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"Lhaka Honhat Association v. Argentina": Landmark decision on direct justiciability of Article 26 ACHR and the autonomous right to a healthy environment

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Abstract: The Inter-American Court of Human Rights (IACtHR), after 28 years of conflict with the Argentine state, finally ruled in favor of the rights of the indigenous communities of Salta, Argentina. The Court condemned Argentina for violating the right of these indigenous communities to their cultural identity, a healthy environment, and adequate food and water. The Court ordered specific action in Argentina for the restitution of those rights, including urgently needed access to food and water, reforestation and the recovery of indigenous culture. Lhaka Honhat is a landmark judgment for the IACtHR sets a precedent concerning the direct justiciability of Article 26 of the American Convention on Human Rights (ACHR). This is the first ruling by this Court to independently analyze the human right to a healthy environment. "Lhaka Honhat" establishes clearer rules for State actions concerning the principle of prevention of environmental damage caused by private individuals and establishes guidelines for restitution and compensation for the violation of indigenous (collective) rights when their natural resources are affected. A more comprehensive reading of the scope of protection under Article 26 in future court cases is likely.

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A. Introduction

On February 6, 2020, the *Inter-American Court of Human Rights* (IACtHR) announced a landmark decision in a case brought by the Lhaka Honhat Association (Our Land) on behalf of its members, several indigenous communities located in Argentina. In the judgment con-

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cerning the case of these indigenous communities v. Argentina[1] the court found the state of Argentina internationally responsible for the violation of the rights to community property, cultural identity, a healthy environment, adequate food and water for indigenous communities.

The ruling expands and clarifies the content of State obligations to protect indigenous peoples' economic, social and cultural rights under Article 26 of the *American Convention on Human Rights* (ACHR). It explicitly emphasizes that States must take measures to effectively protect indigenous lands from encroachments by non-indigenous settlers.[2]

For the first time in a contentious case, the Inter-American Court analyzed rights to a healthy environment, adequate food, water and cultural identity autonomously from Article 26 of the American Convention, ordering specific measures of reparation for the restitution of those rights, including actions for access to water and food, for the recovery of forest resources and for the recovery of indigenous culture.[3]

B. Facts of the case and procedural history

The Lhaka Honhat Association originally brought the case before the *Inter-American Commission on Human Rights* (IACHR) in 1998, supported by the *Centro de Estudios Legales y Sociales* (CELS), with the aim to protect their ancestral lands.[4] Already since the nineteenth century, non-indigenous settlers have moved onto Lhaka Honhat lands. They engaged in cattle herding, logging and other activities that caused deforestation and contaminated water sources. Because they installed wire fencing, settlers prevented indigenous peoples from freely moving within their territories. The combined effect of the mentioned activities has interfered with the indigenous way of life. The ability of the "Our Land" communities to access traditional food and water sources and to practice their religious and cultural rites was disturbed. Despite adopting legislation concerning the titling of the communities' lands, the Argentine state has failed to appropriately protect their lands from encroachment.

1 *Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, Judgment of Feb. 6, 2020. Series C No. 400, https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf, cited: IACtHR l.c. or ibid.; cf. Press Release, Inter-American Court of Human Rights I/ACourt H.R._PR-24/2020, San José, Costa Rica, April 2, 2020, http://www.corteidh.or.cr/docs/comunicados/cp_24_2020_eng.pdf (last accessed on Feb. 28, 2021).

2 Cf. *Lara Dominguez* (Minority Rights Group International), The Inter-American Court of Human Rights Issues Landmark Judgment in Indigenous Rights Case, April 16, 2020, https://minorityrights.org/2020/04/16/nuestra-tierra-v-argentina (last accessed on Feb. 28, 2021).

3 Press Release, Inter-American Court of Human Rights I/ACourt H.R._PR-24/2020, l.c., note 1.

4 Cf. concerning the history of the case: *Dominguez*, l.c., note 2. Additional documents and information are available: *CELS*, The Inter-American Court of Human Rights found Argentina guilty and ruled in favor of the indigenous communities of Salta, https://www.cels.org.ar/web/en/2020/04/the-inter-american-court-of-human-rights-found-argentina-guilty-and-ruled-in-favor-of-the-indigenous-communities-of-salta/ (last accessed on Feb. 28, 2021).

