

## THE RIGHT TO A HEALTHY ENVIRONMENT BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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**Abstract** The article explores the interpretation of the right to a healthy environment by the Inter-American Court of Human Rights as an autonomous right under the American Convention on Human Rights. It places this development in the context of transformative constitutionalism in Latin America and examines it against the background of the Court's broader case law. The article argues that, even though this is an important judicial innovation, there are three challenges with the approach of the Court. The first relates to the individual and collective dimensions of the right; the second to the link between this development and the Court's previous jurisprudence; and the third to the corresponding reparations. The last part of the article seeks to explore ways in which the Court could offer further guidance on the contours of the right and its relationship with civil and political rights.

**Keywords:** human rights, right to a healthy environment, Inter-American Court of Human Rights, *Lhaka Honhat*, Advisory Opinion OC-23/17, indigenous peoples, right to property, transformative constitutionalism.

### I. INTRODUCTION

One of the most important developments in the recent jurisprudence of the Inter-American Court of Human Rights (IACtHR or the Court) has been the establishment of the right to a healthy environment as an autonomous right under the American Convention on Human Rights (ACHR or the Convention). This judicial innovation has placed the IACtHR at the vanguard of human rights institutions regarding the protection of the environment.<sup>1</sup> It has transformed the engagement of the Court with environmental issues and could, more broadly, have a catalyst effect on the evolving body of climate change

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<sup>1</sup> American Convention on Human Rights, 'Pact of San Jose, Costa Rica' (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR). For a positive assessment of the IACtHR's approach on the right to a healthy environment, see MA Tigre and N Urzola, 'The 2017 Inter-American Court's Advisory Opinion: Changing the Paradigm for International Environmental Law in the Anthropocene' (2021) 12 *JHRE* 24.

litigation.<sup>2</sup> By explicitly recognizing the right to a healthy environment the IACtHR has set the ground for a more ambitious approach in future environmental and climate cases in the Inter-American human rights system.

The Court achieved this in two steps. In 2017, it issued its landmark Advisory Opinion OC-23/17<sup>3</sup> (Advisory Opinion), where it declared the autonomous status of the right and addressed its main contours. Three years later, it handed down the *Lhaka Honhat* judgment,<sup>4</sup> the first contentious case where the Court applied the right and found that it had been violated. Jointly, the Advisory Opinion and *Lhaka Honhat* form a turning point in the jurisprudence of the IACtHR and the right has now been established as being directly justiciable under the ACHR. Some authors have explored the methodological devices used by the Court in its Advisory Opinion or in *Lhaka Honhat*.<sup>5</sup> Others have discussed the relevance of the IACtHR's approach in the broader context of environmental law and in relation to the justiciability of economic, social, cultural and environmental rights (ESCR).<sup>6</sup> Yet, the doctrinal implications of this emerging jurisprudence have not yet been comprehensively examined.

<sup>2</sup> Most importantly, Colombia and Chile submitted a request for an IACtHR Advisory Opinion on the climate emergency: 'Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile' (9 January 2023) <[https://www.corteidh.or.cr/docs/opiniones/soc\\_1\\_2023\\_en.pdf](https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf)>. For a relevant petition pending before the Inter-American Commission on Human Rights, see 'Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada' (23 April 2013) <<https://climatecasechart.com/non-us-case/petition-inter-american-commission-human-rights-seeking-relief-violations-rights-arctic-athabaskan-peoples-resulting-rapid-arctic-warming-melting-caused-emissions/>>. In general, J Peel and HM Osofsky, 'A Rights Turn in Climate Change Litigation' (2018) 7 TEL 37.

<sup>3</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, IACtHR Series A No 23 (15 November 2017) (AO).

<sup>4</sup> *Case of Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina*, IACtHR Series C No 400 (6 February 2020).

<sup>5</sup> Tigre and Urzola (n 1); M Carstens, "'Lhaka Honhat Association v. Argentina": Landmark Decision on Direct Justiciability of Article 26 ACHR and the Autonomous Right to a Healthy Environment' (2020) 53 VRÜ 492; D Giannino and A Manzoni, 'The Commons: An Innovative Basis for Transnational Environmental Law in the Era of Anthropocene? The Case of Latin America' (2019) 11 PerspectFed 61. For a more critical view on the Court's approach to the direct justiciability of ESCR, see D Mejía-Lemos, 'The Protection of the Environment through International Human Rights Litigation: Taking Stock of Challenges and Opportunities in the Inter-American System' (2022) 22 HRLRev 1; E Ferrer Mac-Gregor Poisot, M Morales Antoniazzi and RA Flores Pantoja (eds), *El caso Lhaka Honhat vs. Argentina y las tendencias de su interamericanización* (UNAM 2022).

<sup>6</sup> L Ronconi and M Barraco, 'La consolidación de los DESCAs en la Corte Interamericana de Derechos Humanos: reflexiones a propósito del caso Lhaka Honhat vs. Argentina' (2021) 50 RevFacDer 1; R Sena, 'The Intersection of Human Rights and Climate Change in the Inter-American Human Rights System: What to Hope for?' (2021) WisIntLJ 331; C Campbell-Durufflé and SA Atapattu, 'The Inter-American Court's *Environment and Human Rights* Advisory Opinion: Implications for International Climate Law' (2018) 8 ClimateL 321.

Addressing this gap is important because the right is likely to have a significant role in future decisions of the Court. To this end, this article provides an in-depth evaluation of the Court's approach regarding the right to a healthy environment and highlights three challenges. The first relates to the core tenets of the right and, in particular, its individual and collective dimensions. The Court makes some broad statements in this regard but has not so far articulated the tenets of the right in a coherent manner. The second challenge concerns the link between the right to a healthy environment and the Court's progressive approach to the right to property. In *Lhaka Honhat*, the Court developed the new right at the expense of the right to property by dissociating socio-economic, cultural and environmental elements from the scope of the latter. This represents a fundamental shift away from the earlier case law of the Court on the right to property and restricts the content of this right. The third challenge concerns the reparations ordered in *Lhaka Honhat* for the violation of the right to a healthy environment. It is shown here that the measures of redress were not substantively different from those ordered in earlier cases where the environmental obligations of States had been determined under the scope of civil and political rights. This puts a question mark on the practical relevance of this new right, at least at the current stage of the Court's jurisprudence.

The article proceeds as follows. First, it provides a brief overview of the place of ESCER in the jurisprudence of the IACtHR. It illustrates how the Court has rendered them directly justiciable and how it has gone about establishing the right to a healthy environment as an autonomous right under the ACHR. The judicial developments in the area of ESCER are analysed from the perspective of transformative constitutionalism, which provides a useful framework for explaining the interpretative techniques followed by the IACtHR. Next, the article examines the three above-mentioned issues arising from the Court's approach. The final part reflects on the key questions that the Court should seek to answer in order to address these challenges and assesses the relationship of the right to a healthy environment with the well-established civil and political rights under the Convention.

## II. ECONOMIC, SOCIAL, CULTURAL AND ENVIRONMENTAL RIGHTS IN THE IACtHR JURISPRUDENCE

### *A. The Shift regarding the Direct Justiciability of ESCER under the ACHR*

In recent years the IACtHR has developed a comprehensive jurisprudence on socio-economic, cultural and environmental rights. For instance, it has extended the list of labour rights under the Convention<sup>7</sup> to include the right

<sup>7</sup> For an overview of the jurisprudence, see FC Ebert, 'A Regional Revitalization of Labour Rights? The Emerging Approach of the Inter-American Court of Human Rights' in B Langille

to job security,<sup>8</sup> the right to just and favourable working conditions,<sup>9</sup> the right to collective bargaining and the right to strike.<sup>10</sup> It has also found violations of, among others, the right to health<sup>11</sup> and the right to social security.<sup>12</sup> To understand how the IACtHR came to take such an expansive approach to ESCER, it is useful to look at the broader context. At its centre is the doctrinal shift in the jurisprudence of the Court marked by *Lagos del Campo v Peru* which laid the foundation for rendering ESCER directly justiciable. This shift has become one of the most important, yet contested, interpretative innovations of the Court and the finding of autonomous violations of ESCER has become part of its regular practice.<sup>13</sup>

Before *Lagos del Campo*, the Court had examined issues relating to ESCER within the scope of specific civil and political rights under Articles 3–25 of the ACHR. This was based on a broad interpretation of the contours of civil and political rights which included socio-economic and cultural elements.<sup>14</sup> Along these lines, the Court had developed a body of well-established case law in which it rendered ESCER indirectly justiciable because of their interconnectedness with other rights that are explicitly recognized in the Inter-American system.<sup>15</sup> Most notably, the Court construed the right to life to include a right to a decent life. It determined that displacement of

and A Trebilcock (eds), *Social Justice and the World of Work: Possible Global Futures* (Bloomsbury/Hart 2023) 227.

<sup>8</sup> *Case of Lagos del Campo v Peru*, IACtHR Series C No 340 (31 August 2017) paras 149–153.

<sup>9</sup> *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their Families v Brazil*, IACtHR Series C No 407 (15 July 2020) para 155.

<sup>10</sup> *Rights to Freedom to Organize, Collective Bargaining, and Strike, and their Relation to Other Rights, with a Gender Perspective*, Advisory Opinion OC-27/21, IACtHR Series A No 27 (5 May 2021) paras 88–105.

<sup>11</sup> *Case of Poblete Vilches et al v Chile*, IACtHR Series C No 349 (8 March 2018) paras 100–117.

<sup>12</sup> *Case of Muelle Flores v Peru*, IACtHR Series C No 375 (6 March 2019) paras 170–177.

<sup>13</sup> See E Ferrer Mac-Gregor, M Morales Antoniazzi and RA Flores Pantoja (eds), *Inclusión, Ius Commune y justiciabilidad de los DESCAs en la jurisprudencia interamericana: el caso Lagos del Campo y los nuevos desafíos* (Instituto de Estudios Constitucionales del Estado de Querétaro 2018). In general, J Rossi and V Abramovich, ‘La Tutela de los Derechos Económicos, Sociales y Culturales en el Artículo 26 de la Convención Americana sobre Derechos Humanos’ (2007) 9 *RevEstudSocio-Juri* 34. For a critical perspective, see J Contesse, ‘Autoridad y disenso en la Corte Interamericana de Derechos Humanos’ (2021) 19 *ICON* 1254; J Contesse, ‘Judicial Interactions and Human Rights Contestations in Latin America’ (2021) 12 *JIDS* 271.

<sup>14</sup> For example, *Case of the “Five Pensioners” v Peru*, IACtHR Series C No 98 (28 February 2003) paras 102–103, 121, where the right to social security was protected under art 21 on the right to property, and *Juridical Conditions and Human Rights of the Child*, Advisory Opinion OC-17/2002, IACtHR Series A No 17 (28 August 2002) para 137(7) and (8), which provided a broad interpretation of the right to life requiring States to adopt measures for children’s existence to develop under decent conditions.

