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University of Oslo

Business, Human Rights, and the Environment in the Inter-American Court of Human Rights

Prospects from the *Tagaeri and Taromenane* case

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"'It is possible', says the gatekeeper, 'but not now'."

- Franz Kafka

Acknowledgements

To my Brother, Christel.

List of Abbreviations

ACHR	American Convention on Human Rights
BHR	Business and human rights
ECtHR	European Court of Human Rights
ESCR	Economic, social and cultural rights
FARC	Colombian Revolutionary Armed Forces
GHG	Greenhouse gases
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ICCAL	*Ius Constitutionale Commune en América Latina*
IAS	Inter-American System of Human Rights
IPVI	Indigenous people in voluntary isolation
NAP	National action plan on business and human rights
NSA	Non-State actor
OAS	Organization of American States
OHCHR	Office of the High Commissioner for Human Rights
PSS	Protocol of San Salvador
RHE	Right to a healthy environment
UN	United Nations
UNHRC	United Nations Human Rights Council
UNGA	United Nations General Assembly
UNGPs	United Nations Guiding Principles on Business and Human Rights

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1 Introduction

1.1 Subject-matter and relevance

In 2011, the United Nations Human Rights Council (UNHRC) unanimously approved the Guiding Principles on Business and Human Rights (UNGPs).[1] The UNGPs quickly rallied a large community of practice around it and became a focal point in the global human rights discourse. Simultaneously, large strides were being accomplished in environmental law. The 17th UN Climate Change Conference was concluded with a commitment to create a binding treaty limiting global emissions, later resulting in the adoption of the Paris Agreement in 2015.

As both agendas developed, much attention was brought to the lack of international supervisory and accountability mechanisms for business and human rights (BHR) and environmental law.[2] To fill this gap, several cases appeared before regional human rights courts due to their mandates as international judicial institutions that hear cases from individuals and groups to create concrete binding obligations for States.[3] Nevertheless, until recently the subfields of BHR and environmental human rights evolved separately, despite evidence that most environmental damage is caused by private sector activity.[4]

This thesis seeks to provide analysis of the Inter-American Court of Human Rights' (IACtHR) jurisprudence on both BHR and the right to a healthy environment (RHE) and tentatively propose that the ongoing *Tagaeri and Taromenane* case has the elements to bridge the gap between the subfields.[5] It aims to answer the question of whether and, if so, how the Court

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[1] UNHRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework' (United Nations 2011) HR/PUB/11/04.

[2] Stéfanie Khoury, 'Corporate (Non-)Accountability and Human Rights: Approaches from the Regional Human Rights Systems and Prospects for the ASEAN' (2018) 46 Asian Journal of Social Science 503; Maiko Meguro, 'Litigating Climate Change through International Law: Obligations Strategy and Rights Strategy' (2020) 33 Leiden Journal of International Law 933.

[3] *Lhaka Honhat (Our Earth) Association Indigenous Communities v Argentina (Merits, Reparations and Costs)* (2020) Series C No 400 (Inter-American Court of Human Rights); *Greenpeace Nordic and Others v Norway (Petition)* [2021] European Court of Human Rights Application no. 34068/21; *Duarte Agostinho and Others v Portugal and 32 Other States (Petition)* [2020] European Court of Human Rights Application no. 39371/20; *La Oroya Community v Peru (Merits)* [2020] Inter-American Commission of Human Rights Report No. 330/20, Case 12.718, OEA/Ser.L/V/II Doc. 348.

[4] Anouska Perram and Norman Jiwan, 'Human Rights Violations Connected with Deforestation – Emerging and Diverging Approaches to Human Rights Due Diligence' (2023) 8 Business and Human Rights Journal 110; Danwood Chirwa and Nojeem Amodu, 'Economic, Social and Cultural Rights, Sustainable Development Goals, and Duties of Corporations: Rejecting the False Dichotomies' (2021) 6 Business and Human Rights Journal 21; Chiara Macchi, 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate Due Diligence"' (2021) 6 Business and Human Rights Journal 93; UNHRC, 'Report on the Eighth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (United Nations Human Rights Council 2022) A/HRC/52/XX; Sara K Phillips and Nicole Anschell, 'Building Business, Human Rights and Climate Change Synergies in Southeast Asia: What the Philippines' National Inquiry on Climate Change Could Mean for ASEAN' (2022) 13 Journal of Human Rights and the Environment 238.

[5]

can construct a new paradigm for the international co-responsibility of business *vis-à-vis* State actors for environmental damage.

1.2 Methodology

The thesis will use a variety of primary (judgments, court orders, advisory opinions, legislation, public hearing recordings and reports by international and non-governmental organizations) and secondary (scholarly publications, blog entries, online resources and expert assessments) sources to contextualize and analyze the IACtHR's body of jurisprudence on BHR and the RHE. The conclusions drawn on Chapter 4 are based on this legal analysis and should not be read as a "prediction" of future judgments, but *de lege ferenda* observations considering identified legal trends. Where possible, the thesis is structured in a chronological fashion. This is not meant to deny the dynamic nature of court practice or to imply a view on the *stare decisis* principle in international law, but rather it is done for organizational purposes and with a view that judicial institutions value stability. It will be noted when the developments are not addressed chronologically. Lastly, the words "business", "corporation", and "enterprise" are used interchangeably unless otherwise noted to avoid repetition and word fatigue.

2 Business and Human Rights in the Inter-American System of Human Rights (IAS)

Corporations are not traditional subjects of international law, but entities created under domestic law.[6] Yet, as they traverse the field of international relations, their actions have repercussions in different areas of international law.[7] As such, corporations are not only right-bearers in bilateral investment treaties, often with direct access to compulsory arbitration proceedings against their host States,[8] but also able to claim diplomatic protection under general international law as nationals of their home State.[9] Under human rights law, corporations also can have their claims heard before regional courts, particularly in regard to violations of the right to property.[10] This is done either through claims made by the corporations directly, as in the case

[6] James Crawford, *Brownlie's Principles of Public International Law* (Ninth edition, Oxford University Press 2019); *Barcelona Traction, phase II (Belgium v Spain)* (1970) I.C.J. Reports 1970 3 (International Court of Justice) [38–40].

[7] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Repr, Clarendon Press 2010) ch 3.

[8] Krista Nadakavukaren Schefer, *International Investment Law: Text, Cases and Materials* (Second edition, Edward Elgar Publishing 2016); *Salini Construttori SPA and Italstrade SPA v Kingdom of Morocco* [2001] International Centre for Settlement of Investment Disputes ARB/00/4, 42 ILM 609.

[9] *Barcelona Traction II* (n 6); *Elettronica Sicula S.pA (United States of America v Italy)* (1989) I.C.J. Reports 1959 15 (International Court of Justice); *Interhandel (Switzerland v United States of America)* (1959) I.C.J. Reports 1959 6 (International Court of Justice).

[10] Khoury (n 2).

of the European system,[11] or through shareholders who fall under the narrower definition of 'person' in the American Convention.[12]

On the flipside, corporations cannot be held responsible by international Courts, neither as such, nor in the figure of their executives and directors.[13] In particular, regional human rights Courts are only designed to hear cases against States. This despite evidence that corporate actors can be directly involved in human rights violations away from their home States and that domestic home State jurisdictions are hesitant in taking on such cases.[14] To account for this shortcoming, international human rights Courts have attempted to hold States responsible for failing their positive and due diligence obligations when corporate actors within their jurisdiction violate human rights.[15]

This chapter investigates how the Inter-American Court of Human Rights deals with situations of human rights abuses committed by corporate non-State actors through the concept of due diligence. Therefore, the following section (1.1) will explore the IACtHR's early case law, dictated by more loosely defined due diligence requirements and informed by its case law on other non-State actors (NSAs), such as paramilitary groups. Afterwards, section 1.2 will analyze the change brought in the Court's jurisprudence by the adoption of the United Nations Guiding Principles on Business and Human Rights, which are tailored to corporations as a distinct form of NSA. Finally, section 1.3 will discuss the legitimacy of the Court's use of the UNGPs and the impacts of the Principles in the Court's approach to the business and human rights field.

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[11] *Retimag SA v Federal Republic of Germany* [1961] European Court of Human Rights Application No 712/60, 4 Yearbook of the ECHR 384; *Société Colas Est and other v France* [2002] European Court of Human Rights Application No 37971/97. In the latter the case, the ECtHR extends the right to private life to the protection of a company's head office from governmental interference (at para. 41).

[12] *Advisory Opinion OC-22/16: Entitlement of legal entities to hold rights under the Inter-American Human Rights System* [2016] Inter-American Court of Human Rights OC-22/16, Series A No 22 [114]; *Cantos v Argentina (Preliminary Objections)* (2001) Series C No 85 (Inter-American Court of Human Rights) [29–30]; *Ivcher Bronstein v Peru (Merits, Reparations and Costs)* (2001) Series C No 74 (Inter-American Court of Human Rights). By extending protection to human shareholders, the IACtHR also extends rights beyond property such as freedom of expression as expressed in the latter case.

[13] Khoury (n 2); Panagiota Kotzamani, 'Corporate Criminality and Individual Criminal Responsibility in International Law: Removing the Hurdles from the International Criminal Court's Approach to Perpetration through Control of a Collective Entity' (2020) 20 International Criminal Law Review 1108.

[14] Stefanie Khoury, *Corporate Human Rights Violations: Global Prospects for Legal Action* (1st edn, Routledge 2016); Kotzamani (n 13).

[15] *Buzos Miskitos v Honduras* [2021] Inter-American Court of Human Rights OC-22/16, Series C No 432; Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (1st edn, Cambridge University Press 2021).

2.1 Early case law: the Court's approach to acts committed by non-State actors.

Since its first contentious case, the IACtHR has recognized the potential for NSAs to violate human rights.[16] However, the Court established that in those cases, States must act with due diligence to prevent the violation and, in case it occurs regardless, take all necessary steps to prosecute and punish the perpetrators and provide appropriate compensation for the victims or their relatives.[17] In that manner, the Court avoided complicated issues and strict standards concerning the attribution of NSA acts to States under general international law.[18] Instead, by dissecting human rights obligations into their negative and positive components, the IACtHR could adopt the due diligence standard for omissions by the State when there was a duty to act.[19] In other words, the *Velásquez-Rodríguez* case set the tone for the manner the Court understands the relationship between States and NSAs under their jurisdiction as not one of attribution, but rather a positive duty the State has to take measures to prevent and redress violations of human rights when it knows or ought to know that NSAs under their jurisdiction are responsible for them.[20]

A later stream of cases regarding the acts of paramilitary groups, primarily in Colombia, posed further challenges for the Court when it came to establishing the degree of due diligence the State ought to observe regarding acts of NSAs. In *Velásquez-Rodríguez*, the Court was dealing with acts committed by State agents, having recognized only in *obiter dictum* that the conclusion would have been the same had their membership been insufficiently proven due to the violation of the duty to investigate, prosecute and punish.[21] In the newer stream of cases, the question was to which degree the responsibility of the State was engaged through the acts of third parties.[22]

As modern literature suggests, due diligence obligations are informed by whether a violation was foreseeable, whether the State had the capacity to act to prevent the violation and

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[16] Nicolás Carrillo-Santarelli and Carlos Arevalo-Narváez, 'The Discursive Use and Development of the Guiding Principles on Business and Human Rights in Latin America' (2017) 15 International Law: Revista Colombiana de Derecho Internacional 61; *Velásquez-Rodríguez v Honduras (Merits)* (1988) Series C No 4 (Inter-American Court of Human Rights) [172].

[17] *Velásquez-Rodríguez* (n 16) para 174.

[18] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (1986) I.C.J. Reports 1986 14 (International Court of Justice) [115].

[19] *Corfu Channel (United Kingdom v Albania)* (1949) I.C.J. Reports 1949 4 (International Court of Justice).

[20] A distinction between the threshold of attribution and violation of positive due diligence obligations has been made by the ICJ in the *Genocide* case (*Genocide Convention (Bosnia and Herzegovina v Serbia)* (2007) I.C.J. Reports 2007 43 (International Court of Justice)). According to the ICJ, the threshold for a violation of the prevention obligation in the Genocide Convention was related to Serbia's "capacity to influence effectively" (at para 430) the acts committed by Serbian-nationalist militias in Bosnia, therefore more lax than the "effective control" standard for attribution in the *Nicaragua* case.

