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Rights of nature in the Inter-American Court of Human Rights: Understanding the ecocentric approach to the right to a healthy environment

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Abstract

The recognition of the right to a healthy environment as an autonomous and justiciable right in Advisory Opinion OC-23/17 represents the turning point of the Inter-American Court of Human Rights towards the adoption of an ecocentric approach. This article examines how the interpretation of the right to a healthy environment suggests the acknowledgement of Nature as a holder of rights under the American Convention on Human Rights. First, it analyses how the Inter-American Court has addressed environmental protection in its jurisprudence, through procedural and substantive rights. Second, it studies the ecocentric interpretation of the right to a healthy environment in the Advisory Opinion OC-23/17 and in the case *La Oroya v Peru*. Lastly, it explores what are the consequences of understanding Nature as a holder of rights for the complaint procedure before the Inter-American Court.

1 | INTRODUCTION

The Rights of Nature (RoN) is a movement that seeks to recognise within existing legal frameworks, legal rights for natural entities, such as rivers, mountains, glaciers, ecosystems or Nature[1] as a whole.[2] This movement has its origins in the union of non-Western and Western ideas, particularly of Indigenous peoples.[3] It was first conceptualised by Christopher Stone in 1972 in his article 'Should Trees Have Standing?'.[4] Since then, the RoN as a concept has been gaining traction among jurists, environmentalists and Indigenous peoples, for whom this idea allows them to integrate their traditional understanding of Nature with Western or westernised legal orders. Since the 2000s, the RoN have been recognised by several jurisdictions, either by introducing them into their legislation, such as Ecuador with its 2008 Constitution, or through case-law, as it happened in Colombia with the Atrato River case, or in New Zealand with the Whanganui River case.[5] Some authors, such as Epstein and Schoukens, have even argued that the European Union has implicitly granted rights to Nature due to the legal obligations to protect it.[6]

Against this context, the recent ecocentric approach taken by the Inter-American Court of Human Rights with regards to environmental protection may constitute a possible avenue for the incorporation of

This article is partially based on a submission by the author to the Inter-American Court of Human Rights on the request for an Advisory Opinion on Climate Emergency and Human Rights made by Chile and Colombia on January 2023.

[1]Throughout this paper, the term Nature is written with a capital N, in accordance with the United Nation Resolution adopted by the General Assembly A/RES/73/235, and the Report of the Secretary General on Harmony with Nature A/74/236. Both these documents use this capitalisation to convey that Nature is 'not an object or property but a subject of law, with legal personhood, whose intrinsic value is recognised'.

[2]Y Epstein and H Schoukens, 'A Positivist Approach to Rights of Nature in the European Union' (2021) 12 Journal of Human Rights and the Environment 205, 206; D Zartner, 'Watching Whanganui & the Lessons of Lake Erie: Effective Realisation of Rights of Nature Laws' (2021) 22 Vermont Journal of Environmental Law 1, 4.

[3]J C Gellers, *Rights for Robots: Artificial Intelligence, Animal and Environmental Law* (Routledge 2020) 104–105.

[4]Epstein and Schoukens (n 2) 205; Gellers (n 3) 106.

[5]Epstein and Schoukens (n 2) 206; Zartner (n 2) 4.

[6]Epstein and Schoukens (n 2).

the RoN into International Human Rights Law. In the *Advisory Opinion OC-23/17*, the Court recognised the Right to a Healthy Environment (RHE) as a justiciable and autonomous right that protects the elements of the environment as legal interests in themselves. Its subsequent application in the *La Oroya v Peru Case*, opens up the possibility to resort to the Inter-American System of Human Rights for activities that pose a risk to Nature, and contribute to climate change, even in the absence of evidence of a direct risk to human beings.

To better understand these developments, this paper will employ the framework of Critical Environmental Law (CEL). CEL is an approach to environmental law that 'exerts a radical critique of traditional legal and ecological foundations, while proposing in their stead a new, mobile, material and acentric environmental legal approach.'[7] As such, CEL seeks two main objectives, which are relevant for this discussion. First, it looks to redefine Nature and its position relative to humans by abandoning the artificial human/nature divide.[8] Instead, CEL adopts an open ecology approach, which understands that Nature combines all the natural, the human, and the artificial on a plane of contingency and fluid boundaries.[9] Accordingly, the environment that we encounter (and in which we live) is considered as an environment that at the same time has built us and was built by us.[10] The boundaries of Nature are expanded, and it is no longer possible to distinguish human and non-human elements because both are part of the same. Second, CEL redefines the notion of legal personhood, by extending it to non-human entities.[11] The traditional subject of law, and particularly of environmental law is de-centred in favour of both human and non-human entities.[12]

Using this approach, and through the study of Inter-American case-law, this paper aims to demonstrate that the ecocentric perspective adopted by the Court when developing the content of the RHE in the *Advisory Opinion OC-23/17* and in the judgement of *La Oroya v Peru* constitutes an implicit recognition of Nature as a subject of rights protected under the American Convention on Human Rights (ACHR). In this context, Nature is understood as a collective entity that includes human beings as an integral part of an interconnected whole. This paper will also analyse how the notion of RoN can be compatible with the ACHR, based on the Court's jurisprudential developments of the notion of legal personhood. Finally, this paper will address the procedural challenges that arise from the recognition of legal personhood to Nature under the ACHR.

This article is divided into four sections. Section 2 refers to the evolution of environmental protection in the Inter-American Court of Human Rights. Section 3 refers to how the Court has characterised the RHE in the *Advisory Opinion OC-23/17* and in *La Oroya v Peru*, with an emphasis on the distinction between the individual and collective dimensions of this right, and how it suggests Nature as the holder of the latter. Section 4 discusses how these developments amount to an implicit recognition of the RoN under the ACHR, how the ecocentric approach taken by the Court interprets Nature as an interconnected whole that rejects the human/Nature divide, and how this expands the conception of personhood in the Inter-American System. Finally, section 5 analyses the challenges that the ecocentric understanding of the RHE poses in relation to the complaint procedure of the Inter-American System of Human Rights.

2 | EVOLUTION OF ENVIRONMENTAL PROTECTION IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The RHE was incorporated into the Inter-American System of Human Rights with the promulgation of the Protocol of San Salvador (PSS) in 1988. Its Article 11 reads as follows:

> Article 11: Right to a Healthy Environment
>
> 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
> 2. The State Parties shall promote the protection, preservation, and improvement of the environment.[13]

Despite this early recognition, in principle, the RHE could not be invoked before the Court. Most of the rights included in the PSS are not justiciable. Its Article 19(6) only allows the application of the individual complaint procedure with respect to the rights entailed in Articles 8(1)(a) (right to unionise) and 13 (right to education).[14] With respect to the other rights, the PSS does not allow other mechanisms of protection besides the observations and recommendations that the Inter-American Commission of Human Rights can formulate to Member States.[15]

Nevertheless, the lack of justiciability of Article 11 did not prevent the Court from addressing environmental issues through the interpretation of rights that are specifically linked to the environment. The Court's environmental case-law can be classified into two groups: those that address environmental issues through procedural rights, and those that address them through substantive rights.

2.1 | Environmental issues through procedural rights

In the context of environmental issues, procedural rights are those that are instrumental to the exercise of other rights, and whose

[7]A Philippopoulos-Mihalopoulos, 'Actors or Spectators? Vulnerability and Critical Environmental Law' (2013) 3 Oñati Socio-Legal Series 854, 863; Gellers (n 3) 117.
[8]Gellers (n 3) 118.
[9]Philippopoulos-Mihalopoulos (n 7) 863.
[10]Gellers (n 3) 119.
[11]ibid 120–121.
[12]ibid.
[13]Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 16 November 1988, entered into force 16 November 1999) OAS Treaty Series No. 69 (Protocol of San Salvador) art 11.
[14]ibid art 19(6). F Quispe Remón, 'Medio Ambiente y Derechos Humanos a la Luz de la Jurisprudencia de la Corte Interamericana de Derechos Humanos' (2022) 22 Anuario mexicano de derecho internacional 71, 78.
[15]ibid.

exercise supports better environmental policymaking.[16] Examples of these rights are freedom of expression, freedom of association, right to information, right to participation and right to an effective remedy.[17] The cases in this group are characterised by the fact that the protection of the environment is not the main issue of the dispute.[18] Most of them deal with the protection of environmental defenders and the access to information on the environment.

