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TLEUZHAN ZHUNUSSOVA

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HUMAN RIGHTS AND THE ENVIRONMENT BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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Tleuzhan Zhunussova*

ABSTRACT: In the current geological era of Anthropocene with the human as the principal agent of global environmental change, environmental concerns have become ever so prominent. As a response, the recent decades since the 1970s saw an emergence of a growing body of substantive rules related to environmental protection and the subsequent increase in environmental litigation. In absence of centralized judicial authority dedicated exclusively to environmental matters, human rights courts and treaty bodies have become the main fora for litigating environmental justice claims, thereby creating situations of inter-legality characterized by an overlap between human rights norms and environmental law. Against this background, the paper aims to analyse the interaction between these two regimes in the case law of the Inter-American Court of Human Rights. To this end, it will first review the case law prior to 2017, in which the Court operated exclusively within its own human rights framework by "greening" the existing Convention rights, with limited success from the point of view of environmental protection. In the next sections, this self-referential stance will be contrasted with the Court's recent inter-legal approach in the landmark *Advisory Opinion OC-23/17 and* the *Lhaka Honhat* case, where it proclaimed the existence of autonomous right to healthy environment by integrating the norms of international environmental law in its interpretation of the American Convention. The ultimate aim of the paper is to highlight the normative value of the IACtHR's inter-legal reasoning in promoting environmental justice, in particular through opening of new judicial avenues for the protection of ecosystem as a fundamental value in its own right.

KEY WORDS: Inter-legality, environmental justice, greening human rights, the Inter-American Court of Human Rights, anthropocentrism.

* Post-doctoral Fellow at Sant'Anna School of Advanced Studies, DIRPOLIS, t.zhunussova@santannapisa.it. I would like to thank Professor Gianluigi Palombella for earlier stimulating discussions on the subject.

1. Introduction

In the current geological era of Anthropocene with the human as the principal agent of global environmental change, environmental concerns have become ever so prominent.[1] As a response, the recent decades since the 1970s saw an emergence of a growing – albeit fragmented - body of substantive rules related to environmental protection and the subsequent increase in environmental litigation. However, with more than one thousand environmental treaties signed on global and regional levels, there is still no centralized judicial authority dedicated exclusively to environmental matters.[2]In its absence, other international courts - including the ICJ, the WTO Appellate Body, the International Tribunal for the Law of the Sea, as well as human rights courts - have been called upon to adjudicate disputes involving environmental issues, thereby creating situations of inter-legality characterized by an overlap between their own legal regimes and environmental law.[3]

In particular, in light of the close connection between the environment and enjoyment of human rights, human rights courts and treaty bodies have become the main fora for litigating environmental justice claims.[4] However, despite the obvious synergy between environmental protection and human rights, the relationships between the two legal frameworks have been far from straight forward.[5] While the strong link between human rights and the environment has been affirmed already in the 1972 Stockholm Declaration on the Human Environment, currently no human rights treaty, except for the African Charter on Human and People's Rights, explicitly recognizes the right to a healthy environment.[6] Instead, human rights courts have mainly dealt

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[1] On the concept of 'Anthropocene' in legal scholarship generally, see L.J. Kotzé, *Environmental Law and Governance for the Anthropocene* (Hart Publishing, 2017); . E. Viñuales, *The Organization of the Anthropocene: In Our Hands?* (Brill, 2018

[2] L.J. Kotzé, E. Daly, 'A Cartography of Environmental Human Rights' in E. Lees, J.E. Vinuales (eds), the Oxford Handbook of Comparative Environmental Law (OUP, 2019) 1044, 1049.

[3] J. Klabbers, G. Palombella, 'Introduction: Situating Inter-Legality' in J. Klabbers, G. Palombella (eds), *The Challenge of Inter-Legality* (CUP, 2019) 1; G. Palombella, 'Theory, Realities and Promises of Inter-legality: A Manifesto' in J. Klabbers, G. Palombella (eds), *The Challenge of Inter-Legality* (CUP, 2019) 363, 367-368.

[4] This link has been most recently affirmed in the Framework principles on human rights and environment, Annex to the Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment to the Human Rights Council, 24 January 2018, A/HRC/37/59, p. 7. In particular, the opening paragraph states that "Human beings are part of nature, and our human rights are intertwined with the environment in which we live. Environmental harm interferes with the enjoyment of human rights, and the exercise of human rights helps to protect the environment and to promote sustainable development", see para. 1.

[5] On the relationships between environment and human rights, see A. Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2007) 18(3) *Fordham Environmental Law Review* 471.

