An advisory opinion on climate emergency and human rights before the Inter-American Court of Human Rights

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1. *Introduction*

On 9 January 2023 the Republic of Chile and the Republic of Colombia, both State parties to the American Convention on Human Rights ('the Convention'),[1] jointly filed a request for an Advisory Opinion on the Climate Emergency and Human Rights ('The Request') before the Inter-American Court of Human Rights ('The Inter-American Court' or 'the Court'). The Request is

> '**to clarify the scope of State obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law, paying special attention to the differentiated impacts** of this emergency on individuals from diverse regions and population groups, as well as on nature and on human survival on our planet'.[2]

The topic of the climate emergency is not new to the Inter-American System. In fact, this was the first regional system, and indeed, the first international forum, to be seized by the theme of climate change as a human rights issue, in *Sheila Watt-Cloutier et al v United States* (the *Inuit*

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[1] The American Convention entered into force in 1978. It is ratified by 25 State members of the Organization of American States. See the Official Page of the Inter-American Court of Human Rights <www.corteidh.or.cr/historia.cfm?lang=en#:~:text=To%20this%20date%2C%20twenty%20five,Peru%2C%20Dominican%20Republic%2C%20Suriname%2C>. Neither the United States nor Canada are parties to the American Convention.

[2] In bold in the original. See the Request here on the official web page of the Inter-American Court : <www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf>.

case).[3] Brought on behalf of all Inuit of the Arctic regions of the United States and Canada, a large number of whom had been individualised for the purposes of filing the claim, the claim back then argued that '*nowhere on Earth has global warming had a more severe impact than the Arctic*'[4] and denounced a '*cataclysmic impact on the Inuit*',[5] amounting to a number of human rights violations under the American Declaration of the Rights and Duties of Man ('The American Declaration').[6] Dismissed by the Inter-American Commission in 2005, the topic is back before the Inter-American System, albeit this time, in the Court and in the shape of an Advisory Request.

It is clear from the wording of the above excerpt that the Request is benefiting from the ground-breaking *Advisory Opinion on the Environment and Human Rights* ('Advisory Opinion 23') ,[7] issued by the Inter-American Court in 2017, one of the most significant rulings on environmental law and human rights issued by any international court to date. The reference to 'individual and collective dimension' of state obligations, as well as the crucial reference to the differentiated impacts on 'nature' echoes Advisory Opinion 23. Admittedly, the Request seeks to build on Advisory Opinion 23, as it makes express reference to the Court's holding on the right to a healthy environment, in its considerations.[8]

This Article attempts some brief observations relating to this Advisory Opinion Request. The observations are clustered into 4 sections, namely (i) comments on the advisory function of the Court (ii) the competence *ratione materiae* of the Court in this case; (iii) the questions before the Court; and (iv) key potential contributions of the Inter-American Court on human rights in the climate emergency context likely to influence in time other systems.

[3] Inter-American Commission on Human Rights, 'Petition Seeking Relief from Violations resulting from Global Warming caused by Acts and Omissions of the United States' (7 December 2005).

[4] ibid 1.

[5] ibid 51.

[6] Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.

[7] IACtHR, *The Environment and Human Rights* Advisory Opinion OC-23/18 Ser A No 23 (15 November 2017) ('Advisory Opinion 23').

[8] The Request (n 2) at 6.

It is submitted that the trajectory of travel of justiciability of climate change issues, globally, owes a great deal to the developments that have taken place in the Inter-American System, and that the Court's Advisory Opinion may prove to be influential in its findings beyond the Americas. Specifically, this Article looks into three key areas: namely the potential contributions of the Court in (i) understanding transboundary harm in the climate emergency context (ii) the contours of the right to life in the context of climate change; and (iii) legal consequences for State inaction.

2. *The Court's Advisory Functions*

Advisory Opinion proceedings before the Court are designed 'to enable OAS member States and OAS organs to obtain a judicial interpretation of a provision embodied in the Convention or other human rights treaties in the American States'.[9]

The advisory functions of the Inter-American Court are enshrined in Article 64 of the American Convention. Member States of the Organization (of American States) 'may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states'.[10] It is to be noted, therefore, that the powers of the Court go beyond the interpretation of the American Convention, including the interpretation of other treaties concerning the protection of human rights in the OAS states. The meaning of 'other treaties' is not circumscribed to other regional human rights treaties. In Advisory Opinion OC-16/99 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, the Inter-American Court addressed the question of whether it had the authority 'to interpret, in an advisory opinion, international treaties' such as the International Covenant on Civil and Political Rights ('ICCPR') and the Vienna Convention on Consular Relations, Article 36 (right to

[9] IACtHR, *Restrictions on the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)* Advisory Opinion OC-3/83 Series A No 3 (8 September 1983) para 22.

