Before the Inter-American Court of Human Rights

Written Opinion

regarding the Request for an Advisory Opinion

on the Climate Emergency and Human Rights

Submitted by:

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December 18, 2023

Attachment: UIC Law School International Human Rights Clinic & Santa Clara University International Human Rights Clinic, Escazú Toolkit: Using the Escazú Agreement in Cases Before the Inter-American System (Nov. 2022, updated Mar. 2023), https://repository.law.uic.edu/whitepapers/25/.

December 18, 2023

Pablo Saavedra Alessandri
Secretary of the Inter-American Court of Human Rights
Avenida 10, Calles 45 y 47
Los Yoses, San Pedro
San José, Costa Rica

Submitted via email to tramite@corteidh.or.cr

Dear Secretary Saavedra Alessandri,

On behalf of the International Human Rights Clinic at Santa Clara University School of Law and the International Human Rights Clinic at the University of Illinois Chicago School of Law, please find a joint submission to assist the Honorable Court in developing its response to the request for an advisory opinion submitted by the Republic of Colombia and the Republic of Chile, requesting the Court to clarify the scope of State obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law. We write this communication pursuant to Article 73.3 of the Rules of Procedure of the Inter-American Court of Human Rights.

Last year, both Clinics collaborated to develop a toolkit analyzing the complementarity between the Inter-American Human Right System's existing approach to environmental access rights and the more specialized normative framework provided by the *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean* ("Escazú Agreement"). The toolkit addresses the environmental access rights recognized in the Escazú Agreement, as well as the Agreement's special protections for individuals and groups in situations of vulnerability and State obligations to create a safe, enabling environment for human rights defenders. Our hope in publishing this toolkit was to promote the integration of the Escazú Agreement's specific obligations as normative guidance on the procedural dimensions of the human right to a healthy environment into the Inter-American System's interpretation of State obligations arising under the human right to a healthy environment and other related rights.

Given the significant role that environmental access rights play in the context of the climate emergency, this submission provides a brief summary of the most relevant points raised in our toolkit, and we have also attached the toolkit itself as an annex. Accordingly, our submission provides our observations on the questions that implicate the importance of environmental access rights to preventing human rights violations arising from the climate emergency, specifically questions A(2)(a), B(1)(iv), and D(1), examining the State duty of prevention, the right to access information, and the right to access to justice.

Specifically, we ask this Honorable Court to expand on the following three legal obligations of States:

1) the due diligence obligation to protect against environmental harms that may exacerbate the climate emergency, whether by public or private entities, which includes the duty to ensure that environmental and social impact assessments ("ESIAs") address future and aggregate harm, as well as the duty to prepare contingency plans and to actively mitigate any activities that have the potential to exacerbate the climate emergency; (Question A(2)(a))

2) the obligation to affirmatively produce and provide access to comprehensive and accurate environmental information, including on factors that contribute to the climate emergency, whether by public or private entities, as well as the duty to provide such access without unnecessary restrictions, (Question B(1)(iv)) and

3) the obligation to provide adequate, effective, and timely judicial remedies to provide protection and redress for the human rights impacts of the climate emergency (Question D(1)).

Our analysis indicates that robust implementation of environmental access rights is essential for the fulfillment of the human right to a clean, healthy, and sustainable environment and related rights, particularly in the context of the climate emergency. We strongly share the view of the UN Special Rapporteur on Human Rights and the Environment, who stated that "[t]o comply with their international human rights obligations, States should apply a rights-based approach to all aspects of climate change and climate action. Applying a rights-based approach clarifies the obligations of States and businesses; catalyzes ambitious action; highlights the plight of the marginalized and most vulnerable; and empowers people to become involved in designing and implementing solutions."[1]

We therefore ask the Honorable Court to consider extending its existing standards in light of the specialized protections outlined in the Escazú Agreement to ensure that vulnerable individuals and communities can utilize their environmental access rights to combat the climate emergency. Additionally, we encourage the Court to incorporate in its analysis the considerations that the International Court of Justice and other international bodies will soon publish in response to other pending advisory opinions on the obligations of States in respect of climate change.

We appreciate the opportunity to share our research and analysis in this regard with the Honorable Court.

In solidarity,

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[1] David R. Boyd. (2019). Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/74/161 (15 July 2019), ¶ 62.

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I. QUESTION A(2)(a)[2] - The Court should declare that States' due diligence obligations to protect against environmental harms extend to any activities that may exacerbate the climate emergency, whether by public or private entities

1. Both the Inter-American Human Rights System [hereinafter "IAHRS" or "Inter-American System"] and the Escazú Agreement already provide guidance on State obligations to regulate, monitor and oversee, request and adopt environmental and social impact assessments [ESIAs], establish contingency plans, and mitigate activities under their jurisdiction that exacerbate or could exacerbate environmental harm as components of the broader duty to prevent significant environmental harm. ESIAs are a tool to implement environmental regulation, monitor and oversee activities that may cause environmental harm, and inform affected communities of relevant risks and alternatives. They are a primary vehicle for fulfilling this obligation, together with contingency plans and mitigation measures to redress environmental harm, but especially important for when preventive measures fail.[3] This section addresses how the Court should extend these obligations to activities that exacerbate or could exacerbate the climate emergency by drawing on the existing

[2] Question A(2)(a) of the Advisory Opinion Request: "What should a State take into consideration when implementing its obligations: (i) to regulate; (ii) to monitor and oversee; (iii) to request and to adopt social and environmental impact assessments; (iv) to establish a contingency plan, and (v) to mitigate any activities under its jurisdiction that exacerbate or could exacerbate the climate emergency?"

[3] ESIAs are, as this Court has already acknowledged, widely incorporated into international and domestic environmental laws# and are generally understood to be the primary domestic environmental management procedure to evaluate the likely impact of a proposed activity on the environment "with a view to ensuring environmentally sound and sustainable development." UNEP, Resolution 14/25 of June 17, 1987, adopting the Goals and Principles of Environmental Impact Assessment. UN Doc. UNEP/WG.152/4 Annex [hereinafter UNEP Resolution 14/25]; U.N. Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800 (1991) at art. 1(vi). An ESIA is "the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made." Thus, government agencies are usually required to produce a "publicly reviewable physical document reflecting the required internal project analysis," ensuring "that the agency has given 'good faith consideration' to the environmental consequences of its proposed action and its reasonable alternatives." Almost always, the EIA process includes the public in the gathering of information as well as in the review of the document. Tseming Yang, The Emergence of the Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law, 70 Hastings L.J. 525, 529 (2019). See also, Advisory Opinion OC-23/17 at ¶ 150, note 297, 157-159 (citing UNEP, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, 2004, p. 18. Available at: https://unep.ch/etu/publications/textONUBr.pdf. See also, UNEP, Resolution 14/25 of June 17, 1987, adopting the Goals and Principles of Environmental Impact Assessment, UN Doc. UNEP/WG.152/4 Annex, Principle 2). An ESIA is commonly designed to inform and elicit feedback from those who may be affected. Yang; See also Sarah Dávila A., Making the Case for a Right to a Healthy Environment for the Protection of Vulnerable Communities: A Case of Coal- Ash Disaster in Puerto Rico, 9 Mich. J. Envtl. & Admin. L. 379, 410-411 (2020) (noting that a State's failure to provide an environmental impact statement particularly impacts the ability of vulnerable groups to access information and participate in decision-making processes). In addition to identifying environmental impacts and potential mitigation measures, ESIAs typically provide an assessment of alternatives to the proposed activity. UNEP Res. 14/25, Principle 4(b-e). Pursuant to the Rio Declaration, "[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority." Report of the United Nations Conference on Environment and Development, Rio Declaration on Environment and Development: Rep. of the G.A., U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992).

Inter-American normative framework as well as the specialized guidance provided by the Escazú Agreement.

2. In its Advisory Opinion on the Environment and Human Rights [Advisory Opinion 23], the Inter-American Court interpreted State obligations to respect and protect the rights to life and personal integrity under the American Convention on Human Rights [American Convention] in light of the fundamental principles of international environmental law.[4] As this Court laid out in the Advisory Opinion, States have a strong duty of prevention that requires them to regulate, monitor and oversee, request and adopt environmental and social impact assessments, establish contingency plans, and mitigate any activities under their jurisdiction that may generate significant environmental harm.[5] The Court defined significant environmental harm as "any harm to the environment that may involve a violation of the rights to life and personal integrity[.]"[6] These obligations are grounded in the requirement that States "comply with their obligations under the American Convention with due diligence[]"[7] by taking all necessary steps to ensure rights, including by protecting against violations by private parties.[8] In the case *Indigenous Communities of the Lhaka Honhat (Nuestra Tierra) Association v. Argentina*,, the Court reaffirmed that the obligation of prevention is an important way for States to comply with their obligation to ensure the right to a healthy environment pursuant to Article 1(1) of the American Convention.[9] The Court added that this obligation of prevention includes actions by public as well as private entities.[10] The Court also reaffirmed that this is a broad duty, finding that "States are bound to use all the means at their disposal to avoid activities under its jurisdiction causing significant harm to the environment."[11]

3. To meet these requirements for compliance with the duty of prevention, this Court has indicated that, pursuant to their obligations under Article 2 of the American Convention,[12] "States must [...] regulate activities that could cause significant harm to the environment in order to reduce

[4] Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, (Nov. 15, 2017). [hereinafter Advisory Opinion OC-23/17]. The United Nations General Assembly (UNGA) requested the International Court of Justice (ICJ) to interpret States' obligations concerning climate change under key instruments, including the UN Charter, International Covenants on Civil and Political Rights, Social and Cultural Rights, the UN Framework Convention on Climate Change, Paris Agreement, UN Convention on the Law of the Sea, and relevant principles of international environmental law (UNGA resolution 77/276).

[5] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 145; I/A Court H.R., Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020. Series C No. 400, ¶ 208. [hereinafter Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina]

[6] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 140.

[7] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 123; see also, Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶ 208.

[8] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 118.

[9] Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶ 207.

[10] *Id*.

[11] *Id*. at ¶ 208 (citing Advisory Opinion OC-23/17, *supra* note 4, at ¶ 142).

[12] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 146.

the risk"[13] of other human rights violations.[14] To fulfill the duty to supervise and monitor, States must also establish monitoring and accountability mechanisms that are both adequate and independent.[15] Such mechanisms must cover public and private actors[16] and include both protective or preventative measures[17] and "appropriate measures to investigate, punish and redress possible abuse through effective policies, regulations and adjudication."[18] According to this Court, the greater the environmental risk, the more vigorous the supervision and monitoring mechanisms must be.[19] While ESIAs are an important component of the duties to regulate and to supervise and monitor, "the control that a State must exercise does not end with the environmental impact assessment; rather, States must continuously monitor the environmental impact of a project or activity."[20] Because ESIAs are one of the most important mechanisms by which States fulfill their obligations to regulate and supervise and monitor activities that may cause significant environmental harm, as well as to provide information about risks and alternatives to such activities, this section addresses the first three elements of the duty of prevention in the context of ESIAs, before going on to address contingency plans and mitigation measures.

4. The Escazú Agreement further clarifies that States must take an active role at all possible times to prevent and protect against the present and potential adverse climate impacts of all activities within their jurisdiction, whether public or private. The Economic Commission for Latin America and the Caribbean has observed that:

> The Escazú Agreement is also a key human rights agreement for climate action. In addition to expressly recognizing and setting out procedural human rights, it serves as the basis for the full exercise of substantive rights such as the right to a healthy environment, the right

[13] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 174.
[14] *Id*.
[15] *Id.* at ¶ 154.
[16] *Id*. at ¶ 153. The Court also emphasized the independent obligations of business enterprises under the UN Guiding Principles on Business and Human Rights to "respect and protect human rights, and prevent, mitigate and assume responsibility for the adverse human rights impacts of their activities." *Id*. at ¶ 155. We respectfully encourage the Court to emphasize the applicability of these obligations to business activities that exacerbate or may exacerbate the climate emergency.
[17] *Id*. at ¶ 152 (citing Case of Ximenes Lopes v. Brazil. Merits, reparations and costs. Judgment of July 4, 2006. Series C No. 149, ¶ 89 and 90; Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits, reparations and costs. Judgment of June 27, 2012. Series C No. 245, ¶ 167; Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs. Judgment of November 30, 2016. Series C No. 329, ¶ 154 and 208; Case of the Kaliña and Lokono Peoples v. Suriname. Merits, reparations and costs. Judgment of November 25, 2015. Series C No. 309, ¶ 221 and 222. [hereinafter "Kaliña and Lokono Peoples"].
[18] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 154.
[19] *Id*.; Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶ 208.
[20] Advisory Opinion OC-23/17 *supra* note 4, at ¶ 153 (citing ICJ, Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay). Judgment of April 20, 2010, ¶ 205, and ICJ, Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua) and Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica). Judgment of December 16, 2015, ¶ 161).

to life, health or food in the context of climate change. It also focuses on persons and groups in vulnerable situations, in an effort to ensure that no one is left behind.[21]

5. The following subsections accordingly address normative guidance from the Inter-American System and the Escazú Agreement on the specific components of the duty of prevention, addressing the obligations to regulate and supervise, monitor through ESIAs, and the obligations to develop contingency plans and mitigation measures to remediate the human rights impacts of significant environmental harm.

6. Given the existential threat posed by the climate emergency to the rights to life and personal integrity, the Honorable Court should explicitly declare that States' due diligence obligation to prevent significant environmental harm applies to the climate emergency. Specifically, we respectfully urge the Honorable Court to interpret the duty of prevention in light of the specialized guidance provided by the Escazú Agreement, consider that all harm caused by the climate emergency constitutes significant environmental harm triggering the duty of prevention, and extend the specific obligations arising under the duty of prevention to all dimensions of the climate emergency, as outlined below.

A. States must request and adopt adequate ESIAs that include an assessment of climate impacts, whether such activities are carried out directly by the State or by private actors.

7. The Inter-American System requires States to approve and conduct ESIAs[22] that "include an evaluation of the potential social impact of the project"[23] when there is a risk of significant damage to the environment. The obligation to conduct an ESIA "is independent of whether a project is being implemented directly by the State or by private individuals."[24] Although this Court has thus far only addressed the ESIA requirement through its contentious jurisdiction in cases involving the rights of Indigenous Peoples,[25] it explicitly declared in its Advisory Opinion on the Environment and Human Rights that the ESIA obligation "also exists in relation to any activity that may cause significant environmental damage."[26] Specifically, the Court declared that "when it is determined that an activity involves a risk of significant damage, an [ESIA] must be carried

[21] Economic Commission for Latin America and the Caribbean/United Nations High Commissioner for Human Rights (ECLAC/OHCHR) *Climate change and human rights: contributions by and for Latin America and the Caribbean* (LC/TS.2019/94), p. 48, Santiago, 2019.
[22] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 164 (citing to Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 129 (Nov. 28, 2007) [hereinafter "Saramaka People"], and Kaliña and Lokono Peoples, *supra* note 17, at ¶¶ 213-226.
[23] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 164 (citing to Saramaka People, *supra* note 22, at ¶ 129, and Kaliña and Lokono Peoples, *supra* note 17, at ¶¶ 213-226).
[24] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 160.
[25] *Id*. at ¶ 156.
[26] *Id*. at ¶ 157.

out."[27] The Court should extend this obligation to all activities that exacerbate or may exacerbate the climate emergency and add a requirement for all ESIAs to directly assess the environmental and social dimensions of a proposed activity's climate impact. To the degree that the obligations to regulate and to supervise and monitor go beyond ESIAs, the Court should also extend these obligations to the climate emergency by explicitly declaring that States have a due diligence obligation to regulate and to supervise and monitor activities that may contribute to the climate emergency.

8. ESIAs serve a vital protective function while also supporting the realization of the core environmental access rights of access to information and public participation in environmental decisions. The Court has found a violation of the right to participate under Article 23 of the American Convention where the State has failed to conduct an adequate ESIA as part of a process of free, prior, and informed consultation with Indigenous Peoples whose communal territory may be affected by a proposed activity.[28] In extending the ESIA requirement to all activities that may cause significant environmental harm, the Court considered that ESIAs play an essential function in fulfilling States' due diligence obligation to protect against human rights violations, by allowing States to determine whether a proposed activity will cause significant environmental harm, preventing such harm and to inform the public about the proposed activity's potential risks and alternatives.[29]

9. As noted above, the Court developed its specific ESIA requirements through its jurisprudence on Indigenous Peoples' rights, beginning with the *Saramaka People v. Suriname* judgment,[30] and the Court has extended these requirements to all activities that pose a risk of significant environmental harm.[31] To be considered adequate under this standard, all ESIAs:

> must be made by independent entities with State oversight prior to implementation of the activity or project, include the cumulative impact, respect the traditions and culture of any indigenous peoples who could be affected, and the content of such assessments must be determined and defined by law or within the framework of the project authorization process, taking into account the nature and size of the project and its potential impact on the environment[.][32]

10. The following paragraphs provide a brief discussion of those required ESIA elements that the Court should explicitly extend to activities that exacerbate or could exacerbate the climate emergency.

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[27] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 160.
[28] Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶¶ 182-184.
[29] Advisory Opinion OC-23/17, *supra* note 4, at ¶¶ 140, 156, citing Saramaka People *supra* note 22, at ¶ 40.
[30] Saramaka People, *supra* note 22, at ¶ 129.
[31] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 157.
[32] *Id.* at ¶ 174.

11. In *Kichwa Indigenous People of Sarayaku v. Ecuador*, the Court followed *Saramaka* in providing specific guidance for what constitutes an adequate ESIA. First, all ESIAs must be done "in conformity with the relevant international standards and best practices[.]"[33] The Court reiterated that this standard applies to all ESIAs in its Advisory Opinion on the Environment and Human Rights.[34] The core standards that the Court has emphasized in its jurisprudence are the requirements that in cases involving Indigenous and Tribal Peoples, that the ESIA "respect the[ir] traditions and culture[,]"[35] and in all cases, that the ESIA be carried out before the State permit the activity in question,[36] as discussed below.

12. However, applicable international standards and best practices for ESIAs encompass a much wider set of considerations, including ones that bear on State obligations relating to the climate emergency. Accordingly, we respectfully encourage the Court to join the UN Special Rapporteur on the human right to a healthy environment in recognizing that these international standards and best practices call for ESIAs to directly consider the present and potential climate impacts of the proposed activity, including projects, plans, and policies;[37] and to explicitly incorporate this requirement into the components of an adequate ESIA under the Inter-American normative framework. In the report submitted by civil society in conjunction with the 2019 thematic hearing convened by the Inter-American Commission on Human Rights (Commission), the authors cite to several examples of climate litigation where domestic tribunals have imposed this requirement.[38] The consideration of climate change should include not only the proposed activity's impact on the climate emergency but also the environmental and social dimensions of those impacts - in other words, the impact of intensified climate change on related human rights

[33] Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, *supra* note 17, at ¶ 206. In the context of Indigenous Peoples' rights, the Court has referred to the Akwé:Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities as a source (Saramaka People, *supra* note 22).

[34] Advisory Opinion OC-23/17, *supra* note 4, ¶ 161, citing Saramaka People, *supra* note 22, at ¶ 41; Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras, ¶ 180 [hereinafter Triunfo de la Cruz Garifuna Community and its members v. Honduras]; Kaliña and Lokono Peoples, *supra* note 17, ¶ 216.

[35] Triunfo de la Cruz Garifuna Community and its members v. Honduras, *supra* note 34, at ¶ 180. In other cases, it has been suggested that this requirement be understood as obliging States to ensure that the proposal conforms to the principle of non-discrimination and considers the needs of those who are particularly vulnerable to environmental harm. Diaz Albar, Magdalena, et al. Cambio Climático y los Derechos de Mujeres, Pueblos Indígenas y Comunidades Rurales en las Américas (abril 2020) p. 66 (citing John Knox. (2018). Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/37/59, ¶ 21).

[36] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 162.

[37] Boyd, *supra* note 1, at ¶ 64(d).

[38] Diaz Albar, Magdalena, et al., *supra* note 35, at pp. 66-68; see also AIDA, High court orders Colombian government to adopt concrete actions for climate crisis mitigation and adaptation (23 Oct 2023), at https://aida-americas.org/en/press/high-court-orders-colombian-government-to-adopt-concrete-actions-for-climate-crisis-mitigation-and-adaptation?emci=ed01fee5-1b8f-ee11-8925-002248223cba&emdi=a4d784be-888f-ee11-8925-002248223f36&ceid=877690.

and vulnerable groups.[39] For example, climate impact analysis should assess not only whether the proposed activity would exacerbate the climate emergency or disrupt mitigation efforts, but also whether it would affect the climate change resilience or adaptive capacity of affected communities.[40] States should also apply this approach to the evaluation of proposed responses to climate change, including adaptation and mitigation activities.[41] In fulfilling this requirement, States should assess "both the upstream and downstream effects"[42] and, in keeping with the Court's recognition that States have a particular obligation to regulate "activities that involve significant risks to [] health[,]"[43] give particular attention to proposals that strongly implicate the climate emergency, such as oil drilling, coal mining, or energy generation that involves combustion of fuel or otherwise results in the release of large amounts of greenhouse gases.[44]

13. With regard to the timing of ESIAs, the Court in *Sarayaku* held that States may not permit a proposed activity until they "have made a prior environmental and social impact assessment."[45] Although States have a heightened obligation when conducting ESIAs that may affect Indigenous territory,[46] the Court has broadened this requirement, indicating that States must use ESIAs to ensure that any affected community is aware of the possible risks, including environmental threats and health risks, in order for them to accept the proposed development or investment plan on an informed and voluntary basis.[47] To meet this requirement, which applies to all ESIAs, the Court has declared that States must ensure that an ESIA "is concluded before the activity is carried out or before the permits required for its implementation have been granted."[48] The prior nature of the ESIA is necessary to permit the consideration of less destructive alternatives and reduce the likelihood of financial losses resulting from changes to the proposed activity.[49] According to the Court, the prior nature of the ESIA also relates to the broader requirement that States implement the actions required to fulfill the obligation of prevention before "damage is caused to the

[39] United Nations Environment Programme, Climate Change and Human Rights, 2015, p. 17.
[40] International Institute for Environment and Development. Climate change in impact assessments: towards an integrated approach (October 2023), p. 3, at https://www.iied.org/sites/default/files/pdfs/2023-10/21636iied.pdf.
[41] United Nations Environment Programme, Climate Change and Human Rights, *supra* note 39, p. 34; Office of the United Nations High Commissioner for Human Rights, Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Focus report on human rights and climate change (2014).
[42] Boyd, *supra* note 1, at ¶ 64(d).
[43] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 141.
[44] Diaz Albar, Magdalena, et al., *supra* note 35, at p. 66 (citing United Nations Environment Programme, Climate Change and Human Rights, *supra* note 39, at p. 16).
[45] Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, *supra* note 17, at ¶ 205, citing Saramaka People, *supra* note 22, at ¶ 130.
[46] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 169.
[47] *Id*. at ¶ 156; see also Saramaka People, *supra* note 22 at ¶¶ 129, 133; Kichwa Indigenous People of Sarayaku, *supra* note 17, at ¶ 206
[48] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 162.
[49] *Id*.

environment, [… since] after the damage has occurred, it will frequently not be possible to restore the previous situation."[50]

14. The Court has also declared that ESIAs must be carried out by "independent and technically competent bodies, under the supervision of the State."[51] Specifically, States must observe their monitoring and oversight obligation by supervising the development of ESIAs to guarantee their independence and technical quality, either by conducting them directly or by ensuring they are "carried out by an independent entity with the relevant technical capacity, under the State's supervision."[52] The Court has further clarified that, to adequately meet its supervisory obligations in this context, the State may not approve an ESIA without first assessing "whether execution of the project is compatible with its international obligations[,]" including "the impact that the project may have on its human rights obligations."[53] The Court has also emphasized that ESIAs must address the social, cultural, and, particularly in cases involving Indigenous and Tribal Peoples,[54] the spiritual impacts deriving from the proposed project.[55] In its Advisory Opinion on the Environment and Human Rights, the Court explicitly extended the requirement from its Indigenous Peoples' rights jurisprudence that ESIAs must "include an evaluation of the potential social impact of the project."[56] Accordingly, all environmental impact statements must "include a social analysis"[57] and the State bears the burden of ensuring that the ESIA includes this essential component.[58]

15. The Court has further declared that ESIAs must address "the cumulative impact of existing and proposed projects."[59] This requirement includes an assessment of the combined impact of the proposed project with other existing, associated, and proposed projects to, according to the Court, "allow a more accurate conclusion to be reached on whether the individual and cumulative effects of existing and future activities involve a risk of significant harm."[60] Because climate change acts as a threat multiplier that interacts with existing conditions in complex ways that can exacerbate underlying vulnerabilities, the Court should apply this requirement to the climate change analysis

[50] Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶ 208.
[51] Kichwa Indigenous People of Sarayaku, *supra* note 17, ¶ 205, citing Saramaka People, *supra* note 22, at ¶ 130.
[52] Advisory Opinion OC-23/17, supra note 4, ¶ 163, citing Saramaka People, *supra* note 22, at ¶ 41, and Kaliña and Lokono Peoples, *supra* note 17, at ¶ 201.
[53] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 164.
[54] *Id*. at ¶ 169.
[55] Kichwa Indigenous People of Sarayaku, *supra* note 17, at ¶ 204.
[56] Advisory Opinion OC-23/17, *supra* note 4, ¶ 164, citing Saramaka People, *supra* note 22, at ¶ 129; Kaliña and Lokono Peoples, *supra* note 17, at ¶ 213-226.
[57] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 164.
[58] *Id*.
[59] Kichwa Indigenous People, *supra* note 17, at ¶ 206.
[60] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 165, citing Saramaka People, *supra* note 22, at ¶ 41.

dimension of ESIAs, requiring States to take an integrated approach that accounts for cumulative, indirect, and interconnected impacts at all levels and over time.[61]

16. The Court also indicated that States should ensure that interested parties have the ability to participate meaningfully in the development and assessment of all ESIAs, finding that "the participation of the interested public allows for a more complete assessment of the possible impact of a project or activity and whether it will affect human rights."[62] In cases involving Indigenous and Tribal Peoples, the Court has required that States do so as a necessary component of the right to consultation.[63] Specifically, the Court has repeatedly held that States must ensure that ESIA processes "respect the [I]ndigenous [P]eoples' traditions and culture, and be completed before the concession is granted [...] to guarantee the effective participation of the [I]ndigenous [P]eoples in the process of granting concessions."[64] This means that the State must guarantee that the ESIA is prepared with the participation and the free, prior, and informed consultation of the affected Indigenous Peoples.[65] Given the growing international and regional consensus around extending this requirement to all interested parties, which the Court acknowledged in Advisory Opinion on *The Environment and Human Rights*[66] and which is reinforced by the Escazú Agreement's strong protections for the rights to access information and to public participation,[67] as well as the strong public interest in the wide ranging impacts of the climate emergency, the Court should explicitly declare that States must ensure the effective participation of all interested parties in all phases of the ESIA process when the proposed activity may exacerbate climate change.

17. The Court has also interpreted the duty to regulate to require that States set forth ESIA requirements in law. In Advisory Opinion 23, the Court specified that States must enact domestic laws or regulations regarding ESIAs, which:

> must be clear, at least as regards: (i) the proposed activities and the impact that must be assessed (areas and aspects to be covered); (ii) the process for making an environmental impact assessment (requirements and procedures); (iii) the responsibilities and duties of project proponents, competent authorities and

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[61] International Institute for Environment and Development, *supra* note 40, at p. 3.
[62] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 168.
[63] Kichwa Indigenous People of Sarayaku, *supra* note 17, at ¶¶ 204, 207 (finding a violation where the ESIA "was prepared without the participation of the Sarayaku People[.]"); see also Advisory Opinion OC-23/17, *supra* note 4, at ¶ 166, citing Saramaka People, *supra* note 22. Preliminary objections, merits, reparations and costs, ¶ 129, 130; Kichwa Indigenous People of Sarayaku, *supra* note 17, ¶ 206; Kaliña and Lokono Peoples, *supra* note 17, at ¶ 215.
[64] Kichwa Indigenous People of Sarayuku, *supra* note 17, at ¶ 206.
[65] *Id.* at ¶¶ 204, 207 (finding a violation where the ESIA "was prepared without the participation of the Sarayaku People[.]").
[66] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 167.
[67] Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Arts. 5-7, Nov. 30, 2018, https://repositorio.cepal.org/server/api/core/bitstreams/7e888972-80c1-48ba-9d92-7712d6e6f1ab/content. [hereinafter Escazú Agreement].

> decision-making bodies (responsibilities and duties); (iv) how the environmental impact assessment process will be used in approval of the proposed actions (relationship to decision-making), and (v) the steps and measures that are to be taken in the event that due procedure is not followed in carrying out the environmental impact assessment or implementing the terms and conditions of approval (compliance and implementation).[68]

18. With regard to this element, the Court should explicitly declare that States must adopt legislative or administrative provisions that define climate change as an environmental impact that all ESIAs must address and thereby require the consideration of climate impacts in their domestic ESIA regime.

19. Finally, the Court found that "States should determine and define, by law or by the project authorization process, the specific content required of an environmental impact assessment, taking into account the nature and size of the project and its potential impact on the environment."[69] The Court indicated that "[t]he content of the environmental impact assessment will depend on the specific circumstances of each case and the level of risk of the proposed activity."[70] As noted above, the Court requires a higher level of scrutiny for proposals that pose greater risks.[71]

20. In the Case of *Nuestra Tierra,* the Court noted that ESIAs "should not be conducted as a mere formality but should make it possible to evaluate alternatives and the adoption of impact mitigation measures[.]"[72] To do so, the ESIA must comply with the criteria outlined above.[73]

21. The purpose of an ESIA is to foster transparency with the public regarding the environmental impacts of any proposed project or activity that poses the risk of significant environmental harm.[74] ESIAs that comport with the above requirements serve an essential preventive function while also guaranteeing the rights to access information and to public participation by informing the public about the potential harm and differentiated impacts of a proposed project, as well as whether less harmful alternatives or preventive measures can be applied, ultimately supporting a transparent participatory process to determine whether the project should go forward at all.[75] Doing so allows the State to comply with its due diligence and

[68] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 150.
[69] *Id.* at ¶ 170.
[70] *Id.*
[71] *Id.* at ¶ 154; Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶ 208.
[72] Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶ 174, note 162,
[73] *Id.*
[74] Kichwa Indigenous People of Sarayaku, *supra* note 17, at ¶ 206.
[75] See, e.g., Advisory Opinion OC-23/17, *supra* note 4, at ¶ 150, note 297, 157-159 (citing UNEP, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, 2004, p. 18. Available

prevention obligations regarding a proposed activity's potential impact on the environment, and allows the public to take an active role in helping mitigate environmental damage, and by extension the climate emergency.[76]

B. The Escazú Agreement provides States with further guidance on the role ESIAs play in addressing the climate emergency.

22. The Escazú Agreement recognizes that ESIAs are an important source of environmental information and critical for effective public participation in environmental decision-making.[77] It also recognizes that ESIAs partially fulfill a State's duty of prevention.[78] In particular, the Escazú Agreement specifies the steps States must take to ensure that domestic ESIA procedures conform to environmental access rights, thereby engaging the public in holding States accountable to their duties of due diligence and prevention. As David Boyd, the United Nations Special Rapporteur on human rights and the environment has emphasized, States' procedural obligations to respect, protect, and fulfill environmental access rights must be understood as essential part of a rights-based approach to climate change.[79] Therefore, the Court should incorporate the specialized guidance provided by the Escazú Agreement into its explicit application of the ESIA requirement to activities that exacerbate or may exacerbate the climate emergency.

23. Several provisions of the Escazú Agreement support the importance of public access to ESIAs and by extension, to information about the potential climate impacts of a proposed activity. Article 6(3)(h) of the Escazú Agreement suggests that States should include "information on environmental impact assessment processes and on other environmental management instruments" in their environmental information systems.[80] This requirement that States make information about EIAs publicly available pursuant to Article 6(3)(h) helps guarantee that EIAs themselves are part of the environmental information that the public can access and supports the right of public participation in the ESIA process.[81] Article 6 of the Escazú Agreement not only establishes ESIAs as a means of fulfilling a State's obligation to comply with the right of access to information, but also requires States to guarantee that ESIAs, along with any other environmental information systems, are well organized and widely accessible, including through "information technology and georeferenced media, where appropriate."[82]

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at: https://unep.ch/etu/publications/textONUBr.pdf. See also, UNEP, Resolution 14/25 of June 17, 1987, *supra* note 3; UNEP Resolution 14/25, *supra* note 3; Yang, *supra* note 3.

[76] Boyd, *supra* note 1, at ¶ 62-64.

[77] Escazú Agreement, *supra* note 67, at Arts. 6(3)(h), 7(9), 7(17).

[78] *Id.* at Arts. 6(3)(h), 7(9), 7(17).

[79] Boyd, *supra* note 1, at ¶ 62-64.

[80] Escazú Agreement, *supra* note 67, at Art. 6(3)(h).

[81] *Id.*

[82] *Id.* at Art. 6(3).

24. Article 7(9) of the Escazú Agreement requires that States publicly share the decision made after consideration of an ESIA and related public input "in an effective and prompt manner[.]"[83] To ensure that affected communities have the information necessary to challenge such decisions pursuant to the right to access justice, this information should "include the established procedure to allow the public to take the relevant administrative and judicial actions."[84]

25. Likewise, Article 7(17) requires States to share multiple information categories associated with ESIAs to ensure that the public can effectively participate in the environmental decision-making processes informed by these assessments.[85] The listed types of information should also be considered as the minimum requirements for an ESIA that comports with the rights to access environmental information and to participate in environmental decision-making.[86] In addition to descriptions of the impacts of the proposed project or activity[87] and measures to address those impacts,[88] these categories include: reports and analyses by the entities involved in the project,[89] information about potential technologies and alternative locations,[90] and "actions to monitor the implementation and results of environmental impact assessment measures."[91] This last category matches the evolving international consensus that States may not abandon their supervision and monitoring function once an ESIA has been approved; rather, they must continue to monitor the environmental impacts of the proposed activity, including its social and climate impacts.[92]

26. In light of the foregoing, the Court should declare that for States to meet their due diligence obligation to prevent environmental harm, including harm related to the climate emergency, they must request and adopt adequate environmental and social impact assessments that include an assessment of climate impacts and serve as an effective vehicle for regulation, monitoring, and oversight of activities with the potential to cause significant damage to the environment, whether such activities are carried out directly by the State or by private actors.

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83 *Id.* at Art. 7(9).
84 *Id.*
85 *Id.* at Art. 7(17).
86 *Id.* Article 7(17) provides that at a minimum the following type of information should be made available to the public: description of physical and technical characteristics of proposed project or activity; main environmental impacts, as appropriate, and including cumulative environmental impact; foreseen measures in relation to the environmental impacts; summary of the information in comprehensible and accessible manner (non-technical), public authority relating to project or activities; available information relating to technologies for executing projects or activities subject to the assessments, and actions taken to monitor the implementation and results of EIA measures.
87 *Id.* at Art. 7(17)(a-b).
88 *Id.* at Art. 7(17)(c).
89 *Id.* at Art. 7(17)(e).
90 *Id.* at Art. 7(17)(f).
91 *Id.* at Art. 7(17)(g).
92 Advisory Opinion OC-23/17, *supra* note 4, at ¶ 153; Knox, *supra* note 35, at ¶ 20.

C. States have a duty to prepare contingency plans and to actively mitigate any activities, whether public or private, that have the potential to exacerbate the climate emergency.

27. As noted above, in its Advisory Opinion on *The Environment and Human Rights*, this Court found that States must meet the principle of prevention, which requires States to take effective measures to protect the environment when proposed activities pose the risk of significant environmental harm.[93] In addition to the duties to regulate, monitor, supervise, require, and approve ESIAs, discussed above, the obligation of prevention also encompasses the duty to prepare contingency plans and the duty to mitigate if significant environmental damage occurs.[94] The Court should interpret these obligations in light of both specific provisions in the Escazú Agreement that illustrate how to give effect to the duty to mitigate, as well as relevant business and human rights standards. The Court should also declare that these obligations apply to public and private activities that may exacerbate the climate emergency.

28. To comport with the obligation of prevention, the Court has already declared that States must "have a contingency plan to respond to environmental emergencies or disasters that includes safety measures and procedures to minimize the consequences of such disasters."[95] Such plans must address both domestic and transboundary harm and cover both public and private conduct,[96] keeping in mind that the goal of contingency plans is to respond to emergencies or environmental disasters, and therefore these plans should establish security measures and procedures that minimize the environmental consequences of all activities within the State's jurisdiction.

29. States are also required to immediately mitigate significant environmental damage.[97] To fulfill this obligation, it is insufficient to have preventative measures in place if they fail to be effective.[98] This Court has specified that States may not avoid the obligation to mitigate where damage occurs after the adoption of otherwise adequate preventative measures.[99] As noted above, the Court in *Nuestra Tierra* also emphasized the importance of robust ESIAs as an effective tool to identify harms, consider alternatives, and develop appropriate measures of mitigation.[100]

30. The Inter-American System has also recognized that States' due diligence obligations to prevent and mitigate environmental harm require them to protect against harms caused by private actors. The Commission has declared that States have a duty to "organize their entire governmental

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[93] Advisory Opinion OC-23/17, *supra* note 4, at ¶¶ 125-174.
[94] *Id.* at ¶ 145.
[95] *Id.* at ¶ 171.
[96] *Id.* at ¶¶ 133, 171.
[97] *Id.* at ¶ 155.
[98] *Id.* at ¶¶ 172-173.
[99] *Id.*
Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶ 174, note 162.

apparatus and, in general, all the structures that manifest the exercise of public power, in such a way that they are capable of legally ensuring the free and full exercise of human rights."[101] States are obligated to protect their citizens against abusive corporate behavior.[102] Ultimately, the Commission has declared that "States must ensure that business activities are not carried out at the expense of individuals' or groups of individuals' fundamental rights and freedoms[.]"[103] The obligation is comprehensive; as recognized in 1988 by the Court, a State's responsibility "to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts."[104] According to the Commission, States are responsible "for the actions of third parties, when they act based on the tolerance, acquiescence, or negligence of the State, or with the support of any state policy or guideline that favors the creation of situations or discrimination."[105] The Commission and the Court have declared that States are required to "take affirmative measures to guarantee that the individuals under their jurisdiction are able to exercise and enjoy the rights contained in the American Convention"[106]

31. These Inter-American standards for affirmative State action to prevent corporate human rights violations mirror international standards, such as those laid out in the United Nations Guiding Principles on Business and Human Rights.[107] The UN Special Rapporteur on human rights and the environment has recognized that, pursuant to the UN Guiding Principles, private actors bear their own obligation to prevent and mitigate environmental harm as well; specifically,

> the responsibility of business enterprises to respect human rights includes the responsibility to avoid causing or contributing to adverse human rights impacts through environmental harm, to address such impacts when they occur and to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships.[108]

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[101] IACHR, OEA/Ser.L/V/II, Business and Human Rights: Inter-American Standards, p. 61 (1 Nov. 2019). [hereinafter OEA/Ser.L/V/II, Business and Human Rights].
[102] *Id.* at ¶ 3.
[103] *Id.*
[104] Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶176 (July 29, 1988) (stating that if a "State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention" it has "failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction").
[105] IACHR, OEA/Ser.L/V/II, Compendium on Labor and Trade Union Rights: Inter-American Standards, ¶143 (30 Oct. 2020) [hereinafter OEA/Ser.L/V/II, Compendium on Labor and Trade Union Rights] (citing Report No. 25/18. Case 12,428. Admissibility and merits. Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families. Brazil. OAS/Ser.L/V/II. 167. Doc. 29. March 2, 2018). See also *Id*. at 66.
[106] OEA/Ser.L/V/II, Compendium on Labor and Trade Union Rights, *supra* note 105, p. 66.
[107] OEA/Ser.L/V/II, Business and Human Rights, *supra* note 101, at 57.
[108] Knox, *supra* note 35, at ¶ 35.

32. As discussed previously, the obligation of prevention under the Escazú Agreement requiring that State or private actor activities do not cause significant environmental harm is complementary to the Inter-American System.[109] This broad obligation is articulated in multiple provisions designed to increase environmental access rights to protect against and mitigate environmental harm. Throughout Article 8, for example, the Escazú Agreement addresses the right to access justice to redress environmental past or ongoing harm but also to ensure recourse to mechanisms aimed at preventing potential environmental harm. Article 8(3)(d) provides that States should have "the possibility of ordering precautionary […] measures […] to prevent, halt, mitigate, or rehabilitate damage to the environment."[110] Likewise, Article 8(3)(g) obligates States to ensure comprehensive, restorative reparations in situations of environmental harm.[111] Additionally, Article 6 obligates States to mitigate harms caused by environmental emergencies by imposing a requirement that States establish an early warning system for situations that pose "an imminent threat to public health or the environment[.]"[112] The Escazú Agreement further requires that States must "immediately disclose and disseminate through the most effective means all pertinent information in its possession that could help the public take measures to prevent or limit potential damage."[113]

33. The Court should extend all these obligations deriving from the duty of prevention to activities that exacerbate or could exacerbate the climate emergency, drawing on the existing Inter-American normative framework as well as the specialized guidance provided by the Escazú Agreement and relevant business and human rights standards.

II. QUESTION B(1)(iv)[114] - The Court should declare that States must affirmatively produce and provide access to environmental information, including on factors that contribute to the climate emergency, whether by public or private entities.

