12. The Greening of the Inter-American Court of Human Rights: Environmental Protection Possibilities for Future Generations

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Abstract: *The protection of the right to a healthy environment differs greatly within the different human rights regional systems. Moreover, when it comes to discussing the rights of future generations, complexity increases. This chapter focuses on the Inter-American system and asks whether, in the context of its greening, the Rio Principles and the principles of institutional continuity and temporal non-discrimination could be used as interpretation methods to mainstream the intergenerational rights for a deeper environmental protection. Thus, the chapter clarifies the historical progression of the protection of the right to a healthy environment before the Inter-American system: going from the incompetence of the Court to exert its jurisdiction to an independent analysis of the right to a healthy environment. Despite the largely procedural nature of the discussion, the chapter goes beyond and justifies the possibility of including the protection of environmental rights of future generations from the perspective of substantive rights.*

1. Introduction

The right to a healthy environment is included in the extensive list of protected human rights under the Inter-American system. However, such environmental protection is excluded from the jurisdiction of the Inter-American Court of Human Rights ('the Court') and the Inter-American Commission on Human Rights (the Commission), at least as stated in the text of the Inter-American Convention on Human Rights ('the Convention'). More recently, through the process known as the greening of the Inter-American system, the so-called reflex protection – through the analysis of other human rights – has been made possible by the Commission and the Court. This means it has become possible to provide environmental protection when civil and political rights are violated due to poor environmental protection. From the early 2000s and onwards, especially after Resolution 12/85 in *Yanomami v Brazil* and after *Indigenous Community Awas Tingni Mayagna (Sumo) v Nicaragua*, this type of reflex protection

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has been progressively accepted in case law and doctrine. Its consolidation came with the Court's *Advisory Opinion OC-23/17*.

This chapter will go one step further by addressing the issue of future generations. It is important to establish that I understand future generations, from a legal perspective, as both those that cannot yet speak for themselves (legally incompetent) – mainly for reasons of age –, and those that are not yet born and, thus, their physical existence is situated in the future. However, this chapter will focus on the second group since the discussion regarding their legal representation is more complex and, as yet, not settled. Still, aspects regarding the under-aged may be of great importance and might be recalled as grounds for the reasoning. Another relevant aspect dealt with is the perspective that the present generation is subject to a duty to protect rights and the environment for future generations.

Because of the current construction of environmental protection within the Inter-American human rights system, there is a need for identifiable harm caused to the rights – such as life or health – of a specific person or group of people. However, if only future generations will feel the harm, those absent still go unprotected, as the interconnection with civil or political rights is virtually impossible in those cases. Therefore, the chapter asks whether in the context of this greener Inter-American system, the Rio Principles – especially sustainable development and precautionary principles – and the principles of institutional continuity and temporal non-discrimination could be used as interpretation methods to mainstream the intergenerational rights for a more profound environmental protection from the Commission and the Court. This means analysing both material and procedural issues because, even if the materiality is proven possible, there is still the hurdle of representing those absents in a system that restricts access to the Court only to the Member States and the Commission.

To do so, the chapter is divided into four parts: Section 2 provides an overview of the greening of the Inter-American system and of the arguments and main cases that enabled it; Section 3 gives an overview of the procedural aspects involved in access to the Inter-American Commission and Court; Section 4 focuses on the analysis of the principles and their application in the construction of International Environmental Law; and Section 5 deals with the application of those principles in the explained scenario, to answer to the research question.

2. The Greening of the Inter-American System

Since 1988, the inter-American system has recognised the human right to a healthy environment. Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)[1] clearly states: '1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment.' Nonetheless, the same Protocol does not include such a right among those that may have jurisdictional control of the Commission and the Court. In that sense, the text of Article 19, para. 6, reads:

> Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

Thus, being neither listed under the substantive part of the American Convention on Human Rights[2] nor included for jurisdictional purposes by the San Salvador Protocol, the right to a healthy environment cannot be directly demanded before the Inter-American Commission nor the Court.[3]

It is possible, however, to allege a violation of the right to a healthy environment when an offence causes a violation of one or more of the rights pro-

1 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 No 69 (1988) (entered into force 16 November 1999) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 67 (1992).