<sup>15</sup> For an overview of socio-economic and cultural rights in the Inter-American system before *Lagos del Campo*, see JL Cavallaro and EJ Schaffer, ‘Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas’ (2004) 56 *HastingsLJ* 217; V Gómez, ‘Economic, Social, and Cultural Rights in the Inter-American System’ in M Baderin and R McCorquodale (eds), *Economic, Social, and Cultural Rights in Action* (OUP 2007) 167; I de Paz González, *The Social Rights Jurisprudence in the Inter-American Court of Human Rights: Shadow and Light in International Human Rights* (Edward Elgar 2018).

indigenous and tribal peoples from their ancestral lands may cause them grave difficulties in terms of accessing clean water and obtaining adequate food and sanitation. This could, in turn, affect their possibility of having a decent life and thereby violate Article 4 of the ACHR.<sup>16</sup> Similarly, the right to property was expanded to encompass the protection of collective property and natural resources of indigenous and tribal peoples in a way that guarantees their social, economic and cultural identity.<sup>17</sup>

In *Lagos del Campo*, however, the IACtHR developed a new interpretative approach to ESCER. Rather than being examined within the scope of rights that are expressly justiciable under Articles 3–25 of the ACHR, the Court determined that violations of ESCER can be established autonomously under Article 26. Article 26 does not contain a list of rights, but provides a general obligation for States Parties to:

... undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full 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] as amended by the Protocol of Buenos Aires.

Under this approach, the Court examines the standards contained in the OAS Charter to find a violation of ESCER derived from Article 26.<sup>18</sup> In order to clarify the scope of specific rights, it routinely refers to the American Declaration of the Rights and Duties of Man<sup>19</sup> and relevant instruments of international law (*corpus iuris*), such as the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and United Nations (UN) General Assembly resolutions.<sup>20</sup>

<sup>16</sup> *Case of the Yakye Axa Indigenous Community v Paraguay*, IACtHR Series C No 125 (17 June 2005) paras 161–168, 176.

<sup>17</sup> *Case of the Saramaka People v Suriname*, IACtHR Series C No 172 (28 November 2007) paras 120–122; *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, IACtHR Series C No 79 (31 August 2001) paras 148–149.

<sup>18</sup> eg, *Lagos del Campo* (n 8) para 143. See further, FC Ebert and C Fabricius, ‘Strengthening Labor Rights in the Inter-American Human Rights System’ (2019) 4 *IntlLabRtsCasL* 179. For some of the main criticisms of this approach, see Section III.

<sup>19</sup> The Court has explained that the American Declaration ‘contains and defines the fundamental human rights referred to in the [OAS] Charter’ and constitutes ‘a source of international obligations related to the Charter’. See *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, IACtHR Series A No 10 (14 July 1989) paras 43, 45.

<sup>20</sup> For rules of interpretation of the ACHR, see ACHR (n 1) art 29. The Court also refers to art 31(3) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, as a basis for relying on international *corpus iuris*.

The IACtHR's outlook on ESCER is formed against the backdrop of, and is another manifestation of, a long-standing jurisprudence that addresses highly complex socio-economic issues through the prism of human rights, in an approach that has been termed 'transformative constitutionalism'. As von Bogdandy and Urueña have put it, transformative constitutionalism describes an 'approach to constitutional texts, a set of empirical assumptions, argumentative tools, and normative goals that coalesce around the notion that legal interpretation should strive toward being responsive to society's problems',<sup>21</sup> such as widespread exclusion, violence and weak institutions, which are prevalent in Latin America.<sup>22</sup> Such deep structural problems are perpetuated through endemic conditions of extreme poverty and inequality and through informal networks that operate on the basis of reciprocity, corruption and coercion.<sup>23</sup> All these factors hinder the inclusion of large parts of the population in the formal operation of social systems such as education, health, economy and law, and impede access to their corresponding outputs.<sup>24</sup> In this context, the Court participates in transformative constitutionalism and seeks to address core structural deficiencies and State failures in the region through its case law.<sup>25</sup>

This explanatory framework of the Court's jurisprudence stands alongside other rich strands of legal scholarship which also focus on the interplay between constitutionalism, human rights interpretation and judicial decision-making in Latin America.<sup>26</sup> Transformative constitutionalism, however,

<sup>21</sup> A von Bogdandy and R Urueña, 'International Transformative Constitutionalism in Latin America' (2020) 114 AJIL 403, 407.

<sup>22</sup> A von Bogdandy, '*Ius Constitutionale Commune en América Latina: Observations on Transformative Constitutionalism*' (2015) 109 AJIL Unbound 109, 110.

<sup>23</sup> In general, A Mascareño, *Diferenciación y contingencia en América Latina* (Ediciones Universidad Alberto Hurtado 2010) ch III.

<sup>24</sup> In general, A Mascareño and F Carvajal, 'The Different Faces of Inclusion and Exclusion' (2015) 116 CEPAL Rev 127. On sub-integration in Latin America and the lack of conditions that are conducive to the exercise of fundamental rights, see M Neves, 'From Legal Pluralism to Social Miscellany: The Problem of the Lack of Identity of the Legal Sphere(s) in Peripheral Modernity and its Implications for Latin America' in CA Rodríguez (ed), *Law and Society in Latin America – Beyond Law: New Work on Law and Social Change from Latin America and Around the World* (ILSA Publications 2003) 125, 141–4.

<sup>25</sup> A von Bogdandy, 'El mandato transformador del sistema interamericano de derechos humanos. Legalidad y legitimidad de un proceso jurisgenerativo extraordinario' (2019) 9 RevCentEstudConst 113. In the words of the Court for example, 'the progressive dimension of the protection of ESCER, although acknowledging the gradual nature of their realization, also includes a sense of progress, which calls for an effective improvement of the enjoyment and exercise of these rights, so that *social inequalities are corrected and the inclusion of vulnerable groups is facilitated*' (emphasis added). *Case of Cuscul Piraval et al v Guatemala*, IACtHR Series C No 359 (23 August 2018) para 146.

<sup>26</sup> For a detailed exposition of different schools of constitutional thought in Latin America, namely neo-constitutionalism, new constitutionalism and egalitarian-dialogic constitutionalism, see A Coddou Mc Manus, 'A Critical Account of *Ius Constitutionale Commune* in Latin America: An Intellectual Map of Contemporary Latin American Constitutionalism' (2022) 11 GlobCon 110. For critical approaches to transformative constitutionalism, see A Rodiles, 'The Great Promise of Comparative Public Law for Latin America: Towards *Ius Commune*

offers a useful analytical reading of the Court's legal interpretative techniques, its expansive reasoning and its influence on other human rights actors in the region. It sheds light on the institutional approach that is adopted by the Court and informs its practices.<sup>27</sup> In particular, the transformative elements of the IACtHR's jurisprudence can be observed both in the methods of interpretation that it uses and in its substantive conceptualization of the rights under the Convention.<sup>28</sup>

This reflects the inclination of the Court to apply the law in a way that expands the scope of civil and political rights and renders new socio-economic rights justiciable. In this way, many of the political and socio-economic problems in the region are reframed as legal issues within the prism of human rights that can, at least partly, be addressed by the legal system.<sup>29</sup> The interpretation of Article 26 as a source of autonomous and directly justiciable ESCER, therefore, is one of the latest moves of the Court that can be viewed within the framework of transformative constitutionalism.<sup>30</sup> In effect, the IACtHR expands the catalogue of rights that provide alleged victims with access to the legal system in order to assert basic needs, such as food, water and sanitary living conditions, and essential services, such as medical care.

At the same time, a jurisprudence with a transformative potential can have significant impact beyond the parties to a case and can become an important element of the discourse and practice within the 'Latin American human rights community'.<sup>31</sup> This community closely interacts with the IACtHR and there is a mutually beneficial relationship between the two. Civil society

Americanum?' in A Roberts et al (eds), *Comparative International Law* (OUP 2018) 501; N Torres Zuñiga, 'The Image of the Inter-American Court of Human Rights as an Agent of Democratic Transformation: A Tool of Self-validation' (2021) 23 *Araucaria* 483. Questioning the impact of socio-economic rights on social transformation in general, see D Landau, 'The Reality of Social Rights Enforcement' (2012) 53 *HarvIntLLJ* 189; R Gargarella, 'The "New" Latin American Constitutionalism: Old Wine in New Skins' in A von Bogdandy et al (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (OUP 2017) 211.

<sup>27</sup> von Bogdandy (n 25). The expansive interpretative techniques of the Court have been contested by some States Parties and national courts. For critical views focusing on instances of resistance to IACtHR judgments, see CA Villagrán Sandoval and F Fernandes Carvalho Veçoso, 'A Human Rights' Tale of Competing Narratives' (2017) 8 *RevDireitoPráx* 1603; J Contesse, 'Resisting the Inter-American Human Rights System' (2019) 44 *YaleIntLL* 179.

<sup>28</sup> According to Soley, the interpretative tools developed by the IACtHR include: (i) the principle of *effet utile* that underpins the interpretation of rights and the expansion of positive obligations of States; (ii) the doctrine of conventionality control; (iii) the concept of vulnerability; and (iv) the integral reparations ordered by the Court. X Soley, 'The Transformative Dimension of Inter-American Jurisprudence' in von Bogdandy et al (n 26) 337, 342–8.

<sup>29</sup> von Bogdandy and Uruña (n 21) 421–2, 430.

<sup>30</sup> See contributions in Ferrer Mac-Gregor, Morales Antoniazzi and Flores Pantoja (n 13); and E Ferrer Mac-Gregor, 'Social Rights in the Jurisprudence of the Inter-American Court of Human Rights' in C Binder et al (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar 2020) 173.

<sup>31</sup> For an explanation of the term, see von Bogdandy and Uruña (n 21) 414: the Latin American human rights community is 'a group of actors that interact, on the basis of the Inter-American Convention on Human Rights, to promote their agendas and to fulfill what they regard as their



actors, for example, bring cases before the Court concerning mass violations of human rights and provide vital information about the situation on the ground, while actors in national institutions implement its case law in the domestic context and interpret national law in line with regional human rights law.<sup>32</sup> In turn, the judgments of the Court constitute a crucial tool for those in the human rights community when pushing ‘for state compliance on the international plane following a judgment’ and challenging ‘laws and practices before the domestic judiciary’.<sup>33</sup> In this regard, the Court’s decisions are important for the effects that they can have on the legal and institutional setting at the national level, for playing a salient role in domestic policies and for empowering domestic actors to advocate legal or policy changes in order to improve the living conditions for people in the region.<sup>34</sup>

The development of the right to a healthy environment by the Court highlights the environmental component of transformative constitutionalism within the context of increasing debate about the relationship between human rights and environmental protection.<sup>35</sup> In this light, the next two sections briefly explain the Court’s evolving conceptualization of the link between human rights and the environment and introduce Advisory Opinion OC-23/17 and the *Lhaka Honhat* case. They show how the IACtHR went about establishing the right to a healthy environment and how it defined its main contours. The discussion is not exhaustive but lays the foundations for the evaluation of the Court’s approach that follows.

### *B. The Protection of the Environment in the Earlier Case Law of the IACtHR*

The link between human rights and the environment is not new in the Inter-American system. Even before the Advisory Opinion and *Lhaka Honhat*, the Court had recognized that there is a direct relationship between the physical environment in which persons live and the effective enjoyment of human rights under the Convention.<sup>36</sup> It had also highlighted ‘the importance of the

mandates’. It includes, among others, non-governmental organizations, domestic courts, civil servants, scholars as well as Judges and Commissioners of the Inter-American system.

