

# **‘SO, THIS IS PERMANENCE’: THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AS A LIMINAL SPACE FOR CLIMATE JUSTICE**

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*This paper aims to appraise the normative potential of the Inter-American Human Rights System (‘IAHRS’) to respond to the threats posed to the enjoyment of human rights in the face of the climate crisis. In so doing, the paper contrasts broader critical International Human Rights and Environmental Law (‘IHREL’) scholarship with the IAHRS innovative norms, thereby highlighting its opportunities and shortcomings. As a heuristic tool, the paper employs the analogy of international law as a continuum that constantly oscillates to distribute said scholarly views. These views are clustered between a spectrum that goes from the Baroque ethos to the Realist ethos, two categories borrowed from critical theorist Bolívar Echeverría. The former contends that the emergence and application of IHREL encompass a structural legitimacy deficit because of its colonial and liberal underpinnings and operation, rendering the solutions for tackling global challenges, such as the climate crisis, ineffective. The latter attitude responds to these critiques by referencing the historical victories of rights movements that tactically mobilised the law to change oppressive patterns. This paper puts forward a third situated description by utilising the case of the IAHRS to frame it as an appropriate ‘space’ of political and legal contention that promises to address some of the shortcomings of IHREL. However, it asserts that the IAHRS, despite constituting pathbreaking legal tools, still fails to meet the tenets of climate justice. The paper is composed of three parts. First, it will lay bare the most salient critiques and defences of IHREL. Secondly, it will highlight the progressive legal production of the IAHRS in the areas of socio-economic and indigenous peoples’ rights to respond to critical scholars. Thirdly, it will juxtapose the climate crisis context with the IAHRS’s normative edifice to make the case for its permanence as a liminal space between two ethe.*

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## I INTRODUCTION

But the dream of the elites will never be entirely peaceful, threatened as it is by the irruption of dialectical images and unthinkable constellations. The ... emergence of communities of life inspired by indigenous, ecologist and feminist epistemes will expose ... their failed tactic of clouding with empty words the most archaic devices of colonization and subalternation.

— Silvia Rivera Cusicanqui, *Un Mundo Ch'ixi es Posible*<sup>1</sup>

Martti Koskenniemi has famously argued that indeterminacy marks the structure of international legal argument, foregrounded in a perennial oscillatory universe, where ‘ascendant and descendant’ arguments justify an ‘apologist’ or a ‘utopian’ position.<sup>2</sup> The former is understood as lacking ‘distance from State behaviour, will or interest’ and the latter as basing itself on ‘principles which are unrelated to State behaviour, will or interest’.<sup>3</sup> These oscillations, as highlighted by Koskenniemi, are exemplified by the law of territorial acquisition, which oscillates ‘between basing title on effective possession (and its derivatives) and on external recognition (acquiescence)’,<sup>4</sup> the doctrine of unilateral declarations, which oscillates between a ‘subjective and an objective understanding’,<sup>5</sup> the doctrine of sources, oscillating between ‘justice and consent based arguments’,<sup>6</sup> and the oscillation between two states justifying the applicable norm of sovereignty and consent in the context of international pollution.<sup>7</sup> Overall, Koskenniemi describes the very nature of international law as ‘fluid’ and ‘open-ended’ on the one hand, and as predicated upon ‘formal rigour’ on the other.<sup>8</sup>

Koskenniemi’s contribution to the theory of international law has inspired several scholars to reflect and expand critically about the oscillatory nature of international law’s institutions and doctrines. For instance, Ntina Tzouvala, by drawing on Koskenniemi’s grammar and Marxist legal critique, underscores ‘the inherent instability of “civilisation” as a pattern of argument that constantly oscillates between two distinct poles: the “logic of improvement” and the “logic of biology”’.<sup>9</sup> Beyond highlighting how international law shifts along the continuum of ‘standard of civilisation’, she argues that such nature is conterminous with the contradictions of global capitalism ‘as a system of production and circulation that produces both homogenisation and unevenness at once’.<sup>10</sup>

Several scholars have also employed the concept of oscillation between different poles in discrete regimes of international law, specifically in

<sup>1</sup> Silvia Rivera Cusicanqui, *Un Mundo Ch'ixi es Posible: Ensayos desde un Presente en Crisis* (Tinta Limón Ediciones, 2018) 39.

<sup>2</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006) 20.

<sup>3</sup> *Ibid* 17.

<sup>4</sup> *Ibid* 286.

<sup>5</sup> *Ibid* 346.

<sup>6</sup> *Ibid* 388.

<sup>7</sup> *Ibid* 512.

<sup>8</sup> *Ibid* 565.

<sup>9</sup> Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press, 2020) 39.

<sup>10</sup> *Ibid* 215.

international human rights and environmental law ('IHREL'). For instance, Marie-Bénédicte Dembour utilises the metaphor of a pendulum to trace the constant flux of international human rights law between its 'universal' and 'relativist' characters, the former seen as 'arrogant' and the latter as 'indifferent'.<sup>11</sup> In a similar vein, Frédéric Mégret argues that international human rights law tends to reproduce the oscillatory nature of international law, not only because they both share a liberal point of departure, but also because they are both grounded in the idea of sovereignty.<sup>12</sup> This might propel additional tensions for international human rights law due to its mission to protect the individual rights of non-subjects of international law.<sup>13</sup> Therefore, sovereignty stretches the continuum on which it oscillates, making it go from protruding its own pedigree to become a 'managerial conspiracy by elites'.<sup>14</sup>

As far as international environmental law is concerned, some scholars have identified its fluctuations based on teleological aspects and geopolitical factors that mould its proverbial principles. For instance, Louis J Kotzé et al elaborate on the idea that the international environmental legal order is complicit in deliberately creating, emboldening and exacerbating the 'many paradigms that drive climate injustice in the Anthropocene'.<sup>15</sup> They describe a form of oscillation between its 'utilitarian' character on the one hand, and an 'ecological' aspiration on the other.<sup>16</sup> Similarly, they also note the tendency of this branch of international law to move across the spectrum from 'anthropocentrism' to 'biocentrism'.<sup>17</sup> Furthermore, Sumudu Atapattu and Carmen G Gonzalez highlight the close connection between the environment and economic issues, which explains why international environmental law is 'the site of intense contestation over environmental priorities', where variegated positions oscillate, ranging from benchmarks of historic responsibility to differential treatment based on capacities and circumstances of specific states.<sup>18</sup> Therefore, whilst this scholarly work successfully unveils the malleable and fluid nature of international law, it does so by prioritising abstractions rather than its material functioning, thereby neglecting the role of agency and geography in the making and operation of international law. Consequently, analyses tend to overlook the

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<sup>11</sup> Marie-Bénédicte Dembour, 'Following the Movement of a Pendulum: Between Universalism and Relativism' in Jane K Cowan, Marie-Bénédicte Dembour and Richard A Wilson (eds), *Culture and Rights: Anthropological Perspectives* (Cambridge University Press, 2001) 56.

<sup>12</sup> Frédéric Mégret, 'The Apology of Utopia: Some Thoughts on Koskenniemi Themes, with Particular Emphasis on Massively Institutionalized International Human Rights Law' (2013) 27(2) *Temple International and Comparative Law Journal* 455, 465.

<sup>13</sup> *Ibid* 461–2.

<sup>14</sup> *Ibid* 495.

<sup>15</sup> Louis J Kotzé, Louise du Toit and Duncan French, 'Friend or Foe? International Environmental Law and Its Structural Complicity in the Anthropocene's Climate Injustices' (2021) 11(1) *Oñati Socio-Legal Series* 180, 183.

<sup>16</sup> *Ibid* 190.

<sup>17</sup> *Ibid*.

<sup>18</sup> Sumudu Atapattu and Carmen G Gonzalez, 'The North–South Divide in International Environmental Law: Framing the Issues' in Shawkat Alam et al (eds), *International Environmental Law and the Global South* (Cambridge University Press, 2015) 1, 2.

situated perspectives of certain international legal regimes — such as human rights and environmental law.<sup>19</sup>

Building on previous endeavours,<sup>20</sup> this article will explore the interrelation of three framings for the study of international human rights bodies. The first one is the conceptualisation of international human rights institutions as ‘spaces’ of legal co-production located along an international law continuum that everlastingly oscillates. The second organises legal scholars’ descriptions of the international law continuum by using the history’s typologies of critical theorist Bolívar Echeverría. The third uses the Inter-American Human Rights System (‘IAHRS’) as a case study to contrast some of the scholars’ descriptions, highlighting its potential as a ‘space’ for transformative legal co-production on the one hand, and as a liminal space for climate justice on the other.

As for the first framing, space will be regarded as a multidimensional construct, which accommodates ‘its political status as a means of social regulation and as the site of political struggle’,<sup>21</sup> where ‘hybrid, relational, and dynamic’ phenomena occur.<sup>22</sup> Therefore, the notion of ‘space’ is a physical location (the auspices of a court) but also relates to the performativity and agency (stakeholders’ subjectivity) that manifest within it. Anchoring the analysis around the ‘legal space’ facilitates a response to reductionistic accounts that disregard the spatial and material conditions of law.<sup>23</sup>

The second framing begins with an engagement with the literature on IHREL that addresses their general conceptualisation and operation. IHREL are the two selected regimes of international law for this paper, not only because having included additional ones would have resulted in a voluminous piece, but, most importantly, because these regimes are instrumental to IAHRS’ approach to climate change and human rights. Furthermore, the purpose is to understand the oscillatory nature of IHREL through scholarly debates. For analytic purposes, the manifold views found in the literature will be clustered into two categories borrowed from Latin American theorist Bolívar Echeverría, namely the ‘Baroque ethos’ and the ‘Realist ethos’.<sup>24</sup> The former is a critical vision of human rights, fleshed out by intellectual undertakings under rubrics such as Third World, Critical and New Approaches to International Law (‘TMAIL’, ‘CAIL’ and ‘NAIL’), whose main theoretical lenses include Marxism, feminism, post-colonialism, and political economy. Overall, critiques stemming from the Baroque ethos lay bare, on the one hand, the colonial, apolitical and managerial nature of existing international legal institutions, and, on the other, articulate a

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<sup>19</sup> Donna Haraway, ‘Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective’ (1988) 14(3) *Feminist Studies* 575.

<sup>20</sup> Juan Auz, ‘Situating the Inter-American Human Rights System in the Oscillation of International Law’ (2021) 2(1) *Journal of Law and Political Economy* 94.

<sup>21</sup> Chris Butler, ‘Critical Legal Studies and the Politics of Space’ (2009) 18(3) *Social and Legal Studies* 313, 321.

<sup>22</sup> Sabine Müller-Mall, *Legal Spaces: Towards a Topological Thinking of Law* (Springer, 2013) 3 (emphasis omitted). See also Daniel Bonilla Maldonado, ‘The Political Economy of Legal Knowledge’ in Colin Crawford and Daniel Bonilla Maldonado (eds), *Constitutionalism in the Americas* (Edward Elgar Publishing, 2018) 29, 40.

<sup>23</sup> Robyn Bartel, ‘Place-Thinking: The Hidden Geography of Environmental Law’ in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law: A Handbook* (Edward Elgar Publishing, 2017) 159, 160.

<sup>24</sup> Bolívar Echeverría, ‘El Ethos Barroco’ (1996) 7(13) *Debate Feminista* 67, 68, 74.

demand for a utopian horizon where societies enjoy dignified material conditions, thus rendering human rights law almost ‘meaningless’.<sup>25</sup> Contrariwise, the Realist ethos acknowledges the limits of international human rights law and institutions, but still endorses its instrumental or tactical use by human rights movements.<sup>26</sup> In that connection, it stresses legal victories throughout history, which served the purpose of dismantling certain oppressive legal frameworks and institutions across the world.<sup>27</sup>

The third framing highlights the legal co-production of the IAHRs to juxtapose scholars’ descriptions of the IHREL continuum. The hypothesis that will lead this paper is that the IAHRs is moving towards the furthest progressive pole of the international law continuum because it is a space for subaltern polities’ struggles that reflect Latin America’s historical and geographical contingencies. This will be illustrated by the Inter-American Court of Human Rights’ (‘IACtHR’) rich jurisprudence on economic, social, cultural, and indigenous peoples’ rights. Such intervention in the making and application of IHREL, it is here argued, is determined by multiple relevant regional commonalities, despite socio-political heterogeneity. The region hosts the world’s highest rate of biodiversity, located in unique and endangered ecosystems, which is not only a paramount source of material and cultural conditions relied upon by indigenous and *campesino* communities, but also a source of socio-environmental conflicts stemming from extractivism.<sup>28</sup> This complex interaction between subaltern polities, their value system being tied to their territories and the ceaseless pressures the global economy exerts over them might explain the role of Latin America both as a receptor and a producer of IHREL.<sup>29</sup> As Arnulf Becker Lorca clearly puts it, one should care about local stories as part of the common history of international law because they form a universal narrative.<sup>30</sup>

Moreover, the third framing would not be complete without an argument about the impossibility of reaching and staying in the progressive pole of the international law continuum. This impossibility is hereby dubbed a ‘liminal space’, that is, a conceptual location characterised by being in-between two identifiable ontologies,<sup>31</sup> namely the Baroque ethos and the Realist ethos. According to the scholarly usage of the concept of liminality or liminal space in

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<sup>25</sup> China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill, 2005) vol 6, 303.