2 American Convention on Human Rights, OAS Treaty Series No 36, 1144 UNTS 123 (entered into force 18 July 1978) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992).

3 Christian Courtis, 'Proteção do ambiente por meio dos direitos consagrados na Convenção Americana' in Associação Interamericana para. a Defesa do Ambiente (AIDA) (ed), *Guia de Defesa Ambiental: construindo a estratégia para. o litígio de casos diante do Sistema Interamericano de Direitos Humanos* (AIDA 2010) 69.

tected by the American Declaration,[4] the Convention, or the selected rights of the San Salvador Protocol.[5] From the early 2000s onwards, this kind of reflex protection has been increasingly accepted in case law and doctrine, especially in connection with cases involving Article 26 of the American Convention, which protects the right to progressive development.

The first cases dealing with reflex environmental protection were Resolution n. 12/85 in *Yanomami v Brasil*[6] and the *Indigenous Community Awas Tingni Mayagna (Sumo) v Nicarágua*[7], respectively analysed by the Commission and the Court.

In the case *Yanomami v Brazil* – which preceded the San Salvador Protocol – the petition adduced that the government violated the rights of the Yanomami community when building a highway crossing their land and authorising the exploration of the land's resources by private parties. Those actions led outsiders to the land, who took contagious diseases to the indigenous people that were not treated due to lack of medical attention. The Commission, in Resolution n. 12/85, determined that the government violated the rights to life (Art. 4) and integrity (Art. 5) of the Convention in light of the environment as a human right and the rights to housing and health. The basis of the discussion was the environment, because the fundamental argument of the petitioners was the indiscriminate exploitation of resources. Consequently, the Commission based its decision on Article 27 of the International Covenant on Civil and Political Rights,[8] concluding

4 American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992).

5 Valerio de Oliveira Mazzuoli and Gustavo de Faria Moreira Teixeira, 'O direito internacional do meio ambiente e o greening da Convenção Americana sobre Direitos Humanos' (2012) 17(67) *Revista de Direito Ambiental (RDA)* 234; Gustavo de Faria Moreira Teixeira, *O Greening no Sistema Interamericano de Direitos Humanos* (Juruá 2011) 32.

6 Inter-American Commission on Human Rights, 'Resolution n.12/85 – Case n. 7615 Brazil', 5 March 1985. In Annual Report CIDH 1984–85, OEA/Ser L V/II.66 Doc 10 rev 1, 1 outubro, 1985, 24, 31 (Caso Yanomami).

7 *Caso Comunidade Mayagna (Sumo) Awas Tingni v Nicaragua*, Inter-American Court of Human Rights, Judgement, 31 August 2001, Series C, No 79 <https://perma.cc/KR58-QEMC>.

8 'Nos Estados em que existam minorias étnicas, religiosas ou linguísticas, não será negado o direito que assiste às pessoas que pertençam a essas minorias, em conjunto com os restantes membros do seu grupo, a ter a sua própria vida cultural, a professar e praticar a sua própria religião e a utilizar a sua própria língua'.

that the Brazilian State did not undertake the necessary care to prevent the severe social damage resulting from the invasion of the indigenous lands.

The *Indigenous Community Awas Tingni Mayagna (Sumo) v Nicaragua* case concerns over 600 people of such a community. In March 1992, due to a project of forest extraction, the Community Awas Tingni concluded a contract with the company MADENSA to determine the integral management of the forest, recognising certain rights of participation over the territory occupied by the Community due to its 'historical possession' thereof. Two years later, the Community, MADENSA, and the Ministry of Environment and Natural Resources of Nicaragua (MARENA) concluded a covenant in which the Ministry committed to facilitating the circumscription of the indigenous land. In March 1996, the State granted a 30-year concession for the forest management and use of approximately 62 000 hectares to the company SOLCARSA without consulting the Community. The members of the community called on several governmental agencies to stop the concession and, instead, circumscribe its territory. However, none of the requests were granted. The Inter-American Court decided that Nicaragua violated their rights to judicial protection (Art. 25) and property (Art. 21) under the American Convention.

