

The Escazú Agreement: The Last Piece of the Tripartite Normative Framework in the Right to a Healthy Environment

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The right to a healthy environment in the Inter-American System for the Protection of Human Rights is not a new right. Human rights and the environment have long been fought for in the Americas and the Caribbean. What is new and exciting in the protection of the environment and human rights is the recent ratification of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (“Escazú Agreement”), a binding treaty in the region that represents a real commitment from States to protect environmental human rights. The Escazú Agreement brings with it special protections for vulnerable persons (persons in vulnerable situations) and communities in the context of environmental harm and climate change. This article argues that the Escazú Agreement provides for a robust set of protections that complement the already existing and foundational decisions by the Inter-American Court of Human Rights: The Advisory Opinion on the Environment and Human Rights (OC-23/17) and the Comunidades indígenas miembros de la Asociación Lhaka Honha (Nuestra Tierra) v. Argentina. The Escazú Agreement provides another vehicle to hold States responsible to protect the environment and human rights as the last piece of this tripart framework of protection.

I. INTRODUCTION

Protecting the environment is more important than ever. A 2020 United Nations study confirmed that climate change has already had catastrophic effects on “socio-economic development, human health, migration and displacement, food security, and land and marine ecosystems.”¹ All ecosystems and human communities are at risk of the inescapable truth that we have destroyed this earth and its natural resources. It is an absolute “moral, ethical and economic imperative” to “take concrete action”

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

to mitigate the existential threat of climate change.² A report by leading international experts states that approximately one million species are at risk of or face extinction unless changes are made to the drivers of climate change and environmental degradation.³ Similarly, vulnerable persons and communities⁴ such as “children, low-income people, people with disabilities, pregnant people,” and underrepresented groups are at particular risk of contracting diseases or other health conditions due to the worsening effects of climate change and resulting environmental degradation.⁵ It is with this moral and existential imperative that this article seeks to clarify a path forward for the protection of environmental human rights through the adjudication of cases in the Inter-American System for the Protection of Human Rights (“Inter-American System”). Specifically, it discusses the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (“Escazú Agreement”), the most recent normative tool protecting the right to a healthy environment and other environmental human rights.

The right to a healthy environment is not a new human right. It has been recognized in the Inter-American System since 1988 through Inter-American instruments and jurisprudence on the

2. *Climate Change: ‘A Moral, Ethical and Economic Imperative’ to Slow Global Warming Say UN Leaders, Calling for More Action*, UN NEWS (May 9, 2019), <https://news.un.org/en/story/2019/05/1038231> [<https://perma.cc/4937-K5XZ>].

3. *World is ‘On Notice’ as Major UN Report Shows One Million Species Face Extinction*, UN NEWS (May 6, 2019), <https://news.un.org/en/story/2019/05/1037941> [<https://perma.cc/E8UK-C4YY>].

4. Vulnerability is context and situation specific, so there is no generalized definition that encompasses all vulnerable groups. Some of the most common vulnerable groups in relation to human rights abuses are children, women, LGBTI persons, older persons, persons with disabilities, and migrants, refugees and asylum seekers. Rep. U.N. Independent Expert on Hum. Rts. & the Env’t, United Environment Programme, U.N. OFF. OF HIGH COMM’R FOR HUM. RTS., *Human Rights and the Environment: Environmental Protection Related to Groups in Vulnerable Situations*, Panama (July 26-27, 2013); *see also Disadvantaged and vulnerable groups*, SOC. PROT. HUM. RTS. (2015), <https://socialprotection-humanrights.org/key-issues/disadvantaged-and-vulnerable-groups> [<https://perma.cc/3YWB-FRLP>]; *Non-Discrimination: Groups in Vulnerable Situations*, U.N. OFF. OF HIGH COMM’R FOR HUM. RTS. (2021), <https://www.ohchr.org/EN/Issues/Health/Pages/GroupsInVulnerableSituations.aspx> [<https://perma.cc/JBY9-3B2V>].

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

rights of indigenous and tribal communities.⁶ The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) and the Court's Advisory Opinion on the Environment and Human Rights (OC-23/17) have built on the recognition of that right for the Americas.⁷ The Protocol and Advisory Opinion on the Environment and Human Rights clarify that the right to a healthy environment is a viable framework for protecting the environment. The Advisory Opinion was critical in recognizing that the right to a healthy environment is a justiciable right in the Inter-American system.

Shortly after the historic advisory opinion, the Inter-American Court decided *Comunidades indígenas miembros de la Asociación Lhaka Honha (Nuestra Tierra) v. Argentina* in 2020, its first contentious case using the right to a healthy environment as a normative framework.⁸ This decision was critical to opening a new path forward in the adjudication of environmental human rights cases using this framework. The decision signaled that the Court was ready to expand and push forward interpretations of environmental human rights, especially the right to a healthy environment as an independent and autonomous justiciable right.⁹

In April 2021, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental

6. Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 11, Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156, 165 (1989) [hereinafter Protocol of San Salvador]; Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, (Aug. 31, 2001) [hereinafter Mayagna Awas Tingni]; Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, (June 17, 2005) [hereinafter Yakye Axa Indigenous Cmty.]; Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, (Nov. 28, 2007) [hereinafter Saramaka People].

7. Protocol of San Salvador, *supra* note 6; The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Arts. 4(1) and 5(1) in relation to Arts. 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, (Nov. 15, 2017) [hereinafter Advisory Opinion OC-23/17].

8. Advisory Opinion OC-23/17, *supra* note 7; Indigenous Cmty. of the Lhaka Honhat (Our Land) Ass'n v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 400, (Feb. 6, 2020) [hereinafter Lhaka Honhat].

9. Lhaka Honhat, *supra* note 8, ¶ 203 (citing Advisory Opinion OC-23/17, *supra* note 7).

Matters in Latin America and the Caribbean (“Escazú Agreement”) entered into force.¹⁰ The Escazú Agreement was first conceived in the United Nations Conference on Sustainable Development (Rio + 20)¹¹ out of a desire to move forward with regional protections in the Americas, after the international community failed to move forward with a binding international agreement on environmental human rights. While the Rio + 20 Conference was significant due to the level of engagement from governments, civil society, and the private sector, its most notable accomplishment was the Escazú Agreement.¹² The Escazú Agreement is the first environmental treaty in Latin America and the Caribbean. It is also the first in the world to protect environmental human rights defenders.¹³ This treaty presents an exciting prospect for the protection of the right to a healthy environment domestically, regionally, and internationally.¹⁴

10. Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Sept. 27, 2018, https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf [<https://perma.cc/9RC4-23YJ>] [hereinafter Escazú Agreement].

11. The United Nations Conference on Sustainable Development (Rio + 20) was held in June 2012, in Rio de Janeiro, Brazil. The Rio+20 Conference was a collaborative effort between the United Nations Department of Economic and Social Affairs (UN DESA) and the United Nations Development Programme (UNDP) where 72 countries sought to build a consensus on moving forward sustainable environmental protections at the domestic level. U.N. Conference on Sustainable Development, *Synthesis of National Reports for Rio+20* (2012) [hereinafter *Synthesis for Rio+20*]; see also U.N. Conference on Sustainable Development, *Report of the United Nations Conference on Sustainable Development*, at 1, U.N. Doc. A/CONF.216/16 (June 20-22, 2012) [hereinafter *Report of the U.N. Conf. on Sustainable Dev.*].

12. The Rio + 20 Conference failed to implement five key priority areas needed to strengthen sustainable development. However, States reaffirmed their commitments to the Rio Principle 10, providing for three fundamental rights: access to information, access to public participation, and access to justice. Further, it was restated that the regional level was an important setting for action to promote access to information, public participation, and access to justice in environmental matters. See U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992) [hereinafter *Rio Declaration on Env't & Dev.*]; see also Stephen Stec & Jerzy Jendroška, *The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings*, 31 J. ENV'T L. 533, 533 (Dec. 18, 2019) (citing U. N., *The Future We Want: Outcome Document of the United Nations Conference on Sustainable Development*, Rio De Janeiro, Brazil June 2012, at 99).

13. *The Escazú Agreement's Adoption Two Years Ago is Celebrated as its Entry into Force Approaches*, CEPAL (March 4, 2020), <https://www.cepal.org/en/pressreleases/escazu-agreements-adoption-two-years-ago-celebrated-its-entry-force-approaches> [<https://perma.cc/D83H-LS87>].

14. The Escazú Agreement was adopted by the *Comisión Económica de las Naciones Unidas para América Latina y el Caribe* (CEPAL). *Id.*

The litigation of environmental protections has been premised on the idea that the “natural environment” is essential for the survival of indigenous and tribal communities as well as for the protection of nature itself.¹⁵ Because the Inter-American System has developed jurisprudence protecting environmental rights through the protection of indigenous peoples as an existential question for their survival, it provides a normative framework that prioritizes the protection of environmental human rights.

This article argues that the Escazú Agreement is the last piece of a tripart framework that drives the process forward for the litigation and adjudication of environmental human rights cases in the Americas and the Caribbean outside of the “greening” of a human rights framework. While this is not the majority view, it is an innovative way to think about the growth of environmental human rights protections in the Americas and the Caribbean. Specifically, this article examines how the right to a healthy environment can be used as a normative framework to bring environmental human rights cases in front of the Inter-American Court and Commission.

This article is divided into three substantive parts. Part I examines how the Escazú Agreement will be integrated into the existing normative framework set up by the Advisory Opinion on the Environment and Human Rights (OC-23/17) and the *Lhaka Honhat (Nuestra Tierra) v. Argentina* case. This section explains the origins of the Escazú Agreement and illustrates ways in which the Inter-American Court can use the Escazú Agreement to move forward in its path to clarify and expand on the right to a healthy environment.

Part II discusses the Escazú Agreement in a substantive manner with an expansive discussion of key protections enumerated in the agreement. Each of these rights and obligations will be discussed and explained in the context of existing international or regional jurisprudence. This section will explain the inner workings of the treaty and how it can be used to adjudicate future environmental human rights cases. This section also addresses the importance of the Escazú Agreement and its different components.

Part III provides a background on the Inter-American System for the Protection of Human Rights. This section sets forth the foundational concepts and procedural understanding for the

15. Advisory Opinion OC-23/17, *supra* note 7.

regional human rights system in the Americas. It discusses judicial and quasi-judicial resources that victims of human rights violations may use to vindicate their human rights. Part III explains the important regional treaties on which this article's discussion rests.

As Alicia Bárcena, the Executive Secretary of the Economic Commission for Latin America and the Caribbean (ECLAC, or "CEPAL" in Spanish), has said: "The Escazú Agreement is a tool that needs to be used to construct a different future that changes our approach to development and that it narrows the gap of good living, beyond an anthropocentric approach to adopt an ecocentric approach in which humanity is part of nature and not as its dominator."¹⁶

II. THE ESCAZÚ AGREEMENT AND THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

The Escazú Agreement is the last piece needed in the tripart normative framework protecting the right to a healthy environment.¹⁷ The first two parts, the Advisory Opinion on the Environment and Human Rights and the *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v. Argentina*, are two very important decisions creating a pathway to protecting the right to a healthy environment in the Inter-American System. This section will discuss how the Escazú Agreement solidifies this new path of holding States accountable through the right to a healthy environment and works harmoniously with these two impactful decisions.

The Escazú Agreement is the first binding agreement that holds States responsible for environmental harm in the region.¹⁸ In 2012,

16. "El Acuerdo de Escazú es una herramienta que debe ser utilizada para construir un futuro distinto que cambie nuestro estilo de desarrollo y que nos acerque al *buen vivir*, superando la visión antropocéntrica y adoptando *una mirada ecocéntrica*, en la que la humanidad se conciba como parte de la naturaleza y no como su dominador." *Lo Logramos El Acuerdo de Escazú es un Hecho*, FUNDACIÓN AMBIENTE Y RECURSOS NATURALES (Apr. 23, 2021), <https://farn.org.ar/lo-logramos-el-acuerdo-de-escazu-es-un-hecho/> [<https://perma.cc/LNT7-UKFR>].

17. While the Escazú Agreement is a regional agreement, its importance extends beyond the Americas and the Caribbean since it opens the door to new human rights protection in relation to the environment. However, for this discussion, I will focus on the impact of the Escazú Agreement in the Americas and Caribbean through the Inter-American System for the protection of human rights.

18. Stec & Jendroška, *supra* note 12 (citing Rep. of the Ninth Meeting of the Neg. Comm'n., UN Doc. LC/CNP10.9/6/Rev. 1 (18 May 2018)).

the international community gathered in Rio de Janeiro, Brazil for the Rio + 20 Conference. This conference had the purpose of gathering the public (governmental and civil society) and private sector to think about how to reduce poverty, advance social equity, and ensure environmental protection.¹⁹ The Rio + 20 Conference resulted in numerous reports detailing the progress made by many countries and recommendations about how to strengthen domestic institutional frameworks to protect the environment and ensure sustainable development.²⁰ While the conference lacked a mechanism to implement these principles, it was significant because States reaffirmed their commitments to Principle 10 of the 1992 Rio Declaration on Environment and Development and other international instruments protecting environmental justice and human rights.²¹

Following the Rio + 20 Conference, where the international community lacked the commitment to take real action holding States accountable, a group of Latin American and Caribbean countries pledged their real commitment to environmental justice and human rights.²² They specifically endorsed the “Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development.”²³ Additionally, this group of countries pledged their commitment to exploring the possibility of adopting a regional instrument that would push forward the protections in Rio Principle 10 and create legally binding obligations²⁴ and “expressed an emerging global view on an expansive interpretation of Rio Principle 10, including participation of minority and vulnerable groups, respect for indigenous peoples, and protection of environmental

19. See *Synthesis for Rio+20*, *supra* note 11, at 1.

20. *Id.*

21. Stec & Jendroæka, *supra* note 12 (citing *The Future We Want: Outcome Document of the United Nations Conference on Sustainable Development*, U.N. Rio De Janeiro, Brazil June 2012, at 99).

22. See *Report of the U.N. Conf. on Sustainable Dev.*, *supra* note 11.

23. This Declaration calls upon States to provide that “each individual should have appropriate access to information, the opportunity to participate in decision-making processes and effective access to judicial and administrative proceedings.” U.N. Conf. on Sustainable Development, Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development, 2, U.N. Doc. A/CONF.216.13 (July 25, 2012), https://www.cepal.org/sites/default/files/pages/files/n1244043_eng.pdf [<https://perma.cc/JH47-TML8>]; see also Stec & Jendroæka, *supra* note 12.