[6] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment to the Human Rights Council, supra at note 3, para. 11. In addition to

with environmental issues by "greening" existing human rights law, including the right to life, the right to property, the right to health, and the right to private life.[7] Although this approach has had success in certain categories of cases, adjudicating environmental claims exclusively through the human rights framework - while disregarding relevant environmental law norms - bears inherent limitations from the standpoint of environmental justice.[8] In particular, "human rights greening" benefits only individuals who can prove that they have been sufficiently affected by environmental harm and not the general public.[9] In addition, such approach is inherently anthropocentric, conceiving environment merely as an instrument for well-being of individuals, rather than a good in its own right.[10]

Against this background, the recent decisions of the Inter-American Court of Human Rights (the IACtHR), in which the Court proclaimed and subsequently enforced an autonomous right to a healthy environment, represent a welcome legal development for fostering environmental justice. Most importantly for our purposes, both the *Advisory Opinion OC-23/17* [11]and the *Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v Argentina* [12]decision illustrate the normative value of inter-legal approach in international adjudication. To make this argument, this chapter will first review the case law of the IACtHR prior to 2017, in which the Court operated exclusively within its own human rights framework, with limited success from the point of view of environmental protection. In the next sections, this self-referential stance will be contrasted with the Court's inter-legal approach in the landmark *Advisory Opinion OC-23/17 and* the *Lhaka Honhat* case, where it integrated the principles and rules of international environmental law in its interpretation of the American Convention. The last section will summarize the argument, highlighting the normative value of the IACtHR's inter-legal reasoning in promoting environmental justice.

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the African Charter on Human and People's Rights, the right to a healthy environment is recognized in many constitutions across the world, see L.J. Kotzé, E. Daly, supra at note 2, pp. 1050-1051; 1057-1059.

[7] For analysis of the relevant case law, see A. Boyle, supra at note 4, pp. 484-504; J.H. Knox, 'Constructing the Human Right to a Healthy Environment' (2020) 16 *Annual Review of Law and Social Science* 79, 84-86.

[8] On self-referential judicial approaches as obstacles to achieving justice, see G. Palombella, supra at note 3, pp. 380-390.

[9] A. Boyle, supra at note 4, pp.505-506.

[10] Ibid, p. 472; L.J. Kotzé, E. Daly, supra at note 2, p. 1059.

[11] *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, IACtHR, Advisory Opinion OC-23/17 Series A No. 23 (15 November 2017).

[12] *Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v Argentina* (Merits, Reparations and Costs), IACtHR, Case No. 400 (6 February, 2020).

2. *"Greening" the Inter-American Convention on Human Rights*

Both the 1948 American Declaration of the Rights and Duties of Man and the 1969 American Convention on Human Rights do not mention the right to a healthy environment, being traditionally focused on the protection of civil and political rights. However, this right is explicitly acknowledged in the Additional Protocol to the Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), adopted in 1988 after environmental issues had gained a global momentum in the 1970s.[13] In particular, Article 11 of the Protocol of San Salvador provides that "everyone shall have the right to live in a healthy environment", while requiring the State Parties to "promote the protection, preservation and improvement of the environment".[14]

However, it should be emphasized that the right to a healthy environment under the San Salvador Protocol is not justiciable, because the obligations of the States parties under the Protocol are limited to adopting necessary measures to progressively achieve the observance of economic, social and cultural rights contained therein.[15] In fact, the Protocol of San Salvador allows for individual petitions procedure exceptionally in relation to trade union rights and the right to education.[16] In this light, before the landmark *Advisory Opinion OC-23/17* that will be discussed below, the IACtHR has dealt with environmental issues by "greening" the existing Convention rights. In particular, the environmental issues adjudicated by the Court in this manner could be divided in two main categories: the first one linked to the right of indigenous and tribal people to their land and the second one concerning procedural environmental rights.

To start with the first and the biggest category of environmental disputes before the IACtHR, they all concerned illegal or unsustainable exploitation of natural resources located on indigenous peoples' ancestral lands, which, in turn, negatively impacted their traditional

[13]V. De Oliveira Mazzuoli, G. De Faria Moreira Teixeira, "Greening" the Inter-American Human Rights System' (2012) 33(2) *L'Observateur des Nations Unies* 299, 301-302.

