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18th December 2023

RE: Inter-American Court of Human Rights *Amicus Curiae* Submission

Dear Sir / Madam,

Please find enclosed an *amicus curiae* submission on behalf of the Centre for Law and Environment (CLE) at University College Cork, Ireland in relation to the Request for an Advisory Opinion on the Climate Emergency and Human Rights to the IACtHR.

I would be most grateful if you could confirm receipt.

Yours faithfully,

Prof Owen McIntyre I School of Law I University College Cork I National University of Ireland

Director, LL.M. (Environmental & Natural Resources Law)
Co-Director, Centre for Law & the Environment

General Editor, *Journal of Water Law*

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Case No. **SOC 1/2023**

INTER-AMERICAN COURT OF HUMAN RIGHTS

AMICUS CURIAE BRIEF

Presented on behalf of:

THE CENTRE FOR LAW AND THE ENVIRONMENT (CLE) AT THE SCHOOL OF LAW, UNIVERSITY COLLEGE CORK (UCC), IRELAND

In the Request for an Advisory Opinion

ON THE CLIMATE EMERGENCY AND HUMAN RIGHTS SUBMITTED TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS BY THE REPUBLIC OF COLOMBIA AND THE REPUBLIC OF CHILE

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18 October 2023
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I. Introduction

1. The Centre for Law and the Environment (CLE) at the School of Law University College Cork (UCC) Ireland is a third-level educational and research institute specialising in environmental, marine, climate, energy and natural resources law. CLE is affiliated with UCC's interdisciplinary Environmental Research Institute (ERI) and assists in coordination of ongoing research between researchers in the School of Law and the Centre for Marine and Renewable Energy (MaREI) on government-funded research projects on ocean law and marine governance. Furthermore, the Centre is actively involved in the offering of the two specialist LLM programs in Environmental and Natural Resources Law and in Marine and Maritime Law.

2. CLE is co-directed by Prof. Owen McIntyre and Prof. Áine Ryall. The Centre comprises full and part-time academic staff, from the School of Law and beyond, focusing on the Centre's areas of expertise and in the related areas of corporate governance, judicial review, human rights and disaster risk reduction law. Moreover, CLE is home to an important number of PhD candidates and postdoctoral researchers in the aforementioned fields. The development and implementation of the Centre's strategic goals in seeking developments and opportunities for research and impactful action is supported by an Advisory Board. The Board is composed of academics and practitioners with expertise across the range of fields of direct relevance to CLE's activities.

3. CLE also exists to provide advice and recommendations to public institutions and private sector actors regarding the identification, development and promotion of innovative legal and policy responses to the impending global socio-ecological crisis. In view of its extensive outreach and advocacy activity, the Centre seeks to contribute to the enhancement of environmental protection under rights-based and participative arrangements.

4. The present advisory opinion gives rise to issues that fall within CLE's remit and expertise. It concerns the scope of obligations of Member States, arising under the framework of the American Convention on Human Rights (AHCR, the Convention) and other applicable international human rights law, to respond to the climate emergency. The scope of these State duties must take account of the principles of equity, justice, cooperation and sustainability, with a human rights-based approach. It must also consider the shared but differentiated duties of mitigation, adaptation and response to the loss and damage caused by climate change (i) on individuals from diverse regions and population groups, (ii) on nature, and (iii) on human survival on the planet. Finally, the scope of the duties laid out in the advisory opinion must incorporate certain standards with the view to having a 'vertical effect' on other Member States.

5. The Republics of Colombia and Chile submitted a series of questions to the Court regarding six core subjects, listed on point IV of the advisory request.[1] The Centre's submission will focus exclusively on the first of those core subjects —the State obligations derived from the duties of prevention and the guarantee of human rights in relation to the climate emergency. In that regard, the requesting Parties asked the Court two main questions. One, regarding the duty to prevent climate events caused by global warming under the ACHR. And the other, concerning the differentiated measures States must take to minimise the impact of the damage caused by the climate emergency.[2]

6. CLE is of the view that the present advisory opinion request provides the Court with the opportunity to address State obligations derived from Convention duties to prevent and to guarantee human rights in relation to the climate emergency can be framed within the broad and over-arching scope of the right to a healthy environment, provided for under Article 11 of the San Salvador Protocol to the ACHR. The Court can contend with the question of expanding the protection afforded by that right to nature's own legal interests to contribute to preventing and mitigating effects of climate change. The Centre presents this written brief as an *amicus curiae*, pursuant to Articles 28 and 44 of the Rules of Procedure of the Inter-American Court of Human Rights (IACtHR).

7. In this written brief, CLE puts before the Court a body of international and comparative law instruments and case-law that recognises the possibility to frame State duties to prevent and to guarantee human rights under a differentiated approach regarding climate change. This approach, addressing climate change effects, environmental degradation and biodiversity loss, would help

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[1] These subject could be regrouped as follows: (i) State obligations derived from the duties of prevention and the guarantee of human rights in relation to the climate emergency, (ii) State obligations to preserve the right to life and survival in relation to the climate emergency in light of science and human rights, (iii) The differentiated obligations of States in relation to the rights of children and the new generations in light of the climate emergency, (iv) State obligations arising from consultation procedures and judicial proceedings owing to the climate emergency, (v) Convention-based obligations of prevention and the protection of territorial and environmental defenders, as well as women, indigenous peoples, and Afro-descendant communities in the context of the climate emergency, and finally, (vi) The shared and differentiated human rights obligations and responsibilities of States in the context of the climate emergency.

[2] "Bearing in mind the State duty of prevention and the obligation to guarantee the right to a healthy environment, together with the scientific consensus reflected in the reports of the IPCC concerning the severity of the climate emergency and the urgency and duty to respond adequately to its consequences, as well as to mitigate its pace and scale: 1. What is the scope of the State's duty of prevention with regard to climate events caused by global warming, including extreme events and slow onset events, based on the obligations under the American Convention, in light of the Paris Agreement and the scientific consensus which recommend that global temperatures should not increase beyond 1.5˚C? 2. In particular, what measures should States take to minimise the impact of the damage due to the climate emergency in light of the obligations established in the American Convention? In this regard, what differentiated measures should be taken in relation to vulnerable populations or based on intersectional considerations? 2.A. 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? 2.B What principles should inspire the action of mitigation, adaptation and response to the losses and damages resulting from the climate emergency in the affected communities?".

realise the collective and individual dimensions of the right to a healthy environment. Furthermore, it would endow living natural entities, bio-physical cycles and processes and non-living natural entities with entitlements to its own value creation, beyond their intrinsic value. The legal protection afforded to nature in the form of recognised proprietary rights to its contributions to people would have to be balanced or harmoniously constructed as limitations to property rights in the interest of society.

8. The Centre, therefore, invites the Court to use the opportunity of the present advisory opinion request to hold as a matter of principle:

8.1 That the Convention recognises nature's contributions to people as legal interests in themselves and as ownership entitlements of nature itself warranting protection under the right to a healthy environment, in the way of a proportionate limitation to property rights in the interest of society.

8.2 That State Parties owe particular and differentiated State duties, as part of the protection afforded by the ACHR framework to nature's legal interests, to nature and components of the environment to prevent and mitigate the effects of climate change.

8.3 That State Parties hold the duty to ensure the respect for the non-regression, *in dubio pro natura* and 'ecological resilience' principles within their institutional arrangements that prevent and mitigate the impact of environmental damage caused by the climate emergency, so that the supremacy of nature's legal interests is guaranteed.

8.4 That these duties have footing on Articles 4(1), 5(1) and 21(1) of the ACHR, and Article 11 of the San Salvador Protocol to the ACHR.