<sup>26</sup> Echeverría (n 24).

<sup>27</sup> Ibid.

<sup>28</sup> Fábio de Castro, Barbara Hogenboom and Michiel Baud, ‘Introduction: Environment and Society in Contemporary Latin America’ in Fábio de Castro, Barbara Hogenboom and Michiel Baud (eds), *Environmental Governance in Latin America* (Palgrave Macmillan, 2016) 1.

<sup>29</sup> Natalia Rodríguez Uribe and Juan Sebastián Urdinola-Rengifo, ‘International Environmental Law in Latin America’ in Erika Techera et al (eds), *Routledge Handbook of International Environmental Law* (Routledge, 2<sup>nd</sup> ed, 2020) 263; Kathryn Sikkink, ‘Latin America’s Protagonist Role in Human Rights’ (2015) 12(22) *Sur: International Journal on Human Rights* 207.

<sup>30</sup> Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (Cambridge University Press, 2014) 14.

<sup>31</sup> Jonas Söderlund and Elisabeth Borg, ‘Liminality in Management and Organization Studies: Process, Position and Place’ (2018) 20(4) *International Journal of Management Reviews* 880.

the social sciences,<sup>32</sup> there is a risk of permanently remaining in such space if certain requirements are not met, which explains the reference in this paper's title. The reasons for situating the IAHRs in a liminal space arise from the climate crisis and the extremely limited juridical options a regional human rights system can offer to tackle a global challenge ingrained in the very fabric of global capitalism. This article will therefore analyse the latest bold developments by the IAHRs vis-à-vis the protection of the environment with implications for climate-related adjudication, namely the enforceability of a right to a healthy environment and prospects of extraterritorial application of human rights. Ultimately, the aim is to pinpoint the tension between notions of climate justice with the constrained legal tools the IAHRs has at hand to make the case for permanence in a liminal space.

Overall, this piece proposes a model to compare international human rights institutions within the oscillatory nature of international law. However, this piece is not a comparative exercise, but a contribution to interrogating what and how to compare. Ultimately, this paper argues for recognition of Latin American polities as protagonists in the making of international law,<sup>33</sup> notwithstanding all the limitations and unfulfilled expectations that might entail.

## II BETWEEN THE BAROQUE AND THE REALIST ETHE OF INTERNATIONAL HUMAN RIGHTS AND ENVIRONMENTAL LAW

Bolívar Echeverría's work is a substantially rich and theoretically sophisticated attempt at laying the foundations for a materialist theory of culture from a Latin American gaze. To understand how societies respond to the structures of modern life, he came up with a typology he coined the four 'ethe' of capitalist modernity, which are the Realist, Romantic, Classic, and Baroque ethe.<sup>34</sup> These ethe are broad categories that describe how societies react to the dialectical interaction between use-value and value, meaning the aspects of life that are vital against those that are commodified. For instance, the 'Classic ethos' describes an attitude towards modern capitalism in which the status quo is tragically accepted as it is, such that rebellion seems futile. Conversely, the 'Romantic ethos' portrays an attitude of glorifying and reifying modern capitalism, without acknowledging any contradiction.

The mentioned particular categories might seem too superfluous and inaccurate to deploy as analytical devices for the IHREL scholarship, because these regimes essentially emerged as legal technologies that ideally seek to manage the excess of modern capitalism. This is without prejudice to using those same analytical categories for clustering other regimes of international law, such as international investment law (Romantic ethos) and international refugee law (Classic ethos). For that reason, it may be more useful to apply the Realist and Baroque ethe as two poles in the IHREL spectrum. The Realist ethos accepts the insuperable efficiency and efficacy of the status quo without questioning the

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<sup>32</sup> Arpad Szokolczai, 'Liminality and Experience: Structuring Transitory Situations and Transformative Events' (2009) 2(1) *International Political Anthropology* 141.

<sup>33</sup> See Prabhakar Singh, 'Indian International Law: From a Colonized Apologist to a Subaltern Protagonist' (2010) 23(1) *Leiden Journal of International Law* 79.

<sup>34</sup> Echeverría (n 24).

immanent contradictions, so does not bother with world alternatives,<sup>35</sup> whereas the Baroque ethos fully acknowledges the contradictions of modern capitalism and refuses to conform to them.<sup>36</sup> In that connection, it is here argued that both human rights institutions and scholars' views about them can be distributed in a spectrum between these two poles. Those closer to the Baroque ethos are approaches of critical voices that unveil the shortcomings of IHREL, whereas those closer to the Realist ethos are those that uphold these regimes' tenets and operation.

It is worth recalling that IHREL is the cluster of regimes that will be analysed in this paper because it is crucial to examine the contribution of the IAHRs therein, especially in light of the climate crisis. In that regard, with the emergence and expansion of international human rights law and institutions in a post-Cold War context, their most forceful critiques also appear. The same is true about international environmental law, since both are connectors between sovereign states and individuals' interests. In parallel, both practitioners and scholars have defended the advancements of these self-contained international regimes; for example, by invoking counterfactual scenarios, where reality is far from perfect but could have been far worse had these regimes not existed.<sup>37</sup> Generally, what these opposing views do is reflect international law's oscillatory nature. In that vein, what follows is a brief literature review that will lay bare such oscillation, which in this case is one of perspectives amongst legal scholars about certain aspects of IHREL. Evidently, it would be Herculean to discuss every point these scholars raise, so the following section focuses on three common themes that commentators from the TWAIL, CAIL and NAIL traditions often elaborate about IHREL, paving the way for a juxtaposition against an IAHRs analysis. Subsequently, the views from the Realist ethos will provide some balance based on the tactical use of IHREL.

Categorising international law after an obscure Latin American cultural theorist might seem too artificial and unnecessary; however, most of the scholarly attempts at categorising IHREL interventions have not situated the operation of their object of study in the broader context of capitalist modernity,<sup>38</sup> which is the roots of how liberal institutions and views about them are shaped. Additionally, these categorisations sometimes seem too rigid and compartmentalised, which is why this paper opts for construing international law as a spectrum, rather than non-porous typologies. Finally, if there is some normative and pragmatic value in the intention of decolonising international law, this paper aims at contributing to that end by using the theoretical tools of a scholar from the Global South.

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<sup>35</sup> Ibid 73.

<sup>36</sup> Ibid 70.

<sup>37</sup> Kathryn McNeilly, 'Rights for Daydreaming: International Human Rights Law Thought Otherwise' in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press, 2021) 267.

<sup>38</sup> See, eg, Marie-Bénédicte Dembour, 'What Are Human Rights? Four Schools of Thought' (2010) 32(1) *Human Rights Quarterly* 1; Benjamin P Davis, 'The Promises of Standing Rock: Three Approaches to Human Rights' (2021) 12(2) *Humanity* 205.

A *The Baroque Ethos of IHREL*

The Baroque ethos applied to IHREL is fundamentally a critical attitude towards its formation and operation. These views problematise IHREL's colonial roots and legacies, its omission of political economy, and its apolitical and managerial mannerism. As for the colonialist problems of IHREL, they take aim at the modernising and universalist nature of human rights,<sup>39</sup> thus preventing the development of Third World ontologies.<sup>40</sup> TWAIL is the intellectual movement that upholds very deeply these colonial and power asymmetry critiques of international law,<sup>41</sup> underscoring the hypocrisy of the Global North for not respecting human rights themselves<sup>42</sup> whilst imposing a 'standard of civilization',<sup>43</sup> and redeeming themselves as saviours.<sup>44</sup> It also highlights the historical roots of a socio-economic deficit in the Third World and contextualises the extraterritorial impacts of contemporary international economic law on human rights, especially by richer nations on Third World nations.<sup>45</sup>

TWAIL has also investigated the disengagement of Third World countries in the making of International Environmental Law, identifying it as a hindrance to the Global South's own economic development,<sup>46</sup> thereby opening a bifurcation between the Global North's scientific narrative of urgent action and the Global South's clamour for social justice.<sup>47</sup> However, environmental negotiations enabled Third World coalitions to introduce concepts that benefit them such as the principle of common but differentiated responsibilities.<sup>48</sup> Moreover, TWAIL scholars are revealing the colonial and racial dimensions of global toxic waste management, whereby pollutants end up both in the proximities of black impoverished communities in the Global North and in marginalised

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<sup>39</sup> Larissa Ramina, 'TWAIL — "Third World Approaches to International Law" and Human Rights: Some Considerations' (2018) 5(1) *Revista de Investigações Constitucionais* 261.

<sup>40</sup> Ignacio de la Rasilla del Moral, 'Notes for the History of New Approaches to International Legal Studies: Not a Map but Perhaps a Compass' in José María Beneyto and David Kennedy (eds), *New Approaches to International Law: The European and the American Experiences* (TMC Asser Press, 2012) 225.

<sup>41</sup> Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press, 2016) 207.

<sup>42</sup> Makau Mutua, *Human Rights Standards: Hegemony, Law, and Politics* (State University of New York Press, 2016) 49.

<sup>43</sup> Frédéric Mégret, 'Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes' in José María Beneyto and David Kennedy (eds), *New Approaches to International Law: The European and American Experiences* (TMC Asser Press, 2012) 3, 10.

<sup>44</sup> Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) *Harvard International Law Journal* 201, 233–7.

<sup>45</sup> Opeoluwa Adetoro Badaru, 'Examining the Utility of Third World Approaches to International Law for International Human Rights Law' (2008) 10(4) *International Community Law Review* 379.

<sup>46</sup> Usha Natarajan, 'Third World Approaches to International Law (TWAIL) and the Environment' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law: A Handbook* (Edward Elgar Publishing, 2017) 207, 217.

<sup>47</sup> *Ibid.* 228.

<sup>48</sup> *Ibid.*



neighbourhoods in Global South countries.<sup>49</sup> In general, TWAIL does not only expose the past and enduring inequality amongst nations in IHREL as the result of the colonial conquest,<sup>50</sup> it also advocates for bestowing voices on oppressed peoples through a critical human rights vision.<sup>51</sup>

The other manifestation of the Baroque ethos in IHREL's critique is in unveiling its neutral stance on global capitalism. This has prompted scholars to ask whether it might not be complicit with the establishment of an unjust world,<sup>52</sup> not reducing the explosion of economic inequality in an expanding neoliberal world order,<sup>53</sup> and focusing too much on an apolitical version of the individual.<sup>54</sup> As a consequence, they argue, when industrialised nations accumulate capital from the Third World, they provoke a plethora of local harm, to which human rights only exist to mitigate the effects but not tackle the cause.<sup>55</sup> Therefore, human suffering becomes a commodity for the neoliberal conception of human rights.<sup>56</sup> Critical International Environmental scholars have also identified the ideological bases of neoliberalism in the operation of law as an essential impediment in the regime's grand objective of fine-tuned global governance with Earth system's limits.<sup>57</sup> This can be shown by the negative effects that carbon markets, enabled by international climate law, might have on local communities and their territories.<sup>58</sup> Overall, the literature on this matter accentuates the exploitative nature of the global capitalist order, including how "economic development, or the costs of cosmopolitan lifestyles, or even the accumulation of capital itself" are the source of First-to-Third world imbalance'.<sup>59</sup> This reality influences the development and operation of IHREL,

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<sup>49</sup> Tony George Puthucherril, 'Regulating Toxic Chemicals, Pesticides, and Hazardous Wastes: A TWAIL Approach to the BRS Legal Regime for a Detoxified Future' in Erika Techera et al (eds), *Routledge Handbook of International Environmental Law* (Routledge, 2<sup>nd</sup> ed, 2021) 189, 189–90.

<sup>50</sup> Mohsen al Attar, 'TWAIL: A Paradox within a Paradox' (2020) 22(2) *International Community Law Review* 163, 170.

<sup>51</sup> BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8(1) *International Community Law Review* 3, 27.

<sup>52</sup> Anna Chadwick, 'Human Rights, Poverty and Capitalism' (Working Paper No 2, Glasgow Centre for International Law and Security, University of Glasgow, September 2020) 5, 25.

<sup>53</sup> Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Belknap Press, 2018) 176.

<sup>54</sup> Umut Özsu, 'Neoliberalism and Human Rights: The Brandt Commission and the Struggle for a New World' (2018) 81(4) *Law and Contemporary Problems* 139, 147.