<sup>32</sup> On the link between civil society and the IACtHR, see Separate Opinion of Judge Ferrer MacGregor Poisot in *Lhaka Honhat* (n 4) paras 70–82, especially para 79.

<sup>33</sup> A Huneus, ‘Constitutional Lawyers and the Inter-American Court’s Varied Authority’ (2016) 79 LCP 179, 187. For the impact of judicial decisions on social actors in general, see C Rodríguez-Garavito, ‘Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America’ (2011) 89 TexLRev 1669, 1679.

<sup>34</sup> Huneus *ibid* 187, 202–6.

<sup>35</sup> See contributions in JH Knox and R Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018); R Mwanza, ‘Framing the Normative Role of the Right to a Healthy Environment: Thinking with Internormativity, Embodiment and Emergence’ (2022) 13 JHRE 349; E Cima, ‘The Right to a Healthy Environment: Reconceptualizing Human Rights in the Face of Climate Change’ (2022) 31 RECIEL 38; A Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23 EJIL 613.

<sup>36</sup> *eg*, see *Case of Kawas Fernández v Honduras*, IACtHR Series C No 196 (3 April 2009) para 148.



protection, conservation and improvement of the environment contained in Article 11 of the [Protocol of San Salvador] as an essential human right related to the right to a dignified life'.<sup>37</sup>

The interconnection between environmental issues and the Inter-American system had been especially pronounced in cases concerning indigenous peoples. The Inter-American Commission on Human Rights (IACmHR or Commission) had recognized that environmental pollution, deforestation and contamination of waters directly affect the resources that sustain life and the livelihoods of indigenous peoples, as well as their cultural identity.<sup>38</sup> In this context, the protection of the environmental integrity of indigenous peoples' territories and their natural resources had been deemed necessary to secure their rights to life, personal integrity and property.<sup>39</sup> Given that ancestral territories and the resources therein play a significant role for the material and cultural survival of the indigenous peoples, the protection of the environment had been inherently tied to these rights.

Based on this approach, the Commission and the Court had identified the environmental elements of civil and political rights and allowed victims of environmental harm to seek justice under the Inter-American system. Indicatively, the Court had clarified that access to, and the quality of, water, adequate food and health constitute essential elements of a decent existence.<sup>40</sup> Environmental pollution may thus have a significant impact on the right to life and the basic conditions of physical, social and economic well-being of an individual or a community.

It had also been recognized that effective protection of the environment involves the obligation of States to provide special protection to forests, crops and waters because of their importance to indigenous peoples<sup>41</sup> and requires State authorities to prevent the risk of environmental harm or to respond with appropriate measures when persons have suffered injury.<sup>42</sup> This also gives rise to obligations of a procedural nature. These include access to information on possible environmental risks and on activities and projects

<sup>37</sup> *Case of the Kalina and Lokono Peoples v Suriname*, IACtHR Series C No 309 (25 November 2015) para 172.

<sup>38</sup> IACmHR, 'Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System' OEA/Ser L/V/II Doc 56/09 (30 December 2009) para 194; *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama*, IACmHR Case 12.354, Report No 125/12 (13 November 2012) para 233.

<sup>39</sup> IACmHR, 'Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources' *ibid*, paras 194, 196.

<sup>40</sup> *Case of the Xákmok Kásek Indigenous Community v Paraguay*, IACtHR Series C No 214 (24 August 2010) paras 194–208.

<sup>41</sup> *Kuna Indigenous People* (n 38) paras 234, 238–240; and IACmHR, 'Third Report on the Situation of Human Rights in Paraguay' OEA/Ser L/VII.110 Doc 52 (9 March 2001) ch IX, paras 38, 50 – Recommendation 8.

<sup>42</sup> IACmHR, 'Report on the Situation of Human Rights in Ecuador' OEA/Ser L/V/II.96 Doc 10 Rev 1 (24 April 1997) ch VIII.

that could have an impact on the environment as a matter of public interest,<sup>43</sup> effective participation in decision-making<sup>44</sup> and access to judicial recourse.<sup>45</sup>

### C. *The Establishment of the Autonomous Right to a Healthy Environment*

It is against this backdrop that the Advisory Opinion and the *Lhaka Honhat* judgment mark a fundamental shift in the approach of the IACtHR by establishing the right to a healthy environment as being directly justiciable, and enforceable independent of other rights in the Convention. The Advisory Opinion was delivered at the request of Colombia, which had asked the Court to interpret State obligations under Articles 4 (right to life) and 5 (right to personal integrity) of the ACHR in the context of the development of major infrastructure projects in the Caribbean Sea. Colombia argued that such projects, owing to their dimensions and permanence, can cause significant harm to the marine environment in the wider Caribbean region and thus to the inhabitants of the coastal areas and islands in the region who depend on this environment for their subsistence and development.<sup>46</sup> In this context, the Court explained that the right to a healthy environment:

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 importance to the other living organisms with which we share the planet that also merit protection in their own right. In this regard, the Court notes a tendency, not only in court judgments, but also in Constitutions, to recognize legal personality and, consequently, rights to nature.<sup>47</sup>

In terms of the State obligations that derive from the right, the Court referred to the Working Group on the Protocol of San Salvador which identified five such obligations: (1) to guarantee everyone a healthy environment to live in and (2) basic public services, (3) to promote environmental protection, (4) environmental conservation and (5) the improvement of the environment.<sup>48</sup>

<sup>43</sup> *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR Series C No 245 (27 June 2012) para 230.

<sup>44</sup> *Saramaka* (n 17) paras 129, 133; *Kaliña and Lokono Peoples* (n 37) para 181.

<sup>45</sup> IACmHR, 'Report on the Situation of Human Rights in Ecuador' (n 42) ch VIII: 'The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.' See, also, *Kaliña and Lokono Peoples* (n 37) paras 258, 267.

<sup>46</sup> AO (n 3) para 2.  
<sup>47</sup> *ibid*, para 62 (emphasis added and *fn*s in the original omitted). See also paras 56–58: the Court relied on art 11 of the Protocol of San Salvador that includes the right to a healthy environment, domestic law in the region and provisions of the international *corpus juris*, such as the American Declaration on the Rights of Indigenous Peoples, the African Charter on Human and Peoples' Rights, the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration and the Arab Charter on Human Rights.  
<sup>48</sup> *ibid*, para 60.

Furthermore, to comply with their duties to ensure the full enjoyment of human rights in the context of environmental protection, States must fulfil a variety of other obligations. According to the Court, these stem from the principle of due diligence and include: '(1) the obligation of prevention; (2) the precautionary principle; (3) the obligation of cooperation, and (4) the procedural obligations relating to environmental protection'.<sup>49</sup> The Court further reiterated that in specific situations concerning indigenous and tribal peoples the special vulnerability of those affected should be taken into account. States have the obligation to take positive measures to ensure indigenous peoples have access to a dignified life which includes their close relationship with their land.<sup>50</sup>

Based on the above definition, the Court signalled the possibility of the right being invoked before the IACmHR or the IACtHR without proof of risk to individuals.<sup>51</sup> In this light, the Advisory Opinion has been praised for advancing an eco-centric approach in relation to the right to a healthy environment.<sup>52</sup> Along these lines, Tigre and Urzola have argued that the Court has opened the door to climate change litigation, given that 'recognizing the environment as a rights-bearing entity could help address the climate crisis by giving the environment, as victim, a "face" – and thus some form of legal standing now, in the present, rather than waiting for harms to occur in a distant future'.<sup>53</sup>

The relevance of the Advisory Opinion became evident in the *Lhaka Honhat* decision delivered in 2020. In this case, Lhaka Honhat, an association of aboriginal communities, claimed that Argentina had failed to grant an effective property title to indigenous peoples over their ancestral territory and to prevent non-indigenous peasant farmers from settling there. It further contended that the State had failed to take appropriate measures to prevent the environmental degradation of the territory concerned and to protect the access of indigenous peoples to their natural resources by allowing activities, such as grazing, illegal logging of the forests and fencing, to be undertaken by the non-indigenous settlers.<sup>54</sup>

The Court found a violation of the right to communal property under Article 21 of the ACHR and the rights to a healthy environment, to adequate food, to water and to take part in cultural life derived from Article 26 of the ACHR.<sup>55</sup> To demonstrate the interconnectedness of the right to a healthy environment with indigenous peoples' rights more broadly, the IACtHR

<sup>49</sup> *ibid*, para 125; see also paras 123–124. The Court elaborates on these obligations in paras 127–241.

<sup>51</sup> *ibid*, para 62. This is further discussed in Sections III.A.2 and IV below.

<sup>52</sup> Tigre and Urzola (n 1) 46; GA Cavallo, 'El derecho humano al acceso a la información ambiental y la jurisprudencia interamericana' (2020) 10 *RevBrasPolítPúblicas* 82, 101; S de Vido, 'A Quest for an Eco-centric Approach to International Law: The COVID-19 Pandemic as Game Changer' (2021) 3 *Jus Cogens* 105, 107.

<sup>54</sup> *Lhaka Honhat* (n 4) paras 103–108, 186–190.

<sup>50</sup> *ibid*, para 48.

<sup>53</sup> Tigre and Urzola (n 1) 48.

<sup>55</sup> *ibid*, paras 167–168, 289.

cited, among others, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), International Labour Organization (ILO) Convention 169, General Comments 12 and 21 of the Committee of Economic, Social and Cultural Rights and Principle 22 of the Rio Declaration as relevant sources.<sup>56</sup>

Having examined the evolution of the justiciability of ESCER under the ACHR and the establishment of the right to a healthy environment, the next section will evaluate the conceptual clarity of the Court's approach in this regard. The discussion starts with a brief outline of the general criticisms faced by the IACtHR regarding its interpretation of Article 26. It then centres around three aspects: first, the core tenets of the right, ie its individual and collective dimensions identified in the Advisory Opinion, as well as the possibility for the right to be invoked even in the absence of risk to individuals; secondly, the dissociation of environmental protection elements from the right to property in the *Lhaka Honhat* case; and thirdly, the scope of reparations ordered in *Lhaka Honhat*. The section demonstrates the conceptual shortcomings of the current formulation of the right to a healthy environment in relation to these three matters. Additional elements of the jurisprudence will be expanded upon in the next section to support the analysis.

### III. THREE CHALLENGES WITH THE COURT'S APPROACH TO THE RIGHT TO A HEALTHY ENVIRONMENT

The methodological merits of the IACtHR's interpretation of Article 26 of the ACHR have been subject to intense debates within and outside the Court.<sup>57</sup> While a detailed analysis is beyond the scope of this article, three of the main criticisms are mentioned because of their relevance for the IACtHR's jurisprudence on the right to a healthy environment.

The first contends that the Court's interpretation of Article 26 is not supported by the actual wording of the provision. Article 26 merely establishes an 'obligation of conduct, but not of results'.<sup>58</sup> As the Convention stipulates,

<sup>56</sup> *ibid.*, paras 245–250.