Environmental defenders are a type of human rights defenders. The Court defined human rights defenders as 'any person who engages in efforts to promote and defend a human right, and who self-identifies or is recognised by society as a defender', being environmental defenders those who engage in environmental matters.[19] This status derives from the labour carried out and does not need to be permanent.[20] In cases such as *Kawas Fernández v Honduras*, and *Luna López v Honduras*, the Court has referred to the importance of the work of environmental defenders and the collective interest that they represent, and the 'undeniable link between the protection of the environment and the enjoyment of other human rights.'[21] Consequently, to guarantee the safety of environmental defenders when carrying out their work is an indirect way of ensuring the protection of the environment.[22]

With respect to the right to access to information, cases like *Claude Reyes v Chile* and *Baraona Bray v Chile* illustrate its relevance in environmental matters to guarantee participation, to strengthen the democratic system, and to promote the principle of environmental democracy.[23] In the case *Baraona Bray v Chile* for instance, the Court stated that opinions, ideas, expressions, and information on environmental matters, such as those regarding the protection of the environment, or activities that entail environmental risk, should be considered as matters of public interest.[24] Thus, states must protect freedom of expression in relation to environmental issues, and promote the citizens' participation in these matters.[25]

Case-law dealing with procedural rights constituted the earliest opportunities where the Court addressed environmental issues.[26] While most of the cases within this group belong to an earlier stage in the development of the Court's environmental case-law, the approach of applying procedural rights to environmental issues may experience a revival in the future due to the recent willingness of the Court to directly apply international instruments related to the protection of the environment, such as the Escazú Agreement.[27] This instrument refers to the rights to access to public information, public participation and justice, which are necessary for the sustainable development of democracies and for the protection of human rights.[28] In the 2022 *Baraona Bray v Chile Case*, the Court explicitly referred to the Escazú Agreement for the first time and used it to further develop the importance of freedom of expression in environmental matters within a democratic society.[29] Against this background, it is expected that similar cases that deal with procedural rights may be brought before the Court.

2.2 | Environmental issues through substantive rights

Substantive rights refer to those 'rights whose enjoyment is particularly vulnerable to environmental degradation.'[30] For instance, the right to life, the right to health, the right to property and the RHE itself.[31] We can classify the substantive rights approach of the Court in two stages, before and after the *Advisory Opinion OC-23/17*.

2.2.1 | Before the *OC-23/17*: environmental protection through its connection with other rights

The first stage is characterised by the recognition of the direct relation between the physical environment and the effective enjoyment of human rights.[32] This linkage between environmental issues and human rights was achieved through a broad interpretation of the provisions of the ACHR.[33] In this stage, the Court addressed environmental issues through the recognition of the environmental dimension of other rights, like the right to life and the right to property.[34] This approach consists of the ecologisation of already existing provisions on human rights instead of the addition of new rights to human rights treaties.[35] This technique is not unique to the Court, other organs and international tribunals of human rights have already employed this approach, like the European Court on Human Rights in relation to the right to life and private life, for instance.[36]

This stage began with the case of *Awas Tingni v Nicaragua*, in which the Court recognised the special relation between Indigenous peoples, their ancestral territories and the natural resources that can

[16] J Calderón-Gamboa and JD Recinos, 'Inter-American Approaches to the Protection of the Right to a Healthy Environment and the Rights of Nature and Potential Contributions to the European Human Rights System' in N Kobylarz and E Grant (eds), *Human Rights and the Planet* (Edward Elgar Publishing 2022) 86, 89; *Baraona Bray v Chile* [2022] Inter-American Court of Human Rights Serie C 481 para 94.
[17] *Baraona Bray v. Chile* (n 16) para 94.
[18] Calderón-Gamboa and Recinos (n 16) 89.
[19] *Baraona Bray v. Chile* (n 16) para 71.
[20] ibid para 70.
[21] *Kawas-Fernández v Honduras* [2009] Inter-American Court of Human Rights Serie C 196 para 148; *Luna López v Honduras* [2013] Inter-American Court of Human Rights Serie C 269 para 123; Calderón-Gamboa and Recinos (n 16) 89–90.
[22] Calderón-Gamboa and Recinos (n 16) 90.
[23] *Claude-Reyes* et al *v Chile* [2006] Inter-American Court of Human Rights Serie C 151 para 151; *Baraona Bray v. Chile* (n 16) para 100.
[24] *Baraona Bray v. Chile* (n 16) para 114.
[25] ibid.
[26] Calderón-Gamboa and Recinos (n 16) 89.
[27] G Aguilar Cavallo, 'La Emergencia Climática y los Derechos Humanos' (2023) 27 Revista de Derecho (Universidad Católica Dámaso A. Larrañaga, Facultad de Derecho) 1, 1.
[28] *Baraona Bray v. Chile* (n 16) para 99.
[29] ibid para 99–100.
[30] ibid para 94.
[31] ibid.
[32] L Mardikian, 'The Right to a Healthy Environment Before the Inter-American Court of Human Rights' (2023) 72 International & Comparative Law Quarterly 945, 952.
[33] Quispe Remón (n 14) 82.
[34] ibid 83.
[35] ibid.
[36] ibid 82–83.

be found there.[37] From this point on, the main Court's approach towards the protection of the environment was made through its connection (*conexidad*) with other rights, especially in relation to the right to Indigenous communal property and the right to a life with dignity (*vida digna*).[38] Examples of this are the cases of *Yakye Axa v Paraguay*, *Xákmok Kásek v Paraguay*, *Kichwa Indigenous People of Sarayaku v Ecuador*, *and Afro-descendant Communities displaced from the Cacarica River basin v Colombia*.[39]

2.2.2 | After the *OC-23/17*: Justiciability of Economic, Social, Cultural and Environmental Rights and the Right to a Healthy Environment

The second stage of the substantive approach to environmental issues is characterised by the recognition of the RHE as a justiciable and autonomous right.[40] This was possible due to the jurisprudential development of the Inter-American Court with regard to the justiciability of Economic, Social, Cultural and Environmental rights (ESCER).[41]

The ACHR is mainly concerned with first-generation rights. This can be illustrated by the disparity between Chapters II and III. The former, on Civil and Political Rights, has 23 articles, while the latter, on Social, Economic and Cultural Rights, includes only one provision, Article 26, which reads as follows:

> 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 realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organisation of American States as amended by the Protocol of Buenos Aires.[42]

As mentioned above, among the Inter-American human rights legal sources, beyond the ACHR, the other main legal instrument that refers to ESCER is the PSS, whose Article 19(6) only allows the justiciability of the right to unionise and the right to education.[43] The lack of justiciability of second-generation rights posed a problem to the Inter-American Court in those cases in which aspects of these rights were evidently violated. To overcome this, the Court employed the same strategy described above, i.e. addressing ESCER issues through one of the civil and political rights established in Chapter 2 of the ACHR.[44] An example of this approach can be found in the case *'Five Pensioners' v Perú*, where the Court found a violation of Article 21 because of the arbitrary change of the amount of the pensions of the alleged victims.[45]

Such an approach changed with the expansive interpretation of Article 26. Based on the principles of interdependence and indivisibility of human rights, the Court considered that Article 26 falls within the protection of Articles 1(1) and 2 of the Convention.[46] In that sense, Article 26 protects the economic, social, cultural and environmental rights derived from the OAS Charter, in accordance with the interpretation provisions of Article 29 of the ACHR.[47] The first precedent for this interpretation can be found in the case *Acevedo Buendía* et al *v Peru*, where the Court recognised that it had competence to address ESCER through Article 26.[48] Such precedent served as the base for the judgement of *Lagos del Campo v Peru*, where the Court recognised for the first time the direct justiciability of ESCER.[49]

Some authors, among which we can find former Inter-American Judge Vio Grossi and Judge Sierra Porto, have highlighted possible shortcomings of such an expansive interpretation of Article 26.[50] In particular, it has been argued that the *pro homine* principle is insufficient to support implicit justiciable rights under Article 26, since the main objective of this principle is to determine the scope and content of a right, not its existence.[51] Moreover, it has been considered that the direct justiciability of ESCER overlooks the consent of the signatories of the PSS, which clearly establishes justiciability limitations.[52] Furthermore, it has been noted that this position is largely contingent on the Court's composition.[53]

Nevertheless, it seems that the Member States have accepted the expansive interpretation of Article 26, as they 'have continued to participate fully in ESCER litigation.'[54] Between 2017 and 2022, the Court has issued 17 judgements and 2 advisory opinions that employed this interpretation, declaring a violation of Article 26 in all