[21] *Velásquez-Rodríguez* (n 16) para 182.

[22] *'Masacre de Mapiripán' v Colombia* (2005) Series C No 134 (Inter-American Court of Human Rights).

whether it discharged reasonable efforts to prevent it.[23] The following cases will be addressed according to this framework to illustrate the approach the IACtHR has developed to each criterion in relation to different NSAs through the years.

In the first of those cases, the families of *19 Merchants* assassinated by a group of paramilitaries in Colombia brought a claim before the Court.[24] The salesmen were assassinated in October 1987, a time in which the paramilitary forces were already known to take part in criminal activities, but before Colombia declared those associations illegal under a 1989 act. Even though Colombian army officials took part in the meetings that decided to execute 17 of the salesmen, insufficient evidence as to the degree of official participation did not allow the Court to attribute the paramilitary actions directly to the State, therefore the Court shifted its reasoning to the violation of preventive (positive) duties by Colombia. The Court considered that because Colombia initially had contributed to the creation of those armed groups, there was a heightened due diligence obligation towards their actions during the time of the violation, thus Colombia was responsible for not having taken preventive action against a risk the State created.

Later, in the *Mapiripán Massacre* case, the Commission asked the Court to establish the responsibility of the Colombian State for a massacre of approximately 49 individuals in the Mapiripán municipality. However, the established facts pointed that the murders were not directly committed or planned by State agents, but rather by private paramilitary groups acting in the highly contested territory. Despite that, the Court went on to declare that Colombia was responsible for this massacre and the corresponding acts of torture and deprivation of liberty since the Colombian army had provided logistical and material support to the paramilitary groups by transporting them to the nearest airfield and allowing them past the military checkpoints in the area. In no part of the sentence does the Court consider Colombia to have the necessary degree of control (whether "overall" or "effective") over the paramilitary groups to trigger the attribution criteria under general international law. Nevertheless, it deems Colombia to be responsible for its lack of due diligence owing to the omission and contribution of its State organs, primarily the Army, once made aware of a threat to the rights to life and personal integrity of the people of Mapiripán.[25]

A few years later, the Court decides the *Pueblo Bello* case, in which the State of Colombia once again is deemed responsible to have violated the rights to life and physical integrity of peasants from the Pueblo Bello area after they were captured, tortured and executed by paramilitary groups acting under the command of a private landowner due to a dispute regarding stolen cattle by the Colombian Revolutionary Armed Forces (FARC).[26] The difference between this case and the previous *Mapiripán* case is that the Colombian army did not provide any form

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[23] Monnheimer (n 15).

[24] *19 Merchants v Colombia (Merits, Reparations and Costs)* (2004) Series C No 109 (Inter-American Court of Human Rights).

[25] *Mapiripán* (n 22) para 120; Monnheimer (n 15) 205.

[26] *'Pueblo Bello' v Colombia* (2006) Series C No 140 (Inter-American Court of Human Rights).

of material or logistical aid to the paramilitary groups, but simply failed to effectively guard the area surrounding a military outpost, where the trucks containing the captured victims sneaked through a hidden dirt road.

The previous cases demonstrate a turn in the jurisprudence of the Court from the idea of attribution of an NSA act to a State towards a concept of violation of positive duties through omission of State agents. In those cases, the standard of due diligence is employed to establish the degree to which the State ought to have been aware of the violations, or their likelihood, as well as the level of resources the State should have employed to prevent or redress the violations. Whereas in *Mapiripán* the State knew and contributed to the acts committed by the paramilitary groups, even though it did not exert any form of control over them, in *Pueblo Bello* the positive knowledge criterion is not fulfilled, as the army garrison patrolling the road checkpoint may not have seen the trucks, which may have taken a detour through an unguarded road.[27] However, the Court adopts a constructive knowledge standard according to which the garrison had a duty to be aware of this mobilization given the size of the paramilitary unit sent to the location and the reported conflicts between the FARC and paramilitary groups reported in the region.[28]

Furthermore, as to the obligation to take reasonable measures to prevent a violation, the Court in *Pueblo Bello* dismissed the government's arguments that it had taken all possible precautions in consideration of its available strategic assets to protect the region. There, the Court considers that the deciding factor was not related to any specific fact of the case, but to the general context of military operations in the region, which were tailored to prevent attacks from the FARC and other guerrilla groups, but did not consider paramilitary organizations.[29] This points to the conclusion that the Court's due diligence standard implicitly entails a duty on the part of State to not discriminate between different foreseeable threats.

Though directed to State failures of due diligence in conflict areas and in relation to paramilitary organizations, the general standard of due diligence developed in those cases was later used by the Court to inform its jurisprudence in cases involving other contexts and different NSAs. For example, in the *Sawhoyamaxa* case the Court used *Pueblo Bello* to set out the State's duty to prevent violations of the right to life.[30] In that case the State was condemned for violating the right to life of the Sawhoyamaxa people as it was aware of the poor living conditions the community was faced to deal with due to their conflict for land with corporate actors, which drove many indigenous people to the side of a road instead of their ancestral land. The Court considered that by not providing an adequate procedure for the Sawhoyamaxa community to reclaim ownership of its ancestral land, despite not having been directly responsible for

[27] ibid 138.

[28] ibid 139.

[29] ibid 134.

[30] *Sawhoyamaxa Indigenous Community v Paraguay,* (2006) Series C No 146 (Inter-American Court of Human Rights) [151 and 152].

driving them out of there, the State had failed to adopt all necessary measures to guarantee their survival capacity.[31] Likewise, the Court considered that the lack of healthcare provision by the State also violated its positive duty in relation to the right to life insofar as it concerned those victims who died of easily preventable diseases in view of the particular State of urgency in the Sawhoyamaxa community and the State's prior commitment through an emergency order to provide them with necessary healthcare.[32] The Court does not attribute to the State the responsibility for the illness-related deaths of three elderly individuals with previous respiratory issues, confirming that there must exist a provable link between the violation and the State failure to act.[33]

Likewise, in the *Yakye Axa* indigenous community case, Paraguay was sentenced for violating the right to life of the community due to the lack of actions taken to prevent the community from engaging in its traditional ways of life.[34] This case concerned primarily the relocation of the community from its ancestral lands by the Anglican Church since 1986 from lands it owned through the Chaco Indian Association since the late XIXth century.[35] Once again, though the State did not directly take part in the relocation of the community from its ancestral land, the Court considered it nevertheless had the duty to adopt measures to guarantee their return to living conditions in accordance their way of life, however, unlike in *Sawhoyamaxa,* the applicants could not prove sufficiently that the lack of State assistance led to 16 deaths in the community. [36]

These last two cases were sentenced before the adoption of the UNGPs, but nevertheless demonstrate that the IACtHR has declared a State responsible for violating the rights of indigenous peoples when private corporations or investors are responsible for driving them away from their ancestral territory. This can be further illustrated by the Court's *obiter dictum* in the *Sawhoyamaxa* case whereby it recognizes that obligations arising from a bilateral investment treaty should always be made compatible with the American Convention since it "is a multilateral treaty on human rights that stands in a class of its own".[37] The next section will analyze cases sentenced after the adoption of the UNGPs and identify in which ways the Court's stance on corporate due diligence has changed.

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[31] ibid 164–166.

[32] ibid 173.

[33] ibid 180.

[34] *Yakye Axa Indigenous Community v Paraguay,* (2005) Series C No 125 (Inter-American Court of Human Rights) 176.

[35] ibid 50.10 and 50.11.

[36] ibid 176.

[37] *Sawhoyamaxa* (n 30) 140; Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 European Journal of International Law 585.

2.2 The UNGPs as a guiding tool to interpreting the American Convention

From its 2015 decision in the *Kaliña and Lokono* case, the IACtHR started referencing the UNGPs in its case law.[38] That case concerned economic activities that threatened the populations' traditional way of life, such as the construction and subsequent rehabilitation of bauxite, sand and gravel mines by foreign companies, logging, illegal hunting, and urban development plans around their ancestral lands. The Court considered that although the granting of a mining license to the BHP Billiton-Suralco consortium was not a violation since it took place before Surinam adopted the American Convention, it was nevertheless the State's duty to prevent and mitigate human rights impacts in the operation of private corporations. In that passage, the Court made its first *in verbis* reference to the Guiding Principles.[39] State responsibility was established due to an omission in providing an independent environmental impact assessment ahead of granting the mining concession or supervising the one made later by the mining consortium.[40] The Court neither elaborates further on the UNGPs' role in interpreting the Convention, nor develops its previous case law on the need for impact assessments to guarantee free, prior and informed consent from indigenous communities in the context of development and infrastructure projects.[41] However, as a commentator notices, the Court in *Kaliña and Lokono* ruled that the obligation to restore indigenous land should be taken jointly by the State and the company.[42]

The Court went on to use the UNGPs as an interpretive framework in further cases. Notably, it made developments regarding UNGP implementation in cases relating to labor rights. In the *Fireworks Factory* case, where Brazil was sentenced for not having duly monitored the working conditions in a firework factory that exploded due to poor safety standards leading to the death of 60 people, the principles were referenced to support the interpretation that "the State was under a duty to regulate, oversee and monitor work safety conditions".[43] In his separate opinion to this case, judge Ferrer MacGregor-Poisot observes that although the UNGPs had been previously noted by the Court, this was the first time they were used to further the Court's standard of due diligence.[44] In specific, the Court had for the first time extended due diligence into a specific duty to oversee and monitor corporate labor practices, which flows

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[38] *Kaliña and Lokono communities v Surinam (Merits, Reparations and Costs)* (2015) Series C No 309 (Inter-American Court of Human Rights) 224.

[39] ibid.

[40] ibid 216.

[41] *Saramaka community v Surinam (Interpretation on the Sentence of Merits, Reparations and Costs)* (2008) Series C No 1855 (Inter-American Court of Human Rights) 41; *Kichwa of Sarayaku Indigenous Community v Ecuador (Merits and Reparations)* (2012) Series C No 45 (Inter-American Court of Human Rights) 206.

[42] Alejandra Gonza, 'Integrating Business and Human Rights in the Inter-American Human Rights System' (2016) 1 Business and Human Rights Journal 357; *Kaliña and Lokono* (n 38) 190.

[43] *Workers of the Fireworks Factory in Santo Antônio de Jesus v Brazil (Preliminary Exceptions, Merits, Reparations and Costs* (2020) Series C No 407 (Inter-American Court of Human Rights) [149 and 150].

[44] *Fireworks Factory* (n 43), Separate Opinion of Judge Eduardo Ferrer MacGregor-Poisot paras. 10 and 11.

from Principles 3(a) and 5 of the UNGPs,[45] despite the State's existing regulatory framework on firework factories and work safety, and that the factory had a valid license to operate.[46] In fact, the existence of a legal framework addressing oversight of labor practices and the prior accreditation of the factory were interpreted as factors heightening the due diligence obligation of the Brazilian State.[47]

Later, the IACtHR solidified the application of the UNGPs in labor rights cases through its advisory opinion *OC-27/21 on Union Rights*.[48] In this decision, the Court refers to the *Fireworks Factory* case as well as the UNGPs to reinforce the conclusion that under the Convention there exists an overarching State duty to regulate, oversee and monitor working conditions through periodical labor inspections included within the Court's doctrine of due diligence.[49] Although this conclusion had been reached before in the contentious jurisdiction, recognizing it through an advisory opinion casts a wider net and, although non-binding, generates an authoritative interpretation of Convention standards for all American States.[50] Furthermore, it dispels the doubt on whether the duties to oversee and monitor are derivative from the State's enhanced due diligence standard once it grants an operating license to the corporation engaging in a risky activity, as was the case in the *Fireworks Factory* sentence.

In *Buzos Miskitos*, the Court directly addressed BHR in connection to the UNGPs, in particular it dedicates a preliminary chapter on corporate responsibility for human rights violations, thus addressing Pillar II of the UNGPs (corporate responsibility to respect) instead of focusing on Pillar I (State responsibility to protect) and the due diligence obligation of States alone.[51] The case concerned the responsibility of the State of Honduras for violating the right to life, integrity and work of a community of over 9,000 lobster fishermen working under hazardous conditions in the department of Gracias a Dios. The Court reiterates that its primary competence is to establish the responsibility of States for Convention violations, but that this includes the responsibility to take positive actions to guarantee that companies adopt due

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[45] Principle 3(a) of the UNGPs states that: "In meeting their duty to protect, States should: (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps." Principle 5 reads: "States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights." UNHRC, 'UNGPs' (n 1).

