



Rights of Present and Future Generations to a Healthy Environment: An analysis in Intergenerational Equity and Solidarity in Latin America

Derechos de las Generaciones Presentes y Futuras a un Medio Ambiente Sano: Un Análisis en Equidad Intergeneracional y Solidaridad en América Latina

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Abstract

The planet is scorching, sea levels are rising, the Arctic is melting, forest fires are soaring, and we are left with existential questions about how we face the global threat of climate change. Faced with the triple planetary crisis of climate change, loss of biodiversity, and environmental pollution, we must ask whether we are doing everything we can to protect all inhabitants on this planet facing this environmental crisis, as well those who will inherit it. These environmental disasters require us all to consider our obligation to present and future generations, and existing and developing normative frameworks for the protection of the right to a healthy environment. This article examines the principles of intergenerational equality and solidarity and how they are essential considerations when protecting vulnerable populations and those living in close connection with nature. It explores these principles within international and regional treaties, and Latin American jurisprudence, which pioneer the rights of nature and environmental human rights advocacy. While global recognition of intergenerational equality and solidarity exists, we can look to the Americas for groundbreaking and innovative arguments that promote the development of normative frameworks in the protection of environmental human rights.

Keywords: *Human rights; Right to a healthy environment; Future generations; Rights of nature.*

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Resumen

El planeta arde, el nivel del mar sube, el Ártico se derrite, los incendios forestales se disparan y nos planteamos preguntas existenciales sobre cómo enfrentar la amenaza global del cambio climático. Ante la triple crisis planetaria del cambio climático, la pérdida de biodiversidad y la contaminación ambiental, debemos preguntarnos si estamos haciendo todo lo posible para proteger a todos los habitantes del planeta que se enfrentan a esta crisis ambiental, así como a los que la heredarán. Estos desastres medioambientales nos exigen a todos considerar nuestra obligación para con las generaciones presentes y futuras, y los marcos normativos existentes y en desarrollo para la protección del derecho a un medio ambiente sano. Este artículo examina los principios de igualdad intergeneracional y solidaridad y cómo son consideraciones esenciales a la hora de proteger a las poblaciones vulnerables y a quienes viven en estrecha relación con la naturaleza. Explora estos principios en los tratados internacionales y regionales, y en la jurisprudencia latinoamericana, pionera en los derechos de la naturaleza y en la defensa de los derechos humanos medioambientales. Si bien existe un reconocimiento mundial de la igualdad intergeneracional y la solidaridad, podemos buscar en las Américas argumentos pioneros e innovadores que promueven el desarrollo de marcos normativos en la protección de los derechos humanos ambientales.

Palabras clave: *Derechos humanos; Derecho al medio ambiente saludable; Generaciones futuras (venideras); Derechos de la naturaleza.*

I. INTRODUCTION

Humanity faces a critical time for its survival with the triple planetary crisis with climate change, loss of biodiversity, and environmental pollution. This crisis calls for us all to consider whether we have the moral obligation and duty to take concrete action to protect the environment for all of mankind, including future generations. Future generations will otherwise inherit a planet with increasingly hot temperatures, changing weather patterns, rising sea levels, longer and more frequent wildfires, loss of biodiversity, droughts, and much more. “The effects of human-caused global warming are happening now, are irreversible for people alive today, and will worsen as long as humans add greenhouse gasses to the atmosphere.”¹ Particularly, children are one of the many vulnerable groups affected by environmental harm and the effects of climate change. Children’s developing bodies and immune systems are more sensitive to disease, pollution, and lack of access to clean water and food sources.² It is estimated that “[b]y 2050, a further 24 million children are projected to be undernourished as a result of the climate crisis.”³

¹ *The Effects of Climate Change*, NASA GLOBAL CLIMATE CHANGE, <https://climate.nasa.gov/effects/> (last visited Apr. 27, 2023).

² *The Climate Crisis*, SAVE THE CHILDREN, <https://www.savethechildren.org/us/what-we-do/emergency-response/climate-change> (last visited Apr. 27, 2023)

³ *The Climate Crisis*, SAVE THE CHILDREN, <https://www.savethechildren.org/us/what-we-do/emergency->

Based on the principles of intergenerational equity and solidarity, we have the responsibility to protect the environmental rights of future generations. Therefore, we must engage with nature and the environment in a way that incorporates intergenerational equity and solidarity. This means that, when we advocate for the protection of the right to a healthy environment, we do so not only for present generations, but also for future generations.

This article examines the international and regional frameworks supporting the right to a healthy environment. It pays particular attention to the rights of children (present) and future generations through environmental human rights protections grounded in the Rights of the Child Framework, as well as procedural rights codified by the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (“Escazú Agreement”). Finally, this article examines domestic Latin American jurisprudence in its recognition of intergenerational equity and solidarity and the protection of the environment for present and future generations.

II. ORIGINS OF THE RIGHT TO A HEALTHY ENVIRONMENT

The right to a healthy environment is widely known as the right to a clean, healthy, and sustainable environment.⁴ The international right to a healthy environment was first recognized in the 1970s by the Declaration of the United Nations Conference on the Human Environment (“Stockholm Declaration”).⁵ The Stockholm Declaration established the foundation for environmental protection in international law, and the framework for the human right to a healthy environment.⁶ Principle 4 of the Stockholm Declaration provides that “[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”⁷ Recognizing the protection of the environment as a pre-condition to life and well-being set forth a strong foundation for subsequent international treaties, declarations, and international resolutions supporting the connection between human rights and the environment. Later, the Rio Declaration recognized the idea that sustainability was critical for the protection of the environment and human beings.⁸ The Rio Declaration emphasized that sustainable development is critical for humans and future generations. Principle 3 of the Rio Declaration provides that “[t]he right to development must be fulfilled so as to equally meet

[response/climate-change](#) (last visited Apr. 27, 2023)

⁴ BRANDS KEHRIS (2022); *see generally* G.A. Res. A/76/L.75 (July 26, 2022) (recognizing the human right to a clean, healthy and sustainable environment).

⁵ Declaration of the United Nations Conference on the Human Environment, June 16, 1972, U.N. Doc. A/CONF.48/14/Rev.1 <https://wedocs.unep.org/bitstream/handle/20.500.11822/29567/ELGP1StockD.pdf> [hereinafter Stockholm Declaration].

⁶ KOESTER (1990) (quoting U.N. Conference on the Hum. Env’t, *Stockholm Declaration*, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972)).

⁷ *See* Stockholm Declaration at Principle 4.

⁸ United Nations Conference on Environment and Development, Aug. 12, 1992, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I, Principle 1 https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf [hereinafter Rio Declaration].

developmental and environmental needs of present and future generations.”⁹ This core idea that environmental protection is critical for our well-being as humans, has been instrumental for the recognition of the human right to a healthy environment and its evolution.

Today, domestic frameworks have recognized the right to a healthy environment either through constitutional provisions, legislative or regulatory measures, and specialized agencies that seek to protect and promote environmental protection.¹⁰ As such, the domestic protection of the environment generally involves environmental regulation and enforcement, public participatory frameworks in decision-making, environmental education, and the creation of specialized agencies, courts, and commissions.¹¹ The domestic protection of the environment has been successful in States that recognize the importance and connection between the environment and human rights. As is discussed later in the article, States in which domestic litigation has been successful have strong domestic environmental protections through State constitutions or legislation. Specifically, the domestic protection of environmental rights is strongest when individuals and communities meaningfully participate in decision-making and the review process of environmental compliance measures.¹²