<sup>55</sup> Rémi Bachand, 'Les Third World Approaches to International Law: Perspectives Pour Une Approche Subalterniste Du Droit International' in Mark Toufayan, Emmanuelle Tourme-Jouannet and Hélène Ruiz Fabri (eds), *Droit International et Nouvelles Approches Sur Le Tiers-Monde: Entre Répétition et Renouveau* (Société de législation comparée, 2013) 395, 411.

<sup>56</sup> Joseph R Slaughter, 'Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World' (2018) 40(4) *Human Rights Quarterly* 735, 767.

<sup>57</sup> Antonio Cardesa-Salzmann and Endrius Cocciolo, 'Global Governance, Sustainability and the Earth System: Critical Reflections on the Role of Global Law' (2019) 8(3) *Transnational Environmental Law* 437, 451.

<sup>58</sup> Julia Dehm, 'Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective' (2016) 33(3) *Windsor Yearbook of Access to Justice* 129, 138.

<sup>59</sup> al Attar (n 50) 178, quoting John D Haskell, 'TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' (2014) 27(2) *Canadian Journal of Law and Jurisprudence* 383, 404.

not only in the constant formation of its legal identity, but also in perpetuating the status quo.

The last compound of critique is the perception of IHREL as a technocratic intervention that elides a proper engagement with the political nature of conflict and is bereft of emancipatory interest.<sup>60</sup> Indeed, some critical accounts of human rights shed light on the moral displacement of revolutionary politics held in state and nation building by contemporary humanist norms.<sup>61</sup> The consequence is that over-reliance on the individual might raise competition between the oppressed, thus making solutions based on solidarity and alliances more difficult.<sup>62</sup> Therefore, the crux of the human rights movement's problem, according to the literature, is 'leaving behind political utopias and turning to smaller and more manageable moral acts'.<sup>63</sup> Human rights, therefore, obfuscate the original forces that produce unjust outcomes, thus naturalising the institutions that cause human rights violations,<sup>64</sup> like unalterable forms of states and corporations.<sup>65</sup> Human rights, then, are not designed to reveal the 'root causes' that systematically reproduce its violations, which might lead to demobilisation of social movements that seek for emancipatory struggle.<sup>66</sup> In a similar spirit, critical environmental lawyers have underscored the fact that global environmental ruin is the result of the discipline's reluctance to apprehend complexity, including the 'North-South divide (the rich and poor cannot agree on how to protect the environment) and a lack of political will (people have other priorities that override environmental protection)'.<sup>67</sup> Therefore, international lawyers remain trapped in the 'seemingly inescapable orbit of globalized capitalism and myths of progress, unable to produce viable solutions to increasing inequality and environmental destruction'.<sup>68</sup>

To these scholars then, IHREL 'is no longer the way forward', because it 'focuses too longingly on the perfection of a politics already past its prime'.<sup>69</sup> However, it is baffling that much of this literature has failed to elaborate on spaces of opportunity to develop international law that is tailored for the oppressed and by the oppressed. The literature has not sufficiently construed

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<sup>60</sup> Martti Koskenniemi, 'The Politics of International Law: 20 Years Later' (2009) 20(1) *European Journal of International Law* 7, 16.

<sup>61</sup> Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press, 2010) 20 ('*The Last Utopia*').

<sup>62</sup> David Kennedy, 'The International Human Rights Regime: Still Part of the Problem?' in Rob Dickinson et al (eds), *Examining Critical Perspectives on Human Rights* (Cambridge University Press, 2012) 19, 24 ('The International Human Rights Regime').

<sup>63</sup> Moyn, *The Last Utopia* (n 61) 147.

<sup>64</sup> Susan Marks, 'Four Human Rights Myths' in David Kinley, Wojciech Sadurski and Kevin Walton (eds), *Human Rights: Old Problems, New Possibilities* (Edward Elgar Publishing, 2013) 217, 229.

<sup>65</sup> David Kennedy, 'Law in Global Political Economy: Now You See It, Now You Don't' in Poul F Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press, 2020) 127, 143.

<sup>66</sup> Susan Marks, 'Human Rights and Root Causes' (2011) 74(1) *Modern Law Review* 57, 71.

<sup>67</sup> Usha Natarajan and Julia Dehm, 'Where Is the Environment? Locating Nature in International Law', *Third World Approaches to International Law Review* (Blog Post, 30 August 2019) <<https://twailr.com/where-is-the-environment-locating-nature-in-international-law/>>, archived at <<https://perma.cc/VC5J-7BZG>>.

<sup>68</sup> *Ibid.*

<sup>69</sup> Kennedy, 'The International Human Rights Regime' (n 62) 34.

human rights institutions with transnational purview and located in the Global South as producers of law with emancipatory potential.<sup>70</sup> It is precisely these kinds of aspirations which the IAHRs is arguably developing to respond to the Eurocentric prism of human rights, something this piece will discuss further.

### B *The Realist Ethos of IHREL*

This section will display the main arguments of scholars that seem to lean closer to the Realist ethos in the IHREL continuum. These views do not blindly commit to the discipline's tenets and practice but do deploy a rather defensive approach to it. The objective is to make visible the other side of the oscillatory spectrum of visions of IHREL. Hence, after having explored the Baroque ethos' arguments, it is time to go to the opposite side to have a clearer panorama.

The literature that posits a rather reflective defence of human rights hinges on the aspiration that current challenging times represent an opportunity for transformation, innovation, creativity and experimentation.<sup>71</sup> They also hinge on the historical legitimacy of human rights, both as means and ends of struggles spearheaded by oppressed groups around the globe. They claim that empirically, the world is, in some respects, in a better condition due to the victories of the human rights movement, including 'a decline in genocide, a shrinking number of people killed in war, decreasing use of the death penalty, and improvements in poverty, infant mortality, and life expectancy, as well as advances in gender equality'.<sup>72</sup> This is, of course, compared to past realities rather than to an ideal world. Besides, critics have failed to propose this ideal system where material equality and individual dignity could be attainable without replicating current undesirable patterns.

Additionally, defenders of IHREL claim that the discipline and the movement that uses the law in a tactical way to achieve justice deem all sets of rights as interdependent and inseparable. This means that both 'status equality' and 'socio-economic equality' have always been, and continue to be, the goal of the global human rights movement, contrary to what critics say about focusing too much on civil and political rights.<sup>73</sup> In that respect, human rights and environmental defenders are constantly challenging state and corporate power, thereby risking their own lives. So, to suggest that these actors are 'engaged in human rights anti-politics placed beyond political economy seems both careless and wrong'.<sup>74</sup>

Furthermore, the critiques previously discussed, according to the Realist ethos, reproduce some shortcomings, ie, overemphasis on the human rights'

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<sup>70</sup> Mutua (n 44) 243.

<sup>71</sup> César Rodríguez-Garavito and Krizna Gomez, 'Responding to the Populist Challenge: A New Playbook for the Human Rights Field' in César Rodríguez-Garavito and Krizna Gomez (eds), *Rising to the Populist Challenge: A New Playbook for Human Rights Actors* (Dejusticia, 2018) 11, 34.

<sup>72</sup> Kathryn Sikkink, 'Evidence Indicates That We Should Be Hopeful — Not Hopeless — About Human Rights', *OpenGlobalRights* (Blog Post, 29 November 2017) <<https://www.openglobalrights.org/evidence-indicates-that-we-should-be-hopeful-not-hopeless-about-human-rights/>>, archived at <<https://perma.cc/U9A4-YTM4>>.

<sup>73</sup> Gráinne de Búrca, 'Not Enough: Human Rights in an Unequal World' (2018) 16(4) *International Journal of Constitutional Law* 1347, 1350.

<sup>74</sup> *Ibid* 1351.

perspective of the centres of power, crafting the critiques *in abstracto* and neglecting the utilisation of rights in real scenarios.<sup>75</sup> Indeed, they barely mention some of the developments of law in the Global South. For instance, courts in the Global South and in Latin America in particular are interpreting their domestic constitutions to promote economic equality using the vernacular of human rights.<sup>76</sup> In Colombia, the widespread usage of constitutional lawsuits propelled the Constitutional Court to order a structural overhaul of the national healthcare system as a whole and, ‘among other things, demanded the equalization of healthcare benefits for those with and without formal sector employment’.<sup>77</sup> In addition, several courts have resorted to a proportionality analysis, a progressive and broader interpretation of the right to property and the right to formal treatment to invalidate austerity measures that affected workers.<sup>78</sup>

Commentators even suggest that, despite all the limitations and shortcomings of International Environmental Law, it is less anthropocentric than it used to be, thus protecting the intrinsic value of nature, that property rights can be limited in light of environmental interests, and that access to justice and the burden of proof are no longer procedural hurdles in environmental legal cases. Likewise, if TWAAIL engages in an exercise of re-encountering and re-appraising what the environment and nature are, then new opportunities to constructively disrupt the field might emerge from the Global South.<sup>79</sup> The Global South is moving towards the internalisation of new connections between the natural and the social, identifying the ways in which ‘control of the natural environment is related to the allocation of resources and how environmental concerns are inextricably intertwined with problems of poverty, inequality and underdevelopment’.<sup>80</sup> This view can be exemplified by the push of some countries from the Global South in international fora to recognise the necessity of a binding treaty on business and human rights that includes environmental dimensions and the campaign to recognise an international human right to a healthy environment.<sup>81</sup>

The last paragraph segues into the next part of this paper, which builds the case for considering the Global South as a space not only of tactical use of the law, but potentially emancipatory legal production. That is the space of the IAHRs.

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<sup>75</sup> Paul O’Connell, ‘On the Human Rights Question’ (2018) 40(4) *Human Rights Quarterly* 962, 978.

<sup>76</sup> Mila Versteeg, ‘Can Rights Combat Economic Inequality?’ (2020) 133(6) *Harvard Law Review* 2017, 2020.

<sup>77</sup> *Ibid* 2034.

<sup>78</sup> *Ibid* 2038–9.

<sup>79</sup> Natarajan (n 46) 230.

<sup>80</sup> *Ibid* 234.

<sup>81</sup> Juan Gabriel Auz Vaca, ‘The Environmental Law Dimensions of an International Binding Treaty on Business and Human Rights’ (2018) 15(2) *Brazilian Journal of International Law* 151; David Boyd, John Knox and Marc Limon, ‘#TheTimeIsNow: The Case for Universal Recognition of the Right to a Safe, Clean, Healthy and Sustainable Environment’ (Report, February 2021) 64.

## III THE IAHRs AS A 'SPACE' FOR ENUNCIATION

What if international human rights institutions are more than mere formal producers and interpreters of law, but a crucible where everything converges: actors, histories, regimes, ecologies, legal traditions, politics? What if we saw these as 'spaces', where dynamic interactions occur and steer the wheels of history towards different trajectories? Precisely this is what this paper proposes, a framing experiment whereby international human rights institutions, particularly regional human rights courts, and bodies, are regarded as 'spaces' where new international law emerges after a distillation process, where the main ingredients are argumentation and mobilisation, and the main techniques are interpretation and tactics.

Scholars have described and compared regional human rights systems from several perspectives such as, inter alia, their historical origins,<sup>82</sup> levels of intrusiveness in domestic remedies,<sup>83</sup> types of remedies and compliance,<sup>84</sup> approaches to legal interpretation,<sup>85</sup> and standard development in specific types of rights.<sup>86</sup> However, no account has addressed how the distinctiveness of a human rights institution and its production of legal knowledge are the result of a co-constitutive process of relationality of plural epistemologies and ontologies on the one hand, and the material reality of geographies on the other, both of which converge in a 'space'. Additionally, no account has challenged scholarly arguments of IHREL based on the practice of regional human rights courts and bodies, or at least not from the vantage point of epistemic diversity that shapes the outcome a human rights case.

Walter Mignolo, the Latin American decolonial thinker, posited that 'knowledge and aesthetic norms are not universally established by a transcendent subject but are universally established by historical subjects in diverse cultural centres'.<sup>87</sup> These historical subjects create a locus of enunciation where different ways of individual and collective expressions and epistemes mingle. These loci of enunciation thus offer the possibility of promoting new forms of political

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<sup>82</sup> Alexandra Huneus and Mikael Rask Madsen, 'Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems' (2018) 16(1) *International Journal of Constitutional Law* 136.

<sup>83</sup> Başak Çalı, 'Explaining Variation in the Intrusiveness of Regional Human Rights Remedies in Domestic Orders' (2018) 16(1) *International Journal of Constitutional Law* 214.

<sup>84</sup> Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010) 6(1) *Journal of International Law and International Relations* 35; Jan Schneider, 'Reparation and Enforcement of Judgments: A Comparative Analysis of the European and Inter-American Human Rights Systems' (Dissertation, Johannes Gutenberg University Mainz, 2015) <<http://rgdoi.net/10.13140/RG.2.1.4292.3601>>.