[37]ibid 87; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* [2001] Inter-American Court of Human Rights Serie C 79 para 148.
[38]Walter Arévalo-Ramírez, 'Challenges for the Coming Years: Learning Regional Lessons on Environmental Protection and Achieving the Participation of Indigenous Peoples in the United Nations System' in K Fontaine-Skronski, V Thool and N Eschborn (eds), *Does the UN Model Still Work? Challenges and Prospects for the Future of Multilateralism* (Brill 2022) 206, 211.
[39]*Yakye Axa Community v Suriname* [2005] Inter-American Court of Human Rights Serie C 125; *Xákmok Kásek Indigenous Community v Paraguay* [2010] Inter-American Court of Human Rights Serie C 214; *Kichwa Indigenous People of Sarayaku v Ecuador* [2012] Inter-American Court of Human Rights Serie C 245; *Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v Colombia* [2013] Inter-American Court of Human Rights Serie C 270.
[40]Calderón-Gamboa and Recinos (n 16) 101.
[41]ibid 100.
[42]American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No. 36 (ACHR) art 26.
[43]Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 16 November 1988, entered into force 16 November 1999) OAS Treaty Series No. 69 (Protocol of San Salvador) art 19(6).
[44]MG Aguilera, *Environmental Human Rights: New Thinking from Latin America and the Caribbean*(Brill Nijhoff 2023) 23.
[45]*'Five Pensioners' v Peru* [2003] Inter-American Court of Human Rights Serie C 89 para 121.
[46]*Acevedo Buendía* et al *v Perú* [2009] Inter-American Court of Human Rights Serie C 198 para 100–101; Aguilera (n 44) 101.
[47]*Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina* [2020] Inter-American Court of Human Rights Serie C 400 para 195.
[48]*Acevedo Buendía* et al *v. Perú* (n 46) para 102.
[49]*Lagos del Campo v Peru* [2017] Inter-American Court of Human Rights Serie C 340 para 141–146.
[50]D Mejía-Lemos, 'The Protection of the Environment through International Human Rights Litigation: Taking Stock of Challenges and Opportunities in the Inter-American System' (2022) 22 Human Rights Law Review, 1, 9–10.
[51]ibid 9.
[52]ibid 10.
[53]ibid 9.
[54]Calderón-Gamboa and Recinos (n 16) 105.

the contentious cases.[55] Even after the change in the composition of the Court in 2022, where four new judges were incorporated, the Court has continued using the expansive interpretation of Article 26.[56] Indeed, since May 2022 to date, there have been nine cases where the Court declared the violation of said article.[57]

With regards to the RHE, the Advisory Opinion OC-23/17 constituted the first time in which the Court recognised the RHE as an autonomous and justiciable right through the expansive interpretation of Article 26.[58] This position was reaffirmed later on by the case of *Lhaka Honhat v Argentina*, where the Court determined that the Argentinian State 'has violated to the detriment of the indigenous communities victims in this case their interrelated rights to take part in cultural life in relation to cultural identity, and to a healthy environment, adequate food, and water'.[59]

La Oroya v Peru is the only other contentious case to date where the Court has referred to the RHE. It was the first time that the Court directly addressed an environmental conflict that does not involve Indigenous peoples. It also introduced several new aspects to the Court's environmental jurisprudence that exceeds the purposes of this article, such as corporate responsibility, and children's rights in relation to environmental protection.[60] Specifically with regards to the RHE, besides reaffirming what was already stated in the OC-23/17 and in the *Lhaka Honhat Case*, the Court, in *La Oroya v Peru*, discussed the precautionary principle in environmental matters as well as the principle of intergenerational equity, the possibility of considering the RHE as a *jus cogens* norm, and the adoption of an explicit ecocentric approach in relation to the RHE.[61]

3 | THE COLLECTIVE DIMENSION OF THE RIGHT TO A HEALTHY ENVIRONMENT

The *Advisory Opinion OC-23/17* was published at a time when the inefficiency of the policies to fight climate change has shown the need for transformative laws that go beyond anthropocentrism and promote the human stewardship of Nature.[62] It was requested by the State of Colombia, whose questions were on issues related to extraterritorial jurisdiction in relation to environmental damage and to obligations that arise from the right to life and personal integrity, enshrined in Articles 4(1) and 5(1), in relation to environmental damage.[63]

The *OC-23/17* was groundbreaking for several reasons. First, it recognised the extraterritorial jurisdiction of Member States in relation to transboundary environmental harm.[64] Second, it recognised the RHE as an autonomous and justiciable right in a way that enables the protection of the environment per se, regardless of its utility for humans.[65] This section presents how the RHE was characterised in the *OC-23/17*, focusing especially on the collective and individual dimensions of the right, and how this characterisation could be the basis for the recognition of rights of nature within the Inter-American System of Human Rights.

The Court developed the content of the RHE in chapter VI. B, devoted to human rights affected by environmental degradation. It began its analysis by referring to the reasons to understand the RHE as a justiciable right through the expansive interpretation of Article 26, as well as to the wide recognition of this right in the international *corpus iuris* and domestic legislations.[66] After this, the Court referred to the content of the RHE.

In paragraph 59 of the *Advisory Opinion OC-23/17*, the Court began its characterisation of the RHE by stating that it is a 'fundamental right for the existence of humankind'.[67] As such, the RHE has both a collective and an individual dimension.[68] In its collective dimension, the RHE 'constitutes a universal value that is owed to both present and future generations.'[69] Regarding its individual dimension, the Court stated that the violation of the RHE 'may have a direct and an indirect impact on the individual owing to its connectivity to other rights.'[70]

Moreover, in paragraph 62 of the *Advisory Opinion OC-23/17*, the Court also established that the RHE is an autonomous right that 'protects the components of the environment [...] as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals.'[71] Among the components of the environment mentioned by the Court, there are forests, rivers, seas and others. It therefore left open the possibility of using this right for the protection of different aspects of Nature, such as glaciers, mountains, deserts, salt flats, flora, fauna and ecosystems in general.[72] The Court emphasised

[55]ibid.

[56]E von Loebenstein, 'El Impacto de la Nueva Composición de la Corte IDH en la Jurisprudencia Sobre DESCA, Sofía Reca Milanta.' (*Diario Constitucional*, 28 January 2024) <https://www.diarioconstitucional.cl/2024/01/28/el-impacto-de-la-nueva-composicion-de-la-corte-idh-en-la-jurisprudencia-sobre-desca-sofia-reca-milanta/>.

[57]ibid; *Guevara Díaz v Costa Rica* [2022] Inter-American Court of Human Rights Series C 453; *Nissen Pessolani v Paraguay* [2022] Inter-American Court of Human Rights Series C 477; *Mina Cuero v Ecuador* [2023] Inter-American Court of Human Rights Series C 501; *Benites Cabrera* et al *v Peru* [2022] Inter-American Court of Human Rights Series C 465; *Aguinaga Aillón v Ecuador* [2023] Inter-American Court of Human Rights Series C 483; *Valencia Campos* et al *v Bolivia* [2022] Inter-American Court of Human Rights Series C 469; *Brítez Arce* et al *v Argentina* [2022] Inter-American Court of Human Rights Series C 474; *Rodríguez Pacheco y otra vs Venezuela* [2023] Corte Interamericana de Derechos Humanos Serie C 504; *Caso Habitantes de La Oroya vs Perú* [2023] Inter-American Court of Human Rights Serie C 511.

[58]Aguilera (n 44) 93; *Advisory Opinion OC-23/17 requested by the Republic of Colombia The Environment and Human Rights* [2017] Inter-American Court of Human Rights Serie A 23 para 57–62.

[59]*Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (n 47) para 289.

[60]*Caso Habitantes de La Oroya vs Perú* (n 57) para 107–114, 139–143.

[61]P Trincado-Vera, 'The Right to a Healthy Environment in La Oroya v. Peru: A Landmark Judgement of the IACtHR' (*Opinio Juris*) <https://opiniojuris.org/2024/05/25/the-right-to-a-healthy-environment-in-la-oroya-v-peru-a-landmark-judgement-of-the-iacthr/>; *Caso Habitantes de La Oroya vs Perú* (n 57) para 124, 128, 129.

[62]MA Tigre and N Urzola, 'The 2017 Inter-American Court's Advisory Opinion: Changing the Paradigm for International Environmental Law in the Anthropocene' (2021) 12 Journal of Human Rights and the Environment 24, 25.

[63]*Advisory Opinion OC-23/17 requested by the Republic of Colombia. The Environment and Human Rights* (n 58) para 3.

[64]Tigre and Urzola (n 62) 37.

[65]ibid 46.

[66]*Advisory Opinion OC-23/17 requested by the Republic of Colombia. The Environment and Human Rights* (n 58) para 57–58.

[67]ibid para 59.

[68]ibid.

[69]ibid.

[70]ibid.

[71]ibid para 62.

[72]ibid.

the importance of protecting Nature and the environment not only for the negative consequences that their degradation may have on people, or for their connection with other human rights, but for its importance for other living organisms that are also deserving of protection themselves.[73] In that sense, the Court also noted the trend of recognising legal personality and rights to Nature, both in judgements and in constitutional legal orders.[74]

When comparing both paragraphs, with regards to the individual dimension of RHE, an apparent contradiction appears between the content of paragraph 59 and that of paragraph 62. The former explored the RHE from a point of view centred on the impact on human beings, while the latter focused on the importance of the components of the environment, stating that the impact on human beings is not necessary for a violation of the RHE to occur. To solve this apparent contradiction, it is necessary to employ the distinction between the individual and collective dimensions of the RHE, both mentioned in paragraph 59 of the *Advisory Opinion OC-23/17*.