[14]Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", Adopted on 17 November, 1988.
[15] Ibid, Article 1.
[16] Ibid, Article 19(6).

ways of living.[17] To illustrate, in one of these landmark cases, *Kichwa Indigenous People of Sarayaku v Ecuador,* the Court declared that the oil exploration activities in the territory belonging to indigenous people violated their right to property under Article 21 of the Convention.[18] To clarify, the Court reached this finding by providing a broad interpretation of the right to property, which, besides the Western individualistic notion, also came to incorporate indigenous collective title over ancestral land.[19] In particular, in doing so, the Court emphasized the strong connection between the quality of life of indigenous people and the natural resources located on their land:

> Article 21 of the American Convention protects the close relationship between indigenous peoples and their lands, and with the natural resources on their ancestral territories and the intangible elements arising from these. The indigenous peoples have a community-based tradition related to a form of communal collective land ownership; thus, land is not owned by individuals but by the group and their community. These notions of land ownership and possession do not necessarily conform to the classic concept of property, but deserve equal protection under Article 21 of the American Convention.[20]

In similar vein, such expansive interpretation of the right to property in Article 21 of the Convention allowed the Court to promote environmental protection in indigenous lands in several other cases.[21] However, it should be emphasized that this method of fostering environmental justice is not without limitations. First of all, as the IACtHR clarified in that same *Sarayaku v Ecuador* case, natural resources on indigenous people's lands enjoy protection under Article 21 in so far as they are "traditionally used and … necessary for their physical and

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[17] R. Pavoni, 'Environmental Jurisprudence of the European and Inter-American Courts of Human Rights: Comparative Insights' in B. Boer (ed), Environmental Law Dimensions of Human Rights (Oxford University Press, 2015), 69, 98. Other cases in this category include *Maya Indigenous Community of Toledo District v Belize, IACommHR, Case No. 12.053, Report No. 40/04*; *Mayagna (Sumo) Awas Tingni Community v Nicaragua,* IACtHR, Case No. 79 (31 August 2001), *Sawhoyamaxa Indigenous Community v Paraguay (Merits, Reparations and Costs),* IACtHR, Case No. 146 (29 March 2006); *Case of the Saramaka People v. Suriname, IACtHR, Case No.172* (28 November 2007). For an overview of the Court's jurisprudence on indigenous peoples and environment, see D. Shelton, 'Environmental Rights and Brazil's Obligations In the Inter-American Human Rights System' (2009) 40 *George Washington International Law Review* 733, 756-768; A.D. Fisher, M. Lundberg, 'Human Rights' Legitimacy in the Face of Global Ecological Crisis – Indigenous Peoples, Ecological Rights Claims and the Inter-American Human Rights System' (2015) 6(2) *Journal of Human Rights and the Environment* 177.

[18]Case of the Kichwa Indigenous People of Sarayaku v Ecuador (Merits and Reprarations), IACtHR, Case No. 245 (27 june 2012).

[19] On this point, see S. Theriault, 'Environmental Justice and the Inter-American Court of Human Rights' in A. Grear, L.J. Kotzé (eds), Research Handbook on Human Rights and the Environment (Edward Elgar Publishing, 2015) 309, 321-323.

[20] *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, supra at note 16, para. 145. See also S. Theriault, supra at note 17, p. 323.

[21] On this point, see cases cited supra at note 15; S. Theriault, supra at note 17, pp. 322-324; R. Pavoni, supra at note 15, pp. 97-98.

cultural survival and the development and continuation of their worldview".[22] In other words, the promotion of environmental protection under the umbrella of Article 21 is limited to situations where it can be demonstrated that environmental degradation prevents indigenous people from enjoying their traditional ways of living and using natural resources.[23] Secondly, in the Court's view, Article 21 does not per se prohibit the state from allowing third parties to exploit natural resources in indigenous land, even when such exploitation may cause environmental degradation and negatively affect indigenous ways of living.[24] Indeed, according to the Court's jurisprudence, limitations to the communal right to property of indigenous peoples are allowed, providing that "they are aimed at achieving a legitimate objective … without denying their right to exist as people".[25]

Furthermore, collective claims to enjoyment of natural resources from general population – coming outside the context of indigenous peoples' rights – so far, have not been accepted in the Inter-American human rights system.[26] This is illustrated by *Metropolitan Nature Reserve* case, in which the Inter-American Commission on Human Rights rejected the claim of citizens of Panama alleging the violation of the right to property under Article 21 due to the construction of a roadway through protected area in Panama City.[27] In particular, the Commission declared the complaint inadmissible as it concerned "abstract victims represented in an *actio popularis*", rather than specifically identified and defined individuals" whose rights were violated.[28] In fact, the only other category of successful environmental cases outside the context of indigenous people's rights concerned "greening" procedural right under the Convention, including the right to information, the right to participate in decision-making and access to justice.[29] The most remarkable case in this regard is *Claude Reyes and others v Chile*, which arose out of refusal of the Chilean Foreign Investment Committee to disclose, upon request of several citizens, information regarding the 'Rio Condor' project. The project aimed

