Inter-American Court of Human Rights’ Advisory Opinion on the Environment and Human Rights

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Introduction

On February 7, 2018, the Inter-American Court of Human Rights published a landmark Advisory Opinion on the Environment and Human Rights (Opinion).[1] Reaffirming that human rights depend on the existence of a healthy environment, the Court ruled that states must take measures to prevent significant environmental harm
to individuals inside—and outside—their territory. In other words, if pollution can travel across the border, so can legal responsibility. This *Insight* reviews briefly the background of the advisory proceeding before discussing its main implications.

**Background**

In March 2016, the Republic of Colombia asked the Court to clarify the scope of state responsibility for environmental harm under the American Convention on Human Rights (American Convention), specifically in light of the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena Convention) and customary international law.

Colombia's Request was likely motivated by a desire for greater legal certainty about possible ramifications of its planned offshore activities in the Caribbean Sea, as well as concerns about potential environmental degradation from its neighbors' new infrastructure projects and other actions (such as Nicaragua's construction of an inter-oceanic canal and offshore drilling after the International Court of Justice had redrawn the two states' boundary).

The Request elicited substantial interest in the region. Five states (Argentina, Bolivia, Guatemala, Panama, and Honduras) submitted written observations and/or participated in the March 2017 hearing, as did the Inter-American Commission on Human Rights and numerous non-state parties.

**Key Issues**

The advisory proceeding afforded the Court an opportunity to provide detailed guidance on the interaction of international human rights law (IHRL) and international environmental law (IEL). As discussed below, the Court (a) recognized for the first time the existence of a fundamental right to a healthy environment under the American Convention; (b) articulated a new test to determine the Convention's extraterritorial application in cases involving environmental harm; and (c) clarified the content of the duty to prevent transboundary environmental harm as a matter of human rights law. These principles could have significant implications for access to justice and establish additional bases for liability for transboundary environmental harm (including for climate-related injuries) in the Americas.

**The Right to a Healthy Environment**

First, the Court recognized the existence of an "autonomous" right to a healthy environment under the American Convention.

Faced with the problem of environmental degradation, Inter-American institutions had previously addressed this issue in terms of its impact on other human rights since the Convention does not refer expressly to the environment. The right to a healthy
environment is recognized in Article 11 of the Protocol of San Salvador (which currently has sixteen parties),[7] but that article is not enforceable through individual petitions.[8] In the Opinion, however, the Court found that the right to a healthy environment is encompassed by Article 26 of the American Convention (Progressive Development) and is further reflected in member states' constitutions and international instruments.[9] Two judges declined to join in this part, noting that any right to a healthy environment under Article 26 is not justiciable and not properly decided in this proceeding.[10]

The recognition of an independent right to a healthy environment (justiciable under Article 26) could open the door to new categories of claims in the Inter-American system. Claimants have already been able to seek remedies for a range of other rights affected by environmental degradation.[11] But, unlike other rights, the right to a healthy environment protects the environment per se. Forests, rivers, and seas, the Court explained, constitute protected juridical interests in themselves,[12] as a Colombian court recently established in relation to the Amazon.[13] This means that harm to the environment could potentially be justiciable—even absent evidence of harm to individuals[14] (a requirement that has led to the dismissal of environment-related claims in other cases[15]).

Extraterritorial Scope of the American Convention

Second, the Court clarified the extraterritorial scope of the American Convention in environmental matters.

Most human rights treaties, including the American Convention, contain jurisdictional limits, which restrict the scope of state obligations to persons subject to their "jurisdiction" and/or within their "territory." Thus, the threshold issue was whether the term "jurisdiction" in Article 1(1) of the American Convention—which obligates states parties "to respect the rights and freedoms recognized [in the Convention] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms"—could encompass extraterritorial obligations relating to environmental harm.

This was a question of first impression for the Court. Prior to this Opinion, no human rights tribunal had considered the issue of transboundary environmental harm. In other contexts, however, tribunals have interpreted the outer limits of human rights treaties narrowly: they have generally required evidence of (a) "effective control" over a foreign territory or (b) control over a particular person by state agents acting abroad. That case law—with some notable exceptions—would preclude claims of transboundary environmental harm.[16]
Here, the Court established that the term "jurisdiction" encompasses any situation in which a state exercises "authority" over a person or subjects the person to its "effective control," whether within or outside its territory. The Court went on to explain that the term "jurisdiction" can embrace activities within a state that cause cross-border effects, noting that states have a duty to prevent transboundary environmental damage that could impair the rights of persons outside their territory. Therefore, in case of transboundary environmental harm, a person will be deemed to be subject to the "jurisdiction" of the state in which the harm originates if there is a "causal relationship" between the polluting activities in the state's territory and the cross-border impact on rights. The exercise of jurisdiction arises, the Court explained, because the state has effective control over the activities that caused the damage and is in a position to prevent harm.

The Court thus essentially redefined the "effective control" test, which in the Inter-American context now looks to the state's control over the domestic activities in question (as understood in IEL) rather than control over a person or territory (the usual understanding of "effective control" in IHRL).

The finding that states can be responsible under the American Convention for a failure to prevent transboundary environmental harm has potentially sweeping implications. The Court, however, emphasized that the exercise of extraterritorial jurisdiction is "exceptional" and must be interpreted on a case-by-case basis. The precise contours of states' extraterritorial obligations will be developed in concrete cases—and will significantly depend on the legal context (such as applicable IEL obligations).