34. Under the American Convention and the Escazú Agreement, States have an affirmative duty to produce information and guarantee access to environmental information, in keeping with

[109] Escazú Agreement, *supra* note 67, atArt. 3(e).
[110] *Id.* at Art. 8(3)(d).
[111] *Id.* at Art. 8(3)(g).
[112] *Id.* at Art. 6(5).
[113] *Id.*
[114] Question B(1)(iv): "Taking into account the right of access to information and the obligations concerning the active production of information and transparency reflected in Article 13 and derived from the obligations under Articles 4(1) and 5(1) of the American Convention, in light of articles 5 and 6 of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement): (1) What is the scope that States should give to their obligations under the Convention vis-à-vis the climate emergency, in relation to: . . . (iv) Production of information and access to information on greenhouse gas emissions, air pollution, deforestation, and short-lived climate forcers; analysis of activities and sectors that contribute to emissions, or other factors[?]"

the principle of maximum disclosure. The Court should interpret the right to access information in light of the specialized guidance of the Escazú Agreement and explicitly extend this standard to information about factors that contribute to the climate emergency. Such information should include but not be limited to accessible data about greenhouse gas emissions, air pollution, deforestation, short-lived climate forcers; an analysis of activities and sectors that are particularly likely to contribute to the climate emergency; efforts at climate mitigation and adaptation, and any other factors that will enable the public to understand the climate situation and related human rights impacts. Additionally, the Court should require States to produce and disseminate information that facilitates public ability to assess whether climate-related conditions are improving or worsening, as well as differentiated effects on particular groups, including those in situations of vulnerability. All such impacts should be continuously monitored, and the relevant information should be regularly updated.[115] Finally, the Court should require States to exercise their due diligence obligations by requiring private actors, including business enterprises, to provide such data and ensure its accessibility to the public.

35. States' obligations under the American Convention to uphold environmental procedural rights play a crucial role in addressing the climate emergency by ensuring that vulnerable individuals and communities have access to relevant information, have the means to participate in decision-making processes, and are able to seek effective remedies when environmental and climate-related issues affect their rights and well-being.[116] These rights are essential tools in the fight against the climate emergency because they ensure that climate-related decisions are transparent, inclusive, and responsive to the needs and concerns of those most affected by environmental changes such as women, indigenous peoples, children, youth, migrants, persons with disabilities, coastal communities, and lower-income groups, among others.[117]

36. The Escazú Agreement seeks to protect environmental human rights, including the right to a healthy environment, by guaranteeing the full and effective implementation of environmental procedural rights within Latin America and the Caribbean.[118] The Escazú Agreement also seeks to support the "creation and strengthening of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and [the right] to sustainable development."[119]

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115 Advisory Opinion OC-23/17, *supra* note 4, at ¶ 153 (citing ICJ, Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay). Judgment of April 20, 2010, ¶ 205, and ICJ, Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua) and Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica). Judgment of December 16, 2015, ¶ 161).

116 Organization of American States, American Convention on Human Rights at Arts. 13, 23, 25, Nov. 22, 1969, 114 U.N.T.S. 143 [hereinafter American Convention].

117 Economic Commission for Latin America and the Caribbean/United Nations High Commissioner for Human Rights (ECLAC/OHCHR), *supra* note 21, at p. 7.

118 Escazú Agreement, *supra* note 67.

119 *Id.* at Art. 1.

37. The Escazú Agreement outlines the specific obligations States Parties must comply with to ensure distinct protections regarding the accessibility of information, including the types of information States must produce and disseminate, how States provide such information, and the measures States must make available to persons and groups in vulnerable situations to facilitate their access to such information.[120]

38. In light of this normative framework, the Honorable Court should consider incorporating the human rights obligations outlined in Articles 5 and 6 of the Escazú Agreement[121] into its interpretation of the right to access information in relation to the climate emergency, in line with its understanding that environmental access rights are an essential component in giving effect to State obligations to protect the rights to life and personal integrity.[122] Specifically, as noted above, this Court should explicitly declare that States have a duty to produce and provide access to information on greenhouse gas emissions, air pollution, deforestation, and short-lived climate forcers, as well as an analysis of activities and sectors that contribute to emissions, and other factors related to the climate emergency.

A. States must guarantee the right to access information in environmental matters, including information pertaining to the climate emergency.

39. Both the Inter-American System and the Escazú Agreement require States to proactively and expansively guarantee the right to access environmental information. This subsection provides an analysis relating to aspects of this normative framework that support the extension of these obligations to information related to the climate emergency.

40. The Inter-American System obligates States to provide access to environmental information,[123] and the Court should explicitly extend this obligation to information relevant to the climate emergency. As outlined in *Claude-Reyes v. Chile*, the State's obligation to provide access to environmental information protects the right to public participation and promotes States' transparency and accountability, thereby strengthening democracy.[124] This rationale applies with

[120] Escazú Agreement, *supra* note 67. *See also* UIC Law School International Human Rights Clinic & Santa Clara University International Human Rights Clinic, Escazú Toolkit: Using the Escazú Agreement in Cases Before the Inter-American System, p. 17 (Nov. 2022, updated Mar. 2023), https://repository.law.uic.edu/whitepapers/25/. [hereinafter Escazú Toolkit].
[121] Escazú Agreement, *supra* note 67. *See also* Escazú Toolkit, *supra* note 120, at p. 17-35.
[122] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 211.
[123] Case of Claude Reyes v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 76-81 (Sept. 19, 2006); Advisory Opinion OC-23/17 at ¶ 225. [hereinafter Reyes v. Chile].
[124] Reyes v. Chile, *supra* note 123, at ¶ 76-81; Advisory Opinion OC-23/17, *supra* note 4, at ¶¶ 86, 213. In two recent judgments, the Court reaffirmed this interpretation when it noted that the right to consultation also implicates this aspect of the right to information and found violations where the States in question failed to guarantee adequate access to information necessary to facilitate meaningful participation in environmental decisionmaking and to meet Inter-American standards for free, prior, and informed consultation. Triunfo de la Cruz Garifuna Community and its members v. Honduras, *supra* note 34, at ¶¶ 123, 129, 131, 136; I/A Court H.R., Case of the Maya Q'eqchi' Indigenous

even greater force to the context of the climate emergency, where extending this obligation would empower individuals and communities to access the information necessary to hold States accountable to their obligation to protect against human rights violations generated by climate change.

41. Article 13(1) of the American Convention provides that "[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in form or art, or through any other medium of one's choice."[125] In *Claude Reyes v. Chile*, the Court interpreted Article 13 to encompass the right to access State-held information, holding that it:

> protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case.[126]

42. In *Baraona Bray v. Chile*, the Court built upon its prior jurisprudence and reaffirmed that access to information and freedom of expression are different facets of the same right and that both are important to the strengthening of democracy, the sustainability in development, and human rights,[127] citing both Principle 10 of the 1992 Río Declaration on Environment and Democracy and the Escazú Agreement.[128] The Court emphasized that procedural environmental rights "support[] better environmental policymaking"[129] and that "respect for and the guarantee of freedom of expression in environmental matters is an essential element to ensure citizens' participation in processes related to such matters and, with it, the strengthening of the democratic system through the application of the principle of environmental democracy."[130]

43. The Court developed more specific guidance on the content of the right to access environmental information in Advisory Opinion on *The Environment and Human Rights*, where it declared that "States have the obligation to respect and ensure access to information concerning possible environmental impacts[,]"[131] which "involves both providing mechanisms and procedures for individuals to request information, and also the active compilation and dissemination of

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Community of Agua Caliente v. Guatemala. Merits, Reparations and Costs. Judgment of May 16, 2023. Series C No. 488, ¶¶ 252, 261, 266, 269.

[125] American Convention, *supra* note 116, at Art. 13(1).

[126] Reyes v. Chile, *supra* note 123, at ¶ 77. *See also* Escazú Toolkit, *supra* note 120, at subsection (IV)(A)(iii)(b) for further discussion of permissible restrictions on access to State-held information.

[127] Baraona Bray v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 481, ¶ 94-100 (Nov. 24, 2022) [hereinafter Baraona Bray v. Chile].

[128] *Id.* at ¶ 94-100.

[129] Baraona Bray v. Chile, *supra* note 127, at ¶ 94.

[130] *Id.* at ¶ 100.

[131] Advisory Opinion OC-23/17, *supra* note 4. at ¶ 225.

information by the State."[132] The Court found that "information must be handed over without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied."[133] It further noted that "access to environmental information should be affordable, effective and timely."[134]

44. Accordingly, the Court found that States have an "obligation of active transparency"[135] which requires States to provide accurate, updated, and understandable information in a timely and proactive manner to build public trust and allow the public to use such information to exercise their other rights, especially "the rights of life, personal integrity and health."[136] In environmental matters, this obligation requires States to provide "relevant and necessary information on the environment […] includ[ing] information on environmental quality, environmental impact on health and the factors that influence this, and also information on legislation and policies, as well as assistance on how to obtain such information."[137] This obligation applies with heightened force in cases of environmental emergencies.[138]

45. The Court's clear statement of States' duty of active transparency provides a strong foundation for extending this obligation to information relating to the climate emergency.[139] In its Merits Report in the *La Oroya* case, the Inter-American Commission found that Perú violated its duty of active transparency by failing to "actively produce necessary information in a timely manner about the environment in La Oroya in order to guarantee the human rights of its residents."[140] In analyzing the active transparency obligation, the Commission reasoned that "the State should ensure that the members of a community are aware of the possible risks, including environmental and health risks[,] caused by State decisions regarding business activities[.]"[141] Accordingly, it noted that Perú's failure had particularly serious consequences because the residents were, therefore, unable to protect themselves from the serious health risks caused by

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[132] *Id.*
[133] *Id* at ¶ 219
[134] *Id.* at ¶ 220.
[135] *Id.* 17 at ¶ 221.
[136] *Id.*
[137] *Id.* at ¶ 223.
[138] *Id.*
[139] *Id.* at 223. *See also* La Oroya Community v. Peru, Merits Report, Case No. 12.718, Inter-Am. Comm'n H.R., Report No. 330/20, OEA/Ser.L/V/II doc. 348, ¶ 150 (Nov. 19, 2020). [hereinafter La Oroya Community v. Peru].
[140] La Oroya Community v. Peru, *supra* note 139, at ¶ 200 (In light of the evidence, "the Commission finds that the State failed to comply with its duty of active transparency as a component of the right to access to information when it failed to actively and timely produce the necessary information on the environment in La Oroya in order to guarantee the human rights of its inhabitants.") (in the original Spanish, "la Comisión estima que el Estado incumplió con su deber de transparencia activa como componente del acceso a la información al omitir producir activa y oportunamente la información necesaria sobre el medio ambiente en La Oroya a efectos de garantizar los derechos humanos de sus pobladores.")
[141] *Id.* at ¶ 154.

severe environmental degradation (including air, water and soil contamination), which the Commission characterized as "one of the worst environmental emergencies in the world[.]"[142]

46. Thus, in light of the Court's jurisprudence and related decisions of the Inter-American Commission, the Court should compel States to provide access to environmental information in relation to the climate emergency, including the production of information and access to information on greenhouse gas emissions, air pollution, deforestation, and short-lived climate forcers, as well as an analysis of activities and sectors that contribute to emissions, including by private actors such as business enterprises. Regarding private actors, the Court should emphasize States' obligations of due diligence regarding the impact of business activities on climate and adopt the framework outlined by the UN Special Rapporteur on human rights and the environment, which applies the UN Guiding Principles on Business and Human Rights to call on businesses to adopt human rights policies, conduct human rights due diligence, and disclose their emissions.[143]

47. Likewise, under Articles 5 and 6 of the Escazú Agreement, States must guarantee access to environmental information, including by affirmatively producing and disseminating such information, and taking steps to ensure access for the most vulnerable persons and communities.[144] The Court should explicitly extend States' obligation to provide access to environmental information to include the production and dissemination of information relevant to the climate emergency and interpret State obligations under Article 13 of the American Convention in light of the specialized guidance provided by the Escazú Agreement.

48. Articles 5 and 6 of the Escazú Agreement require a State Party to "ensure the public's right of access to environmental information in its possession, control or custody, in accordance with the principle of maximum disclosure."[145] The Agreement defines "environmental information" broadly to encompass "any information [...] regarding the environment and its elements and natural resources, including information related to environmental risks, and any possible adverse impacts affecting or likely to affect the environment and health, as well as to environmental protection and management."[146]

49. In order for States to properly implement the right of access to environmental information, Article 5 requires States to ensure the public has the ability to:

> (a) request[…] and receiv[e] information from competent authorities without mentioning any special interest or explaining the reasons for the request;

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[142] *Id.* at ¶ 198 ("an environmental emergency considered one of the worst in the world").
[143] Boyd, *supra* note 1, at ¶ 71-72.
[144] Escazú Agreement, *supra* note 67, at Arts. 5, 6. *See also* Escazú Toolkit, *supra* note 120, pp. 32-35.
[145] Escazú Agreement, *supra* note 67, at Art. 5(1).
[146] *Id.* at Art. 2(c).

(b) be[…] informed promptly whether the requested information is in possession or not of the competent authority receiving the request; and

(c) be[…] informed of the right to challenge and appeal when information is not delivered, and of the requirements for exercising this right.[147]

50. The Escazú Agreement also requires that States provide and ensure the accessibility of information held by public authorities, including information on environmental impact assessment processes and other environmental management instruments.[148] Additionally, Article 5(18) requires States to create independent oversight mechanisms to guarantee "transparency in access to environmental information, to oversee compliance with rules, and guarantee the right of access to information."[149]

51. Information that States generate, collect, publicize and disseminate must be "reusable, processable[,] and available in formats that are accessible, [with] no restrictions […] placed on its reproduction or use[.]"[150] In order to ensure that their environmental information systems facilitate access, States must ensure that these information systems "are duly organized, accessible to all persons[,] and made progressively available through information technology and georeferenced media[.]"[151]

52. In addition, States have an obligation to take affirmative steps to ensure persons and groups in vulnerable situations—such as women, Indigenous Peoples, children, youth, migrants, persons with disabilities, coastal communities, and lower-income groups, among others who may be particularly vulnerable to or disproportionately affected by the consequences of environmental harm, including climate change[152]—have access to environmental information by "establishing procedures for the provisions of assistance, from the formulation of requests through the delivery of the information, taking into account their conditions and specificities, for the purpose of promoting access and participation under equal conditions."[153]

53. The Economic Commission for Latin America [ECLAC] has recognized the importance of the human rights protections of the Escazú Agreement in the context of the climate emergency.[154] With regard to the right to access information, ECLAC has noted that "[t]he Escazú Agreement

[147] *Id.* at Art. 5(2).
[148] *Id.* at Art. 6(3)(h).
[149] *Id.* at Art. 5(18).
[150] *Id.* at Art. 6(2).
[151] *Id.* at Art. 6(3).
[152] Escazú Agreement, *supra* note 67, at Arts. 2(e), 5(3). *See also* Economic Commission for Latin America and the Caribbean/United Nations High Commissioner for Human Rights (ECLAC/OHCHR), *supra* note 21, at p. 7.
[153] Escazú Agreement, *supra* note 67, at Art. 5(3).
[154] Economic Commission for Latin America and the Caribbean/United Nations High Commissioner for Human Rights (ECLAC/OHCHR), *supra* note 21, at p. 48.

means that the public shall have access to data and information on emissions, climate vulnerabilities and other information related to climate observations and the risks associated with climate change, among other things."[155] ECLAC further observed that "the Escazú Agreement also promotes the generation and proactive dissemination of climate information, such as sources related to CO2 emissions."[156]

54. Thus, in light of the human rights obligations articulated in Articles 5 and 6 of the Escazú Agreement, the Court should direct States to provide access to environmental information in relation to the climate emergency, which includes public authorities overseeing the generation and dissemination of the broadest possible range of information relevant to the climate emergency and ensuring vulnerable persons and groups have access to such information.

B. States may only restrict access to environmental information under specific, limited circumstances; the Court should explicitly extend this obligation to information regarding the climate emergency.

55. Both the Inter-American System and Escazú Agreement require States to treat environmental information as presumptively accessible, with restrictions on access permitted only under a narrow set of specifically enumerated circumstances. Given the critical public interest in information relevant to the climate emergency, the Court should explicitly apply the principle of maximum disclosure to such information.

56. While Article 13 of the American Convention specifies that the right to access information is not absolute, it is clear that restrictions on the right of information must be justified and in accordance with the narrow grounds enumerated in Article 13(2).[157] In both *Claude Reyes* and *Gomes Lund v. Brazil*, the Court has held that the principle of good faith and maximum disclosure should limit restrictions on access to State-held information.[158] The Court incorporated these standards in its Advisory Opinion 23, where it reiterated the proportionality test and requirements established in *Claude-Reyes*.[159]

57. The Escazú Agreement also binds States to the principle of maximum disclosure.[160] States may only limit access to environmental information if one of a limited set of exceptions enumerated under Article 5(6) is clearly met.[161] These limited exceptions are:

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[155] *Id.* at p. 49.
[156] *Id.*
[157] American Convention, *supra* note 116, at Art. 13(1).
[158] Reyes v. Chile, *supra* note 123, at ¶ 92; Gomes Lund et al v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., (ser. C) No. 219, ¶¶ 199, 230 (Nov. 24, 2010).
[159] Advisory Opinion OC-23/17, *supra* note 4, at ¶¶ 213, 224. *See also* Escazú Toolkit, *supra* note 120, pp. 21-23.
[160] Escazú Agreement, *supra* note 67, at Arts. 3(h), 5(1).
[161] *Id.* at Art. 5(5-6). *See also* Escazú Toolkit, *supra* note 120, at p. 20.

(a) when disclosure would put at risk the life, safety or health of individuals;
(b) when disclosure would adversely affect national security, public safety, or national defence;
(c) when disclosure would adversely affect the protection of the environment, including any endangered or threatened species; or
(d) when disclosure would create a clear, probable[,] and specific risk of substantial harm to law enforcement, prevention, investigation[,] and prosecution of crime.[162]

58. Even when a restriction on access to information meets one of the criteria listed above, the Escazú Agreement requires that States only impose the restriction when several factors are met.[163] First, States must have previously established their reasoning for imposing a restriction by law, and the restriction must be "clearly defined and regulated."[164] Such reasons must take the public interest into account and "shall [...] be interpreted restrictively."[165] Second, States have to overcome the presumption that access to information is necessary and bear the burden to prove that limitations to access information are justified.[166] Lastly, where States imposes restrictions on access to information, they must communicate the "refusal in writing, including the legal provisions and the reasons justifying the decision in each case, and inform the applicant of the right to challenge and appeal."[167]

59. Given the strong public interest in information relating to the climate emergency, the Court should interpret Article 13 of the American Convention in light of the complementary specialized guidance provided by the Escazú Agreement and explicitly extend these standards to limit the ability of States to restrict access to such information.

C. States must produce comprehensible and accurate environmental information; the Court should extend this requirement to information relating to the climate emergency, including periodic updates as the climate emergency worsens.

60. As noted above, the Inter-American System applies the principle of maximum disclosure to the right to access information.[168] It has likewise established that States have an obligation of active transparency to take proactive steps to share environmental information with the public.[169] However, the Court has not yet had the opportunity to define the obligation of active transparency

[162] Escazú Agreement, *supra* note 67, at Art. 5(6)(a)-(d).
[163] *Id.* at Art. 5(5), 5(8).
[164] *Id.* at Art. 5(8).
[165] *Id.*
[166] *Id.* at Art. 5(5), 5(8).
[167] *Id.* at Art. 5(5).
[168] Advisory Opinion OC-23/17, *supra* note 4, at ¶¶ 221-223.
[169] *Id.*

to include stronger and more specific requirements to produce, organize, update, and disseminate environmental information, as specified in Article 6 of the Escazú Agreement. The Court should deepen its existing normative framework by incorporating the strong, specific requirements of Article 6 of the Escazú Agreement regarding the environmental information that States must affirmatively produce, organize, update, and disseminate into its interpretation of Article 13 of the American Convention and apply these requirements to information relevant to climate change.

61. Beyond requiring that States actively provide information about particular situations of environmental impact, Article 6 of the Escazú Agreement calls for the establishment of long-term environmental monitoring mechanisms that should provide the public with a view of how environmental quality is changing over time as a result of State environmental decision-making.[170] Because the climate emergency implicates many human rights, States need to create these kinds of environmental information systems to provide the public with the necessary information to understand how climate change may be affecting their other rights and to allow them to take preventive or protective action. The Court can look to the Escazú Agreement to provide specific content regarding the ways that States should produce and disseminate environmental information relevant to the climate emergency pursuant to the existing obligation of affirmative transparency. It can also more fully conceptualize how the interconnections between climate change, environmental access rights, the right to a healthy environment, and affected substantive rights can be addressed by this instrumental application of the right to access information. Accordingly, this subsection briefly outlines the requirements that the Court should consider.

62. The Escazú Agreement not only requires that States make environmental information accessible, but it also directs States to actively produce and disseminate such information.[171] The inclusion of this proactive duty recognizes that in a technically complex area like the environment, the right to access information has no meaning unless comprehensible, accessible, and accurate information exists and is made publicly available in an organized, updated format. Accordingly, the Agreement provides detailed guidelines as to the types of environmental information that States must produce, how it should be organized, and the means States must implement to ensure that this information is properly disseminated and updated.[172] States must achieve these obligations "to the extent possible within available resources[.]"[173]

63. Article 6(1) of the Escazu Agreement requires States to "generate, collect, publicize and disseminate environmental information [. . .] in a systematic, proactive, timely, regular, accessible

[170] Escazú Agreement, *supra* note 67, at Art. 6.
[171] *Id.*
[172] Escazú Agreement, *supra* note 67, at Art. 6.
[173] *Id.* at Art. 6(1).

and comprehensible manner[.]"[174] States must also "periodically update this information"[175] and "encourage the disaggregation and decentralization of environmental information at the subnational and local levels."[176]

64. Additionally, States must "encourage independent environmental performance reviews[;]"[177] "promote access to environmental information contained in concessions, contracts, agreements[,] or authorizations granted, which involve the use of public goods, services[,] or resources[;]"[178] and "ensure that consumers and users have official, relevant[,] and clear information on the environmental qualities of goods and services and their effects on health[.]"[179]

65. In accordance with Article 6(3), States are required to maintain up-to-date environmental information systems.[180] These systems should encompass data on relevant resources, regulations, including environmental laws,[181] pertinent public authorities,[182] scientific and academic research,[183] environmental impact assessment procedures,[184] and other environmental management tools.[185] Notably, this provision explicitly requires States to include data on climate change sources.[186] Additionally, these systems may include substantive information concerning environmental conditions,[187] such as polluted areas categorized by pollutant type and location,[188] data on natural resource utilization and preservation,[189] and an estimated inventory of waste by type, ideally specifying volume, location, and year.[190]

66. In addition, pursuant to Article 6(4), States must also "take steps to establish a pollutant release and transfer register covering air, water, soil[,] and subsoil pollutants, as well as materials and waste in its jurisdiction[,]"[191] which can "be established progressively" and "updated periodically."[192]

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[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.* at Art. 6(8).
[178] *Id.* at Art. 6(9).
[179] *Id.* at Art. 6(10).
[180] *Id.* at Art. 6(3).
[181] *Id.* at Art. 6(3)(a).
[182] *Id.* at Art. 6(3)(c).
[183] *Id.* at Art. 6(3)(f).
[184] *Id.* at Art. 6(3)(h).
[185] *Id.* at Art. 6(3)(j).
[186] *Id.* at Art. 6(3)(g).
[187] *Id.* at Art. 6(3)(b).
[188] *Id.* at Art. 6(3)(d).
[189] Escazú Agreement, *supra* note 67, at Art. 6(3)(e).
[190] *Id.* at Art. 6(3)(i).
[191] *Id.* at Art. 6(4).
[192] *Id.*

67. Similarly, Article 6(5) also requires States to establish an early warning system for situations that pose "an imminent threat to public health or the environment[.]"[193] States must "immediately disclose and disseminate through the most effective means all pertinent information in its possession that could help the public take measures to prevent or limit potential damage."[194]

68. Although the Escazú Agreement primarily refers to State-held or controlled information,[195] it recognizes that the public also has a right to access to privately held information. Article 6(12) requires States to "take the necessary measures [...] to promote access to environmental information in the possession of private entities, in particular information on their operations and the possible risks and effects on human health and the environment."[196] Article 6(13) similarly requires States to "encourage public and private companies, particularly large companies, to prepare sustainability reports that reflect their social and environmental performance."[197]

69. We urge the Court to apply its recognition that States have an affirmative, proactive duty to produce information and guarantee access to environmental information, in keeping with the principle of maximum disclosure, to information relating to the climate emergency. The Court should interpret the right to access information in light of the specialized guidance of the Escazú Agreement and explicitly extend this standard to information about factors that contribute to the climate emergency, including data about relevant pollutants and activities, climate mitigation and adaptation efforts, the progress of climate effects, the differentiated impacts experienced by vulnerable groups, and privately held information.

III. QUESTION D(1)198 - The Court should declare that States have an obligation to provide adequate, effective, and timely judicial remedies to provide protection and redress for the human rights impacts of the climate emergency.

70. Both the Inter-American System and the Escazú Agreement recognize the importance of the right to access to justice to protect against and remedy environmental harm; this understanding should be applied with even greater force to the climate emergency. The Court should interpret the right to access justice in environmental matters in light of the specialized guidance provided by

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[193] *Id.* at Art. 6(5).
[194] *Id.*
[195] *Id.* at Art. 5(1).
[196] *Id.* at Art. 6(12). *See also* California State Senate Bill 253 ("Climate Corporate Data Accountability Act") and Senate Bill 261, requiring California public and private companies to publicly disclose their GHG emissions, climate-related financial risks, and measures they adopt to reduce and adapt to that risk, with reporting beginning in 2026.
[197] Escazú Agreement, *supra* note 67, at Art. 6(13).
[198] Question D(1): "Based on Articles 8 and 25 of the American Convention, and taking into account that scientific research has indicated that there is a limit to the amount of greenhouse gases that we can continue to emit before reaching dangerous and irreversible climate change, and that we could reach this limit within the current decade: . . . . (2) What is the nature and scope of a State Party's obligation in relation to the establishment of effective judicial remedies to provide adequate and timely protection and redress for the impact on human rights of the climate emergency?"

the Escazú Agreement and declare that States have an obligation to provide adequate, effective, and timely judicial remedies to provide protection and redress for the human rights impacts of the climate emergency.

71. Given that the climate emergency is exacerbating existing vulnerabilities, it is essential that the Court recognize the heightened obligations States have toward such groups in this context. Although the right to access justice applies to the whole population, States must implement measures to ensure that vulnerable individuals and communities have access to effective judicial remedies. Access to effective judicial remedies plays a crucial role in addressing environmental harms by ensuring that vulnerable individuals and communities have the means to seek effective protection or remedies when climate-related harms threaten or violate their human rights.[199] Article 8 of the Escazú Agreement provides specialized guidance on access to justice for vulnerable groups that the Court should draw upon when interpreting State obligations in the context of the climate emergency.

72. The right to access justice is well-established in the Inter-American System under Articles 8 and 25 of the American Convention,[200] which includes States' obligation to provide effective remedies for human rights violations,[201] to investigate,[202] and to ensure accountability for those violations.[203] Likewise, one of the three main pillars of the Escazú Agreement is the right to access justice in environmental matters, which includes effective judicial and administrative mechanisms.[204] The following subsections highlight the complementarity between these two normative frameworks and highlight the elements that the Court should explicitly apply to the climate emergency.

73. This Honorable Court has previously recognized States' obligation to provide judicial remedies in the context of environmental protection and should interpret this obligation in light of Article 8 of the Escazú Agreement and explicitly extend this obligation to the context of the climate emergency, taking into account the scientific research stating the limit to the amount of greenhouse

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[199] Economic Commission for Latin America and the Caribbean/United Nations High Commissioner for Human Rights (ECLAC/OHCHR), *supra* note 21, at p. 7.
[200] American Convention, *supra* note 116, at Arts. 8, 25.
[201] Velásquez Rodríguez v. Honduras, *supra* note 104, at ¶ 91; *see also* Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶¶ 294-95; 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, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.129, doc. 4, ¶ 177 (Sep. 7, 2007), available at https://www.cidh.oas.org/countryrep/AccesoDESC07eng/Accesodescindice.eng.htm.
[202] *See, e.g.*, Villaseñor Velarde et al. v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.374, ¶ 110 (Feb. 5, 2019).
[203] *See, e.g.*, Case of Cruz Sánchez et al. v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 292, ¶ 398 (Apr. 17, 2015); Case of Anzualdo Castro v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 124 (Sept. 22, 2009). For further discussion, see Escazú Toolkit, *supra* note 120, at p. 50.
[204] Escazú Agreement, *supra* note 67, at Art. 8.

gases that humanity can continue to emit before reaching dangerous and irreversible climate change.

74. In 2020, the Court affirmed in the *Nuestra Tierra* case the applicability of the right to access justice in the context of environmental protection. The Court found that States, in order to respect individuals' right to access justice, must guarantee effective remedies by "taking into account whether 'domestic remedies exist that guarantee real access to justice to claim reparation for a violation[;]'" respect due process guarantees; and respond to all requests for a remedy "within a reasonable time."[205] Additionally, the State violates the right to access justice if it fails to provide effective remedies that give individuals the opportunity to challenge State acts that may have violated their rights.[206]

75. In its Advisory Opinion on *The Environment and Human rights*, the Court listed the right "to an effective remedy" among the procedural rights most strongly implicated in environmental matters[207] and reiterated that "access to justice is a peremptory norm of international law."[208] In environmental matters, the right to access justice ensures that individuals can call upon the State to enforce environmental standards and to provide redress, "including remedies and reparation[s]" for human rights violations when a State fails to follow or enforce its own environmental rules.[209] The Court also recognized the intersection between the right to access justice and other environmental access rights, noting that "access to justice guarantees the full realization of the rights to public participation and access to information[.]"[210]

76. In addition, the Court linked the right to access justice to a State's obligation of prevention, observing that this duty encompasses measures to investigate human rights violations, punish those responsible, and ensure reparations to the victims.[211] States must supervise and monitor activities within their jurisdiction that may cause significant damage to the environment[]"[212] through "adequate independent monitoring and accountability mechanisms[,]"[213] which can include both preventive measures and measures to investigate, punish and redress possible abuse through policies, regulations, and adjudication.[214]

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[205] Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶¶ 294-295, 298 (Feb. 7, 2020). *See* Escazú Toolkit, *supra* note 120, at p. 51.
[206] Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶¶ 295, 304.
[207] 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, *supra* note 4, at ¶ 64.
[208] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 233.
[209] *Id.* at ¶ 234.
[210] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 234.
[211] *Id.* at ¶ 127.
[212] *Id.* at ¶ 154.
[213] *Id.*
[214] *Id.*

77. Thus, the Honorable Court should explicitly extend this normative framework around access to justice to the context of the climate emergency, to enable vulnerable individuals and communities to protect themselves against and seek redress for human rights violations generated by the effects of climate change.

78. Similarly, Article 8 of the Escazú Agreement recognizes the right to access justice in environmental matters, including protecting vulnerable persons or groups, with an emphasis on the State's obligation to prevent and mitigate harm.[215] The Honorable Court should interpret the obligations outlined above in light of this provision and explicitly extend these protections to those seeking protection from and redress for human rights violations caused by the climate emergency.

79. Article 8(1) of the Escazú Agreement requires States Parties to "guarantee the right of access to justice in environmental matters in accordance with the guarantees of due process."[216] Article 8(2) requires States to guarantee "access to judicial and administrative mechanisms to challenge and appeal" violations of other environmental access rights protected by the Agreement as well as any other State act or omission with actual or potential negative environmental effects or that violates environmental laws or regulations.[217] These procedural protections ensure that individuals and communities have access to justice when they face obstacles in receiving environmental information or participating in environmental decision-making processes, as well as any actual or potential violation of substantive human rights affected by environmental harm.[218]

80. Article 8(3) enumerates specific affirmative steps that States must take to guarantee the right of access to justice in environmental matters. First, States are obligated to invest in competent State entities with environmental expertise.[219] Second, these State entities must provide "effective, timely, public, transparent[,] and impartial procedures[.]"[220] Persons and groups must be granted broad legal standing to bring claims regarding the harms to the environment.[221]

81. Article 8(4) sets forth the measures States must undertake to facilitate access to justice. Specifically, States must reduce or eliminate barriers to access to justice.[222] They are also obligated to "publicize the right of access to justice and [corresponding] procedures to ensure its effectiveness[.]"[223] Similarly, States must make relevant judicial and administrative decisions

[215] Escazú Agreement, *supra* note 67, at Art. 8.
[216] *Id.* at Art. 8(1).
[217] *Id.* at Art. 8(2).
[218] *Id.* at Art. 8. For further discussion, *see* Escazú Toolkit, *supra* note 120 at p. 52.
[219] Escazú Agreement, *supra* note 67, at Art. 8(3).
[220] *Id.* at Art. 8(3).
[221] *Id.* at Art. 8(3)(c).
[222] *Id.* at Art. 8(4)(a).
[223] *Id.* at Art. 8(2).

publicly accessible.[224] This requirement relates to the Article 8(6) obligation that environmental decisions and their legal grounds be made in writing.[225]

82. In addition, the Agreement requires that State enforcement of judicial decisions be timely and for States to provide comprehensive reparations, including restoration, compensation, "assistance for affected persons[,]" and other forms of redress.[226] These obligations also constitute important means for States to comply with their due diligence obligation to mitigate environmental harm, discussed above.

83. The Escazú Agreement also recognizes the importance of the right to access to justice in giving effect to several of its guiding principles, predominantly the preventive principle,[227] the precautionary principle,[228] and the principle of intergenerational equity.[229] Article 8(3)(d) complements these principles by requiring that States provide precautionary or other measures to prevent environmental harm.[230] By defining the types of actions subject to review broadly and by including not only definite environment harm but also potential harm, Article 8 provides the public with powerful tools to seek preventive measures and to overcome State resistance to taking action before the risk of harm has been scientifically proven.[231]

84. Additionally, States must ensure access to justice for vulnerable individuals and groups.[232] In keeping with the Escazú Agreement's overall commitment to ensuring that vulnerable persons or groups can exercise their environmental access rights, Article 8(5) requires States to "meet the needs of vulnerable people and groups by establishing 'support mechanisms, including, as appropriate, free technical and legal assistance.'"[233] A suite of other provisions can be interpreted to give further scope to State obligations regarding access to justice for vulnerable groups when read in combination with the Agreement's commitment to the "[p]rinciple of equality and principle of non-discrimination[,]"[234] the pro persona principle[235] and the related requirement that States "adopt the most favourable interpretation for the full enjoyment of and respect for the access rights when implementing the . . . Agreement."[236] For example, the provision noted above requiring States to give "broad legal standing in defence of the environment[]"[237] should expand the ability

[224] *Id.* at Art. 8(4)(c).
[225] *Id.* at Art. 8(2).
[226] *Id.* at Art. 8(6).
[227] *Id.* at Art. 3(e).
[228] *Id.* at Art. 3(f).
[229] *Id.* at Art. 3(g).
[230] *Id.* at Art. 8(3)(d).
[231] *See* Escazú Toolkit, *supra* note 120, at 64, 32-33 for a discussion of this aspect of the Agreement.
[232] Escazú Agreement, *supra* note 67, at Art. 8(5).
[233] *Id.*
[234] *Id.* at Art. 3(a).
[235] *Id.* at Art. 3(k).
[236] *Id.* at Art. 4(8).
[237] *Id.* at Art. 8(3)(c).

of vulnerable groups to engage in proceedings that affect them. Likewise, the requirements that States undertake "measures to minimize or eliminate barriers to the exercise of the right of access to justice"[238] and allow for protective measures[239] should apply with heightened force to vulnerable groups, who may face greater barriers and experience more significant harms where the State fails to prevent environmental damage. Similarly, a joint reading suggests that States should take particular care to ensure adequate reparations that meet the unique needs of vulnerable groups, pursuant to the guarantee of broad measures of redress in Article 8(3)(g).[240]

85. The Court should interpret its existing normative framework on access to justice in light of the specialized guidance provided by the Escazú Agreement and extend these obligations to the climate emergency. The Escazú Agreement provides a helpful tool for understanding the right to access justice in the specific context of cases of environmental rights violations and by extension, the climate emergency, thereby enhancing protections in this area, particularly on issues of effectiveness, timeliness, and affordability of environmental justice mechanisms, including for vulnerable groups. We ask the Court to declare that States have a broad obligation to provide adequate, effective, and timely judicial remedies to protect against and provide redress for the human rights impacts of the climate emergency.

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86. In summary, we respectfully urge the Court to explicitly extend the State obligations discussed in this submission to the context of the climate emergency and interpret the American Convention in light of the specialized guidance provided by the Escazú Agreement as outlined herein. We thank the Court for the opportunity to submit our observations in this vital matter.

[238] *Id.* at Art. 8(4)(a).
[239] *Id.* at Art. 8(3)(d).
[240] *Id.* at Art. 8(3)(g).

2022

Escazú Toolkit: Using the Escazú Agreement in Cases Before the Inter-American System (Nov. 2022, updated Mar. 2023)

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Published: November 2022
Updated: March 2023

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Acknowledgements

Thank you to the Dr. Scholl Foundation for their generous funding.

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I. Executive Summary

The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean ("Escazú Agreement") is the first environmental treaty in the Americas and the Caribbean and entered into force on April 22, 2021.

While the Escazú Agreement is a regional treaty for the Americas and the Caribbean, it is supported by the United Nations Economic Commission for Latin America and the Caribbean ("ECLAC"), and not the Inter-American Human Rights System for the Protection of Human Rights ("Inter-American System"). The Escazú Agreement is a groundbreaking treaty, both as the first in the region to enshrine regional commitments to environmental governance as human rights obligations arising from the right to a healthy environment,[1] as well as for its strong protections for vulnerable groups,[2] with a special emphasis on State obligations to promote and protect the activity of human rights defenders.[3]

The protection of human rights in the Inter-American System occurs through advocacy at the Inter-American Commission on Human Rights ("Inter-American Commission" or "Commission") and the Inter-American Court of Human Rights ("Inter-American Court" or "Court"). Since the Escazú Agreement is not a regional Inter-American instrument, this toolkit will explore how advocates will be able to use it for cases brought before the Inter-American Commission and Court. It has significant potential as an important tool for advocates to continue deepening and strengthening the protection of environmental human rights in the region.

This toolkit is intended to provide advocates with legal arguments to defend environmental human rights in the Americas through existing norms and jurisprudence from the Inter-American System and specific provisions from the Escazú Agreement.[4] The toolkit will reflect legal arguments grounded in the rights to information, participation, and access to justice in relation to environmental matters, as well as the substantive rights to health and a healthy environment.

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[1] Alessandro Rosso, '*Opinio Juris*', The Escazú Agreement: A Leap Forward for Environmental and Human Rights Protection in Latin America and the Caribbean (Nov 3, 2021), http://opiniojuris.org/2021/03/11/the-escazu-agreement-a-leap-forward-for-environmental-and-human-rights-protection-in-latin-america-and-the-caribbean/; see also *Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean* Preamble & Art. 1, Sept. 27, 2018, https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf. [hereinafter Escazú Agreement].

[2] Escazú Agreement, *supra* note 1, at Preamble & Arts. 4.5, 5.3-4, 6.6, 7.14, 8.5, 10.2(e).

[3] Antonio Guterres, '*United Nations*', Secretary-General's message marking the Entry into Force of the Escazú Agreement (Apr. 22, 2021), https://www.un.org/sg/en/content/sg/statement/2021-04-22/secretary-generals-message-marking-the-entry-force-of-the-escazú-agreement; see also Escazú Agreement, *supra* note 1, at Preamble and Art. 9.

[4] The material in the toolkit assumes that the reader is familiar with the Inter-American System and its mechanisms. For readers looking for an introduction to the Inter-American System, please review the helpful resources provided: *Inter-American Human Rights System,* International Justice Resource Center (accessed March 3, 2023), https://ijrcenter.org/regional/inter-american-system/.

II. Introduction: Advocates Can Use the Escazú Agreement to Deepen the Existing Inter-American Normative Framework on Human Rights and the Environment

A. What is the Escazú Agreement and How Will It Be Implemented?

The Escazú Agreement is a new regional environmental human rights treaty that entered into force on April 22, 2021.[5] It is a UN regional treaty adopted by the ECLAC, and ratification is open to the 33 Latin American and Caribbean ECLAC member States.[6] Although ECLAC is a UN body, the Escazú Agreement cannot apply to non-ECLAC member States,[7] and the negotiating parties took care to adapt its provisions to the specific regional context of Latin America and the Caribbean.[8]

The substantive content of the Escazú Agreement reflects the crisis of human rights violations related to environmental harm and climate change facing vulnerable communities and human rights defenders in the region.[9] The treaty is grounded in the human right to a healthy environment[10] and seeks to implement Principle 10 of the Rio Declaration on environmental access rights by enshrining the complementary procedural rights to information, participation, and access to justice.[11]

Given the importance of the treaty's content, implementation will be a key priority for advocates. The agreement allows for a regular Conference of the Parties[12] and creates the "Committee to Support Implementation and Compliance," with the mandate of promoting implementation of the treaty,[13] which mirrors the implementation mechanism for the only other regional environmental access rights treaty, Europe's Aarhus Convention.[14] As

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[5] *Escazú Agreement Enters into Force in Latin America and the Caribbean on International Mother Earth Day*, Economic Commission for Latin America and the Caribbean, (April 22, 2021), https://www.cepal.org/en/pressreleases/escazu-agreement-enters-force-latin-america-and-caribbean-international-mother-earth.

[6] *See Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, ECLAC Observatory on Principle 10, https://observatoriop10.cepal.org/en/treaties/regional-agreement-access-information-public-participation-and-justice-environmental.

[7] *Id*.

[8] See *Negotiating Committee Road Map for the Formulation of an Instrument on the Application of Principle 10 in Latin America and the Caribbean*, ECLAC, *available at* https://repositorio.cepal.org/bitstream/handle/11362/38728/S2012855_en.pdf; see also Escazú Agreement, *supra* note 1, at Preface and Preamble.

[9] Escazú Agreement, *supra* note 1, at Preface and Preamble; Zaineb Ali, *The Escazú Agreement: A landmark regional treaty for environmental defenders*, Universal Rights Group (02/10/2021), https://www.universal-rights.org/contemporary-and-emerging-human-rights-%20issues/the-escazu-agreement-a-landmark-regional-treaty-for-environmental-defenders/.

[10] Escazú Agreement, *supra* note 1, at Art. 4.

[11] Escazú Agreement, *supra* note 1, at Preface and Preamble; *Principle 10 of the Rio Declaration on Environment and Development,* ECLAC Observatory on Principle 10, *https://observatoriop10.cepal.org/en/infographics/principle-10-rio-declaration-environment-and-development*.