The IACommission declared the petition admissible in 2006. Attempts to mediate the dispute and to enforce the recommendations issued by the IACommission in 2012 have been unsuccessful. Argentina failed to comply with the recommendations contained in its January 2012 merits report, in which the Commission found Argentina responsible for violating the victims' rights to property, judicial protection, and access to information, and recommended measures to compensate the victims.[5]

Eventually, the case was referred to the IACtHR on February 1, 2018. The 132 indigenous communities as part of the Lhaka Honhat Association claimed communal ownership of about 643,000 hectares of land near Argentina's border with Paraguay and Bolivia.[6]

The Lhaka Honhat association claimed the alleged violation of their rights to cultural identity, adequate food (and water) and a healthy environment, derived from the state's knowledge and inaction upon illegal deforestation, cattle raising and installation of wiring around the community's area by private parties; especially, the indigenous plaintiffs claimed that their land had been occupied by other settlers with the state constructing an international bridge without prior consultation.[7]

C. The decision in detail[8]

The Court investigated the right to community property under Article 21 of the American Convention, and rights to cultural identity, a healthy environment, and adequate access to food and water under Article 26 American Convention.[9]

5 Press Release, IACHR brings Argentina case before the IACourt, Feb. 23, 2018, https://www.oas.org/en/iachr/media_center/PReleases/2018/035.asp (last accessed on Feb. 28, 2021).

6 *IACtHR*, l.c. (note 1), paras. 28, 47.

7 *IACtHR*, l.c. (note 1), para. 23 and para. 186.

8 For the case see l.c., note 1; cf. *CELS*, The Inter-American Court of Human Rights found Argentina guilty and ruled in favor of the indigenous communities of Salta, note 4; cf. Indigenous peoples major group for sustainable development, Inter-American Court condemns Argentina over indigenous rights, https://indigenouspeoples-sdg.org/index.php/english/ttt/1330-inter-american-court-condemns-argentina-over-indigenous-rights (last accessed on Feb. 28, 2021); cf. in detail: Inter-American Court decides first environmental rights case against Argentina, April 8, 2020, https://ijrcenter.org/2020/04/08/inter-american-court-decides-first-environmental-rights-case-against-argentina/ (last accessed on Feb. 28, 2021), e.g. IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, judgment of June 27, 2012, series C No. 245, that affirmed the right to free, prior, and informed consent for indigenous communities where development on their traditional lands may affect the use and enjoyment of their lands. Concerning articles 21, 25 of the ACHR see IACtHR, *Saramaka People v. Suriname*, Preliminary Objections, Merits, Costs, and Reparations. Judgment of Nov. 28, 2007, series C No. 172, the first binding international decision that recognized the right to natural resources located within the territory of an indigenous or tribal group.

9 Furthermore, rights to judicial protection and due process under articles 25 and 8 (*IACtHR,* l.c. (note 1), para. 91).

I. The ruling in Lhaka Honhat

1. Right to communal property title

The February 2020 ruling states that communities from the Rivadavia Department of the province of Salta, Argentina, the Wichí (Mataco), Iyjwaja (Chorote), Komlek (Toba), Niwackle (Chulupí) and Tapy'y (Tapiete), are entitled to their ancestral land in Northern Salta province. The Court stated a constant indigenous presence of the indigenous communities in Argentina that are part of the Lhaka Honhat (Our Land) Association, established in the area at least since 1629.[10]

The Court held that the indigenous communities have a right to a unique communal property title for the 400,000 hectares they inhabit and established deadlines for compliance.

Concerning the question whether the Argentine state had violated the right to community property (Article 21 of the American Convention)[11] the Court decided that the indigenous communities have a right to a unique communal property title for 400,000 hectares they inhabit, it established deadlines for compliance. The ruling held that the state violated community property rights by not granting legal security to the original inhabitants and allowing the presence of non-indigenous settlers to be maintained. The Court stressed that the indigenous communities have been claiming their property rights over their land for more than 28 years without the state attending to their demands.[12] Argentina would not have the right norms to guarantee communal property rights as practised by the indigenous peoples.[13]

The decision determines the failure to implement proper mechanisms to guarantee the right to collective ancestral land property, not having presented a deed to the property for the association and absence of the previous consultation with the communities on modifying their territory. Particularly, there have not been the necessary mechanisms for consulting the mentioned indigenous communities before constructing an international bridge in their territory. [14]

2. Indigenous communities' rights a healthy environment, to food, access to water, and the right to cultural identity

The Court identified autonomous rights that can be derived from Article 26.[15] The Court amplified states' obligations with respect to the autonomous right to a healthy environment.

10 *IACtHR*, ibid., para. 49.
11 *IACtHR*, ibid., para. 114.
12 *IACtHR*, ibid., paras. 136-137, 166.
13 *IACtHR*, ibid., paras. 167-168.
14 *IACtHR*, ibid., paras. 183-185.
15 *IACtHR*, ibid., para. 196.