24. See Stec & Jendroæka, *supra* note 12.

defenders.”²⁵

These views and interpretations culminated with the 2018 adoption of this agreement in Escazú, Costa Rica.²⁶ In April 2021, the Escazú Agreement entered into force, making it a fully binding instrument of law.²⁷ The Escazú Agreement is a formal and permanent multilateral environmental and human rights treaty that creates a normative framework in the protection of environmental human rights.²⁸ States Parties to the treaty pledged to and are obligated to protect the human rights to information, public participation, and justice in environmental matters.²⁹ By becoming parties to the agreement, State Parties agreed to be bound by the provisions in the Escazú Agreement. Article 1 of the Escazú Agreement, states that its objective is to “guarantee the full and effective implementation . . . of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters.”³⁰

The Agreement created the “Committee to Support Implementation and Compliance,” which is tasked with promoting the implementation of the agreement.³¹ This Committee has a consultative role and is “non-adversarial, non-judicial and non-punitive.”³² Article 5(18) of the Escazú Agreement provides for the Compliance Committee as follows:

Each Party shall establish or designate one or more impartial entities or institutions with autonomy and independence to promote transparency in access to environmental information, to

25. This recognition of vulnerable groups was particularly important in shaping this regional instrument that reflects the cultural, historic, and political experience of people in the Americas and the Caribbean. *Id.*

26. *Escazú Agreement Takes Effect, Enshrining Right to Sustainable Development*, IISD (Apr. 26, 2021), <https://sdg.iisd.org/news/escazu-agreement-takes-effect-enshrining-right-to-sustainable-development/> [<https://perma.cc/EH43-ULG3>].

27. As of April 2021, twenty-four countries had signed and twelve had ratified the Escazú Agreement. *Id.*

28. Carlos Sánchez & Geraldine Neris, *El Acuerdo de Escazú y su interacción en el derecho argentino. Una visión desde la provincia de San Juan*, REVISTA ELECTRÓNICA DE DERECHO INTERNACIONAL CONTEMPORÁNEO, INSTITUTO DE RELACIONES INTERNACIONALES, Dec. 2020, at 95, 97, <https://doi.org/10.24215/2618303Xe005>.

29. Escazú Agreement, *supra* note 10.

30. *Id.*, at art. 1.

31. *Id.* at art. 18.1.

32. *Id.* at art. 18.2.

oversee compliance with rules, and monitor, report on and guarantee the right of access to information. Each Party may consider including or strengthening, as appropriate, sanctioning powers within the scope of the responsibilities of the aforementioned entities or institutions.³³

For now, the Compliance Committee has not been fully formed and is still in the planning stages. The most recent efforts in planning for the Compliance Committee have been the negotiation of the Rules of Governing the Structure and Functions of the Committee to Support Implementation and Compliance (“the Rules”) with the Escazú Agreement.³⁴ The Committee will be critical for implementing the Escazú Agreement, engaging in consultation with member states, addressing pressing issues with human rights defenders, reviewing implementation plans and actions, and providing opinions on the interpretation of the agreement.³⁵

The Escazú Agreement does not provide for judicial or quasi-judicial measures of enforcement, thus relying on the Compliance Committee and existing international and regional human rights mechanisms to interpret and enforce it. This means that to understand the real implications of the Escazú Agreement, we must also look at existing decisions of the regional Inter-American and international legal systems. Then the question becomes, how does the Escazú Agreement fit within the existing Inter-American normative framework protecting the right to a healthy environment?

The Escazú Agreement is binding on the States Parties to the treaty.³⁶ For States in the Americas and the Caribbean that are not

33. *Id.* at art. 5.18.

34. Econ. Comm’n. of Latin Am., Rules Relating to the Structure and Functions of the Committee to Support Implementation and Compliance, ECLAC Doc. LC/COP-EZ.1/5 (Oct. 2022), available at <https://repositorio.cepal.org/handle/11362/48347> [<https://perma.cc/RV8E-6HA9>].

35. *See id.* ¶ 11.

36. Antigua and Barbuda, Argentina, Bolivia, Ecuador, Guyana, Mexico, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Uruguay have ratified the Escazú Agreement, thus making them “States Parties” to the treaty. Additionally, Belize, Brazil, Colombia, Costa Rica, Dominica, Dominican Republic, Grenada, Guatemala, Haiti, Jamaica, Paraguay, and Perú are signatories to the Escazú Agreement. REGIONAL AGREEMENT ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION AND JUSTICE IN ENVIRONMENTAL MATTERS IN LATIN AMERICA AND THE CARIBBEAN, U.N. TREATY COLLECTION (Mar. 4, 2018), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-18&chapter=27&clang=_en

a party to the treaty, it provides non-binding guidance on the protection of the right to information, participation, and justice in environmental matters.³⁷ The Inter-American Court of Human Rights (“Inter-American Court” or “Court”) has the power to interpret international obligations arising out of customary international law and human rights instruments.³⁸ The Inter-American Court is the primary judicial human rights body in the Inter-American System, with the power to adjudicate contentious cases and to issue advisory opinions on issues of interpretation concerning the American Convention and other Inter-American instruments.³⁹ The Court’s advisory power to issue opinions on how the American Convention should be interpreted is critical in moving forward into new areas of law within the protection of human rights.⁴⁰ It is this very power that permits the Court to consider the evolutive interpretation of human rights as authorized under Article 29 of the American Convention and the rules of interpretation under the Vienna Convention on the Law of Treaties.⁴¹

As such, the Court can consider emerging norms and ongoing developments in international human rights and international law to interpret human rights instruments pertaining to the Americas.⁴² It also means that the Escazú Agreement, as a human rights treaty, likely will be interpreted by the Court when considering OAS member states’ violations of environmental human rights. It is for that reason that the Inter-American Court

[<https://perma.cc/6GYR-MDE5>]

37. See *Earth Day Marks Entry into Force of Escazú Agreement, a New Environmental Law Treaty for Latin America and the Caribbean*, WORLD BANK (Apr. 22, 2021), <https://www.worldbank.org/en/news/feature/2021/04/22/earth-day-marks-entry-into-force-of-escaz-agreement-a-new-environmental-law-treaty-for-latin-america-and-the-caribbean> [<https://perma.cc/HXK3-3TTP>].

38. See Advisory Opinion OC-23/17, *supra* note 7, ¶¶ 42-43; see also *Lhaka Honhat*, *supra* note 8, ¶ 197.

39. Inter-Am. Comm’n H.R., *Rules of Procedure*, ORG. AM. STATES art. 1(1) (Aug. 1, 2013), <https://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp> [<https://perma.cc/4CW2-DBFA>] [hereinafter *IACHR Rules of Procedure*]; see American Convention on Human Rights art. 62-63, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter *American Convention*].

40. See American Convention, *supra* note 39, at art. 64(1); see also *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 48 (July 14, 1989) [hereinafter *Advisory Opinion OC-10/89*].

41. Advisory Opinion OC-23/17, *supra* note 7, ¶ 43.

42. Advisory Opinion OC-10/89, *supra* note 40, ¶¶ 41, 43.

can consider the evolving practice of environmental human rights with the Escazú Agreement as an important normative instrument in the protection of the right to a healthy environment and other environmental human rights.

A. *Advisory Opinion on the Environment and Human Rights OC-23/17*

In its *Advisory Opinion on the Environment and Human Rights*, the Court affirmed its power to consider the evolving nature of international human rights to develop further protections in environmental human rights.⁴³ In 2016, Colombia requested the Inter-American Court to provide guidance on legal questions relating to State obligations under the American Convention. Colombia's questions related to environmentally harmful activities that may harm habitats essential to the full and effective enjoyment of human rights.⁴⁴ When considering environmental harm, Colombia asked the Court to consider its obligations in relation to protecting the environment as essential for people's subsistence and development.⁴⁵ Colombia expressed concern with the severe environmental degradation of the marine and human environment.⁴⁶ Colombia specifically asked the Court to consider the situation of the Wider Caribbean Region and the coastal and marine environments.⁴⁷ It asked what international obligations States owe to victims of human rights abuses resulting from environmentally harmful activities.⁴⁸ While some of the questions presented by Colombia were specific to the Coastal Wider Caribbean Region, others were sufficiently broad to concern the international community, and especially other countries in the

43. *Advisory Opinion OC-23/17*, *supra* note 7, ¶ 48 (citing *Yakye Axa Indigenous Cmty.; Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 118 (Mar. 29, 2006); *Saramaka People; Kaliña & Lokono Peoples v. Suriname*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309, ¶ 173 (Nov. 25, 2015)).

44. *Id.* ¶¶ 1-2.

45. *Id.* ¶ 2.

46. *Id.*

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

48. *Id.* ¶ 3.

Americas.⁴⁹

Colombia asked the Court to consider obligations arising from international customary law and international treaties.⁵⁰ Colombia also asked the Court to provide guidance as to the international obligation “concerning prevention, precaution, mitigation of damage, and cooperation between the States potentially affected.”⁵¹ Specifically, it asked the Court to consider international obligations stemming from environmental standards codified under customary international law and treaty law.⁵² Additionally, Colombia asked the Court to determine how the American Convention needed to be interpreted to integrate the duties of prevention, mitigation, and cooperation under international law.⁵³ This question was critical as it allowed the Court to consider integrating international environmental legal principles from outside of the Inter-American System for the protection of human rights.⁵⁴ In essence, the Court was asked to consider a growing body of law in environmental human rights that supports the further interpretation of the right to a healthy environment in the Inter-American System. In doing so, the Court invoked its authority to interpret the international obligations arising out of the American Convention, in light of relevant international environmental and human rights cases, reports, and expert findings.⁵⁵ The Court asserted its power to interpret human rights instruments in light of evolving interpretations of international law.⁵⁶

The Advisory Opinion also found that while the right to a

49. *Id.* ¶¶ 1-2.

50. *Id.* ¶¶ 1-3.

51. *Id.* ¶ 1.

52. *Id.*

53. *Id.*

54. *Id.* ¶¶ 98-100.

55. *See Id.* ¶ 17; *cf.* Advisory Opinion OC-10/89, *supra* note 40, ¶ 42; Entitlement of Legal Entities to Hold Rights Under the Inter-American Human Rights System (Art. 1(2), in relation to Arts. 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) American Convention on Human Rights, and Arts. 8(1)(A) & (B) Protocol of San Salvador), Advisory Opinion OC-22/16, Inter-Am. Ct. H.R. (ser. A) No. 22, ¶ 81 (Feb. 26, 2016) [hereinafter Advisory Opinion OC-22/16]; “Other Treaties” Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, ¶¶ 37-40 (Sept. 24, 1982) [hereinafter Advisory Opinion OC-1/82].

56. Advisory Opinion OC-23/17, *supra* note 7, ¶¶ 42-43; *see also* Lhaka Honhat, *supra* note 8, ¶ 197.

healthy environment is an economic, social, and cultural right, it is indivisible from civil and political rights.⁵⁷ This finding is important because it recognizes the indivisibility and interconnectedness of the right to a healthy environment with other human rights, including non-derogable rights.⁵⁸ This finding leaves little room for States to argue that they are unable to provide structures that protect the right.⁵⁹

The Court stated that “all human rights are vulnerable to environmental degradation, in that the full enjoyment of all human rights depends on a supportive environment.”⁶⁰ Additionally, the Court found that States that are State Parties to the American Convention may be held responsible for violations of Article 11 of the Protocol of San Salvador (the right to a healthy environment) through Article 26 of the American Convention.⁶¹ This means that the Inter-American Court is moving forward in protecting the right to a healthy environment as an autonomous and justiciable right.

B. *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v. Argentina*

A finding that the right to a healthy environment was an autonomous and justiciable right was critical because it opened the door to the possibility of the right to a healthy environment used as a justiciable right in Inter-American litigation. More recently, the Inter-American Court case *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v. Argentina* recognized that the right to a healthy environment is justiciable, thus becoming an

57. Advisory Opinion OC-23/17, *supra* note 7, ¶ 47.

58. The American Convention provides that there are non-derogable rights that cannot be suspended even in times of war, public danger or emergency. American Convention, *supra* note 39, at art. 27.

59. *Id.*

60. Advisory Opinion OC-23/17, *supra* note 7, ¶ 54 (citing John H. Knox, *Preliminary Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶ 19, Hum. Rts. Council, UN Doc. A/HRC/22/43 (Dec. 24, 2012)). Similarly, the International Court of Justice has emphasized that “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.” *Cf.* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8); *Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, Judgment, 1997 I.C.J. Rep. 7, ¶ 112 (Sept. 25).

61. Advisory Opinion OC-23/17, *supra* note 7, ¶ 57.

example of precedent-setting litigation.⁶² The case *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v. Argentina* is an example of precedent-setting litigation that took advantage of the opening provided by the Advisory Opinion and its recognition of the right to a healthy environment.⁶³ The petitioners brought the case against Argentina based on the now recognized and justiciable right to a healthy environment.⁶⁴ The Court affirmed that through Article 26 of the American Convention, the petitioners (the Lhaka Honhat indigenous community) could be protected under the right to a healthy environment.⁶⁵ In the *Lhaka Honhat v. Argentina* case, indigenous lands had been used and degraded by non-indigenous persons.⁶⁶ These non-indigenous persons were fencing indigenous lands for their private agricultural uses like farming and cattle raising.⁶⁷ This overuse of the land led to soil erosion and contamination of natural resources in the indigenous lands.⁶⁸ These practices, which were known by the Argentine Government, stripped the indigenous communities of their right to use and enjoy their lands to carry out traditional indigenous practices.⁶⁹ The indigenous communities were no longer able to access clean water, hunt, and gather in their lands, thus threatening their survival.⁷⁰ The Court found that Argentina had violated the indigenous communities' rights to property, judicial guarantees, food, and water, and most importantly, the right to a healthy environment.

The Court ordered Argentina to remediate and compensate the indigenous communities for the harms committed by ensuring that they had access to their lands, were consulted prior to any interferences with it, and that the natural resources in it were cleaned where polluted.⁷¹ The Court's finding that the right to a

62. Lhaka Honhat, *supra* note 8, ¶¶ 280, 282, 287, 289.

63. Up to this point, all environmental litigation in the Inter-American System had been through the "greening" of human rights. This means that the Court found violations of human rights relating to the environment through the violation of the American Convention with the rights to life, property, culture, as well as others.

64. Lhaka Honhat, *supra* note 8, ¶¶ 186-209.

65. *Id.* ¶¶ 202-203.

66. *Id.* ¶¶ 287, 314, 330.

67. *Id.* ¶ 287.

68. *Id.* ¶ 280.

69. *Id.* ¶¶ 282, 287.