[22] *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, supra at note 16, para. 146, as cited in S. Theriault, supra at note 17, p. 324.
[23] S. Theriault, supra at note 17, p. 324.
[24] Ibid.
[25] *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, supra at note 16, para. 156. See also S. Theriault, supra at note 17, p. 324. In addition, prior to allowing the exploitation of natural resources that are essential to indigenous peoples' existence, the state must consult the affected communities, conduct an environmental impact assessment and subsequently ensure that the latter receive reasonable benefits from these activities, see ibid, para. 157; S. Theriault, supra at note 17, pp. 324-325, for discussion.
[26] R. Pavoni, supra at note 15, p. 98.
[27] *Metropolitan Nature Reserve v Panama,* IACommHR, Case No. 11.533, Report No. 88/03 (22 October 2003).
[28] Ibid, as cited in R. Pavoni, supra at note 15, p. 94.
[29] R. Pavoni, supra at note 15, p. 72. For an overview of the Court's jurisprudence on procedural environmental rights, see R. Pavoni, supra at note 15, pp. 72-76; D. Shelton, supra at note , pp. 768-774; S. Theriault, supra at note 17, pp. 318-321.

at large-scale exploitation of forests in the southern region of Chile and sparked considerable public debate regarding its potential environmental impact.[30] Thus, several Chilean citizens decided to inquire about the suitability of the chosen investor, as well as the potential environmental impact of the project and after their request had been denied, filed for the violation of their right to seek and receive information under Article 13(1) of the Convention.[31] Despite the fact that the petitioners in question were not directly affected by the Rio Condor project, the Court accepted the claim and recognized the right to obtain information of public interest, including those pertaining to environmental matters, belong to all citizens in a democratic society:

> Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention …The information should be provided *without the need to prove direct interest or personal involvement in order to obtain it*, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the *two dimensions, individual and social*, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.[32]

Thus, the *Claude Reyes* case demonstrates that the IACtHR is ready to strengthen the participatory aspect of environmental justice through broad reading of Article 13 of the Convention. However, as is the case with the first category of environmental disputes, such approach is limited from the point of view of environmental protection as it does not grant individuals a fully-fledged right to participate in environmental decision-making.[33] To sum up, despite certain advancements, the self-referential approach of the Court to environmental issues consisting of greening the Convention rights has limited potential to foster the environmental justice, in particular outside the context of indigenous people's rights. In this regard, the inter-legality stance taken by the IACtHR in its groundbreaking *Advisory Opinion OC-23/17*, in which an autonomous right to healthy environment was proclaimed for the first time, may open a new chapter in successful environmental litigation.

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[30] *Claude Reyes and others v Chile (Merits, Reparations and Costs),* IACtHR, Case No. 161 (19 September 2006). For discussion, see R. Pavoni, supra at note 15, pp. 75-76; S. Theriault, supra at note 17, pp. 318-320.
[31] *Claude Reyes and others v Chile,* supra at note 29, para. 57(13).
[32] Ibid, para. 77, emphasis added, as cited in R. Pavoni, supra at note 15, pp. 75-76.
[33] S. Theriault, supra at note 17, p. 321.

3. *Inter-American Court of Human Rights' Advisory Opinion OC-23/17 On the Environment and Human Rights*

The groundbreaking *Advisory Opinion OC-23/17* arose out of Columbia's request regarding States' obligations in the field of environmental protection in the context of construction and operation of large-scale infrastructure projects in the Wider Caribbean Region. Colombia's concern was that, due to their dimensions and permanence, such projects could cause significant environmental damage beyond national territory and as a result, negatively affect human rights of individuals in the whole region.[34] In particular, Columbia asked the Court to clarify the link between the American Convention and the Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (the Cartagena Convention), specifically inquiring whether: (1) an individual outside the territory of a state falls under jurisdiction of that state by virtue of being located in the area covered by environmental protection treaty regime to which the state in question is a party (the so-called 'functional jurisdiction"); (2) state actions or omissions leading to serious harm to the marine environment are compatible with obligations under the American Convention, in particular those concerning the right to life and the right to personal integrity; (3) the provisions of the Convention relating to the rights to life and personal integrity give rise to obligations in the field of environmental protection, including duties of prevention, precaution, mitigation of damage, and cooperation.[35]

The Court, essentially, gave affirmative answers to all three questions put forward by Columbia, at the same time, broadening the scope of its request beyond the Cartagena Convention and the Caribbean region.[36] Instead, the Court extensively relied upon various international environmental law instruments, including the UN Convention on the Law of the Sea, Stockholm Declaration on the Human Environment, the Rio Declaration on Environment and Development, Agenda 2030 for Sustainable Development, as well as the relevant case law of the ICJ and other international courts. In adopting what is, essentially, an inter-legality approach, the IACtHR not only affirmed the existence of the right to a healthy environment but also provided a comprehensive and systematic account of states' obligations in the field of environmental protection.[37]

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[34] *The Environment and Human Rights Advisory Opinion,* supra at note 11, paras. 1-2.
[35] Ibid, para. 3.
[36] Ibid, para. 35.
[37] Ibid, para. 23.

