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

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1. – On 14 March 2016, Colombia filed a request for an advisory opinion before the Inter-American Court of Human Rights (the Court or IACtHR) concerning the obligations of State Parties to the American Convention on Human Rights (ACHR), in respect of infrastructural works creating a risk of significant environmental damage to the marine environment of the Wider Caribbean Region. On 7 February 2018, the Court issued an advisory opinion (AO) where for the first time, it developed the content of the right to a healthy environment. For the first time also, the Court addressed the conditions allowing the ACHR to apply extraterritorially in cases of transboundary environmental damage. This commentary seeks to promote the study and analysis of the AO, by presenting and commenting on the main findings of the Court.

2. – In its original terms, Colombia's request read as follows:

> I. In accordance with Article 1.1 of the [ACHR], should it be considered that a person, although not located within the territory of a State party, is subject to its jurisdiction where the following four conditions are cumulatively met?
> 1) The person is present or resides in an area defined and protected by a conventional regime for the protection of the environment to which the relevant State is a party;
> 2) That the said regime establishes an area of functional jurisdiction, for example, as envisaged in the [Cartagena Convention];
> 3) That in the said jurisdictional area the States parties have the obligation to prevent, reduce and control pollution through a series of general and/or specific obligations; and
> 4) That as a result of the environmental damage or risk of environmental damage in the area protected by the relevant treaty, which is attributable to the State who is party to both that treaty and to the [ACHR], the human rights of the affected person had been breached or risk being breached.
> II. Are measures and conduct that through the action or omission of a State party have effects which are capable of causing grave damage to the marine environment, compatible with the obligations enshrined in articles 4.1 and 5.1, read in light of article 1.1 of the [ACHR] or any other provision therein, in light of the fact that the environment is a framework and an indispensable

> source for the livelihood of the inhabitants of the coasts and/or islands of the other State party?
> III. Should we interpret, and if yes to what extent, the obligations to respect and ensure human rights and liberties set out in article 4.1 and 5.1 of the [ACHR], as providing for an obligation on State parties to respect international environmental norms that seek to prevent environmental damage which is capable of limiting or impairing the effective enjoyment of the right to life and physical integrity, and that one of the ways to comply with the said obligation is through an environmental impact assessment in an area protected under international law and through cooperation with the affected states? If applicable, which general parameters should be considered in carrying out environmental impact assessments in the Wider Caribbean Region?

As can be seen, Colombia's requests were limited to the jurisdictional area established by the 1984 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena Convention). Against these explicit conditions, and in conformity with its previous case-law, the Court stated that in light of the general interest attached to its advisory opinions, attempts to limit its advisory function to a State or group of States could not proceed. The Court also recalled that its advisory function plays a preventive role in the Inter-American System for the Protection of Human Rights (Inter-American System) and should be observed as guidance in the interpretation and application of the Convention, not only by State parties to it, but also by all State Members to the Organization of American States (§§ 29-31).

With respect to the particular subject-matter of the request submitted by Colombia, the Court asserted:

> The questions presented in the request go beyond the interest of the States parties to the Cartagena Convention and are of relevance for all States in the planet. Therefore, this Tribunal considers that it is not appropriate to limit its answer to the scope of application of the Cartagena Convention. Furthermore, taking into consideration the relevance of the environment as a whole for the protection of human rights, it is neither appropriate to limit its answer to the marine environment. In this Opinion, *the Court will pronounce on the State's environmental obligations that are more intimately related with the protection of human rights*, this being the principal function of this tribunal, and thus it will refer to the environmental obligations that derive from the obligations to respect and ensure human rights. (§§ 35, emphasis added)

One concern that arises from § 35 is whether or not the Court's extension of its scope of mandate to "pronounce on States' environmental obligations that are more intimately related with the protection of human rights" is formally consistent with the ACHR. Under Article 64 (1) of the ACHR, "The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states". It is thus not clear that the Court was entitled to approach the assessment of State's environmental obligations as a primary function, the authors neither suggest that it actually did. In our opinion, environmental obligations in general can only be dealt with by the Court as auxiliary to the interpretation of the ACHR and other American treaties for the protection of human rights. This is consistent with previous opinions of the Court where it has described its advisory function as "unique in contemporary international law", inter alia, because the subject-matter of the request "is not limited to the ACHR [but] includes other treaties concerned with human rights protection in the American States", (IACtHR, *Entitlement of legal entities to hold rights under the Inter-American Human Rights System*, AO No. 22, February 26, 2016, § 19).