⁹ Rio Declaration at Principle 3

¹⁰ In the Ugandan Constitution, environmental protections are conceptualized broadly, recognizing Ugandan’s reliance on natural resources, and the close relationship between environmental protection and poverty in developing nations. Report of the Uganda Constitutional Comm’n, *Analysis and Recommendations*, ¶ 26.39. The Argentinian constitution recognizes that the right of all persons and future generations to a “healthy environment fit for human development.” Pt. II, art. 41, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). Similar to the Argentinian Constitution, the South African Constitution explicitly recognizes the right to a healthy environment for present and future generations and takes it further in that the South African government has the affirmative duty to ensure its fulfillment. S. AFR. CONST., 1996, ¶ 24, 152; see also KOTZÉ & ANÉL DU PLESSIS (2010), pp. 157-158. The Italian Constitution explicitly recognizes the right to a healthy environment. Article 117 provides that the State has the duty to protect the environment and ecosystem. Art.117(2)(s), Costituzione [Cost.] (It.). In France, the Constitution incorporates the Charter for the Environment, and states that “[s]tatutes shall . . . lay down the basic principles of . . . the preservation of the environment.” 1958 LA CONSTITUTION, art. 34 (Fr.). India’s Constitution recognizes the duty of the State to protect the environment but expands this duty to all Indian citizens. “It shall be the duty of every citizen of India . . . to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.” Although the Indian constitution provides that the environmental rights contained in it are not enforceable, Indian courts have found that the right to a clean environment is indeed enforceable based on its relationship to the protection of the right to life. INDIA CONST. pt. IVA, art. 51(A); see RODGERS (2000), pp. 97, 108. Similarly, in Nigeria, provisions protecting the right to a healthy environment are not justiciable, however, the right to a healthy environment is expressly correlated to other human rights. As such, the Nigerian constitution provides that a failure to protect the environment may lead to violations of individual human rights. CONSTITUTION OF NIGERIA (1999), § 20; ORJI (2012), pp. 285-286.

¹¹ Org. of Am. States, *Domestic Environmental Law* (Feb. 23, 2007); MCALLISTER (2008). See also BOYD (2018), pp. 17, 28.

¹² BOYD (2018), pp. 26-27.

Around the world, countries have recognized the importance of protecting the environment, including Latin American countries, who have been at the forefront of the explicit recognition of environmental rights in their constitutions and regulatory environmental frameworks. For example, in the Americas, constitutional environmental safeguards evolved to provide a robust system of substantive and procedural protections.¹³ Brazil, Colombia, Costa Rica, and Argentina have spearheaded the recognition of environmental participatory rights.¹⁴ Specifically, Brazil has important constitutional provisions providing for the use of specialized agencies to establish a framework of procedural protections.¹⁵ Argentina on the other hand, has developed a comprehensive system of substantive regulations for the protection of clean water and industrial waste, as well as procedural protections on the rights to information and participation.¹⁶ The Argentine Constitution goes further and recognizes the right “to a healthy and balanced environment” that protects future generations.¹⁷ In Chile, a specialized environmental court system, the “*Tribunal Ambiental*,” is an autonomous environmental body that hears and decides environmental claims.¹⁸ Finally, Bolivia has expressly recognized the right to a healthy environment for present and future generations. Article 33 of the Constitution of the Plurinational State of Bolivia protects the right to a “healthy, protected, and balanced environment” for everyone; “[t]he exercise of this right must be granted to individuals and collectives of present and future generations, as well as to other living things, so they may develop in a normal and permanent way.”¹⁹ This provision has not only recognized the right to a healthy environment, but gone further to recognize the importance of protecting children (present

¹³ KOTZÉ (2018), pp. 136, 142, at 26-27 (citing Daniel A. Sabsay, (2004) *Constitution and Environment in Relation to Sustainable Development*, 21 Pace Envtl. L. Rev. 155).

¹⁴ KOTZÉ (2018), p. 30. Article 93 of the Colombian Constitution recognizes international treaties ratified by Colombia, such as the Convention on the Rights of the Child, having constitutional status. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COLOMBIA [CONSTITUCIÓN] Jul. 20, 1991, Cap. IV, arts. 93 (Col.); Código de la Niñez y la Adolescencia, No. 7739, Asamblea Legislativa, de la República de Costa Rica, Título I, Feb. 6, 1998; CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL [CONSTITUTION OF THE FEDERAL REPUBLIC OF BRAZIL] Senado Federal, Centro Gráfico; Brasília, Brazil: 1988.

¹⁵ Brazil’s environmental protections provide for a good example of procedural protections that are available at the domestic level. Former Brazilian president Bolsonaro and his government represented a dark chapter in Brazil’s protection of environmental human rights as he sought to exploit Brazil’s natural resources in indigenous and tribal lands for the benefit of economic exploitation. KOTZÉ (2018), pp. 27-28.

¹⁶ KOTZÉ (2018), p. 27.

¹⁷ Article 75(22) of the Argentine Constitution, the rights protecting children articulated in the Convention on the Rights of the Child enjoy constitutional status. CONSTITUCIÓN NACIONAL, 10, at arts. 41, 75 (Arg.). See also, U.N. Convention on the Rights of the Child, art. 28, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S 3 (entered into force Sept. 2, 1990) [hereinafter Convention on the Rights of the Child or CRC]. <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

¹⁸ See TRIBUNAL AMBIENTAL [Environmental Tribunal], <https://tribunalambiental.cl/quienes-somos/> (last visited Apr. 27, 2023) (noting the tribunal is an independent judicial organ with three tribunals located in Antofagasta, Santiago, and Valdivia, all part of this specialized system adjudicating environmental cases).

¹⁹ The Bolivian Constitution also provides for the rights of children and youth to physical development, which can be understood to include factors affecting children’s development, including a healthy environment. CONSTITUCIÓN POLÍTICA DEL ESTADO, Feb. 7, 2009, Pt. 1, Ch. 5, arts. 33, 59 (Bol.).

generations), and future generations.

III. RIGHT TO A HEALTHY ENVIRONMENT

3.1 Substantive dimension

The right to a healthy environment is to be enjoyed by all persons and communities.²⁰ This substantive dimension to a healthy environment ensures that persons and communities are able to live in their environment free from interference from harmful substances, or environmentally harmful activities. Therefore, the right to a healthy environment protects from environmental harms interfering with the actualization of human rights.²¹ Because human rights are understood to be interrelated, interdependent, and interconnected, the protection of a healthy environment is fundamental to human dignity, equality, and freedom, and a violation of the right to a healthy environment is a violation of other human rights.²² A clean, healthy, and sustainable environment is determinative of a person's health, and their ability to enjoy their right to health, life, reproductive rights, rights of the child, adequate standard of living, food security, safe drinking water and sanitation, and safe and affordable housing.²³ Since the right to a healthy environment is an

²⁰ African Charter on Human and Peoples' Rights, art. 24, June 27, 1981, 21 I.L.M. 58 https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf [hereinafter African Charter]; Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 11, Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156, 165 (1989) <https://www.oas.org/juridico/english/treaties/a-52.html> [hereinafter Protocol of San Salvador]; Arab Charter on Human Rights, art. 38, 2004 <https://digitallibrary.un.org/record/551368?ln=en&v=pdf>; ASEAN Human Rights Declaration, art. 28, Nov. 18, 2012 <https://asean.org/asean-human-rights-declaration/>; *see also*, U.N. H.R.C., CCPR General Comment No. 6: Art. 6 (Right to Life), ¶ 5, U.N. Doc. HRI/Gen/1/Rev.9 (Vol. I), (April 30, 1982) <https://www.refworld.org/legal/general/hrc/1982/en/32185>; John H. Knox (former Special Rapporteur on Human Rights and the Environment), *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶ 2, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018) [hereinafter Knox Report A/HRC/37/59 (Jan. 24, 2018)] https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/A_HRC_37_59_EN.pdf; *see also*, International Covenant on Economic, Social and Cultural Rights, art. 12., Jan. 3, 1976, 993 U.N.T.S. 3 <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> [hereinafter ICESCR].

²¹ Knox Report A/HRC/37/59 (Jan. 24, 2018) at ¶ 12.

²² Knox Report A/HRC/37/59 (Jan. 24, 2018) at ¶ 5.