To elaborate, the Court achieved the incorporation of environmental law rules and principles into the Convention by favoring the approach of systematic interpretation contained in the VCLT. In particular, the IACtHR emphasized the necessity to interpret the American Convention as a part of the whole international legal system, including "extensive *corpus iuris* of environmental law" that has evolved in the recent years.[38] In its own words:

> The Court finds that … it must take international law on environmental protection into consideration when defining the meaning and scope of the obligations assumed by the States under the American Convention, in particular, when specifying the measures that the States must take. In this Advisory Opinion, the Court wishes to underline that, although it is not for the Court to issue a direct interpretation of the different instruments on environmental law, it is evident that the principles, rights and obligations contained therein make a decisive contribution to establishing the scope of the American Convention.[39]

The Court also stressed the importance of interpreting the Convention in light of its object and purpose, being the protection of the fundamental rights of individuals, regardless of their nationality.[40] It also noted that the Convention itself favored the teleological interpretation of its provisions, with Article 29 establishing the *pro persona* principle, according to which the interpretation of the provision that least restricts the enjoyment or exercise of individual rights must be sought.[41]

Moving specifically to the question of environmental protection, the Court started by underlying the close connection between environmental protection, sustainable development and human rights, as proclaimed in a number of soft law instruments, including the Stockholm Declaration on the Human Environment, the Rio Declaration on Environment and Development and Johannesburg Declaration on Sustainable Development.[42] It is on the basis of the close relationships between these three concepts, that the Court declared the existence of an autonomous right to a healthy environment, in its view, recognized by "numerous human rights protection systems".[43] While the Court acknowledged that the right to a healthy environment is affirmed in the Protocol of San Salvador, in light of its non-justiciability, it boldly grounded the existence of the right in Article 26 of the Convention. Interestingly, originally Article 26 of the

[38] Ibid, para. 44.
[39] Ibid.
[40] Ibid, para. 41.
[41] Ibid, para. 42.
[42] Ibid, paras. 52-54. Ibid, paras. 47-49. It also previously affirmed a global consensus on 'undeniable' interrelationships between environment and human rights, as evidenced by the positions adopted by the Inter-American Commission, the OAS General Assembly, the European Court of Human Rights, the African Commission on Human and Peoples' Rights, as well as the UN Independent Expert on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, see paras. 47-51.
[43] Ibid, para. 55.

Convention was interpreted as simply requiring the States parties to adopt necessary measures to progressively achieve the realization of the rights "*implicit* in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States" ("OAS Charter").[44] However, since its recent *Case of Lagos del Campo v Peru* from 2017, the Court established its competence to declare direct violations of economic, social, cultural and environmental rights recognized in the OAS Charter on the basis of Article 26.[45] Although the environmental protection per se is not mentioned anywhere in the OAS Charter, in the Court's view, it can nevertheless be derived from the document by virtue of its Articles 30, 31, 33 and 34 that refer to states' obligations to achieve "integral development".[46] Indeed, the implications of including the right to healthy environment under the scope of Article 26 are consequential as it makes this right directly justiciable in the Inter-American system, potentially opening the door to new categories of environmental claims.[47] In this regard, it is also important to note that the Court characterized the right to a healthy environment as a "fundamental right for the existence of humankind" that

> … has both *individual* and also *collective* connotations. In its collective dimension, the right to a healthy environment constitutes *a universal value that is owed to both present and future generations*. That said, the right to a healthy environment also has an individual dimension insofar as its violation may have a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the rights to health, personal integrity, and life.[48]

It further stressed that in its collective dimension, the right grants the protection to the nature itself, thereby moving away from traditional anthropocentric approach to environment:

> as an autonomous right, the right to a healthy environment, unlike other rights, 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*. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their