On the basis of the aforementioned, the Court exercised its discretion to reformulate Colombia's advisory requests and decided that the opinion would cover the general environmental obligations arising out of the obligations to respect and ensure human rights (§ 35), and in relation to the rights to life and personal integrity in particular (§ 38) (see section 3 below).

3. – The point of departure of the Court here reaffirmed the interdependence and indivisibility of human rights (§§ 47, 54, 55, 57). In this case, the Court used interdependence to construe an inter-American environmental legal framework. The Court affirmed the existence of a "right to live in a healthy environment" as a guarantee with protracted individual and collective dimensions. In the words of the Court, "environmental degradation and the adverse effects of climate change affect the effective enjoyment of human rights" (§ 47). Moreover, the Court went on to recall its previous jurisprudence on the close connection of ancestral territories and natural resources and the special vulnerability of tribal and indigenous groups (IACtHR, *the Sawhoyamaxa Indigenous Community v. Paraguay*, March 29, 2006 [Merits, Reparations and Costs], § 118), as well as the position of the Inter-American Commission on Human Rights which recognizes a minimum environmental quality as a precondition for the exercise of fundamental human rights (see § 48).

For the first time, the Court stated that the right of a healthy environment not only has a basis in the San Salvador Protocol on Economic, Social and Cultural Rights, but also in Article 26 of the ACHR (§ 57), entitled "Progressive development". The right to a healthy environment was thus defined as an "autonomous right" under the ACHR, different from the environmental implications of other rights. The opinion of the Court reads as follows:

> Additionally, this right [to a healthy environment] shall also be considered as included among the economic, social and cultural rights protected by article 26 of the ACHR, since that norm protects the rights deriving from the economic, social, education science and cultural provisions of the OAS Charter, the American Declaration of the Rights and Duties of Man…and those deriving from an interpretation of the Convention in accordance with the criteria establish in its Article 29 … The Court reiterates the interdependence and indivisibility between civil and political rights, and economic, social and cultural rights, since these must be understood integrally and comprehensively as human rights, without hierarchy and enforceable in all cases against the competent authorities. (§ 57)

In their separate opinions, Judges Vio Grossi and Sierra Porto pointed out that what § 57 entails is that the right to a healthy environment "shall also be considered as included within the economic, social and cultural rights protected by Article 26 of the ACHR", therefore enforceable through the lens of the judicial and quasi-judicial proceedings of the Inter-American System.

This section finishes with an indicative list of the human rights that in the opinion of the Court are particularly vulnerable to environmental damage i.e., the right to life, personal integrity, private life, health, water, food, housing, participation in cultural life, property, and the right not to be forcibly displaced. Of most relevance to the requesting State, the Court underlined the connection between environmental damage and the right to peace: "since the displacement caused by the degradation of the environment frequently triggers violent conflicts amongst the displaced population" (§ 66). The Court also noted that groups of people especially vulnerable to the effects of environmental damage include indigenous peoples, children, people living in extreme poverty, minorities, women and communities economically dependent on the natural

resources, rivers and forests for their survival, among them coastal communities and islanders (§ 67).

4. – As for the first question (conditions for the extraterritorial application of the ACHR [Article 1.1 ACHR]), the Court reformulated it as follows:

In accordance with article 1.1 of the [ACHR] and in assessing compliance with the State's environmental obligations, should it be considered that an individual, although not within the territory of a State party, may be subject to the jurisdiction of that State? (§ 37).

According to Article 1 (1) of the ACHR:

> The States Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination [...].