9. The issues arising in the present advisory opinion request are far from being purely academic. In a recent advisory opinion,[3] the Court noted that besides the collective and individual connotations of the right to a healthy environment, the right to a healthy environment protects the components of the environment as legal interests in themselves. These legal interests valorise the intrinsic value of nature's elements and sets the autonomous character of the right to a healthy environment. Furthermore, the Court has perceived it as a tendency of several States to translate that recognition into an enactment of nature's legal personality with its corresponding entitlements. The recognition of such legal interests, and its protection through differentiated duties of State Parties respecting emerging environmental law principles, has enormous potential to integrate principles of equality, justice, cooperation and sustainability into the due diligence actions Member States must adopt in the face of environmental degradation regarding the climate emergency.

[3] *The Environment and Human Rights*, Advisory Opinion OC-23, Inter-American Court of Human Rights Series A No 23 (15 November 2017).

10. In the light of the jurisprudence cited in this brief, including the opinion stated in Advisory Opinion OC 23/17, and the increasing tendency in international and national law to recognise the intrinsic value of nature through legal personality and entitlements, the Centre urges the Court to recognise in express terms the four propositions advanced in this written brief. Taking into consideration the changes over time caused by the socio-ecological crisis and present-day conditions altered by the climate emergency, this recognition would be in line with the Court's evolutive interpretation of the ACHR and its Protocols.[4]

II. Background

11. The Republics of Chile and Colombia requested an advisory opinion to the IACtHR with the view to determine what would be the scope, within the ACHR framework, of the duty of Member States to respond to the climate emergency. They ask the Court to consider the differentiated impacts of the climate emergency (i) On individuals from diverse regions and populations groups, (ii) On nature, and (iii) On human survival on the planet. Furthermore, the applicant Member States seek that the IACtHR advises on a response that takes into account the daily challenges of dealing with the climate emergency, their causes and consequences. Finally, they request that the response is based on the principles of equality, justice, cooperation and sustainability, with a human rights-based approach.

12. The need for a human rights-based approach following these requirements, according to the applicant Member States, is rooted in the close relationship between the climate emergency and the violation of human rights, and the rapid response human rights can contribute to. Such a human rights-based approach would build on what was developed regarding the right to a healthy environment on the advisory opinion cited in para 9. In that document, the Court highlighted the link between that right and other substantive and procedural rights that have an impact on the life, survival and development of present and future generations, also protected by the Convention and other international law instruments —*inter alia* the UNFCCC, the Paris Agreement, the Escazú Agreement and the Aarhus Convention.

13. Chile and Colombia understand that determining the scope of human right obligations regarding the climate emergency requires dictating certain standards. These guidelines or standards would: (1) Identify the duty-bearers —States, sub-national public bodies—, (2) Set out the responsibilities of such duty-bearers at all levels and with regard to non-State actors, (3) Determine the regional, transnational and global shared but differentiated obligations in this regard, and (4) Distinguish the contribution that emissions from States make to climate change, and the differentiated impacts they cause on subsistence, considering (a) The protection of

[4] See: *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10, Series A No 10 (14 July 1989); *The Right to Information on Consular Assistance in the Framework of Guarantees for Due Legal Process*, Advisory Opinion OC-16, Inter-American Court of Human Rights, Series A No 16 (1 October 1999).

essential biomes to respond to the crisis (e.g. the Amazonian biome), (b) The need to reduce to a minimum, prevent, or deal with the damage and losses caused by global warming and the climate emergency, and (c) The need to establish mechanisms and practices that permit restoration and adaptation.

14. Both States aim for an advisory opinion comprising a human-rights based response to the climate emergency that will have a sort of 'vertical effect' on other Member States.

III. Protection of nature's legal interests within Article 11 of the San Salvador Protocol to the ACHR

A. Protection of nature's legal interests within the right to a healthy environment

15. According to Article 11(1) of the San Salvador Protocol to the ACHR:

> "1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.."

16. In the *Lhaka Honhat* case, this Court found that the right to a healthy environment, just like other socio-economic rights, is directly justiciable under Article 26 of the ACHR.[5] In principle, pursuant to that provision, these rights are subject to the progressive achievement of their full realisation. But given the interdependence and indivisibility of civil and political rights, and economic, social, and cultural rights, the right to a healthy environment, "[s]hould be understood integrally and comprehensively" as a human right, "[w]ith no order of precedence" and "[e]nforceable in all cases before the competent authorities."[6]

17. In para 59 of Advisory Opinion OC-23/17, the IACtHR explains the reasoning behind the recognition of legal personality and rights to nature, within the scope of the right to a healthy environment. Up to that point, the Court recognised two connotations to this right: a collective connotation —the protection of the environment in the public interest owed to present and future generations— and an individual one —the protection against the direct and indirect impact of environmental degradation on other associated human rights.[7]

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[5] *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina,* Inter-American Court of Human Rights Series C No 400 (6 February 2020), [202].

[6] *The Environment and Human Rights* (n 3), [57].

[7] In that passage, the Court established that "The human right to a healthy environment has been understood as a right that has both individual and also collective connotations. In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations. That said, the right to a healthy environment also has an individual dimension insofar as its violation may have a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the rights to health, personal integrity, and life. Environmental degradation may cause irreparable harm to human beings; thus, a healthy environment is a fundamental right for the existence of humankind." *The Environment and Human Rights* (n 3), [59].

17.1 Considering this definition, the content of the right would deal with two main aspects of what has been known as the 'anthropocentric' dimension of the right to a healthy environment. The first aspect would cover the environmental aspect of the infringement of other human rights —the rights to life, to health or to bodily integrity— , or the general State duty to assure a legal framework and institutional arrangements for nature conservation to the extent necessary for the enjoyment of the Convention's human rights. This dimension reflects a protection of the environment for its utilitarian value, "[i]nsofar as it guarantees conditions or resources that are immediately necessary for human life and well-being."[8]

17.2 The second aspect would cover the recognition of the interconnection and interdependence between humans and the environment. Under an 'immersive anthropocentric' approach, "[u]se of natural resources and services is predominantly shaped by the principles of sustainability, intergenerational equity, precaution, social solidarity, international cooperation and overall responsibility for environmental quality."[9] Therefore, the right to a healthy environment would include an acknowledgement of "[b]oth 'human interest' and 'the intrinsic value of all life'' wherein, from a more or less intense holistic approach, the possibility of human life in harmony with nature is ensured.[10]

18. However, para 62 of the advisory opinion establishes that the right to a healthy environment derives its autonomy from the protection it affords to the components of the environment as legal interests in themselves, "[e]ven in the absence of the certainty or evidence of a risk of individuals." The protection of the legal interests of nature is grounded on the intrinsic value of nature, which goes beyond any utilitarian consideration or the measure of the impact to those human rights breached by environmental harm. That intrinsic value of nature and its components, explains the Court, acknowledges the relationality of all these elements with human beings and their environment.[11]

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[8] Natalia Kobylarz, 'Anchoring the right to a healthy environment in the European Convention on Human Rights: What concretised normative consequences can be anticipated for the Strasbourg Court in the field of admissibility criteria? In Giovanni Antonelli et al (eds.), *Environmental law before the courts: a US-EU narrative* (1edn, Springer 2023) 153-199.

[9] Natalia Kobylarz (n 8).

[10] Natalia Kobylarz, 'Balancing its way out of strong anthropocentrism: Integration of 'ecological minimum standards' in the European Court of Human Rights 'fair balance' review', (2022) 13(0) Journal of Human Rights and the Environment 16.

[11] According to the Court: "[A]s an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right. In this regard, the Court notes a tendency, not only in court judgments, but also in Constitutions, to recognize legal personality and, consequently, rights to nature." *The Environment and Human Rights* (n 3), [62].

19. The scope of the right to a healthy environment as established in the aforementioned advisory opinion was finally set out by this Court in the aforementioned *Lhaka Honhat* case.[12] Moreover, the judgement recalled the obligations due by States regarding the right to a healthy environment in Advisory Opinion No. OC-23/17; notably, regarding obligations of prevention in the larger context of environmental harm. Despite mentioning that components of nature must be protected as legal interests in themselves "[b]ecause of its importance for the other living organisms with which we share the planet", regardless of its benefits or effects for humanity, the Court did not explicitly recognise that protection for nature as a result of its intrinsic value.[13]

20. Shortly thereafter, section II(8) of Resolution 3/2021 of the Inter-American Commission on Human Rights (IACHR) explicitly recognised that the right to a healthy environment was also about protecting nature and the environment as legal interests in themselves.[14] The Resolution used the same terms used by this Court in Advisory Opinion No. OC-23/17 to do so, but did not mention the intrinsic value of nature worthy of protection within the framework of the right either.