<sup>57</sup> Objections to the IACtHR's interpretation of art 26 have consistently been raised by Judges of the Court. See the Partially Dissenting Opinions of Judge Vio Grossi and Judge Sierra Porto in *Lagos del Campo* (n 8) but also in subsequent cases. See also Contesse, 'Autoridad y disenso en la Corte Interamericana de Derechos Humanos' (n 13); Contesse, 'Judicial Interactions and Human Rights Contestations in Latin America' (n 13); J Contesse, 'Human Rights as Transnational Law' (2022) 116 *AJIL Unbound* 113; Mejía-Lemos (n 5); D Cerqueira, 'The Justiciability of Economic, Social, and Cultural Rights under the American Convention' (*Blog de la Fundación para el Debido Proceso*, 29 May 2018) <<https://dplfblog.com/2018/05/29/the-justiciability-of-economic-social-and-cultural-rights-under-the-american-convention/>>; E Benz and V Kahl, 'El caso Lhaka Honhat: la extensión de la justiciabilidad directa de los DESCAs y la esperanza incumplida de la concreción del derecho a un medioambiente sano' in Ferrer Mac-Gregor Poisot, Morales Antoniazzi and Flores Pantoja (n 5) 237.

<sup>58</sup> Partially Dissenting Opinion of Judge Vio Grossi in *Lhaka Honhat* (n 4) para 18(e) and in *Lagos del Campo* (n 8) 10.

States Parties ‘undertake to adopt measures’ to ‘achiev[e] progressively ... the full realization of rights implicit in the economic, social, educational, scientific, and cultural standards’ under the OAS Charter. Critics argue, therefore, that the provision permits the Court to monitor ‘compliance with the obligation of progressive development’ of rights that may be derived from the Charter, but it is not clear how it can give rise to new justiciable rights.<sup>59</sup> Furthermore, it is contended that the way the Court derives rights from some parts of the Charter is also problematic. This becomes clear when considering cases such as *Lhaka Honhat* where the Court relied on Articles 30, 31, 33 and 34 of the Charter to find support for the right to a healthy environment. These Articles merely provide a list of principles, goals and aspirations to ‘ensure international social justice’ in the relations of the States Parties and ‘the integral development of their peoples’.<sup>60</sup> They do not include, however, any specific rights that the Court can enforce.<sup>61</sup>

The second criticism is that the IACtHR’s interpretation of Article 26 is not in line with the intention of the States Parties. As mentioned above, the Court relies on the Protocol of San Salvador, read together with the ACHR, in order to establish new rights and clarify their scope. The Protocol contains a list of social, economic and cultural rights, including the right to a healthy environment under Article 11. However, it explicitly excludes the contentious jurisdiction of the IACtHR over these rights, except for trade union rights and the right to education as specified in Article 19(6) of the Protocol. It is not clear, therefore, why the States Parties would have negotiated an additional protocol on ESCER and restricted the competence of the Court in this way if they had understood Article 26 to recognize directly justiciable ESCER. The Protocol of San Salvador, it is argued, demonstrates the intention of States to limit the direct enforcement of ESCER<sup>62</sup> and further

<sup>59</sup> Partially Dissenting Opinion of Judge Sierra Porto in *Lagos del Campo* (n 8) para 8.

<sup>60</sup> See Charter of The Organization of American States (signed 30 April 1948, entered into force 13 December 1951) ch VII <<http://www.oas.org/dil/1948%20charter%20of%20the%20organization%20of%20american%20states.pdf>>.

<sup>61</sup> For extended criticism on this point see, Partially Dissenting Opinions of Judge Vio Grossi paras 62–68 and Judge Sierra Porto paras 9–10 in *Lhaka Honhat* (n 4). Similarly, see Partially Dissenting Opinions of Judge Vio Grossi pages 10–13 and Judge Sierra Porto paras 7–14 in *Lagos del Campo* (n 8), where the Court cited arts 34, 45 and 46 of the OAS Charter. More recently, see Partially Dissenting Opinion of Judge Patricia Perez Goldberg in *Case of Brítez Arce et al v Argentina*, IACtHR Series C No 474 (16 November 2022) paras 8–12. In addition, for a critical view on the use of sources of international law and the rules of treaty interpretation by the Court, see Judge Sierra Porto in *Poblete Vilches* (n 11) paras 16–22 and in *Lagos del Campo* (n 8) paras 40–43. Along similar lines, Judge Vio Grossi criticizes the Court for its use of non-binding sources that are not ‘designed to interpret’ the ACHR, in *Lhaka Honhat* (n 4) para 34, but see also more broadly paras 9–61. Also see GL Neuman, ‘Import, Export, and Regional Consent in the Inter-American Court of Human Rights’ (2008) 19 EJIL 101.

<sup>62</sup> Indicatively, see Partially Dissenting Opinion of Judge Vio Grossi in *Lhaka Honhat* (n 4) paras 69–87. Also see Partially Dissenting Opinions of Judge Vio Grossi pages 7–8 and Judge Sierra Porto paras 15–20 in *Lagos del Campo* (n 8).

undermines the persuasive strength of the IACtHR's interpretation of Article 26 in conjunction with this instrument.

The third criticism is that the Court's approach opens the door to a constant evolution of new rights.<sup>63</sup> If not carefully crafted, this strategy may come at the expense of legal certainty as far as the obligations of States Parties to the ACHR are concerned. Moreover, this pitfall may be compounded in the context of socio-economic rights. Judicial decisions inevitably become part of a wider discourse on socio-economic policies, which presuppose a degree of redistribution involving hard policy choices.<sup>64</sup> In a region with States that are characterized by weak institutions and unstable public resources, the task of the IACtHR in establishing directly justiciable ESCER is delicate. This is especially so as it has given rise to strong reactions from States Parties, which can have an impact on the Court's effectiveness and legitimacy.<sup>65</sup>

The stakes, therefore, are high. The establishment of a new right is, in principle, a task that requires a high degree of justification.<sup>66</sup> It requires close examination of the legal basis used and conceptual and doctrinal clarity concerning the contours of the right. More importantly perhaps, it requires an assessment of whether it is the best option when compared with other viable alternatives. It is precisely for this reason that when the IACtHR introduces and applies new rights, the need for clear explanation is greater than if it had

<sup>63</sup> JJ Faundes Peñafiel, C Carmona Caldera and PP Silva Sánchez, 'Hermenéutica del derecho al medio ambiente sano, a la identidad cultural y a la consulta, a la luz de la sentencia "*Lhaka Honhat (nuestra tierra) vs. Argentina*" (2020)' (2020) 10 RevBrasPolítPúblicas 644, 653. See specifically, Judge Sierra Porto in *Lagos del Campo* (n 8) paras 13–14 and in *Poblete Vilches* (n 11) para 17.

<sup>64</sup> The need for balancing the rights of different parts of the population in scenarios involving redistribution of resources is exemplified in *Lhaka Honhat* (n 4). In this case, there was an underlying conflict between the rights of indigenous peoples and the rights of third parties, such as peasant farmers, who had to relocate under circumstances of vulnerability. As Judge Sierra Porto pointed out, the latter lived in the contested territory 'in similar conditions of poverty and precarity' as the indigenous communities and their rights were also affected by the actions and public policies of the Argentinian government. See Partially Dissenting Opinion of Judge Sierra Porto para 13 and paras 12–14 and the *Lhaka Honhat* judgment (n 4) paras 51–52. When ordering the restitution of land to the indigenous communities, the Court provided some guidelines on the relocation of the *criollo* population. See paras 329–330.

<sup>65</sup> For an elaboration on the Court's legitimacy, see Section III.C.2 below. In 2019, the governments of Argentina, Brazil, Chile, Colombia and Paraguay adopted a statement emphasizing potential legal restrictions on the Inter-American system of human rights including the principle of subsidiarity and the doctrine of margin of appreciation. They urged the Commission and the Court to adopt a 'strict application' of the sources of international law and stressed the importance of considering 'the political, economic, and social realities of the States by the organs of the Inter-American human rights system'. In addition, they highlighted the need to respect the principle of proportionality and 'the constitutional and legal systems of the States, as well as the requirements of the rule of law' when ordering reparations (author's translation). For the statement, see 'Gobiernos de Argentina, Brasil, Chile, Colombia y Paraguay se manifiestan sobre el Sistema Interamericano de Derechos Humanos' <<https://www.mre.gov.py/index.php/noticias-de-embajadas-y-consulados/gobiernos-de-argentina-brasil-chile-colombia-y-paraguay-se-manifiestan-sobre-el-sistema-interamericano-de-derechos-humanos>>.

<sup>66</sup> In general, P Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control' (1984) 78 AJIL 607; D Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 HarvHumRtsJ 101.

followed another, well-established route relying on the environmental elements of the civil and political rights under the ACHR.<sup>67</sup> Ultimately, conceptual or doctrinal weaknesses may limit the long-term persuasiveness of transformative jurisprudence and its practical effectiveness.

### *A. The Core Tenets of the Right*

#### *1. The individual and collective dimensions*

According to the IACtHR, the right to a healthy environment has two dimensions. In its collective dimension, it ‘constitutes a universal value that is owed to both present and future generations’.<sup>68</sup> It also has an individual dimension ‘insofar as its violation may have a direct and indirect impact on the individual owing to its connectivity to other rights’.<sup>69</sup>

The individual dimension of the right seems to be based on the impact that its violation may have on the individual *because* the right to a healthy environment is connected to other rights. Nevertheless, the Court did not clarify its autonomous meaning in relation to individuals.<sup>70</sup> While it referred to a healthy environment as a ‘fundamental right for the existence of humankind’,<sup>71</sup> it did not flesh out the extent to which the right offers additional layers of protection for alleged victims. Indeed, invoking the right seems to depend on whether the individual can show that other rights have also been violated, such as the rights to personal integrity and life.

If the individual dimension of the right is manifested in its interconnection with other rights under the Convention, it may be argued that this approach does not significantly differ from the already settled case law of the Court. As illustrated above, the Court had recognized that environmental harm can have an adverse impact on civil and political rights and is therefore a relevant consideration under Articles 3–25 of the ACHR.<sup>72</sup> In this context, it would be necessary to demonstrate how establishing the right to a healthy environment adds independent legal content to what individuals can claim from the State beyond what is already offered by existing rights.

This becomes more evident by looking at the application of the right to a healthy environment in *Lhaka Honhat*. The Court briefly discussed this right and reiterated the State obligations in broad terms.<sup>73</sup> However, when it came to determining State responsibility, the IACtHR bundled the right to a healthy environment with the rights to food, water and cultural identity.<sup>74</sup>

<sup>67</sup> For an explanation, see Section III.B below.

<sup>68</sup> AO (n 3) para 59.

<sup>69</sup> *ibid.*

<sup>70</sup> Here the Court refers to broad obligations provided by the Working Group on the Protocol of San Salvador, AO (n 3) para 60.

<sup>71</sup> *ibid.*, para 59.

<sup>72</sup> See Section II.A and B above.

<sup>73</sup> *Lhaka Honhat* (n 4) paras 202–209. For State obligations, see especially para 208.

<sup>74</sup> *ibid.*, paras 255–289.