70. *Id.* ¶¶ 280-282.

71. *Id.* ¶¶ 310-321, 326-336.

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

Additionally, the OAS General Assembly has recognized, and the Court has emphasized that to protect environmental and human rights, it is essential that “States of the hemisphere implement policies and strategies to protect the environment, including the application of various treaties and conventions.”⁷² This means that moving forward with the protection of environmental human rights requires that the region, and the Court as one of its bodies, consider international obligations in treaties and conventions that are relevant to the region. The Escazú Agreement fits within this guidance.

To reaffirm this point, the Court has also emphasized that it has the authority to interpret not only the American Convention, but also “other treaties concerning the protection of human rights in the States of the Americas.”⁷³ Therefore, there is no question that the Inter-American Court can consider the Escazú Agreement as binding authority on States that have ratified the treaty, but also persuasively for States that have not. The Court has emphasized that it also has the authority to consider the evolving nature of international law, and as such, the Escazú Agreement could be considered as codification of procedural human rights that have been widely recognized in Inter-American jurisprudence.⁷⁴

C. *What is the Escazú Agreement?*

The Escazú Agreement is a regional treaty on the right to access to information, public participation, and access to justice in

72. Advisory Opinion OC-23/17, *supra* note 7, ¶ 53 (quoting Org. Am. States [OAS], General Assembly Res., *Human Rights and the Environment*, para. 2, OEA/Ser.P AG/Res.1819 (XXXI-O/01) (June 5, 2001), <http://www.oas.org/usde/FIDA/documents/res1819.htm> [<https://perma.cc/C658-V9DC>]).

73. Advisory Opinion OC-23/17, *supra* note 7, ¶ 17 (quoting Advisory Opinion OC-1/82, *supra* note 55, ¶ 1; Advisory Opinion OC-22/16, *supra* note 55, ¶ 17).

74. See below discussion on cases protecting the three pillars: information, participation, and access to justice in environmental matters. These cases discuss at length these pillars and recognize international obligations recognized and protected through the American Convention (such as *Claude-Reyes v. Chile*, *Gomes Lund v. Brazil*, *Saramaka People v. Suriname*, and *Yakye Axa Indigenous Community v. Paraguay*).

environmental matters in the Americas.⁷⁵ It is the first environmental human rights treaty in Latin American and the Caribbean providing concrete guidance as to procedural environmental rights and accompanying State obligations. It builds on what the Rio Declaration, the Stockholm Declaration, the Aarhus Convention, and other environmental agreements have recognized as key principles, rights, and obligations to protect environmental human rights.⁷⁶ Its importance extends beyond the region. The Escazú Agreement “is a ground-breaking legal instrument for environmental protection, but it is also a human rights treaty. Its main beneficiaries are the people of our region, particularly the most vulnerable groups and communities.”⁷⁷ The Escazú Agreement reflects a regional Americas experience, paying special attention to human rights defenders, capacity building, cooperation, and domestic implementation. “[I]t is an agreement reached by and for Latin America and the Caribbean, reflecting the ambition, priorities and particularities of our region.”⁷⁸

Thus, the Escazú Agreement fits neatly in this tripart normative framework. The Advisory Opinion recognizes for the first time that the right to a healthy environment is autonomous and justiciable under the American Convention on Human Rights. *Nuestra Tierra v. Argentina* is the first case on the merits that uses the right to a healthy environment for the vindication of environmental rights in the Inter-American System.⁷⁹ Finally, the Escazú Agreement is a binding regional treaty that provides for concrete international obligations protecting environmental human rights through its three pillars: the rights to information, participation, and access to justice in environmental matters. It is with this last piece that

75. Escazú Agreement, *supra* note 10.

76. “Initiated at the United Nations Conference on Sustainable Development (Rio+20) and rooted in the tenets of Principle 10 of the 1992 Rio Declaration on the Environment and Development, the Regional Agreement is the fruit of a two-year preparatory phase and nine intense meetings of its negotiating committee. Led by Chile and Costa Rica, as co-chairs, and five other Presiding Officers (Argentina, Mexico, Peru, Saint Vincent and the Grenadines, and Trinidad and Tobago), the negotiations brought together government delegates, representatives of the public, experts, academics and other interested stakeholders who participated actively on a collaborative basis on an equal footing.” Escazú Agreement, *supra* note 10, at preface.

77. *Id.*

78. *Id.*

79. The petitioners in *Nuestra Tierra v. Argentina* claimed that their right to a healthy environment, as well as other human rights protected by the American Convention had been violated. *Lhaka Honhat*, *supra* note 8.

petitioners may bring environmental human rights cases when they have historically struggled to have their human rights protected due to their vulnerability and/or lack of access to justice.

This tripart framework provides for the possibility of remedying wrongs in the vindication of environmental rights. This is of course critical for vulnerable communities (those who have been historically marginalized and/or are dependent on natural resources that may be endangered) facing environmental adversity.⁸⁰ Similarly, this tripart framework is critical for human rights defenders, who are at risk of suffering from human rights violations based on their work in protecting human rights and the environment. The Inter-American Court will have to interpret a variety of provisions in the Escazú Agreement to shed light on State obligations that protect the most vulnerable.

D. The Right to a Healthy Environment and Sustainable Development as a Broad Framework for the Escazú Agreement

The Escazú Agreement expressly and unambiguously recognizes the right to a healthy environment. It states that “[e]ach Party shall guarantee the right of every person to live in a healthy environment.”⁸¹ The right to a healthy environment protects individuals and groups from environmental harm that interferes with the full and effective enjoyment of human rights.⁸² Generally, it is understood that human rights are interrelated with and interdependent with other human rights. The right to a healthy environment is fundamental to human dignity, equality, and freedom.⁸³ The right to a healthy environment is designed to implicate a range of factors considered “underlying determinant[s] of health.”⁸⁴ The quality of food and water and the adequacy of housing largely depends on the State’s assurance that

80. A more robust discussion of vulnerability and “vulnerable” persons and groups in the context of the Escazú Agreement is included later in the article.

81. Escazú Agreement, *supra* note 10, at art. 4(1).

82. John H. Knox (former Special Rapporteur on Human Rights and the Environment), *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶ 2, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018) [hereinafter Knox Report A/HRC/37/59 (Jan. 24, 2018)].

83. *Id.* at ¶ 16.

84. *The Right to Health*, U.N. Office of the High Comm’r for Hum. Rts., Fact Sheet No. 31, June 2008, at 1, 7, <http://www.refworld.org/docid/48625a742.html> [<https://perma.cc/NV8F-FY5U>].

these basic necessities on which communities depend are free from hazardous substances or pollutants.⁸⁵

Parallel to the substantive right to a healthy environment is the responsibility of States to protect individuals and communities from State and non-state actors engaging in environmentally harmful activities that violate human rights.⁸⁶ “An illegal act which violates human rights and which is not initially directly imputable to a State can lead to international responsibility of the State, not because of an act itself, but because of the lack of due diligence to prevent the violation or to respond as required.”⁸⁷ This duty of due diligence requires States to proactively investigate potential or ongoing human rights violations, and take affirmative steps to mitigate any harm or risks of human rights violations.⁸⁸ This process requires that States prevent acts of violence or other forms of human rights violations, protect victims of human rights abuses, prosecute and investigate acts representing human rights violations, punish perpetrators, and provide redress to victims of such violations.⁸⁹

When a State “knew or should have known” of a human rights violation, and failed to act with due diligence to prevent that human rights violation, investigate and punish the responsible parties, and provide accountability to the victims, the State may be held responsible for such abuses.⁹⁰ As such, States have the

85. Baskut Tuncak (Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes), *Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes*, U.N. Doc. A/HRC/33/41, ¶¶ 26, 49, 50, 110 (Aug. 2, 2016) [hereinafter Tuncak Report A/HRC/33/41].

86. *Id.* at 10; *see also*, International Covenant on Civil and Political Rights art. 3, Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; *see also*, American Convention, *supra* note 39, at art.1; African Charter on Human and Peoples’ Rights, Oct. 21, 1986, 1520 U.N.T.S. 217 [hereinafter African Charter].

87. Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988) [hereinafter Velásquez Rodríguez].

88. *Id.* at ¶ 176; *see also* Maria de Penha v. Brazil, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 704 (2000).

89. *Accelerating Efforts to Eliminate All Forms of Violence Against Women: Ensuring Due Diligence in Prevention*, HRC Res. 14/12, ¶ 19 (June 30, 2010); G.A. Res. 67/144, ¶11 (Feb. 27, 2013).

90. Jessica Lenahan (Gonzales) v. United States, Case. 12.626, Inter-Am. Comm’n H.R., Report No.80/11, ¶ 133 (2011); *see* Comm. on the Elimination of Discrimination Against Women Commc’n No. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003, A.T. v. Hungary (Jan. 26, 2005); González et al. (“Cotton Field”) v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009); Osman v. United Kingdom, 29 Eur. Ct. H.R. 245 (1998).

responsibility to protect individuals and communities from the effects of climate change, polluted ecosystems, destroyed biodiversity, and other environmental harms.⁹¹ The State's duties include protecting against those who would cause, acquiesce to, or permit environmental harm; protecting from the harmful interference of others, including private persons or entities; and taking effective steps to provide and promote conservation efforts of ecosystems, biological diversity, and climate change.⁹²

As mentioned earlier, the Escazú Agreement protects procedural environmental human rights. The Escazú Agreement focuses on protecting environmental human rights through the protection of the right to information, participation, and access to justice in environmental matters. These three pillars of protection will be discussed in detail below.

III. THE ESCAZÚ AGREEMENT'S THREE PILLARS

A. *Pillar I: The Right to Information*

The first pillar of the right to information on environmental matters is particularly important for the protection of vulnerable populations. It provides that all persons must have the right to information on environmental matters, which has been widely protected in international human rights law.

All persons have “the right to freedom of thought and expression.”⁹³ The right to freedom of thought and expression includes the right to information.⁹⁴ The right to information includes the right “to seek, receive, and impart information and ideas.”⁹⁵ This means that the flow of information must be multidirectional from government, private entities, and the population, especially populations that normally do not have access to information.

91. Advisory Opinion OC-23/17, *supra* note 7, ¶ 28 (citing Velásquez Rodríguez, *supra* note 87, ¶ 164).

92. Knox Report A/HRC/37/59 (Jan. 24, 2018), *supra* note 82 at ¶ 36.

93. The right to information is well established in human rights and protected under several international and regional treaties. American Convention, *supra* note 39, at art. 13; *accord* ICCPR, *supra* note 86, at art. 19; European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, Nov. 4, 1950, E.T.S. No. 005 (entered into force Sept. 3, 1953).

94. American Convention, *supra* note 39, at art. 13.

95. *Id.*

The Escazú Agreement protects the right to information and defines “environmental information” as information regarding the environment, its elements, and natural resources.⁹⁶ Environmental information also encompasses information regarding possible environmental risks or adverse impacts affecting the environment and interrelated matters such as health.⁹⁷ The right to information concerning environmental harm is multidimensional. It requires that States without undue delay collect, update, and disseminate information on matters, including the quality of the environment; air and water quality; pollution, waste, chemicals, and other potentially harmful substances introduced into the environment; actual environmental impacts on human health and well-being; and relevant laws and policies.⁹⁸

International human rights law has consistently recognized that to increase access to information, it must be delivered in a variety of methods (orally, in writing, in print, through art, or other forms) according to the population receiving it.⁹⁹ It is for that reason that the Escazú Agreement asks that States must guarantee (to the extent possible) that “competent authorities generate, collect, publicize and disseminate environmental information relevant to their functions in a systematic, proactive, timely, regular, accessible and comprehensible manner.”¹⁰⁰

According to Article 5(1) of the Escazú Agreement, States must ensure that the public has access to information that is in “its possession, control or custody, in accordance to the principle of maximum disclosure.”¹⁰¹ This means that the right to seek, receive, and impart information should be fulfilled without having to declare a special interest or reason.¹⁰² Additionally, the right to access information includes being informed about whether the State has the relevant information in its possession, and when the state declines to provide information, it must inform the seeker of the right to challenge and appeal that decision.¹⁰³

96. Escazú Agreement, *supra* note 10, at art. 2(c).

97. *Id.*

98. Knox Report A/HRC/37/59 (Jan. 24, 2018), *supra* note 82 at ¶¶ 11, 17, 18.

99. ICCPR, *supra* note 86, at art. 19(2); American Convention, *supra* note 39, at art. 13.

100. Escazú Agreement, *supra* note 10, at art. 6(1).

101. *Id.* at art. 5(1).

102. *Id.* at art. 5(2)(a).

103. Accessible environmental information includes: “(a) [R]equesting and receiving information from competent authorities without mentioning any special interest

The Inter-American Court of Human Rights has recognized the right of access to information in the context of the right to freedom of expression. In *Claude-Reyes v. Chile*, the Inter-American Court recognized that in the Inter-American System all persons have a right to information and to participation in the democratic process.¹⁰⁴ A subsequent Inter-American Court decision, *Gomes Lund v. Brazil*, extended the scope of that right, affirming that the right to information must be timely and without undue delay so that individuals have access to the truth about human rights violations.¹⁰⁵ The rights to information, expression, association, and assembly in relation to environmental advocacy cannot be subject to overbearing or excessive restrictions.¹⁰⁶ This means that States may not restrict the right to information “with excessive or indiscriminate use of force, arbitrary arrest or detention, torture or other cruel, inhuman or degrading treatment or punishment, enforced disappearance, the misuse of criminal laws, stigmatization or the threats of such acts.”¹⁰⁷

In the case of vulnerable persons or communities, the Escazú Agreement requires States to facilitate and provide accessible information that addresses their specific vulnerabilities and conditions.¹⁰⁸ For example, indigenous communities who speak a different language from the government’s official language (Spanish) have a right to request and receive environmental information in their language.¹⁰⁹ In the case of Perú’s Quechua indigenous people, Perú must provide environmental information

or explaining the reasons for the request; (b) being informed promptly whether the requested information is in possession or not of the competent authority receiving the request; and (c) being informed of the right to challenge and appeal when information is not delivered, and of the requirements for exercising this right.” *Id.* at art 5(2)(a)-(c).

104. In *Claude-Reyes v. Chile*, the Inter-American Court had to consider the question of whether the public had a right to information regarding a forestry exploitation project, which had significant environmental impacts. The Court found that Chile had a positive obligation to provide access to information through the least restrictive measures due to the importance of access to information in a democratic system. *Claude Reyes v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶¶ 76-77, 87* (Sept. 19, 2006) [hereinafter *Claude Reyes*].