21. *Comunidad de La Oroya v. Perú,* a case pending before the Court, is said to be the first case where State liability for the violation of human rights of a non-indigenous community caused by environmental pollution would be assessed.[15] The IACHR submitted its report on the merits to this Court two years ago regarding that case, and it had the opportunity to outline the scope of the right to a healthy environment. The Commission highlighted that besides the individual and collective dimensions of the right to a healthy environment, due protection was owed "[t]o the environment's own characteristics as legal interests in themselves, regardless of the link with their utility to human beings."[16]

B. Interdependence of the protection to nature afforded by the right to a healthy environment with other socio-economic rights linked to basic public services

22. According to para 15 of this document, pursuant to Article 11(1) of the San Salvador Protocol to the ACHR, there is a link between the right to a healthy environment and the access to basic public services. Basic public services, now conceived under a human rights-based approach also grounded on sustainable development, are part of the substantive dimension of the right to a healthy environment. For instance, several UNEP documents —albeit non-binding— have acknowledged that the substantive elements to the right include "[c]lean air, a safe climate, access

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[12] *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (n 5), [202]-[209].
[13] *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (n 5), [203].
[14] *Climate Emergency: Scope of Inter-American Human Rights Obligations*, Resolution 3/2021, Inter-American Commission on Human Rights (31 December 2021), s II(8).
[15] *La Oroya Community v. Perú,* Inter-American Court of Human Rights Case No 12.718.
[16] *La Oroya Community v. Perú,* Merits Report No 330/20, Inter-American Commission on Human Rights Case No 12.718 (19 November 2020), [131].

to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems."[17]

23. Amongst the five State obligations arising from the right to a healthy environment recognised by the Working Group on the Protocol of San Salvador, there is the State duty to guaranteeing everyone, without any discrimination, a healthy environment in which to live and basic public services.[18] The Working Group established five criteria to frame the exercise of the right to a healthy environment as the provision of environmental protection that meets certain quality conditions. These criteria are the following:[19]

23.1 Availability: It imposes States to ensure existence of sufficient resources so that all persons, under a differentiated approach, can benefit from a healthy environment and have access to basic public services. Therefore, a healthy environment would depend on the state of various natural factors —*inter alia* atmospheric conditions, quality and sufficiency of water sources, —, and basic public services would be comprised of all essential services provided by the State to ensure human life in acceptable conditions —e.g. Piped water supply, sewage, cleaning, electricity and gas—.

23.2 Accessibility: To ensure all persons gain access to a healthy environment and to basic public services, States must ensure (a) Physical accessibility, wherein persons "[a]re not required to leave their homes, schools or workplaces to find favourable environmental conditions" and wherein basic public services are widely extended, (b) Economic accessibility, which implies that States must dismantle all socio-economic barriers hindering access to a healthy environment and basic public services, (c) Non-discrimination, and (d) Access to information about the conditions of the environment and basic public services.

23.3 Sustainability: This criterion refers to the requirement to make sure "[t]hat future generations will also enjoy the benefits of a healthy environment and basic public services," which evokes at the same time intergenerational justice and sustainable development.

23.4 Quality: It embodies the requirement that the constituent elements of the environment "[h]ave technical conditions of quality that make them acceptable, in line with international standards", and that quality requirements of the components of the environment do not hinder livelihoods in the vital spaces of the rights-holders.

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[17] See: UN Environment Programme and UN Human Rights Special Procedures, *Right to a Healthy Environment: Good Practices - Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* (UNEP 2020), [3].

[18] Organisation of American States, Working Group of the Protocol of San Salvador, 'Progress Indicators for Measuring Rights under the Protocol of San Salvador' General Assembly Res AG/RES. 2823 (XLIV-O/14) (Washington DC 4 June 2014), [26]-[38].

[19] Organisation of American States, Working Group of the Protocol of San Salvador (n 18), [30]-[34].

23.5 Adaptability: Besides technical criteria of compliance with environmental quality standards, the healthy condition of the environment must ensure that various demographic groups have the possibility "[t]o develop in accordance with their own specific characteristics." Moreover, regarding basic public services, adaptability requires that States provide these essential utilities in a way that meets "[t]he specific needs of the context where they are located."

24. In the *Lhaka Honhat* case, the Court determined how the interdependence between the rights to a healthy environment, adequate food, water and cultural identity works in practice. Although this was done in the context of indigenous peoples' rights, a general approach could be extracted by way of inductive reasoning. According to that judgement, there is a close relationship or interdependence between the environment and these rights. Environmental impact can render all of these prerogatives particularly vulnerable, which is why States have the duty to adopt appropriate economic, environmental and social policies, at all levels, and in particular, regarding the most disadvantaged and marginalised individuals and groups.[20]

25. The basic idea that stems from this interdependence is basically that the different categories of rights —civil and political rights, on the one hand, and economic, social, cultural and environmental rights, on the other hand— "[c]onstitute an indivisible whole based on the recognition of the dignity of the human being." In that sense, it is no surprise that the cited advisory opinion, on the basis of considerations by the Inter-American Commission, had outlined that several of the human rights of the convention required, "[a]s a necessary precondition for their enjoyment, a minimum environmental quality, and are affected by the degradation of natural resources."[21]

26. This vision of the right to a healthy environment linked to the access to basic public services has been echoed by the UN Human Rights Council and in their (non-binding) Resolutions that recognised the right within international environmental law. These instruments conceded that both sustainable development in its three dimensions and the protection of the environment contributed to and promoted human well-being and enjoyment of socio-economic and environmental human rights, for present and future generations. These rights, as part of the substantial elements of the right to a healthy environment, included the rights to clean air, a safe and stable climate, an adequate standard of living, healthy and sustainably produced food, to housing, to access to safe drinking water and adequate sanitation, to participation in cultural life, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems.[22]

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[20] *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (n 5), [243]-[246].

[21] *The Environment and Human Rights* (n 3), [49].

[22] UN Human Rights Council 'The human right to a clean, healthy and sustainable environment' (8 October 2021) A/HRC/RES/48/13; UN General Assembly 'The human right to a clean, healthy and sustainable environment' A/76/L.75.

27. The interdependence of the protection to nature afforded by the right to a healthy environment with other socio-economic rights linked to basic public services is therefore evident. The scope of social, economic and environmental fundamental rights within international environmental law, as part of the rights comprising the indivisible whole of the entitlement to a human life in dignity, depends on achieving the protection of the environment and sustainable development. However, the access to basic public services as part of the substantial dimension of the right to a healthy environment does not directly and fully protect nature's intrinsic interests. It rather protects natural resources and ecosystems to the extent that they can assure the material content of the social, economic and environmental fundamental rights in a manner consistent with global solidarity, sustainability, and intergenerational equity.

28. Consequently, the CLE puts before the Court's attention that a prerogative to access basic services, as part of the scope of the right set out in Article 11 of the San Salvador Protocol and the Inter-American human rights system case-law, still falls short of recognising a duty to respect all life forms for the value derived of its properties of wholeness, flourishment or harmony. What differentiates this approach to the individual and collective dimensions of the right, is an extension of an ethical responsibility both towards future generations and nature. Yet to fully recognise components of the environment as legal interests in themselves relevant to the right to a healthy environment, that merit protection in their own right, the CLE invites the Court to examine whether under its ecologically progressive interpretation of the Convention, the scope of the self-worth of nature as a value derived from its properties is a legally rational justification to adjudicate such a protection.