The Court first interpreted Article 1 (1) in light of its ordinary meaning, context and the *travaux preparatoires* of the ACHR. The Court held that a person may be subject to a State's jurisdiction under article 1 (1) of the ACHR even if not physically within that State's territory. It proceeded to construe the term "jurisdiction" for the first time in its case law. In so doing, the Court took into account a previous interpretation by the Inter-American Commission in the decision on admissibility in the inter-State dispute brought by Ecuador against Colombia over the alleged extrajudicial killing of Mr. Franklin Guillermo Aisalla (Franklin Guillermo Aisalla Molina (*Ecuador v. Colombia*), Admissibility Report No. 112/10, 21 October 2011, § 91). It held that an individual may be under a State's jurisdiction if that individual is in its territory or is in any way under its authority, responsibility or control (§ 73). It stated that an individual may be exceptionally under a State's jurisdiction on an extraterritorial basis (§§ 75-78, 81) and then proceeded to provide a fairly accurate account of the European Court of Human Rights, the Human Rights Committee on the subject, and the few cases decided by the Inter-American Commission on that basis (§§ 79, 80). The Court noted however, that the cases cited did not correspond to events of a similar nature to those that would arise vis-à-vis environmental obligations under the ACHR.

In interpreting this provision, the Court concluded that a person may be subject to a State's jurisdiction without being located in its territory, when the State exercises authority over that person or when that person is within its effective control, either within or outside its territory (§§ 74-77). The Court nonetheless warned that instances where the extraterritorial conduct of a State triggers its jurisdiction are exceptional and should be interpreted in a restrictive manner, on a case-by-case basis (§§ 81-82).

Paragraph 81 illustrates the position so far developed by the Court:

> In order to analyse the possibility of an extraterritorial exercise of jurisdiction in the context of compliance with environmental obligations, it is necessary to assess the obligations deriving from the American Convention in light of the obligation of the State in environmental matters. Moreover, the possible bases of jurisdiction that may derive from this systemic interpretation should be justified in the particular circumstances of the case. The Inter-American Court considers that a person is subject to the 'jurisdiction' of a State, in respect of conduct that takes place beyond the territory of that State (extraterritorial conduct) or with effects beyond said territory, when that State exercises authority over that person or when that person is within its effective control, either within or outside its territory." (§. 81)

4.1 – The Court went on to comment on States' obligations under special environmental regimes. Elsewhere, authors have already expressed the view that the Court may have felt the need to make a pronouncement in this respect given the far-reaching consequences of its construction of the term 'jurisdiction'. We add now that this may also be explained as an expression of deference to Colombia, given the substantial transformation of its initial request.

The Court first recalled that the UN Environmental Programme launched an initiative on regional seas in order to tackle the accelerated degradation of the oceans and coastal areas through integral and specific measures for the protection of the common marine environment. In relation to the Caribbean Sea, States adopted the Cartagena Convention. It noted that a common aspect in the treaties that make part of the UNEP initiative for the protection of regional sea is the establishment of special regimes for the prevention, reduction and control of marine pollution within the jurisdictional area of each treaty. The relevant area of these treaties comprises the maritime jurisdictional spaces of the relevant coastal States, including their Exclusive Economic Zones (§§ 83-87).

In respect of Colombia's argument that the environmental obligations imposed upon States in these areas can be equated to human rights obligations, the Court made it clear that "the exercise of jurisdiction by a State under the ACHR does not depend on the relevant conduct being performed in a delimited geographic area." What is relevant is that the "State is exercising authority over the person" or that "the person is within the effective control of that State". Thus, the fact that the environmental obligations in those areas are conducive to the protection of human rights is not necessarily tantamount to the exercise of jurisdiction under the ACHR (§§ 89-94). In our view, the Court here correctly distinguished between the relevant primary norms at stake and the question of the extraterritorial application of the ACHR as governed by Article 1.1.

As detailed below, its subsequent approach however raises room for concern.

4.2. – The Court first noted that many instances of environmental damage are extra-territorial and that the prevention and regulation of extraterritorial pollution through bilateral and multilateral agreements have tailored international environmental law as we know it (p. 96).