²³ Baskut Tuncak, (U.N. former Special Rapporteur, Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Materials.) U.N. Doc. A/HRC/33/41 at ¶ 12 <https://www.ohchr.org/en/documents/thematic-reports/ahrc3341-report-rights-child-and-hazardous-substances-and-wastes> [hereinafter Tuncak Report A/HRC/33/41]; John H. Knox, U.N. Special Rapporteur, Framework Principles on Human Rights and the Environment, United Nations Human Rights Special Procedures, at ¶ 4 (2018) <https://www.ohchr.org/sites/default/files/FrameworkPrinciplesUserFriendlyVersion.pdf> [hereinafter Framework Principles]; citing, Convention on Access to Information, Public Participation in Decision-

underlying determinant of health, the quality of natural resources, including food and water, is critical for the protection of persons and communities relying on or exposed to their environments.²⁴

Parallel to the substantive dimension of the right to a healthy environment is the responsibility to protect individuals and communities from environmental harm(s) that violate human rights.²⁵ States have the international obligation to protect individuals and communities from State and non-State actors engaging in activities that may pose an environmental risk or harm that violates human rights.²⁶ In fact, “[a]n illegal act which violates human rights and which is not initially directly imputable to a State can lead to international responsibility of the State, not because of an act itself, but because of the lack of due diligence to prevent the violation or to respond as required.”²⁷ The duty of due diligence in human rights requires States to proactively investigate human rights violations when they “knew or should have known” of such violations, but failed to act to prevent the harms, investigate, punish the responsible parties, and provide accountability.²⁸ As such, States

Making and Access to Justice in Environmental Matters art. 1, June 25, 1998, 2161 U.N.T.S 447 <https://unece.org/DAM/env/pp/documents/cep43e.pdf>; African Charter at art. 24; Protocol of San Salvador, art. 11; Arab Charter on Human Rights at art. 38; and ASEAN Human Rights Declaration at art. 28; see also, U.N. H.R.C., CCPR General Comment No. 6: Art. 6 (Right to Life) at ¶ 5, U.N. Doc. HRI/Gen/1/Rev.9 (Vol. I), (April 30, 1982); Knox Report A/HRC/37/59 at ¶ 5; see also, ICESCR, at art. 12.

²⁴ Tuncak Report, A/HRC/33/41 at ¶ 47; General Comment 14 on the right to enjoy the highest attainable standard of health, emphasizes that for indigenous communities, “the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this regard, the committee considers that [...] denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.” Office of the High Commissioner for Human Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, at ¶ 27, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

²⁵ Tuncak Report, A/HRC/33/41 at ¶ 10; see also, International Covenant on Civil and Political Rights Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967) 999 U.N.T.S. 171, art 3 <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> [hereinafter ICCPR]; see also, American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143, art.1 https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf [hereinafter American Convention]; African Charter at art. 24.

²⁶ Knox Report A/HRC/37/59 at ¶ 33; see also ICCPR at art. 3; American Convention at art. 1; African Charter at art. 24.

²⁷ Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172, (Jul. 29, 1988) https://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf

²⁸ See e.g., A.T. v. Hungary, CEDAW Committee, Communication No. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003 (2003) <https://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf>; González et al. (“Cotton Field”) v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 205, Inter-Am. Ct. H.R., (Nov. 16, 2009) https://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf; Jessica Lenahan, Case. 12.626, Inter-Am. Comm’n H.R., Report No.80/11 (July 21, 2011) <https://law.utexas.edu/wp-content/uploads/sites/11/2015/04/2014-HRC-IACHR-JessicaLenahan-Report.pdf>; Osman v. United

have a responsibility to protect human rights resulting from environmentally harmful activities, polluted ecosystems, loss or destruction of biodiversity, and climate change.²⁹

3.2 Procedural dimension

Along with the substantive protection of the right to a healthy environment there is its procedural dimension. The procedural dimension to the right to a healthy environment provides that persons and communities have the right to information, participation, and access to justice in environmental matters.³⁰

3.3 Right to information

The first procedural right within the right to a healthy environment framework is the right to information, grounded on the freedom of thought and expression, and based on the concept that the flow of information is multidirectional.³¹ The right to information provides that all persons have the right to seek, receive, and impart information.³² All persons, including the public and affected communities, have a right to receive information relating to environmental matters. The Escazú Agreement provides for very specific State obligations to ensure the protection of the right to information in the context of environmental matters.

“Environmental information” is defined by the Escazú Agreement as information regarding the environment, its elements, and natural resources.³³ Environmental information includes information relating to possible environmental risks or adverse health effects.³⁴ It includes environmental quality, including air and water quality, pollution, waste, chemicals, and other potentially harmful substances.³⁵ The duty to protect the right to information places an obligation on States to collect, update, and disseminate information without undue delay.³⁶ This obligation includes the right to access to information, which requires States to disseminate information in a “systematic,

Kingdom, App.23452/94, Eur. Ct. H.R., 29 EHRR 245 (1998) [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-58257%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58257%22]})

²⁹ See Knox Report A/HRC/34/49 (Jan. 19, 2017) at ¶ 37.

³⁰ Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Sept. 27, 2018, https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf [hereinafter Escazú Agreement]; Knox Report A/HRC/34/49 (Jan. 19, 2017) at ¶10; see also, Rio Declaration at Principle 10.

³¹ The right to information is well established in human rights and protected under several international and regional treaties. American Convention art. 13; ICCPR at art. 19; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 005 (entered into force Sept. 3, 1953) <https://rm.coe.int/1680a2353d> [hereinafter European Convention]

³² American Convention at Art. 13.

³³ Escazú Agreement at art. 2(c)

³⁴ Escazú Agreement at art. 2(c)

³⁵ Knox Report A/HRC/37/59 (Jan. 24, 2018) at ¶¶ 11, 17, 18.

³⁶ Escazú Agreement at art. 6(1).

proactive, timely, regular, accessible and comprehensible manner.”³⁷

To ensure access to information, States must make information accessible and in accordance with the principle of maximum disclosure.³⁸ This obligation seeks to remove barriers to information that are State-held.³⁹ In the case of vulnerable persons or communities, information must be available and accessible to address their specific vulnerabilities and conditions.⁴⁰ For example, the dissemination of information must be delivered in the languages spoken by communities, or through means that makes information accessible and understandable by the affected community.⁴¹

3.4 Right to participation

The right to participation is an important procedural right for environmental protection. It ensures that individuals and groups can partake in meaningful decision-making processes for issues relating to and affecting their lives.⁴² “Public participation’ refers to all interaction between government and civil society, and includes the process by which government and civil society engage in open dialogue, establish partnerships, share information, and otherwise interact to design, implement, and evaluate the development policies, projects, and programs.”⁴³ Traditionally, the right to participation focuses on the right of persons and the public to take part in public affairs, vote, be elected, and participate in public service.⁴⁴

Additionally, the Escazú Agreement provides for very specific rights and obligations in the realm of the right to participation relating to environmental matters. To ensure effective participation, Article 7 of the Agreement requires that public participation be open and inclusive, and that information is provided in a clear, timely, and comprehensive manner.⁴⁵ There is a close relationship between information and participation. For individuals and groups to enjoy effective participation, they must have and receive “early and timely” information.⁴⁶ The dissemination of timely information is therefore essential for a person or group to engage in meaningful dialogue and

³⁷ Escazú Agreement at art. 6(1).

³⁸ Escazú Agreement at art. 5(1); *see also* Office of the Special Rapporteur for Freedom of Expression, the Right to Access to Information, Interamerican Commission on Human Rights and Organization of American States, ¶ 29 (2009) (defining the principle of maximum disclosure as legally guaranteeing “the effective and broadest possible access to public information, and any exceptions must not become the general rule in practice.”)

³⁹ Escazú Agreement at art. 5(1).

⁴⁰ Escazú Agreement at art. 5(3).

⁴¹ Escazú Agreement at art. 6(6).

⁴² *OHCHR and equal participation in political and public affairs*, U.N. OFF. OF THE HIGH COMM’R ON HUM. RTS., <https://www.ohchr.org/en/equal-participation> (last visited Apr. 27, 2023).

⁴³ Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development, Org. of Am. States Unit for Sustainable Development 1 (2001), http://www.oas.org/dsd/PDF_files/ispenglish.pdf.

⁴⁴ American Convention at art. 23.

⁴⁵ Escazú Agreement at arts. 7(1), 7(4).