IV. The jump to an objective ecocentric approach to rights-based environmental protection in international environmental law

A. Nature's intrinsic value as the justification to protect nature's legal interest as part of the right to a healthy environment in international law

29. Within a rights-based protection of nature's legal interests, such as the one offered by the Convention and the Court's case-law, a suitable and supportive environment cannot rely on utilitarian or solidarity towards nature considerations alone. As the above-cited advisory opinion has explained, the right established extends to the protection of components of nature as legal interests in themselves, for their intrinsic value. That is, a pluricentric approach to the environment and nature, where humans are "[c]onsidered to be an integral, but unprivileged, part of nature" and humans and non-human entities relate to each other on the basis of symbiosis, respect and harmony. Under such an objective ecocentric approach, drawing heavily from ecological ethics, nature's self-worth is combined with the acknowledgement of humans as part of the universe.[23]

[23] Natalia Kobylarz (n 10).

30. International environmental law has slowly begun to recognise nature's intrinsic value. The task has been carried mostly out by non-binding instruments or by way of mention in the Preamble of binding instruments. For instance, the UN World Charter for Nature 1982 had already recognised that "Mankind is part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients, and that "Every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action."[24]

31. In the Preamble to the UN Convention on Biological Diversity 1992 (CBD), the Contracting Parties declare they are conscious "[o]f the intrinsic value of biological diversity and of the ecological, genetic, social, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components."[25]

32. This acknowledgement was echoed by Principles 1 and 2 of the IUCN World Declaration on the Environmental Rule of Law. Interconnectedness and interdependence are salient in the recognition of nature's intrinsic value and of the right of both humans and living beings "[t]o the conservation, protection, and restoration of the health and integrity of ecosystems."[26]

33. Another important breakthrough was achieved by the Kunming-Montreal Global Biodiversity Framework 2022 (GBF). This instrument, a strategic plan for the implementation of the UN Convention on Biological Diversity 1992 and its Protocols, recognised the plurality of concepts and the diverse value systems that nature and its contributions to humans embodies for different people. In addition to the recognition of notions and values such as ecosystems, biodiversity, Mother Earth, ecosystem goods and services, and nature's gifts, the instrument also recognises, for those countries that recognise them, rights of nature and rights of Mother Earth as being an integral part of the GBF's successful implementation.[27]

34. A step further in that direction has also been taken by The Strasbourg Principles of International Environmental Human Rights Law 2022. Principle 9 evokes the right to a healthy environment's subjective anthropocentric —where "[n]ature has a preconditional utility for humans"— and objective ecocentric dimensions —in which nature's intrinsic value is acknowledged—, while Principle 10 mentions the substantial elements of the right —mentioned in paras 23 to of this document— and its procedural ones —access to environmental information, to participation in

[24] UN General Assembly, 'World Charter for Nature' (28 October 1982) A/RES/37/7.
[25] Convention on Biological Diversity (adopted 5 June 1992) 1760 UNTS 69 (UN).
[26] IUCN World Commission on Environmental Law, *IUCN World Declaration on the Environmental Rule of Law* (26-29 April 2016).
[27] Section C, (7)(b) of the GBF. Conference of the Parties to the Convention on Biological Diversity 'Kunming-Montreal Global Biodiversity Framework' (19 December 2022) CDB/COP/DEC/15/4.

environmental decision-making process, to justice in environmental matters, and to adequate State protection when acting in defence of the environment.[28]

35. Finally, the Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas 2023 has also recognised the intrinsic value of the marine environment. In its Preamble, the Parties to the Agreement are desiring "[t]o at as stewards of the oceans in areas beyond national jurisdiction on behalf of present and future generations by protecting, caring for and ensuring responsible use of the marine environment, maintaining the integrity of ocean ecosystems and conserving the inherent value of biological diversity of areas beyond national jurisdiction."[29]

B. The taxing character of nature's intrinsic value as a justification for an objective ecocentric approach to rights-based environmental protection

36. Yet the objective ecocentric approach to human-rights based protection of nature's legal interests, grounded on nature's intrinsic value, is problematic. Nature's self-worth as justification for protecting nature's legal interests has sustained heavy criticism from legal scholars. This is so for a number of reasons. This document will outline some of the main ones. The intrinsic value of nature conveys an ontology of value that derives from logical fallacies. It also has been criticised for representing nature and components of the environment in a stereotypical fashion that is incompatible with science of the Earth systems, and for incorporating conflicting concepts of nature and the environment.

36.1 From a legal philosophical point of view, the intrinsic value of nature is an applied reflection of natural law considerations. The intrinsic value of nature is derived from a particular property of nature: nature is worth protecting because its value resides in its unity, its universality, its harmony, and its capacity as a producer or a nurturer. So this amounts to recognising already existing inalienable rights that natural entities ought to have due to the fact of their self-worth, responding to nature's moral status. However, this formulation is incompatible with the "ought/is" principle laid down by Kant.[30] It is not possible to derive normative conclusions, such as the need to respectfully behave towards 'the earth community', from the descriptive assertion that the environment is an interconnected, interdependent and harmonious unity comprising humans and natural entities. This is because another equally prescriptive premise -the intrinsic and moral value

[28] 'The Strasbourg Principles of International Environmental Human Rights Law - 2022', (2022) 13(special issue) Journal of Human Rights and the Environment 195.
[29] UN General Assembly, 'Agreement under the UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction' (19 June 2023) A/CONF.232/2023/4.
[30] Lynda M. Warren, 'Wild Law – the theory', 18 Environmental Law & Management (2006) 11; Tilo Wesche, 'Who owns nature? About the rights of nature' (2022) 65 Estudios de Filosofía 49.

of the environment, equally as important as that of humans- is needed to establish the causal link between how nature is and what humans ought to do to protect it.[31]

36.2 On the other hand, from a scientific perspective, perceiving nature as a universal, harmonious, caring and nurturing entity reliant on totality is a product of Western modern thought rather than an evidence-based assessment of the reality of nature. In nature creation, destruction and interruption of life take place, indistinctive. Scholars point out that nature would therefore not be caring nor nurturing, but arbitrary and indifferent due to its enormous power. As violence is actually an inherent characteristic of nature, any disregard for its capriciousness should be viewed as part of that vision of Modernity where humans can tame nature and escape natural constraints. Natural constraints are, for instance, the successive species extinctions occurred throughout the Earth's geological ages.[32]

36.3 Another stark contrasting observation to such universal, harmonious and nurturing perception of nature is the one fostered by Earth system science. The Earth system is defined "[a]s the integrated biophysical and socioeconomic processes and interactions (cycles) among the atmosphere, hydrosphere, cryosphere, biosphere, geosphere, and anthroposphere (human enterprise) in both spatial —from local to global— and temporal scales, which determine the environmental state of the planet within its current position in the universe".[33] It focuses on the Earth as an integrated entity where interactions between the geosphere and the biosphere are affected by human activities as a significant outside force.[34]

36.4 What is salient about human-driven changes to biogeochemical processes, ecosystems and biodiversity is that their effects could be equated to some of the great forces of nature in their extent and impact. It is the materialisation of the 'paradox of historicised nature': "The more profoundly humans have shaped nature over their history, the more intensely nature comes to affect their lives."[35] Moreover, global change caused by human-driven activities to the planet's surface is non-linear —it cannot be understood as the result of a simple cause-effect relationship. There is an element of unpredictability in the effects of anthropogenic agency in the environment: "Earth System dynamics are characterised by critical thresholds and abrupt changes." So human agency "[c]ould inadvertently trigger such changes and potentially switch the Earth System to alternative modes of operation that may prove irreversible and less hospitable to humans and other forms of life." This causes the Earth System to operate in a state of unprecedented changes in character,

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[31] Philip Milton, 'David Hume and the eighteenth-century conception of natural law", 2(1) Legal Studies (1982) 14.
[32] Mihnea Tănăsescu, *Understanding Rights of Nature* (1edn 2022, Transcript Verlag) 64-66.
[33] Will Steffen et al, 'The Anthropocene: Are Humans Now Overwhelming the Great Forces of Nature?', 36(8) Ambio (2007) 614.
[34] Will Steffen et al, 'The emergence and evolution of Earth System Science', (2020) 1(1) Nature Review Earth and Environment 54.
[35] Andreas Malm, *The Progress of this Storm: Nature and Society in a Warming World* (2edn Verso, 2020) 76-77.

magnitude and rate.[36] All of which, the Court would note, is far from the harmonious and caring characteristics that an intrinsic value appraisal would endow nature and components of the environment with.

