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THE HUMAN RIGHTS TO WATER AND SANITATION IN THE CASE LAW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

BELO HORIZONTE
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Amael Notini Moreira Bahia

THE HUMAN RIGHTS TO WATER AND SANITATION IN THE CASE LAW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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“Water is taught by thirst;
Land, by the ocean passed;
Transport, by throe;
Peace, by its battles told;
Love, by memorial mould;
Birds, by the snow.”
(Emily Dickinson, Poems: Third Series, 1896)

ABSTRACT

The thesis analyses if the human rights to water and sanitation, as conceived by the Inter-American Court of Human Rights (IACtHR), have specific features that differentiate them from other formulations of these rights in general human rights law. Considering the innovative methods of treaty interpretation of the IACtHR, the hypothesis of the thesis is that its case law has established a legal framework for the human rights to water and sanitation that is more protective than other formulations in international law. The first chapter presents a historic perspective of the protection of human needs related to water in international law and the development of the human rights to water and sanitation, introducing the different sources of this right in general international law. This chapter discusses the protection of the human rights to water and sanitation by the International Covenant on Civil and Political Rights, by the International Covenant on Economic, Social and Cultural Rights, and by other initiatives in specific and regional treaties. Then, the thesis discusses the human rights to water and sanitation in the case law of the IACtHR, either as a derivative or as an autonomous right. Despite the specificity of the factual circumstances of the cases ruled by the IACtHR, the second chapter evaluates the normative content of the obligations established by the IACtHR, the redress mechanisms and the impacts of these implications for the realization of other human rights. Lastly, in the light of these elements, the third chapter formulates a critical overview of the human rights to water and sanitation constructed by the IACtHR. This final chapter aims to ascertain whether the case law of the IACtHR presents specific normative elements that differ from other sources of the human rights to water and sanitation in general international law, such as the justiciability, the scope and content of the obligations, redress mechanisms and the interrelation with other rights. The thesis concludes that even though the IACtHR recognizes an autonomous human right to water and privileges methods of interpretation that are more focused on the protection of human dignity than the traditional rules of interpretation, its case law does not establish normative elements that are more progressive than general international law in relation to the human rights to water and sanitation.

Keywords: Human Rights to Water and Sanitation; Case Law; Inter-American Court of Human Rights.

RESUMO

A presente dissertação analisa se os direitos humanos à água e ao saneamento, na forma como concebidos pela Corte Interamericana de Direitos Humanos (CIDH), têm características específicas que os diferenciam de outras construções desses direitos no arcabouço geral dos direitos humanos. Considerando os métodos inovadores de interpretação de tratados da CIDH, a hipótese da dissertação é que sua jurisprudência estabeleceu um arcabouço normativo para os direitos humanos à água e ao saneamento que é mais protetivo do que outras formulações no direito internacional. Para este fim, o primeiro capítulo apresenta uma perspectiva histórica da proteção de necessidades humanas relacionadas à água no direito internacional e o desenvolvimento dos direitos humanos à água e ao saneamento, introduzindo as diferentes fontes deste direito no direito internacional geral. Este capítulo discute a proteção dos direitos humanos à água e ao saneamento pelo Pacto Internacional sobre Direitos Civis e Políticos, pelo Pacto Internacional sobre Direitos Econômicos, Sociais e Culturais, e por outras iniciativas em tratados específicos e regionais. Em seguida, a tese discute os direitos humanos à água e ao saneamento na jurisprudência da CIDH, desenvolvida nas acepções derivada e autônoma. Apesar da especificidade das circunstâncias factuais dos casos julgados pela CIDH, o segundo capítulo avalia o conteúdo normativo das obrigações estabelecidas pela CIDH, os mecanismos de reparação e os impactos dessas implicações para a realização de outros direitos humanos. Finalmente, à luz desses elementos, o terceiro capítulo formula uma visão crítica dos direitos humanos à água e ao saneamento construídos pela CIDH. Este último capítulo visa verificar se a jurisprudência da CIDH apresenta elementos normativos específicos que diferem de outras fontes dos direitos humanos à água e ao saneamento no direito internacional geral, tais como a justiciabilidade, o escopo e o conteúdo das obrigações, os mecanismos de reparação e a conexão com outros direitos. A dissertação conclui que, embora a IACtHR privilegie métodos de interpretação mais focalizados na proteção da dignidade humana do que as regras tradicionais de interpretação e reconheça um direito humano autônomo à água, sua jurisprudência não estabelece elementos normativos mais progressistas do que o direito internacional geral em relação aos direitos humanos à água e ao saneamento.

Palavras-chave: Direitos Humanos à Água e ao Saneamento; Jurisprudência; Corte Interamericana de Direitos Humanos.

LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
HR Committee	United Nations Human Rights Committee
HRC	United Nations Human Rights Council
IACommHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
IASHR	Inter-American System of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IDI	Institut de Droit International
ILA	International Law Association
ILC	International Law Commission
OAS	Organization of American States
OC-23/17	Advisory Opinion No. 23/17
PCIJ	Permanent Court of International Justice
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNWC	United Nations Convention on the Law of Non-Navigational Uses of International Watercourses
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization

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INTRODUCTION

Water is as essential as it is neglected on international law. Despite being an inestimable element of human survival and dignity, the rights to water and sanitation had a surprisingly recent development, and still lack proper codification. The struggle for the emergence of the human rights to water and sanitation was permeated by a persistent contestation of their legal status and normative elements.

These challenges are even direr in the climate change context. There are global projections suggesting greater scarcity due to changes in precipitation, temperature, demand and deterioration of water quality.[1] There is much uncertainty as to how climate change may affect water resources, especially in relation the potential effects it may have on the quality of drinking water.[2] These issues may represent bottlenecks to the universalization of these human rights, whilst also impairing the enjoyment of others.

Yet, these rights have been thoroughly developed and reaffirmed in general international law as the result of the combined efforts of the organized civil society, diplomacy and academia. That is due to the importance of the formal recognition of the human rights to water and sanitation for their material implementation, especially in relation to injustices committed against vulnerable individuals and groups.

In the light of these circumstances, the thesis analyzes the case law of the Inter-American Court of Human Rights (IACtHR) to identify specific features of the legal constructions and obligations encompassed by the human rights to water and sanitation in the Inter-American System of Human Rights (IASHR). The restriction of scope to the case law of the IACtHR is due to its notorious dynamism in the interpretation of human rights treaties and in the innovative solutions for implementation and enforcement of human rights obligations.[3]

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[1] Guy Howard et al., "Climate Change and Water and Sanitation: Likely Impacts and Emerging Trends for Action," *Annual Review of Environment and Resources* 41, no. 1 (November 1, 2016): 253–76, https://doi.org/10.1146/annurev-environ-110615-085856. p. 254.
[2] Baiwen Ma et al., "Impact of Climate Change on Drinking Water Safety," *ACS ES&T Water* 2, no. 2 (February 11, 2022): 259–61, https://doi.org/10.1021/acsestwater.2c00004. p. 260.
[3] Christina Binder, "The Prohibition of Amnesties by the Inter-American Court of Human Rights," *German Law Journal* 12, no. 5 (May 1, 2011): 1203–30, https://doi.org/10.1017/S2071832200017272. p. 1204.

Therefore, the thesis intends to ascertain if the Court provided insights in its case law also in relation to the human rights to water and sanitation. The hypothesis of the thesis is that the case law of the IACtHR has established a framework for the human rights to water and sanitation that is more protective than other formulations in international law.

Accordingly, considering the peculiarities of the IACtHR's jurisdiction, the thesis seeks to answer the following question: Do the human rights to water and sanitation, as conceived by the IACtHR, have specific features that differentiate them from other constructions of the human rights to water and sanitation in general international law? These features may prove to be important contributions to the general conception of the human rights to water and sanitation, as there are uncertainties relating to the justiciability, obligations, redress mechanisms and other elements of these rights.

This thesis uses the method of qualitative empirical analysis to assess the case law of the IACtHR. As explained by Gregory Shaffer and Tom Ginsburg, this line of research "focuses on midrange theorizing concerning the conditions under which international law is formed and those under which it has effects in different contexts, aiming to explain variation".[4] The main reason for the adoption of the qualitative assessment of the case law is the close verification of the specificities of each case in light of their context for the identification of patterns and disparities.[5] However, for better delimitation of this thesis, the case law is assessed only to the extent that is relevant to the object studied. Indeed, many of the instruments and cases addressed in this thesis cover way beyond the human rights to water and sanitation, which is why the magnifying glass eliminates other matters to avoid distractions and to focus objectively on the issue discussed.

To this purpose, the thesis introduces the general context and the main theories that govern the issue at hand, in order to enable a comprehension of the cases studied. That is why the first chapter discusses the development of water and sanitation in international law and their main legal sources. In this regard, the chapter presents the emergence of the issue of water in international law and the progressive steps that were necessary for the insertion of considerations of vital human needs in the interstate agenda and in international water law.

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[4] Gregory Shaffer and Tom Ginsburg, "The Empirical Turn in International Legal Scholarship," *American Journal of International Law* 106, no. 1 (January 2012): 1–46, https://doi.org/10.5305/amerjintelaw.106.1.0001. p. 1.
[5] *Ibid.* p. 4.

These developments are interrelated and interdependent with the codification and inference of the human rights to water and sanitation in international human rights instruments, which is discussed in the following part of the chapter. After this background is presented, the chapter deals with the legal grounds and specific normative elements of the human rights to water and sanitation in the frameworks of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and of the International Covenant on Civil and Political Rights (ICCPR), which are the main human rights instruments in general international law, as well as specific and regional treaty regimes.

Then, the thesis proceeds to realize a qualitative evaluation of the cases that pertain to the human rights to water and sanitation in the case law of the IACtHR, which are the object of the thesis. The second chapter details the circumstances that lead to the adjudication of the cases studied and how they differ in relation to the legal assessment of similar factual premises. As such, the chapter discusses the human rights to water and sanitation in the case law of the IACtHR, developed in derivative and autonomous forms. In the derivative phase, the IACtHR enhances civil and political rights, such as the rights to life, humane treatment and property, to encompass economic, social and cultural elements, which came to include access to water and sanitation services. On the other hand, the autonomous perspective presents a new paradigm for justiciability of economic, social and cultural rights in light of 26 (progressive development) of the American Convention on Human Rights (ACHR). Despite the specificity of the factual circumstances of the cases ruled by the IACtHR, this chapter will evaluate the legal grounds and normative content of the obligations established by the IACtHR, the redress mechanisms and the impacts of these implications for the realization of other human rights.

Finally, after these issues properly presented, the thesis focuses on the critical appraisal of the specific elements of the case law of the IACtHR in face of the general context and sources of the human rights to water and sanitation in international law. Accordingly, the third chapter formulates a critical overview of the human rights to water and sanitation constructed by the IACtHR and aims to ascertain whether the case law of the IACtHR presents specific normative elements that differ from other sources of the human rights to water and sanitation. For that purpose, the chapter analyses issues that are common to all constructions of the human rights to water and sanitation, namely justiciability, scope and content of obligations and redress mechanisms, as well as matters that emerged in a singular perspective in the case law of the IACtHR.

As a preliminary remark, this thesis does not employ the term “human rights to water and sanitation” fortuitously. The term is used in plural to reiterate that the human right to water and the human right to sanitation are considered autonomous rights, despite the joint consideration of their elements for didactic purposes. As will be seen in this work, the terminology in not uniform in treaties, case law and academic writings. As such, when there is a recognition of only the human right to water, which is a practice that permeates many legal frameworks, this specificity will be highlighted and analyzed in its respective context. Having established this premise, the thesis favors the utilization of the plural formulation of these rights, but will employ the singular “human right to water” and “human right to sanitation” when appropriate.

1 THE HUMAN RIGHTS TO WATER AND SANITATION IN GENERAL INTERNATIONAL LAW

The management and utilization of water resources are intrinsically related to several cultural, economic and social implications, including the fulfillment of human rights. They directly affect the wellbeing of entire populations, which it why it is unsurprising that there have been several attempts to regulate the rights and obligations pertaining to its sustainability and protection. Given that water is a limited resource and is essential to sustain life, the rules regulating its use concern several fields of law and stakeholders.

In international law, there are two main legal frameworks that address water resources directly. The first is international water law, which includes international watercourses and transboundary aquifers; the second is human rights law, that regulates both the derivative and the autonomous facets of the individual human rights to water and sanitation and the corresponding States' obligations.

The first section of this chapter aims to present an historic overview of the formation of the legal sources and international instruments that led to the current framework of the regulation of water and sanitation in international law. It discusses the long road for the consideration of vital human needs in the realm of international water law, that has always focused primarily on States, their sovereignty and the interstate interests that exist in a transboundary context. It also addresses the recent insertion of the issue of the human rights to water and sanitation in multilateral fora, the preoccupations and reservations of some States in relation to these rights and, ultimately, the reach of a reasonable degree of consensus in relation to its recognition.

The second section, on the other hand, pertains to the assessment of the legal grounds and normative elements of the human rights to water and sanitation in the main international instruments that protect these rights. This analysis encompasses the interpretation of general, specific and regional human rights treaties and the soft law instruments that guide their implementation.

1.1 A Brief Recollection of Water in International Law and the Emergence of the Human Rights to Water and Sanitation

When considering the normative framework of water in international law, it is paramount to comprehend the different systems that address the issue and their complementary angles. The intercommunication between these systems is particularly relevant to understand the formation of States' positions in relation to the human rights to water and sanitation, due the potential effects they may have on each other.

Thus, this section describes the introduction of water in the agenda of States in international law, from the initial viewpoint of a strategic resource for peace treaties and economic affairs related to navigation, to the present struggle for the consideration of vital human needs in the allocation of water in a transboundary context. Then, the section discusses the emergence of the human rights to water and sanitation, their progresses and setbacks in the initiatives conducted in the multilateral for a, as well as the increasing consensus on their normative elements.

1.1.1 International Water Law and the Consideration of Vital Human Needs

The first interaction between international law and water was naturally focused on States. These actors are, and have always been, the main subjects of international law, and their conflicting interests in relation to shared water resources led to the adoption of several treaties that envisaged to regulate the reciprocal rights and obligations of riparian States.[6] The interactions of these actors with the field of water resources, which is primarily focused on the tutelage of sovereignty, may shed some light into the late development of the human rights to water and sanitation.[7]

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[6] Malcolm Shaw, *International Law*, 6th ed (Cambridge, UK ; New York: Cambridge University Press, 2008). p. 197.

[7] The discussion on water resources does not encompass seawater, as it is regulated by an entirely different system of international law and does not have significant pertinence for this thesis.

1.1.1.1 The First Convergence: Water and Navigation

Initially, navigation and boundary issues were the primary concerns of States related to water. These issues were the most recurrent in agreements related to water in the 18th and 19th centuries, as "international rivers were seen as important boundaries between countries and as vehicles of commerce".[8] During this period, navigation enjoyed a status of priority over other uses in international law, as States still had few concerns related to other uses related to water, such as human needs.[9]

Given the significant economic relevance of navigation, peace treaties often included provisions designed to open or close traffic in certain rivers.[10] In fact, even the Peace of Westphalia (1648), which is a landmark for the establishment of the current States and the emergence of international law, also disciplined the freedom of navigation in international rivers.[11] Also, the Final Act of Vienna (1815) established the core rules applicable to navigation in international law, which included the freedom of navigation and commerce for riparian States, the freedom of commerce for non-riparian States and the duty of consultation of other riparian States on matters pertaining to navigation.[12]

The very definition of "international river", which was the main concept employed at the time to describe the scope of the legal regime applicable to transboundary water resources, was highly influenced by the primary focus on navigation. The Final Act of Vienna (1815), in its article 108, presents some of the first elements of this concept, determining the rules applicable to States that are separated or crossed by the same navigable river.[13] These elements were used to establish two categories of international river: (i) the contiguous, that

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[8] Edith Brown Weiss, "The Evolution of International Water Law," *Collected Courses of the Hague Academy of International Law* 331 (2007), http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789004172883_02. p. 237-238.
[9] Chenjun Zheng and Otto Spijkers, "Priority of Uses in International Water Law," *Sustainability* 13, no. 3 (February 2, 2021): 1567, https://doi.org/10.3390/su13031567. p. 1571-1572.
[10] Brown Weiss, "The Evolution of International Water Law." p. 236.
[11] Ariel Dinar et al., *Bridges Over Water: Understanding Transboundary Water Conflict, Negotiation and Cooperation* (Hackensack: World Scientific, 2007), https://doi.org/10.1142/6184. p. 61.
[12] Dante Augusto Caponera and Marcella Nanni, *Principles of Water Law and Administration: National and International* (Leiden, The Netherlands: CRC Press/Balkema, 2020). p. 209-210.
[13] "ART. CVIII. The Powers whose states are separated or crossed by the same navigable river, engage to regulate, by common consent, all that regards its navigation. For this purpose they will name Commissioners, who shall assemble, at latest, within six months after the termination of the Congress, and who shall adopt as the basis of their proceedings, the principles established by the following Articles". Congress of Vienna, "Final Act of the Congress of Vienna," 1815, http://www.hlrn.org/img/documents/final_congress_viennageneral_treaty1815.pdf.

establish border limits between States; and (ii) the successive, which cross State borders. These concepts considered rivers in isolated units rather than as a system, thus neglecting lakes and other superficial and underground water sources. [14]

1.1.1.2 The Multiplication of Uses and their Conflicts

Following these developments, States began to increasingly confer attention to purposes other than navigation, which gradually started to provide new perspectives for water in international law. In this regard, the *Institut de Droit International* (IDI) adopted, in the Madrid Declaration (1911), the first set of rules applicable to non-navigational uses of these resources. [15] This declaration establishes the legal regimes applicable to contiguous and successive rivers, a scope inherited from the treaties that dealt with navigation. In contiguous rivers, the Madrid Declaration determines that riparian States must not implement any potentially harmful modifications without the prior consent of other riparian States. [16] Pertaining to successive rivers, the declaration stated that diversions would require previous consent of the affected States, prohibited the discharge of harmful materials and other activities that might negatively impact the river, whilst also reaffirmed the priority of navigation over other uses.[17] It should be noted that the Madrid Declaration was not a binding document, but merely a soft law instrument devoted to guide State practice on the subject.[18]

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[14] Lucius Caflisch, "Règles Générales Du Droit Des Cours d'eau Internationaux," *Collected Courses of the Hague Academy of International Law* 219 (1989), https://doi.org/10.1163/1875-8096_pplrdc_A9780792321408_01. p. 30-31.

[15] Institut de Droit International, "Réglementation Internationale de l'usage Des Cours d'eau Internationaux En Dehors de l'exercice Du Droit de Navigation – Session de Madrid," 1911, http://www.idi-iil.org/app/uploads/2017/06/1911_mad_01_fr.pdf.

[16] "I. Lorsqu'un cours d'eau forme la frontière de deux Etats, aucun de ces Etats ne peut, sans l'assentiment de l'autre, et en l'absence d'un titre juridique spécial et valable, y apporter ou y laisser apporter par des particuliers, des sociétés, etc. ... des changements préjudiciables à la rive de l'autre Etat. D'autre part, aucun des deux Etats ne peut, sur son territoire, exploiter ou laisser exploiter l'eau d'une manière qui porte une atteinte grave à son exploitation par l'autre Etat ou par les particuliers, sociétés, etc., de l'autre". *Ibid.*

[17] "II. Lorsqu'un cours d'eau traverse successivement les territoires de deux ou de plusieurs Etats: 1° Le point où ce cours d'eau traverse les frontières de deux Etats, soit naturellement, soit depuis un temps immémorial, ne peut pas être changé par les établissements de l'un des Etats sans l'assentiment de l'autre ; 2° Toute altération nuisible de l'eau, tout déversement de matières nuisibles (provenant de fabriques, etc.), est interdit ; 3° Il ne peut être prélevé par les établissements (spécialement les usines pour l'exploitation des forces hydrauliques) une quantité d'eau telle que la constitution, autrement dit le caractère utilisable ou le caractère essentiel du cours d'eau à son arrivée sur le territoire d'aval, s'en trouve gravement modifié ; 4° Le droit de navigation en vertu d'un titre reconnu en droit international ne peut pas être violé par un usage quelconque ; 5° Un Etat en aval ne peut pas faire ou laisser faire, dans son territoire, de constructions ou établissements qui, pour l'autre Etat, produisent le danger d'inondation ; 6° Les règles précédentes sont applicables, de même, au cas où, d'un lac situé dans un

Then, the Treaty of Versailles (1919), for the first time in a peace treaty, regulated non-navigational uses such as irrigation and fishing, enabling even their precedence over navigation under certain circumstances.[19] Furthermore, the Geneva Convention relating to the Development of Hydraulic Power affecting more than one State (1923) established the first specific legal regime for a non-navigational use of transboundary water resources, but the broad obligations and procedures adopted in this instrument led to a low adherence of States.[20] Given the incipient development of the rules applicable to non-navigational uses of transboundary water resources, it is unsurprising that States were still reluctant to codify specific obligations and cooperate following strict procedures.

Accordingly, the 20th century was still initially marked by a predominance of navigation and boundary issues in water agreements. This scenario changed only in the late half of the century, when the discussion of non-navigational uses increased dramatically in the adoption of water agreements.[21] Accordingly, as States started to dispute the rights and obligations related to the utilization of transboundary water resources, several theories emerged in order to regulate the conflicts and interests involving sovereignty and the use of water in an international context.

On the side of upstream States, whose territory encompasses the upper part of a transboundary water resource, the theory that prevailed was that of the absolute sovereignty over these resources. This doctrine became notorious at the time of the enunciation of the opinion of Judson Harmon, then Attorney General of the United States of America (USA), on the Rio Grande dispute. In the late nineteenth century, the USA diverted the Rio Grande, which in turn compromised irrigation for local crops in Mexico, endangering several

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territoire des cours d'eau s'écoulent dans le territoire d'un autre Etat ou les territoires d'autres Etats. 7° Il est recommandé d'instituer des commissions, communes et permanentes, des Etats intéressés qui prendront des décisions ou, tout au moins, donneront leur avis lorsqu'il se fera de nouveaux établissements ou des modifications aux établissements existants et qu'il pourrait en résulter quelque conséquence importante pour la partie du cours d'eau située sur le territoire de l'autre Etat." *Ibid.*

[18] Ludwik Teclaff, "Evolution of the River Basin Concept in National and International Water Law," *Nat. Resources J.* 36, no. 2 (1996): 359–91. p. 365-366.

[19] Dinar et al., *Bridges Over Water*. p. 62.

[20] Caflisch, "Règles Générales Du Droit Des Cours d'eau Internationaux." p. 44.

[21] BROWN WEISS, **The Evolution of International Water Law (Volume 331), Collected Courses of the Hague Academy of International Law**. p. 240.

communities that needed the water for their own subsistence.[22] In this context, Harmon declared that each State was sovereign to use the water resources contained within its territory without any limitations, not even when other States might be affected.[23] This position did not last long, as the USA later retracted its position and reached an agreement to settle the Rio Grande issue.[24]

In response to the Harmon doctrine, downstream States disseminated the theory of absolute integrity, pleading that the consent of all riparian States was necessary in order to authorize any significant uses of transboundary water resources.[25] Like the Harmon doctrine, the theory of absolute integrity has not gained significant support from States.[26] In 1957, this theory was employed by Spain to avoid the diversion of waters by France in the *Lac Lanoux* case. Nonetheless, the theory of absolute integrity was not endorsed by the arbitral tribunal, which stated that the obligation to celebrate a prior agreement would be equivalent to granting a right of veto to one of the riparian States, thus paralyzing the exercise of territorial sovereignty of the other States sharing the resource.[27]

The tribunal also commented that, precisely due to the potential sovereignty limitations, it could be observed that international practice preferred less extreme solutions, such as the obligation to negotiate in good faith to achieve an agreement, without making the exercise of their competences conditional on the conclusion of this agreement. In this scenario, the violation of good faith, exemplified by unjustified breakdown of the talks, abnormal delays, disregard for the procedures provided for, systematic refusal to take into consideration the proposals or interests of the opposing parties, could lead to international responsibility.[28]

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[22] Matfas Romero, "Mr. Romero to Mr. Gresham (Papers Relating to the Foreign Relations of the United States, 1894, with the Annual Message of the President, Transmitted to Congress, December 3, 1894)" (Office of the Historian, 1894), https://history.state.gov/historicaldocuments/frus1894/d386.
[23] Salman, "The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law," *International Journal of Water Resources Development* 23, no. 4 (2007): 625–40. p. 627.
[24] Stephen McCaffrey, "The Harmon Doctrine One Hundred Years Later: Buried, Not Praised," *Natural Resources Journal* 36, no. 3 (1996): 549–90. p. 588-90.
[25] Trilochan Upreti, *International Watercourses Law and Its Application in South Asia* (Kathmandu: Pairavi Prakashan, 2006). p. 104-105.
[26] Malgosia Fitzmaurice, "General Principles Governing the Cooperation between States in Relation to Non-Navigational Uses Of International Watercourses," *Yearbook of International Environmental Law* 14, no. 1 (December 1, 2003): 3–45, https://doi.org/10.1093/yiel/14.1.3. p. 7.
[27] UNRIAA, "Affaire Du Lac Lanoux (Espagne v. France)," 1957, https://legal.un.org/riaa/cases/vol_XII/281-317_Lanoux.pdf.
[28] *Ibid.* p. 306-307.

Eventually, the incompatibility between these two theories was resolved through the concept of the restriction of sovereignty, which represents the consideration of the interests of all riparian States in the use of the shared resource.[29] The theory of the community of interests was first developed in the context of the right of navigation of international rivers, and later adapted in the context of other uses. As enunciated by the Permanent Court of International Justice (PCIJ) in the Oder River Case, in 1929:

> When consideration is given to the manner in which states have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one state, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream states, but in that of a community of interest of riparian states. This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian states in the use of the whole course of the river and the exclusion of any preferential privileges of any riparian state in relation to others.[30]

This judgment had the important role of enabling a dialogue between upstream and downstream States, given the inertia faced due to the mutual attempt to preserve sovereignty over natural resources. Furthermore, even if not directly applicable to non-navigational uses, the Oder River Case established the foundations of the community of interests in international water law.

Later, in 1937, the PCIJ had the opportunity to enunciate the same principle for uses other than navigation in the Meuse River case. The Netherlands and Belgium disputed the withdraw of water from the Meuse, as both countries had projects for the construction of channels that would consume portions of the river's flow. The case was resolved strictly along the obligations prescribed in the Treaty between Belgium and the Netherlands for the Regulation of Drawings of Water from the Meuse (1863), as the PCIJ refused to resort to other rules of international law. In any case, it should be noted that Judge Hudson recognized, in his individual opinion, that "principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals",

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[29] Joseph W. Dellapenna, "The Customary International Law of Transboundary Fresh Waters," *International Journal of Global Environmental Issues* 1, no. 3/4 (2001): 264, https://doi.org/10.1504/IJGENVI.2001.000981. p. 270.

[30] Permanent Court of International Justice, "Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder," 1929, https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_23/74_Commission_internationale_de_l_Oder_Arret.pdf.

whilst a "sharp division between law and equity, such as prevails in the administration of justice in some States, should find no place in international jurisprudence".[31]

Subsequently, as the non-navigational uses of transboundary water resources began to gain influence in international law, the theory of the community of interest led to the establishment of the principle of equitable utilization, which gained significant support from international doctrine and states. Some reflections of the principle of equitable utilization can be verified in the scholarly declarations in the 1960s, such as in the Declaration of Salzburg (1961), emitted by the IDI, and in the Helsinki Rules on the Uses of the Waters of International Rivers (1966), drafted by the International Law Association (ILA). In relation to the Declaration of Salzburg, the IDI stated that if the States disagree on their rights of use, the settlement of the dispute will be made on the basis of equity, taking into account, particularly, their respective needs.[32] As for the Helsinki Rules, the ILA declared that each State is "entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin", and that no category of uses is entitled to inherent preference.[33] Even though the Helsinki Rules do not establish any priority between uses, the authoritative commentaries to this instrument dictates that "if a domestic use is indispensable—since it is, in fact, the basis of life—it would not have difficulty in prevailing on the merits against other uses in an evaluation of the drainage basin".[34] It should be noted, however, that the IDI and the ILA are scientific and academic organizations, and their resolutions do not represent the States' legal perspective, but rather that of highly qualified publicists.[35] In spite of the slightly different formulas, these documents reflect the same

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[31] Manley Hudson, "Separate Opinion of Judge Hudson on the Case Relating to the Diversion of Water from the Meuse," 1937, https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_AB/AB_70/06_Meuse_Opinion_Hudson.pdf. p. 76.

[32] "Art. 3. Si les Etats sont en désaccord sur la portée de leurs droits d'utilisation, le règlement se fera sur la base de 1'équité, en tenant compte notamment de leurs besoins respectifs, ainsi que des autres circonstances propres au cas d'espèce". Institut de Droit International, "Utilisation Des Eaux Internationales Non Maritimes (En Dehors de La Navigation) - Session de Salzbourg," 1961, https://www.idi-iil.org/app/uploads/2017/06/1961_salz_01_fr.pdf.

[33] "Article IV. Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin. Article VI. A use or category of uses is not entitled to any inherent preference over any other use or category of uses". International Law Association, "Helsinki Rules on the Uses of the Waters of International Rivers," 1966, https://www.internationalwaterlaw.org/documents/intldocs/ILA/Helsinki_Rules-original_with_comments.pdf.

[34] *Ibid.*

[35] Gildo Manuel Espada, "O Papel Do Institut Du Droit International e Da International Law Association Na Codificação Das Normas Do Direito Internacional de Águas: Entre Hard Law e Soft Law," *Revista Da*

central position, which is the reciprocal consideration of the interests of riparian States in the management of international watercourses.

1.1.1.3 The Emergence of Vital Human Needs

These landmarks were essential to promote, to some extent, the introduction of individual and collective interests in international water law, even if still submissive to the will of States. Accordingly, they were essential to the consideration, even if limited and tangential, of vital human needs in the legal framework of international water law. In this context, the International Law Commission (ILC) developed a robust codification process of the legal framework applicable to international watercourses. This process culminated in the adoption of the United Nations Convention on the Law of Non-Navigational Uses of International Watercourses (UNWC), which, as pointed out by Sergio Alcega, is not an attempt of universal codification, but rather an instrument for progressive harmonization of international water law.[36] The UNWC provides the following formula for the principle of equitable utilization:

> Art. 5 (1) Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.

Although inherently broad, this formulation allows the identification of two main objectives to be achieved by the principle of equitable and reasonable utilization, which are optimization and sustainability in the use of the shared resource. Optimization represents the maximization of benefits for all riparian States, satisfying as many needs as possible, whereas sustainability requires the adoption of an integrated management of water resources,

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Faculdade de Direito Da UFGRS 1, no. 39 (December 31, 2018), https://doi.org/10.22456/0104-6594.73392. p. 102.

[36] Sergio Salinas Alcega, "Derecho internacional de aguas: aproximación general y traslación al ámbito europeo," in *El Derecho y la gestión de aguas transfronterizas: Quintas jornadas de Derecho de Aguas*, ed. Armando Guevara Gil, Yury Pinto Ortiz, and Frida Segura Urrunaga (Lima: Pontificia Universidad Católica del Perú, Departamento Académico de Derecho, 2018), 29–68. p. 33.

considering environmental, social, and economic aspects of its utilization.[37] The combination of these objectives results in the coexistence of the imperatives of environmental protection with the interests of economic exploitation of international watercourses.[38]

Thus, in the Gabcikovo-Nagymaros case, when referring to the Oder River case and the codification work of the ILC, the International Court of Justice (ICJ) declared the customary character of the principle of equitable use by stating that “modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly”.[39]

As interpreted by Judge Skubiszewski in his dissenting opinion, the ICJ applies general law when it states that Hungary did not forfeit "its basic right to an equitable and reasonable sharing of the resources of an international watercourse", as well as when it refers to the concept of the "community of interest in a navigable river".[40] In light of these considerations, Judge Skubiszewski states that the “canon of an equitable and reasonable utilization figures prominently in the recent United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, especially in its general principles”.

The expansion of the uses endorsed in the realm of the legal framework of international watercourses and the arbitration of preferences through the principle of equitable utilization gradually led to the consideration of the vital human needs in the allocation of water. In fact, even though the UNWC does not establish any inherent priority between uses, it expressly states in its article 10 that in the event of conflict, there must be given special regard to the requirements of vital human needs. These needs include the provision of “sufficient water to sustain human life, including both drinking water and water required for

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[37] Otto Spijkers, “The Cross-fertilization between the Sustainable Development Goals and International Water Law,” *Review of European, Comparative & International Environmental Law* 25, no. 1 (April 2016): 39–49, https://doi.org/10.1111/reel.12152. p. 45.

[38] Attila Tanzi and Maurizio Arcari, *The United Nations Convention on the Law of International Watercourses: A Framework for Sharing*, International and National Water Law and Policy Series 5 (The Hague: Kluwer Law International, 2001), http://dx.doi.org/10.1163/9789004420830. p. 115.

[39] International Court of Justice, “Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia),” 1997, https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-00-EN.pdf. p. 56.

[40] Krzysztof Skubiszewski, “Dissenting Opinion of Judge Skubiszewski on the Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia),” 1997, https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-12-EN.pdf. p. 234.

the production of food in order to prevent starvation".[41] As pointed out by Otto Spijkers, the concept of "vital human needs" is defined in both quantitative and qualitative terms and is similar to the minimum standards usually secured for individuals in international human rights treaties, even though this disposition does not necessarily entail in the recognition of the human rights to water and sanitation.[42]

The States' concerns over their sovereignty still greatly influence this incidental protection of vital human needs, as it does not derogate from the general rule of absence of priority among uses and ambiguously requires the special consideration of vital human needs.[43] Still, Laurence Boisson de Chazournes notes that "vital human needs are an integral part of the determination of what is an equitable and reasonable utilization".[44]

Based on art. 10 of the UNWC, it may be argued that vital human needs enjoy a presumed priority over other uses, but such a priority is not absolute and may be disregarded under specific circumstances to be ascertained in the application of the principle of equitable and reasonable utilization.[45] Under this conception, States must consider the impacts of water allocation not only for their population, but also in relation to the population of other States that might be affected.[46] In this regard, the exception to the priority could be established, for instance, by the availability of alternative sources of water to satisfy vital human needs.[47]

It is noteworthy that ratification of the UNWC is inexistant in Latin America,[48] which means that the rule of equitable and reasonable utilization and the criteria for water allocation are to be assessed in accordance with customary international law and regional/local treaties. Whilst it in undisputed that the principle of equitable utilization is firmly established in

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[41] International Law Commission, "Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Commentaries Thereto and Resolution on Transboundary Confined Groundwater," *Yearbook of the International Law Commission* II, no. Part. Two (1994): 89–135. p. 110.
[42] Otto Spijkers, "The Sustainable Human Right to Water as Reflected in the Sustainable Development Goals," *Utrecht Law Review* 16, no. 2 (October 30, 2020): 18–32, https://doi.org/10.36633/ulr.560. p. 29.
[43] Maurizio Arcari, *Il Regime Giuridico Dele Utilizzazioni Dei Corsi d'Acqua Internazionali: Principi Generali e Norme Sostanziali* (Padova: CEDAM, 1998). p. 354.
[44] Laurence Boisson de Chazournes, *Fresh Water in International Law*, Second edition (Oxford, United Kingdom: Oxford University Press, 2021). p. 189.
[45] Tanzi and Arcari, *The United Nations Convention on the Law of International Watercourses*. p. 141.
[46] Zheng and Spijkers, "Priority of Uses in International Water Law." p. 1579.
[47] Alistair Rieu-Clarke, Ruby Moynihan, and Bjorn-Oliver Magsig, *UN watercourses convention user's guide* (Dundee: IHP-HELP Centre for Water Law, Policy and Science, 2012). p. 130.
[48] Out of the 33 Latin American States, only Paraguay and Venezuela signed the UNWC, and none ratified it. United Nations, "Convention on the Law of the Non-Navigational Uses of International Watercourses," *United Nations Treaty Series* 2999 (1997): 77.

customary international law, the rules concerning vital human needs do not enjoy the same status,[49] especially since the criteria for the allocation of water must be assessed according to the specific elements of each case. Hence, the special consideration given to vital human needs will not necessarily be applied in disputes between States that have not ratified the UNWC, which brings insecurity to the protection of these uses in disputes over international watercourses in Latin America.