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

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

107. Knox Report A/HRC/37/59 (Jan. 24, 2018), *supra* note 82, ¶¶ 10, 13.

108. Escazú Agreement, *supra* note 10, at art. 5(3).

109. *Id.* at art. 6(6).

that is accessible and understandable in Quechua.¹¹⁰

These provisions on the right to access information in their language place an additional burden on States to protect them as to rectify inequities in the enjoyment of human rights. In fact, vulnerable persons or populations face additional barriers to the enjoyment and protection of their human rights. Persons or communities may be rendered vulnerable to environmental harm because they have a particular set of circumstances that render them vulnerable to a particular harm, or because they face obstacles to exercising their human rights.¹¹¹

Because the right to environmental information is inextricably linked to the ability of persons and communities to consent to actions that affect their lives, accessible information that recognizes barriers to information is particularly important.¹¹² Consent can only occur when the local population is able to make informed decisions with the benefit of all necessary information about a proposed project.¹¹³

The Inter-American Court recognized in *Saramaka People v. Suriname* and in *Claude-Reyes v. Chile* that consent is essential for the public and communities to make the appropriate decisions during consultation processes.¹¹⁴ Environmental impact assessments are one type of environmental information that is critical for participatory rights and is often not adequately provided to the public and affected communities.

Environmental impact assessments must be provided to the public in a manner that is understandable and accessible, so as to provide real opportunities for meaningful participation and decision-making.¹¹⁵ The availability of environmental impact

110. Since the 1970's, Perú has exploited and permitted private corporations to exploit indigenous lands and natural resources. This environmental contamination has resulted in persistent illness; death; and the loss of cultivation, hunting, and fishing of the Quechua people. *Land is Life*, OXFAM INT'L 1, 2 (Sept. 26, 2016), https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/file_attachments/bn-land-is-life-peru-land-rights-260916-en.pdf [<https://perma.cc/SH3L-H92D>].

111. Knox Report A/HRC/37/59 (Jan. 24, 2018), *supra* note 82, ¶ 21.

112. Off. of the High Comm'r for Hum. Rts., *CRC General Comment No. 12 On the Right of the Child to be Heard*, ¶ 87 (2009).

113. Knox Report A/HRC/37/59 (Jan. 24, 2018), *supra* note 82, ¶ 20.

114. *Saramaka People*, *supra* note 6, at ¶ 134; *Claude Reyes*, *supra* note 104, ¶ 76-77, 87.

115. Knox Report, A/HRC/37/59 (Jan. 24, 2018), *supra* note 82; ALAN GILPIN, *ENVIRONMENTAL IMPACT ASSESSMENT: CUTTING EDGE FOR THE TWENTY-FIRST CENTURY 2* (Cambridge Univ. Press 1995).

assessments removes barriers to access to justice, and truly opens the door to what would happen “behind closed doors” if the information was not made accessible.¹¹⁶ The burden is on the State to ensure that environmental impact assessments are made available to the population, and especially to vulnerable populations. The protection of vulnerable persons and communities includes all persons having equal access to a safe, clean, healthy, and sustainable environment, without discrimination.¹¹⁷ For States to prevent and mitigate the effects of environmental discrimination, they must account for historical, systematic, and persistent patterns of discriminatory treatment. The Escazú Agreement builds on existing international and regional law protecting environmental human rights.¹¹⁸

Additionally, the Escazú Agreement recognizes the importance of environmental information for imminent threats to public health or the environment. Article 6(5) of the agreement requires that States disclose and disseminate information that “could help the public take measures to prevent or limit potential damage.”¹¹⁹ For example, if the air quality in Bogotá was reaching dangerously high toxicity levels, the municipal government of Bogotá (as State agent) must have collected the data to inform the public of it.¹²⁰ Although the duty is not to collect the data, the disclosure of information presupposes that States must collect it in order to inform the population. In that case, Bogotá would have to accurately measure and monitor pollutants in the air regularly, as to inform the population of Bogotá.

To advance the accuracy of environmental information, the Escazú Agreement requires States to use information technology and georeferenced media,¹²¹ which are two technological innovations that advance the dissemination of accurate

116. *Id.* at 3.

117. Knox Report A/HRC/37/59 (Jan. 24, 2018), *supra* note 82, ¶ 7.

118. Escazú Agreement, *supra* note 10, at art. 6(3).

119. *Id.* at art. 6(5).

120. In 2018, a group of environmental lawyers in Bogotá brought legal action (*tutela*) against the Mayor’s Office of Bogotá for not adopting measures to reduce emissions and for permitting dangerous air quality conditions that led to respiratory issues and health issues in the population. William Moreno Hernández, *Con tutela buscan que aire de Bogotá sea declarado sujeto derechos; Los ponentes aseguran que la iniciativa no es un imposible jurídico*, EL TIEMPO (Oct. 12, 2018).

121. “Georeferencing” is the process in which locations are assigned “to geographical objects within a geographic frame of reference.” Xiaobai A. Yao, *Georeferencing and Geocoding*, in INT’L ENCYCLOPEDIA OF HUM. GEOGRAPHY, 111-117 (2020).

information.¹²² This duty to use these two technological innovations is only required to the extent that it is appropriate to use such technology, and “where appropriate” to do so to collect and disseminate the information.¹²³ Similarly, States must take steps to register “pollutant release and transfer” in the air, water, soil, and subsoil.¹²⁴ All these efforts must be designed to regularly measure and monitor pollution, regulate State and non-State efforts (through private entities), and provide accessible environmental information to the public and affected communities.¹²⁵ As such, the public may engage in public participation in environmental decision-making processes regarding their health and environment.¹²⁶

Along with the right to information, the second pillar of the Escazú Agreement is particularly important for vulnerable populations who have been historically disenfranchised or who face particular vulnerability due to their environmental conditions. The right to information and participation are interrelated, interdependent, and interconnected, and the right to information may be a precondition for certain aspects of the right to participation. This discussion will follow in the next section.

B. *Pillar II: The Right to Participation*

The right to participation ensures that individuals and communities can take part in decision-making processes that affect their lives.¹²⁷ At the core of the right to participation is the right of all persons to exercise self-determination and exercise their autonomy to develop and dispose of their wealth and natural resources.¹²⁸ “Public participation” refers to all interaction between government and civil society, and includes the process by

122. Escazú Agreement, *supra* note 10, at art 6(4).

123. *Id.*

124. *Id.* at art. 6(4).

125. *Id.* at art. 6(11)-(12).

126. *Id.* at art. 6(12).

127. The right to participation is inseparably linked to other human rights such as the rights to peaceful assembly and association, freedom of opinion and expression and the rights to education and information. *OHCHR and equal participation in political and public affairs*, U.N. OFF. OF HIGH COMM’R ON HUM. RTS. (2021), <https://www.ohchr.org/EN/Issues/Pages/EqualParticipation.aspx> [<https://perma.cc/7XRH-57SK>] [hereinafter OHCHR & Equal Participation].

128. ICCPR, *supra* note 86, General Comment 25; Protocol of San Salvador, *supra* note 6.

which government and civil society open dialogue, establish partnerships, share information, and otherwise interact to design, implement, and evaluate development policies, projects, and programs.”¹²⁹

Additionally, the right to participation includes the right to take part in public affairs, to vote and be elected, and have access to the public service of the country.¹³⁰ Some obstacles to the exercise of the right to participation include:

[D]irect and indirect discrimination on grounds such as race, colour, descent, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth, disability, nationality or other status. Even when there is no formal discrimination in connection with political or public participation, inequalities in access to other human rights may impede the effective exercise of political participation rights.¹³¹

There is no question that vulnerable persons and populations have historically faced discrimination on the grounds of their identity in the context of their race, ethnicity, language, or descent.¹³² Additionally, economic, social, and other forms of status have relegated many groups to positions of invisibility in the participatory process.¹³³ It is therefore important that their accessibility (to participation) is prioritized.

Protecting the right to participation in political and public affairs is essential to the protection of all persons, but particularly important for marginalized and vulnerable communities who have historically been invisible to participatory processes.¹³⁴ Vulnerable communities not only face the actual exposure to environmentally dangerous conditions, but also often lack the voice and

129. Org. of Am. States Unit for Sustainable Dev., *Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development*, at 1 (2001), https://www.oas.org/dsd/PDF_files/ispenglish.pdf [<https://perma.cc/7TU7-SBGC>].

130. American Convention, *supra* note 39, at art. 23.

131. See OHCHR & Equal Participation, *supra* note 127; see also ICCPR, *supra* note 86, General Comment 25.

132. OHCHR & Equal Participation, *supra* note 127, at 4.

133. *Id.*

134. See OHCHR & Equal Participation, *supra* note 127; *Climate Change and Human Rights*, U.N. OFF. OF HIGH COMM’R ON HUM. RTS. 1, 26-27 (2019), https://www.ohchr.org/Documents/Issues/ClimateChange/S1900999_en.pdf [<https://perma.cc/V9P3-ZAJ2>].

opportunity to exercise their human rights.¹³⁵ For example, indigenous and tribal communities have been historically deprived of their right to be consulted and provide consent for activities within their ancestral lands. The ability to participate in decision-making processes requires that indigenous and tribal communities are included in decisions made about their lands and natural environment.¹³⁶ They have a right to be consulted, and the State is obligated to ensure that they provide free, prior, and informed consent for any activities in their land or affecting their natural environment.¹³⁷ All information that may have “significant impact” must be provided to the public and affected communities.¹³⁸

In the environmental context, it has been recognized that the right to participation includes the right to take part in decision-making processes relating to environmental matters.¹³⁹ The Escazú Agreement protects the right to participation by providing that State parties to the agreement must ensure open and inclusive public participation in environmental decision-making processes.¹⁴⁰ Information must be provided in a clear, timely, and comprehensive manner that informs the public and ensures effective participation.¹⁴¹

The “early and timely” requirement ensures that there is a “reasonable timeframe” in which the communities receive the information and have adequate time to respond to ensure their effective participation.¹⁴² The timeliness of the information is also critical so that State officials are able to consider the public’s observations, thus truly ensuring that the participatory process is meaningful and protects the right to consultation.¹⁴³ For example, in the *Saramaka v. Suriname* case, the Inter-American Court held

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

136. *Saramaka People*, *supra* note 6, ¶¶ 122, 126.

137. *Id.*

138. Escazú Agreement, *supra* note 10, at art. 7(16), 7(17)(a)-(g).

139. Knox Report A/HRC/37/59 (Jan. 24, 2018), *supra* note 82, ¶¶ 12, 23.

140. Escazú Agreement, *supra* note 10, at art. 7(1).

141. *See* Escazú Agreement, *supra* note 10, art. 6(1); *see also*, United Nations Environment Programme, *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters*, Guideline 10 (Nov. 2011) [hereinafter UNEP Guidelines].

142. Escazú Agreement, *supra* note 10, at art. 7(2), 7(4), 7(5).

143. “Before adopting the decision, the relevant public authority shall give due consideration to the outcome of the participation process.” *Id.* at art. 7(4), 7(7).

that the affected indigenous community had a right to be consulted prior to the exploration or extraction of natural resources in ancestral lands.¹⁴⁴

As discussed earlier, the manner in which the information is provided depends on the context of what is needed for a population in terms of what is most accessible, such as “in writing, electronically, orally and by customary methods.”¹⁴⁵ For example, for some indigenous, tribal, or local communities, information may be best delivered through oral means since it represents the traditional way in which they transmit information through community members and to future generations.¹⁴⁶

In addition, the authorities must consider the:

[T]ype or nature of the environmental decision under consideration and, where appropriate, in non-technical language; the authority responsible for making the decision and other authorities and bodies involved; the procedure foreseen for the participation of the public, including the date on which the procedure will begin and end, mechanisms for participation and, where applicable, the date and place of any public consultation or hearing; and the public authorities involved from which additional information on the environmental decision under consideration can be requested and the procedure for requesting information.¹⁴⁷

As mentioned earlier, technology may be used to increase access to the information, and in this context, participation.¹⁴⁸ This is particularly important in an increasingly digital age and with areas that may be remote to access for public officials.¹⁴⁹ The use of technology to create environmental information system structures has been critical to collecting and disseminating environmental information, communications with the governmental or private

144. Saramaka People, *supra* note 6, ¶ 184.

145. Escazú Agreement, *supra* note 10, at art. 7(6).

146. *Challenges and Opportunities for Indigenous Peoples' Sustainability*, U.N. DEP'T OF ECON. & SOC. AFF. (Apr. 23, 2021), <https://www.un.org/development/desa/dspd/2021/04/indigenous-peoples-sustainability/> [<https://perma.cc/3TT8-K77Z>].

147. Escazú Agreement, *supra* note 10, at art. 7(6)(a)-(d).

148. Emma Greenfield, *Digital Equity for Indigenous Communities*, SAMUEL CTR. FOR SOC. CONNECTEDNESS (2021), <https://www.socialconnectedness.org/digital-equity-for-indigenous-communities/> [<https://perma.cc/WKS2-S2XY>].

149. *Id.*

sector, and engaging the public in decision-making processes.¹⁵⁰ Technology has been used to disseminate information about pollution levels, hazardous chemicals with “cancer potential” or health risks that may exist due to environmental factors.¹⁵¹ This information can be critical for the public to understand the consequences of environmental risks or degradation and their effects on human health, and in turn increase the accessibility of their participation.

Additionally, for participation to be effective, it must include a variety of stakeholders, including State and non-State actors, private entities, civil society, and affected populations.¹⁵² States have the obligation to ensure that there is an existing and accessible legal framework in which the public and affected communities are given the opportunity to comment, directly or through representatives, on the information that the government or private entities have provided.¹⁵³ “The information disseminated shall include the established procedure to allow the public to take relevant administrative and judicial actions.”¹⁵⁴ The opportunity to adjudicate any claims on the accessibility of information or participatory processes is important for timely adjustments or actions by public officials.

Special attention must be given to the effective participation of women, gender minorities,¹⁵⁵ indigenous peoples, and other disenfranchised vulnerable populations. “Evidence across sectors, including economic planning and emergency response, demonstrates unquestioningly that policies that do not consult women or include them in decision-making are simply less

150. Kim Fortun, *Environmental Information Systems as Appropriate Technology*, 20 DESIGN ISSUES 3, 55 (Summer 2004), http://www.faculty.umb.edu/peter_taylor/epi/fortun04.pdf [<https://perma.cc/Q93B-EJNF>].

151. *Id.* at 59-60.

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

153. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 8, June 25, 1998, 2161 U.N.T.S. 447 (Aarhus Convention).