[46] *Fireworks Factory* (n 43) paras 133 and 134.

[47] ibid 133.

[48] *Advisory Opinion OC-27/21: Rights to freedom to organize, collective bargaining, and strike, and their relation to other rights, with a gender perspective* [2021] Inter-American Court of Human Rights OC-27/21, Series A No 27.

[49] ibid 122.

[50] Cecilia Bailliet, 'The Strategic Prudence of the Inter-American Court of Human Rights - Rejection of Requests for an Advisory Opinion' (2018) 15 Revista de Direito Internacional 254; Jorge Contesse, 'The Rule of Advice in International Human Rights Law' (2021) 115 American Journal of International Law 367.

[51] *Buzos Miskitos* (n 15) 42.

diligence measures, also including possible affectations to economic, social and cultural rights.[52] Namely, the Court calls upon States to take action in ensuring that companies under their jurisdiction adopt:

> "a) appropriate policies for the protection of human rights;
> b) due diligence processes for the identification, prevention and correction of human rights violations, as well as to ensure dignified and decent work; and
> c) processes that allow the company to remedy human rights violations in connection to their activity, especially when they affect persons in poverty or belong to vulnerable groups".[53]

Furthermore, the Court indicated that the primary responsibility falls under corporations and that they should adopt due diligence measures on their own account with a special duty to monitor human rights impacts continuously.[54] In the same paragraph, the Court notes that the corporate responsibility to respect human rights includes an obligation by businesses to implement preventive and mitigation measures addressed at diminishing their activities' negative impacts on workers and communities' rights, as well as the environment.[55] Although this passage is an *obiter dictum*, since the Court could not have ruled on the international responsibility of a corporation due to its mandate, nor did it rule on the right to a healthy environment in this case, it had implications on the reparations ordered by the Court. One of the guarantees of non-repetition ordered included an obligation for the State to adopt regulations that mandate "fishing companies to adopt human rights policies, due diligence processes, and processes to remedy human rights violations" and established that vessel certification and financing of oversight mechanisms is a corporate responsibility.[56] Moreover, the Court decided that Honduras should designate an authority to ensure compliance with the judgement with the involvement of affected communities and the fishing companies.[57] Although those reparations do not establish direct obligations for companies, they involve them in the reparation process alongside the State.

The Court's last case with reference to the UNGPs, *Vera Rojas*, concerned the termination of an insurance plan for home medical care to a girl afflicted by Leigh syndrome, a rare disease that causes progressive nerve tissue damage.[58] The termination of this type of care,

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[52] ibid 46 and 48.

[53] ibid 49.

[54] ibid 51.

[55] ibid 51; Inter-American Juridical Committee, 'Guidelines Concerning Corporate Social Responsibility in the Area of Human Rights and the Environment in the Americas'.

[56] *Buzos Miskitos* (n 15) para 138.

[57] ibid 159.

[58] *Vera Rojas et al v Chile (Merits, Reparations and Costs)* (2021) Series C No 439 (Inter-American Court of Human Rights).

necessary for the girl's life and health, happened due to the approval of Circular IF7/No7 of the Chilean Health Superintendency, which disobliged insurance providers to offer home care for chronic illnesses in their policies. The Court understood that the State had a heightened due diligence obligation insofar as the provision of health services constitutes a public good.[59] In order to attribute State responsibility, the IACtHR first established that the healthcare providers knew there was a severe risk to the health, life and integrity of Ms. Vera Rojas upon the termination of the policy coverage for home care, the Court then investigated the role that Circular IF7/No7 played in allowing for that decision.[60] Thus, the Court ruled that Chile violated the American Convention due to a deficiency in the regulatory framework to address the obligation of healthcare providers to respect the rights to life, decent life, personal integrity, health, social security and rights of the child. Although the decision to terminate the coverage was done by a corporation, the State was still held responsible for failing to properly regulate the acts of private companies that affect human rights, an interpretation arising from a UNGP informed reading of the Convention.[61]

The cases described in this section showcase how the UNGPs informed the Court's decisions over time. Although in its first case a mention was made to the Principles without much further elaboration on its impact in the interpretation of the Convention, the Court showed considerable development in the last few years starting with the *Fireworks Factory* case, which actively saw the UNGPs used to incorporate a new "duty to oversee and monitor" in the general due diligence requirements set forth in the Court's previous case law. That duty was further developed and broadened in *Advisory Opinion OC-27/21*. More recently, *Buzos Miskitos* and *Vera Rojas* solidified the State's duty to encourage human rights compliant behavior of private companies and recognized that the primary duty to respect lies with private actors. Particularly, in the *Buzos Miskitos* case the Court recognized, albeit in *obiter dictum*, companies' primary duties to prevent and mitigate environmental damages arising from their operations. Likewise, remedies were directed for the State to obligate corporations to adopt due diligence requirements and in *Vera Rojas* the Court applied its understanding of the duty to regulate corporate activity in a case concerning the right to health in its individual formulation.

2.3 Challenges and implications of adopting the UNGPs in the IACtHR jurisprudence

In spite of the developments illustrated in the section above, the IACtHR has a mandate to interpret and apply the Convention that only goes so far as violations by the State Parties

[59] ibid 89.

[60] ibid 129 and 130.

[61] ibid 88. See Principle 3 (b) specifically addressing the obligation of States to enact laws and policies to encourage corporate respect with human rights. The conclusion reached by the Court seems to fit into the same logic.

who have accepted its compulsory jurisdiction are concerned.[62] Although in certain cases the Court's jurisdiction may extend to other treaties, that is the exception rather than the rule.[63] Nevertheless, as highlighted by the use the Court makes of the UNGPs, there is margin for the use of soft law instruments in giving meaning to the Convention as a living instrument.[64] However, when referencing externally to the UNGPs as an authoritative source for the interpretation of the Convention, the Court faces two problems.

First, although the UNGPs state that companies are responsible to protect human rights, the Court's mandate is limited to establishing the international responsibility of State parties for human rights violations. Therefore, it could be argued that the UNGPs have not added anything substantial to the established doctrine the Court had on attributing responsibility for violations of positive State duties *vis-à-vis* actions of NSAs (including companies). Furthermore, because the way the Court uses external sources has sometimes been construed as overstepping its mandate, leading to resistance and backlash by American States, the reference to external soft law instruments may weaken both the Inter-American system and the UNGPs.[65]

Second, the UNGPs themselves do not contain hard obligations towards companies. In fact, the logic embedded in them is that they should not create any new obligations towards States, let alone ground any international legal obligations owed by corporate actors. As such, they leave ample space for topics such as international responsibility for acts of national companies abroad, lack a supervisory mechanism, and limit corporate responsibility to the negative aspect of the respect framework, excluding them from the positive duties of protection and fulfilment.[66] Thus, as some scholars argue, the reliance on the UNGPs as an external authoritative source for the Court's decisions may have the opposite effect of freezing the development of corporate obligations in human rights.[67]

As for the first issue, this chapter has argued that the practice of external reference to the UNGPs has indeed changed the Court's understanding of BHR issues. *Kaliña and Lokono* decided on a shared duty between State and business to restore indigenous land, *Fireworks Factory* established the duty to monitor and oversee compliance with workplace health and

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[62] American Convention on Human Rights, art. 62

[63] *Advisory Opinion OC-1/82: "Other treaties" subject to the consultative jurisdiction of the Court (Art 64 American Convention on Human Rights)* [1982] Inter-American Court of Human Rights OC-1/82, Series A No. 1. San Salvador Protocol, art. 19 (6). Inter-American Convention on Forced Disappearances, art. XIII

[64] Gerald L Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 European Journal of International Law 101; María Carmelina Londoño-Lázaro, Ulf Thoene and Catherine Pereira-Villa, 'The Inter-American Court of Human Rights and Multinational Enterprises: Towards Business and Human Rights in the Americas?' (2017) 16 The Law & Practice of International Courts and Tribunals 437; Carrillo-Santarelli and Arevalo-Narváez (n 11); Tainá Garcia Maia, 'Beyond the American Convention on Human Rights: An Analysis of the Role of External Sources as a Tool for the Evolutive Interpretation of the American Convention' (Master thesis, 2018).

[65] Neuman (n 64).

[66] Khoury (n 2).

[67] Carrillo-Santarelli and Arevalo-Narváez (n 16).

safety requirements, *Buzos Miskitos* positioned companies as the primary duty-bearers to prevent, mitigate and remedy human, social and environmental impacts caused in their activities, and *Vera Rojas* established that the duty to regulate also applies for rights in their individual sphere. The Court has relied on the UNGPs in all those cases to center business activity rather than State omission as one of the main sources of human rights violations, a practice all too shy in the Court's earlier cases on business and human rights, which demonstrated a State-centric approach to international responsibility.[68]

Furthermore, although in some cases external referencing can lead to the creation of obligations that certain States perceive to be *ultra vires* or illegitimate, the use of the UNGPs has so far not encountered much resistance among State parties. On the contrary, they seem to have to have solidified the Court's authority in addressing corporate human rights violations, considering that before the UNGPs, the IAS came under heavy backlash for a precautionary measure issued by the Commission ordering Brazil to halt the development of the Belo Monte hydroelectric dam.[69] It is worth noting that Brazil has reported twice on the compliance with the *Fireworks Factory case* in 2022, demonstrating a change of behavior in relation to the *Belo Monte* precautionary measure.[70] Likewise, *Fireworks Factory*, *Buzos Miskitos* and *Vera Rojas* concerned States that were, at the time of sentencing, actively engaging with the business and human rights agenda through the development or implementation of National Action Plans on Business and Human Rights (NAPs).[71] Both the practice of external referencing, and the appropriate political climate can explain the contrast in perceived legitimacy between the frictionless external referencing to the UNGPs and the early pushback on cases involving corporate responsibility.[72]

As for the second contention, although it is true that the UNGPs were conceived as a non-binding instrument and that they purposefully lack a mandatory supervisory mechanism, so far, the decisions of the IACtHR have precisely filled this gap. As the four judgments enter their phase of compliance supervision, the Court can "give teeth" to the Principles through the continued observation on the compliance with remedies such as those ordered in *Buzos Miskitos* and *Vera Rojas*. Moreover, the Court's progressive *pro homine* doctrine of interpretation is not

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[68] *Yakye Axa* (n 34); *Sawhoyamaxa* (n 30).

[69] Vinodh Jaichand and Alexandre Andrade Sampaio, 'Dam and Be Damned: The Adverse Impacts of Belo Monte on Indigenous Peoples in Brazil' (2013) 35 Human Rights Quarterly 408.

[70] Brazil, 'Caso Fábrica de Fogos. Sentença. Relatório Estatal de Cumprimento.' (Ministério das Relações Exteriores 2022) 2.

[71] Danish Institute for Human Rights, 'National Action Plans on Business and Human Rights (Chile)' (*Globalnaps*) <globalnaps.org/chile> accessed 7 February 2023; Danish Institute for Human Rights, 'National Action Plans on Business and Human Rights (Honduras)' (*Globalnaps*) <globalnaps.org/honduras> accessed 7 February 2023; Danish Institute for Human Rights, 'National Action Plans on Business and Human Rights (Brazil)' (*Globalnaps*) <globalnaps.org/brazil> accessed 7 February 2023.

[72] For a more nuanced discussion on perceived (sociological) legitimacy of international courts, Nienke Grossman and others (eds), *Legitimacy and International Courts* (1st edn, Cambridge University Press 2018)

likely to produce a "freezing" effect that overreliance on the UNGPs could lead to, making it more likely to adopt the Principles in complementarity to a wider net of human rights norms.[73] As new legal instruments are being discussed on the international business and human rights sphere, such as mandatory due diligence laws,[74] a binding treaty,[75] and a framework convention,[76] it is more plausible that stronger business obligations will be reflected in the IACtHR's jurisprudence.