Hence, the application of specific State obligations relating to the effective realization of the right to a healthy environment was not clearly distinguished from those arising from the other, interrelated, yet separate, rights. Elaborating on the measures that public authorities should undertake to avoid violations of this new right could therefore help to improve legal certainty. As Judge Sierra Porto pointed out in his dissenting opinion, '[p]roviding content to and establishing the scope of the rights is extremely important so that everyone can understand them and the States can respect them, but it is even more relevant in these cases in which ... new rights are being generated ...'.<sup>75</sup>

The formulation of the collective dimension of the right as a 'universal value'<sup>76</sup> also raises some challenges. Universal values, as such, are characterized by indeterminacy and thus do not offer meaningful distinctions between legal and illegal conduct in real cases. The Advisory Opinion did not offer any concrete guidance with regard to the collective dimension of the right to a healthy environment. It stated that the right 'differs from the environmental content that arises from the protection of other rights' under the ACHR.<sup>77</sup> However, it did not provide an explanation as to how it creates new State obligations toward present and future generations, nor did it demonstrate what role the collective dimension of the right could play in a contentious case and whether it could be invoked by applicants.

## 2. *A right invoked 'in the absence of the certainty or evidence of a risk to individuals'*

As the Court stated in its Advisory Opinion, the right to a healthy environment can be invoked 'even in the absence of the certainty or evidence of a risk to individuals'.<sup>78</sup> It has been pointed out that this could potentially mark a paradigm shift from an anthropocentric to an eco-centric approach.<sup>79</sup> In its current formulation, however, this part of the definition is conceptually unclear. First, it appears from the Court's statement that proof of harm or risk of harm would not be necessary. This potentially means that any individual or group would be able to rely on the right to a healthy environment. Evidently, such claims would amount to public interest litigation which is not currently permitted in the Inter-American system according to the Commission.<sup>80</sup>

Secondly, if the intention of the IACtHR was to include situations that involve damage to the environment per se within the remit of the right and

<sup>75</sup> Partially Dissenting Opinion of Judge Sierra Porto in *Lhaka Honhat* (n 4) para 11.

<sup>76</sup> AO (n 3) para 59.

<sup>77</sup> *ibid*, para 63.

<sup>78</sup> *ibid*, para 62.

<sup>79</sup> Tigre and Urzola (n 1) 46–8; de Vido (n 52) 107.

<sup>80</sup> *Metropolitan Nature Reserve v Panama*, IACmHR, Report No 88/03, OEA/Ser L/V/II.118 Doc 70 Rev 2 (22 October 2003) para 34. See interpretation of art 44 of the ACHR in IACmHR, 'Digest of the IACHR on its Admissibility and Competence Criteria' OEA/Ser L/V/II.175 Doc 20 (4 March 2020) 19.

place the protection of nature at the centre of it, then further issues arise. Did the IACtHR intend to establish nature as the holder of rights under the Convention, given that the right to a healthy environment ‘protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves’ in the absence of risks to humans?<sup>81</sup> If so, the IACtHR did not identify who would have standing to enforce the relevant rights. The *Lhaka Honhat* decision does not appear to offer any clarification on these issues either. The Court’s analysis on the merits of the case focused on the effects of environmental harm on the indigenous communities. The conceptual and practical problems, therefore, subsist and this uncertainty on the core tenets of the right render its scope of application ambiguous for potential victims and the States Parties.

*B. The Interplay between the Right to a Healthy Environment and the Right to Property*

*1. Dissociating elements of environmental protection from the right to property*

The *Lhaka Honhat* decision has significant implications for the right to property under Article 21 of the ACHR. As briefly mentioned above, the Court had previously developed a line of case law in which it had dealt with the protection of natural resources, access to water, food security and cultural identity under the right to property. In fact, broad interpretations of the right to property have been one of the most innovative contributions of the IACtHR.<sup>82</sup> The case law has involved issues of land titling and delimitation of boundaries but also integrated socio-economic, cultural and environmental aspects that were especially pertinent in the context of indigenous and tribal peoples.<sup>83</sup>

In *Lhaka Honhat*, however, the Court seems to have deviated from this approach. In a nutshell, it excluded the environmental, as well as the socio-economic and cultural, elements of the case from the scope of Article 21. On the facts of the case, it relied on Article 21 only to assess the recognition and determination of the communal ownership of the land in question and the participation of indigenous peoples in processes concerning projects or works that affect their land.<sup>84</sup> Instead, the environmental issues of the case were addressed under Article 26. In this sense, the Court developed the right to a healthy environment under Article 26 at the expense of the well-established right to property and diminished the latter to a right that primarily deals with the determination of land ownership and demarcation of boundaries.

<sup>81</sup> AO (n 3) para 62.

<sup>82</sup> See M Monteiro de Matos, *Indigenous Land Rights in the Inter-American System: Substantive and Procedural Law* (Brill/Nijhoff 2020).

<sup>83</sup> *Saramaka* (n 17) para 122; *Kuna Indigenous People* (n 38) paras 232–233.

<sup>84</sup> *Lhaka Honhat* (n 4) paras 92–185.

Dissociating property from its environmental and cultural elements represents a step back from the expansive and progressive meaning of the right to property that the IACtHR had developed in its earlier jurisprudence.

Judge Ferrer Mac-Gregor Poisot rightly noted in his Separate Opinion that not all violations of cultural life necessarily involve land issues and a violation of the right to property.<sup>85</sup> In the same vein, not every instance of environmental harm will necessarily be linked to the right to property. Therefore, there may be situations where the right to a healthy environment is violated without triggering the responsibility of the State under Article 21. In *Lhaka Honhat*, however, there was a clear link between the interference with the property of indigenous communities and the deterioration of food resources, the loss of flora and fauna and the lack of access to drinking water. This, in turn, affected the cultural identity of the indigenous peoples. For this reason, the Court could have achieved the same level of protection of the victims' rights by integrating the socio-economic, cultural and environmental aspects of the case into Article 21.<sup>86</sup>

Admittedly, the legal institution of property has been perceived with scepticism in international legal scholarship. It has been criticized for entrenching colonial and racial domination<sup>87</sup> and for reproducing economic inequality,<sup>88</sup> while the desirability of conceptualizing property rights as human rights has been contested.<sup>89</sup> In this light, a line of reasoning that supports the exclusion of non-economic considerations from an understanding of land under Article 21 inadvertently confirms this scepticism. It appears to revert to the idea that the right to property is confined to a narrow conceptualization that does not appropriately accommodate social concerns. By shifting away from previous jurisprudence and reducing the core tenets of Article 21, the Court decreases the potential of the right to property to be used for the realization of basic needs that directly depend on land, its natural produce and water.

<sup>85</sup> Separate Opinion of Judge Ferrer Mac-Gregor Poisot in *Lhaka Honhat* (n 4) para 40.

<sup>86</sup> See Partially Dissenting Opinions of Judge Vio Grossi paras 50, 51 and Judge Sierra Porto paras 15–22 in *Lhaka Honhat* (n 4). For a broad reading of the right to property in a different context, see L Mardikian, 'In-Between an Economic Freedom and a Human Right: A Hybrid Right to Private Property' (2021) 81 *ZaöRV/HJIL* 341.

<sup>87</sup> B Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Duke University Press 2018); M Koskenniemi, 'Sovereignty, Property and Empire: Early Modern English Contexts' (2017) 18 *TheoInqL* 355; CI Harris, 'Whiteness as Property' (1993) 106 *HarvLRev* 1707.

<sup>88</sup> M Albertus, *Property without Rights: Origins and Consequences of the Property Rights Gap* (CUP 2020). On the right to property in the context of inequality in Latin America, see JP Bohoslavsky and L Clérico, 'Regulación del derecho de propiedad en un contexto de extrema desigualdad y Covid-19. Una mirada desde el derecho constitucional argentino e interamericano de derechos humanos' (2020) Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No 2020-34.

<sup>89</sup> T Hayward, 'Human Rights vs Property Rights' (2013) Just World Institute Working Paper No 2013/04.

The separation of environmental elements from the right to property was not explained in the judgment. The IACtHR did not say whether it was advancing a new definition of the right, moving away from its previous jurisprudence. Instead, this dissociation can be inferred from the factual application of Articles 21 and 26 and from the Separate Opinion of Judge Ferrer Mac-Gregor Poisot. Judge Ferrer Mac-Gregor Poisot has been one of the proponents of the direct justiciability of ESCER under Article 26 and, reportedly, has played a key role in shaping the approach of the IACtHR in this regard.<sup>90</sup> For this reason, his Separate Opinion in *Lhaka Honhat* arguably has some explanatory potential for the interpretation of the right to property. The sub-section that follows focuses on the relevant parts of his Separate Opinion in order to examine the rationale of this shift.

## 2. The conceptual basis of this dissociation

Judge Ferrer Mac-Gregor Poisot argued that the *Lhaka Honhat* decision separated socio-economic, cultural and environmental elements from the right to property by utilizing the distinction between the terms ‘land’ and ‘territory’.<sup>91</sup> He claimed that legal developments at the international level and the evolution of case law reveal important normative differences between the two terms and, hence, justify this distinction.<sup>92</sup> More specifically, according to Judge Ferrer Mac-Gregor Poisot, the term ‘land’ is used to denote an economic resource and relates to the ‘notion of a material possession that may be occupied, possessed or owned’.<sup>93</sup> It is confined to the physical space owned and utilized by the alleged victims.<sup>94</sup> The term ‘territory’, on the other hand, denotes ‘the exercise of autonomy or jurisdiction’ and encompasses a cultural and spiritual dimension.<sup>95</sup> It is thus understood to include elements such as water, products on which the traditional diet of indigenous peoples is based and the natural environment as an expression of cultural life broadly related to that physical space.<sup>96</sup> These characteristics are distinct from the limited concept of land and should be protected separately under the new rights derived from Article 26.<sup>97</sup>

<sup>90</sup> O Parra Vera, ‘La justiciabilidad de los derechos económicos, sociales y culturales en el Sistema Interamericano a la luz del artículo 26 de la Convención Americana. El sentido y la promesa del caso *Lagos del Campo*’ in Ferrer Mac-Gregor, Morales Antoniazzi and Flores Pantoja (n 13) 181, 182–4.

<sup>91</sup> Separate Opinion of Judge Ferrer Mac-Gregor Poisot in *Lhaka Honhat* (n 4) paras 11–12. See also E Ferrer Mac-Gregor, ‘*Lhaka Honhat* y los derechos sociales de los pueblos indígenas’ (2020) 39 *RevElectronEstudIntl* 1, 2–4. See, in general, FV Mora Navarro, ‘Los derechos a un ambiente sano, a la alimentación adecuada, al agua y a la identidad cultural. Caso comunidades indígenas miembros de la asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina ante la CIDH’ (2020) 5 *e-RevIntlProtSoc* 330.

<sup>92</sup> Separate Opinion of Judge Ferrer Mac-Gregor Poisot in *Lhaka Honhat* (n 4) paras 10–41.

<sup>93</sup> *ibid*, para 20. <sup>94</sup> *ibid*, para 24. <sup>95</sup> *ibid*, para 20. <sup>96</sup> *ibid*, paras 12, 24.