<sup>85</sup> Laurence Burgogue-Larsen, "'Decompartmentalization": The Key Technique for Interpreting Regional Human Rights Treaties' (2018) 16(1) *International Journal of Constitutional Law* 187, 187–8.

<sup>86</sup> Riccardo Pavoni, 'Environmental Jurisprudence of the European and Inter-American Courts of Human Rights: Comparative Insights' in Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press, 2015) 69; Michael Riegner, 'Regionalizing Business and Human Rights: Corporate Accountability in the European, African and Inter-American Human Rights Systems' (2020) 93(1–2) *Die Friedens-Warte* 70.

<sup>87</sup> Walter D Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton University Press, rev ed, 2012) 5.

emancipation and not just mimicry.<sup>88</sup> This theoretical assertion resonates with a relevant insight in comparative international human rights law, an aspiration from TWAIL, and a remark from CAIL. As for the former, scholars have already credited the legal culture of regional human rights courts and bodies as the main explainer for the variance of formalistic approaches when it comes to remedies.<sup>89</sup> This is attuned to the aspirational idea of some TWAIL scholars, who have suggested that the site of origin of human rights actors is an important aspect that should be considered because the Third World is indeed an ‘epistemic site of production and not merely a site of reception for international legal knowledge’.<sup>90</sup> Additionally, the Marxist notion of ‘fetishism’ of commodities has been equated to the reification of international courts and tribunals as if they were autonomous objects capable of having a life and will of their own, thus forgetting they are the expression of social forces and their dynamics.<sup>91</sup>

The remainder of this section will consider the IAHRs as a ‘space’ of legal production from the Global South, where historically marginalised peoples have found their locus of enunciation to achieve justice and thereby acknowledgement of their agency as part of the social forces that create law. This will show how this system transcends the confines of formalistic apolitical human rights institutions because it gives a high priority to the ‘locus of enunciation’, that is, the ‘geo-political and body-political location of the subject that speaks’.<sup>92</sup> This article stresses that the IAHRs is a multidimensional ‘space’ that enables a relational encounter with Latin America’s socio-historical context, geography and actors, lending itself to a redrawing of the boundaries of legal imaginaries.<sup>93</sup> Therefore, the re/production of legal meanings occurs in such a way that collective traumas of victims, geopolitical history, intersectional violence and colonial legacies supplement the adjudicators’ tools to interpret international law, thereby engendering regional legal idiosyncrasy.

As was mentioned earlier, this paper will not embark on a comparison exercise, but just plant the seeds for further methodological inquiry, where the basic assumption is to accept the oscillatory and indeterminate nature of IHREL and try to establish where our object of analysis lies within the continuum. Is our object of analysis closer to the Realist ethos or the Baroque ethos? This section will therefore explore some recent cases from the IAHRs that deal with economic, social, and cultural rights in order to test the arguments of the literature and establish whether a similar approach can be transposed to comparative endeavours.

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<sup>88</sup> Ibid.

<sup>89</sup> Çalı (n 83) 230.

<sup>90</sup> James Thuo Gathii, ‘The Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996–2019 as an Appendix)’ (2020) 114 *Proceedings of the ASIL Annual Meeting* 165, 166.

<sup>91</sup> Bianchi (n 41) 85.

<sup>92</sup> Ramón Grosfoguel, ‘The Epistemic Decolonial Turn: Beyond Political-Economy Paradigms’ (2007) 21(2–3) *Cultural Studies* 211, 213.

<sup>93</sup> Mara Ntona and Mika Schröder, ‘Regulating Oceanic Imaginaries: The Legal Construction of Space, Identities, Relations and Epistemological Hierarchies within Marine Spatial Planning’ (2020) 19(3) *Maritime Studies* 241.

A *Progressing Socio-Economic and Indigenous Peoples' Rights in the IAHRs*

The IAHRs, composed of the Inter-American Commission on Human Rights ('IACHR') and the IACtHR, is an actor of international law because it engages in the exercise of interpreting rules and principles that shape states' behaviour. These interpretations then become binding for the defendant state party in a contentious case and form an authoritative reference for the rest that accepted their jurisdiction.<sup>94</sup> What is important to consider is that the facts of a given case that serve the purposes of contextualising the application of certain rules and principles are contingent upon historical and political conditions, which in turn determine the experience of human rights victims. In this connection, human rights victims in Latin America, quite often subsumed in historically marginalised and oppressed populations, argue before the IACHR and the IACtHR with the hope that these institutions not only provide a shallow grievance forum but a profound transformative experience.<sup>95</sup> Not surprisingly, users of the IAHRs deposit their hopes with high expectations precisely because of its progressive resolutions and case law, which have contributed to expanding the scope of protection of entire populations, even when confronted with constraints to the interpretation of certain provisions from the *American Convention on Human Rights* ('ACHR').<sup>96</sup>

Few social issues are as delicate as the question of equality and redistribution, and it is impossible for a society to alleviate inequality as a systemic deficit if it does not manage to overcome the exclusion that affects entire populations who are unable to participate in social systems, including the legal system.<sup>97</sup> Seen in this light, overcoming exclusion is a project shared by conceptions with very different ideas regarding social welfare, redistribution, free trade or investment regulation. Since Latin America is one of the most unequal regions in the world in terms of economic income,<sup>98</sup> it makes perfect sense for victims, whose rights have been affected by an unequal redistribution of wealth and unfair labour conditions, to resort to the IAHRs to seek recourse.

Against this background, the IACtHR has expanded some important notions that the Baroque ethos has not sufficiently considered in its critiques. For instance, in *Hacienda Brasil Verde Workers v Brazil*, the IACtHR found that the workers of the *fazenda*, who were subject to the practice of slave labour therein, were being recruited 'from the poorest regions of the country ... using fraud,

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<sup>94</sup> See generally Sandra Carvalho and Eduardo Baker, 'Strategic Litigation Experiences in the Inter-American Human Rights System' (2014) 11(20) *Sur: International Journal on Human Rights* 449, 456.

<sup>95</sup> Ximena Soley, 'The Transformative Dimension of Inter-American Jurisprudence' in Armin von Bogdandy et al (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press, 2017) 337, 338.

<sup>96</sup> *American Convention on Human Rights: 'Pact of San José, Costa Rica'*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) ('*American Convention on Human Rights*').

<sup>97</sup> Armin von Bogdandy, 'Ius Constitutionale Commune en América Latina: Observations on Transformative Constitutionalism' in Armin von Bogdandy et al (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press, 2017) 27.

<sup>98</sup> Matías Busso and Julián Messina (eds), *The Inequality Crisis: Latin America and the Caribbean at the Crossroads* (Inter-American Development Bank, 2020) 17.

deception and false promises'.<sup>99</sup> The Court also acknowledged that the events in question had occurred in a context of 'historical structural discrimination' based on the economic status of the 85 workers identified and rescued by the Ministry of Labour in March 2000.<sup>100</sup> This would be the first time the Court connected the economic background of a group of victims with their status of vulnerability and structural discrimination.

More recently, the IACtHR issued a judgment declaring the international responsibility of Brazil for violations of various rights connected with the deaths of 60 people and six injured in the explosion at a fireworks factory in the municipality of Santo Antônio de Jesus, state of Bahia, as well as 100 relatives of the deceased and survivors of the explosion.<sup>101</sup> The Court concluded that 'the workers of the fireworks factory were part of a discriminated or marginalized group because they were in a situation of structural poverty and also most of them were Afro-descendant women and girls'.<sup>102</sup> The State then failed to adopt measures to guarantee the exercise of the right to equitable and satisfactory working conditions without discrimination, and the intersection of comparative disadvantages aggravated the victimisation experience.<sup>103</sup>

This turn towards emphasising the economic status of victims has, in some respects, a parallel with its focus on expanding the interpretative scope of justiciable rights. The *ACHR* enshrines a chapter on Economic, Social and Cultural Rights, whose art 26 stresses that states parties commit to adopting measures to progressively achieve the full realisation of the rights implicit in the economic, social, educational, scientific and cultural standards.<sup>104</sup> However, these rights are not by themselves directly justiciable, which led the IACtHR to interpret art 26 in a broader manner. In the case of *Gonzales Lluy v Ecuador*, the IACtHR issued the first of its judgments in a case involving discrimination against people with HIV.<sup>105</sup> It was also the first case to declare a violation of the right to education because of lack of information in schools about HIV, which was the first occasion on which a violation of the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* ('*Protocol of San Salvador*') was found. The Court connected all these problems by finding a violation of the right to life — because of the risk to the child's life in the face of such a serious illness — and of the right to personal integrity.<sup>106</sup> This led to the issuance of three concurring opinions as to whether the case should be framed as a direct violation of the right to health, through art

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<sup>99</sup> *Hacienda Brasil Verde Workers v Brazil (Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 318, 20 October 2016) [305].

<sup>100</sup> *Ibid* [343].

<sup>101</sup> *Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v Brazil (Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 407, 15 July 2020) [1], [49].

<sup>102</sup> *Ibid* [200].

<sup>103</sup> *Ibid* [198].

<sup>104</sup> *American Convention on Human Rights* (n 96) art 26.

<sup>105</sup> *Gonzales Lluy v Ecuador (Preliminary Objections, Merits, Reparations, and Costs)* (Inter-American Court of Human Rights, Series C No 298, 1 September 2015) ('*Gonzales Lluy v Ecuador*').

<sup>106</sup> *Ibid* [190]–[191], citing *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, opened for signature 17 November 1988, OAS 69 (entered into force 16 November 1999) arts 4–5 ('*Protocol of San Salvador*').



26 of the *ACHR*, or whether it corresponded to an indirect violation of life and personal integrity, as has been the constant jurisprudence of the Court.<sup>107</sup>

One of the reasons why the IACtHR has slowly shifted to adopt more generous interpretations of the *ACHR* is because of its broader methodological interpretative tools. The Court has endorsed the view that the Convention's interpretation should be integral, in such a way that it encompasses the literal, teleological, systemic and historical methods of interpretation.<sup>108</sup> Against this backdrop, the *Lagos del Campo v Perú* ('*Lagos del Campo*') case provides a foundation on which the interpretive prerogatives of the IACtHR could freely manifest.<sup>109</sup> Whilst it is true that the IACtHR had long recognised its competence to adjudicate violations of art 26 through the 'existing interdependence and indivisibility between civil and political rights and economic, social and cultural rights', stating that 'they should all be understood integrally as human rights, without any specific hierarchy',<sup>110</sup> it is only with *Lagos del Campo* that a proper violation of art 26 was found. Alfredo Lagos del Campo was fired from his job in 1989, after an interview he gave in his capacity as a union leader.<sup>111</sup> The Court found that Mr Lagos del Campo clearly acted in a union representative capacity, and, by not protecting Mr Lagos del Campos' rights, the State impacted his ability to represent workers, and deprived workers of their representative.<sup>112</sup> The Court found that Mr Lagos del Campo's arbitrary and unjustified firing deprived him of his right to work and to job security under art 26 in relation to the rights to freedom of expression, association and a fair trial.<sup>113</sup> This is the first judgment of the IACtHR that recognises the direct enforceability of economic and social rights.

Apart from the progressive development the IACtHR has shown in expanding the interpretive scope of the art 26, it has also developed a rich jurisprudence on indigenous peoples' rights, one of the most vulnerable groups in the region. The IACtHR's expansive interpretation of the right to property has given rise to the state's obligation to guarantee the meaningful participation of indigenous peoples when projects, programmes and activities in their territories could affect their rights. Indeed, as explained by the IACtHR in *Saramaka v Suriname*, the right to property, including that of indigenous peoples, is not absolute and may be subject to legitimate restrictions.<sup>114</sup> However, when it comes to limiting indigenous property, the state must not only comply with the conditions commonly required under international human rights law,<sup>115</sup> but must also ensure that such a restriction 'does not amount to a denial of their survival as a tribal

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<sup>107</sup> *Gonzales Lluy v Ecuador* (n 105) 116–50.

<sup>108</sup> *González ('Cotton Field') v Mexico (Preliminary Objection, Merits, Reparations, and Costs)* (Inter-American Court of Human Rights, Series C No 205, 16 November 2009).

<sup>109</sup> *Lagos del Campo v Perú (Preliminary Objections, Merits, Reparations, and Costs)* (Inter-American Court of Human Rights, Series C No 340, 31 August 2017).

<sup>110</sup> *Ibid* [141].

<sup>111</sup> *Ibid* [1].

<sup>112</sup> *Ibid* [162].

<sup>113</sup> *Ibid* [166].

<sup>114</sup> *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs)* (Inter-American Court of Human Rights, Series C No 172, 28 November 2007) [127].

