

## INTERNATIONAL DECISIONS

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*Rights to life and to personal integrity in environmental matters—environmental rights—  
extraterritorial jurisdiction—principles of prevention, precaution, cooperation*

ADVISORY OPINION ON THE ENVIRONMENT AND HUMAN RIGHTS (STATE OBLIGATIONS IN RELATION TO THE ENVIRONMENT IN THE CONTEXT OF THE PROTECTION AND GUARANTEE OF THE RIGHTS TO LIFE AND TO PERSONAL INTEGRITY—INTERPRETATION AND SCOPE OF ARTICLES 4(1) AND 5(1) OF THE AMERICAN CONVENTION ON HUMAN RIGHTS). OC 23/17. At [http://www.corteidh.or.cr/docs/opiniones/seriea\\_23\\_esp.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf) (Spanish only). Inter-American Court of Human Rights, November 15, 2017.

On November 15, 2017, the Inter-American Court of Human Rights (Court) rendered a historic advisory opinion (Advisory Opinion) on the relationship between human rights and the environment. The opinion was a response to a request from Colombia regarding extraterritorial jurisdiction of state parties to the American Convention, in particular their obligations under the rights to life and personal integrity,<sup>1</sup> arising from the construction and operation of large-scale infrastructure projects in the Greater Caribbean region. Colombia's concern was that, due to their dimensions and permanence, such projects could cause significant environmental harm, that goes beyond national borders, and, as a consequence, adversely affect the inhabitants of the whole region and the enjoyment of their rights under the Convention (para. 2). One of the most important aspects of the Advisory Opinion is the Court's finding that in relation to large-scale transboundary infrastructure projects, state parties to the Convention can exercise extraterritorial jurisdiction under certain circumstances and thus be responsible for the human rights of the people in the affected area. Another significant finding of the Court is that Article 26 of the American Convention,<sup>2</sup> which provides for the progressive realization of economic, social, and cultural rights, includes an autonomous right to a healthy environment—a right fundamental for the existence of humankind. Finally, the Court directly linked the rights to life and personal integrity with general principles of international environmental law under a due diligence obligation. The Court's extensive use of international environmental law instruments, case law, and

<sup>1</sup> American Convention on Human Rights, Arts. 4–5, *opened for signature* Nov. 22, 1969, 1144 UNTS 123 [hereinafter Convention].

<sup>2</sup> The right is already part of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, *entered into force* Nov. 16, 1999, OAS Treaty Series No. 69; 28 ILM 156 [hereinafter San Salvador Protocol].

reasoning could pave the way for greater interconnection and integration between human rights and international environment law obligations.

The Court began by stating that Article 1.1 of the American Convention establishes that the state parties are under an obligation to respect the rights and freedoms prescribed in the Convention and guarantee the free and full exercise of the rights of the people under their jurisdiction (para. 72). According to the Court, the term “jurisdiction” in Article 1.1 implies that states are obliged to respect and guarantee the rights of all people in the state’s territory or under its authority, responsibility, and effective control (para. 77). Following the interpretative rules of the law of treaties (paras. 40–42), the Court explained that the ordinary meaning of the term “jurisdiction,” interpreted in good faith and taking into account the context and purpose of the American Convention, is not limited to the national territory of a state party, but it is a wider concept that includes certain aspects of the exercise of jurisdiction outside its territory (para. 74). The Court, referencing the case law of the European Court of Human Rights<sup>3</sup> (ECtHR), affirmed the effective control test, according to which, what needs to be established is the state’s effective control, whether legal or illegal, over an area beyond its territory or over people of another state (para. 79). In the Court’s view, this meaning of “jurisdiction” is in line with the American Commission’s interpretation (para. 75) and the preparatory work of the American Convention (para. 77).

The Court indicated, however, that the exercise of extraterritorial jurisdiction by a state is exceptional and therefore should be interpreted in a restrictive manner (para. 81). American Convention obligations should also be analyzed in light of existing obligations regarding protection of the marine environment (*id.*). Moreover, the possible bases for jurisdiction that emerge from this systematic interpretation must be justified in the particular circumstances of this specific case to verify the existence of effective control of the state in question (*id.*).

In this respect, the Court examined the conduct raised in Colombia’s request in order to determine whether it amounted to the exercise of extraterritorial of jurisdiction. The Court particularly focused on Article 4.1 of the Cartagena Convention,<sup>4</sup> which stipulates that the area of functional jurisdiction (its application zone) includes areas outside of national jurisdiction, and that state parties are obliged to comply with certain obligations for the purpose of protecting the marine environment in the whole region.