The idea of priority for the fulfillment of vital human needs has some roots in international and domestic practice, other than the formulation employed by the ILC. For instance, in the Zarumilla River Case, an award conferred by the Chancellery of Brazil in 1945, it was decided that Peru would have to divert part of the river to guarantee the needs of the local Ecuadorian population.[50] Furthermore, there are several international treaties and established domestic jurisprudence in different jurisdictions that confer priority to domestic water uses that are intrinsically related to vital human needs.[51] International non-governmental organizations have also assisted in the development of this principle, as can be seen in the ILA's Berlin Rules on Water Resources Law (2004), which recognized the priority of vital human needs over other uses. In any case, despite the development related to the consideration of vital human needs in the prism of the principle of equitable utilization of international watercourses, sovereignty remained a crucial issue for States in the allocation of water in international law.

Accordingly, as evinced by the development of the law of international watercourses and the timid consideration of vital human needs in the recent codification of the ILC, it may be observed that these developments are a relatively recent phenomenon in international law. International water law was always focused on the States' interests, and for most part of history their primary concerns were related to navigation and, occasionally, to other economic activities related to water.

As such, vital human needs were vaguely introduced in the legal discourse only as a circumstance with may enjoy special consideration in the event of conflict of uses between

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[49] Christina Leb, "The Right to Water in a Transboundary Context: Emergence of Seminal Trends," *Water International* 37, no. 6 (October 2012): 640–53, https://doi.org/10.1080/02508060.2012.710950. p. 646.
[50] Food and Agriculture Organization of the United Nations, ed., *Sources of International Water Law*, FAO Legislative Study 65 (Rome: Food and Agriculture Organization of the United Nations, 1998).
[51] Ximena Fuentes, "The Criteria for the Equitable Utilization of International Rivers," *British Yearbook of International Law* 67, no. 1 (January 1, 1997): 337–412, https://doi.org/10.1093/bybil/67.1.337. p. 352.

riparian States. This formulation is insufficient for the protection of the human rights to water and sanitation, as it only protects limited uses, conditioned to the interests of the State in the utilization of the international watercourse, and that do not allow the direct participation and consideration of interests of non-state actors.[52]

Furthermore, as the allocation of water considers the interests of riparian States, which are the sole legitimate parties to invoke the international responsibility of other riparian States' wrongful acts in international water law, individuals do not have the right to invoke a breach of the principle of equitable and reasonable utilization.[53] Furthermore, as the presumed priority would not be absolute, States would still be free to sacrifice vital human needs if they jointly decide to prioritize other uses.[54] As such, if individuals were to rely solely on the principle of equitable and reasonable utilization for the realization of the human rights to water and sanitation, they would need to depend on the discretionary power of riparian States to be able to file a legal claim or to initiate interstate negotiations.

On the other hand, Pierre-Marie Dupuy argues that international water law and the human rights to water and sanitation are not contradictory, as they are, in fact, complementary.[55] Even though the law applicable to transboundary water resources is focused primarily on the interests of States, these interests are ultimately employed in benefit of individuals.[56]

1.1.2 The Development of the Human Rights to Water and Sanitation

In the field of human rights law, the development of the main human rights instruments in international law has created guarantees that are essential not only for human survival, but also for a decent and healthy life. Precisely, the Universal Declaration of Human

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[52] Alistair Rieu-Clarke and Christopher Spray, "Ecosystem Services and International Water Law: Towards a More Effective Determination and Implementation of Equity?," *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 16, no. 2 (July 24, 2013): 12–65, https://doi.org/10.4314/pelj.v16i2.3. p. 46-47.

[53] Attila Tanzi, *The Consolidation of International Water Law: A Comparative Analysis of the UN and UNECE Water Conventions*, La Ricerca Del Diritto Nella Comunità Internazionale 14 (Napoli: Editoriale scientifica, 2017). p. 113.

[54] Ellen Hey, "The Watercourses Convention: To What Extent Does It Provide a Basis for Regulating Uses of International Watercourses," *Review of European, Comparative & International Environmental Law* 7, no. 3 (1998): 291–300. p. 293.

[55] Pierre-Marie Dupuy, "Le Droit à l'eau, Un Droit International?," *EUI Law Working Paper*, no. 06 (2006). p. 11-12.

Rights (UDHR), adopted in 1948, establishes in its Article 25 that everyone "has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services".[57] The UDHR introduced concepts that molded contemporary human rights law, such as human dignity and the universality of human rights, and had such an impact in the international community that there are claims that several obligations contained in this instrument have been sedimented in customary international law.[58]

However, as can be seen in the elements of the UDHR's right to an adequate standard of life, water is not mentioned in the list of basic rights included within the article. Initially, all rights prescribed in Article 25 were conceived in separate articles and later jointed into one complex ensemble.[59] In fact, the explicit basic rights that are listed as necessary for an adequate standard of living were almost suppressed due to the drafters' desire for brevity.[60] However, as recalled by the Johannes Morsink, "at the insistence of the USSR delegation the rights to housing and medical care were saved and at similar insistence of the Chinese delegation those to food and clothing were saved as well".[61]

Hence, it may be observed that the drafters argued over the necessity of specifying the elements of an adequate standard of life, but there was no pretension of listing an exhaustive number of rights that were necessary for its realization.[62] The list of rights that was mentioned in this article was only maintained due to the political struggle of some delegations that viewed their express recognition as an important method to give more precision to an otherwise overly general right. In order to justify the omission of the human rights to water and sanitation, apart from the political and formal debate that was conducted during the drafting process, it is also suggested that, given that water is as fundamental as air, its

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[56] *Ibid.*
[57] United Nations, "Universal Declaration of Human Rights," 1948. art. 25(1).
[58] Salman MA Salman, "The Human Right to Water and Sanitation: Challenges and Opportunities," in *Research Handbook on Freshwater Law and International Relations*, by Mara Tignino and Christian Bréthaut (Edward Elgar Publishing, 2018), 280–304, https://doi.org/10.4337/9781785360695.00025. p. 282; Gildo Manuel Espada, "História Da Evolução Do Direito Humano à Água," *Revista Da Faculdade de Direito Da UFGRS*, no. 40 (2019): 81–100. p. 84.
[59] Trudy Peterson, *The Universal Declaration of Human Rights: An Archival Commentary* (International Council on Archives, 2018). p. 62.
[60] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, Pennsylvania Studies in Human Rights (Philadelphia: University of Pennsylvania Press, 1999). p. 192.
[61] *Ibid.*

protection was regarded as evident and its regulation was deemed unnecessary.[63] This clarification is also consistent with the development of international water law at the time, as the legal regime was in a transition where navigation was losing space to other economic activities related to water, but consideration for vital human needs was mostly inexistant.

This explanation for the omission of the human rights to water and sanitation is also employed in the specific regime of international humanitarian law. Humane treatment, which includes the satisfaction of basic human needs, as well as the assistance and care for the wounded and sick, would not be possible without water. This premise was considered "so obvious that it has not been considered necessary to formulate specific rules"[64] Nevertheless, some specific references were made in relation to the treatment of prisoners and civilian persons in time of war. The Geneva Convention relative to the Treatment of Prisoners of War (1949), establishes that prisoners of war shall be supplied with sufficient drinking water, as well as sufficient water and soap for their personal toilet and for washing their personal laundry.[65] Similarly, the Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) establishes the same obligations towards civilians.[66]

However, as was the case with the UDHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), both adopted in 1966, do not explicitly refer to the human rights to water and sanitation. It would still be a long time before these rights were explicitly recognized and perceived as binding upon States.

1.1.2.1 The Timid Emergence and Derivative Recognition

In relation to soft law instruments, the Stockholm Declaration on the Human Environment (1972) safeguards natural resources for the benefit of present and future

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[62] Léo Heller, *Os Direitos Humanos à Água e Ao Saneamento* (Rio de Janeiro: Editora FIOCRUZ, 2022), https://doi.org/10.7476/9786557081693. p. 59.
[63] P Gleick, "The Human Right to Water," *Water Policy* 1, no. 5 (October 1998): 487–503, https://doi.org/10.1016/S1366-7017(99)00008-2. p. 491.
[64] Ameur Zemmali, "The Protection of Water in Times of Armed Conflict," *International Review of the Red Cross* 35, no. 308 (1995): 550–64. p. 556.
[65] International Committee of the Red Cross, "Geneva Convention Relative to the Treatment of Prisoners of War," *United Nations Treaty Series* 75 (1949): 135. arts. 26 and 29.
[66] International Committee of the Red Cross, "Geneva Convention Relative to the Protection of Civilian Persons in Time of War," *United Nations Treaty Series* 77 (1949): 287. arts. 85 and 89.

generation, among which water is included.[67] In its turn, the Mar de la Plata Action Plan (1977) considered that all peoples have the right to have access to drinking water in quantity and quality consistent with their basic needs, and that sanitation was significant to a similar extent.[68] Thus, it recommended States to give priority, in their national development policies and plans, to supplying drinking water and final disposal of wastewater where human needs had not yet been satisfied.[69] The Mar de la Plata Action Plan has been described as the starting point of the discussions pertaining to the human rights to water and sanitation, as well as the basis of the modern conception of these rights.[70] Furthermore, the Dublin Statement on Water and Sustainable Development (1992) recognized the "basic right of all human beings to have access to clean water and sanitation at an affordable price".[71]

In the realm of the United Nations General Assembly (UNGA), it is interesting to observe that in Resolution 54/172 (1999), whilst affirming the right to development, expressly promoted the right to water as a fundamental human right and stated that its promotion was a moral imperative for States and for the international community.[72] This resolution was not particularly endorsed in its adoption, which was perceived to be more likely due to the controversy over the right to development, which was the main issue dealt in the resolution, and not the particular issue of water.[73]

Then, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment No. 15 (2002), which recognized the human right to water in the framework of the ICESCR. Even though it did not address sanitation as an independent right, it was a very important landmark in the establishment of the rights to water and sanitation in international human rights law. This document presented the components and obligations of the human right to water, which are still very relevant guidelines on its realization.

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[67] United Nations, "Stockholm Declaration on the Human Environment," 1972. art. 2.
[68] United Nations, "Mar de La Plata Action Plan (United Nations Water Conference)," 1977, https://www.internationalwaterlaw.org/bibliography/UN/UN_Mar%20del%20Plata%20Action%20Plan_1977.pdf. p. 63-64.
[69] *Ibid.*
[70] Salman M. A. Salman and Siobhán Alice McInerney-Lankford, *The Human Right to Water: Legal and Policy Dimensions*, Law, Justice, and Development (Washington, D.C. (1818 H St. NW, Wash., DC 20433): World Bank, 2004). p. 9.
[71] United Nations, "Dublin Statement on Water and Sustainable Development," 1992.
[72] United Nations General Assembly, "Resolution 54/175 - The Right to Development," 1999.

Furthermore, in the 2000s, several resolutions were adopted in international forums and conferences in order to recognize either a basic need or a right to water, such as the "Millennium Declaration" (2000) and the Resolution on the International Decade for Action "Water for Life" 2005-2015 (2003), even though there was no attempt to further discipline or distinguish these concepts. As clarified by Salman M. A. Salman and Siobhán McInerney-Lankford, basic need implies a passive behavior for the recipient, whilst the concept of right represents a legal entitlement that is connected to a corresponding duty.[74] This lack of consistent legal treatment of the issue has been interpreted as a temporary shift in the international practice, that was more inclined, in this period, for the adoption of political agreements rather than the recognition of rights.[75]

In 2008, the United Nations Human Rights Council (HRC) appointed an independent expert on the issue of the human rights to water and sanitation, whose tasks included the promotion and exchange of best practices related to safe drinking water and sanitation, as well as the issuance of recommendations on the matter.[76] In light of the contributions of the independent expert, the HRC adopted Res. 12/8 (2009), which recognized that States have an obligation to address and eliminate discrimination with regard to access to sanitation.[77]

1.1.2.2 The Establishment of the Autonomous Nature and Proliferation in Multilateral Fora

These developments led to the symbolic recognition of the human rights to water and sanitation by the UNGA in Resolution No. 64/292 (2010), which was a landmark for their establishment as autonomous rights. This resolution recognized "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights".[78]

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[73] Adele J. Kirschner, "The Human Right to Water and Sanitation," *Max Planck Yearbook of United Nations Law Online* 15, no. 1 (2011): 445–87, https://doi.org/10.1163/18757413-90000075. p. 452.
[74] Salman and McInerney-Lankford, *The Human Right to Water*. p. 15-16.
[75] Silvia Bertazzo, "La Tutela Del Acceso al Agua Potable En El Derecho Internacional," *Revista de Derecho (Coquimbo)* 22, no. 2 (2015): 55–92, https://doi.org/10.4067/S0718-97532015000200003. p. 72.
[76] Human Rights Council, "Resolution 7/22 - Human Rights and Access to Safe Drinking Water and Sanitation," 2008.
[77] Human Rights Council, "Resolution 12/8 - Human Rights and Access to Safe Drinking Water and Sanitation," 2009.
[78] United Nations General Assembly, "Resolution 64/292 - The Human Right to Water and Sanitation," 2010.

It should be noted that resolutions are adopted by consensus, without a vote, unless a vote is requested. Nevertheless, a vote was called, by the USA, and the resolution was adopted by a vote of 122 in favor and 41 abstentions. A significant number of States that abstained from the resolution are developed countries and major donors in the water sector.[79]

As previously debated, there are only speculations as to why the rights to water and sanitation were not considered in the drafting of other international instruments. However, the controversy was aggravated in the context of the adoption of UNGA Resolution No. 64/292, as the abstentions demonstrated, at the time, the lack of consensus of States over the recognition of the human rights to water and sanitation.[80]

Many countries, even some of those that voted in favor of the resolution, believed that the HRC was the appropriate forum for the discussion of the human rights to water and sanitation.[81] These States expressed concern that the resolution could affect the work under development under the auspices of the HRC, and that the adoption of a resolution on the issue was premature.[82]

In this context, Léo Heller elucidates the different perspectives as to why States abstained from UNGA Resolution No. 64/292, namely: (i) procedural grounds, given that the process of negotiation conducted by the sponsors was hasty and did not leave room for ample discussion; (ii) lack of consensus, after the call for a vote; (iii) disagreement on the adoption of the resolution by the UNGA, when it should have been addressed at the HRC; (iv) the still pending work of the independent expert on the issue; (v) dispute over the existence of the human rights to water and sanitation; and (vi) reluctance associated with the potential effects of these rights on transboundary water resources.[83] On the other hand, Heller also stresses that some States may have supported the resolution with double intentions, as it establishes a

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[79] Stephen C. McCaffrey, "International Water Cooperation in the 21st Century: Recent Developments in the Law of International Watercourses: International Water Cooperation," *Review of European, Comparative & International Environmental Law* 23, no. 1 (April 2014): 4–14, https://doi.org/10.1111/reel.12064. p. 9.

[80] Stephen McCaffrey, "The Human Right to Water: A False Promise?," *U. Pac. L. Rev.* 47, no. 2 (2016): 221–32. p. 227.

[81] Brazil, Costa Rica and Switzerland, for instance, voted in favor of the resolution, but stated its preference for the development of the human rights to water and sanitation in the context of the HRC. United Nations, "Official Records of the United Nations General Assembly Sixty-Fourth Session, 108th Plenary Meeting, A/64/PV.108," 2010, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/466/29/PDF/N1046629.pdf?OpenElement. p. 8-17.

[82] This was the position of the United States, Turkey, New Zealand, United Kingdom, Australia, Botswana, Netherlands, Canada. *Ibid.*

[83] Heller, *Os Direitos Humanos à Água e Ao Saneamento*. p. 71.

rather ambiguous text that does not directly reinforce the binding nature of the human rights to water and sanitation in rapport with the ICESCR's human right to an adequate standard of living.[84]

In relation to the issue of sovereignty, Ethiopia stated that these rights cannot be considered in isolation from the sovereign right of States to exploit their own resources, as established in the 1992 Rio Declaration on Environment and Development.[85] Additionally, some States deemed necessary to stress that the recognition of these rights did not entail any obligations towards other States.[86] On the other hand, Brazil advocated that "the human right to water and sanitation is compatible with the principle of the sovereign right of States to use their own water resources",[87] whilst also referring to the Rio Declaration. Curiously enough, UNGA Resolution No. 64/292 was introduced by Bolivia, which was "very symbolic, as it occurred amid an historic moment for this country, which was struggling for the national political sovereignty of its waters".[88]

These divergences do not contest the importance of water for the fulfillment of human rights, but rather illustrate the States' different perceptions over the legal nature and scope of the rights to water and sanitation.[89] Accordingly, this resolution, despite the controversies enunciated, was a very important landmark and stimulated the consolidation of the human rights to water and sanitation in international law.[90]

In any case, following these developments, the HRC adopted Resolution n° 15/9, which recalled the recognition of the human rights to water and sanitation by the UNGA and

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[84] *Ibid.*
[85] United Nations, "Official Records of the United Nations General Assembly Sixty-Fourth Session, 108th Plenary Meeting, A/64/PV.108." p. 16-17.
[86] On this issue, Argentina declared that "the rights to water and sanitation is a human right that every State must ensure for the individuals within its jurisdiction and not with respect to other States" (p. 9). Additionally, Guatemala stated that "the adoption of resolution 64/292 will create no international or inter-State right or obligation" (p. 10). Finally, New Zealand expressed that the resolution was introduced before States "had an adequate opportunity to fully consider its implications in terms of both our domestic and our international obligations" (p. 11). *Ibid.*
[87] *Ibid.* p. 8.
[88] Colin Brown, Priscila Neves-Silva, and Léo Heller, "The Human Right to Water and Sanitation: A New Perspective for Public Policies," *Ciência & Saúde Coletiva* 21, no. 3 (March 2016): 661–70, https://doi.org/10.1590/1413-81232015213.20142015. p. 663.
[89] Laurence Boisson de Chazournes, "Le Droit à l'eau et La Satisfaction Des Besoins Humains : Notions de Justice," in *Unité et Diversité Du Droit International/Unity and Diversity of International Law*, ed. Denis Alland et al. (Brill | Nijhoff, 2014), 967–81, https://doi.org/10.1163/9789004262393_047. p. 971.
[90] Gonzalo Cavallo, "The Human Right to Water and Sanitation: From Political Commitments to Customary Rule?," *Pace Int'l L. Rev. Online Companion* 3, no. 5 (2012): 136–200. p. 169.

affirmed that these rights are an essential element of the right to an adequate standard of living, other than inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity. This resolution was adopted without a vote, and thus succeeded in reaching a consensus that was not conceivable in UNGA Resolution No. 64/292. Furthermore, the resolution was significantly clearer om the scope, content and obligations of the human rights to water and sanitation than its predecessor.[91] The outcome of this initiative is consistent with the justifications given by States in their previous abstentions, as there was a discomfort of these actors in dealing with the issue in the UNGA instead of the HRC.

Subsequently, in 2011, the HRC transformed the mandate of the independent expert into that of a special rapporteur.[92] In the same year, the HRC further welcomed the work of the special rapporteur in the selection of good practices related to the human rights to water and sanitation.[93]

In 2012, the HRC adopted Resolution 21/2, which was directed towards the financing and implementation of the human rights to water and sanitation.[94] This resolution marked the diminishment of the contestation of these rights by the United Kingdom and Canada, which were the fiercest challengers of their recognition, along with the US.[95]

In this context, the outcome document of the Rio+20 Conference (2012), entitled "The future we want", also explicitly reaffirms the "commitments regarding the human right to safe drinking water and sanitation, to be progressively realized for our populations with full respect for national sovereignty". [96] Accordingly, these manifestations illustrate the preoccupations of States in relation to the extraterritorial implications of the human rights to water and sanitation. In light of these considerations, it is paramount to observe that, at this point, even though States do not contest the importance of these rights and their primary role

[91] Heller, *Os Direitos Humanos à Água e Ao Saneamento*. p. 72.
[92] Human Rights Council, "Resolution 16/2 - The Human Right to Safe Drinking Water and Sanitation," 2011.
[93] Human Rights Council, "Resolution 18/1 - The Human Right to Safe Drinking Water and Sanitation," 2011.
[94] HUMAN RIGHTS COUNCIL, Resolution 21/2 - The human right to safe drinking water and sanitation.
[95] Madeline Baer, "Beyond Consensus: Contesting the Human Rights to Water and Sanitation at the United Nations," *Human Rights Review* 23, no. 3 (September 2022): 361–83, https://doi.org/10.1007/s12142-022-00655-3. p. 374.
[96] United Nations, "The Future We Want, UN Doc. A/CONF.216/L.1," 2012. p. 23.

for providing an adequate standard of life, they still have preoccupations as to what the recognition of these rights imply for their sovereignty.[97]

Following these developments, the UNGA adopted Resolution 24/18 (2013), that provided a more precise definition of the human rights to water and sanitation, as it established the legal elements comprised in these rights. As such, the resolution stated that:

> the human right to safe drinking water and sanitation entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use and to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure and acceptable, and that provides privacy and ensures dignity.[98]

At this point, the USA remained as the sole challenger to the human rights to water and sanitation. Even though it gradually commenced to refrain from contesting the validity of these rights, it dedicated its opposition to issues related to their applicability, implementation and clarification, which lasted until the withdraw of the USA from the HRC in 2018.[99]

Still in 2013, the UNGA reiterated in Resolution 68/157 the importance of giving due consideration to the human rights to water and sanitation in the development agenda, especially by defining concrete goals, targets and indicators.[100] Afterwards, in 2014, the UNGA stressed the importance of international cooperation and underlined the significance of the implementation of effective remedies for violations of economic, social and cultural rights, including in relation to the human rights to water and sanitation.[101]

Then, in 2015, the UNGA adopted Resolution 70/169, which was a beacon in the recognition of an autonomous human right to sanitation. This resolution clearly established the respective elements of the human rights to water and sanitation, as it recognized that:

> the human right to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use, and that the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally

[97] Doug Donoho, "Some Critical Thinking about a Human Right to Water," *ILSA Journal of International & Comparative Law* 19, no. 1 (2012): 91–115. p. 112.
[98] Human Rights Council, "Resolution 24/18 - The Human Right to Safe Drinking Water and Sanitation," 2013.
[99] Baer, "Beyond Consensus." p. 375-377.
[100] United Nations General Assembly, "Resolution 68/157 - The Human Right to Safe Drinking Water and Sanitation," 2013.
[101] United Nations General Assembly, "Resolution 27/7 - The Human Right to Safe Drinking Water and Sanitation," 2014.

> acceptable and that provides privacy and ensures dignity, while reaffirming that both rights are components of the right to an adequate standard of living.[102]

In light of the progress made in the UNGA, the HRC also confirmed the relevance of conferring an autonomous recognition of the human right to sanitation. As such, in Resolution 33/10 (2016), the HRC stated that the "human rights to safe drinking water and sanitation are closely related, but have features that warrant distinct treatment in order to address specific challenges in their implementation".[103]

In 2017, the UNGA aimed to promote a more strategic approach to the human rights to water and sanitation. It called upon States to identify the patterns of the failure to respect, protect and fulfill these rights.[104] Also in this direction, in 2018, the HRC called for the monitoring on the realization of these rights and for the enhancement of the efforts to improve the availability, accessibility, quality and use of water-related data.[105]

In 2019, the UNGA recognized in Resolution 74/141 that the impacts of climate change and environmental damage directly affect the enjoyment of the human rights to water and sanitation, especially those of marginalized and vulnerable groups.[106] In 2020, due to the spread of COVID-19, the HRC called upon States to accelerate the realization of these rights, particularly in the context of the response and prevention of the escalation of the pandemic.[107] Finally, in 2021, the UNGA recognized the importance of hygiene and access to adequate water and sanitation services for the prevention of the emergence and spread of infectious diseases.[108]

As noted by Léo Heller *et al.*, the recognition of the human rights to water and sanitation "enabled focused conversations between governments, civil society groups, service providers and development professionals on how to integrate HR principles into policies and

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[102] United Nations General Assembly, "Resolution 70/169 - The Human Rights to Safe Drinking Water and Sanitation," 2015.
[103] Human Rights Council, "Resolution 33/10 - The Human Rights to Safe Drinking Water and Sanitation," 2016.
[104] United Nations General Assembly, "Resolution 72/178 - The Human Rights to Safe Drinking Water and Sanitation," 2017.
[105] Human Rights Council, "Resolution 39/8 - The Human Rights to Safe Drinking Water and Sanitation," 2018.
[106] United Nations General Assembly, "Resolution 74/141 - The Human Rights to Safe Drinking Water and Sanitation," 2019.
[107] Human Rights Council, "Resolution 45/8 - The Human Rights to Safe Drinking Water and Sanitation," 2020.
[108] United Nations General Assembly, "Resolution 76/153 - The Human Rights to Safe Drinking Water and Sanitation," 2021.

plans".[109] Accordingly, the struggle for the establishment and improvement of the normative elements of the human rights to water and sanitation in international law was essential to safeguard legal freedoms and entitlements of individual and group, as well as the public policy prospects in the water sector.

1.2 Sources and Elements of the Human Rights to Water and Sanitation

In the overview of the development of the issue of water in international law, as well as in the establishment of the human rights to water and sanitation, it can be verified that there are controversies related to the emergence and the normative elements that permeate these rights in international law, as well as their consequences for the States. Considering this premise, this section will address the theories, sources and elements of these rights in the legal framework of the general, specific and regional human rights treaties.

The first instrument analyzed is the ICESCR, which was a milestone for the establishment of the derivative technique to recognize the human rights to water and sanitation. This instrument is still very influent in the determination of the normative elements of the human rights to water and sanitation, as it has been employed as an authoritative source in several other treaty regimes and in constantly present in virtually all multilateral discussions and academic development of these rights.

Then the section deals with the ICCPR, which is also an important instrument to safeguard the human rights to water and sanitation, even though the development of these rights in this legal framework received considerable limitation due to the discussion on the difference of civil and political from economic, social and cultural rights. This reservation was ultimately surpassed, but it still generates intense academic debate.

Following these instruments, the section details the establishment of the human rights to water and sanitation in specific treaty regimes, namely those pertaining to the safeguard of women, children and persons with disabilities. Differently from the previous instruments, these specific regimes have expressly provided for these rights, despite occasional formal and material limitations on the scope and content of the corresponding obligations.

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[109] Léo Heller et al., "Overview of 12 Years of Special Rapporteurs on the Human Rights to Water and Sanitation: Looking Forward to Future Challenges," *Water* 12, no. 9 (September 17, 2020): 2598–2619, https://doi.org/10.3390/w12092598. p. 2599.

In relation to the regional human rights systems, the chapter verifies the existence or absence of international instruments specifically applicable to the African, European, Arab and Asian regions that protect the human rights to water and sanitation. Naturally, as the IASHR is the main object of this thesis, the treaties applicable to this region will be evaluated in a more detailed manner in the next chapter.

1.2.1 International Covenant on Economic, Social and Cultural Rights

As previously stated, the ICESCR does not contain any explicit reference to the rights to water and sanitation. In fact, the analysis of ICESCR's *travaux préparatoires* demonstrates that the rights to water and sanitation were neither discussed nor rejected in its drafting and adoption.[110] There are speculations that these rights were not addressed due to the premise that they were a precondition to other human rights or that water scarcity was not an issue at the time.[111] Also, similarly to the UDHR, it has been argued that "like air, it was considered so fundamental that its formal inclusion was unnecessary".[112] Another way of interpreting this omission is the everlasting preoccupation of States in relation to their sovereignty over natural resources, which was also enshrined in the ICESCR:

> Article 1. (…)
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
> (...)
> Article 25. Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.[113]

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[110] Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials*, First edition (Oxford, United Kingdom: Oxford University Press, 2014). p. 899; Malcolm Langford, "Ambition That Overleaps Itself? A Response to Stephen Tully's Critique of the General Comment on the Right to Water," *Netherlands Quarterly of Human Rights* 24, no. 3 (September 2006): 433–59, https://doi.org/10.1177/016934410602400304. p. 439.
[111] Takele Bulto, "The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery?," *Melbourne Journal of International Law* 12, no. 2 (2011): 42–66. p. 55.
[112] Stephen Tully, "A Human Right to Access Water? A Critique of General Comment No. 15," *Netherlands Quarterly of Human Rights* 23, no. 1 (March 2005): 35–63, https://doi.org/10.1177/016934410502300103. p. 39.
[113] United Nations, "International Covenant on Economic, Social and Cultural Rights," *United Nations Treaty Series* 993 (1966): 3.

As such, States felt the urge to stress their sovereignty over natural resources as the fundamental clause of the ICESCR, against which no interpretation could prevail. In fact, article 25 of the ICESCR was conceived as a mechanism to recognize the sovereignty over natural resources as absolute, in opposition to the limitations initially prescribed in article 1, paragraph 2.[114]

1.2.1.1 Legal Grounds of the Derivative Recognition

Gradually, the rights to water and sanitation began to be explicitly recognized as a precondition for the realization of other human rights. In 2002, the CESCR adopted General Comment No. 15, entitled "The Right to Water", interpreting this right in light of ICESCR's right to and adequate standard of life. In this regard, Article 11, paragraph 1, of the ICESCR recognizes the "right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions".[115] Accordingly, the General Comment No. 15 argues that the employment of the word "including" indicates that the list of rights prescribed in Article 11, paragraph 1, of the ICESCR is not exhaustive. As such, the CESCR indicated that the "right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival".[116]

Furthermore, the General Comment No. 15 states that "sanitation is not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of drinking water supplies and resources".[117] Accordingly, even though the General Comment No. 15 has explicitly recognized only the human right to water, sanitation is presented as one of the core elements for its fulfillment.

Apart from the recognition of the human right to water, the General Comment No. 15 further strengthened the interrelation of this right with other human rights. It stated that the right to water is intrinsically connected with the right to the highest attainable standard of health, the rights to adequate housing and adequate food, the right to gain a living by work

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[114] David Halperin, "Human Rights and Natural Resources," *Wm. & Mary L. Rev.* 9, no. 3 (1968): 770–87. p. 776-778.
[115] United Nations, "International Covenant on Economic, Social and Cultural Rights."
[116] Committee on Economic, Social and Cultural Rights, "General Comment 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11," 2002, https://www.refworld.org/pdfid/4538838d11.pdf. p. 1-2.

and the right to culture.[118] In this regard, the General Comment No. 15 stresses the importance of water for agriculture and its role in realizing the right to food, especially in the case of subsistence farming and for securing the livelihoods of indigenous peoples.[119] Pertaining to the right to health, the concept of environmental hygiene is highlighted by the CESCR, which involves non-discriminatory measures to prevent threats such as unsafe and toxic water conditions, thus ensuing in an obligation to protect water resources from contamination.[120] Moreover, the document stresses that "priority in the allocation of water must be given to the right to water for personal and domestic uses", and that it "should also be given to the water resources required to prevent starvation and disease , as well as water required to meet the core obligations of each of the Covenant rights".[121]

Stephen Tully contested the legal grounds presented in General Comment No. 15, and argued that, in the context of the ICESCR, it would only be possible to support an implied right to water, and solely to the extent that is necessary to satisfy the rights that were explicitly referred in Article 11, paragraph 1, such as food or housing.[122] Tully criticizes what he framed as an "interpretative creativity", insofar as, in his interpretation, the General Comment No. 15 had innovated in relation to issues that the original drafters and States did not seem fit to address.[123]

In response to these arguments, Malcolm Langford recalls the general rule of interpretation codified in Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), which states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[124] Langford argues that the VCLT supports a purposive approach which, along with the consideration of subsequent agreements and practice, takes into account the development of international law.[125] In this context, it is argued that, given the existence of several international instruments declaring an independent human right to water, the CESCR

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[117] *Ibid.* p. 10.
[118] *Ibid.* p. 2-3.
[119] *Ibid.*
[120] *Ibid.*
[121] *Ibid.*
[122] Tully, "A Human Right to Access Water?" p. 36-37.
[123] *Ibid.*
[124] United Nations, "Vienna Convention on the Law of Treaties," *United Nations Treaty Series* 1155 (1969): 331.
[125] Langford, "Ambition That Overleaps Itself?" p. 435.

had sufficient elements, based on State practice, to conclude that this right had attained an importance equal to the conditions to an adequate standard of living explicated in Article 11, paragraph 1, of the ICESCR.[126] Additionally, as pointed out by Langford, the caution of the CESCR is further demonstrated by its "decision to omit a freestanding right to adequate sanitation in the general comment", as it had a slightly later development than the right to water and did not have the same standing at the time.[127] Precisely, only in 2010 the CESCR published a statement in which it unequivocally recognized an autonomous right to sanitation.[128]

Indeed, the VCLT is of great assistance in the enlightenment of the provisions of the ICESCR, especially since the ICJ declared repeatedly that Articles 31 and 32 of the VCLT are recognized as part of customary international law.[129] Furthermore, whilst the VCLT does not establish any hierarchy between methods of interpretation prescribed in Article 31 of the VCLT, which include the grammatical, the systemic and the teleologic approaches,[130] it is interesting to observe that the ICJ has ruled that interpretation "must be based above all upon the text of the treaty".[131] Additionally, as Oliver Dörr demonstrates, the jurisprudence of the ICJ also clarifies that the textual logic and analogous wording of related treaties are essential to determine the ordinary meaning of a term.[132]

Accordingly, as Ndjodi Ndeunyema elucidates, the CESCR's "understanding of the term "including" reflects a legal drafting tradition that is frequently adopted by domestic and international law-making organs".[133] Additionally, as explained by Salman M. A. Salman, the inference employed by the CESCR relied on a "well-established method of statutory

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[126] *Ibid.* p. 438.
[127] *Ibid.*
[128] Committee on Economic, Social and Cultural Rights, "Statement on the Right to Sanitation (E/C.12/2010/1)," 2010.
[129] International Court of Justice, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)," 2007, https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf. p. 110.
[130] André Lupi, "Art. 31," in *Direito Dos Tratados: Comentários à Convenção de Viena Sobre o Direito Dos Tratados (1969)*, ed. Aziz Tuffi Saliba (Belo Horizonte: Arraes, 2011), 223–39. p. 228.
[131] International Court of Justice, "Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections," 2004, https://www.icj-cij.org/public/files/case-related/105/105-20041215-JUD-01-00-EN.pdf. p. 318.
[132] Oliver Dörr, "Article 31," in *Vienna Convention on the Law of Treaties: A Commentary*, ed. Oliver Dörr and Kirsten Schmalenbach (Heidelberg: Springer, 2012), 521–71. p. 544-545.
[133] Ndjodi Ndeunyema, "Unmuddying the Waters: Evaluating the Legal Basis of the Human Right to Water Under Treaty Law, Customary International Law, and the General Principles of Law," *Michigan Journal of International Law*, no. 41.3 (2020): 455, https://doi.org/10.36642/mjil.41.3.unmuddying. p. 466.

interpretation in the realm of rights".[134] In fact, the interpretation of the ICESCR as encompassing a right to water within the concept of an adequate standard of living was advocated in the legal doctrine even before the adoption of the General Comment No. 15.[135] Indeed, even if a restrictive view of the treaty were to be applied, the worlding employed by the drafters of the ICESCR cannot be interpreted as establishing an exhaustive list of rights that are necessary to achieve an adequate standard of life. Instead, the wording is very clear when it specifies that food, clothing and housing are some of the conditions that must be met for the realization of the right to an adequate standard of life.