154. Escazú Agreement, *supra* note 10, at art. 7(9).

155. “[T]he term ‘gender minorities’ refers to individuals who have gender identities that are not associated with their birth sex.” Brian Wood & David Spach, *HIV in Sexual and Gender Minority Populations*, NAT’L HIV CURRICULUM 1 (2021), <https://www.hiv.uw.edu/go/key-populations/hiv-sexual-gender-minority-populations/core-concept/all> [<https://perma.cc/2DDJ-GWNS>].

effective, and can even do harm.”¹⁵⁶

Article 7(10) of the Escazú Agreement requires that States ensure the rights of vulnerable persons and communities by requiring that public officials establish procedures (conditions) that facilitate adaptable processes reflecting “social, economic, cultural, geographical and gender characteristics.”¹⁵⁷ For example, in Colombia displaced and refugee women and girls have been excluded from formal political spaces because of COVID-19 restrictions, causing them to rely on informal supportive health systems.¹⁵⁸

In this context of vulnerable populations suffering from social exclusion, contemporary sources of disenfranchisement, or historic systems of oppression, States must ensure that measures are implemented to “eliminate barriers to participation.”¹⁵⁹ For example, Afro-descendants are disproportionately more likely to be chronically poor than other sectors of the population, with less access to education, employment, and representation in participatory processes including public and private decision-making positions.¹⁶⁰

As discussed above, environmental impact assessments provide information about the potential environmental risks and health effects of development and exploitative projects.¹⁶¹ States must ensure that environmental impact assessments are conducted prior to the implementation of projects, and must be provided in a continuous manner.¹⁶² The Inter-American Commission on

156. POLICY BRIEF: THE IMPACT OF COVID-19 ON WOMEN, at 3, U.N. (Apr. 9, 2020), <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/06/report/policy-brief-the-impact-of-covid-19-on-women/policy-brief-the-impact-of-covid-19-on-women-en-1.pdf> [<https://perma.cc/3X2F-MRVM>].

157. Escazú Agreement, *supra* note 10, at art. 7(10).

158. Latin America and the Caribbean Rapid Gender Analysis for COVID-19, CARE + U.N. WOMEN RAPID GENDER ANALYSIS 1, 21 (May 2020), https://www.care-international.org/files/files/enlac_rga_report_english_final_junio2_1comprimido.pdf [<https://perma.cc/TJJ5-T5F5>] (citing CARE, *Colombia RGA-P Key Informant Interview (informal)*, (Apr. 2020)).

159. Escazú Agreement, *supra* note 10, at art. 7(14).

160. World Bank, *Eliminating Afro-descendant Exclusion in Latin America is Vital for Development* (Aug. 29, 2018), <https://www.worldbank.org/en/news/press-release/2018/08/29/eliminating-afro-descendant-exclusion-in-latin-america-is-vital-for-development> [<https://perma.cc/U5KN-YF9T>].

161. GILPIN, *supra* note 115, at 3.

162. Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J., ¶ 205 (Apr. 20).

Human Rights has emphasized that individuals should have access to “information, participation in relevant decision-making processes, and judicial recourse” to protect against adverse environmental conditions that may have impacts on human health.¹⁶³ Without having specific and accurate information about the environmental impacts of a project, individuals and communities cannot prepare, take precautionary measures, or remediate situations that may affect them.¹⁶⁴ “Access to information is a prerequisite for public participation in decision-making and for individuals to be able to monitor and respond to public and private sector action.”¹⁶⁵

In addition to providing environmental impact assessments, the public must be provided the reasons and grounds underlying environmentally impactful decisions. In the *Report on the Situation of Human Rights in Ecuador*, the Inter-American Commission examined the situation of human rights in Ecuador between 1992-1996.¹⁶⁶ One of the areas that the Commission examined was the human rights violations arising out of oil exploitation activities that polluted the natural resources in the Oriente¹⁶⁷ and resulted in adverse effects on human health in the region.¹⁶⁸ This report was one of the earliest findings in the Inter-American System showing how environmental pollution can result in human rights violations. The Commission recognized the importance of environmental information as a key component in the public’s and the affected populations’ ability to engage in meaningful decision-making

163. The Report on the Situation of Human Rights in Ecuador arose out of a petition filed on behalf of the Huaorani indigenous people whose environment and human rights were being threatened by oil exploitation projects, concessions, and contracts with foreign oil companies. The exploitative activities polluted the natural resources in their land, including the water, air, and soil, by dumping billions of gallons of toxic waste and crude oil into land and water sources. The environmentally disastrous activities resulted in the serious illnesses of the local population, and destruction of crops and domestic animals. Org. of Am. States, *Report on the Situation of Human Rights in Ecuador*, doc. 10, chap. VIII, rev. 1, OEA/Ser.L./VI/II.96 (1997) [hereinafter *Report on Hum. Rts. in Ecuador*].

164. See Sarah Dávila-Ruhaak, *Making a Case for the Right to a Healthy Environment for the Protection of Vulnerable Communities: A Case of Coal-Ash Disaster in Puerto Rico*, 9 MICH. J. ENV’T & ADMIN. L. 379, 409 (2020).

165. *Report on Hum. Rts. in Ecuador*, *supra* note 163, at ch. VIII.

166. *Id.*

167. The “Oriente” region is situated in the interior of Ecuador and is home to 500,000 inhabitants, many of whom are indigenous peoples, including the Quichua, Shuar, Huaorani, Secoya, Siona, Shiwiar, Cofan and Achuar for hundreds of years. *Id.*

168. *Id.*

processes.¹⁶⁹

Additionally, it is important to understand that the public must be granted the opportunity to be heard in a meaningful way and in accordance with domestic and international legal obligations.¹⁷⁰ As such, access to “judicial remedies is the fundamental guarantor of rights at the national level.”¹⁷¹ The next section discusses in detail the importance of the right to access to justice in environmental matters and the protections provided for in that area under the Escazú Agreement.

C. *Pillar III: Access to Justice*

The third and final pillar of the Escazú Agreement, the right to access to justice in environmental matters, is particularly important to protect vulnerable populations and human rights defenders because they are often criminalized and penalized for protecting human rights. “Environmental defenders across Latin America are being sued and arrested as they protest against agribusiness, mining and energy projects on their land.”¹⁷² In their human rights work, human rights defenders also assist affected communities in navigating systems of justice to obtain redress for human rights violations.

The right to access to justice is “the right of access to judicial and other remedies that serve as suitable and effective grievance mechanisms against violations of human rights.”¹⁷³ The right to access to justice is broad and includes access to counsel, guarantees of procedural fairness, effective remedies, and guarantees of non-

169. The Commission stated that: “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. However, individuals in affected sectors have indicated that they lack even basic information about exploitation activities taking place locally, and about potential risks to their health. The Government should ensure that such information as the law in fact requires be submitted is readily accessible to potentially affected individuals.” *Id.*

170. Escazú Agreement, *supra* note 10, art. 7(15).

171. *Report on Hum. Rts. in Ecuador*, *supra* note 163, at ch. VIII.

172. Michelle Carrere & Vanessa Romo, *In Latin America, the Law Is ‘a Tool to Silence’ Environmental Defenders*, MONGABAY: NEWS & INSPIRATION FROM NATURE’S FRONTLINE (Sarah Engel trans., Dec. 14, 2021), <https://news.mongabay.com/2021/12/in-latin-america-the-law-is-a-tool-to-silence-environmental-defenders/> [<https://perma.cc/K5L8-RJY9>].

173. Org. of Am. States, *Access to Justice as a Guarantee of Economic, Social and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights*, ¶ 41, OEA/Ser.L/V/II.129 (Sep. 7, 2007).

discrimination.¹⁷⁴ Without access to justice, individuals and communities are unable to fully exercise and enjoy their human rights and hold public officials and private entities accountable for human rights violations.¹⁷⁵ The Escazú Agreement provides that all persons have “the right of access to justice in environmental matters.”¹⁷⁶ To ensure the protection of the right of access to justice, State parties must ensure that due process protections are afforded through judicial and administrative mechanisms.¹⁷⁷

Specifically, access to justice challenges and appeals are protected on procedural and substantive grounds:

- (a) any decision, action or omission related to the access to environmental information; (b) any decision, action or omission related to public participation in the decision-making process regarding environmental matters; and (c) any other decision, action or omission that affects or could affect the environment adversely or violate laws and regulations related to the environment.¹⁷⁸

Practically speaking, this means that when an individual or community’s rights are violated due to environmental harm, risk, or the lack of available participatory rights, they can navigate judicial and quasi-judicial mechanisms to vindicate their rights. Specifically, they can vindicate their substantive rights to environmental protection, such as claims to clean water and air, safe and adequate housing, health and reproductive health, adequate standard of living, adequate food, and others.¹⁷⁹ The

174. ICCPR, *supra* note 86, at art. 2, 14, 26.

175. *Access to Justice*, U.N. & THE RULE OF LAW, <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> [<https://perma.cc/LUU3-LM98>] (last visited Jun. 25, 2022).

176. Escazú Agreement, *supra* note 10, at art. 8(1).

177. *Id.* at art. 8(2).

178. *Id.*

179. Tuncak Report A/HRC/33/4, *supra* note 85; Knox Report, A/HRC/37/59 (Jan. 24, 2018), *supra* note 82 (citing Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art. 1, June 25, 1998, 2161 U.N.T.S. 447); African Charter on Human and Peoples’ Rights, art. 24, June 27, 1981, 21 I.L.M. 58; Protocol of San Salvador, *supra* note 6, at art. 11; Arab Charter on Human Rights, art. 38, 2004; ASEAN Human Rights Declaration, art. 28, Nov. 18, 2012; *see also*, U.N. H.R.C., CCPR General Comment No. 6: Art. 6 (Right to Life), ¶ 5, U.N. Doc. HRI/Gen/1/Rev.9 (Vol. I), (April 30, 1982); Knox Report, A/HRC/37/59 (Jan. 24, 2018), *supra* note 82, ¶ 5; *see also*, International Covenant on Economic, Social and Cultural

quality of food and water, and the adequacy of housing largely depend on the State's assurance that these basic necessities on which communities depend are free from hazardous substances or pollutants.¹⁸⁰

Under Article 8(2)(c) of the Escazú Agreement, individuals or communities may challenge State actions or omissions that have resulted in environmental harms or violations to the right to a healthy environment, such as the remediation of contaminated sites or injunctions of environmentally harmful activities.¹⁸¹ For example, in the case of *Yakye Axa Indigenous Community v. Paraguay*, the Yakye Axa indigenous community brought a petition against Paraguay for the violation of their human rights, as environmentally impactful activities affected their community, ancestral lands, customs, and natural resources.¹⁸² The Inter-American Court found that the Yakye Axa community had suffered from human rights violations resulting from the lack of clean water, unsanitary conditions, and inadequate access to medical healthcare.¹⁸³ The Inter-American Court highlighted the importance of their right to access a clean and healthy environment.¹⁸⁴

Procedural protections through Article 8(2) facilitate bringing challenges and appeals when individuals or communities are unable to obtain information that is environmentally relevant.¹⁸⁵ The Escazú Agreement clarifies that States may be held responsible for actions and omissions that fail to protect the rights to information and participation.¹⁸⁶ This is particularly important for populations that have traditionally struggled to have access to information that is government held or that the government

Rights, art. 12., Jan. 3, 1976, 993 U.N.T.S. 3.

180. Tuncak Report A/HRC/33/41, *supra* note 85, ¶ 50.

181. In the case of children, Tuncak, the former Special Rapporteur on the Rights of Children, has discussed the importance of effective remedies in the protection of children suffering from human rights violations due to their exposure to environmental harm. *See* Tuncak Report A/HRC/33/41, *supra* note 85, ¶ 39; *see also* Escazú Agreement, *supra* note 10, at art. 8(2)(c).

182. The Yakye Axa community, the petitioner in the case, is an indigenous community of hunter-gatherers that lives in the Paraguayan Chaco and has primarily relied on their ancestral lands for cultural and physical survival. *Yakye Axa Indigenous Cmty.*, *supra* note 6, ¶¶ 50.1, 50.3, 50.10.

183. *Id.* ¶¶ 50.96-98.

184. *Id.* ¶¶ 51, 63.

185. Escazú Agreement, *supra* note 10, at art. 8(2).

186. *Id.*

refuses to make public. For example, individuals seeking information that should be accessible to the public may navigate judicial or quasi-judicial mechanisms to obtain information that “affects or could affect the environment adversely.”¹⁸⁷ This broad conception of environmental information is important to vindicate the right to environmental information when no proven risk or scientific certainty has been used by public officials to deny access to information held by private entities or corporations.¹⁸⁸ The availability of information that *may be* impactful to a community is critical because it opens the door to information that would traditionally stay “behind closed doors” if the information were to not be made accessible.¹⁸⁹

Article 8(3)(a) and (b) of the Escazú Agreement ensures that States guarantee the right to access to justice by requiring that State officials have environmental expertise, and that procedures are “effective, timely, public, transparent and impartial,” and affordable.¹⁹⁰ Additionally, there must be measures that ease the burden of proof to facilitate the production of evidence in cases of environmental damage.¹⁹¹ This is especially important for the public or communities who may not have access to scientific research or where environmental degradation results in inter-generational health risks such as cancer, respiratory diseases, etc. For instance, there is some evidence to the effect that children from certain disadvantaged communities are at a higher risk of exposure to toxic chemicals:

Children from low-income and minority families are more likely to be at risk of exposure because they (1) spend more time playing on a contaminated soil than children from higher-income families, (2) spend more time in houses that have lead paint or high dust levels, (3) may be exposed to higher levels of contaminants in utero and in breast milk because their mothers are also disproportionately exposed, and (4) have inadequate diets that may increase the absorption of toxic chemicals from their digestive system.¹⁹²

187. *See id.* at art. 8(2)(c).

188. *Cf.* Sarah Dávila A., *Time to Wake Up! Pushing the Boundaries in the Americas to Protect the Most Vulnerable*, 39 UCLA J. ENVTL. L. & POL’Y 123, 161 (2021).

189. GILPIN, *supra* note 115, at 2, 3.

190. Escazú Agreement, *supra* note 10, at art. 8(3)(a)-(b).

191. *Id.* at art. 8(3)(e).