It determined the right to a healthy environment could be derived from Article 26 in its Advisory Opinion OC-23/17.[16] According to the Advisory Opinion states have an obligation to prevent environmental harms and, when it is not possible to prevent the harm, to implement measures that will restore the situation to how it existed before the harm was done.[17] The court stated that illegal forestry, cattle-rearing and the installation of barbed wire on the part of the non-indigenous settlers affected environmental assets since the early 1900s.[18]

Similarly, the Court concluded that the rights to food and access to water can be derived from Article 26 and that States have an obligation to respect and guarantee the right to food, as well as to prevent third parties from interfering with it.[19] Futhermore, states have an obligation to guarantee access to water, both by guaranteeing the progressive realization of this right and implementing immediate measures to ensure that access to water is provided in a non-discriminatory manner.[20]

In addition, the Court established that States have an obligation to adopt measures and policies to ensure that all persons are able to exercise the right to cultural identity, as well as measures to protect this right and prevent third-party interference.[21] The Court stated that activities of the non-indigenous ("Creole") settlers on the territory, mainly their use of livestock, illegal logging, and barbed-wire fencing, altered the indigenous way of life and their cultural identity.[22] The changes in the community's lifestyle and cultural identity are the consequence of the interference of these foreign activity on their territory. This impairment interferes with the traditional feeding patterns of the hunter-gatherer peoples and on their access to clean water. While the State was aware of the activities and implemented measures to stop some of them, the Court concluded that the illegal logging continues and the barbed-wire fences still exist.[23] Argentina had failed to implement measures to stop this illegal logging and other harmful activities in the indigenous territory, which had altered the indigenous way of life and damaged their cultural identity.

Therefore, the Court determined that the State measures have been ineffective in preventing these activities from causing harm to the indigenous communities, and held that the

16 *IACtHR*, ibid., para. 203. *IACtHR*, environment and human rights, advisory opinion OC-23/17 of Nov. 15, 2017, requested by the Republic of Colombia, Official summary issued by the Inter-American Court, pp.2-3 (I.), http://www.corteidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf (last accessed on Feb. 28, 2021).

17 *IACtHR*, ibid., para. 208.

18 *IACtHR*, ibid., paras. 36, 51-52.

19 *IACtHR*, ibid., para. 221, drawing on regional and universal human rights standards.

20 *IACtHR*, ibid., paras. 229-230.

21 *IACtHR*, ibid., para. 242.

22 *IACtHR*, ibid., paras. 257, 262, 266.

23 *IACtHR*, ibid., paras. 267-271.

State failed to guarantee the indigenous communities' rights to a healthy environment, cultural identity, food, and water under Article 26.[24]

II. The main issues in detail: autonomous right to a healthy environment and direct justiciability of Art. 26 ACHR

The two main issues in the Lhaka Honhat case, the direct justiciability of Artikel 26 ACHR and the autonomous existence of the right to a healthy environment, demand a more detailed analysis of the reasoning offered by the IACourt.

1. Lagos del Campo vs. Peru: direct judicial enforceability of ESCR under Article 26

As stated in Lhaka Honhat[25], since the Lagos del Campo vs. Peru judgment (2017) the majority position of the IACtHR has established the tribunal's jurisdiction to declare the direct violation of Article 26: It is the first decision delivered by the IACtHR that introduced the direct judicial enforceability of economic, social and cultural rights under Article 26 of the ACHR.[26] Before Lagos del Campo, the Court considered Article 26 judicially enforceable only indirectly or by connection, in relation to certain civil and political rights protected in the ACHR: The Court had applied a vague 'duty of progressive realization' to independent Economic, Social, and Cultural Rights (ESCR) claims under Article 26 of the ACHR, which led the Court to reject all such claims argued before it as 'non-justiciable', and therefore privileged the assessment of certain human rights over others. "Lagos del Campo" demonstrates a significant shift by the IACourt in its determination of state responsibility for ESCR violations.[27] Moreover, it strengthens the global recognition of ESCR more broadly. It will facilitate the formulation of adequate public policies and establish regional standards and guidelines for their effective enjoyment and realization, especially with regard to the most vulnerable populations." [28]

24 *IACtHR*, ibid., paras. 286-289.

25 See e.g. concurring opinion of Judge *Freire*, *IACtHR*, l.c. (note 1), p. 127.

26 *Case of Lagos del Campo v. Peru*, judgment of Aug. 31, 2017, series C No. 340. Cf. *Angel Cabrera / Daniel Cerqueira / Salvador Herencia-Carrasco*, Remarks on the judgment of the Inter-American Court in the Lhaka Honhat vs. Argentina case, July 29, 2020, Justicia en las Américas, https://dplfblog.com/2020/07/29/remarks-on-the-judgment-of-the-inter-american-court-in-the-lhaka-honhat-vs-argentina-case/ (last accessed on Feb. 28, 2021); cf. *ESCR-net*, Lagos del Campo vs Peru, Case No. 12.795, Judgment of 31 Aug. 2017, https://www.escr-net.org/caselaw/2018/lagos-del-campo-vs-peru-case-no-12795-judgment-31-august-2017-preliminary-objections (last accessed on Feb. 28, 2021).