Additionally, not only the interpretation of the CESCR is consistent with the VCLT and the jurisprudence of the ICJ on the interpretation of treaties, but it also enjoys a special authoritative standard for the comprehension of the treaty.[136] In this vein, as ruled by the ICJ in similar circumstances:

> 66. (…)
> Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its "General Comments".
> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.[137]

It should be noted, however, that even though the CESCR has the capacity to provide authoritative interpretations of the ICESCR, these do not have a binding nature.[138] Precisely due to this soft law nature of the instrument, it may be subject to difficulties in establishing legitimacy in face of States, as international law binds them only to the extent of their own

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[134] Salman M.A. Salman, "The Human Right to Water and Sanitation: Is the Obligation Deliverable?," *Water International* 39, no. 7 (November 10, 2014): 969–82, https://doi.org/10.1080/02508060.2015.986616. p. 972.
[135] Henri Smets, "Le droit de chacun à l'eau," *Revue Européenne de Droit de l'Environnement* 6, no. 2 (2002): 129–70, https://doi.org/10.3406/reden.2002.1482. p. 135; Salman and McInerney-Lankford, *The Human Right to Water*. p. 57.
[136] James Crawford and Amelia Keene, "Interpretation of the Human Rights Treaties by the International Court of Justice," *The International Journal of Human Rights* 24, no. 7 (August 8, 2020): 935–56, https://doi.org/10.1080/13642987.2019.1600509. p. 941.
[137] International Court of Justice, "Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)," 2010. p. 663-664.

volition. In any case, despite some contestation from very specific countries, such as the USA, the General Comment No. 15 became a very influential document in the issues of the human rights to water and sanitation.[139]

1.2.1.2 Normative Elements of General Comment No. 15

In relation to the normative elements of these rights in the ICESCR framework, the General Comment No. 15 specifies that the "right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses".[140] Some members of the CESCR attempted to highlight the collective nature of the right to water and that water should be perceived as a common good.[141] Instead, the General Comment No. 15 settled for a narrow approach of this right, focused on personal and domestic uses, even if the collective aspects of this right are tangentially mentioned in the document.

Accordingly, as an individual right, the right to water contains both freedoms and entitlements. The freedoms are related to the right to maintain access to water supplies, free from interferences such as arbitrary disconnection or contamination, whereas the entitlements concern the right to a non-discriminatory system of water supply and management.[142] Additionally, the General Comment No. 15 establishes that water should not be treated primarily as an economic good, but rather a social and cultural one, and that the realization of the right to water must be sustainable, to ensure access by both present and future generations.[143] As such, the adequacy of water is not measured solely by aspects of quality and quantity, as it also encompasses the analysis of availability, quality, and accessibility (physical, economic, non-discrimination and information).[144]

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[138] McCaffrey, "The Human Right to Water: A False Promise?" p. 229.
[139] Nina Reiners, "Despite or Because of Contestation? How Water Became a Human Right," *Human Rights Quarterly* 43, no. 2 (2021): 329–43, https://doi.org/10.1353/hrq.2021.0021. p. 340-341.
[140] Committee on Economic, Social and Cultural Rights, "General Comment 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11." p. 1.
[141] Malcolm Langford, "The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems?," *International Journal of Water Resources Development* 21, no. 2 (June 2005): 273–82, https://doi.org/10.1080/07900620500035887. p. 276.
[142] Committee on Economic, Social and Cultural Rights, "General Comment 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11." p. 4.
[143] *Ibid.*
[144] *Ibid.* p. 5.

The CESCR defines availability as sufficient and continuous water supply for personal and domestic uses, including drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.[145] In quantitative terms, the General Comment No. 15 does not establish a specific amount of water to meet the availability requirement. Instead, it states that the quantity should correspond to the World Health Organization (WHO) guidelines, notwithstanding that, in certain circumstances, additional water may be required due to due to health, climate, and work conditions.[146] Currently, as clarified by the WHO, 20 L/person/day is often an adequate standard for drinking, cooking, food hygiene, handwashing and face washing, even though other hygiene practices are not included in this estimative.[147] Furthermore, this parameter is likely to be insufficient in face of disease outbreaks or other circumstances that require additional water supply.[148]

In its turn, the quality parameter states that water should be of an acceptable color, odor and taste, as well as safe, meaning free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health.[149] The quality of water will depend on its use, as economic uses are often less demanding in terms of quality than social uses.[150] In any case, concerning water for personal and domestic uses, the General Comment No. 15 establishes a high threshold of quality, measured not only by health standards, but also by the acceptance by the users of its color, odor and taste.

The factor of accessibility comprises four parameters, namely physical, economic, non-discrimination and information. Physical accessibility means that water facilities and services must be within safe physical reach for all sections of the population.[151] In relation to economic accessibility, the General Comment No. 15 states that the direct and indirect costs associated with securing water must be affordable, and that the costs of the right to water must

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[145] *Ibid.* p. 4-5.
[146] *Ibid.*
[147] World Health Organization, *WHO Global Water, Sanitation and Hygiene: Annual Report 2020* (Geneva: World Health Organization, 2022), https://apps.who.int/iris/handle/10665/354462. p. ix.
[148] *Ibid.*
[149] Committee on Economic, Social and Cultural Rights, "General Comment 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11." p. 5.
[150] Jimena Murillo Chávarro, *The Human Right to Water: A Legal Comparative Perspective at the International, Regional and Domestic Level*, 1st ed. (Intersentia, 2015), https://doi.org/10.1017/9781780685557. p. 22.
[151] Committee on Economic, Social and Cultural Rights, "General Comment 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11."

not constrain a household to the extent that it impairs the realization of other human rights.[152] Hence, the CESCR opted for an "ends-oriented middle approach", as some international instruments advocated for free access to water in order to satisfy basic human needs, whilst others indicated it should be priced.[153] The CESCR did not, however, establish quantitative parameters to evaluate the affordability standard, apart from stating that payment for water services must comply with the principle of equity, that is, the economic burden placed on poorer households should not be disproportionate in comparison with richer ones.[154]

When it comes to non-discrimination, water must be accessible to all, including the most vulnerable or marginalized sections of the population.[155] In this regard, the General Comment No. 15 expressly states that States parties should provide particular regard to marginalized and vulnerable individuals and groups, such as women, children, minority groups, indigenous peoples, refugees, asylum-seekers, internally displaced persons, migrant workers, prisoners and detainees.[156]

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[152] *Ibid.*

[153] Langford, "The United Nations Concept of Water as a Human Right." p. 277.

[154] Henri Smets, "Quantifying the Affordability Standard: A Comparative Approach," in *The Human Right to Water*, ed. Malcolm Langford and Anna F. S. Russell (Cambridge: Cambridge University Press, 2017), 276–99, https://doi.org/10.1017/9780511862601.010. p. 278.

[155] Committee on Economic, Social and Cultural Rights, "General Comment 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11." p. 5.

[156] The CESCR was very diligent in its evaluation of non-discrimination, to the point that it prescribed specific measures for each group that faces vulnerabilities in the context of the human rights to water, as reproduced below. "In particular, States parties should take steps to ensure that: (a) Women are not excluded from decision-making processes concerning water resources and entitlements. The disproportionate burden women bear in the collection of water should be alleviated; (b) Children are not prevented from enjoying their human rights due to the lack of adequate water in educational institutions and households or through the burden of collecting water. Provision of adequate water to educational institutions currently without adequate drinking water should be addressed as a matter of urgency; (c) Rural and deprived urban areas have access to properly maintained water facilities. Access to traditional water sources in rural areas should be protected from unlawful encroachment and pollution. Deprived urban areas, including informal human settlements, and homeless persons, should have access to properly maintained water facilities. No household should be denied the right to water on the grounds of their housing or land status; (d) Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water; (e) Nomadic and traveller communities have access to adequate water at traditional and designated halting sites; (f) Refugees, asylum-seekers, internally displaced persons and returnees have access to adequate water whether they stay in camps or in urban and rural areas. Refugees and asylum-seekers should be granted the right to water on the same conditions as granted to nationals; (g) Prisoners and detainees are provided with sufficient and safe water for their daily individual requirements, taking note of the requirements of international humanitarian law and the United Nations Standard Minimum Rules for the Treatment of Prisoners;18 (h) Groups facing difficulties with physical access to water, such as older persons, persons with disabilities, victims of natural disasters, persons living in disaster-prone areas, and those living in arid and semi-arid areas, or on small islands are provided with safe and sufficient water. *Ibid.* p. 6-7.

Lastly, information accessibility pertains to the right to seek, receive and impart information concerning water.[157] This aspect is essential to enable public participation, as it its intrinsically connected with the possibility to formulate positions and ascertain the interests involved in decisions related to water and sanitation.

Concerning the obligations of States in the context of the General Comment No. 15, the document establishes that, while, in general, the ICESCR establishes obligations that are conditioned by a progressive realization clause and thus limited by the States' available resources, some obligations are of immediate effect. Among these immediate obligations are the core obligations, which are non-derogable minimum essential levels of each of the human rights prescribed by the ICESCR.[158] The following obligations were labeled as core obligations of the human right to water:

> (a) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;
> (b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;
> (c) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;
> (d) To ensure personal security is not threatened when having to physically access to water;
> (e) To ensure equitable distribution of all available water facilities and services;
> (f) To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups;
> (g) To monitor the extent of the realization, or the non-realization, of the right to water;
> (h) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups;
> (i) To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation.[159]

The specific obligations prescribed by the CESCR are those to respect, protect and fulfill. The obligation to respect prohibits the State from directly or indirectly interfering with the enjoyment of the human right to water.[160] Likewise, the obligation to protect represents an

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[157] *Ibid.* p. 5.
[158] *Ibid.* p. 12.
[159] *Ibid.*
[160] *Ibid.* p. 8.

obligation of due diligence, as it requires the State to prevent third parties from interfering in any way with this right.[161] In fact, States must not impair or allow any activities in their jurisdiction to interfere with the enjoyment of the human right to water in other countries.[162] These obligations are related to the freedoms of the human right to water, as it requires the State and third parties to abstain from frustrating the access to sufficient and safe water supplies.

In its turn, the obligation to fulfill, related to the entitlements of the human right to water, requires States to taking necessary measures for the full realization of this right, which include assisting individuals and communities, ensuring appropriate education related to water and providing sufficient water services and facilities to those who, for reasons beyond their control, are unable to realize the right by themselves.[163]

If the State fails to comply with its obligations of progressive realization due to resource constraints, it has the burden of proving that it made efforts and employed all available resources to realize the human right to water.[164] As a matter of fact, there is a strong presumption that retrogressive measures are prohibited under the ICESCE, in which case the State can only be exempt from responsibility if it proves that the measures were only introduced after a careful consideration of all alternatives and that they are justified in light of a holistic perspective of the ICESCR and considering the optimization of the available resources.[165]

1.2.2 International Covenant on Civil and Political Rights

Similarly to the ICESCR, the ICCPR prescribes a series of human rights, among which the rights to water and sanitation are not included. However, unlike the ICESCR, that establishes positive obligations upon States to progressively implement economic, social and cultural rights, the ICCPR focuses mainly on negative obligations pertaining to civil and political rights.

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[161] *Ibid.* p. 9.
[162] *Ibid.* p. 11.
[163] *Ibid.* p. 9.
[164] *Ibid.* p. 13.
[165] *Ibid.* p. 8.

From this perspective, following Karel Vasak's theory of generations of human rights, the rights proclaimed in the UDHR fall into two categories: (i) the first generation, pertaining to civil and political rights, that creates negative obligations to the State and requires it to abstain from interfering with individual liberties; and (ii) the second generation, which comprises economic, social and cultural rights, and establishes positive obligations to the State in order to enable their implementation.[166] Vasak also proclaims a third generation of human rights, which include "the right to development, the right to a healthy and ecologically balanced environment, the right to peace, and the right to ownership of the common heritage of mankind".[167]

In light of these dimensions of human rights, the ICCPR codified the first generation of human rights, whilst the ICESCR codified the second. That is precisely why the obligations prescribed by the ICCPR have direct and immediate applicability, whilst the ICESCR establishes a progressive development of human rights.[168] This distinction is often attributable to the fact that "civil and political rights can be realized without significant costs being incurred, whereas the enjoyment of economic, social, and cultural rights requires a major commitment of resources".[169]

As such, a literal approach of the human rights to water and sanitation that considers the traditional scope of the ICCPR tends to focus on the negative obligations of the State, prohibiting the interference with the enjoyment of these rights.[170] In this regard, Pierre Thielbörger argues that, from a conceptual perspective, the right that is derived from another

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[166] Karel Vasak, "A 30-Year Struggle; the Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights," *UNESCO Courier* XXX, no. 11 (1977): 29,32.
[167] *Ibid.*
[168] The different approaches are clearly visible in the comparative analysis of the applicability clauses of each treaty: "Article 2(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". United Nations, "International Covenant on Civil and Political Rights," *United Nations Treaty Series* 999 (1966): 171."Article 2(1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". United Nations, "International Covenant on Economic, Social and Cultural Rights."
[169] Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights," *Human Rights Quarterly* 9, no. 2 (May 1987): 156, https://doi.org/10.2307/762295. p. 159.

must present the same legal features of its source.[171] Hence, "civil and political rights can only create civil and political rights, whereas socio-economic rights can only generate socio-economic rights".[172]

In this regard, Article 6(1) of the ICCPR declares that every human being has the inherent right to life, and that no one shall be arbitrarily deprived of his life.[173] Given that survival is impossible without water, the compromise of its availability or quality that endangers life is a violation of the right to life.[174]

This is also the case when Article 7 of the ICCPR is concerned. It states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[175] Accordingly, the deprivation of water, especially in contexts where the individuals depend on the State to satisfy their basic human needs, such as prisons, is prohibited for constituting an inhumane treatment.

It should be noted, however, that the literal interpretation is very restricted, insofar as it provides for negative obligations related to extreme circumstances and only to the extent that the right to life or to a humane treatment is violated. There is no consideration of the specific features of the human rights to water and sanitation, and the justiciability is conditioned to the occurrence of serious threats to human integrity that are attributable to an illegal conduct.

Alas, it could be argued that the dichotomy between human rights is outdated, as basic economic, social and cultural standards, that are required for subsistence, are necessary for the exercise of civil and political freedoms.[176] As such, this dichotomy has lost influence due to the rise of the theory of the tripartite typology of human rights, that states that all human rights comprise, in different extents, the obligations to respect, protect and fulfill.[177] The obligations to respect and protect are related to the freedoms conferred upon individuals, as

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[170] Daphina Misiedjan, *Towards a Sustainable Human Right to Water: Supporting Vulnerable People and Protecting Water Resources*, 1st ed. (Intersentia, 2019), https://doi.org/10.1017/9781780686165. p. 56-57.
[171] Pierre Thielbörger, "Re-Conceptualizing the Human Right to Water: A Pledge for a Hybrid Approach," *Human Rights Law Review* 15, no. 2 (June 1, 2015): 225–49, https://doi.org/10.1093/hrlr/ngv008. p. 228-229.
[172] Ibid.
[173] United Nations, "International Covenant on Civil and Political Rights."
[174] Misiedjan, *Towards a Sustainable Human Right to Water*. p. 56-57.
[175] United Nations, "International Covenant on Civil and Political Rights."
[176] Salman and McInerney-Lankford, *The Human Right to Water*. p. 25-26.
[177] Ida Koch, "Dichotomies, Trichotomies or Waves of Duties?," *Human Rights Law Review* 5, no. 1 (January 1, 2005): 81–103, https://doi.org/10.1093/hrlrev/ngi004. p. 85-86.

they require States to, respectively, refrain from interfering with the enjoyment of human rights and prevent violations of these rights by other parties. In the other hand, the obligation to fulfill entails entitlements, as it is related to the adoption of measures to realize human rights.

Precisely, the authoritative interpretation of the ICCPR by the United Nations Human Rights Committee (HR Committee) does not limit the treaty's applicability only to negative obligations.[178] In its General Comment No. 6 (1982), that dealt with the right to life, the committee stated that this right should not be interpreted narrowly, and that it requires States to undertake positive measures.[179] To illustrate its statement, the General Comment No. 6 highlights that it would be "desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics".[180]

At this point, even though the HR Committee recognized the extensive interpretation of Article 6 of the ICCPR, it employs a very soft wording to convey the measures to be taken by States. In this regard, Thorsten Kiefer and Catherine Brölmann stress that the utilization of the word "desirable" leads to inquiry whether the HR Committee would, in its quasi-judicial mandate, find a violation in the event of the failure to comply with the provision of minimum survival conditions.[181]

On the other hand, Silvia Bertazzo postulates that the authoritative interpretation leads unquestionably to the adoption of positive measures to ensure a decent life, including the provision of water in adequate quantity and quality.[182] However, Bertazzo considers that this obligation surfaces only in extreme cases, such as sanitary emergences, that are known by the authorities and within their authority to assist the affects individuals and groups to achieve a minimum standards of access to water.[183]

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[178] Misiedjan, *Towards a Sustainable Human Right to Water*. p. 471.
[179] Human Rights Committee, "General Comment No. 6: Article 4 (Right to Life)," 1982.
[180] *Ibid.*
[181] Thorsten Kiefer and Catherine Brölmann, "Beyond State Sovereignty: The Human Right to Water," *Non-State Actors and International Law* 5, no. 3 (2005): 183–208, https://doi.org/10.1163/157180705775435465. p. 189.
[182] Bertazzo, "La Tutela Del Acceso al Agua Potable En El Derecho Internacional." p. 59-60.
[183] *Ibid.*

Also in this perspective, Inga Winkler argues that Article 6(1) of the ICCPR encompasses a duty to provide minimum survival requirements, including access to water.[184] However, Winkler concedes that:

> Yet the guarantee of water as covered under the right to life is much narrower in scope than the guarantees derived from the provisions of the Social Covenant. The right to life is tantamount neither to the right to an adequate standard of living nor to the highest attainable standard of health. Accordingly, the guarantee of water as derived from the right to life does not aim to attain an adequate standard of living. Rather, it covers mere survival requirements, i.e. safe water for drinking purposes in an amount sufficient to prevent death caused by dehydration. Keeping this in mind, it seems logical that this guarantee is not subject to progressive realisation but has to be ensured immediately.[185]

In any event, when the HR Committee enacted General Comment No. 36 (2018), in substitution to General Comment No. 6, the matter was settled unequivocally. The HR Committee declared that the right to life "concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity".[186] Among the measures called for the protection of the right to life, the General Comment No. 36 expressly requires the provision of access to essential goods and services, such as food, water, shelter, health-care, electricity and sanitation.[187] The HR Committee also indicated that the States' obligations under Article 6 of the ICCPR require the adoption of measures to preserve the environment and protect it against harm, pollution and climate change.[188]

Accordingly, the authoritative interpretation of the ICCPR by the HR Committee is consistent with what Antônio Augusto Cançado Trindade labels as the "wide and proper dimension of the right to life".[189] Cançado Trindade clarifies that the indivisibility and the inter-relatedness of all human rights guides the modern configuration of the human right to life, which comprises the right of every human being of not being arbitrarily deprived of his

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[184] Inga T. Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Oxford ; Portland, Or: Hart Pub, 2012). p. 54.
[185] *Ibid.*
[186] Human Rights Committee, "General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, CCPR/C/GC/36," 2018. p. 1.
[187] *Ibid.* p. 6.
[188] *Ibid.* p. 15.
[189] Antônio Augusto Cançado Trindade, "The Parallel Evolutions of International Human Rights Protection and of Environmental Protection and the Absence of Restrictions upon the Exercise of Recognized Human Rights,"

life, in a civil and political conception, but also the right to have to an adequate standard of living, in an economic, social and cultural sphere.[190]

In conclusion, although there is has been a reasonable consensus over the implicit recognition of the human rights to water and sanitation under the auspices of the ICCPR, there are multiple interpretations as to what are the limits of their normative elements. The authoritative interpretation of the HR Committee has provided a holistic approach to the right to life enshrined in Article 6(1) of the ICCPR that entitles individuals to a life with dignity. This interpretation approximates ICCPR's human right to life to ICESCR's human right to an adequate standard of living, even though it is still not clear if the HR Committee will employ the CESCR's General Comment No. 15 analogically in its quasi-judicial proceedings.

1.2.3 Specific Treaty Regimes

Despite the omissions in the ICESCR and in the ICCPR, there are international instruments that have expressly protected the human rights to water and sanitation in relation to specific groups, such as women, children and persons with disabilities. Despite their limited scope, these instruments have important features that must be highlighted.

1.2.3.1 Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979, guaranteed women's rights to water and sanitation in rural areas:

> Art. 14
> 1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.
> 2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
> (…)

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in *Human Rights and Environment*, ed. Antônio Augusto Cançado Trindade and César Leal (Fortaleza: Expressão Gráfica e Editora, 2017), 49–92. p. 65.
[190] Ibid.

> (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications. [191]

As such, this specific recognition is limited to the context of eliminating discrimination against women in the rural areas. In this vein, there is not only a restriction of scope in relation to the subjects of these rights, insomuch as the field of application has also territorial and socioeconomic limits. The special regard given to the situation of women in rural areas is due to the additional structural disadvantage experienced by rural women concerning the responsibilities in water related duties and the consequences of the lack of sanitation.[192]

Accordingly, the Committee on the Elimination of Discrimination against Women adopted the General Recommendation No. 34 on the Rights of Rural Women (2016), in which it highlighted that rural women and girls are amongst the most affected by water scarcity, unequal access to natural resources and lack of infrastructure and services.[193] In this context, the committee clarifies that States should ensure that rural women have access to essential services and public goods, including sufficient, safe, acceptable and physically accessible and affordable water for personal and domestic uses, as well as for agriculture/irrigation.[194] It also enunciates that these services comprise adequate sanitation and hygiene, enabling women and girls to practice menstrual hygiene and access sanitary pads.[195]

Despite the main focus on rural areas, Margaret Satterthwaite argues that the CEDAW framework confers equal access to water and sanitation to all girls and women, as States are required to "take affirmative steps to dismantle de jure and de facto discrimination in all areas

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[191] United Nations, "Convention on the Elimination of All Forms of Discrimination Against Women," *United Nations Treaty Series* 1249 (1979): 13.

[192] Anne Hellum, "Engendering the Right to Water and Sanitation: Integrating the Experiences of Women and Girls," in *The Human Right to Water*, ed. Malcolm Langford and Anna F. S. Russell (Cambridge: Cambridge University Press, 2017), 300–344, https://doi.org/10.1017/9780511862601.011. p. 320-321.

[193] Especially, the following circumstances influence in the enjoyment of the human rights to water and sanitation by women in rural areas: "In order to access water, rural women and girls are frequently obliged to walk long distances to fetch it, sometimes exposing them to heightened risk of sexual violence and attacks. Due to poor rural infrastructures and services in many regions, rural women often spend 4-5 hours per day (or more) collecting water from sometimes poor quality sources, carrying heavy containers and suffering acute physical problems, as well as facing illnesses due to unsafe water. In the absence of toilets or latrines, rural women and girls must also walk long distances in search of privacy. Lack of adequate sanitation also increases their risk of ill health. In order to remedy this situation, rural women and girls must have physical and economic access to sanitation, which is safe, hygienic and secure, as well as socially and culturally acceptable". Committee on the Elimination of Discrimination against Women, "General Recommendation No. 34 on the Rights of Rural Women," 2016. p. 21-22.

[194] *Ibid.*

of life, including access to water, sanitation, and hygiene—whether in the household, in education facilities, in medical settings, or in detention facilities".[196]

1.2.3.2 Convention on the Rights of the Child

In its turn, the Convention on the Rights of the Child (CRC), adopted in 1989, determines the duty of States Parties to provide safe drinking water as a means of combating disease and malnutrition:

> Art. 24
> 1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
> 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
> (…)
> (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
> (…)
> (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;[197]

This instrument is restricted to the protection of children's right to health, and water is considered solely to the extent that it is necessary to combat disease and malnutrition. Consequently, there is a subjective limitation of the right, as it applies only to children, as well as a material purview, as it is directed specific goals within the right to health. It is interesting to verify that this convention adopts the notion of environmental health, as it considers the dangers and risks of environmental pollution. However, it focuses mainly on the quality parameter of the human rights to water,[198] and it only deals with sanitation in an informational level.

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[195] *Ibid.*
[196] Margaret Satterthwaite, "Assessing the Rights to Water and Sanitation: Between Institutionalization and Radicalization," *Georgetown Journal of International Law* 52, no. 2 (2021): 315–79. p. 344.
[197] United Nations, "Convention on the Rights of the Child," *United Nations Treaty Series* 1577 (1989): 3.
[198] Amanda Cahill, "'The Human Right to Water – a Right of Unique Status': The Legal Status and Normative Content of the Right to Water," *The International Journal of Human Rights* 9, no. 3 (September 2005): 389–410, https://doi.org/10.1080/13642980500170840. p. 391.

Nevertheless, the Committee on the Rights of the Child adopted General Recommendation 15 on the Right to Health (2013), in which it explicitly recognized that the rights to safe and clean drinking water and sanitation are essential for the enjoyment of life and other human rights.[199] Therefore, the realization of the right to health under Convention on the Rights of the Child requires States to consider child indicators on water-related diseases and household size in the planning and implementation of water services, water allocation and service disconnections.[200] Additionally, it means that the States must monitor and regulate the environmental impact of activities that may compromise the access to safe drinking water and sanitation.[201]

1.2.3.3 Convention on the Rights of Persons with Disabilities

Finally, the Convention on the Rights of Persons with Disabilities (CRPD), adopted in 2006, ensures equal access by persons with disabilities to clean water services:

> Article 28 – Adequate standard of living and social protection
> 1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.
> 2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:
> (a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;[202]

Even though its scope is limited in relation to the subjective factor, as it applies only to persons with disabilities, it does not have any material or geographic conditions. Furthermore, rather than prescribing the rights to water and sanitation under the right to an adequate standard of living, as in the case of the UDHR and the ICESCR, this convention connects

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[199] Committee on the Rights of the Child, "General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24), CRC/C/GC/15," 2013. p. 12.
[200] *Ibid.*
[201] *Ibid.*
[202] United Nations, "Convention on the Rights of Persons with Disabilities," *United Nations Treaty Series* 2515 (2006): 3.

these rights to the right to social protection. Additionally, it expressly highlights the importance of economic accessibility and quality.

1.2.4 Regional Human Rights Systems

As in the case of the Inter-American context, other regional human rights systems have also dealt with the human rights to water and sanitation. These other conceptions will be discussed in light of each region.

1.2.4.1 Africa

The African Charter of Human Rights does not address the human rights to water and sanitation. This omission is attributed to the lack of proposals for the codification of these rights rather than an outright opposition.[203] In any case, in the Guidelines on the Right to Water in Africa (2019), the African Commission on Human and Peoples' Rights recalled that " the right to water is not among the rights directly protected in the African Charter, but is implied in the protection of a number of those rights, including the rights to life, dignity, work, health, economic, social and cultural development and to a satisfactory environment".[204] Even though the document explicitly refers only to the human right to water, it also deals with the normative elements of the human right to sanitation. In this document, sovereignty is still a delicate topic, as it expresses that States shall not waive their sovereignty over natural resources.[205]

These Guidelines enacted by the African Commission are very detailed and deal with several aspects of the human rights to water and sanitation. This document reproduces and enhances several aspects previously addressed by the General Comment No. 15 in the context of the ICESCR.

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[203] Danwood M. Chirwa, "Access to Water as a New Right in International, Regional and Comparative Constitutional Law," in *The Cambridge Handbook of New Human Rights*, ed. Andreas von Arnauld, Kerstin von der Decken, and Mart Susi, 1st ed. (Cambridge University Press, 2020), 55–69, https://doi.org/10.1017/9781108676106.005. p. 65.
[204] African Commission on Human and Peoples' Rights, "Guidelines on the Right to Water in Africa," 2019, https://www.achpr.org/public/Document/file/English/ENG-%20ACHPR%20Guidelines%20on%20the%20Right%20to%20Water%20in%20Africa.pdf. p. 6.
[205] Ibid. p. 11.

Initially, the instrument is adamant on the statement that these rights are immediately applicable upon ratification of the African Charter.[206] It should be noted that measures that reduce the enjoyment of the human rights to water and sanitation are presumed to violate the African Charter.[207] In the case of noncompliance, the State must demonstrate that it allocated all available resources to the realization of human rights.[208]

In relation to non-discrimination, the Guidelines declare that States must safeguard equal access to water facilities and services, as well as non-discriminatory participation to all stakeholders, which may include the adoption of positive measures to enable the involvement of marginalized and vulnerable groups.[209] Furthermore, States must render special attention to gender equality and the protection of women's rights.[210]

In relation to the elements of the human rights to water and sanitation, the Guidelines adopted the parameters of availability, quality, physical and economical accessibility, and focused on personal and domestic uses. The factor of availability dealt with the priority to human needs in water management, provision of a sufficient and safe amount of water and the continuity or regularity of the water supply.[211] Accordingly, the Guidelines stress that under no circumstances may an individual be deprived of the minimum essential amount of water for basic human needs and survival.[212] In line with WHO's parameters, the Guidelines state that the absolute minimum is 20 liters/person/day, but the effective realization of the human rights to water and sanitation require at least 50 – 100 liters/person/day.[213]

Pertaining to quality, water must be of an acceptable color, odor and taste, which is defined by water users.[214] In order to protect water resources, States shall protect them from contamination by harmful substances and pathogenic microbes, as well as promote safe sanitation and hygiene practices.[215]

On physical accessibility, States must ensure physical and equitable access to water facilities or services, distributed in an adequate number of water outlets, in the immediate

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[206] Ibid. p. 12.
[207] Ibid. p. 12-13.
[208] Ibid.
[209] Ibid.
[210] Ibid.
[211] Ibid. p. 21-22.
[212] Ibid.
[213] Ibid.
[214] Ibid. p. 24.

vicinity of the household and in public places.[216] These services and facilities must be accessible to all, especially considering the needs of persons with disabilities and other vulnerable groups, additionally to being culturally appropriate and sensitive to gender, age and privacy requirements.[217]

Relating to economic accessibility, the cost of water must not strain the enjoyment of other essential goods and services for the realization of human rights.[218] To this end, States must establish benchmarks for the monitoring of water affordability, and water prices must be planned to cover the costs of operation and maintenance in the long term.[219] The appropriate pricing policies must consider flexible payment schemes and cross-subsidies from high-income users to low-income users, and marginalized groups shall not be subjected to water disconnection.[220]

Additionally, apart from the traditional overview of the human rights to water and sanitation, the Guidelines offer a range of directives that deal with a rights-based approach to water management, specific measures directed towards vulnerable and marginalized groups, sustainable water management and participation of private actors in the water sector. Finally, the Guidelines establish a reporting system of the human rights to water and sanitation, in which States shall include in their periodic reports information on the implementation of legislation, policies and case law to demonstrate the compliance with these rights.[221]

1.2.4.2 Europe

The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not provide for explicit human rights to water and sanitation. Nevertheless, the European Court of Human Rights (ECtHR) has ruled in cases involving water pollution that the endangering of the human and environmental health was in violation of Article 8 of the ECHR, which establishes the right to respect for private and

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[215] Ibid. p. 23.
[216] Ibid. p. 22.
[217] Ibid.
[218] Ibid. p. 23-24.
[219] Ibid.
[220] Ibid.
[221] Ibid. p. 38-39.

family life.[222] As detailed by Katharina Braig, it is not necessary for the activity to endanger the individual's health to trigger the violation of Article 8, as long as the effects are direct and serious, whilst the consequences are intense and repeated.[223] Additionally, the ECtHR has recognized that insufficient water and sanitation in detention may lead to the violation of Article 3 of the ECHR, related to the prohibition of torture.[224]

In this context, arose a European Citizens' Initiative titled 'Water and sanitation is a human right, water is a public good!' (2012), which came to be known as the "Right2Water" initiative. The initiative registered 1.659.543 signatures and urged the European Union and States to ensure that all inhabitants enjoy the rights to water and sanitation, to exclude water supply and management from internal market rules and liberalization, and to increase efforts to achieve universal access to water and sanitation.[225] The proposal was mainly focused on the dichotomy between public and private provision of water and sanitation services due to the negative impacts of privatization in Europe, such as the increase of prices.[226]

In response to this initiative, the European Commission stated that the European Union has contributed to the realization of the human rights to water and sanitation by establishing ambitious water quality standards and by financial support to expand and improve water infrastructures.[227] Thus, the European Commission welcomed the mobilization of European citizens in support of access to safe drinking water and sanitation and stated that these rights will continue to guide European policies, but decided to remain neutral in relation to national, regional and local choices for the provision of water services.[228]

Even though the Right2Water initiative did not prosper in the objectives it aspired, it did manage to influence the revision of the European legislation on drinking water. In this regard, the revised Drinking Water Directive requires States to "take the necessary measures

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[222] Katharina Franziska Braig, "The European Court of Human Rights and the Right to Clean Water and Sanitation," *Water Policy* 20, no. 2 (April 1, 2018): 282–307, https://doi.org/10.2166/wp.2018.045. p. 288-290.
[223] *Ibid.* p. 292.
[224] *Ibid.* p. 296.
[225] European Citizens' Committee, "Water and Sanitation Are a Human Right! Water Is a Public Good, Not a Commodity! - ECI(2012)000003," 2012, https://europa.eu/citizens-initiative/initiatives/details/2012/000003_en.
[226] Jerry van den Berge, Rutgerd Boelens, and Jeroen Vos, "How the European Citizens' Initiative 'Water and Sanitation Is a Human Right!' Changed EU Discourse on Water Services Provision," *Utrecht Law Review* 16, no. 2 (October 30, 2020): 48–59, https://doi.org/10.36633/ulr.568.
[227] European Commission, "Communication from the Commission on the European Citizens' Initiative 'Water and Sanitation Are a Human Right! Water Is a Public Good, Not a Commodity!,'" 2014, https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2014)177. p. 4.
[228] *Ibid.* p. 12-13.

to improve or maintain access to water intended for human consumption for all, in particular for vulnerable and marginalized groups".[229] In order to achieve this purpose, States shall identify the populations without or with limited access to water and ascertain the reasons for this lack of access.[230] Then, the States must assess possibilities for improving access, inform the populations concerned of their possibilities for having access to water and implement measures directed toward the provision of water for these groups.[231]

1.2.4.3 Middle East and Asia

Pertaining to the Arab region, the Arab Charter on Human Rights (2004) includes an extensive list of rights, among which several are similar to those prescribed in other human rights instruments.[232] This instrument has established, in its Article 39, the right to the highest attainable standard of physical and mental health, which requires States to undertake measures that include the provision of basic nutrition and safe drinking water for all, as well as combating environmental pollution and providing proper sanitation systems.[233]

Finally, in relation to Asia, the region does not have well-developed norms and institutions pertaining to human rights.[234] In this context, it is not surprising that the rights to water and sanitation lack a proper normative codification in this region.[235] However, specifically in the context of South Asia, the Social Charter of the South Asia Association for

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[229] European Parliament, "Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the Quality of Water Intended for Human Consumption," 2020, https://eur-lex.europa.eu/eli/dir/2020/2184/oj. art. 16.
[230] *Ibid.*
[231] *Ibid.*
[232] This regional instrument is not to be confused with the Arab Charter on Human Rights adopted in 1994, which was very limited and did not even enter into force, as it did not provide any commitments that were not already established in the ICCPR and in the ICESCR. Wael Allam, "The Arab Charter on Human Rights: Main Features," *Arab Law Quarterly* 28, no. 1 (2014): 40–63, https://doi.org/10.1163/15730255-12341271. p. 42-46.
[233] League of Arab States, "Arab Charter on Human Rights," 2004.
[234] Debra L. DeLaet, "An Emerging Asian Human Rights Regime as a Tool for Protecting the Vulnerable in Asia?," in *Routledge Handbook of Human Rights in Asia*, ed. Fernand de Varennes and Christie M. Gardiner, 1st ed. (Abingdon, Oxon ; New York, NY : Routledge, 2019.: Routledge, 2018), 30–43, https://doi.org/10.4324/9781315720180-3. p. 31.
[235] Benjamin Clemenceau, "Où En Est Le Droit Des Êtres Humains à l'eau et à l'assainissement Depuis l'adoption de La Résolution N° 64/292 de l'Assemblée Générale Des Nations Unies Du 28 Juillet 2010 ?," *Revue Des Droits de l'homme*, no. 13 (December 4, 2017), https://doi.org/10.4000/revdh.3651. p. 5.