**Duty to Prevent Transboundary Harm**

Third, the Opinion made clear that, in the context of transboundary environmental harm, duties to "respect" and "ensure" the rights to life and personal integrity (the focus of Columbia's Request) must be interpreted in the light of IEL. The Court emphasized in particular the importance of (1) the duty to prevent environmental harm, (2) the precautionary principle, (3) the duty to cooperate with potentially affected states, and (4) procedural environmental rights. While these elements are well established in IEL, the Opinion provides guidance on their application in the Inter-American human rights system.

**Duty to Prevent**

The Court reiterated that States have a duty to prevent "significant" harm to the environment of other States or the global commons. States must, at a minimum, regulate, supervise, and monitor activities under their jurisdiction that could cause significant harm to the environment; carry out environmental impact assessments
(EIAs); prepare contingency plans to minimize the possibility of environmental
disasters; and mitigate any significant harm to the environment, in line with the best
available science.

State responsibility, as the Court acknowledged, is not limitless.[25] For example,
drawing on the ILC's Draft Articles on Prevention of Transboundary Harm from
Hazardous Activities, the Court explained that international responsibility would
attach if the state (a) knew, or should have known, that there was a real and
immediate risk to protected rights (e.g., the right to life), and failed to take the
necessary measures that would have been reasonably expected to prevent such risk,
and (b) if there is a causal link between the significant harm to the environment and
the human rights impacts.[26]

**Precautionary Principle**

The status of the precautionary principle in international law may be contested, but
the Court found sufficient evidence to conclude that this principle is relevant in
determining whether a state has complied with its duties under the American
Convention.[27] The Court underscored that the duty to ensure the rights to life and
personal integrity implies a duty to act with due diligence. Thus, states must act in
accordance with the precautionary principle, even in the absence of scientific
certainty, and adopt measures to prevent serious or irreversible damage to the
environment.

**Duty to Cooperate**

The Court also found that the general duty to cooperate with the potentially affected
states in case of transboundary environmental harm (including the related obligations
of notification, consultation, and information-sharing) remains applicable under the
American Convention.[28] Specifically, states must cooperate, in good faith, to
protect against environmental damage and to protect the rights of persons under
their jurisdiction.

**Procedural Environmental Rights**

Finally, the Court reaffirmed that procedural environmental rights—access to
information, public participation, and justice—are fundamental for the fulfillment of
other rights in the American Convention.[29] The Court had previously found that
Article 13 of the Convention requires states to grant access to information relating to
activities that might harm the environment. It now also noted that states have a duty
under Article 23(1)(a) to ensure the public's right to participate in decisions that might
affect the environment, as well as a duty under Articles 8(1) and 25 to ensure the
public's access to justice in environmental matters.
In delineating these rights, the Court took a step toward embedding Principle 10 of the Rio Declaration in the Inter-American system and lent express support to efforts to enshrine procedural environmental rights in a new regional agreement for Latin America and the Caribbean.[30]

Implementing procedural rights in a cross-border context (and enabling affected individuals to take part in foreign proceedings) will be challenging. Nonetheless, states are expected to provide non-discriminatory treatment to persons affected by transboundary environmental harm.[31]

Conclusions

Many central elements of the Opinion—including the nature of the requisite causal nexus, the level of due diligence, and the scope of extraterritorial duties—remain to be clarified in future litigation. However, the Opinion will likely have significant implications. First, it may influence how mega-infrastructure projects in the Americas, including offshore platforms, dams, and cross-border pipelines, are approved, monitored, and executed. Second, it may open the door to transboundary climate litigation. The Court expressly recognized the adverse impact of climate change on human rights, and its new test for extraterritoriality is sufficiently broad to encompass climate-related harms (assuming there is sufficient causal nexus and evidence that a state failed in its duty of due diligence).[32] Third, the Court noted that states are increasingly expected to regulate activities of its enterprises abroad, potentially hinting at a higher standard for multinational companies operating in the Americas. [33] Finally, the Court’s Opinion could shape the practice of other human rights tribunals and national courts.

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[8] Id. art. 19(6)–(7).


[16] Cf. Advisory Opinion, supra note 1, ¶¶ 79–80. However, a line of human rights decisions focusing on direct effects would permit courts to hear transboundary environmental claims. See Maria L. Banda, Regime Congruence: Rethinking the Scope of State Responsibility for Transboundary Environmental Harm, 103 Minn. L. R. __ (2018).

[17] Id. ¶ 81.

[18] Id. ¶¶ 81, 95, 101.

See id. ¶ 102.

[21] Id. ¶¶ 81–82, 93.

[22] Id. ¶¶ 115–116. Other rights may trigger the same obligations. Id. ¶ 243.

[23] While Colombia's Request focused specifically on the Wider Caribbean Region, the Court discussed general obligations applicable to all States. See id. ¶ 126.


[25] Id. ¶ 119.

[26] Id. ¶ 120.

[27] Id. ¶¶ 175–80.

[28] Id. ¶¶ 181–209.

[29] Id. ¶¶ 211–41.


[31] See Advisory Opinion, supra note 1, ¶¶ 231, 238–240.

[32] The Court (unlike the Commission) has not yet heard any climate-related petitions.

[33] Advisory Opinion, supra note 1, ¶¶ 151, 155.
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