[10] American Convention art 64(1) (emphasis added).

consular assistance).[11] In the said case, the United States submitted that the Vienna Convention on Consular Relations was 'neither a human rights treaty nor a treaty "concerning" the protection of human rights'.[12] The Court found that both the ICCPR and the Vienna Convention on Consular Relations fell within the notion of 'other treaties concerning the protection of human rights in the American states'.[13] It found that Article 36 of the Vienna Convention on Consular Relations enshrined a right which formed part of the right of due process, an individual human right.[14]

In accordance with the Rules of Procedure of the Court (Article 70), Requests for an Advisory Opinion relating to the American Convention 'shall state with precision the questions on which the opinion of the Court is being sought'.[15] Article 70 of the Rules of Procedure requires that a request for an Advisory Opinion shall also 'identify the provisions to be interpreted', and 'the considerations giving rise to the request'.[16]

Article 71 of the Rules of Procedure which deals with 'other treaties' requires that 'the request shall indicate the name of the treaty and parties thereto, the specific questions on which the opinion of the Court is being sought, and the considerations giving rise to the request'.[17]

In its jurisprudence on Advisory Opinions, the Court has held that it has the inherent authority 'to define or clarify and, in certain cases, to reformulate the questions submitted to it'.[18]

3. *The competence* ratione materiae *of the Court in this case*

Unlike the case of the International Tribunal for the Law of the Sea ('ITLOS') whose advisory functions are not enshrined in its main treaty

[11] IACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* Advisory Opinion OC-16/99 (1 October 1999) (Requested by the United Mexican States) para 4.

[12] ibid 15.

[13] ibid para 34.

[14] ibid paras 87 and 124.

[15] IACtHR, Rules of Procedure art 70(1).

[16] IACtHR, Rules of Procedure art 70(2)

[17] IACtHR, Rules of Procedure art 71(1).

[18] IACtHR, *Enforceability of the right to reply or correction (Arts. 14(1), 1 (1) and 2 American Convention on Human Rights)* Advisory Opinion OC- 7/86 Ser A No 7 (26 August 1986) para 12.

(the United Nations Convention on the Law of the Sea) or made explicit in its rules, but stem from the interpretation ITLOS has made of its rules, the advisory powers of the Inter-American Court to address issues of interpretation of the American Convention (and indeed other treaties subject to the above) are set out expressly in its instruments and unlikely to be challenged in this case. Chile and Colombia have complied with the above rules having stated the precise questions, identified mostly the provisions to be interpreted and provided the considerations which have given rise to the request. It is to be noted that the questions (which are considered below) raise interpretation questions in relation to the American Convention (centrally) 'in light of' some other widely ratified treaties (namely the Paris Agreement[19] (Heading Question A.1), Article 12 of the Convention on the Rights of the Child (Heading Questions C)), as well as some regional treaties (Escazú Agreement[20] Articles 5 and 6 (Question B), and Article 9 (Heading Question E), and Protocol of San Salvador (Articles 1, 12 and 14)).

Despite the wide spectrum of regional treaties the Request could have invoked for interpretation of State obligations in relation to the climate emergency, the Request focused only on provisions of the American Convention.[21] This has the effect, prima facie, of addressing State obligations of 25 State members of the Organization of American States only (out of the 31 OAS Members). Canada and United States are not parties to the American Convention. An immediate question, therefore, may be how universal this requested interpretation is, for the Americas, if it is to leave out the obligations of the biggest emitter States in the region. Yet one could argue that non-State parties to the American Convention would have obligations under general international law, nevertheless, not to cause transboundary harm to other States, and it will be interesting to watch whether the Inter-American Court makes any reference to general

[19] UN, Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) <https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf>.

[20] ECLAC, Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean ('Escazú Agreement') (adopted 4 March 2018, entered into force 22 April 2021) <https://repositorio.cepal.org/server/api/core/bitstreams/7e888972-80c1-48ba-9d92-7712d6e6f1ab/content>.