The third relevant case that reinforces the case law for the reflex protection of environmental rights is *Yakye Axa v Paraguay*.[9] It concerns the international responsibility of the State for not guaranteeing the right to the ancestral property of the Yakye Axa Indigenous Community and the consequences thereof for over 300 people. At the end of the 19th century, large tracts of land of the Paraguayan Chaco were sold to British entrepreneurs, which led to the settlement of several missions of the Anglican Church in the region. Various cattle ranches were also established in the area, where the indigenous people that were there beforehand were employed. At the beginning of 1986, the members of the Yakye Axa community moved, due to the terrible living conditions they had to endure in the cattle ranches. However, this did not improve their situation, which is why, in 1993, they started domestic procedures to reclaim the land they considered their traditional habitat. None of the several appeals resulted. Since 1996, 28 to 57 families settled next to a highway, and the remainder of the members are spread around villages in the area. In the face of the lack of results

9 *Caso das comunidades indígenas Yakye Axa contra o Paraguai*, Inter-American Court of Human Rights, Judgement, 17 June 2005, Series C, No 125 <https://perma.cc/W776-RD4H>.

in the national judiciary, they brought the case before the Inter-American system, arguing violations of the rights to life (Art. 4), humane treatment (Art. 5), personal liberty (Art. 7), fair trial (Art. 8), of the child (Art. 19), property (Art. 21), and judicial protection (Art. 25), all from the American Convention. Violations of the San Salvador Protocol were also argued. Particularly to environmental issues, Article 11 of the Protocol was mentioned due to claims for access to clean water and sanitation to the traditional communities. In summary, the Court was asked to decide whether the basic means for the dignified life of the members of the Yakye Axa community were provided, including environmental and progress-related means. The Court concluded that they were not provided.

Despite being an indirect recognition of the right to a healthy environment in the competence of the Inter-American System, it is, nonetheless, perceptible. The core is that cases of environmental degradation may demonstrate situations in which fundamental rights are at risk of irreparable harm.[10] In other words, the international instruments of environmental protection – mainly the declarations of Stockholm 1972 and Rio 1992 –, together with Article 11 of the San Salvador Protocol and the provisions of the American Declaration and Convention, give legal ground for the indirect applicability of the right to a healthy environment within the Inter-American System.[11]

In that sense, other cases considered by the Court may also be included: *Community La Oroya v Peru*,[12] due to the effects of industrial pollution; *Claude Reyes and others v Chile*,[13] due to the State restriction in providing information to citizens about the ecological impacts of projects, as well as cases analysed by the Commission: *Community Kichwa de Sarayacu and its people v Ecuador*;[14] *Indigenous Maian Communities of the Toledo District v Belize*;[15] *Indigenous Communities San Mateo Huanchor v Peru*;[16] *Indigenous*

10 Oliveira Mazzuoli and Faria Moreira Teixeira (n 5) 237.
11 Faria Moreira Teixeira (n 5) 134.
12 CIDH, caso da comunidade de La Oroya contra o Peru, Relatório Anual de 2007, Cap.III, para. 46, OEA/Ser L /V/II.130 Doc 22Rev 1, de 29 de dez. de 2007.
13 Corte IDH, caso Claude Reyes e outros contra o Chile, sentença de 19 de set. de 2006, Série C, No 151.
14 CIDH, Informe de No 62/04, caso das comunidades indígenas Kichwa de Sarayacu e seus membros contra o Equador, de 13 de out. de 2004.
15 CIDH, Informe de No 40/04, caso de No 12.053 das comunidades indígenas Maias do Distrito de Toledo contra Belize, de 12 de out. de 2004.
16 CIDH, Informe de No 69/04, caso das comunidades indígenas San Mateo Huanchor contra o Peru, OEA/Ser L V/II.122 Doc 5 Rev 1, de 15 de out. de 2004.