36.5 The ascribed definition of nature itself as an intrinsically valuable entity worthy of legal protection remains unclear as well. When nature or components of the environment are defined as natural spaces with ecological integrity, consisting of vital cycles and evolutionary processes, that have legal interests in themselves, two kinds of notions of nature and the environment are at play. Nature is at the same time a process of change, and a fundamental character of natural space. Within the first notion —nature as "[t]he specific force at the core of life and change"—, nature can be the object of conservation "[b]y a proper understanding of its mechanisms", which includes human activity in its dynamic. But under the second notion —nature as "[t]he essence, inner quality"—, nature must be protected against any distortion or denaturation.[37]

36.6 As scholars have rightly indicated, these definitions imply very different environmental protection policies, which can hardly be merged. Is environmental protection about preserving the cultural representations of nature as a heritage from human disturbance, by limiting as much as possible human intervention or intervening just enough to remove previous human disturbance? Or is it rather ensuring, by human intervention, the good functioning of natural processes and the environment as a set of self-producing resources? The mention of the correlation between nature's intrinsic value and conservation and restoration of nature and components of the environment, at least in international environmental law, leaves this question unresolved.[38]

37. The CLE wishes to indicate to the Court the complication in accepting nature's intrinsic value as the justification of an objective eco-centric approach to interpret the ACHR's human-rights based protection of nature's legal interests. In deriving that self-worth from alleged properties of nature, there is a clear absence of a normative reason for the protection of nature. Even if a wholeness, theology, sacredness or nurturing character of nature could be described, or even if it is assumed that nature has existence goals that can be scientifically justified rather than functions, and that these goals of integrity and flourishment are good, it would remain unexplained why nature deserves unconditional protection. Moreover, characterising nature and the components of the environment as a universal, harmonious and nurturing entity does not correspond to the factual state of nature. That is, as a single planetary system with its own inherent dynamics and properties, innately violent and arbitrary due to the immense power of its forces, and historically affected by past and ongoing human activity. Finally, the lack of reconciliation between the competing visions of nature that would hold a legally protected self-worth renders it difficult to conceive

[36] ibid.
[37] Frédéric Ducarme and Denis Couvet, 'What does 'nature' mean?' (2020) 6 Palgrave Communications 14.
[38] ibid.

environmental protection where fair and just coexistence conditions between humans, ecosystems and natural entities are ensured.

C. The jump to a objective ecocentric approach to interpret the ACHR's human-rights based protection of nature's legal interests, based on nature's ownership interests in its own ecosystem services

38. The difficulties of justifying the protection of nature's own legal interests under a human rights-based approach such as the ACHR on the basis of its intrinsic value can nonetheless be overcome. The CLE would like to suggest to the Court that an approach based on recognising that nature and components of the environment have ownership entitlements to its own ecosystem services and contributions to people could be considered to expand the protection offered by Article 11 of the San Salvador Protocol to the ACHR. In principle, this other justification would allow for two different ways of upholding an objective eco-centric approach to protect nature's legal interests: either by endowing particular ecosystems with legal personhood, so that the environmental person can exercise the protection of such entitlements, or by enshrining the non-regression, *in dubio pro natura* and 'ecological resilience' principles to ensure the supremacy of nature's legal interests.[39]

39. As the Court noted in para 59 of Advisory Opinion OC-23/17, there is a tendency in Constitutions and case law of ACHR State Parties to uphold an objective ecocentric approach through strong human rights-based protection of nature's legal interests. This tendency has manifested in the endowment of nature or components of the environment, on the one hand, with legal personality or right-holder status, and on the other hand, with substantial rights, using what legal scholarship has called an 'eco-theological' foundation of rights of nature.[40] However, within the context of the Inter-American human rights system, the ripple effects of such a tendency might be curtailed by the structure of the protection of human rights offered by the Convention itself. In general terms, endowing a particular ecosystem with legal personality or creating substantial rights of nature exceeds any reasonable, effective interpretation of Article 11 of the San Salvador Protocol because it falls outside of the Court's material and personal remit set out in Articles 62(3) and 63(1) of the ACHR and Articles 25 and 29 of the IACtHR Rules of Procedure.

40. Nevertheless, this assumption does not hinder the protection of nature's own legal interests under the right to a healthy environment recognised by the Convention using an objective ecocentric approach diverting from nature's intrinsic value. Legal scholars have proposed that

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[39] Natalia Kobylarz (n 10); Silvia Bagni, Mumta Ito and Massimiliano Montini, 'El debate sobre los derechos de la naturaleza en el contexto jurídico europeo' (2022) 13(1) Revista Catalana de Dret Ambiental 1.

[40] 'Eco-theological' rights of nature are the rights of nature or of components of the environment to exist, to be preserved and to be restored. These rights bear significant resemblance to fundamental rights such as the right to life, the right to liberty, or the right to property. These substantive rights are meant to create duties of environmental protection and environmental harm redress upon the State or other individuals and incorporated bodies. See Mihnea Tănăsescu (n 32) 429-453.

emerging environmental law principles can be used to interpret existing provisions of international human rights law instruments that establish property rights limitation clauses to provide for ecological human rights.[41] Therefore, in a manner consistent with the Court's expansive and evolutionary interpretation of the Convention, and with the *corpus iuris* of international human rights law, nature's legal interests, as part of the objective-ecocentric dimension of the right in Article 11(1) of the San Salvador Protocol, could be considered as inherent ownership entitlements of nature itself that trump any economic or State ownership considerations. This justification would be backed both by the socio-ecological function of the human right to property in Article 21(1) of the ACHR, and by the non-regression, *in dubio pro natura* and 'ecological resilience' principles. But first, the CLE will present to the Court how inherent ownership entitlements of nature to its own ecosystem services or contributions to people constitute a more adequate justification for an objective eco-centric approach to a human-rights based protection of nature's legal interests under the Convention.

41. The reason to consider that nature has inherent ownership entitlements is more or less simple. Rights of nature can be interpreted as nature's property rights in its resources, because it is capable of value creation that allows for it to regularly provide itself with living and non-living elements relevant to its continuity, whatever form that may assume.[42] This idea is not new. It was sketched at the very outset of the rights of nature movement by Christopher D. Stone himself. In his seminal article, he proposed that violations of rights of nature should entail a cost "[b]y declaring the "pirating" of them to be the invasion of a property interest." Property rights of nature to its own ecosystem services creates their monetary worth. As nature is endowed with entitlements similar to the exclusivity of intellectual property rights that have monetary value, the deterioration of natural elements would be seen as an encroachment on the monopoly to its own resources. Therefore, remedies to any breach of nature's ownership interests in its own resources due to deterioration would include the total of its social and environmental costs.[43]

42. The philosophical background of the theory is based on the same liberal thought that has animated private law regulations in continental and common law jurisdictions since the 19th century. The normative content of property rights is informed by freedom. Material self-determination, which allows a person to provide herself with goods and services that are relevant to life by means of her own efforts without State intervention —and regardless of any consideration—, is protected by law. That person, of course, is also entitled to the ownership of the proceeds of her own labour; an ownership enabling her to acquire a self-determined supply of goods and services and, in turn, materialising freedom. Yield of labour is the product of value

[41] Natalia Kobylarz (n 10); Silvia Bagni, Mumta Ito and Massimiliano Montini (n 39).
[42] Tilo Wesche (n 30) 62-66.
[43] Christopher D. Stone, 'Should Trees Have Standing? —Toward Legal Rights for Natural Objects' (1972) 45 Southern California Law Review 450.

