

## SYMPOSIUM ON UN RECOGNITION OF THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT

### INTERNATIONAL RECOGNITION OF THE RIGHT TO A HEALTHY ENVIRONMENT: WHAT IS THE ADDED VALUE FOR LATIN AMERICA AND THE CARIBBEAN?

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Although there is still no United Nations treaty on the right to a healthy environment, the recognition of the right by the UN General Assembly and the UN Human Rights Council have helped solidify its status as customary international law. The overwhelming recognition of the right at the national and regional levels, and now at the United Nations, evidences greater uniformity and certainty in understanding human rights obligations relating to the environment. But what value do the resolutions add to the regional recognition of the right in Latin America and the Caribbean (LAC)? Through judicial and legislative developments, LAC has provided fertile ground for the flourishing of the right to a healthy environment. The region has seen some of the most innovative responses to the fragmented fields of human rights and the environment, providing a model for progressive legal development. Within this context, this essay focuses on how UN recognition of the new right may impact the burgeoning law on human rights and the environment in LAC. I argue that the resolutions should support the already rich environmental and climate jurisprudence in the region to realize the full potential of the right to a healthy environment. The right to a healthy environment can further solidify the role of the Inter-American Court of Human Rights (IACtHR) as a leading human rights court in environmental protection, with wide-ranging implications for rights-based environmental (and climate) litigation.

#### *Recognition of the Right to a Healthy Environment in LAC*

Even before the adoption of the resolutions by the Human Rights Council and the General Assembly, LAC has had a burgeoning case law on human rights and the environment. The Inter-American System of Human Rights has three main instruments related to economic, social, and cultural rights: the 1948 American Declaration of the Rights and Duties of Man;<sup>1</sup> the 1969 American Convention on Human Rights;<sup>2</sup> and the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.<sup>3</sup> Neither the Convention nor the Declaration specifies a right to a healthy environment. But Article 11 of the Protocol recognizes that “[e]veryone shall have the right to live in a healthy environment and to have access to basic public

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<sup>1</sup> [American Declaration of the Rights and Duties of Man](#), May 2, 1948, OAS Res. XXX (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS Doc. OAS/Ser.L/V/I.4 Rev. 13 (2010).

<sup>2</sup> [American Convention on Human Rights](#), Nov. 22, 1969, 1144 UNTS 123.

<sup>3</sup> [Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights](#), Nov. 17, 1988, OAS Doc. OAS/Ser.L/V/I.4 rev. 13 (San Salvador Protocol).

services.” Despite this strong articulation, implementation of the right remained restricted due to: (1) limited ratification of the Protocol, by only sixteen countries; (2) lack of authority by the Inter-American Commission on Human Rights to receive individual petitions alleging violations of the right in the Protocol; and (3) the Protocol’s weak requirement of only progressive, rather than full, realization of rights.<sup>4</sup>

This weak implementation changed in 2017, when the IACtHR issued an advisory opinion recognizing the right to a healthy environment as fundamental to human existence.<sup>5</sup> The IACtHR reaffirmed the principle of human rights interdependence and indivisibility, noting the “unquestionable” link between environmental protection and the realization of other human rights, including the adverse impacts of environmental degradation and climate change on the enjoyment of human rights. The IACtHR acknowledged the right as “fundamental to the existence of humanity.” Adopting an ecocentric perspective, it interpreted the right as “autonomous” under the Convention, and as protecting “components of the environment” as “legal interests in themselves.” The Court emphasized that nature is to be protected not only for its benefits to humanity or the effects of its degradation on other human rights, but also in its own right.

The importance of the IACtHR’s 2017 advisory opinion cannot be overstated. Deemed a groundbreaking opinion, it significantly advanced international law, placing the IACtHR as a “forerunner” in guaranteeing the most robust protection of environmental rights under the Convention.<sup>6</sup> Furthermore, by recognizing the right as directly justiciable before the Court, the opinion “open[ed] the door to new categories of claims” in the Inter-American human rights system, such as climate change.<sup>7</sup> At the domestic level, the decision further opened a potential pathway for climate lawsuits, facilitating rights-based climate litigation in LAC.

