

# Upgrading Environmental Rights

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Verena Kahl



José Daniel Rodríguez-Orúa

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*La Oroya* and its Significance for a Safer Climate

2024 signifies a watershed moment in human rights and climate change law, as landmark decisions of regional and international courts will clarify states' obligations in light of the ongoing climate emergency. Just recently, the European Court of Human Rights (ECtHR) handed down the first climate decisions in its history (see [here](#), [here](#), and [here](#) as well as corresponding discussion [here](#) and [here](#)). Among [three advisory proceedings](#) pending before international judicial institutions is the [request](#) for an advisory opinion submitted by Chile and Colombia to the Inter-American Court of Human Rights (IACtHR) on the climate emergency and human rights. The landmark decision, which – [after the unsuccessful Inuit petition](#) lodged with the Inter-American Commission in 2005 – will be the first opportunity for the Court to deal with State obligations under the American Convention on Human Rights (ACHR) in the context of climate change, is projected to rely heavily on the IACtHR's robust environmental case law.

On March 22nd, 2024, the Court published an important addition to this environmental jurisprudence. In [Community of La Oroya v. Peru](#) the IACtHR for the first time found a violation of the autonomous right to a healthy environment (RtHE) in a [non-indigenous context](#) related to the long-lasting environmental contamination of a community by toxic substances (for discussions on the case and its main innovations see [here](#), [here](#), [here](#), [here](#) and [here](#)). The present contribution will present the Court's main findings under the RtHE, focussing particularly on the new developments since [Advisory Opinion on the Environment and Human Rights \(AO-23\)](#) and [Lhaka Honhat Association \(Our Land\) v. Argentina](#). In a second step, we will address how these developments may contribute to shape member States' obligations in the context of climate change.

**New developments since AO-23 and *Lhaka Honhat Association* with respect to the RtHE**

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The RtHE forms an integral part of autonomous justiciable rights established under the American Convention since the IACtHR's decision in *Lhaka Honhat Association*, which built on AO-23 as a door-opener for deriving the RtHE from article 26 ACHR. In *La Oroya* the IACtHR sticks to an ecocentric vision as adopted in AO-23, describing the environment as a "universal value", so that the RtHE "protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals." (para. 118, see also AO- 23, paras. 59, 62). In *La Oroya*, the Court similarly emphasized that "States are obliged to protect nature not only because of its usefulness or effects, but because of their importance to the other living organisms with which we share the planet." (para. 118, see also AO-23, para. 62).

## **Substantive Elements of the RtHE**

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In the middle of these previously established standards, the Court introduces something new, a concretization of the RtHE's components. While repeating that this right is composed of different procedural and substantive elements, the IACtHR underscored that the substantive elements included, inter alia, air, water, food, the ecosystem and the climate. Defining the elements of the RtHE is crucial for the radius of protection the right guarantees, a right which has, despite its widespread recognition, often remained a kind of "black box" with challenges for its implementation. All of the non-exhaustive elements listed by the Court are either components of the environment itself, like air (atmosphere), water (hydrosphere) or the ecosystem (biosphere), or constitute sub-components that can be attributed to one of the environmental elements.

## **Rights to clean air and clean water**

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Even more concretely, the Court noted that air and water pollution may have detrimental effects for a healthy and sustainable environment, as the deposit of pollutants may affect aquatic ecosystems, flora and fauna as well as the soil through the alteration of their composition, with negative consequences for people's health and living conditions (see para. 119). From this the IACtHR inferred that individuals have the right to breathe air "whose pollution levels do not constitute a significant risk to the enjoyment of their human rights, particularly the right to a healthy environment, health, personal integrity and life." (para. 120). The Court made clear that the right to breathe clean air is a substantive element of the RtHE, establishing for the very first time the right to breathe clean air as a sub-right of the RtHE. It further shows the interconnectedness of several conventional rights in the area of environmental pollution.

In particular, States are obliged under the RtHE to:

“a) establish laws, regulations and policies that regulate air quality standards that do not constitute health risks;

b) monitor air quality and inform the population of possible health risks;

c) carry out action plans to control air quality that include the identification of the main sources of air pollution, and implement measures to enforce air quality standards.”

(ibid.)