creation: a person uses natural resources to procure herself with such goods and services and produces something of higher value. That is, something useful for her survival.[44]

43. Regarding nature and components of the environment, its process of value creation is ruled by a different logic. Nature produces ecosystem services. Ecosystem services —or nature's contributions to people— are "[t]he contributions, both positive and negative, of living nature (diversity of organisms, ecosystems and their associated ecological and evolutionary processes) to people's quality of life."[45] Ecosystem services arise from long-term biological, chemical and physical processes, which are not man-made but arise spontaneously. Nature lacks any agency or intention when creating ecosystem services: they are the result of self-causation. These ecosystem services or resources are 'natural' because they are brought forth by nature itself. Consequently, "Ecosystem services thus contribute to value creation, which comes from nature. Nature is thus also a source of value creation that cannot be offset against human labour." As nature's processes that create value creation are considered labour that entitles it to ownership of its own proceeds, whenever value is contributed to, a right to ownership of the produced value in favour of nature follows.[46]

44. Consequently, humans are in a co-ownership of ecosystem services with nature. Termination of the co-ownership through partition is physically impossible, because ownership interests of both nature and humans are conditional on the existence of ecosystem services. So when a person uses, exploits and transfers natural resources, they are interfering with nature's shared interest in ecosystem services. Yet that exploitation could not be made at the expense of threatening the production of ecosystem services. Humans would have the duty under property law to neither damage nor destroy ecosystem services through their use, which implies a duty of sustainable use of those natural resources. In short, "[f]ree property power over natural resources is limited by sustainability obligations in the very idea of property."[47]

45. Scholars have pointed out how nature's rights to its own resources, given nature's worth for the value creation in the ecosystem services it produces, is paramount to local participatory governance arrangements of rights of nature. Should nature or components of the environment be endowed with legal personhood in a specific jurisdiction, and vested ownership of the natural entity in the legal personhood, it would be entitled to the safeguards of constitutional property clauses. That is, protection "[f]rom legal or physical acts of private parties and the State's executive branch, but also from legislation that limits or takes away their ownership."[48] In the cases of the

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[44] Tilo Wesche (n 30) 62-63.
[45] Andrew N. Kadykalo et al, 'Disentangling 'ecosystem services' and 'nature's contributions to people' (2019) 15(1) Ecosystems and People 269.
[46] Tilo Wesche (n 30), 63-65.
[47] Ibid, 65-66.
[48] Björn Hoops, 'What if the Black Forest Owned Itself? A Constitutional Property Law Perspective on Rights of Nature' (2022) 11(3) Transnational Environmental Law 475.

Te Urewera forest and the Whanganui River in New Zealand, law has officially vested the fee simple estate in the Crown-owned establishment land of the forest and parts of the river bed in the legal persons of these ecosystems.[49] Lack of protection of nature's legal interests as ownership entitlements to their own contributions to people causes major environmental governance problems that can ultimately affect environmental human rights, due to ecosystem extinction. This is the case, for instance, of certain rivers and riverine ecosystems in Australia. Despite requiring flowing water to survive, they are only protected "[b]y placing constraints on the actions of other water users", but have been given no rights to their own water.[50]

D. The effective interpretation of Articles 11 of the San Salvador Protocol and 21(1) of ACHR to incorporate nature's value creation of ecosystem services as the justification of an objective-ecocentric perspective to protect nature's legal interests by means of the human rights-based approach framed within the Convention

46. However, within the objective-ecocentric ACHR's human rights-based approach proposed in this brief, there is no need for an additional Protocol or any other international instrument within the Organisation of American States to recognise nature's legal interests as ownership entitlements to its own resources protected by the Convention. The CLE kindly asks the Court to assess whether nature's legal interests could be considered as inherent ownership entitlements of nature itself that trump any economic or State ownership considerations about their use. In the CLE's opinion, as previously stated, this line of interpretation is based on the *effet utile* given to Articles 11(1) of the San Salvador Protocol and 21(1) of the ACHR, and their balancing with the emerging non-regression, *in dubio pro natura* and 'ecological resilience' principles of environmental law. All of which is consistent with Articles 29 of the Convention, 31 of the Vienna Convention of the Law of Treaties (VCLT), and finally, with the *pro persona* principle, where the ACHR are interpreted in a way which is more protective of human rights.

47. The reason for this can be found in the notion of *socio-ecological function of property*. This consideration stems directly from the root of title in Article 21(1) of the ACHR, and of its harmonious interpretation in conjunction with Article 11(1) of the San Salvador Protocol. State Parties can subordinate the use and enjoyment of property to the interest of society. Amidst the impending socio-ecological crisis, it is in the interest of society that all human rights guaranteed in the Convention are to remain unaffected by use of property. Property here is understood *latu sensu*. It includes —without being limited to— land rights, water rights, agriculture and cattling, fisheries, natural resource licensing, and planning and environmental permissions. In that sense, there are positive and negative obligations of human property holders (i) To not cause harm to society with property use, and to make a beneficial use of it for society, and (ii) To respect the right to a healthy environment and the rights of present and future generations.

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[49] Te Urewera Act 2014 (NZ), s 12; Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (NZ), s 41.
[50] Erin O'Donnell, 'Rivers as living beings: rights in law, but no rights to water?' (2021) Griffith Law Review 1.

48. The concept of the socio-ecological function of property has been developed by the Colombian Constitutional Court. The notion has been explicitly provided for in Article 58 of the Constitution. According to the Court's case-law, with such a provision, the Constitution has brought forward an 'ecologisation' of private property. Property holders must respect the rights of members of society, in observation of the solidarity principle, from which property derives its social function. Moreover, they must also bear limitations on their rights imposed by the rights of future generations, pursuant to the ecological function of property and sustainable development. Hence, legislation can impose greater restrictions on natural resource appropriation or to the use their holders can give them.[51]

49. The Inter-American human rights system is no stranger to expansively interpreting the right to property set out in Article 21(1) of the ACHR. The Court's case-law has found that indigenous peoples' land rights include a collective dimension that is worthy of legal protection, and that it is in itself a proportional limitation to other property rights. The existing case-law could be expansively applied to impose to State Parties a duty to take the appropriate measures to create a legal framework whereby nature's contributions to people are recognised as legal interests in themselves warranting protection under the right to a healthy environment, and as limitations to property rights in the interest of society.

49.1 The right to property has been broadly interpreted by this Court. It includes any entitlement susceptible to appropriation and integration to a person's patrimony. That is "[a]ll movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value."[52] The CLE petitions the Court to consider ecosystem services as both corporal and intangible elements of value, that make up for nature's legal interests and warrant protection under the objective scope of protection of the right to a healthy environment and as a limitation on the right to property as well.

49.2 The Court has held that in the case of indigenous peoples' property rights, there is a traditional 'communal form of collective property of the land'. This collective dimension of the right of indigenous peoples' to communal property implies taking into account "[t]hat the land is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledges and practices in connection with nature, culinary art, customary law, dress, philosophy, and values."[53] The Court later added, in the *Mayagna (Sumo) Awas Tingni* case, that the connection of indigenous peoples with their territories included that to "[t]he natural resources these territories contain that are connected to their culture, as well as the intangible elements

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[51] See Constitutional Court, Judgement C-189/06 (15 March 2006) Escobar Gil J, §§ 6 and 7; Judgment T-760/07 (25 September 2007) Vargas Hernández J, §§ 3.3 and 3.4; Judgment C-750/15 (10 December 2015) Rojas Ríos J, § 8.1.
[52] *Ivcher-Bronstein v Peru,* Inter-American Court of Human Rights Series C No 74 (6 February 2001), [122].
[53] *Mayagna (Sumo) Awas Tingni Community v Nicaragua,* Inter-American Court of Human Rights Series C No 79 (31 August 2001), [149].

derived from them."[54] Consequently, it was recognised in the *Samaraka People* case that "[t]he right to the use and enjoyment of the territory would have no meaning if it was not connected to the natural resources that are found within that territory".[55] Finally, in the *Lhaka Honhat* case, the Court held that to ensure effective ownership of land of indigenous peoples, the State had *inter alia* the duty to "[r]efrain from carrying out actions that may result in agents of the State or third parties acting with its acquiescence or tolerance, adversely affecting the existence, value, use and enjoyment of their territory."[56] The CLE thus invites the Court to extend the scope of application of the duty to respect the collective dimension of indigenous peoples' land rights in the IACtHR's case-law to all ecosystem services and nature's contributions to people that make up nature's legal interests.