Communities Ngöbe and its people v Panamá;[17] *Metropolitan Natural Park by Rodrigo Noriega v Panamá*;[18] *Indigenous Communities Mapuche Pehuence by Mercedes Julia Henteao Beroiza and others v Chile*;[19] *Inuit People v United States of America (USA)*;[20] *Indigenous and Riverside Communities of the Xingu River v Brazil*;[21] and *Community La Oroya v Peru*.[22]

The interpretation of the Inter-American Court on this matter was consolidated in Advisory Opinion OC-23/17. On 14 March 2016, Colombia requested the Court to issue an Advisory Opinion whose 'essential question' was about how to interpret the American Convention when infrastructure projects may pose a risk of severe impact:

> on the marine environment of the Wider Caribbean Region and, consequently, the human habitat that is essential for the full exercise and enjoyment of the rights of the inhabitants of the coasts and/or islands of a State Party to the Pact, in light of the environmental laws established in treaties and customary international law applicable between the respective States.[23]

Thus, the Opinion addressed the scope of Articles 1(1) – obligation to respect rights, 4(1) – right to life, and 5(1) – right to humane treatment/personal integrity, all of the American Convention and in light of international environmental law. In the Court's own words, '[t]his Opinion constitutes one of the first opportunities this Court has to refer extensively to the State obligations arising from the need to protect the environment under the American Convention.'[24]

In summary, the Court concluded on a number of duties that States must comply with, derived from the obligations to respect and ensure the rights

17 CIDH, Informe de n No 75/09, caso das comunidades indígenas Ngöbe e seus membros contra o Panamá, de 5 de ago. de 2009.

18 CIDH, Informe de No 84/03, caso Parque Natural Metropolitano do Panamá, de 22 de out. de 2003.

19 CIDH, Informe de No 30/04, Solução Amistosa Mercedes Julia Huentes Beroiza, de 11 de mar. de 2004.

20 CIDH, Petição Inicial de No 1.413/05, caso do Povo Inuit contra os Estados Unidos da América (EUA).

21 CIDH, Solicitação de Medidas Cautelares de No 382/10, caso das comunidades tradicionais da bacia do Rio Xingu (Pará) contra o Brasil, de 11 de nov. de 2009.

22 CIDH, Informe de No 76/09, caso da comunidade de La Oroya contra o Peru, de 5 de ago. de 2009.

23 *Advisory Opinion OC-23/17,* Inter-American Court of Human Rights, 15 November 2017, para. 1 <https://perma.cc/KE5E-V3XY>.

24 ibid., para. 46.

to life and personal integrity in the context of environmental protection. Those include the obligation of:

- prevention, with duties to regulate, supervise and monitor, require and approve impact assessments on the environment, prepare a contingency plan and mitigate if environmental damage occurs;
- acting in accordance with the precautionary principle 'to protect the rights to life and to personal integrity in cases where there are plausible indications that an activity could result in serious or irreversible environmental damage, even in the absence of scientific certainty'[25];
- cooperation, with duties to notify, and to consult and negotiate with potentially affected States;
- ensuring the right of access to information and public participation, as well as the right of access to justice.

Finally, the Court's decision in *Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v Argentina* in April 2020 was the first to analyse the right to a healthy environment independently. So, it no longer uses the reflex effect. Therefore, it is of great relevance to the analysis of cases.

The indigenous communities claimed ownership of lands in the Argentine province of Salta. For around 35 years, the State had made progress towards recognising indigenous land ownership, but implementing actions related to the indigenous territory had not yet been concluded. The relevant circumstances included the presence of non-indigenous settlers and various activities being carried out on these lands: livestock farming, installation of fences and illegal logging. The relevant facts also included civil works, activities and projects in the territory claimed.[26]

Specifically regarding the right to a healthy environment, the Court referred directly to Advisory Opinion OC-23/17 to state that it is an autonomous fundamental right.[27] The Court has also referred to the fact that Argentina recognises the right to a healthy environment in its Constitution and has ratified the international instruments relevant for recognising such a right within the Inter-American system. On those bases, the

25 ibid., para. 180.
26 *Case of the Indigenous Community of the Lhaka Honhat (Our Land) Association v Argentina,* Inter-American Court of Human Rights, Judgment of 6 January 2020, para. 46 <https://perma.cc/998V-MDHZ>.
27 ibid., para. 203.