[12] Escazú Agreement, *supra* note 1, at Art. 15; note that the first Conference of the Parties was concluded in April 2022, with upcoming sessions planned for April 2023 and April 2024, see *Countries of Latin America and the Caribbean Reaffirm the Escazú Agreement as a Fundamental Tool for Ensuring a Healthy Environment for Present and Future Generations*, ELCAC (April 22, 2022), https://acuerdodeescazu.cepal.org/cop1/en/news/countries-latin-america-and-caribbean-reaffirm-escazu-agreement-fundamental-tool-ensuring.

[13] Escazú Agreement, *supra* note 1, at Art. 18(1).

[14] See United Nations Economic Commission for Europe Convention on Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters at Art. 15 (June 25, 1998), https://unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf; Attila

described in Article 18 of the Escazú Agreement, the Compliance Committee has a consultative role and is "non-adversarial, non-judicial and non-punitive."[15]

The treaty further specifies that the Committee's work must be undertaken with "the significant participation of the public and paying particular attention to the national capacities and circumstances of the Parties."[16] At the time of writing, the Compliance Committee had not yet been fully formed, although the Parties adopted a proposed draft of the Rules of Governing the Structure and Functions of the Committee to Support Implementation and Compliance with the Escazú Agreement during the first Conference of the Parties in April 2022.[17] These rules contemplate an individual complaint mechanism whereby the Committee could receive reports of non-compliance and issue observations and recommendations.[18] The possibility of creating a special rapporteurship to monitor implementation and mediate disputes has also been raised.[19] Though these early developments indicate some political will to support effective implementation and enforcement, it will take several years for them to be realized, and for the treaty to meet its full potential, sustained civil society engagement with this Committee, and advocacy for additional ratifications will be necessary.[20] Implementation measures will be critical.[21]

B. Can Advocates Enforce the Escazú Agreement through the Inter-American System?

As these implementation mechanisms develop, advocates have another, more immediately available, pathway to seek enforcement of the human rights principles underlying the agreement: the Inter-American System. Because the Escazú Agreement was adopted by the ECLAC rather than the Organization of American States ("OAS"), it is not *directly* enforceable before the Inter-American System.[22] As Inter-American bodies, the

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Pánovics, *The Escazú Agreement and the Protection of Environmental Human Rights Defenders*, Pecs Journal of International and European Law, 23-34, 27 (2021), https://ceere.eu/pjiel/wp-content/uploads/2021/06/pjiel-2021-1-attila-panovics.pdf; *Implementing the Escazú Agreement: The Need for Rapid Definition of the Committee to Support Implementation and Compliance*, The Global Network for Human Rights and the Environment (Aug. 17, 2021), https://gnhre.org/2021/08/implementing-the-escazu-agreement-the-need-for-rapid-definition-of-the-committee-to-support-implementation-and-compliance/.

15 Escazú Agreement, *supra* note 1, at Art. 18 (1).

16 *Id.* at Art. 18(2)*; see also* ECLAC Participation and Justice, *supra* note 6, at 165-66.

17 ECLAC, Decisions Adopted at the First Conference of the Parties, pp. 17-25 Decision I/3: Rules Relating to the Structure and Functions of the Committee to Support Implementation and Compliance, April 22, 2022, *available at* https://acuerdodeescazu.cepal.org/cop1/sites/acuerdodeescazucop1/files/22-00344_cop-ez.1_decisions_approved_4_may.pdf [hereinafter Decision I/3]; *See also* ECLAC, Revised Proposal on the Rules Relating to the Structure and Functions of the Committee to Support Implementation and Compliance, LC/COP-EZ.1/DDR/2, March 22, 2022, *available at* https://www.cepal.org/en/publications/48347-rules-relating-structure-and-functions-committee-support-implementation-and; Recommendations of the Public ("Civil Society"), Proposals on Elements to be Considered in the Rules Governing the Structure and Functions of the Committee to Support Implementation and Compliance, ("Proposed Rules") https://accessinitiative.org/sites/default/files/english_10.6.2020_final_reviseddraft_proposal_for_committee.pdf [hereinafter Recommendations on the Public].

18 Decision I/3 *supra* note 17, at pp. 20-22.

19 See U.N. Development Programme, et al., The Escazú Agreement: Human Rights and Healthy Ecosystems, p.31, 2021, *available at* https://www.learningfornature.org/wp-content/uploads/2019/08/Escazu-Dialogue-Series-Report-Human-Rights-and-Healthy-Ecosustems-11.03.2022-Compressed.pdf.

20 At the time of writing, 13 ECLAC Member States had ratified the treaty. *See* ECLAC Information, Participation, and Justice, *supra* note 6.

21 Recommendations of the Public, *supra* note 17, ¶ 11.

22 See Krsticevic, Viviana and Cruz, Patricia, *Escazú Now: We celebrate the entry into force of the Escazú Agreement, which reaffirms the importance of rights and human rights defenders in fighting the climate emergency*, CEJIL, (May 17, 2021), https://cejil.org/en/blog/escazu-now-we-celebrate-the-entry-into-force-of-the-escazu-agreement-which-reaffirms-the-importance-of-rights-and-human-rights-defenders-in-fighting-the-climate-emergency/.

Commission and Court only have jurisdiction over Inter-American human rights treaties adopted by the OAS.[23] The Inter-American Commission and Court have developed a consistent practice of looking to external sources of law to interpret State obligations under the American Convention on Human Rights ("American Convention") and other Inter-American human rights treaties.[24] Accordingly, the Commission and Court have the interpretive authority to consider the normative content of the Escazú Agreement to interpret and define State obligations under the American Convention in cases involving violations of environmental human rights.[25]

Pursuant to Article 29 of the American Convention, the Inter-American Court has the authority to consider the evolving nature of international human rights law.[26] The Court has established that "[h]uman rights treaties are living instruments the interpretation of which must evolve with the times and current conditions. This evolutive interpretation is consistent with the general rules of interpretation established in Article 29 of the American Convention, as well as in the Vienna Convention on the Law of Treaties."[27]

The Court has explained that it has the authority to interpret treaties "directly related to the protection of human rights in a Member State of the inter-American system, even if that instrument does not belong to the same regional system of protection."[28] To engage in this interpretive work, the Court must apply the pro persona principle, which requires interpreting Article 29(b) as prohibiting any treaty provision from being interpreted as "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party."[29] Accordingly, for the Court to determine whether the actions or omissions of a State are compatible with the Convention, the Court has declared itself "able to interpret the obligations and rights they contain in light of other pertinent treaties and norms."[30]

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[23] See Inter-American Commission on Human Rights, Informational Booklet and Case Systems, p.7, https://www.oas.org/en/iachr/docs/Booklet/folleto_peticiones_EN.pdf; Organization of American States, American Convention on Human Rights at Art. 47(b), 62(3), Nov. 22, 1969, 114 U.N.T.S. 143 [hereinafter American Convention].

[24] *See e.g.*, Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 124-131 (June 17, 2005); Poblete Vilches et al. v. Chile, Merits, Reparations, and Costs. Inter-Am. Ct. H.R. (ser. C) No. 349, ¶ 103 (Mar. 8, 2018); Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 92 (Nov. 28, 2007).

[25] 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, ¶¶ 40-45 (Nov. 15, 2017) [hereinafter Advisory Opinion OC-23/17].

[26] American Convention, *supra* note 23, at Art. 29; Advisory Opinion OC-23/17, *supra* note 25, ¶ 43.

[27] Case of the Indigenous Communities of the Lhaka Honhat (Nuestra Tierra) Association v. Argentina, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 400, ¶ 197 (citing The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 114 (October 1, 1999); Case of Hernández v. Argentina, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 395, ¶ 67 (Nov. 22, 2019); Case of Atala Riffo and Daughters v. Chile, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 254, ¶ 83 (Feb. 24, 2012).

[28] Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 161 (June 27, 2012) (quoting "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No.1, ¶ 21 (September 24, 1982); *see also* Interpretation of the American Declaration on Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 44 (July 14, 1989), and Juridical Status and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 22 (August 28, 2002) (internal quotation marks omitted)).

[29] American Convention, *supra* note 23, at Art. 29(b); see also Advisory Opinion 05/85 at ¶ 52; Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 147 (Aug. 31, 2001).

[30] Hernández v. Argentina, Inter-Am. Ct. H.R. (ser. C) No. 395, ¶ 65 (Nov. 22, 2019).

In Advisory Opinion OC-23/17 on *The Environment and Human Rights*, the Court reasserted its authority to interpret "other treaties concerning the protection of human rights in the States of the Americas"[31] and affirmed its power to consider the evolving nature of international human rights to develop further protections in environmental human rights.[32]

Recent jurisprudence indicates that the Court will continue to use external legal frameworks to interpret State obligations related to environmental human rights. In the *Nuestra Tierra* case, discussed below, the Court applied the same reasoning to interpret Article 26 of the American Convention and find a violation of the independently-justiciable right to a healthy environment.[33] In doing so, the Court affirmed "its competence to determine violations of Article 26 of the American Convention and [its determination that] this protects those economic, social, cultural and environmental rights ("ESCER") derived from the [OAS Charter], and the norms of interpretation established in Article 29 of the Convention are pertinent for their interpretation."[34]

As such, the Escazú Agreement fits within this guidance and represents an important source of normative content that should inform the Court's evolving understanding of the human right to a healthy environment and related procedural and substantive rights.[35] In future cases, the Court should apply the analytical framework outlined above to refer to the Escazú Agreement in interpreting the specific content of the right to a healthy environment and other environmental human rights.

As the Inter-American Commission and its Special Rapporteur on Economic, Social, Cultural, and Environmental Rights have noted, "the Escazú Agreement reinforces principles and obligations established in inter-American legislation and jurisprudence on the right to a healthy environment, highlighting the need to guarantee the so-called "access rights" to ensure its validity, such as the effective protection of the right for people to defend the environment."[36] In accordance with this view, this toolkit illustrates the ways in which the Escazú Agreement supports and strengthens existing human rights protections relevant to the right to a healthy environment and the rights of human rights defenders to guide advocates in incorporating this new source of law into their litigation and advocacy before the Inter-American System.

Essentially, the Escazú Agreement and its Compliance Committee are complementary to the Inter-American System.[37] The Compliance Committee will promote and guide treaty implementation and State compliance

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[31] Advisory Opinion OC-23/17, *supra* note 25, at ¶17.

[32] Advisory Opinion OC-23/17, *supra note* 25, at ¶¶ 40-45, 48; *see also* Nuestra Tierra, *supra* note 27 at ¶ 197 (citing Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB- SUNAT) v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 198, ¶ 160), and Case of Hernández v. Argentina, Inter-Am. Ct. H.R. (ser. C) No. 395, ¶ 67.

[33] Nuestra Tierra, *supra* note 27, at ¶ 195 – 199, 202 – 203.

[34] *Id*. ¶ 195.

[35] As experts are beginning to argue, the "Court can consider the Escazú Agreement as binding authority on States that have ratified the treaty, but also persuasively for States that have not. The Court has emphasized that it also has the authority to consider the evolving nature of international law, and as such the Escazú Agreement could be considered as codification of procedural human rights that have been widely recognized in Inter-American jurisprudence." Sarah Dávila A., *The Escazú Agreement: The Last Piece of the Tripart Normative Framework in the Right to a Healthy Environment,* 42 STAN. ENVTL. L. J. 3 64, 78 (2023).

[36] Inter-American Commission on Human Rights, Press Release; On Earth Day, IACHR and REDESCA welcome the entry into force of the Escazú Agreement and call on the States of the region to strengthen their environmental public policies in the face of the climate emergency (April 22, 2021), https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/098.asp.

[37] For further discussion, see Noroña, Daniel. *All hands on deck: Is the Inter-American Human Rights System compatible with the Escazú Agreement?* The Global Network for Human Rights and the Environment, (August 25, 2021), https://gnhre.org/2021/08/all-hands-on-deck-is-the-inter-american-human-rights-system-compatible-with-the-escazu-agreement/; Medici-Colombo, Gastón, *The Escazú Agreement and the Inter-American Human Rights Rights System: a rich synergy already in action*, The Global Network for Human Rights

specific to the Escazú Agreement. On the other hand, the Inter-American Court and Commission can interpret how the Escazú Agreement informs the body of human rights law applicable to OAS member States and assess whether States have violated their obligations under the American Convention or other Inter-American standards in light of the Escazú Agreement when determining State responsibility in individual complaints.[38] Advocates seeking to advance the incorporation of human rights principles into regional environmental governance while achieving justice for individuals and communities facing human rights violations arising from environmental harm can engage in both of these important processes.

This toolkit is divided into seven sections. Section III provides a legal framework for the human right to a healthy environment. While the right to a healthy environment is not a core focus of the Escazú Agreement, it grounds the discussion of procedural rights in the context of human rights affected by environmental risk, harm, or climate change. Specifically, the right to a healthy environment grounds the procedural protections of the Escazú Agreement because the Inter-American Court has recognized that the environmental access rights enshrined in the Escazú Agreement are fundamentally intertwined with and derive from the human right to a healthy environment. The toolkit addresses the legal foundations of this substantive right within the Inter-American System and explores how the Escazú Agreement builds upon that normative framework.

Section IV explains the core procedural rights protected under the Escazú Agreement – the rights to information, participation, and access to justice in environmental matters. For each access right, the toolkit describes the existing Inter-American normative framework and suggests how the Escazú Agreement's detailed protections may be used to complement and broaden enforcement of these rights through the mechanisms of the Inter-American System.

Next, Section V discusses protections for vulnerable persons and groups. The toolkit explains how the Inter-American System and the Escazú Agreement recognize that vulnerable groups and particularly human rights defenders require heightened protections and State obligations to guarantee their human rights, including the right to defend human rights.

Finally, the last Section explains how environmental access rights in the Escazú Agreement complement existing Inter-American protections for related substantive rights that are likely to be affected by environmental harm, using the right to health as an emblematic example.

Each section of the toolkit can be used as a standalone resource for advocates working on cases involving environmental harm before the Inter-American System, or collectively as a comprehensive framework for the litigation of procedural environmental human rights within the existing Inter-American normative framework.

III. The Right to a Healthy Environment

A. The Inter-American System and the Escazú Agreement Recognize the Human Right to a Healthy Environment

Although the Escazú Agreement protects procedural rights – the rights to information, participation, and access to justice, discussed in later sections – the treaty frames these environmental access rights as arising from and

and the Environment, (February 10, 2022), https://gnhre.org/2022/02/the-escazu-agreement-and-the-inter-american-human-rights-system-a-rich-synergy-already-in-action/.

[38] Advocates for Advisory Opinion OC-23/17, *supra* note 25, ¶¶ 40-45.

essential to the human right to a healthy environment. Accordingly, any discussion of how the environmental access rights enshrined in the Escazú Agreement might complement existing Inter-American norms should begin with an examination of how these two normative frameworks understand the human right to a healthy environment. First, this section describes how the Inter-American System has defined the human right to a healthy environment, and then it assesses how the Escazú Agreement can complement this approach.

B. Recognition of the Right to a Healthy Environment by the Inter-American System

The Inter-American System unequivocally recognizes the human right to a healthy environment. In its 2017 Advisory Opinion on *The Environment and Human Rights*, the Court interprets and clarifies the right to a healthy environment as a binding obligation for States.[39] Subsequently, in the 2020 *Nuestra Tierra* judgment, the Court recognized for the first time in its contentious jurisdiction that violations of the right to a healthy environment are directly justiciable through Article 26 of the American Convention[40] and it further affirmed that States are obliged to respect, protect, and fulfill the right to a healthy environment.[41] In that case, the Court declared that States can be found responsible for violating the right to a healthy environment when the State is made aware of harmful environmental activities and subsequently fails to undertake effective actions to remedy the harm.[42]

Although the right to a healthy environment is also explicitly recognized and protected under Article 11 of the Protocol of San Salvador, the Court is not authorized to declare violations of that provision.[43] Instead, pursuant to the *Nuestra Tierra* decision, litigants can now ask the Court to declare a violation of the autonomous human right to a healthy environment contained in Article 26 of the American Convention.[44]

The right to a healthy environment is also inextricably connected to the enjoyment of other human rights.[45] The Court has stated that "all human rights are vulnerable to environmental degradation, in that the full enjoyment of all human rights depends on a supportive environment."[46] Therefore, environmental protection has been viewed as a necessary pre-condition to the enjoyment and fulfillment of other fundamental human rights.[47]

The human rights that are interrelated to the right to a healthy environment are classified into two groups: substantive rights and procedural rights.[48] Substantive rights include the right to life, personal integrity, private

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[39] *Id.*

[40] Nuestra Tierra, *supra* note 27, at ¶¶ 202, 289. *See also*, Advisory Opinion OC-23/17, *supra* note 25, ¶ 57 (recognizing that the right to a healthy environment "is included among the economic, social and cultural rights protected by Article 26 of the American Convention, because this norm protects the rights derived from the economic, social, educational, scientific and cultural provisions...").

[41] Nuestra Tierra, *supra* note 27, at ¶ 207.

[42] *Id*.

[43] Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156, 165 [hereinafter Protocol of San Salvador], Art. 11 (stating "1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment.").

[44] Nuestra Tierra, *supra* note 27, at ¶¶ 202-209, 289.

[45] Sarah Dávila A., *Making the Case for a Right to a Healthy Environment for the Protection of Vulnerable Communities: A Case of Coal-Ash Disaster in Puerto Rico*, 9 Mich. J. Envtl. & Admin. L. 379, 385 (2020).

[46] Advisory Opinion OC-23/17, *supra* note 25, ¶ 54.

[47] Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources, Inter-Am. Comm'n H.R., Report No. 56/09, OEA/Ser.L/V/II., ¶ 190 (2009); Advisory Opinion OC-23/17, *supra* note 25, ¶ 49.

[48] Advisory Opinion OC-23/17, *supra* note 25, ¶¶ 54, 64.

life, not to be forcefully displaced, participate in cultural life, food, water, housing, health, and property.[49] Procedural rights include freedom of expression, freedom of association, access to information, access to justice, right to an effective remedy, and the right to participate in decision-making.[50] As discussed below, the procedural rights encompass the three pillars upon which the Escazú Agreement stands, which aim "to ensure the right of all persons to have access to information in a timely and appropriate manner, to participate significantly in making the decisions that affect their lives and their environment, and to access justice when those rights have been infringed."[51]

The Court has found that the right to a healthy environment has two dimensions of protection.[52] The first dimension is the individual dimension, which protects individual persons.[53] It provides that violating an individual's right to a healthy environment may directly or indirectly violate their other human rights, such as the right to health.[54] This is due to the interrelatedness between the right to a healthy environment and other human rights.[55]

The second dimension is the collective dimension, which protects specific, identifiable groups or collectives of persons.[56] It provides that these groups, such as children or minorities, must be protected as they are particularly affected by environmental degradation due to their group's status.[57] For example, indigenous persons can exercise their rights to property as a collective, rather than individually, when States fail to protect or prevent environmental damage in traditional indigenous lands and territories.[58] More broadly, the Court has suggested that the collective dimension of the right to a healthy environment extends to humanity as a whole, because of the existential threat posed by environmental harm.[59]

In addition to these two dimensions of protection, the environment itself is subject to protection and not just the human populations living in it.[60] The Court has formally recognized forests, rivers, and seas as protected under

[49] Advisory Opinion OC-23/17, *supra* note 25, ¶ 66. *See also* the right to life (G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 3 (Dec. 10, 1948)); the right to housing (*id.* at Art. 25(1)); the right to not be forcefully displaced (*id.* at Art. 12); the right to participate in cultural life (*id.* at Art. 27); the right to food (*id.* at Art. 25); the right to health (*id.*); the right to property (*id.*); the right to water (U.N. Doc. HRI/GEN/1/Rev.6, U.N Int'l Covenant on Civil and Political Rights, Human Rights Comm., Art. 11, 12 (May 12, 2003); and the right to personal integrity (A/RES/61/106, Art. 17, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006)).

[50] Advisory Opinion OC-23/17, ¶¶ 64, 66. *See also* the right to freedom of expression (G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 19 (Dec. 10, 1948)); the right to freedom of association (*id*. at Art. 20); the right of access to information (*id*. at Art. 19); the right to an effective remedy (*id.* at Art. 8); the right to participate in decision-making (*id.* at Art. 21).

[51] Alicia Bárcena, Preface to the Escazú Agreement, at pp. 7-8 (2018).

[52] Advisory Opinion OC-23/17, *supra* note 25, ¶ 59.

[53] *Id*.

[54] *Id.* For example, if there is environmental degradation and a specific individual suffers or may suffer from health conditions, their life is or may be affected and that individual would have a claim under this particular dimension.

[55] Advisory Opinion OC-23/17, *supra* note 25, ¶ 59.

[56] *Id*.

[57] *Id.* For further discussion of the heightened protections owed to vulnerable groups, see the section on vulnerable groups and human rights defenders, *see infra* Section V.

[58] Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149; Kichwa Indigenous People of Sarayaku *supra* note 28, at ¶¶ 145, 23; Advisory Opinion OC-23/17, *supra* note 25, ¶ 48.

[59] Advisory Opinion OC-23/17, *supra* note 25, ¶ 59.

[60] *Id*. ¶ 62.

the right to a healthy environment.[61] The Court reasoned that these natural resources are protected even if there is no certainty or evidence of risk to individual persons.[62]

A State's international responsibility for the violation of the substantive and procedural aspects of the right to a healthy environment can stem not only from the State's failure to respect that right, but from the State's due diligence obligations to protect it. Citing its Advisory Opinion *The Environment and Human Rights*, the Court held in *Nuestra Tierra* that a State's due diligence obligation to prevent violations of the right to a healthy environment extends not only to the actions of State and public entities but also to those of private individuals and other non-State actors.[63] This due diligence obligation to protect from human rights violations by private parties can be traced back to the Court's first judgment in a contentious case in which the Court declared that "[a]n illegal act which violates human rights and which is not initially directly imputable to a State can lead to international responsibility of the State, not because of an act itself, but because of the lack of due diligence to prevent the violation or to respond as required."[64]

The Court also declared in *Nuestra Tierra* that the due diligence obligation to prevent violations of the right to a healthy environment "encompasses all those legal, political, administrative and cultural measures that promote the safeguard of human rights and that ensure that eventual violations of those rights are examined and dealt with as wrongful acts."[65] For example, according to the Court, States are "bound to use all the means at their disposal to avoid activities under its jurisdiction causing significant harm to the environment."[66]

Additionally, the Court has declared that the obligation to prevent violations of the right to a healthy environment includes "the obligation to implement the necessary measures *ex ante* damage is caused to the environment, taking into account that, owing to its particularities, after the damage has occurred, it will frequently not be possible to restore the previous situation."[67] Among the measures States could take to comply with their due diligence obligation to protect the right to a healthy environment, the Court has mentioned the obligations to "(i) regulate; (ii) supervise and monitor; (iii) require and approve environmental impact assessments; (iv) establish contingency plans, and (v) mitigate, when environmental damage has occurred."[68]

According to the Court, "States must[] . . . regulate activities that could cause significant harm to the environment in order to reduce the risk"[69] of other human rights violations.[70] The monitoring and accountability mechanisms

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[61] *Id*.

[62] *Id*.

[63] Nuestra Tierra, supra note 27, at ¶ 207, citing 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 Articles 4(1) and 5(1) of the American Convention on Human Rights); Advisory Opinion OC-23/17, *supra* note 25, ¶ 118.

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

[65] Nuestra Tierra, *supra* note 27, at ¶ 207, citing 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 Articles 4(1) and 5(1) of the American Convention on Human Rights). Advisory Opinion OC-23/17, *supra* note 25, ¶ 118.

[66] Nuestra Tierra, *supra* note 27, at ¶ 208, citing 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 Articles 4(1) and 5(1) of the American Convention on Human Rights). Advisory Opinion OC-23/17, *supra* note 25, ¶ 142 and footnote 247.

[67] Nuestra Tierra, *supra* note 27, at ¶ 208.

[68] *Id.* Citing 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 Articles 4(1) and 5(1) of the American Convention on Human Rights). Advisory Opinion OC-23/17, *supra* note 25, ¶ 145.

[69] Advisory Opinion OC-23/17, *supra* note 25, ¶ 174.

[70] *Id*. at ¶¶ 145, 151, 174.

must be adequate and independent.[71] They must include both preventative measures and measures undertaken to investigate, punish, and repair environmental harms and abuses, through policies, regulatory activities, and ensuring access to justice.[72] According to the Court, the greater the environmental risk, the more vigorous the supervision and monitoring mechanisms must be.[73] States are also required to approve and conduct environmental impact assessments ("EIAs")[74] that "include an evaluation of the potential social impact of the project"[75] when there is a risk of significant damage to the environment, regardless of whether the action causing the damage is done by the State or by an individual. [76] States are required to adopt contingency plans that respond to emergencies or environmental disasters, including security measures and procedures to minimize the consequences.[77] With regard to mitigation, States are required to immediately mitigate significant environmental damage, even when it has occurred despite preventative measures.[78] It is important to emphasize that the State's international responsibility for third-party human rights violations generally arises from the lack of regulation, supervision or control of the activities of these third parties that cause damage to the environment.[79]

In addition to the Inter-American Court decisions and opinions, the Commission has also issued several thematic reports in which it has addressed issues related to the protection of the right to a healthy environment, such as the reports on the rights of indigenous and tribal peoples over their ancestral lands and natural resources (2009),[80] on human rights defenders (2017),[81] on extractive industries (2016),[82] and on business and human rights (2020).[83] Additionally, the Commission addressed the right to access to water in the Americas in its 2015 annual report.[84] Advocates litigating before the Inter-American System should incorporate those sources in their arguments as well.

C. Recognition of the Right to a Healthy Environment by United Nations Persuasive Authorities

In addition to citing the Inter-American sources of law, advocates litigating environmental harm cases before the Inter-American System may also want to cite other persuasive sources on the right to a healthy environment. For example, the former United Nations Special Rapporteur on Human Rights and the Environment has stated

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[71] *Id*. at ¶¶ 152-155.

[72] *Id*.

[73] *Id*.

[74] An environmental impact assessment (EIA) is the primary domestic environmental management procedure to evaluate the likely impact of a proposed activity on the environment. For further discussion, *see infra* Section IV: The Three Pillars of the Escazú Agreement.

[75] Advisory Opinion OC-23/17, *supra* note 25, ¶ 164 (citing to Saramaka People, *supra* note 24, at ¶ 129, and Kaliña and Lokono Peoples v. Suriname, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 209 ¶¶ 213-226).

[76] Advisory Opinion OC-23/17, *supra* note 25, ¶¶ 156-170.

[77] *Id.* at ¶ 171.

[78] *Id.* at ¶¶ 172-173.

[79] Nuestra Tierra, *supra* note 27, at ¶ 207.

[80] Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, Inter-Am. Comm'n H.R., Report No. 56/09, OEA/Ser.L/V/II., doc, (Dec. 30 2009).

[81] Towards Effective Integral Protection Policies for Human Rights Defenders, Inter-Am. Comm. H.R., Doc. 207 OEA/Ser.L/V/II., (Dec. 30, 2017).

[82] Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, Inter-Am. Comm. H.R., Doc. 47/15 31, OEA/Ser.L/V/II. (Dec. 31, 2015).

[83] Business and Human Rights: Inter-American Standards, Inter-Am. Comm. H.R., CIDH/REDESCA/INF.1/19, OEA/Ser.L/V/II, (Nov. 1, 2019).

[84] Inter-Am. Comm. H.R., 2015 Annual Report, Chapter IV.A, Access to Water in the Americas – An Introduction to the Human Right to Water in the Inter-American System (2015).

that this is a right that is broad in scope and encompasses the right to enjoy a safe, clean, healthy, and sustainable environment,[85] and it provides protection from environmental harm that interferes with the full and effective enjoyment of other human rights.[86]

Two important developments at the United Nations signal global recognition of the human right to a healthy environment and its importance for tackling multiple challenges, including the triple planetary crisis of climate change, pollution, and biodiversity loss.[87] First, on October 8, 2021, the United Nations Human Rights Council adopted Resolution 48/13 recognizing the human right to a clean, healthy, and sustainable environment.[88] Shortly thereafter, on July 28, 2022, the United Nations General Assembly adopted a similar resolution with 161 votes in favor and zero against, signaling a broad consensus recognizing the right.[89] This recognition follows the 2018 Framework Principles on Human Rights and the Environment published by the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment.[90] Advocates litigating before the Inter-American System may want to incorporate these UN developments, as well as the principles of the Escazú Agreement mentioned below, to reflect the current or emerging status of the basic obligations that States have under international human rights law in relation to the enjoyment of a safe, clean, healthy, and sustainable environment.

D. Recognition of the Human Right to a Healthy Environment by the Escazú Agreement

The Escazú Agreement can be used to complement and expand on the Inter-American Court's understanding of the right to a healthy environment. Article 4(1) of the agreement unambiguously recognizes the right to a healthy environment by stating that "[e]ach Party shall guarantee the right of every person to live in a healthy environment."[91] Article 1 of the treaty also defines its objective as fulfilling environmental access rights for the purpose of contributing to the enjoyment of the human right to a healthy environment.[92] Furthermore, in its Decision 1/6 on Human Rights Defenders in Environmental Matters, the First Conference of the Parties to the Escazú Agreement also stressed that "the Escazú Agreement contributes [to] the right of every person to live in a healthy environment[.]"[93]

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[85] John H. Knox (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: Rep. of the G.A.*, ¶ 2, U.N. Doc. A/73/188 (July 19, 2018).

[86] John H. Knox (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: Rep. of the G.A.*, ¶ 2, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018).

[87] *UN General Assembly declares access to clean and healthy environment a universal human right,* UN News (July 28, 2022), https://news.un.org/en/story/2022/07/1123482.

[88] H.R. Council Res. A/HRC/RES/48/13, The Human Right to a Clean, Healthy, and Sustainable Environment (Oct. 8, 2021).

[89] G.A. Res. 76/300 (Aug. 1, 2022) *available at* https://digitallibrary.un.org/record/3983329?ln=en; UN News *supra* note 87.

[90] Knox, *supra* note 86.

[91] Escazú Agreement, *supra* note 1, at Art. 4(1).

[92] *Id.* at Art. 1. The Preface to the treaty by the UN Secretary-General also underscores this point, stating that "this treaty aims to . . . guarantee the rights of every person to a healthy environment[.]" Escazú Agreement, Preface by Antonio Guterres, Secretary-General of the United Nations, at p. 5.

[93] ECLAC, Decisions Adopted at the First Conference of the Parties, p. 29, Decision I/6: Human Rights Defenders in Environmental Matters, April 22, 2022, *available at* https://acuerdodeescazu.cepal.org/cop1/sites/acuerdodeescazucop1/files/22-00344_cop-ez.1_decisions_approved_4_may.pdf ("[T]he Escazú Agreement contributes [to] the right of every person to live in a healthy environment").

The Escazú Agreement not only demands that States guarantee the right to a healthy environment but also, as will discussed below, adopt measures to protect environmental defenders, and harmonize their internal legislation with the standards indicated in that instrument. To this end, the Escazú Agreement contains specific provisions that require States to prevent environmental harm and protect environmental health.[94]

States also have an obligation of prevention under the Escazú Agreement that requires them to ensure that activities within their jurisdiction do not cause significant environmental damage to areas outside of their jurisdiction.[95] Article 8 of the Escazú Agreement, for example, provides that States should have "the possibility of ordering precautionary… measures… to prevent, halt, mitigate, or rehabilitate damage to the environment."[96] As discussed in the Right to Information and Right to Participation sections of this toolkit, Article 6 of the Escazú Agreement suggests that States must generate and disseminate environmental information,[97] including by carrying out environmental impact assessments[98] and other environmental decision-making processes with public participation.[99]

In sum, as noted above, both the Escazú Agreement and the Inter-American System recognize the fundamental interrelationship between the substantive right to a healthy environment and the procedural environmental access rights protected under the Escazú Agreement. In this sense, the Escazú Agreement can be considered the last piece of a tripart framework, along with the Court's Advisory Opinion on *The Environment and Human Rights* and the *Nuestra Tierra* decision, that opens the door for concrete State obligations in the protection of the right to a healthy environment through the Agreement's three pillars: information, participation, and access to justice in environmental matters.[100] By incorporating these provisions of the Escazú Agreement into their legal briefs, advocates litigating cases of environmental harm before the Inter-American System will help further develop the normative content of the substantive and procedural human rights obligations States have to respect, protect, and fulfill the human right to a healthy environment. The next section explores these procedural rights, the three pillars of the Escazú Agreement, to guide advocates in mobilizing this new treaty to broaden and deepen existing protections within the Inter-American System.

IV. The Three Pillars of the Escazú Agreement

The Escazú Agreement was adopted to promote regional implementation of the environmental access rights protections – the rights to information, participation, and access to justice – identified in Principle 10 of the Rio Declaration[101] as the procedural rights essential to the right to a healthy environment and sustainable

[94] Escazú Agreement, *supra* note 1, at Art. 8.

[95] Advisory Opinion OC-23/17, *supra* note 25, ¶¶ 127-128, 140, 174. The Advisory Opinion provides that States are also required to meet the precautionary principle, which requires States to take effective measures to protect the environment when there serious or irreversible threats of damage (*id.* at ¶¶ 175-180). States must also meet the obligation to cooperate, which requires them to cooperate with other States in case any activities, projects, or incidents may cause transboundary harm (*id.* at ¶¶ 181-210). Finally, the obligation of prevention must also be met (*id*. at ¶¶ 125, 127, 181, 211).

[96] Escazú Agreement, *supra* note 1, at Art. 8.

[97] *Id.* at Art. 6.

[98] *Id.* at Art. 6(3)(h).

[99] *Id.* at Art. 7(9).

[100] Dávila, *supra* note 35, at pp. 64, 68, 69.

[101] *Report of the United Nations Conference on Environment and Development, Rio Declaration on Environment and Development: Rep. of the G.A.*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992). *For further discussion of this history, see also* Dávila *supra* note 35 at notes 10-11, 17-24; S*ee also* ECLAC, History of the Regional Agreement, https://www.cepal.org/en/subsidiary-bodies/acuerdo-regional-acceso-la-informacion-la-participacion-publica-acceso-la-justicia/history-regional-agreement.

development.[102] As noted above, this framework aligns with the procedural rights identified by the Inter-American Court as inextricably linked to environmental degradation and the right to a healthy environment.[103] Accordingly, the detailed environmental access rights protections of the Escazú Agreement can be used to complement the Inter-American System's understanding of these procedural rights in cases of environmental harm.

The following sections of the toolkit address each of the three pillars in turn, providing first a description of existing Inter-American norms relative to each procedural right, then providing suggestions for how advocates might use the specialized protections provided by the Escazú Agreement to broaden the existing Inter-American normative framework on environmental access rights.

A. Pillar One: The Right to Information in Environmental Matters

The right to access information is the first pillar of the Escazú Agreement and is well-established in international human rights law.[104] This section will provide a legal framework for the right to access information regarding environmental matters. The Escazú Agreement provides specific protections on how information must be provided, its accessibility, and measures for persons and groups in vulnerable situations. This section will also explain interpretations of the right to access information from Inter-American precedent. Specifically, this section focuses on how the Escazú Agreement can be used to complement and strengthen the obligation States have under the Inter-American System to guarantee the right to access information in light of the principle of maximum disclosure, including by affirmatively providing information including environmental impact assessments, particularly to vulnerable groups.

1. The Inter-American System Recognizes the Right to Information

The Inter-American System recognizes the right to access information and its significance in the context of environmental harm. This subsection analyzes relevant aspects of the Inter-American Court's normative framework around the right to access information and then provides additional detail regarding its recognition of the right to access information specifically in relation to environmental harm in its Advisory Opinion on *The Environment and Human Rights*.

Article 13(1) of the American Convention provides that "[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in form or art, or through any other medium of one's choice."[105] In *Claude-Reyes v. Chile*, the Inter-American Court interpreted Article 13 to encompass the right to access State-held information, holding that it:

> protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case.[106]

[102] Escazú Agreement, *supra* note 1, at Preamble and Art. 1.

[103] Advisory Opinion OC-23/17, *supra* note 25, at ¶ 64.

[104] Escazú Agreement, *supra* note 1, at Art. 1, 5, 6; Case of Claude Reyes v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 76-81 (Sept. 19, 2006).

[105] American Convention, *supra* note 23 at Art. 13(1).

[106] Claude Reyes v. Chile, *supra* note 104, at ¶ 77. See subsection (IV)(A)(iii)(b) *infra* for further discussion of permissible restrictions on access to State-held information.

Likewise, Principle 4 of the Inter-American Commission's Declaration of Principles on Freedom of Expression provides that "[a]ccess to information held by the state is a fundamental right of every individual…[and] [t]his principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies."[107] The Inter-American Commission's Special Rapporteur on Freedom of Expression has noted that the right to freedom of expression (and information within it) has been recognized to be essential for the preservation of rule of law and democracy.[108]

In its Advisory Opinion on *The Environment and Human Rights*, the Inter-American Court listed the right to information among the procedural rights most closely linked to environmental matters[109] and reiterated its importance in promoting the realization of other core human rights.[110] The Court also linked the right to information to the right to public participation with regard to environmental protection and sustainable development, noting that "[a]ccess to State-held information of public interest can permit participation in public administration by means of the social control that can be exercised through such access."[111] It noted the applicability of this aspect of the right to information to the environmental context, observing "that access to information on activities and projects that could have an impact on the environment is a matter of evident public interest."[112] Although it found that the "right is not absolute,"[113] the Court ultimately declared that "States have the obligation to respect and ensure access to information concerning possible environmental impacts."[114]

With regard to the content of the right to information in relation to the environment, the Court found that "information must be handed over without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied."[115] It further noted that "access to environmental information should be affordable, effective and timely."[116] Finally, "[i]n the context of environmental protection, [the] obligation [to respect and ensure the right to information] involves both providing mechanisms and procedures for individuals to request information, and also the active compilation and dissemination of information by the State."[117]

Accordingly, the Court found that States have an "obligation of active transparency"[118] that requires States to provide accurate, updated, understandable information in a timely and proactive manner to build public trust and allow the public to use such information to exercise their other rights.[119] In environmental matters, this obligation requires States to provide "relevant and necessary information on the environment . . . includ[ing] information on

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[107] Inter-Am. Comm'n H.R., Declaration of Principles on Freedom of Expression (Oct. 2000), https://www.oas.org/en/iachr/mandate/basics/declaration-principles-freedom-expression.pdf, at Principle 4.

[108] Inter-American Comm'n H.R., The Inter-American Legal Framework Regarding the Right to Freedom of Expression, OEA/Ser.L/V/II. CIDH/RELE/INF.9/12, 7 at pp. viii-ix (March 7, 2011).

[109] Advisory Opinion OC-23/17, *supra* note 25, at ¶ 64.

[110] *Id.* at ¶¶ 211, 217. It is worth noting that in ¶ 218, the Court observed with approval the forthcoming adoption of the Escazú Agreement "as a positive measure to ensure the right of access to information in [environmental] matter[s]."

[111] Advisory Opinion OC-23/17, *supra* note 25, at ¶ 213.

[112] *Id*. at ¶ 214.

[113] *Id*. at ¶ 225. Permissible restrictions on the right to access information are discussed, *infra*, in subsection (IV)(A)(iii)(b).

[114] *Id.* at ¶ 225.

[115] *Id.* at ¶ 219.

[116] *Id.* at ¶ 220 (referencing the Bali Guidelines and a range of other international instruments).

[117] *Id.* at ¶ 225.

[118] *Id.* at ¶ 221.

[119] *Id*.

environmental quality, environmental impact on health and the factors that influence this, and also information on legislation and policies, as well as assistance on how to obtain such information."[120] This obligation applies with heightened force in cases of environmental emergency.[121]

2. The Escazú Agreement Recognizes to Right to Information

The Escazú Agreement protects the right to access environmental information. It defines this term broadly to encompass "any information . . . regarding the environment and its elements and natural resources, including information related to environmental risks, and any possible adverse impacts affecting or likely to affect the environment and health, as well as to environmental protection and management."[122] Article 5(1) of the Escazú Agreement provides that a State Party must "ensure the public's right of access to environmental information in its possession, control or custody, in accordance with the principle of maximum disclosure."[123]

Under Article 5(2)(a) of the Escazú Agreement, the right of access to environmental information includes the right to request and receive information.[124] Specifically, the right to access information includes the right to "(a) requesting and receiving information from competent authorities without mentioning any special interest or explaining the reasons for that request; (b) being informed promptly whether the requested information is in possession or not of the competent authority receiving the request; and (c) being informed of the right to challenge and appeal when information is not being delivered."[125]

In doing so, States must guarantee that the "competent authorities generate, collect, publicize and disseminate environmental information… in a systematic, proactive, timely, regular, accessible and comprehensible manner."[126] States must provide and ensure the accessibility of information held by public authorities, including information relating to environmental conditions, including environmental impact assessments.[127] Article 5(18) requires States to create independent oversight mechanisms to assure "transparency in access to environmental information, to oversee compliance with rules, and guarantee the right of access to information."[128]

Furthermore, the Escazú Agreement provides that States have an obligation to ensure that vulnerable persons and groups have access to environmental information by "establishing procedures for the provision of assistance,

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[120] *Id.* at ¶ 223.

[121] *Id.* Although at the time of writing the Inter-American Court had not yet issued a judgment in the case of La Oroya Community v. Peru, the Inter-American Commission addressed this issue in its Merits Report, and the Court's judgment is likely to contain relevant application of these standards. See La Oroya Community v. Peru, Case No. 12.718, Inter-Am. Comm'n H.R., Report No. 330/20, OEA/Ser.L/V/II doc. 348, ¶¶ 146-150 (Nov. 19, 2020), (but note that the citation in note 181 erroneously refers to the Inter-American Court's judgment in the Nuestra Tierra case; instead, it should refer to the Inter-American Court's Advisory Opinion 23). In the La Oroya Merits Report, ¶148, the Inter-American Commission also signaled that the "[t]he right to access environmental information includes that information that is necessary for the exercise or protection of human rights in the context of business activities, and this information should be provided in a timely, comprehensible, accessible, updated, and complete manner." (citing IACHR (2019) Business and Human Rights: Inter-American Standards. OEA/Ser.L/V/II CIDH/REDESCA/INF.1/19, 1 Nov. 2019, ¶ 48.).

[122] Escazú Agreement, *supra* note 1, at Art. 2(c).