[21] For example, it did not include any reference or question on the American Declaration.

international law in its Advisory Opinion. Taking the *Right to Information on Consular Assistance* rationale to the climate context (in said case the US, not a party to the Convention, was found to own an obligation of due process under the Vienna Convention on Consular Relations, as interpreted by the Inter-American Court) one could say that the interpretation of treaties referred in this request, binding on OAS members (ie the provisions on the rights of the child are binding on Canada[22]) by the Inter-American Court, would be equally valid. It is pertinent to recall that the interpretation of the Convention on Consular Relations by the Inter-American Court was eventually reaffirmed as correct by the International Court of Justice in the *LaGrand* case[23] with wide implications.

It is also the case that even if the obligations in relation to mitigation under the American Convention focus on parties which are not big emitters, much of the oil and mining operations, and deforestation does take place in such States' jurisdictions (the global south). The obligations so clarified in relation to the effects of such activities may prove fundamental in tackling climate change effects.

From that point of view, the Advisory Opinion may have a profoundly transformative impact.

4. *The questions before the Court*

There are 6 headings of questions.

First theme – The first theme focuses on duties of prevention and guaranteeing human rights 'in relation to the climate emergency', 'taking into account the 'obligation to guarantee the right to a healthy environment'.[24] There is no reference to specific provisions under the American Convention under this heading (what are those rights to be guaranteed?). It surprisingly fails to make express reference to Article 4 (the Right to Life) as a minimum. On a footnote, it considers that the right to a healthy environment enunciated by the Inter-American Court in its Advisory

[22] Canada ratified the Convention on the Rights of the Child on 12 December 1991.

[23] ICJ, *LaGrand case (Germany v United States of America)* Judgment [2001] ICJ Rep 466.

[24] The Request (n 2) 8

Opinion No 23, emanates from 'the Court's case law and doctrine, protected by the American Convention', Article 11 of the Protocol of San Salvador and Article 1 of the Escazú Agreement. But the Inter-American Court interpreted the scope of Article 4 of the American Convention in enunciating such basic right. The scope of Article 4 (right to life), in the climate change emergency appears to be the key question as well as other possibly affected rights under the American Convention such as Article 5 (humane treatment), Article 21 (use and enjoyment of one's property), Article 11.2 (protection of home), Article 16 (right to culture). Despite lack of express reference to provisions in the American Convention, doubtless the Inter-American Court will address that gap and use its powers to reframe and address the questions by reference to the American Convention.

By reference to the above the specific questions are namely: (1) What is the scope of the State's duty of prevention with regard to climate events caused by global warming … based on the obligations under the American Convention, in light of the Paris Agreement and the scientific consensus which recommend that global temperatures should not increase beyond 1.5°C? and; (2) …what measures should States take to minimize the impact of the damage due to the climate emergency in light of the obligations established in the American Convention? and 'what differentiated measures should be taken in relation to vulnerable populations or based on intersectional considerations?[25] The second question further breaks down into two additional clusters of questions on specific steps to implement such obligations (regulate, monitor and oversee, adopt environmental impact assessments etc) and enquiries on what principles should inspire the 'actions of mitigation, adaptation and response to the losses and damage resulting from the climate emergency'…[26]

Second theme – The second theme has a somewhat misleading title which references 'obligations to preserve the right to life and survival in relation to the climate emergency' but which in essence are about access to information. The questions revolve around the interpretation of Article 13, 'derived from the obligations' under 4(1) and 5(1) of the American Convention 'in light' of Articles 5 and 6 of the Escazú Agreement.

[25] ibid.
[26] ibid.

Third Theme – The third theme revolves around 'the differentiated obligations of States in relation to the rights of children and the new generations in light of the climate emergency'.[27] It identifies children as 'the most vulnerable in the long term to the imminent risks to life and well-being as a result of the climate emergency'. The heading assumes terminology that needs to be defined and should have been sought definition of, in the first cluster of questions (theme 1) in the first place. What is an 'imminent risk to life' under Article 4 the American Convention? In fact, so far, there have been no express questions on the right to life. And here, clumsily a 'choice' was made to put the specific question of interpreting the right to life (In fact Articles 1, 4, 5,) in relation to children and 'new generations' only. While this third theme may look at the enhanced interpretation of Articles 4 (right to life) and 5 (humane treatment) in relation to Article 19 (rights of the child) in the climate emergency, the notion of 'imminent risks to life' should probably be assessed generally, under theme 1 (above), in the first place. Clearly, the Court has the powers to do so.