Court established that the States must respect not only the right but also the obligation to ensure it.[28] In particular, the obligation to implement *ex ante* measures, based on the prevention principle, was, among other arguments, highlighted as international customary law by the Advisory Opinion. In the face of all that, the Court concluded that, besides harming the rights to take part in cultural life in relation to cultural identity, to adequate food, and water, the State of Argentina violated the right to a healthy environment in regard to the obligation to ensure the rights established in Article 1(1) of the American Convention.[29]

Therefore, the progressively greening path taken by the Inter-American Commission and Court already seems to indicate that it is worth looking in depth into the possibility of protecting the environmental rights of future generations. However, before finally drawing conclusions in this regard, the question of legal standing naturally emerges when talking about future generations. Hence, the next section will analyse the possibilities for accessing the Commission and the Court on behalf of future generations.

3. Access to the Inter-American Commission and Court

Before delving into the intergenerational aspect, it is interesting to analyse the discussions regarding transboundary environmental harm, which were also raised in Advisory Opinion OC-23/17. The latter explored the meaning and scope of the word jurisdiction (including transboundary) in Article 1(1) of the American Convention to determine State obligations in relation to environmental protection:

> For the purposes of Article 1(1) of the American Convention, it is understood that individuals whose rights under the Convention have been violated owing to transboundary harm are subject to the jurisdiction of the State of origin of the harm, because that State exercises effective control over the activities carried out in its territory or under its jurisdiction, in accordance with paragraphs 95 to 103 of this Opinion.

Thus, a first concern when discussing the judicialisation of the rights of future generations is jurisdiction, which has both geographical/spatial and chronological aspects. In that sense, it is relevant to understand trans-

28 ibid., paras 204–207.
29 ibid., para. 289.

boundary environmental impacts and how the Court may assess the State's responsibilities. It is largely settled by the Court that the obligations of States do not include harming the rights of people located outside their borders, but they may be liable for harm caused within their territory and inflicted outside. The key aspect here is whether or not the same reasoning applies to 'trans-chronological' harms.

From the jurisdictional perspective, we are dealing with two sides of the same coin, despite there being two discussions. 'State jurisdiction refers to the power of a state to affect persons, property, and circumstances within its territory'.[30] It should be recalled that, for the purposes of analysis in this chapter, we consider the absent (future) generations as those not yet born. Thus, when referring to the geographical aspect, the harm caused to people in another country is harm caused to someone outside the State's jurisdiction. One of the problems with protecting the rights of the generations not yet born could be considering that those are people out of the reach of jurisdictional power, even for damages that have already occurred and will impact or continue to impact until future generations come along. This might be true for other matters, but not for protecting people against harm to their environment-related rights. That is what the Advisory Opinion had already clarified in relation to spatial absence, with direct application of the reasoning to the time absence, considering that the core feature is the effective control over the harmful activity. The responsibility of a State is not linked with its territorial jurisdiction.

In other words, if it were a matter of discussing jurisdiction, the State where the transnational environmental harm originates would not be responsible for it. It is, however, a matter of effective control over harmful activity. Therefore, choosing the path of arguments related to jurisdiction for excluding the responsibility of the State makes no sense, neither for spatial nor for time discussions.

Still, the second and main concern when discussing the judicialisation of the rights of future generations is active legitimation. In this regard, two aspects must be considered: (i) the representation of the victims, which, in this case, are absent; (ii) the procedure within the Inter-American system, in which the victims access the Court through the action of the Commission.

30 Malcom Shaw, 'International Law: Jurisdiction' (*Britannica* 1998) <https://perma.cc/8YWB-9498>.

For the analysis of the representation of victims, the procedures in the case of deceased victims – or other victims that cannot act – may be of assistance. In those cases, victims are also absent, but they belonged to past generations. In those cases, the active legitimation can be exercised through procedural representation, i.e., by someone else on behalf of the victim. A complaint may then be presented either by a person with a private and personal connection with the victim or by the so-called indirect victims.[31] This means that the complaint may be submitted by:

> those that may allege that the violation caused them some harm, or that they have a valid personal interest in having the offence ceased. This is the case of parents and siblings presented as victims due to the passing of his/her relative [...].[32]

The critical difference, then, is no longer of a procedural nature but of a substantive nature: how should the harm be characterised?. Would it be possible to prove the violation of a human right or even an autonomous environmental harm when discussing the rights of people that do not yet exist?