Finally, the small number of cases in which the Court referenced UNGPs implies that there is still ample room for the Court to develop their effect on the contours of corporate responsibility for human rights violations. As discussed, the *Buzos Miskitos* sentence mentioned, in *obiter dictum*, that companies have a duty to prevent and mitigate possible negative impacts their activities have on the environment, which can be important foreshadowing for the Court's future BHR jurisprudence in line with the current political priorities in the BHR sphere.[77] The next Chapter will analyze current developments on the IACtHR's jurisprudence on the right to a healthy environment. The final Chapter will tentatively analyze the *Tagaeri and Taromenane* case as a possible bridge between BHR and the RHE in the Court's upcoming jurisprudence.

3 The right to a healthy environment in the Inter-American Court of Human Rights

International environmental law and human rights law are traditionally understood as two distinct regimes of international law.[78] Each has developed at different paces, in different times, and through different instruments. Currently, no international court with an explicit mandate to rule on environmental obligations exists, and most cases concerning international

[73] Surya Deva, 'The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface' (2021) 6 Business and Human Rights Journal 336.

[74] Gabriela Quijano and Carlos Lopez, 'Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?' (2021) 6 Business and Human Rights Journal 241.

[75] UNHRC, 'Report on the Eighth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (n 4).

[76] Claire Methven O'Brien, 'Transcending the Binary: Linking Hard and Soft Law Through a UNGPS-Based Framework Convention' (2020) 114 AJIL Unbound 186.

[77] UNHRC, 'Report on the Eighth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (n 4) para 2; *Buzos Miskitos* (n 15) para 51.

[78] Christopher Campbell-Duruflé and Sumudu Anopama Atapattu, 'The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law' (2018) 8 Climate Law 321.

environmental law have been argued before national courts,[79] with some exceptions concerning specific issues, such as transboundary pollution[80] and the protection of maritime biodiversity.[81]

Yet, some human rights treaties contain a right to a healthy environment but lack a judicial or quasi-judicial mechanism with the explicit task to interpret and apply this right.[82] Likewise, the right to a healthy environment has been recognized in several soft law instruments, and recently unanimously acknowledged by the UN Human Rights Council and ratified by the UN General Assembly (UNGA).[83] This trend points to a convergence between the environmental law and human rights regime, a trend which has seen cautious, but significant development in the jurisprudence of the IACtHR, particularly through the introduction of *Advisory Opinion OC-23/17 on the Environment and Human Rights* and the sentence on the *Lhaka Honhat Community v. Argentina* case.[84]

Despite the growing recognition of the right to a healthy environment in national and international law, companies still make up the minority of defendants in climate litigation cases domestically,[85] and due to the jurisdictional barriers identified in Chapter 1, not a single case before an international court or quasi-jurisdictional body concerning the right to a healthy environment has been brought by individuals against a company.[86] And although States have been sentenced in cases where corporations or other private business actors were conducting operations that led to environmental harm,[87] and quasi-jurisdictional bodies have made links between

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[79] As of the submission of this thesis, more than 2000 climate change litigation cases were registered in the largest database on international climate litigation, only 113 of which in international courts and supervisory mechanisms, more than half of those (62) before EU bodies. This does not concern the entirety of environmental law cases, as it excludes cases solely concerned with other environmental themes such as water pollution and protection of biodiversity. Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2022 Snapshot' (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy 2022). On the difficulties to argue climate cases before international Courts see Meguro (n 2).

[80] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (2010) I.C.J. Reports 2010 14 (International Court of Justice).

[81] *Import Prohibition of Certain Shrimp and Shrimp Products (United States)* [1998] World Trade Organization Appelate Body AB-1998-4, WT/DS58/AB/R.

[82] For example, Art. 11 of the Protocol of San Salvador, Art. 7 of ILO Convention No. 169, and Art. 24 of the African (Banjul) Charter on Human and People's Rights. For a more comprehensive review of the right to a healthy environment in different regional systems, see Sanzana Pavez and Gabriela Paz, 'The Justiciability of the Human Right to a Healthy Environment in the African and Inter-American System' (Master thesis, 2019).

[83] UNHRC, 'The Human Right to a Clean, Healthy and Sustainable Environment' (United Nations Human Rights Council 2021) A/HRC/RES/48/13; UNGA, 'The Human Right to a Clean, Healthy and Sustainable Environment' (United Nations General Assembly 2022) Resolution A/76/L. 75.

[84] *Advisory Opinion OC-23/17: The Environment and Human Rights* [2017] Inter-American Court of Human Rights OC-23/17, Series A No 23; *Lhaka Honhat (Merits)* (n 3).

[85] Setzer and Higham (n 79).

[86] A single climate change case has been brought against a company by a State in an international Court, regarding the interpretation of the EU Directive 2003/87/EC on greenhouse gasses (GHGs) emissions allowance, see *Federal German Republic v Nordzucker AG* [2015] European Court of Justice C-148/14.

[87] *Kichwa of Sarayaku* (n 41); *Sawhoyamaxa* (n 30).

the corporate responsibility to respect human rights and the right to a healthy environment,[88] this link is not explicit in the UNGPs and has not yet translated into a sentence by an international court, establishing the international responsibility of a State.[89]

This chapter will articulate the development of the right to a healthy environment in the case law of the IACtHR in other to identify and structure cross-cutting themes with the BHR jurisprudence. It is structured in three sections: First (3.1), it sketches an overview of the development of economic, social and cultural rights (ESCRs) justiciability in the IACtHR; Second (3.2), it expands on the existing jurisprudence of the IACtHR on the RHE; Third (3.3), it elaborates on articulating RHE and BHR in light of new developments to improve the arguments for justiciability before the IACtHR.

3.1 Development of the doctrine of justiciability of Economic, Social and Cultural Rights in the Inter-American Court.

Neither the American Convention on Human Rights (ACHR), nor the Declaration contain an explicit provision recognizing the right to a healthy environment. The only mention of the right in a human rights treaty in the region is Article 11 of the 1999 Protocol of San Salvador on Economic, Social and Cultural Rights (PSS). However, the treaty does not contain any clause providing for the jurisdiction of the IACtHR over that right, as those are restricted by Article 19(6) for the rights contained in Articles 8(a) (right to participate in a worker's union), and 13 (right to education). Furthermore, the Protocol was only ratified by 18 States, less than the 24 ACHR State-parties.[90]

As such, the right remained unrecognized as autonomously justiciable for a long time in the IAS petition and case system. Although there were cases in which environmental damage was indirectly linked to violations of other rights, such as life[91] and property,[92] the hurdle posed by the PSS was deemed to exclude any ESCR other than those mentioned in Article 19(6) to be

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[88] *La Oroya* (n 3).

[89] For an in-depth discussion on the existing links between the corporate responsibility to protect and the right to a healthy environment in the extractive sector in Latin America, see Daniel Iglesias Márquez, 'El derecho a un medio ambiente sano ante el extractivismo en las Américas: el alcance de los estándares interamericanos sobre empresas y derechos humanos' (2021) 2021 Revista Electrónica de Estudios Internacionales <http://www.reei.org/index.php/revista/num41/articulos/derecho-medio-ambiente-sano-ante-extractivismo-americas-alcance-estandares-interamericanos-sobre-empresas-derechos-humanos> accessed 27 February 2023.

[90] American Convention on Human Rights "Pact of San José, Costa Rica" (B-32), Signatories and Ratifications, Department of International Law, OAS: <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm> accessed 2 March 2023; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights "Protocol of San Salvador" Department of International Law, OAS: <http://www.oas.org/juridico/english/Sigs/a-52.html> accessed 2 March 2023.

[91] *Kichwa of Sarayaku* (n 41) para 46.

[92] *Saramaka community v Surinam (Preliminary Objections, Merits, Reparations and Costs)* (2007) Series C No 172 (Inter-American Court of Human Rights) [214].

justiciable. For example, in a 2005 petition by the Inuit Circumpolar Council against the United States for environmental damage relating to greenhouse gasses (GHG) emissions and climate change, affecting the Inuit traditional way of life, health, property, mobility, integrity and cultural rights, was rejected by Commission on the following year in a two-paragraph letter.[93] Osofsky argues that the petition articulated several complex and novel issues, including the interaction between the human rights and environmental law regimes, which may have contributed to its expeditious rejection.[94]

Nevertheless, later jurisprudence by the IACtHR started articulating ESCRs with traditional convention rights through a teleological and evolutionary interpretation of Article 26 of the ACHR concerning the duty of progressive development of ESCRs. Although Article 26 does not contain any concrete obligations *per se*, it alludes to the "the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."[95] According to some scholars, Article 26 would, at least, imply a justiciable duty of non-regression regarding ESCRs.[96]

This view was espoused by the IACtHR in the *Acevedo Buendía* case.[97] In it, 273 employees discharged from the Peruvian General Comptroller's Office brought a petition claiming that Peru's refusal to fully comply with a Peruvian Supreme Court judgment by withholding pensions owed from April 1993 to October 2002 violated the Convention.[98] Although the Commission restricted its claim to Articles 21 (right to property) and Article 25 (right to judicial protection), the petitioners extended the claim to Article 26.[99] The Court dismissed Peru's preliminary objection on the *ratione materiae* competence of the Court over the right to social security in light of Article 26.[100] In the merits, the Court considered, for the first time, that Art. 26 contains substantive, justiciable rights in the form of the obligation to not regress on ESCRs.[101] Despite this, it rejected the claim that Art. 26 was violated in the case since the matter *sub judice* concerned the non-payment of benefits as ordered by a national Court, not measures "adopted by the State that hindered the progressive realization of the right to

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[93] IACHR to Sheila Watt-Cloutier, 'Letter Concerning Petition No P-1413-05' (16 November 2006).

[94] Hari M Osofsky, 'The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights' in Hari M Osofsky and William CG Burns (eds), *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press 2009).

[95] Article 26, American Convention on Human Rights

[96] Laurence Burgorgue-Larsen, 'Part II Substantive Guarantees, Ch.24 Economic and Social Rights', *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press 2011).

[97] *Acevedo Buendía et al ("Discharged and Retired Employees of the Comptroller") v Peru* (2009) Series C No 198 (Inter-American Court of Human Rights).

[98] ibid 2.

[99] ibid 4.

[100] ibid 17.

[101] ibid 103.

pension".[102] As such, the Court did not need to rule on the justiciability of individual ESCRs, but rather just consider that the nature of the case was not conducive to their applicability, which according to *ad hoc* judge Shiyin García Toma made this an *obiter dictum* assertion.[103]

Further Article 26 jurisprudence before the Court still focused on individualizable ESCRs contained in the Charter of the OAS. For example, in *Lagos del Campo*, the first case to decide on a violation of Article 26 (8 years after *Acevedo Buendía*), the Court ruled that Peru had violated the right to labor of a worker representative for not providing judicial remedy after he was fired in 1989 due to a newspaper interview where he criticized the company's interference in the election of the industry council assembly.[104] The Court interpreted the rights contained in Article 26 through Articles 45.b and c, 46 and 34.g of the OAS Charter and Article XIV of the American Declaration, which prescribe aspects of the right to labor.[105] Only subsequently, when analyzing the right to freedom of association, does the Court refer to Article 19 (6) of the PSS, which gives it explicit jurisdiction over cases concerning the right to participate in a worker's union.[106] By treating the right to work in a different manner than the right to participate in a worker's union, the Court establishes that not only the rights explicitly stated in Article 19 (6) of the PSS are actionable, but also other ESCRs contained in the OAS Charter through Article 26. Furthermore, as pointed out by Judge Ferrer MacGregor Poissot, the case unlinked a violation of Article 26 to its collective aspect, as the Court conceived the right to labor as an individual entitlement of Mr. Lagos del Campo, rather than a general State duty to enact policy, legislation or direct resources to ESCR development.[107]

The decision on *Lagos del Campo* was not met without internal resistance. Two judges published concurring votes contesting the competence of the Court to rule on Article 26. In his partially dissenting opinion, judge Eduardo Vio Grossi argued that by interpreting Article 26 to include the justiciability of rights not originally enclosed in the Convention, the Court had exceeded State consent to jurisdiction. He argues that literal, systematic, and historical interpretations of the rule led to the conclusion that it was designed include a duty on States to nationally ensure the development of ESCRs, but not direct justiciability considering the different wording and placement of Article 26 in relation to the civil and political rights contained in the Convention. Moreover, he argued that States had the possibility to make those rights justiciable with the PSS, but explicitly chose to restrict justiciability under article 19(6).[108]

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[102] ibid 106.