[123] *Id.* at Art. 5(1).

[124] *Id.* at Art. 5(2)(a).

[125] *Id.* at Art. 5(2).

[126] *Id.* at Art. 6(1).

[127] *Id.* at Art. 6(3)(h).

[128] *Id.* at Art. 5(18).

from the formulation of requests through the delivery of the information, taking into account their conditions and specificities, for the purpose of promoting access and participation under equal conditions."[129]

3. States Must Follow the Principle of Maximum Disclosure and May Only Place Justified Limits on the Right to Information

a. The Escazú Agreement Requires States to Follow the Principle of Maximum Disclosure and Justify Limits on the Right to Environmental Information

Although the Escazú Agreement allows States to restrict access to information under limited circumstances, States must apply the "principle of maximum disclosure[]" in implementing their obligation to ensure the right to access publicly-held information.[130] Article 5 accordingly favors disclosure and provides specific limits on States' ability to restrict access to information and includes procedural safeguards to allow the public to hold States accountable when they exceed these limits.

First, information must be made accessible to everyone.[131] States may not limit access by requiring the person requesting the information to demonstrate "any special interest or explain[] the reasons for that request."[132] The Escazú Agreement only permits States to limit access to environmental information under specific circumstances.[133] Article 5 directs States to follow their domestic rules regarding exceptions to the disclosure of public information,[134] in accordance with the procedural safeguards outlined below.[135] In adopting and applying these domestic rules, States must comply with their existing human rights obligations and "encourage the adoption of exception regimes that favour the disclosure of information."[136]

For States that do not have a relevant domestic legal framework to apply, Article 5(6) of the Escazú Agreement sets forth four enumerated exceptions to the general rule that States must disclose information.[137] These exceptions allow States to limit access to information "when disclosure would put at risk the life, safety or health of individuals."[138] States may also limit access to information where disclosure negatively affects "national security, public safety[,]"[139] environmental protection,[140] or poses "a clear, probable and specific risk of substantial harm to law enforcement[.]"[141]

To deny access to information, States must have previously established by law and "clearly defined and regulated" its reasons to do so.[142] These reasons must take the public interest into account and "shall . . . be

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129 *Id.* at Art. 5(3).
130 *Id.* at Art. 5(6)(d).
131 *Id.* at Art. 5(8).
132 *Id.*
133 *Id.* at Art. 5(5-6).
134 *Id.* at Art. 5(9).
135 *Id.* at Art. 5(5).
136 *Id.* at Art. 7(5).
137 *Id.* at Art. 5(6).
138 *Id.* at Art. 5(6)(a).
139 *Id.* at Art. 5(6)(b).
140 *Id.* at Art. 5(6)(c).
141 *Id.* at Art. 5(6)(d).
142 *Id.* at Art. 5(8).

interpreted restrictively."[143] States have to overcome the presumption that access to information is necessary and bear the burden to prove that limitations to access information are justified.[144] In determining whether a restriction is justified, State authorities must apply a "public interest test [by] weigh[ing] the interest of withholding the information against the public benefit of disclosing it, based on suitability, need and proportionality."[145]

However, under the Escazú Agreement, States must also comply with specific requirements designed to enhance transparency and accountability regarding any refusal to disclose requested information. If a State denies access to information pursuant to its domestic rules, it must communicate the "refusal in writing, including the legal provisions and the reasons justifying the decision in each case, and inform the applicant of the right to challenge and appeal."[146] In all circumstances, Article 5(2) specifies that to comply with their obligations to guarantee the right to access information, States must "inform[] [the public] of the right to challenge and appeal when information is not delivered, and of the requirements for exercising this right."[147]

b. The Escazú Agreement Can Guide the Inter-American System to Promote Maximum Disclosure in Environmental Matters

Although the Inter-American System already limits the ability of States to restrict access to information, it has not yet carefully explored how these limitations should apply in the specific context of environmental matters.[148] The Escazú Agreement's clear and precise standard may be invoked to encourage the Inter-American System to strengthen its existing protections in this area and adapt them to cases involving the environment.

As noted above, Article 13 of the American Convention establishes a broad "freedom to seek, receive, and impart information."[149] While this freedom is not absolute, restrictions on the right of information must be justified and in accordance with the narrow grounds enumerated in Article 13(2).[150] Under these provisions, States may not engage in "prior censorship"[151] and may only permissibly restrict access to information through the "subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure . . . the rights or reputations of others; or . . . the protection of national security, public order, or public health or morals."[152] It should be noted that the Inter-American Court has generally established that no other restrictions may be applied

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143 *Id.*

144 *Id.* at Art. 5(5), 5(8).

145 *Id.* at Art. 5(9).

146 *Id.* at Art. 5(5).

147 *Id.* at Art. 5(2)(c).

148 Note that in Nuestra Tierra, the Inter-American Court declined to rule on an alleged Article 13 right to access information violation due to a lack of evidence. Nuestra Tierra, *supra* note 27, at ¶ 185.

149 American Convention, *supra* note 23, at Art.13(1).

150 Case of Claude-Reyes et al. v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 77, 88 (Sept.19, 2006).; American Convention *supra* note 23 at Art. 13(2-5). Article 13(3) prohibits State restrictions "by indirect methods or means . . . tending to impede the communication and circulation of ideas and opinions." Article 13(4) allows prior censorship of "public entertainments . . . for the moral protection of childhood and adolescence." Article 13(5) allows States to prohibit incitement of violence and hate crimes."

151 American Convention, *supra* note 23, at Art. 13(2).

152 *Id*.

to Article 13, whether from the general provision on limitations in Article 32 of the American Convention[153] or restrictions on the right to freedom of expression from other international treaties.[154]

In *Claude-Reyes v. Chile*, the Court analyzed the compatibility of restrictions on State-held environmental information with Article 13. In conducting its analysis, the Court "observe[d] that in a democratic society, it is essential that the State authorities are governed by the principle of maximum disclosure, which establishes the presumption that all information is accessible, subject to a limited system of exceptions."[155] It also held that because "Article 13 of the Convention protects the right of all individuals to request access to State-held information," States may not require the person requesting the information "to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied."[156]

The Court found that States may only restrict such information by law, for the purposes enumerated in Article 13(2).[157] For restrictions to be imposed, they must also satisfy a proportionality test requiring that "the restriction must be proportionate to the interest that justifies it and must be appropriate for accomplishing this legitimate purpose, interfering as little as possible with the effective exercise of the right." [158] The Court explained that it would only find a legitimate interest where the restrictions are "necessary in a democratic society; consequently, they must be intended to satisfy a compelling government interest."[159] The State must also select the least restrictive means of achieving that purpose.[160] Finally, the Court held that States bear the burden of showing that any restrictions on access to State-held information comply with these requirements.[161]

In *Gomes Lund v. Brazil*, the Court affirmed that the principle of good faith and maximum disclosure should limit restrictions on access to State-held information.[162] Accordingly, it reasserted that "State power is presumed public and accessible, subject to a limited regime of exceptions."[163] As in *Claude-Reyes*, the Court in *Gomes Lund* held that States must justify any restriction and bear the burden to demonstrate "the impossibility of presenting said information, and given doubts or empty legal arguments, the right to access to information will be favored."[164] The Court emphasized that in cases where "judicial or administrative authorities in charge of the ongoing investigation or pending procedures"[165] need access to State-held information, the State could not avoid disclosure by claiming State secrets, confidentiality, public interest, or national security.[166]

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153 Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 65 (Nov. 13, 1985).

154 *Id*.

155 Claude-Reyes et al. v. Chile, *supra* note 150, at ¶ 92.

156 *Id*. at ¶ 77.

157 *Id*. at ¶ 90.

158 *Id*. at ¶ 91.

159 *Id*.

160 *Id*.

161 *Id*. at ¶ 93.

162 Gomes Lund et al v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., (ser. C) No. 219, ¶¶ 199, 230 (Nov. 24, 2010).

163 *Id*. at ¶ 230.

164 *Id*.

165 *Id*. at ¶ 202.

166 *Id.* ¶¶ 202, 230.

The Court incorporated these standards in its Advisory Opinion on *The Environment and Human Rights*, where it reiterated the proportionality test and requirements established in *Claude-Reyes*.[167] It observed that "the principle of maximum disclosure is applicable [to access to State-held information], based on the presumption that all information is accessible, subject to a limited system of exceptions."[168] Likewise, "the burden of proof to justify any denial of access to information must be borne by the entity from whom the information was requested."[169] States may only refuse to provide information by justifying its decision "in a way that allows the reasons and rules on which it has based the decision not to deliver the information to be known."[170] Any refusal lacking such justification will be considered arbitrary.[171]

The Escazú Agreement provisions described above complement this existing Inter-American normative framework on the limitations placed on the State restriction of access to information. Advocates may be able to use the specific guidelines in Article 5 of the Escazú Agreement to encourage the Inter-American System to build from what it already established in *Claude-Reyes* to strengthen protections around the right to access State-held or controlled environmental information. For example, advocates may draw upon the Escazú Agreement's commitment to the principle of maximum disclosure as a core principle of environmental access rights, as well as its related access to information provisions[172] to argue that the Inter-American System should apply a strict proportionality standard that favors disclosure on any restrictions on the right to access information in environmental matters.

4. States Must Take Affirmative Steps to Produce and Disseminate Information

The Escazú Agreement not only requires that States make environmental information accessible, but it also directs States to actively produce and disseminate such information. The inclusion of this proactive duty recognizes that in a technically complex area like the environment, the right to access information has no meaning unless comprehensible, accessible, and accurate information exists and is made publicly available in an organized, updated format. Accordingly, the Agreement provides detailed guidelines as to the types of environmental information that States must produce, how it should be organized, and the means States must implement to ensure that this information is properly disseminated and updated. Many of these obligations are subject to a progressive realization standard whereby States must achieve them "to the extent possible within available resources[.]"[173]

Article 6(1) requires States to "generate, collect, publicize and disseminate environmental information relevant to their functions in a systematic, proactive, timely, regular, accessible and comprehensible manner."[174] States must also periodically update the information[175] and encourage the disaggregation and decentralization of environmental information at the subnational and local levels.[176] This information must also be "reusable,

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[167] Advisory Opinion OC-23/17, *supra* note 25, at ¶¶ 213, 224.

[168] *Id.* at ¶ 224.

[169] *Id.*

[170] *Id*.

[171] *Id*.

[172] Escazú Agreement, *supra* note 1, at Art. 5(1, 2, 5-10).

[173] *Id.* at Art. 6(1).

[174] *Id.*

[175] *Id.* Article 6(11) adds the additional requirement that States must "create and keep regularly updated its archiving and document management systems in environmental matters in accordance with its applicable rules with the aim of facilitating access to information at all times."

[176] *Id.* at Art. 6(1).

processable and available in formats that are accessible, and that no restrictions are placed on its reproduction or use[.]"[177]

Article 6 contains a number of highly specific requirements as to the different ways that States must produce and publicize environmental information. In addition to the requirements described below, States must also "encourage independent environmental performance reviews[;]"[178] "promote access to environmental information contained in concessions, contracts, agreements or authorizations granted, which involve the use of public goods, services or resources[;]"[179] "ensure that consumers and users have official, relevant and clear information on the environmental qualities of goods and services and their effects on health[.]"[180] As discussed in more detail in subsection V below, States must also facilitate access to information by persons in vulnerable situations by "disseminat[ing] environmental information in the various languages used in the country, and prepar[ing] alternative formats that are comprehensible to those groups using suitable channels of communication."[181]

States must publish "a national report on the state of the environment" every five years or less, that contains quantitative data on the state of the environment and natural resources, efforts to implement national environmental laws, an assessment of domestic implementation of environmental access rights, and collaboration between different sectors.[182] Article 6(7) specifies that "[s]uch reports shall be drafted in an easily comprehensible manner and accessible to the public in different formats and disseminated through appropriate means, taking into account cultural realities."[183]

Article 6(3) of the Escazú Agreement requires that States have in place one or more up-to-date environmental information systems.[184] These systems may provide information about pertinent resources and regulations, including environmental laws,[185] relevant public authorities,[186] scientific or academic studies,[187] climate change information,[188] "information on environmental impact assessment processes and on other environmental management instruments, where applicable, and environmental licences or permits granted by the public authorities;"[189] and "information on the imposition of administrative sanctions in environmental matters."[190] They may also include substantive information about the state of the environment,[191] such as "a list of polluted areas, by type of pollutant and location;"[192] "information on the use and conservation of natural resources and

177 *Id.* at Art. 6(2).
178 *Id.* at Art. 6(8).
179 *Id.* at Art. 6(9).
180 *Id.* at Art. 6(10).
181 *Id.* at Art. 6(6).
182 *Id.* at Art. 6(7).
183 *Id*.
184 *Id.* at Art. 6(3).
185 *Id.* at Art. 6(3)(a).
186 *Id.* at Art. 6(3)(c).
187 *Id.* at Art. 6(3)(f).
188 *Id.* at Art. 6(3)(g).
189 *Id.* at Art. 6(3)(h).
190 *Id.* at Art. 6(3)(j).
191 *Id.* at Art. 6(3)(b).
192 *Id.* at Art. 6(3)(d).

ecosystem services;"[193] and "an estimated list of waste by type and, when possible, by volume, location and year[.]"[194] In order to ensure that their environmental information systems facilitate access to environmental information, States must ensure that they "are duly organized, accessible to all persons and made progressively available through information technology and georeferenced media[.]"[195]

In addition, pursuant to Article 6(4), States must also "take steps to establish a pollutant release and transfer register covering air, water, soil and subsoil pollutants, as well as materials and waste in its jurisdiction."[196] The provision allows for the register to "be established progressively" and requires that it be "updated periodically."[197]

Similarly, Article 6(5) also requires States to establish an early warning system for situations that pose "an imminent threat to public health or the environment[.]"[198] States must "immediately disclose and disseminate through the most effective means all pertinent information in its possession that could help the public take measures to prevent or limit potential damage."[199]

Although the Escazú Agreement primarily refers to State-held or controlled information,[200] it recognizes that the public also needs access to privately held information. Article 6(12) requires States to "take the necessary measures . . . to promote access to environmental information in the possession of private entities, in particular information on their operations and the possible risks and effects on human health and the environment."[201] Article 6(13) similarly requires States to "encourage public and private companies, particularly large companies, to prepare sustainability reports that reflect their social and environmental performance."[202]

5. The Escazú Agreement Can Provide the Inter-American System with Strong, Specific Content to Inform States' Obligation of Active Transparency in Environmental Matters

As noted above, the Inter-American Court in its Advisory Opinion on *The Environment and Human Rights* established that States have an obligation of active transparency to take proactive steps to share environmental information with the public.[203] The Court's forthcoming judgment in the *La Oroya* case will likely feature the application of this framework to Perú's violation of the La Oroya community's right to information about the environmental and health impacts of the metallurgical complex at issue in that case.[204] Together with these expected jurisprudential developments, advocates can use the Escazú Agreement provisions discussed above to encourage the Inter-American System to define the obligation of active transparency to include stronger and more specific requirements to produce, organize, update, and disseminate environmental information.

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193 *Id.* at Art. 6(3)(e).

194 *Id.* at Art. 6(3)(i).

195 *Id.* Art. 6(3). "Georeferencing" is the process in which locations are assigned "to geographical objects within a geographic frame of reference." Xiaobai A. Yao, *Georeferencing and Geocoding*, *in* INT'L ENCYCLOPEDIA OF HUM. GEOGRAPHY, 458 (Rob Kitchin & Nigel Thrift, 2020).

196 Escazú Agreement, *supra* note 1, at Art. 6(4).

197 *Id*.

198 *Id.* at Art. 6(5).

199 *Id*.

200 *Id.* at Art. 5(1).

201 *Id.* at Art. 6(12).

202 *Id.* at Art. 6(13).

203 Advisory Opinion OC-23/17, *supra* note 25, at ¶¶ 221-223.

204 *See,* e.g., La Oroya Community *supra* note 121, at ¶¶ 150, 194 (Nov. 19, 2020).

The Court derived the obligation of active transparency from its recognition of the public's right to access State-held information in *Claude-Reyes*, as well as the right to obtain information necessary for the exercise of other rights, recognized in *I.V. v. Bolivia*.[205] As noted above, in *Claude-Reyes* the Court established that the right to access information necessarily entails a corresponding positive State obligation to provide that information.[206] In *I.V.*, the Court held that "[t]he obligation of the State to provide information *ex officio*, known as "active transparency obligation," imposes on States the duty to provide the necessary information for individuals to be able to exercise other rights," which in turn indicates that "the right of access to information has an instrumental nature to achieve the satisfaction of other rights under the Convention."[207] This reasoning is reflected, for example, in the Court's conclusion that the right to participation cannot be effectively exercised if the State has failed in its obligation to provide the necessary information beforehand.[208]

In its Advisory Opinion on *The Environment and Human Rights*, the Court reaffirmed that this positive "'obligation of active transparency'"[209] requires States to "provide the information requested, so that the individual may have access to it in order to examine and assess it[,]"[210] and ensure that the information provided is what is necessary "for individuals to be able to exercise other rights . . . particularly . . . in relation to the rights to life, personal integrity, and health."[211] In fulfilling this obligation, States should "provide the public with as much information as possible on an informal basis[,]"[212] and, to maintain public trust, it should "deliver information that is clear, complete, timely, true and up-to-date."[213] Finally, "[t]his information should be . . . understandable, in an accessible language, . . . and be provided in a way that is helpful to the different sectors of the population."[214]

With regard to the environment, the Court suggested that this obligation of active transparency encompasses a State duty to proactively share information with the public, particularly where such information may have a bearing on other human rights.[215] The duty to publish "relevant and necessary information on the environment . . . includes information on environmental quality, environmental impact on health and the factors that influence this, and also information on legislation and policies, as well as assistance on how to obtain such information."[216] States must be particularly proactive with regard to this obligation "in cases of environmental emergencies that require relevant and necessary information to be disseminated immediately and without delay to comply with the duty of prevention."[217]

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[205] Advisory Opinion OC-23/17, *supra* note 25, ¶ 221; (citing to Case of Claude Reyes *supra* note 104, at ¶ 77 and Case of I.V. v. Bolivia, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 329, ¶ 156 (Nov. 30, 2016).

[206] Claude Reyes *supra* note 104, at ¶ 77.

[207] I.V. *supra* note 205 at ¶ 156.

[208] Advisory Opinion OC-23/17, *supra* note 25, at ¶ 231.

[209] *Id.* at ¶ 221.

[210] *Id*.

[211] *Id.*

[212] *Id*.

[213] *Id.* at ¶ 221, note 505.

[214] *Id.* at ¶ 221.

[215] *Id.* at ¶ 223.

[216] *Id*.

[217] *Id. See also* La Oroya Community *supra* note 121, at ¶ 150.

In its Merits Report in the *La Oroya* case, the Inter-American Commission referred to this standard[218] and found that Peru had failed to uphold its duty of active transparency by failing to "actively produce necessary information in a timely manner about the environment in La Oroya in order to guarantee the human rights of its residents."[219] In analyzing the obligation of active transparency, the Commission reasoned that "the State should ensure that the members of a community are aware of the possible risks, including environmental and health risks caused by State decisions regarding business activities[.]"[220] Accordingly, it noted that Peru's failure had particularly serious consequences because the residents were therefore unable to protect themselves from the serious health risks caused by very high levels of contamination, which the Commission characterized as "one of the worst environmental emergencies in the world[.]"[221]

Advocates can encourage the Inter-American System to deepen this existing normative framework by incorporating the strong, specific requirements of Article 6 of the Escazú Agreement regarding the environmental information that States must affirmatively produce, organize, update, and disseminate. Beyond requiring that States actively provide information about particular situations of environmental impact, Article 6 calls for the establishment of long-term environmental monitoring mechanisms that should provide the public with a view of how environmental quality is changing over time as a result of State environmental decision-making. Because the right to a healthy environment implicates many other human rights,[222] States need to create these kinds of environmental information systems to provide the public with the necessary information to understand how environmental harm may be affecting their other rights and to allow them to take preventive or protective action.

By this approach, the Inter-American System can look to the Escazú Agreement to provide specific content regarding the ways that States should produce and disseminate environmental information pursuant to the obligation of affirmative transparency. It can also more fully conceptualize how the interconnections between environmental access rights, the right to a healthy environment, and affected substantive rights can be addressed by this instrumental application of the right to access information.

6. States Must Carry Out Prior Environmental and Social Impact Assessments

a. The Escazú Agreement Recognizes that States Must Carry Out and Publicize Prior Environmental Impact Assessments

The Escazú Agreement recognizes that Environmental Impact Assessments ("EIAs") are an important source of environmental information that also facilitate effective public participation in environmental decision-making.[223] Although the Escazú Agreement does not provide a definition of EIAs, they are widely incorporated into international and domestic environmental laws[224] and are generally understood to be the primary domestic

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[218] *Id.* at ¶¶ 148-150.

[219] *Id.* at ¶ 200 ("actively and timely produce the necessary information on the environment in La Oroya in order to guarantee the human rights of its inhabitants.") (in the original Spanish, "al omitir producir activa y oportunamente la información necesaria sobre el media ambiente en La Oroya a efectos de garantizar los derechos humanos de sus pobladores.").

[220] *Id.* at ¶ 154.

[221] *Id.* at ¶ 198 ("an environmental emergency considered one of the worst in the world").

[222] Advisory Opinion OC-23/17, *supra* note 25, at ¶¶ 64-66.

[223] Escazú Agreement, *supra* note 1 at Arts. 6(3)(h), 7(9), 7(17).

[224] *See, e.g.*, Advisory Opinion OC-23/17 *supra* note 25 at ¶ 150, note 297, 157-159 (citing UNEP, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, 2004, p. 18. Available at: https://unep.ch/etu/publications/textONUBr.pdf. *See also*, UNEP, Resolution 14/25 of June 17, 1987, adopting the Goals and Principles

environmental management procedure to evaluate the likely impact of a proposed activity on the environment "with a view to ensuring environmentally sound and sustainable development."[225] An EIA is commonly designed to inform and elicit feedback from those who may be affected.[226] In addition to identifying environmental impacts and potential mitigation measures, EIAs typically provide an assessment of alternatives to the proposed activity.[227] Pursuant to the Rio Declaration, "[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."[228]

Several provisions of the Escazú Agreement support the importance of public access to EIAs. Article 6(3)(h) of the Escazú Agreement suggests that States should include "information on environmental impact assessment processes and on other environmental management instruments" in their environmental information systems.[229] Article 7(9) of the Escazú Agreement requires that States publicly share the decision made after consideration of an EIA and related public input "in an effective and prompt manner[.]"[230] To ensure that affected communities have the information necessary to challenge such decisions, this information should "include the established procedure to allow the public to take the relevant administrative and judicial actions."[231]

Likewise, Article 7(17) requires States to share multiple categories of information associated with EIAs to ensure that the public can effectively participate in the environmental decision-making processes informed by these assessments.[232] In addition to descriptions of the impacts of the proposed project or activity[233] and measures to address those impacts,[234] these categories include: reports and analyses by the entities involved in the project,[235] information about potential technologies and alternative locations,[236] and "actions to monitor the implementation and results of environmental impact assessment measures."[237]

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of Environmental Impact Assessment, UN Doc. UNEP/WG.152/4 Annex, Principle 2); Tseming Yang, The Emergence of the Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law, 70 Hastings L.J. 525 (2019).

225 UNEP, Resolution 14/25 of June 17, 1987, adopting the Goals and Principles of Environmental Impact Assessment. UN Doc. UNEP/WG.152/4 Annex [hereinafter UNEP Resolution 14/25]; U.N. Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800 (1991) at art. 1(vi). An EIA is "the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made." Thus, government agencies are usually required to produce a "publicly reviewable physical document reflecting the required internal project analysis," ensuring "that the agency has given 'good faith consideration' to the environmental consequences of its proposed action and its reasonable alternatives." Almost always, the EIA process includes the public in the gathering of information as well as in the review of the document. Yang, *supra* note 224 at 529 (2019).

226 Yang, *supra* note 225; *See also* Dávila *supra* note 45 at 410-411 (noting that a State's failure to provide an environmental impact statement particularly impacts the ability of vulnerable groups to access information and participate in decision-making processes).

227 UNEP Res. 14/25, Principle 4(b-e), *supra* note 224.

228 Report of the United Nations Conference on Environment and Development, Rio Declaration on Environment and Development: Rep. of the G.A., U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992).

229 Escazú Agreement, *supra* note 1, at Art. 6(3)(h).

230 *Id.* at Art. 7(9).

231 *Id*.

232 *Id.* at Art. 7(17).

233 *Id.* at Art. 7(17)(a-b).

234 *Id.* at Art. 7(17)(c).

235 *Id.* at Art. 7(17)(e).

236 *Id.* at Art. 7(17)(f).

237 *Id.* at Art. 7(17)(g).

b. The Escazú Agreement Can Support the Inter-American System in Broadening its Normative Framework on Environmental and Social Impact Assessments

The Inter-American System has established a strong normative framework requiring States to conduct prior environmental and social impact assessments (ESIAs)[238] that must be used to inform the required free, prior, and informed consultation procedures that States must engage in with indigenous and tribal peoples whose collective property rights may be affected by a proposed project or development. [239] In its Advisory Opinion on *The Environment and Human Rights*, the Inter-American Court acknowledged that although it had previously only required EIAs in indigenous peoples' rights cases,[240] "the obligation to make an environmental impact assessment also exists in relation to any activity that may cause significant environmental damage."[241] The Court also engaged in a substantial discussion of EIAs as one of the supervision and monitoring measures that States must carry out to prevent environmental harm from violating the rights to life and personal integrity.[242] These developments have set the stage for the Inter-American System to apply its ESIA requirements more broadly, and the Escazú Agreement's recognition of the important role that EIAs play in guaranteeing the right to access information may be used to encourage this normative expansion.

In describing the process States must undertake to fulfill indigenous peoples' right to consultation, the Court has repeatedly held that the State must complete environmental and social impact assessments prior to making decisions that could impact the collective property rights of the indigenous peoples in question.[243] As the Court made clear in *Saramaka*, the State may not grant concessions within indigenous territories before conducting an adequate environmental and social impact study.[244] Without providing such a study at the earliest stages of a project's development, consultation cannot be meaningfully prior or informed.

In *Sarayaku*, the Court provided more specific guidance for what would constitute an adequate ESIA. It specified that the ESIA must be carried out by "independent and technically competent bodies, under the supervision of the State[,]"[245] and "in conformity with the relevant international standards and best practices[.]"[246] It must also "respect the indigenous peoples' traditions and culture, and be completed before the concession is granted . . . to guarantee the effective participation of the indigenous people in the process of granting concessions."[247] This means that the State must guarantee that the ESIA is prepared with the participation of the affected indigenous peoples.[248]

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[238] In this sense, the Inter-American standard is broader. As noted, *infra*, advocates may also encourage the Inter-American System to extend this additional "social" element to all EIAs.

[239] Saramaka People *supra* note 24, at ¶ 129; Kichwa Indigenous People of Sarayaku *supra* note 28, at ¶ 205; Triunfo de la Cruz Garífuna Community and its members v. Honduras, Merits, Reparations, and Costs. Judgment, Inter-Am. Ct. H.R. (ser. C) No. 305 ¶ 156 (Oct. 8, 2015); Kaliña and Lokono Peoples *supra* note 75, at ¶¶ 214, 215.

[240] Advisory Opinion OC-23/17, *supra* note 25, at, ¶ 156.

[241] *Id.* at ¶ 157.

[242] *Id.* at ¶¶ 149, 154 (holding that "the Inter-American Court considers that States have an obligation to supervise and monitor activities within their jurisdiction that may cause significant damage to the environment. Accordingly, States must develop and implement adequate independent monitoring and accountability mechanisms.").

[243] Saramaka People, *supra* note 24, at ¶ 129, 148; Triunfo de la Cruz Garífuna Community *supra* note 239, at ¶ 156.

[244] Saramaka People, *supra* note 24, at ¶¶ 129, 133.

[245] Kichwa Indigenous People of Sarayaku *supra* note 28, at ¶ 205.

[246] *Id.* at ¶ 206.

[247] *Id.*

[248] *Id.* at ¶¶ 204, 207 (finding a violation where the ESIA "was prepared without the participation of the Sarayaku People[.]").

The Court has indicated that States must use ESIAs to ensure that the affected community is aware of the possible risks, including environmental threats and health risks, in order for them to accept the proposed development or investment plan on an informed and voluntary basis.[249] ESIAs must address "the cumulative impact of existing and proposed projects."[250] The study also needs to address the social, cultural, and spiritual impacts deriving from the proposed project.[251]

In *Nuestra Tierra*, the Court reaffirmed that States must guarantee that "no concession will be granted on [indigenous] territory unless and until independent and technically capable entities, under the State's supervision, have made a prior environmental impact assessment.[252] The Court further noted that ESIAs "should not be conducted as a mere formality, but should make it possible to evaluate alternatives and the adoption of impact mitigation measures[.]"[253] To do so, the ESIA must comply with the criteria outlined above.[254] The Court clarified that the affected community's participation in the development of the ESIA is "not the same as the exercise of the right to free, prior and informed consultation of the indigenous peoples or communities [], which is more wide-ranging." [255]

In its Advisory Opinion on *The Environment and Human Rights*, the Court included the "[d]uty to require and approve environmental impact assessments"[256] among the required actions States must take to "regulate activities that could cause significant environmental damage in a way that reduces any threat to the rights to life and to personal integrity."[257] It provided detailed guidelines for environmental impact assessments and explicitly noted that although its prior jurisprudence on ESIAs focused exclusively on indigenous peoples, these guidelines should apply broadly[258] "when there is a risk of significant environmental harm, regardless of whether the activity or project will be carried out by a State or by private persons."[259] The Court determined that under these circumstances, the State must carry out an EIA that:

> must be made by independent entities with State oversight prior to implementation of the activity or project, include the cumulative impact, respect the traditions and culture of any indigenous peoples who could be affected, and the content of such assessments must be determined and defined by law or within the framework of the project authorization process, taking into account the nature and size of the project and its potential impact on the environment[.][260]

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249 Saramaka People, *supra* note 24, at ¶¶ 129 and 133; Kichwa Indigenous People of Sarayaku *supra* note 28, at ¶ 206.

250 Kichwa Indigenous People of Sarayaku *supra* note 28, at ¶ 206.

251 *Id*. at ¶ 204.

252 Nuestra Tierra, *supra* note 27, at ¶ 174.

253 *Id.* at ¶ 174, note 162.

254 *Id.*

255 *Id.*

256 Advisory Opinion OC-23/17, *supra* note 25, ¶ 156.

257 *Id.* at ¶ 149.

258 *Id.* at ¶¶ 156, 161.

259 *Id.* at ¶ 174. *See also Id.* at ¶ 160.

260 *Id.* at ¶ 174. With regard to the timing of the EIA, the Court also noted that "[m]aking the environmental impact assessment during the initial stages of project discussion allows alternatives to the proposal to be explored and that such alternatives can be taken into account." *Id.* at ¶ 162 (Citing UNEP, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, 2004, p. 40).

As to this last element, the Court specified that States must enact domestic laws or regulations regarding EIAs that:

> must be clear, at least as regards: (i) the proposed activities and the impact that must be assessed (areas and aspects to be covered); (ii) the process for making an environmental impact assessment (requirements and procedures); (iii) the responsibilities and duties of project proponents, competent authorities and decision-making bodies (responsibilities and duties); (iv) how the environmental impact assessment process will be used in approval of the proposed actions (relationship to decision-making), and (v) the steps and measures that are to be taken in the event that due procedure is not followed in carrying out the environmental impact assessment or implementing the terms and conditions of approval (compliance and implementation).[261]

Although the Court did not specify whether States need to include the social element of EIAs in situations that do not affect indigenous peoples, it found that States "must take into account the impact that the project may have on its human rights obligations."[262] It also suggested that this human rights impact analysis may be equivalent to the social component required in EIAs for cases involving indigenous peoples.[263]

Similarly, the Court did not include the participation of interested parties as a required element, seemingly because the Court has not yet ruled on this issue outside of the indigenous peoples' rights context.[264] However, the Court recommended that States allow such participation, finding that "the participation of the interested public allows for a more complete assessment of the possible impact of a project or activity and whether it will affect human rights."[265]

Finally, the Court indicated that "[t]he content of the environmental impact assessment will depend on the specific circumstances of each case and the level of risk of the proposed activity."[266] The Court found that "States should determine and define, by law or by the project authorization process, the specific content required of an environmental impact assessment, taking into account the nature and size of the project and its potential impact on the environment."[267]

As the Inter-American System begins to integrate these principles into its contentious jurisprudence, the Escazú Agreement will provide useful support to promote stronger and more specific requirements for the way States must regulate and carry out EIAs. With respect to domestic regulation of EIAs, the procedural requirements in the Escazú Agreement described above give specific content to these requirements and can be used to guide the Inter-American System in applying this standard in future contentious cases.

Given its broad conceptualization of persons and groups in vulnerable situations[268] and strong focus on non-discrimination and equality in the exercise of environmental access rights,[269] the Escazú Agreement may also support the argument that the "social" dimension of EIAs as conceptualized in the Court's indigenous peoples'

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261 *Id.* at ¶ 150.
262 *Id.* at ¶ 164.
263 *Id*.
264 *Id.* at ¶ 166.
265 *Id.* at ¶ 168.
266 *Id.* at ¶ 170.
267 *Id*.
268 Escazú Agreement, *supra* note 1, at Art. 2(e).
269 *Id.* at Art. 3(a).

rights jurisprudence should likewise be extended. The Escazú Agreement's strong and detailed protections with regard to the rights to information and participation, including those outlined above and in the next section, can be used both to encourage the Inter-American System to take the additional step of requiring public participation as an element of adequate EIAs and to give specific content to that element, once adopted.

Furthermore, even with the normative developments described here, the Inter-American System has not yet provided substantial guidance regarding the minimum standards for how States must conduct the process of regulating and carrying out EIAs itself to comply with the rights to access information and to participation. The relevant provisions of the Escazú Agreement will assist the Inter-American System in elaborating what States must do in order to ensure such compliance. For example, requiring States to make information about EIAs publicly available pursuant to Article 6(3)(h) helps guarantee that EIAs themselves are part of the environmental information that the public can access.[270]

Similarly, the Article 7(9) requirement that States make information about the final decision on an EIA publicly available also helps make sure the domestic EIA process occurs in compliance with the right to access environmental information; the corresponding requirement that States simultaneously provide information about the process to challenge such decisions brings the EIA procedure at least partially into compliance with the right to access justice.[271] The detailed list of information States must make public pursuant to Article 7(17) not only helps make the EIA process consonant with the right to access information but also facilitates public participation in the environmental decision-making process by making necessary information available and accessible.[272]

Other provisions of Articles 5, 6, and 7 have similar effects, even when they do not mention EIAs specifically; this is particularly true for Article 5(18), which requires States to establish an independent entity to "promote transparency in access to environmental information, to oversee compliance with rules, and monitor, report on and guarantee the right of access to information."[273] The Escazú Agreement can therefore be used to fill an important gap in the Inter-American System's approach to EIAs by providing specific content for the procedural protections that should apply to domestic EIA mechanisms.

7. States Must Assure Access to Information for Vulnerable Groups

a. The Escazú Agreement Requires States to Promote Access to Information to Persons or Groups in Vulnerable Situations

Several provisions of the Escazú Agreement relating to the right to access information reinforce States' obligation to promote access to information by persons or groups in vulnerable situations.

First, Article 5(3) requires States to "facilitate access to environmental information for persons or groups in vulnerable situations . . . for the purpose of promoting access and participation under equal conditions."[274] To do so, States must "establish[] procedures for the provision of assistance, from the formulation of requests through to the delivery of information[.]"[275] These procedures must "take[] into account [vulnerable persons']

[270] *Id.* at Art. 6(3)(h).
[271] *Id.* at Art. 7(9).
[272] *Id.* at Art. 7(17).
[273] *Id.* at Art. 5(18).
[274] *Id.* at Art. 5(3).
[275] *Id*.

conditions and specificities[,]"[276] to ensure the assistance is tailored to the particular situation of vulnerability and specific needs at issue.[277]

Similarly, Article 5(4) directs States to guarantee "that . . . persons or groups in vulnerable situations, including indigenous peoples and ethnic groups, receive assistance in preparing their requests and obtain a response."[278] Beyond specifying a particular type of assistance that the State must provide to facilitate access to information by vulnerable groups, this provision places the burden on the State to affirmatively ensure that the appropriate public authorities respond to all requests for information from such groups.

In recognition that cost can be a barrier to accessing information for vulnerable groups, Article Article 5(17) facilitates access by requiring States to provide information at no cost.[279] Although this provision allows States to impose reasonable "reproduction and delivery costs[,]" States are encouraged to waive payment when "the applicant is deemed to be in a vulnerable situation or to have special circumstances warranting such a waiver."[280]

Although the State's active duty to disseminate environmental information is intended, at least in part, to reduce barriers in accessing environmental information, Article 6(6) recognizes that language can be another barrier for vulnerable groups. Accordingly, "[i]n order to facilitate access by persons or groups in vulnerable situations to information that particularly affects them," States must make their best efforts "to ensure that the competent authorities disseminate environmental information in the various languages used in the country[.]"[281] They should also "prepare alternative formats that are comprehensible to [vulnerable groups], using suitable channels of communication."[282] To be suitable, such channels should likely be culturally appropriate and designed with the specific circumstances of vulnerable groups in mind.

Finally, by defining environmental information to encompass the actual or potential health effects of environmental harm,[283] the Escazú Agreement also ensures that its protections for the right to access information cover an area of significant priority for vulnerable groups. Likewise, by including "a list of polluted areas,"[284] "an estimated list of waste by type[,]"[285] among others, in environmental information systems pursuant Article 6(3), the Escazú Agreement encourages States to provide information that enhances the ability of vulnerable groups both to identify themselves as such and to push against the potentially hazardous cumulative impact of multiple sources of pollution – including toxic waste – in their communities. Several other provisions may have a similar effect, including the pollutant release and transfer register envisioned in Article 6(4),[286] the early warning system in Article 6(5),[287] and the requirement that States encourage private entities to share information about the environmental and health risks of their operations in Article 6(12)[288] serve similar functions.

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276 *Id*.
277 *Id*.
278 *Id.* at Art. 5(4).
279 *Id.* at Art. 5(17).
280 *Id*.
281 *Id.* at Art. 6(6).
282 *Id*.
283 *Id.* at Art. 2(c).
284 *Id.* at Art. 6(3)(d).
285 *Id.* at Art. 6(3)(i).
286 *Id.* at Art. 6(4).
287 *Id.* at Art. 6(5).
288 *Id.* at Art. 6(12).

b. The Escazú Agreement Can Provide the Inter-American System with Specific Content to Guarantee Vulnerable Groups' Right to Environmental Information

As discussed in Section V on Vulnerable Peoples, the Inter-American System has repeatedly recognized that States owe a heightened duty of protection to vulnerable persons. However, it has not yet developed detailed normative guidance for States on the steps they should take to give effect to this heightened duty in the context of the right to access environmental information. Advocates accordingly have an opportunity to incorporate the specialized provisions of the Escazú Agreement to guide the Inter-American System in providing strong protections in this regard.

In *Ximenes Lopes*, the Court recognized that some groups of people are more vulnerable to harm than others and held that States must provide "special protection" to "any person who is in a vulnerable condition."[289] Although the Court has acknowledged that this obligation extends to the right to a healthy environment, it has not yet applied it in the context of related environmental access rights.[290] The Inter-American Commission's Special Rapporteur for Freedom of Expression has, however, emphasized that within the Inter-American System, the right to access information "is considered a fundamental tool . . . for the general fulfillment of other human rights, especially for the most vulnerable groups."[291]

Although the "informed" element of indigenous and tribal peoples' right to free, prior, and informed consultation and consent[292] logically implicates the right to access information, the Inter-American Court has not yet incorporated this right into its normative framework. The Inter-American Commission has consistently found Article 13 violations in cases involving this issue,[293] and it is possible that the Court will incorporate it in the future. In its most recent judgment, *Nuestra Tierra*, the Court declined to rule on the alleged violation of Article 13 due to lack of evidence.[294] However, it reiterated that in the context of activities that may affect indigenous territory, States must consult with the affected indigenous peoples, which in addition to other obligations, requires States "to receive and provide information and also to ensure constant communication between the parties."[295] In *Sarayaku*, the Court also required that States undertake consultation in a manner that can be understood by the affected indigenous or tribal peoples, including in the language spoken by the majority of community residents.[296]

As the Inter-American System deepens its normative framework around the right to information in environmental matters, it will have more opportunities to connect these disparate pieces and recognize that States owe vulnerable groups a heightened duty to protect this right. Advocates can encourage it to do so with particular force by raising arguments based in the specialized protections of the Escazú Agreement. For example, in the

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289 Ximenes Lopes v. Brazil, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 103 (July 4, 2006).

290 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 Articles 4(1) and 5(1) of the American Convention on Human Rights). Advisory Opinion OC-23/17, Inter-Am. Ct. H.R., *supra* note 25 ¶¶ 67-68.

291 The Inter-American Legal Framework regarding the Right to Access to Information, Inter-Am. Comm'n H.R., Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II, CIDH/RELE/INF. 2/09, p. 1, ¶ 4. (Dec. 30, 2009).

292 This right is discussed in more depth in Pillar 2 on the right to participation. *See supra,* at Section IV (B).

293 *See e.g.*, Nuestra Tierra, *supra* note 27, at note 2; Indigenous Community of Maya Q'eqchi' Agua Caliente v. Guatemala, Case 13.082, Inter-Am. Comm'n H.R. Report No. 11/20, OEA/Ser.L/V/II.175, doc. 17, ¶ 114 (Mar. 3, 2020).

294 Nuestra Tierra, *supra* note 27, at ¶ 185. In the reparations, the Court ordered the State to provide information as part of the "prior, adequate, free and informed consultations" it ordered Argentina to hold with the victim communities. *See Id.* at ¶ 328.

295 *Id.* at ¶ 174.