<sup>97</sup> Ferrer Mac-Gregor, ‘*Lhaka Honhat* y los derechos sociales de los pueblos indígenas’ (n 91) 5. For an opposite view, see Partially Dissenting Opinion of Judge Sierra Porto in *Lhaka Honhat* (n 4) paras 18–19.

On closer analysis, however, some doubts can be raised as to whether the differentiation between ‘land’ and ‘territory’ is clearly evidenced in earlier cases of the Court and international instruments on indigenous peoples’ rights. In the previous case law of the IACtHR, in most instances the two terms seem to be conflated and their respective scopes are not distinguished. In one of its key judgments on communal property rights, *Awás Tingni Community v Nicaragua*, the Court analysed the relationship of indigenous peoples with their land in a multi-dimensional way. Acting on the basis of Article 21, it established a link between culture and both land and territory based on the indigenous peoples’ anthropological characteristics.<sup>98</sup> Similarly, in *Saramaka People v Suriname*, it referred to territory, land and natural resources under the right to property. It appears, though, as if the Court did not make a clear conceptual distinction between these terms: it stated that territory encompasses both land and natural resources and has an inextricable relationship with the economic, social and cultural survival of indigenous and tribal peoples<sup>99</sup> and at the same time, it stressed that there is a strong link between culture and land itself.<sup>100</sup>

In the same vein, in *Xákmok Kásek Indigenous Community v Paraguay*, the Court made references to the relationship of indigenous and tribal peoples with their land *and* their relationship with their territory under Article 21. The IACtHR explained that land involves ‘traditional presence or use, by means of spiritual or ceremonial ties ... and any other element characteristic of their culture’.<sup>101</sup> It also observed ‘that the relationship of the members of the Community with their traditional territory is manifested, inter alia, by the implementation of their traditional activities on those lands’.<sup>102</sup> Read

<sup>98</sup> *Awás Tingni* (n 17) para 149: ‘Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, *their relationship to the land is not merely a matter of possession and production, but a physical and spiritual element that they must enjoy fully, even to preserve their cultural legacy* and transmit this to future generations’ (emphasis added). See also *Case of the Sawhoyamaya Indigenous Community v Paraguay*, IACtHR Series C No 146 (29 March 2006) para 118.

<sup>99</sup> *Saramaka* (n 17) para 120.  
<sup>100</sup> The Court explained that ‘Land is more than merely a source of subsistence for them; it is also a necessary source for the continuation of the life and cultural identity of the Saramaka people. The lands and resources of the Saramaka people are part of their social, ancestral, and spiritual essence. In this territory, the Saramaka people hunt, fish, and farm, and they gather water, plants for medicinal purposes, oils, minerals, and wood.’ *ibid.*, para 82 (citations in the original omitted). It also stated that ‘while territory collectively belongs to the Saramaka people concerned, specific plots of land were divided among the clans’ (fn 66 of the judgment). Given the meaning of land recognized in para 82, the use of the two terms seems rather indistinguishable. Similarly, in some parts of the judgment the Court refers, in a tautological manner, to natural resources found in the *territory* and in others, to natural resources found in the *land*. See specifically paras 122–123. See also *Case of the Moiwana Community v Suriname*, IACtHR Series C No 124 (15 June 2005) para 133.

<sup>101</sup> *Xákmok Kásek* (n 40) para 113.

<sup>102</sup> *ibid.*, para 114. For the contrary observation, see Separate Opinion of Judge Ferrer MacGregor Poisot in *Lhaka Honhat* (n 4) fn 22.

contextually, then, these terms appear to be conflated, without a clear conceptual distinction.

As far as international instruments on indigenous peoples' rights are concerned, ILO Convention 169 and UNDRIP group together references to land and territory. For example, Article 13(2) of the ILO Convention explains that the term 'lands' in Articles 15 and 16 of the Convention 'shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use'. In a similar way, UNDRIP identifies the right of indigenous peoples to 'maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources'.<sup>103</sup> While the drafters intended to distinguish territory from private ownership,<sup>104</sup> the text of UNDRIP does not untangle the conceptual or doctrinal implications of using the terms 'territory' and 'land' in the specific context of collective ownership of indigenous peoples.<sup>105</sup> Therefore, the differentiation of the two terms could be perceived as tenuous under these international instruments.

It therefore seems that the IACtHR watered down the scope of Article 21 in order to provide an expansive interpretation of the ESCER under Article 26. Diminishing the right to property to issues of occupation, possession and ownership has the effect of reintroducing a limited understanding of property and the modes of its use and its disposal. This is exactly what the Court had warned against in *Kichwa Indigenous People of Sarayaku v Ecuador*, as it would render the protection under Article 21 'illusory'.<sup>106</sup>

<sup>103</sup> UN General Assembly, 'United Nations Declaration on the Rights of Indigenous Peoples' (13 September 2007) UN Doc A/RES/61/295 (UNDRIP) art 25.

<sup>104</sup> For example, UN documentation on the drafting of UNDRIP reports that the term territory: 'conveys some notion of the totality of indigenous peoples' relationship to the land and to all of its resources and characteristics. It is fundamental that this relationship be understood as more than simply a matter of "land ownership", in the usual sense of private ownership by citizens, but a special and comprehensive kind of relationship that is historical, spiritual, cultural and collective.' UN Sub-Commission on the Promotion and Protection of Human Rights, 'Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples / by Erica-Irene A Daes, Chairperson of the Working Group on Indigenous Populations' (19 July 1993) UN Doc E/CN.4/Sub.2/1993/26/Add.1, para 36.

<sup>105</sup> On the ambiguity of the terms land, territory and resources under UNDRIP, see C Charters, 'Indigenous Peoples' Rights to Lands, Territories, and Resources in the UNDRIP: Articles 10, 25, 26, and 27' in J Hohmann and M Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 395, 402.

<sup>106</sup> *Kichwa Indigenous People* (n 43) para 145: 'These [indigenous] 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. Ignoring the specific forms of the right to the use and enjoyment of property based on the culture, practices, customs and beliefs of each people, would be tantamount to maintaining that there is only one way to use and dispose of property, which, in turn, would render protection under Article 21 of the Convention *illusory* for millions of people' (emphasis added); see also para 146.

C. *The Scope of Reparations regarding the Right to a Healthy Environment*

1. *The Court's approach to reparations*

The approach of the IACtHR to reparations is a distinctive feature of its jurisprudence and one of its most celebrated doctrinal innovations.<sup>107</sup> In the context of indigenous peoples, it is common for the Court to order compensation and a wide range of non-pecuniary remedies. The latter include land restitution<sup>108</sup> and legal and administrative reforms to implement an effective system of land delimitation, demarcation and titling.<sup>109</sup> In addition, the IACtHR often requires the creation of funds, to be allocated for the development of the community.<sup>110</sup> These reparations have collective effects, in that they aim to transform the structural causes that triggered the violations and to avoid their recurrence.<sup>111</sup> They are broad enough to allow the State a degree of experimentation in order to determine the proper measures of redress.<sup>112</sup> At the same time, their inherent flexibility enables the Court to tailor them to the different categories of victims and the complexities of their situations.<sup>113</sup>

In this light, the scepticism regarding the conceptual and doctrinal contours of the right to a healthy environment could, at least partly, be dispelled if the reparations granted to the victims in *Lhaka Honhat* were novel. This would be especially important if measures of redress substantially differed from those that the Court had ordered in the past or if some of them could not have been otherwise granted. It would demonstrate that the right has a discernible added value for victims. However, this does not seem to be the case.

<sup>107</sup> See Soley (n 28). On the ways that the Court monitors compliance with its judgments, see P Saavedra Alessandri, 'The Role of the Inter-American Court of Human Rights in Monitoring Compliance with Judgments' (2020) 12 *JHumRtsPrac* 178.

<sup>108</sup> Indicatively, *Xákmok Kásek* (n 40) para 281.

<sup>109</sup> *Awás Tingni* (n 17) para 164.

<sup>110</sup> *Moiwana Community* (n 100) para 214. For an overview, see D Contreras-Garduño and S Rombouts, 'Collective Reparations for Indigenous Communities Before the Inter-American Court of Human Rights' (2010) 27 *UtrechtIntlEurL* 4.

<sup>111</sup> Soley (n 28) 347. Studies show that the compliance of States Parties with the Court's judgments is generally weak but there are significant variations depending on the type of reparation ordered. Pecuniary and symbolic reparations have, reportedly, the highest level of compliance. On the compliance rates of different types of reparations, see RL Resende, 'Precedent of the Inter-American Court of Human Rights: State Compliance and Judicial Performance in Brazil, Colombia, Argentina, Chile, and Bolivia' (2023) Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No 2023-02; FF Basch et al, 'La efectividad del sistema interamericano de protección de derechos humanos: un enfoque cuantitativo sobre su funcionamiento y sobre el cumplimiento de sus decisiones' (2010) 7 *SurIntlJHumRts* 8, 19; and D Hawkins and W Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010) 6 *JIntlLIntlRel* 35, 58. See also JK Staton and A Romero, 'Rational Remedies: The Role of Opinion Clarity in the Inter-American Human Rights System' (2019) 63 *IntlStudQ* 477.

<sup>112</sup> TM Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 *ColumJTransnatlL* 351, 387.

<sup>113</sup> On indigenous peoples in particular, TM Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples' (2014) 25 *DukeJComp&IntlL* 1.



The reparations corresponding to the violation of the rights to a healthy environment, adequate food, access to water, and cultural identity under Article 26 were all discussed together in the judgment. The measures focused on ensuring the conservation and improvement of environmental resources in the territory of indigenous communities, as well as the provision of basic goods and services.<sup>114</sup> This included the obligation of the State to take actions ‘to conserve the surface and groundwater in the indigenous territory’, ‘to guarantee permanent access to drinking water’, ‘to avoid a continuation of the loss of, or decrease in, forestry resources’ and ‘to endeavor to ensure its gradual recovery’.<sup>115</sup> The State was also ordered to create a community development fund to address the recovery of the indigenous culture and to implement measures improving food security and the documentation and dissemination of the history of community traditions.<sup>116</sup> In this light, it has been pointed out that a key characteristic of these reparations is their specificity with regard to the violations of the ESCER in this case.<sup>117</sup> This includes, for example, the guidance that the IACtHR provided on the purposes of the community development fund, focusing on repairing the damage caused to the cultural identity of the indigenous peoples.<sup>118</sup>

However, the novel character of the reparations is not evident given that both the substance and the flexibility of the measures remain similar to those found in earlier cases that the Court had decided under Articles 3–25.<sup>119</sup> Indeed, the Court had in the past also ordered measures relating to the improvement of food security and resource management in order to ensure the conservation and protective capacities of indigenous lands and resources,<sup>120</sup> the supply of drinking water, as well as the implementation of agriculture and cultural development programmes.<sup>121</sup> In *Saramaka v Suriname*, for example, the Court had found that the Saramaka people were ‘left with a legacy of environmental destruction, despoiled subsistence resources, and spiritual and social problems’.<sup>122</sup> Environmental damage had impacted their subsistence resources and their spiritual connection with their territory.<sup>123</sup> In this regard, redress for the ‘denigration of their basic cultural and spiritual values’ and the alterations ‘to the very fabric of their society’ was considered necessary by the Court.<sup>124</sup> The State was required to create a

<sup>114</sup> *Lhaka Honhat* (n 4) paras 331–342. <sup>115</sup> *ibid*, para 333. <sup>116</sup> *ibid*, paras 337–342.