Regional Cooperation declares that States agree to, among others, guarantee access to water and sanitation in legislative, executive and administrative provisions.[236]

[236] South Asia Association for Regional Cooperation, "Social Charter of the South Asia Association for Regional Cooperation," 2004, https://www.refworld.org/pdfid/595c933c4.pdf. art. III(4).

2 THE HUMAN RIGHTS TO WATER AND SANITATION IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

The protection of the human rights to water and sanitation by the IACtHR did not emerge fortuitously. It was the result of an extensive jurisprudential construction that aimed to provide full effect to the dispositions of the ACHR, regardless of the formal, or even academic, constraints to the interpretation of human rights obligations. These developments are not limited to a single article or set of rules. They encompass the very comprehension of the IACtHR on the assessment of human rights obligations and the respective international responsibility of the State for their violation.

In this scenario, even though the case law of the IACtHR in relation to human rights rules in general could offer significant contributions to the debate on the human rights to water and sanitation, the present chapter focuses on the cases in which the utilization or protection of water resources and the access to water and sanitation services is concerned. The chapter is structured in two sections, each aiming to address a specific context of justiciability of the human rights to water and sanitation. These parameters have also been developed in the context of the Inter-American Commission of Human Rights (IACommHR), which will not be addressed due to the methodological delimitation of this thesis.

The first section deals with the initial phase of recognition of these human rights in the case law of the IACtHR, that involved the consideration of civil and political rights jointly with economic, social and cultural elements. As will be presented, this period is marked by hermeneutical enhancement of the rights to life, humane treatment and property, especially in contexts of marginalized populations to whom the State owe a special duty of attention and safeguard.

On the other hand, the second section addressed the emergence of autonomous economic, social and cultural rights under the auspices of the precepts of progressive development codified by the ACHR. This stage represents a landmark for the establishment of an autonomous human right to water, even though the human right to sanitation remained as a derivative right.

Accordingly, the methodological approach of the chapter is focused on the justiciability of the human rights to water and sanitation, which is the main point of evolution in the case law of the IACtHR. On the other issues, such as the obligations' normative elements and the redress mechanisms, they tend to present certain uniformity and continuity,

even after the change in the legal bases of justiciability. For this reason, they will be analyzed in the context of each case, in order to highlight eventual progresses and setbacks.

2.1 The Human Rights to Water and Sanitation as Derivative Rights

The justiciability the human rights to water and sanitation in the IASHR as derivative rights to closely linked with the evolutionary interpretation of the ACHR by the IACtHR. These derivations have been employed in relation to several rights and are intrinsically related to the intrinsic connection of civil and political rights with economic, social, and cultural rights.

In this regard, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (1988), the Protocol of San Salvador, is an important instrument to understand the approach of the IASHR in relation to the interdependence and indivisibility of human rights. The preamble of the protocol is very precise on the issue:

> Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified;
> (...)
> Recalling that, in accordance with the Universal Declaration of Human Rights and the American Convention on Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights;[237]

As such, even though the Protocol of San Salvador establishes a separate regime of human rights obligations to those of the original convention, it clearly establishes the intrinsic relationship between all human rights. This approach would be vastly employed by the IACtHR to underline the legal bases and normative elements of economic, social and cultural rights in the auspices of the related civil and political rights.

Accordingly, this section deals with the indirect protection of the human rights to water and sanitation in the light of the human rights to life, humane treatment, and property.

The main cases that deal with water and sanitation services in the case law of the IACtHR are those pertaining to the human right to life, in which the Court details the responsibilities of the State in the realization of the right to a decent life. Nonetheless, the cases relating to the right to humane treatment and the right to property are particularly relevant, respectively, to the safeguard of the minimum conditions of treatment of prisoners and the protection of natural resources within the ancestral territories of Indigenous Peoples.

2.1.1 The Adequate Standard of Living and the Human Rights to Water and Sanitation

The current comprehension of the human right to life in the case law of the IACtHR evolved in a series of parallel cases that had very few in common, other than the State's omission to address serious risks to the enjoyment of a decent life. In this regard, it is paramount to observe the drafting of the ACHR on the issue:

> Article 4. Right to Life
> 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.[238]

As such, Article 4 of the ACHR initially focus only on the right of the individual to have his life respected and not to be arbitrarily deprived of his life, both very restrictive and negative obligations. The case of *Villagrán Morales et al. v. Guatemala* (1999) is particularly relevant in the evolutionary interpretation of Article 4, as it was the first in which the IACtHR expanded its conception of the human right to life to require a more robust approach of the State to realize this right. In that specific case, the Court stated:

> 144. The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation

[237] Organization of American States, "Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)," *OAS Treaty Series* 69 (1988).
[238] Organization of American States, "American Convention on Human Rights (Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969)," *OAS Treaty Series* 36 (1969).

> of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it.[239]

The concurring opinion of Judges Cançado Trindade and Abreu Burelli to this case is particularly interesting to illustrate what would be the interpretative directive of the IACtHR in its future case law. They stated the Court "conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, as well as economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights".[240] In this regard, the State is responsible for the guarantee of minimum conditions of a life with dignity, especially for marginalized groups.[241]

It is in the context of these cases that emerges the case law of the IACtHR in relation to the derivation of the human rights to water and sanitation from the right to life. The cases that will be presented pertain mainly to the marginalization of Indigenous Peoples in Paraguay. The factual circumstances of the cases are virtually identical, but the concepts employed by the Court have been gradually improved in each judgment, as will be demonstrated.

2.1.1.1 Case of the *Yakye Axa Indigenous Community v. Paraguay*

The first case judged by the IACtHR on the human rights to water and sanitation of was related to the Yakye Axa Indigenous Community and its quest for land rights in Paraguay. This case originated from Complaint No. 12.313, received at the Secretariat of the IACommHR on January 10, 2000.

The Commission found the case to be admissible, as decided in the Admissibility Report no. 2/02, which led to the adoption of the Report on the Merits no. 67/02, as provided by article 50 of the American Convention. The IACommHR found that Paraguay did not implement the Yakye Axa Indigenous Community's right to land and, as a result, this community was cast into a state of alimentary, health and sanitary vulnerability, which, in

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[239] Inter-American Court of Human Rights, "Case of the 'Street Children' (Villagran-Morales et al.) v. Guatemala, Judgment of November 19, 1999 (Merits)," 1999. p. 37.
[240] Antônio Augusto Cançado Trindade and Alirio Abreu Burelli, "Joint Concurring Opinion of Judges A. A. Cançado Trindade and A. Abreu Burelli on the Case of the 'Street Children' (Villagran-Morales et al.) v. Guatemala, Judgment of November 19, 1999 (Merits)," 1999. p. 2.
[241] Ibid.

turn, continuously threatened the subsistence of the community's members.[242] Accordingly, the Commission recommended Paraguay to, among others, guarantee the exercise of traditional subsistence activities by the members of the Yakye Axa Indigenous Community.[243]

After analyzing Paraguay's reply to the report and its recommendations, the Commission decided to file the case before the IACtHR on March 17, 2003. The IACommHR filed the application under articles 51 and 61 of the American Convention, for the analysis of the possible violation of rights prescribed by this international instrument, such as the right to life (article 4), the right to a fair trial (article 8), the right to property (article 21) and the right to judicial protection (article 25). As will be seen, the right of life codified in article 4 of the American Convention will have a central role in the consolidation of the human rights to water and sanitation. Pursuant articles 62 and 63(1), the IACtHR decided that it had jurisdiction to hear the case, as Paraguay had consented to the adjudicatory jurisdiction of the Court.

Concerning the evidence presented before the IACtHR, the Court stated that it had authority to assess and appraise evidence, as it was not bound to establish a rigid *quantum* of evidence to reach its decision.[244] Additionally, the Court emphasized that, in accordance with its jurisprudence, the testimonies of alleged victims and their relatives are "useful insofar as they can provide more information on the alleged violations that may have taken place and regarding their consequences". [245] However, these testimonies cannot be appraised

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[242] Inter-American Commission of Human Rights, "Application to the Inter-American Court of Human Rights in the Case of the Yakye Axa Indigenous Community (Case 12.313) against the Republic of Paraguay," 2003, https://www.oas.org/es/cidh/decisiones/corte/2004-1986/47.%20Yakye%20Axa,%20Paraguay.pdf. p. 5-6.

[243] *Ibid.* p. 5-6. The full list of recommendations includes: "1. Take such measures as may be necessary, as soon as possible, to make effective the right of the Yakye Axa Indigenous Community of the Enxet-Lengua People and its members to ownership and possession of its ancestral territory, ordering the delimitation, demarcation and granting of title deed to its lands, in accordance with their customary law, values, practices, and customs. 2. Guarantee the exercise of their traditional subsistence activities by the members of the Community. 3. Take such measures as may be necessary to put an end to the state of nutritional, medical, and sanitary emergency of the Community. 4. Take such measures as may be necessary to protect the habitat claimed by the Community, as long as the granting of title deed to their ancestral territory in favor of the Indigenous Community is pending. 5. Establish an effective and simple remedy for the protection of the right of the Indigenous Peoples of Paraguay to claim and have access to their traditional territories. 6. Make reparations, both at the individual and communal level, for the consequences of the violation of the rights listed. 7. Take such measures as may be necessary to avoid similar facts in the future, in accordance with the duty of prevention and guarantee with regard to the basic rights recognized in the American Convention".

[244] Inter-American Court of Human Rights, "Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005 (Merits, Reparations and Costs)," 2005, https://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf. p. 7.

[245] *Ibid.* p. 23.

individually, as they must be analyzed in the context of all evidence presented in the proceedings.[246]

Following the testimonies of the alleged victims and the documents presented by the parties, the Court established the historic reconstruction of the litigation in light of the proven facts. In accordance with this reconstruction, large parts of the land occupied by indigenous communities were sold through the London stock exchange in the 19th century, which led the Yakye Axa Community to endure critical living conditions.[247] In 1979, the Anglican Church began a resettlement program that encompassed this community, but the new arrangement did not improve the living conditions of the members of this communities, which continued to die due to lack of food and water.[248]

In 1993, the community decided to begin steps to claim the lands they considered to be their ancestral territory and, in 1996, several members of the Yakye Axa Community decided to return to these lands to await the Paraguayan Indigenous Institute's decision on the case.[249] As they were not allowed to enter their lands, the community decided to settle alongside the road between Pozo Colorado and Concepción.[250]

From that point onwards, the community lived in extreme conditions, as its members were not able to cultivate or practice their traditional subsistence activities. This existential fragility was recognized by the President in Executive Order no. 3789/1999, which ordered the Paraguayan Indigenous Institute, along with the pertinent ministries, to aid the Yakye Axa Community. In this regard, the community regularly requested the Paraguayan Indigenous Institute's support, which was sometimes granted.[251]

One of the experts stated that blood tests and fecal samples "demonstrated that the members of the Yakye Axa Community suffer significant levels of parasitism and anemia".[252] Furthermore, the analysis of the water used by the community demonstrated the vulnerability of access to this resource:

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[246] *Ibid.* p. 23.
[247] *Ibid.* p. 28.
[248] *Ibid.* p. 28.
[249] *Ibid.* p. 29, 47.
[250] *Ibid.* p. 47.
[251] *Ibid.* p. 50.
[252] *Ibid.* p. 21.

> It was found that the Community has a single source of water which is not suitable for drinking, which is a water deposit or 'tajamar'. This deposit is roughly sixty by forty meters, and its purpose is to store rainwater. This deposit is on the other side of the fence that borders the land that they claim, for which reason the members of the Community have to enter furtively to obtain water for their personal hygiene and for their own use. The water is exposed to contact with wild animals and with animals raised on the estate.[253]

The opinion of this specific expert, along with his public health medic report, was paramount for the Court to establish that the source of water used by the community was employed both for human consumption and personal hygiene. These circumstances, along with the fact that the settlement had no toilet or sanitary facilities, rendered evident that the hygienic conditions of the community's settlement were very precarious.[254]

Specifically concerning the right to life enshrined in article 4 of the American Convention, the Court stated that it "includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated".[255] Accordingly, the Court declared that, in order to protect the right to life, the State must, as a guarantor, ensure at least a minimum standard of living that is compatible with the dignity of the human person, other than also not creating conditions that hinder or render impossible for its population to reach this threshold.[256] Whilst referencing the CESCR' General Comment No. 15, the IACtHR observed:

> Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity. In the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. In this regard, said Committee on Economic, Social and Cultural Rights has highlighted the special vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of obtaining food and clean water.[257]

Given the extreme conditions faced by the Yakye Axa Community, especially since its members would be able to develop their subsistence activities had they not been displaced from their traditional lands, the Court ruled that, despite the periodic attempts of Paraguay to

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[253] *Ibid.* p. 21.
[254] *Ibid.* p. 48.
[255] *Ibid.* p. 84.
[256] *Ibid.* p. 84.
[257] *Ibid.* p. 85-86.

assist the community, the State had not been able to correct the situation of vulnerability and, thus, did not take the appropriate measures to ensure the community's right to a decent life.[258] On the other hand, the IACtHR failed to recognize the responsibility of the State for the deaths of sixteen members of the Yakye Axa Community related to the absence of an appropriate and timely response of the issue, as it stated that it lacked evidence in the matter to establish such connection.[259]

After the violation of the right to a decent life was established, the IACtHR decided that the State had to repair the non-pecuniary damages suffered by the Yakye Axa Community, which include the extreme living conditions undertaken due to the State's in implementing the community's land rights.[260] The Court deemed necessary for the State to create a program to be implemented in the ancestral lands of the community, for the purposes of the supply of drinking water and sanitary infrastructure, as well as the creation of a community development fund, with the allocation of US $ 950.000,00 (nine hundred and fifty thousand USA dollars) for the implementation of education, housing, agricultural and health programs for the benefit of the members of the Community.[261] The deadline for the implementation of this program was two years.[262] Accordingly, even though the IACtHR made a significant effort to individualize the victims, it established collective redress mechanisms.[263]

The Court also decided that, as long as the community remained landless, the State was obliged to supply, immediately and in a regular basis, sufficient drinking water for consumption and personal hygiene of the members of the community.[264] Furthermore, during this transition, the State was under the obligation to provide latrines or any other type of

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[258] *Ibid.* p. 87.
[259] *Ibid.* p. 87-88.
[260] *Ibid.* p. 94.
[261] *Ibid.* p. 94.
[262] *Ibid.* p. 102.
[263] Sílvia Silveira Loureiro, "O Reconhecimento Pela Corte Interamericana de Direitos Humanos Das Vítimas Coletivas Como Sujeitos Do Direito Internacional: Análise Da Evolução Jurisprudencial Em Casos de Reclamos Territoriais Dos Povos Indígenas," *Revista Do Instituto Brasileiro de Direitos Humanos* 12, no. 12 (2012): 383–99. p. 388.
[264] Inter-American Court of Human Rights, "Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005 (Merits, Reparations and Costs)." p. 99.

appropriate toilets for effective and healthy management of the biological waste of the community.[265]

It should be noted that, in this case, there were allegations of the autonomous violations of economic, social and cultural rights under Article 26 of the ACHR. Nonetheless, the IACtHR did not address the issue and opted to develop consideration solely to their violation as derivative rights. This omission was severely criticized by Andres Ramíres, as he claimed that the IACtHR had the duty to rule on the content of all the claims brought before it and to present its reasons for their dismissal.[266]

The most controversial issue pertaining to this judgment was undoubtedly the omission of the Court to recognize the responsibility of the State for the deaths that occurred in the community due to the lack of access to basic goods and services. In his partially dissenting opinion, Judge Abreu Burelli stated that the IACtHR did not employ a consistent evaluation of the evidence, as the elements of the case, such as the partial acquiescence of the State on the issues related to the provision of basic goods and services and the reparations ordered by the Court, "show beyond a doubt that there has been and currently is a lack of basic services, including drinking water, indispensable for the health and life of the members of the Community".[267] Additionally, Judges Cançado Trindade and Ventura Robles expressed that the Court's decision to establish a higher standard of proof on the causal link of the deaths of the individuals, when it had already recognized the lack of the basic conditions of a decent life, was "an aggravating circumstance of the abridgment of the right to life".[268]

On a different note, Judge Fogel, which was the judge *ad hoc* indicated by Paraguay, advocated for a different perspective of the right to life, that encompasses the socio-economic situation of the State and measures to eradicate poverty. He advocates that the adoption of positive measures to fulfill the right to life cannot be limited to specific groups, but must also combat the factors that generate poverty:

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[265] *Ibid.*
[266] Andres Ramírez, "El Caso de La Comunidad Indígena Yakye Axa vs. Paraguay," *Revista IIDH* 41 (2005): 347–64. p. 364.
[267] Alirio Abreu Burelli, "Partially Dissenting Opinion of Judge A. Abreu Burelli on the Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005 (Merits, Reparations and Costs)," 2005. p. 4.
[268] Antônio Augusto Cançado Trindade and Manuel Ventura Robles, "Separate Dissenting Opinion of Judges A. A. Cançado Trindade and M. E. Ventura Robles on the on the Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005 (Merits, Reparations and Costs)," 2005. p. 2-3.

> I believe that, in light of these principles, it is not a matter of protecting one of the human rights embodied in the Inter-American System to the detriment of another or other such rights, or of protecting some complainants in a way that leads to violation of these rights of others also protected by the Convention. In this framework, we must deem it axiomatic that no assistance provided to small groups that are dispersed and/or settled on precarious lands can create conditions that ensure a decent existence
> (...)
> Insisting on supplying food to the members of indigenous communities, with no ending date and without meeting the conditions stated in the previous paragraph, can lead to an unwanted end by creating dependency and weakening their own social protection mechanisms.
> (…)
> The State's duty to adopt positive measures to protect the right to life, even if this involves aid to the vulnerable population groups in a situation of extreme poverty, cannot be limited to them, as said assistance does not attack those factors that generate poverty in general, and especially extreme poverty, and therefore it cannot create said conditions for a decent life.
> (…)
> International responsibility is not limited to the right to international assistance when the State Party cannot attain, on its own, the model set forth in the Covenant, embodied in the International Covenant on Economic, Social and Cultural Rights.[269]

As can be seen, Judge Fogel adopts a very unorthodox approach to socio-economic rights that intends to limit individual justiciability in favor of a systematic effort to eliminate extreme poverty. In turn, if the State does not have the resources to achieve such feat, he claims that the responsibility for the realization of these rights must be shares with other countries. In any case, Judge Fogel's attempt to diminish Paraguay's responsibility in relation to the provision of an adequate standard of life to specific groups and to involve international cooperation as an obligation of other States may be related to his position as a judge *ad hoc*.[270]

The Case of the *Yakye Axa Indigenous Community v. Paraguay* represented an important landmark on the jurisprudence of the IACtHR insofar as, even though the right to life had already been developed in previous cases to encompass the positive protection of a decent life, it was the first to explicitly recognize the State's obligation to ensure the communities' access to water and sanitation services. Hence, the rights to water and sanitation

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[269] Ramon Fogel, "Partly Concurring and Partly Dissenting Opinion of Judge Ramon Fogel on the on the Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005 (Merits, Reparations and Costs)," 2005. p. 10-13.

[270] The issue of the impartiality of *ad hoc* judges has been very controversial since the adoption of the Statute of the PCIJ. The matter continued to draw conflict in international law with the reproduction of the *ad hoc* judges' formula in the Statute of the CIJ and in the American Convention on Human Rights. Ranieri Resende, "Deliberation and Decision-Making Process in the Inter-American Court of Human Rights: Do Individual Opinions Matter?," *Northwestern Journal of Human Rights* 17, no. 1 (2019): 25–50. p. 37-38.

and sanitation were protected as an element of the right to life, not as an independent right. Limited as it may have been at the time, this recognition represented an important step for the establishment of the human rights to water and sanitation in the IASHR.

This case, along with the case law that it inspired, also had an important role in giving visibility to the human rights violations committed against Indigenous Peoples in Paraguay, which enabled the creation of opportunities for political and legal reforms.[271] As such, X argues that these cases evince the structural discrimination faced by Indigenous Peoples in Paraguay, which was recognized by the IACtHR when it acknowledged their historic marginalization.[272]

Despite the symbolic landmark created by the judgement on the *Yakye Axa Indigenous Community v. Paraguay* case, the reparations established by the Court were not implemented by the State. Accordingly, a new judgement was enacted in 2008, which aimed to monitor Paraguay's compliance with 2005's judgement on the merits. The new judgement found that, not only little progress had been made on the acquisition of traditional land for the community, but also the potable water supply provided by the State for the community was insufficient and inadequate. Thus, the IACtHR ruled that Paraguay failed to comply with, among others, the provision of basic goods and services for the subsistence of the members of the community.[273]

The implementation of the judgement is still pending, as the community had to settle for an alternative parcel of land with no public access road and continues to live on extreme conditions while the road is being constructed.[274] Hence, even if the community legally became owner of a land, it is unable to materially exercise its rights of access and use, which entails on the lasting marginalization of the Yakye Axa Indigenous Community. In 2017, a delegation of the IACtHR verified that the community still lived under very precarious

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[271] Valerio Olguín Carvallo, "Derechos Humanos: Comunidades Indígenas y Organizaciones Campesinas y La Disputa Frente al Estado Paraguayo," *Revista Paraguay Desde Las Ciencias Sociales* 12 (2021): 38–71. p. 66.
[272] Paola Pelletier Quiñones, "La 'Discriminación Estrutural' En La Evolución Jurisprudencial de La Corte Interamericana de Derechos Humanos," *Revista IIDH* 60 (2014): 205–15. p. 211.
[273] Inter-American Court of Human Rights, "Case of the Yakye Axa Indigenous Community v. Paraguay, Order of February 08, 2008 (Monitoring Compliance with Judgement)," 2008, https://www.corteidh.or.cr/docs/supervisiones/yakyeaxa_08_02_08-ing.pdf. p. 5-6.
[274] Joel E. Correia, "Adjudication and Its Aftereffects in Three Inter-American Court Cases Brought against Paraguay: Indigenous Land Rights," ed. Kristin Henrard, *Erasmus Law Review* 11, no. 1 (May 2018): 43–56, https://doi.org/10.5553/ELR.000102. p.54-55.

conditions, especially in relation to the provision of water, access to toilets and treatment of residual waters.[275]

2.1.1.2 Case of the *Sawhoyamaxa Indigenous Community v. Paraguay*

The second decision of the IACtHR on the human rights to water and sanitation is extremely similar to the *Yakye Axa Indigenous Community v. Paraguay* case, as it involves analogous circumstances and occurs in the same State. It originated from petition no. 322/2001, received by the Secretariat of the IACommHR on May 15, 2001.

The Sawhoyamaxa Indigenous Community alleged that Paraguay did not ensure the right to ancestral property and, consequently, casted the members of the community into a state of vulnerability. The Commission found the case to be admissible, as provided by the Admissibility Report no. 12/03, and approved the Report on the Merits no. 73/04 in order to recommend Paraguay to, among others, guarantee the members of the community the exercise of their traditional subsistence activities and to adopt any such measures as may be necessary to cure the state of nutritional, medical and health emergency of the community.[276] After the response of the State, the IACommHR decided to file the case before the IACtHR, which occurred on February 3, 2005. The IACtHR decided that it had jurisdiction to hear the case, as Paraguay had consented to the contentious jurisdiction of the Court, as provided by Article 62 of the American Convention.

Accordingly, the IACtHR reaffirmed its methodology for appraising evidence and presented the proven facts, which greatly resemble the *Yakye Axa Indigenous Community v. Paraguay* case. In this regard, the lands of the Sawhoyamaxa Indigenous Community were sold in the 19th century, without their knowledge, through the London Stock Exchange. Non-indigenous occupation of these lands gradually rose in the 20th century, which led the lands to be divided among several private owners. As the Sawhoyamaxa Indigenous Community

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[275] Inter-American Court of Human Rights, "Case of the Yakye Axa Indigenous Community v. Paraguay, Order of May 14, 2019 (Monitoring Compliance with Judgement)," 2019, https://www.corteidh.or.cr/docs/supervisiones/yakye_axa_14_05_19.pdf. p. 7.

[276] Inter-American Commission of Human Rights, "Application to the Inter-American Court of Human Rights in the Case of the Sawhoyamaxa Indigenous Community of the Enxet-Lengua People and Its Members (Case 12.419) against the Republic of Paraguay," 2005, http://www.cidh.org/demandas/12.419%20Sawhoyamaxa%20Paraguay%202feb05.pdf. p. 10.

began to lose access to its ancestral territory, its members had to increasingly depend on their salaries to survive, not being able to develop their subsistence activities. In order to flee the poor living conditions in which they were submitted, the members of the Sawhoyamaxa Indigenous Community created settlements alongside the road from Pozo Colorado to Concepción, in the hope to gain access to their claimed traditional land.

However, the process of recognition of the Sawhoyamaxa Indigenous Community's traditional lands was not effective in securing this community's land rights and its members had to endure extreme living conditions for several years. The vulnerability of this community was recognized by the government in Executive Order no. 3789/1999, which declared the state of emergency of the situation faced by the Sawhoyamaxa Indigenous Community.

Despite the declaration of the state of emergency, the community remained in precarious living conditions. As proven by an expert's statement the community had limited access to water, which was also used by animals.[277] Furthermore, there were only few precarious latrines and most members of the community had to use the open field to relieve themselves. In this regard:

> The most reliable source of drinking water is the rainwater they gather, but it is very scarce because of inadequate storing facilities**.** Thus, the small earth dams located inside the fenced lands claimed by the Sawhoyamaxa Indigenous Community for their own are their main source of water, so its members are forced to break into the premises in hiding to get water for their personal use and hygiene. **The water is** exposed to contact with wild animals and other animals bred on the estate, and it receives the debris flushed by the rain.
> (…)
> Owing to the characteristics of the soil in Chaco, water is not easily absorbed by the earth, so "all that water gathers without draining." To this, it should be added that only a few families have managed to build precarious latrines. To relieve nature, they have to cross the fences surrounding the property, and do their business in plain view of the other members of the Community. When it rains, the stagnant water covers the floor of the huts with the excrement that has been spread behind the fencing. It is needless to point out the immense risk this poses for health.[278]

Accordingly, the IACtHR stated that the right to life is a prerequisite for the enjoyment of other human rights and, as such, no restrictive approach to its interpretation is

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[277] Inter-American Court of Human Rights, "Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006 (Merits, Reparations and Costs)," 2006, https://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf. p. 50.
[278] *Ibid.* p. 15.

admissible.[279] In this sense, the right to life encompasses the duty to guarantee the creation of the conditions that may provide a decent life.[280]

On the other hand, the Court clarified that a State cannot be responsible for all situations in which the right of life is endangered. Considering the several factual limitations of the exercise of the State's authority, the positive obligations must be interpreted in accordance with the means available for their consolidation, in order to avoid the creation of an impossible or disproportionate burden on the State.[281] Hence, for these obligations to arise, it must be determined if the authorities knew or should have known of the circumstances posing an immediate and certain risk to the right to life. Furthermore, it must be ascertained whether the State adopted the necessary measures within its scope of authority and that could be reasonably expected to prevent or avoid the risk.[282]

These considerations are extremely relevant to the present factual case, as the extreme conditions in which the Sawhoyamaxa Indigenous Community lived were not disputed, but, rather, the discussion lied on whether the State had reasonably exercised its authority in order to prevent the community's situation. It was also undisputed that Paraguay had knowledge of the precarious living conditions of the Sawhoyamaxa Indigenous Community.

The Court stated that the main measure to be adopted by the State in order to terminate the extreme situation lived by the community was to provide their traditional lands, where its members could use natural resources for their subsistence activities. As such, even though the State was not responsible for the community's settlement in the public road, it also did not take the adequate measures to relocate them to their ancestral land. Paraguay alleged that the Sawhoyamaxa Indigenous Community refused to move to a provisional location while the issue was solved in the domestic jurisdiction but presented no evidence to support that the offer had been made or that there were possible locations that the community could be sent. Hence, the Court concluded that the State did not implement the necessary measures for the community to leave the public road, which led its members to suffer with inadequate living conditions.[283]

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[279] *Ibid.* p. 80.
[280] *Ibid.* p. 81.
[281] *Ibid.* p. 81.
[282] *Ibid.* p. 81.
[283] *Ibid.* p. 83.

In this case, unlike in the previous one, the IACtHR recognized the responsibility of the State for the deaths that occurred due to the failure of the State to adopt positive measures to prevent the extreme situation endured by the community.[284] The Court found that these measures could be reasonably expected from the State, as it had knowledge of the situation and still did not employ the adequate measures to address to issue. Accordingly, it can be seen that the dissenting opinions issued in the *Yakye Axa Indigenous Community v. Paraguay* case had an impact in the present case, as IACtHR reassessed its standard of proof for the establishment of a causal link between the deaths and the State's omission.

Considering the circumstances of the case, the IACtHR ruled that, other than the restitution of the Sawhoyamaxa Indigenous Community's traditional lands, Paraguay would have to create a fund, allocating an amount of US$ 1.000.000,00 (one million USA Dollars), intended to implement educational, housing, agricultural and health projects, as well as to provide drinking water and to build sanitation infrastructure, for the benefit of the members of the community.[285] The deadline established for the completion of the improvement projects by the implementation committee was two years as from delivery of the lands.[286]

Furthermore, the Court ordered that, while the members of the Community remained landless, the State would have to adopt measures to, among others, supply sufficient drinking water for consumption and personal hygiene.[287] It would also have to set up latrines or other type of sanitation facilities in the settlements.[288]

As can be seen in the decision of the IACtHR, the solution provided for the Sawhoyamaxa Indigenous Community was similar to that presented for the Yakye Axa Indigenous Community. It continued to individualize the victims and, despite individual compensations for the deaths of some victims, it applied majorly collective redress mechanisms.[289] This approach was expected, given the factual similitude of both cases and the short time frame between the judgements. Hence, on the measures adopted for the resolution of the case, the Court was faithful to its jurisprudence and, by reaffirming its

[284] *Ibid.* p. 85.
[285] *Ibid.* p. 100.
[286] *Ibid.* p. 101.
[287] *Ibid.* p. 102.
[288] *Ibid.*
[289] Silveira Loureiro, "O Reconhecimento Pela Corte Interamericana de Direitos Humanos Das Vítimas Coletivas Como Sujeitos Do Direito Internacional: Análise Da Evolução Jurisprudencial Em Casos de Reclamos Territoriais Dos Povos Indígenas." p. 390.

previous decision, it enshrined more legal certainty to the protection of the human rights to water and sanitation in its jurisdiction.

However, differently from the resolution of the case, the construction of the human rights to water and sanitation was slightly modified since the previous judgement. In the *Yakye Axa Indigenous Community v. Paraguay* case, the Court considered that, under the right to life, the State had to ensure at least a minimum standard of living, other than also not creating conditions that hinder or render impossible for its population to reach this threshold.[290] As the State had prejudiced the living conditions of the Yakye Axa Indigenous Community by not ensuring the right to traditional land, it had the duty, as a guarantor, to undertake the necessary measures to ensure living conditions compatible with human dignity. On the other hand, in the *Sawhoyamaxa Indigenous Community v. Paraguay* case, the IACtHR established other criteria for the emergence of positive obligations. The Court stated that, for these obligations to arise, it must be determined if the authorities knew or should have known of the circumstances posing an immediate and certain risk to the right to life, whilst also verifying if the State adopted the necessary measures within its scope of authority and that could be reasonably expected to prevent or avoid the risk.[291] Thus, the Court further limited the responsibility of the State as a guarantor, considering the State's knowledge and scope of authority.

In this case, Paraguay did not manage to indicate an *ad hoc* judge, as its request to appoint Judge Fogel was made after the term expired.[292] However, considering the immense similarity between the cases, it is reasonable to assume that Judge Fogel's opinion would follow the same unorthodox approach employed in the Yakye Axa case.

After two years of the decision on the merits, in 2008, the Court issued a new decision on this case in order to monitor the compliance with the judgement. The IACtHR verified that Paraguay had yet to implement the fund for the indigenous community and that the basic services to be supplied while the community remined landless were insufficient. In this regard, the monthly supply of water was not regular or enough for the satisfaction of the community's

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[290] Inter-American Court of Human Rights, "Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005 (Merits, Reparations and Costs)." p. 84.
[291] Inter-American Court of Human Rights, "Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006 (Merits, Reparations and Costs)." p. 81.
[292] *Ibid.* p. 4.

vital human needs.[293] The Court referenced General Comment 15, of the Committee on Economic, Social and Cultural Rights, to declare that, as the alternative sources of water were not accessible and unsuitable for human consumption, the State had to fulfill its task to provide water for the community, because, otherwise, it would be endangering its members.[294] Furthermore, the State and the community disagreed on the status of the management of biological waste, but the IACtHR was not able to reach a conclusion with the information provided by the parties. Hence, the Court ruled that Paraguay had not complied with these aspects of the judgement and ordered the State to adopt the necessary measures to address these issues.

In 2014, the Paraguayan Senate adopted Law 5194/2014, in order to expropriate 14,404 hectares of land to the community.[295] This legislative landmark was only possible due to the significant social organization and mobilization for the compliance with the judgement.[296] However, even though the community started to use and occupy its rightful traditional lands, their formal transference to them was challenged by two unconstitutionality lawsuits.[297] As such, the community "enjoys de facto usage of their land but limited de jure protection because the property technically remains under the legal control of the ranching

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[293] Inter-American Court of Human Rights, "Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Order of February 2, 2008 (Monitoring Compliance with Judgement)," 2008, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiGqK-D6bf3AhX5Q7gEHTPkBYcQFnoECAcQAQ&url=http%3A%2F%2Fwww.corteidh.or.cr%2Fdocs%2Fsupervisiones%2Fsawhoyamaxa_08_02_08.doc&usg=AOvVaw3F_W894csaVpvac1Rtj-bz. p. 7.