⁴⁶ Escazú Agreement at arts. 7(2), 7(4), 7(5).

consultation processes relating to environmental matters.⁴⁷ “The information disseminated shall include the established procedure to allow the public to take relevant administrative and judicial actions.”⁴⁸

At the center of the right to participation is the ability of individuals and groups to shape participatory processes in order for public authorities to be responsive to their needs. In the case of vulnerable persons or populations, States must ensure that public participation is available.⁴⁹ As such, the Escazú Agreement requires that public officials use and implement measures that facilitate participatory processes reflecting “social, economic, cultural, geographical and gender characteristics.”⁵⁰ These measures must “eliminate barriers to participation,” especially for individuals and groups who are disproportionately affected by environmental harm.⁵¹

As part of providing information in anticipation of participatory processes, States must ensure that environmental impact assessments (sometimes inclusive of social assessments as well) are shared. Environmental impact assessments provide information regarding environmental and health risks, and the effects of upcoming or ongoing projects with an environmentally impactful dimension.⁵² This obligation to provide information to individuals and groups to engage in meaningful participation is particularly important for the protection of present and future generations. As will be discussed below, youth and other groups have been pushing for measures that protect intergenerational equity and solidarity, and for environmental protections that not only protect them, but future generations.

3.5 Right to access to justice

The right to access to justice is a core right for the vindication of human rights. It is “the right of access to judicial and other remedies that serve as suitable and effective grievance mechanisms against violations of human rights.”⁵³ Access to justice is a broad right that provides for guarantees of fairness, the ability of persons and groups to navigate judicial and quasi-judicial mechanisms, access to counsel, effective remedies, guarantees of equality, and freedom from discrimination.⁵⁴

Similar to the right of information and participation, the Escazú Agreement provides for robust protections under the right to access to justice. It provides that access to justice challenges and

⁴⁷ Escazú Agreement at arts. 7(4), 7(7).

⁴⁸ Escazú Agreement at art. 7(9).

⁴⁹ Escazú Agreement at art. 6(2), 6(6); *see also* Escazú Agreement at Preface (stating the beneficiaries of the agreement are mainly the “people of [the Latin American] region, particularly the most vulnerable groups and communities.”).

⁵⁰ Escazú Agreement art. 7(10).

⁵¹ Escazú Agreement at art. 7(14).

⁵² GILPIN (1995).

⁵³ Org. of Am. States, Access to Justice as a Guarantee of Economic, Social and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights, ¶ 41, OEA/Ser. L/V/II.129 (Sept. 7, 2007). <https://cidh.oas.org/pdf%20files/ACCESS%20TO%20JUSTICE%20DESC.pdf>

⁵⁴ ICCPR at arts. 2, 14, 26.

appeals must be protected procedurally and substantively. It states in relevant part:

(a) [A]ny decision, action or omission related to the access to environmental information; (b) any decision, action or omission related to public participation in the decision-making process regarding environmental matters; and (c) any other decision, action or omission that affects or could affect the environment adversely or violate laws and regulations related to the environment.⁵⁵

Challenges to substantive rights related to environmental matters include, but are not limited to, claims for violations of the right to a healthy environment, health and reproductive health, water, adequate food, adequate housing, and standard of living.⁵⁶ On the other hand, individuals or groups could present challenges for violations of their procedural rights in the environmental context for lack of receiving environmental information, lack of ability to meaningfully engage in participatory processes, or navigate judicial or quasi-judicial (administrative) mechanisms to vindicate their rights.

The Escazú Agreement places an obligation on States to guarantee access to justice and provides that States may be held responsible for actions or omissions that fail to ensure the full exercise of the rights to information and participation in environmental matters.⁵⁷ This provision is important for marginalized and vulnerable populations, as they are often overlooked and excluded from engaging in participatory processes. As discussed in the next section, children (present) and future generations are at the forefront of the push for climate justice advocacy, and the rights to information, participation, and access to justice are critical in bringing them into conversations regarding decisions affecting their lives.

IV. NORMATIVE FRAMEWORK PROTECTING CHILDREN (PRESENT) AND FUTURE GENERATIONS

In the case of children (present generations) and future generations, international treaties and other sources of international law have begun to set forth provisions seeking to protect the right to a healthy environment. The Convention on the Rights of the Child (“CRC”), together with other core human rights treaties, provides that children are right-holders and entitled to universal and inalienable rights.⁵⁸ Children are entitled to the protection of their human rights, free from

⁵⁵ Escazú Agreement at art. 8(2).

⁵⁶ See Tuncak Report, A/HRC/33/41 at ¶¶ 26, 49, 50, 110 ; Knox Report, A/HRC/37/59 (Jan. 24, 2018) (citing Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art. 1, June 25, 1998, 2161 U.N.T.S 447); African Charter at art. 24; Protocol of San Salvador at art. 11; Arab Charter on Human Rights at art. 38; ASEAN Human Rights Declaration at art. 28; *see also*, U.N. H.R.C., CCPR General Comment No. 6: Art. 6 (Right to Life) at ¶ 5; Knox Report, A/HRC/37/59 (Jan. 24, 2018) ¶ 5; *see also*, ICESCR at art. 12.

⁵⁷ Escazú Agreement at art. 8(2).

⁵⁸ See Convention on the Rights of the Child (recognizing children’s inherent the rights to life, survival, and development (art. 6); right to family relations and to not be separated from their parents against their will (arts. 9-10); the “enjoyment of the highest attainable standard of health” (art. 24); the right to an adequate standard of living for their development (art. 27); the right to education (art. 28); and the protection from violence and exploitation (art. 32)); *see also*, ICCPR at arts. 23, 24; ICESCR at art 10.

discrimination.⁵⁹ Due to their own personhood, children are entitled to protections as right-holders, independent from their parents, family, or guardians. They are “entitled to special protection under international human rights law, and in particular under the Convention on the Rights of the Child.”⁶⁰

While a rights-based framework considers all persons as right-holders to which States owe an obligation, it is of particular importance to consider the issue of vulnerability within this rights-based framework. States may have a special duty to ensure the protection of vulnerable persons or groups facing environmental harm or who suffer from human rights violations resulting from climate change.⁶¹ Former Special Rapporteur on the issue of human rights obligations related to the environment, John Knox, emphasized that the individuals or communities most vulnerable to environmental harm often include members of indigenous or traditional communities, ethnic, racial or other minorities, disabled or displaced persons, women, children, or persons living in poverty.⁶²

In the case of children, their age, physiological, and developmental needs require that they are especially protected.⁶³ The World Health Organization estimated that over 1.7 million children under the age of five died of exposure to environmental pollution and toxic chemicals in 2012.⁶⁴ Some of the risks that children face, rendering them particularly vulnerable, are cancer, respiratory problems, developmental delays, hormonal dysfunctions, and behavioral disorders, to name a few.⁶⁵ Exposure to environmentally harmful settings and the effects of climate change can lead to food insecurity, malnutrition, and developmental delays.⁶⁶ The international community has agreed that

⁵⁹ Report of the Off. of the U. N. High Comm’r for Hum. Rts. on Its Thirty-Fifth Session, *Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child*, U.N. Doc. A/HRC/35/13, ¶ 28 (May 4, 2017) <https://www.ohchr.org/en/documents/reports/ahrc3513-analytical-study-relationship-between-climate-change-and-full-and> [hereinafter *Climate Change and the Rights of the Child*, A/HRC/35/13] Off. of the High Comm’r for Hum. Rts., *CRC General Comment No. 26 on children’s rights and the environment with a special focus on climate change* <https://www.ohchr.org/en/documents/general-comments-and-recommendations/crcgc26-general-comment-no-26-2023-childrens-rights> [hereinafter *CRC General Comment No. 26*]

⁶⁰ U.N. Statement, *Children Have Specific Rights and Should Be Protected at All Times*, UN Experts, Off. of the U. N. High Comm’r for Hum. Rts. (Oct. 6, 2022), <https://www.ohchr.org/en/statements/2022/10/children-have-specific-rights-and-should-be-protected-all-times-un-experts>.

⁶¹ DÁVILA-RUHAAS (2020), pp. 379, 394.

⁶² Knox Report A/HRC/37/59 (Jan. 24, 2018) at Annex ¶ 41.

⁶³ U.N. Office of the High Comm’r for Human Rights, *CRC General Comment No. 13*, ¶ 62, U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011). https://www2.ohchr.org/english/bodies/crc/docs/crc.c.gc.13_en.pdf

⁶⁴ Tuncak Report A/HRC/33/41 at ¶ 3 (citing WHO, *Preventing Disease through Healthy Environments: A Global Assessment of the Burden of Disease from Environmental Risks* (2016)).