By drawing from previous decisions of the International Court of Justice (Corfu Channel Case [*United Kingdom v. Albania*] 15 December 1949, p. 22; Legality of the threat or use of nuclear weapons, Advisory Opinion, 8 July 1986, § 29; Pulp Mills on the River Uruguay Case [*Argentina v. Uruguay*], 20 April 2010, §§ 101, 204), as well as from the Stockholm and Rio Declarations (§ 98) and the UN Convention on the Law of the Sea, the Court recognised the obligation on American States not to allow their territory to be used against the rights of third States, as well as to use all available means to prevent activities taking place in their territory or in any area under their jurisdiction causing significant environmental damage against third States.

The following paragraphs, together with § 81 commented on, and translated above, evince the position of the Court on the extraterritorial application of the ACHR in cases of transboundary environmental damage:

> The obligation to respect and ensure human rights requires States to abstain from impeding or rendering more difficult the compliance of the obligations of the Convention by other State parties. The activities undertaken in the jurisdiction of one State party shall not deprive other States of their capacity to ensure that persons under their jurisdiction enjoy their rights under the Convention. The Court considers that States have an obligation to avoid transboundary environmental damage that may affect the human rights of persons outside their territory. For the purposes of the ACHR, it is understood that the person whose rights have been breached fall within the jurisdiction of

> the State of origin if there is a causal link between the facts occurring in its territory and the violation of the human rights of person outside its territory. The exercise of jurisdiction by a State of origin in relation to transboundary damage is based on the understanding that it is the State in whose territory or in whose jurisdiction these activities are undertaken, who has effective control over them and is in a position to prevent the causation of transboundary damage that may affect the enjoyment of human rights of individuals outside its territory. The potential victims of the negative consequences of these activities should be deemed to be within the jurisdiction of state of origin for the purposes of any potential state responsibilities for failure to prevent transboundary damage. In any case, not every injury activates this responsibility" (§§ 101, 102).

As can be seen, the Court takes the position that the obligations to respect and ensure human rights require States to abstain from impeding or rendering more difficult other States' compliance with the obligations of the Convention. As cautioned by the authors elsewhere, the legal basis for this proposition, as footnote 194 allows the interpreter to discern, is General Comments 14 and 15 of the Committee on Economic, Social and Cultural Rights'.

Further, the Court posits that for the purposes of the ACHR, the person whose rights have been breached fall within the jurisdiction of the State of origin if there is a *causal* link between the facts occurring in its territory and the violation of the human rights of persons outside its territory. Surprisingly, footnotes 146 and 147 of the Opinion, while quoting extensively from the case-law of the European Court of Human Rights (*Chiragov vs. Armenia*, *13216/05*, 16 June 2015; *Al-Skeini et al. vs. UK*, 55721/07, 7 July 2011; *Ilaşcu et al. vs. Moldava and Russia*, 48787/99, 8 July 2004; *Banković et al. vs. Belgium*, 52207/99, 12 December 2001), do not refer to the case Andreou (*Andreou vs. Turkey*, 45653/99, 27 October 2009) or other instances where the causal link criterion have been endorsed.

On an overall assessment, the position of the Court lacks legal rigour. It is evident that —probably as a result of the enthusiastic approach to the obligation to prevent transboundary damage under customary international law — the Court effectively conflated the extraterritoriality threshold with the obligation to prevent transboundary damage. Indeed, although the conditions for the extraterritorial application of the Convention were said to be exceptional, the obligation to prevent transboundary damage is at the end the sole criterion used for the extraterritorial application of the ACHR. There is simply no extraterritoriality threshold in §§ 101 and 102 of the ACHR.