With respect to the individual dimension, the Court established that the violation of the RHE 'may have a direct and an indirect impact on the individual owing to its connectivity to other rights.'[75] That is, there has to be a relationship between the individual person and the affected component of the environment in order for the violation of the RHE, in its individual dimension, to happen. Consequently, in its individual dimension, the holder of the RHE is the individual person, and, in order to determine its status as an alleged victim in a potential process before the Inter-American Court, it is necessary to prove that the alleged environmental degradation had an impact on other rights.

In that sense, the individual dimension of the RHE seems to be incompatible with what was stated in paragraph 62. In the latter paragraph, the Court explicitly stated that to determine a violation of the RHE, it is not necessary to prove that there is a risk for individuals. Thus, it can be assumed that paragraph 62 refers to the collective dimension of the RHE.

With respect to the collective dimension of the RHE, neither paragraph 59 nor paragraph 62 make a direct reference to whom the holder of RHE would be. Paragraph 52 refers to the RHE as an 'universal interest', while paragraph 62 refers to the components of the environment as legal interest in themselves deserving of protection. As a result, the inquiry of who is the holder of the RHE emerges.

To the date of writing, there are two judgements where the Inter-American Court of Human Rights has found a violation of the RHE: *Lhaka Honhat v Argentina* and *La Oroya v Peru*.

In *Lhaka Honhat v Argentina*, the Court referred to the territorial claims of the association of Indigenous communities Lhaka Honhat on their ancestral lands in the Department of Rivadavia in the Province of Salta, which were occupied and used by the criollo population.[76] Besides declaring the violation of the Indigenous right to communal property, the Court referred to the violation of the RHE, the right to adequate food, the right to water and the right to participate in cultural life.[77] According to the expert witnesses, the practices of cattle farming, land enclosure and illegal logging of native trees, presumably attributable to the criollo population, had an environmental degradation effect that directly impacted the RHE, as well as the right to adequate food, water and to participate in cultural life.[78]

The decision of the Court in the case *Lhakha Honhat v Argentina* did not provide an example of how to apply the collective dimension in a concrete case. This may be confusing, since the victim in this case is a collective entity, i.e. all the indigenous communities indicated by the representatives that inhabit the disputed lands.[79] However, when determining the State's responsibility, the Court analysed the RHE together with the rights to adequate food, to water and to participate in cultural life, due to the interdependence of these rights.[80] In fact, when determining the Argentinian State's responsibility, the Court examined how the effects of environmental damage produced by the activities of the criollo population in the area had an impact on food, access to water and the cultural changes of the affected Indigenous communities.[81] Thus, the environmental degradation was not analysed in itself, but in relation to other rights of the alleged victims. The violation of the RHE was not declared for the damage that the activities of the Criollo population caused to the components of the environment but was instead assessed in relation to the effects that said degradation had on the enjoyment of other rights. In that sense, the analysis in *Lhaka Honhat* resembles the analysis that flows from the individual dimension of the RHE, since the violation of the right was determined in connection with other rights.[82]

While Lhaka Honhat reaffirmed some basic aspects of the RHE that were mentioned in the Advisory Opinion, with regards to the distinction between the individual and the collective dimension of the RHE, and the practical consequences of it, it did not bring a significant development. Furthermore, the judgement did not distinguish between the State obligations that arise from the RHE and those that arise from the interrelated rights, creating legal uncertainty with respect to the measures that public authorities should undertake.[83]

The Court did not have another opportunity to further pronounce itself on the scope and meaning of the RHE until *La Oroya v Peru*. This case was about the Peruvian city of La Oroya, a 33.000 inhabitants city with a metallurgical facility, the Complejo Metalúrgico de La Oroya (CMLO), that has been in operation for nearly 100 years.[84] During this time, the CMLO's activities affected the vegetation, air, soil and water in La Oroya, causing it to be one of the ten most contaminated cities in the world.[85] There were 80 alleged victims in this case, two of whom lost their lives because of the contamination

[73] ibid.
[74] ibid.
[75] ibid para 59.
[76] *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (n 47) para 50–52.
[77] ibid para 168, 202–289.
[78] ibid para 279–284.
[79] ibid para 35.
[80] ibid para 274–275, 284, 287–288.
[81] ibid para 284.
[82] ibid para 289.
[83] Mardikian (n 32) 960.
[84] *Caso Habitantes de La Oroya vs Perú* (n 57) para 67.
[85] Trincado-Vera (n 61); *Caso Habitantes de La Oroya vs Perú* (n 57) para 76.

caused by the CMLO.[86] The Court found Peru responsible for the violation of the RHE, the right to health, the right to personal integrity, the right to life, the right to access to information, the right to political participation, children's rights and the obligation of progressive development of Article 26.[87]

In particular, when examining the content of the RHE, the Court referred to two substantive components: the right to breathe clean air, and the right to water free of contamination.[88] With regard to the right to water, the Court made a distinction between the right to water as an autonomous right and the right to water as a substantive aspect of the RHE.[89] The former is a right protected under Article 26 of the ACHR.[90] It was first recognised in *Lhaka Honhat v Argentina*, where the Court stated that it 'entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.'[91] The right to water as an autonomous right 'protects the use, access, and enjoyment of water for human use', which is why in La Oroya the Court said that it is based on an anthropocentric vision.[92]

On the other hand, the right to water as a substantive aspect of the RHE 'protects the water basins as elements of the environment that have intrinsic value since they constitute a universal interest, and because of their importance for other living organisms, including human beings.'[93] Consequently, this right is based on an ecocentric perspective.[94]

While both rights are interrelated, the 'violation of one does not necessarily imply the violation of the other.'[95] In other words, the contamination or destruction of a component of the environment, such as the water basins, has a double effect: the direct violation of the RHE, and the violation of other human rights, such as the autonomous right to water, as a consequence of environmental damage.[96]

The Court also employed this reasoning when determining the responsibility of Peru for the violation of the RHE.[97] The Court found the State responsible for the violation of its obligations under Article 26 because the 'high levels of contamination' in the air, water and soil had a negative impact on 'different elements of the environment in La Oroya in themselves'.[98] This contamination also 'generated a systemic risk for the health, life, and personal integrity of the inhabitants' of La Oroya.[99] However, the State's responsibility for the violation of these rights as a consequence of this contamination was analysed separately.[100]

In both the *Advisory Opinion OC-23/17* and the decision in *La Oroya v Peru*, the Court developed the argument that the certainty or evidence of a risk for human beings is not necessary to trigger a violation of the RHE. It is sufficient to prove the mere impact on the environment's components. Therefore, even though it did not explicitly state so, *La Oroya v Peru* strongly suggests that it could be possible to have a violation of the RHE without any human victim. This means that, for instance, the destruction of a glacier in a remote region of the Andes where no human being lives could be an infringement of the ACHR. However, in such a case, one may wonder who the victim would be, or, in other words, who would be the holder of the RHE. This may suggest that the Court is recognising Nature as a holder of rights protected under the American Convention.

4 | NATURE AS THE HOLDER OF THE COLLECTIVE DIMENSION OF THE RIGHT TO A HEALTHY ENVIRONMENT

To determine whether the developments on the collective dimension of the RHE made in both the Advisory Opinion OC-23/17 and in *La Oroya v Peru* amount to a recognition of RoN, it is required to address three main issues: i) the notion of rights; ii) the ecocentric approach taken by the Court; and iii) the compatibility of the recognition of legal personhood of Nature with the ACHR.

4.1 | Hohfeld's Taxonomy and Rights of Nature

Even though the notion of 'rights' is essential for Western law, its actual meaning can vary depending on the context in which it is used.[101] This entails a challenge for the thesis of RoN. If the very notion of rights is contested, then what does actually mean that Nature has rights? To provide some clarity in this matter, Hohfeld's taxonomy of rights can be helpful.[102]

According to Hohfeld, it is common to reduce all legal relations to the categories of 'rights' and 'duties'.[103] These terms are ambiguous in their meaning, frequently causing confusion.[104] To address this, Hohfeld proposes to exhibit legal relationships in a scheme of correlatives.[105] This way, to understand what is meant by right in a specific context, we can examine the correlative duty.[106] Each entitlement has a correlative limitation. In other words, rights and duties are two sides of the same relationship.