[103] *Acevedo Buendía* (n 97), Concurring Opinion of Judge *ad hoc* Shiyin García Toma.

[104] *Lagos del Campo v Peru (Preliminary Exceptions, Merits, Reparations and Costs)* (2017) Series C No 340 (Inter-American Court of Human Rights).

[105] ibid 143.

[106] ibid 157.

[107] *Lagos del Campo* (n 104).

[108] ibid, Partially Dissenting Opinion of Judge Eduardo Vio Grossi.

Judge Sierra Porto argued that the interpretation on the justiciability of ESCRs represents a mutation in the content of the American Convention, rather than an evolutive interpretation in accordance with Article 19.[109] He points that the Court misused the precedent in *Acevedo Buendía*, where the Court mentioned justiciability as an *obiter dictum*, without mentioning which particular rights were violated.[110] In criticizing the Court's use of the method of evolutive interpretation, Sierra Porto thus argues that evolutive interpretation relies on the determination of a new scope for pre-existing rights in light of new circumstances, rather than the creation of new rights.[111] He argues that the Court resorted to an argument of constitutional mutation rather than evolutive interpretation, which would be beyond the Court's treaty-based mandate.[112]

The case also came in light of academic debate on the extent of justiciability of ESCRs before the Inter-American Court. Three major opinions stood out among Court commentators: those who opposed any direct justiciability of ESCRs outside of Article 19 (6) of the San Salvador Protocol; those who argued for limited jurisdiction over Article 26 rights; and those who argued for the justiciability of all ESCRs contained in the *corpus juris* of Inter-American human rights.

The first group resorted to more canonical interpretations of the ACHR under the general international law treaty interpretation regime as espoused in the abovementioned partially dissenting opinions.[113] Those commentators argue that the Court's decision in *Lagos del Campo* overreached the mandate established in the American Convention.[114] They resort to historical interpretations in the drafting of the Convention, considering how an explicit list of ESCRs was rejected in the drafting process, as well as proposals to extend the Court's jurisdiction to all the rights contained in the PSS. Furthermore, they agree with judge Sierra Porto that the Court relied heavily on evolutive interpretation, without duly considering traditional methods of treaty interpretation.[115]

The second group understood that the wording of Article 26 permitted the justiciability of rights beyond the American Convention but restricted to those also recognized in the Charter of the OAS. Their argument is based on the wording of Article 26, where there is a direct

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[109] ibid, Partially Dissenting Opinion of Judge Humberto Antonio Sierra Porto, 42.

[110] ibid 39.

[111] ibid 41.

[112] ibid 42.

[113] Manuel E Ventura Robles, 'Impacto de las reparaciones ordenadas por la Corte Interamericana de Derechos Humanos y aportes a la justiciabilidad de los derechos económicos, sociales y culturales' (2012) 56 Revista del Instituto Interamericano de Derechos Humanos 139; James L Cavallaro and Emily J Schaffer, 'Less as More: Rethinking Supernational Litigation of Economic and Social Rights in the Americas' (2004) 56 Hastings Law Journal 217; Maria Valentina de Moraes and Mônia Clarissa Hennig Leal, 'Casos Lagos Del Campo X Acevedo Buendía: Nova Interpretação da Corte Interamericana de Direitos Humanos Quanto à Justiciabilidade dos Direitos Sociais?' (2022) 19 Direito Público.

[114] Moraes and Leal (n 113).

[115] Cavallaro and Schaffer (n 113).

reference to ESCRs contained in this instrument. Taking this as a starting point, they pose that the obligations concerning the progressive development in the fields of education, labor rights and social assistance and culture contained in Articles chapter 7 of the OAS Charter would be justiciable.[116] In light of the wording of Article 26, however, they deny that references to the American Declaration would suffice to substantiate the justiciability of an ESCR under Article 26.[117] When it comes to the scope of justiciability, scholars in this group diverge on whether progressive development is a justiciable duty *per se*[118] or whether a link to an individual harm has to be proven under the general obligations to protect, respect, ensure and fulfill of Articles 1 and 2 of the ACHR.[119]

The third group goes beyond the justiciability of Charter rights and argues that Article 26 should be read under the light of the entire body of human rights law concerning ESCRs in the Americas. They take the view that Article 29 of the Convention, if read in conjunction with Article 31.3(c) of the Vienna Convention on the Law of Treaties, empowers the Court to consider "any relevant rules of international law applicable in the relations between the parties". This entails the justiciability of all ESCRs, including those contained in the San Salvador Protocol that fall outside the scope of justiciability in Article 19(6). Scholars in this group, such as those associated with the *Ius Constitutionale Commune en América Latina* (ICCAL) thought,[120] also tend to agree that the justiciability of ESCRs is not limited to the duties of progression and non-regression, but rather can be autonomously violated even in the absence of State policy that has a general effect on those rights. In this sense, the third group understands ESCR justiciability as including individual entitlements.[121]

The *Lagos del Campo* case, as illustrated by the separate opinion of Judge Ferrer Mac-Gregor, demonstrated a victory for the advocates of the more moderate and expansive views. Further cases, such as *Fireworks Factory*, *Buzos Miskistos* and *Vera Rojas,* discussed in the foregoing chapter, also developed Article 26 jurisprudence in fields such as the rights to health and labor in relation to corporate responsibility. Nevertheless, the right to a healthy environment still presented challenges since it falls outside the scope of rights that can be clearly implied

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[116] Julieta Rossi and Víctor Abramovich, 'La tutela de los derechos económicos, sociales y culturales en el artículo 26 de la Convención Americana sobre Derechos Humanos' (2007) 9 Estudios Socio-Jurídicos 34; Tara J Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' in Malcolm Langford (ed), *Social Rights Jurisprudence* (1st edn, Cambridge University Press 2009).

[117] Rossi and Abramovich (n 116) 48.

[118] Rossi and Abramovich (n 116).

[119] Melish (n 116).

[120] Armin von Bogdandy and René Urueña, 'International Transformative Constitutionalism in Latin America' (2020) 114 American Journal of International Law 403.

[121] Óscar Parra Vera, 'La justiciabilidad de los derechos económicos, sociales y culturales en el Sistema Interamericano a la luz del artículo 26 de la Convención Americana. El sentido y la promesa del caso Lagos del Campo' in Eduardo Ferrer Mac-Gregor, Mariela Morale Antoaniazzi and Rogelio Flore Pantoja (eds), *Inclusión, ius commune y justiciabilidad de los DESCA en la jurisprudencia interamericana: el caso Lagos del Campo y los nuevos desafíos* (Instituto de Estudios Constitucionales del Estado de Querétaro 2018).

from the Charter of the OAS. The next section will discuss the strategies the Court used in developing a doctrine of justiciability for these rights, with an emphasis on the use of *Advisory Opinion OC-23/17* on human rights and the environment as a hook to the *Lhaka Honhat* case, the first case that declared the violation of the right to a healthy environment by a State party.

3.2 Developing the justiciability of the right to a healthy environment: from advisory to contentious jurisdiction

The IACtHR's advisory function is the broadest of all human rights Courts and its practice precedes contentious cases.[122] All State parties and organs of the OAS are entitled to request an advisory opinion under Article 64 of the American Convention, concerning the interpretation of the Convention, its Protocols or "other treaties" binding to the State Parties.[123] Not unlike advisory jurisdiction in other Courts, the resulting opinions are non-binding and attribution of legal responsibility to a State on contentious issues is beyond the scope of the Court's jurisdiction. Nevertheless, advisory opinions are authoritative and contentious cases often refer to them to clarify questions of interpretation of the ACHR.

Scholars have suggested that the use of advisory opinions can be fruitful in developing the Court's jurisprudence while providing a cushion for potential resistance and backlash. The non-contentious and participative nature of the procedure welcomes dialogue and is less likely to be perceived as a finger-pointing exercise. Contesse, for example, highlights the role of advisory opinions in changing State behavior to avoid a future sentence, what he calls "anticipatory adjudication".[124] Nevertheless, as Bailliet accurately points out, they should still be thought through strategically, lest States might perceive the mechanism as a shortcut from the usual contentious route.[125]

In 2017, the IACtHR issued its *Advisory Opinion OC-23/17* on human rights and the environment. The opinion was met with praise by environmentalists and paved the way, three years later, to the *Lhaka Honhat* case, the first in international jurisprudence to declare the violation of the human right to a healthy environment. Understanding the path through which this opinion gave way to the justiciability of the right can illustrate one of the paths available for the Court to further develop the right in relation to corporate violations.

3.2.1 The Advisory Opinion OC-23/17 on human rights and the environment

[122] Laurence Burgorgue-Larsen, 'Ch.4 Advisory Jurisdiction' in Amaya Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press 2011).

[123] *OC-1/82* (n 63).

[124] Contesse (n 50).

[125] Bailliet (n 50).

In March 2016, Colombia asked the Court to rule on the meaning of the term 'jurisdiction' in Art. 1(1) of the American Convention in relation to marine environment protection treaties when a State party bound by it is responsible for environmental damage that causes damage to life or personal integrity.[126] Following concerns that the Court may judge the case too closely to a case between Colombia and Nicaragua already under litigation at the International Court of Justice (ICJ), it decided to reformulate the question to encompass all situations in which extraterritorial jurisdiction would be applicable for obligations relating to the environment, not only those concerning maritime environment treaties.[127]

Early in the opinion, the Court acknowledges the use of conventions establishing obligations commonly associated with the field of environmental law to interpret the American Convention. This, the Court states, derives from the provisions on systematic interpretation contained in the customary rules of treaty interpretation contained in the Vienna Convention on the Law of treaties.[128] Likewise, it is consistent with the Court's existing jurisprudence on the use of 'other treaties' containing human rights obligations and binding upon American States, as it decided in its first advisory opinion that those also include dispositions relating to human rights in treaties of a different nature.[129]

While classifying the categories of rights that the opinion will influence, the Court distinguished the RHE from other rights indirectly affected by environmental damage.[130] This was the first time in the Court's jurisprudence that the RHE was recognized as autonomous, deriving from Article 26 of the ACHR. Notably, the Court invoked Article 11 of the Protocol of San Salvador, but without mentioning the restrictions on justiciability included in Article 19 (6).[131] In order to argue that the right to a healthy environment is derivable from the OAS Charter, the Court relied on the concept of "integral development" contained in Articles 30 to 34 of the Charter, which do not explicitly mention environmental obligations. Nevertheless, the Court argued that the definition of "integral development" alluded to the concept of sustainable

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[126] *OC-23/17* (n 84) para 3.

[127] ibid 36. for an analysis on the implications of expanding the advisory function through the admissibility of this opinion, see Lucas Carlos Lima, 'The Protection of the Environment before the Inter-American Court of Human Rights: Recent Developments' (2020) 34 Rivista Giuridica Dell'Ambiente 495.

[128] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Art. 31 (3), c. More broadly, on the importance of a systemic (or integrative) approach to international law, see International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (United Nations Publications 2006) Report on the work of the fifty-eighth session A/61/10.

[129] *OC-1/82* (n 63). The Court has interpreted human rights related disposition in treaties such as the Vienna Convention on Consular Relations, see *Advisory Opinion OC-16/99: The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law* [1999] Inter-American Court of Human Rights Advisory Opinion OC-16/99, Series A No. 16.

[130] *OC-23/17* (n 84) para 64.