<sup>115</sup> *Ibid*.

people'.<sup>116</sup> This entails that in projects 'that have a significant impact on the right of use and enjoyment of their ancestral territories', the state must 'obtain the consent of indigenous and tribal peoples';<sup>117</sup> local communities should benefit from the project; and a prior social and environmental impact assessment should be conducted.<sup>118</sup>

In addition, the IACtHR has vastly interpreted the right to cultural identity in its jurisprudence concerning indigenous peoples. The Court has stated that the right to cultural identity is a fundamental and collective right of indigenous communities, which must be respected in a multicultural, pluralist and democratic society.<sup>119</sup> Also, the right to cultural identity is connected to the right to life and indigenous territorial rights, because the intrinsic connection that the members of indigenous and tribal peoples have with their territory should be protected to guarantee the development and continuity of their worldview.<sup>120</sup>

As we have seen, the recent developments in the IACtHR's jurisprudence show that those that are most vulnerable in society are mobilising in the 'space' provided by the IAHRs and voicing their subjective experiences. In doing so, they are co-producing law that is, to an important extent, transformative. This endeavour is supported by the institutions that channel their anxieties and thirst for justice. This is something that the literature, which is critical towards IHREL, has so far failed to account for and could provide additional arguments for theoretical re-calibration. However, the next section will balance this section's optimistic appraisal by shedding light on the limits of a progressive legal producer such as the IAHRs due to the increasing existential threats of global reach, namely the climate crisis.

#### IV THE IAHRs IN THE CLIMATE CONTEXT: A PERMANENT LIMINAL SPACE

Liminality is a notion rooted in anthropology, firstly used by Arnold van Gennep in his book *Les Rites de Passage* to describe a transitional, ambiguous and uncertain stage during rites of passage, but whose usage can be extended to all forms of social interactions.<sup>121</sup> In that connection, scholars that work at the juncture of law and geography are using the concept in several fields of inquiry. For instance, Irus Braverman investigates novel judicial challenges to the United States' Fourth Amendment by examining the doorframe, both as an object and as a liminal legal space.<sup>122</sup> Health law researchers are also drawing from liminality

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<sup>116</sup> Ibid [129].

<sup>117</sup> Ibid [136].

<sup>118</sup> Ibid [129]; *Kichwa Indigenous People of Sarayaku v Ecuador (Merits and Reparations)* (Inter-American Court of Human Rights, Series C No 245, 27 June 2012) [176] ('*Kichwa Indigenous People of Sarayaku v Ecuador*'); *Punta Piedra Garífuna Community and Its Members v Honduras (Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 304, 5 October 2015) [215].

<sup>119</sup> *Kichwa Indigenous People of Sarayaku v Ecuador* (n 118) [213].

<sup>120</sup> Ibid [159].

<sup>121</sup> Söderlund and Borg (n 31) 881; Arnold van Gennep, *Les Rites de Passage* (A et J Picard, 2<sup>nd</sup> ed, 1981).

<sup>122</sup> Irus Braverman, 'Rights of Passage: On Doors, Technology, and the Fourth Amendment' (2016) 12(3) *Law, Culture and the Humanities* 669, 670.

to shed light on the legal status of the foetus vis-à-vis pregnancy loss,<sup>123</sup> dispute silo-based approaches to classifying and regulating research objects in biomedicine,<sup>124</sup> and frame health research regulation as an inherently human experiential process.<sup>125</sup> Furthermore, Joel E Correia uses legal geographies of liminality to understand how indigenous peoples in Paraguay avail themselves of legal indeterminacy to bring claims to and implement rulings from the IACtHR.<sup>126</sup>

In that regard, the notion of liminal space is useful to situate the progressive nature of the IAHRs somewhere, which in this case is the continuum of IHREL. As with any transformative or progressive endeavour, including rites of passage that anthropologists study, phases constitute an essential part, which implies that there might be the possibility of not reaching the ‘transformative phase’ and therefore stay in a state of permanent liminality, where the accumulation of unfulfilled expectations can generate a permanent crisis.<sup>127</sup> This section argues that in order to test the transformative potential of the IAHRs, it is necessary to scrutinise it in the context of an extreme yet plausible situation. Liminality, therefore, can lend itself to describe responses in the selected extreme context, which in this case is the expectations of climate justice advocates in light of the climate crisis.

The climate crisis siphons myriad catastrophic narratives, articulated both from the scientific community and the media.<sup>128</sup> It is thus unsurprising that international legal institutions are trying to wield the authority and global scope of international law to tackle the effects of the climate crisis on the rights of all.<sup>129</sup> Propelled by the curiosity and necessity of unveiling the role of international law — particularly international human rights law — in addressing the climate crisis, scholars and practitioners are placing their eyes on the

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<sup>123</sup> See Karolina Kuberska et al, ‘Death Before Birth: Liminal Bodies and Legal Frameworks’ in Chris Dietz, Mitchell Travis and Michael Thomson (eds), *A Jurisprudence of the Body* (Palgrave Macmillan, 2020) 149.

<sup>124</sup> See Samuel Taylor-Alexander et al, ‘Beyond Regulatory Compression: Confronting the Liminal Spaces of Health Research Regulation’ (2016) 8(2) *Law, Innovation and Technology* 149.

<sup>125</sup> See Graeme Laurie, ‘Liminality and the Limits of Law in Health Research Regulation: What Are We Missing in the Spaces In-Between?’ (2017) 25(1) *Medical Law Review* 47.

<sup>126</sup> Joel E Correia, ‘Indigenous Rights at a Crossroads: Territorial Struggles, the Inter-American Court of Human Rights, and Legal Geographies of Liminality’ (2018) 97 *Geoforum* 73.

<sup>127</sup> Laurie (n 125) 58.

<sup>128</sup> See, eg, Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (Special Report, October 2018); Nova Xavantina and Santarém, ‘The Amazon Is Approaching an Irreversible Tipping Point’, *The Economist* (online, 1 August 2019) <<https://www.economist.com/briefing/2019/08/01/the-amazon-is-approaching-an-irreversible-tipping-point>>, archived at <<https://perma.cc/7VWS-JUWK>>.

<sup>129</sup> Human Rights Council, *Annual Report of the Office of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, 10<sup>th</sup> sess, Agenda Item 2, UN Doc A/HRC/10/61 (15 January 2009).

potential of international human rights institutions.<sup>130</sup> Indeed, climate change cases have already reached the remit of some United Nations treaty bodies, such as the Human Rights Committee and the Committee on the Rights of the Child.<sup>131</sup> In addition, recent efforts to bring climate justice concerns to regional human rights institutions are multiplying, particularly in Europe, where four climate-related cases are so far pending before the European Court of Human Rights.<sup>132</sup>

In the IAHRs, climate-related human rights discussions have emerged and developed in both a top-down and bottom-up manner. As for the latter, users of the system affected by the climate crisis have been the ones influencing its inclusion in the work of the IACHR. For instance, the very first climate-related petition before an international human rights organ ever recorded was filed by the Inuit peoples before the IACHR in 2005 against the US, arguing that unrestrained GHG emissions affect their human rights.<sup>133</sup> Despite the relevance and pioneering nature of the petition, it was dismissed on procedural grounds.<sup>134</sup> However, a similar petition filed in 2013 by the Athabaskan peoples against Canada is still pending.<sup>135</sup> Also, two public hearings on climate change and human rights in Latin America have been held before the IACHR, the first one on the effects of fracking on the climate and human rights of environmental

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<sup>130</sup> Alan Boyle, 'Climate Change, the Paris Agreement and Human Rights' (2018) 67(4) *International and Comparative Law Quarterly* 759; Human Rights Council, *Human Rights and Climate Change*, 26<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/26/L.33/Rev.1 (25 June 2014).

<sup>131</sup> Michael D Hausfield et al, 'Communication to the Committee on the Rights of the Child', Communication to the Committee on the Rights of the Child in *Sacchi v Argentina*, 23 September 2019; Human Rights Committee, *Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning Communication No 2728/2016*, 127<sup>th</sup> sess, UN Doc CCPR/C/127/D/2728/2016 (23 September 2020).

<sup>132</sup> *Duarte Agostinho v Portugal (Communicated Case)* (European Court of Human Rights, Fourth Section, Application No 39371/20, 13 November 2020); *KlimaSeniorinnen Schweiz v Switzerland (Communicated Case)* (European Court of Human Rights, Third Section, Application No 53600/20, 6 April 2021); Catherine Hambro and Emanuel Feinberg, 'New Application: Natur og Ungdom and Greenpeace Nordic, v Norway and Request under Rule 41 (priority)', Application to the European Court of Human Rights in *Natur og Ungdom v Norway*, 15 June 2021; Michaela Kromer, 'New Application: Mex M v Austria and Request for Expedite Proceedings under Rule 41 (Expedite Proceedings)', Application to the European Court of Human Rights in *Mex M v Austria* (European Court of Human Rights, 25 March 2021).

<sup>133</sup> Sumudu Anopama Atapattu, 'Climate Change under Regional Human Rights Systems' in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge, 2018) 128, 134; Jessie Hohmann, 'Igloo as Icon: A Human Rights Approach to Climate Change for the Inuit' (2009) 18(2) *Transnational Law and Contemporary Problems* 295, 297.

<sup>134</sup> Hohmann (n 133) 312.

<sup>135</sup> Don McCrimmon, 'The Athabaskan Petition to the Inter-American Human Rights Commission: Using Human Rights to Respond to Climate Change' (2016) 6(2) *Polar Journal* 398, 399; Verónica de la Rosa Jaimes, 'The Arctic Athabaskan Petition: Where Accelerated Arctic Warming Meets Human Rights' (2015) 45(2) *California Western International Law Journal* 213.

defenders,<sup>136</sup> and the other on climate change and the rights of vulnerable populations.<sup>137</sup>

Conversely, the top-down approach could be traced to 2008, when the Organization of American States issued a resolution on ‘Human Rights and Climate Change in the Americas’, which instructed the IACHR to ‘determine the possible existence of a link between adverse effects of climate change and the full enjoyment of human rights’.<sup>138</sup> This mandate arguably influenced certain proactive developments to protect human rights in the context of climate change, for example in recommendations for states to protect the rights of persons of African descent,<sup>139</sup> people living in poverty,<sup>140</sup> indigenous peoples in Pan Amazonia,<sup>141</sup> and business and human rights standards.<sup>142</sup> Despite these normative developments, the IAHRs and Latin American organisations and movements have so far only modestly engaged in climate-related issues, at least compared to other international human rights bodies.<sup>143</sup> This is puzzling because climate change and its response measures will exacerbate existing rampant economic inequality,<sup>144</sup> threaten crucial ecosystems,<sup>145</sup> increase the unconstrained violence against environmental defenders<sup>146</sup> and produce diverse continuities of a colonial past.<sup>147</sup>

<sup>136</sup> ‘Use of Hydraulic Fracturing (Fracking) and the Violation of Human Rights of Communities and Defenders of Environmental and Land Rights in the Americas’, *Organization of American States* (online, 3 October 2018) <<http://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=en&Session=1160&page=2>>, archived at <<https://perma.cc/RH9U-US9E>>.

<sup>137</sup> See Magdalena Albar Diaz et al, *Cambio Climático: y los Derechos de Mujeres, Pueblos Indígenas y Comunidades Rurales en las Américas* (Bogotá, 2020) 83.

<sup>138</sup> Organization of American States, General Assembly, *Human Rights and Climate Change in the Americas*, Doc No AG/RES 2429 (XXXVIII-O/08), 4<sup>th</sup> plen sess, 1–3 June 2008, [4].

<sup>139</sup> Organization of American States, Inter-American Commission on Human Rights, *Economic, Social, Cultural and Environmental Rights of Persons of African Descent: Inter-American Standards to Prevent, Combat and Eradicate Structural Racial Discrimination*, Doc No OEA/Ser.L/V/II.Doc.109/21, 16 March 2021, [216]–[218].

<sup>140</sup> Organization of American States, Inter-American Commission on Human Rights, *Report on Poverty and Human Rights in the Americas*, Doc No OEA/Ser.L/V/II.164.Doc.147, 7 September 2017, [182], [293].

<sup>141</sup> Organization of American States, Inter-American Commission on Human Rights, *Situación de Los Derechos Humanos de Los Pueblos Indígenas y Tribales de La Panamazonia*, Doc No OEA/Ser.L/V/II.Doc.176/19, 29 September 2019, [419].

<sup>142</sup> Organization of American States, Inter-American Commission on Human Rights, *Informe Empresas y Derechos Humanos: Estándares Interamericanos*, Doc No OEA/Ser.L/V/II CIDH/REDESCA/INF.1/19, 1 November 2019, [233]–[253].