<sup>117</sup> Separate Opinion of Judge Ferrer Mac-Gregor Poisot in *Lhaka Honhat* (n 4) paras 68–69.

<sup>118</sup> A Cabrera, D Cerqueira and S Herencia-Carrasco, ‘Remarks on the Judgment of the Inter-American Court in the Lhaka Honhat vs. Argentina Case’ (*Blog de la Fundación para el Debido Proceso*, 29 July 2020) <<https://dplfblog.com/2020/07/29/remarks-on-the-judgment-of-the-inter-american-court-in-the-lhaka-honhat-vs-argentina-case/>>.

<sup>119</sup> The dichotomy between the establishment of directly justiciable ESCER and reparations has been observed in other cases. See, eg, FC Ebert and C Fabricius, ‘Die neue WSK-Rechtsprechung des IAGMR: Impulse für Arbeitnehmerrechte in Lateinamerika’ (*Völkerrechtsblog*, 2 November 2018) <<https://voelkerrechtsblog.org/die-neue-wsk-rechtsprechung-des-iagmr/>>.

<sup>120</sup> *Kaliña and Lokono Peoples* (n 37) para 296.

<sup>121</sup> *Yakye Axa* (n 16) para 205; *Kichwa Indigenous People* (n 43) paras 322–323.

<sup>122</sup> *Saramaka* (n 17) para 153. <sup>123</sup> *ibid*, para 200. <sup>124</sup> *ibid*, para 200.

community fund to ‘finance educational, housing, agricultural, and health projects, as well as provide electricity and drinking water, if necessary, for the benefit of the Saramaka people’.<sup>125</sup> Similarly, in *Kichwa Indigenous People of Sarayaku v Ecuador*, the State was ordered to ensure reforestation<sup>126</sup> and to pay non-pecuniary damages for the ‘implementation of educational, cultural, food security, health care and eco-tourism development projects’.<sup>127</sup> As a result, it seems that even though States may find themselves liable for violations of new rights, the core of what they will be required to do in the form of reparations may not be strikingly different.

## 2. Diverging legitimacy demands

It is worth considering why the direct justiciability of the right to a healthy environment has not yet had any significant effects on reparations. One might have expected that the IACtHR’s approach to reparations would in fact be more far-reaching than in previous cases where it had relied on the environmental aspects of civil and political rights. It is possible to explain the Court’s approach to reparations in *Lhaka Honhat* by drawing on insights from sociological institutionalism and focusing on the diverging legitimacy demands that the IACtHR faces.

According to Tallberg and Zürn, the legitimacy of an institution depends on the beliefs and perceptions within a given constituency or relevant audience that its exercise of authority is appropriate.<sup>128</sup> Institutions that command a high level of legitimacy enjoy more support from relevant actors, be it in the form of ‘investing resources and energies in the project that lies behind’ the institutions, behaving in accordance with their rules or decisions, or voicing lower levels of opposition.<sup>129</sup> Under these conditions, institutions have more power and tools at their disposal to achieve their objectives or fulfil their mandate.<sup>130</sup> Therefore, they have strong incentives to satisfy the demands of their audiences in order to retain their legitimacy. Given that these demands are diverse and may often be conflicting, institutions develop various strategies to address them.<sup>131</sup> As Stephen demonstrates, these strategies may vary from institutional reform and operational adaptation to ‘coping mechanisms’.<sup>132</sup>

<sup>125</sup> *ibid.*, para 201.      <sup>126</sup> *Kichwa Indigenous People* (n 43) para 294.      <sup>127</sup> *ibid.*, para 323.

<sup>128</sup> See J Tallberg and M Zürn, ‘The Legitimacy and Legitimation of International Organizations: Introduction and Framework’ (2019) 14 *RevIntlOrg* 581, 585.

<sup>129</sup> C Reus-Smit, ‘International Crises of Legitimacy’ (2007) 44 *IntlPol* 157, 163–4.

<sup>130</sup> *ibid.* 172.

<sup>131</sup> MD Stephen, ‘Legitimacy Deficits of International Organizations: Design, Drift, and Decoupling at the UN Security Council’ (2018) 31 *CambRevIntlAff* 96, 104–5. In general, JW Meyer, ‘Reflections: Institutional Theory and World Society’ in G Krücken and GS Drori (eds), *World Society: The Writings of John W Meyer* (OUP 2009) 36; and JW Meyer and B Rowan, ‘Institutionalized Organizations: Formal Structure as Myth and Ceremony’ (1977) 83 *AmJSoc* 340.

<sup>132</sup> Stephen *ibid.* 105.

In the context of the IACtHR, civil society actors and the States Parties to the ACHR are the key audiences whose perceptions about how the Court should develop its jurisprudence can be of consequence for its legitimacy. Civil society actors, including transnational networks of lawyers, practitioners and non-governmental organizations, typically seek the effective enforcement of rights through recourse to the Court. They demand a progressive interpretation of the Convention that allows them to ‘fulfil their respective human rights agendas’ and enables them to promote concrete changes on the ground.<sup>133</sup> Even though their legitimacy demands are far from being uniform across the region,<sup>134</sup> judicial interpretations that ‘give credence to their claims’<sup>135</sup> will enjoy greater support and legitimacy from them. It is important for the IACtHR that it is viewed as legitimate by these actors because they can have a crucial role in defending its work. As Soley and Steininger have demonstrated, civil society actors have been the most vocal allies of the Court and have had an important role in defusing criticism of it. They lobby political parties, set up discussion fora and raise public awareness of the Inter-American human rights system.<sup>136</sup>

However, the legitimacy demands of civil society may often be in tension with those of the States Parties that fund the IACtHR’s operations.<sup>137</sup> Governments which must implement the judgments are concerned about the preservation of their own competences that may be affected by the Inter-American system.<sup>138</sup> They demand interpretations of the Convention that respect States’ sovereign powers and that are confined by the text of the Inter-American documents. This would favour decisions of the Court that provide room for sufficient State discretion, and do not encroach on a government’s control over domestic policies and legislation.<sup>139</sup> If the work of the IACtHR is perceived as antagonistic to the interests of States, the latter have

<sup>133</sup> Soley (n 28) 352. See O Vilhena Vieira and AS Dupree, ‘Reflection on Civil Society and Human Rights’ (2004) 1 *SurIntJHumRts* 47.

<sup>134</sup> On religious civil society actors, see R Urueña, ‘Evangelicals at the Inter-American Court of Human Rights’ (2019) 113 *AJIL Unbound* 360.

<sup>135</sup> X Soley and S Steininger, ‘Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights’ (2018) 14 *IntJLC* 237, 254. On the importance of civil society for the legitimacy and empowerment of the IACtHR, see F Piovesan, ‘*Ius Constitutionale Commune latinoamericano en derechos humanos e impacto del sistema interamericano: Rasgos, potencialidades y desafíos*’ in A von Bogdandy, M Morales Antoniazzi and E Ferrer Mac-Gregor (eds), *Ius Constitutionale Commune en América Latina: Textos básicos para su comprensión* (Instituto de Estudios Constitucionales del Estado de Querétaro and Max Planck Institute for Comparative Public Law and International Law 2017) 551, 569.

<sup>136</sup> Soley and Steininger *ibid* 254.

<sup>137</sup> See specifically, Cavallaro and Schaffer (n 15) 220–1.

<sup>138</sup> On the relationship between international courts and national audiences, see KJ Alter, *The New Terrain of International Law: Courts, Politics and Rights* (Princeton University Press 2014) 32–67. In general, KJ Alter, LR Helfer and MR Madsen (eds), *International Court Authority* (OUP 2018); N Grossman et al (eds), *Legitimacy and International Courts* (CUP 2018).

<sup>139</sup> See W Sandholtz, Y Bei and K Caldwell, ‘Backlash and International Human Rights Courts’ in A Brysk and M Stohl (eds), *Contracting Human Rights: Crisis, Accountability, and Opportunity* (Edward Elgar 2018) 159. For an overview of debates, see A Follesdal, ‘The Legitimacy Deficits of

the power to reduce its authority in a number of ways, including by withdrawing or threatening to withdraw from the Convention, cutting back on funding or refusing to comply with specific judgments.<sup>140</sup> These are serious challenges to the legitimacy of the Court and put at risk its position as a key transnational actor engaged in the human rights governance of the region.<sup>141</sup>

The effectiveness of the IACtHR, therefore, depends, at least to some extent, on the engagement of both audiences with it and on their perceptions concerning the legitimacy of what the Court does and how it does it. As the Court finds itself in between these often colliding legitimacy demands and tries to accommodate them, it may not be too far a stretch to expect that the Court will seek compromise. In this sense, it may ‘tolerate’ a degree of incongruence between its expansive interpretation of new rights and the scope of reparations, at least in the current stage of its post-*Lagos de Campo* jurisprudence, so that it can signal to both audiences that their demands are heard and acted upon. The Court seems to do this by relabelling the environmental aspects of civil and political rights under the umbrella of a new, autonomous right to a healthy environment. This triggers a move to address environmental issues under the Convention and puts a new tool in the hands of litigants and civil society actors, thus satisfying the demands of civil society. In this way, the IACtHR positions itself in the vanguard of developing progressive jurisprudence on environmental protection. At the same time, if the establishment of the right to a healthy environment has few additional consequences when it comes to reparations, the legitimacy concerns of States may also be satisfied.

#### IV. CONSIDERING OLD AND NEW RIGHTS

Given that the right now forms a part of the inter-American jurisprudence, it is pertinent to reflect on how the Court could offer further guidance concerning the contours of the right and its relationship with well-established civil and political rights. When considering the potential contribution that the Court could make to refining the right to a healthy environment, two situations need to be distinguished.

The first relates to situations where environmental damage affects rights under Articles 3–25 of the ACHR and reaches the threshold required to

the Human Rights Judiciary: Elements and Implications of a Normative Theory’ (2013) 14 *TheoInqL* 339.

<sup>140</sup> eg, Venezuela denounced the Convention in 2012. Venezuela also submitted its withdrawal from the OAS Charter in 2017 and Nicaragua in 2021. The Dominican Republic challenged the jurisdiction of the IACtHR in 2014. It stopped appearing before it and reporting on compliance to the Inter-American institutions. IACmHR, ‘Annual Report 2019. Follow-up Recommendations Issued by the IACHR in its Country and Thematic Reports’ 775 <<https://www.oas.org/en/iachr/docs/annual/2019/docs/IA2019cap5RD-en.pdf>>; and Soley and Steinger (n 135) 250.