[131] ibid 56.

development, as elaborated by the OAS Executive Secretariat for Integral Development, and therefore contained an environmental element.[132]

In its analysis of the specific duties deriving from environmental claims, the Court states that there is a possibility to extend jurisdiction extraterritorially, in cases where the State has effective control over the activities that generated the harm, even if the impacts are felt extra-territorially, when there is a causal link between activity and the negative impact.[133] In relation to the obligation implied in the rights to life and integrity concerning environmental damage, as originally asked by Colombia, the Court describes detailed steps that States are to take in case an activity occurring under their jurisdiction presents a significant risk of environmental damage that could affect those rights.[134] Nevertheless, the Court accepts that such obligations may apply to other Convention protected rights, when they may be put in risk by environmental degradation.[135]

In relation to activities undertaken by NSAs, the Court has affirmed that all activities potentially harmful to the environment occurring under State jurisdiction entail, at a minimum, an obligation of means to ensure that it will not cause unnecessary harm to the rights to life and integrity, as well as an obligation to mitigate and redress the harms caused.[136] To not create an undue burden on State organs, however, the obligation is limited by the foreseeability of harm and the feasibility of the measures, taken into account the resources that each State may have at its disposition.[137]

The Court identified that States are under the duty to prevent environmental damage that may affect the rights to life and integrity,[138] cooperate with third States where there is the likelihood of transboundary harm,[139] and provide procedural safeguards to affected groups or individuals (which include access to information, public participation, and access to justice).[140] Those obligations are to be harmonized with the precautionary principle, namely that they are due even in the face of scientific uncertainty concerning the likelihood of harm.[141]

With regards to the justiciability of the right to a healthy environment, judges Sierra Porto and Vio Grossi presented a concurring opinion reinforcing their views on the non-justiciability of Article 26 derived rights, other than those explicitly contained within Article 19 (6)

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[132] The Secretariat mentions sustainable development as a goal in their website. OAS, 'Democracy for Peace, Security, and Development' (1 January 2013) <https://www.oas.org/en/sedi/about.asp> accessed 10 April 2023.

[133] *OC-23/17* (n 84) para 104.

[134] ibid 123–242.

[135] ibid 243.

[136] ibid 118.

[137] ibid 119.

[138] ibid 133.

[139] ibid 185.

[140] ibid 211.

[141] ibid 180.

of the Protocol of San Salvador.[142] Nevertheless, both judges voted in favor of the opinion, with judge Sierra Porto clarifying that although he disagrees with the majority's view on the justiciability of the right to a healthy environment, that was simply an *obiter dictum* and did not reflect on the operative paragraphs of the opinion.[143]

Yet, the opinion subtly nods to the group of scholars who argue for the expansive justiciability of ESCRs. Unlike in the *Lagos del Campo* case, where labor rights could be derived from dispositions contained under Chapter VII of the Charter of the OAS, that is not clear from the wording of the Charter when it comes to environmental protection. In referring to a definition of "integral development" elaborated by a department within the General Secretariat of the OAS, the Court relies on a less authoritative international source for interpreting the Charter, giving more weight to the existence of the right in domestic jurisdictions for justifying its autonomous nature within the American Convention.[144]

Despite this, the justiciability of the right to a healthy environment remained an *obiter dictum* within a non-binding advisory opinion. Although this was met with excitement by some advocating direct justiciability of environmental claims, it was still not certain that a direct violation of the right would be found.[145] With the *Lhaka Honhat* decision in 2020, the justiciability of the right to a healthy environment was finally decided by a hair-splitting majority of 4 judges, with 3 partially dissenting on this point.

3.2.2 The *Indigenous Communities of the* Lhaka Honhat *(Our Land) Association* v. *Argentina* case

On February 6, 2020, the Inter-American Court delivered a sentence against Argentina for violating, among others, the right to a healthy environment of approximately 132 indigenous communities members of the *Lhaka Honhat* association.[146] The communities, inhabiting the northwestern province of Salta, at the triple frontier with Paraguay and Bolivia, brought claims concerning the lack of recognition of their traditional ownership of land, resulting in the presence of non-indigenous settlers in the region, as well as resource exploration and development

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[142] *OC-23/17* (n 77), Concurring Opinions of Judges Eduardo Vio Grossi and Humberto Antonio Sierra Porto.

[143] ibid, Concurring Opinion of Judge Humberto Antonio Sierra Porto, para. 5.

[144] ibid 58. Scholars associated with expansive approach to Article 26 and ICCAL scholarship consider that the Inter-American System is an internationalized version of the collective constitutional identity of Latin America, thus giving weight to interpretations of the Convention base on the Inter-American *bloque de constitucionalidad*, see Armin von Bogdandy, 'Ius Constitutionale Commune En América Latina : Observations on Transformative Constitutionalism' (2015) 109 AJIL Unbound 109.

[145] Mónica Feria-Tinta and Simon C Milnes, 'International Environmental Law for the 21st Century: The Constitutionalization of the Right to a Healthy Environment in the Inter-American Court of Human Rights Advisory Opinion No. 23' (2019) 12 Anuario Colombiano de Derecho Internacional.

[146] Experts before the proceedings stated that the exact number of communities is difficult to pinpoint due to cultural practices of dynamic merge and separation of those communities, see *Lhaka Honhat (Merits)* (n 3) para 33.

projects occurring therein for a period of 35 years.[147] The Commission and the petitioners alleged a violation of the rights to communal property, freedom of movement and residence, a healthy environment, food, cultural identity, and judicial guarantees and protection.[148]

In relation to the right to a healthy environment, the petitioners alleged that the presence of non-indigenous settlers carrying out activities such as cattle farming, fencing and logging affected the local environmental balance, with permanent damage to local fauna and flora.[149] They alleged the State was aware of this activity and failed to take steps to prevent, mitigate, and redress the damage.[150] The Court recognized the right as justiciable for the first time in a contentious case by referencing the *obiter dictum* in the *OC-23/17* and replicating the same argumentation, namely that the right can be implied from the definition of "integral development" contained in the OAS Charter if the term is interpreted in accordance to the practice of OAS and other international organs, and with particular emphasis on the justiciability of the right in domestic legal orders.[151]

Moreover, the Court recognized the justiciability of the rights to food, water, and to take part in cultural life alongside it. It understood that the four rights are interrelated as the environmental damage caused by grazing, logging and fencing changed the environment in a manner that access to food and water became scarcer, leading to a change in cultural habits and modes of living by the indigenous communities.[152] The State of Argentina was sentenced for the violation of the four interrelated rights deriving from Article 26 as the Court deemed that the facts demonstrated it was aware of such activities by settlers, but did not take all necessary steps to effectively put a stop to them.[153] Thus, although the right to a healthy environment was recognized as both autonomous, justiciable and violated, in this case it was read in conjunction with other Article 26 rights.

The Court provided remedies for the violation of the RHE, a development concerning this right considering the non-remedial nature of advisory opinions. It separated the measures of reparation for the violation of the right to property from the measures relating to the interrelated Article 26 rights. A mix of direct (e.g., payment of costs and expenses)[154] and structural remedies (e.g., creation of an earmarked fund for the reestablishment of indigenous culture)[155] was ordered, but the obligations of NSAs in relation to the logging, cattle farming, and fencing activities was not addressed.

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[147] ibid 46.

[148] ibid 91.

[149] ibid 167.

[150] ibid 190.

[151] ibid 203, 206.

[152] ibid 284.

[153] ibid 287.

[154] *Lhaka Honhat (Merits)* (n 77), operative paragraph 16.

[155] *Lhaka Honhat (Merits)* (n 77), operative paragraph 13.

The Court ordered the State to produce a report and plan of action delimitating the actions necessary to preserve and guarantee access to water, food, and "to avoid the persistence of the loss or decrease in forestry resources"[156]. The Court did not condition the efforts towards their preservation to any direct benefit of the community, providing a link between a remedy and the right to a healthy environment in its collective dimension, that is, "a universal value that is owed to both present and future generations"[157] and not conditioned to violations of other rights or requiring a direct causal link with individualized rights-holders.

Five individual votes were appended to the decision. Judges Pazmiño Freire and MacGregor Poissot issued concurring opinions. The former stressed that subjecting the violation of ESCRs to civil and political rights would constitute an obstacle on the enjoyment of rights not authorized by the specific rules of interpretation under Article 29,[158] while the latter praised the Court's development on indigenous rights jurisprudence and highlighted how Argentina did not file a preliminary objection questioning the justiciability of the RHE.[159]

The other three judges issued partially dissenting opinions, all regarding the justiciability of ESCRs and the RHE. Judges Sierra Porto and Vio Grossi argued the same points in their opinions to the *Lagos del Campo* case regarding traditional rules of treaty interpretation, the distinction between existence and justiciability of a right and the omission on Article 19 (6) of the PSS and added that the addition of the right to water in a situation where neither the victims nor the Commission had argued it overstepped the jurisdictional limits imposed by the PSS and allowed the Court to indefinitely expand the charter of rights.[160]

Moreover, judge Pérez Manrique appended a novel opinion, arguing that violations of ESCRs should be justiciable whenever they happen simultaneously with violations of traditional Convention rights. This view implies that Article 26 rights would not be subject to indirect violation, but only made directly justiciable if the violation is connected to another right. Thus, he dissents on the autonomous justiciability of ESCRs in this case on the grounds that a more holistic approach would have been reached by analyzing such rights in relation to the right to property.[161]

Commentators drew criticism from both sides. Some considered that there was a missed opportunity to further clarify the obligations arising from a violation of the right to a healthy environment.[162] Conversely, others remained skeptical of the Court's increasingly expansive

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[156] ibid, operative paragraph 12.

[157] *OC-23/17* (n 84) para 59.

[158] *Lhaka Honhat (Merits)* (n 77), Concurring Opinion of Judge Patricio Pazmiño Freire, p. 5.

[159] *Lhaka Honhat (Merits)* (n 77), Separate Opinion of Judge Eduardo Ferrer MacGregor Poissot, para. 84.

[160] ibid, Partially Dissenting Opinion of Judge Humberto Sierra Porto paras. 8 and 9, Partially Dissenting Opinion of judge Eduardo Vio Grossi, para. 49.

[161] ibid, Partially Dissenting Opinion of Judge Ricardo Pérez Manrique, para. 15.

[162] Maria Antonia Tigre, 'Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina' (2021) 115 American Journal of International Law 706.

jurisprudence and its possible legitimacy risks.[163] The next section argues that new normative developments, including the UNGPs can help bridge the gap between both concerns, providing more solid normative ground for the justiciability of the right to a healthy environment while also offering a framework for more detailed obligations arising from its violation.

3.3 The justiciability of the RHE going forward

The dispute on the justiciability of the right to a healthy environment before the IACtHR may not be entirely over with the *Lhaka Honhat* decision. Even well-established legal precedent may be challenged by political factors such as changes in a Court's bench, as evidenced by the United States Supreme Court's decision to overrule abortion rights in *Dobbs v. Jackson*.[164] Therefore, stakeholders interested in preserving judicial developments must continue to provide improved legal arguments for their maintenance. This is even more true in split-majority decisions, such as the *Lhaka Honhat* decision on the point of justiciability of the RHE.

Chapter 2 has argued that the UNGPs have been used to establish more detailed obligations for States in their conduct *vis-à-vis* private actors and that this has been well received by States. In so doing, the Court has used them as interpretive guidance to established Convention rights, including rights derived from Article 26.[165] Nevertheless, the Court has not yet articulated the UNGPs with the RHE. Providing this articulation could have implications for justiciability arguments considering new developments.

In the cases noted above, the Court has decided that the OAS Charter must provide the basis for a justiciable ESCR. When referring to the right to a healthy environment in *Lhaka Honhat*, the Court pointed to the wording "integral development" and the practice of the OAS Executive Secretariat for Integral Development to infer that the term incorporates sustainable development with an environmental scope.[166]

Yet, as pointed out by the dissenting votes, the Court did not address Article 19 (6) of the PSS as a jurisdictional limitation, nor did it rule on the distinction between the existence and justiciability of a right.[167] Moreover, even if taking the justiciability of ESCR's for granted, the Court would still bear a high argumentative burden to ground it on the OAS charter, as environmental obligations are not explicitly mentioned in that instrument. Likewise, the

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[163] Diego Mejía-Lemos, 'The Right to a Healthy Environment and Its Justiciability before the Inter-American Court of Human Rights: A Critical Appraisal of the Lhaka Honhat v Argentina judgement' (2022) 31 Review of European, Comparative & International Environmental Law 317.

[164] *Dobbs v Jackson Women's Health Organization* [2022] Supreme Court of the United States 19-1392, 597 U.S.

[165] *Buzos Miskitos* (n 15); *Fireworks Factory* (n 43).

[166] *Lhaka Honhat (Merits)* (n 3) para 202.

[167] ibid, Partially Dissenting Opinion of Judge Humberto Sierra Porto paras. 8 and 9, Partially Dissenting Opinion of judge Eduardo Vio Grossi, para. 49.

expansive view on the Court's mandate espoused by some judges[168] and commentators[169] emphasizes the role of constitutional methods in interpreting the Convention and may create attrition between the Court and democratic States who may see their role as principal policymakers threatened.[170] Therefore, it is important to further refine arguments based on the law of treaties to establish a balance between recognizing the Court as a needed avenue for environmental litigation while ensuring its role is compatible with the mandate of a regional human rights Court.