This notion of Hohfeldian rights/duties traditionally describes legal relationships between two persons,[107] where one of them is entitled to something (has a right), and the other one is obliged to

[86] *Caso Habitantes de La Oroya* vs *Perú* (n 57) para 85, 219.
[87] Trincado-Vera (n 61); *Caso Habitantes de La Oroya* vs *Perú* (n 57) para 266.
[88] Trincado-Vera (n 61); *Caso Habitantes de La Oroya* vs *Perú* (n 57) para 120–121, 125.
[89] Trincado-Vera (n 61); *Caso Habitantes de La Oroya* vs *Perú* (n 57) para 122–124.
[90] Trincado-Vera (n 61); *Caso Habitantes de La Oroya* vs *Perú* (n 57) para 122.
[91] Trincado-Vera (n 61); *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (n 47) para 222, 226.
[92] Trincado-Vera (n 61); *Caso Habitantes de La Oroya* vs *Perú* (n 57) para 124.
[93] Trincado-Vera (n 61); *Caso Habitantes de La Oroya* vs *Perú* (n 57) para 124.
[94] Trincado-Vera (n 61); *Caso Habitantes de La Oroya* vs *Perú* (n 57) para 124.
[95] *Caso Habitantes de La Oroya* vs *Perú* (n 57) para 124.
[96] ibid para 118.
[97] ibid para 179.
[98] ibid.
[99] ibid.
[100] ibid para 214, 219, 223, 234.
[101] Epstein and Schoukens (n 2) 208–209.
[102] ibid 209.
[103] WN Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 The Yale Law Journal 16, 28.
[104] ibid 29.
[105] ibid 30.
[106] Epstein and Schoukens (n 2) 209.
[107] ibid.

something (has a duty). Authors like Epstein and Schoukens have argued that environmental law has established several duties to protect natural entities, duties that have a correlative right attached.[108] According to the interest theory of rights, 'entities whose interests are legally protected for their own sakes can be rights holders'.[109]

When applying this Hohfeldian framework to the collective dimension of the RHE, as it was described in the Advisory Opinion OC-23/17 and in *La Oroya v Peru*, it can be argued that i) the American Convention sets legal duties to protect the components of the environment, ii) these duties have a correlative right and iii) the holders of such right are not individual human beings. In that sense, to determine whether the Court is recognising rights to non-human entities or not, we need to clarify who is the right holder. The explicit adoption of an ecocentric approach with regards to the collective dimension of the RHE in *La Oroya* offers some clues.

4.2 | Anthropocentrism v Ecocentrism: What does the Inter-American Court mean?

As it was previously stated, in *La Oroya v Peru*, the Inter-American Court clearly adopted an ecocentric approach when referring to the collective dimension of the RHE, i.e., the aspect of this right that protects the elements of the environment as legal interests in themselves. This is in contrast with the anthropocentric approach taken with regards to the autonomous right to water, an approach that presumably is the one employed with the other human rights protected under the ACHR.

The anthropocentric paradigm is based on the premise that Nature is an entity fundamentally separated from human beings.[110] As a consequence, its protection does not stem from its intrinsic importance, but it depends on the benefits that it can offer humanity.[111] Anthropocentrism is a consequence of what decolonial studies have denominated as modernity.[112]

Modernity rests on the epistemological premise of the radical separation between the subject and the object. The subject, as illustrated by the cartesian mantra of cogito ergo sum, is an isolated category that constitutes within and before itself.[113] The object, on the other hand, is understood as a distinct entity that is external to it.[114] This dualist paradigm was not only employed for the construction of a Western European identity that considered itself superior to others, justifying this way the domination of the non-Western world.[115] It was also used as the basis for the creation of binary hierarchies that allowed the domination of the white European man over all that was considered as an inferior 'other'.[116] That inferior other encompassed all that was placed in the exteriority of the subject of the cogito ergo sum, which included colonised peoples, women and nature.[117] This binarism has allowed the proliferation of the epistemologies of mastery that seek to universalise partial perspectives that justify the subjugation of some at the hands of others, presenting them as rational and logical.[118] The same reasoning that considers colonised/racialised people and women as inferior inspires this radical separation between human beings and Nature.[119] Consequently, anthropocentrism is inspired by these dualist visions that place men at the centre, granting them the right to dominate everything that is external to them.

These epistemologies of mastery have inspired various aspects of modernity, being law among them. In that sense, law has been characterised by the adoption of this anthropocentric view in relation to Nature, considering it through the instrumental perspective in relation to humanity's interests.[120] This anthropocentric view of the relationship between Nature and the human being can be found not only in arguments in favour of the indiscriminate exploitation of Nature, but also in recent efforts to fight against climate change, like for example with the principle of sustainable development.[121] From this perspective, sustainability is understood as the satisfaction of the needs of economic development of the present, without compromising the satisfaction of the development needs of future generations.[122] The protection of Nature is subservient to human needs.[123] This perspective can be observed, for instance, in the way in which the protection of the environment has been addressed within international humanitarian law, and international criminal law.[124]

Nevertheless, the current climate crisis and the existential threat that it poses for humankind, as well as for all life on the planet, has highlighted the inability of law, legal regulations and governance regimes to adequately respond to it.[125] The main global responses to address climate change are still dominated by neoliberal capitalist ideologies deeply rooted in an anthropocentric paradigm.[126] Furthermore, as it was stated above, the anthropocentric paradigm, and its premise of the fundamental separation between humans and Nature, emerged together with capitalist Modernity.[127] In that sense, anthropocentrism is a relatively recent view, characteristic of European thought that was developed since then until the present day. It is not really universal and responds to the social and economic context in which it appeared.

Against this background, a new approach that protects human interests within the framework of a broader and comprehensive

[108] ibid 211.
[109] ibid.
[110] S Adelman, 'Epistemologies of Mastery' in A Grear and LJ Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar Publishing 2015) 11.
[111] R Tamayo-Álvarez, 'Los Derechos de la Naturaleza y el Principio del Buen Vivir Como un Giro Decolonial en la Gobernanza Ambiental Internacional' (2023) 54 Revista Derecho del Estado 19, 21.
[112] Adelman (n 110) 12–13; Tamayo-Álvarez (n 111) 21.
[113] AI Quijano, 'Colonialidad y Modernidad/Racionalidad' (1992) 13 Perú indígena 11, 14–15.
[114] ibid 15.
[115] ibid 15–16; Adelman (n 110) 14.
[116] Quijano (n 113) 15–16; Adelman (n 110) 14.
[117] Adelman (n 110) 13; N Maldonado-Torres, 'On the Coloniality of Being' (2007) 21 Cultural Studies 240, 245.
[118] Adelman (n 110) 14.
[119] ibid.
[120] Tamayo-Álvarez (n 111) 21.
[121] ibid 22.
[122] ibid.
[123] ibid.
[124] ibid 40, 42.
[125] A Grear, 'Towards a New Horizon: In Search of a Renewing Socio-Juridical Imaginary' (2013) 3 Oñati Socio-Legal Series 966, 970.
[126] ibid.
[127] Tamayo-Álvarez (n 111) 21.

protection of all living things is needed.[128] Thus, the ecocentric approach emerged.

The notion of 'ecocentric' is somewhat contested in academia. Some authors, like Montini and Garver, have understood the notion of an ecocentric approach as a 'cult of wilderness' that seeks to restore Nature into an almost mythical pristine state free of human interference, and that is indifferent to human life.[129] In that sense, these authors advocate for overcoming this divide between anthropocentric and ecocentric views in favour of a human-inclusive ecocentric approach, that takes into consideration the need for both the environment and human beings.[130]

The alternative conception, as defined by De Vido, understands the ecocentric approach as 'the encompassing idea that disrupts the human/Nature divide and considers the relationship between organisms and the healthy interaction of all components of ecosystems, including human beings.'[131] From this perspective, Nature is an all-encompassing entity that includes human beings.

This perspective is more in line with non-Western views of the relationship between humans and Nature. For instance, the Māori cosmovision included in the Te Awa Tupua legislation that understands the Whanganui River in Aotearoa (New Zealand) as an indivisible living whole.[132] Also, the African metaphysical ontologies that confer intrinsic value to forests, which are understood not only as the trees but also as all that inhabits and lives therein.[133] A closer example to the Inter-American context is the Andean philosophy of *Sumak Kawsay*, also known as Buen Vivir or Good Living.