<sup>143</sup> Juan Auz, ‘Why Is the Inter-American Human Rights System Lagging on Climate Change?’, *OpenGlobalRights* (Blog Post, 11 January 2018) <<https://www.openglobalrights.org/why-is-the-inter-american-human-rights-system-lagging-on-climate-change/>>, archived at <<https://perma.cc/X9T6-NUDK>>.

<sup>144</sup> Philip Alston, *Climate Change and Poverty: Report of the Special Rapporteur on Extreme Poverty and Human Rights*, 41<sup>st</sup> sess, Agenda Item 3, UN Doc No A/HRC/41/39 (17 July 2019) [14]–[15].

<sup>145</sup> Christopher PO Reyer et al, ‘Climate Change Impacts in Latin America and the Caribbean and Their Implications for Development’ (2017) 17(6) *Regional Environmental Change* 1601, 1601–2.

<sup>146</sup> Global Witness, *Last Line of Defence: The Industries Causing the Climate Crisis and Attacks against Land and Environmental Defenders* (Report, September 2021).

<sup>147</sup> Carmen G Gonzalez, ‘Climate Change, Race, and Migration’ (2020) 1(1) *Journal of Law and Political Economy* 109, 113.

As was mentioned before, the notion of permanent liminality is predicated on the impossibility for the IAHRs to adequately fulfil the tenets of climate justice. One of these tenets is distributive justice, meaning the fair distribution of climate impacts and benefits across geographies and groups.<sup>148</sup> The second is procedural justice, which relates to the active and effective participation in the decision-making processes that determine outcomes that affect the climate and the people.<sup>149</sup> The third tenet is corrective justice, defined as the aspiration of remedying and compensating people, property and nature for the impacts of climate change.<sup>150</sup> This definition of climate justice should be read in the context of Latin America, whose total GHG emissions accounts for less than 10% of global emissions, yet is particularly vulnerable to the negative impacts of climate change and its ‘per capita CO<sub>2</sub> emissions level represents about 1/3 of the average per capita emissions level of Europe or the United States’.<sup>151</sup> The overall hypothesis of this section is that human rights-based climate litigation does not always align with climate justice.<sup>152</sup>

In what follows, it will be explored how some of the abovementioned legal developments, including the IACtHR’s all-encompassing interpretation of art 26 of the *ACHR*, could play a role in delivering climate justice through litigation. In doing so, it will discuss the extent to which direct enforceability of the right to a healthy environment might serve a purpose thereof. In addition, it will assess potential trajectories of the application of extraterritorial human rights obligations in the context of climate litigation, considering the expansion of the definition of jurisdiction by the IACtHR. The assumption of this section is that applicants complied with all the admissibility criteria instituted by the IACHR and the IACtHR, including those related to *ratione personae*, *loci*, *materiae*, and *temporis*; characterisation of the claim; exhaustion of domestic remedies; and non-duplication of procedures.<sup>153</sup> This means that Latin American climate litigation pursued at present, and in the future, before domestic courts must have complied with all these admissibility requirements before continuing its contentious journey at the IAHRs.

### A *The Right to a Healthy Environment in the IAHRs*

Most Latin American countries have engendered new or reformed existing constitutions, leading to a significant expansion of the catalogue of rights and guarantees in response to their common authoritarian past of mass human rights

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<sup>148</sup> Usha Natarajan, ‘Environmental Justice in the Global South’ in Sumudu A Atapattu, Carmen G Gonzalez and Sara L Seck (eds), *The Cambridge Handbook of Environmental Justice and Sustainable Development* (Cambridge University Press, 2021) 39, 49.

<sup>149</sup> *Ibid* 52–3.

<sup>150</sup> *Ibid* 54–5.

<sup>151</sup> Alicia Bárcena et al, *Economics of Climate Change in Latin America and the Caribbean: A Graphic View*, UN Doc LC/TS.2017/84/Rev.1 (2018) 22.

<sup>152</sup> Juan Auz, ‘Two Reputed Allies: Reconciling Climate Justice and Litigation in the Global South’ in Cesar Rodríguez-Garavito (ed), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (Cambridge University Press, forthcoming).

<sup>153</sup> James L Cavallaro et al, *Doctrine, Practice, and Advocacy in the Inter-American Human Rights System* (Oxford University Press, 2019) 80–3.

violations and dictatorships.<sup>154</sup> Environmental rights are no exception.<sup>155</sup> Today, the constitutions of twenty countries in the region recognise the right to a healthy environment, and in some cases, the rights of nature, whose scope and formulation evidently vary from country to country.<sup>156</sup> In the early 1990s, domestic courts started to shape the content of the right to a healthy environment and its collective connotation(s). The Colombian, Brazilian and Paraguayan constitutional courts, for example, regarded the environment as a basic condition for society's survival and development, meriting a balancing test against other societal interests.<sup>157</sup> In addition, domestic courts in Argentina, Colombia, Chile, Peru and Ecuador have adopted a long practice of 'greening' existing human rights by establishing a link between environmental pollution and the violation of fundamental rights.<sup>158</sup>

Some of these domestic developments in Latin America arguably influence the normative understanding at the IAHRs. The *American Declaration of the Rights and Duties of Man* and the *ACHR* do not explicitly recognise a right to a healthy environment. However, they do recognise a broad spectrum of human rights that environmental harm can threaten, including the right to life; the right to physical, mental and moral integrity (humane treatment); the right to property; the right to health; the rights of the child; and the right to equality before the law.<sup>159</sup> As the IACHR has stated,

[a]lthough neither the American Declaration of the Rights and Duties of Man nor the American Convention on Human Rights includes any express reference to the protection of the environment, it is clear that several fundamental rights enshrined therein require, as a precondition for their proper exercise, a minimal environmental quality, and suffer a profound detrimental impact from the degradation of the natural resource base. The IACHR has emphasized in this regard that there is a direct relationship between the physical environment in which persons live and the rights to life, security, and physical integrity. These rights are directly affected when there are episodes or situations of deforestation,

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<sup>154</sup> Gabriel Negretto, 'Constitution-Building Processes in Latin America' (Discussion Paper No 3/2018, International Institute for Democracy and Electoral Assistance, 2018) 26, 31.

<sup>155</sup> Kerri Woods, 'Environmental Human Rights' in Teena Gabrielson et al (ed), *The Oxford Handbook of Environmental Political Theory* (Oxford University Press, 2016) 333, 340.

<sup>156</sup> María Florencia Saulino and Luis José Torres Asencio, 'The Protection of the Environment' in Juan F Gonzalez-Bertomeu and Roberto Gargarella (eds), *The Latin American Casebook: Courts, Constitutions, and Rights* (Routledge, 2016) 172, 172.

<sup>157</sup> Antonio Herman Benjamin and Nicholas Bryner, 'Brazil' in Emma Lees and Jorge E Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (Oxford University Press, 2019) 82, 87; Corte Constitucional de Colombia [Constitutional Court of Colombia], Sentencia T-415/92, 17 June 1992, [9]; Corte Suprema de Justicia [Supreme Court of Justice of Paraguay], Sentencia 1328, 16 October 2013.

<sup>158</sup> Adriana Fabra Aguilar, 'Enforcing the Right to a Healthy Environment in Latin America' (1994) 3(4) *Review of European, Comparative and International Environmental Law* 215, 215.

<sup>159</sup> Organization of American States, *American Declaration of the Rights and Duties of Man*, Doc No OEA/Ser.L.V/II.82.Doc.6 Rev.1, 2 May 1948; *American Convention on Human Rights* (n 96).

contamination of the water, pollution, or other types of environmental harm on their ancestral territories.<sup>160</sup>

Similarly, the IACtHR has followed the same rationale in the seminal *Mayagna (Sumo) Awas Tingni Community v Nicaragua* case, in which for the first time it recognised the close tie indigenous peoples have with their territory (environment), as it lays their ontological foundation.<sup>161</sup> Following this case, similar endeavours aimed at connecting environmental protection with indigenous peoples' rights multiplied before the IACtHR.<sup>162</sup> Despite this important leap towards an ecological understanding of human rights being initiated by indigenous peoples, the IACtHR extended a 'green' interpretation of human rights over non-indigenous domains, for instance, in cases about environmental defenders and freedom of expression.<sup>163</sup> This extension is arguably a positive development because it lessens the burden for indigenous peoples in the Americas to be the main environmental stewards and, with that, reducing all the restrictive implications that might entail.<sup>164</sup>

It is worth noting that the expansive environmental interpretation of the ACHR does not emerge only from judges, it also arises from the authority of a specific treaty. The *Protocol of San Salvador*, which operationalises the economic, social and cultural rights embedded in the ACHR, expressly articulates a right to a healthy environment.<sup>165</sup> Article 11 of the Protocol recognises both a human right 'to live in a healthy environment' and a duty on states to 'promote the protection, preservation, and improvement of the environment'.<sup>166</sup> However, the Protocol only makes two rights justiciable through the complaints procedure, neither of them concerning art 11.<sup>167</sup>

Although the *Protocol of San Salvador* expressly recognises a right to a healthy environment, violations of this right, in theory, should not give rise to the application of the system of individual petitions governed by the ACHR. However, this situation dramatically shifted after the IACtHR published its

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<sup>160</sup> *Kuna Indigenous People of Madungandí and Emberá Indigenous People of Bayano and Their Members v Panama (Merits)* (Inter-American Commission on Human Rights, Report No 125/12, Case No 12.354, 13 November 2012) 233; Organization of American States, Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders in the Americas*, Doc No OEA/Ser.L/V/II.Doc.66, 31 December 2011, [309].

<sup>161</sup> *Mayagna (Sumo) Awas Tingni Community v Nicaragua (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 79, 31 August 2001) [149].

<sup>162</sup> Pedro Pablo Silva Sanchez, 'Indigenous Peoples and the Environment under the Inter-American System for the Protection of Human Rights' (Working Paper No 5, Scottish Centre for International Law, 2015).

<sup>163</sup> *Kawas-Fernández v Honduras (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 196, 3 April 2009) 148; *Claude-Reyes v Chile (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 151, 19 September 2006).

<sup>164</sup> Mariana Monteiro de Matos, *Indigenous Land Rights in the Inter-American System: Substantive and Procedural Law* (Brill Nijhoff, 2020) vol 10, 88.

<sup>165</sup> *Protocol of San Salvador* (n 106) art 11.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid* art 19.6.



*Advisory Opinion on Human Rights and the Environment* in 2017,<sup>168</sup> and its judgement on the *Lhaka Honhat v Argentina* ('*Lhaka Honhat*') case in 2020, where the IACtHR deems the right to a healthy environment directly justiciable.<sup>169</sup>

The IACtHR considered in its *Advisory Opinion* that the right to a healthy environment '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'.<sup>170</sup> The IACtHR, following previous jurisprudence on indigenous and tribal peoples, also

bears in mind that the effects on these rights may be felt with greater intensity by certain groups in vulnerable situations. It has been recognised that environmental damage 'will be experienced with greater force in the sectors of the population that are already in a vulnerable situation'.<sup>171</sup>

Hence, based on 'international human rights law, States are legally obliged to confront these vulnerabilities based on the principle of equality and non-discrimination'.<sup>172</sup>

In the *Lhaka Honhat* case, the communities alleged violations of their right to a healthy environment, adequate food and to cultural identity, considered as autonomous rights contained in art 26 of the *ACHR*.<sup>173</sup> They argued that the activities of 'criollo' farmers degraded the environment and, consequently, limited their right of access to their traditional food sources, water and, ultimately, affected their cultural identity.<sup>174</sup> The State, they added, was fully aware of the circumstances described, but failed to adopt appropriate protective measures.<sup>175</sup> The IACtHR stated that the communities' possession of their territories was indeed affected by the settlers' disruption thereof, thereby suggesting an implicit priority to the collective property rights of indigenous peoples over other individuals or groups.<sup>176</sup> It was thus established that, by

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<sup>168</sup> *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) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights) (Advisory Opinion)* (Inter-American Court of Human Rights, Series A No 23, 15 November 2017) ('*Advisory Opinion on Human Rights and the Environment*').

<sup>169</sup> *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 400, 6 February 2020) ('*Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina*').

<sup>170</sup> *Advisory Opinion on Human Rights and the Environment* (n 168) [62].

<sup>171</sup> *Ibid* [67], quoting Human Rights Council, *Human Rights and the Environment*, HRC Res 16/11, 16<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/RES/16/11 (12 April 2011) Preamble para 15.

<sup>172</sup> *Advisory Opinion on Human Rights and the Environment* (n 168) [67].

<sup>173</sup> *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina* (n 169) [6].

<sup>174</sup> *Ibid* [188]–[189].

<sup>175</sup> *Ibid* [190].