192. Michael Gochfeld & Joanna Burger, *Disproportionate Exposures in Environmental*

In this case, it could be difficult for the children of these communities (through their parents and/or representatives) to prove causation between the environmentally harmful activities and pollution and their health. “[H]ow substances move through air, soil, and water is often unknown and difficult to trace,” and the level of exposure “is also often unknown.”¹⁹³ It is also possible that there are multiple sources of pollution with exposure at different times, which can complicate the difficulty of proving that a particular activity emitted specific pollutants that resulted in the specific injury affecting the population.¹⁹⁴ Once there have been judicial and administrative decisions, Article 8(3)(f) requires that the execution and enforcement of such decisions are carried out in a timely manner. Article 8(3)(g) requires that restitution, restoration, compensation, penalties, and guarantees of non-repetition are available to affected persons or communities.¹⁹⁵ The fact that the Escazú Agreement expressly provides for these effective remedies is important to ensure that once litigants have navigated judicial or administrative mechanisms, there is real, binding enforcement of such outcomes. This is particularly important in human rights cases where the enforcement of decisions is difficult to obtain.¹⁹⁶

For vulnerable persons, and especially human rights defenders, the Escazú Agreement recognizes that they should be supported according to their vulnerable situations and that “appropriate, free technical and legal assistance” must be provided.¹⁹⁷ This is particularly important because legal assistance increases the possibility of persons and communities navigating access to justice mechanisms and enforcing their human rights.¹⁹⁸ As with other areas of human rights and environmental abuses, Afro-descendants, indigenous, and marginalized communities are

Justice Populations: The Importance of Outliers, 101 AM. J. PUB. HEALTH S53, S54 (2011).

193. Kristin E. Schleiter, *Proving Causation in Environmental Litigation*, 11 AMA J. ETHICS 456, 460 (2009).

194. *Id.*

195. Escazú Agreement, *supra* note 10, at art. 8(3)(f)-(g).

196. Maria Adeowale, *Using the Law: Access to Environmental Justice*, CAPACITY GLOBAL 13 (2004), <https://unece.org/DAM/env/pp/compliance/C2008-23/Amicus%20brief/AnnexBEJUUsingtheLaw009Capacity04.pdf> [https://perma.cc/GU22-RGHJ].

197. Escazú Agreement, *supra* note 10, at art. 8(5).

198. Adeowale, *supra* note 196, at 13.

disproportionately more affected by barriers to access to justice in environmental matters.¹⁹⁹

Obstacles affecting access to justice in environmental matters have included not finding the right information or advice, the length of time that it took to find the information, lack of technical assistance when receiving it, and the cost of accessing it.²⁰⁰ A study conducted by Capacity Global found that:

Groups often found that when information was available it was often too technical or expensive to make use of it. For example, requesting photocopies of specific documents from local councils was quoted from 50p to £3.50 per sheet, this was seen as prohibitively expensive, especially as some documents may comprise hundreds of pages and access to more than one document was required. Once the information was received it was often perceived to be too technical and there was no support provided to answer the technical questions the information raised . . . Each group had to go through on average three points of contact before receiving the required information or assistance. The invisibility of environmental advice caused a number of problems, not only in using the “wrong” advice source but also denying access to the required information. The groups felt that it was their perseverance as an individual or as part of a community group that actually made them continue with their case rather than the quality or accessibility of advice.²⁰¹

These findings are critical because requiring free legal and technical assistance to environmental access to justice might not seem to be an important element of access, but the reality is that when there is a barrier at every point of access, navigating judicial and quasi-judicial mechanisms becomes virtually impossible. Additionally, to ensure that States facilitate access to justice in environmental matters, the Escazú Agreement requires that States impose:

(a) measures to minimize or eliminate barriers to the exercise of the right of access to justice; (b) means to publicize the right of access to justice and the procedures to ensure its effectiveness; (c) mechanisms to systematize and disseminate judicial and administrative decisions, as appropriate; and (d) the use of

199. *Id.*

200. *Id.* at 32.

201. *Id.* at 32-33.

interpretation or translation of languages other than the official languages when necessary for the exercise of that right.²⁰²

As included above, Article 8(4) of the Escazú Agreement provides that States must facilitate and promote access to justice mechanisms in environmental matters.²⁰³ The measures, mechanisms, and resources that help an individual or community to navigate judicial and quasi-judicial systems regarding environmental matters provide for greater access to justice. A person or community's inability to navigate justice systems to vindicate their rights and seek accountability has a direct impact on the protection of environmental human rights. Vulnerable communities who have been historically marginalized and have not had access to justice, or have had their participatory rights violated, can use the Escazú Agreement as a normative tool for the State to compel protective measures or other forms of redress such as restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.²⁰⁴

D. *Vulnerability and Human Rights Defenders as the Fourth Pillar*

In the case of polluted environments or climate change, many underrepresented communities or minorities²⁰⁵ tend to live in poverty and are disproportionately affected by changing environmental conditions such as rising temperatures and sea levels, droughts, changes in precipitation or available freshwater, and higher exposure to toxic chemicals. They also disproportionately lack the autonomy to live in a healthy and sustainable environment. For many, living in poverty or “multidimensional poverty” means that they do not have access to basic needs, such as housing, education, electricity, and clean water.²⁰⁶ All of these economic, social, and political factors compound complicated historic dynamics of marginalization and

202. Escazú Agreement, *supra* note 10, at art. 8(4).

203. *Id.*

204. See G.A. Res. 60/147, §§ 7, 9 ¶ 18 (Mar. 21, 2006) [hereinafter Basic Principles on Right to a Remedy and Reparation].

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

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

discrimination. Communities and groups such as indigenous peoples, Afro-descendants, and campesinos are particularly vulnerable to environmental harm and climate change due to their reliance on the natural environment and their historic marginalization.²⁰⁷ The Escazú Agreement considers the vulnerability, lack of access, and invisibility that affected communities experience, to provide for a comprehensive framework of procedural protections.²⁰⁸

1. *Human rights defenders.*

Another innovation of the Escazú Agreement is the special protection of human rights defenders. Some call it the fourth pillar of protection under the Escazú Agreement.²⁰⁹ In general, human rights defenders are persons that work to protect and promote human rights. The Declaration on Human Rights Defenders provides that there is no specific definition on who is or can be a human rights defender, but provides that “individuals, groups and associations . . . contributing to . . . the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals” are protected.²¹⁰ Human rights defenders generally work at the local or national level, but can also work internationally, and perform a range of tasks from investigating and shedding light on human rights violations; facilitating a community’s, or the public’s, participation in decision-making processes; providing training or equipment to improve access to information; assisting individuals and communities in accessing basic services; and teaching human rights, or disseminating

207. Org. of Am. States, *The Afro-descendant Theme in the Americas*, <http://www.oas.org/dil/afrodescendants.htm> [<https://perma.cc/D4LK-S5KH>] (last visited June 25, 2022).

208. As discussed in this article, the Escazú Agreement defines “persons or groups in vulnerable situations” as those that “face particular difficulties in fully exercising the access rights recognized in the present Agreement.” Escazú Agreement, *supra* note 10, *Foreword*, at 5.

209. Günther Maihold & Viktoria Reisch, *Environmental Rights and Conflict over Raw Materials in Latin America, The Escazú Agreement Is Ready to Come into Force in 2021*, STIFTUNG WISSENSCHAFT UND POLITIK (Jan. 15, 2021), <https://www.swp-berlin.org/en/publication/environmental-rights-and-conflicts-over-raw-materials-in-latin-america> [<https://perma.cc/5WWD-5FY2>].

210. G.A. Res. A/RES/53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Human Rights Defenders, pmbl. (Mar. 8, 1999) [hereinafter Declaration on Human Rights Defenders].

information about human rights standards.²¹¹

Human rights defenders can be of any age, sexual orientation, gender identity, race, and ethnic background, and be of any professional or other background.²¹² Human rights defenders do not have to self-identify as such and can be engaged in the protection of human rights by virtue of what they do. For example, “[a]n inhabitant of a rural community who coordinates a demonstration by members of the community against environmental degradation of their farmland by factory waste could also be described as a human rights defender.”²¹³ Or a student protester who organizes students to campaign to end torture in detention could also be a human rights defender.²¹⁴ The critical test to determine whether someone can be considered a human rights defender is whether the person is actually defending a human right.²¹⁵

In the context of environmental protection, human rights defenders are those who work to protect the environment from harm, and who seek to protect the communities affected by environmental harm.²¹⁶ They engage in the protection of the environment in different ways. While some human rights defenders self-identify as environmental justice lawyers and advocates working towards the protection of the environment, others are community or indigenous leaders, organizers, unionists, teachers, journalists, and other active community members advocating to protect their communities from environmental harm. Other less obvious human rights defenders are individuals who protect the environment as a way to protect their family or community from harm.

The Escazú Agreement has recognized the importance of human rights defenders in protecting the environment. It provides

211. Office of the High Comm’r for Human Rights, *Human Rights Defenders: Protecting the Right to Defend Human Rights*, *Factsheet No. 29*, at 3-5 (Apr. 2004) [hereinafter *Factsheet 29*].

212. *Id.* at 6.

213. *Id.* at 8.

214. *Id.*

215. *Id.* at 9, 29.

216. The term “environmental human rights defenders” has been used by former Special Rapporteur Knox, to refer to individuals working to protect the environment. They have also been referred to as “environmental defenders.” See Michel Forst (Special Rapporteur on the situation of human rights defenders), *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, at ¶7, U.N. Doc. A/71/281, (Aug. 3, 2016).

that States shall guarantee “a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity.”²¹⁷ This provision provides for a safe environment where human rights defenders can engage in their work to protect human rights and in the case of environmental issues, the environment and the communities affected by environmentally harmful activities.

Defenders have faced “unprecedented risks,” and have been vulnerable to state-sanctioned violence and targeted by private entities and corporations for seeking to protect their communities.²¹⁸ Human rights defenders have historically been subjected to a range of human rights abuses, including being the “target of executions, torture, beatings, arbitrary arrest and detention, death threats, harassment and defamation, as well as restrictions on their freedom of movement, expression, association and assembly.”²¹⁹ In particular, Latin America accounts for a large number of murders of human rights defenders:

Threats and killings of land and environmental defenders continued in Latin America last year despite the Covid-19 pandemic. Led by Colombia and Mexico, the region again tallied the highest number of murders of any [country] in the world . . . Globally 227 frontline activists were killed, a year-on-year increase. Three out of four murders in 2020 were committed in Latin America and the region accounted for seven of the top ten countries with the most recorded attacks.²²⁰

“Defenders have been the victims of false accusations and

217. Escazú Agreement, *supra* note 10, at art. 9(1).

218. *Violence Against Environmental Defenders – New UN Major Report Urges Zero-Tolerance*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS. (Oct. 21, 2016), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20730&LangID=E> [<https://perma.cc/FML4-X6A5>].

219. Special Rapporteur on Human Rights Defenders, *Challenges Faced by Human Rights Defenders – Human Rights Violations Committed Against Defenders, and other Difficulties they Confront*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/challenges-faced-human-rights-defenders> [<https://perma.cc/2VAY-JH7B>].

220. Fermín Koop, *Latin America Is Still the Most Deadly Region for Environmental Defenders*, DIÁLOGO CHINO – WORLD (Sept. 20, 2021), <https://dialogochino.net/en/extractive-industries/46451-latin-america-is-still-the-most-deadly-region-for-environmental-defenders/> [<https://perma.cc/GGD6-XMMV>].

unfair trial and conviction.”²²¹ In addition, gender identity and sexual orientation may render human rights defenders more vulnerable to attacks from inside and outside their community. Some women defenders and defenders belonging to gender minorities face particular forms of violence due to their gender identity and sexual orientation.²²² They have suffered additional forms of violence in the form of killings, death threats, kidnapping, beatings, torture, arbitrary arrests and detention, harassment, and rape and other forms of sexual violence, due to their identity.²²³

The Escazú Agreement seeks to protect human rights defenders by requiring that States take “appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer.”²²⁴ This duty to proactively protect human rights defenders is important so that States engage in the due diligence of protecting human rights defenders from state or non-state action, such as actions from private corporations seeking to suppress human rights defenders from protecting environmental justice and human rights.

Parallel to the duty of due diligence to proactively investigate and take measures to prevent attacks on human rights defenders is the duty to protect them from harm. The Escazú Agreement provides that States: “shall take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders . . . including their right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights.”²²⁵

For example, Honduras is undeniably responsible for the killing of Berta Cáceres, the indigenous Lenca human rights defender, who was killed in March 2016 for her work in rallying the indigenous Lenca people and waging a grassroots campaign to halt a dam development project in indigenous territory.²²⁶ Her murder

221. *Factsheet 29*, *supra* note 211, at 10.

222. Press Release, U.N. Off. of the High Comm’r for Hum. Rts., Berta Cáceres’ Murder: U.N. Experts Renew Call to Honduras to End Impunity (Apr. 11, 2016) [hereinafter U.N. Experts Renew Call to Honduras].

223. *Factsheet 29*, *supra* note 211, at 11-14.

224. Escazú Agreement, *supra* note 10, at art. 9(3).

225. Escazú Agreement, *supra* note 10, at art. 9(2).

226. U.N. Experts Renew Call to Honduras, *supra* note 222.

is directly linked to her human rights defense work and identity as an indigenous woman.²²⁷ Similar to Berta Cáceres, many others have lost their lives or have been victims of human rights violations for their work to protect their communities from environmental harm and for exercising the right to participate in the decision-making process.

The duty to protect human rights defenders holds States responsible for the harm that defenders suffer due to their environmental work.²²⁸ For example, in Brazil, President Jair Bolsonaro has repeatedly verbally attacked human rights defenders seeking to protect the Amazon and most recently the Araribóia indigenous territory.²²⁹ The Araribóia territory is one of the few untouched territories in the Amazon that has not been destroyed by loggers or cattle ranchers.²³⁰ Private persons and companies (criminal networks) have been pushing for the illegal logging of the territory and attacking Tenetehara defenders protecting the territory.²³¹ Human Rights Watch detailed how indigenous leaders

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

228. States are responsible for protecting the rights of all persons in their territory or subject to their extraterritorial activities. But what is especially important to understand in this discussion of human rights defenders engaging in environmental human rights work is that they are placed at particular risk for their work. States have a heightened duty to protect them from state action and non-state (i.e. private corporations) action when it would place them at risk or further aggravate their vulnerability. G.A. Res. 53/144, annex (Dec. 09, 1998) [hereinafter Declaration on the Right and Responsibility of Individuals].

229. The Araribóia territory is located in Brazil and is larger than the U.S. State of Rhode Island. It is home to the Tenetehara and Awá indigenous people. César Muñoz, *Brazil's Amazon – and Its Defenders – Are Under Attack from Illegal Loggers*, HUM. RTS. WATCH (Nov. 15, 2019), <https://www.hrw.org/news/2019/11/15/brazils-amazon-and-its-defenders-are-under-attack-illegal-loggers> [<https://perma.cc/9XWX-TCJG>].