Fourth theme – The Fourth theme relates to the general topic of State obligations arising from consultation procedures and judicial proceedings owing to the climate emergency. This basically refers to the interpretation of Articles 8 and 25 of the American Convention in providing 'adequate and timely protection and redress for the impact on human rights of the climate emergency'.[28] Here again, it assumes that the impact 'on human rights' by climate degradation is already clear. But the request did not ask that question specifically before (what are those rights likely to be impacted). While it has not been spelled out, clearly, what substantive rights under the Convention may be affected by climate degradation, such an enquiry would fall under theme 1 of the Request.

Fifth theme – The fifth theme focuses on obligations of protection of environmental defenders including indigenous and afro-descendant communities.

[27] ibid 10.
[28] ibid 11.

Sixth theme – The sixth theme focuses on shared and differentiated human rights obligations and responsibilities of States in the context of the climate emergency.

There is a conceptual error at the basis of this question. It invokes obligations to redress (climate emergency effects) under the American Convention but as mere 'progressive development' (Article 26). This is a misconception which arises from the misconceived approach that the climate emergency only breaches economic and social rights which cannot be justiciable in the same manner as civil and political rights are. The question in its current form is cumbersome in addition because it does not request an interpretation of a specific provision under the American Convention. For example, question 1 under this title asks: 'What considerations and principles should States and international organisations take into account, collectively and regionally, when analyzing shared but differentiated responsibilities in the context of climate change, from the perspective of human rights and intersectionality?'[29]

If the jurisdiction of the Court is indeed engaged to the extent that it is a question of remedies to people affected by climate change within the jurisdiction of the American Convention, then this should be tied to remedies under the American Convention, namely Article 63(1).

What this title is seeking is a number of questions on legal consequences in a situation where various States contribute to the effect.

The lack of reference to specific provisions herein would require that the Court uses its inherent authority to define, clarify and reformulate the questions submitted to it.

5. *Key potential contributions of the Inter-American Court on climate change and human rights*

Despite the shortcomings and some of the gaps and misconceptions underlying the formulation of the questions before the Court, the potential contribution of an Advisory Opinion clarifying fundamental questions of State obligations in relation to human rights impacts by climate change on people protected by the American Convention, may be transformative.

[29] ibid 13.

The Inter-American Court is particularly well placed to contribute substantially in the understanding of State obligations (and their legal consequences) in the current climate emergency. Indeed, the trajectory of travel of justiciability of climate change issues at international level, owes a great deal to the developments that have taken place in the Inter-American System.[30] Advisory Opinion 23 crystalized the interconnectivity of two areas that historically had received a separate treatment in international law: environmental law and human rights. This did not come out of nowhere. For many years the Inter-American System had made basic social and economic rights (including in the context of environmental degradation) justiciable under the American Convention.[31] The doctrines and jurisprudence of the Inter-American Court which were crystalized in Advisory Opinion 23, for the first time considered climate change as a possible form of *transboundary harm* that could cause human rights violations. It construed the right to life, fully, within the context of environmental degradation. Within that context, it considered environmental degradation (including climate degradation) a justiciable matter, able to give rise to remedies. It is in these areas that the impact of the Inter-American Court is likely to be felt most. In fact, it is likely to clarify notions and contribute to the better understanding of State obligations in relation to the climate crisis.

I deal with each of these key areas in turn.

a) Climate change as transboundary harm

A significant aspect of the Advisory Opinion 23 for potential climate change claims, is that it signalled the possibility of 'diagonal' human rights violations in circumstances far broader than those which have been held admissible under the Inter-American system to date.

[30] On the impact of the Inter-American system doctrines and jurisprudence on the Human Rights Committee see, M Feria-Tinta, 'Climate Change as a Human Rights Issue: Litigating Climate Change' in I Alogna, C Bakker, JP Gauci (eds), *The Inter-American System of Human Rights and the United Nations Human Rights Committee' in Climate Change Litigation: Global Perspectives* (Brill 2021).

[31] M Feria-Tinta, 'Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' (2007) 29 Human Rights Quarterly 431-459.

