agencies, but also those of private entities such as companies whose activities are likely to endanger the environment. Potential litigants must bear in mind, however, that only States may be held responsible before the Inter-American System. Therefore, although the case may involve the actions of private individuals, petitioners must prove State responsibility in order to pursue the case internationally. This type of responsibility can stem from negative obligations (e.g., authorizing activities by private entities that could have an adverse impact on the environment), or from positive obligations (e.g., failing to control the activity of private entities, otherwise known as the obligation to protect).
Other Relevant Sources for Developing Jurisprudence

The instruments currently available in the Inter-American System are not the only relevant ones for arguing a case. The case law of other international fora, such as the human rights protection systems of Europe, Africa and the United Nations, as well as international environmental conventions and treaties, all contain elements that can contribute to the development and interpretation of the rights in the Inter-American System.

Among other advances, the Court and the Commission have referred to other international instruments for interpreting the rights in the Convention and Declaration. This allows for the inclusion of international environmental standards in those cases in which, by using the indirect mechanisms suggested in this guide, advocates can present environmental harms as human rights violations.

In particular, this avenue can allow advocates to include principles specific to environmental law. Among these is the Precautionary Principle, which requires the application of adequate measures necessary to prevent or halt violations of human rights generated by activities harmful to the environment.

Material and Formal Requirements for Litigating Cases before the IASHR

Compliance with all material and formal requirements is necessary in order for a petition to be admissible before the Inter-American Commission. These include: the exhaustion of domestic remedies; the no duplication of international proceedings; filing within the required deadline; the existence of specific and identified victims—even if the situation also affects other persons; and the existence of a harm arising from a State action or omission entailing a violation of one or more rights enshrined in the American Convention.
As described in Chapter II, petitioners must identify the victims, exhaust available domestic remedies, prove State responsibility and define possible reparations. These considerations are important when litigating environmental cases from a human rights perspective, as these cases generally have specific characteristics that must be translated to human rights terms and which will determine whether the case should be presented before the Inter-American System of Human Rights.

We emphasize three specific aspects that differentiate environmental cases from other human rights cases. First, the characteristics of the environmental harm may generate complications with respect to particularly vulnerable groups of victims, as well as the time and duration of the impacts caused. Therefore, petitioners must make a special effort in documenting and investigating the case and in formulating an in-depth legal analysis, so that the problem can be understood in its true magnitude.

Second, the exhaustion of domestic remedies constitutes an essential factor for selecting a case to submit to the Inter-American System. This factor is particularly relevant for cases involving environmental degradation, in light of the remedies in environmental law that may also be available domestically. It is crucial to analyze all available options for the protection of rights, whether administrative or judicial, with the aim of achieving the desired outcome in the case. Although it is also an essential requirement before the Inter-American System, engaging domestic courts may be more effective than international tribunals, as the former have more proximity to and, therefore, greater familiarity and experience with the circumstances at issue.

Finally, reparations are another factor that differentiates environmental cases from other human rights cases. It is important to remember that the Inter-American System seeks comprehensive reparations for damages. When this is not possible, alternative forms of reparation should include compensatory damages, guarantees of no repetition and the implementation of measures to mitigate damages.
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### Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

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Sentences from the Inter-American Court

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- Mayagna (Sumo) Awas Tingni Community v. Nicaragua, August 31, 2001, Series C, No. 79.
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- Matter of the Peace Community of San de Apartadó regarding Colombia, Resolution of June 18, 2002.
- Matter of the Communities of Jiguamiandó and Curbaradó regarding Colombia, Resolution of March 6, 2003.

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CHRISTIAN COURTIS obtained his law degree from the University of Buenos Aires, Argentina and holds a Masters in Law from the University of Virginia, United States. He is currently the Human Rights Officer of the Human Rights and Economic and Social Issues Unit at the Office of the High Commissioner for Human Rights and teaches Philosophy of Law at the University of Buenos Aires. He is a visiting professor in the School of Law at ITAM (Instituto Tecnológico Autónomo de México), as well as at the University of Toulouse-Le Mirail (France), Valencia, Castilla-La Mancha, Pablo de Olavide and Carlos III (Spain), California-Berkeley, Diego Portales (Chile) and the National Autonomous University of Honduras, among others. He has served as a consultant for the Pan-American and World Health Organizations, UNESCO and the United Nations Division for Social Policy and Development and has been an advisor for the Argentine Senate as well as advisor for legal reforms in countries of Latin America, Africa and the Caribbean. He has been involved as an author, editor and compiler in a range of books and articles on human rights, legal theory and international treaties.

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**Martin Wagner** has a J.D. from the University of Virginia Law School, where he was Executive Editor of the Virginia Journal of International Law and graduated in the top 10 percent of his class. He served as a law clerk for a judge of the US Court of Appeals for the Ninth Circuit and spent five years litigating environmental and human rights lawsuits and promoting international legal mechanisms for the protection of human rights. He served as a Peace Corps volunteer in Senegal, West Africa. Currently he is the director of the International Program for Earthjustice, which focuses on promoting and protecting human rights and a healthy environment through international treaties, agreements and U.S. legislation. He teaches International Environmental Law and International Trade and Environmental Protection at Golden Gate University in San Francisco, California.
The Americas was the first region in the world to recognize the human right to a healthy environment through both an international treaty and domestically in a number of national constitutions. Such recognition is cause for much hope, given the obvious relationship between the environment and the protection of human rights. Furthermore, the fact that this right has been enshrined in several legal texts signifies that millions of people may see an improvement in their local environment and, by extension, their quality of life. Nevertheless, almost two decades later, the situation in the region is far from ideal, and unfortunately, negative examples abound. Bridging this gap between the recognition of the right to a healthy environment and its effective enjoyment is vital for the region.

In response to this situation, the Interamerican Association for Environmental Defense (AIDA) has decided to publish this guide. It aims to promote an understanding of the Inter-American System of Human Rights by examining the legal and strategic considerations for litigating cases of human rights violations resulting from environmental degradation. It is our hope that communities, organizations, attorneys and government officials from a variety of perspectives will use this publication as a reference tool and guide for implementing strategies to protect the environment and human rights. To that end, we also hope that this guide will promote dialogue and discussions that can help strengthen efforts to achieve the effective and universal protection of human rights.

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