296 Kichwa Indigenous People of Sarayaku *supra* note 28, at ¶ 201.

La Oroya case, the State failed to provide the community with timely, accurate, and accessible information about the actual health effects and health risks of the severe environmental contamination caused by the metallurgical complex, thereby depriving community members of the ability to take preventive measures.[297] Applying Escazú Agreement protections to environmental information of this kind would provide States with very clear direction to make sure people in vulnerable situations have information essential to protecting their rights to health, personal integrity, and life, among others.

8. Conclusion

In sum, both the Escazú Agreement and the Inter-American System recognize the right to access information. By incorporating provisions of the Escazú Agreement in their arguments before the institutions of the Inter-American System, advocates litigating cases of environmental harm can deepen existing protections of the right to access information in relation to the environment. The next section discusses the right to participation, which is interconnected and interdependent on the right to information. For individuals and groups to exercise their right to participation, they must have their right to information protected.

B. Pilar Two: The Right to Participation in Environmental Matters

In sum, both the Escazú Agreement and the Inter-American System recognize the right to access information. By incorporating provisions of the Escazú Agreement in their arguments before the institutions of the Inter-American System, advocates litigating cases of environmental harm can deepen existing protections of the right to access information in relation to the environment. The next section discusses the right to participation, which is interconnected and interdependent on the right to information. For individuals and groups to exercise their right to participation, they must have their right to information protected.

1. The Inter-American System Recognizes the Right to Participation

The Inter-American System recognizes the right to participation and its importance in environmental matters. This subsection analyzes the Inter-American Court's recognition of the right to participation in the context of environmental harm in its contentious jurisdiction and also in its Advisory Opinion on *The Environment and Human Rights* and then offers further detail on salient facets of the Inter-American System's normative framework around the right to participation.

The Inter-American Court has primarily grounded the right to public participation in Article 23 of the American Convention, which ensures that all individuals are granted the right to participate freely in their government.[298] Specifically, individuals are guaranteed the right to take part in public affairs, the right to freely vote and be elected in genuine periodic elections, and the right to have access to the public services of one's country.[299] Article 23(2) allows a State to regulate the rights above "only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings."[300] The Inter-American Court has held that "[t]he right to participate in government specifically implies that citizens not only have the right, but also the opportunity, to participate in the conduct of public affairs[,]"[301] and

[297] La Oroya Community *supra* 121, at ¶ 198.

[298] American Convention, *supra* note 23, at Art. 23(1).

[299] American Convention, *supra* note 23, at Art. 23(1)(a)-(c).

[300] American Convention, supra note 23, at Art. 23(2).

[301] Luna López v. Honduras. Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 269, ¶ 142. (Oct.10, 2013).

accordingly, States must "adopt measures that guarantee the necessary conditions for the full exercise of [this] right."[302]

It is worth noting that the majority of the Inter-American Court's relevant jurisprudence interpreting this right relates to public participation as a component of indigenous and tribal peoples' right to consultation, discussed infra. at page 40. The Court's forthcoming judgment in the *La Oroya* case will likely represent an important first step in expanding the Court's normative framework on the right of non-indigenous communities to participate in environmental decision-making that affects them.[303] Accordingly, advocates have an opportunity to build from the Court's interpretation of Article 23 in its Advisory Opinion on *The Environmental and Human Rights*, discussed below, by using the specialized provisions of the Escazú Agreement to deepen the Inter-American System's understanding of this right in environmental matters.[304]

In the Advisory Opinion on *The Environment and Human Rights*, the Court listed the right "to participation in decision-making" among the essential procedural rights most tightly connected to environmental matters.[305] The Court also noted that "[p]ublic participation is one of the fundamental pillars of . . . procedural rights[]"[306] with vital importance for the accountability, effectiveness, and credibility of public authorities and government processes.[307] Ultimately, the Court held that States must guarantee the right to public participation in "decision-making and policies that could affect the environment, without discrimination and in a fair, significant and transparent manner[.]"[308]

When examining the right in the context of environmental matters, the Court observed that "participation is a mechanism for integrating public concerns and knowledge into public policy decisions affecting the environment."[309] The Court added that "participation in decision-making makes Governments better able to respond promptly to public concerns and demands, build consensus, and secure increased acceptance of and compliance with environmental decisions."

The Court emphasized the interconnections between the right to participation and the right to information, which in certain circumstances acts as a precondition for effective exercise of the right to participation.[310] Specifically,

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302 *Id.*

303 See La Oroya Community *supra* note 121, at ¶¶ 154-155, 194,199-200 (Nov. 19 2020) (finding that Peru violated the La Oroya community's rights to information and participation by failing to provide them with necessary information about the environmental and health impacts of the metallurgical complex and thereby also preventing them from participating in environmental decisions that directly affected them).

304 For example, the right to public participation, as it tends to apply in environmental matters, could also be encompassed within the right to freedom of association enshrined in Article 16 of the American Convention. Article 16(1) recognizes that "[e]veryone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes." Public participation in environmental decision-making processes is related to the right to association because it protects the collaborative work of human rights defenders, community groups, and other advocacy organizations. Although thus far, the Inter-American Court of Human Rights has primarily situated the right to public participation as deriving from Article 23, advocates may have an opportunity to broaden this understanding of the right, particularly through a combined reading of Articles 16 and 23 of the American Convention in conjunction with the Escazú Agreement's provisions on the right to public participation (Article 7) and State obligations pursuant to Art. 4(6) to "guarantee an enabling environment for the work of persons, associations, organizations or groups that promote environmental protection[.]" See, e.g., Escaleras Mejía et al. v. Honduras, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 361, ¶¶ 62-70 (Sept. 26, 2018).

305 Advisory Opinion OC-23/17, *supra* note 25, ¶ 64.

306 *Id.* at ¶ 226.

307 *Id.*

308 *Id.* at ¶ 231.

309 *Id.* at ¶ 228.

310 *Id.* at ¶¶ 226, 231.

it held that to fulfill their obligation to guarantee the right to public participation, "States must have previously ensured access to the necessary information."[311] It also noted that "public participation requires implementation of the principles of disclosure and transparency and, above all, should be supported by access to information that permits social control through effective and responsible participation."[312]

Citing the European Court of Human Rights, the Inter-American Court underscored that, in order to guarantee the right to participation, individuals must have the power "to challenge official acts or omissions that affect their rights before an independent authority and to play an active role in the planning procedures for activities and projects by expressing their opinions."[313] The Court indicated that States can implement a wide range of mechanisms to facilitate "public participation in environmental matters including public hearings, notification and consultations, as well as participation in the elaboration and enforcement of laws[.]"[314] Finally, the Court included judicial review mechanisms, illustrating the connection between the right to participation and the right to access justice.[315]

2. The Escazú Agreement Recognizes the Right to Participation

Article 7 of the Escazú Agreement also protects the right to participation.[316] Article 7(1) of the Escazú Agreement provides that to ensure this right, States must "implement open and inclusive participation in environmental decision-making processes."[317] In addition to ensuring that participation is open and inclusive, the Escazú Agreement also requires that participation be effective and timely and that States must actively facilitate the participation of vulnerable and directly affected persons. Additional provisions of Article 7 provide detailed guidelines, discussed here and in the following subsections, for the specific steps States must take to give effect to this right.

Through two separate provisions,[318] the Escazú Agreement clarifies that the right to participation applies to a broad range of environmental decision-making processes at various points along the timeline for such decisions, but at a minimum "from the early stages."[319] Article 7(2) requires that States provide the necessary mechanisms for the public to be able to participate in environmental "decision-making processes, revisions, re-examinations or updates with respect to projects and activities, and in other processes for granting environmental permits that have or may have a significant impact on the environment, including where they may affect health."[320] Additionally, Article 7(3) complements this requirement by extending it to a broader set of decision-making processes that "have or may have a significant impact on the environment[,]" including "land-use planning, policies, strategies, plans, programmes, rules and regulations[.]"[321]

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311 *Id.* at ¶ 231.

312 *Id.* at ¶ 226 (citing Case of Claude Reyes, *supra* note 104, at ¶ 86).

313 *Id.* at ¶ 229.

314 *Id.* at ¶ 232.

315 *Id.*

316 The Agreement defines participation as "revisions, reexaminations, or updates with respect to projects and activities, and in other processes for granting environmental permits that have or may have a significant impact on the environment including when they may affect health." Escazú Agreement, Art. 7(2).

317 Escazú Agreement, *supra* note 1, at Art. 7(1).

318 *Id.* at Art. 7(2)-(3).

319 *Id.* at Art. 7(4).

320 *Id.* at Art. 7(2).

321 *Id.* at Art. 7(3). Note that unlike Art. 7(2), this provision does not mention effects on health.

Decision-making processes must be transparent and accountable. When publicizing the decision, States must also assure access to justice by "includ[ing] [information about] the established procedure to allow the public to take the relevant administrative and judicial actions."[322] Taken together, these provisions allow the public to hold the State accountable for violations of the right to participation and the corresponding State obligation to consider the public's input when reaching a decision. Independent experts agree that "[t]he opportunity to adjudicate any claims on the accessibility of information or participatory processes is important for timely adjustments or actions by public officials."[323]

Article 7 of the Escazú Agreement also contains various provisions designed to make public participation more accessible to vulnerable groups and directed affected individuals, as discussed in more detail below. In addition to requiring language access for directly affected persons,[324] these provisions require States to establish "spaces for consultation on environmental matters[,]"[325] "identify and support persons or groups in vulnerable situations . . . to engage them . . . in participation mechanisms[,]"[326] "guarantee that . . . the rights of indigenous peoples and local communities are observed[,]"[327] and facilitate the participation of persons who are "directly affected by the projects or activities that have or may have a significant impact on the environment[.]"[328]

3. Participation Must be Effective and Timely

a. The Escazú Agreement Requires that Public Participation in Environmental Decision-Making Processes be Effective and Timely

The Escazú Agreement contains several detailed provisions under Article 7 that require States to ensure the public can participate in environmental decision-making in an effective and timely manner. These specific obligations acknowledge the interdependence of timeliness and effectiveness in the context of public participation, in the sense that if the public does not have an opportunity to participate at the appropriate stage of decision-making or does not receive necessary information with enough time to be able to participate, its participation will not be effective. Essentially, these provisions obligate States to put systems in place for the public to navigate and participate in environmental decision-making processes in an accessible and inclusive manner.

In recognition of the fact that the public is unlikely to have a meaningful impact on the decision taken if it cannot participate at an early enough stage of the proceedings,[329] Article 7(4) of the Escazú Agreement requires States to "adopt measures to ensure that the public can participate in the decision-making process from the early stages, so that due consideration can be given to the observations of the public."[330] Similarly, to ensure that decision-making processes include adequate time for the public to determine whether and how to participate and for their input to be considered by the decision-maker, Article 7(5) of the Escazú Agreement requires States to establish

322 *Id.* at Art. 7(9).

323 Dávila *supra* note 35, at p. 91.

324 Escazú Agreement, *supra* note 1, at Art. 7(11).

325 *Id.* at Art. 7(13).

326 *Id.* at Art. 7(14).

327 *Id.* at Art. 7(15).

328 *Id.* at Art. 7(16).

329 This aspect of timely participation is particularly important for public intervention to seek precautionary or other preventive measures to avert anticipated environmental harm, in keeping with the Agreement's commitment to the precautionary and preventive principles. Escazú Agreement, *supra* note 1, at Art. 3(e-f).

330 *Id.* at Art. 7(4).

procedures for public participation that "provide for reasonable timeframes that allow sufficient time to inform the public and for its effective participation."[331]

Timeliness and effectiveness also affect whether decision-making processes are accessible and inclusive. Article 7(10) accordingly requires States to create favorable conditions for public participation "that are adapted to the social, economic, cultural, geographical and gender characteristics of the public."[332] In recognition of the additional barriers faced by certain groups, States must go one step further for persons and groups in vulnerable situations by proactively supporting them to engage in participation processes "in an active, timely and effective manner."[333] These aspects of State obligations are also discussed in more depth in the following subsection on inclusive participation.

As discussed in Pillar I: on the right to information, the Escazú Agreement also acknowledges that States must provide the public with the necessary information at the appropriate time as an essential precondition to the effective exercise of the right to public participation.[334] The Escazú Agreement requires that State authorities provide information to individuals or groups to notify them of activities that may affect them and to allow them to effectively engage in participatory processes.[335] Article 7(4) acknowledges this connection, requiring that States must "provide the public with the necessary information in a clear, timely and comprehensive manner, to give effect to its right to participate in the decision-making process."[336]

Article 7(6) outlines the minimum categories of necessary information that States must provide the public with for participation to be effective.[337] Such information must be provided "in an effective, comprehensible and timely manner[.]"[338] To help members of the public decide whether to engage in an environmental decision-making process, States must describe "the type or nature of the environmental decision under consideration[.]" [339] For the public to understand how they can participate, States must also identify "the authority responsible for making the decision and other authorities and bodies involved[,]"[340] as well as the logistical and procedural details of the decision-making process, "including the date on which the procedure will begin and end . . . and the date and place of any public consultation or hearing[.]"[341] Finally, the State must enable the public to request additional information by identifying the appropriate public authority and procedure for making any such requests.[342]

Article 7(17) provides a detailed list of the types of information States must make public as part of environmental decision-making processes, in order to ensure that the public can accurately assess the merits, risks, and alternatives related to the decision under consideration and thereby engage effectively in the decision-making process.[343] These minimum informational requirements include "a description of the area of influence and

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331 *Id.* at Art. 7(5).

332 *Id.* at Art. 7(10).

333 *Id.* at Art. 7(14). The following subsection addresses protections for vulnerable groups in more detail.

334 *See supra* Section (IV)(A)(vi)(1).

335 Escazú Agreement, *supra* note 1, at Art. 7(4), 7(6), 7(17).

336 *Id*. at Art. 7(4).

337 *Id.* at Art. 7(6).

338 *Id*.

339 *Id.* at Art. 7(6)(a).

340 *Id.* at Art. 7(6)(b).

341 *Id.* at Art. 7(6)(c).

342 *Id.* at Art. 7(6)(d).

343 *Id.* at Art. 7(17).

physical and technical characteristics of the proposed project or activity;"[344] "a description of the main environmental impacts of the project or activity and, as appropriate, the cumulative environmental impact;"[345] and "a description of the measures foreseen with respect to those impacts[,]"[346] such as potential mitigation or prevention measures, among several others.[347] To ensure that this information is accessible, the State must provide it "free of charge to the public"[348] and also include "a summary . . . in comprehensible, non-technical language[.]"[349]

In addition to assuring that participation can take place in time and with the necessary information to be meaningful, effective participation also requires the public to be able to engage actively and meaningfully in the proceedings and obliges the State to take the public's input into account as it reaches a decision. To address this aspect of effectiveness, Article 7(7) requires States to provide the public with "an opportunity to present observations[.]"[350] It also specifies that, "[b]efore adopting the decision, the relevant public authority shall give due consideration to the outcome of the participation process."[351] To allow the public to verify whether the State complied with this obligation, States must publicize environmental decisions "in an effective and prompt manner"[352] and include not only the "grounds and reasons underlying the decision,"[353] but also how the relevant authority took public input into account.[354]

b. The Escazú Agreement Could Provide Specific Guidance to the Inter-American System Regarding Specific Steps States Must Take to Ensure Effective and Timely Participation in Environmental Decision-Making

The Inter-American Court has primarily addressed the right to timely and effective participation in environmental decision-making in cases involving the collective property rights of indigenous and tribal peoples,[355] discussed in more depth in the next subsection on the right to consultation. Certain aspects of these cases only apply in this specific context, but advocates may be able to combine the principles underlying these judgments with the more broadly applicable provisions of the Escazú Agreement to strengthen the Inter-American System's protection of public participation in environmental decision-making. The Inter-American System's emphasis on transparency, accountability, and the democratic process as the core values vindicated by the right to public participation, provides a promising opening for such arguments. Similarly, advocates may invoke the provisions of the Escazú Agreement that outline the specific steps that States must take to guarantee effective and timely public participation in environmental decision-making to guide the Inter-American System in developing more detailed requirements in this area.

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344 *Id.* at Art. 7(17)(a).
345 *Id.* at Art. 7(17)(b).
346 *Id.* at Art. 7(17)(c).
347 *Id.* at Art. 7(17).
348 *Id*.
349 *Id.* at Art. 7(17)(d).
350 *Id.* at Art. 7(7).
351 *Id*.
352 *Id.* at Art. 7(9).
353 *Id.* at Art. 7(8).
354 *Id*.
355 *See, e.g.*, Kaliña and Lokono Peoples, *supra* note 75, at ¶¶ 206- 207, 211.

Accordingly, this subsection provides a very brief overview of how the Inter-American System addresses the effectiveness and timeliness of participation in environmental decision-making as essential components of indigenous and tribal peoples' right to consultation. It also discusses the relevant aspects of the Inter-American Court's Advisory Opinion on *The Environment and Human Rights* and their likely application in the forthcoming *La Oroya* judgment.

Most recently, in *Nuestra Tierra v. Argentina*, the Court affirmed the right to timely and effective participation in environmental matters, although still within the specific context of indigenous peoples' collective property rights.[356] The Court acknowledged that the State's lack of effort to effectively control illegal deforestation of Lhaka Honhat territory and its failure to comply with environmental and social impact assessment requirements or to consult adequately with the affected peoples led to human rights violations.[357] The inability of the Lhaka Honhat to voice their concerns in the decision-making process when development of their native territory was at stake amounted to a violation of their right to effective participation.[358] Specifically, the State needed to "make a prior environmental impact assessment" before granting any concessions[359] and consult with the Lhaka Honhat in a way that "ensure[s] the effective participation of the affected peoples or communities, in conformity with their customs and traditions, [which] . . . requires the State to receive and provide information and also to ensure constant communication between the parties."[360]

In *Saramaka*, the Court outlined that States must take specific steps to assure the effectiveness and timeliness of indigenous peoples' participation in consultation processes. First, effective participation requires the State to ensure that the affected peoples "are aware of possible risks, including environmental and health risks, in order that the proposed [activity] is accepted knowingly and voluntarily."[361] States must also "actively consult with [the affected] community according to their customs and traditions[,]"[362] and, in doing so, "take account of the [affected] people's traditional methods of decision-making."[363] With regard to timeliness, States must consult the affected peoples "at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community, if such is the case."[364] In subsequent cases, the Court has repeatedly emphasized *Saramaka*'s requirement that States must consult with affected peoples early in the process of development in order for indigenous communities to engage in internal dialogue and effectively participate in decision-making before the State approves or carries out activities affecting them.[365]

In addressing the right of indigenous peoples to adequate consultation in *Kaliña and Lokono Peoples v. Suriname*, the Court affirmed that "the State must . . . put in place mechanisms for the effective participation of the indigenous peoples using procedures that are culturally adapted to the decision-making of such peoples . . . [as] part of the exercise of their right to take part in any decision-making on matters that affect their interests, in

356 Nuestra Tierra, *supra* note 27, at ¶¶ 173-184.

357 *Id.* at ¶ 174, and note 162, ¶¶ 184, 208, 288-289; Saramaka People, *supra* note 24, at ¶ 129 and footnote 124.

358 Nuestra Tierra, *supra* note 27, at ¶ 184.

359 Nuestra Tierra, *supra* note 27, at ¶ 174 (internal quotation marks omitted).

360 *Id.*

361 Saramaka People, *supra* note 27, at ¶ 133.

362 *Id*.

363 *Id.*

364 *Id.*

365 *Id.*; Kaliña and Lokono Peoples v. Suriname, *supra* note 75, at ¶¶ 202-203, 207, 211; Garífuna Punta Piedra Community v. Honduras, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 304, ¶¶ 217 and 223 (Oct. 8, 2015).

accordance with their own procedures and institutions, in relation to Article 23 of the American Convention."[366] The Court reiterated that States must guarantee "effective participation 'with regard to any development, investment, exploration or extraction plan[,] [which includes] any activity that may affect the integrity of the lands and natural resources[,] [such as] "any proposal related to logging or mining concessions.'"[367]

These core principles around the right to effective and timely participation in decisions that affect a community's rights can be applied more broadly, and Article 7 of the Escazú Agreement offers advocates a relevant, specific source of normative guidance in this regard. For example, the requirement already established by the Inter-American Court that for participation to be effective, it must take place at an early stage, is complemented and strengthened by the more broadly applicable and specific timeliness protections enshrined in Article 7(4) and 7(5).[368] This approach could also be used to encourage the Inter-American System to require that the right to participation also support the public's ability to avoid environmental harm through preventive measures, particularly in combination with the Escazú Agreement's emphasis on the preventive and precautionary principles, as well as its inclusion of preventive measures in Article 8,[369] discussed in the next section on the right to access justice.

In a similar vein, the Escazú Agreement's requirements that States provide the public the opportunity to present observations and give their input due consideration[370] could be raised to give concrete effect to the Inter-American Court's pronouncements that "participation is a mechanism for integrating public concerns and knowledge into public policy decisions affecting the environment[]"[371] and that "[t]he right to participate in government specifically implies that citizens not only have the right, but also the opportunity, to participate in the conduct of public affairs[,]"[372] The related requirement that public authorities include the grounds for their decision and describe how they took public input into account when reaching it[373] operates similarly and could also be incorporated into arguments about what constitutes effective participation in environmental decision-making before the Inter-American System.

Likewise, although the Court has until now applied the obligation to adapt consultation and other participatory processes to the particular needs, cultures, and traditions of indigenous and tribal peoples, by combining this norm with the Escazú Agreement's injunction that States adapt participatory processes to "the social, economic, cultural, geographical and gender characteristics of the public[,]"[374] advocates may persuade the Court to develop more widely protective standards that require States to take an intersectional and inclusive approach to public participation in environmental decision-making. The clear and strong requirements in Article 7 that States must take affirmative steps to facilitate participation by vulnerable groups, indigenous peoples, and directly affected persons[375] are also helpful in this regard. For the marginalized communities that often bear the majority of environmental harms as one manifestation of multiple layers of structural and historical discrimination, such an approach could be transformative. The Escazú Agreement's innovations in these areas may also support

366 Kaliña and Lokono Peoples, *supra* note 75, at ¶ 203 (referring to para. 196, where the Court quoted to Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples for this proposition).

367 *Id.* at ¶ *206, quoting,* Saramaka People v. Suriname, *supra* note 27, at ¶ 129.

368 Escazú Agreement, *supra* note 1, at Art. 7(4-5).

369 *Id.* at Art. 8(3)(d), discussed *infra* at IV(C).

370 *Id.* at Art. 7(7).

371 Advisory Opinion OC-23/17, *supra* note 25, ¶ 228.

372 Luna López v. Honduras, *supra* note 301, at ¶ 142.

373 Escazú Agreement, *supra* note 1, at Art. 7(8).

374 *Id.* at Art. 7(10).

375 *Id.* at Art. 7(14-16).

the Inter-American System in continuing to deepen and refine its existing protections for indigenous and tribal peoples.

The Inter-American System is poised to expand its innovative approach to the right to participation in environmental decision-making beyond the important but limited context of the cases discussed above. As mentioned previously, the Court has begun to address the right to participation in environmental matters in its Advisory Opinion on *The Environment and Human Rights*, and its forthcoming judgment in the *La Oroya* case will likely provide it with an opening to address what constitutes effective and timely participation in environmental decision-making processes in a contentious case involving a non-indigenous community. These anticipated normative developments may also be enhanced in combination with arguments based on the Escazú Agreement.

As mentioned above, in *The Environment and Human Rights*, the Court observed that in environmental matters, "participation is a mechanism for integrating public concerns and knowledge into public policy decisions affecting the environment."[376] To accomplish this purpose, "public participation requires implementation of the principles of disclosure and transparency and, above all, should be supported by access to information that permits social control through effective and responsible participation."[377] Likewise, effective participation must occur "without discrimination and in a fair, significant and transparent manner[.]"[378] Finally, participation can only be effective where "States . . . have previously ensured access to the necessary information[]"[379] and where individuals can both "play an active role in the planning procedures for activities and projects by expressing their opinions[]"[380] and "challenge official acts or omissions that affect their rights before an independent authority[.]"[381] Finally, with regard to timeliness, in addition to the above point about the prior provision of necessary information, "the State must ensure that there are opportunities for effective participation from the initial stages of the decision-making process, and inform the public about these opportunities for participation."[382]

When the Court issues its judgment in the *La Oroya* case, it will have the opportunity to apply these standards to the State's failure to ensure public participation by a non-indigenous community directly and severely affected by the significant environmental impacts of a metallurgical complex.[383] In its Merits Report, the Inter-American Commission found that the State's failure to provide the community with relevant official information about the environmental and health impacts of the metallurgical complex not only violated the right to access information but also prevented the community from exercising "social control" by participating in public governance of the complex.[384]

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376 Advisory Opinion OC-23/17, *supra* note 25, ¶ 228.

377 *Id.* ¶ 226 (citing Case of Claude Reyes v. Chile, *supra* note 104, at ¶ 86), 378.

378 *Id.* at ¶ 231.

379 *Id.*

380 *Id.* at ¶ 229.

381 *Id.*

382 *Id.* at ¶ 232.

383 *See* IACHR Files Case Before IA Court on Peru's Responsibility for the Effects of Contamination in La Oroya Community (Oct. 14, 2021) (https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/274.asp); La Oroya Community, *supra* note 121, at ¶¶ 193-200 (2020), (analyzing how Peru violated the La Oroya community's rights to information and participation by failing to provide them with necessary information about the environmental and health impacts of the metallurgical complex and thereby also preventing them from participating in environmental decisions that directly affected them).

384 *See* La Oroya Community, *supra* note 121, at ¶ 194.

The Court has previously explored this connection between the rights to information and public participation in *Claude-Reyes v. Chile*, where the Court interpreted the right to seek and receive information as an essential quality of effective public participation in environmental decision-making, finding that Chile failed to comply with its obligation pursuant to Article 13 of the American Convention to provide the public with information regarding a project with potential environmental impact.[385] The Court held that for States to ensure that public participation will be effective, the public must have "[a]ccess to State-held information of public interest[.]"[386] It also emphasized that guaranteeing such access plays a critical role in promoting State transparency and accountability by enabling public participation in the democratic process, suggesting that effective participation is hat which allows for individuals to exercise "social control" to influence public administration and "question, investigate and consider whether public functions are being performed adequately."[387] This holding implies that States must provide relevant information in advance of opportunities for public participation and accordingly informed the Inter-American Court's declaration in its Advisory Opinion on The Environment and Human Rights that to fulfill their obligation to guarantee the right to public participation, "States must have previously ensured access to the necessary information."[388]

The Escazú Agreement's very specific guidelines as to the timing and type of information that States must provide in environmental decision-making procedures[389] could support the Inter-American System in incorporating similar standards into its existing normative framework. One point of particular importance is Article 7(17)'s requirement that States provide the public with free, comprehensible information not only about the specific environmental impact of a proposed activity, but also the cumulative environmental impact. This concept is particularly critical for marginalized communities that often struggle to achieve justice or meaningful remedy when experiencing disease or other harms caused by the cumulative impact of multiple sources of pollution or other environmental harms, and the Inter-American System will need to grapple with this aspect of environmental human rights violations. The combination of the Escazú Agreement's concrete recognition of the public's need to receive and engage actively with this type of information with the Inter-American System's existing normative framework could result in powerful, detailed protections to ensure that the public can access essential information to allow for effective and meaningful participation in a wide range of environmental decision-making processes.

4. States Must Actively Facilitate Inclusive Participation in Environmental Decision-Making

a. The Escazú Agreement Requires States to Facilitate Inclusive Participation by Vulnerable Groups and Those Directly Affected by Activities with a Significant Environmental Impact

In keeping with the Escazú Agreement's broad commitment to assisting vulnerable groups as well as those directly affected by environmental decisions to exercise their environmental access rights,[390] Article 7 contains several provisions aimed at ensuring States take affirmative measures and create durable institutional structures to support these groups to participate in environmental-decision-making processes. Taken as a whole, they

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[385] Claude Reyes *supra* note 104, at ¶¶ 73, 76, 80. It is worth noting that the Court declined to reach a decision on the alleged victim's argument that the State had violated Article 23 in addition to Article 13 of the American Convention, because it had already considered his arguments with regard to lack of effective public participation in its analysis of the Article 13 claim. See *Id.* at ¶¶ 105-107.

[386] Claude Reyes, *supra* note 104, at ¶ 86.

[387] Claude Reyes, *supra* note 104, at ¶¶ 86-87; *See also* Dávila *supra* note 45 at 409.

[388] Advisory Opinion OC-23/17, *supra* note 25, at ¶ 231.

[389] *See, e.g.* Escazú Agreement, *supra* note 1, at Art. 7(4, 6, 17).

[390] *Id.* at Art. 4(5).

place an obligation on States to put systems in place for the public – particularly vulnerable groups and directly affected persons – to navigate participatory processes in an accessible and inclusive way. These provisions should be interpreted in the context of the Agreement's overarching goal of "plac[ing] equality at the core of sustainable development[]"[391] and "includ[ing] those that have traditionally been underrepresented, excluded or marginalized[,]"[392] and its requirement that States implement the Agreement in accordance with the *pro persona* principle,[393] as well as the principles of non-discrimination, equality,[394] and good faith.[395]

Pursuant to Article 7(14) of the Escazú Agreement, States must "make efforts to identify . . . persons or groups in vulnerable situations[,]"[396] and take affirmative measures to support them to engage "in an active, timely and effective manner in participation mechanisms."[397] To "eliminate barriers to participation," States must also consider the development of "appropriate means and formats" for their participation, presumably by making it simpler and more affordable for them to do so.[398] Similarly, with regard to "the public directly affected by the projects or activities that have or may have a significant impact on the environment[,]" States must take steps to identify such persons and "promote specific actions to facilitate their participation."[399]

Article 7(15) references the extensive legal framework on indigenous peoples' rights that has already been developed in the region and the need for the Escazú Agreement to align with that framework.[400] Specifically, States must guarantee that they implement the Escazú Agreement in a way that complies with "domestic legislation and international obligations in relation to the rights of indigenous peoples and local communities."[401] These provisions add an additional layer of protection for indigenous peoples, who are already included within the Agreement's definition of vulnerable groups, by invoking the existing Inter-American and international normative framework to protect indigenous and tribal peoples' rights to free, prior, and informed consultation and, under some circumstances, consent.[402]

Although the Agreement does not outline all of the specific steps that States must take to facilitate participation by these groups, it does provide some detail on the measures States should adopt to eliminate barriers to participation and adapt decision-making procedures to the particular needs and circumstances of these groups. For example, as noted above, under Article 7(10), States must "establish conditions that are favourable to public participation in environmental decision-making processes[.]"[403] This provision further requires that States

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391 António Guterres, *Foreword* to the Escazú Agreement, at p. 5 (2018).

392 Alicia Bárcena, *Preface* to the Escazú Agreement, at p. 8 (2018).

393 Escazú Agreement, *supra* note 1, at Art. 3(k).

394 *Id.* at Art. 3(a).

395 *Id.* at Art. 3(d).

396 Escazú Agreement, *supra* note 1, at Art. 7(14). Pursuant to Art. 2(e), the Escazú Agreement defines "Persons or groups in vulnerable situations" as "those persons or groups that face particular difficulties in fully exercising the access rights recognized in the present Agreement, because of circumstances or conditions identified within each Party's national context and in accordance with its international obligations." Such groups may include "populations suffering from social exclusion, contemporary sources of disenfranchisement, or historic systems of oppression[.]" Dávila *supra* note 35 at 92.

397 Escazú Agreement, *supra* note 1, at Art. 7(14).

398 *Id*.

399 *Id.* at Art. 7(16).

400 *Id.* at Art. 7(15).

401 *Id*.

402 The following subsection provides a brief overview of the Inter-American System's normative framework on indigenous and tribal peoples' rights.

403 Escazú Agreement, *supra* note 1, at Art. 7(10).

intentionally design these conditions to account for "the social, economic, cultural, geographical and gender characteristics of the public."[404] Likewise, Article 7(11) guarantees language access in environmental decision-making processes by directing States to ensure that language is not a barrier for directly affected persons who do not primarily speak the official language(s) by adopting measures "to facilitate their understanding and participation."[405]

Beyond these specific steps, Article 7(13) encourages States to increase the participation of "various groups and sectors" by establishing or using existing "spaces for consultation on environmental matters[.]"[406] Within such spaces, States must "promote regard for local knowledge, dialogue and interaction of different views and knowledge, where appropriate."[407] As discussed below in the context of indigenous peoples, consultation is a particularly important and empowering way for vulnerable groups and directly affected persons or communities to engage in environmental decision-making processes that impact them and share their "local knowledge" and "different views."[408] Consultation may, for example, serve as one of the "specific actions"[409] that States must promote to facilitate the participation of directly affected persons under Article 7(16) or as a way for States to fulfill their duty under Article 7(10) to "establish conditions that are favourable to public participation in environmental decision-making processes[.]"[410]

b. The Escazú Agreement Could Guide the Inter-American System in Expanding the Right to Consultation to Non-Indigenous Group

As noted above, the *La Oroya* case will likely represent the Inter-American Court's first opportunity to apply its analysis of the right to public participation in "decision-making and policies that could affect the environment,"[411] in a contentious case that does not involve the collective property rights of indigenous peoples.[412] Together with the jurisprudential developments expected from that case, advocates can use the Escazú Agreement provisions discussed above to encourage the Inter-American System to extend much of its existing normative framework around indigenous and tribal peoples' rights to participation and consultation to a broader range of groups, including persons and groups in a situation of vulnerability or those who are directly affected by activities with an environmental impact.

Although the Court's extensive jurisprudence on indigenous and tribal peoples' rights to participation and consultation in decisions affecting their collective property rights derives in part from its understanding of the specific history, circumstances, needs, and threats pertinent to indigenous and tribal peoples,[413] the general principles articulated in these cases could, in combination with relevant provisions from the Escazú Agreement, form the basis for a broader understanding of these rights within the Inter-American System. Accordingly, this section provides a brief discussion of this normative framework and some initial suggestions in this regard.

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404 *Id*.

405 *Id.* at Art. 7(11).

406 *Id.* at Art. 7(13).

407 *Id*.

408 *Id*.

409 *Id.* at Art. 7(16).

410 *Id.* at Art. 7(10).

411 Advisory Opinion OC-23/17, *supra* note 25, ¶ 231.

412 *See*, La Oroya Community *supra* note 121, at ¶¶ 154-155, 194, 199-200 (2020) (finding that Peru violated the La Oroya community's rights to information and participation by failing to provide them with necessary information about the environmental and health impacts of the metallurgical complex and thereby also preventing them from participating in environmental decisions that directly affected them).

413 *See, e.g.*, Kichwa Indigenous People of Sarayaku *supra* note 28, at ¶¶ 145-147 (Jun. 27, 2012).

By jointly reading the rights established in Articles 21 and 23, the Court has interpreted the American Convention to include the right to prior, free, and informed consultation and under some circumstances, consent, where State interventions may restrict the collective property rights of indigenous or tribal peoples.[414] Most recently, in *Nuestra Tierra*, the Court reaffirmed that the safeguards that States must provide to guarantee indigenous peoples' right to collective property "are . . . based on the right of the indigenous peoples to take part in decisions that affect their rights."[415] The Court reiterated that in this context, the right to consultation partially derives from the "'political rights' relating to participation recognized in Article 23 of the [American] Convention."[416] To fulfill this obligation, States must ensure that indigenous peoples are "consulted adequately through institutions that represent them[,]"[417] and that they can participate effectively in such consultations.[418] Likewise, States must structure procedures for prior consultation in accordance with international standards "to create channels for sustained, effective and reliable dialogue with . . . indigenous communities in consultation and participation processes through their representative institutions."[419]

The Court has repeatedly recognized that consultation is essential to preserve, protect, and guarantee the special relationship indigenous and tribal peoples have with their lands, as well as their fundamental rights to cultural identity, cultural survival, and self-determination as peoples.[420] In *Sarayaku*, the Court found that under Article 21 of the American Convention, States have a "positive obligation to adopt special measures to ensure that members of indigenous and tribal peoples enjoy the full and equal exercise of their right to the lands that they have traditionally used and occupied[,]"[421] including "the obligation to guarantee the right to prior consultation"[422] to prevent harm to an indigenous peoples' "ancestral territory, or their subsistence and survival as an indigenous people."[423] In subsequent cases, the Court incorporated Article 23 as an additional legal basis for the right to participation aspect of consultation,[424] holding that States must implement participation mechanisms "that are culturally adapted to the decision-making of [indigenous peoples]" as "part of their right to take part in any decision-making on matters that affect their interests, in accordance with their own procedures and institutions."[425]

The Court developed this normative framework in the *Saramaka* case,[426] where it held that to comply with the obligation to consult, States must 1) "ensure the effective participation of the [affected peoples], in conformity with their customs and traditions, regarding any development, investment or extraction plan [] within [their]

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414 Saramaka People, *supra* note 27, at ¶ 133; Nuestra Tierra, *supra* note 27, ¶ 173; Kichwa Indigenous People of Sarayaku, *supra* note 28, at ¶¶ 159-62, 171.

415 Nuestra Tierra, *supra* note 27, at ¶ 173.

416 *Id.*

417 *Id.; see also* Saramaka People, *supra* note 27, at ¶ 166.

418 Nuestra Tierra, *supra* note 27, at ¶ 174.

419 Kichwa Indigenous People of Sarayaku, *supra* note 28, at ¶ 166; *see also* Case of the Triunfo de la Cruz Garífuna Community, *supra* note 239, at ¶ 159.

420 Saramaka People, supra note 27, at ¶ 129; Kichwa Indigenous People of Sarayaku, supra note 28, at ¶¶ 159-60, 176, 217.

421 Kichwa Indigenous People of Sarayaku, supra note 28, at ¶ 171.

422 *Id.* at ¶ 176.

423 *Id.*

424 Kaliña and Lokono Peoples, *supra* note 75, at ¶¶ 202-203, 208-212, 230.

425 *Id.* at ¶ 203.

426 However, it is worth noting that the Court did not find a violation of Article 23 in the Saramaka judgment, basing the right to consultation instead within Article 21 in conjunction with Article 1.1 of the American Convention. Saramaka People, *supra* note 27, at ¶ 158.

territory[]" by respecting the right to consultation;[427] 2) "guarantee the [affected peoples] receive a reasonable benefit from any such plan within their territory[;]"[428] and 3) "ensure that no concession will be issued within the [affected peoples'] territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment."[429]

In *Sarayaku*, the Court provided detailed guidance for how it would assess whether a State has fulfilled its duty to consult with indigenous or tribal peoples.[430] Specifically, the Court will consider whether the consultation took place before significant decisions regarding the project have been made, whether the consultation was carried out in good faith and for the purpose of reaching an agreement, whether the consultation was adequate and accessible, and whether the consultation was informed, including through the timely preparation and dissemination of an environmental and social study of the proposed project's potential impacts.[431] For the Court to find a consultation to be adequate and accessible, the State must carry it out "using culturally appropriate procedures" that align with the traditions of the indigenous or tribal peoples in question.[432] States must also undertake consultation in a manner that can be understood by the affected indigenous or tribal peoples, including in the language spoken by the majority of community residents,[433] as well as in a time frame that respects the internal decision-making process of the affected peoples.[434]

Finally, the Court has held that under certain circumstances, the State has a duty not only to consult but also to obtain consent from the affected community.[435] This heightened obligation is mandatory in cases of "large-scale development or investment projects that would have a major impact" on the community's territory and natural resources.[436] As the Court found in *Saramaka*, under these circumstances, "the State has a duty . . . to obtain [the indigenous peoples'] free, prior, and informed consent, according to their customs and traditions."[437] In analyzing the need for this higher standard, the Court considered the potentially severe human rights effects of such projects for indigenous peoples, including loss of land and culture, environmental and social harms, "long-term negative health and nutritional impacts as well as, in some cases, harassment and violence."[438] This consent standard derives from indigenous and tribal peoples' right to self-determination and is recognized under international law.[439]

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[427] Saramaka People, *supra* note 27, at ¶¶ 129, 133; S*ee also* Kichwa Indigenous People of Sarayaku, *supra* note 28, at ¶ 157; Triunfo de la Cruz Garífuna Community, *supra* note 239, at ¶ 156.

[428] Saramaka People, *supra* note 27, at ¶ 129; *see also* Kichwa Indigenous People of Sarayaku, *supra* note 28, at ¶ 157; Triunfo de la Cruz Garífuna Community, *supra* note 239, at ¶ 156.

[429] Saramaka People, *supra* note 27, at ¶ 129; *see also* Kichwa Indigenous People of Sarayaku, *supra* note 28, at ¶ 157; Triunfo de la Cruz Garífuna Community, *supra* note 239, at ¶ 156. This requirement reflects the Inter-American Court's understanding that prior production and provision of necessary information is an essential precondition to effective participation.

[430] Kichwa Indigenous People of Sarayaku, supra note 28, at ¶¶ 167, 177-78. Note that the Court also summarized this normative framework in Advisory Opinion 23. Advisory Opinion OC-23/17, *supra* note 25, ¶ 227.

[431] *Id.* at ¶¶ 167, 177-78.

[432] *Id.* at ¶ 201.

[433] *Id.*

[434] *Id.* at ¶ 202.

[435] Saramaka People, supra note 27, at ¶ 134.

[436] *Id.*

[437] *Id.*

[438] *Id.* at ¶ 135 (quoting U.N., Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65 (Fifty ninth session), U.N. Doc. E/CN.4/2003/90, January 21, 2003, p. 2).

[439] Saramaka People, supra note 27, at ¶¶ 93-96, 131, 134-36.

These standards could be combined with the Escazú Agreement's specific provisions regarding States' obligations to take proactive steps to create inclusive, accessible public participation procedures; facilitate the participation of vulnerable groups, indigenous peoples, and persons directly affected by environmental harm, and eliminate barriers to such participation.[440] For example, they could guide the Inter-American System in interpreting State obligations under Article 23 of the American Convention to require States to take specific, affirmative measures to ensure that all vulnerable persons or groups whose rights may be affected by an environmental decision can participate in the process for making that decision.