[294] *Ibid.*

[295] Republic of Paraguay, "Ley Nº 5194/2016," 2016, https://www.bacn.gov.py/leyes-paraguayas/4640/declara-de-interes-social-y-expropia-a-favor-del-instituto-paraguayo-del-indigena-indi-para-su-posterior-adjudicacion-a-la-comunidad-indigena-sawhoyamaxa-del-pueblo-enxet-la-finca-n-16786-padron-n-12935-con-una-superficie-de-9105-hectareas-con-2978-metros-cuadrados-y-la-finca-n-16784-padron-n-12936-con-una-extension-de-5299-hectareas-con-4720-metros-cuadrados-ambas-del-distrito-de-villa-hayes-pozo-colorado-del-departamento-presidente-hayes-chaco-pertenecientes-a-las-firmas-kansol-sa-y-roswell-y-cia.

[296] Maximiliano Mendieta Miranda and Julia Cabello Alonso, *Mejorando Los Derechos de Los Pueblos Indígenas a Través de Sistemas Regionales de Derechos Humanos: El Caso de Paraguay* (London: Instituto Internacional de Medio Ambiente y Desarrollo, 2017). p. 6.

[297] Inter-American Court of Human Rights, "Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Order of May 14, 2019 (Monitoring Compliance with Judgement)," 2019, https://www.corteidh.or.cr/docs/supervisiones/sawhoyamaxa_14_05_19.pdf. p. 7.

company that refuses to cede the title".[298] In 2017, the IACtHR still received complaints over the access, by the community, to water and other basic services.[299]

2.1.1.3 Case of the *Xákmok Kásek Indigenous Community v. Paraguay*

As in the cases previously discussed, this litigation involved the precarious living conditions of an indigenous community that was deprived of its traditional lands. The case arose from petition no. 326/2001, received by the Secretariat of the IACommHR on May 15, 2001. After a failed attempt of friendly settlement of the dispute, the IACommHR adopted Report No. 30/08, which concluded that the Xákmok Kásek Indigenous Community was placed in a "vulnerable state with regards to food, medical care, and sanitation that poses a constant threat to the survival".[300] Accordingly, the Commission recommended the State to, among others, to provide adequate goods and services relating to water, education and health care services, and access to the food necessary for their subsistence. As Paraguay only partially complied the recommendations, even with the extension of the deadlines, the IACommHR decided to submit the case to the IACtHR.

Similarly to the Yakye Axa and the Sawhoyamaxa Indigenous Communities, the Xákmok Kásek lived in small and flexible communities, based on hunting, gathering and fishing, until their lands were sold in the London stock exchange in the 19th century.[301] From this point onwards, the community was forced to occupy the role of providing cheap labor for private companies and practice their subsistence activities in different ranches, where they established temporary residence.

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[298] Correia, "Adjudication and Its Aftereffects in Three Inter-American Court Cases Brought against Paraguay." p. 55.
[299] Inter-American Court of Human Rights, "Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Order of May 14, 2019 (Monitoring Compliance with Judgement)." p. 5.
[300] Inter-American Commission of Human Rights, "Application with the Inter-American Court of Human Rights in the Case of Xákmok Kásek Indigenous Community of the Enxet-Lengua People and Its Members (Case 12,420) against the Republic of Paraguay," 2009, https://www.cidh.oas.org/demandas/12.420%20Xakmok%20Kasek%20Paraguay%203jul09%20ENG.pdf.
[301] Inter-American Court of Human Rights, "Case of the Xákmok Kásek Indigenous Community v. Paraguay, Judgement of August 24, 2010 (Merits, Reparations, and Costs)," 2010. p. 14-15.

In the 1990s, the State verified the special vulnerability of the community due to the lack of title to their lands.[302] The indigenous leaders pleaded to the State for a priority in their land claim, considering that they were living in precarious conditions, which was confirmed by the prosecutor on labor matters. The prosecutor noted that the community lived without minimum conditions of hygiene, clothing, space and food.[303] In this context, in 2009, the President of Paraguay issued Decree No. 1830, that declared the state of emergency in the Xákmok Kásek Indigenous Community and ordered the administrative authorities to provide medical care and food to the families until the land claim process was concluded.[304]

In this case, the IACtHR adopted the same construction of the human right to life as previously ruled in its previous case law. It stated that Article 4(1) of the ACHR presumes negative obligations, as it prohibits the arbitrary deprivation of life, as well as positive obligations, that require States to take measures to protect and preserve life.[305] It also highlighted that the responsibility of the State must be considered in the context of the difficulties in the planning and adoption of public policies, additionally to the evaluation of the available resources and competing priorities.[306] Furthermore, the IACtHR states that it has to be verified whether the authorities knew or should have known of the factual risks incurred to the right to life in the specific case, and if they took the adequate measures, within their powers and that could be reasonably expected, to prevent or avoid the risk.[307] This contextual analysis aims to avoid interpretations that place an impossible or disproportionate burden on the State.

As Paraguay had declared a state of emergency pertaining to the Xákmok Kásek Indigenous Community, and had already explicitly recognized their vulnerability, it is undisputed that the State knew about the situation endured by the community. That is why, in this case, the discussion related to the violation of the right to life is mainly focused on the adequality of the measures adopted by the State to address the situation.

Considering the issue of the access to water, the Court employed an expert testimony to establish that the community did not have access to water distribution services since

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[302] *Ibid.* p. 43.
[303] *Ibid.*
[304] *Ibid.*
[305] *Ibid.* p. 42.
[306] *Ibid.* p. 43.
[307] *Ibid.*

2003.[308] Moreover, in light of the information provided by the State, the IACtHR noted that, in 2009, after the state of emergency was declared, the State provided water, in daily quantity, no higher than 2,17 liters/person.[309] During droughts, due to the lack of water tanks or natural water sources near their residence, the community must access a cistern seven kilometers away from their homes.[310]

In this regard, it noted that, according to international standards, such as those provided by the WHO, most people need a minimum of 7,5 liters per day to meet all their basic needs, as well as a quality standard, which consists on a tolerable level of risk.[311] Even though this was a positive step in the case law of the IACtHR, as it provided a standard of due diligence for the measures to be employed by the State, the approach adopted by the Court on quantity and quality of water was rather limited, in comparison with the international standards it referenced.[312]

In any case, the Court concluded that the State did not take the necessary measures to provide water in sufficient quantity and adequate quality to the community, which led to their explosion to risks and diseases.[313] The lack of water was also impaired children to attend school.[314] Following these conclusions, and other aspects discusses in the case in relation to food and health, the Court ruled that "the State has not provided the basic services to protect the right to a decent life of a specific group of individuals in these conditions of special, real and immediate risk".[315]

Pertaining to the deaths that occurred in the Xákmok Kásek Indigenous Community, the Court stated that, even if the State commenced to provide support to the community, it is not relieved from the international responsibility that resulted from its failure to adopt

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[308] Ibid. p. 44.
[309] *Ibid.*
[310] *Ibid.* p. 45.
[311] *Ibid.*
[312] Jimena Murillo Chávarro, "The Right to Water in the Case-Law of the Inter-American Court of Human Rights," *Anuario Colombiano de Derecho Internacional - ACDI* 7, no. 1 (April 25, 2014): 39–68, https://doi.org/10.12804/acdi7.2014.02. p. 57-58.
[313] Inter-American Court of Human Rights, "Case of the Xákmok Kásek Indigenous Community v. Paraguay, Judgement of August 24, 2010 (Merits, Reparations, and Costs)."
[314] *Ibid.* p. 49.
[315] *Ibid.* p. 50.

measures in the past.[316] In addition, the Court stated that many of the individuals died from illnesses that were easily preventable if adequate care was provided.[317]

After the constatation of the violation of the human rights of the Xákmok Kásek Indigenous Community, the IACtHR established the respective reparations to be implemented by the State to redress the community. In this case, the Court was not very strict in the individualization of the victims, as it was in its previous case law, and the focus of the reparations remained in a collective perspective.[318]

In relation to the life conditions of the community, the IACtHR ordered Paraguay to, until the traditional territory or an alternative land is delivered, supply them immediately with, among others, "sufficient potable water for the consumption and personal hygiene", as well as "installation of latrines or any other adequate type of sanitation system".[319] Additionally, in order to ensure the adequacy and regularity of the provision of basic supplies and services, the Court indicated that the State must prepare a study within six months of the publication of the judgement pertaining to the implementation of its obligations. Concerning the provision of potable water, the study should contain the frequency, the method and the amount of water of the deliveries, whilst, on the issue of sanitation, it would have to address the type and number of latrines to be provided.[320] After the draft of the study, which would have to include the perspective of the members of the community, the State would forward it to the Court, which may require the expansion or completion of the study and the respective adaptation in the delivery of basic goods and services.[321] Regarding the non-pecuniary damage suffered by the Xákmok Kásek Indigenous Community, the IACtHR ordered the State to create a community development fund, with the sum of US$ 700.000,00 (seven hundred thousand USA Dollars), which must be used to implement basic goods and services, including drinking water and sanitation infrastructure, in the land to be awarded to the community.[322]

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[316] *Ibid.* p. 53.
[317] *Ibid.* p. 54.
[318] Silveira Loureiro, "O Reconhecimento Pela Corte Interamericana de Direitos Humanos Das Vítimas Coletivas Como Sujeitos Do Direito Internacional: Análise Da Evolução Jurisprudencial Em Casos de Reclamos Territoriais Dos Povos Indígenas." p. 392.
[319] Inter-American Court of Human Rights, "Case of the Xákmok Kásek Indigenous Community v. Paraguay, Judgement of August 24, 2010 (Merits, Reparations, and Costs)." p. 69.
[320] *Ibid.* p. 69-70.
[321] *Ibid.* p. 70.
[322] *Ibid.* p. 73.

The only dissenting opinion issued in this judgement was that of Judge *ad hoc* Augusto Pedrozo, which was indicated by Paraguay. In his opinion, he adopted the same understanding as the Paraguayan *ad hoc* judge in the *Yakye Axa Indigenous Community v. Paraguay* case in relation to the right to life. Judge Pedrozo stated that the right to life includes the obligations to provide social protection and to eradicate extreme poverty, which, must, however, be considered in the light of the socio-economic situation of the State.[323] In this context, he stressed that the evaluation of the right to life should not be limited to providing services to vulnerable groups affected by extreme poverty, but to the elimination of the roots of extreme poverty. Additionally, Judge Pedrozo claimed that the responsibility of the State must be shared with the international community in the matter of the elimination of poverty.[324]

Finally, in relation to the implementation of the judgement, the Court noted that, in 2017, the communities were inhabiting part of its traditional lands, even if they were not yet titled in favor of the community.[325] In 2019, Paraguay started to allocate resources to the community development fund of the Xákmok Kásek Indigenous Community and expressed the commitment to complete the integralization of the fund in the following years.[326] Despite the struggles in the compliance with the judgment, Joel Correia states that the recognition of the rights of the Xákmok Kásek Indigenous Community "disrupted a long-standing status quo of comporting with the state's legal processes", enabling new political and legal perspectives to erode the control of their ancestral lands by private parties.[327] This conclusion is especially pertinent considering that Correia argues that the water scarcity faced by Indigenous Peoples in that region "is not a "natural" result of biophysical geography but a socially produced outcome of how settler waterscapes rework hydrosocial relations along racial lines".[328]

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[323] Augusto Pedrozo, "Concurring and Dissenting Opinion of Judge Augusto Fogel Pedrozo on the Case of the Xákmok Kásek Indigenous Community v. Paraguay, Judgement of August 24, 2010 (Merits, Reparations, and Costs)," 2010. p. 4-5.
[324] *Ibid.* p. 6.
[325] Inter-American Court of Human Rights, "Case of the Xákmok Kásek Indigenous Community v. Paraguay, Order of May 14, 2019 (Monitoring Compliance with Judgement)," 2019. p. 6.
[326] *Ibid.* p. 13-14.
[327] Joel E. Correia, "Reworking Recognition: Indigeneity, Land Rights, and the Dialectics of Disruption in Paraguay's Chaco," *Geoforum* 119 (February 2021): 227–37, https://doi.org/10.1016/j.geoforum.2019.11.014. p. 233.
[328] Joel E. Correia, "Between Flood and Drought: Environmental Racism, Settler Waterscapes, and Indigenous Water Justice in South America's Chaco," *Annals of the American Association of Geographers* 112, no. 7 (October 3, 2022): 1890–1910, https://doi.org/10.1080/24694452.2022.2040351. p. 1892.

2.1.2 Water and Conditions of Imprisonment

The cases related to the conditions of imprisonment are connected with Article 5 of the ACHR, which requires the State to respect the physical, mental, and moral integrity, as well as prohibits torture or cruel, inhuman, or degrading punishment or treatment.[329] As such this provision imposes on States the duty to treat all persons deprived of their liberty with respect for their inherent dignity. In this sense, the responsibility of the State in relation to the right to humane treatment arises not only when the lack of basic conditions of imprisonment are a form of punishment, but also if there is a failure in the provision of public services that are necessary for the safeguard of human dignity. In this regard, the cases focus mainly on the standards of availability and quality of basic services for persons that, for reasons beyond their control, are unable to access them on their own.

In the Case of López Alvarez v. Honduras (2006), the IACtHR considered that the conditions of imprisonment of the victim were not consistent with human dignity and with the State's duty as a guarantor of the detainees' rights.[330] In this specific case, the Court ascertained that the criminal establishments were overpopulated and lacked adequate hygiene conditions and drinkable water.[331] As such, the IACtHR ordered the State to adopt measures in order to ensure an adequate diet, medical attention, and physical and sanitary conditions to inmates pursuant with the international standards on the subject.[332]

Additionally, in the Case of *Vélez Loor v. Panama* (2010), the Court considered that the failure of the State to provide minimum conditions of life, including the provision of safe and sufficient water to detainees "constitutes a serious failure by the State in its duty to guarantee the rights of those held in its custody, given that the circumstances of incarceration prevent detainees from satisfying their own personal basic needs by themselves".[333] The Court also recalled that United Nations Standard Minimum Rules for the Treatment of Prisoners establish that prisoners shall be provided with water and with toilets as are necessary for health and cleanliness, as well as drinking water whenever needed. These standards were

[329] Organization of American States, "American Convention on Human Rights."
[330] Inter-American Court of Human Rights, "Case of López-Álvarez v. Honduras, Judgment of February 1, 2006 (Merits, Reparations and Costs)," 2006. p. 45-46.
[331] *Ibid.* p. 33.
[332] *Ibid.* p. 69.

acknowledged and endorsed by the IACtHR, which also referenced the recognition of the human rights to water and sanitation by UNGA Resolution No. 64/292 to reinforce the importance of these measures.[334] In light of these parameters, the Court found that there was a problem with water services in the specific case, as evidence suggested that there were frequent shortages of water supply and overflow of sewage.[335] Hence, the Court deemed necessary for the State to correct these issues and conform to international standards of conditions of imprisonment.

Lastly, in the Case of *Pacheco Teruel et al. v. Honduras* (2012), the IACtHR verified that, in the factual circumstances evaluated, the imprisonment conditions were precarious, as the water service was inadequate and there was no running water.[336] In this context, the Court recalled its jurisprudence to reiterate the standards on prison conditions and the State's obligations in relation to persons deprived of liberty. Specifically in relation to water, the IACtHR established that detainees "must have access to potable water for personal consumption and to water for personal hygiene", and that the "lack of drinking water constitutes grave negligence by the State with regard to its obligation of guarantee to those in its custody".[337] Pertaining to sanitation, the Court reaffirmed that latrines must be hygienic and offer privacy.[338]

2.1.3 Indigenous Communities and the Traditional Use of Water Resources

In a different perspective from the cases related to the right to life, there is a precedent in the case law of the IACtHR that focuses on the protection of the water resources, not only on its supply to vulnerable individuals and groups. The Case of the *Saramaka People v. Suriname* originated from petition no. 12.338/2000, received by the Secretariat of the IACommHR on October 27, 2000. The Commission recommended the State, on the

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[333] Inter-American Court of Human Rights, "Case of Vélez Loor v. Panama, Judgement of November 23, 2010 (Preliminary Objections, Merits, Reparations and Costs)," 2010. p. 64.
[334] *Ibid.*
[335] *Ibid.* p. 63.
[336] Inter-American Court of Human Rights, "Case of Pacheco Teruel et al. v. Honduras, Judgement of April 27, 2012 (Merits, Reparations and Costs)," 2012. p. 19.
[337] *Ibid.* p. 20.
[338] *Ibid.* p. 21.

Admissibility and Merits Report No. 09/06, among others, to abstain from causing or allowing third parties to cause environmental harm to the natural resources in the territory of the Saramaka People.[339] Then, the IACommHR filed the case before the IACtHR on June 16, 2006. The IACtHR decided that it had jurisdiction over the case, in accordance with Article 62 (3) of the American Convention.

By interpreting the right to property in light of its case law, the Court stated that Article 21 of the ACHR secures "the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving there from".[340] In this context, the right to the use and enjoyment of the natural resources that lie on and within the land, including subsoil natural resources flows from the right of the community to use and enjoy their territory in accordance with their traditions and customs.[341]

Recalling the cases of the Yakye Aya and Sawhoyamaxa Indigenous Communities, the Court declared that not only the cultural and economic survival of indigenous and tribal peoples depend on their access and use of the natural resources in their territory, but also the protection of their right to property would be void if it did not encompass the traditional use of natural resources.[342] As such, "water, for example, is a natural resource essential for the Saramakas to be able to carry out some of their subsistence economic activities, like fishing".[343] Hence, the Court held that Article 21 of the American Convention protects the natural resources traditionally used and that are necessary for the indigenous community's survival.[344]

It is evident that all exploration and extraction activities in the territory of the Saramaka may impact to a greater or lesser extent the enjoyment of natural resources for the subsistence of the indigenous community. However, the Court stated that the right to property

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[339] Inter-American Commission of Human Rights, "Application to the Inter-American Court of Human Rights in the Case of 12 Saramaka Clans (Case 12.338) against the Republic of Suriname," 2006, http://www.cidh.org/demandas/12.338%20Saramaka%20Clans%20Suriname%2023%20junio%203006%20ESP.pdf.

[340] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations and Costs)," 2007, https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf. p. 26.

[341] *Ibid.* p. 36-37.

[342] *Ibid.*

[343] *Ibid.*

[344] *Ibid.*

enshrined in Article 21 of the American Convention should not be interpreted in a way that prevents the State from granting any type of concession for the exploration or extraction of natural resources within the territory of the Saramaka People.[345]

Accordingly, the Court noted that, while clean natural water is essential for the subsistence of the Saramaka People, it is likely to be affected by extraction activities related to other natural resources not used for traditional or essential uses of the indigenous community.[346] Accordingly, the IACtHR recalled its case law to establish the criteria for limiting the right to property under Article 21 of the ACHR. In this regard, the restrictions must be: (i) previously established by law; (ii) necessary; (iii) proportional; and (iv) with the aim of achieving a legitimate objective in a democratic society.[347]

Additionally, the restrictions of the Indigenous Peoples' right to property must not lead to the denial of their survival. To address this safeguard, the IACtHR delineated three due diligence requirements for the development of activities that might affect Indigenous Peoples' land and natural resources.

The first requirement pertains to the effective participation of the members of the community, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan in their traditional territory.[348] This safeguard confers upon States the obligation to accept and disseminate information, in a context of constant communication with the Indigenous Peoples.[349] The consultations must occur in the early stages of the plan, in order to provide time for internal discussion within the community and the possibility of feedback to the State.[350] The IACtHR also stressed that the consultations must ensure access to relevant information, such as environmental and health risks, to support the decision of the community, which shall follow the traditional decision-making process of the Indigenous Peoples.[351]

Specifically in relation to large-scale projects that would have a major impact within Indigenous Peoples' territory, the Court enunciated the duty of the State to obtain their free,

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[345] *Ibid.*
[346] *Ibid.*
[347] *Ibid.* p. 38.
[348] *Ibid.*
[349] *Ibid.* p. 40.
[350] *Ibid.*
[351] *Ibid.*

prior, and informed consent.[352] This obligation is stricter than the duty to consult, as it requires effective participation, in accordance with the Indigenous Peoples' traditions and customs, as a necessary precondition for the development of the project discussed. Therefore, in these exceptional circumstances, the express acquiescence of the Indigenous Peoples is required, additionally to their involvement in the procedure of authorization by the State.

The second requirement consists of the guarantee of a reasonable benefit from the utilization approved in the territory of Indigenous Peoples.[353] This condition is a representation of the just compensation owed to Indigenous Peoples due to the restriction of their right to property.[354]

Finally, the third requirement states that the State shall not grant concessions in Indigenous Peoples' territory "unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment".[355] This condition is highly related to the duty to consult, as it enables the evaluation of risks and circumstances that are essential for an informed decision-making process.

In any case, as argued by Marcos Orellana, even if these three criteria are met, it would be inconsistent with the approach adopted by the Court if the State were to implement a project that might affect the survival of Indigenous Peoples.[356] He contends that "if the natural resource affected is essential for survival, then payment of compensation quantifies the price of the group's existence", which would be inadmissible in consideration of their human right to life.[357] Following a similar reasoning, Lisl Brunner states that Indigenous Peoples enjoy an internal right to self-determination and possess, to some extent, a right to benefit from their natural resources without interference.[358]

In the case of the Saramakas, the IACtHR assessed that the concessions granted by Suriname led to the blockage of numerous creeks, which were the primary source of water for

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[352] *Ibid.* p. 41.
[353] *Ibid.* p. 38.
[354] *Ibid.* p. 41.
[355] *Ibid.* p. 38.
[356] Marcos A. Orellana, "Saramaka People V. Suriname. Judgment (Preliminary Objections, Merits, Reparations, and Costs)," *American Journal of International Law* 102, no. 4 (October 2008): 841–47, https://doi.org/10.2307/20456684. p. 847.
[357] Ibid.
[358] Lisl Brunner, "The Rise of Peoples' Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights," *Chinese Journal of International Law* 7, no. 3 (October 1, 2008): 699–711, https://doi.org/10.1093/chinesejil/jmn031. p. 708-710.

the community.[359] In this regard, the expert witnesses testified that these projects rendered the community without water for drinking, cooking, washing, irrigation, watering gardens, and catching fish.[360] As a consequence, subsistence farms became less productive or even had to be abandoned, and the forest was rendered incapable of producing traditional Saramaka agricultural crops.

Considering these unlawful limitations on the Saramakas' right to property, the IACtHR ordered Suriname to establish a community development fund, by allocating US$ 600.000,00 (six hundred thousand United Stated Dollars), for the benefit of the Saramakas.[361] The fund would be directed towards the financing of educational, housing, agricultural and health projects, as well as providing electricity and drinking water. Furthermore, the Court required the State to, among others, remove or amend the legal provisions that restrict the Saramakas' right to property, additionally to adopting legislative, administrative and other measures to ensure effective and fully informed consultations, to establish benefit-sharing mechanisms and to verify the conduction of environmental and social impact assessments before the implementation of projects that might affect the community.[362]

This case was a landmark for the clear identification, by the IACtHR of the violation of the rights of the community as a whole, and not only of its individual members.[363] By comparison, in its previous case law, the Court tended to limit itself to the protection of individual rights and even exhaustively listed the victims of each case, even though it did not have any restrictions to collective redress mechanisms.

The IACtHR verified that the community development fund was created by the State in 2009 and the sum specified in the judgement was entirely allocated.[364] Additionally, even though there were reservations in 2011 in relation to the management of the fund, these

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[359] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations and Costs)." p. 45.
[360] *Ibid.*
[361] *Ibid.* p. 58-59.
[362] *Ibid.* p. 56-57.
[363] Lucas Lixinski, "Case of the Kaliña and Lokono Peoples v. Suriname," *American Journal of International Law* 111, no. 1 (January 2017): 147–54, https://doi.org/10.1017/ajil.2017.5. p. 152.
[364] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname, Order of September 26, 2018 (Monitoring Compliance with Judgement)," 2018, https://www.corteidh.or.cr/docs/supervisiones/saramaka_26_09_18.pdf. p. 5.

preoccupations did not persist in the observations of the community, which led the Court to consider this part of the judgement completely implemented by the State.[365]

However, in relation to the modification of its legislation, Suriname indicated that the measures established by the Court were complicated, if not unattainable.[366] On this issue, the IACtHR invoked Article 27 of the VCLT, which determines that States shall not employ internal law as justification for the failure to perform a treaty. In the perception of the Court, these obligations do not stem necessarily from the supremacy of international law, but as a result of the sovereign commitment of States.[367] Nonetheless, the State still failed to present information in relation to the fulfillment of these measures, which was heavily criticized by the Court.[368]

2.2 The Human Rights to Water and Sanitation as Autonomous Rights

There is no denying that the IACtHR made significant contributions to economic, social and cultural rights, in general, and especially to the human rights to water and sanitation, by employing its derivation technique. Nonetheless, there were arguments that favored the autonomous justiciability of these rights, as their indirect protection placed them in a subsidiary position in relation to civil and political rights.[369]

In this regard, during the drafting procedure of the ACHR, Chile and Uruguay presented propositions to incorporate economic, social and cultural rights to the convention, but the States decided to adopt the predominant solution in the drafting of human rights treaties at the time, which was to elaborate an instrument focused on civil and political rights.[370] In its text, the ACHR delineates civil and political rights in its Chapter II (Articles 3 to 25) and only provides for a sole disposition on economic, social and cultural rights in Chapter III (Article 26):

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[365] *Ibid.*
[366] *Ibid.* p. 13-14.
[367] *Ibid.*
[368] *Ibid.* p. 15-16.
[369] Eduardo Mac-Gregor Poisot, "Social Rights in the Jurisprudence of the Inter-American Court of Human Rights," in *Research Handbook on International Law and Social Rights*, by Christina Binder et al. (Edward Elgar Publishing, 2020), 173–87, https://doi.org/10.4337/9781788972130.00020.p. 176.
[370] Joaquín Mejía, "Aspectos Teóricos y Normativos de La Justiciabilidad de Los Derechos Económicos, Sociales y Culturales," *Revista IIDH* 51 (2010): 55–112. p. 59.

> Article 26. Progressive Development
>
> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.[371]

In its initial activities, the IACtHR reaffirmed that the differences between civil and political rights and economic, social and cultural rights was not a rigid and invariable limit, neither the result of an ontological condition, but only a repercussion of the development of international law.[372] However, the initial comprehension of Article 26 was not related to the protection of human rights, but objectives and patterns of conducts for States in the realm of economic, social and cultural policies.[373]

Later, the Protocol of San Salvador provided some grounds for the autonomous consideration of economic, social and cultural rights. For instance, it enunciates that everyone "shall have the right to live in a healthy environment and to have access to basic public services".[374] However, Article 19(6) of the Protocol of San Salvador states that only the right to trade union organization, prescribed in Article 8(a), and the right to education, regulated by Article 13, may be brought to the IACommHR and to the IACtHR.[375]

In light of the limitations of the San Salvador Protocol, the Article 26 of the ACHR began to receive increasing attention by the IACtHR. It is interesting to note that the violation of Article 26 had already been claimed in several cases, including some pertaining to water and sanitation, such as in the Case of the Yakye Axa Indigenous Community, but, for a long period, the Court preferred to consider economic, social and cultural rights as derivative rights.[376] It was only in the Case of *Acevedo Buendía et al. v. Perú* (2009) that the Court started to integrate Article 26 in its case law. In this case, the IACtHR assessed the *travaux*

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[371] Organization of American States, "American Convention on Human Rights."
[372] Mejía, "Aspectos Teóricos y Normativos de La Justiciabilidad de Los Derechos Económicos, Sociales y Culturales." p. 61.
[373] Antônio Augusto Cançado Trindade, "La Justiciabilidad de Los Derechos Económicos, Sociales y Culturales En El Plano Internacional," *Lecciones y Ensayos* 69 (1997): 53–104. p. 66
[374] Organization of American States, "Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)."
[375] *Ibid.*
[376] Christian Courtis, "Artículo 26. Desarollo Progresivo," in *Convención Americana sobre Derechos Humanos: comentada*, ed. Christian Steiner and Patricia Uribe Granados, Primera edición (Distrito Federal, México,

préparatories of the ACHR to conclude that Article 26 is subject to the general obligations that are applicable to the other rights prescribed by the convention.[377] Manuel Ventura Robles highlights that, in this case, the IACtHR created grounds for the accountability in the implementation of economic, social and cultural rights and for the justiciability in case of regressive measures.[378]

This has been, for a long time, one of the most controversial issues among judges and scholars in relation to the jurisdiction of the IACtHR. On one side, there were claims that economic, social and cultural rights were not mere directives, but binding and justiciable obligations that were in equal footing with civil and political rights,[379] The defenders of this conception advocated that the autonomous justiciability of economic, social and cultural rights was not only possible under Article 26 of the ACHR, but also necessary in light of the *pro persona* principle.[380]

In another perspective, there are many critics of the autonomous justiciability of economic, social and cultural rights in the IASHR. For instance, James Cavallaro and Emily

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Bogotá, Colombia: Suprema Corte de Justicia de la Nación ; Konrad Adenauer Stiftung, Programa Estado de Derecho para Latinoamérica, 2014). p. 656.

[377] "99. Before entering into the analysis of these two aspects, the Court deems appropriate to make some general considerations in this respect. In this sense, the Tribunal notes that the content of Article 26 of the Convention was the subject-matter of an intense debate in the preparatory works of the Convention, as a result of the States Parties' interest to assign a "direct reference" to economic, social and cultural "rights"; "a provision establishing certain legal mandatory nature [...] in its compliance and application"; as well as "the [respective] mechanisms [for its] promotion and protection", since the Preliminary Draft of the treaty prepared by the Inter-American Commission made reference to such mechanisms in two Articles that, according to some of the States, only "contemplated, in a merely declarative text, the conclusions reached in the Buenos Aires Conference." The review of said preparatory works of the Convention also proves that the main observations, upon which the approval of the Convention was based, placed a special emphasis on "granting the economic, social and cultural rights the maximum protection compatible with the peculiar conditions to most of the American States." In this way, as part of the debate in the preparatory works, it was also proposed "to materialize the exercise of [said rights] by means of the activity of the courts. 100. Furthermore, it is pertinent to note that even though Article 26 is embodied in chapter III of the Convention, entitled "Economic, Social and Cultural Rights", it is also positioned in Part I of said instrument, entitled "State Obligations and Rights Protected" and, therefore, is subject to the general obligations contained in Articles 1(1) and 2 mentioned in chapter I (entitled "General Obligations"), as well as Articles 3 to 25 mentioned in chapter II (entitled "Civil and Political Rights")." Inter-American Court of Human Rights, "Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Perú, Judgment of July 1, 2009 (Preliminary Objection, Merits, Reparations and Costs)," 2009. p. 32.

[378] Manuel Ventura Robles, "Impacto de Las Reparaciones Ordenadas Por La Corte Interamericana de Derechos Humanos y Aportes a La Justiciabilidad de Los Derechos Económicos, Sociales y Culturales," *Revista IIDH* 56 (2012): 139–56. p. 153.

[379] Victor Bazán, "Un Desafío Fundamental Para El Sistema Interamericano de Derechos Humanos: La Justiciabilidad Directa de Los Derechos Económicos, Sociales y Culturales," *Revista Europea de Derechos Fundamentales* 25 (2015): 61–98. p. 62-63.

[380] Ibid. p. 90-93.

Schaffer contend that Article 26 of the ACHR cannot be read as establishing any specific rights or duties.[381] They considered the expansion of the jurisdiction of the IACtHR to be a very dangerous option, as it was contrary to the literal interpretation of the ACHR and the limitation on the justiciability of economic, social and cultural rights by Article 19 of the San Salvador Protocol.[382] In particular, these reluctances are deeply rooted in the traditional rule of interpretation of international law established by the VCLT.[383]

Naturally, these academic clashes had a direct impact on the IACtHR's understanding on the matter. These reservations influenced the case law of the IACtHR, as is demonstrated by the gradual and conflictive development of the autonomous justiciability of economic, social and cultural rights, and remained strongly present in the dissenting opinions of the judges in the cases that discusses the issue.

It is in this context that the Court declared an autonomous violation to Article 26 in the *Lagos del Campo v. Peru* case (2017). In this case, the IACtHR employed the *pro persona* principle, enshrined in Article 29 of the ACHR, to recognize an autonomous right to job security, which was not expressly provided for in the convention.[384] This decision represented an opening for the consideration of economic, social and cultural rights and led the specialized scholarship to dwell on which rights should be addressed in light of the new possibilities. Some of the main issues that emerged were the protection of the environment and the role of sustainable development in a human rights context.[385]

This decision of the Court sets the panorama in which the discussion of an autonomous human right to water in the IASHR begins to rise. The IACtHR firstly enunciated a human right to a healthy environment in the *Advisory Opinion No. 23/17* (OC-23/17), and later declared an autonomous human right to water in the case of the *Indigenous Communities*

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[381] James Cavallaro and Emily Schaffer, "Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas," *Hastings Law Journal* 56 (2004): 217–82. p. 225.
[382] Ibid. p. 268.
[383] Oswaldo R. Ruiz-Chiriboga, "The American Convention and the Protocol of San Salvador: Two Intertwined Treaties: Non-Enforceability of Economic, Social and Cultural Rights in the Inter-American System," *Netherlands Quarterly of Human Rights* 31, no. 2 (June 2013): 159–86, https://doi.org/10.1177/016934411303100203. p. 165.
[384] Inter-American Court of Human Rights, "Case of Lagos Del Campo v. Peru, Judgement of 31, 2017 (Preliminary Objections, Merits, Reparations and Costs)," 2017. p. 47.
[385] Jorge Calderón Gamboa, "Consolidando Los Derechos Económicos, Sociales, Culturales y Ambientales En El Sistema Interamericano: La Justiciabilidad Directa En La Sentencia Lagos Del Campo y La Relatoría DESCA," in *70º Aniversario de La Declaración Universal de Derechos Humanos: La Protección Internacional*

of the Lhaka Honhat (Our Land) Association v. Argentina, with a close connection with the human right to a healthy environment.

2.2.1 *Advisory Opinion No. 23/17*: The Environment and Human Rights

In 2017, the IACtHR issued the OC-23/17, which concerned the interrelation between the environment and the protection of the human rights to life and personal integrity. In this context, the IACtHR provided the first fundaments for the establishment of the rights to water and sanitation as autonomous rights in the IASHR.

The advisory opinion was requested by Colombia pursuant Article 64(1) of the ACHR and envisioned the clarification as to the position of the IACtHR on the interpretation of the ACHR in relation to the risks involved in the construction and development of major infrastructure projects on the environment. Colombia formulated questions to the IACtHR pertaining to the exercise of jurisdiction in the framework of the ACHR, to the due diligence requirements for the implementation of major infrastructure project and the connection of these obligations with those emanating from international environmental law.

Regarding its advisory jurisdiction, the IACtHR reinforced that it had full authority and competence to interpret any article of the ACHR, even those of procedural nature.[386] Additionally, Article 64(1) of the ACHR establishes that the advisory function of the IACtHR is not limited to the ACHR, as it also encompasses other treaties concerning the protection of human rights adopted by American States.[387] In relation to this provision, the IACtHR stated that its authority in relation to other treaties is broad and non-restrictive, encompassing the interpretation of any provision related to the protection of human rights, including those established in bilateral or multilateral treaties, whatever the main purpose of the treaty.[388]

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de Los Derechos Humanos En Cuestión, ed. Carol Proner et al. (Valencia: Tirant lo Blanch, 2018), 343–54. p. 351.

[386] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17 of November 15, 2017 (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)," 2017, https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf. p. 11.

[387] Organization of American States, "American Convention on Human Rights."

[388] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17." p. 11-12.