The *Sumak Kawsay* has been recognised in different ways by the constitutions of Ecuador and Bolivia in the 2000s, but it originated in Andean philosophy.[134] Andean philosophy is a cluster of conceptions, models and categories collectively lived by the peoples of the Andes.[135] The term *Sumak Kawsay* is kichwa, and while it has been literally translated to Spanish as '*buen vivir*' (good living), it refers to a way of life in which plenitude is reached in community and harmony with other people and Nature.[136] It is a system of life that allows harmony with Nature, understanding it as everything that surrounds us, including humans.[137] Under this view, everything is related and there is complementarity with the other components of the whole.[138] The individual and their community are an integral part of Nature, in the same way that an animal species or an ecosystem.[139] In that sense, the *Sumak Kawsay* constitutes a system of life that prescribes ways of social, economical and political organisation based on the idea that everything is a complementary and relational part of Nature, which implies that the use of its components must be done in an harmonious way to avoid imbalance.[140] From this point of view, it is not possible to conceive the relationship between human beings and Nature as one of mastery.[141]

This second notion of ecocentrism as a disruption of the Nature/human divide is also compatible with Critical Environmental Law. One of its main proponents, Philippopoulos-Mihalopoulos, has employed the term 'ecocentrism' following the first definition.[142] However, he understands Nature as an autopoietic system in a continuous and circular process of self-generation with no centre.[143] In that sense, his view resembles the understanding of Nature that underlies both De Vido's definition of the ecocentric approach as well as the aforementioned non-Western cosmologies. Ultimately, both understandings of 'ecocentrism' strive to achieve the same goal: to overcome the Cartesian notion of a definitive essential divide between human beings and Nature.

When analysing the use of the term 'ecocentric' in *La Oroya v Peru*, in light of what was stated in the *Advisory Opinion OC-23/17* in its paragraphs 59 and 62, it can be argued that the Court is using such term in its second meaning, understanding Nature as a human inclusive entity.

In the *Advisory Opinion OC-23/17*, the Court referred to the individual and collective dimensions of the RHE, being the individual dimension the one that protects the rights of an individual when they are affected by environmental degradation.[144] As it was previously discussed, the collective dimension protects both the interests of present and future generations, as well as the elements of the environment as legal interests in themselves.[145] Thus, the collective dimension is protecting an entity that encompasses both the human species as a whole, as well as the elements of the environment, i.e. Nature. This conclusion is further sustained in the fact that the Court is acknowledging the adoption of RoN within the Latin American region as a development path.[146] Indeed, the Court referred to the recognition of the legal personhood of Nature through judgements in Colombia and India, and through constitutional recognition in Bolivia and Ecuador.[147] The latter examples are particularly significant for our argument since both constitutions are an explicit adoption of the Sumak Kawsay cosmology.

This approach to the collective dimension of the RHE described in the Advisory Opinion OC-23/17 is what the Court denominated as

[128] Massimiliano Montini, 'The Transformation of Environmental Law into Ecological Law' in K Anker et al (eds), *From Environmental to Ecological Law* (Routledge 2020) 13, 15.
[129] G Garver, 'A Systems-Based Tool for Transitioning to Law for a Mutually Enhancing Human-Earth Relationship' (2019) 157 Ecological Economics 165, 166.
[130] ibid; Montini (n 128) 15.
[131] S De Vido, 'A Quest for an Eco-Centric Approach to International Law: The COVID-19 Pandemic as Game Changer' (2021) 3 Jus Cogens 105, 110.
[132] Zartner (n 2) 11.
[133] NF Unuigbe, 'African Eco-Philosophy on Forests: A Path Worth Exploring for the Implementation of Earth Jurisprudence' in K Anker et al (eds), *From Environmental to Ecological Law* (Routledge 2020) 164, 170.
[134] R Llasag Fernández, 'El Sumak Kawsay y sus Restricciones Constitucionales' (2009) 12 Foro: Revista de Derecho 113, 114.
[135] ibid.
[136] E Gudynas, 'Buen Vivir: Today's Tomorrow' (2011) 54 Development 441, 442.
[137] Llasag Fernández (n 134) 114.
[138] ibid 115–116.
[139] ibid 116.
[140] ibid 117.
[141] ibid 118–119.
[142] Philippopoulos-Mihalopoulos (n 7) 857.
[143] A Philippopoulos-Mihalopoulos, 'Towards a Critical Environmental Law' in A Philippopoulos-Mihalopoulos (ed), *Law and ecology: new environmental foundations* (Routledge 2011) 18, 26–27.
[144] *Advisory Opinion OC-23/17 requested by the Republic of Colombia. The Environment and Human Rights* (n 58) para 59.
[145] ibid para 59, 62.
[146] Tigre and Urzola (n 62) 46.
[147] *Advisory Opinion OC-23/17 requested by the Republic of Colombia. The Environment and Human Rights* (n 58) para 62.

ecocentric in *La Oroya v Peru*. Thus, the ecocentric approach taken by the Court falls in line with the definition of De Vido, that is, it understands Nature as an interconnected whole including both human and non-human elements. This means that the collective dimension of the RHE protects Nature as a whole. Following a Hohfeldian understanding of rights, this amounts to an implicit recognition of RoN, since Nature under the Court's ecocentric approach would be the holder of the RHE in its collective dimension.

4.3 | Definition of person under the ACHR and Nature as a holder of rights

The recognition of Nature as a holder of rights suggests the need for the expansion of the notion of person beyond traditional and anthropocentric conceptions of law for which individual humans are the sole and central subject.[148] However, this endeavour entails some difficulties for the Inter-American System, due to the clear anthropocentric perspective that flows from the literal reading of the ACHR. With regards to the notion of person, it seems that the ACHR only considers human beings as rights holders. This interpretation would follow from the preamble of the ACHR, as well as of its Article 1, which reads as follows:

> Article 1. Obligations to Respect rights
>
> 1. The States Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
> 2. For the purposes of this Convention, 'person' means every human being.

This literal interpretation was the stance that the Court traditionally held, until the *Advisory Opinion OC-22/16* on the entitlement of legal entities to hold rights. There, the Court used the term 'person' as a synonym of 'holder of rights',[149] and established that, in principle, Article 1(2) of the ACHR refers exclusively to human beings, excluding legal entities from conventional protection.[150]

However, the Court also referred to two exceptions to this general rule on the definition of person: indigenous communities and unions.[151] The Court considered that due to the special characteristics of both indigenous communities and unions, it is possible to grant the entitlement of rights to these collective entities.

In the case of unions, federations and confederations, Article 8(1)(a) of the PSS establishes the right to unionise, which enshrines the State's duties to allow unions to form federations and confederations, at the national and international level and to allow them to function freely. Through the adoption of systematic interpretation, i.e., the inclusion 'of not only the text of the treaty to which [the provision] belongs, but also the system with which it is in keeping',[152] the Court determined that based on this article, unions, federations and confederations are indeed holders of rights and can appear before the Court to defend their rights.[153]

Unlike unions, Indigenous communities do not have an explicit provision that sustains their consideration as persons/rights holders under the ACHR. Nonetheless, their entitlement to rights emerges as a result of the interpretation of several Inter-American norms made by the Court in its jurisprudence.[154] In the *Advisory Opinion OC-22/16* the Court stated that Indigenous communities can be considered as holders of rights for three main reasons. First, the personhood of Indigenous people has already been recognised by the Court in previous case-law, like in the case of the *Kichwa Indigenous People of Sarayaku v Ecuador* or in the *Case of the Afro-descendant Communities displaced from the Cacarica River Basin v Colombia*.[155] Second, there is a wide recognition of Indigenous peoples as subjects of International law.[156] Lastly, Indigenous peoples find themselves in a particular situation where their identity and certain individual rights can only be exercised through a community.[157] Indigenous and tribal communities share distinctive characteristics, like the special relationship with their ancestral lands, which is why they 'require special measures under international human rights law in order to guarantee their physical and cultural survival.'[158] The recognition of the personhood of Indigenous peoples would be one of them.

Based on these two examples, it is possible to affirm that the recognition of Nature as a holder of rights would not be immediately incompatible with Article 1 of the ACHR. However, this would require explicit recognition by the Court, considering that the expansion of the notion of personhood beyond the individual human beings goes against the general rule and requires a systematic interpretation. Nonetheless, I consider that there are enough arguments for such a statement.

First, as it was previously discussed, the Court already employed a systematic interpretation of Article 26 to recognise the RHE, which entails the implicit recognition of Nature as the holder of its collective dimension. Second, there are multiple states that have already recognised Nature as a holder of rights at the domestic level, including many of those who are Members to the ACHR. And while there is not

[148] Tigre and Urzola (n 62) 47.
[149] *Opinión Consultiva OC-22/16 solicitada por la República de Panamá Titularidad de Derechos Humanos de las Personas Jurídicas en el Sistema Interamericano de Derechos Humanos* [2016] Corte Interamericana de Derechos Humanos Serie A 22 para 38.
[150] ibid para 70.
[151] ibid para 71.
[152] ibid para 94.
[153] ibid para 105.
[154] ibid para 84.
[155] ibid para 74, 76.
[156] ibid para 77–80.
[157] ibid para 83.
[158] ibid para 77.

such a wide recognition of RoN on an international law level, the United Nation has recognised that 'Nature or Mother Earth is not an object or property but a subject of law, with legal personhood, whose intrinsic value is recognised' in the General Assembly Resolution A/RES/73/235, and in the Report of the Secretary General on Harmony with Nature A/74/236.[159] Lastly, Nature, understood from an ecocentric perspective, also finds itself in a particular situation where its physical survival requires special measures. To ensure the survival of the human species, as well as the survival of every other organism on the planet, it is necessary to recognise Nature as a holder of rights under the ACHR. Thus, considering Nature as a person for the purposes of the RHE would be compatible with Article 1(2) of the ACHR. This recognition of personhood would not be absolute. Just as it happens with unions, Nature would be considered a person only for the purposes of the collective dimension of the RHE.