⁶⁵ Tuncak Report A/HRC/33/41 at ¶ 10.

⁶⁶ World Health Org., *Don’t pollute my future! The Impact of the Environment on Children’s Health*, WORLD HEALTH ORGANIZATION, 6 (2017) <https://www.who.int/publications/i/item/WHO-FWC-IHE-17.01>; see also World Health Org. *Inheriting a Sustainable World? Atlas on Children’s Health and the Environment*, _____ WORLD HEALTH ORGANIZATION, _____ 10-11 (2017) <https://www.who.int/publications/i/item/9789241511773>; U.N. Children’s Fund, *Sustainable Development*

children are particularly vulnerable to environmental harm and the effects of climate change, and therefore must be protected.⁶⁷ The CRC has recognized that to protect children, the Best Interests of the Child is the primary standard for protection.⁶⁸ A child rights-based approach is rooted in the principles of non-discrimination; best interests of the child; life, survival and development; and participation by being able to express their views.⁶⁹ It is imperative that children and future generations are especially protected, and that their rights are safeguarded by taking into account their vulnerability and need for protection.

The United Nations Committee on the Rights of the Child (“Committee on the Rights of the Child”) has emphasized that States have an obligation to ensure that children are protected from environmental harm and the effects of climate change.⁷⁰ Under a child rights-based framework, States have the responsibility to address the negative impacts of climate change, and take action to protect children from actual and foreseeable adverse effects.⁷¹ Additionally, with a child rights-based framework in mind, States must take urgent action to mitigate climate change by reducing and limiting greenhouse gas emissions, and preventing interrelated and interconnected human rights violations.⁷² The Duty of Prevention requires that States take urgent action to prevent, to the greatest extent possible, the disastrous effects of climate change on children’s and future generations’ human rights.⁷³

The Duty of Prevention has been widely recognized, most recently by the Inter-American Court of Human Rights (“Inter-American Court” or “Court”) in its Advisory Opinion OC-23/17 on *The Environment and Human Rights*.⁷⁴ The Court noted that “States are responsible for protecting, preserving, and preventing the degradation of the environment both inside and outside of their

Starts and Ends with Safe, Healthy and Well-Educated Children, UNICEF, 8 (May 2013) https://sustainabledevelopment.un.org/content/documents/3372SD_children_FINAL.pdf.

⁶⁷ CRC; ICCPR at art. 24; European Social Charter, Council of Europe, ETS 163, art. 7 (May 3, 1996) <https://rm.coe.int/168006b642>; Stockholm Convention on Persistent Organic Pollutants, 2256 U.N.T.S 119, art. 10(c) (May 17, 2004) https://treaties.un.org/doc/Treaties/2001/05/20010522%2012-55%20PM/Ch_XXVII_15p.pdf

⁶⁸ CRC at art. 3.

⁶⁹ Office of the High Comm’r for Human Rights, CRC General Comment No. 5, U.N. Doc. CRG/GC/2003/527, ¶ 12 (Nov. 27, 2003) <https://digitallibrary.un.org/record/513415?ln=en&v=pdf> [hereinafter CRC General Comment No. 5].

⁷⁰ Climate Change and the Rights of the Child, A/HRC/35/13 at ¶¶ 29-30. CRC General Comment No. 26 at ¶¶ 11, 14, 21, 28.

⁷¹ CRC General Comment No. 26 at ¶ 50.

⁷² CRC General Comment No. 26 at ¶ 33.

⁷³ CRC General Comment No. 26.

⁷⁴ The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Arts. 4(1) and 5(1) in relation to Arts. 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, (Nov. 15, 2017) [hereinafter Advisory Opinion OC-23/17]

territory, just as they would with the violation of other human rights.”⁷⁵ The Court emphasized that the Duty of Prevention, includes the duty to prevent “significant damage,” which is defined as “something more than ‘detectable’ but need not be at the level of ‘serious’ or ‘substantial.’”⁷⁶ Additionally, Principle 15 of the Rio Declaration provides that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”⁷⁷ As such, when there are threats of significant damage, States have the duty to prevent harm by engaging in risk assessments, management, and communication.⁷⁸ To prevent harm, States must also work towards incorporating precautionary measures, ensure non-regression, and promote the progressive realization of rights.⁷⁹ States must therefore allocate the maximum amount of resources to ensure the protection of the environment and the protection of rights affected by environmental harm.⁸⁰

In addition to the Duty of Prevention, States must promote intergenerational equity. The Principle of Intergenerational Equity has been increasingly recognized in the field of environmental human rights. This principle “places a duty on current generations to act as responsible stewards of the planet and ensure the rights of future generations to meet their developmental and environmental needs.”⁸¹ States and current generations have a responsibility to ensure and protect the rights of future generations to a healthy environment. This means that, for future generations to access a healthy environment, current generations, must use and enjoy the environment in a sustainable manner.⁸²

Sustainable development is an important theory to consider within this framework (protecting the environment and human rights) since it provides that development must meet “the needs of the present without compromising the ability of future generations to meet their own needs.”⁸³ It aims to balance the interests of the present with the responsibility to conserve natural resources for the future. The principle of intergenerational equity and duty of protection prioritizes sustainability as a consideration for using current resources available while placing a responsibility in

⁷⁵ See Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 140 (Sept. 25) <https://www.icj-cij.org/case/92>; Int’l Law Comm’n, General Commentary on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, in Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001) https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf [hereinafter General Commentary U.N. Doc. A/56/10]; see South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, ¶ 940 (Perm. Ct. Arb. 2016) <https://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>; Advisory Opinion OC-23/17 ¶¶ 118, 134, 140.

⁷⁶ Advisory Opinion OC-23/17 at ¶ 136 (quoting General Commentary U.N. Doc. A/56/10 at ¶ 4).

⁷⁷ Rio Declaration at Principle 15.

⁷⁸ *The Ten Principles of the UN Global Compact*, U.N. GLOBAL COMPACT, <https://unglobalcompact.org/what-is-gc/mission/principles> (last visited Apr. 27, 2023).

⁷⁹ Escazú Agreement at art. 3; see also Climate Change and the Rights of the Child, A/HRC/35/13 at ¶ 36.

⁸⁰ Climate Change and the Rights of the Child, A/HRC/35/13 at ¶ 65.

⁸¹ Climate Change and the Rights of the Child, A/HRC/35/13 at ¶ 35.

⁸² *The Right to a Healthy Environment Gives Rise To A Growing Wave of Climate Change Litigation*, UNIVERSAL RTS. GRP. (Dec. 18, 2020), <https://www.universal-rights.org/the-right-to-a-healthy-environment-gives-rise-to-a-growing-wave-of-climate-change-litigation/>; see also, Stockholm Declaration.

⁸³ G.A. Res. A/RES/42/187 (Dec. 11, 1987).

present generations to preserve resources for the future. As such, States must prioritize environmental protection and sustainability to address and prevent the adverse effects of climate change, as well as the mobilization of resources, such as financial resources and technology that strengthen climate mitigation and adaptation.⁸⁴ This responsibility is primarily carried out by States, since they owe individuals and communities an obligation to protect and prevent human rights violations. Some argue that this obligation is (or should be) also shared by the private sector, since they play an important role in resource utilization and engage in environmentally impactful activities. The Guiding Principles on Business and Human Rights clarify that States have an obligation to ensure that private actors⁸⁵ are refraining from engaging in human rights violations, as well as engaging in their activities while respecting the principle of “no harm.”⁸⁶ The no harm principle has been recognized under customary international law as a responsibility of the State. It requires that States not only refrain from causing harm, including transboundary harm, but that they also take active steps to prevent harm by conducting environmental impact assessments.⁸⁷

In respecting in the “no harm” principle, for-profit private entities should engage in human rights due diligence. This would encourage private entities to assess their actual and potential human rights impact by collecting, tracking, evaluating, and communicating information about how their activities may contribute to the violation of human rights.⁸⁸ The obligations of States and private entities extend to the protection of environmental rights. As such, once there is a violation of human rights, including a violation of the right to a healthy environment by a State or a private actor, children have the right to access to justice and effective remedies. The Committee on the Rights of the Child has emphasized that children’s access to redress mechanisms is imperative to vindicate their rights

⁸⁴ Climate Change and the Rights of the Child, A/HRC/35/13 at ¶ 3.