This interpretation of the content and scope of the right to a healthy environment was solidified in 2020, with the IACtHR’s cutting-edge decision in a contentious case.<sup>8</sup> In *Lhaka Honhat v. Argentina*, the IACtHR held Argentina liable for violations of the right (in addition to associated rights) in relation to an Indigenous group, and ordered reparation measures for restitution of the environment, including the recovery of forest resources.<sup>9</sup> The new rights will once again be tested in *La Oroya Community v. Perú*,<sup>10</sup> a pending case that provides the Court with its first opportunity to assess the responsibility of states for interference with human rights caused by environmental harm to a non-Indigenous community.

More recently, Chile and Colombia have asked the Court to clarify a series of legal obligations of states as it pertains to human rights and climate change.<sup>11</sup> The 2023 request for an advisory opinion invites the Court to apply the right to a healthy environment to a wide range of questions related to states’ responsibility for climate change. In addition to its own jurisprudence, the Court is likely to invoke the Escazú Agreement, a historic treaty

<sup>4</sup> Maria Antonia Tigre & Natalia Urzola, [The 2017 Inter-American Court’s Advisory Opinion: Changing the Paradigm for International Environmental Law in the Anthropocene](#), 12 J. HUM. RTS. & ENV’T 24, 42 (2021).

<sup>5</sup> [The Environment and Human Rights, Advisory Opinion OC-23/17](#), Inter-Am. Ct. H.R. (ser. A) No. 23, para. 62 (Nov. 15, 2017).

<sup>6</sup> Domenico Giannino, [The Ground-Breaking Advisory Opinion OC-23/17 of the Inter-American Court of Human Rights: Healthy Environment and Human Rights](#), INT’L J. CONST. L. BLOG (Dec. 1, 2018).

<sup>7</sup> Maria L. Banda, [Inter-American Court of Human Rights’ Advisory Opinion on the Environment and Human Rights](#), 22 ASIL INSIGHTS 6 (May 10, 2018).

<sup>8</sup> See Maria Antonia Tigre, [Indigenous Communities of the Lhaka Honhat \(Our Land\) Association v. Argentina](#), 115 AJIL 706 (2021).

<sup>9</sup> [Case of the Indigenous Communities of the Lhaka Honhat \(Our Land\) Association v. Argentina](#), Inter-Am. Ct. H.R. (ser. C) No. 400 (Feb. 6, 2020).

<sup>10</sup> Comunidad de La Oroya, Peru, Case 12.718, Inter-Am. Comm’n H.R., [Letter of Submission](#) (Sept. 30, 2021).

<sup>11</sup> Sabin Center for Climate Change Law, [Request for an Advisory Opinion on the Scope of the State Obligations for Responding to the Climate Emergency](#), CLIMATE CHANGE LIT. DATABASES (last visited Mar. 20, 2023).

adopted in 2018 to advance substantive and procedural environmental rights in LAC.<sup>12</sup> The agreement is the first treaty in the region explicitly linking human and environmental rights, and the first in the world to include provisions to protect environmental defenders. Escazú specifically recognizes a substantive environmental right in Article 4.1, which notes that: “Each Party shall guarantee the right of every person to live in a healthy environment and any other universally-recognized human right related to the present Agreement.” This recognition, combined with the positive enforcement duties of states, is essential for advancing environmental protection in the region.<sup>13</sup> The treaty, a result of years of grassroots activism and advocacy, can potentially transform how governments approach environmental protection by prioritizing the inclusion of diverse voices affected by environmental harm.

### *Added Value of International Recognition*

Given this expansion of the right to a healthy environment at the regional level, what added value do the international resolutions bring? I argue that the resolutions bolster regional innovation for four reasons: (1) expansion of regional recognition; (2) boost to the enforcement of the right; (3) protection of environmental defenders; and (4) support for the new request for an advisory opinion on climate change. In short, the UN recognition of the right to a healthy environment will help the already rich environmental and climate jurisprudence in the region realize its full potential.