27 *OAS*, The Special Rapporteurship on ESCER welcomes the historic decision of the Inter-American Court on Human Rights on Justiciability in Matters of ESCR, 15 Nov. 2017, http://www.oas.org/en/iachr/media_center/PReleases/2017/181.asp (https://www.escr-net.org/node/408465), both last accessed on Feb. 28, 2021).

28 *OAS*, ibid.

There has been much debate regarding the direct enforceability of ESCR as autonomous rights. By overcoming politically constructed categories of human rights that historically led to different legal assessment standards, „Lagos del Campo“ advances a consolidated vision of an integrated approach to human rights protection.[29]

2. Internal debate on the justiciability of ESCR in Lhaka Honhat[30]

In Lhaka Honhat, the issue of direct enforceability of Economic, Social, and Cultural Rights remained contested inside the IACtHR. There are separate opinions covering all ranges of the spectrum. Judge Ferrer MacGregor fully supported the decision to declare state responsibility for violations of ESCR. Some of the dissenting judges (Vio Grossi and Sierra Porto) argued that the innovation of the direct justiciability of ESCR derives in legal uncertainty, as states could not anticipate or defend from possible violations to article 26 for which they might be found responsible by the IACtHR. Furthermore, an intermediate approach by Judge Pérez Manrique recommended that the Court should have found a simultaneous violation of civil and political rights and article 26 related to the implicit ESCR, based on the interrelation and indivisibility of human rights.

Part of the criticism by Judge Grossi to the majority opinion argued that evolutive interpretation contravened the rules of interpretation of the Vienna Convention on the Law of Treaties. While recognizing the relevance of ESCR, Grossi asserts that under the text of the American Convention, the Court's jurisdiction is limited to declare the violation of civil and political rights. Similarly, Judge Sierra recalled that in *Hernández v. Argentina* on 2019.[31]

3. The autonomous existence of the right to a healthy environment

For the first time, in Lhaka Honhat (2020), the IACtHR found state responsibility for violations of the right to a healthy environment, adequate food, water and cultural identity. Such responsibility was based on Article 26 of the ACHR concerning the duties of states to carry out progressive developments towards the "full realization of the rights *implicit* in the economic, social, educational, scientific, and cultural standards" recognized in the Charter of the Organization of American States (OAS). [32]

29 *OAS,* ibid.

30 Cf. *Paolo Patarroyo,* Justiciability of 'implicit' rights: Developments on the right to a healthy environment at the Inter-American Court of Human Rights, May 11, 2020, https://www.ejiltalk.org/justiciability-of-implicit-rights-developments-on-the-right-to-a-healthy-environment-at-the-inter-american-court-of-human-rights/ (last accessed on Feb. 28, 2021).

31 The Court found Argentina responsible for the violation of article 26 in conjunction with the right to personal integrity (article 5.1 of the ACHR), and not on an independent basis as it did in *Lhaka Honhat*.

32 *IACtHR*, ibid., para. 196. Cf. *Patarroyo*, note 30; cf. *Cabrera et al.*, ibid., note 26.

In the Lhaka Honhat case, the Court repeats its position by declaring that "the right to a healthy environment must be considered as included among the rights (…) protected by Article 26 of the American Convention, given the obligation of States to achieve the integral development of their peoples, which arises from Articles 30, 31, 33 and 34 of the Charter".[33]

Back in 2018, the IACtHR issued Advisory Opinion 23 concerning the protection of environmental rights, referring to the relevance of the right to a healthy environment. Here the Court had set the basis for an autonomous right for the protection of the environment. The Advisory Opinion referred to the importance of environmental protection as part of the duties to protect and guarantee the rights to life and personal integrity, in the context of the marine environment in the Greater Caribbean region. The Court indicated that the right to a healthy environment had a basis in the Protocol of San Salvador on ESCR and in Article 26 of the American Convention.