In a very similar manner, the Court further established people’s right to water “that is free from levels of contamination that constitute a significant risk to the enjoyment of their human rights”, referring particularly to the RtHE and the rights to health and life (para. 121). In the area of water protection, the RtHE requires States to:

“a) design norms and policies that define water quality standards and, in particular, in treated and wastewater that are compatible with human and ecosystem health;

b) monitor contamination levels of water bodies and, if applicable, report possible risks to human and ecosystem health;

c) make plans and [...] undertake any practice with the aim of controlling water quality, including the identification of the main causes of contamination;

d) implement measures to enforce water quality standards; and

e) adopt actions to ensure the sustainable management of water resources.”

The standards, plans and control measures designed by States under both the right to clean air and the right to water must adhere to “the best available science” as well as be in accordance with the criteria of “availability, accessibility, sustainability, quality and adaptability [...]” (paras. 120, 121).

With regard to the right to water, the Court emphasized that while there is “a close relationship between the right to water as a substantive facet of the right to a healthy environment and the right to water as an autonomous right”, differences existed, meaning that a violation of one right does not necessarily imply the violation of the other (para. 124). The IACtHR differentiated between the two rights based on their distinct protective orientation: The right to water under the RtHE followed an ecocentric vision, protecting water as a universal value for all living organisms, while the right to drinking water and sanitation rather adopts an anthropocentric vision, focused on the significance of water for human survival (see *ibid.*). Although this clarification is both helpful and necessary in light of the development of a new water right under the RtHE, doubts may remain whether the standards established by the Court under the RtHE in the present case do not pursue an anthropocentric approach to protection after all, so that a certain confusion regarding the two water rights may persist.

## Positive Obligations of Prevention and Precaution

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In addition, the Court established that the principle of prevention also applies to the rights to clean air and water, resorting to well-known standards consolidated in AO-23 and *Lhaka Honhat Association*. It therefore restated that under certain circumstances States are obliged to supervise and oversee certain activities to protect human rights from harm that originates from the actions of public entities and private persons (para. 125). This obligation of conduct, which requires measures *ex ante* before the harm has occurred, applies particularly in cases of potentially harmful activities (see *ibid.*). States must therefore “a) regulate; b) supervise and monitor; c) require and approve environmental impact assessments; d) establish contingency plans, and e) mitigate, when environmental damage has occurred (*ibid.*, see also AO-23, para. 145).” Regarding the duty to regulate, the Court held that States must regulate businesses to ensure that their activities do not cause or contribute to human rights violations and that companies rectify such violations (para. 111). Therefore, both public and private entities must act under a standard of due diligence to prevent environmental harm (para. 157, for a detailed analysis on the Court’s standard on due diligence of private entities see [here](#)).

With regard to the precautionary principle, the Court underscored that States must adhere to this principle to protect the right to life, personal integrity and – as an important addition – the right to health (para. 127, see also para. 207). In this regard, the Court found that “the absence of scientific certainty about the specific effects that environmental pollution may have on human health cannot be a reason for States to postpone or avoid adopting preventive measures, nor can it be invoked as a justification for the failure to adopt general protective measures for the population”. (para. 207). Even though the IACtHR elaborated on the precautionary principle in the realm of the RtHE, it explicitly connected the obligations emanating from this principle to other rights only. Nonetheless, in light of the principles’ clear environmental protection objective, it stands to reason that the obligations emanating from it should also apply under the RtHE itself.

## Causality and Burden of Proof

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The Court further clarified its standard for determining a causal nexus between a polluting activity and a violation of the right to health. According to the IACtHR, it is not necessary to demonstrate direct causality between the diseases acquired and exposure to the pollutants, provided that: a) a risk to health by a specific polluting activity has been demonstrated; b) individuals were exposed to such pollution under conditions that posed a risk, and c) the State is responsible for not complying with its duty to prevent such pollution (para. 204). In these cases, to establish State responsibility it is sufficient if the State allowed the existence of pollution levels that posed a significant risk to human health and individuals were actually

exposed to this contamination in such a way that their health was at risk. In any case, “it would be up to the State to demonstrate that it was not responsible for the high levels of pollution and that this did not constitute a significant risk to the individuals” (para. 204).