Obligations under environmental treaties are not, however, the same as human rights obligations, and state conduct in the application zones of treaties for the protection of the marine environment is not necessarily an exercise of a state’s jurisdiction under the American Convention (para. 88). In this respect, the Court stated that, even though the environmental treaties obligations, such as the Cartagena Convention, can contribute to the protection of the human rights under the American Convention, they do not establish a special jurisdiction common to the state parties of the marine protection treaties (*id.*). Instead, the exercise of jurisdiction under the American Convention is based on the effective control test, thus distinguishing it from the geographical limits of the environmental treaties, which involve obligations to prevent, reduce, and control contamination in particular geographical areas (*id.*).

<sup>3</sup> Among others, the Court cited *Loizidou v. Turkey*, Preliminary Objections, App. No. 15318/89 (Eur. Ct. H.R. Mar. 23, 1995) and *Al-Skeini v. United Kingdom*, Judgment, App. No. 55721/07 (Eur. Ct. H.R. July 7, 2011).

<sup>4</sup> Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Mar. 24, 1983, 1506 UNTS 157 [hereinafter *Cartagena Convention*].

The Court then addressed whether environmental protection treaties extend the jurisdiction of a state beyond its territorial limits, explaining that a state's compliance with its human rights and environmental law obligations cannot justify breaching other international law norms, such as the principle of non-intervention (para. 90). Following the reasoning of the ECtHR in the case of *Banković v. Belgium*,<sup>5</sup> the Court was of the view that the American Convention should be interpreted in compliance with other principles of international law (*id.*). State sovereignty limits the scope of a state's contribution to the realization of human rights (*id.*). In the same way, a state's duties and rights over marine areas ought to be exercised with respect to the rights and duties of other states (*id.*). In this sense, the Cartagena Convention cannot be interpreted "to prejudice the present or future claims or the legal views of any Contracting Party concerning the nature and extent of maritime jurisdiction" (para. 91).

As a consequence, the Court concluded that the Cartagena Convention did not extend the jurisdiction of the state parties to the American Convention (para. 92). For a person to be under the jurisdiction of a state party to the latter convention, the location of the person in a specific geographical zone—as for example in the geographical zone specified by an environmental treaty—would not be enough (para. 93).

The Court then moved on to consider jurisdiction in relation to transboundary environmental harms. Informed by international environmental law obligations (paras. 97–99), the Court considered that states have the obligation to prevent such harms, which can affect the human rights of people outside their territory (para. 101). For the purposes of the American Convention, the persons whose rights are violated are under the jurisdiction of the state causing the harm when there is a causal link between the damage or injury and the action or omission of that state (*id.*). As the Court further clarified, although the obligation to prevent transboundary harm does not turn on whether conduct that generated the environmental damage in question is legal or illegal, a causal link must exist between the damage caused and the action or omission of the state of origin, taken within its territory or under its jurisdiction.

Having established that the state parties can have extraterritorial obligations under the American Convention regarding transboundary environmental harm, the Court turned to the substantive content of those obligations. One of the most important parts of the Advisory Opinion is the Court's assertion of an autonomous right to a healthy environment.

The Court observed that environmental degradation can cause irreparable damage to human beings, and for this reason, a healthy environment is a fundamental right for the existence of humankind (para. 59). Furthermore, the Court discussed the nature of the right to a healthy environment, stating that it is a right with both individual and collective dimensions. In its individual dimension, this right is linked to other human rights, such as the right to health, life, and personal integrity, and implicates direct and indirect reparations to the person (*id.*); in its collective dimension, the right constitutes a universal value that is owed to present and future generations (*id.*). To reach this conclusion, the Court linked the right to a healthy environment with the concept of sustainable development (paras. 53–55).

The Court, however, made an important distinction between the right to a healthy environment as an autonomous right, and the environmental obligations that arise from the

<sup>5</sup> *Banković v. Belgium*, Decision as to Admissibility, App. No 52207/99 (Eur. Ct. H.R. Dec. 12, 2001).

protection of other human rights, such as, the rights to life and personal integrity (para. 63). With respect to the latter, the Court emphasized that the enjoyment of these rights, identified as substantive rights, is particularly vulnerable to environmental degradation (para. 64). But it noted that numerous other rights can be affected by a failure to comply with environmental obligations, including economic, social, and cultural rights (*id.*).

A legal basis for the right to a healthy environment exists under Article 11 of the San Salvador Protocol,<sup>6</sup> which provides a right to a clean environment. The Court, however, grounded its recognition of this right under Article 26 of the Convention (para. 57), which provides for the progressive realization and international cooperation in relation to economic, social, and cultural rights. On this point, the Court emphasized the irrefutable relationship between the protection of the environment and the protection of “other human rights,” due to the fact that environmental degradation affects their effective enjoyment (*id.*).