Without prejudice of the general obligation to *progressively* adopt measures to achieve full effectivity of ESCR, the Court determined in Lhaka Honhat, that some aspects merit immediate justiciability in relation to the duties to respect and guarantee the ESCR pursuant to the American Convention.[34]

In particular, the analysis referred to the state obligations under the precautionary principle, to exercise due diligence before the occurrence of environmental damage which may preclude the restoration of the previous conditions. Among such measures the Court pointed out to the duties to (i) regulate, (ii) supervise, (iii) require and approve environmental impact assessments, (iv) establish contingency plans, and (v) mitigate when environmental damage has taken place.[35]

The Court noted that Argentina knew of the activities impacting the life of the indigenous communities and adopted actions. However, such state action had not been effective to stop the harmful activities, and prevented the communities from making decisions over the activities carried out in their ancestral territory and from maintaining their way of life.[36] Therefore, the IACtHR in Lhaka Honhat declared that Argentina was internationally responsible for the violation of the rights of the indigenous communities to participate in cultural life, to a healthy environment, adequate food and included *iura novit curia*, the right to water, under Article 26 of the ACHR. [37]

33 IACtHR, ibid., para. 202; cf. *Cabrera et al*., ibid.: "In *OC-23/17*, the IACtHR (… highlights) the connection between the environment and integral development (expressly enshrined in the OAS Charter)".

34 *IACtHR*, ibid., para. 272, cf. *Patarroyo*, note 30.

35 *IACtHR*, ibid., para. 208, cf. *Patarroyo*, ibid.

36 *IACtHR*, ibid., para. 287.

37 *IACtHR*, ibid., para. 196; cf. *Cabrera et al*., note 26; cf. *Patarroyo*, note 30.

D. Court order

The Argentine State is required to take specific action on the mentioned issues, especially since many indigenous people have died of hunger and dehydration on the respective land.

The state is ordered to cede an undivided deed to 4000 km2 of ancestral territory to the indigenous Lhaka Honhat Association, among other reparations: The decision establishes that within a period of a maximum of six years, the state must limit and mark the land for which it will then concede a single deed to the undivided territory for the concerned indigenous communities, ensure the relocation of the descendants of European immigrants encouraging voluntary departure, remove all fences and cattle belonging to them, among other obligations.

Regarding food, water, environment, and cultural identity, in its sentence judgement the Court ordered Argentina to present a report identifying the obstacles and critical situations with which the indigenous population is faced, especially where there is a lack of access to drinking water or food within the territory. A plan and timeframe to correct the obstacles and critical situations has to be implemented within six months of this judgment.[38] The fences and the cattle belonging to non-indigenous (Creole) people have to be removed from the indigenous territory. A transfer of the Creole residents to an area outside of the indigenous territory has to happen within six years.

This plan of action will be elaborated in dialogue with the communities. Its implementation will be immediate from its presentation.[39] Additionally, a community development fund has to be created and implemented within four years.[40]

Necessary legislative measures and policies have to be adopted to give legal certainty to the indigenous communities' community property rights. Finally, Argentina has to pay $50,000 for legal costs and expenses within six months of the judgment.[41]

E. Critical appraisal and considerations

Despite its positive outcome (the protection of environmental rights as directly justiciable), in face of indigenous people dying of hunger and suffering dehydration this conflict lasted for too long. Although, unfortunately, such lengthy proceedings happen quite often in the IASystem, for the number and complexity of petitions filed with the IACHR has steadily

38 *IACtHR*, ibid., para. 332, cf. *Patarroyo*, note 30.

39 In detail *IACtHR*, ibid., paras 122, 123; cf. Inter-American Court decides first environmental rights case against Argentina, April 8, 2020, l.c. (note 8); cf. *CELS*, l.c. (note 4) and Art. 19 UNDRIP.

40 As compensation for the damage to the cultural identity of the communities in relation to natural resources and food, the Court ordered the creation of a USD$2 million fund for actions directed to the recovery of indigenous culture, including programs concerning food safety, teaching or sharing of the history of the affected communities (*IACtHR*, ibid., para. 339, cf. *Patarroyo*, note 30).

41 *IACtHR*, ibid., para 122-123; cf. for reparations e.g. Inter-American Court decides first environmental rights case against Argentina, April 8, 2020, l.c. (note 8).

grown.[42] The number of cases and petitions processed had progressively escalated as a result of progress in the consolidation of democracy in the Hemisphere and increased participation and awareness among users of this system.[43] With limited resources allocated by the OAS, this situation has resulted in a "considerable workload for the IACHR, which affects the prompt and efficient processing of cases, particularly in terms of (..) procedural delays (..)."[44] It is a positive development, that a special OAS Working Group was introduced to strengthen the IASystem.[45]

After more than 20 years of litigation, the IACtHR granted a historic victory to the indigenous communities of Lhaka Honhat. The Lhaka Honhat decision can be intergrated in the context of indigenous peoples' rights to self-determination and development. It is the first indigenous land rights case against Argentina before the IACourt and provided the Court with the opportunity to rule for the first time on the autonomous rights to a healthy environment, cultural identity, food, and water.