The IACtHR therefore followed the example of less strict causality requirements as established by the ECtHR (see [here](#)), while shifting the burden of proof to the State concerning the causation of high levels of pollution and the corresponding significant risk. This important concretization of causality requirements may foreshadow generous standards with regard to complex causality chains in the context of climate change, where a shift of the burden of proof would be equally valuable for claimants.

## **Intergenerational Equity**

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In its judgment, the Court drew upon its AO-23 to further develop the principle of intergenerational equity by tethering it both to the precautionary principle and the best interest of the child.

Regarding precaution, the Court noted that intergenerational equity demands that States develop environmental policies, which promote stable environmental conditions that allow future generations to enjoy similar opportunities for development and viability of life (para. 128). Therefore, the RtHE is conceived as a “universal interest owed to present and future generations” (para. 141). This, in turn, may indicate that the IACtHR considers the preservation of the environment for future generations a justiciable obligation under the RtHE. This reference to intergenerational equity could lead to new landmark developments for future-oriented claims in the Court’s following case law.

In addition, the Court tied intergenerational equity to the best interest of the child. Given children’s special vulnerability to environmental harm, the IACtHR underscored that States have to prevent polluting activities from impacting children’s rights, “as they will be most affected by the current and future consequences of environmental damage”. Therefore, States must act under a stringent standard of due diligence and ensure that the risks do not persist (paras. 142). Importantly, the Court further emphasized that States have an enhanced duty to protect children against health risks posed by the emission of gases that contribute to climate change (para. 143).

## **Non-regression in environmental protection**

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In *La Oroya*, the Court concluded that Peru’s amendment of air quality standards related to sulfur dioxide was a regressive measure regarding the protection of the RtHE. Peru had previously established that the WHO’s air quality standard was the guideline for setting the maximum standard to assess environmental and health risks. Nevertheless, the State later raised the maximum permissible emissions of sulfur dioxide in a manner incompatible with WHO standards. This regression in air quality standards required careful consideration,

justified in reference to the totality of rights, within the context of the maximum utilization of resources available to the State (paras. 186 et seq.). This inclusion of the non-regression principle into environmental protection may very well rub off on future standards of climate protection, particularly with regard to domestic regulation of mitigation measures.

## **The significance of the findings on the RtHE for climate protection**

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While the specification of the RtHE is in itself a huge progress for human rights protection in the context of environmental pollution, the significance of these developments extends far beyond the decision itself. The new parameters established in *La Oroya* will have considerable influence on environmental and climate litigation in the Inter-American Human Rights System and in the Court's upcoming Advisory Opinion on the climate emergency and human rights.

In particular, the specification of the RtHE's elements as well as the derivation of new sub-rights to clean air and water may foreshadow the standards to be developed by the Court in the context of the climate crisis. As the climate is considered a substantive element of the RtHE, it is – in a consistent continuation of the jurisprudential standards set in *La Oroya* – possible that the IACtHR recognizes a right to a safe climate as a sub-right of the RtHE with corresponding obligations. This would be a revolutionary development, as no human rights treaty or monitoring body has recognized an independent human right to a safe climate yet. If the Court proceeds in this sense, it would further stand to reason that the obligations under such a right to a safe climate also require measures that are in accordance with the “best available science” and adhere to the principles of prevention and precaution.

Furthermore, as the principle of intergenerational equity plays an important role in the distribution of climate change-related burdens between present and future generations, the Court could further develop its reasoning on State duties to protect future generations from climate change and potentially corresponding justiciable rights.

While the Court's reasoning on progressive realization of the RtHE and the limited grounds for regressive policies may inform mitigation duties of States under the ACHR, e.g. to ensure that their Nationally Determined Contributions (NDCs) represent a progression over time and reflect their highest possible ambition, its standards on violations of the right to health from polluting activities will be particularly relevant when analyzing the rise in diseases and health conditions due to GHG emissions.

*La Oroya* lays foundational principles that will likely shape the content and direction of environmental and climate change litigation and jurisprudence in the Americas. This historic judgment provides a robust basis for anticipating how the Court will handle the specification of environmental rights within the climate emergency and how it may accordingly inform States' human rights obligations.

## References

- ↑1 At the date of publication of the present contribution, no official English translation of the decision was available. All translations reproduced in this text were therefore made by the authors themselves. They therefore accept full responsibility for any errors that may have occurred in the translation process.
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## References

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