50. To the CLE's knowledge, the Court's case-law has yet to deal with an actual limitation of the human right to property based on environmental considerations. Lessons in that regard could be drawn from the international human rights systems. These international jurisdictions have established such limitations, and have evaluated *in concreto* how proportional these considerations are in limiting property rights.

50.1 Within the European human rights system, the European Court of Human Rights (ECtHR) has applied several times the limitation in the public interest of the right to property established in Article 1 of Protocol 1 to the European Convention on Human Rights (ECHR). According to Strasbourg Court case-law, "Any interference by a public authority with the peaceful enjoyment of "possessions" can only be justified if it serves a legitimate public (or general) interest. For limitations on personal property rights of an individual to be lawful, the court must find a 'fair balance' between public interest and the interest of the person concerned. Additionally, the interference must pursue a legitimate aim in the public interest, and the means used to interfere must be proportionate to the aim pursued.[57]

50.2 The protection of the environment falls well within the notion of public interest in that provision.[58] The right to a healthy environment currently falls outside the material scope of the ECtHR. However, in the *Hamer* case, the Court held that, considering the increasing important of environmental protection in today's society, "[e]conomic considerations and even certain fundamental rights as the right to property should not take precedence over considerations relating to protection of the environment, in particular where the State has enacted legislation on the

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[54] *Yakye Axa Indigenous Community v Paraguay,* Inter-American Court of Human Rights Series C No 125 (17 June 2005), [154].

[55] *Samaraka People v Surinam*, Inter-American Court of Human Rights Series C No 173 (28 November 2007), [121]-[122].

[56] *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina* (n 5), [98].

[57] Council of Europe and European Court of Human Rights, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights* (31 August 2022), <https://www.echr.coe.int/documents/d/echr/Guide_Art_1_Protocol_1_ENG> accessed on 16 December 2023.

[58] *Kyrtatos v Greece*, Application no 41666/98 (ECtHR, 22 August 2003), § 52.

subject."[59] Moreover, regarding circumstances in which Member States intervene, through control of property in the public interest, the Court has held that in those cases the communities public interest is pre-eminent. So "[t]he State's margin of appreciation is wider than when exclusively civil rights are at stake."[60] In application of these principles, for instance, the Strasbourg Court has deemed appropriate and proportionate the revocation of a permit to exploit gravel in accordance to national law,[61] the demolishing of a house built in a forest where building was prohibited, even in the absence of a right within the ECHR,[62] or the retention of vessel and fishing gear due to the exercise of unlicensed fishing activities posing a serious threat to the biological resources in the area.[63]

50.3 The African Commission (ACmHPR) and the African Court on Human and Peoples' Rights (ACtHPR) have also addressed the limitation of the human right to property in the context of environmental matters. In the *Ogiek* case, the ACtHPR held that, in light of Article 14 of the African Charter of Human and Peoples' Rights (ACHPR), "the interest of public need" or "the general interest of the community" could justify an encroachment on collective land rights of ancestral peoples provided that they were necessary and proportional. On the facts of the case, the Court held that the respondent State did not provide any evidence that the Ogiek people's continued presence in the Mau Forest area was the main cause for the depletion of its natural environment. It also found that the environmental degradation on that ecosystem had actually been caused by "[e]ncroachment upon the land by other groups and government excisions for settlements and ill-advised logging concessions."[64]

50.4 Furthermore, in the *Endorois* case, the ACmHPR held, on the basis of the jurisprudence of the IACtHR and the ECtHR, that indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution of those land or to obtain lands of equal extension and quality. The Commission found that the 'public interest' test was more stringent when verifying limitations to the property rights of indigenous peoples than those of individual right-holders. For that reason, the displacement of the Endorois people from their ancestral land and the destruction of their possession to construct a game reserve was held to be unlawful eviction that denied them from the collective dimension of the right to their traditional lands.[65]

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[59] *Hamer v Belgium,* Application no 21861/03 (ECtHR, 27 February 2008), § 79.
[60] Council of Europe and European Court of Human Rights (n 57).
[61] *Fredin v Sweden (No 1),* Application no 12033/86 (ECtHR, 18 February 1991).
[62] *Hamer v Belgium* (n 59).
[63] *Yasar v Romania,* Application no 64863/13 (ECtHR, 26 November 2019).
[64] African Commission on Human and People's Rights v Kenya, African Court on Human and Peoples' Rights, Application No 006/2012 (26 May 2017), [130].
[65] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, African Commission on Human and Peoples' Rights Case 276/2003 [209], [212], and [238].

51. Hence, there would not be any reasonable argument to exclude the necessity, the adequacy and the proportionality *strictu sensu* of the protection of nature's legal interest as a limitation to property rights in the interest of society, as per the explanation set out in part IV of this brief.

52. In reason of the broad conception of property within the Convention and the intricate relationship of the human right to property and the associated ecosystem services therewith, by means of inductive reasoning, the IACtHR's expansive interpretation of the human rights in the Convention would make it possible to extract a general premise. Given the socio-ecological function of property, and the connection that other human right holders other than the fee simple holder and nature itself have with the ecosystem services associated therewith, under the Convention there exists a limitation of the human right to property in the interest of society of nature's legal interests.

V. Particular and differentiated State duties owed, as part of the protection afforded by the ACHR framework to nature's legal interests, to nature and components of the environment to prevent and mitigate the effects of climate change

53. But how could the Court establish, on the basis of the Convention, particular and differentiated duties at the charge of State Parties to prevent and mitigate the effects of climate change that can protect nature's legal interests as part of the right to a healthy environment? To answer this question, the CLE will take into account the Kyoto Protocol, the Rio Declaration, the UN Framework Convention on Climate Change (UNFCCC), the Paris Agreement, Advisory Opinion No. OC-23/17 of this Court, and the Resolution No. 3/2021 of the IACHR.

54. The CLE would like to draw the attention of the Court to the fact that State Parties to the ACHR have, in the Centre's view, two essential obligations: (i) A duty of cooperation in good faith with other State Parties to reduce greenhouse gas (GHG) emissions to ensure a safe climate that enables the protection of nature's legal interests; and (ii) A duty to take appropriate measures to prevent GHG emissions that can potentially cause significant harm to nature's legal interests within each State Party's jurisdiction in accordance with international law, considering those that could have transboundary effects, and to mitigate it if it occurs.

55. The CLE points out to the Court that any State Party duties stemming from the ACHR regarding climate change prevention and mitigation should take into account the dynamics and the effects of past and ongoing GHG. There is both a present global rate of GHG emissions —the emissions "flow"— and a historical concentration of GHGs in the atmosphere —the emissions "stock"—. Small and large changes in global GHG emissions (flow) reflect incrementally or expansively and in the long-term in the atmospheric GHG concentrations (stock), respectively. This means that the benefits of mitigation are unlikely to unfold in the short-to-medium term. So mitigation policies adopted by State Parties to perform their duties arising from the Convention regarding curbing climate change should lead to a consideration of the integration of prevention

and mitigation within existing environmental management policies, the cost of prevention and mitigation action and the impact of these policies on other human rights protected by the Inter-American human rights system.[66]

56. It stems from systematic interpretation of the Convention and international environmental law, the duty of cooperation in good faith with other State Parties to reduce GHG emissions to ensure a safe climate that enables the protection of nature's legal interests. State parties have thus the following duties: (a) To notify other State Parties that may potentially be affected by significant environmental harm as a result of GHG-emitting activities within their own jurisdiction, (b) To consult and negotiate with potentially affected State parties of GHG-emitting activities that could entail significant transboundary harm —all very well-defined in international law and by this Court in its advisory opinion—, and (c) To facilitate information exchange between State Parties. Moreover, in the CLE's view, State Parties have the duty (d) To promote, formulate, implement and fund an Inter-American, ambitious, rights-based and public climate policy to protect nature's legal interests.