The ruling is highly significant because it expands and builds on the scope of economic, social and cultural rights protection under the American Convention, and the Court's `Advisory Opinion on the Right to a Healthy Environment´[46]. In conformity with *Dominguez*[47], the judgment breaks new ground on these issues, for it held that by failing to adequately protect and title indigenous lands, Argentina violated their right to a healthy environment, water, food and cultural identity. Consequently, the IACourt's assessment establishes that these rights are protected under and can be applied through Article 26 of the ACHR, which enshrines the right to economic, social and cultural development. In addition, this case is important for it builds on the Court's 2017 Advisory Opinion in relation to the environment and human rights, in which the IACourt recognized the "autonomous" right to a healthy environment under Article 26 of the ACHR, finally emphasizing that this right should not only be considered a component of other substantive human rights. Moreover, the court deci-

42 *Ariel Dulitzky,* Too Little, Too Late: The Pace of Adjudication of the Inter-American Commission on Human Rights, 35 Loy. L.A. Int'l & Comp. L. Rev. 131 (2013), p. 2.

43 *OAS*, Permanent Counsel, Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-American Human Rights System for consideration by the Permanent Council, 11, GT/SIDH/13/11/rev. 2.

44 "The IACHR has introduced various reforms to its internal practices and Rules of Procedure to deal with the new influx of complaints. Nevertheless, there is a growing backlog and the length of adjudication has reached an unacceptable point. Some progress exists, but States and petitioners still experience long wait times before receiving a decision from the IACHR on the merits of a case." (*Dulitzky*, ibid., note 42).

45 *OAS*, Permanent Counsel, Report (…), ibid., note 43.

46 *IACtHR*, Environment and Human Rights, Advisory Opinion OC-23/17 of Nov. 15, 2017, l.c. (note 16).

47 Similar: *Dominguez*, l.c., note 2.

sion is up to date by stressing the indeniable interdependence and indivisibility between human rights, the environment and sustainable development.[48]

According to *Patarroyo*[49], the Court's discussion concerning its power to decide over violations of 'implicit' ESCR under the American Convention supports the development of the relationship between the protection of the environment and human rights, and their direct justiciability. Obviously, in Lhaka Honhat the Court includes environmental law elements such as the precautionary principle and due diligence while assessing state conduct in the performance of the duty to guarantee the protection of human rights from the conduct of third parties.

In agreement with *Cabrera et al.*[50], one can state that since the IACtHR introduced its new line of jurisprudence in the Lagos del Campo case, its reasoning has commuted between greater and lesser argumentative accuracy, with repeated divergences within the court itself, regarding the competence to declare direct violation of Art. 26 of the ACHR. In Lhaka Honhat, the Court could have been more precise in justifying, for instance, the inclusion of the right to water in the catalogue of autonomous and justiciable rights.

However, while in *Advisory Opinion OC-23/17* the IACtHR established general standards on the principle of prevention in environmental matters, Lhaka Honhat evaluates more explicitly its non-compliance in the framework of a contentious case.[51]

Another important development concerns the "inter-Americanization" of Principle 22 of the Rio Declaration, which recognizes the central role of indigenous peoples "in environmental management and development because of their traditional knowledge and practices".[52]

Beyond that, in agreement with *Patarroyo*[53], despite the findings of responsibility based on the evolutive interpretation of the American Convention, the reparations ordered resemble cases where in relation to the violation of the right to a healthy environment no separate finding of state responsibility occurred. It is plausible that in future, the IACtHR could contribute to urgent issues on the reparations for environmental damages, such as analyzing the methods to calculate pecuniary compensation, assessing when the harm to the environment may impact the enjoyment of rights by future generations and formulating other forms of reparation such as guarantees of non-repetition.

48 See *IACtHR*, Environment and Human Rights, Advisory Opinion *OC-23/17* of Nov. 15, 2017, cf. (note 16), p.2: rights especially related to the environment are classified in two groups: substantive and procedural rights, p.3: "states´ substantive and procedural obligations regarding environmental protection". Cf. Inter-American Court decides first environmental rights case against Argentina, April 8, 2020, l.c. (note 8).

49 *Patarroyo*, note 30.

50 *Cabrera et al.*, note 26.

51 *IACtHR*, ibid., paras 202-209, esp. para. 207.

52 *IACtHR*, ibid., para. 250; cf. *Cabrera et al*., note 26.

53 *Patarroyo*, note 30.