It should be noted that the purpose of the IACtHR's advisory opinions is to assist States in the compliance with their international human rights obligations, clarify their meaning, object and purpose, as well as assist in the definition of public policies to protect human rights.[389] Accordingly, the Court specified that the OC-23/17 would be directed towards the clear and systematic identification of the obligations of States in relation to the protection of the environment in the light of obligations to respect and ensure human rights to all persons subject to their jurisdiction.[390]

Prior to the enunciation of the substantive elements of the advisory opinion, the IACtHR also deemed necessary to point out the methods and premises for the interpretation criteria of the ACHR and other applicable international instruments. The Court emphasized the recourse to the VCLT, that establishes the interpretation in good faith of the ordinary meaning of the terms employed, in light of the object and purpose of the treaty. On this subject, the Court specifies that the object and purpose of the ACHR is "the protection of the fundamental rights of the human being".[391] As such, the provisions of the ACHR must be interpreted in view of the values that it seeks to safeguard, which leads to the search for the "best perspective" for the protection of the individuals.[392]

Also concerning the interpretation parameters, the IACtHR highlighted the importance of the *pro persona* principle, codified in Article 29 of the ACHR, that establishes the prohibition of the interpretation of any provisions of the convention in a way that restricts the enjoyment or exercise of any right or freedom.[393] Additionally, the Court emphasized that human rights treaties are living instruments, which must be considered in an evolutive perspective, in accordance with the contextual circumstances and conditions.[394]

The Court concludes its remarks on the issue of interpretation with a note on the consideration of obligations emanating from international environmental law and their effects for the proposes of the advisory opinion. It established that, in consonance with the systemic interpretation of treaties embodied in the VCLT, the extensive set of customary rules sedimented in the realm of environmental protection must be taken into account for the

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[389] *Ibid.* p. 13-14.
[390] *Ibid.* p. 13.
[391] *Ibid.* p. 19.
[392] *Ibid.*
[393] *Ibid.*
[394] *Ibid.*

clarification of the pertinent obligations under the ACHR.[395] As such, the IACtHR pointed out that, even though it was not its role to interpret international environmental law instruments, their principles, rights and obligations could evidently provide substantial contributions to the scope of the environmental obligations to be ascertained in the framework of the ACHR.[396]

With respect to the relationship between the protection of the environment and human rights, the IACtHR stated that environmental degradation and climate change undeniably affect the realization of human rights.[397] In this context, the Court emphasized that Article 26 of the ACHR protects right derived from the OAS Charter and reiterated the indivisibility of the first dimension (civil and political rights) and the second dimension (economic, social and cultural rights) of human rights.[398]

Furthermore, pursuant article 26 of the ACHR, the IACtHR recognized the human right to a healthy environment, which, as an autonomous right, "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".[399] In this regard, the Court noted a tendency of legislative and judicial recognition of the legal personality of nature in several States and stressed that other living organisms deserve a shelter in their own right.[400] The IACtHR elucidated that the human right to a healthy environment has both individual and collective connotations. In the individual facet, this right deals with the direct and indirect impacts of environmental degradations to the individual, whilst the collective dimension pertains to the universal value of environmental integrity that is due to present and future generations.[401]

Therefore, this decision adds a new layer of protection to water resources in the human rights framework, not intertwined with the safeguard of individuals, but of nature itself, as prescribed by the right to a healthy environment. That is precisely why the Court underscored that the human right to a healthy environment is not to be confused with the environmental components that emerge from the protection of other rights.[402] These rights are

[395] *Ibid.* p. 20.
[396] *Ibid.*
[397] *Ibid.* p. 21.
[398] *Ibid.* p. 25.
[399] *Ibid.* p. 28.
[400] *Ibid.*
[401] *Ibid.* p. 26.
[402] *Ibid.* p. 28.

complementary and address the same issue through different perspectives and normative elements.

In any case, the Court recognized that several human rights are particularly vulnerable to environmental degradation, as is the case of the human rights to water and sanitation, and the effects of these impacts may be felt with more intensity by marginalized groups.[403] The groups that depend on environmental resources, such as river basins, for economic or subsistence purposes, are highly affected by the deterioration of the environment.[404]

In relation to the human rights to water and sanitation, the IACtHR reiterated in OC-23/17 the importance of the access to water in the conditions required for a decent life, emphasizing that it includes access for personal and domestic use, that encompasses consumption, sanitation, laundry, food preparation, and personal and domestic hygiene, and may also require additional water resources based on health, climate and working conditions.[405] The Court stressed that these rights are of progressive realization, but comprise obligations of immediate effect, such as non-discrimination and the adoption of measures for their realization.[406] Access to water is particularly vulnerable to pollution, as the harmful effects of environmental degradation directly affect availability and quality of water resources.

Beyond these obligations, the State must also adopt positive measures to ensure the right to life, both preventing third parties from harming the conditions for the exercise of a decent life and guaranteeing the essential minimum of water for individuals who are unable to access it.[407] In regard to this essential minimum, the Court stated that, in the event of the absence of resources to comply with these obligations, the State must demonstrate that it employed all measures within its power, as a matter of priority, to attain this objective.[408]

In this regard, the IACtHR clarified that the obligation to respect the right to life entails the restriction of the exercise of a State's powers, as it must refrain from any practice or activity that denies or restricts access to the requisites of a decent life, such as adequate water and food.[409] The State must also prevent unlawfully pollution that has a negative impact

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[403] *Ibid.* p. 29-30.
[404] *Ibid.* p. 31.
[405] *Ibid.* p. 46-47.
[406] *Ibid.* p. 47.
[407] *Ibid.* p. 49-50.
[408] *Ibid.*
[409] *Ibid.* p. 48-49.

on the individual access to the conditions of a decent life, as in the case of the dumping of waste from State-owned facilities in ways that affect the access or quantity of potable water.[410] However, these obligations must be ascertained in a way that does not impose an impossible or disproportionate burden on the State, given that the adoption of public policies and operational choices are made in a context of strategic allocation of resources in accordance with contending priorities.[411]

In relation to the obligation of prevention of the violation of human rights by third parties, the IACtHR specified that, as an obligation of means, the mere occurrence of the violation of a right does not entail the State responsibility.[412] In fact, the State must adopt all necessary measures to prevent the harm, such as those of legal, political, administrative and cultural nature, as well as establish the adequate mechanisms to ensure punishment and compensation for wrongful acts.[413] It should be noted that the Court adopted a precautionary approach, that is, it established that these measures must be undertaken not only when there is scientific certainty of the probability of the occurrence of environmental damage, but also in the cases where there are plausible indications that this harm might exist.[414] The adoption of the precautionary approach relied on the *pro persona principle* and represented an important landmark for the reinforcement of the precautionary principle in international law.[415]

Pertaining to the positive measures directed towards the provision of goods and services, the State must adopt measures that assist individuals and groups to exercise their rights. To this end, the State must disseminate information on the use and protection of water resources, or even guarantee an essential minimum of water to individuals or groups who, for reasons beyond their control, are unable to access it.[416] If the State fails to comply with these minimum standards, it must demonstrate that it employed every means at its disposal to satisfy, as a matter of priority, these core obligations.[417]

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[410] *Ibid.*
[411] *Ibid.* p. 49-50.
[412] *Ibid.*
[413] *Ibid.*
[414] *Ibid.* p. 72.
[415] Lucas Carlos Lima, "The Protection of the Environment before the Inter-American Court of Human Rights: Recent Developments," *Rivista Giuridica Dell'Ambiente* 3 (2020): 495–522. p. 502.
[416] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17." p. 50.
[417] *Ibid.*

Moreover, the Court dealt with the procedural obligations that emanate from the human right to a healthy environment, which also concern the safeguards applicable to water resources. In this respect, concerning the right to access to information, regulated by Article 13 of the ACHR,[418] the IACtHR stated that information on activities and projects that could have an impact on the environment are clearly of public interest and constitutes the basis for the exercise of other rights, such as public participation.[419] The right to information has a passive facet, that requires the State to provide public information when required, and an active side, which imposes on the State the obligation to promote transparency on issues of public interest, including the provision of active provision of information on environmental quality, environmental legislation and policy, as well as other aspects that may interfere with the enjoyment of human rights.[420]

Regarding public participation, this right is broadly protected by Article 23 of the ACHR, which safeguards the opportunity to take part in public affairs.[421] The IACtHR declared that this right encompasses the obligation of the State to ensure public participation, without discrimination, at all stages in the decision-making and in policies that may affect the environment.[422]

In relation to access to justice, the Court specified that the State must ensure that environmental standards and procedural rights are enforced and provide redress for eventual violations, including remedies and reparations.[423] This right must be complied with in light of the due process established by law.[424]

The OC-23-17 was a milestone for the protection of the environment in the human rights framework. However, it was not adopted without criticism from some of the judges of IACtHR. In this regard, Judge Vio Grossi disputed the autonomous recognition of the human right to a healthy environment, as he contended that "the only rights susceptible of being

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[418] "Article 13. Freedom of Thought and Expression. 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice". Organization of American States, "American Convention on Human Rights."
[419] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17." p. 83-84.
[420] *Ibid.* p. 86.
[421] "Article 23. Right to Participate in Government. 1. Every citizen shall enjoy the following rights and opportunities: a. to take part in the conduct of public affairs, directly or through freely chosen representatives". Organization of American States, "American Convention on Human Rights."
[422] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17." p. 89.
[423] *Ibid.* p. 90.

subject to the system of protection established in the Convention are those "recognized" in it" and that Article 26 of the ACHR is not an appropriate legal ground for the recognition of autonomous rights.[425] That was also the position of Judge Sierra Porto, who reiterated "the non-existence of the direct justiciability of the economic, social and cultural rights under Article 26 of the American Convention".[426]

2.2.2 Case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*

The dispute that would entail in the Case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* arose in the context of Case 12.094, that was filed before the IACommHR. This case was initially marked by a lengthy and unsuccessful friendly settlement process, before it was admitted by the Commission.[427] In the view of the IACommHR, the State had violated the right to property of the Indigenous Peoples that form part of the Lhaka Honhat Association due to the non-recognition of the title over their traditional lands and to the failure in the exercise of due diligence to control of deforestation by illegal loggers.[428] As can be seen, in its origin, the case was more related to the case law of the IACtHR that focused on the protection of Indigenous Peoples' ancestral lands rather than that of the essential elements of human right to life.

The State received 22 extensions for the remediation of these violations, as the IACommHR verified some progress after the issuance of the Report on the Merits No. 2/12.[429] However, in 2018, the case was ultimately submitted before the IACtHR due to the lack of prospect that the recommendations would be implemented in a reasonable time.[430]

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[424] *Ibid.* p. 91.
[425] Eduardo Vio Grossi, "Concurring Opinion of Judge Eduardo Vio Grossi on the Advisory Opinion OC-23/17 of November 15, 2017," 2017. p. 2.
[426] Humberto Sierra Porto, "Concurring Opinion of Judge Humberto Antonio Sierra Porto on the Advisory Opinion OC-23/17 of November 15, 2017," 2017. p. 2.
[427] Inter-American Commission of Human Rights, "Merits Report No. 2/12 (Case 12.094)," 2012, https://www.oas.org/en/iachr/decisions/court/2018/12094FondoEn.pdf. p. 1.
[428] *Ibid.* p. 78.
[429] Inter-American Court of Human Rights, "Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)," 2020, https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf. p. 6.
[430] *Ibid.*

The IACtHR asserted its jurisdiction and then proceeded to appraise the facts that were pertinent for the settlement of the dispute. In accordance with the factual reconstruction assembled by the Court, the Lhaka Honhat Indigenous Communities are situated in an area that borders with the Republic of Paraguay and the Plurinational State of Bolivia, where they have been established since times prior to the establishment of the Argentine State.[431] These communities have long claimed the title for their ancestral territories, which led to several interactions with the State and unfortunately did not bear practical results.[432]

The State does not dispute the ancestral ties of the communities to their ancestral territory. In fact, the disputed revolves around the determination of whether the State's measures have provided legal certainty to the right to property and ensured the conditions for its full exercise.[433]

In relation to the human rights to water and sanitation, the IACtHR put forward the legal grounds, standards and normative elements of these rights and assessed their application to the Case of the Indigenous Communities of the Lhaka Honhat. It is particularly important to remark that the Lhaka Honhat Indigenous Communities did not allege the violation of the human rights to water and sanitation, yet the IACtHR nevertheless deemed necessary to address these rights in light of the facts of the case.[434] This case was the first contentious application of IACtHR's construction of the human rights to water and sanitation under Article 26 of the ACHR, even though some normative elements of these rights were already established in the previous case law pertaining to the rights to life, humane treatment and property. It should be noted, however, that the Court explicitly recognized only the right to water, even though it also addressed elements of the right to sanitation.

Correspondingly, the IACtHR stated that it would refer to relevant instruments of international law to determine the scope of the rights included in Article 26 of the ACHR.[435] Precisely, this case dealt with several rights included within the scope of Article 26, namely the right to a healthy environment, the right to food, the rights to water and sanitation and the

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[431] *Ibid.* p. 18-20.
[432] *Ibid.* p. 23-31.
[433] *Ibid.* p. 32.
[434] The IACtHR based its competence on the *iura novit curia* principle, which represents the jurisdictional premise that the judge knows the law and may analyze possible violations that were not alleged by the parties, as long as it remains faithful to the facts of the dispute. *Ibid.* p. 65.
[435] *Ibid.*

right to culture. The Court recognized the duty of the State to respect and ensure these rights by protecting them from potential abuses of public entities and private parties, as well as to establish mechanisms to monitor, supervise and enable redress for violations.[436]

The Court commenced its approach on the autonomous human right to water by underlining their interconnection with the human right to an adequate standard of living, codified by Article 25 of UDHR and by Article 11 of the ICESCR, as well as their express recognition on the CRC and CEDAW.[437] The IACtHR further noted the development of these rights in the multilateral fora, with special regard to UNGA Resolution No. 64/292, to the Social Charter of the Americas and to the Organization of American States (OAS) General Assembly resolutions 2349/07 (Water, health and human rights) and 2760/12 (The human right to safe drinking water and sanitation).[438]

It is unfortunate that the IACtHR did not reinforce the recognition of these rights under the ICCPR, as the HR Committee's General Comment No. 36 had already established them under Article 4 of this instrument. At the time of the judgement, the African Commission of Human Rights had also adopted the "Guidelines on the Right to Water in Africa", which were neglected by the Court as well. As a result, the main influence for IACtHR's perspective on the human rights to water and sanitation was CESCR's General Comment No. 15, that regulated the human rights to water and sanitation under the ICESCR. As this document had a major focus on the right to water, which might explain the Court's emphasis on this right, in detriment of the right to sanitation. Nonetheless, the CESCR had already published Statement E/C. 12/2010/1, which expressly recognized the right to sanitation.[439]

Indeed, the IACtHR followed the guidance provided by the CESCR in its General Comment No. 15 and the previous parameters of its own case law to determine the elements of the human rights to water and sanitation. It recalled that, in line with the teachings of the CESCR, the Court had already determined on OC-23/17 that these rights include access to water for consumption, sanitation, laundry, food preparation, and personal and domestic

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[436] *Ibid.* p. 68.
[437] *Ibid.* p. 73-74.
[438] *Ibid.* p. 74.
[439] Committee on Economic, Social and Cultural Rights, "Statement on the Right to Sanitation (E/C.12/2010/1)."

hygiene, and may comprise additional supply depending on health, climate and working conditions.[440]

The Court also recalled the freedoms and entitlements enacted by the CESCR, that require, respectively, the abstention from interfering with the access to water and providing a system of water supply and management without discrimination.[441] The IACtHR further stressed the CESCR's position that water should be treated as a social and cultural good, and not primarily as an economic good, and that the factors of availability, quality and accessibility must be ascertained to evaluate its fulfillment.[442] This observation is peculiarly important in view of the IACtHR's remark that the human rights to water and sanitation are connected to the right to take part in cultural life.[443]

The IACtHR also highlighted that States should provide special consideration to Indigenous Peoples and other groups that have traditionally faced difficulties in exercising the human right to water. As such, States must ensure the protection of Indigenous Peoples' traditional lands from unlawful pollution, in addition to providing resources for these communities to design, deliver and control their access to water.[444] It also stated that, in the context of the right to a cultural identity, the cultural values attached to water must be considered by States.[445]

In the specific case of the Lhaka Honhat Indigenous Communities, the IACtHR found that the introduction of livestock in their ancestral territory by third parties led, among others, to the desertification of areas due to the pressure of cattle-grazing, to the competition for the consumption of water and to the contamination of water by animal feces.[446] The water scarcity that resulted from this economic activity even led the livestock owners to block the Indigenous Peoples' access to water sources, which directly interfered with their way of life and restricted their options of supply to limited and untreated water.[447]

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[440] Inter-American Court of Human Rights, "Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)." p. 75.
[441] *Ibid.*
[442] *Ibid.*
[443] *Ibid.* p. 73.
[444] *Ibid.* p. 76.
[445] *Ibid.* p. 80.
[446] *Ibid.* p. 85-86.
[447] *Ibid.* p. 92.

In order to redress these violations, the IACtHR ordered the State to identify the members of the Lhaka Honhat Indigenous Communities that lacked access to drinking water and to draw up an action plan to establish the appropriate measures to respond to this situation and their implementation timetable.[448] The Court also ruled that the State would have to elaborate a report to set the actions to be adopted to conserve the surface and groundwater in the ancestral territory, prevent contamination and remedy any existing deterioration, as well as to guarantee drinking water for all members of the Lhaka Honhat Indigenous Communities.[449]In its footnote considerations, the Court felt that it was necessary to highlight the reservation that the measures ordered do not entail in the direct and free provision of water.[450] In this regard, the IACtHR pointed out that the State could adopt this approach, but any other that guaranteed the access to drinking water would suffice.[451]

In this case, as was customary in the previous case law of the IACtHR, the State was commanded to establish a community development fund for the victim communities. However, the Court altered the traditional scope of the previous community development fund and omitted the water and sanitation services from its envisaged measures.[452] Instead, the IACtHR commissioned the allocation of US$2.000.000,00 (two million USA dollars) for the purposes of the recovery of indigenous culture and food security.[453]

This case represented a very important step for the case law of the IACtHR, but also had some point of divergence with the human rights to water and sanitation's trend of development. The Case of the Indigenous Communities of the Lhaka Honhat succeeded in applying the environmental parameters of OC-23/17 to the realization of the human rights to water and sanitation, as it was not limited to the provision of goods, services and infrastructure, but also encompassed the conservation and prevention of contamination of water resources.

On the other hand, the Court failed to consistently address the right to sanitation and the community development fund did not preview altogether water and sanitation services in its scope. The IACtHR also seemed more careful to establish specific obligations to the State,

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[448] *Ibid.* p. 104.
[449] *Ibid.* p. 104-105.
[450] *Ibid.* p. 105.
[451] *Ibid.*
[452] *Ibid.* p. 106.
[453] *Ibid.*

which was tasked to plan all the measures to redress the violations identified. The lack of recognition of the right to sanitation, whilst recognizing the right to water, is especially problematic. At the time of the judgement, the right to sanitation had already acquired substantial support as an autonomous right in international law and the Court itself referenced international instruments that recognized this right. Furthermore, the Court focused its redress measures on drinking water and did not provide any indications in relation to sanitation. The aspect of the redress measures may be attributable to the specific characteristics of the case, but the theoretical construction of the right to water, without reference to the right to sanitation, was clearly a missed opportunity.

In relation to the legal ground of the recognition of an autonomous right to water, Judge Pazmiño Freire endorsed the reasoning of the IACtHR in his concurring opinion and stressed that this interpretation should not be regarded as an innovation, or a creation, of the Court.[454] Instead, he argues that this right stems directly from the OAS Charter, in light of Article 26 of the ACHR, and that the indirect justiciability previously employed by the IACtHR to address these rights consisted on a restricted interpretation of the ACHR.[455] Also in this line of interpretation, Judge Mac-Gregor Poisot remarked that the autonomy of rights under Article 26 of the ACHR does not deny the indivisibility of rights, it only facilitates the justiciability of economic, social and cultural rights and puts them in equal footing with civil and political rights.[456]

It should be noted, however, that this recognition was not without criticism, as the same reservations expressed in the context of OC-23/17 were reinforced in the dissenting opinions on the Case of the Indigenous Communities of the Lhaka Honhat. Judge Vio Grossi, in his partially dissenting opinion, contested the recognition of the human right to water under article 26 of the ACHR on the grounds that this interpretation cannot be derived from the literal meaning of this article or from the IACtHR's case law, and that the elements of the autonomous right were constructed on international recommendations and non-binding

[454] Patricio Pazmiño Freire, "Concurring Opinion of Judge Patricio Pazmiño Freire on the Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)," 2020. p. 2.
[455] Ibid. p. 4-5.
[456] Eduardo Mac-Gregor Poisot, "Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot on the Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)," 2020. p. 14-16.

instruments rather than binding sources of international law.[457] Differently from Judges Pazmiño Freire and Mac-Gregor Poisot, Judge Vio Grossi viewed with skepticism the autonomous justiciability of the human right to water, as he observed that the same result was achieved with the reference to the violation of civil and political rights expressly prescribed by the ACHR and the separation of these rights weakens and contradicts the thesis of the interdependence and indivisibility of human rights.[458] Additionally, Judge Vio Grossi also contended that the Protocol of San Salvador had clearly limited the IACtHR's jurisdiction over economic, social and cultural rights when it specified that only the right to trade union organization and the right to education could be brought before the Court.[459]

This dissidence was supported by Judge Sierra Porto, who was concerned with what he categorized as a disregard for the limits imposed by the Protocol of San Salvador and as an indiscriminate use of soft law instruments.[460] He also contested the competence of the Court to analyze the human right to water, as the parties had not alleged its violation and the IACtHR decided to evaluate it without reasonableness and pertinence.[461]

In light of these two positions, Judge Pérez Manrique attempted to create a third perspective that conciliated the opposite viewpoints. He argued that, even though the Protocol of San Salvador had limited the justiciability of economic, social and cultural rights, the restriction only meant that the only rights of this category that could be brought before the IACtHR were those of education and trade union organization.[462] However, that did not impede the IACtHR from assessing other economic, social and cultural rights in a simultaneous violation with civil and political rights, based on the principles of indivisibility and interdependence.[463] Even though Judge Pérez Manrique intended to form an

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[457] Eduardo Vio Grossi, "Partially Dissenting Opinion of Judge Eduardo Vio Grossi on the Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)," 2020. p. 8-12.
[458] *Ibid.* p. 15.
[459] *Ibid.* p. 25.
[460] Humberto Sierra Porto, "Partially Dissenting Opinion of Judge Humberto Antonio Sierra Porto on the Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)," 2020. p. 3.
[461] *Ibid.*
[462] Ricardo Pérez Manrique, "Partially Dissenting Opinion of Judge Ricardo C. Pérez Manrique on the Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)," 2020. p. 3.
[463] Ibid.

approximation between the diverging theories, his position is more inclined towards the dissent created by Judges Vio Grossi and Sierra Porto.

Hence, these perceptions demonstrate the reluctance of some judges to expand the IACtHR's jurisdiction by confirming the justiciability of the human right to water as an autonomous right, under article 26 of the ACHR. In any case, these reservations do not deny the existence of a right to water, they only contest its autonomous character under Article 26 of the ACHR and its direct justiciability before the IACtHR.

3 DISTINGUISHING FEATURES OF THE HUMAN RIGHTS TO WATER AND SANITATION IN THE INTER-AMERICAN CASE LAW

As can be perceived at this point of the thesis, the human rights to water and sanitation are neither complete concepts nor simple ones. That is precisely why it was important to provide sufficient legal and contextual substance of these rights in the previous chapters, along with a detailed overview of its application by the IACtHR's case law. Building upon these elements that have been discussed in these legal frameworks, the present chapter provides a critical overview of the IACtHR's conception of the human rights to water and sanitation.

For this purpose, the chapter is organized in two sections. The first addressed the usual aspects of the human rights to water and sanitation in the case law of the IACtHR, in light of its other counterparts in general, specific and regional counterparts. Then, in the second part, the chapter discusses emerging environmental issues that have been enshrined in the case law of the IACtHR and, although not directly related to the human rights to water and sanitation, have great impact in their realization.

3.1 Common but differentiated aspects of Inter-American's Human Rights to Water and Sanitation

Every formulation of the human rights to water and sanitation, either in general or specific regimes, have a standard set of features that is usual in human rights obligations as a whole. Indeed, some of these main aspects are justiciability, scope and content of the obligations, and redress mechanisms. These aspects may be present in varied degrees and in different formats, but they are necessary features for the existence and implementation of human rights obligations.

Following this premise, this section evaluates the human rights to water and sanitation, as conceived by the case law of the IACtHR, in search of specificities that stand out in these elements that are common to all constructions of these rights. For this purpose, as is expected of a comparative study, this assessment dialogues with other sources of international law and their interpretation by international publicists. The analysis of IACtHR's case law does not seek to highlight only the positive aspects of the IACtHR's human rights to water and sanitation, but also potential challenges and setbacks.

3.1.1 Justiciability

The issue of justiciability pertains to the capacity of individuals or groups to seek remedies for the violation of human rights and to render the responsible parties accountable.[464] Traditionally, economic, social and cultural rights have faced more resistance to their justiciability than civil and political rights due to the intrinsic relationship with public policies, governmental expenditure and other complex issues that are very sensitive in the State's domestic sphere.[465]

The dual segregation of rights has also been established in relation to the effects of the respective obligations of each category of rights. In this regard, the economic, social and cultural rights would mainly entail in positive obligations of progressive development, whilst civil and political rights would require the respect of negative obligations of immediate effect.[466]

This dichotomy has proven to be misguided, as economic, social and cultural rights may entail in negative obligations, as well as positive obligations of immediate effect, which have been described in the context of the ICESCR as core obligations. On the other hand, civil and political rights may also, under certain circumstances, require positive obligations of progressive development.

In sum, the line between economic, social and cultural rights and the civil and political rights became very difficult to be drawn, particularly due to the indivisibility and interdependence of human rights.[467] Nonetheless, even though the distinction among civil and political rights, on one side, and economic, social and cultural rights, on the other, begun to become blurry, the distinctions on the justiciability of these rights is an issue that remains controversial.

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[464] Harvard Law Review Association, "What Price for the Priceless?: Implementing. The Justiciability of the Right to Water," *Harvard Law Review* 120 (2007): 1067–68. p. 1072-1073.
[465] *Ibid.* p. 1075.
[466] Alston and Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights." p. 159.
[467] Salman and McInerney-Lankford, *The Human Right to Water*. p. 25-26.

3.1.1.1 Preliminary considerations relating to general human rights instruments

The establishment of negative and core obligations by General Comment No. 15 in relation to the human rights to water and sanitation in the normative framework of the ICESCR was not particularly disputed.[468] That may be attributable to the fact that the main focus of conflict that arose from the issuance of that document was the legal basis of the recognition of the rights and their inference from the human right to an adequate standard of living, not their content.

However, this issue was especially problematic in the context of the ICCPR, in which the existence of the human rights to water and sanitation, as corollaries of the human right to life, was not subject of extensive criticism. The true controversy in this legal regime was the extent that the ICCPR protected the human rights to water and sanitation. The more restrictive approach defended the obligations to refrain from interfering and preventing third parties from disrupting the enjoyment of these human rights.[469] Then, some theories began to accept the requirement of positive intervention of the State, but only in relation to a minimum quantity of water necessary for survival, which was endorsed by the first interpretations of the ICCPR by the HR Committee.[470] Ultimately, the HR Committee adopted a more expansive approach, that required States to employ positive measures to ensure the enjoyment of an adequate standard of life, including the provision of water and sanitation services.[471]

As elucidated by Philip Alston and Gerard Quinn in the overview of the *travaux préparatoires* of the ICCPR and of the ICESCR, there were different approaches concerning justiciability. In the context of the ICCPR, it was contended during the drafting process that the provision of effective remedies was implicit in the convention.[472] This position did not prevail, and the text of the ICCPR explicitly refers, in its Article 2(3), to the duty of States to

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[468] Tully, "A Human Right to Access Water?"
[469] Thielbörger, "Re-Conceptualizing the Human Right to Water." p. 228-229.
[470] Bertazzo, "La Tutela Del Acceso al Agua Potable En El Derecho Internacional." p. 59-60; Winkler, *The Human Right to Water*. p. 54; Human Rights Committee, "General Comment No. 6: Article 4 (Right to Life)."
[471] Human Rights Committee, "General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, CCPR/C/GC/36." p. 6.
[472] Alston and Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights." p. 170.

ensure effective remedies to the violation of the rights prescribed by the convention.[473] In the context of the ICESCR, there was a draft that envisioned the inclusion of political, administrative and judicial remedies in the case of human rights violations, but the proposition was defeated and the issue forgotten.[474] Nonetheless, many States indicated the creation of remedies for the rights prescribed in the ICESCR and, even when those are not available, the provisions of the convention play a significant role in interpreting domestic legislation.[475]

This jurisdictional segregation may be further observed in the complaint mechanisms of the ICESCR and of the ICCPR. In one hand, the ICESCR did not initially have a mechanism for the communication of violations of the rights prescribed by the convention. This issue was only addressed by the Optional Protocol to the ICESCR, adopted in 2008 and in force since 2013.[476] On the other side, the ICCPR has established a complain mechanism in its First Optional Protocol, adopted in 1966 and in force since 1976, at the same time as the original convention.[477] The difference in the instrumentalization of these mechanisms is visible in the number of ratifications, as ICESCR's has 26 and ICCPR's has 117, which undoubtedly impacts their range of impact in the realization of rights established in the respective conventions.

3.1.1.2 The initial steps for justiciability in the Inter-American System

In the IASHR, the ACHR has a similar drafting to that of the ICCPR. For that reason, it was necessary to construct a robust interpretation of the convention to establish implicit

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[473] "Article 2 (...) 3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted." United Nations, "International Covenant on Civil and Political Rights."

[474] Alston and Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights." p. 170.

[475] *Ibid.* p. 170-171.

[476] The instrument has 26 ratifications and 46 signatures United Nations, "Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (UNGA Resolution No. 63/117)," 2008.

economic, social and cultural rights in light of the explicitly prescribed civil and political rights. Additionally, in this phase of the case law of the IACtHR, the possibility of enabling the justiciability of autonomous rights under Article 26 was systematically neglected by the Court.[478] The tendency of the IACtHR to avoid a pronunciation on the issue led litigants to argue that these potentially autonomous rights were not even justiciable.[479]

In relation to water and sanitation, during the period of the derivation of economic, social and cultural rights from civil and political rights, the IACtHR mainly enhanced the elements of the rights to life, humane treatment and property to include access to water and sanitation. The Court explicitly referenced the human right to water only to the extent that it had an impact on the enjoyment of these rights.

In this regard, in the Case of the *Yakye Axa Indigenous Community v. Paraguay* (2005), the IACtHR made a timid reference to the human right to water to express that its detriment has great impacts on the right to a decent existence and basic conditions to exercise other human rights.[480] In this context, in the *Sawhoyamaxa Indigenous Community v. Paraguay* (2006), the Court continued to improve the normative elements of the human right to life and the provision of water and sanitation services, but failed to explicitly address the human rights to water and sanitation.[481]

In the Case of the *Xákmok Kásek Indigenous Community v. Paraguay* (2010), the IACtHR evaluated the issue of the access to and quality of water as a parameter for the right to a decent existence.[482] This case was emblematic for the independent consideration of the human rights to water and sanitation, as it was the first time the Court dedicated a specific topic to address the issue.

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[477] This instrument has significantly more support than its economic, social and cultural counterpart, with 117 ratifications and 35 signatures. United Nations, "First Optional Protocol to the International Covenant on Civil and Political Rights," *United Nations Treaty Series* 999 (1966): 171.

[478] Tara J. Melish, "The Inter-American Court of Human Rights: Beyond Progressivity," in *Social Rights Jurisprudence*, ed. Malcolm Langford, 1st ed. (Cambridge University Press, 2009), 372–408, https://doi.org/10.1017/CBO9780511815485.021. p. 375.

[479] *Ibid.* p. 376.

[480] Inter-American Court of Human Rights, "Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005 (Merits, Reparations and Costs)." p. 85-86.

[481] Inter-American Court of Human Rights, "Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006 (Merits, Reparations and Costs)." p. 83.

[482] Inter-American Court of Human Rights, "Case of the Xákmok Kásek Indigenous Community v. Paraguay, Judgement of August 24, 2010 (Merits, Reparations, and Costs)." p. 44.

In these cases, the *ad hoc* judges indicated by Paraguay played a role in the attempt to limit the justiciability of the human rights to water and sanitation in light of the human right to life. They argued that the focus of the realization of economic, social and cultural rights should be on the elimination of poverty, instead of being limited to the adoption of positive measures to remediate violations incurred to specific groups.[483] These judges also claimed the existence of an interstate responsibility to realize these rights when the State held accountable does not have the resources to attain the eradication of poverty and the guarantee of conditions for a decent life for all persons in its jurisdiction.

Even though the human right to life, its components and derivative rights should not be comprehended restrictively,[484] the propositions of the Paraguayan *ad hoc* judges virtually impair their justiciability. These arguments intended to shift the analysis of these rights into a broad goal of progressive development, without mechanisms to ensure the assessment of violations in specific cases and without clear parameters of how to realize the State's obligations. As such, if these premises were to be accepted, the IACtHR would abdicate its institutional role of addressing violations of rights prescribed by the ACHR, as well as exclude injustices and inequalities from its jurisdictional power, leading to the reinforcement of a systemic pattern of exclusion and denial of redress to marginalized individuals and groups.[485]

It is clear that these perceptions were not shared by the remaining members of the IACtHR and did not have any visible impacts in its case law, but they do give voice to the State's reservations on the justiciability of economic, social and cultural rights. There were also scholar impressions that the formulation of the IACtHR on the right to a decent life was not sufficiently clear to delimit its scope of application and legal consequences, as it was not clear whether the right was applicable only to the vulnerable groups whose rights were

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[483] Fogel, "Partly Concurring and Partly Dissenting Opinion of Judge Ramon Fogel on the on the Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005 (Merits, Reparations and Costs)." p. 10-13; Pedrozo, "Concurring and Dissenting Opinion of Judge Augusto Fogel Pedrozo on the Case of the Xákmok Kásek Indigenous Community v. Paraguay, Judgement of August 24, 2010 (Merits, Reparations, and Costs)." p. 4-6.

[484] Inter-American Court of Human Rights, "Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006 (Merits, Reparations and Costs)." p. 80.