⁸⁵ Guiding Principles on Business and Human Rights, U.N. Office of the High Comm’n for Hum. Rts. 3 (2011) (focusing on for-profit enterprises). *See also* Hum. Rts. Council, *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 7, U.N. Doc. A/HRC/17/31 (March 21, 2011) https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr_en.pdf [hereinafter Guiding Principles on Business and Human Rights].

⁸⁶ *See generally*, Guiding Principles on Business and Human Rights; *Children’s Rights and Business Principles*, UNICEF, GLOBAL COMPACT & SAVE THE CHILDREN (2010), <https://www.unicef.org/documents/childrens-rights-and-business-principles> [hereinafter Children’s Rights and Business Principles]; *see also* BROWNLIE (2008) (discussing the for the “no harm” principle under customary international law).

⁸⁷ JERVAN (2014). *See e.g.*, Gabčíkovo-Nagymaros Project (Hung./Slovk.); The United Kingdom v. Albania, Judgment, 1949. I.C.J. Rep. 4 (Apr. 9); Belgium v. Spain, Judgment, 1970. I.C.J. Rep.3 (Feb 5) <https://www.icj-cij.org/case/50>; New Zealand v. France, Judgment, 1974. I.C.J. Rep. 457 (Dec. 20) <https://www.icj-cij.org/case/59>; United States of America v. Iran, Judgment, 1980 I.C.J. Rep. 3 (May 24) <https://www.icj-cij.org/case/64>; Australia v. France, Judgment, 1974 I.C.J. Rep. 253 (Dec. 20) <https://www.icj-cij.org/case/58>.

⁸⁸ *See* Guiding Principles on Business and Human Rights; *see also* Children’s Rights and Business Principles.

against States and private entities.⁸⁹

As discussed above, States have an international obligation to provide timely and effective remedies for violations of human rights. With respect to environmental human rights and climate change, States have the obligation to ensure that children are afforded the right to effective remedies that facilitate appropriate methods of redress or reparation, such as compensation, treatment and recovery measures, and rehabilitation.⁹⁰ Children's protection of environmental human rights has been widely recognized and places an obligation on States to protect children and future generations.⁹¹

While there is an existing system for the protection of children's rights, the right of children and future generations to a healthy environment needs to be strengthened. In the case of climate litigation, children have been pushing advocacy forward in ways that are creative and important for the development of this normative framework of protection. This area, while admittedly important, needs our attention now more than ever before.

The next section will examine how the domestic litigation of environmental climate-related cases in the Americas have pushed the boundaries of advocacy.

V. ANALYSIS OF DOMESTIC ENVIRONMENTAL AND CLIMATE LITIGATION IN THE AMERICAS

The concept of intergenerational equity and solidarity is emerging in the domestic litigation of environmental human rights cases and specifically, through the protection of children and future generations. This section will examine the litigation of cases from Colombia, Argentina, and Ecuador. These Latin American cases have been groundbreaking and innovative in the protection of environmental rights for present and future generations. Groups of children and youth, through non-governmental organizations and parent groups, have advanced the development of important arguments and positions that have helped promote the concept of intergenerational equity and solidarity, as well as the protection of children and future generations.⁹² As mentioned earlier, these

⁸⁹ U.N. Committee on the Rts. of the Child, General No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights, U.N. Doc CRC/C/GC/16 (Apr. 17, 2013). <https://www2.ohchr.org/english/bodies/crc/docs/crc.c.gc.16.pdf>

⁹⁰ CRC General Comment No. 5 at ¶ 24.

⁹¹ Stockholm Declaration (stating "to defend and improve the human environment for present and future generations has become an imperative goal for mankind."); United Nations Framework Convention on Climate Change, 1771 U.N.T.S. 107, preamble, 1992 (determining the protection of the environment for "present and future generations"). <https://unfccc.int/resource/docs/convkp/conveng.pdf>

⁹² See e.g., *Demanda Generaciones Futuras v. Minambiente* [hereinafter *Future Generations v. Ministry of the Environment and Others*], Corte Suprema de Justicia [Supreme Court of Justice], 2 (Apr. 5, 2018) (Colom.) <https://cortesuprema.gov.co/corte/wp-content/uploads/2018/04/STC4360-2018-2018-00319-011.pdf>; *Kain v. Department of Environmental Protection*, 49 N.E. 3d. 1124 (Mass. 2016) (challenging the refusal by Massachusetts to issue binding greenhouse gas (GHG) emission reduction targets) <https://casetext.com/case/kain-v-dept-of-envtl-prot-1>; *Andrea Lozano Barragán y otros v. Presidente de la República y otros*, STC4360-2018 A, Corte Suprema de Justicia [Supreme Court], Sala de Casación Civil [Appeals Chamber] (Colombia), 5 Apr. 2018 (challenging deforestation in the Colombian Amazon)

cases been selected because they reflect important advancements in the normative framework of the right to a healthy environment and the connection between the rights of nature and the protection of present and future generations. These three cases recognize the pressing effects of climate change, loss of biodiversity, and environmental harm and therefore recognize the importance of protecting the rights of nature. The courts in these cases also acknowledged important international environmental and human rights principles such as sustainable development, principles of conservation, and the importance of equality, universality, interculturality, and the gendered and generational approach to the protection of human rights. These cases emphasize the importance and responsibility of all to protect present and future generations. Other domestic cases, not discussed in this article, have also raised similar arguments, but have not been successful so they have not been included in this discussion.⁹³

The remainder of this section will discuss these successful cases advancing arguments grounded in principles articulated in international environmental and human rights treaties, jurisprudence, and other sources of international law. The arguments presented in these cases can help us to push forward the development of the emerging field of environmental human rights, for the protection of present and future generations.

5.1 Future Generations v. Ministry of the Environment and Others (Colombia)

In the *Future Generations v. Ministry of the Environment and Others* (“Demanda Generaciones Futuras v. Minambiente”), DeJusticia⁹⁴ and twenty-five Colombian children brought a case against Colombia for failing to protect their rights to life and a healthy environment.⁹⁵ They

<https://www.cortesuprema.gov.co/corte/wp-content/uploads/relatorias/tutelas/B%20MAY2018/STC4360-2018.doc>; *Moncayo e otros v. Ecuador*, Protective Action No. 21201202000170, Sucumbíos Provincial Court of Justice, 26 Jan. 2021 (challenging gas flares by a state-owned oil company in Ecuadorean villages) https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210729_16152_ruling.pdf; *Neubauer et al. v. Germany*, 1 BvR 288/20, German Constitutional Court, 29 Apr. 2021 (challenging the German government's mitigation targets) https://www.bverfg.de/e/rs20210324_1bvr265618en.html; *Sharma v. Minister for the Environment*, FCA 560, Federal Court of Australia, 27 May 2021 (holding the Minister for the Environment owes a duty of care to children who may suffer potential ‘catastrophic harm’ due to the climate implications of approved projects). https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210527_VID-389-of-2021-2021-FCA-560-2021-FCA-774-2022-FCAFC-35-2022-FCAFC-65_judgment.pdf

⁹³ *E.g.*, *Juliana v. United States*, 339 F. Supp. 3d 1062, 1103 (D. Or. 2018) https://climatecasechart.com/wp-content/uploads/case-documents/2018/20180307_docket-17-71692_opinion.pdf; *Segovia et al. v. Climate Change Commission*, The Philippines Supreme Court (Mar. 7, 2017) https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2017/20170307_17425_judgment.pdf; NGT, *Mahendra Pandey v. UoI*, Application No. 470/2016, (Jan. 2, 2019) https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20190102_Application-No.-4702016_decision.pdf

⁹⁴ Dejusticia is a research-based and advocacy organization dedicated to the protection of human rights and social justice, and the strengthening of the rule of law. DEJUSTICIA, <https://www.dejusticia.org/en/about/> (last visited Apr. 27, 2023).