Nevertheless, an important contribution of the verdict relates to reparation measures: In deciding on the obligation to restore the territory of the communities declared as victims, the Court assesses the complexity of relocating hundreds of non-indigenous people whose interests will be directly affected. The ruling establishes different timeframes for each of the restitution measures, with guidelines on how the Argentine State should proceed to minimize the impact on the Creole population in indigenous territory. A considerable number of peasants who are covered by the"UN Declaration on the Rights of Peasants and Workers in Rural Areas", adopted by the UN General Assembly in 2018, are affected. This implies the need to recognize the duties that the State has towards numerous Creole families who are also in a vulnerable situation, particularly given that their rights could be concerned when implementing the reparations ordered. Lhaka Honhat sets a significant precedent in terms of the restitution of indigenous lands. The Court upheld the centrality of indigenous lands to their cultural integrity and survival, determining a way forward in cases where large non-indigenous settler populations have gradually encroached on indigenous territories, infringing on their economic, social and cultural rights in the process.[54]

In addition, that the IACtHR ordered the Argentine state to establish a community development fund for the communities that make up the Lhaka Honhat Association is in line with previous cases. However, it establishes, for the first time, that the main purpose of this fund must be to "repair the damage to cultural identity" before specifying that it also serves as "compensation for material and immaterial damage". Moreover, in the Lhaka Honhat case, the IACtHR specified that the development fund should be used for "the recovery of indigenous culture, including (…) programmes relating to food security and the documentation, teaching or dissemination of the history of the traditions of the indigenous communities that are victims".[55] Though, the operation of the development fund will have to overcome the challenge of creating a Committee where the 132 indigenous communities are represented and benefit from it.

Furthermore, the IACourt definitely takes a new direction with respect to the basis of the right to consultation, but - in agreement with *Moerloose/de Casas* - it missed out the opportunity to differentiate consultation from consent.[56] With convincing rationale it is called "a historical judgment, with old established jurisprudence regarding property rights, and innovative in some respects with respect to consultation rights, but which lacks the expected clarification on consent."[57]

54 *Dominguez*, l.c., note 2.

55 *IACtHR*, ibid., para. 339, based on *Xaxmok Casek*, *Yakye Axa* and *Sawhoyamaxa*.

56 *IACtHR*, ibid., paras. 179, 181 (provicial route and bridge works). Of this opnion : *Stéphanie De Moerloose / C. Ignacio de Casas*, The Lhaka Honhat Case of the IACtHR: The Long-awaited granting of 400,000 hectares under communal property rights, Eur. Journal of Intern. Law blog, July 16, 2020, https://www.ejiltalk.org/the-lhaka-honhat-case-of-the-inter-american-court-of-human-rights-the-long-awaited-granting-of-400000-hectares-under-communal-property-rights/ (last accessed on Feb. 28, 2021).

57 *De Moerloose/de Casas*, ibid.

It is true that the Court missed the occasion to differentiate consultation from consent. Though, a State duty to consult exists, and, in specific cases, to obtain indigenous peoples' consent in respect to plans or projects for investment, development or exploitation of natural resources in ancestral territories".[58] It is beyond dispute, that this duty to obtain consent is a limited one, not least because the distinction between consultation and consent depends upon the scale of the project[59] and has never been quite clear until now. Because the maintenance work on a route adresssed to in the Lhaka Honhat case did not require consultation and the building of a bridge did not satisfy the preliminary obligation to consult, (so that the Court found it unnecessary to make specific reference to the requirement of consent,) it was unfortunate but a consequent decision by the Court in Lhaka Honhat, that the difference between "consultation" and "consent" requires no further analysis in *this* context.

Finally, this judgment creates the chance for a more expansive reading of the scope of protection under Article 26 for future plaintiffs,[60] not only in Argentina. "*Lhaka Honhat v. Argentina*" seems to be as important as the famous Awas Tingni decision of 2001[61] - the first time that the IACourt has issued a judgment in favor of the rights of indigenous peoples to their ancestral (collective) land. Like Awas Tingni, Lhaka Honhat can be called a landmark judgment - a further key precedent for defending indigenous rights in Latin America and a major step in the fight against the historical and ongoing subjugation of indigenous peoples in the region.

Countries like Brazil, highly discussed because of massive fires in the Amazon rain forest and the noncompliance of indigenous land rights,[62] also have submitted to the jurisprudence of the IACtHR.[63] In face of the wide interpretation of Art. 26 of the ACHR by the IACourt specifically concerning a healthy environment and actions for the recovery of forest resources and indigenous culture this could have consequences for the Brazilian state in a future decision.

Unfortunately, in Argentina, the refusal to comply with international and constitutional obligations (recognition of indigenous land property, requirement of indigenous consulta-

58 *IACHR*, 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.56/0930, Dec. 2009), https://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf (last accessed on Feb. 28, 2021), paras. 289-290.

59 *IACtHR*, ibid., paras. 329-333, established by IACourt in *Saramaka v. Suriname,* Nov. 28, 2007, para. 134.

60 *Dominguez*, l.c., note 2.