In that sense, reviewing past scholarly discussion on the justiciability of Article 26 could provide the Court with valuable insights. Rossi and Abramovic's argued in a 2007 paper that the wording of Article 26 suggests that ESCRs are justiciable as an obligation of conduct and within the limits of the obligations recognized in the OAS Charter.[171] This position is more grounded in the traditional doctrine of sources in international law than the constitutionalist interpretations proposed by ICCAL scholars. Moreover, it is compatible with a view that although Article 19 (6) of the PSS only provides the jurisdictional basis for certain rights, it does not prohibit other ESCRs to be justiciable through Article 26. However, it cannot clearly articulate why the right to a healthy environment would be justiciable as the OAS Charter does not contain explicit environmental obligations or commitments.

Notwithstanding, some international developments can harmonize this view with the justiciability of the RHE. Importantly, the unanimous approval of the UNGPs as a framework for business responsibility, as well as the recent UNHRC and UN General Assembly resolutions recognizing the right to a healthy environment internationally,[172] and the approval of the sustainable development goals (Agenda 2030),[173] all point to State practice that indicates 'integral development' in the OAS Charter can only be understood with an environmental component that also applies to the conduct of economical actors within the jurisdiction of a State.

Such legal developments constitute subsequent practice of OAS member States that showcase that the term "development" must refer to sustainable development with the view to guarantee the RHE, including as it relates to the behavior of corporate NSAs.[174] Thus, the reference Article 26 makes to "the rights implicit (…) in the Charter of the Organization of American States" must recognize the right to a healthy environment is included therein in accordance

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[168] ibid, Separate Opinion of Judge Eduardo Ferrer MacGregor Poissot,

[169] von Bogdandy (n 144).

[170] Andreas Føllesdal, 'Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights' (2017) 15 International Journal of Constitutional Law 359.

[171] Rossi and Abramovich (n 116).

[172] UNHRC, 'The Human Right to a Clean, Healthy and Sustainable Environment' (n 83); UNGA (n 83).

[173] UNGA, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (United Nations General Assembly 2015) Resolution A/RES/70/1.

[174] ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (International Law Commission 2018) 2018, Vol. 2, Part Two.

to Article 31.3.b of the Vienna Convention on the Law of Treaties establishing subsequent practice as an authentic means of interpretation of the Charter of the OAS.

This Chapter has analyzed the IACtHR's jurisprudential development of the right to a healthy environment and identified some argumentative shortcomings concerning its justiciability. Likewise, it argued that the UNGPs alongside other *soft law* instruments can be used to improve the legal argumentation for the justiciability and applicability of the RHE to the conduct of business under the IAS. The following Chapter will then turn to the potential for articulating the UNGPs and the right to a healthy environment into a novel doctrine for corporate responsibility for environmental damage in the IAS.

4 Corporate responsibility for violation of the right to a healthy environment: prospects from the *Tagaeri and Taromenane* case

Despite the existence of separate doctrines on corporate responsibility and the connection between human rights and the environment through a justiciable right to a healthy environment, the Inter-American Court has so far only mentioned the intersection between both briefly in *obiter dicta* in the *Buzos Miskitos* case and the *OC-23/17*.[175] Nevertheless, activities with high environmental impact such as oil exploration, mining, farming, and fishing are more often than not carried out by private sector actors or State-owned enterprises. Therefore, considering the full scope of the right to a healthy environment requires careful consideration of the extent to which a State is responsible for the activities of private actors and how effective remedies can be designed to affect the conduct of businesses carrying out activities with high environmental impact. The *Tagaeri and Taromenane* case, currently at the last procedural stage before the IACtHR, offers a possible window into this paradigm. Part 4.1 will summarize the case as it stands and Part 4.2 will discuss the challenges and opportunities it presents for the development of corporate accountability for environmental abuses.

4.1 The Tagaeri and Taromenane *indigenous communities v. Ecuador* case

The Tagaeri and Taromenane indigenous groups are a subgroup of the Waorani ethnicity who live in a largely untapped rainforest area between the Yasuní and Curaray rivers within the southern Yasuní national park, in the northeastern Orellana province of Ecuador, extending into Peruvian territory.[176] After clashes with oil corporations and illegal loggers since the

[175] *Buzos Miskitos* (n 15) para 51. *OC-23/17* (n 84) para 155.

[176] It is disputed whether the Taromenane are a subgroup of the Waorani people, however ethnographic evidence seems to point to this conclusion, see David A Cordero Heredia and Nicholas Koeppen, 'Oil Extraction, Indigenous Peoples Living in Voluntary Isolation, and Genocide: The Case of the Tagaeri and Taromenane Peoples' (2021) 34 Harvard Human Rights Journal; *Tagaeri and Taromenane v Ecuador (Merits)* [2019] Inter-

beginning of the oil boom in the northeastern Orellana and Sucumbíos department in the late 1970s and 1980s, the Tagaeri and Taromenane peoples separated from other Waorani groups and became indigenous peoples in voluntary isolation (IPVIs).[177] The Tagaeri and Taromenane preserve a hunter-gatherer and migratory way of life, with families frequently moving settlements to the place of their ancestors, a lifestyle which echoes a relationship of respect between obtaining resources whilst preserving nature, reflecting their notion of "good life" (*sumac kawsay*).[178]

Notwithstanding, the many Waorani groups have engaged in internal violence since long before the first contact with non-Waorani.[179] This created a reputation which contributed to the perception of Waorani groups as savage and uncivilized and is reiterated by some Waorani as a "shield against state penetration and further colonization of their land".[180] Likewise, it has created a narrative that the killings are simply a form of indigenous justice, disregarding the influence of third-parties involved in the resource conflicts in the area.[181]

In light of this context, in 2006 representatives of Ecuadorian indigenous communities filed a petition before the IAS against Ecuador for the failure to grant a proper land title to the IPVIs and take measures to prevent three massacres, in 2003, 2006, and later in 2013 conducted by loggers and members of other Waorani groups against the IPVIs, leading to the death of dozens of them and the abduction of two underage girls.[182] The representatives claimed a violation of Article 26, but the right to a healthy environment was not explicitly mentioned in the initial request.[183] They argued that the violations happened as a result of economic activities carried out in the region surrounding the oil boom, especially illegal logging, and pointed to concessions granted to oil companies for surveying and exploration in the surrounding region without consultation with indigenous peoples.[184]

American Commission of Human Rights Report No. 152/19, Case 12.979, OEA/Ser.L/V/II.173 Doc. 167 [16]; Stine Krøijer, 'The Spear as Measure: Rage, Revenge Spear-Killing and the Transformation of Indigenous Citizenship in Ecuador' (2021) 32 History and Anthropology 78, 81. Insofar as the proceedings in the *Tagaeri and Taromenane v. Ecuador* case treat both groups indistinctly, and considering that the alleged violations concern both groups, they will be addressed as a single group throughout this thesis, unless otherwise specified.

[177] Matt Finer and others, 'Ecuador's Yasuní Biosphere Reserve: A Brief Modern History and Conservation Challenges' (2009) 4 Environmental Research Letters 034005.

[178] Heredia and Koeppen (n 176).

[179] Stephen Beckerman and others, 'Life Histories, Blood Revenge, and Reproductive Success among the Waorani of Ecuador' (2009) 106 Proceedings of the National Academy of Sciences 8134.

[180] Krøijer (n 176) 78.

[181] Heredia and Koeppen (n 176).

[182] The relevant companies are Petrobras, Petroamazonas, Petroproducción, Petroecuador and BGP. The activities happened around the "intangible zone", but in areas where IPVIs were likely to be found due to migratory patterns. *Tagaeri and Taromenane v Ecuador (Admissibility)* [2014] Inter-American Commission of Human Rights Report No. 96/14, Petition 422-06, OEA/Ser.L/V/II.153 Doc. 12 [2].

[183] ibid 3.

[184] ibid 21.

The State, on its part, did not contest the Commission's competence to rule on a claim regarding Article 26. Instead, it stated that the creation of an intangible zone for the IPVIs, as well as a protocol for unwanted contact with them was elaborated in accordance with its international obligations.[185] Likewise, the State adopted a code of conduct for enterprises with activities around the intangible zone, capacitated over 2000 Petroamazonas employees on the rights of IPVIs and contact protocols, as well as passed a regulation on free, prior and informed consent in hydrocarbon exploration licenses.[186]

The Commission elaborated on the international standards concerning IPVIs and raised the point that such exploration should only be done considering the no contact principle, whereby the State is required to take positive measures to avoid contacting or permit that third parties enter in contact with them.[187] Particularly, the Commission found that creating effective intangibility zones is the most appropriate way to protect the rights of IPVIs from resource exploration by third parties, especially corporations.[188] Although there may exist urgent exceptions for the regime of intangibility, the Commission understood that in the case of extractive and development projects, those must be obtained through the consent of indigenous communities that maintain contact with the IPVIs, however if this is not possible, the activities should not be carried out in IPVI territory.[189] As for activities in the surrounding areas, they must subject to impact assessments and in consultation with nearby communities to determine the extent of impact on the natural resources available to IPVIs, in such a way that the activities do not damage their life, integrity, health or cultural practices.[190]

Despite not mentioning the UNGPs explicitly, the Commission refers to due diligence and corporate responsibility to respect the human rights of IPVIs in its report, while adding a footnote to the Office of the High Commissioner for Human Rights' (OHCHR) Interpretive Guide to Pillar II of the Principles. In this section, the Commission pointed out that companies have a duty to respect internationally recognized human rights regardless of the insufficiency of national norms, while States have the duty to ensure that corporations are obliged under national law to exercise human rights due diligence to identify, prevent and mitigate any potential damage to human rights, especially when concerning activities that may affect vulnerable communities such as IPVIs.[191]

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[185] ibid 29, 30.

[186] *Tagaeri and Taromenane (merits)* (n 178) paras 81, 84.

[187] ibid 93.

[188] ibid 103, 104.

[189] ibid 109.

[190] ibid 110.

[191] ibid 120; OHCHR, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide' (United Nations 2012).

The Commission concluded that the State did not consider the nomadic movement patterns of the Tagaeri-Taromenane when delimiting the intangible zone.[192] It also declared that the intangible zone did not offer sufficient legal protections to the IPVI's territory, considering the history of third-party invasion in the zone, which pointed to its inefficacy, as well as the broad exception in Ecuadorian law for exploration in the zone. This exception provided that, in cases of "national interest", the President with the approval of the National Assembly could allow interferences in indigenous land regardless of their status or whether consent was obtained through third parties.[193] The exception was invoked by the President and approved by the Assembly for the exploration of two oil fields in areas surrounding the intangible zone, despite cartographic evidence of the presence of IPVIs in the region.[194] Likewise, the Commission estimated that the State did not provide the same level of protection to IPVI land as it did to corporations extracting resources from the region, noticing "signs of corporate pressure to reduce the level of protection in IPVI territory".[195] Given those circumstances, the Commission considered that Ecuador violated the rights to equality, property, dignified life and health of the Tagaeri-Taromenane people.[196]

Regarding the right to life, the Commission applied a three-part test to determine whether Ecuador failed to protect the lives of the IPVIs from third parties. First, on the standard of knowledge, it decided that Ecuador knew that there was a risk to the lives of the IPVI even as early as the 2003 massacre due to the already reported tensions in the area.[197] Furthermore, the Commission had already issued precautionary measures to protect the indigenous groups in 2007.[198] Second, on the standard of risk, the Commission did not find elements to substantiate that the risk of another massacre was any lower since the creation of the intangible zone in 1999.[199] Third, on the standard of feasibility, the Commission pointed to a lack of effective measures, especially on the prevention of illegal logging, and comprehensive impact assessments for oil fields in continuous consultations with indigenous communities.[200]

Likewise, the Commission considered that the forcible separation of two Taromenane girls constituted a violation of children's rights, personal freedom, family, freedom of movement and cultural rights.[201] Regarding procedural rights, the Commission noted that the lack of effective avenues to challenge the delimitation of the intangible zone, as well as the lack of

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[192] *Tagaeri and Taromenane (merits)* (n 178) para 126.
[193] ibid 133.
[194] ibid 42.
[195] ibid 134.
[196] ibid 137.
[197] ibid 144.
[198] ibid 143.
[199] ibid 146.
[200] ibid 148.
[201] ibid 167.

judicial diligence on the 2003, and 2006 massacres constituted a violation of Articles 8 and 25, the State acknowledged its responsibility for those massacres in the public hearings of 23 August 2022.[202] However, it considered that the State was taking appropriate measures by investigating the 2013 massacre with due regard to principles of indigenous justice.[203]

The Commission recommended 4 remedial measures: revisit the delimitation of the Tagaeri-Taromenane intangible zone, offer culturally sensitive means for the rehabilitation and family integration of the Taromenane girls, continue the investigations on the 2013 massacre and offer information on the status of investigations for the 2003 and 2006 massacres, and establish legal and regulatory measures of non-repetition in line with the applicable standards for the protection of IPVIs.[204] Yet, it did not recommend any measures to address the conduct of oil business operating in the area.