<sup>176</sup> Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (Cambridge University Press, 2<sup>nd</sup> ed, 2018) 373.

affecting the ancestral practices that constitute the cultural identity of the communities, simultaneously their right to food was also affected.<sup>177</sup>

In terms of how the right to a healthy environment should be protected, the IACtHR has developed a special duty of prevention, which involves taking all measures available to prevent activities under its jurisdiction from causing ‘significant harm’ to the environment. This obligation must be fulfilled under a standard of due diligence and should include measures such as: (i) regulating, supervising and overseeing activities capable of producing significant environmental damage; (ii) requiring and approving environmental impact studies; (iii) establishing contingency plans and mitigation plans in case of occurrence of environmental damage.<sup>178</sup> The adoption of such measures must be governed by the precautionary principle and respect the so-called procedural rights, such as access to information, public participation and justice.<sup>179</sup>

The application of the right to a healthy environment as an autonomous right in the *Lhaka Honhat* case, which some commentators deem controversial for imposing unconsented duties on states,<sup>180</sup> might serve the purposes of convincing the organs of the IAHRs that there is a valid reason to admit a contentious procedure on climate change. Indeed, the right to a healthy environment is being invoked by most domestic human rights-based climate litigation in Latin America,<sup>181</sup> suggesting that if any of those cases ends up with a dissatisfying result from the vantage points of plaintiffs, they could lodge a petition before the IAHRs arguing the direct justiciability of such a right. However, in most of those cases, the right to a healthy environment was not the only one that was invoked, but also a plethora of constitutional rights that might be violated by climate change, including the right to life, water and food.<sup>182</sup> In that sense, it is likely that future climate cases litigated before the IAHRs will follow the path of most of the cases that contained environmental dimensions and therefore argue for traditionally and emergent justiciable rights. The main reason for this is that, despite defining the collective and individual nature of the right to a healthy environment, the IACtHR did not specify the markers upon which the quality of the environment would be measured.<sup>183</sup> In that sense, not even the recently entered into force *Escazú Agreement*, which enshrines the right to a healthy environment, clearly defines these crucial standards.<sup>184</sup>

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<sup>177</sup> *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina* (n 169) [280]–[284].

<sup>178</sup> *Ibid* [208].

<sup>179</sup> *Ibid*.

<sup>180</sup> Rosmerlin Estupiñán Silva, ‘Primera opinión interamericana sobre medio ambiente: ¿derecho exigible o decisión ultra vires?’ in Henry Jiménez Guanipa, Eduardo Viedma and Florian Huber (eds), *Energía, Cambio Climático y Desarrollo Sostenible: Impacto sobre los Derechos Humanos* (Fundación Heinrich Böll, 2018) 295, 312.

<sup>181</sup> Juan Auz, ‘Human Rights-Based Climate Litigation: A Latin American Cartography’ (2022) 13(1) *Journal of Human Rights and the Environment* (forthcoming).

<sup>182</sup> *Ibid*.

<sup>183</sup> Jorge E Viñuales, ‘A Human Rights Approach to Extraterritorial Environmental Protection? An Assessment’ in Nehal Bhuta (ed), *The Frontiers of Human Rights* (Oxford University Press, 2016) 177, 218.

<sup>184</sup> *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, signed 26 September 2020, UNTS (entered into force 22 April 2021) 21 (‘*Escazú Agreement*’).

The resulting risk from this uncertainty is that the IAHRs might resort to a panoply of options to ascertain it. On the one hand, it could cherry-pick valuing methodologies and thus adopt a prescriptive approach, and on the other hand, it could opt for a hortatory and deferential treatment, thus privileging states' discretion for technical specificities. Both might seem problematic for several reasons, most notably because it will be very complicated for the IAHRs to determine what kind of knowledge it will apply as valid when ordering climate-friendly measures to protect and repair the environment. Will it weave scientific knowledge with indigenous knowledge to establish dialogical criteria? Will it select an inaccurate methodology in the long term? Will it resort to the international climate regime for guidance? These questions can also be answered by states at the domestic level, should they take the initiative.

Across the board of domestic climate litigation cases in Latin America, the right to a healthy environment is one of many rights that are invoked. It is likely that until the Court delineates in a better way the content of such a right, the plaintiffs will keep resorting to focusing on traditional rights. Unfortunately, this hinders the potential of corrective, procedural and distributional justice, because the environment is not being considered from the voices that live with and in it, which reduces the adequacy of remedial measures and proper redistribution of environmental benefits.

### B *Possible Trajectories of Extraterritorial Human Rights Application*

The extraterritorial application of human rights law by the IAHRs in the context of climate change is still a matter of scholarly work.<sup>185</sup> As mentioned earlier, the Athabaskan case would be the first one in which the IACHR would address a legal question that encompasses transboundary human rights infringement resulting from the emissions of black carbon from Canada to the US.<sup>186</sup> However, a similar petition is still awaited before the IAHRs. In that connection, the purpose of this subsection is to explore possible paths a climate case with extraterritorial elements might take. To do so, some procedural and substantial features of the IAHRs will be discussed in the context of Latin America.

If future contentious cases before the IAHRs include a climate crisis dimension, it is analytically useful to imagine possible typologies of litigation. Patrick Toussaint, in this vein, proposes two typologies based on the temporality

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<sup>185</sup> Christopher Campbell-Durufié and Sumudu Anopama Atapattu, 'The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law' (2018) 8 *Climate Law* 321; Monica Feria-Tinta and Simon C Milnes, 'The Rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights' (2016) 27(1) *Yearbook of International Environmental Law* 64; Maria Antonia Tigre and Natalia Urzola, 'The 2017 Inter-American Court's Advisory Opinion: Changing the Paradigm for International Environmental Law in the Anthropocene' (2021) 12(1) *Journal of Human Rights and the Environment* 24; Monica Feria-Tinta, 'Climate Change as a Human Rights Issue: Litigating Climate Change in the Inter-American System of Human Rights and the United Nations Human Rights Committee' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff, 2021) 310.

<sup>186</sup> de la Rosa Jaimes (n 135).

of harm: either preventive or restorative.<sup>187</sup> Preventive climate cases encompass adaptation and mitigation measures, whilst restorative cases allude to damages, losses and ensuing compensation.<sup>188</sup> Preventive cases will therefore deal with aspects concerning GHG emissions' reduction and risk assessment for potential climate harm. Simultaneously, this category could include the inadequacies of response measures, both for being ill-equipped to reduce emissions and for violating rights if deployed.<sup>189</sup> Restorative cases might include past and ongoing harm associated with extreme weather or slow-onset events.

If said typologies were applied to a climate case with extraterritorial dimensions, then the preventive type will include firstly climate adaptation measures. Indeed, alleged victims from State B could argue that State A's GHG emissions would partially cause future transboundary climate-related harm in their locality, thus triggering state responsibility for risk of harm. This in turn could prompt them to request State A to bear the proportional adaptation measures' costs. This hypothetical case shares similar factual grounds to *RWE v Lliuya*,<sup>190</sup> in which it was argued that a German energy company was proportionally liable for its share of global GHG emissions and therefore should cover the expenses for adaptation measures in favour of a claimant's property in Peru. The second type of preventive case entails mitigation measures, where petitioners from State B request that State A take appropriate measures to reduce its GHG emissions. This scenario could resemble *Sacchi et al v Argentina et al*, litigated before the UN Committee on the Rights of the Child.<sup>191</sup> In this case, petitioners sought to establish, inter alia, a jurisdictional link between the polluting activity of the state defendant and a direct and foreseeable human rights impact outside that state's territory, which in turn could have justified a legislative amendment that ensures appropriate mitigation and adaptation ambition.<sup>192</sup> Contrariwise, the logic of restorative cases is based on the notion of past and ongoing harm resulting from carbon-intensive activities in the jurisdiction of State A which impinge on the rights holders in State B, who might be seeking for remedial or compensatory relief. Apart from the Athabaskan case, no other extraterritorial human rights case with similar characteristics has so far been lodged before an international human rights organ.

These three trajectories could be combined in one single case, whereby petitioners could claim adaptation, mitigation or compensation measures from State A to be implemented in State B. Conversely, they could be included in discrete cases. However, to assess whether these typologies might have some legal anchoring when a Latin American applicant files a climate lawsuit before

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<sup>187</sup> Patrick Toussaint, 'Loss and Damage and Climate Litigation: The Case for Greater Interlinkage' (2021) 30(1) *Review of European, Comparative and International Environmental Law* 16, 21.

<sup>188</sup> International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56<sup>th</sup> sess, Agenda Item 162, Supp No 10, UN Doc A/56/10 (2001) ch V(E) ('Draft Articles on Prevention of Transboundary Harm from Hazardous Activities') 148.

<sup>189</sup> Christina Voigt, 'Introduction: Climate Change as a Challenge for Global Governance, Courts and Human Rights' in Wolfgang Kahl and Marc-Philippe Weller (eds), *Climate Change Litigation: A Handbook* (Beck – Hart – Nomos, 2021) 1, 4, 9–10.

<sup>190</sup> Landgericht Essen [Essen District Court], 2 O 285/15, 15 December 2016.

<sup>191</sup> Hausfield et al (n 131).

<sup>192</sup> Ibid.

the IACHR and the IACtHR, it is necessary to assess them while considering relevant ‘Inter-American’ norms. In that vein, the most optimal doctrinal source is the Inter-American Court’s *Advisory Opinion on Human Rights and the Environment*, chiefly because it specifically delineates the notion of jurisdiction in the context of environmental harm, and it also clarifies, to a certain extent, due diligence obligations in that very context.<sup>193</sup>

The Advisory Opinion explicates how the organs of the IAHRs have so far interpreted the notion of jurisdiction according to art 1(1) of the *ACHR*, thereby including ‘every person who is within the State’s territory or who is in any way subject to its authority, responsibility or control’.<sup>194</sup> The IACtHR, in the context of human rights violations arising from transboundary environmental damage, modified its previous understanding of jurisdiction to encompass the state’s effective control over the activities that *caused* the damage and the subsequent human rights violations.<sup>195</sup> In this quest to find new avenues to establish jurisdiction, it seems the IACtHR has inadvertently adopted the Anthropocene’s tenet of humans as a new geological force that transforms Earth’s systems, mainly because it has likened the authority of states exercising effective control (humans) to pollutants originating from those states (geological forces).<sup>196</sup> The evident question now is how helpful this novel understanding of jurisdiction could be in ‘diagonal’ climate litigation before the IAHRs?

Going back to the potential extraterritorial litigation typologies, it is necessary to situate preventive cases in the context of the IAHRs practice vis-à-vis general climate litigation. Firstly, for sake of illustration, a case that embodies this typology could include an indigenous community from any states party that accepted the jurisdiction of the IACtHR or the IACHR, suing a state from the Amazon basin, for example Brazil, for failing to regulate activities in the Amazon that contribute to GHG emissions.<sup>197</sup> The same could be true for states that fail to implement their regulations on industrial and transport GHG emissions, such as Mexico.<sup>198</sup> It is noteworthy that the IACHR has admitted extraterritorial interstate petitions with regard to the violation of the right to life.<sup>199</sup>

If petitioners seek mitigation and adaptation measures in their locality, the first step would be to define the jurisdictional link, for which the *Advisory Opinion on Human Rights and the Environment* requires establishing the actions

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<sup>193</sup> *Advisory Opinion on Human Rights and the Environment* (n 168) [72]–[82], [123], [125], [142].

<sup>194</sup> *Ibid* [73].

<sup>195</sup> *Ibid* [104].

<sup>196</sup> Dipesh Chakrabarty, *The Climate of History in a Planetary Age* (University of Chicago Press, 2021) 156–7.

<sup>197</sup> Joana Setzer, Guilherme JS Leal and Caio Borges, ‘Climate Change Litigation in Brazil: Will Green Courts Become Greener?’ in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff, 2021) 143, 144.

<sup>198</sup> Rodolfo Godínez Rosales, ‘Climate Change and the Individual in Mexico’ in Francesco Sindico and Makane Moïse Mbengue (eds), *Comparative Climate Change Litigation: Beyond the Usual Suspects* (Springer, 2021) 277.