⁹⁵ Acción de Tutela [filing for constitutional claims in Colombian law], Tribunal Superior del Distrito Judicial

alleged that climate change, along with Colombia's disregard and failure to reduce deforestation in the Amazon, threatened the youth's fundamental rights.⁹⁶ Specifically, they argued that the Colombian Amazonian deforestation resulted in the increase of greenhouse gas emissions.⁹⁷ This, in turn, violated the children's rights to a healthy environment, life, health, food, and water, which are all protected under the Colombian constitution through articles 49, 58, 63, 67, 79, 80, 88, 95-8, 215, and 226.⁹⁸ In its decision, the Colombian Constitutional Court recalled one of its prior decisions, *T-411 de 1992*, and stated: "[t]he ecological problem and everything that it implicates is of universal importance, it is a problem of survival."⁹⁹ The Court added with emphasis that the protection of the environment must be responsive to a grave problem that poses a life or death question.¹⁰⁰ The Court stated:

[T]hese imminent dangers are evident in phenomena such as the excessive increasing of temperatures, the thawing of the poles, the massive extinction of animal and plant species, the increasingly frequent occurrence of meteorological events and disasters outside margins previously considered normal. There are unusual and unforeseen rainy seasons, permanent droughts, hurricanes or destructive tornadoes, strong and unpredictable tidal waves, draining rivers, increasing disappearances of species, etc...We are all obligated to stop exclusively thinking about our self-interest. We must consider the way in which our daily actions and behaviors affect society and nature...But in addition, this includes the unborn, who also deserve to enjoy the same environmental conditions that we have.¹⁰¹

The Court continued referring to its extensive jurisprudence in environmental rights to emphasize the need to protect the environment as a precondition of our survival on earth, especially for those of present (children) and future generations.¹⁰² It found that the principles of intergenerational equity and solidarity impose a responsibility on the Colombian government to stop and prevent the causes of the Amazon's deforestation.¹⁰³ The Court stated the following in its decision:

[B]y virtue of what has been said, it can be preached, that the fundamental rights of life, health, the minimum subsistence, freedom, and humanity are substantially linked and determined by the environment and the ecosystem. Without a healthy environment, subjects of law and sentient

de Bogotá (T.Sup.) [Appellate Court of the Judicial District of Bogotá], Sala Civ. Enero 29, 2018 (Colom.), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20180129_11001-22-03-000-2018-00319-00_complaint.pdf [<https://perma.cc/Z5KA-F4G6>]; *see also* Future Generations v. Ministry of the Environment and Others.

⁹⁶ Future Generations v. Ministry of the Environment and Others at 2-4.

⁹⁷ Future Generations v. Ministry of the Environment and Others.

⁹⁸ Future Generations v. Ministry of the Environment and Others at 26-27.

⁹⁹ Future Generations v. Ministry of the Environment and Others at 27 (stating "[e]l problema ecológico y todo lo que este implica es hoy en día un clamor universal, es un problema de sobrevivencia." (Translation by the author)).

¹⁰⁰ Future Generations v. Ministry of the Environment and Others at 27.

¹⁰¹ Future Generations v. Ministry of the Environment and Others at 18.

¹⁰² Future Generations v. Ministry of the Environment and Others at 28.

¹⁰³ Future Generations v. Ministry of the Environment and Others at 37.

beings in general will not be able to survive, much less protect those rights, for our children or for future generations.¹⁰⁴

The Court found that the environment had rights of its own, but also that it had to be protected in relation with the rights of individuals and communities.¹⁰⁵ The Court recognized and incorporated the principles of intergenerational equity and solidarity with the pressing need to protect the Colombian Amazon for the rights of humanity and nature itself.

5.2 Asociación Civil por la Justicia Ambiental v. Provincia entre Ríos et al. (Argentina)

In this second case, *Asociación Civil por la Justicia Ambiental*¹⁰⁶ v. *Provincia entre Ríos et al.*, a group of children in Argentina, through their parents and legal representatives (Asociación Civil por la Justicia Ambiental and Foto Ecologista de Paraná), filed an *amparo colectivo ambiental*.¹⁰⁷ The petitioners alleged that Argentina, in the Entre Ríos Province and Municipio de Victoria, failed to protect environmentally sensitive wetlands in the Paraná Delta.¹⁰⁸ The petitioners asked the Court to find that the Paraná Delta was “subject to rights” as an essential ecosystem for climate change adaptation and mitigation.¹⁰⁹ They further argued that Argentina had an obligation to protect the region by recognizing it a “risk area” and designate a “guardian” for its protection.¹¹⁰ In making this argument, the Petitioners referred to the Inter-American Court of Human Rights Advisory Opinion OC-23/17 on *The Environment and Human Rights*, and quoted the following:

¹⁰⁴ Future Generations v. Ministry of the Environment and Others at 13 (translation by DeJusticia, <https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/>).

¹⁰⁵ Future Generations v. Ministry of the Environment and Others at 13.

¹⁰⁶ The petitioners included *La Asociación Civil por la Justicia Ambiental* and *La Asociación Foro Ecologista de Paraná*. Interpone Acción de Amparo Colectivo Ambiental Solicita Medida Cautelar Urgente, Corte Suprema de Justicia de la Nación [filing for constitutional claim] 1-2 (2020) (Arg.).

¹⁰⁷ The Argentine amparo Ambiental is based on article 41 of the Argentine constitution and article 32 of the General Environmental Law, which focuses on environmental protection and the human rights to life, health, and physical integrity. Article 41 states that every person can request an amparo action against acts or omissions of the public authorities, as long as the rights are recognized by the Argentine constitution. This kind of action can be brought against any type of discrimination, related to rights for the protection of the environment. CONSTITUCIÓN NACIONAL at art. 41; *see generally*, *Asociación Civil por la Justicia Ambiental v. Provincia entre Ríos et al.*, Corte Suprema de Justicia de la Nación, 6 (Aug. 11, 2020) (Arg.). <http://www.saij.gob.ar/descarga-archivo?guid=rstuvwfa-llos-comp-uest-o21000230pdf&name=21000230.pdf>

¹⁰⁸ The petitioners asked that the Court hold Argentina responsible “por las omisiones e incumplimientos en relación al deber de preservar la integridad de los humedales del Delta de Paraná.” The government (through private actors) had permitted for the burning and farming of land through monoculture and cattle ranching resulting in the deforestation of the area. This practice had taken place in approximately 250 square kilometers, resulting in an environmental disaster with grave consequences, including the increase of greenhouse gas emissions. *Asociación Civil por la Justicia Ambiental v. Provincia entre Ríos et al.* at 1, 12-13.

¹⁰⁹ *Asociación Civil por la Justicia Ambiental v. Provincia entre Ríos et al.* at 2-3.

¹¹⁰ *Asociación Civil por la Justicia Ambiental v. Provincia entre Ríos et al.* at 2-3

[T]he Court considers it important to stress that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals.¹¹¹

The recognition that the Paraná Delta was “subject to rights” is significant because it solidifies the doctrine of the “Rights of Nature,” recognizing ecosystems and the environment as right-holders. Finally, the petitioners asked that the Court order Argentina to develop and implement an Environmental Territorial Order and Plan to regulate the use of the Paraná Delta due to its importance for present and future generations.¹¹²

Some of the most important elements of this *amparo colectivo ambiental* were its emphasis that the degradation and deforestation of critical ecosystems in Argentina are environmentally disastrous for the plant species and animals living in the region, but also globally. It stressed that Argentina had the obligation of protecting present generations, but also future generations based on the principle of intergenerational solidarity and equity.¹¹³ In order to ensure that the environment was protected, and the harm mitigated, the *amparo colectivo ambiental* referred to Argentina’s obligations under the Escazú Agreement and the importance of the public’s participatory rights.¹¹⁴

The Court’s first decision was based on the jurisdiction of the Argentine Supreme Court to hear the *amparo colectivo ambiental*. The Court found that it had the jurisdictional authority to do so, and could not be limited or curbed by legislative authority since the Argentine Constitution, through Article 116, provided authority to hear claims relating to the protection of the environment.¹¹⁵ The Court consolidated this *amparo colectivo ambiental* and other similar claims, which are now pending for a final decision on the merits.¹¹⁶ That decision is still pending.