230. *See id.*

231. The Tenetehara people live in the Caru indigenous territory in the Amazon. César Muñoz, *Defenders of the Rainforest: The Fight to Protect Brazil's Amazon*, Human Rights Watch (Sept. 23, 2019), <https://www.hrw.org/video-photos/interactive/2019/09/23/defenders-rainforest-fight-protect-brazils-amazon>

in the territory organized patrols to protect the territory. They are known as the “keepers of the culture” or “forest guardians.”²³² These “forest guardians” organized to protect the forest and their lives, including their way of living, from private action and the State’s destruction of their environments. President Jair Bolsonaro and his administration has supported a campaign of deregulating environmental protections and destroying the Amazon for logging and cattle ranching. “Bolsonaro’s great achievement when it comes to the environment has been this tragic destruction of forests which has turned Brazil into perhaps one of the greatest enemies of the global environment” said Carlos Rittl, a Brazilian environmentalist working at Germany’s Institute for Advanced Sustainability Studies.²³³

In Latin America and the Caribbean, States and private corporations have worked independently and in collaboration to suppress the work of communities and human rights defenders seeking to stop environmentally harmful activities. The following section will discuss the role of private entities and corporations in the violation of environmental human rights and the role that the Escazú Agreement has to hold them responsible.

2. *State and private action.*

States work with private and public corporations to exploit natural resources and to carry out development projects. States and corporations have worked together to carry out exploitative and polluting projects in the name of economic prosperity. Communities in environments with rich biodiversity and reliant on natural resources have paid the highest price. They have been targeted for defending their lands and ecosystems. “[A]t least two thousand victimizing events against men and women and two hundred against organizations defending the environment and land were recorded” in the last decade in Latin America and the Caribbean.²³⁴ For this reason, States must be held responsible for

[<https://perma.cc/VB6U-635U>].

232. *Id.*

233. Tom Phillips, *Amazon Deforestation Surges to 12-year High Under Bolsonaro*, THE GUARDIAN (Nov. 30, 2020), <https://www.theguardian.com/environment/2020/dec/01/amazon-deforestation-surges-to-12-year-high-under-bolsonaro> [<https://perma.cc/4V6H-GM3A>].

234. Isabella Ariza & Luisa Gomez Betancur, *Escazú: Setting Protections for Environmental Defenders in Latin America and the Caribbean*, CORP. ACCOUNTABILITY LAB (Mar. 23, 2021), <https://corpaccountabilitylab.org/calblog/2021/3/23/escaz-setting->

their actions and those of corporations that violate human rights.

States are responsible for acts or omissions that violate human rights and are imputable to the State.²³⁵ The doctrine of State responsibility provides that States are responsible to prevent, investigate, and punish human rights violations, thus bearing the primary responsibility of protecting persons and groups in their territories or affected by their extraterritorial actions.²³⁶ States are also responsible for human rights violations that they “knew or should have known” were committed by state agents or non-state actors.²³⁷ The landmark Inter-American case *Velásquez Rodríguez v. Honduras* was foundational in cementing the doctrine of State responsibility and the role of non-State actors in human rights abuses.²³⁸ The Inter-American Court held that “[a]n illegal act which violates human rights and which is not initially directly imputable to a State can lead to international responsibility of the State, not because of an act itself, but because of the lack of due diligence to prevent the violation or to respond as required.”²³⁹ The Court recognized that States are responsible for human rights abuses by non-state actors when States could have prevented or held accountable those responsible. “The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”²⁴⁰ The process of “taking steps” is called the duty of due diligence.

The duty of due diligence requires States to proactively investigate potential or ongoing human rights violations, and to take affirmative steps to mitigate any harm or risks of human rights violations.²⁴¹ This process requires that States prevent acts of violence or other forms of human rights violations, protect

protections-for-environmental-defenders-in-latin-america-and-the-caribbean
[<https://perma.cc/L7BB-86ER>].

235. Velásquez Rodríguez, *supra* note 87, ¶ 172.

236. ICCPR, *supra* note 86, at art. 1; American Convention, *supra* note 39, at art. 1; Velásquez Rodríguez, *supra* note 87, ¶ 172.

237. Velásquez Rodríguez, *supra* note 87, ¶ 172.

238. *Id.*

239. *Id.*

240. *Id.* ¶ 176.

241. *Id.*; Maria de Penha v. Brazil, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev., 704 (2000).

victims of human rights abuses, prosecute and investigate acts representing human rights violations, punish perpetrators, and provide redress to victims of such violations.²⁴² When the State “knew or should have known” of the human rights violation, and failed to act with due diligence to prevent the human rights violations, investigate and punish the responsible parties, and provide accountability to the victims, the State may be held responsible for such abuses.²⁴³ As such, States have the responsibility to protect individuals and communities from the effects and human rights violations resulting from climate change, polluted ecosystems, destroyed biodiversity, and other environmental harms. The State’s responsibility to protect the right to a healthy environment encompasses the responsibility to protect persons and communities from environmentally harmful interference. The State’s duties include protections against those who would cause, acquiesce to, or permit environmental harm; protections from the harmful interference of others, including private persons or entities; and taking effective steps to provide and promote conservation efforts of ecosystems, biological diversity, and climate change.²⁴⁴

This duty to prevent environmental harm has long been recognized under customary international law and regional Inter-American instruments and jurisprudence.²⁴⁵ States are responsible

242. Accelerating Efforts to Eliminate All Forms of Violence Against Women: Ensuring Due Diligence in Prevention, HRC Res. 14/12, (June 30, 2010); G.A./ Res. 67/144 (Feb. 27, 2013).

243. Comm. on the Elimination of Discrimination Against Women Commc’n No. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003, A.T. v. Hungary (Jan. 26, 2005); González et al. (“Cotton Field”) v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser.C), No. 205 (Nov. 16, 2009); Jessica Lenahan, Case. 12.626, Inter-Am. Comm’n H.R., Report No.80/11 (July 21, 2011); Osman v. United Kingdom, App.23452/94, Eur. Ct. H.R., 29 EHRR 245 (1998).

244. Knox Report, A/HRC/37/59 (Jan. 24, 2018), *supra* note 82, ¶ 10.

245. The customary nature of the principle of prevention has been recognized by the International Court of Justice. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. ¶ 29 (July 8); Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 140 (Sept. 25); Pulp Mills on River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 101 (Apr. 20); Certain Activities Carried Out by Nicaragua in Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. 665, ¶ 104 (Dec. 16). The International Tribunal for the Law of the Sea (ITLOS) and the Permanent Court of Arbitration (PCA) have also indicated this. Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire), Case No. 23, Order 2016/4 of Apr. 25, 2015, ¶ 71; Iron Rhine Arbitration (Belg. v. Neth.), Award, ¶ 222 (Perm. Ct. Arb. 2005); Indus Waters Kishenganga Arbitration (Pak.

for protecting, preserving, and preventing the degradation of the environment both inside and outside of their territory, just as they would with the violation of other human rights.²⁴⁶ Specifically, States have the obligation to prevent “significant damage,” which is defined as “something more than ‘detectable’ but need not be at the level of ‘serious’ or ‘substantial.’”²⁴⁷ States have the obligation to exercise due diligence commensurate with the fragility of ecosystems and the vulnerability of communities.²⁴⁸ This means that the more an environment or population is at risk, the more due diligence a State must exercise to prevent significant environmental harm from occurring.²⁴⁹

When a corporation is engaging in environmentally harmful activities, States are responsible for ensuring that procedural and substantive rights are protected so that the environment and the population affected by such activities can enjoy their human rights.²⁵⁰ Especially considering that vulnerable communities have historically struggled to enjoy their human rights due to environmental pollution and degradation resulting from extraction or development projects, or due to the effects of climate change.²⁵¹ The Escazú Agreement provides that States “shall encourage public and private companies, particularly large companies, to prepare sustainability reports that reflect their social and environmental performance.”²⁵² As part of receiving and documenting relevant information, States must report all of their

v. India), Partial Award, at ¶¶ 448-450 (Perm. Ct. Arb. 2013); Indus Waters Kishenganga Arbitration (Pak. v. India), Final Award, ¶ 112 (Perm. Ct. Arb. 2013); South China Sea Arbitration (Phil. v. China), Award, ¶ 941 (Perm. Ct. Arb. 2016).

246. See Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 140 (Sept. 25); Int’l Law Comm’n, Rep. on the Work of its Fifty-Third Session, *General Commentary on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, [hereinafter *General Commentary on Draft Articles on Prevention of Transboundary Harm*]; see *South China Sea Arbitration* (Phil. v. China), ¶ 940 (Perm. Ct. Arb. 2016); Advisory Opinion OC-23/17, *supra* note 7, ¶¶ 118, 134.

247. Advisory Opinion OC-23/17, *supra* note 7, ¶ 136 (quoting *General Commentary on Draft Articles on Prevention of Transboundary Harm*, *supra* note 246, ¶ 4).

248. Advisory Opinion OC-23/17, *supra* note 7, ¶ 142.

249. *Id.*

250. *Guiding Principles on Business and Human Rights*, U.N. OFF. OF HIGH COMM’R FOR HUM. RTS. 1, 10 (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf [<https://perma.cc/5T99-RM7N>].

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

252. Escazú Agreement, *supra* note 10, at art. 6(13).

environmentally relevant activities to the private sector.²⁵³ This includes promoting the access to information held by private entities, “in particular information on their operations and the possible risks and effects on human health and the environment.”²⁵⁴

While the Escazú Agreement has not detailed in great lengths the responsibilities that corporations hold regarding environmentally harmful activities, it is important to note that the mention of State responsibility toward informing the public and reporting on private action is important. Anita Ramasastry, the Chair of the United Nations Working Group on Business and Human Rights, has said that the Escazú Agreement is a “catalyst for sustainable development and responsible business conduct” in Latin America.²⁵⁵ That is so because the Escazú Agreement expressly refers to the United Nations Guiding Principles on Business and Human Rights as a general framework of understanding corporate responsibility towards protecting environmental human rights in the region.²⁵⁶ While the Escazú Agreement does not provide for a direct mechanism to hold corporations responsible, it does hold States responsible for failing to protect the rights of persons and populations affected by corporate action.²⁵⁷

Additionally, as detailed in the section above, the Escazú Agreement provides a robust set of protections for human rights defenders.²⁵⁸ Human rights defenders are routinely attacked and have their rights violated for protecting the environment and populations being harmed by corporate interests.²⁵⁹ “[D]efenders are killed for protesting against environmentally harmful corporate projects, and state authorities fail to successfully control the situation, leaving corporations unaccountable for their role.”²⁶⁰ This heightened protection requires that States protect human rights defenders, and regulate corporate action towards the

253. *Id.* at art. 6(7).

254. *Id.* at art. 6(12).

255. Ariza & Betancur, *supra* note 234.

256. Escazú Agreement, *supra* note 10, at art. 5(18).

257. *Id.* at art. 6(12), (13).

258. *Id.* at art. 9(12), (13).

259. Ariza & Betancur, *supra* note 234.

260. *Id.*

environment, the public, and those defending the environment.²⁶¹

Some in the corporate community have embraced the Escazú Agreement, but the majority have lobbied aggressively against it, arguing that the agreement will limit employment and social development stemming from corporate projects.²⁶² This is an outdated and unjustified position, since many studies have shown that economies benefit from conservation and environmental protection initiatives. “[I]ncreasing land and marine protected areas could lead to an average of \$250 billion in increased economic output each year and an average annual increase of \$350 billion in improved ecosystem services.”²⁶³ Additionally, the price that populations have paid for environmental corporate interests have been too high.

IV. THE ESCAZÚ AGREEMENT AND NEW AREAS RIPE FOR LITIGATION

In addition to the issues of vulnerability, human rights defenders, and corporate responsibility, there are two areas ripe for litigation in the Inter-American System. These two areas are: climate change and the rights of children and “future generations.”

The Escazú Agreement emphasizes that the protection of the environment must include protecting the environment for *present and future generations*.²⁶⁴ The protection of the environment for present generations provides that the right to a healthy environment is justiciable for injuries deriving from environmental degradation.²⁶⁵ It recognizes that in order for a healthy environment to exist, the use and enjoyment of the environment must be sustainable.²⁶⁶ Environmental sustainability requires that humans use and protect the natural resources and environment in such a way that “humans and nature can exist in

261. Escazú Agreement, *supra* note 10, at art. 6(7), (12), (13).

262. Ariza & Betancur, *supra* note 234.

263. *Economic Growth and Environmental Protection: Latin America's Role in Global Conservation Efforts*, WILSON CENTER (Aug. 4, 2020), <https://www.wilsoncenter.org/event/economic-growth-and-environmental-protection-latin-americas-role-global-conservation-efforts> [https://perma.cc/T24J-CG8C].

264. Escazú Agreement, *supra* note 10, at art. 1 (emphasis added).

265. Renata Politi, *The Right to a Healthy Environment Gives Rise to A Growing Wave of Climate Change Litigation*, UNIVERSAL RTS. GRP. (Dec. 18, 2020), <https://www.universal-rights.org/blog/the-right-to-a-healthy-environment-gives-rise-to-a-growing-wave-of-climate-change-litigation/> [https://perma.cc/T76R-367M].

266. *Id.*

productive harmony.”²⁶⁷ The relationship between environmental sustainability and future generations is a close one. For future generations²⁶⁸ to have access to a clean and healthy environment, present generations must conserve and protect natural resources as to not degrade or affect future environmental conditions.²⁶⁹ “Environmental conditions help determine whether people are healthy or not, and how long they live. They can affect reproductive health and choices, and they can help determine prospects for social cohesion and economic growth, with further effects on health.”²⁷⁰

The protection of the right to a healthy environment for future generations is important for the advancement of the right to a healthy environment as a legally binding obligation.²⁷¹ It considers present generations to be custodians of the environment.²⁷² This vision places us humans, and especially States, as owing an obligation to future generations to protect the environment. “[T]o defend and improve the human environment for present and future generations has become an imperative goal for mankind.”²⁷³ This idea recognizes that intergenerational justice is part of the right to a healthy environment. It requires the conservation of the

267. Cynthia Stahl & Todd S. Bridges, “Fully Baked” Sustainability Using Decision Analytic Principles and Ecosystem Services, 9 INTEGRATED ENV’T ASSESSMENT & MGMT 551, 551-553 (2013); James Kevin Summers & Lisa M. Smith, *The Role of Social and Intergenerational Equity in Making Changes in Human Well-Being Sustainable*, 43 AMBIO 718, 721 (2014).