Taking this argument one step further, advocates may be able to use the Escazú Agreement's provision on consultation[441] in combination with the standards laid out here to encourage the Inter-American System to extend a modified version of these consultation requirements to all vulnerable and directly affected groups.[442] Guided by the language of Article 7(10), requiring States to adapt participation procedures to the specific characteristics of the interested public,[443] the Inter-American System may adjust its current normative framework to require States to conduct such consultation in a way that considers from an intersectional perspective the vulnerable conditions, historical situation of discrimination or disadvantage, particular needs, or risks faced by the particular groups being consulted. In addition, advocates litigating cases on behalf of indigenous and tribal peoples can refer to the Escazú Agreement to deepen the existing normative framework protecting their right to consultation; Article 7(15) of the Escazú Agreement invites just such an interchange.[444]

5. Conclusion

To conclude, both the Escazú Agreement and the Inter-American System recognize the right to participation. By incorporating provisions of the Escazú Agreement in their arguments before the institutions of the Inter-American System, advocates litigating cases of environmental harm can deepen existing protections of the right to participation in relation to the environment. The next section discusses the right to access justice, which provides individuals and groups with the ability to seek redress for violations of the rights to access information and to participation, as well as other rights implicated by environmental harm.

C. Pillar Three: The Right to Access to Justice in Environmental Matters

The right to access justice is the third pillar of the Escazú Agreement.[445] This section will provide a legal framework for the right to access justice in relation to environmental matters, drawing from the Inter-American System and the Escazú Agreement. The Escazú Agreement provides for redress when human rights are violated as a result from a State's failure to comply with environmental obligations.[446] The right of access to justice ensures that judicial and administrative mechanisms are available and accessible to challenge State actions or

[440] Escazú Agreement, *supra* note 1, at Art. 7(10), 7(11), 7(13), 7(16).

[441] *Id.* at Art. 7(13).

[442] This argument recognizes that because indigenous and tribal peoples hold a special relationship with their territory and natural resources that is bound up in their cultural survival as peoples, many aspects of the Inter-American System's normative framework may not be applied to non-indigenous groups. However, where the basic rights of a vulnerable community will be significantly affected by an environmental decision, something more than the ability to participate in the democratic process is at stake. Applying a modified version of consultation in such cases would address this reality.

[443] Escazú Agreement, *supra* note 1, at Art. 7(10).

[444] *Id.* at Art. 7(15).

[445] *Id.* at Arts. 1, 8.

[446] *Id.* at Art. 8.

omissions in environmental matters.[447] This section will discuss interpretations of the right to access to justice from legal precedent in the Inter-American System and assess how the specialized protections under the Escazú Agreement can complement this approach. Specifically, this section focuses on how the EA can be used to complement and strengthen the obligation States have under the Inter-American System to provide effective, timely, and affordable access to justice in environmental matters, particularly to vulnerable groups.

1. Recognition of the Right to Access to Justice by the Inter-American System

The Inter-American System recognizes the right to access justice and its salience in the context of environmental harm. This subsection analyzes the Inter-American Court's recognition of the right to access justice specifically in relation to environmental harm in its Advisory Opinion on *The Environment and Human Rights* and then provides additional detail on relevant aspects of the Inter-American System's normative framework around access to justice.[448]

Traditionally, the Inter-American System has interpreted Articles 8 and 25 of the American Convention jointly to encompass States' obligation to provide effective remedies for human rights violations in accordance with due process guarantees.[449] Article 8(1) of the American Convention provides that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time[.]"[450] These minimum guarantees apply equally "in the administrative process or in any other procedure whose decisions may affect the rights of persons."[451] Article 25 of the American Convention provides that "[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights[.]"[452] It also requires that to guarantee the right to judicial protection, States must ensure that any person claiming a remedy will have their rights determined by the competent authority and enforced by the State's legal system.[453] By reading these two provisions together, the Court has established a right to access justice under the American Convention that includes the State obligation to investigate[454] and ensure accountability for human rights violations.[455]

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[447] Escazú Agreement, *supra* note 1, at Art. 8(2).

[448] The Inter-American System has developed an extensive and detailed normative framework on the right to access justice. This toolkit does not provide a comprehensive examination of every aspect of this framework but rather seeks to highlight those elements where the relevant provisions of the Escazú Agreement might be used to expand upon existing protections within the Inter-American System. For more information about how the right to access justice has been conceptualized more broadly within the Inter-American System, *see* Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 13: Protección Judicial (2021); 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, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.129, doc. 4, ¶ 41 (Sep. 7, 2007).

[449] Velásquez Rodríguez, *supra* note 64, at ¶ 91; *see also* Nuestra Tierra, *supra* note 27, at ¶¶ 294-95; 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, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.129, doc. 4, ¶ 177 (Sep. 7, 2007), available at https://www.cidh.oas.org/countryrep/AccesoDESC07eng/Accesodescindice.eng.htm.

[450] American Convention, *supra* note 23 at Art. 8(1).

[451] Baena Ricardo et al. v. Panama, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72, ¶ 127 (Feb. 2, 2001); *see also* Yakye Axa Indigenous Community, *supra* note 24, at ¶ 62.

[452] American Convention, *supra* note 23 at Art. 25(1).

[453] *Id.* at Art. 25(2).

[454] *See, e.g.*, Case of Villaseñor Velarde et al. v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.374, ¶ 110 (Feb. 5, 2019).

[455] *See, e.g.*, Case of Cruz Sánchez et al. v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 292, ¶ 398 (Apr. 17, 2015); Case of Anzualdo Castro v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 124 (Sept. 22, 2009).

In the *Nuestra Tierra* judgment, the Court affirmed the applicability of the right to access justice in the context of environmental protection.[456] The Court noted that it would assess whether the State has fulfilled its obligation to guarantee effective remedies by "taking into account whether 'domestic remedies exist that guarantee real access to justice to claim reparation for a violation.'"[457] As noted above, the State must also respect due process guarantees.[458] Additionally, the State violates the right to access justice if it fails to provide effective remedies that give individuals the opportunity to challenge State acts that may have violated their rights even where that claim does not succeed on the merits, and conversely, the failure of a claim on the merits does not necessarily imply a violation of the right to access justice.[459] Finally, the right to access justice includes a positive obligation for State authorities to respond to all requests for a remedy "within a reasonable time."[460]

In its Advisory Opinion on *The Environment and Human Rights*, the Inter-American Court listed the right "to an effective remedy" among the procedural rights most strongly implicated in environmental matters[461] and reiterated that, as previously recognized in its jurisprudence, "access to justice is a peremptory norm of international law."[462] In assessing how States must ensure the rights to life and personal integrity in situations of environmental harm, the Court concluded that pursuant to Articles 8 and 25 of the American Convention, States must guarantee "access to justice . . . with regard to protection of the environment[.]"[463] The Court emphasized that in environmental matters, the right to access justice ensures that individuals can call upon the State to enforce environmental standards and to provide redress, "including remedies and reparation[]" for human rights violations caused when a State fails to follow or enforce its own environmental rules.[464] It also recognized the interrelationship between the right to access justice and other environmental access rights, noting that "access to justice guarantees the full realization of the rights to public participation and access to information[.]"[465]

The Court also linked the right to access justice to its broader discussion of States' obligation of prevention in the Advisory Opinion, observing that this duty encompasses measures to investigate human rights violations, punish those responsible, and ensure compensation to the victims.[466] States must "supervise and monitor activities within their jurisdiction that may cause significant damage to the environment[]"[467] through "adequate independent monitoring and accountability mechanisms."[468] Such "mechanisms must not only include

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456 Nuestra Tierra, *supra* note 27, at ¶ 294-295.

457 *Id.* at ¶ 294 (citing Case of Goiburú et al. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 153, ¶ 120 (Sept. 22, 2006); Case of García Lucero et al. v. Chile, Preliminary Objection, Merits and Reparations, Judgment, Inter-Am. Ct. H.R., (ser. C) No.267, ¶ 182 (Aug. 28, 2013)).

458 Nuestra Tierra, *supra* note 252, at ¶ 298.

459 *Id.* ¶¶ 295, 304 (citing Case of Castañeda Gutman v. Mexico, Preliminary objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., (ser. C) No. 184, ¶ 101 (Aug. 6, 2008)).

460 Nuestra Tierra, *supra* note 27, at ¶ 295 (citing Case of Cantos v. Argentina, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R., (ser. C) No. 97, ¶ 57 (Nov. 28, 2002).

461 Advisory Opinion OC-23/17, *supra* note 25, ¶ 64.

462 *Id.* ¶ 233 (citing Case of Goiburú et al. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 153, ¶ 131 (Sep. 22, 2006); Case of La Cantuta v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 160 (Nov. 29, 2006)).

463 *Id*. at ¶ 241.

464 *Id.* at ¶ 234.

465 *Id.*

466 *Id.* at ¶ 127.

467 *Id.* at ¶ 154.

468 *Id.*

preventive measures, but also appropriate measures to investigate, punish and redress possible abuse through effective policies, regulations and adjudication."[469]

2. Recognition of the Right to Access to Justice by the Escazú Agreement

Article 8 of the Escazú Agreement addresses the right to access to justice in environmental matters. Specifically, Art. 8(1) requires States Parties to "guarantee the right of access to justice in environmental matters in accordance with the guarantees of due process."[470] While the provisions of Article 8 echo many elements of the existing normative framework on access to justice within the Inter-American System, they offer important guidance for the specific application of this right to the context of environmental harm and to the enforcement of the other procedural rights recognized in the Escazú Agreement.

Throughout Article 8, the Escazú Agreement addresses the right to access justice not only to redress environmental harm that has already occurred but also to ensure recourse to mechanisms aimed at preventing potential environmental harm. This aspect of the treaty recognizes the importance of the right to access justice in giving effect to several of its guiding principles, predominantly the preventive principle,[471] the precautionary principle,[472] and the principle of intergenerational equity.[473] Most importantly, Article 8(3)(d) requires that to prevent, mitigate, or repair harm to the environment, States must provide for precautionary or other measures.[474]

Article 8(2) requires States to guarantee "access to judicial and administrative mechanisms to challenge and appeal" violations of the other environmental access rights protected by the Agreement as well any other State act or omission with actual or potential negative environmental effects or that violates environmental laws or regulations.[475] These procedural protections ensure that individual and communities have access to justice when they face barriers in receiving environmental information or participating in environmental decision-making processes, as well as any actual or potential violation of substantive human rights affected by environmental harm. By defining the types of actions subject to review broadly and by including not only definite environment harm but also potential harm, these provisions provide the public with powerful tools to seek preventive measures and to overcome State resistance to taking action before the risk of harm has been scientifically proven.[476]

Under Article 8(3), the Agreement enumerates specific steps that States must take to guarantee access to justice, which have particular resonance for communities that have historically struggled to vindicate their environmental rights.[477] States are obligated to invest in competent State entities with environmental expertise.[478] They must also provide affordable, "effective, timely, public, transparent and impartial procedures[.]"[479] Persons and groups must be granted legal standing to bring claims regarding harms to the

469 *Id.*
470 Escazú Agreement, *supra* note 1, at Art. 8(1).
471 Escazú Agreement, *supra* note 1, at Art. 3(e).
472 *Id.* at Art. 3(f).
473 *Id.* at Art. 3(g).
474 *Id.* at Art. 8(3)(d).
475 *Id.* at Art. 8(2).
476 For a discussion of this aspect of the Agreement, see Dávila, *supra* note 35, at pp. 32-33.
477 Escazú Agreement, *supra* note 1, at Art. 8(3).
478 *Id.* at Art. 8(3)(a).
479 *Id.* at Art. 8(3)(b).

environment.[480] In recognition of the technical complexity inherent in environmental protection and the barriers the public may face in producing such evidence, States must establish the means of producing "evidence of environmental damage[.]"[481]

Article 8(4) sets forth the measures States must undertake to facilitate access to justice. Specifically, States must reduce or eliminate barriers to access to justice.[482] They must also publicize both the existence of the right to access justice as well as the procedures or mechanisms the State has made available to give effect to the right.[483] Similarly, States must create a system to organize relevant judicial and administrative decisions and make them publicly accessible.[484] This requirement relates to the obligation in Article 8(6) that environmental decisions and the legal reasoning supporting them be made in writing.[485]

In recognition that achieving enforcement of environmental rights decisions represents another potential barrier to accessing justice, the Agreement further requires that State enforcement of judicial decisions be timely.[486] It also directs States to provide comprehensive reparations, including restoration, compensation, "assistance for affected persons[,]" and other forms of redress.[487]

All of these provisions ensure that when an individual or community experiences human rights violations caused by actual or threatened environmental harm, or by related violations of other environmental access rights, the State has provided the means for them to navigate judicial and administrative mechanism to seek redress.[488]

Article 8(7) commits States to "promote . . . alternative dispute resolution mechanisms . . . [to] allow [environmental] disputes to be prevented or resolved."[489]

3. Access to Justice Must be Effective

Both the Escazú Agreement and the Inter-American System recognize that a core element of the right to access justice is that measures to provide access to justice must be effective. The Inter-American Court has begun to consider what factors it might look to when assessing the effectiveness of access to justice mechanisms in the context of the right to a healthy environment, but the specialized provisions of the Escazú Agreement could contribute significantly to the development of the law in this area.[490]

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480 *Id.* at Art. 8(3)(c).

481 *Id.* at Art. 8(3)(e).

482 *Id.* at Art. 8(4)(a).

483 *Id.* at Art. 8(4)(b).

484 *Id.* at Art. 8(4)(c).

485 *Id.* at Art. 8(6).

486 Escazú Agreement, *supra* note 1, at Art. 8(3)(f).

487 *Id.* at Art. 8(3)(g).

488 Dávila, *supra* note 35, at p. 231.

489 Escazú Agreement, *supra* note 1, at Art. 8(7).

490 It is beyond the scope of this toolkit to address in detail the specific application of the Escazú Agreement to the Inter-American System's existing normative framework on access to justice in the context of indigenous peoples' rights, but it is worth noting here that advocates working on indigenous land rights may want to consider incorporating arguments based in the Escazú Agreement to the Court's jurisprudence on the right of indigenous peoples to effective and expeditious administrative mechanisms to ensure their territorial rights. See, e.g. Case of Kuna Indigenous People of Madungandí and Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 284, ¶ 166 (Oct. 14, 2014); Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 79, ¶

a. The Escazú Agreement Specifies How States Must Design Justice Mechanisms to Assure Their Effectiveness in Environmental Matters

As noted above, the Escazú Agreement affirms that, to guarantee access to justice, States must ensure that available procedures are effective.[491] Other provisions of Article 8 inform the content of this requirement as applied to the specific context of environmental matters and reflect the understanding that for justice mechanisms to be effective in this context, the State must equip them with appropriate abilities and tools. For example, Article 8(3)(a) requires States to establish "competent State entities with access to expertise in environmental matters[,]" recognizing that for mechanisms providing access to justice in environmental matters to be effective, the relevant State entities must be capable of handling complex matters with the assistance of technical experts who can ensure that these mechanisms operate consistently with available science.[492] Likewise, the requirement that State mechanisms have the power to order precautionary measures to prevent environmental harm[493] reflects another essential component of effective access to justice in environmental matters, as does the requirement that States support the generation of environmental evidence.[494]

Similarly, the requirement that States empower justice mechanisms to order broad reparations to redress environmental harm and related human rights violations contributes to the Escazú Agreement's conceptualization of what constitutes effective access to justice.[495] This provision supports the understanding that in the context of environmental matters, simple monetary damages cannot provide sufficient redress for the range of harms likely to be at stake. The express direction to include "restitution to the condition prior to the damage[]" and "restoration" acknowledge the unique types of redress necessary in matters of environmental rights violations.[496]

The emphasis on timely execution and enforcement of judicial and administrative decisions, enshrined in Article 8(3)(f), likewise informs the analysis of what States must do to assure the effectiveness of access to justice mechanisms under the Escazú Agreement.[497] If States do not ensure the enforcement of domestic judgments, then the public has no meaningful avenue to vindicate their environmental rights or prevent environmental harm.

b. The Escazú Agreement Can Be Used to Strengthen the Inter-American System's Normative Framework on Effective Access to Justice in Environmental Matters

Within the Inter-American System, the existing normative framework requires that for States to ensure access to justice, mechanisms must be effective and adequate for their purpose.[498] The specialized guidance of the

138 (Aug. 31, 2001); Case of the Xákmok Kásek Indigenous Community. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 214, ¶ 109 (Aug. 24, 2010).

491 Escazú Agreement, *supra* note 1, at Art. 8(3)(b).

492 *Id.* at Art. 8(3)(a).

493 *Id.* at Art. 8(3)(d).

494 *Id.* at Art. 8(3)(e).

495 *Id*. at Art. 8(3)(g).

496 *Id*.

497 *Id.* at Art. 8(3)(f).

498 Case of López Lone et al. v. Honduras, Preliminary Objection, Merits, Reparations and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 302, ¶ 245 (Oct. 5, 2015) (citing Case of Velásquez Rodríguez, *supra* note 64, ¶ 63; and Case of Granier et al. (Radio Caracas Television) v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. H.R. (ser. C) No. 293, ¶ 282 (Jun. 22, 2015)).

Escazú Agreement provides a helpful tool for applying this existing framework to the specific context of cases of environmental rights violations and thereby enhancing protections in this area.

Article 25(1) of the American Convention on Human Rights expressly enshrines "the right to . . . effective recourse . . . for protection against" human rights violations.[499] The Inter-American Court has consistently held that this provision obligates States to "ensure a simple, prompt and effective judicial remedy before a competent judge or court[]"[500] and that "this remedy must be adequate and effective."[501] The Court grounds its understanding of the effectiveness of judicial remedies in the need for international human rights law to protect individuals from "the arbitrary exercise of public authority"[502] and the recognition that "[t]he inexistence of effective domestic recourses places the individual in a state of defenselessness."[503]

To meet the effectiveness requirement, the remedy must be able to fulfill its purpose, that is, to determine whether a human rights violation has occurred and provide redress.[504] Likewise, to be considered adequate, the remedy must be "suitable to address the infringement of a legal right."[505] In analyzing the relationship between Article 25(1) and the due process guarantees of Article 8(1) of the American Convention, the Court has also found that for remedies to be effective, they must comport with those due process guarantees.[506] Additionally, remedies may not be illusory, such as where judicial bodies lack competence, independence, or impartiality.[507] The Court has also found judicial remedies ineffective where individuals, due to State interference, cannot access such remedies in any way.[508] Finally, the Court has considered remedies ineffective where judicial bodies lack "the means to carry out [their] judgments[,]"[509] and has found violations of Art. 25(1) and 25(2)(c) in relation to Art. 1(1) where States failed to comply with domestic judgments to vindicate human rights violations.[510]

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499 American Convention, *supra* note 23 at Art. 25(1).

500 López Lone, supra note 498, at ¶ 245.

501 *Id.* (citing Case of Velásquez Rodríguez, *supra* note 64, ¶ 63; and Granier et al. (Radio Caracas Television), *supra* note 498, at ¶ 282.

502 Claude Reyes, *supra* note 104, at ¶ 129.

503 *Id.*

504 Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and Their Members, *supra* note 490, ¶ 165 (citing Case of the Saramaka People, *supra* note 27, at ¶ 177; Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 270, ¶ 404 (Nov. 20. 2013); Kichwa Indigenous People of Sarayaku, *supra* note 28, at ¶ 261 (Jun. 27, 2012)).

505 Velasquez Rodriguez, *supra* note 64, at ¶ 64.

506 Ximenes Lopez, *supra* note 298, at ¶ 193; Case of Palamara Iribarne v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 163 (Nov. 22, 2005); Case of the Moiwana Community v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment Inter-Am. Ct. H.R (ser. C) No. 124, ¶ 142 (Jun. 15, 2005).

507 Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 24 (Oct. 6, 1987) [hereinafter Advisory Opinion O/C-9/87]; Case of Uson Ramirez v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 207, ¶ 130 (Nov. 20, 2009).

508 Case of expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 282, ¶ 396 (Aug. 28, 2014) (finding that State expulsion of the victims prevented them from accessing available judicial remedies); Case of Castillo Páez v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 34, ¶ 58 (Nov. 3, 1997) (finding that State obstruction of justice violated Art. 25).

509 Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 24 (Oct. 6, 1987) [hereinafter Advisory Opinion OC-9/87].

510 Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 198, ¶ 79 (Jul. 1, 2009).

Although, as noted above, the Inter-American Court reaffirmed in the *Nuestra Tierra* judgment that it would apply this effectiveness requirement to an access to justice violation alleged in a case involving environmental harm, it did not conduct a detailed analysis of what its current normative framework requires to consider a remedy effective in this context.[511] In this regard, the Escazú Agreement provisions discussed in this section have the potential to fill a critical gap and could inform the pronouncement of more specific State obligations to ensure the effectiveness of justice mechanisms in environmental matters. By giving detailed content to the powers and resources that States must build into judicial remedies in environmental matters, the Escazú Agreement can guide the Inter-American System in applying the effectiveness requirement to environmental human rights cases.

The *Case of Claude-Reyes et al. v. Chile* is also instructive. In that case, the Inter-American Court found that Chile failed to provide vulnerable individuals with effective judicial recourse to vindicate the right to information after State officials refused to inform affected populations of the planned deforestation.[512] Specifically, the Court held that when the State refuses access to State-held information, it must ensure the availability of "a simple, prompt and effective recourse that permits determining whether there has been a violation of the right of the person requesting information and, if applicable, that the corresponding body is ordered to disclose that information."[513] It also found that pursuant to Article 25(2)(b) of the American Convention, if a State does not provide a population with effective methods to protect rights through judicial recourse, it must promptly establish such a method.[514] Finally, it found the judicial remedy in this case ineffective both because it failed to determine whether the right to information had been violated[515] and because it did not comport with the due process obligation under Art. 8(1) of the American Convention that when domestic bodies adopt decisions "that that could affect human rights[,]"[516] they must do so through "a duly justified written decision."[517]

The Court applied a similar approach in *Kaliña and Lokono Peoples v. Suriname*, which involved violations of an indigenous peoples' collective property rights. As part of their efforts to pursue land claims, they sought State-held "information [that] could have provided them with additional evidence when filing their claims in the domestic jurisdiction."[518] The Court held that "the failure to hand over information in Suriname's public records, and the failure to justify the refusal to provide it" constituted a violation of both the right to information under Article 13 of the American Convention, as well as the right to judicial protection under Article 25.[519]

The standards articulated in these judgments also suggest avenues for advocates to use the Escazú Agreement to deepen the Inter-American System's understanding of how a violation of the right to access information connects to the right to access justice. For example, the requirement in Article 8(6) that environmental decisions *and* the legal justifications for the decision reached be issued in writing[520] clarifies how the standard set forth in *Claude-Reyes* applies to environmental matters. Similarly, Article 8(2)(a) makes explicit that States must provide broad access to justice for "any decision, action or omission related to the access to environmental information[,]" which could be used to build upon how the Court analyzed effectiveness in *Claude-Reyes*.

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511 Nuestra Tierra, *supra* note 27, at ¶¶ 294-95.

512 Claude Reyes et al., *supra* note 104, at ¶ 139.

513 *Id.* at ¶ 137.

514 *Id.*

515 *Id.* at ¶¶ 134-136, 143.

516 *Id. at* ¶ 120.

517 *Id. at* ¶ 122.

518 Kaliña and Lokono Peoples, supra note 75, at ¶¶ 267-68.

519 *Id.* at ¶¶ 267-268.

520 Escazú Agreement, *supra* note 1, at Art. 8(6).

Finally, the Inter-American System has also found that for judicial remedies to be effective, States must also guarantee compliance with domestic judgments, in a way that assures effective protection of the rights found to have been violated.[521] Failure to do so constitutes a violation of Article 25 of the American Convention in relation to Article 1(1) of the same instrument.[522] Towards this end, States must establish "effective mechanisms to execute . . . [domestic] judgments, so that the declared rights are protected effectively[,]"[523] including where such judgments rule against State authorities.[524] The enforcement of domestic judgments will only be considered effective if it takes place in a way that is consistent with the underlying principles of judicial protection established by the Inter-American System – due process, legal certainty, judicial independence, and the rule of law[525] – and all public entities have the obligation to facilitate the execution of judgments.[526]

Several provisions of the Escazú Agreement offer guidance for how the Inter-American System can deepen this aspect of access to justice in environmental matters, where enforcement of judgments has critical significance. Article 8(3)(f) provides an unambiguous statement of this requirement, obligating States to adapt their domestic legal systems to include "mechanisms to execute and enforce judicial and administrative decisions in a timely manner[.]"[527] Related provisions, such as the requirements under Article 8(3)(d) that States provide "the possibility of ordering precautionary and interim measures, inter alia, to prevent, halt, mitigate or rehabilitate damage to the environment[]"[528] and Article 8(3)(g), which obligates States to ensure comprehensive, restorative reparations in situations of environmental harm,[529] build upon this foundational requirement and give content to what constitutes the effective execution of judgments in environmental cases.

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[521] Case of Liakat Ali Alibux v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 276 ¶ 33 (Jan. 30, 2014); Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 77, ¶ 237 (May 26, 2001); Case of Suárez Rosero v. Ecuador, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 35, ¶ 65 (Nov. 12, 1997); Case of Muelle Flores v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 375, ¶ 128 (Mar. 6, 2019). Although at the time of writing the Inter-American Court had not yet issued a judgment in the Case of La Oroya Community v. Peru, the Inter-American Commission addressed this issue in its Merits Report, and the Court's judgment is likely to contain relevant application of these standards as well. *See* Community of La Oroya v. Peru, Case No. 12.718, Inter-Am. Comm'n H.R., Report No. 76/09, OEA/Ser.L/V/II, doc.348, ¶¶ 215-217 (2020).

[522] Acevedo Buendía et al., *supra* note 510, at ¶ 79.

[523] *Id.* at ¶ 220.

[524] Case of Muelle Flores v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 375, ¶ 128 (Mar. 6, 2019).

[525] Case of Muelle Flores v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 375, ¶ 128 (Mar. 6, 2019).

[526] *Id*. at ¶ 106.

[527] Escazú Agreement, *supra* note 1, at Art. 8(3)(f).

[528] *Id.* at Art. 8(3)(d).

[529] *Id.* at Art. 8(3)(g).

4. Access to Justice Must be Timely

a. The Escazú Agreement Requires that Access to Justice in Environmental Matters be Timely

The Escazú Agreement requires States to ensure that procedures are "timely"[530] and take place "in accordance with the guarantees of due process."[531] It also obligates States to create "mechanisms to execute and enforce judicial and administrative decisions in a timely manner[.]"[532]

b. The Escazú Agreement Can be Used to Strengthen the Inter-American System's Normative Framework on Timely Access to Justice in Environmental Matters

Under the normative framework of the Inter-American System on access to justice, States must ensure that access to justice for ongoing or imminent human rights violations be prompt[533] and that judicial proceedings occur within a reasonable time.[534] When analyzing the right to access justice under Articles 8(1) and 25(1) of the American Convention on Human Rights, the Inter-American Court has concluded that because "the right to access to justice implies that the controversy be solved within a reasonable time[,] an extended delay may constitute, in itself, a violation of the judicial guarantees."[535] A lack of State response[536] or excessive delay in carrying out an investigation or other legal remedy can also undermine the effectiveness of that remedy.[537] Likewise, the Court in *Nuestra Tierra* held that "the obligation to provide adequate and effective judicial remedies signifies that the proceedings must be held within a reasonable time."[538]

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[530] Escazú Agreement, *supra* note 1, at Art. (8)(3)(b).

[531] *Id.* at Art. 8(1).

[532] *Id.* at Art. 8(3)(f).

[533] Article 25(1) of the American Convention provides that recourse for violations of human rights must be "prompt[.]" American Convention, *supra* note 23 at Art. 25(1). Note that although this requirement differs from the "reasonable time" requirement in Article 8(1), the Court has frequently applied the same analytical framework to both requirements. *See, e.g.*, Case of Cantos v. Argentina, Merits, Reparations, Costs and Judgment, Inter-Am. Ct. H.R. (ser. C) No. 97, ¶ 57 (Nov. 28, 2002). It has found that the "prompt" requirement of Art. 25(1) applies particularly to actions for amparo, while the Art. 8(1) "reasonable time" standard may be more appropriate for other types of procedures. *See, e.g.*, Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 182, ¶ 170 (Aug. 5, 2008).

[534] As part of the right to a fair trial under Article 8(1) of the American Convention, such proceedings must occur "within a reasonable time[.]" American Convention, *supra* note 23 at Article 8(1). *See also* 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, Inter-Amer. Comm'n H.R. OEA/Ser.L/V/II.129, doc. 4, ¶ 156 (Sep. 7, 2007).

[535] Case of Ticona Estrada et al. v. Bolivia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 191, ¶ 79 (Nov. 27, 2008).

[536] *Id.*

[537] *See, e.g.*, Case of the "Juvenile Reeducation Institute" v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 245 (Sep. 2, 2004); Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 65 (Jun. 17, 2005). For more discussion on the legal framework around effectiveness of judicial remedies, *see* Section IV(C)(iii)(1), *infra*.

[538] Nuestra Tierra, *supra* note 27, at ¶ 301 (quoting Case of Ramírez Escobar et al. v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 351, ¶ 257 (Mar. 9, 2018)); Case of Colindres Schonenberg v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 373, ¶ 118 (Feb. 4, 2019).

However, the Court has primarily grounded its assessment of the timeliness of access to justice within Article 8(1) of the American Convention, and it has applied these requirements to "civil, labor, criminal or any other jurisdiction[.]"[539] In the context of legal proceedings to determine indigenous peoples' land rights, the Inter-American Court has also recognized that, pursuant to Article 8(1), "one of the elements of due process is that actions to determine the rights of individuals under . . . any . . . jurisdiction must be conducted within a reasonable time."[540] Advocates can point to the similarity between the timeliness and due process requirements of the Escazú Agreement and those of Article 8(1) of the American Convention to argue that the Inter-American System should extend its understanding of these requirements[541] to proceedings that can affect environmental rights.

Although the Court generally assesses the duration of the proceedings as a whole, beginning with "the first procedural act[,]"[542] at times it will separately evaluate each stage.[543] In administrative procedures, the Court considers the overall duration beginning with the initial act that sets the administrative process in motion, such as the submission of a claim, rather than looking only to the beginning of subsequent judicial proceedings.[544] The Court has also found that the right of access to justice requires that enforcement of a judgment take place within a reasonable time.[545] The broad definition of the types of proceedings covered by the Escazú Agreement's access to justice provisions[546] can be used to guide the Inter-American System in both applying the "reasonable time" standard broadly to the different stages of environmental matters, as mentioned above, but also to include initial decisions or other preliminary steps in that analysis.

As the Court reaffirmed in *Nuestra Tierra*, the Inter-American System determines what constitutes reasonable time by looking at four factors: "(i) the complexity of a matter; (ii) the procedural activity of the interested party; (iii) the conduct of the judicial authorities; and (iv) the effects on the legal situation of the person involved in the proceedings."[547] The Court added the fourth factor due to its concern for the adverse impacts of delay and has

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[539] Case of the Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 133 (Aug. 24, 2010); *see also* Claude Reyes et al., *supra* note 104, at ¶¶ 116-20.

[540] Xákmok Kásek Indigenous Community, *supra* note 539, at ¶ 133.

[541] Case of Ivcher Bronstein v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶¶ 103-105 (Feb. 6, 2001); Baena Ricardo, *supra* note 451, at ¶¶ 124-27.

[542] Case of Tibi v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 168 (Sep. 7, 2004).

[543] Case of Terrones Silva et al. v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 360, ¶ 186 (Sep. 26, 2018); Case of Anzualdo Castro v. Peru, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶¶ 126-27 (Sep. 22, 2009); Yakye Axa Indigenous Community, *supra* note 24, at ¶¶ 65-66.

[544] Case of the Xákmok Kásek Indigenous Community, *supra* note 539, at ¶¶ 67, 127, 137; Case of the Yakye Axa Indigenous Community, *supra* note 24, at ¶¶ 50.16-50.19, 68-69, 71-73, 84-85, 8. In the context of investigations, the Court will begin calculating the duration of the proceedings from the moment State authorities learn about a serious human rights violation, such as a femicide (quoting Case of González et al. ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 290, 294 (Nov. 16, 2009)) or an enforced disappearance (quoting Case of Anzualdo Castro v. Peru, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 131 (Sept. 22, 2009)). *See also* 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: A review of the Standards Adopted by the Inter-American System of Human Rights, Inter-Am. Comm'n. H.R., OEA/Ser.L/V/II.129, doc. 4, ¶ 220 (Sep. 7, 2007).

[545] Acevedo Jaramillo et al., *supra* note 452, at ¶¶ 225, 231, 244, 252, 264, 268-269, 277-278 (Feb. 7, 2006). For a discussion of whether this requirement should be grounded in Article 25 or Article 8 of the American Convention, see *Id.*, Separate Opinion of Judge A.A. Cançado Trindade, ¶¶ 3, 4, 6.

[546] Escazú Agreement, *supra* note 1, at Art. 8(2)(a-c)

[547] Nuestra Tierra, *supra* note 27, at ¶ 301 (citing Case of Ramírez Escobar et al. v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 351, ¶ 257 (Mar. 9, 2018); and Case of Colindres Schonenberg v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 373, ¶ 118 (Feb. 4, 2019). Note that the Court sometimes lists these factors in a different order, as in Case of the Xákmok Kásek Indigenous Community, *supra* note 539, at ¶ 133.

indicated that "[i]f the passage of time has a relevant impact on the judicial situation of the individual, the proceedings should be carried out more promptly so that the case is decided as soon as possible."[548]

The Court places on the State the burden of demonstrating the reasonableness of the time taken to resolve proceedings.[549] In cases involving a lengthy process, the Court has held that "a protracted delay . . . constitutes in itself a violation of the right to fair trial[,]"[550] unless the State can show "that the delay is directly related to the complexity of the case or to the conduct of the parties involved."[551] Where the State does not provide a justification for a significant delay, the Court does not need to apply the above criteria and instead will automatically find a violation of the right to access justice.[552] For example, in *Nuestra Tierra*, the Court found Argentina responsible for a violation of Article 8(1) of the American Convention where the State provided no justification for a three-year delay in the proceedings at issue.[553] The Escazú Agreement's requirement that States guarantee the timeliness of procedures in environmental matters[554] can be used to bolster the continued application of this standard to environmental rights cases before the Inter-American System.

i. Complexity

With regard to the first factor, although the Court has found many types of situations as complex, including the restoration of indigenous territories, it rarely finds a lengthy delay in such cases to be justified simply by their complexity.[555] Instead, where the delays have been caused by "the deficient and delayed actions of the State authorities[,]"[556] rather than the complexity of the matter at hand, the Court is more likely to find a violation.[557] This aspect of the Court's analysis is particularly important in the context of environmental matters, which are likely to be complex. When combined with the Escazú Agreement's specific injunction that States ensure "timely" procedures in environmental matters, advocates can argue that this aspect of the Court's jurisprudence should prevent States from using the complexity of environmental cases as an excuse for unreasonable delay or inaction.

ii. Activity of the Interested Party

For the second factor, the Court will look at whether the interested party actively engaged with the proceeding and complied with their obligations to move the process forward, taking State-caused barriers into account.[558]

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548 Case of Valle Jaramillo et al. v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 192, ¶ 155 (Nov. 27, 2008).

549 Case of Favela Nova Brasília v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 333, ¶ 218 (Feb. 16, 2017).

550 Yakye Axa Indigenous Community, *supra* note 24, at ¶ 88.

551 *Id.*

552 Nuestra Tierra, *supra* note 27, at ¶ 301-02 (citing Case of Bayarri v. Argentine, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 187, ¶ 107 (Oct. 30, 2008); Granier et al., supra note 498, at ¶ 255; and Case of Amrhein et al. v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 354, ¶ 422 (Apr. 25, 2018).

553 Nuestra Tierra, *supra* note 27, at ¶ 302.

554 Escazú Agreement, *supra* note 1, at Art. 8(1).

555 Yakye Axa Indigenous Community, *supra* note 24, at ¶¶ 87-89; Case of Valle Jaramillo et al., *supra* note 548, at ¶ 156; Case of the Moiwana Community, *supra* note 506, at ¶¶ 160-62.

556 Xákmok Kásek Indigenous Community, *supra* note 539 at ¶ 134.

557 Yakye Axa Indigenous Community, *supra* note 24, at ¶ 88.

558 Moiwana Community, *supra* note 506, at ¶ 161 (Jun. 15, 2005); Case of the Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 185 (Jan. 31, 2006).

In the context of administrative proceedings to restore indigenous land rights, the Court considered that the community took affirmative steps to initiate activities within the proceedings.[559] Advocates could use the Escazú Agreement's provisions that enhance the public's ability to exercise the right to access justice to argue that this factor should weigh in favor of alleged victims where the States fail to comply with these requirements and thereby impede their ability to proactively engage in the proceedings. Specifically, the provisions requiring States to ensure "broad active legal standing in defence of the environment[,]"[560] establish "measures to minimize or eliminate barriers to the exercise of the right of access to justice[,]"[561] and guarantee that proceedings are transparent[562] could be used to support this argument.

iii. Conduct of State Authorities

With regard to the conduct of State authorities, the third factor, the Court scrutinizes the diligence with which the State carried out the procedures in question,[563] typically with detailed reference to relevant domestic law[564] and, where appropriate, reference to patterns of delay or impunity.[565] As noted above, in *Xákmok Kasek Indigenous Community*, the Court assigned particular weight to this factor in attributing procedural delays primarily to "the passiveness, inactivity, insufficient diligence, and lack of response of the State authorities."[566] However, the Court has at times found the duration of the proceedings reasonable where the State demonstrated its diligence in pursuing a complex case,[567] or where a combination of a relatively short duration, some State activity, and a lack of evidence as to the other factors persuades the Court that the time is reasonable.[568] Advocates can point to the detailed access to justice provisions of the Escazú Agreement[569] to give specific content about the types of activities States must conduct in environmental proceedings in order to demonstrate diligence under this factor.

iv. Effects on the Person(s) Involved

Finally, as noted above, the fourth factor directs the Court to consider whether, given the situation of the alleged victim and rights at issue, a delay in the proceedings might cause harm that should have led the State to ensure prompt resolution of the matter.[570] In *Xákmok Kasek Indigenous Community*, the Court found that the duration of administrative proceedings to determine the land rights of an indigenous community was not reasonable, in part because the delay in resolving the indigenous community's land claims "had a direct effect on their living

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559 Xákmok Kásek Indigenous Community, *supra* note 539, at ¶ 135.

560 Escazú Agreement, *supra* note 1, at Art. 8(3)(c).

561 *Id.* at Art. 8(4)(a).

562 *Id.* at Art. 8(3)(b).

563 Yakye Axa Indigenous Community, *supra* note 24, at ¶ 88; Xákmok Kásek Indigenous Community, *supra* note 539, at ¶ 134.

564 Yakye Axa Indigenous Community, *supra* note 24, at ¶¶ 65-77, 84-88.

565 Case of the Las Dos Erres Massacre v. Guatemala, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶¶ 134-35 (Nov. 24, 2009); Xákmok Kásek Indigenous Community, *supra* note 539, at ¶ 137.

566 Xákmok Kásek Indigenous Community, *supra* note 539, at ¶ 134.

567 Luna López, *supra* note 301, at ¶¶ 192-93, 196.

568 Kuna Indigenous People of Madungandí and Emberá Indigenous People of Bayano and Their Members, *supra* note 490, at ¶¶ 177, 184-86 (the Court analyzed four proceedings separately and found three of them to violate the reasonable time requirement, with the exception of a three-year criminal proceeding where no evidence justified an expedited proceeding and the State had begun investigations).

569 Escazú Agreement, *supra* note 1, at Art. 8(3). *See also* the discussion on the obligation of prevention, above.

570 Valle Jaramillo, supra note 548, at ¶ 155; Kuna Indigenous People of Madungandí and Emberá Indigenous People of Bayano and Their Members, *supra* note 490, at ¶ 180.

conditions."[571] Similarly, in *Furlan*, the Court found that the adverse effects of delayed proceedings were exacerbated by the vulnerable condition of alleged victims with disabilities, concluding that the State should have exercised "a higher degree of diligence"[572] and that its failure to do so violated the reasonable time requirement.[573]

This aspect of the Inter-American System's understanding of reasonable time complements the Escazú Agreement's clear emphasis on the importance of prevention in environmental matters. Delay in the resolution of environmental proceedings typically implicates some of the most basic human rights, including the rights to life and humane treatment, as discussed extensively in the Inter-American Court's Advisory Opinion on *The Environment and Human Rights*.[574] Partially in recognition of this fact, as well as the frequent impossibility of environmental restoration,[575] the Escazú Agreement has incorporated the preventive principle,[576] the precautionary principle,[577] and the principle of intergenerational equity[578] into the obligations undertaken by States Parties. These principles, in addition to the explicitly preventive provisions of Article 8 of the Escazú Agreement discussed in the preceding subsection,[579] can be used to argue that the Inter-American System should place particular weight on this fourth factor in environmental rights cases, especially those involving delays in the resolution of preventive proceedings.

In a case involving labor rights violations, the Court held that "[d]elay in executing a judgment may not be such as to allow that . . . the right protected by the judgment be adversely affected."[580] In that case, the Court also rejected the State's argument that it was unable to execute the judgment due to budget issues, finding that "[b]udget regulations may not be used as an excuse for many years of delay in complying with the judgments.[581] As noted above, the Escazú Agreement's clear requirement that the State ensure timely execution of environmental decisions[582] can be used to argue that the Inter-American System should apply these requirements to environmental rights cases, including the point that all forms of redress must be enforced in a timely manner. To this end, the Agreement's provision on redress also supports the argument that timely enforcement should include preventive and restorative measures as well as financial compensation not only to affected individuals but potentially also in the form of trust funds designed to support an entire community or ecosystem affected or threatened by environmental harm.[583]

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[571] Xákmok Kásek Indigenous Community, *supra* note 539, at ¶ 136.

[572] Case of Furlan and Family v. Argentina, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246, ¶ 202 (Aug 31, 2012).

[573] *Id.* at ¶¶ 201-04.

[574] Advisory Opinion OC-23/17, *supra* note 25, pp. 44-90.

[575] *Id.* at ¶ 130.

[576] Escazú Agreement, *supra* note 1, at Art. 3(e).

[577] *Id*. at Art. 3(f).

[578] *Id*. at Art. 3(g).

[579] *Id*. at Art. 8(3)(d, g).

[580] Acevedo Jaramillo et al., *supra* note 452, at ¶ 225.