<sup>141</sup> In general, R Urueña, ‘Double or Nothing? The Inter-American Court of Human Rights in an Increasingly Adverse Context’ (2018) 35 *WisIntlLJ* 398.

establish a violation. In such situations, the Court could avoid an ‘either/or’ approach, stepping back from the broad interpretation it follows concerning civil and political rights such as the rights to life and property, in order to find an autonomous violation of the right to a healthy environment. Such a trade-off has normative and doctrinal implications, as demonstrated in Section III. Therefore, the Court should continue to flesh out the environmental dimensions of rights expressly set out in the Convention, exploring their connection with the right to a healthy environment under Article 26. As Judge Pérez Manrique stated, the Court should base its reasoning on the interconnectedness of the rights: in a case like *Lhaka Honhat*, for example, the point of departure would be Article 21, with a violation of the right to a healthy environment resulting from the State’s failure to ensure the effective protection of the right to property.<sup>142</sup>

The advantage of this approach is that it allows the Court to preserve the wide scope of civil and political rights under its previous jurisprudence and the close links between land and socio-economic, cultural and environmental elements under Article 21, thus developing the right to a healthy environment in a symbiotic, rather than exclusionary, manner. The environmental aspects of civil and political rights would be maintained, and even strengthened when read in conjunction with the right to a healthy environment. This would also provide more room for considering the necessity of taking immediate action, given the adverse impact of environmental degradation on many aspects of human life and community ties. It would constitute, in this sense, a complementary ‘pull’ for dealing with the impact of environmental harm on human rights.

The right to a healthy environment may prove most useful in cases concerning indigenous peoples, which, so far, have been the entry point for the Court to apply the right in contentious cases. This area offers fertile ground for the IACtHR to strengthen collective environmental rights both procedurally and substantively for the benefit of society as a whole.<sup>143</sup> However, as the right to a healthy environment is phrased in broad terms, such obligations would extend to non-indigenous communities or groups rendered vulnerable to the effects of environmental degradation.<sup>144</sup> This could, for example, reinforce the requirements that communities affected by environmental problems take part in relevant decision-making processes and

<sup>142</sup> Partially Dissenting Opinion of Judge Pérez Manrique in *Lhaka Honhat* (n 4) paras 13–14.

<sup>143</sup> In general, J Gilbert, ‘The Rights of Nature, Indigenous Peoples and International Human Rights Law: From Dichotomies to Synergies’ (2022) 13 JHRE 399; MA Tigre, ‘Climate Change and Indigenous Groups: The Rise of Indigenous Voices in Climate Litigation’ (2022) 9 e-Publica 210.

<sup>144</sup> See in particular the case pending before the IACtHR: *Community of La Oroya v Peru*. For the IACmHR press release, see OAS, ‘IACHR Files Case Before IA Court on Peru’s Responsibility for the Effects of Contamination in La Oroya Community’ (14 October 2021) <[https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media\\_center/preleases/2021/274.asp](https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/274.asp)>.

exert some influence on the balance between environmental, social and economic interests. It could also strengthen State obligations to comply with due diligence requirements. This could involve a variety of obligations such as the adoption of clear regulatory measures on environmental monitoring and the prevention of environmental harm; the supervision of public and private actors regarding their compliance with environmental standards; the implementation of public participation procedures and the provision of sufficient and timely information on activities that may affect the environment in which communities live.<sup>145</sup>

The second category involves situations where the right to a healthy environment is invoked independently from civil and political rights. An example could relate to climate change, where applicants allege that their human rights have been violated by the State's failure to take sufficient action on climate change and to prevent human rights violations caused by environmental degradation. Admittedly, this type of case would bring the IACtHR into uncharted waters and raise complex issues.<sup>146</sup> The Court could further develop State obligations in light of evolving environmental standards under the international *corpus iuris*. It could also clarify the level of harm that needs to be shown by the alleged victims in order to demonstrate a violation of the right to a healthy environment, as well as the criteria for establishing causality between the State's act or omission and the harm caused.

At the same time, it seems important to improve conceptual clarity by explaining how considerations of 'humanity' and the nature of the right to a healthy environment as a 'universal value' relate to legal requirements that derive from it. It would be useful to detail the specific rules that emerge from such a 'universal value' and to flesh out the legal contours of the right further. This would allow potential applicants to know what can be invoked before the Court and would also strengthen legal certainty regarding the collective dimension of the right. Moreover, given that the Advisory Opinion refers to the value being owed to future generations, the Court could shed some light on the balance between the freedoms and obligations of the current and future generations that derive from it.

In addition, the Court could rely on the principle of progressivity encompassed in Article 26 to develop the collective aspects of the right. As the IACtHR has pointed out, Article 26 gives rise not only to immediate obligations but also to progressive ones. The latter concern 'the adoption of provisions, especially of an economic and technical nature – to the extent of

<sup>145</sup> *ibid.*

<sup>146</sup> Climate change litigation raises similar questions and debates in the context of the European Court of Human Rights. See C Heri, 'Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability' (2022) 33 EJIL 925; A Zahar, 'The Limits of Human Rights Law: A Reply to Corina Heri' (2022) 33 EJIL 953.

available resources and by either legislative or other appropriate means – to achieve progressively the full realization of certain [ESCR]’.<sup>147</sup> They include ‘a sense of progress, which calls for an effective improvement of the enjoyment and exercise of these rights, so that social inequalities are corrected and the inclusion of vulnerable groups is facilitated’.<sup>148</sup> Applying the principle of progressivism would be a complex task that could, nevertheless, allow the Court to assess the domestic legal framework, public policies and specific measures related to environmental protection.

Finally, if, as suggested in the Advisory Opinion, the Court decides to consider cases where ‘evidence of risk to individuals’ is not required, it would be important to explain how this would be possible under the current procedural rules relating to the competences of the Commission and the Court, and who would have standing in such cases. Even though Article 44 of the ACHR provides a broad basis for jurisdiction *rationae personae*, the Commission has interpreted this in a way that requires victims who have been ‘individualized and identified’,<sup>149</sup> or in certain circumstances potential victims who are ‘at imminent risk of being directly affected by a legislative provision’.<sup>150</sup> Furthermore, the Court has stated that petitions *in abstract* cannot be processed in contentious cases.<sup>151</sup> Therefore, it seems that some core aspects of the right would not be justiciable unless these rules are revisited.<sup>152</sup> Having said this, petitions *in abstract* can fall within the Court’s advisory jurisdiction.<sup>153</sup> This could provide an opportunity for the IACtHR to assess whether the domestic regulatory frameworks in place contribute to the exacerbation of environmental risks and whether they are effective in mitigating the human rights impact of known or foreseeable risks. Moreover, it would allow the Court to provide guidance on adaptation measures to enable States to reduce the impact of environmental degradation on their population.

<sup>147</sup> *Cuscul Piraval* (n 25) para 144. In this case, the Court discussed the principle of progressivity in relation to the right to health and, for the first time, found its violation.

<sup>148</sup> *ibid*, para 146.

<sup>149</sup> *Mario Roberto Chang Bravo v Guatemala*, IACmHR Inadmissibility Report No 57/08, Petition 283-06 (24 July 2008) para 38. See D Rodríguez-Pinzón, ‘The “Victim” Requirement, the Fourth Instance Formula and the Notion of “Person” in the Individual Complaint Procedure of the Inter-American Human Rights System’ (2001) 7 ILSA JIntl&CompL 369; F Hampson, C Martin and F Viljoen, ‘Inaccessible Apexes: Comparing Access to Regional Human Rights Courts and Commissions in Europe, the Americas, and Africa’ (2018) 16 ICON 161.

<sup>150</sup> *Maria Eugenia Morales De Sierra v Guatemala*, IACmHR Case No 11.625, Report No 28/98, OEA/Ser L/V/II.95 Doc 7 Rev at 144 (1997) (6 May 1998) para 35.

<sup>151</sup> *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94, IACtHR Series A No 14 (9 December 1994) para 49.

<sup>152</sup> Broadening the rules on the jurisdiction of the Inter-American organs would carry the risk of increasing their already significant backlog. E Álvarez-Icaza, ‘The Inter-American System and Challenges for its Future’ (2014) 29 AmUIntlLRev 989, 997.

<sup>153</sup> Advisory Opinion OC-14/94 (n 151).



## V. CONCLUSION

This article has highlighted some of the challenges resulting from current approach of the IACtHR toward the right to a healthy environment. Declaring the autonomous nature of the right, at first sight, is a major innovation for the protection of alleged victims affected by environmental harm. However, it has been shown that the individual and collective dimensions of the right lack conceptual clarity and their application in contentious cases remains ambiguous. In addition, this development has come at the expense of the progressive turn of the Court on the right to property. The latter had been expanded to include socio-economic, cultural and environmental elements, but the Court removed these from the scope of Article 21 in *Lhaka Honhat*. Finally, this judicial innovation, so far, does not appear to have been of discernible benefit to victims in practice. This is because the scope of reparations does not seem to be significantly different from the environmentally related remedies that previously had been ordered by the Court under civil and political rights. To some extent, this can be explained as a way of managing the colliding legitimacy demands of civil society and States that the IACtHR faces.

Given that the right to a healthy environment is likely to have an increasingly significant role in future decisions of the Commission and the Court, it is worthwhile considering how the current judicial approach could be improved. The challenge remains to carve out the doctrinal implications of the right to a healthy environment that could not be effectively realized under other human rights. The function of the new right should be to strengthen State obligations relating to environmental protection rather than to detract from the scope of other rights. This is important, not least because the Court's normative influence outside the Inter-American system could be enhanced if it continued to develop broader interpretations of civil and political rights with clear environmental dimensions. Indeed, an interpretation along these lines could have more relevance for other international judicial institutions, such as the European Court of Human Rights, which cannot apply the right to a healthy environment.<sup>154</sup> Similarly, such an interpretation could also be useful for

<sup>154</sup> A number of avenues for dialogue between the regional human rights courts are available. The European Court of Human Rights has in the past 'drawn inspiration' on specific issues from the IACtHR. The African Court and African Commission on Human and Peoples' Rights have referred to its rulings. For examples of case law, see IACtHR, 'Dialogue Between Regional Human Rights Courts' (2020) 45, 52 <<https://www.corteidh.or.cr/sitios/libros/todos/docs/dialogo-en.pdf>>. Also, GL Neuman, 'The External Reception of Inter-American Human Rights Law' (2011) *QuebecJIntlL* 99; M Talbot, 'Collective Rights in the Inter-American and African Human Rights Systems' (2018) 49 *GeoJIntlL* 163. As far as the International Court of Justice is concerned, its references to the IACtHR are limited, P Wojcikiewicz Almeida, 'The ICJ and the Inter-American Court of Human Rights' in A Skordas and L Mardikian (eds), *Research Handbook on the International Court of Justice* (Edward Elgar, forthcoming); E De Brabandere, 'The Use of Precedent and External Case-Law by the International Court of Justice and the International Tribunal for the Law of the Sea' (2016) 15 *LPiCT* 24.

domestic courts in Latin American States whose constitutions do not include expansive environmental rights or rights of nature. Meanwhile, the right to a healthy environment can form a solid basis for creating new substantive and procedural guarantees for the protection of the environment. This purpose would arguably be best served by a framework that avoids the shortcomings identified in this article and develops conceptually sound content for the right to a healthy environment that helps advance environmentally friendly interpretations of other human rights.