On 30 September 2020, the Commission submitted the case to the Court's analysis, highlighting that it would be the first case on the Court to deal with IPVIs.[205] Nevertheless, it did not claim a violation of the right to a healthy environment nor asked the Court to order reparations addressing corporate due diligence. The case is currently in its last stage, with the final allegations having been presented in September 2022.

Despite the Commission's silence, the petitioners have referred to the right to a healthy environment in relation to the pollution and noise caused by the oil fields and the construction of roads in the Yasuní national park as affecting all Waorani communities, including the IPVIs during the public hearings on 23 August 2022. They argued furthermore that the preservation of biodiversity and natural resources is fundamental for the continued survival and cultural practices of the IPVIs. [206] The State did not challenge the justiciability of the RHE.

4.2 The *Tagaeri and Taromenane* case in relation to the RHE and BHR

The *Tagaeri and Taromenane* case may provide an opportunity for the Court to elaborate on the scope of corporate responsibility in relation to the RHE. This thesis suggests there are at least 3 meaningful ways in which the case can articulate this relationship. First, it may develop on the due diligence framework proposed by the UNGPs and set standards for when and to which extent States should require business to set forth procedures to prevent, mitigate and remedy environmental impacts that affect IPVIs. Second, it can further develop the argument on the justiciability of the right to a healthy environment by creating a nexus between the

[202] ibid 184; 'Tagaeri and Taromenane v. Ecuador, (Public Hearings)' <https://www.youtube.com/watch?v=YRud5NS7U-c&ab_channel=SuperiorTribunaldeJusti%C3%A7a%28STJ%29> at 6:55:00.

[203] *Tagaeri and Taromemane (merits)* (n 176) para 182.

[204] ibid operative paragraphs 1–4.

[205] IACHR to OAS Secretary General, 'Letter concerning case No 12.979 Pueblos Indígenas Tagaeri y Taromenane (in voluntary isolation) v. Ecuador' (30 September 2020).

[206] 'Tagaeri and Taromenane v. Ecuador, (Public Hearings)' (n 202) at 6:33:00.

right and BHR, as well as use new legal developments such as the Escazú agreement and the UNGA resolution on the right to a healthy environment. Third, it may apply structural remedies to require the incorporation of international standards for impact assessment in domestic law.

Regarding due diligence, the Commission did not analyze the conduct of the corporate actors themselves, but rather limited the report to the State responsibility to protect human rights. Nevertheless, a thorough analysis based on the UNGP's corporate responsibility to respect human rights (Pillar II) could have clarified the extent of due diligence the State was expected to perform regarding the oil companies operating in the region.[207]

Under Pillar II, business enterprises are required to continuously exercise due diligence where their activities caused, contributed or are linked to their chain of operations.[208] The commentary to Principle 17 states that complicity is a form of contribution that, beyond the forms in which it is defined by domestic law, can arise when a company benefits from abuses committed by third parties.[209] In such case, companies are required to exercise due diligence in order to identify, prevent, mitigate and, where appropriate, remedy such abuses.

When it comes to environmental damage, conducting due diligence in situations with an elevated risk is a duty States should require of business in line with the prevention principle under environmental law.[210] In the *OC-23/17*, "the Court [took] note that, according to the 'Guiding Principles on Business and Human Rights', business enterprises should respect and protect human rights, and prevent, mitigate and assume responsibility for the adverse human rights impacts of their activities".[211] By referring to the UNGPs, it has recognized engaging business to respect human rights is part of the State obligation to monitor activities with high risk of environmental impact under the prevention principle.

The Commission pointed out that the oil companies were actively engaged in opposing expansion of the intangible zone.[212] Applying the standards set in Pillar II alongside the duty to monitor potentially harmful activity for the environment is an opportunity for the Court to bring attention to the oil companies' activities and possibly elaborate further on the scope of the right to a healthy environment. Importantly, the Court has the chance to order the State to adopt laws and regulations requiring companies in the oil sector to adopt due diligence mechanisms, as it did for fishing companies in the *Buzos Miskitos* case.[213]

A similar view was adopted by the petitioners, centering the role of the oil corporations and the effect of pollution in this case. They have asked the Court to establish a truth

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[207] See for example the IACtHR's section on Pillar two included in the *Buzos Miskitos* case, *Buzos Miskitos* (n 15).

[208] UNHRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework' (United Nations 2011) HR/PUB/11/04, guiding principle 13.

[209] ibid 19.

[210] *Buzos Miskitos* (n 15); *OC-23/17* (n 84).

[211] *OC-23/17* (n 84) para 155.

[212] *Tagaeri and Taromenane (merits)* (n 176) para 35.

[213] *Buzos Miskitos* (n 15) para 138.

commission tasked with investigating the State and oil company agents' role in the abuses. Likewise, the petitioners have pointed out in public hearings that pollution generated by oil prospecting and exploration constitutes one of the main abuses towards the Waorani and IPVI populations.[214]

Considering the petitioners request, the Court is entitled to invoke the *iuria novit curiae* principle to include the right to a healthy environment in the list of alleged violations and use the opportunity to develop arguments on the justiciability and material scope of the right, especially in relation to business activities. There are legal grounds for the application of the principles as non-controversial facts of the case, such as the presence of illegal logging within the intangible zone and oil exploration in the vicinities, point to the violation of the right. Likewise, Ecuador has not raised a preliminary objection on the justiciability of Article 26.

As seen in Chapter 2, the existence of this link was recognized in the *Buzos Miskitos* case and is in line with the business responsibility to respect the full charter of human rights recognized in the UNGPs.[215] The right to a healthy environment is one of such rights, as it appears in the PSS and was recently recognized by the UNHRC and the UNGA. Moreover, as seen in the foregoing Chapters, elaborating this link in the jurisprudence may provide a better argument for the justiciability of the right as it becomes intrinsically linked with BHR, a more developed field within the Court's jurisprudence and that has bolstered its legitimacy to tackle violations committed by business enterprises.

Furthermore, the case allows the Court to improve on the justiciability argument by referencing new legal developments concerning the right to a healthy environment, such as those in the UNHRC and UNGA.[216] Moreover, the Escazú Agreement, ratified by Ecuador, recognizes the right in relation to matters of environmental decision-making.[217] As discussed on Chapter 3, new legal developments can be used to ground the justiciability of the right to a healthy environment as a matter of subsequent State practice under the general rules of treaty interpretation.

Lastly, the *Tagaeri and Taromenane* case presents a formidable opportunity to develop tailored remedies for environmental damage caused by corporations. Considering its long-standing practice of adopting reparations that go beyond the individuals affected in the case to effect structural change as a guarantee of non-repetition, there are at least 2 avenues the Court can use to address the role of oil companies in environmental damage.[218]

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[214] 'Tagaeri and Taromenane v. Ecuador, (Public Hearings)' (n 202).

[215] *Buzos Miskitos* (n 15); UNHRC, 'UNGPs' (n 1).

[216] UNHRC, 'The Human Right to a Clean, Healthy and Sustainable Environment' (n 83); UNGA (n 83).

[217] United Nations Treaty Collection, 'Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean ("Escazú Agreement")' art 4.1.

[218] Fabián Novak, *The System of Reparations in the Jurisprudence of the Inter-American Court of Human Rights* (Brill Nijhoff 2018) 47.

Firstly, the Court can order the State to adopt legal and regulatory measures to require businesses to conduct due diligence in accordance with international standards. This would be especially true in situations where a business is likely to be causing, contributing, or linked to human rights abuses through its operation. Such regulations could take the form of a NAP, as Ecuador is currently developing, or an effort to develop mandatory human rights due diligence laws.[219] This matters since due diligence goes beyond impact assessments and entails a continuous effort to engage affected stakeholders by businesses and the State alike.

Secondly, the Court can heed to the proposal by the petitioners and order the State to set up an independent truth commission for the investigation of the massacres in relation to State and corporate actors, including oil company management. Truth commissions have already been used in national jurisdictions to investigate criminal conduct of business management in relation to human rights abuses to positive results.[220] Similarly, they offer an important means for the engagement of all actors in the de-escalation of conflict situations, constituting an important building block of the right to peace.[221]

The Court can play a pivotal role through this suggested reparation to reframe the narrative on the violation of IPVIs with the understanding that oil companies and business actors should be held accountable for human rights abuses. Beyond helping bridge the gap between State and corporate responsibility, especially regarding a right on which business enterprises have an equal or higher impact than States, the possible developments on the *Tagaeri and Taromenane* case may also inform subsequent cases to further expand on the relationship between business, human rights, and the environment.[222]

5 Conclusion

Human rights courts have a peculiar role within the Westphalian system. As citizens challenge States for acts within their sphere of sovereignty, they are tasked with considering

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[219] Danish Institute for Human Rights, 'National Action Plans on Business and Human Rights (Ecuador)' (*Globalnaps*) <globalnaps.org/ecuador> accessed 7 February 2023.

[220] Ministério Público Federal, Ministério Público do Trabalho and Ministério Público do Estado de São Paulo, 'Direitos Humanos, Empresas e Justiça de Transição: O Papel Da Volkswagen Do Brasil Na Repressão Política Durante a Ditadura Militar' (2020) PR-SP-00104695/2020.

[221] On the development of the right to peace as an individual right, see Cecilia Bailliet, 'Normative Evolution of the International Law of Peace in a Post-Western Age' in Cecilia Bailliet (ed), *Research handbook on international law and peace* (Edward Elgar Publishing 2019).

[222] Currently there are two other cases and one advisory opinion in the Court's docket, which are likely to be decided after the *Tagaeri and Taromenane* case. *La Oroya* (n 3); Colombia, Chile and IACtHR, 'Request for an Advisory Opinion on the Extent of State Obligations, in Their Individual and Collective Scopes, to Respond to the Climate Emergency in the Framework of International Human Rights Law' (9 January 2023); *U'Wa indigenous community v Colombia (Merits)* [2019] Inter-American Commission of Human Rights Report No. 146/19, Case 11.754, OEA/Ser.L/V/II.173.

interests that go beyond State consent and directly concern individual stakeholders.[223] To carry out this task, they have crafted instruments that are appropriate for a dynamic scenario with an everchanging constellation of interests beyond State consent.[224] This thesis sought to analyze two new developments within the constellation: The marked development in the idea of environmental protection as an actionable right in face of a climate crisis alongside the role and responsibility of business enterprises for human rights abuses. Albeit with a scope limited to one regional Court and with a focus on trend analysis, it hopefully points to developments that will materialize and ripple through the interconnected fabric of human rights law. Although the *Tagaeri and Taromenane* case is, on a surface level, a case with localized contributions to the rights of IPVIs (themselves a small group within indigenous peoples), it agglutinates elements to contribute on two big challenges currently faced in human rights practice. Even if the Court reaches a conclusion different than the one tentatively suggested in this thesis, that will be a pointer to how far the IACtHR, and potentially other Courts, are willing to use their instruments in a carefully balanced role between State consent and community interests.

[223] Shai Dothan (ed), 'International Judicial Review', *International Judicial Review: When Should International Courts Intervene?* (Cambridge University Press 2020).

[224] Some examples are the doctrines of margin of appreciation, the *pro persona* principle and evolutionary interpretation of human rights treaties.

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