Finally, at § 103, the Court concluded that the obligation to prevent environmental transboundary damage, as well as the obligation to repair said damage, was independent of the legality of the conduct at stake, thus declaring a *sine delicto* regime in the ACHR when human rights are affected by significant environmental transboundary damage. It reads:

> Therefore, it is possible to conclude that the obligation to prevent environmental transboundary damage is an obligation recognized by international environmental law, by virtue of which States can be held responsible for significant damage caused to persons located outside their territory as a result of activities originating in their territory or under their authority or effective control. It is important to highlight that this obligation does not depend on the lawful or unlawful character of the conduct causing the damage. This is because States are obliged to repair promptly, adequately and effectively, transboundary damage resulting from activities undertaken in their territory or under their jurisdiction. This obligation is independent from the question of whether the activity in question is prohibited or not under international law. In any case, there must always be a causal link between the

> damage caused and the act or omission of the State of origin in respect of activities within its territory or under its jurisdiction *or* control.

5. – The Court interpreted questions two and three in Colombia's request (on obligations deriving from the duties to respect and ensure the rights to life and personal integrity in the context of the protection of the environment) as requiring an integrated decision about the obligations of State parties to the ACHR, in light of their obligations to respect and guarantee the rights to life and personal integrity, in relation to environmental damage both within their territories and beyond their national frontiers (§ 38).
With reference to the negative obligation to respect human rights, the Court affirmed that States shall abstain from (i) any activity that denies or restricts access to a decent life; and (ii) the illegal pollution of the environment in a manner that affects the conditions allowing for a decent life. As to the positive obligations, they arise when (i) the State authorities knew or should have known that there is a real or imminent risk against the life of a determined group of people, and measures reasonably available were not undertaken to prevent or tackle the risk; and (ii) there is a causal link between the violation and the significant damage caused to the environment (§ 120).
Although a more detailed section, the mere reaffirmation of a causal link as the relevant criterion for the extraterritorial application of the ACHR comes without much needed clarification.

6. – Vis-a-vis Colombia's question on the specific obligations arising out of the respect and guarantee of the rights to life and personal integrity, the Court stated it would instead address the following general obligations (§ 126).

6.1. – As for the obligation to prevent transboundary environmental damage, the Court declared the customary nature of the obligation to prevent transboundary environmental damage (§ 129). The Court then clarified that this principle imposes obligations that are similar to the general obligation to prevent violations of human rights and is not restricted to inter-State relations (§ 133). It did not however, provide any reasoning on a State practice and *opinio juris* basis.

6.2. – With regard to precautionary principle, and by referring to the Rio Declaration, the Court defined the principle as one requiring measures to be adopted in cases where there is no scientific certainty of the environmental impact of an activity. It also underlined that, depending on the instrument, "precaution" is characterized as a principle, an approach or a criterion (§ 176, footnote 395). It noted a trend in the International Tribunal of the Law of the Sea to characterize the precautionary approach as part of customary international law and as an integral part of the general obligation of due diligence in preventing environmental damage. The Court concluded that

> the States must act in conformity with the principle of precaution, for the purposes of the protection of the right to life and personal integrity, in cases where there are plausible indicators that an activity can bring about grave and irreversible damages to the environment, even in the absence of scientific certainty (§§ 180-1).

6.3. – On the obligation to cooperate, the Court affirmed its customary character (§ 184) and recalled that according to the ICJ, this obligation is indispensable for the protection

of the environment and allows States to jointly address and prevent the risks of damage to the environment. It includes specific duties of; previous and timely notification; and consultation and negotiation in good faith with the potentially affected States (§§ 186-205). The Court refrained from recognizing the customary character of the duty to exchange information as part of the obligation to prevent, albeit noting and commending an increasing trend in treaty-practice.

7. – Finally, the Court characterised these procedural obligations as deriving from the human rights of: access to information (§§ 213-225); public participation (§§ 226-232); and access to justice §§ 233-240), all in connection with the general obligation of States to protect the environment.

In conclusion, the Court's first approach to "jurisdiction" in Article 1 (1) of the ACHR, although timely, requires further elucidation. Currently, the question remains of whether the exceptional criteria of extraterritorial application recognized at §§ 73 to 81 of the AO govern the application of the obligation to prevent transboundary damage, now part of Article 26 of the ACHR; or whether the extraterritoriality threshold has in fact been conflated with the human rights obligations to prevent transboundary damage. Importantly, subsequent case-law would offer further guidance on the concrete content and scope of this very pertinent AO.