[485] Aiofe Nolan, Bruce Porter, and Malcolm Langford, "The Justiciability of Social and Economic Rights: An Updated Appraisal (CHRGJ Working Paper No. 15)," 2009. p. 8.

recognized by the Court, to all vulnerable groups, or even to all persons subject to its jurisdiction.[486]

In this context, Jo Pasqualucci asserts that the right to a decent life is applicable to both vulnerable and non-vulnerable groups, differing only in relation to how these groups access the IACtHR's jurisdiction. Her argument is that the analysis of the IACtHR's criteria for the limitation on the State's responsibility in relation to the right to a decent life have different application in accordance with the circumstances. Persons that live under the State's control are generally unable to meet, by themselves, their basic needs, which puts the State in a special condition of guarantor to ensure the provision of the necessary services for the attainment of the conditions for their decent life and lessens the burden of proof of the victims to establish a violation of their human rights.[487] Other vulnerable and non-vulnerable groups have to prove, in addition to their lack of basic conditions for the enjoyment of a decent life, that the State has or should have knowledge of their situation and that there is a causal link between their living conditions and a conduct or omission of the State.[488] However, whilst vulnerable groups enjoy a presumption in their favor when these circumstances are alleged, non-vulnerable groups do not have this prerogative.[489]

Concerning the cases related to the conditions of imprisonment, the IACtHR established very similar considerations, but on the context of the right to humane treatment. Whilst establishing standards for the treatment of prisoners, the Court determined the parameters that States had to follow in relation to water and sanitation services. It even acknowledged the recognition of the human rights to water and sanitation by the UNGA in Resolution No. 64/292 to provide more substance to these normative elements.[490]

In its turn, pertaining to the traditional use of water resources, the focus of the IACtHR was on the protection of these resources in light of the right to property. In the Case of the *Saramaka People v. Suriname* (2007), the Court recognized the right of Indigenous Peoples to

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[486] Jo Pasqualucci, "The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System," *Hastings International and Comparative Law Review* 31, no. 1 (2008): 1–32. p. 25.
[487] *Ibid.* p. 28.
[488] *Ibid.* p. 29-30.
[489] *Ibid.*
[490] Inter-American Court of Human Rights, "Case of Vélez Loor v. Panama, Judgement of November 23, 2010 (Preliminary Objections, Merits, Reparations and Costs)." p. 64.

their traditional lands includes the use and enjoyment of natural resources, such as water.[491] In this regard, the Court stated that the grant of concessions by the State that restricts Indigenous Peoples' right to property must not amount to a denial of their survival and must comply with obligations of consultation public participation, benefit sharing and the conduction of environmental and social impact assessments.[492] This case enables the justiciability of the protection of water as an essential resource for the survival of Indigenous Peoples, both in relation to substantial violations, as in the case of pollution or degradation, in addition to procedural violations, such as the inexistence of public participation or lack of environmental and social impact assessment.

In parallel to these precedents, there were development in soft law instruments that would later aid to shape the autonomous justiciability discourse in the Americas. In 2007, when the IACtHR had already made significant contributions in the Yakye Axa and Sawhoyamaxa cases, the OAS General Assembly Inter-American Meeting on Economic, Social, and Environmental Aspects of the Availability of, and Access to, Drinking Water, which called on States to increase their efforts to universalize access to drinking water and to increase awareness on the importance of the conservations and sustainable use of water resources.[493] Furthermore, in the same year, it adopted a resolution on "Water, Health and Human Rights", that recalled the obligations of states under the CRC, the CEDAW and the ICESCR in relation to water and recognized that "water is essential to the life and health of all human beings and that access to safe drinking water and basic sanitation is indispensable for a life with human dignity".[494]

Later, in 2012, after the significant progress of the Court in the Xákmok Kásek case in relation to the specific consideration of the human rights to water and sanitation, the Social Charter of the Americas, adopted by the OAS General Assembly stated:

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[491] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations and Costs)." p. 36-37
[492] *Ibid.* p. 38-41.
[493] Organization of American States General Assembly, "Inter-American Meeting on Economic, Social, and Environmental Aspects of the Availability of, and Access to, Drinking Water, AG/RES. 2347 (XXXVII-O/07)," 2007.
[494] Organization of American States General Assembly, "Water, Health and Human Rights, AG/RES. 2349 (XXXVII O/07)," 2007.

> Member states recognize that water is fundamental for life and central to socioeconomic development and environmental sustainability and that non-discriminatory access by the population to safe drinking water and sanitation services, in the framework of national laws and policies, contributes to the objective of combating poverty.
> Member states, in keeping with their national realities, undertake to continue working to ensure access to safe drinking water and sanitation services for present and future generations.[495]

Following the issuance of this document, the OAS General Assembly also emanated a specific resolution on these rights. The Resolution on "The Human Right to Safe Drinking Water and Sanitation" recalled UNGA Resolution No. 64/292, reaffirmed the recognition of these rights by employing the same wording as the Social Charter of the Americas and invited States to share pertinent public policy practices, plans and measures.[496] As occurred in the UNGA, the USA made reservations to the declaration, stating that the right recognized was not protected in its constitution and was not justiciable in its courts.[497] Canada also deemed necessary to express that the right addressed in the resolution did encompass transboundary water issues.[498]

In light of the case law of the IACtHR and these soft law instruments, in 2015, the IACommHR recognized that, even though the human right to water was not established as an autonomous rights, there was a general obligation of States to guarantee access to safe drinking water in sufficient amounts to realize other human rights.[499] This position illustrates the limits of the indirect justiciability, as it allows the protection of the human rights to water and sanitation only to the extent that their violation impedes the enjoyment of other human rights.

3.1.1.3 The Road for Autonomous Justiciability

The tide began to turn in the case law of the IACtHR with the recognition of the autonomous justiciability of economic, social and cultural rights under Article 26 of the

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[495] Organization of American States General Assembly, "Social Charter of the Americas, AG/Doc.5242/12 Rev. 2," 2012.
[496] Organization of American States General Assembly, "The Human Right to Safe Drinking Water and Sanitation, AG/RES. 2760 (XLII-O/12)," 2012.
[497] *Ibid.*
[498] *Ibid.*

ACHR. Even though some of the judges viewed the autonomous character of the human right to water as an imprudent and unnecessary addition to the justiciability of these rights, others seemed to celebrate a landmark, not only for this right, but for economic, social and cultural rights in general. For a long time, economic, social and cultural rights were regarded as secondary and not subject to adjudication,[500] which led to the view that they had to be autonomous to effectively enable justiciability. In this regard, some viewed that the derivation of economic, social and cultural rights from civil and political rights leads to an increased focus on negative obligations, rather than positive ones.[501] As pointed out by Eduardo Mac-Gregor Poisot, the previous understanding of the Court that focused on the derivation of rights "prevented an in-depth analysis of the scope of the obligations to respect and to ensure social rights", as "there are some components of social rights that cannot be linked to standards for civil and political rights".[502] Also in this regard, Mariela Antoniazzi and Gabriela Navarro argue that the autonomous justiciability economic, social and cultural rights does not undermine the inseparability of human rights obligations, but enables a detailed analysis of each autonomous rights protected by the ACHR.[503]

In this regard, the IACtHR the autonomous rights to a healthy environment, which laid out the legal grounds for a direct protection of water resources, even when there is no risk of harm to individuals.[504] The Court also gave a special highlight to the human right to water due to its significant vulnerability to environmental degradation.[505] In this advisory opinion, the IACtHR kept its derivative approach to the human rights to water and sanitation, but it started to pave way for autonomous justiciability by establishing specific obligations that required States to implement measures that were intended to address particularly the protection and

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[499] Inter-American Commission of Human Rights, "Chapter IV.A - Access to Water in the Americas: An Introduction to the Human Right to Water in the Inter-American System," in *Annual Report* (Washington, D.C.: Organization of American States, 2015). p. 502.
[500] Thomas Antkowiak, "A 'Dignified Life' and the Resurgence of Social Rights," *Northwestern Journal of Human Rights* 18, no. 1 (2020): 1–51. p. 45.
[501] Harvard Law Review Association, "What Price for the Priceless?: Implementing. The Justiciability of the Right to Water." p. 1085.
[502] Mac-Gregor Poisot, "Social Rights in the Jurisprudence of the Inter-American Court of Human Rights." p. 176.
[503] Mariela Antoniazzi and Gabriela Navarro, "Tackling Inequality in Times of Pandemics: Right to Water in the Inter-American Court of Human Rights, MPIL Research Paper Series No. 2020-30," 2020. p. 11.
[504] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17." p. 28.
[505] *Ibid.* p. 29-30.

utilization of water resources.[506] Differently from the theory of the different categories of applicants that enjoy the human right to a decent life,[507] the IACtHR did not present any material or procedural specificities for claiming this right, as long as the individuals or groups are unable to access water and food for reasons beyond their control.[508]

Following the premises established for the human right to a healthy environment, the autonomous right to water emerged for the first time in the case law of the IACtHR in the Case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (2020). In this case, the Court stressed the importance of the *pro persona* principle embodied in Article 29 of the ACHR in the context of the interpretation of the consideration of autonomous rights under the auspices of Article 26.[509] Additionally, it is important to stress that the recognition of the human right to water had a particularity, when compared to other rights recognized in light of Article 26. Not only it was not alleged by the parties, but it was also not expressly provided for in the OAS Charter. This point is especially relevant because Article 26, at a first glance, focuses on the realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in that instrument.[510]

Nonetheless, that was not regarded as a problem by the IACtHR. On the contrary, the Court declared that the human right to water is revealed by the provisions of the OAS Charter that permit deriving rights from which, in turn, the right to water can be understood. Accordingly, the Court asserted that the human right to water is necessary, for instance, for the protection of the human rights to food, to a healthy environment and to health, which had been recognized as autonomous rights in Article 26's legal umbrella.[511] In other words, the IACtHR's interpretation that originated the autonomous human right to water is a second-

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[506] *Ibid.* p. 46-49.
[507] Pasqualucci, "The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System." p. 28-30.
[508] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17." p. 50.
[509] Inter-American Court of Human Rights, "Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)." p. 65-66.
[510] "Article 26. Progressive Development. The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires." Organization of American States, "American Convention on Human Rights."
[511] Inter-American Court of Human Rights, "Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)." 72-73.

degree deduction, a derivation within a derivation, that protects rights that are necessary for the safeguard of the rights implicit in the standards of the OAS Charter.

Thus, the IACtHR opted, as it had consistently done so in its previous case law, to interpret the ACHR giving particular weight to the *pro persona* principle. Lucas Lixinski asserts that this principle amounts to the adoption of the interpretation that is most protective of human rights and leads to a specific understanding of the treaty's object and purpose that removes any other teleological approaches.[512] Accordingly, the practice of the IACtHR favors the adoption of the *pro persona* principle and usually employs other methods, such as those provided by the VCLT, as validating mechanisms.[513]

In favor of the position adopted by the IACtHR, Judge Pazmiño Freire stated that an interpretation that did not allow for the autonomous justiciability of economic, social and cultural rights under Article 26 of the ACHR would be against the *pro persona* principle.[514] He pointed out that the argument of indirect justiciability, under rights explicitly established in the ACHR, would be a restrictive interpretation of the ACHR and a retrogressive measure.[515]

Also in favor of the judgement, Judge Mac-Gregor Poisot did not focus its analysis on the rules of interpretation, but rather on the effects that stem from Article 26's autonomous justiciability. He states that the autonomous justiciability enables equality between all human rights, whilst indirect justiciability leads to their hierarchization.[516] This interpretation is also somewhat based on the *pro persona* principle, as the subsidiarity of economic, social and cultural rights could not be read as the Article 26's interpretation that most favors the human person.

On the other hand, there were judges that were not pleased with the IACtHR's reasoning, as already had happened in the previous cases involving the autonomous

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[512] Lucas Lixinski, "The Inter-American Court of Human Rights' Tentative Search for Latin American Consensus," in *Building Consensus on European Consensus*, ed. Panos Kapotas and Vassilis P. Tzevelekos, 1st ed. (Cambridge University Press, 2019), 337–63, https://doi.org/10.1017/9781108564779.016. p. 341.
[513] *Ibid.* p. 363.
[514] Pazmiño Freire, "Concurring Opinion of Judge Patricio Pazmiño Freire on the Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)." p. 4.
[515] Ibid. p. 5.
[516] Mac-Gregor Poisot, "Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot on the Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)." p. 16.

recognition of rights under Article 26 of the ACHR. The main point of disagreement is the different perceptions and weight given in the methods of interpretation, as the dissenting judges were more inclined to address the issue by a more rigid and methodic employment of the rules of interpretation of the VCLT, rather than the *pro persona* driven method.

Judge Vio Grossi, for instance, was very strict in the utilization of the VCLT's general rule of interpretation and did not confer the same importance to the *pro persona* principle.[517] He contended that a good faith, textual and teleological interpretation of Article 26 does not lead to the recognition of autonomous rights, as it only acknowledges the existence of norms other than those of the ACHR.[518] In the judge's perception, it was the intention of the States to provide a different justiciability treatment for civil and political, in one hand, and economic, social and cultural rights, in the other.[519] Additionally, he disputed the heavy reliance on the *pro persona* principle and stated that this method of interpretation, in itself, was not sufficient to establish autonomous rights under Article 26, as the Court had to make resource to external sources that were not even binding upon States.[520] The judge expressed his dissatisfaction particularly due to his view that the same result could be achieved by the previous understanding of the Court of enabling the justiciability of rights that were connected to those expressly enshrined in the ACHR.[521]

Judge Sierra Porto followed this dissent, arguing that the interpretation of the ACHR and of the Protocol of San Salvador in light of the general rule of interpretation of the VCLT does not allow the autonomous justiciability of economic, social and cultural rights.[522] Thus, he also contested the methodological preference of the IACtHR for the *pro persona* principle rather than the standard framework for treaty interpretation in international law. He was particularly frustrated with the recognition of the autonomous human right to water. In his vision, as the OAS Charter makes no reference to this right, its recognition by the Court was

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[517] Vio Grossi, "Partially Dissenting Opinion of Judge Eduardo Vio Grossi on the Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)." p. 3.
[518] *Ibid.* p. 5-17.
[519] *Ibid.* p. 10.
[520] *Ibid.* p. 11-14.
[521] *Ibid.* p. 15.
[522] Sierra Porto, "Partially Dissenting Opinion of Judge Humberto Antonio Sierra Porto on the Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)." p. 3.

more erroneous than the others and provides a dangerous range of unpredictability for the States in relation to their human rights obligations.[523]

Lastly, Judge Pérez Manrique attempted to find a middle ground, but ultimately sided with the dissent. He understood that the best interpretation for the issue was a systematic one, and not the *pro persona* principle.[524] Following his viewpoint, the systemic interpretation of the ACHR enables the joint consideration of civil and political rights (Articles 3 to 25) and economic, social and cultural rights (Article 26), but the violation of the latter cannot be evaluated in isolation.[525] Even though this formula provides grounds for the autonomous development of economic, social and cultural rights, their justiciability is still dependent upon civil and political rights.

In light of these considerations, it should be noted that the IACtHR, in its footnote considerations, also deemed important to stress the intrinsic relationship between the human right to water and the human right to life. Almost as a subsidiary argument for the recognition of the human right to water, the Court stated that this right "may be derived from and/or be related to other rights" and that, for the purposes of that case, it was "not necessary to include further considerations in this regard".[526] As such, to accommodate the reservations of the judges that were not satisfied with the argumentation of the Court to recognize an autonomous human right to water under Article 26 of the ACHR, it conceded that the right would be nonetheless protected by other provision of the convention, which was not disputed. In result, the human right to water would be assessed in any scenario and the Court felt that this double coating of legal foundations provided sufficient grounds for its analysis of the human right to water without the need of further explanation.

The autonomous justiciability of the human right to water is not per se a particularity of the IASHR, as several domestic and quasi-judicial legal regimes share this mechanism. What is, nonetheless, a singularity of the case law of the IACtHR is the modus of interpretation employed to establish the human rights to water and sanitation, and that also

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[523] *Ibid.* p. 4.
[524] Pérez Manrique, "Partially Dissenting Opinion of Judge Ricardo C. Pérez Manrique on the Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)." p. 2.
[525] Ibid. p. 3.
[526] Inter-American Court of Human Rights, "Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)." p. 73.

guides its realization. The *pro persona* principle was decisive in the bold interpretation of the ACHR, and the same result would not be reached if the general rules of interpretation of the VCLT were used in their strict conception.

Nonetheless, despite the breakthrough of pertaining to the recognition of the human right to water under Article 26 of the ACHR in the *Lhaka Honhat* case, the Court still managed to be cautious. Indeed, it refrained from declaring an autonomous right to sanitation, even though it had also addressed this right in the elements of an adequate standard of life in its case law.

It is true that the previous case law of the IACtHR refrained from referencing the human right to sanitation, either as an autonomous or a combined right, even though its normative elements were addressed on several occasions. However, when the first cases pertaining to the human rights to water and sanitation were judged in by the IACtHR, the right to sanitation still lacked the same acknowledgement of the right to water. This was not the case at the time of the Case of the *Indigenous Communities of the Lhaka Honhat*. In fact, the very Court referenced soft law instruments that were the foundation of the human right to sanitation, such as UNGA Resolution No. 64/292 and CESCR's General Comment No. 15, even though it abstained from referencing the posterior developments that resulted from them.[527]

Even though there are benefits to linkage of water and sanitation, the omission of sanitation altogether may lead to its considerations as a secondary right in relation to water.[528] Unfortunately, this omission did not occur only in the Inter-American Context, as the Guidelines on the Right to Water in Africa (2019), of the African Commission on Human and Peoples' Rights, also focused solely on the right to water, even though it also addressed the normative elements of the right to sanitation.[529] If these omissions are to be perceived as intentional, which may not be the case, it may be due to the fact that the human right to sanitation is recognized by fewer countries than the human right to water, and thus these regional instances could be hesitating to declare it.[530]

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[527] *Ibid.* p. 74.
[528] Inga T. Winkler, "The Human Right to Sanitation," *University of Pennsylvania Journal of International Law* 37, no. 4 (2016): 1331–1406. p. 1375.
[529] African Commission on Human and Peoples' Rights, "Guidelines on the Right to Water in Africa." p. 6.
[530] International Law Association, "Johannesburg Conference: The Role of Sustainable Natural Resources Management in International Law, First Report of the Committee," 2016. p. 10.

Nonetheless, this trend of omission is starting to fade in the Americas. In 2021, the IACommHR issued a resolution that, although focused on other matters, expressly addressed the human rights to water and sanitation. In Resolution 3/2021, the IACommHR noted that the impacts of climate change "interfere with the enjoyment of human rights such as life, health, food, work, culture, water and sanitation and self-determination of all people, and in particular, of individuals and groups in vulnerable situations".[531] In this context, it declared that States must ensure that children and adolescents' "rights to education, identity, housing, water, and sanitation are not affected by the destruction or alteration of basic infrastructure for their well-being such as schools, hospitals, and public transport systems".[532]

Therefore, the issue of justiciability of the human rights to water and sanitation in the IASHR is not impaired by the issue of legal grounds, but is still affected by ripples in legitimacy. In a context of ample acclamation of these rights in the international sphere, the reserves on legitimacy are not related to the human rights to water and sanitation in themselves. In fact, the resistance encountered was connected with the possibility of autonomous justiciability of this right under Article 26 of the ACHR, even though its indirect protection by rights expressly provided by the convention is solidly established in the case law of the IACtHR.

In this context, considering that the once disputed protection of economic, social and cultural rights under the auspices of the interdependence and indivisibility of civil and political rights has become uncontroversial in the context of the IACtHR, there is room for expectation that the reservations concerning the autonomous justiciability of these rights under Article 26 of the ACHR will also fade over time. That is, if the continuous expansion of the jurisdiction of the IACtHR does not prove fatal for the legitimacy of the IASHR in an interstate level.

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[531] Inter-American Commission of Human Rights, "Climate Emergency: Scope of Inter-American Human Rights Obligations, Resolution 3/2021," 2021. p. 9.
[532] *Ibid.* p. 16.

3.1.2 Scope and Content of Obligations

As indicated by Sergio Alcega, it is necessary to delimitate the normative content of the human rights to water and sanitation to establish their scope and limits.[533] There is a clear progression of the legal obligations established in relation to water and sanitation services in the case law of the IACtHR, either through the derivative or the autonomous justiciability. These elements vary due to the circumstances of each case and in light of the primary rights that were violated. Nonetheless, despite the very specific circumstances in which the human rights to water and sanitation were analyzed in the case law of the IACtHR, the Court has provided general standards for the realization of these rights.

In the Case of the *Yakye Axa Indigenous Community v. Paraguay* (2005), the IACtHR briefly referenced the General Comment No. 15 to state that the right to access to clean water has a major impact on the right to a decent existence and basic conditions to exercise other human rights.[534] It stated that the human right to life included the right of not being deprived of life and the right not to have access to a decent existence impaired or obstructed.[535] The Court also conceded that, as a guarantor, the State must ensure at least a minimum standard of living that is compatible with human dignity.[536]

In the Case of the *Sawhoyamaxa Indigenous Community v. Paraguay* (2006), the Court did not expressly address the human rights to water and sanitation, but still referenced the General Comment No. 15 when it established the responsibility of the State for the failure to adopt the adequate measures to enable the community to use natural resources, which are essential or their survival capacity and preservation of ways of life.[537] The IACtHR also reiterated its approach on the right to life and specified that the responsibility of the State as a guarantor is limited by its knowledge of the circumstances and authority to adopt measures that could be reasonably expected to prevent or avoid the risk of human rights violations.[538]

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[533] Sergio Salinas Alcega, "El Derecho al Agua Como Derecho Humano: Contenido Normativo y Obligaciones de Los Estados," in *El Derecho al Agua*, ed. Antonio Embid Irujo (Navarra: Aranzadi Thomson Reuters, 2006), 89–136. p. 106.
[534] Inter-American Court of Human Rights, "Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005 (Merits, Reparations and Costs)." p. 85-86.
[535] *Ibid.* p. 84.
[536] *Ibid.*
[537] Inter-American Court of Human Rights, "Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006 (Merits, Reparations and Costs)." p. 83.
[538] *Ibid.* p. 81.

This approach was endorsed in the Case of the *Xákmok Kásek Indigenous Community v. Paraguay* (2010), which, additionally, addressed some initial standards dedicated specifically to the human rights to water and sanitation. The IACtHR referenced General Comment No. 15 to establish a minimum quantity of water needed for the guarantee of a decent existence. However, unlike the General Comment No. 15, that only referred the question to WHO guidelines, the IACtHR stated, based on international standards, that 7,5 liters/person/day was a sufficient amount of water to satisfy all basic needs of most people.[539] It also stated that the water provided must comply with a quality standard, which consists of a tolerable level of risk.[540]

In relation to the quantitative parameters of the human rights to water and sanitation, the African Commission on Human and Peoples' Rights, by employing the same sources as the IACtHR in its Guidelines on the Right to Water in Africa, reached the conclusion that the absolute minimum for the realization of the human rights to water and sanitation is 20 liters/person/day, but their effective implementation requires at least 50 – 100 liters/person/day.[541] Jimena Chávarro states that the IACtHR misunderstood the sources it appraised, as it considered only the quantity of water necessary for water consumption and cooking, leaving behind other uses that are also necessary for the fulfillment of the human rights to water and sanitation, such as personal hygiene.[542]

In the cases pertaining to conditions of imprisonment, the IACtHR established that the right to humane treatment encompasses a minimum set of standards for the treatment of prisoners. The Court recalled the United Nations Standard Minimum Rules for the Treatment of Prisoners and stated that the States must provide prisoners with drinking water, as well as water and toilets as are necessary for health and cleanliness.[543] It also specified that the lack of

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[539] Inter-American Court of Human Rights, "Case of the Xákmok Kásek Indigenous Community v. Paraguay, Judgement of August 24, 2010 (Merits, Reparations, and Costs)." p. 45.
[540] *Ibid.*
[541] African Commission on Human and Peoples' Rights, "Guidelines on the Right to Water in Africa." p. 21-22.
[542] Murillo Chávarro, "The Right to Water in the Case-Law of the Inter-American Court of Human Rights." p. 57-58.
[543] Inter-American Court of Human Rights, "Case of Vélez Loor v. Panama, Judgement of November 23, 2010 (Preliminary Objections, Merits, Reparations and Costs)." p. 64.

drinking water constitutes grave negligence of the State and that latrines must be hygienic and offer privacy.[544]

Relating to the traditional use of water resources, the Court stressed the due diligence parameters that are necessary for the conduction of projects that might affect natural resources in ancestral territories of Indigenous Peoples. Among these parameters, the duty of consultation and of conduction of environmental and social impact assessment are particularly relevant for the human rights to water and sanitation. The duty of consultation requires States to disseminate information and guarantee the effective participation of Indigenous Peoples in decisions relating to projects that might affect the natural resources within their territories.[545] In close connection to this obligation, the environmental and social impact assessments must be conducted by independent and technically capable entities, under the supervision of the State, in order to evaluate the potential risks of the envisioned projects.[546]

Following these developments, the IACtHR issued OC-23/17, that was essential to systematize the contributions its case law had already provided to the human rights to water and sanitation, as well as to provide new insights in the environmental aspect of these rights. This advisory opinion has deeply relied on General Comment No. 15 to establish the minimum requirements related to water and sanitation to realize the human right to a decent life. Based on that soft law instrument, the IACtHR declared that the access to water for domestic and personal uses encompasses the water for consumption, sanitation, laundry, food preparation, and personal and domestic hygiene.[547]

This was the first occasion that the IACtHR expressly enunciated the uses that were protected in the element of the access to water within the right to a decent existence, even though it had already declared the responsibility of States for the omission in the provision of water for some of these uses. Additionally, despite the lack of a new position of the IACtHR on the minimum volume of water that was required to satisfy basic human needs, it may be argued that the quantity adopted in the Xákmok Kásek case was overruled, as it encompassed a more restrictive scope of uses than those declared in OC-23/17.

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[544] Inter-American Court of Human Rights, "Case of Pacheco Teruel et al. v. Honduras, Judgement of April 27, 2012 (Merits, Reparations and Costs)." p. 20-21.
[545] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations and Costs)." p. 40.
[546] *Ibid.* p. 45.
[547] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17." p. 46-47.

Also, in the OC-23/17, the Court classified that the access water, as an element of the human right to a decent life, is a right of progressive realization that contains, nonetheless, immediate obligations of non-discrimination and of the adoption of measures for attaining the prescribed objectives.[548] Traditionally, civil and political rights were regarded as obligations of result, whilst economic, social and cultural rights were addressed as obligations of conduct.[549] Specifically in the case of progressive development, Philip Alston and Gerard Quinn argued that obligations of this nature have a hybrid character when the steps for their realization are not specified. They are obligations of result insofar as States must match their performance, and also obligations of conduct, in the sense that the States are obliged to take steps, though unspecified, to achieve the satisfaction of the obligation.[550] On the other hand, when the steps are clear an unequivocal, the obligation is solely based on the conduct of the State.[551] However, as pointed out by Malcolm Langford, the distinction of obligations of conduct, that require States to take steps, and obligations of result, that impose an immediate realization, are not always evident in practice, especially when "it is clear that sufficient resources are available or adjudicators believe that the State has had sufficient time to address the problem".[552]

Moreover, in the OC-23/17, the IACtHR further enhanced its comprehension of the due diligence obligations of the State in relation to water resources. It clarified that the State must prevent unlawful pollution that has negative effects on the enjoyment of a decent life.[553] Nonetheless, the Court stressed the limitations of the State's responsibility, as it had already done in its previous case law. In this regard, it emphasized that these obligations cannot impose an impossible or disproportionate burden in the State and that it must be established whether the State took the necessary measures in its area of responsibility to avoid the risk

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[548] *Ibid.*
[549] Mónica Tinta, "Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions," *Human Rights Quarterly* 29, no. 2 (2007): 431–59. p. 433.
[550] Alston and Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights." p. 185.
[551] *Ibid.*
[552] Malcolm Langford, "The Justiciability of Social Rights: From Practice to Theory," in *Social Rights Jurisprudence*, ed. Malcolm Langford, 1st ed. (Cambridge University Press, 2009), 3–45, https://doi.org/10.1017/CBO9780511815485.003. p. 24.
[553] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17." p. 48-49.

and if there was a causal link between the State's conduct or omission and the violation of human rights.[554]

In relation to the positive obligations of the State, the Court recognized the duty of the State to disseminate information on the use and protection of water resources, as well as to provide, among others, an essential minimum of water for those who are unable, for reasons beyond their control, to access it.[555] If the State does not have the resources to comply with these positive obligations, it must demonstrate that every effort has been made, as a matter of priority, to satisfy these minimum obligations.[556]

In order to allocate to the State the burden of proving that the utilization of all resources within its power to comply with the essential minimum obligations, the Court referenced a paragraph of CESCR's General Comment No. 12, related to the right to food, that dealt with core obligations in the context of the ICESCR.[557] The concept of core obligations, as laid out by the CESCR in General Comment No. 3, is also useful to understand the potential implications of the IACtHR's reasoning:

> 10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[558]

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[554] *Ibid.* p. 49-50.
[555] *Ibid.* p. 50.
[556] *Ibid.*
[557] The IACtHR made express reference to paragraph 17 of General Comment No. 12, which, in turn, relied on the concepts established by the CESCR in General Comment No. 3 in relation to the core obligations. Committee on Economic, Social and Cultural Rights, "General Comment No. 12: The Right to Adequate Food (Art. 11), E/C.12/1999/5," 1999. p. 4.
[558] Committee on Economic, Social and Cultural Rights, "General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), Document E/1991/23," 1990. p. 3-4.

Accordingly, the core obligations formula is a method designed to give effectivity to the provisions of the ICESCR and is completely transposable to IACtHR's context. It is difficult, however, to ascertain which are these core obligations. As the IACtHR only referenced the General Comment No. 12, it is not clear if it also endorsed the core obligations of General Comment No. 15, or if the core obligations related to water and sanitation would amount only to the provision of an essential minimum of water.

Up until this point, water and sanitation were entirely protected though the lens of other human rights. In the issue of justiciability, there were concerns that the indirect protection of the human rights would limit their appraisal by the Court.[559] However, the autonomous recognition of the human right to water by the IACtHR in the Case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (2020) did not lead to a significant shift in the approach of the Court. In fact, the IACtHR relied heavily on OC-23/17 and on the General Comment No. 15, both which addressed the human right to water as a derivation of the human right to life.

As such, in this case, the Court once again employed General Comment No. 15 to delineate the normative elements of the human right to water. It reiterated the uses that it recognized as protected by this human right in OC-23/17, that was largely based on the General Comment No. 15, and recalled some of the others concepts in CESCR's document, such as the freedoms and entitlements, as well as the standards for the compliance with this human rights (availability, quality and accessibility).[560] In relation to the relationship with other rights, the Court recollected the CESCR's considerations of the importance of the human right to water to enable the satisfaction of the right to food, due to its intrinsic connection with agriculture, and of the right to health, especially concerning the environmental hygiene factor.[561]

Furthermore, the Court reaffirmed its considerations of OC-23/17, in relation to the human right to water's obligations. It stated that there is an obligation to respect, that entails in the duty of due diligence of preventing the impairment of the enjoyment of this right, and the obligation to ensure, that requires the provision of water for those who are unable to

[559] Mac-Gregor Poisot, "Social Rights in the Jurisprudence of the Inter-American Court of Human Rights." p. 176.
[560] Inter-American Court of Human Rights, "Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)." p. 74-75.

access it, for reasons beyond their control.[562] The IACtHR also reinforced that the access to water is an obligation of progressive realization that also encompasses immediate obligations of non-discrimination and adoption of steps for its realization. Pertaining to vulnerable groups, the IACtHR agreed with the CESCR that States should give special attention to those who have traditionally faced difficulties in the realization of the human right to water, especially Indigenous Peoples.

The evolution of the human rights to water and sanitation in the case law of the IACtHR is greatly influenced by the CESCR's General Comment No. 15, which is present in virtually all cases in which these rights are addressed. However, rather than the parts of the General Comment No. 15 that the IACtHR reproduced in its case law, it is perhaps more relevant to underline the segments that it did not. That is because the degree of reference to the General Comment No. 15 increased jointly with the expansion of the normative elements of the human rights to water and sanitation in its case law. Thus, the IACtHR is not clear as to whether it adopted this soft law instrument as a due diligence standard for the realization of the human rights to water and sanitation, or if it intentionally chose to refer exclusively to the parts that it deemed applicable to the IASHR.

The main omissions pertain to the absence of reference to vulnerable groups other than Indigenous Peoples and the lack of considerations on the specific core obligations of the human right to water. These omissions may be attributable to the lack of consensus of the Court over the omitted parts, or even due to the understanding that they were not relevant to the settlement of the contentious cases in which the human rights to water and sanitation were considered. Either way, these omissions open room for doubt whether the IACtHR endorsed the integrality of the CESCR's General Comment No. 15 of only the selected parts it reiterated in its case law.

Hence, it may be seen that there are important steps for the recognition of the human rights to water and sanitation in the IASHR. There are very interesting features in the scope and content of the obligations prescribed by the IACtHR, but it leaves behind very important issues that were addressed in General Comment No. 15 that should have been discussed for better clarity. What is more aggravating, nonetheless, is that the IACtHR's selective

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[561] *Ibid.* p. 75.
[562] *Ibid.* p. 76.

replication occurred without improvement or update of the concepts of General Comment No. 15, as it has been adopted more than 20 years ago and there have been other developments in international law that were not contemplated by the Court.

As such, the IACtHR does not clarify the reasons for its preference of General Comment No. 15 over other soft law instruments. As discussed in the issue of justiciability, the utilization of soft law instruments to elaborate binding obligations is one of the points of conflict between the judges in the IACtHR and certainly expands the normative effect of these instruments beyond their role in the traditional theory of the sources of international law. In this context, the adoption of a more transparent legal argumentation in the selection of soft law instruments and in the explanation of their applicability could improve the legitimacy of the parameters established by the Court, as well as provide more elements for States to properly comply with their human rights obligations.

3.1.3 Redress Measures and Specific Obligations

As can be seen in the framework of the obligations established by the IACtHR in relation to the human rights to water and sanitation, it is clear that the violation of these rights has never been appraised individually, but rather is inserted in a context of systematic violation of other human rights. Naturally, as the violation of these rights occurs in the same context and towards the same victims, the reparation of these violation is intrinsically connected and their realization is interdependent. That is precisely why the IACtHR considers human rights in an integrated approach also for the establishment of redress mechanisms. As such, for this purpose, it takes "full account of the fact that human rights are indivisible, interdependent, and interrelated".[563]

In the Case of the *Yakye Axa Indigenous Community v. Paraguay* (2005), the IACtHR decided that, as long as the community remained landless, the State had to supply immediately and in a regular basis, sufficient drinking water for consumption and personal hygiene of the members of the community, as well as provide latrines or any other type of appropriate toilets for effective and healthy management of the biological waste of the

[563] Tinta, "Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions." p. 459.

community.[564] The Court also ordered the State to establish a community program dedicated to the provision of water and sanitation infrastructure, as well as a community development fund, with the amount of US$ 950.000,00, for the development of programs on the areas of education, housing, agriculture and health.[565]

Additionally, in the Case of the *Sawhoyamaxa Indigenous Community v. Paraguay* (2006), the Court presented very similar redress mechanisms. The main difference on the approach of the Court is that it did not create an independent program for the provision of water and sanitation infrastructure. Instead, it determined the creation of a community development fund with US$ 1.000.000,00, that should be used for the implementation of programs on the areas of education, housing, agriculture and health, as well as to provide drinking water and to build sanitation infrastructure.[566]

In its turn, in the Case of the *Xákmok Kásek Indigenous Community v. Paraguay* (2010) also adopted a reparation package that was very similar to the previous cases, including the temporary provision of basic services and the creation of a community development fund, with the allocation of US$ 700.000,00 and the same object as the Sawhoyamaxa community development fund.[567] The main innovation in this case pertains to the indication of the Court that the State would have to prepare a study to ensure the adequacy and regularity of the provision of basic supplies and services. Among other issues, the study commissioned information on the frequency, method and amount of the deliveries of potable water, as well as number of latrines provided to the community.[568] This development was very important for the improvement in the monitoring mechanism of the provision of these services, even though the Court did not receive information on the completion of the study.[569]

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[564] Inter-American Court of Human Rights, "Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005 (Merits, Reparations and Costs)." p. 99.
[565] *Ibid.* p. 95.
[566] Inter-American Court of Human Rights, "Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006 (Merits, Reparations and Costs)." p. 100.
[567] Inter-American Court of Human Rights, "Case of the Xákmok Kásek Indigenous Community v. Paraguay, Judgement of August 24, 2010 (Merits, Reparations, and Costs)." p. 69-73.
[568] *Ibid.*
[569] Inter-American Court of Human Rights, "Case of the Xákmok Kásek Indigenous Community v. Paraguay, Order of May 14, 2019 (Monitoring Compliance with Judgement)." p. 15.