5.3 Herrera Carrión et al. v. Ministerio del Ambiente (Ecuador)

The third and last case discussed is *Herrera Carrión et al v. Ministerio del Ambiente* from Ecuador. In this case, a group of nine girls¹¹⁷ from the Provinces of Sucumbíos and Orellana, submitted a constitutional injunction (*acción de protección*) against the government of Ecuador.¹¹⁸ In

¹¹¹ Acción de Amparo Colectivo Ambiental at 61 (quoting Advisory Opinion OC-23/17 at ¶ 62).

¹¹² Asociación Civil por la Justicia Ambiental v. Provincia entre Ríos et al. at 3.

¹¹³ Asociación Civil por la Justicia Ambiental v. Provincia entre Ríos et al. at 8.

¹¹⁴ Acción de Amparo Colectivo Ambiental at 6.

¹¹⁵ Asociación Civil por la Justicia Ambiental v. Provincia entre Ríos et al. at 9.

¹¹⁶ Asociación Civil por la Justicia Ambiental v. Provincia entre Ríos et al. at 1.

¹¹⁷ The group of nine girls who brought suit are: Leonella Yasuni Monacayo Jimenez, Valladolid Requelme Rosa Daniel, Naranjo Vite Skarlett Liliana, Jurado Silva Liberth Jamileth, Muñoz Samaniego Denisse Mishelle, Bravo Casigña Danny Sthefany, Mora Castro Evelyn Mishell, Tejada Cuichan Jeyner Eberilde, Herrera Carrión Kerly Valentina. Acción de Protección Herrera Carrión, et al. v. Procuraduría General del Estado, et al., República del Ecuador (June 3, 2020) (Ecuador); República del Ecuador Función Judicial, Segunda Instancia, Herrera Carrión (July 29, 2021) (Ecuador).

¹¹⁸ Acción de Protección Herrera Carrion, et al. v. Procuraduria General del Estado, et al. The Constitution of Ecuador recognizes the “Rights of Nature” stating that “[a]ll persons, communities, peoples and nations

their petition, they claimed that the use of gas flaring violated their right to health, water, food, healthy environment, and the rights of nature.¹¹⁹ They argued that while gas flaring was authorized under specific circumstances, the way in which it was being used in these municipalities was unlawful, because it disregarded Ecuador's environmental protections.¹²⁰ They further maintained that the gas flaring practices contributed to the loss of biodiversity, natural cycles, and climate change.¹²¹ They asked that this practice be banned, especially in the areas near the Ecuadorian Amazon, and that the Court impose the prohibition of future gas flaring projects.¹²² Additionally, the petitioners emphasized the responsibility to protect present and future generations.

In its decision (on appeal), the Court ordered Ecuador to stop the use of gas flaring near populated areas, and progressively reduce it in the rest of the country.¹²³ In its analysis, the Court examined and considered the effects of gas flaring on the environment and the surrounding population exposed to such practices.¹²⁴ The Court integrated Ecuadorian environmental law, specifically Ecuador's constitution, as well as principles of sustainable development.¹²⁵ The Court emphasized the need to prioritize finding alternatives to the use of hydrocarbons due to its impactful effects and pollution of natural resources, especially water resources, in violation of principles of conservation, sustainable development, and renewable resources.¹²⁶

In its decision, the Court emphasized the importance of protecting the environment and human rights, and specifically the rights to life, health, water, and food.¹²⁷ One of the Court's most crucial points, is the importance and responsibility of protecting the rights of present and future generations.¹²⁸

[T]he right to health is guaranteed by the State, whose realization is linked to the exercise of other rights, within those the right to water, food, education, physical education, work, social security, a healthy environment, and others that sustain a healthy living. The State must guarantee this right through economic, social, cultural, education, and environmental policies. It must also enable without exclusion the permanent and timely access to programs, actions, and services to health, sexual health, and reproductive health. The provision of services must be guided by the principles of equality, universality, solidarity, interculturality, quality, effectiveness, efficiency, precaution, and

can call upon public authorities to enforce the rights of nature" becoming the first country to recognize nature (Pacha Mama) as a right-holder. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUCIÓN] Oct. 20, 2008, Ch. VII, arts. 71-74, (Ecu.).

¹¹⁹ *Acción de Protección Herrera Carrion, et al. v. Procuraduría General del Estado, et al* at 4-5.

¹²⁰ *Acción de Protección Herrera Carrion, et al. v. Procuraduría General del Estado, et al* at 30.

¹²¹ *Acción de Protección Herrera Carrion, et al. v. Procuraduría General del Estado, et al* at 37.

¹²² *Acción de Protección Herrera Carrion, et al. v. Procuraduría General del Estado, et al.*

¹²³ *Acción de Protección Herrera Carrion, et al. v. Procuraduría General del Estado, et al* at 3. On May 7, 2020, the Court of first instance dismissed the petition based the petitioner's lack of evidence.

¹²⁴ *Herrera Carrion, et al. v. Procuraduría General del Estado, Appeal.*

¹²⁵ *Herrera Carrion, et al. v. Procuraduría General del Estado, Appeal.*

¹²⁶ *Herrera Carrión Appeal* at 10.

¹²⁷ *Herrera Carrion, et al. v. Procuraduría General del Estado, Appeal* at 12.

¹²⁸ *Herrera Carrion, et al. v. Procuraduría General del Estado, Appeal* at 10.

bioethics, with a gendered and generational focus.¹²⁹

The Ecuadorian Court considered the *DeJusticia* decision in favor of the 25 youth petitioners who alleged that it was Colombia's responsibility to protect present and future generations.¹³⁰ Additionally, the Court referred to the Stockholm Declaration and World Charter for Nature, and emphasized the responsibility to end practices of releasing toxic substances into the environment that have the effect of increasing temperatures.¹³¹ As part of this responsibility, the Court stressed that it was critical to ensure biodiversity for the protection of present and future generations.¹³² Finally, the Court quoted the Commission of Brundtland (1987), stating "it is in humanity's hands to ensure that development is sustainable to satisfy the needs of the present without compromising/jeopardizing the capacity of future generations satisfying their own."¹³³ As such, Ecuador was found to be responsible for ensuring that it implemented mitigation efforts and addressed the negative ecological impacts in the Ecuadorian Amazon.¹³⁴ The Court ordered the progressive elimination of gas flaring, especially those near highly populated areas, and the remainder by 2030.¹³⁵

VI. CONCLUSION

It is clear from *Future Generations v. Ministry of the Environment and Others* ("DeJusticia"), *Asociación Civil por la Justicia Ambiental v. Provincia entre Rios et al.*, *Herrera Carrión et al. v. Ecuador*, that domestic courts have been pushing advocacy boundaries by establishing strong normative connections between domestic constitutions, environmental regulatory systems, and international human rights and environmental law sources to protect the rights of present and future generations. From these three decisions, it is clear that the principle of the intergenerational equity and solidarity places a responsibility on present generations to protect the environment for future generations. It is up to present generations to mitigate the effects of climate change and loss of biodiversity to prevent further degradation and destruction.

Finally, international human rights and environmental law sources, such as the CRC, with the Rights of the Child framework and the Escazú Agreement provide strong normative frameworks to hold States accountable for the protection of the environment and for present and future generations to vindicate their rights. While these developments have been emerging globally, we can look to the Americas for groundbreaking and innovative arguments that continue pushing advocacy to protect human rights and the environment for present and future generations.

¹²⁹ *Herrera Carrion, et al. v. Procuraduría General del Estado*, Appeal at 56-57.

¹³⁰ *Herrera Carrion, et al. v. Procuraduría General del Estado*, Appeal at 29 (citing *Future Generations v. Ministry of the Environment and Others*).

¹³¹ *Herrera Carrion, et al. v. Procuraduría General del Estado*, Appeal at 29, (citing Stockholm Declaration; citing U.N. Doc. A/RES/37/7, World Charter for Nature, 9 Nov. 1982).

¹³² *Herrera Carrion, et al. v. Procuraduría General del Estado*, Appeal at 29.

¹³³ *Herrera Carrion, et al. v. Procuraduría General del Estado*, Appeal at 54.

¹³⁴ *Herrera Carrion, et al. v. Procuraduría General del Estado*, Appeal at 39.

¹³⁵ *Herrera Carrion, et al. v. Procuraduría General del Estado*, Appeal at 65.

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