57. Some scholars have pointed out that this obligation is the main one regarding climate change that can arise from human rights treaties. The scope of this obligation would only require "[a] state to implement mitigation action to the extent that this may effectively promote the enjoyment of the treaty's rights within the state's territory or under its jurisdiction." This is because no other implied duty could stem from human rights treaties given their context, their object and purpose. Otherwise, human rights treaties would be "[r]educed to a Trojan horse allowing extraneous rules and objectives to take hold of human rights institutions."[67] However, in the context of the ACHR, wherein Article 11 of the San Salvador Protocol explicitly enshrines the right to a healthy environment, the prevention and mitigation of climate change —and its impact to both human and nature's legal interests— is closely linked to the Convention's main objective of protecting the enjoyment of human rights. This particular context, foreign to the ECHR and other UN human rights treaties, enables this Court to establish other duties for State Parties beyond international cooperation in good faith to render effective the right to a healthy environment.

58. The duty to take appropriate measures to prevent and mitigate GHG emissions that can potentially cause significant harm to nature's legal interests within each State Party's jurisdiction, in accordance with international law, is grounded on the prevention principle set out in environmental international law. The prevention principle has been enshrined in international law as the responsibility for States to "[e]nsure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national

[66] Benoit Mayer, 'Climate Change Mitigation as an Obligation Under Human Rights Treaties' (2021) 115(3) American Journal of International Law 409.
[67] ibid.

jurisdiction", and is linked to the duty to exercise due diligence to avoid provoking transboundary environmental harm.[68]

59. In particular, this duty is applied to the "flow" of GHG emissions. The scope of this duty of means would include the following obligations: (a) To adopt constitutional or legislative measures to give effect to the protection of nature's legal interests as part of the right to a healthy environment from GHG-emitting activities that could cause significant environmental harm, (b) To supervisor and monitor illegal extractive activities, rural and urban development, agri-industrial activities, fisheries, carbon sink exploitation, and other GHG-emitting activities that could cause significant environmental harm, in order to guarantee the protection of nature's legal interest as part of the right to a healthy environment, (c) To require and approve prior, science-based, participative and independently carried-out environmental impact assessments (EIAs) in relation to GHG-emitting activities that involve risks of significant environmental harm within the State Party's jurisdiction, taking specifically into account the future and cumulated impact that GHG emissions can have on the concerned ecosystem services; (d) To prepare contingency plans to deal with environmental disasters related to those GHG emissions; and (e) To mitigate significant environmental damage if it occurs.

60. Moreover, the duty in mention should be based on the common but differentiated responsibilities principle. States with "[g]reater financial capacity must provide the guarantees to provide greater technical and logistical capacities to the States that have a greater degree of impact on climate change, as well as less financial and infrastructure capacity to face the climate emergency."[69] Consequently, the duty to mitigate GHG-emitting activities that can cause significant harm to nature's legal interest as a result of climate change creates an obligation of conduct including the duties for State Parties (i) To engage in assistance to secure aid, transfer technology and develop international partnership to assist American countries with higher poverty rates to eradicate poverty, (ii) To increase support for debt relief in favour of American countries with high poverty rates in exchange for implementing climate change prevention and mitigation strategies to offset GHG-emitting activities from American countries with less poverty rates, and (iii) To use all means possible at their disposal to formulate and carry out an Inter-American decarbonisation or fossil fuel non-proliferation policy.

VI. The application of the non-regression, *in dubio pro natura* and 'ecological resilience' principles in the compliance of the duties owed to nature's legal interests to prevent and mitigate climate change

61. To avoid State Parties from tilting the fair balance against the right to a healthy environment when discharging their duties pursuant to part V of this brief, it is necessary to assure the

[68] *The Environment and Human Rights* (n 3), [128].
[69] *Climate Emergency: Scope of Inter-American Human Rights Obligations* (n 14), s I(7).

supremacy of nature's legal interests over economic or State ownership of natural resources considerations, or deficiencies in EIAs. In that regard, the CLE invites the Court to consider the existence of a duty of State Parties to ensure respect for the non-regression, *in dubio pro natura* and 'ecological resilience' principles within their climate change prevention and mitigation institutional arrangements.

62. The non-regression principle supports the premise "[t]hat governments and other institutions must not reduce the *level of protection afforded by laws, regulations and standard*s". In accordance with this principle, also known as the standstill principle, there will be no walking back in environmental protection when designing and implementing environmental governance. Judges ought to incorporate this principle in their decisions "[i]n order to ensure the fulfilment of rights guaranteed by environmental law." This principle "[i]s intended to avoid removing or weakening norms in favour of interests that have not been demonstrated to be higher in importance than the public interest in the environment, given that, in many circumstances, backsliding can lead to environmental consequences that are irreversible or difficult to repair." It represents not only the strong link between the healthy environment and human rights, where the first is a precondition for the effective exercise of the latter, but it calls for the progressive realisation of human rights, in the way that once norms have secured the rights, the State has then the duty to maintain their enjoyment.[70]

63. The *in dubio pro natura* principle is both an interpretation principle for judges and public administrators facing a lack of certainty regarding applicable rules to environmental matters, and a criterion to elucidate competence or attribution issues between different levels of government. In case of doubt, institutional and judiciary bodies are bound to construe applicable rules to environmental matters in the way that favours environmental protection the most, "[g]iving preference to the least harmful alternative." Moreover, it would also be useful to solve issues and clashes amongst legislative and executive powers regarding environmental competences in centralised, decentralised and federal legal systems. This principle could also be applied regarding nature's legal interest even absent a risk of harm to human interests, and can even be used to justify shifting the burden of proof in environmental litigation.[71]

64. And last but not least, the 'ecological resilience' principle —proposed by right of nature scholars— seeks to use a systemic perspective to assess "[t]he ability of an ecosystem to return to the condition preceding an external disturbance" in case of significant environmental harm as a result of GHG-emitting activities. Resilience can prove to be especially useful in cases where GHG-emitting activities cause biodiversity loss, given the connection between ecological

[70] Nicholas S. Bryner, 'Never Look Back: Non-Regression in Environmental Law', (2022) 43(3) U. Pa. J. Int'l L. 555.
[71] Serena Baldin and Sara de Vido, 'The *In Dubio Pro Natura* Principle: An Attempt of a Comprehensive Legal Reconstruction' (2022) Revista General de Derecho Público Comparado 32, 168; IUCN World Commission on Environmental Law (n 26).

resilience decrease and biological diversity decrease. The inclusion of 'ecosystem resilience assessments' in existing EIAs would increase their effectiveness as it would include the most possible ecosystem interactions and impacts to other human rights that could be negatively affected as a result of GHG-emitting activities. This would comprise *inter alia* health impact assessments of such activities, space-time evolution of climate change appraisals, and soil consumption and territorial transformations.[72]

65. In the CLE's view, the application of the duty laid out in para 61 would contribute to bring about a new type of human-rights based approach to environmental governance in preventing and mitigating climate change, that is mindful of integrating principles of equality, justice, cooperation and sustainability by putting nature's own legal interests first.

[72] Michele Carducci et al, *Towards an EU Charter of the Fundamental Rights of Nature* (2020, EESC) 70-87 <https://www.eesc.europa.eu/en/our-work/publications-other-work/publications/towards-eu-charter-fundamental-rights-nature> accessed 18 December 2023.