5 | CONSEQUENCES OF RECOGNISING NATURE AS A HOLDER OF RIGHTS ON THE COMPLAINT PROCEDURE UNDER THE ACHR

As it was discussed in the previous sections, in *La Oroya v Peru* the Court implicitly recognised Nature as a holder of rights under the ACHR. Despite this acknowledgement, Nature was not considered a victim within this contentious procedure, the victims were the 80 inhabitants of La Oroya that were individualised in the Merits Report.[160] Regardless, the Court declared Peru's responsibility for the violation of the RHE based solely on the contamination of the soil, water and air of La Oroya, and ordered several reparations aimed exclusively at redressing environmental damage.[161] This was possible because the Court also took into consideration the collective impact that the alleged violations may have had.[162] The Court stated that 'in the present case the alleged violations to the [RHE] may have had impacts that transcend the alleged victims mentioned in the Merits Report, since the environmental contamination may have affected the rights of others subjects in La Oroya'.[163] In that sense, the case of *La Oroya* offers an example of how the Court can assess the RoN in a case where there are other victims that were affected by environmental damage.

This section will address a different scenario that arises from the recognition of RoN within the Inter-American System: a contentious case where Nature is the only victim. Considering Nature as a holder of rights protected under the ACHR would allow it to access the complaint procedure before the Court. Naturally, that raises several procedural challenges.

According to Article 33 of the ACHR, in the Inter-American System of Human Rights (IASHR), both the Inter-American Court and Commission have competence with respect to matters relating to the fulfilment of rights.[164] This means that, unlike the European System of Human Rights for instance, in the IASHR the individual complaint procedure does not grant direct access to the Court. Every complaint must be directed first to the Inter-American Commission, who has several tools at its disposal to address the issue at hand.[165] One of those tools is the filing of a contentious case before the Court. The entities that take part in this stage of the procedure are the Inter-American Commission, the representatives of the victim and the representatives of the state.[166]

Against this background, there are three main issues to be addressed: the determination of the complainant, the determination of the victim and the designation of the representative of the victim.

5.1 | Determination of the complainant

One of the distinctive characteristics of the IASHR is that, unlike other regional systems, it distinguishes between the figure of the complainant and the victim.[167] This matter is regulated by Article 44 of the ACHR, which reads as follows:

> Article 44.
>
> Any person or group of persons, or any nongovernmental entity legally recognised in one or more member states of the Organisation, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

Based on this article, the Court defined the concept of legal standing on an Inter-American level as:

> the power of any person or group of persons, or nongovernmental entity legally recognised in one or more member states of the Organisation to present petitions before the InterAmerican Commission containing claims or complaints referring to the presumed violation by a State Party of any of the human rights recognised at the inter-American level.[168]

Consequently, being an alleged victim is not a requisite to initiate a complaint for the violation of any of the rights protected under the

[159] UN General Assembly, 'Harmony with Nature' (United Nations 2018) A/RES/73/235 <https://www.un.org/pga/73/wp-content/uploads/sites/53/2019/04/A.RES_.73.235.pdf>; UN General Assembly, 'Harmony with Nature. Report by the Secretary General' (United Nations 2019) A/74/236 para 5 <https://documents.un.org/doc/undoc/gen/n19/232/63/pdf/n1923263.pdf?token=xlvHWFVSzbi8p3Lof7&fe=true>.
[160] *Caso Habitantes de La Oroya* vs *Perú* (n 57) para 57.
[161] ibid para 179, 328, 332–334.
[162] ibid para 58.
[163] ibid.
[164] ACHR (n 42) art 33.
[165] Inter-American Court of Human Rights, *ABC of the Inter-American Court of Human Rights : What, How, When and Why of the Inter-American Court of Human Rights. Frequently Asked Questions / InterAmerican Court of Human Rights* (2020) 19.
[166] Rules of Procedure of the Inter-American Court of Human Rights (approved by the Court during its LXXXV Regular Period of Sessions, held from 16 to 28 November 2009) <https://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf> art 23, 24, 25.
[167] *Opinión Consultiva OC-22/16 solicitada por la República de Panamá. Titularidad de Derechos Humanos de las Personas Jurídicas en el Sistema Interamericano de Derechos Humanos* (n 149) para 56.
[168] ibid para 28.

IASHR. It is possible to file complaints on your own behalf as a victim, but also on behalf of third parties.[169]

Therefore, in the case of a violation of the RHE in its collective dimension, any person or group of persons could initiate the proceedings before the IASHR, by filing a complaint regarding the violation of this right due to the detriment of any component of the environment.[170] Of course, this complaint filing requires the exhaustion of domestic remedies.[171]

The function of the requisite of the exhaustion of domestic remedies is, on one hand, to inform the State about the alleged violation and, on the other, to provide the State with the opportunity to remedy the alleged violation.[172] Article 46(2) of the ACHR establishes some exceptions to the requirement of exhaustion of domestic remedies, which proceed when there are no available remedies, or when they are ineffective.[173] In other words, for the exhaustion of domestic remedies to proceed it is necessary that these remedies exist, and that they are adequate and effective.[174] The Court defined 'adequate remedies' as those which function within the domestic law to protect the violated rights.[175] Effective remedies are those that are able to produce the result for which they were conceived.[176]

Domestic remedies can be filed either by natural persons or legal persons.[177] In the case of legal persons, the filing of a complaint does not imply the exhaustion of domestic remedies per se, the compliance with this requirement will be analysed on a case-by-case basis.[178] Nevertheless, in these cases, there needs to be alignment between the claims of the legal person and the alleged violations that are being asserted.[179]

Therefore, in a case where Nature is the only victim, any person or group of persons, either natural or legal persons, can lodge a petition before the Inter-American Commission, as long as the requirement of the exhaustion of domestic remedies is fulfilled. This petition can initiate a procedure that can eventually lead to a contentious case before the Court.

5.2 | Determination of the alleged victim in a contentious case before the Court

Once a procedure before the IASHR has been initiated, the Inter-American Commission of Human Rights has different faculties at its disposal, among which there is the submission of the Merits Report to the Court to begin a contentious case.[180] A Merit Report must include, among other elements, the identification of the alleged victims in compliance with Article 35(1) of the Court's Rules of Procedure, which reads as follows:

> Article 35. Filing of the case by the Commission
>
> 1. The case shall be presented to the Court through the submission of the report to which article 50 of the Convention refers, which must establish all the facts that allegedly give rise to a violation and identify the alleged victims. In order for the case to be examined, the Court shall receive the following information [..][181]

The determination of the alleged victims in cases with collective subjects presents some challenges to comply with Article 35(1), since it requires that the Merits Report must include the identification of the alleged victims. However, the second paragraph of said article states the following:

> Article 35. Filing of the case by the Commission
>
> 2. When it has not been possible to identify one or more of the alleged victims who figure in the facts of the case because it concerns massive or collective violations, the Tribunal shall decide whether to consider those individuals as victims[182]

The Court has stated in its case-law that, for the fulfilment of this requirement, it is necessary to evaluate the characteristics of each case.[183] A clear example of the application of this exception can be found in the *Lhaka Honhat Case*. In that opportunity, the alleged victim was the association of Indigenous communities Lhaka Honhat, which included several communities belonging to the many Indigenous peoples that inhabited the region.[184] Following Article 35 of the Rule of Procedure, in principle it would be required that the Merits Report clearly specified which Indigenous communities were part of the Lhaka Honhat association. Nevertheless, due to the characteristics of the Indigenous peoples involved, the communities have been evolving over time, combining with each other, or giving rise to new communities through what is referred to as fission-fusion processes.[185] Consequently, it was essentially impossible to calculate the exact number of affected communities.[186] Such difficulty is a factual concern, which is the reason why the Court applied the exception of Article 35(2).[187] Thus, the Court

[169] ibid para 56.
[170] ibid para 122.
[171] ibid.
[172] ibid para 122–123.
[173] ibid para 125.
[174] ibid para 128.
[175] ibid para 129.
[176] ibid para 130.
[177] ibid para 133.
[178] ibid para 139.
[179] ibid para 136.
[180] ACHR (n 42) art 48–51.
[181] Rules of Procedure of the Inter-American Court of Human Rights (approved by the Court during its LXXXV Regular Period of Sessions, held from 16 to 28 November 2009) <https://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf> art 35(1).
[182] ibid art 35(2).
[183] *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (n 47) para 30.
[184] ibid para 32–33.
[185] ibid para 33.
[186] ibid para 32–33.
[187] ibid para 34.

considered as alleged victims the 132 Indigenous communities mentioned by the representatives, and also all those communities that emerged from them through processes of fission-fusion.[188]

In the case of a potential process before the Court on the violation of the RHE in its collective dimension, the same reasoning could be employed to justify the application of the exception of Article 35(2). Because of the very nature of Nature as a collective entity composed by an undetermined number of human and non-human elements, it would be nearly impossible to accurately individualise each of its members in the Merits Report. Just as it happened in *Lhaka Honhat*, this is a factual concern that would enable the Court to apply the exception of Article 35(2).