61 *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*; cf. *Carstens*, *Margret*, Indigene Territorialrechte in Lateinamerika nach dem Awas Tingni-Urteil von 2001, VRÜ 3/2009, pp. 399-424.

62 Cf. *Margret Carstens*, Indigene Landrechte in Zeiten des Klimawandels und der Verhandlung um das Freihandelsabkommen Mercosur am Beispiel Brasilien, VRÜ/WCL, 2/2020, pp. 116-148.

63 Cf. *Hartmut-E. Kayser*, Die Rechte der indigenen Völker Brasiliens, historische Entwicklung und gegenwärtiger Stand, Aachen 2005, p. 412.

tion and consent)[64] has a longer tradition and prevents an effective implementation of the Lhaka Honhat decision.[65] The government of the province of Salta and the resource sector have no interest in the implementation of the decision. In light of indigenous peoples' demands that are reflected in international guidance on human rights and the environment, improvements in implementation are essentially needed.[66] Following *Moerloose/de Casas*,[67] the Lhaka Honhat judgment mentions duties that must be fulfilled by the national government. There are additional difficulties of international instruments' implementation in federal states, where provinces have different realities and interests. This may be reflected in the local reception of the Lhaka Honhat judgment. Although the lack of national regulation should not be an excuse for not implementing rights: The passage of laws regarding the recognition of the right to communal property is long overdue. Furthermore, a lack of the Rule of Law in the provincial government of Salta and its disrespect of human rights due to corruption prevent an adequate implementation of Lhaka Honhat.[68] According to *Chehtman*[69] „in practice domestic authorities have had a zigzagging attitude vis-à-vis the hierarchy and applicability of international human rights norms, particularly with respect to the decisions of the Inter-American Court of Human Rights." Convincingly, he highlights a „lack (of) an adequate model to regulate the specific terms of the relationship between domestic courts and their supranational counterparts." For "Argentina's Supreme Court has handed down (…) contradictory judgments on the obligation to implement the IACourt's decisions." These decisions show " the risks of resorting to the national court as a mecha-

64 Cf. *Silvina Ramírez*, Argentina: The continually postponed law on Indigenous communal ownership, in IWGIA, The Indigenous World (2020), pp. 343-349, p. 346-347: The law of indigenous communal ownership is envisaged in the Argentine Constitution (Art. 75 para 17). Parliamentary debate and the indigenous consultation on the bills of law are complex: There is no interest from the government in a law that permanently allocates territory to indigenous communities. Economic interests continue to have a powerful effect, it is unlikely that this "conflict of interest" will be resolved soon.

65 Enforcement according to national rules. Argentinia is obliged by the ACHR to effectively implement compensation measures. Aftermath of IACourt decision done exclusively by the IACourt.

66 Cf. *Pia Marchegiani* / *Elisa Morgera* / *Louisa Parks*, Indigenous peoples' rights to natural resources in Argentina: the challenges of impact assessment, consent and fair and equitable benefit-sharing in cases of lithium mining, The International Journal of Human Rights 24 (2020), pp. 224-240.

67 Cf. *De Moerloose / de Casas*, note 56. Cf. Justicia en las Américas, Remarks on the judgment of the IACourt in the Lhaka Honhat vs. Argentina case, July 29, 2020, https://dplfblog.com/2020/07/29/remarks-on-the-judgment-of-the-inter-american-court-in-the-lhaka-honhat-vs-argentina-case/ (last accessed on Feb. 28, 2021).

68 *De Moerloose / de Casas*, ibid.

69 *Alejandro Chehtman*, International Law and Constitutional Law in Latin America, in: Conrado Hübner Mendes / Roberto Gargarella (eds.), The Oxford Handbook of Constitutional Law in Latin America, Oxford 2021 (forthcoming).

nism for implementing judgments of the IACtHR."[70] Consequently, *Basch et al.* demand that „states should adopt formal mechanisms for the effective implementation of international decisions, establishing through constitutional, legal, or jurisprudential means their binding nature, and that they incorporate in public policy-making and in solving legal cases the standards developed by the Commission and the IACourt in the interpretation of the American Convention."[71] This would help with implementing Lhaka Honhat as well. Until then, maybe a treaty, geared to the decision, offers a speedy and adequate solution (perhaps similar to Australian land use agreements)?

70 *César Rodríguez Garavito / Celeste Kauffman*, Center for Studies of Law, Justice, and Society (Dejusticia), From Orders to Practice: Analysis and Strategies for Implementing Decisions of the Inter-American Human Rights System, The Inter-American Human Rights System, Washington DC 2016, pp. 249-284, p. 273.

71 *Fernando Basch*, The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions, SUR - International Journal on Human Rights 7 (2010), pp. 9-35, p. 30.