The Advisory Opinion made it clear that, in principle, the Inter-American system permits cross-border human rights claims in respect of other types of conduct, such as transboundary pollution and ecological damage. The Court held that the word *jurisdiction*, for the purposes of the human rights obligations under the American Convention 'as well as extraterritorial conducts may encompass a State's activities that cause effects outside its territory'.[32] The Court emphasised that States

> 'must ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of their jurisdiction, and that States are obliged to use all available means to avoid activities in their territory, or in any area under their jurisdiction, causing significant damage to the environment of another State'.[33]

In this context, one of the most interesting features of the Advisory Opinion 23 was the Court's handling of the concept of 'effective control'. The Court held:

> 'In cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or *under whose jurisdiction the activities* were carried out that has *the effective control over them* and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage'.[34]

It further concluded:

> 'When transboundary harm or damage occurs, a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory. The exercise of jurisdiction

[32] Advisory Opinion 23 (n 7) para 95.
[33] ibid para 97.
[34] ibid para 102 (emphasis added).

> arises *when the State of origin exercises effective control over the activities that caused the damage and the consequent human rights violation*'.[35]

Thus, in the Advisory Opinion 23, as concerns transboundary environmental harms, 'effective control' is no longer something which has to be exercised *over the territory* where the victim was, nor *over the victim* herself. Rather, what matters is whether the source state – State X – has effective control *over the activities* that caused the transboundary harm.

This is significant for potential climate change cases because it opens the door to the application of the American Convention in climate degradation cases, extraterritorially. As seen above, the questions posed jointly by Chile and Colombia *assume* the application of the American Convention in climate change cases in a transboundary context. But it would be necessary (before the Court can turn to further questions) for the Court to clarify what the requirements are for that to apply and what flows in terms of State responsibility from cases of transboundary harm in the climate context. The Court's reasoning in the Advisory Opinion 23 could be used to support an argument that a State's contribution to the accumulation of greenhouse gases in the atmosphere should result in State responsibility and accountability to victims living in other States. I don't see why the Court could not by proprio motu extend this analysis to the interpretation of the American Declaration for completeness.

Not all activities are relevant here, but in the words of the Advisory Opinion 23 only activities 'causing *significant* damage to the environment of another State' (see above). In my view, in this advisory opinion, the Court would need to bring its analysis to the climate context and address: (i) How should we understand the term 'significant' damage? (ii) what is the test to be applied to understand 'causal link' between the action that occurred in State A and the negative impact on the human rights of people in State B in the climate context?

It is clear that the thinking of the Court in this area, would be likely to influence other international courts and quasi-judicial organs' approach to similar questions (as it did in the case of *Sacchi et al*[36] before the Committee on the Rights of the Child).

[35] ibid para 104(h) (emphasis added).

[36] Case 104/2019 Argentina, 105/2019 Brazil, 106/2019 France, 107/2019 Germany, 108/2019 Turkey before the United Nations Committee for the Rights of the Child ('*Sacchi et al*'). UN Doc CRC/C/88/D/104/2019, Decision adopted by the Committee on the

b) Right to life

Perhaps a much-needed area of clarification by the Inter-American Court is in the protection of the right to life in the context of the climate emergency. The majority decision in the *Torres Strait Islanders* case[37] by the UN Human Rights Committee, the first legal action brought by climate-vulnerable inhabitants of low-lying islands against a Sovereign state, left this issue in a very muddled way despite setting up several groundbreaking precedents for international law and climate justice.[38] In essence, the Committee considered that to find a violation of the right to life, it was necessary to apply a test of 'imminence' to the threat to the right of life in the context of climate change. It found that obligations of a State under the right to life were not breached in the case because the Islands were at risk of sinking in 10 to 15 years time (unless action was taken).[39] In other words, it erroneously applied a temporal approach to construe the notion of 'imminence'. The arguments on behalf of the claimants, however, did not argue a threat to the right to life conceived only as a negative obligation 'not to be arbitrarily deprived of one's life'. It posited that the 'right to life in dignity' was violated by the inaction of the respondent State. Although the Committee embraced the same notion of the right to life existing in the Inter-American System (see General

Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of communication No. 104/2019. For a discussion on the case and the impact of the Inter-American Court of Human Rights' analysis in Advisory Opinion No 23, see M Feria-Tinta, 'The future of environmental cases in the European Court of Human Rights' in N Kobylarz, E Grant, *Human Rights and the Planet (*Edward Elgar 2022).

[37] Human Rights Committee, *Daniel Billy et al.* Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/201 Adopted by the Committee at its 135th session (27 June – 27 July 2022). ('*Torres Strait Islanders case*').

[38] For an analysis of the decision see M Feria-Tinta, 'Torres Strait Islanders: United Nations Human Rights Committee Delivers Ground-Breaking Decision on Climate Change Impacts on Human Rights' EJIL Talk! (27 September 2022).