[44] American Convention on Human Rights, Adopted on 22 November 1969, Article 26, emphasis added.
[45] *The Environment and Human Rights Advisory Opinion,* supra at note 11, para. 57, footnote 86, referring to the *Case of Lagos del Campo v Peru (Preliminary Objections, Merits, Reparations and Costs),* Case No. 340 (31 August 2017), paras. 142-144.
[46] Ibid, para. 57, footnote 85.
[47] Indeed, this remained the most controversial aspect of the Advisory Opinion, with Judges Sierra Porto and Vio Grossi dissenting on the direct justiciability of the right to a healthy environment before the Court. The IACtHR additionally noted that the right to a healthy environment is recognized in domestic systems of several American states, as well as the American Declaration on the Right of Indigenous Peoples, the African Charter on Human and People's Rights, the ASEAN Human Rights Declaration and the Arab Charter on Human Rights, see ibid, para. 58.
[48] Ibid.

> importance to the other living organisms with which we share the planet that also *merit protection in their own right*.[49]

At the same time, the Court noted that, in addition to the autonomous content of the right to a healthy environment, there are also several substantive and procedural Convention rights that are most likely to be affected by environmental degradation, including the rights to life, personal integrity, private life, health, water, food, housing, participation in cultural life and property, as well as the rights to information, to participation in decision-making and to an effective remedy.[50] It then turned to specifying states' obligations in the field of environmental protection that are linked to rights to life and to personal integrity that formed the center of Colombia's request. On the basis of extensive thirty-pages analysis of rules and principles of international environmental law, the Court first affirmed that the State parties are under the obligation to prevent environmental harm within and outside their territory.[51] It further noted that for the purposes of establishing responsibility of the State party under the Convention, there should be a causal link between the harmful act that originated in the respondent state territory and the violation of the Convention right of individual, located on its territory or abroad.[52]

In this regard, as the central tenet of states' environmental obligations, the Court put forward the concept of due diligence, understood as a category of obligations of conduct, as opposed to obligations of result.[53] On the basis of the principle of due diligence applied to the situations of transboundary harm, the Court identified a series of further specific obligations, namely that of prevention, precaution, cooperation, as well as procedural duties relating to environmental protection.[54] Firstly, regarding the obligation of prevention of environmental harm, the Court noted that it includes a duty to regulate, to supervise and monitor dangerous activities within its jurisdiction, *inter alia* by requiring both state entities and private parties to undertake prior environmental impact assessment whenever there is a risk of significant environmental harm.[55] Likewise, if the environmental damage occurs notwithstanding the preventing measures, the state should develop a contingency plan and take all the appropriate measures to mitigate the harm.[56] Secondly, concerning the precautionary principle, the Court declared that the State parties should take all available measures to prevent harm to the rights

[49] Ibid, para. 62.
[50] Ibid, paras. 64-66.
[51] Ibid, para. 101.
[52] Ibid.
[53] Ibid, para. 123.
[54] Ibid, para. 125.
[55] Ibid, paras. 141-170.
[56] Ibid, paras. 170-174.

to life and to personal integrity, even in absence of scientific certainty - but merely with plausible indications of potential risks - that the activities in question could lead to severe environmental damage.[57] Interestingly, this reading of the precautionary principle goes further than the standard established by the ICJ in *Pulp Mills* case, where scientific certainty was required for the obligations of prevention to arise.[58] Thirdly, the obligations of cooperation identified by the Court require the states that may be potentially affected by transboundary environmental harm to notify each other, to consult and negotiate in good faith and in timely manner, with the view to prevent or mitigate the environmental harm.[59] Lastly, as for the procedural obligations under the American Convention that are linked to environmental protection, the Court mentioned the right of access to information, the right to public participation in environmental decision-making and access to justice to persons affected by environmental harm.[60]

To sum up, the Court's inter-legal reasoning in the Advisory Opinion, represented by strong integration of international environmental law within the Inter-American human rights system, paved the way to a historical recognition of the autonomous right to a healthy environment that is directly enforceable before the Court. Moreover, recognition of both individual and collective dimensions of the right potentially opens new avenues for advancing environmental claims for the protection of the environment *per se*, even in absence of direct harm to individuals. At the same time, after the Advisory Opinion was issued, it yet remained to be seen how exactly the right to a healthy environment was to be adjudicated in contentious cases before the Court. In this respect, the *Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v Argentina,* in which the Court found the violation of the right to a healthy environment for the first time in contentious case, represents an important development from the point of view of environmental justice.