5.3 | Designation of the representatives of Nature in a contentious case before the Court

The Rules of Procedure of 2009 is the more recent expression of the evolution of the role of the alleged victim in contentious proceedings before the Inter-American Court. As it was stated in the 'Reasons to Modify' the current Rules of Procedure, the primary reform related to granting more prominence in litigation to the victims or their representatives before the proceedings of the Court, allowing the Commission to play the role of organ of the Inter-American System.[189] According to the Rules of Procedure, the participation of the alleged victim is made through the presentation of the Pleadings, Motions and Evidence Brief by themself or by their representatives. This matter is regulated by Article 25 of the Rules of Procedure, which reads as follows:

> Article 25. Participation of the Alleged Victims or their Representatives
>
> 1. Once notice of the brief submitting a case before the Court has been served, in accordance with Article 39 of the Rules of Procedure, the alleged victims or their representatives may submit their brief containing pleadings, motions, and evidence autonomously and shall continue to act autonomously throughout the proceedings.
> 2. When there are several alleged victims or representatives, these shall designate a common intervener, who shall be the only person authorised to present pleadings, motions, and evidence during the proceedings, including the public hearings. Should there be no agreement as to the appointment of a common intervener in a case, the Court or its Presidency may, if appropriate, establish a deadline for the appointment of up to three representatives to act as common interveners. In the latter case, the Presidency shall establish the deadline for the submission of the respondent State's answer and the time allotted to the respondent State, the alleged victims or their representatives, and, if applicable, the petitioning State for their participation in the public hearings.
> 3. In case that there is disagreement among the alleged victims as to that indicated in the preceding paragraph, the Court shall make the appropriate ruling.[190]

Based on paragraphs 2 and 3 of Article 25, if there is a multiplicity of victims or representatives, one of them has to be appointed as the common intervener, either by agreement of the victims or by the Court itself. In that sense, the representation of Nature before the Court poses a problem. Unlike what happens with other holders of rights recognised by the Court, such as Indigenous and Tribal communities and unions, Nature, from an ecocentric perspective, is a collective entity composed of an undetermined number of individuals that entails present and future generations. Because of that, the designation of a common representative for those who are part of Nature is virtually impossible. It would require an agreement of humankind as a whole to designate a common representative that takes into consideration all the members of this collective entity.

This should not be an issue if Nature is only one of the victims in a case. For instance, if there is a case where environmental degradation harmed both the environment components and the members of a community, like in La Oroya. In such a scenario, Article 25(2) allows the Court to designate a common intervener, being the most likely option the representative of the individuals affected. However, if Nature is the only victim in a contentious procedure, a possibility that arises from the recognition of RoN, Article 25 does not offer a proper solution.

An obvious way to address this issue would be to reform the current Rules of Procedure. The recognition of Nature as the holder of the RHE would fully justify a reform to ensure that it has an adequate representation before the Court in a contentious case.

Nonetheless, there could be another solution under the provisions of the current Rules of Procedure. Its article 37 provides an alternative for those cases where the alleged victim does not have legal representation: the Inter-American Defender. Article 37 reads as follows:

> Article 37. Inter-American Defender
>
> In cases where alleged victims are acting without duly accredited legal representation, the Tribunal may, on its own motion, appoint an Inter-American defender to represent them during the processing of the case.[191]

[188] ibid para 35.

[189] 'Reasons to Modify' (*Inter-American Court of Human Rights - Rules*) <http://www.corteidh.or.cr>.

[190] Rules of Procedure of the Inter-American Court of Human Rights (n 181) art 25.

[191] ibid art 37.

Article 2 of the same instrument defines the Inter-American Defender as 'the person appointed by the Court to assume the legal representation of an alleged victim that has not appointed a representative by themselves.' This way, the aim is to ensure that the victims are not left without representation.[192] The Inter-American Defenders Offices is composed of public defenders of the Member States and works due to the agreement between the Asociación Interamericana de Defensorías Públicas and the Inter-American Court.[193]

While the appointment of an Inter-American Defender is a mechanism originally thought to overcome the socioeconomic barriers that prevented the alleged victims to have access to legal representation, it could have the potential to solve the lack of representation in those cases where Nature is the only alleged victim. Based on Article 37 of the Rule of Procedure, the Court could appoint a Defender to represent Nature in a contentious case on the violation of the RHE.

Nevertheless, the designation of Nature's representative is not settled. The lack of similar case law makes the task of predicting how the Court would solve this issue impossible. Ultimately, the Court will have to determine how to designate the representative of Nature in a contentious procedure, if such a case ever reaches the Court.

6 | CONCLUSION

The recognition of Nature as the holder of the collective dimension of the RHE is the most recent milestone in the evolution of environmental protection within the Inter-American Court. The Court's jurisprudence went from recognising indirect protection to the environment, by granting procedural and substantive rights, to the current ecocentric approach taken in the *Advisory Opinion OC-23/17* and in *La Oroya v Peru*. This approach was a result of the characterisation of the collective dimension of the RHE, which protects Nature understood through the lens of the Court's ecocentric approach. This way, Nature is a collective entity that includes both human and non-human elements that form an interconnected whole. Nature is protected by the collective dimension of the RHE, and thus it can be considered as the holder of this right. Consequently, the notion of personhood under the American Convention is expanded, allowing the possibility of a contentious case where Nature is the sole victim.

Such development still presents some challenges that need to be resolved, particularly with regard to the determination of the representative of Nature as the only victim in a contentious case. Nevertheless, the implicit incorporation of the RoN thesis into the Inter-American jurisprudence represents a radical shift in International Human Rights Law, which has historically and philosophically rested on the idea that only the human person has intrinsic value.[194] On a more practical level, it opens the door for new environmental litigation strategies, and thus, for a more effective protection of the environment, which is particularly important in the times of climate catastrophe that we are currently experiencing.[195]

However, such a shift is not yet set in stone. Similarly to the case of the expansive interpretation of article 26, the ecocentric approach towards the RHE is highly contingent on the Court's composition.[196] While the four new judges that joined the Court in 2022 have not changed the position on ESCER to date, it remains to be seen if it will be the same with the RHE. Progress is not linear. The *Advisory Opinion OC-23/17* and *La Oroya* case could also turn into nothing but a short 'ecocentric lapsus' in the otherwise overwhelmingly anthropocentric jurisprudence of the Inter-American Court. The Request for the *Advisory Opinion OC-32 on the Climate Emergency and Human Rights*, issued by Chile and Colombia in January 2023 represents an opportunity for the Court to either strengthen this ecocentric approach and explicitly recognise Nature as a holder of rights, or to regress to a more traditional understanding of the relationship between human rights and the environment.[197]

As former judge Pedro Nikken said paraphrasing the Argentinian jurist Carlos Nino, human rights are the antidote invented by humankind to stand against oppression.[198] In the context of the planetary threat that is climate change, this statement means that international human rights law must be prepared for the violence that will result from it. Decades of environmental exploitation and degradation constitute a form of violence that occurs gradually, albeit inevitably, and that is leading us to the destruction of our planet.[199] Human rights must evolve to address these challenges, and the development of RoN jurisprudence may be the way forward in this endeavour.[200]

DATA AVAILABILITY STATEMENT

The data that support the findings of this study are available from the corresponding author upon reasonable request.

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[192] ME Franco Martín del Campo and Z Fajardo Morales, *Las víctimas ante la Corte Interamericana de Derechos Humanos: evolución y tipologías* (Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas 2021) 100.
[193] ibid.
[194] Calderón-Gamboa and Recinos (n 16) 104.
[195] ibid.
[196] Mejía-Lemos (n 50) 9.
[197] 'Solicitud de Opinión Consultiva Sobre Emergencia Climática y Derechos Humanos a La Corte Interamericana de Derechos Humanos de La República de Colombia y La República de Chile' <https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_es.pdf>.
[198] P Nikken, 'La Protección de los Derechos Humanos: Haciendo Efectiva la Progresividad de los Derechos Económicos, Sociales y Culturales' (2010)52 Revista IIDH 55, 66.
[199] De Vido (n 131) 108.
[200] Tigre and Urzola (n 62) 48.

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