<sup>199</sup> Organization of American States, Inter-American Commission on Human Rights, *Report No 112/10: Inter-State Petition IP-02: Admissibility: Franklin Guillermo Aisalla Molina: Ecuador — Colombia*, Doc No OEA/Ser.L/V/II.140 Doc.10, 140<sup>th</sup> reg sess, 21 October 2010.

or omissions of the respondent state and their causal link with the extraterritorial human rights harm.<sup>200</sup> The crux of the matter, however, is that the bodies of the IAHRs, tasked with declaring the jurisdictional purview of the state of origin, must first deem the factual charge of a right's violation tied to significant environmental harm.<sup>201</sup> Preventive cases thus might face some tensions with this requirement because its overall aim, at least in the aspirational sense, is to avoid human rights violations.<sup>202</sup> Hence, overcoming such hurdles might entail demonstrating a failure to implement due diligence and equating it to an actual human rights violation. This option could be relatively feasible if petitioners request precautionary measures before the IACHR concerning 'a risk of irreparable harm to persons or to the subject matter of a pending petition or a case'.<sup>203</sup> Perhaps this option might contribute to clarifying the specificities of due diligence that are absent in the Advisory Opinion, namely the scope of rights that can be protected by due diligence, identifying the state and its correspondent capabilities to adjust the metric for due diligence, and the question of changing historic circumstances.<sup>204</sup>

As far as restorative cases are concerned, the IAHRs could potentially be less onerous in establishing the jurisdictional link because the main applicants' argument would rely on a human rights violation that has already occurred, paving the way for compensatory remedies. In these types of cases, the criteria to establish a jurisdictional basis for pursuing recourse against the state, from which the environmental harm originated, should be applied, *mutatis mutandis*, following the approach of preventive cases. The main difference is that petitioners must firstly establish the link between the human rights violation to the environmental damage that caused it, and secondly, establish the attribution of the foreseeable and preventable environmental damage to the originating state's jurisdiction.<sup>205</sup> Therefore, the Advisory Opinion delimitates the obligation of due diligence as an obligation of conduct in which states should take appropriate and proportionate measures as to avoid significant environmental damage or risk thereof within and outside the states' territories.<sup>206</sup> It also narrows the scope of significance of the damage to violations to the rights to life and personal integrity, which does not only trigger the prevention principle, but also the precautionary principle.<sup>207</sup>

The potential shortcomings these two avenues for extraterritorial litigation for climate-related harm pose are manifold, so only one will be mentioned here. This corresponds to attribution as a basis to establish a jurisdictional link with the pollutant state. In this regard, even though attribution science has become more

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<sup>200</sup> *Advisory Opinion on Human Rights and the Environment* (n 168) [104].

<sup>201</sup> *Ibid* [120].

<sup>202</sup> Campbell-Durufflé and Atapattu (n 185) 333.

<sup>203</sup> Dinah Shelton, 'The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System' (2015) 5(1) *Notre Dame Journal of International and Comparative Law* 1, 12.

<sup>204</sup> Tigre and Urzola (n 185); Jorge E Viñuales, 'Due Diligence in International Environmental Law: A Fine-Grained Cartography' in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press, 2020) 111.

<sup>205</sup> Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011) 52.

<sup>206</sup> *Advisory Opinion on Human Rights and the Environment* (n 168) [142].

<sup>207</sup> *Ibid* [174], [180].

accurate over the years and has been extensively used in climate litigation,<sup>208</sup> it remains to be seen how the IAHRs will articulate those findings when interpreting the prevention, precaution, and due diligence principles in light of climate action or the lack thereof. Even if the probabilities of attribution are significant, the IAHRs should assess the extent to which states' obligations to avert climate harm were not fulfilled. States, in that regard, could argue that national legislation which regulates corporations' emissions, the submission of National Determined Contributions to the UNFCC climate regime, and the fact that Latin American states are marginal global GHG emitters, are sufficient grounds to meet the due diligence threshold.<sup>209</sup> In response, IACHR or the IACtHR should determine whether that is, in fact, the case or whether the application of notions of international shared responsibility could be implemented to gauge a proportionality of attribution and thus jurisdictional basis.<sup>210</sup>

Taken as a whole, the practice of the IAHRs is not necessarily characterised by extraterritorial cases. The Advisory Opinion, however, provides an authoritative legal basis to pursue a climate case under certain technical and factual conditions, as was previously highlighted. Now, considering that most states in the region that have accepted the jurisdiction of the IACHR and IACtHR are relatively low GHG emitters, it will be crucial for prospective applicants to strategically consider what might be the added value of pursuing an extraterritorial climate case before the IAHRs.<sup>211</sup> So far, domestic climate litigation in the region is on the rise, and some instances evidence promising developments when it comes to comprehensive remedies. Maybe the question that scholars should pose is not whether extraterritorial litigation amongst low emitting countries is juridically feasible, but whether it is efficient from a climate justice perspective.

## V CONCLUSION

The diagnosis of the IAHRs as a very progressive space for legal production located in the IHREL continuum is based upon its bold and generous interpretation of human rights obligations resulting from the situated experience of victims. However, these relational encounters traditionally have not engaged with environmental or climate dimensions. That is why the limits of the IAHRs as a space of emancipation reverberate louder when the multifaceted aspects of environmental degradation at a global scale are included. This condition

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<sup>208</sup> Rupert F Stuart-Smith et al, 'Filling the Evidentiary Gap in Climate Litigation' (2021) 11(8) *Nature Climate Change* 651, 652–4.

<sup>209</sup> See Michael Burger, Jessica Wentz and Radley Horton, 'The Law and Science of Climate Change Attribution' (2020) 45(1) *Columbia Journal of Environmental Law* 57, 62; Alice Ollino, 'Reflections on the Advisory Opinion on Human Rights and the Environment and the Notion of Extraterritorial Jurisdiction' (2020) 93(1–2) *Die Friedens-Warte* 56, 65; Benoit Mayer, 'Climate Change Mitigation as an Obligation under Human Rights Treaties?' (2021) 115(3) *American Journal of International Law* 409.

<sup>210</sup> André Nollkaemper et al, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31(1) *European Journal of International Law* 15; Campbell-Durufflé and Atapattu (n 185) 334.

<sup>211</sup> Annalisa Savaresi, 'Inter-State Climate Change Litigation: "Neither a Chimera nor a Panacea"' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff, 2021) 366, 384; Bárcena et al (n 151) 22.

downplays the role of any regional human rights system seeking to tackle aspects of global crises, such as the climate emergency, which will be constantly returning to haunt the marginalised unless the underlying causes become the priority. Indeed, the climate justice aspirations, essential for the IAHRs to move closer towards Echeverría's Baroque ethos in the international law continuum, suffer from at least two arguably insurmountable hurdles. The first one is the enclave nature of regional human rights institutions in the Global South, such as the IAHRs, which renders it malleable to hegemonic forces that drive global political economy, which, in turn, shape normative and political conditions for and in the region. Therefore, the region, by itself, will never be able to stop the mitigation and adaptation requirements to prevent, in a significant manner, the human rights violations arising from the climate crisis. This is an ontological difference from the provenance of other human rights violations, in which state power is the essential factor behind them and not the dynamics of Earth's system's anthropogenic disturbances. The other impossibility, as argued elsewhere,<sup>212</sup> is the structural dependency of Latin America on its extractivist economic model, which moulds the regulatory landscape that enables an investment-friendly environment, one in which human rights and ecologic concerns become mere managerial secondary aspects.

Thus, even if the Advisory Opinion and the *Lhaka Honhat* case open the tap to a flurry of progressive climate and environmental rulings from the IACtHR, states are likely to differ in their compliance due to a dense set of 'socio-metabolic interdependences' between Latin America and its economic partners.<sup>213</sup> Such relationships include numerous legal obligations that ensure investments flow to domestic economies. The systematic lack of compliance with the numerous rulings for the protection of indigenous peoples, which include significant legal and policy reforms to manage socio-environmental conflicts in extractivist contexts, attests to the previous claim.<sup>214</sup> Moreover, the US, Canada and most of the Caribbean countries are not under the contentious jurisdiction of the IACtHR. This is a problem because the US and Canada are large CO<sub>2</sub> emitters, and many Caribbean countries are significantly vulnerable to climate-induced disasters.<sup>215</sup> Also, some high emitting countries have either withdrawn from the *ACHR* or threatened to do so, such as Venezuela and Brazil respectively.<sup>216</sup> If these countries are not participating in the human rights community, then the authority that might compel them to change their behaviour

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<sup>212</sup> Juan Auz, 'Human Rights-Based Climate Litigation in Latin America', *Oxford Human Rights Hub* (Blog Post, 14 April 2021) <<http://ohrh.law.ox.ac.uk/human-rights-based-climate-litigation-in-latin-america/>>, archived at <<https://perma.cc/B5ZN-K23G>>.

<sup>213</sup> Martín Arboleda, *Planetary Mine: Territories of Extraction under Late Capitalism* (Verso Books, 2020) 48.

<sup>214</sup> Correia (n 126) 76.

<sup>215</sup> Simon Evans, 'Analysis: Which Countries Are Historically Responsible for Climate Change?', *Carbon Brief* (online, 5 October 2021) <<https://www.carbonbrief.org/analysis-which-countries-are-historically-responsible-for-climate-change/>>, archived at <<https://perma.cc/8LGE-DE62>>; World Meteorological Organization, *State of the Climate in Latin America and the Caribbean: 2020* (Report No 1272, World Meteorological Organization, 2021) 25.

<sup>216</sup> Ximena Soley and Silvia Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights' (2018) 14(2) *International Journal of Law in Context* 237, 255.



will not come from the IAHRs. Therefore, these unsurmountable hurdles confine the IAHRs to a permanent liminal space, between the Realist and the Baroque ethe, where the emancipatory potential is greater than in other human rights spaces, but still contingent upon extra-legal conditions.

The potential implications of looking at human rights institutions as ‘spaces’ of contention and deliberation, where diverse epistemes converge and diverge, is that it could help in conceiving the relationship between progressive legal imaginaries and the diversity of loci of enunciation. For instance, and despite lucid criticism,<sup>217</sup> it could be claimed that the dramatic reality of people on the move that come from the Global South to face Europe’s colonial structures is the main force behind a yet timorously protective human rights approach before the European Court of Human Rights.<sup>218</sup> Another example would be how a minority such as the Kurdish people in Turkey has been subjected to the government’s uninhibited repression, obliging them to mobilise before the European Court of Human Rights to seek recourse, confronting it with challenging situations of systemic power asymmetries and oppression.<sup>219</sup> In short, the immanent contradictions of global capitalism are pushing actors from former colonial geographies to use the ‘spaces’ of liberal human rights, whose realities, rooted in geo-historical conditions, are slowly but steadily moving the cogs of the rusty legal machinery towards novel imaginaries.

Remembering what Silvia Rivera Cusicanqui mentioned in her quote at the beginning of this piece, it may be appropriate to conceive that the forms the IAHRs adopt in their judgments, sometimes regarded as ‘ultra vires’ or ‘activist’, are but a humble mirroring of the complex mosaic of subaltern experiences that are channelled through such space. Oppressed polities that vent their anxieties — anchored in situated landscapes and histories, through the prism of international law, are exercising a way to decolonise hitherto legal assumptions and push interpretative boundaries. It is arguably their collective experience and agency that is the main explainer of a ‘peculiar’ and ‘idiosyncratic’ approach to reconfigure legal imaginaries. However, even if that is the case, as we have seen, this is not sufficient to counter the massive forces of the Anthropocene and the utmost necessity of rich nations to take responsibility for having exacerbated it. If the underlying causes are not fully addressed, then invoking international law is ‘no more than an act of self-defense’.<sup>220</sup>

This paper’s title is a reference to the introductory verse of Joy Division’s song ‘Twenty-Four Hours’, whose lyrics, much in line with the band’s spirit, exude a pessimist perspective on romantic relationships. Indeed, permanence as a liminal space betwixt and between status quo and transformation seems like a

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<sup>217</sup> Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press, 2015).

<sup>218</sup> *MSS v Belgium and Greece* [2011] I Eur Court HR 255; *Othman (Abu Qatada) v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 8139/09, 17 January 2012); *Hirsi Jamaa v Italy* (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012).

<sup>219</sup> Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey’s Kurdish Conflict* (Cambridge University Press, 2020) 6.

<sup>220</sup> Francisco-José Quintana and Justina Uriburu, ‘Modest International Law: COVID-19, International Legal Responses, and Depoliticization’ (2020) 114(4) *American Journal of International Law* 687, 694.

place devoid of hope, especially for international human rights institutions like the IAHRs. However, the last two verses of the cited song provide a glimpse of optimism: ‘Deep in the heart of where sympathy held sway, got to find my destiny before it gets too late’.<sup>221</sup>

In this light, it could be said that, as long as human rights violations occur in Latin America, oppressed polities will continue to make use of justice spaces or create their own. However, as the climate crisis quickly spreads, so should the strategies and tactics, ‘before it gets too late’. Moreover, some critics might problematise the selection of Joy Division as a reference for an article about Latin America, and they would be spot on. However, just as formal human rights have emerged as a Global North project but redeployed by Global South actors, so this piece utilises a sombre artist as a heuristic tool to illustrate the situatedness of a Latin American actor in the geo-politics of international law.

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<sup>221</sup> Joy Division, ‘Joy Division — Twenty Four Hours (Official Lyric Video)’ (YouTube, 19 December 2020) <<https://www.youtube.com/watch?v=F9ourSxX8ao>>.