[581] *Id.*

[582] Escazú Agreement, *supra* note 1, at art. 8(3)(f).

[583] *Id*. at art. 8(3)(g).

5. Access to Justice Must be Affordable

a. The Escazú Agreement Requires that Access to Justice in Environmental Matters be Affordable

Included in its guarantees around the right to access justice, the Escazú Agreement requires that proceedings be affordable. Not only does the Escazú Agreement generally require States to "minimize or eliminate barriers to the exercise of the right of access to justice[,]"[584] which presumably includes cost, Article 8(3)(b) requires States to provide "effective, timely, public, transparent and impartial procedures that are not prohibitively expensive."[585] Additionally, Article 8(5) provides that States must "meet the needs of persons or groups in vulnerable situations by establishing support mechanisms, including, as appropriate, free technical and legal assistance[]" to give effect to access to justice.[586]

Additional requirements within Article 8 of the Escazú Agreement, though not mentioning cost explicitly, also require States to undertake some of the high-cost components of environmental litigation. These requirements include the obligation to establish "the use of interpretation or translation[,]"[587] to "facilitate the production of evidence of environmental damage,"[588] and to ensure that State authorities have "access to expertise in environmental matters[.]"[589] These provisions suggest that States may be responsible for the costs of these elements of environmental litigation, rather than the affected individuals or communities.

b. The Escazú Agreement Can be used to Strengthen the Inter-American System's Normative Framework on the Affordability of Access to Justice in Environmental Matters

The Inter-American System also requires that access to justice be affordable but has not yet explored the details of this requirement in the context of environmental rights cases. The Escazú Agreement may provide helpful guidance in this regard.

The Inter-American Court addressed the need to ensure affordability of access to justice in Advisory Opinion OC-11/90 on *Exceptions to the Exhaustion of Domestic Remedies*.[590] The Court stated that Article 1 of the American Convention prohibits States from discriminating against individuals on the grounds of economic status.[591] Persons who cannot afford the costs associated with legal or judicial proceedings are considered to be "discriminated against by reason of his economic status[.]"[592] In criminal proceedings, States may violate Article 8 of the American Convention where "the accused is forced to defend himself because he cannot afford legal counsel[]" and can prove "that the lack of legal counsel affected the right to a fair hearing[.]"[593] In civil or other kinds of cases, the Court has found that the due process guarantees of Article 8 may also require States

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584 Escazú Agreement, *supra* note 1, at Art. 8(4)(a).

585 *Id*. at Art. 8(3)(b).

586 *Id*. at Art. 8(5).

587 *Id*. at Art. 8(4)(d).

588 *Id*. at Art. 8(3)(e).

589 *Id*. at Art. 8(3)(a).

590 Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90, Inter-Am. Ct. H.R. (ser. A) No. 11, ¶¶ 20-31 (Aug. 10, 1990).

591 *Id.* at ¶ 22.

592 *Id.*

593 *Id.* at ¶ 27.

to provide legal counsel where "the circumstances of a particular case or proceeding"[594] indicate that "legal representation is . . . necessary for a fair hearing."[595] The Escazú Agreement's clear direction that States provide vulnerable groups with support including "free technical and legal assistance[]"[596] may be used to clarify that in environmental matters pursued by vulnerable groups, the Inter-American System could find support for technical and legal assistance necessary to comport with the due process guarantees of Article 8 of the American Convention in conjunction with the prohibition against discrimination on the basis of economic status in Article 1.

In the *Case of Cantos v. Argentina*, the Inter-American Court found a violation of Articles 8 and 25 of the American Convention where Argentina demanded that, to pursue his case, Mr. José María Cantos pay approximately 140,000,000 pesos in filing fees, fines accrued from failure to pay initial filing fees within five days, attorneys and expert fees, and interest.[597] The Court held that "[t]he right of access to a court of law cannot be denied because of filing fees[,]"[598] and made similar findings as to regulated attorney's fees[599] and expert fees.[600] It concluded that States violate the right to access justice where the costs involved cause the interested party to "fear . . . being forced to pay disproportionate or excessive sums because they turned to the courts."[601] Accordingly, the Court pronounced that procedural costs required to access and navigate judicial mechanisms must be reasonable[602] and limits placed on the right of access to the courts, including fees, must be proportional to the aim sought.[603]

The affordability provisions of the Escazú Agreement clarify that the Inter-American System should apply this normative framework in the context of environmental matters and find violations of the right to access justice where States impose excessive costs in such cases. The specific provisions that assign State responsibility for some of the more costly aspects of environmental proceedings could be used to guide the Inter-American System in applying this framework to costs associated with the production of environmental evidence and the interventions of environmental experts, for example, thereby deepening the Inter-American System's affordability protections for access to justice in environmental matters. In this vein, although a State may argue that it must impose higher fees in environmental cases that require it to spend more to produce environmental evidence or engage environmental experts, litigants could point to the provisions of the Escazú Agreement to show that States must bear these costs and that the proportionality analysis applied by the Inter-American Court in *Cantos* does not excuse this obligation.

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[594] *Id.* at ¶ 27-28.

[595] *Id.*

[596] Escazú Agreement, *supra* note 1, at Art. 8(5).

[597] Cantos, *supra* note 533, at ¶ 70 (Nov. 28, 2002); see also ¶ 50 (finding that "[a]ny domestic law or measure that imposes costs or in any other way obstructs individuals' access to the courts and that is not warranted by what is reasonably needed for the administration of justice must be regarded as contrary to Article 8(1) of the Convention.") and ¶ 52 (finding that "[a]ny law or measure that obstructs or prevents persons from availing themselves of the recourse in question is a violation of the right of access to the courts," pursuant to Article 25 of the American Convention).

[598] Cantos, *supra* note 533, at ¶ 54.

[599] *Id.* at ¶ 56.

[600] *Id.* at ¶ 62.

[601] *Id.* at ¶ 55.

[602] *Id.* at ¶ 62.

[603] *Id.* at ¶ 54.

6. States Must Assure Access to Justice for Vulnerable Groups

a. The Escazú Agreement Requires States to Facilitate Access to Justice in Environmental Matters for Vulnerable Groups

As discussed further in Section V, the Escazú Agreement commits States to take affirmative steps, including through the provision of "guidance and assistance" to ensure that "persons or groups in vulnerable situations" can meaningfully exercise their environmental access rights.[604] In keeping with the Agreement's overall commitment to ensuring that vulnerable persons or groups can exercise their environmental access rights, Article 8(5) requires States to create support mechanisms to help vulnerable groups access justice, including through the provision of "free technical and legal assistance."[605] This provision recognizes that vulnerable groups face heightened barriers to access justice and may need assistance to enforce their rights.[606] States must also facilitate access to justice by providing interpretation or translation in non-official languages as needed.[607]

A suite of other provisions can be interpreted to give further scope to State obligations regarding access to justice for vulnerable groups when read in combination with the Agreement's commitment to the "[p]rinciple of equality and principle of non-discrimination[,]"[608] the pro persona principle[609] and the related requirement that States "adopt the most favourable interpretation for the full enjoyment of and respect for the access rights when implementing the . . . Agreement."[610] For example, the provision requiring States to give "broad legal standing in defence of the environment[]"[611] should expand the ability of vulnerable groups to engage in proceedings that affect them. Likewise, the requirements that States undertake "measures to minimize or eliminate barriers to the exercise of the right of access to justice"[612] and allow for protective measures[613] should apply with heightened force to vulnerable groups, who may face greater barriers and experience more significant harms where the State fails to prevent environmental damage. Similarly, a joint reading suggests that States should take particular care to ensure adequate reparations that meet the unique needs of vulnerable groups, pursuant to the guarantee of broad measures of redress in Article 8(3)(g).[614]

b. The Escazú Agreement can be used to Strengthen the Inter-American System's Normative Framework on Access to Justice by Vulnerable Groups in Environmental Matters

Although the Inter-American System requires States to consider vulnerability when providing access to justice, advocates can strengthen these existing protections by pointing to the specific provisions of the Escazú Agreement that obligate States to take affirmative steps to facilitate access to justice for vulnerable groups.

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604 Escazú Agreement, *supra* note 1, at Art. 4(5).
605 *Id.* at Art. 8(5).
606 Dávila, *supra* note 35, at p. 34.
607 Escazú Agreement, *supra* note 1, at Art. 8(4)(d).
608 *Id.* at Art. 3(a).
609 *Id*. at Art. 3(k).
610 *Id*. at Art. 4(8).
611 *Id*. at Art. 8(3)(c).
612 *Id*. at Art. 8(4)(a).
613 *Id*. at Art. 8(3)(d).
614 *Id*. at Art. 8(3)(g).

The Inter-American System takes an intersectional approach in ensuring that vulnerable groups enjoy equal access to justice and requires States to take victims' identities or vulnerabilities into account when ensuring meaningful access to justice.[615] Furthermore, States must adapt procedural requirements to the situation of vulnerable persons and groups and ensure they have equal access to justice without discrimination.[616] More generally, States owe a heightened duty of protection towards groups facing discrimination and must "adopt positive measures to reverse any discriminatory situations that exist in their societies that affect a specific group of persons."[617]

The Inter-American System has applied this approach to the specific situations of different vulnerable groups, including persons with disabilities,[618] undocumented migrants, and women. In *Furlan*, the Court held that States must apply "a higher degree of diligence"[619] to avoid delay in the resolution of proceedings in recognition of the vulnerability of persons with disabilities to delay or other barriers to effective access to justice.[620] The Court has also required States to recognize the vulnerability of undocumented migrants and ensure equal access to justice regardless of migratory status.[621] With regard to gender, the Court has also recognized that States must guarantee access to justice in a way that takes into account the intersectional vulnerability experienced by women, particularly in the context of violence against women.[622]

The Court has also developed an extensive line of jurisprudence requiring States to account for the vulnerability of indigenous peoples in ensuring access to justice, particularly in the context of land rights. For example, in *Kuna Indigenous People of Madungandi and Embera Indigenous People of Bayano v. Panama*, the Inter-American Court found a violation of the right to access justice because the administrative procedures available to the communities to challenge violations of their rights "did not obtain a response that permitted an adequate determination of their rights and obligations."[623] The Court emphasized that to comply with Article 25 of the American Convention, States must ensure these proceedings "take into account [indigenous communities'] specificities, their economic and social characteristics, as well as their situation of special vulnerability, their

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615 Kuna Indigenous People of Madungandi and Embera Indigenous People of Bayano and Their Members, *supra* note 490, at ¶ 167; Case of Furlan and Family, *supra* note 572, at ¶¶ 201-02.

616 Furlan and Family, *supra* note 572, at ¶ 268; Case of Tiu Tojín v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 190, ¶ 97 (Nov. 26, 2008); Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 240 (Sep. 8, 2005) (Note that the Court declined to rule on the access to justice claims before it in this case because the facts giving rise to these claims occurred before the Dominican Republic accepted the Court's contentious jurisdiction, see ¶ 201).

617 Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis), *supra* note 504, at ¶ 404; Juridicial Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 104 (Sep. 17, 2003).

618 *See also* Ximenes Lopes, *supra* note 298, at ¶ 99 (holding that States have heightened obligations of protection, including to investigate and sanction abuses, towards persons with disabilities in private mental health institutions).

619 Furlan and Family, *supra* note 572, at ¶ 202.

620 *Id.* at ¶¶ 201-202.

621 Advisory Opinion OC-18/03, *supra* note 617 at ¶¶ 107, 159; *see also* Due Process in Procedures for the Determination of Refugee Status and Statelessness and the Granting of Complementary Protection, Inter-Am. Comm'n H.R. OEA/Ser. L/V/II. Doc. 255 ¶¶ 98-102 (2020).

622 Case of González et al. ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 258, 284 (Nov. 16, 2009); Case of Véliz Franco et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 277, ¶ 210 (May 19, 2014); Case of Digna Ochoa et al. v. México, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 447, ¶ 101 (Nov. 25, 2021).

623 Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and Their Members, *supra* note 490, at ¶ 173.

customary law, values, and customs."[624] As the Court held in *Yakye Axe*, this includes the requirement that States "provide an effective means with due process guarantees . . . for [indigenous peoples] to claim traditional lands[.]"[625]

The Court has also directed States to take affirmative measures to redress discrimination faced by indigenous peoples in accessing justice and remove existing barriers that exacerbate their vulnerability. In *Saramaka People v. Suriname*, the Court found that the State, by failing to recognize the legal capacity of the Saramaka people, had "place[d] them in a vulnerable situation where . . . the Saramaka people may not seek, as a juridical personality, judicial protection against violations of their . . . rights[,]"[626] thereby violating the right to judicial protection.[627] The Court likewise found the State liable for impermissible discrimination in access to justice against indigenous peoples in *Tiu Tojín v. Guatemala*,[628] holding "that the next of kin of the missing victims faced obstacles when accessing justice due to the fact that they belonged to the Mayan Indian People."[629] In that case, the Court concluded the State should take affirmative measures to guarantee their right to a fair trial without discrimination and in recognition of the barriers to access justice that they faced as indigenous persons.[630] Specifically, "the State must ensure that they understand and are understood in the legal proceedings . . . offering them interpreters or other effective means for said purpose."[631] The Court further required the State to ensure that the alleged victims did not need to expend excessive effort in order to access the authorities involved and to "pay an amount for future expenses, as a way of guaranteeing that the victims can act as plaintiffs in the criminal proceedings[.]"[632]

The expansive definition of vulnerable groups in the Escazú Agreement combined with its specific directives as to the affirmative measures that States must undertake to ensure access to justice for such groups can be used to encourage the Inter-American System to apply its existing protections both more broadly and more forcefully in the context of environmental harm. For example, advocates may use these provisions to push the Inter-American System to recognize that additional groups beyond those traditionally recognized as vulnerable require additional protections to access justice where the presence or threat of environmental harm creates a situation of vulnerability under the terms of the Escazú Agreement.

Where litigants lack meaningful access to the courts or other procedures, the provision on legal standing offers a concrete formulation to bolster the Inter-American System's existing requirements that a lack of juridical personality (as in the case of indigenous peoples) or discriminatory barriers faced in accessing justice (as in the case of undocumented migrants) and ensure that all individuals and groups placed in a situation of vulnerability by environmental harm can enjoy equal access to justice. The other provisions noted above can similarly be used to guide the Inter-American System in specifying the types of positive measures that might be required to give effect to the right to access justice in environmental matters.

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624 *Id.* at ¶ 167; *see also* Yakye Axa Indigenous Community, *supra* note 24, at ¶ 63 (Jun. 17, 2005); Saramaka People, *supra* note 27, at ¶ 178; Tiu Tojín, *supra* note 616, at ¶ 96.

625 Yakye Axa Indigenous Community, *supra* note 24, at ¶ 96; *see also S*aramaka People, *supra* note 27, at ¶ 178.

626 Saramaka People, *supra* note 27, at ¶ 173.

627 *Id*. at ¶ 175.

628 This case involved the State's failure to investigate and adjudicate the enforced disappearance of a young indigenous woman and her child during Guatemala's internal armed conflict, rather than indigenous land rights.

629 Tiu Tojín, *supra* note 616, at ¶ 97.

630 *Id.* at ¶ 99.

631 *Id.* at ¶ 100.

632 *Id.*

7. Conclusion

In sum, both the Escazú Agreement and the Inter-American System recognize the right to access justice. By incorporating provisions of the Escazú Agreement in their arguments before the institutions of the Inter-American System, advocates litigating cases of environmental harm can deepen existing protections of the right to access justice in relation to the environment, particularly on issues of effectiveness, timeliness, and affordability of environmental justice mechanisms, including for vulnerable groups.

V. Special Protections for Vulnerable Persons and Human Rights Defenders

A. The Escazú Agreement and the Inter-American System Recognize Heightened Protections for Vulnerable Groups and Human Rights Defenders

In recognition of the particular vulnerability of certain groups to human rights violations and their negative effects, both the Inter-American System and the Escazú Agreement place additional obligations on States to provide heightened protection to these groups.

Perhaps the most significant contribution of the Escazú Agreement to the protection of environmental rights in the Americas is its recognition of State obligations to protect groups that are placed in a situation of vulnerability as result of environmental harm and its strong protections for environmental human rights defenders. The treaty weaves these heightened protections throughout its substantive provisions, continually emphasizing that States must take affirmative actions to protect vulnerable groups and human rights defenders. ECLAC and UNHCHR leadership have referred to the protection of human rights defenders as the fourth pillar of the Escazú Agreement.[633]

This section provides an overview of these special protections under both the normative framework of the Inter-American System and the text of the Escazú Agreement. It also offers an in-depth analysis of the specific norms relevant to human rights defenders, as an example of how these special protections apply to a vulnerable group and in recognition of their centrality to the protection of environmental human rights.

1. The Escazú Agreement Recognizes Additional Protections for Vulnerable Groups in Case of Environmental Harm

Within the Inter-American System, the concept that States owe a heightened duty of protection to vulnerable groups, who are thereby entitled to special protections, is well established. This concept is grounded in the Inter-American Court of Human Rights' interpretation of the nature of State obligations relating to the principle of non-discrimination recognized in Article 1.1 of the American Convention on Human Rights.[634] In this regard, the

633 *Countries of Latin America and the Caribbean Reaffirm the Escazú Agreement as a Fundamental Tool for Ensuring a Healthy Environment for Present and Future Generations*, ECLAC, *supra* note 12.

634 *See* Case of Baldeón García v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 147, ¶ 81 (Apr. 6, 2006); Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 154 (Mar. 29, 2006); Case of the Pueblo Bello Massacre, *supra* note 558, at ¶ 111; Case of Furlan and Family v. Argentina, *supra* note 572, at ¶ 134 (Aug. 31, 2012); Case of the Kichwa Indigenous People of Sarayaku, *supra* note 28, at ¶ 244 (Jun.

Court has held that Article 1.1 requires "that States offer effective protection that considers the particularities, social and economic characteristics, as well as the situation of special vulnerability, customary law, values, customs, and traditions."[635] The Court has recognized that some groups of people are more vulnerable to harm than others and held that "any person who is in a vulnerable condition is entitled to special protection, which must be provided by the States if they are to comply with their general duties to respect and guarantee human rights."[636]

The Court has further held that States must not only "refrain from violating such rights, but also adopt positive measures, to be determined according to the specific needs of protection of the legal person, either because of his personal condition or the specific situation he is in[.]"[637] Finally, the Court has acknowledged the intersectional nature of vulnerability, calling on States to "take into consideration that the groups of persons who live in adverse conditions and have few resources, such as those who live in extreme poverty, children and teenagers who are at risk, and indigenous communities" [638] are more likely to face additional vulnerabilities, including mental disability,[639] and must also be protected from discrimination arising from the same.[640] Accordingly, the Court requires that States provide heightened protections for certain groups due to the legal and factual barriers they face in enjoying and accessing their human rights,[641] including economic status, age, disability, gender, ethnic origin, and social condition, among others.[642]

In the context of economic, social, cultural, and environmental rights relevant to situations of environmental harm, the Court has analyzed the State obligations arising from these rights as including special protections for vulnerable groups. In its Advisory Opinion 23 on *The Environment and Human Rights*, the Inter-American Court clearly stated that States are directly responsible for protecting the right to a healthy environment of persons or communities in vulnerable situations.[643] The Court specified that vulnerable groups that are especially vulnerable to environmental damage and therefore should be protected include "indigenous peoples, children, people living in extreme poverty, minorities, and people with disabilities, [and women], among others…"[644] The Court has further recognized that vulnerable populations that have a close relationship and dependency on traditional lands and their natural environment "are especially vulnerable to environmental degradation."[645]

27, 2012); Case of Anzualdo Castro v. Peru, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 37 (Sep. 22, 2009).

635 Case of Rosendo Cantú et al. v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 184 (Aug. 31, 2010).

636 Case of Ximenes Lopes *supra* note 298, at ¶ 103.

637 *Id.* (citing to the Court's grounding of this proposition in its analysis of State obligations under Article 1.1 of the American Convention on Human Rights in the following judgments: Baldeón García, *supra* note 634, at ¶ 81; Sawhoyamaxa Indigenous Community, *supra* note 634, at ¶ 154; Case of the Pueblo Bello Massacre *supra* note 558, at ¶ 111. *See also* Case of Furlan and Family, *supra* note 572, at ¶ 134).

638 Case of Ximenes Lopes *supra* note 298, at ¶ 149.

639 *Id.*

640 *Id.* at ¶ 105*; see also* Case of the Sawhoyamaxa Indigenous Community, *supra* note 634, at ¶ 154.

641 *See* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, *supra* note 617 at ¶ 112.

642 *See* Rosmerlin Estupiñan-Silva, *La Vulnerabilidad en la Jurisprudencia de la Corte Interamericana de Derechos Humanos: Esbozo de una Tipologia*, Derechos Humanos y Políticas Públicas, 2014, at 193-231.

643 Advisory Opinion OC-23/17, *supra* note 25, at ¶¶ 67-68.

644 *Id.*

645 Advisory Opinion OC-23/17, *supra* note 25, ¶ 67; *see also Id.* at ¶ 113. In Awas Tingni, the Court found that indigenous communities have rights to their ancestral land through their collective right to property. Furthermore, indigenous peoples have an extremely dependent relationship with their natural environment. The Court recognized the need to protect the environment due to its relationship to human

Consequently, the Court has held that "States are legally obliged to confront these vulnerabilities based on the principle of equality and non-discrimination."[646]

Both the Commission and the Court have historically recognized persons or groups may be vulnerable based on identity,[647] reliance and relationship to their natural environment,[648] work,[649] and historical discrimination.[650] Groups traditionally recognized as vulnerable include indigenous peoples,[651] tribal peoples or communities of African descent,[652] minorities,[653] persons with disabilities,[654] LGBTI+ individuals,[655] and women.[656] Additional

rights, especially in regard to indigenous peoples. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 79, (Aug. 31, 2001). In Yakye Axa, the Court once again established that indigenous peoples have close ties to their lands and ecosystem. The Court found that conditions for a decent life include access to and the quality of water, food, and health as well as environmental protection, going on to state that these conditions "have a major impact on . . . basic conditions to exercise other human rights." Case of the Yakye Axa Indigenous Community, *supra* note 24, at ¶ 163. The Court also established that indigenous communities could suffer human rights violations from lack of clean water, unsanitary conditions, and inadequate access to medical care when prevented from accessing their land – therefore indigenous communities are heavily interdependent on their ancestral lands and protecting these lands is imperative for both their physical and cultural survival. *Id.* at ¶¶ 97-98, 131. The Court again recognized the relationship between indigenous peoples and their need for a healthy environment in Xámok Kásek. In that case, the Court found that when the indigenous community lost access to their land without being able to participate in the relevant decision-making process, the community was so deprived that it could not survive either physically or culturally. Case of the Xámok Kásek Indigenous Community, *supra* note 539.

646 Nuestra Tierra, *supra* note 27, at ¶ 209 (internal citations omitted); See also, 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 Articles 4(1) and 5(1) of the American Convention on Human Rights). Advisory Opinion OC-23/17, *supra* note 25, at ¶¶ 67-68.

647 *See, e.g.*, Compendium on Equality and Non-Discrimination: Inter-American Standards, Inter-Am. Comm'n H.R, OEA/Ser. L/ V/II.171, doc. 31, ¶¶ 47-48 (Feb. 12, 2019); Case of the Gómez Paquiyauri Brothers v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶¶ 160, 164, 167-171 (Jul. 8, 2004).

648 *See, e.g.*, Nuestra Tierra, *supra* note 27, at ¶ 209 (internal citations omitted); Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, *supra* note 80, ¶¶ 48-57.

649 *See, e.g.*, Case of Bedoya Lima et al. v. Colombia. Merits, Reparations and Costs. Inter-Am. Ct. H.R. (ser. C) No. 431, ¶¶ 40, 91, 94 (Aug. 26, 2021); Annual Report of the Inter-American Commission on Human Rights 2013, Annual Report of the Office of the Special Rapporteur for Freedom of Expression, Inter-Am. Comm'n H.R, OEA/Ser.L/V/II., doc. 50, ¶¶ 355-477 (Dec. 31, 2013).

650 *See, e.g.*, Compendium on Equality and Non-Discrimination: Inter-American Standards, *supra* note 647, ¶¶ 47-48; Economic, Social, Cultural and Environmental Rights of Persons of African Descent, Inter-American Standards to Prevent Combat and Eradicate Structural Racial Discrimination, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II., doc. 109, ¶¶ 1-2 (Mar. 16, 2021).

651 *See, e.g.*, Compendium on Equality and Non-Discrimination: Inter-American Standards, *supra* note 647, ¶¶ 78-79*;* Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, *supra* note 80, ¶¶ 48-57.

652 Economic, Social, Cultural and Environmental Rights of Persons of African Descent, Inter-American Standards to Prevent Combat and Eradicate Structural Racial Discrimination, *supra* note 650, ¶¶ 16-19.

653 *See, e.g.*, Compendium on Equality and Non-Discrimination: Inter-American Standards, *supra* note 647, ¶¶ 47- 48; Advisory Opinion OC-23/17, *supra* note 25, ¶ 67.

654 Furlan and Family, *supra* note 572, at ¶ 134 (Aug. 31, 2012); Case of Ximenes Lopes, *supra* note 298, at ¶ 103; Compendium on Equality and Non-Discrimination: Inter-American Standards, *supra* note 647, ¶¶ 94-95.

655 *See, e.g.*, Advances and Challenges towards the recognition of the Rights of LGBTI Persons in the Americas, Inter-Am. Comm'n H.R, OEA/Ser.L/V/II.170, doc. 184, ¶ 39 (Dec. 7, 2018); Compendium on Equality and Non-Discrimination: Inter-American Standards, *supra* note 647, ¶¶ 87-88.

656 Compendium on Equality and Non-Discrimination: Inter-American Standards, *supra* note 647, ¶¶ 70-73.

groups recognized by the Court and Commission as vulnerable include children,[657] the elderly,[658] displaced persons and other migrants,[659] persons deprived of liberty,[660] persons living in extreme poverty,[661] and human rights defenders.[662] More recently, Court has also observed that, in relation to the right to a healthy environment, some "groups [] are especially vulnerable to environmental damage," and may experience resulting human rights violations "with greater intensity[,]" indicating an increased recognition of the ways that environmental harm can place individuals or communities in a situation of vulnerability.[663]

2. The Escazú Agreement Creates Additional Protections for Vulnerable Groups in Cases of Environmental Harm

This recognition that environmental harm may place people in a situation of vulnerability requiring heightened protection is reflected in the approach taken by the Escazú Agreement. The Escazú Agreement applies a more flexible, intersectional approach to this concept of applying heightened protections to vulnerable groups by expanding these protections to extend not only to historically marginalized groups but to all groups in a situation of vulnerability as a result of environmental harm.[664]

Article 2 defines "Persons or groups in vulnerable situations" as: "those persons or groups that face particular difficulties in fully exercising the access rights recognized in the present Agreement, because of circumstances or conditions identified within each Party's national context and in accordance with its international obligations."[665] By defining vulnerability in terms of individual situations while still covering the historically marginalized groups described above, the Escazú Agreement may be used to apply special protections to a broader range of groups than previously recognized within the Inter-American System.

Article 4 of the Escazú Agreement asserts that States should ensure guidance and assistance is particularly provided to "those persons or groups in vulnerable situations" so that they may fully exercise their rights under the treaty,[666] and various other provisions provide specific guidance in this regard.[667] Accordingly, in cases involving either historically vulnerable groups or those rendered vulnerable to access rights violations as a result of environmental harm, the Escazú Agreement can be invoked to support the claim that States must apply heightened protections to these groups, as well as to suggest specific steps that States must take in doing so.

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[657] *See, e.g.*, Case of Gómez Paquiyauri Brothers v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶¶ 124, 160, 164, 167-171 (Jul. 8, 2004); Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 144-146 (Nov. 19, 1999); Case of Bulacio vs. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 138 (Sep. 18, 2003); Case of Furlan and Family, *supra* note 572, at ¶ 126; Freedom of Expression, Childhood, Freedom of Expression, and the Media in the Americas, Special Rapporteur for Freedom of Expression, Inter-Am. Comm'n H.R., OEA/Ser. L/V/II, CIDH/RELE/INF.23/19, ¶¶ 28-39 (Feb. 2019).

[658] Compendium on Equality and Non-Discrimination. Inter-American Standards, *supra* note 647, ¶¶ 98-100.

[659] *See, e.g.*, Advisory Opinion OC-18/03, *supra* note 617 at ¶¶ 112-113; Due Process in Procedures for the Determination of Refugee Status and Statelessness and the Granting of Complementary Protection, *supra* note 621, ¶ 94.

[660] *See, e.g.*, Case of Maritza Urrutia v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 87 (Nov. 27, 2003); Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Inter-Am. Comm'n H.R., OEA/Ser/L/V/II.131, doc. 26 (Mar. 14, 2008).

[661] Advisory Opinion OC-23/17, *supra* note 25, ¶ 67.

[662] Digna Ochoa, *supra* note 622, at ¶¶ 100-101; Luna López, *supra* note 301, at ¶¶ 122-23.

[663] Advisory Opinion OC-23/17, *supra* note 25, ¶ 67; *see also* Nuestra Tierra, *supra* note 27, at ¶ 209 (internal citations omitted).

[664] Escazú Agreement, *supra* note 1, at Art. 2(e)

[665] Escazú Agreement, *supra* note 1, at Art. 2(e)

[666] *Id*. at Art. 4(5).

[667] *See, e.g.*, *id.* at Arts. 5.3-5.4, 5.17, 6.6, 7.14, 8.5, and 10.2(e).

3. The Escazú Agreement Strengthens Existing Protections for Human Rights Defenders in the Inter-American System

The Escazú Agreement is the first regional human rights treaty to include specific provisions requiring States to protect and promote the work of human rights defenders.[668] The States negotiating the treaty included this provision because of the increasing volume and intensity of attacks against human rights defenders in Latin America and the Caribbean, particularly following the 2016 murder of indigenous environmental human rights defender Berta Cáceres.[669] Human rights defenders, particularly those working to defend human rights related to the environment[670] face a disproportionately and increasingly high risk of attacks, killings,[671] threats, and other acts of repression against their work in the Americas.[672] States frequently criminalize the work of human rights defenders.[673] As a result, human rights defenders constitute a vulnerable group due to the threats they face for their work.

As noted above, the Inter-American Commission and Court have already recognized this situation and the special protections owed to human rights defenders by States, but the explicit protections provided under the Escazú Agreement make clear that States must take affirmative measures to "guarantee an enabling environment"[674] to protect and promote the work of environmental human rights defenders in exercising their environmental access rights and those of the individuals and communities they serve. Accordingly, as the Inter-American Commission noted in its recent resolution on environmental human rights defenders, "the Escazú Agreement is a milestone, because it stresses protection for defenders and their role: its spirit reminds us that, to protect the environment, we need to start by protecting the people who defend it."[675] This section offers some arguments that advocates can present before the Inter-American System to begin to fulfill this promise.

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668 *Id.* at Preface, Arts. 4(6) and 9; *see also Secretary General's message marking the Entry into Force of the Escazú Agreement*, U.N. April 22, 2021, available at https://www.un.org/sg/en/content/sg/statement/2021-04-22/secretary-generals-message-marking-the-entry-force-of-the-escazú-agreement.

669 Kendrick Foster, Protecting Latin America's Environmental Defenders: The Fight for the Agreement, Harvard International Review (Aug. 25, 2021), available at https://hir.harvard.edu/protecting-latin-americas-environmental-defenders-the-fight-for-the-escazu-agreement/; Front Line Defenders, Global Analysis 2021, p. 28 (Feb. 23, 2022), available at https://www.frontlinedefenders.org/sites/default/files/2021_global_analysis_-_final.pdf; *see also* Dávila, *supra* note 35, at pp. 38-40.

670 Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development, U.N. Human Rights Council, Resolution A/HRC/40/L.22/Rev.1 at ¶ 1 (Mar. 20, 2019); Human rights defenders & business in 2021: Protecting the rights of people driving a just transition, Business & Human Rights Resource Center (Apr. 05, 2022), available at https://www.business-humanrights.org/en/from-us/briefings/hrds-2021/; Front Line Defenders, Global Analysis 2020 (Feb. 9, 2021), available at https://www.frontlinedefenders.org/sites/default/files/fld_global_analysis_2020.pdf.

671 Front Line Defenders, Global Analysis 2021, p. 30 (Feb. 23, 2022), available at https://www.frontlinedefenders.org/sites/default/files/2021_global_analysis_-_final.pdf.

672 Global Witness, Defending Tomorrow, p. 9 (Jul. 05, 2020), available at https://www.globalwitness.org/documents/19938/Defending_Tomorrow_EN_high_res_-_July_2020.pdf.

673 Criminalization of the Work of Human Rights Defenders, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II., doc. 49/15, ¶ 74 (Dec. 31, 2015).

674 Escazú Agreement, *supra* note 1, at Art. 4(6).

675 *U.N. Special Rapporteur on the situation of human rights defenders*, Mandate, Retrieved from: https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/mandate.

4. Environmental Defenders Are Human Rights Defenders Entitled to Special Protections

The UN Special Rapporteur on the situation of human rights defenders defines human rights defenders as "all persons, who individually or in association with others, act to promote or protect human rights peacefully,"[676] and environmental human rights defenders as "individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora, and fauna."[677] The Inter-American Court has held that the status of a human rights defender is not defined by whether they are a private citizen or a public servant but by the work they do.[678] This work includes activities such as monitoring, reporting and educating about human rights.[679] The Court has also recognized that the work of environmental defenders is human rights work that entitles them to the same heightened protections as other human rights defenders.[680]

States have the obligation to respect, protect, and guarantee the rights of human rights defenders. International human rights law recognizes the right to defend rights.[681] As the Inter-American Commission has noted, defenders serve as a crucial backbone to every democratic society, since they "contribute to the improvement of social, political and economic conditions, the reduction of social and political tensions, the building of peace, domestically and internationally, and the nurturing of national and international awareness of human rights."[682] The Court has deepened this understanding, recognizing "that the activities of monitoring, denunciation and education that human rights defenders perform make an essential contribution to respect for human rights, because they act as guarantors against impunity."[683]

To guide States in applying existing norms to the situation of human rights defenders, the United Nations adopted the Declaration on Human Rights Defenders in 1998.[684] According to the Declaration on Human Rights Defenders, States have a special obligation to respect, protect, and guarantee human rights defenders' rights.[685] To protect defenders' rights, States need to actively prevent violations, [686] including those committed by non-

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[676] U.N. Secretary-General, *Situation of human rights defenders*, ¶ 7, U.N. Doc. A/71/281 (Aug. 03, 2016) [hereinafter U.N. Doc. A/71/281].

[677] *Id.*; Case of Human Rights Defender et al. v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 283, ¶ 129 (Aug. 28, 2014). The UN takes the same approach. *See*, Office of the United Nations High Commissioner for Human Rights, *Human Rights Defenders: Protecting the Right to Defend Human Rights*, Factsheet No. 29, ¶¶ 6-8 (Apr. 2004).

[678] In the Case of Kawas-Fernández v. Honduras, the Court found that Jeannette Kawas-Fernández was an environmental human rights defender due to her engagement in "the conversation of the environment and natural resources." Case of Kawas-Fernández v. Honduras, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 196, ¶ 19 (Apr. 3, 2009); *see also*, Human Rights Defender et al. v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 283, ¶ 129 (Aug. 28, 2014); Case of Luna López, *supra* note 301, at ¶ 122.

[679] Luna López v. Honduras, *supra* note 301, at ¶ 123; Kawas-Fernández, supra note 678, at ¶ 147.

[680] Luna López, *supra* note 301, at ¶ 123; Kawas-Fernández, *supra* note 678, at ¶ 147.

[681] Criminalization of the Work of Human Rights Defenders, *supra* note 673, ¶¶ 23-28; *Cf.* Case of Digna Ochoa et al., *supra* note 662, at ¶¶ 34, 100.

[682] Criminalization of the Work of Human Rights Defenders, *supra* note 673, ¶ 20.

[683] Digna Ochoa, *supra* note 662, at ¶ 100.

[684] G.A Res. 53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Dec. 09, 1998) [hereinafter G.A. Res. 53/144].

[685] G.A. Res. 53/144, *supra* note 684 at Art. 2.

[686] G.A. Res. 53/144, *supra* note 684 at Arts. 2, 9, 12; *see also* U.N. Special Rapporteur on the situation of human rights defenders, *Commentary on the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,* pp. 8-10 (Jul. 2011).

State actors, such as corporations.[687] States guarantee the rights of human rights defenders by adopting positive measures like implementing domestic laws, both to protect defenders and to create an enabling environment for the defense of rights.[688] While the Declaration is not binding, it provides an authoritative interpretation on the application of existing human rights standards to the specific situation of human rights defenders; a broad civil society coalition is currently working towards adoption of a binding international human rights treaty on the rights of human rights defenders, known as the Esperanza Protocol.[689]

The Escazú Agreement holds a special place in the protection of human rights defenders for its clear, broad, and proactive language requiring States to protect and promote their work in the context of environmental protection. Specifically, in its preamble, the treaty acknowledges the important contributions of human rights defenders, "[r]ecognizing the important work . . . of human rights defenders in environmental matters for strengthening democracy, access rights and sustainable development and their fundamental contributions in this regard[.]"[690] Under Article 4, which outlines the general obligations of States Parties, the treaty charges States with the obligation to affirmatively "guarantee an enabling environment for the work of persons, associations, organizations or groups that promote environmental protection, by recognizing and protecting them."[691] Not only does this language provide States with a clear mandate to protect the work of environmental defenders and ensure that they are encouraged to carry it out, but it offers a strategically broad definition of the individuals and groups that enjoy such protection.

Finally, the treaty devotes an entire article, Article 9, to a non-exclusive list of the specific protections due to environmental defenders, incorporating again that broad definition of those eligible for these heightened protections[692] while explicitly referencing existing State obligations towards human rights defenders under international human rights law.[693] Article 9 also strongly restates existing Inter-American human rights standards obliging States to respond in an "appropriate, effective and timely" manner to any threats or attacks against human rights defenders while exercising their rights under the treaty.[694]

In the First Conference of the Parties to the Escazú Agreement, the States parties reaffirmed the urgency of implementing the treaty's strong protections for human rights defenders in environmental matters. In Decision I/6, the parties "stress[ed] the importance of the work of human rights defenders in environmental matters[]" and "reaffirm[ed] the critical importance of guaranteeing an enabling environment for the work of [those who] promote environmental protection, by recognizing and protecting them[.]"[695]

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687 U.N. Special Rapporteur on the situation of human rights defenders, *Commentary on the Declaration on the Right and Responsibility of Individuals, Groups and Organs and Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, pp. 10-11 (Jul. 2011); *see, e.g.*, Business and Human Rights Research Center, *In the Line of Fire*, (Mar. 2021), available at https://media.business-humanrights.org/media/documents/HRD_2020_Snapshot_EN_v9.pdf.

688 G.A. Res. 53/144, *supra* note 684 at Arts. 2, 3.

689 Center for Justice and International Law, Esperanza Protocol (1st ed. 2021), available at https://esperanzaprotocol.net/wp-content/uploads/2022/06/Esperanza-Protocol-EN-2.pdf.

690 Escazú Agreement, *supra* note 1, at Preamble.

691 *Id.* at Art. 4(6).

692 *Id*. at Art. 9(1).

693 *Id*. at Art. 9(2).

694 *Id.* at Art. 9(3); Case of Digna Ochoa, *supra* note 662, at ¶ 100.

695 ECLAC. First meeting of the Conference of the Parties to the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Draft Decision I/6, Human Rights Defenders in Environmental Matters (April 22, 2022), Preamble, available at https://acuerdodeescazu.cepal.org/cop1/sites/acuerdodeescazucop1/files/22-00302_cop-ez.1_draft_decision_6_web.pdf. To implement this commitment, the parties decided "to establish [a] working group on human rights defenders in environmental matters" that will be charged with developing an action plan for presentation at the second Conference

5. Latin American Environmental Human Rights Defenders are Particularly Vulnerable

In their role of promoting human rights and advocating against violations, human rights defenders often become targets themselves.[696] They experience grave human rights violations in retribution for their work, such as killings, physical attacks, intimidation, and criminalization.[697] Environmental defenders face particularly high risks; for example, recent data from the Business and Human Rights Resource Center shows that nearly 70% of attacks against human rights defenders in 2021 were against climate, land, and environmental defenders.[698] Likewise, Latin American human rights defenders face disproportionately high risks;[699] in the last several years, the region has been home to the highest proportion of all global targeted killings of activists, and in 2021, 70% occurred in the Americas.[700]

As noted above, the Escazú Agreement's strong protections for environmental defenders were drafted in recognition of this regional context, highlighting the urgency of strategic and effective litigation and advocacy to achieve implementation of these standards.

6. The Escazú Agreement Can Build on Existing Inter-American Protections for Environmental Defenders

Because the Escazú Agreement defines environmental defenders broadly and places clear, proactive obligations on States to protect and promote their work through the creation of a safe, enabling environment, it can be an essential tool to broaden protections for environmental defenders in the Americas. Combined with existing protections for human rights defenders within the Inter-American System, the Escazú Agreement can strengthen and broaden these standards while providing the Inter-American Commission and Court with the normative foundation to push States to take more concrete and effective steps towards meaningful protection of environmental defenders under threat.

As noted above, the Escazú Agreement acknowledges the important contributions of human rights defenders and includes binding obligations requiring States to establish safe working conditions for them.[701]

Specifically, Article 9 states that "[e]ach Party shall guarantee a safe and enabling environment for persons, groups, and organizations that promote and defend human rights in environmental matters so that they are able

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of the Parties and to "hold an annual forum on human rights defenders in environmental matters[.]" *Id*. at ¶¶ 1-3. It also urged all countries in the region to strengthen their efforts to guarantee the rights of human rights defenders in environmental matters. *Id*. at ¶ 4. Note that as of the time of writing, ECLAC had organized a regional forum on environmental human rights defenders to begin elaborating the Action Plan on Environmental Defenders of the Escazú Agreement. *See*, ECLAC, First Annual Forum on Human Rights Defenders in Environmental Matters in Latin America and the Caribbean, available at https://www.cepal.org/en/events/first-annual-forum-human-rights-defenders-environmental-matters-latin-america-and-caribbean.