268. The term “future generations” refers to unborn children and persons. Scientifically “future generations” can be defined as “generations where ‘its [sic] members are not yet alive’ at the time of reference.” Jochelle Greaves Siew, *Facing the Future: The Case for a Right to a Healthy Environment for Future Generations under International Law*, 8 GRONINGEN J. INT’L L. 30, 33 (2020), <https://doi.org/10.21827/GroJIL.8.1.30-47> [<https://perma.cc/962L-SU3T>] (quoting PETER LAWRENCE, JUSTICE FOR FUTURE GENERATIONS: CLIMATE CHANGE AND INTERNATIONAL LAW 15 (2014)).

269. Different agreements, declarations, and international sources assert the need to protect the right to a healthy environment for present and future generations. See, e.g., U.N. Conference on the Human Environment, *Stockholm Declaration of the U.N. Conference on the Human Environment*, art. 3, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972) [hereinafter *Stockholm Declaration*].

270. U.N. Population Fund, *State of World Population 2001: Footprints and Milestones: Population and Environmental Change*, 7 (Jan. 1, 2001), https://www.unfpa.org/sites/default/files/pub-pdf/swp2001_eng.pdf [<https://perma.cc/L3F2-RJZ6>].

271. Greaves Siew, *supra* note 268, at 38, 42; see also *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 429, 455 (July 8) (Weeramantry, J., dissenting).

272. Greaves Siew, *supra* note 268, at 34.

273. *Stockholm Declaration*, *supra* note 269, ch. 1, § I, ¶ 6.

environment and the preservation of the quality and access of the environment.²⁷⁴ A legally binding obligation ensures that States are held accountable and encouraged to use and protect the environment in a sustainable manner for present and future generations.²⁷⁵

Similarly, the Inter-American Court has expressly stated that the right to a healthy environment belongs to present and future generations.²⁷⁶ In its *Advisory Opinion on the Environment and Human Rights*, the Court stated that “a healthy environment is a fundamental right for the existence of humankind.”²⁷⁷ The opinion provides that future generations must be protected by establishing a connection between the environment and the sustainable use of natural resources.²⁷⁸ The idea that future generations have a right to a healthy environment and that States have an obligation to protect it is new and critical for protections and mitigations against climate change.

The United Nations’ recent study, *Climate Change 2021: The Physical Science Basis*, found that global warming will continue to increase due to anthropogenic drivers such as emissions, including greenhouse gas concentrations and carbon dioxide.²⁷⁹ According to the report, “[i]t is unequivocal that human influence has warmed the atmosphere, ocean and land. Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred.”²⁸⁰ The effects of global warming, rising land and sea temperatures, rising sea levels, agricultural and ecological droughts, and an increase in wildfires will all increase if the

274. Greaves Siew, *supra* note 271, at 34 (citing Edith Brown Weiss, *Intergenerational Equity*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Feb. 2013)); see Summers & Smith, *supra* note 267, at 719.

275. Greaves Siew, *supra* note 271, at 38.

276. Advisory Opinion OC-23/17, *supra* note 7, ¶ 59.

277. *Id.*

278. The OAS General Assembly Resolution “Human Rights and the Environment in the Americas” provides that there is “a growing awareness of the need to manage the environment in a sustainable manner to promote human dignity and well-being.” Org. Am. States G.A. Res., AG/RES. 1926 (XXXIII-O/03), Human Rights and the Environment in the Americas (June 10, 2003); see also *Rio Declaration on Env’t & Dev.*, *supra* note 12, princ. 1, 4; *Stockholm Declaration*, *supra* note 269, princ. 8; Org. Am. States, *Inter-American Democratic Charter*, art. 15, Sept. 11, 2001, AG/RES. 1 (XXVIII-E/01).

279. IPCC, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS. WORKING GROUP I CONTRIBUTION TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2021), https://report.ipcc.ch/ar6/wg1/IPCC_AR6_WGI_FullReport.pdf.

280. *Id.* at 4 (emphasis omitted).

patterns of climate change continue occurring.²⁸¹ This is concerning for everyone, but especially for children and future generations. According to UNICEF, extreme temperatures and climate-related events such as droughts and flooding can destroy crops, and leave families living in poverty with less access to food and clean water, lower incomes, and worsening health.²⁸² “By 2050, a further 24 million children are projected to be undernourished as a result of the climate crisis” and “90% of diseases resulting from the climate crisis are likely to affect children under the age of five.”²⁸³

The Inter-American Court and other human rights bodies will have to consider this issue of children and future generations. The current approach to human rights cases is based on petitioners proving past injuries and/or proven severe risk based on environmental harm and their impact on human rights.²⁸⁴ The Inter-American Court should consider cases such as *Future Generations v. Ministry of the Environment and Others* (“Demanda Generaciones Futuras v. Minambiente”) when reviewing environmental risk or harm questions (including climate change) for children or future generations. The *Future Generations v. Ministry of the Environment and Others* case was brought by DeJusticia and twenty-five children and youth against Colombia for failing to protect their rights to life and a healthy environment.²⁸⁵

Specifically, the twenty-five children and youth petitioners claimed that climate change and Colombia’s failure to reduce deforestation in the Colombian Amazon were threatening their fundamental rights.²⁸⁶ They argued that the deforestation in the

281. *Id.* at 21-24.

282. *The Climate Crisis*, SAVE THE CHILDREN, <https://www.savethechildren.org/us/what-we-do/emergency-response/climate-change> [https://perma.cc/7LBP-JN3Z] (last visited Nov. 8, 2022).

283. *Id.* (emphasis omitted).

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

285. *Future Generations v. Ministry of the Environment and Others* (“Demanda Generaciones Futuras v. Minambiente”) is an Acción de Tutela, which is a case based on a filing for constitutional claims in Colombian law. Tribunal Superior del Distrito Judicial de Bogotá [T. Sup.] [Appellate Court of the Judicial District of Bogotá], Sala Civ., enero 29, 2018, (Colom.), http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20180129_11001-22-03-000-2018-00319-00_complaint.pdf [https://perma.cc/Z5KA-F4G6].

286. *Id.* at 26-27.

Colombian Amazon resulted in the increasing of greenhouse gas emissions which violated their rights to a healthy environment, life, health, food, and water.²⁸⁷ They were successful, and as part of the decision, the Court had some important legal and moral findings:

These imminent dangers are evident in phenomena such as the excessive increasing of temperatures, the thawing of the poles, the massive extinction of animal and plant species, the increasingly frequent occurrence of meteorological events and disasters outside margins previously considered normal. There are unusual and unforeseen rainy seasons, permanent droughts, hurricanes or destructive tornadoes, strong and unpredictable tidal waves, draining rivers, increasing disappearances of species, etc. . . . We are all obligated to stop exclusively thinking about our self-interest. We must consider the way in which our daily actions and behaviors affect society and nature . . . But in addition, this includes the unborn, who also deserve to enjoy the same environmental conditions that we have.²⁸⁸

The Inter-American Court must and can use the Escazú Agreement to open the door for further protections within the right to a healthy environment framework. It can do so by following the direction of the Colombia Constitutional Court and finding further protections based on claims of environmental risk and climate change. The Court can consider specific procedural protections in the Escazú Agreement as a way to interpret how State Parties to the Escazú Agreement are bound and how non-State parties should be bound in protecting the right to information, participation, and access to justice in environmental matters.²⁸⁹

Additionally, the Escazú Agreement opens the door to providing more flexibility for petitioners to prove environmental risk in a case. For example, “[e]nvironmental information” is defined as any information that includes “environmental risks, and any possible adverse impacts affecting or likely to affect the

287. *Id.*

288. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Civ., abril 5, 2018, M.P: L. A. Tolosa Villabona, Sentencia 4360-2018 (p.15-18) (Colom.), *translated by* Dejusticia, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision.pdf [<https://perma.cc/F49L-6LYU>].

289. Using the Escazú Agreement would still require litigants to claim violations of the American Convention on Human Rights and the Court to find that the American Convention was violated in relation to the rights to information, participation, and access to justice in the context of environmental issues.

environment and health, as well as to environmental protection and management.”²⁹⁰ The Escazú Agreement places the burden on States to take necessary measures, whether legal or administrative, to promote access to environmental information in the possession of State or private entities that relates to “possible risks and effects on human health and the environment.”²⁹¹ Most importantly, States must provide “mechanisms to challenge and appeal . . . any other decision, action or omission that affects or could affect the environment adversely or violate laws and regulations related to the environment.”²⁹² This last quote from Article 8, Paragraph (2)(c) is the most critical for the protection of individuals, communities, and the environment in the face of climate change. It provides for a more flexible standard when proving injuries. Article 8, Paragraph (2)(c) language on the decision, actions, or omissions that “affects or could affect” the environment opens the door to possible injuries in the future or injuries that are not certain or are extremely hard to prove with certainty. This recognition is particularly important because it provides an opening for persons or communities to hold States responsible when there is sufficient evidence of serious or irreversible damage, even if there is no “scientific certainty” that the degradation will take place.²⁹³ Because in environmental and human rights law, obligations generally arise out of injuries or harm committed, this flexible language is an innovation and step forward in protecting against environmental risk that is hard to prove and against the effects of climate change.²⁹⁴

While the Court has not yet had the opportunity to interpret State obligations arising out of the Escazú Agreement, it has recognized the duty of prevention in environmental harm. In its *Advisory Opinion on the Environment and Human Rights*, the Court recognized that States have a duty to prevent environmental harm under customary international law and Inter-American instruments and jurisprudence.²⁹⁵ The Court recognized that

290. Escazú Agreement, *supra* note 10, at art 2(c).

291. *Id.* at art. 6(12).

292. *Id.* at art. 8(2)(c).

293. *Id.*; *see also* United Nations Framework Convention on Climate Change (UNFCCC), May 9, 1992, FCCC/INFORMAL/84 1771 U.N.T.S. 107, <https://unfccc.int/resource/docs/convkp/conveng.pdf> [<https://perma.cc/KDV5-KC2U>].

294. Greaves Siew, *supra* note 271, at 38, 42.

295. Advisory Opinion OC-23/17, *supra* note 7, § B.3. The customary nature of the principle of prevention has been recognized by the International Court of Justice. Legality

States are responsible for protecting, preserving, and preventing the degradation of the environment both inside and outside of their territory, just as they would be with the violation of other human rights.²⁹⁶ It added that States have the obligation to prevent “significant damage,”²⁹⁷ which is defined as “something more than ‘detectable’ but need not be at the level of ‘serious’ or ‘substantial.’”²⁹⁸ As part of this duty of prevention, States must mitigate environmental harm in a way that remediates it and creates ways for communities to safeguard their lives and health when endangered.²⁹⁹ This duty of prevention is consistent with the Escazú Agreement. The Escazú Agreement is guided by fundamental human rights principles such as equality and non-discrimination; transparency and accountability; non-regression and progressive realization; good faith; and the precautionary and preventive principles.³⁰⁰ Guidance from these principles reinforces the Court’s recognition that petitioners must be heard not only for past injuries, but also for possible future injuries arising out of past and present environmental harm and risk, as

of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8); Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 140 (Sept. 25); Pulp Mills on River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 101 (Apr. 20); Certain Activities Carried Out by Nicaragua in Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. 665, ¶ 104 (Dec. 16). The International Tribunal for the Law of the Sea (ITLOS) and the Permanent Court of Arbitration (PCA) have also indicated this. Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire), Case No. 23, Order 2016/4 of Apr. 25, 2015, ¶ 71, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_prov_meas/23_published_texts/2015_23_Ord_25_Avr_2015-E.pdf [<https://perma.cc/XWU5-7JMQ>]; Iron Rhine Arbitration (Belg. v. Neth.), 27 R.I.A.A. 35, ¶ 222 (Perm. Ct. Arb. 2005); Indus Waters Kishenganga Arbitration (Pak. v. India), 31 R.I.A.A. 1, ¶¶ 112, 448-450 (Perm. Ct. Arb. 2013); South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, ¶ 941 (Perm. Ct. Arb. 2016).

296. See Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 140 (Sept. 25); Int’l Law Comm’n, *General Commentary on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, in Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001); see South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, ¶ 940 (Perm. Ct. Arb. 2016); Advisory Opinion OC-23/17, *supra* note 7, ¶¶ 118, 134, 140.

297. Advisory Opinion OC-23/17, *supra* note 7, ¶ 134. The Escazú Agreement provides that public participation must be ensured when there is “significant impact” on the environment or environmental matters. Escazú Agreement, *supra* note 10, at art. 7(2).

298. Advisory Opinion OC-23/17, *supra* note 7, ¶ 136 (quoting *General Commentary on Draft Articles on Prevention of Transboundary Harm*, *supra* note 246, ¶4) (emphasis omitted).

299. *Id.* ¶ 145.

300. Escazú Agreement, *supra* note 10, at art. 3.

well as the future effects of climate change.

It is within this tripart framework, consisting of the *Advisory Opinion on the Environment and Human Rights, Nuestra Tierra v. Argentina*, and the Escazú Agreement, that petitioners may bring more claims for violations of the right to a healthy environment as well as interrelated human rights. This tripart framework, with the Escazú Agreement as its last piece, will create an opening for the vindication of environmental rights for those who have been unable to successfully do so until now. Vulnerable populations and human rights defenders are recognized as needing special protections, and as such, State Parties to the Escazú Agreement must protect them accordingly. Additionally, the Inter-American System must use the Escazú Agreement as guidance for developing the legal framework protecting the right to a healthy environment, specifically the rights to information, participation, and access to justice in environmental matters.

V. CONCLUSION

The Escazú Agreement is an exciting new treaty that will provide an opportunity to litigate and vindicate environmental human rights in the Americas and the Caribbean. This instrument is the last piece of a tripart framework that opens the door for concrete State obligations in the protection of the right to a healthy environment through its three pillars: information, participation, and access to justice in environmental matters. States that are Parties to the Agreement are bound by the international obligations set forth. For all other States that are not parties to it, the Escazú Agreement still provides a robust guidance as to how the rights to information, participation, and access to justice in environmental matters must be protected. The Escazú Agreement is a meaningful step in the right direction to protect the environmental human rights of all persons in the region, but especially those who are most vulnerable. We are beyond the question of whether we should take action to protect our environments from the real consequences of climate change. It is a moral and existential imperative to continue thinking of innovative ways to protect the environment and human rights affected by environmental degradation and climate change. Vulnerable persons and communities are already suffering from the damages caused by changing climatic conditions. Present and

future generations depend on us to push forward and continue the fight for our planet.