4. *Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v Argentina*

The *Lhaka Honhat* case arose out of a long-standing dispute over the right to property over ancestral land of several indigenous communities forming part of the *Lhaka Honhat* association, who lived in Salta, the northern province of Argentina, since the beginning of the

[57] Ibid, paras. 175-180.
[58] Ibid, para. 177.
[59] Ibid, paras. 181-210.
[60] Ibid, paras. 211-241.

seventeen century.[61] Although Argentina previously recognized association's right to communal property, pursuant to previous decisions of the Inter-American Commission of Human Rights, it did little to effectively guarantee the title.[62] In particular, the state allowed third parties, mainly non-indigenous Creole communities, to engage into illegal deforestation, cattle raising and installation of fencing in the area.[63] Moreover, an international bridge was built by the state authorities in the ancestral territory, without prior consultation with the indigenous communities.[64] All these activities lead to the environmental degradation of the land, at the same time negative affecting the traditional ways of life of indigenous communities, including their access to water and food customarily obtained through hunting, gathering, fishing and agriculture.[65]

In light of these circumstances, the Court ruled that Argentina violated the indigenous communities' right to communal property under Article 21 by failing to clearly demarcate and title the land, by allowing the continued presence of Creole population in the territory and by not consulting the communities regarding the international bridge construction.[66] Most importantly, while in previous cases outlined in Section 2, the Court addressed environmental degradation of indigenous territories by relying exclusively on Article 21, in this case it also declared the violation of indigenous people's rights to cultural identity, to healthy environment, to adequate food and water. [67] In doing so, it reaffirmed the autonomous nature of the right to healthy environment and its direct justiciability before the Court under Article 26, firstly proclaimed in the *Advisory Opinion OC-23/17.*

Indeed, with regard to the right to a healthy environment, the IACtHR strongly relied on the findings of its Advisory Opinion and the previous jurisprudence on Article 26 of the Convention. In particular, it reiterated that the right to a healthy environment falls under the scope of Article 26 by virtue of provisions of the OAS Charter, which provide for the obligation of American state to guarantee "integral development for their peoples".[68] It then explicitly referred to the *Advisory Opinion OC-23/17*, specifically declaring once again that the right to a healthy environment

[61] *Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v Argentina,* supra at note 12, para. 1.
[62] Ibid, paras. 99-113.
[63] Ibid, para. 186.
[64] Ibid, paras. 180-182.
[65] Ibid, paras. 187-189.
[66] Ibid, paras. 167-168, 184-185.
[67] Ibid, para. 287.
[68] Ibid, para. 202.

> "constitutes a universal value"; it "is a fundamental right for the existence of humankind," and that "as an autonomous right [...] it 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. This means that nature must be protected, not only because of its benefits or effects for humanity, "but because of its importance for the other living organisms with which we share the planet."[69]

As with the *Advisory Opinion OC-23/17*, the issue of direct enforceability of the right to a healthy environment, as well as other economic, social and cultural rights, divided the Court, with three judges voting against and three voting in favor, including the President's decisive vote. One of the dissenting judges, Vio Grossi maintained that economic, social and cultural rights referred to in Article 26 are not directly justiciable before the Court but merely give rise to the obligation of the State parties to adopt all the necessarily measures to make them effective progressively.[70] In particular, the judge emphasized that both literal meaning of terms used in Article 26 and the intention of the Convention drafters clearly indicated that economic, social and cultural rights, addressed separately from the civil and political rights in the Convention, were never meant to have the same practical effect of direct justiciability as the latter.[71] Moreover, he maintained that the teleological interpretation of the Convention adopted by the Court in the current case contradicted the principle of legal certainty as the States parties were not aware before the litigation of the full scope of rights justiciable under the Convention and their corresponding obligations.[72] The judge further noted that by constantly "updating" the catalogue of the Convention rights by virtue of Article 26, the IACtHR had wrongly assumed the "international normative function", which, instead, only belongs to the State parties under the Convention.[73] In his view, this seemed particularly problematic in the light of practically open-ended nature of economic and social standards contained in the OAS Charter, such as the principle of "integral development" from which the Court derived the rights to a healthy environment, cultural identity, food and water in the present case.[74]

In similar vein, another dissenting Judge Sierra Porto, affirmed that Article 26 does not give grounds for autonomous justiciability of economic, social and cultural rights before the Court, neither under the Convention nor under the Protocol of San Salvador, which only provides for direct enforceability of the right to education and the right to join a trade union.[75]

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[69] Ibid, para. 203.
[70] Ibid, Partially Dissenting Opinion of Eduardo Vio Grossi, para. 17.
[71] Ibid, paras. 11– 26, in particular paras. 14-17.
[72] Ibid, para. 54.
[73] Ibid, para. 55.
[74] Ibid, paras. 62-68.
[75] Ibid, Partially Dissenting Opinion of Judge Humberto Antonio Sierra Porto, paras. 3-10.