### *Expansion of Regional Recognition*

The first reason why the resolutions add value relates to the wider recognition of the right by LAC states. Of the thirty-three states in LAC, twenty-five recognized the right in international or domestic law prior to the UN resolutions: twenty-two states belong to the San Salvador Protocol and/or the Escazú Agreement, and three of the eleven states that have not yet joined either treaty include the right in their national constitutions. Thirty-one countries in LAC voted in favor of the General Assembly resolution, and seven LAC countries voted in favor of the Human Rights Council resolution. Of the countries expressing support at the United Nations, six countries (Bahamas, Barbados, Belize, Dominica, Grenada, and Haiti) had not adopted the right in any of the sources mentioned, and recognized it for the first time at the UN level. After the UN votes, Trinidad and Tobago is the only country in LAC that still does not have any type of recognition of the right.

Therefore, it is evident that international recognition has led to an immediate expansion of the recognition of the right in the six countries that had not acknowledged it earlier. The next step is for the recognition to spur domestic implementation, which is still lacking.

### *Rights Enforcement*

Despite this expanding law on human rights and the environment, the overwhelming social and economic challenges faced in the region negatively impact compliance, since socioeconomic needs often take precedence over environmental protection. Supporting international recognition of the new right through a non-binding resolution or even adopting the right at the national or regional level is not the same as ensuring its protection in practice.<sup>14</sup>

<sup>12</sup> [Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean](#) (Sept. 27, 2018; entered into force Apr. 22, 2021) (last visited Mar. 20, 2023) (Escazú Agreement).

<sup>13</sup> Maria Antonia Tigre, *The Right to a Healthy Environment in Latin America and the Caribbean: Compliance Through the Inter-American System and the Escazú Agreement*, in *INTERNATIONAL COURTS VERSUS NON-COMPLIANCE MECHANISMS: COMPARATIVE ADVANTAGES IN STRENGTHENING TREATY IMPLEMENTATION* (Christina Voigt & Caroline Foster eds., forthcoming 2023).

<sup>14</sup> James. R. May, *The Case for Environmental Rights: Recognition, Implementation and Outcomes*, 42 *CARDOZO L. REV.* 983; 1001 (2021).

Implementation will require improvements and revisions of national legal frameworks, procedural guarantees of judicial accountability and effective remedies, and a continued role of courts in (progressively) interpreting, clarifying, and giving force to the right. The interdependence of social, economic, procedural, and ecological rights lies at the core of understanding the right to a healthy environment in LAC. This is partly why the region has a rich history of environmental litigation, which is now being supplemented and complemented by climate litigation.<sup>15</sup>

Although not binding, the resolutions adopted by the General Assembly and the Human Rights Council can potentially support the enforceability of the right, for two main reasons: (1) the “naming and shaming” aspect of the implementation of human rights; and (2) strengthening arguments that can be advanced in domestic, regional, and international environmental and climate litigation. Indeed, UN resolutions have been found to reinforce environmental democracy. For example, the right to water followed a similar process, with recognition by the Human Rights Council and the General Assembly. While benchmarks on the implementation of the right to water are still far from ideal, they have improved since UN recognition.<sup>16</sup> In addition, global recognition supports a coordinated effort to address environmental crises, promoting cooperation between countries and possibly facilitating access to financial resources, institutional support, and capacity building. Furthermore, recognition provides more substantial protection of rights in a preventive manner, embodying a holistic approach to the effective implementation of a wide variety of environmental norms adopted in multilateral environmental agreements.

#### *Protection of Environmental Defenders*

The UN recognition of the right to a healthy environment might also help protect the rights of environmental defenders facing enormous challenges in LAC, deemed the deadliest region in the world by Global Witness.<sup>17</sup> Although the General Assembly resolution does not refer to environmental defenders, in linking human rights and environmental protection, it can help highlight that environmental defenders are human rights defenders, and therefore protected under the human rights apparatus. The Escazú Agreement expressly safeguards environmental defenders, requiring states to ensure local protection. This strong and unique statement responds to regional context and pluralism. The killings of environmental defenders are deeply linked to the lack of enforcement of the right to a healthy environment and, generally, of human rights. Social-environmental conflicts will persist unless the right is guaranteed. This means maintaining necessary conditions for the development of life in all forms and regions, promoting equity between generations and genders, and ensuring the protection of vulnerable communities. By definitively bringing environmental issues to the realm of human rights, the resolutions support the protection of environmental defenders.