A philosophical approach to the problem of granting rights to future people raises a strong objection, stating that

> The fact that future individuals do not yet exist seems to entail that they could not have rights; rights need to be ascribed to someone (as opposed to "floating in the air"). This would mean not only that the rights of future people are meaningless but even that no duties are owed to them. A full examination of this challenge therefore requires us to find out whether duties can make sense without correlative rights (and if so, what could still be the added value of rights), and whether such correlative rights are really out of reach in our context.[33]

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31 See also: *X v France,* European Court of Human Rights, Application No 18020/91, Judgement, 31 March 1992 <www.echr.coe.int/echr/>; Irineu Cabral Barreto, *A Convenção Europeia dos Direitos do Homem anotada* (3rd edn, Coimbra Editora 2005); Jorge de Jesus Ferreira Alves, *A Convenção Europeia dos Direitos do Homem Anotada e Protocolos Adicionais Anotados* (Legis 2008).

32 André Pires Gontijo, 'O papel do sujeito perante os sistemas de proteção dos direitos humanos: a construção de uma esfera pública por meio do acesso universal como instrumento na luta contra violação dos direitos humanos' (2009) 49 Revista IIDH 107.

33 Axel Gosseries, 'On Future Generations' Future Rights' (2008) 16(4) The Journal of Political Philosophy 446.

Legally, however, the issue does not seem to be restricted to the existential discussion; it is related (i) to a group of people, identifiable or not, who at least at some level, have the nature of a social right – as recognized by the American Convention of Human Rights, under Article 26;[34] and (ii) to environmental principles, including the sustainable development principle, which have already been incorporated into the body of international customary law.

The relation to a group of people means that the rights of future generations can be compared to social rights due to their shared nature. Initially, this could be a problem for attempting protection under the Inter-American system, where the competence is restricted to civil and political rights. Thus, even with the greening of the Commission and the Court, it would be hard to characterise grounds for protection without a precise characterisation of violation of individual rights. The most recent developments, though, bring the right to a healthy environment, which is inherently social, to the scope of protection of the Inter-American system. Therefore, the nature of protected rights is no longer an obstacle to protecting future generations' environmental rights.

It follows that, in the same way as they may do for the violation of rights of multiple individuals or the violation of environmental rights of present generations, civil organisations may play an essential role in representing the absent – including future generations.

The relation to environmental principles, in turn, means that countries must respect the entirety of the sustainable development principle. It thus conveys the aspect of guaranteeing that future generations have the resources to fulfil their needs. Also, because of being customary law,[35] the principle of sustainable development may be brought before the Commission and the Court in accordance with the principle of good faith and the duty to modify the relevant internal legislation.

34 Under the paradigm of human rights protection at the Inter-American System, this is the consensual approach. Although different approaches are possible – and adopted in other systems – such a discussion is out of the scope of this chapter, which deals with the possibilities within the frame of the Inter-American System.

35 Pedro Ivo Diniz, 'Natureza Juridica do Desenvolvimento Sustentavel no Direito Internacional' (2015) 12(2) Revista de Direito Internacional 739.

3.1. Brief Note on the Criticism of the Environmental Control by the Inter-American Court

All arguments considered so far indicate not only the possibility, but also the need to enable the protection of the environmental rights of future generations under the Inter-American system by both the Commission and the Court. They are, however, largely based on the progressively increasing greening of the Inter-American System of Human Rights, against which there is also criticism. The most relevant one here is that the expansion of the competence towards environmental matters may engender a backlash effect that creates resistance from States, which may even lead to non-compliance by those who argue that they did not agree with such competence.

This discussion is even more sensitive and of higher relevance in the context of the rights of future generations, for which harms are potential instead of consummated. The more uncertainty involved, the more States might refrain from committing or complying. A common suggestion here is to differentiate clearly between rules and standards. This, having in mind that:

> rules are those legal commands which differentiate legal from illegal behavior in a simple and clear way. Standards, however, are general legal criteria which are unclear and fuzzy and require complicated judiciary decision making.[36]

In other words, when dealing with legal standards, more flexibility – and even activism – is both allowed and expected from the court.