Instead, in his opinion, the Court should have declared the violation of the right to a healthy environment and other rights, which the judge nevertheless recognized, as a part of the violation of indigenous peoples' right to communal property under Article 21.[76] The third dissenting judge, Perez Manrique, instead, took an intermediate view declaring that, in light of interdependence and indivisibility of the two categories of rights, the Court should have declared a simultaneous violation of the right to property under Article 21 and the violation of the economic, social, cultural and environmental rights under Article 26.[77]

Dissenting views notwithstanding, the principal opinion of the Court remained true to its progressive approach previously adopted in the Advisory *Opinion OC-23/17.* In particular, after affirming the right to a healthy environment, the IACtHR reiterated previously formulated states' obligations to prevent environmental harm, inter alia by ensuring that the third parties do not violate these obligations.[78] Further, in line with the Advisory Opinion, the Court affirmed that this duty of diligent prevention of environmental harm entails the obligations to regulate, to supervise and to monitor potentially dangerous activities of third parties, as well as to require them to conduct environmental impact assessment.[79] Further, the state parties are under an obligation to establish contingency plans and mitigate the environmental harm if it occurs.[80] In this light, the IACtHR concluded that although Argentina was aware of illegal deforesting and fencing occurring on indigenous territories, it fell short of preventing these harmful activities, thereby violating indigenous communities' right to a healthy environment, together with the rights to cultural identity, adequate food and water.[81] On this basis, the Court ordered a series of reparation measures, including the restoration of the indigenous communities' effective title over the territory by ordering its proper delimitation and demarcation, as well as the relocation of non-indigenous Creole population within six years.[82] When it comes to the restitution of economic, social and cultural rights, including the right to a healthy environment, the IACtHR requested Argentina to submit a report within one year outlining the actions that it intend to take with regard to conservation and recovery of the groundwater and forestry resources in the indigenous territories, as well as to provide permanent access to drinking water and to food for the indigenous population.[83] The Court stressed that the implementation of the indicated

[76] Ibid, paras. 15-23.
[77] Ibid, Partially Dissenting Opinion of Judge Ricardo C. Perez Manrique, paras. 4-15.
[78] *Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v Argentina,* supra at note 12, para. 207.
[79] Ibid, para. 208.
[80] Ibid.
[81] Ibid, paras. 272-289.
[82] Ibid, paras.326-330.
[83] Ibid, paras. 331-336.

measures will be monitored by it until it "has sufficient information to consider that the measure of reparation ordered has been completed".[84] In addition, as in most cases concerning indigenous people's rights, the IACtHR ordered the state to establish the Community Development Fund for the recovery of indigenous culture, which will implement the programs related to natural and food resources, as well as those concerning the conservation of the history and traditions of indigenous communities.[85]

5. *Conclusion*

To summarize, the current chapter aimed at demonstrating the value of inter-legality approach in advancing environmental justice in the Inter-American human rights system. In doing so, it contrasted the two approaches of the IACtHR in adjudicating environmental claims: the self-referential stance adopted by the Court prior to 2017 focused exclusively on "greening" the American Convention rights, on the one hand, and the systematic approach consisting of integrating environmental law into the American Convention in *Advisory Opinion OC-23/17* and the *Lhaka Honhat* judgment, on the other. In particular, it was demonstrated that although the first approach has had some success in cases involving indigenous population and procedural environmental rights, its role in advancing fully-fledged environmental protection remains limited. Indeed, it was noted that as a result of operating exclusively within the human rights framework, the IACtHR could only entertain environmental claims with proven harm to the well-being of specific individuals. Naturally, the underlying rationale of such approach is anthropocentrism, implying the protection of the environment not for its own sake but for the sake of human prosperity.

In contrast, the recent approach adopted by the IACtHR first in *Advisory Opinion OC-23/17* and later in *Lhaka Honhat* judgment moves away from this paradigm. As demonstrated, by relying not only on the Inter-American human rights system but also on extensive *corpus iuris* of environmental law, the Court updated the catalogue of the Convention rights with the autonomous right to a healthy environment. Of equal importance is the fact that the IACtHR proclaimed this right to be directly enforceable before the Court in both individual and collective dimensions or, in other words, both in cases where its violation has a direct impact

[84] Ibid, para. 335.
[85] Ibid, paras. 337-342.

on individuals but also in absence of such impact. Thus, the adoption of inter-legality stance by the Court potentially opened new exciting possibilities for fostering environmental justice, including claims for the protection of ecosystem and its components as fundamental values in their own right.