696 U.N. Doc. A/71/281, *supra* note 676, ¶ 26.

697 Front Line Defenders, Global Analysis 2021, p. 17 (Feb. 23, 2022), available at https://www.frontlinedefenders.org/sites/default/files/2021_global_analysis_-_final_-_update_3_feb_2023.pdf.

698 Business & Human Rights Resource Center, *Human rights defenders & business in 2021: Protecting the rights of people driving a just transition* (Apr. 05, 2022), available at https://www.business-humanrights.org/en/from-us/briefings/hrds-2021/human-rights-defenders-business-in-2021-protecting-the-rights-of-people-driving-a-just-transition/.

699 Global Witness, Defending Tomorrow, p. 9 (Jul. 05, 2020), available at https://www.globalwitness.org/documents/19939/Defending_Tomorrow_EN_low_res_-_July_2020.pdf.

700 Front Line Defenders, Global Analysis 2021, p. 5, 30 (Feb. 23, 2022), available at https://www.frontlinedefenders.org/sites/default/files/2021_global_analysis_-_final_-_update_3_feb_2023.pdf.

701 Escazú Agreement, *supra* note 1, at Preface.

to act free from threat, restriction and insecurity."[702] Article 9.2 emphasizes States' duty to recognize, protect, and promote all rights of environmental human rights defenders.[703] Additionally, Article 9.3 stresses States' duty to prevent attacks and threats against defenders, as well the duty to investigate and provide remedies for previous attacks.[704]

With its strong focus on human rights defenders, the Escazú Agreement may be used to deepen existing protections within the Inter-American System through strategic litigation and advocacy.

7. Existing Inter-American Protections Complement the Contributions of the Escazú Agreement

As noted above, the Inter-American Court of Human Rights has emphasized the importance of State obligations to protect human rights defenders in a way that complements the relevant provisions of the Escazú Agreement and provides normative content and guidance for implementing these essential protections for environmental defenders. [705] Specifically,

> the Court has indicated that States have the duty to ensure that [human rights defenders] can carry out their activities freely; to protect them when they are subject to threats in order to avoid attacks on their life and integrity; to refrain from imposing obstacles that hinder their work, and to investigate, seriously and effectively, any violations committed against them, combatting impunity. Moreover, in cases of attacks against human rights defenders, States have the obligation to ensure impartial, prompt and authoritative justice and this entails an exhaustive search for all the information in order to design and execute an investigation that involves the proper analysis of the different hypotheses of authorship, by act or omission, at different levels, exploring all the pertinent lines of investigation to identify those responsible.[706]

In the *Luna Lopez v. Hondura*s case, the Court emphasized the need for States to take concrete steps to protect human rights defenders, ordering Honduras to adopt a new public policy that aims to reduce the risk and protect the rights of defenders.[707] The Court supported the recommendations of an expert who testified in the case, adopting his view that "a public policy for the protection of human rights defenders, including defenders of the environment, should at least take into account the following requirements:

> a) The participation of human rights defenders, civil society organizations, and experts in the formulation of the standards that could regulate protection for the collective in question; b) The protection program should address the problem in a comprehensive and inter-institutional manner, according to the risk of each situation; and adopt measures to immediately address the complaints made by defenders;

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[702] *Id*. at Art. 9(1).

[703] *Id*. at Art. 9(2).

[704] *Id*. at Art. 9(3).

[705] Digna Ochoa et al., *supra* note 662, at ¶ 100; Case of García Prieto et al. v. El Salvador, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 188, ¶ 24 (Nov. 24, 2008); Case of the Ituango Massacres v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 148, ¶ 148 (Jul. 1, 2006); Case of the Pueblo Bello Massacre, *supra* note 558, at ¶ 268; Case of the Mapiripán Massacre v. Colombia, Merit, Reparations and Costs, Judgment, Inter- Am Ct. H.R. (ser. C) No. 134, ¶ 299 (Sep. 15, 2005).

[706] Digna Ochoa et al., *supra* note 662, at ¶ 100 (internal citations omitted).

[707] Luna López, *supra* note 301, at ¶¶ 123, 243-44.

> c) The creation of a risk analysis model that allows for the effective assessment of the risk and protection needs of each defender or group;
> d) The creation of an information management system for the situation of prevention and protection of human rights defenders;
> e) The design of protection plans that respond to the specific risk faced by each defender and the characteristics of their work;
> f) The promotion of a culture that legitimates and protects the work of human rights defenders, and
> g) The allocation of sufficient human and financial resources to respond to the real needs for the protection of human rights defenders."[708]

In addition to this detailed guidance, the Inter-American system's intersectional approach to the heightened protections due to vulnerable groups, including human rights defenders, is a rich source of normative development that can deepen the Escazú Agreement's protections for environmental defenders by giving shape to the treaty's acknowledgement that States must provide additional protections to vulnerable groups. For example, the Inter-American Court has consistently recognized that in addressing attacks against female human rights defenders, States need to analyze the risks of gender-based violence against female defenders by identifying and investigating aspects that put female defenders in heightened danger.[709] Specifically, in the *Digna Ochoa v. Mexico* case, the Court held that "[i]n the case of attacks against women human rights defenders, the Court considers that all the measures designed to mitigate the risks they run should be adopted with a gender perspective and with an intersectional approach, so that these women can be provided with comprehensive protection based on considering, understanding and highlighting the complexities of the different forms of violence that women defenders face due to their profession and their gender."[710] The Court's jurisprudence in this regard can guide States Parties to the Escazú Agreement to apply an intersectional approach to upholding the rights of environmental defenders who are also members of additional vulnerable groups.

B. Existing Inter-American Standards Complement the Application of the Escazú Agreement's Three Pillars to Human Rights Defenders

Together with the specific protections articulated in Article 9 of the Escazú Agreement, the three main pillars of the treaty play a crucial role in protecting human rights defenders. The treaty incorporates this fact into Article 9, explicitly obligating each State Party to "take adequate and effective measures to recognize, protect and promote . . . the rights of human rights defenders in environmental matters, including . . . their ability to exercise their access rights, taking into account its international obligations in the field of human rights[.]"[711] Under this provision, the treaty not only requires States to ensure that environmental defenders can exercise their access rights, but it explicitly directs them to do so in conformity with their existing human rights obligations. Existing Inter-American standards provide the normative content that the treaty directs States to apply to these specialized protections, and the Inter-American Court already regularly engages in the type of analysis invited by this provision. By bringing arguments that combine existing Inter-American standards with these complementary protections under the Escazú Agreement, advocates can sharpen the Inter-American System's focus on defining and enforcing State obligations with regard to environmental defenders and promote more rapid implementation of these protections.

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[708] *Id.* at ¶ 243. The Court repeated these guidelines in the reparations it ordered in Human Rights Defender v. Guatemala as well. Case of Human Rights Defender et al. v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 283, ¶ 263 (Aug. 28, 2014).

[709] Bedoya Lima et al., *supra* note 649, at ¶ 91.

[710] Digna Ochoa et al., *supra* note 662, at ¶ 101.

[711] Escazú Agreement, *supra* note 1, at Art. 9(2).

1. Pillar One: Environmental Defenders' Rights to Environmental Information

With regard to the first pillar, the right to access to environmental information, the Escazú Agreement provides strong safeguards to ensure access to information regarding environmental matters. Access to information, both in the sense of being able to obtain relevant information and in the sense of having the right to share such information, is crucial to the work of environmental defenders. In addition to the general requirement in Article 9.2 that States Parties protect "all of the rights of environmental defenders [], including their right to . . . freedom of opinion and expression, . . . as well as their ability to exercise their access rights,"[712] the treaty provides specific protections of the right to access information that are relevant to human rights defenders. In Article 5.1, the Escazú Agreement states that "[e]ach Party shall ensure the public's right of access to environmental information in its possession, control or custody, in accordance with the principle of maximum disclosure."[713] Article 6.1 further states that "[e]ach Party shall guarantee . . . that the competent authorities generate, collect, publicize and disseminate environmental information[.]"[714] However, the treaty does not address the obligation to allow private individuals to disseminate information, aside from a provision noting that State authorities should try to prevent any restrictions being placed on the use or reproduction of environmental information.[715]

The right to information generally derives from the broad principle of freedom of expression, and, as the official Commentary on the UN Declaration on Human Rights Defenders states, "[f]reedom of expression is one of the rights crucial to the work of human rights defenders."[716] Article 6 of the Declaration establishes the right to information.[717] This provision includes the rights to "know, seek, obtain, receive and hold information[.]"[718] Additionally, to ensure the effectiveness of the right to information, the Declaration entails the rights to "study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms[.]"[719] The Declaration also protects the right to freely publish information.[720]

These various facets of the right to information are well-established in the jurisprudence of the Inter-American Court and takes on special relevance in cases involving journalists and, by extension, human rights defenders.[721] For example, in the *Vélez Restrepo* case, the Court held that the right to freedom of thought and expression as enshrined in Article 13 of the American Convention on Human Rights "protects the right to seek, to receive and to impart ideas and information of all kinds, as well as to receive and to obtain the information and ideas disseminated by others."[722] In the situation of journalists collecting and disseminating information of public interest, States may not prevent or hinder such activities without committing a serious violation of the right to

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712 *Id*.

713 *Id*. Art. 5(1).

714 *Id*. Art. 6(1).

715 Escazú Agreement, *supra* note 1, at Art. 6(2).

716 U.N. Special Rapporteur on the situation of human rights defenders, *Commentary on the Declaration on the Right and Responsibility of Individuals, Groups and Organs and Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, p. 58 (Jul. 2011).

717 G.A. Res. 53/144, *supra* note 684 at Art. 6.

718 *Id.* at Art. 6(a).

719 *Id.* at Art. 6(c).

720 *Id*. at Art. 6(b).

721 For further discussion on the right to access to information in the Inter-American System, see Pillar One (IV)(A), *supra*.

722 Case of Vélez Restrepo and family v. Colombia, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 248, ¶ 137 (Sep. 3, 2012); Bedoya Lima et al., *supra* note 649, at ¶ 106.

freedom of expression that has "intimidating effect on the free flow of information[]"[723] and affects "one of the basic conditions of a democratic society[.]"[724] As a result, "any measure that interferes with the journalistic activities of people playing this role will inevitably obstruct the right to freedom of expression in its individual and collective dimensions."[725] These pronouncements from the Inter-American Court can be applied to the specific context of violations of the right to access to information against environmental defenders in combination with the provisions of the Escazú Agreement explicitly protecting this aspect of their work.

The Court's recent judgment in the *Case of Bedoya Lima et al. v. Colombia* is particularly relevant in illustrating the Inter-American System's intersectional approach to these types of violations. Ms. Bedoya was a journalist who was kidnapped and subjected to physical, sexual, and verbal assault.[726] The Court found that Ms. Bedoya was subjected to this violence because she was a journalist, and that such violence was "intended to punish, intimidate, and silence her."[727] The Court emphasized that journalists, especially female ones, were specifically more vulnerable to violence aimed at silencing them.[728] The Court also emphasized that States have an obligation to protect the right to freedom of expression of vulnerable persons, in particular women, whose point of view provides valuable information to society and is essential to democracy.[729] As such, States have a responsibility to protect the right to information of vulnerable persons and groups, but also to protect them for their role in disseminating information critical to the protection of human rights.

The right to disseminate information also relates to the troubling trend of State criminalization of human rights defenders, particularly in the case of defamation or other charges aimed at chilling speech critical of State activities.[730] The Inter-American Commission has found that efforts by States to criminalize human rights defenders can directly undermine the rights to access to information and to participation by hindering not only the specific defender in question from exercising their rights, but by "generat[ing] community division, because when a defender is criminalized, it often generates mistrust and collective insecurity, as well as a climate of fear, threats, accusations, and social ostracism."[731] The Commission has also noted that speech critical of the State is subject to special protections under Article 13 of the American Convention and that the Commission and Court will accordingly apply a strict version of the necessity test when evaluating the Conventionality of criminal restrictions on such speech.[732] In the *Lysias-Fleury* case, the Inter-American Court held that human rights defenders have the right to be free from criminalization, noting with concern that States arrest and detain HRDs, not to press charges, but rather to use "threats against and harassment of human rights defenders, to intimidate [them] and dissuade [them] from carrying out [their] work."[733]

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723 Vélez Restrepo and Family, supra note 722, at ¶ 146.

724 *Id.* at ¶ 139; see also *id.* at ¶¶ 139-149.

725 *Id.* at ¶ 107.

726 Bedoya Lima et al., *supra* note 649, at ¶ 108.

727 *Id.*

728 *Id.* at ¶ 112.

729 *Id.* at ¶ 113.

730 Criminalization of the Work of Human Rights Defenders, *supra* note 673, ¶¶ 93, 97-116.

731 Basic Guidelines for Investigating Crimes against Human Rights Defenders in the Northern Triangle, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II., doc.110/21, ¶ 73 (Jun. 1, 2021).

732 Criminalization of the Work of Human Rights Defenders, *supra* note 673, ¶¶ 94-99.

733 Case of Lysias Fleury et al. v. Haiti, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 236, ¶ 59 (Nov. 23, 2011); *see also* Kawas Fernández, *supra* note 678, at ¶ 153.

In order to specifically safeguard the participation of human rights defenders, Articles 9.1 and 9.2 of the Escazú Agreement reiterates defenders' rights to live free from restrictions, move freely, assemble and associate peacefully, and freely express themselves; these provisions can be jointly read as protecting defenders from criminalization.[734] Furthermore Article 4.6 obligates States to "guarantee an enabling environment for the work of persons, associations, organizations or groups that promote environmental protection, by recognizing and protecting them."[735] The Escazú Agreement's express protection of human rights defenders' right to access to justice can also be interpreted as a counterweight to the ways in which criminalization of defenders weaponizes legal mechanisms to prevent defenders from protecting human rights.[736] These provisions pair with the Inter-American System's critical analysis of criminalization to provide a clear protection for environmental defenders against this practice that can be raised in future cases.

2. Pillar Two: Environmental Defenders' Right to Public Participation in Environmental Decision-Making Process

The second pillar of the Escazú Agreement protects the right to public participation in the environmental decision-making process, another crucial access right for environmental defenders. As noted previously, Article 9.2 emphasizes the application of this right to human rights defenders, requiring that States Parties protect "all of the rights of environmental defenders [], including their right to . . . peaceful assembly and association, . . . as well as their ability to exercise their access rights,"[737] and the treaty also contains specific protections of the right to participation that are pertinent to human rights defenders. Specifically, Article 7 provides detailed protections, requiring "[e]ach Party [to] ensure the public's right to participation and, for that purpose, commit[] to implement open and inclusive participation in environmental decision-making processes based on domestic and international normative frameworks."[738] States Parties must also "guarantee mechanisms for the participation of the public in decision-making processes . . . that have or may have a significant impact on the environment,"[739] among other related obligations.

The UN Declaration on Human Rights Defenders reinforces the bedrock principle of non-discriminatory participation by ensuring that "[e]veryone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country and in the conduct of public affairs."[740] Most pertinent to the activities of environmental defenders, the Declaration specifies that "[t]his includes, inter alia, the right, individually and in association with others, to submit to government bodies and agencies concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms."[741]

In the Inter-American System, the right to participation has been grounded in Article 16.1 (right to freedom of association) and Article 23 (right to participate in government) of the American Convention on Human Rights.[742]

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[734] Escazú Agreement, *supra* note 1 at Art. 9(1)-(2).

[735] *Id*. at Art. 4(6).

[736] *Id*. at Art. 9(3).

[737] *Id*. at Art. 9(2).

[738] *Id*. at Art. 7(1).

[739] *Id.* at Art. 7(2).

[740] G.A. Res. 53/144, *supra* note 684 at Art. 8.1.

[741] *Id.* at Art. 4.2.

[742] For further discussion on the right to participation in the Inter-American System, see Pillar Two, IV(B), *supra*.

In the *Escaleras Mejia* case, the Inter-American Court interpreted these articles in light of Article 8 of the UN Declaration on Human Rights Defenders to find that threats and attacks against an environmental defender violated his right to participation.[743] The Court also found that these threats and attacks affected not only Mr. Escalera Mejia's rights to freedom of association and participation, but also had a chilling effect on other environmental defenders, compounding the violation.[744] The Court further observed that intimidating human rights defenders impacts not only the defender's ability to carry out their human rights work, but also the community and society as a whole.[745]

In the *Kawas Fernandez* case, the Court analyzed the murder of an environmental defender as a violation of Article 16, finding that the attack against her was "motivated by [her] work in defense of the environment[,]" and "that her death, evidently, resulted in the deprivation of her right to associate freely with others."[746] Because, as the Court acknowledged, "these circumstances have also had an intimidating effect on other people who are engaged in the defense of the environment[,]"[747] the Court found that "[g]iven the important role of human rights defenders in democratic societies," to guarantee the right to participate in non-governmental organizations or other groups monitoring human rights, States must "create the legal and factual conditions for [defenders] to be able to freely perform their task."[748]

The Court made similar pronouncements in the *Lysias Fleury* case.[749] In that case, the Court further held that where threats or attacks against a human rights defender are made in relation to the defender's work in defense of human rights and therefore prevent the defender from "exercising freedom of association with the organization for which he worked[,]"[750] the State fails in its obligation to guarantee the right to freedom of association under Article 16 of the American Convention.

By raising the specialized right to participation protections of the Escazú Agreement in cases involving human rights defenders before the Inter-American System, advocates can push the Commission and Court towards understanding how acts that block defenders' access to specific aspects of the public participation and consultation process feed into this broader context acknowledged by the Court in these cases.

3. Pillar Three: Environmental Defenders' Right to Access to Justice in Environmental Matters

In its third pillar, the Escazú Agreement protects the right to access to justice in environmental matters. In light of widespread impunity throughout the region for attacks against human rights defenders, this right has particular importance for environmental defenders under threat. In Article 8.1, the Escazú Agreement states that "[e]ach Party shall guarantee the right of access to justice in environmental matters in accordance with the guarantees of due process."[751] The treaty explicitly applies this protection to human rights defenders in Article 9.2, requiring

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[743] Escaleras Mejía et al., *supra* note 525, at ¶¶ 68-78. The Court also found that every individual defending human rights related to the environment has the right to special protection by the State with particular regard to the right to life.

[744] *Id.* at ¶ 69.

[745] *Id.* at ¶ 70.

[746] Kawas Fernández, *supra* note 678, and ¶ 152.

[747] *Id.* at ¶ 153.

[748] *Id.* at ¶ 146.

[749] *Id.* at ¶ 100.

[750] Lysias Fleury et al., *supra* note 733, at ¶¶ 101-02.

[751] Escazú Agreement, *supra* note 1, at Art. 8(1).

that States Parties protect "all of the rights of environmental defenders . . . including . . . their ability to exercise their access rights[.]"[752] It also extends this obligation to more traditional human rights violations against defenders when it reiterates the States' duty to take "appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations" against environmental defenders in Article 9.3.[753]

The UN Declaration on Human Rights Defenders also recognizes the right to access to justice, stating that defenders "have the right, individually and association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights."[754] Article 9.2 of the Declaration establishes the right "to complain to and have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority[.]"[755] Pursuant to Article 9.5, "[t]he State shall conduct a prompt and impartial investigation or ensure that an inquiry takes place whenever there is reasonable ground to believe that a violation of human rights and fundamental freedoms has occurred in any territory under its jurisdiction."[756] As interpreted by the UN Special Rapporteur on the situation of human rights defenders, "the obligation to provide human rights defenders with an effective remedy entails that the State ensures, without undue delay, a prompt and impartial investigation into the alleged violations, the prosecution of the perpetrators regardless of their status, the provision of redress, including appropriate compensation to victims, as well as the enforcement of the decisions or judgments."[757] If States do not comply with this duty, the lack of an effective remedy constitutes an additional violation and leaves the defender vulnerable to additional threats.[758]

The Inter-American System has developed strong jurisprudence around the right to access to justice under Articles 8 and 25 of the American Convention on Human Rights, and its organs have begun to apply these standards to the situation of human rights defenders.[759] In a recent report, the Inter-American Commission emphasized the importance of protecting this right for defenders, noting that "the most effective way to protect human rights defenders is by effectively investigating the acts of violence against them, and punishing the persons responsible[.]"[760] The Court has repeatedly underscored this obligation, noting that impunity for attacks against human rights defenders exacerbates and reinforces the chilling effect of such attacks on other defenders.[761]

In the case of *Lysias Fleury et al. v. Haiti*, the Court held that States must "investigate seriously and effectively the violations committed against [defenders], in order to combat impunity."[762] In determining that Haiti violated Mr. Fleury's right to access to justice by allowing a security force attack against him for his work as a human rights defender to remain in impunity, the Court underscored that "the State is obliged to provide effective judicial remedies to those who allege that they are victims of human rights violations[,]" and "to investigate, prosecute,

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[752] *Id.* at Art. 9(2).

[753] *Id*. at Art. 9(3).

[754] G.A. Res. 53/144, *supra* note 684 at Art. 9.1.

[755] *Id*. at Art. 9.2.

[756] *Id*. at Art. 9.5.

[757] G.A Res. 65/223, Commentary on the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, ¶ 44 (Jul. 2011) [hereinafter G.A. Res. 65/223].

[758] G.A. Res. 65/233, *supra* note 755, ¶ 44 (Aug. 04, 2010).

[759] For further discussion on the right to access to justice in the Inter-American System, *see* Pillar Three, Section IV(C), *supra*.

[760] Basic Guidelines for Investigating Crimes against Human Rights Defenders in the Northern Triangle, *supra* note 731, ¶ 73.

[761] Kawas Fernández, *supra* note 678, at ¶ 153.

[762] Lysias Fleury et al., *supra* note 733, at ¶ 81.

and, as appropriate, punish human rights violations[.]"[763] In the case of *Luna Lopez et al. v. Honduras*, where a local politician and environmental defender was threatened and eventually murdered for his work,[764] the Inter-American Court held that States have the obligation to conduct a proper investigation when crimes against human rights defenders occur and provide effective judicial remedies for victims of human rights violations.[765]

In the *Escaleras Mejia* case, the Court made the clear pronouncement that the State must take the victim's status as a human rights defender into account when conducting the investigation to assure meaningful access to justice in cases of attacks against human rights defenders. Specifically, the Court held that:

> In cases of attacks against human rights defenders, States have the obligation to ensure access to justice that is impartial, timely, and formal, which implies an exhaustive search for all of the information to design and carry out an investigation that leads to the due analysis of the question of who committed the act, through action or omission, at different levels, exploring all of the pertinent investigative lines to identify those responsible. Consequently, when faced with indications or allegations that a particular act against a human rights defender could have been motivated by his or her work to promote and defend human rights, the investigating authorities must take into account the context of the facts and the defender's activities to identify the interests that may have been affected in the exercise of the same, in order to establish and exhaust the lines of investigation that take into account the defender's work, determine the theory of the crime, and identify the perpetrators.[766]

Finally, the Court again reiterated its intersectional approach to the right to access to justice for women human rights defenders in the *Digna Ochoa* case, where it pronounced that:

> in order to ensure effective access to justice on an equal basis for women human rights defenders, . . . States must guarantee (i) unrestricted access, without gender-based discrimination, to justice, ensuring that women human rights defenders receive effective protection against harassment, threats, reprisals and violence; (ii) a system of justice that is in keeping with international standards concerning competence, efficiency, independence, impartiality, integrity and credibility, and the diligent and prompt investigation of acts of violence, as well as (iii) the application, in the context of this access to justice for women human rights defenders, of mechanisms that ensure that the evidentiary standards, investigations and other legal probative procedures are impartial and are not influenced by gender stereotyping or prejudices.[767]

These clear standards on the application of the right to access to justice to the specific situation of human rights defenders complement the specialized protections in the Escazú Agreement. Raising these standards together in future cases will strengthen Inter-American standards on the rights of human rights defenders and promote more effective implementation of this aspect of the new treaty.

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[763] *Id.* at ¶¶ 105-106.

[764] Luna López, *supra* note 301, at ¶¶ 24-46, 191.

[765] *Id.* at ¶¶ 153-59.

[766] Escaleras Mejía et al., *supra* note 525, at ¶ 47 (internal citations omitted) (unofficial translation); *see also Id.* at ¶ 54 (citing Case of Human Rights Defender et al., *supra* note 708, at ¶ 142 (Aug. 28, 2014) and Case of the Xucuru Indigenous People and its members v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 346, ¶ 175 (Feb. 5, 2017).

[767] Digna Ochoa et al., *supra* note 662, at ¶ 101.

4. The Inter-American System and the Escazú Agreement Recognize that Human Rights Defenders Cannot Exercise their Rights When Subject to Threats and Attacks

Underlying all of the standards outlined above is the shared understanding between the Inter-American System and the Escazú Agreement that human rights defenders cannot exercise their rights – including their environmental access rights – when they are subject to threats, criminalization, attacks, and killings intended to silence their activism. Under the Escazú Agreement, Article 9 clearly acknowledges that defenders can only exercise their rights in a "safe and enabling environment . . . free from threat, restriction and insecurity."[768] Current Inter-American standards complement and give content to this shared understanding, inviting arguments that combine both in cases involving environmental defenders.

In several cases relating to human rights defenders, as discussed previously, the Court has found that States must create a safe and enabling environment for human rights defenders to "conduct their activities freely," including by protecting them from threats, investigating any violations committed against them, and refraining from imposing restrictions that impede their work.[769] The Court has also reiterated that this special protection is necessary because "the defense of human rights can be exercised freely only when the persons engaged in it are not victims of any threats or any type of physical, psychological or moral aggression, or other forms of harassment."[770] Accordingly, in *Human Rights Defender et al, v. Guatemala*, the Court held that "it is the State's obligation not only to create the legal and formal conditions, but also to ensure the real conditions in which human rights defenders can freely carry out their work."[771] As a result of these obligations, States also have heightened duties to guarantee the rights to life and personal integrity of human rights defenders.[772]

This recognition is echoed in Article 9.2 of the Escazú Agreement, which charges States Parties with "tak[ing] adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters, including their right to life [and] personal integrity[.]"[773] Essentially, the treaty acknowledges that environmental access rights and the rights to life and personal integrity are fundamentally interrelated when environmental defenders face threats and attacks. Advocates seeking to enforce this provision can rely upon the Inter-American standards articulated above to raise arguments based in this shared understanding of the heightened obligations States owe to human rights defenders.

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768 Escazú Agreement, *supra* note 1, at Art. 9(1).

769 Kawas Fernández, *supra* note 678, at ¶ 145; (Apr. 3, 2009). *See also* Escaleras Mejía et al., *supra* note 525, at ¶ 54 (internal citations omitted); Digna Ochoa et al., *supra* note 662, at ¶ 100 (internal citations omitted); Human Rights Defender et al., *supra* note 708, at ¶ 142.

770 Human Rights Defender et al., *supra* note 708, at ¶ 142; see also Escaleras Mejía et al., *supra* note 525, at ¶ 54 (internal citations omitted).

771 Human Rights Defender et al., *supra* note 708, at ¶ 142.

772 In the *Escaleras Mejía* case, the Inter-American Court indicated defending human rights related to the environment has the right to special protection by the State with particular regard to the right to life. Escaleras Mejía et al., *supra* note 525, at ¶ 54. In Human Rights Defender v. Guatemala, the Court similarly held that, "the State's obligation to guarantee the rights to life and personal integrity of an individual is increased in the case of a human rights defender." Case of Human Rights Defender et al., *supra* note 708, at ¶ 142. Although the Court did not find a violation of the obligation to protect the right to life in that case, the Court declared that State responsibility for a violation of the right to life arises when the following three elements are met: (1) "a situation of real and imminent danger existed for the life or personal integrity of a specific individual, or group of individuals," (2) "the [State] authorities knew or should have known about this," (3) and the State failed to adopt necessary safeguards within their power which could have prevented the danger. *Id*. at ¶¶ 143, 149. In undertaking this analysis, the Court announced that it will also consider whether the State "was aware of the situation of special vulnerability facing human rights defenders[.]" *Id*. at ¶ 143.

773 Escazú Agreement, *supra* note 1, at Art. 9(2).

C. Conclusion

The Escazú Agreement offers heightened protections and new possibilities for innovative advocacy and litigation on behalf of environmental human rights defenders, and other vulnerable groups. Given the threats faced by environmental defenders in the Americas, the Escazú Agreement is a powerful tool to improve their situation, if States take meaningful and immediate measures to implement these special protections. Litigation and advocacy before the Inter-American System that invokes the specialized protections of the Escazú Agreement to interpret State obligations under Inter-American human right treaties can be a powerful vehicle for promoting such implementation.

VI. Selected Substantive Rights: Analyzing the Right to Health in Light of the Escazú Agreement

A. The Inter-American System and the Escazú Agreement Recognize the Right to Health

Although the Escazú Agreement addresses procedural rather than substantive rights, in the context of environmental harm and sustainable development, these rights are inherently interdependent and indivisible, as the Inter-American Court recognized in its Advisory Opinion on *The Environment and Human Rights*.[774] In the Advisory Opinion, the Court found that multiple substantive rights were likely to be affected by environmental degradation, including the rights to life, personal integrity, private life, not to be forcefully displaced, participate in cultural life, food, water, housing, health, and property.[775] Accordingly, this section of the toolkit examines how the environmental access rights protected by the Escazú Agreement complement the existing Inter-American normative framework to protect substantive rights that are likely to be affected by environmental harm, looking specifically at the right to health as an emblematic example.

As the Court has noted in Advisory Opinion on *The Environment and Human Rights* and the subsequent *Nuestra Tierra* judgment, "damage to the environment may affect all human rights,"[776] and they must still be analyzed as separate human rights violations.[777] For example, a situation amounting to a violation of the right to a healthy environment may also encompass a separate violation of a related substantive right, such as the right to health. It is similarly artificial to expect that environmental access rights violations will not occur in conjunction with related substantive rights violations. On the contrary, in the context of a human rights case involving environmental harm, the same set of facts are likely to give rise to violations of both substantive and procedural rights.

Given this reality, advocates seeking to incorporate arguments based in the Escazú Agreement before the Inter-American System will need to analyze substantive rights in tandem with related procedural rights. To provide guidance on how the environmental access protections of the Escazú Agreement map onto substantive rights

774 Advisory Opinion OC-23/17, *supra* note 25, at ¶¶ 47, 54.

775 *Id.* at ¶ 64.

776 *Id*.

777 Nuestra Tierra, *supra* note 27, at ¶ 203 (The Court's recognition of the right to a healthy environment "evidently does not mean that other human rights will not be violated as a result of damage to the environment."); Advisory Opinion OC-23/17, *supra* note 25, at ¶¶ 63-64, 69.

likely to be affected by environmental harm, this section examines the specific example of the right to health, addressing first the existing Inter-American normative framework and then describing how the Escazú Agreement could be used to complement this understanding.

B. Recognition of Right to a Healthy Environment by the Inter-American System

The right to health is well-recognized in the Inter-American System. It is both an autonomous right and a right that is associated with other substantive and procedural rights that are affected by acts that harm the environment.

As discussed in the section on the right to a healthy environment, above, the Court has asserted its authority to declare violations of the human right to health by virtue of Article 26 of the American Convention. Although the right to health is explicitly recognized and protected under Article 7(f) of the San Salvador Protocol in the context of the right to just, equitable, and satisfactory conditions of work,[778] the Court is not authorized to declare violations of that provision.[779] Instead, the Court has declared that the right to health is an autonomous right implicit in the economic, social, and cultural rights recognized under Article 26 of the American Convention and is therefore justiciable through Article 26.[780] In *Poblete Vilches v. Chile*, for example, the Court held that States have an obligation to take adequate, deliberate, and concrete steps toward the full realization of the right to health and that failure to do so amounts to a violation of Article 26.[781]

In its Advisory Opinion on *The Environment and Human Rights*, the Inter-American Court identified the right to health as a right that is particularly vulnerable to environmental impact.[782] For example, activities that pollute air, water, soil, and food supplies can result in a violation of the right to health, among others.[783]

Therefore, States have a corresponding duty to respect, protect, and fulfill the human right to health in the context of environmental harms. The duty to respect the right to health requires States to refrain from acts that harm the environment. For example, the Court has found that a State's failure to provide water of sufficient quantity and adequate quality affects human health because it exposes people to the risk of dehydration and disease.[784] Furthermore, a State's duty to protect the right to health in the context of environmental harm is a positive obligation that includes the duty to prevent both State agents and third parties from violating the right.[785] Thus, States can be liable for their failure to regulate and supervise environmental acts that result in violations of the right to health committed by third parties.[786] Finally, States also have a positive obligation to adopt measures

778 Organization of American States (OAS), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), Article 7(f). Nov. 16, 1999.

779 Additional Protocol to the American Convention on Human Rights ("Protocol of San Salvador"), Art. 19(6).

780 Poblete Vilches et al., *supra* note 24.

781 *Id.* at pp. 31-32, 104.

782 Advisory Opinion OC-23/17, *supra* note 25, at ¶¶ 65-66 (States are obligated to take advisory opinions into account when exercising their duty to ensure conformity of their domestic legal regime with applicable Inter-American Human Rights instruments).

783 Advisory Opinion OC-23/17, *supra* note 25, at ¶ 117; Office of the High Commissioner for Human Rights, CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 34 (Aug. 11, 2000).

784 Xákmok Kásek Indigenous Community, *supra* note 539, at ¶ 196.

785 Advisory Opinion OC-23/17, *supra* note 25, at ¶ 118.

786 Ximenes Lopes, *supra* note 298, at ¶¶ 86-87.

that ensure the fulfillment and enjoyment of the right to health in the context of environmental harm, which includes the duty to adopt regulatory guidelines that prevent third party interference with the right to health.[787]

The enjoyment of the right to health, as it relates to environmental harm, also requires States to respect, protect, and fulfill other related substantive and procedural rights.[788] Substantively, the Court has declared that States are obligated to refrain from acts of environmental harm that negatively affect the enjoyment of other human rights and must actively take the necessary measures to ensure access to clean water, food, and adequate housing, for example, to guarantee the right to health.[789] For example, States have a positive obligation to disseminate information about the protection of water sources, food and water.[790] The Court has also declared that the realization of the right to health[791] requires States to respect, protect, and fulfill "procedural rights (such as the rights to freedom of expression and association, to information, to participation in decision-making, and to an effective remedy)."[792]

C. Other Persuasive Authorities Recognize the Human Right to Health

In addition to citing the Inter-American sources of law discussed above, advocates litigating environmental harm cases before the Inter-American System may also want to cite other persuasive sources on the right to health. Article 25 of the Universal Declaration on Human Rights, for example, generally recognizes "the right to a standard of living adequate for the health and well-being" of every person, including medical care.[793] The right to health is also generally recognized in article 12 of the International Covenant on Economic, Social, and Cultural Rights ("ICESCR")[794] and article 16 of the African Charter on Human and Peoples' Rights.[795] Article 7 of the ICESCR also connects the right to health with the right to just, equitable, and satisfactory conditions of work, by prohibiting unhealthy working conditions.[796]

More specifically, according to the United Nations Committee on Economic, Social, and Cultural Rights, States must ensure "an adequate supply of safe and potable water and basic sanitation."[797] The Committee has further clarified that the obligation to fulfill the right to health requires States to formulate and implement national policies

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787 *See* Advisory Opinion OC-23/17, *supra* note 25, at ¶ 119. *See also*, Office of the High Commissioner for Human Rights, CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 39 (Aug. 11, 2000).

788 Advisory Opinion OC-23/17, *supra* note 25, at ¶ 64.

789 *See* Nuestra Tierra, *supra* note 27, at ¶ 222; Yakye Axa Indigenous Community, *supra* note 24, at ¶¶ 161, 166. *See also*, Advisory Opinion OC-23/17, *supra* note 25, at ¶¶ 115-17. CESCR Committee, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 4.

790 Advisory Opinion OC-23/17, *supra* note 25, at ¶ 121.

791 *Id*. at ¶ 211.

792 *Id*. at ¶ 64.

793 Universal Declaration of Human Rights, Article 25, Dec. 10, 1947. Retrieved from: https://www.un.org/en/about-us/universal-declaration-of-human-rights.

794 International Covenant on Economic, Social, and Cultural Rights, Article 12, Dec. 16 1966.

795 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), Article 12, Jun. 27, 1981.

796 International Covenant on Economic, Social, and Cultural Rights, Article 12, Dec. 16 1966.

797 CESCR Committee, General Comment No. 14: The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 15.

aimed at reducing and "eliminating pollution of air, water, and soil, including pollution by heavy metals."[798] According to the Committee, States must not only avoid engaging in activities that release substances harmful to human health,[799] they must also act to prevent and reduce exposure to harmful substances or other detrimental environmental conditions that directly or indirectly harm human health.[800] Additionally, the Committee has emphasized that the right to health in the context of environmental harm requires States to also guarantee certain procedural rights, such as the right to public participation in decisions that could harm the environment, to access information about how those harms could affect human health, and to access justice and seek an effective remedy when those environmental harms cause violations of the right to health.[801] Those are precisely the procedural rights and obligations emphasized in the Escazú Agreement.

D. Recognition of the Human Right to Health by the Escazú Agreement

The Escazú Agreement complements the protections of the right to health that exist under the Inter-American System by focusing on the obligations of States to ensure public access to information about environmental harms that may affect the right to health, public participation in environmental matters that may affect the right to health, and access to justice and judicial remedies when environmental harms have a detrimental effect on the right to health. In particular, the Escazú Agreement requires States to ensure people have clear information about the "environmental quality of goods and services and their effects on health."[802] The States' obligations under the Escazú Agreement extend to ensuring access to environmental information possessed by private parties, especially information on "their operations and the possible risks and effects on human health and the environment."[803]

More specifically, Article 7 of the Escazú Agreement obligates States to guarantee "open and inclusive participation" by creating mechanisms for the public to participate in decisions that may have a significant impact on the environment, "including when they may affect health."[804] This right to public participation under the Escazú Agreement includes the opportunity, within reasonable timeframes, to present observations and receive information regarding the environmental decision-making process.[805]

In sum, the three-pillar framework of the Escazú Agreement that focuses on the procedural rights to information, participation, and access to justice in environmental matters complements and reinforces the existing Inter-American normative framework to protect substantive rights that are likely to be affected by environmental harm, including the human right to health. Advocates litigating cases of environmental harm before the Inter-American System that involve potential violations of the human right to health may therefore want to add to their arguments the procedural rights framework highlighted in the Escazú Agreement.

VII. Conclusion

798 *Id*. at ¶ 36.
799 *Id.* at ¶ 34.
800 *Id.* at ¶ 15.
801 *Id*. at ¶ 35.
802 Escazú Agreement, *supra* note 1, at Art. 6(10).
803 *Id*. at Art. 6(12).
804 *Id*. at Art. 7(1)-7(2).
805 *Id*. at Art. 7(5), 7(7), 7(17).

This toolkit explored how advocates will be able to use the Escazú Agreement for cases before the Inter-American Commission and Court to strengthen the protection of environmental human rights in the region. This toolkit is intended to be used as guidance in the crafting of legal arguments through existing norms and jurisprudence from the Inter-American System and specific provisions from the Escazú Agreement. The Escazú Agreement was based on Principle 10 of the Rio Declaration and adopted to protect and promote environmental access rights protections in the Americas and the Caribbean. As a reminder, the Inter-American System and ECLAC are not directly related. Cases before the Inter-American Court and Commission must be grounded in violations of the American Convention and other Inter-American human rights treaties.

This toolkit reflects how the Escazú Agreement strengthens existing human rights protections relating to the right to a healthy environment and the rights of human rights defenders by focusing on "access rights." Specifically, the Escazú Agreement codifies protections in the areas of the right to information, participation, and access to justice in environmental matters.

The first access right, or pillar as it is referred to in the Escazú Agreement and this toolkit, is the right to information in relation to environmental matters. As discussed in Pillar I on the right to information, the Escazú Agreement provides specific guidance on how to ensure the maximum disclosure of environmental information. This principle complements existing Inter-American normative framework limitations on State restriction of access to information by imposing an affirmative obligation on States to produce, organize, update, and disseminate information.

The Escazú Agreement requires that States facilitate a robust system for EIAs, including the social dimension to EIAs. This robust system is meant to ensure access to information, and maximum participation to indigenous as well as non-indigenous persons and groups in vulnerable situations. This broader understanding of vulnerability broadens the scope of protection for non-indigenous persons and groups affected by environmental harm, especially in their ability to protect their rights to health, personal integrity, life, and others.

In Pillar II, the right to participation, protects the right to have meaningful participation in decision-making processes. The Escazú Agreement guarantees effective and timely participation in environmental decision-making. The agreement provides for minimum categories of necessary information that ensure the effectiveness of public participation, such as the authorities responsible for making decisions and bodies involved the participatory processes. Additionally, the Escazú Agreement requires that States make public specific types of information so that the public can assess the merits, risks, and alternatives to decisions made. Finally, and one of the most important innovations of the Escazú Agreement is the focus on emphasizing the need to ensure the participation of vulnerable persons or groups, indigenous peoples, and affected persons in relation to environmental matters by requiring free, comprehensive information about proposed activities, and their cumulative environmental impact.

Finally, Pillar III protects access to justice in environmental matters. As discussed in the toolkit, access to justice ensures that individuals and groups are able to navigate justice systems accessibly and effectively. The Escazú Agreement can be interpreted to build on existing Inter-American protections, such as the *Nuestra Tierra* case, and fill the critical gaps of access to justice in environmental matters. Specifically, the agreement provides unambiguous obligations for States to provide mechanisms that prevent, halt, mitigate, or rehabilitate environmental harm. Provisions under the Escazú Agreement broaden the scope of the types of justice proceedings within the access to justice framework, thus recognizing more types of proceedings that are and must be accessible for individuals and groups affected by environmental harm as well as the public. Additionally, the Escazú Agreement provides an important requirement of timeliness. "Timely" access to justice fits within the

Inter-American System framework and can be used to bolster existing protections under the Inter-American System and expand them to environmental rights cases.

As discussed throughout the toolkit, access rights to information, participation, and access to justice in environmental matters are inextricably linked to environmental degradation, the right to a healthy environment, and the protection of vulnerable persons and groups in relation to environmental matters. As such, by incorporating these Escazú Agreement provisions into legal briefs, advocates litigating cases of environmental harm before the Inter-American System will help further develop the normative framework for the right to a healthy environment.