[39] *Torres Strait Islanders case* (n 37) paras 8.7 and 8.8.

Comment No 36 of the committee),[40] it simply did not apply its own holdings in General Comment 36, in the case.[41]

Compare the above with the Inter-American Court well established case law. In Advisory Opinion No 23, the Inter-American Court relied on long-standing jurisprudence by the Court which has indicated that compliance with the obligations imposed by Article 4 of the American Convention, related to Article 1(1) of this instrument, not only presupposes that no person may be deprived of his or her life arbitrarily (negative obligation) but also, in light of the obligation to ensure the free and full exercise of human rights, it requires States to take all appropriate measures to protect and preserve the right to life (positive obligation).[42] This is a key consideration concerning the right to life, which has also been embraced by recent jurisprudence of the Human Rights Committee.[43]

This approach has enabled the Court to examine and establish the violation of Article 4 of the Convention in relation to individuals who did not die as a result of the actions that violated this instrument.[44] In the case of the *Yakye Axa Indigenous Community v Paraguay*,[45] the Court for example, made findings of violations of the right to life conceived as a 'right to a life with dignity'.

The proposition that, in international human rights law, the right to life includes a right to life with dignity has evolved from the jurisprudence of the Inter-American Court of Human Rights since the *Villagrán Morales v Guatemala* case.[46] In *Yakye Axa Indigenous Community v. Paraguay,* the right to life in Article 4 of the American Convention on Human Rights was regarded as containing basic economic, social and cultural

[40] Human Rights Committee, 'General Comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life' (30 October 2018) UN Doc CCPR/C/GC/36 ('General Comment No 36').

[41] See for example General Comment No 36 (n 40) para 62.

[42] Advisory Opinion 23 (n 7) para 108.

[43] Art 4 of the ACHR is in similar terms to art 6(1) of the ICPR and provides: 'Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of this life'.

[44] Advisory Opinion 23 (n 7) para 109.

[45] IACtHR, *Case of Yakye Axa Indigenous Community v Paraguay* Judgment (Merits, Reparations and Costs) (17 June 2005).

[46] IACtHR, *Villagrán-Morales v Guatemala* Judgment (19 November 1999).

rights which included being able to exercise traditional activities for subsistence (hunting, fishing) and access to natural resources deeply connected with the cultural identity of aboriginal communities. The Court stated that:

> 'one of the obligations that the State must inescapably undertake as a guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard the State has the duty to take positive, concrete measures geared towards fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk'.[47]

The Court concluded in the case, that Paraguay had violated the right to life because it had failed to ensure the indigenous community's 'right to a life in dignity'.

In *Sawhoyamaxa Indigenous Community v Paraguay*[48] the Court also emphasized the duty of states to guarantee the creation of conditions that may be necessary in order to prevent violations of the right to life.

This approach to the right to life, highlighted by the Court in the context of establishing the link between environmental degradation and the right to life, is crucial to the proper understanding of the right to life today. The Inter-American Court's elaboration of these tests in the climate emergency context, would clarify the law and contribute substantially to the understanding of this fundamental right beyond the Americas.

c) Legal consequences

What would be the legal consequences for violations of their obligations by States in relation to the climate emergency? The Advisory Opinion of the Inter-American Court may contribute in a key way to develop obligations to redress climate change impacts. It is one of the international courts with broad experience in ascertaining legal consequences for human rights violations. Its analysis of the common and differentiated

[47] ibid para 162.

[48] IACtHR, *Sawhoyamaxa Indigenous Community v Paraguay* Series C No 146 (29 March 2006).

responsibilities together with construing obligations under Article 63 (1) may prove to be helpful to the International Court of Justice, when it makes its own analysis of State obligations, globally in addressing questions under its own advisory proceedings.

6. *Effects*

The Inter-American Court has held that while an advisory opinion of the Inter-American Court does not have the binding character of a judgment in a contentious case, 'it does have undeniable legal effects'.[49] It is an authoritative legal pronouncement. Most Latin American States are monist systems and this legal pronouncement could be invoked in domestic cases directly. To the extent that an Advisory Opinion clarifies State obligations, it would require States to act in accordance with the Court's findings in order not to be exposed to be litigation under the American Convention. The Court's Advisory Opinion would certainly influence other courts (regional and international) in their own assessments of international law in the context of climate change. In short, it would set the premises to hold States accountable for climate inaction and would contribute to a new era in international law, to make the protection of human rights effective.

[49] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (n 11) para 48.