Although this is a path whose exploration is outside of the scope of this chapter – mainly because of its political nature –, it is undoubtedly a discussion that must be included when searching for the protection of future generations' environmental rights under the Inter-American system.

4. Environmental Principles and Rights for Future Generations

This section focuses on the principles involved in protecting human rights in the context of environmental protection, namely, sustaable development, prevention, precaution, cooperation, institutional continuity, and temporal

36 Hans-Bernd Schaefer, 'Legal Rules and Standards', in Charles K Rowley and Friedrich Schneider (eds), *The Encyclopedia of Public Choice* (Springer 2005).

non-discrimination. As already briefly mentioned in the previous section, the environmental principles may already be considered, if not sources *per se* of international law, instruments for interpretation.[37]

Beyond the discussion of principles as a source of international law, there is a more recent understanding of the need to rebuild international law based on solidarity and that could also be applied. Such a perspective points out that there are:

> elements to approach the issue, from such a perspective and in a more satisfying way, on international jurisprudence and in the practice of States and international bodies, as well as in the more lucid legal doctrine. From such elements comes [...] the awakening of an universal legal consciousness [...] to rebuild, in the beginning of the XXI century, the International Law base in a new paradigm, no longer State-centered, but situating humankind in a central position and having present the problems that affect humankind as a whole.[38]

Still, only the more consolidated approach of applying the principles of international environmental law will be used.

a) Sustainable Development

The broader principle of sustainable development was first described as such by the Report of the Brundtland Commission in 1987: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[39] Incorporating the concept adopted by the Brundtland Commission, Principle 4 of the 1992 Rio De-

37 See, eg: Antonio Augusto Cancado Trindade, *Principios do Direito Internacional Contemporaneo* (2nd edn, Brasilia – FUNAG 2017); Max Valverde Soto, 'General Principles of International Environmental Law' (1997) 3(1) ILSA Journal of International & Comparative Law 193; Winfried Lang, 'UN-Principles and International Environmental Law' (1999) 3 Max Planck UNYB 157 <https://perma.cc/869D-HK42>; Oscar Schachter, 'The Emergence of International Environmental Law' (1991) 44(2) Journal of International Affairs 457; Diniz (n 35).

38 Antonio Augusto Cancado Trindade, 'A Formação do Direito Internacional Contemporâneo: Reavaliação Crítica da Teoria Clássica de Suas "Fontes"' (2002) 29 Curso de Direito Internacional Organizado pelo Comitê Jurídico Interamericano 1, 60 <https://perma.cc/29SQ-PHJ5>.

39 Gro H Brundtland and others, 'Our Common Future: Report of the World Commission on Environment and Development', UN-Doc A/42/427 (United Nations 1987) <https://perma.cc/B5MA-QNXZ>.

claration on Environment and Development affirms that '[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'.[40]

No further arguments are needed for this chapter. As stated in the previous section, such an umbrella principle explicitly incorporates the rights of future generations – by unequivocally acknowledging them and their rights – into the international regulatory framework.

b) Prevention

Another basic principle is the prevention principle, established as number 11 of the 1992 Rio Declaration. It requires States to:

> enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.[41]

The principle of prevention requires action to be taken at an early stage and, if possible, before damage has actually occurred, leading to the prohibition of activities that (may) cause environmental damage. Therefore, it is in direct alignment with the purpose of preventing environmental damage from occurring to future generations.

c) Precaution

Together with the principle of prevention must always come the precautionary principle. The Rio Declaration expressly enshrined it under Principle 15:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty

40 United Nations Conference on Environment and Development, 'Rio Declaration on Environment and Development' UN-Doc A/CONF.151/5/Rev.1 (United Nations 1997).

41 ibid.

> shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[42]

The precautionary principle protects society from the potential risks associated with the current uncertainties about the impacts of behaviours and activities. This sheds light on the discussion about proving harm. Even in the face of uncertainties – including temporal uncertainties, as in the case of harm to future generations – environmental rights must be protected.

d) Cooperation

In several fields of international law, States have chosen to go beyond mere co-existence and the allocation and regulation of sovereign rights to cooperate. This is the case of protecting the environment. Those grounds allowed for the recognition that States are responsible for thinking globally about not harming the environment, making room for international instruments such as the Stockholm and the Rio Declarations. It also makes the existence of agreed supervisory and monitoring mechanisms possible, including the Convention on Long-Range Transboundary Air Pollution, the Convention on the Law of the Sea, the Vienna Convention for the Protection of the Ozone Layer, the amended Convention on Marine Pollution from Land-Based Sources, the Convention on Biological Diversity, the United Nations Framework Convention on Climate Change, among others.[43] Similarly, the principle of cooperation may provide enough basis for protecting the environmental rights of future generations, as long as States decide to cooperate to achieve such a goal.

e) Temporal Non-Discrimination and Institutional Continuity

Although the path towards its recognition was not easy, the principle of non-discrimination became a basilar one after the Second World War,[44]

42 ibid.

43 Malcom Shaw, 'International Law: International Cooperation' (*Britannica*, 1998) <https://perma.cc/9J6V-LUXA>; Rüdiger Wolfrum, 'International Law of Cooperation' in *Max Planck Encyclopedia of Public International Law* (OUP 2010).

44 Office of the High Commissioner for Human Rights and the International BAR Association, 'The Right to Equality and Non-Discrimination in the Administration of Justice' in *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations 2003) 634.

starting with the UN Charter (1945) and strengthened by the Universal Declaration of Human Rights. Accepting that there is an intergenerational (or temporal) aspect for non-discrimination is simply another way of applying the principle of intergenerational solidarity[45] and, thus, aiming at fully guaranteeing sustainable development.

The principle of institutional continuity refers to the recurring modes of action and organisational patterns within institutions. Although, theoretically, such continuity could serve both the negative purpose of reproducing flawed patterns or the positive purpose of pushing forward improved rights protection and standards of equality, the discussion about future generations should try to ensure it is positive, for instance, in attempting to perpetuate the principle of non-discrimination also on its temporal dimension.

This brief review of basic environmental principles, and their connection to the protection of rights – especially environmental rights – of future generations, reinforces the possibility of judicialising such protection in the international courts.

5. Concluding Remarks

All that considered, we can see a clear historical progression of the protection of the right to a healthy environment before the Inter-American system: going from the incompetence of the Court to exert its jurisdiction to an independent analysis of the right to a healthy environment. In such a context, the chapter goes beyond and justifies the possibility of including the protection of environmental rights of future generations from the perspective of substantive rights, especially when all the involved principles are considered.

Although the procedural aspects pose extra challenges, mainly the: (i) scope of jurisdiction; (ii) representation of the victims, which, in this case, are absent; and (iii) the procedure within the Inter-American system, in which the victims access the Court through the action of the Commission. However, all those are overcome in the context of protecting the right to a healthy environment. First, it is a matter of control over harmful activity

45 Marisa Quaresma dos Reis, 'The Principle of Intergenerational Solidarity in Reshaping Constitutional Rights and Obligations: An Example from Portugal' in Marie-Claire Cordonier Segger, Marcel Szabó and Alexandra R Harrington (eds), *Advancing Future Generations Rights through National Institutions* (CUP 2021).

and not a matter of national jurisdiction over a territory. Thus, in the same sense that territoriality plays no role on State responsibility when harm is transboundary, time constraints should play no role when harm transcends current generations. Second and third, the representation of absent victims is not a novelty. The reasoning here is similar to the necessity of representation when the absent are past generations – for instance, deceased victims. In the face of the international protection of sustainable development and the environmental dimension, the fact that the victims do not yet exist is not an impediment *per se*. To that, the precautionary principle even adds the factor that certainty of harm is not necessarily mandatory to address activities that pose risks to the environment.

Finally, the criticism of the expansion of the Commission and the Court's intervention in environmental matters should also be considered, mainly aiming at preventing resistance and non-compliance from States. This should not, however, obstruct the possibility of protecting the environmental rights of future generations through the Inter-American System of Human Rights.