The implementation of these judgements was (and still is) a challenge for the IACtHR, mainly due to the difficulties in relation to the acquisition of traditional land.[570] As such, these communities continued to face extreme conditions after the issuance of the respective judgements and the compliance with the orders of the Court is partially pending, with some of them still facing extreme conditions.

In the context of the right to property, the Court employed redress mechanisms that are akin to those established in the auspices of the right to life. In the Case of the *Saramaka People v. Suriname* (2007), the IACtHR determined the creation of a community development fund, consisting of US$ 600.000,00, with the aim of financing educational, housing, agricultural and health projects, as well as providing electricity and drinking water.[571] It also required the adoption of legislative measures to realize the procedural rights established by the judgement, such as environmental impact assessments and consultations. In this specific case, the State created the community development fund without much resistance, yet voiced the unlikeliness of the possibility of altering its legislation due to internal factors.[572]

Even though the IACtHR had a concern not to impose impossible burdens on States, the specific and obligations established under the IACtHR to redress violations had a negative impact on some Latin American States. That is because it tends to determine the adoption of redress mechanisms without much deference for States and their domestic legislation.[573] In this regard, in 2019, the Republic of Argentina, the Federative Republic of Brazil, the Republic of Chile, the Republic of Colombia and the Republic of Paraguay released a statement that manifested several concerns on this regard. Accordingly, the States:

> 4. Highlight the importance of a strict application of the sources of international human rights law and the recognition of the margin of appreciation of the States in the fulfillment of the obligations established by the Convention. They also recall that the resolutions and judgments of the organs of the Inter-American system only have effects for the parties to the litigation.
> 5. Emphasize the importance of due knowledge and consideration of the political, economic and social realities of the States by the organs of the Inter-American

[570] Correia, "Adjudication and Its Aftereffects in Three Inter-American Court Cases Brought against Paraguay." p. 54-55.
[571] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations and Costs)." p. 58-59.
[572] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname, Order of September 26, 2018 (Monitoring Compliance with Judgement)." p. 5-14.
[573] Jorge Contesse, "Contestation and Deference in the Inter-American Human Rights System," *Law & Contemporary Problems* 79, no. 2 (2016): 123–45. p. 128.

> human rights system. In this context, they stress the need for the forms of reparation to maintain due proportionality and respect both the constitutional and legal systems of the States, as well as the requirements of the rule of law.[574]

In this statement, the States called for the adoption of the margin of appreciation doctrine in the IASHR. This theory has roots in the case law of the ECtHR, which established that the measures ordered by the judgements must leave a certain degree of discretion for the State, as the specificities of the domestic legal regimes and of the organization and implementation of public policies may require different solutions for the compliance with the ruling.[575]

In the view of Antonio Augusto Cançado Trindade, the margin of appreciation has not found explicit recognition by the case law of the IACtHR due to the rule of law that is in force in the American States, not to mention that the rights violated in the IASHR are different to those of its European counterpart.[576] Indeed, the cases in which there are violations of non-derogable obligations of human rights are usual in the IASHR, and those are not compatible with the application of a margin of appreciation.[577]

On the other hand, Jo Pasqualucci states that the IACtHR has recognized the applicability of the margin of appreciation doctrine to the IASHR.[578] In her view, the duty to implement broad legislative, administrative and other measures to protect specific human rights is a manifestation of this doctrine that has been applied in the case law of the

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[574] "4. Destacan la importancia de una estricta aplicación de las fuentes del Derecho Internacional de los Derechos Humanos y del reconocimiento del margen de apreciación de los Estados en el cumplimiento de las obligaciones que establece la Convención. Asimismo, recuerdan que las resoluciones y sentencias de los órganos del sistema interamericano sólo tienen efectos para las partes del litigio. 5. Enfatizan la importancia del debido conocimiento y consideración de las realidades políticas, económicas y sociales de los Estados por parte de los órganos del sistema interamericano de derechos humanos. En este marco, resaltan la necesidad de que las formas de reparación guarden una debida proporcionalidad y respeten tanto los ordenamientos constitucionales y jurídicos de los Estados, como las exigencias propias del Estado de Derecho". República Argentina et al., "Declaración Sobre El Sistema Interamericano de Derechos Humanos (Asunción, 23 de Abril de 2019)," 2019.

[575] Sabino Cassesse, "Ruling Indirectly: Judicial Subsidiarity in the ECtHR," in *Subsidiarity: A Double Sided Coin? 1. The Role of the Convention Mechanism; 2. The Role of the National Authorities* (Official opening of the judicial year of the European Court of Human Rights, Strasbourg: European Court of HUman Rights, 2015). p. 1-3.

[576] Antônio Augusto Cançado Trindade, *El Derecho Internacional de Los Derechos Humanos En El Siglo XXI*, 2nd ed. (Santiago de Chile: Editorial Jurídica de Chile, 2006). p. 389.

[577] Gonzalo Aguilar Cavallo, "Margen de Apreciación y Control de Convencionalidad: ¿una Conciliación Posible?," *Boletín Mexicano de Derecho Comparado* 1, no. 155 (August 17, 2020): 643, https://doi.org/10.22201/iij.24484873e.2019.155.14944. p. 671.

[578] Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Second Edition (Cambridge: Cambridge University Press, 2013). p. 51-52.

IACtHR.[579] Jorge Contesse explains that the utilization of this doctrine by the IACtHR has been inconsistent and unclear, and has not succeeded in establishing the reason and methods for its application in the IASHR.[580]

In this context, in the Case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (2020), the Court ordered the State to elaborate an action plan to provide access to water to the victims that lacked it, as well as a report on the measures to be implemented to conserve water resources and guarantee the availability of drinking water.[581] The IACtHR even deemed necessary to highlight that the direct and free provision of water, although a possible alternative, was not the only means for the compliance with the State's obligations, as any other that guaranteed access to drinking water would be enough.[582] Additionally, as it did in the previous cases, the Court determined the establishment of a community development fund consisting of US$2.000.000,00, in the highest amount among the cases analyzed, that, however, did not encompass water and sanitation services in its scope.

The consultative strategy to implement immediate obligations had already been employed in the *Xákmok Kásek* case, but it was widened in the Case of the *Lhaka Honhat* to require a more complete analysis in the report commissioned and the establishment with an action plan to execute it. These measures seem to confer, even if slightly, a higher degree of deference to the State in the realization of the human rights to water and sanitation. The State still has to provide a very similar standard of services, if not higher, considering the environmental aspect of the recent case law. Nonetheless, it has more liberty in doing so, as it will prepare its study to reach the result envisioned by the Court, instead of just implementing the solution prescribed in the judgement.

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[579] *Ibid.* p. 216.
[580] Contesse, "Contestation and Deference in the Inter-American Human Rights System." p. 141-142.
[581] Inter-American Court of Human Rights, "Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)." p. 104-105.
[582] *Ibid.* p. 5.

3.2 Progressive development of the Human Rights to Water and Sanitation and Environmental Obligations

As the human rights to water and sanitation are not a completed and static concept, they are always subject to improvement and evolution. That is because every right has its limitations, and their true fulfillment may depend on other sources and obligations.

In this sense, this section assesses issues that have not been incorporated to the human rights to water and sanitation, but are closely related to their realization. The section initially discusses the approximation of environmental protection and the human rights to water and sanitation, in an attempt to fill some of the gaps that exist in these rights in relation to water resources. In the sequence, the section debates the extraterritorial application of the human rights to water and sanitation and their potential impact in the application of principles of international water law.

3.2.1 Interconnection between the Protection of the Environment and the Human Rights to Water and Sanitation

Although the OC-23/17 was mainly focused on the autonomous right to a healthy environment, it had an important impact on the development of the human rights to water and sanitation. That is due to the emergence in international human rights law of an autonomous protection of natural resources, including water.

In this regard, although the traditional conception of the human rights to water and sanitation may protect some aspects of the environment, it does not protect it fully. For instance, even though General Comment No. 15 promotes the sustainable realization of the human right to water, when it comes to the environment, the obligations detailed in this instrument are primarily concerned with the prevention of threats to health from unsafe and toxic water conditions, such as contamination by harmful substances and pathogenic microbes.[583] It is undeniable that this aspect of the human rights to water and sanitation provides a substantial safeguard to water resources, but it might not be sufficient, in its own, to protect ecosystems, biodiversity and other complex environmental layers of a these

resources. Accordingly, this gap of protection may have negative consequences in the implementation of the human right to water in the long term. As noted by Laurence Boisson de Chazournes, in relation to the limitations of the right to water in the protection of the environment:

> Water as a component of the environment is not effectively protected under the right to safe drinking water. Certain parameters related to quality and quantity necessary for the fulfilment of this right are taken into consideration, although they are not sufficient to protect the environment in and of themselves. However, adequate protection of ecosystems and biodiversity is essential both in quantitative and qualitative terms.[584]

Thus, whilst the right to water indisputably assists in the achievement of a healthy environment, as it requires the prevention of contamination from harmful substances and the quality control of water resources, it provides limited mechanisms for the protection of the environment and favors economic and developmental priorities in the utilization of water resources.[585] In the light of these aspects, it should be noted that water is a scarce resource and may be disputed by competing uses, such as agriculture, industry and basic human needs. The conciliation of these uses can lead to the overexploitation of the water resource if the environmental factor is not dully considered in the allocation criteria. In this context, the joint consideration of the human rights to water and sanitation promotes a more sustainable utilization and protection of water resources.

This convergence may draw inspiration from other fields of international law that face similar challenges. By way of illustration, in the field of international water law, article 6 of the UNWC requires the consideration of several criteria for the utilization of an international watercourse in an equitable and reasonable manner.[586] They include the geographic, hydrographic, hydrological, climatic, ecological, and other factors of a natural character. Furthermore, article 10 of the UNWC establishes that, in the event of a conflict between uses, special consideration shall be accorded to the satisfaction of vital human needs.

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[583] Committee on Economic, Social and Cultural Rights, "General Comment 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11." p. 4.
[584] Boisson de Chazournes, *Fresh Water in International Law*. p. 205.
[585] Alan Boyle, "Human Rights and the Environment: Where Next?," *European Journal of International Law* 23, no. 3 (August 1, 2012): 613–42, https://doi.org/10.1093/ejil/chs054. p. 628-629; Francesco Francioni, "International Human Rights in an Environmental Horizon," *European Journal of International Law* 21, no. 1 (February 1, 2010): 41–55, https://doi.org/10.1093/ejil/chq019. p. 47.
[586] United Nations, "Convention on the Law of the Non-Navigational Uses of International Watercourses."

Although the UNWC seems to suggest that vital human needs take precedence over environmental protection, it has been argued that it should not prevail over the sustainable utilization of the international watercourse.[587] In fact, the international case law has ruled in some cases that riparian states must respect a minimum environmental flow in the utilization of international watercourses to protect water resources from degradation.[588]

In addition to the developments in the field of international water law, the integration of the utilization of water and environmental protection has also been promoted through legal and soft law instruments that provide environmental standards for the utilization of water and implementation of projects that might affect these resources.[589] Even in the cases that the environmental standards are not binding, they may guide the States in the sustainable utilization of water resources.

In fact, these preoccupations with the protection of the environment led to the recognition of an autonomous human right to a healthy environment. Accordingly, in 2021, the HRC recognized the right to a clean, healthy and sustainable environment in Resolution HRC n. 48/13, which was a landmark for the promotion of this right in international law. These developments do not only reiterate the importance of a healthy environment as a human right in itself, but also assists in the interpretation of other human rights, such as the human rights to water and sanitation.

In a similar vein, in OC-23/17, the IACtHR was very clear on the issue that the human right to a healthy environment was not limited to the environmental factors of other human rights obligations, although they are complementary.[590] Accordingly, the Court recognized the autonomous right to a healthy environment, which protects water resources and other natural elements even when there is no immediate risk to individuals.[591]

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[587] Zheng and Spijkers, "Priority of Uses in International Water Law." p. 1578.
[588] Amael Notini Moreira Bahia, "O Direito Dos Cursos d'água Internacionais e o Caso Silala: Aplicações Do Princípio Do Uso Equitativo de Recursos Compartilhados e Do Princípio Da Cooperação," *Revista Catalana de Dret Ambiental* 12, no. 2 (December 22, 2021), https://doi.org/10.17345/rcda3133. p. 19.
[589] Owen McIntyre, "The Emergence of Standards Regarding the Right of Access to Water and Sanitation," in *Environmental Rights: The Development of Standards*, ed. Stephen J. Turner et al., 1st ed. (Cambridge University Press, 2019), 147–73, https://doi.org/10.1017/9781108612500.007. p. 161.
[590] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17." p. 28.
[591] *Ibid.*

In the context of this right and of the environmental dimension of other human rights, the Court declared the State's duty of precaution, that imposes the obligation to take preventive measures when there are plausible possibilities of the occurrence of harm, despite the lack of scientific certainty.[592] In light of these parameters, the responsibility of the State in relation to environmental protection arises when there is a failure to regulate, supervise or monitor the activities of third parties that caused the damage.

It is interesting to note that, in the view of the IACtHR, the degree of due diligence required of the State varies accordingly to level of risk of environmental harm and violation of human rights, and the appropriate measures to address these issues must be evaluated in connection with the conditions of each situation.[593] However, the Court established a minimum set of measures that must be undertaken by the State in order to prevent human rights violations from environmental damage, which are regulation, supervision and monitoring, environmental impact assessments, establishment of contingency plans and mitigation.[594]

Concerning the duty to regulate, the IACtHR established that Article 2 of the ACHR, that requires States to adopt legislative measures to safeguard the rights and freedoms prescribed in the convention,[595] applies not only to constitutional and legal texts, but also to all normative provision of regulatory nature.[596] The obligation to monitor and supervise requires States to implement independent monitoring and accountability mechanisms to prevent, investigate, punish and redress potential violations of human rights.[597]

Furthermore, the Court established that the duty to require and approve environmental impact assessments arises in the context of any activities that may cause significant environmental damage.[598] It recalled that the principle of prevention, as conceived by the ICJ in light of customary international law, requires the adoption of due diligence measures when

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[592] *Ibid.* p. 72.
[593] *Ibid.* p. 57.
[594] *Ibid.* p. 58.
[595] "Article 2. Domestic Legal Effects. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms". Organization of American States, "American Convention on Human Rights."
[596] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17." p. 59.
[597] *Ibid.* p. 60.
[598] *Ibid.* p. 61.

there is a risk of significant damage, which include the realization of an environmental impact assessment.[599] There are many theories to define significant damage, as it is a very wide concept.[600] Nonetheless, the IACtHR understood that the environmental damage that violates the human rights to life and to personal integrity must be considered significant damage.[601]

The Court deemed necessary to specify the minimum standards applicable to the environmental impact assessments. As such, it declared that these due diligence measures must: (i) be made before the activity is carried out; (ii) be elaborated by independent entities or under the supervision of the State; (iii) specify the cumulative impact of existing and proposed projects; (iv) provide opportunity for the participation of interested parties; (v) respect the tradition and culture of Indigenous Peoples; and (vi) present a content that is proportionate to the level of risk.[602]

In relation to the duty to elaborate a contingency plan, the IACtHR established that the State in which the potential harmful activities are conducted is responsible for preparing this document, which must address measures to respond to emergencies or disasters, including safety measures and procedures to avoid, even if partially, the negative consequences of these events.[603] However, if the damage occurs despite the adoption of all pertinent measures, the State in which the harmful activities were conducted still has the responsibility to ensure its mitigation and should employ the best scientific data and technology for this purpose.[604]

This new regard to environmental matters led to further developments in the case law of the IACtHR that followed the OC-23/17, especially in relation to the new set of redress mechanisms developed to reflect this new paradigm. Accordingly, as previously discussed in the context of the specific redress mechanisms ordered by the Court in relation to these rights, in the Case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the decision of the IACtHR is concerned not only with the continuous provision of water to communities, but also stresses the responsibility of the State to conserve water

[599] *Ibid.* p. 55.
[600] Hanqin Xue, *Transboundary Damage in International Law*, Cambridge Studies in International and Comparative Law, N.S.], [27 (Cambridge: Cambridge University Press, 2003). p. 7-8.
[601] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17." p. 56.
[602] *Ibid.* p. 64-67.
[603] *Ibid.* p. 68.
[604] *Ibid.*

resources.[605] These measures address the preoccupation related to the environmental aspects of the human rights to water and sanitation, and may represent a new perspective for the joint consideration of these rights with environmental protection, or even an attempt to implement a sustainable human right to water.

There are also other aspects in the OC-23/17 that impact the enjoyment of the human rights to water and sanitation, even though are inserted in more specific issues and groups, such as the special due diligence requirements applicable to projects that might affect Indigenous Peoples' lands and resources. These obligations support the implementation of other legal frameworks related to the protection of Indigenous Peoples, as the International Labor Organization Convention n. 169 compels States to safeguard the rights of these communities to participate in the use, management and conservation of natural resources pertaining to their lands.[606]

Even though the obligation to undertake environmental impact assessments has been recognized by the ICJ as part of customary international law, it does not provide for the specific consideration of Indigenous Peoples and their traditions, as the due diligence standards are verified in the concrete aspects of each case.[607] Accordingly, the requirements put forward by the IACtHR set standards for fulfilling this obligation to adequately protect Indigenous Peoples and their customs.[608] Consequently, in the light of the case law of the IACtHR, if a State intends to develop a project in an international watercourse that might impact other riparian States, as well as Indigenous Peoples, it must, in addition to the traditional due diligence standards of an environmental impact assessment, conduct the studies in accordance with the customs and traditions of the potentially affected Indigenous Peoples.

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[605]Inter-American Court of Human Rights, "Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)." p. 104-105.
[606] International Labor Organization, "Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries," *United Nations Treaty Series* 1650 (1989): 383.
[607] International Court of Justice, "Case Concerning Pulp Mills on River Uruguay (Argentina v. Uruguay)," 2010. p. 82-83; International Court of Justice, "Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)," 2015. p. 706.
[608] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17." p. 64-67.

Additionally, whilst international water law obliges States to consult with other States for the development of projects that affect international watercourses,[609] the case law of the IACtHR further specifies that the State must also consider the interests of Indigenous Peoples in all stages of a project's development. Even though international river basin organizations have different methods of public participation, most are limited to the mere provision of information to stakeholders, without enabling them to participate in the decision-making process.[610] Hence, the implementation of the rights of Indigenous Peoples in the management of transboundary waters could represent an important step for the construction of democratic spheres of participation in the governance systems of international river basin organizations, not only for these communities, but also for all stakeholders that might be impacted by a project developed in an international watercourse.

In conclusion, the considerations of the IACtHR on environmental protection and human rights have direct impact on the enjoyment of the human rights to water and sanitation, even if they are not directly related to the normative elements of these rights. The interconnection of the precepts of environmental protection and the development of the human rights to water and sanitation are intrinsically complementary and may prove to be important tools for reciprocal regulatory improvement.

3.2.2 Extraterritorial repercussions of the Human Rights to Water and Sanitation

Another issue that emerged in OC-23/17 and has a potential impact in the realization of the human rights to water and sanitation is the transboundary application of the ACHR. In this regard, the IACtHR discussed the matter of the jurisdiction of the ACHR, that is, the territorial scope in which the violation of rights prescribed by the convention entail the responsibility of the State.[611] As for this point, the Court indicated that the concept of jurisdiction in the framework of the ACHR entails that the "State obligation to respect and to

[609] UNRIAA, "Affaire Du Lac Lanoux (Espagne v. France), Sentence de 16 Novembre 1957," 1957. p. 306-307.
[610] Sabine Schulze, "Public Participation in the Governance of Transboundary Water Resources ? Mechanisms provided by River Basin Organizations," *L'Europe en Formation* 365, no. 3 (2012): 49–68, https://doi.org/10.3917/eufor.365.0049. p. 66.
[611] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17." p. 32-33.

ensure human rights applies to every person who is within the State's territory or who is in any way subject to its authority, responsibility or control".[612]

In this regard, the jurisdiction of the State is not limited to its territory, as it also encompasses other situations in which individuals may be affected by the State. These exceptional circumstances are verified when the extraterritorial conduct of the State constitutes an exercise of jurisdiction.[613] This was the first precedent of the IACtHR to recognize the possibility of extraterritorial application of the ACHR.[614] The parameter for the ascertainment of jurisdiction established by the IACtHR was that of the exercise of authority or effective control, which must be interpreted restrictively.[615]

Specifically in the context of environmental obligations, Colombia suggested the possibility of equating the jurisdiction of the ACHR in environmental matters to that of the international instruments that aim to protect and preserve the environment.[616] This proposition was refuted by the Court, which stated that, even though the compliance with environmental obligations may enhance the protection of human rights, it does not establish a special jurisdiction for environmental aspects of human rights. As such, while it is possible to extend the jurisdiction of a State to an extraterritorial dimension, the jurisdiction of the State is limited by the sovereign territorial rights of the other relevant States.[617] In this respect, the territorial sovereignty has a double role, as it limits the scope of the State's obligation to the global realization of human rights, whilst it also imposes the duty to respect the rights and obligations of other concerned States in international law.[618]

Accordingly, the IACtHR highlighted that the activities conducted in the jurisdiction of a State should not deprive other States of their capacity to realize human rights for the persons within their jurisdiction.[619] In this scenario, the Court pondered that, in the event of a transboundary damage that affects human rights, that is, when there is a causal link between the damage and the violation of human rights, the victims of such extraterritorial harm are

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[612] *Ibid.* p. 33.
[613] *Ibid.* p. 34.
[614] Lima, "The Protection of the Environment before the Inter-American Court of Human Rights: Recent Developments." p. 500-501.
[615] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17." p. 35-36.
[616] *Ibid.* p. 39.
[617] *Ibid.*
[618] *Ibid.* p. 39-40.
[619] *Ibid.* p. 43.

subject to the jurisdiction of the State in which the harmful activities originated.[620] This understanding is based on the premise that the State has effective control over the activities conducted within its jurisdiction and has the duty and responsibility to prevent that their implementation does not interfere with human rights outside its territory.[621] That is, the jurisdictional link between the victims and the responsible State originates from the failure to comply due diligence obligations that have negative extraterritorial effects. In this scenario, the IACtHR recognized the State's obligation to ensure access to justice for the persons affected by the unlawful activities, even if they live or are outside its territory.[622]

This extensive interpretation and parallel consideration of the parameters established in international environmental law instruments stem from the understanding of the Court that its advisory jurisdiction encompasses a broad authority to interpret any provisions related to human rights obligations, including bilateral and multilateral treaties in the environmental field.[623] On the other hand, as pointed out by Lucas Lima in his commentary to the OC-23/17, "strengthening the system for the protection of human rights does not automatically imply a competence to interpret instruments relating to international environmental law".[624]

There is very thin line that separates the environmental obligations enshrined in the jurisdiction of the IACtHR and the actual obligations that emanate from international environmental law. For instance, the IACtHR unequivocally employed the *pro persona* principle to ascertain obligations intrinsically connected to the field of international environmental law. Indeed, the *pro persona* principle was essential for the recognition, by the IACtHR, of the principle of precaution, which is still a very contested rule in customary international law.[625]

Other than the prohibition of transboundary harm and the due diligence obligations that exist in international environmental law, the IACtHR failed to present the application of human rights to the principle of equitable utilization, which is one of the core rules that regulate international water law. It is unfortunate that the IACtHR did not address this issue in

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[620] *Ibid.*
[621] *Ibid.*
[622] *Ibid.* p. 91.
[623] *Ibid.* p. 11-12.
[624] Lima, "The Protection of the Environment before the Inter-American Court of Human Rights: Recent Developments." p. 506.
[625] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17." p. 72.

the Case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, as the communities whose rights were recognized by the Court were situated in the State's border area with the Republic of Paraguay and with the Plurinational State of Bolivia.[626] In any case, that contentious case was not the ideal opportunity for the establishment of obligations in relation to the regulation of the human rights to water and sanitation in the context of transboundary water resources, as it would only be able to bind Argentina, leaving the obligations of other riparian States unattended. It could also mean that the IACtHR is reluctant to address the issue of the transboundary effects of the human rights to water and sanitation, as States have historically been resistant to recognize potential implications of these rights for outside their jurisdiction.[627]

Due to this omission, it may be helpful to interpret this customary principle in the light of the framework of extraterritorial application of human rights established by the IACtHR. Even though there are different approaches to the interpretation of customary international law,[628] the interpretation of a treaty that codifies rules of international law may certainly offer some guidance to the analysis of its customary counterpart.[629] In this regard, it is important to recall the interpretation directives codified by the Vienna Convention on the Law of Treaties. Its article 31(3)(c) establishes that the interpretation of a treaty must consider "any relevant rules of international law applicable in the relations between the parties".[630] These other applicable binding rules may be derived from other treaties, as well as customary international law and principles.[631] It is worth mentioning that this systemic approach is also established in international customary law and applies to the interpretation of customary norms.[632] As such,

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[626] Inter-American Court of Human Rights, "Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgement of February 6, 2020 (Merits, Reparations and Costs)." p. 18-20.
[627] Donoho, "Some Critical Thinking about a Human Right to Water." p. 112; United Nations, "Official Records of the United Nations General Assembly Sixty-Fourth Session, 108th Plenary Meeting, A/64/PV.108." p. 16-17; United Nations, "The Future We Want, UN Doc. A/CONF.216/L.1." p. 23; African Commission on Human and Peoples' Rights, "Guidelines on the Right to Water in Africa." p. 11; Organization of American States General Assembly, "The Human Right to Safe Drinking Water and Sanitation, AG/RES. 2760 (XLII-O/12)."
[628] Orfeas Chasapis Tassinis, "Customary International Law: Interpretation from Beginning to End," *European Journal of International Law* 31, no. 1 (August 7, 2020): 235–67, https://doi.org/10.1093/ejil/chaa026. p. 237-239.
[629] Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave*, Queen Mary Studies in International Law, volume 17 (Leiden ; Boston: Brill Nijhoff, 2015). p. 272.
[630] United Nations, "Vienna Convention on the Law of Treaties."
[631] Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden ; Boston: Martinus Nijhoff Publishers, 2009). p. 433.
[632] Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration*. p. 266.

States that integrate the Inter-American Human Rights System should interpret the principle of equitable and reasonable utilization codified by the UNWC, as well as its customary counterpart, in accordance with the ACHR. This interpretative approximation of the regimes is also highly compatible with the *pro persona* principle, which is the dominant form of the IACtHR's method of assessing the States' obligations in international law.[633]

Following the systemic interpretation perspective, relevant human rights obligations, as those provided for the human rights to water and sanitation, must be considered jointly with the principle of equitable and reasonable utilization for the decision on water allocation. It should be stressed these rights may be applied extraterritorially under certain circumstances, as ruled by the IACtHR in the OC-23/17. As pointed out by Catarina de Albuquerque, the States must ensure that its own use of water resources does not compromise the access to sufficient and safe water in other States.[634] The General Comment No. 15, adopted in the context of the ICESCR, also asserts that "activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction".[635]

Differently from the vital human needs' formula, the systemic interpretation of the principle of equitable and reasonable utilization leads to an allocation of water that does not focus on the conflicts and priority of uses. Rather, it guides the application of the principle of equitable and reasonable utilization through the consideration of the States' international obligations, such as environmental due diligence and the human rights right to water and sanitation. Hence, an allocation of water that risks violating human rights, or other international obligations, would not only trigger the State's international responsibility for the breach of the specific obligation, but would also be inequitable and unreasonable. The systemic interpretation approach does not derogate from the general rule of the absence of hierarchy between uses, it merely notes that the maximization of benefits in an international watercourse cannot be achieved if the principle of equitable and reasonable utilization is

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[633] Lixinski, "The Inter-American Court of Human Rights' Tentative Search for Latin American Consensus." p. 363.
[634] Catarina de Albuquerque, *Access to Justice for Violations of the Human Rights to Water and Sanitation*, Realising the Human Rights to Water and Sanitation : A Handbook / by the UN Special Rapporteur Catarina de Albuquerque, 9.2014 (Bangladore, India: Precision Fototype, 2014). p. 15.
[635] Committee on Economic, Social and Cultural Rights, "General Comment 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11." p. 11.

employed as a mechanism to violate international law. It could hardly be argued that the violation of international law could be a legitimate result in an analysis of equity and reasonableness. In conclusion, the States remain the sole legitimate parties to manage international watercourses consonantly with their interests, inasmuch as the arrangements for water allocation are consistent with their other international obligations.

There may be, however, difficulties in the application of this systemic interpretation, especially when water availability is not sufficient to reconcile different interests across jurisdictions. This situation is particularly dire because the allocation of water under the principle of equitable and reasonable utilization in accordance with the human rights to water and sanitation may not be enough for the protection of these rights. A possible solution for this complex issue would be to rely on international cooperation between riparian States. This possibility surpasses the discussion of the allocation of water in a specific international watercourse, as it could encompass the planning of alternate sources of water, or even temporary solutions for the provision of water.[636]

Finally, as the systemic interpretation approach applies both to treaty and customary law, it is not limited to the group of States that have ratified the UNWC. Accordingly, this approach intends to provide guidelines for the applications of customary international water law and other treaty regimes, thus allowing for a wider protection of the human rights to water and sanitation in Latin America. It also intends to implement a preventive perspective, as the redressing mechanisms provided for these communities by international instruments are often limited or not suitable for the management of emergencies, such as in a water stress scenario.[637]

However, there are still numerous challenges for effective safeguard of these rights, as customary international law faces challenges due to the system's informality, the lack of precise rules and the limited mechanisms of enforcement.[638] Furthermore, it is unclear if

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[636] Anna F.S. Russell and Stephen McCaffrey, "Tapping Transboundary Waters: Implications of the Right to Water for States Sharing International Watercourses," in *The Human Right to Water*, ed. Malcolm Langford and Anna F. S. Russell (Cambridge: Cambridge University Press, 2017), 144–73, https://doi.org/10.1017/9780511862601.007. p. 160-161.
[637] Daphina Misiedjan and Joyeeta Gupta, "Indigenous Communities: Analyzing Their Right to Water under Different International Legal Regimes," *Utrecht Law Review* 10, no. 2 (2014): 77–90. p. 83.
[638] Dellapenna, "The Customary International Law of Transboundary Fresh Waters." p. 276-277.

States would be willing to adopt this approach in their bilateral and multilateral treaties and other instances of international cooperation.

Of course, the interpretation of the principle of equitable utilization in the light of the human rights to water and sanitation is purely hypothetical and a circumstance where it might be applicable is yet to be submitted to the IACtHR. For that matter, as described by Otto Spijkers, the extraterritorial application of these rights is "developed primarily in scholarly opinion" and there are still many uncertainties relating to this theory, including its very scope.[639]

Nevertheless, the gradual expansion of the IACtHR's jurisdiction seems to enable alternative solutions for transboundary access to justice, both in domestic jurisdictions and in the Inter-American Human Rights System. The possibility of holding a State accountable for transboundary human rights violations may certainly enable individuals and groups to seek justice in these circumstances, even though the Court might be reluctant to address a topic that is so sensitive to States as the sovereignty over their natural resources.

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[639] In this regard, Spijkers states that, for instance, "it is unclear whether the reach of such a right extends even beyond shared basins". Otto Spijkers, "The No Significant Harm Principle and the Human Right to Water," *International Environmental Agreements: Politics, Law and Economics* 20, no. 4 (December 2020): 699–712, https://doi.org/10.1007/s10784-020-09506-3. p. 708.

CONCLUSIONS

Water and sanitation have historically not received the attention they deserve in international law. This negligence aided in deepening the negative effects of the emerging crisis on water security and enhances the risks that are already grave in a context of climate change. That may have been the case until the present, but this scenario is beginning to change.

Seventeen years have passed since the IACtHR first dealt with the issues of water and sanitation in its case law. In this period, there has certainly been a significant amount of progress in the establishment of the legal bases, the normative elements and the very realization of the human rights to water and sanitation.

The position of the IACtHR on the human rights to water and sanitation is unique, in the sense that it manages to be simultaneously innovative and cautious. Even though these human rights had already emerged in international law when the Court first introduced these issues in its case law, it was certainly one of the first international jurisdictions to enable their justiciability and to impose redress mechanisms specifically directed towards the provision of water and sanitation services and construction of the corresponding infrastructure.

In its recent case law, the Court was also very prominent in the recognition of an autonomous right to water in a bold interpretation of the progressive development clause of the ACHR. Furthermore, it presented very robust parameters for the protection of environmental resources and the extraterritorial application of the ACHR, which could have a major impact in the realization of the human rights to water and sanitation. It should not be forgotten that the IACtHR has also determined the adoption of very robust measures pertaining to water and sanitation in its rulings, even though there have been some challenges in relation to the compliance with the judgements.

On the other hand, the Court systematically failed to recognize, or even reference, the right to sanitation in its case law. This omission is rather surprising, considering that the IACtHR determined several times the adoption of redress mechanisms related to the right to sanitation. Nonetheless, with or without express recognition, this right remains as an essential element of the human rights to water and to a decent existence, which enables its justiciability in the IASHR. There are even some signs that this right will be considered in the future case law of the IACtHR, as it began to be more prominent in recent Inter-American soft law instruments.

Additionally, the IACtHR made very restricted effort to clarify the obligations of States in relation to the human rights to water and sanitation. It was highly influenced by CESCR's General Comment No. 15, but the selective reproduction of this document and the limited improvements and updates in light of other developments in international law demonstrate that there is plenty of room for refinement of the issue in the case law of the IACtHR.

In any case, there are undoubtedly grounds for improvement in the clarification of the obligations that emanate from the human rights to water and sanitation, as well as in the dialogue with State to implement the measures ordered by the States. For the first issue, it is reasonable to expect that the Court will continue to address the legal conundrums to the extent that they appear to be necessary for the adjudication of each concrete case, even due to the reason that the judgement binds only those involved in the litigation. In relation to the second thematic, which pertains to the institutional position of the Court as a whole and to its legitimacy before States.

This problem is not new and has been approached by several angles, such the argument in favor of the increase of the utilization of the margin of appreciation doctrine. It is clear, nonetheless, that the matter is not restricted to the legal realm, as it encompasses political disparities and regional dialogues that go beyond the jurisdictional mission of the Court. These legitimacy issues that must not be overlooked by the IACtHR, given that States are sovereign subjects of international law and are mainly bound to the extent of their consent to the international legal frameworks.

In light of these considerations, it is paramount to observe that the hypothesis of this thesis was only partially confirmed. It was assumed, given the innovative treaty interpretation methods of the IACtHR, that its case law established a framework for the human rights to water and sanitation that are more protective than their other counterparts. On one hand, this assumption proved valid in relation to the innovation of the IACtHR in relation to the methods of recognition of the human right to water and the creation of specific redress mechanisms. On the other, it proved to be misguided, as the IACtHR's case law does not address issues that have been reasonably developed in general international law, such as the consideration of the right to sanitation as an autonomous right. Additionally, it does not provide normative elements that have not already been established in general international law, and particularly, in CESCR's General Comment No. 15.

In any event, the case law of the IACtHR created very positive conditions for the realization of the human rights to water and sanitation in the IASHR. That does not mean that there are no more challenges or restrictions to the assessment and implementation of these rights, but it is certainly an important step towards their universalization. Yet, it does mean that the jurisdiction of the IACtHR is open to consider and assess violations of the human rights to water and sanitation, whilst attributing clear redress mechanisms for the individuals and groups affected.

This step is an important one in the road to universalization as it enables the correction of injustices and the protection of the most marginalized peoples in the Latin American context. It is not the end, but it is nonetheless a very promising beginning.

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