#### *Impact of the Resolutions on the LACtHR's Advisory Opinion on Climate Change*

As noted, the adoption of the resolutions amidst the growing regional recognition of the right is timely. The 2023 request for an advisory opinion provides a unique opportunity to further define states' obligations toward the climate crisis by a progressive human rights court that is open to the expansion of rights. Developments in LAC exemplify how reliance on a variety of legal sources to address the triple planetary crisis can have some positive impacts. These sources range from the adoption of the rights of nature to Indigenous knowledge, as well as activist

<sup>15</sup> Maria Antonia Tigre, Natalia Urzola & Alexandra Goodman, *Climate Litigation in Latin America: Is the Region Quietly Leading a Revolution?*, 14 J. HUM. RTS. & ENV'T 67 (2023).

<sup>16</sup> UN Sustainable Development Goals, *Water Decade*.

<sup>17</sup> Global Witness, *Decade of Defiance: Ten Years of Reporting Land and Environmental Activism Worldwide* (Sept. 2022).

courts that have been outspoken about the limits of the current legal system and a narrow interpretation of the existing laws.

While the UN recognition does not directly add much to the content of the right to a healthy environment in LAC, its impact on the IACtHR is diffuse but important. First, it confirms the Court's view that it has a great deal of support in its efforts to clarify and apply the right as part of its rights-based approach to environmental/climate issues. That the vote was actually near-universal, and especially so in LAC, without any abstentions or negative votes, sends a positive message to courts at the national and regional level that their progressive recognition and application of the right is appropriate. Second, the linkages of the right to a healthy environment to other rights—in both the Human Rights Council and the General Assembly resolutions—and the fact that the resolutions cite many of the same precedents that the Court relied on (i.e., precedents from other regional and international courts, international instruments, and UN resolutions, as well as the work of the UN special rapporteur on human rights and the environment) critically reinforce this message. Third, the growing connections between the right to a healthy environment and other rights support the development of a stronger jurisprudence centered around the former, but that makes use of precedents based on traditional human rights. As such, the resolutions are important because they can be read as giving the Court a near-universal endorsement of the path that it is already on, to expand the rights-based approach to non-Indigenous environmental cases (such as in the *La Oroya* case), to climate change (in the new advisory opinion), or to other matters in the future.

The questions posed in the request for the advisory opinion raise several opportunities to engage with the content of the substantive and procedural duties of states related to the right. These include clarifying states' obligations to: (1) prevent and minimize climate impact; (2) consider differentiated impacts on vulnerable groups, including children, women, and environmental defenders; and (3) promote procedural environmental rights, including information, broad participation and consultation, effective judicial remedies, and due diligence. The questions embrace climate issues rarely addressed by courts, including migration and forced displacement, non-economic losses, environmental defenders, women's rights, Indigenous peoples, peasant communities, and Afro-descendants. The opinion can therefore expand on the contours of the right in clarifying these obligations, relying on the legal framework the region has developed in recent years. Based on the innovations seen in the region and the progressive stance the Court has recently taken, it is likely that the response from the Court will be bold, appropriately reacting to the needs of the global planetary crisis we are facing. The groundwork done regionally through legislative and judicial developments, paired with recognition at the United Nations, allows for that progression. The Court may also become an international trend-setter. It is predicted that the IACtHR's advisory opinion will be the first, setting the scene for responses from the International Tribunal for the Law of the Sea and the International Court of Justice on different but related questions to the climate crisis.

### *Conclusion*

Courts at the domestic and regional levels in LAC have often relied on a wide range of legal sources, including UN resolutions, to reinforce the rationale for finding violations of the right to a healthy environment. This reliance demonstrates the value of resolutions from the Human Rights Council and the General Assembly in the progressive development of law, particularly in countries and regions where the right has not yet been adopted at the constitutional level. This holistic interpretation of norms, which relies on national, regional, and international law, whether binding or not, is essential to designing legal responses to the current environmental crisis. This essay has shown how the greatest innovation is likely to come first and foremost from LAC courts. In this sense, UN recognition helps regional development and the expansion of rights, potentially buttressing compliance in practice.