This finding of a legal basis under Article 26 for an autonomous right to a healthy environment caused the most controversy among the Court’s members, eliciting two partly dissenting opinions. Judge Sierra Porto was of the view that the Court’s finding of a directly justiciable right to a healthy environment under Article 26 exceeded the scope of that provision and the Advisory Opinion (Sierra Porto sep. op., paras. 2, 7, 11). Judge Vio Grossi was of the opinion that Article 26 referred solely to economic, social, and cultural rights already “recognized” in the Convention and to their progressive realization (Vio Grossi sep. op., para. 3). In this respect, only rights already included in the Convention can be the object of its protection system (Vio Grossi sep. op., para. 5). Nonetheless, whether an autonomous right to a healthy environment under Article 26 will be directly justiciable remains to be seen in subsequent jurisprudence of the Court, and especially in contentious cases.

The Court also made important points with regard to the rights to life and personal integrity. First, it reaffirmed its previous position that the right to life is a fundamental right in the American Convention because its exercise is essential for the exercise of all other human rights (para. 108). The right does not just presuppose that no person will be deprived arbitrarily of his life, but it confers on the state positive obligations to adopt the necessary measures to protect everyone under its jurisdiction (para. 108). On this point, the Court made a reference to its previous decisions that the protection of the environment is a precondition for a decent life (para. 109).

Moreover, the Court emphasized the close connection between the right to life and the right to personal integrity; there are occasions where the lack of conditions guaranteeing a decent life also constitute a violation of the right to personal integrity, such as in cases involving human health (para. 114). In this respect, the Court had previously recognized that certain projects and interventions relating to the environment can represent a risk to the life and personal integrity of individuals (*id.*).

The Court adopted a distinctive approach to specifying the positive environmental obligations arising under the rights to life and personal integrity. It directly linked those rights to general principles of international environmental law. First, the Court explained that states are obliged to exercise due diligence in complying with their obligations under the Convention (para. 123). The Court further explained that due diligence in international law created obligations for states regarding conduct and behavior, rather than the

<sup>6</sup> San Salvador Protocol, *supra* note 2.

achievement of a specific objective.<sup>7</sup> Because of the due diligence obligation, states must take all measures appropriate to protect and preserve the rights under the Convention (para. 123). The due diligence obligation is thus the basis of the majority of environmental obligations, including those related to the rights to life and personal integrity (para. 124). To protect and guarantee those two rights in relation to environmental harm both inside and outside their territories, the Court deemed it necessary to examine the environmental law principles of prevention, precaution, and cooperation, as well as procedural environmental law obligations (para. 125).

Turning to the content of these environmental law principles, the Advisory Opinion first examined the principle of prevention. Drawing on well-established environmental law concepts, the Court stated that this principle arises in the event of risk of significant environmental harm (para. 135), with reference to, among others, International Court of Justice (ICJ) landmark judgments,<sup>8</sup> the International Law Commission Draft Articles on Transboundary Environmental Harm, and European Court of Human Rights case law<sup>9</sup> (paras. 135–39). Moreover, the Court observed that under the principle of prevention, states have an obligation to regulate, supervise, conduct environmental impact assessments, establish contingency plans, and mitigate environmental damage (para. 145). In addition, the Court dedicated a substantive part of its analysis to environmental impact assessments and the importance of public participation in the decision-making process (para. 156).

The Advisory Opinion also borrowed heavily from the precautionary principle of international environmental law. The Court was of the view that states must always try to find the “best angle” to protect the person against human rights violations (para. 180). The “best angle,” together with due diligence, means that states should act in conformity with the precautionary principle when interpreting the rights to life and personal integrity in environmental matters (*id.*).

The Court continued to borrow from environmental law in its analysis of the duty to cooperate under Article 26 of the American Convention. In its view, the rights to life and personal integrity were clearly linked to procedural environmental obligations (para. 210). In this respect, the Court drew heavily from decisions analyzing the notification, consultation, and participation obligations of international environmental law (paras. 181–208). It linked the obligations arising from the rights to life and personal integrity, most notably, with procedural environmental rights under the Aarhus Convention<sup>10</sup> (paras. 215, 216, 222, 224, 231, 232, 236). This is an important step, given that Colombia is not a party to Aarhus.

<sup>7</sup> On the concept of due diligence, the Court cited *Case Concerning Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, 2010 ICJ Rep. 14 (Apr. 20) [hereinafter *Pulp Mills*], and the International Law Commission Draft Articles on Transboundary Harm, UN Doc. A/56/10 (2001).

<sup>8</sup> *Pulp Mills*, *supra* note 7; *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica v. Nicar.), Judgment, 2015 ICJ Rep. 665 (Dec. 16); *Indus Waters Kishenganga Arbitration* (Pak. v. India), Final Award (Perm. Ct. Arb. Dec. 20, 2013); *Indus Waters Kishenganga Arbitration* (Pak. v. India), Partial Award (Perm. Ct. Arb. Feb. 18, 2013).

<sup>9</sup> See, e.g., *Fedeyeva v. Russian Federation*, 2005-IV Eur. Ct. H.R. 376; *Hatton v. United Kingdom*, 2003-VIII Eur. Ct. H.R. 189.

<sup>10</sup> *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, entered into force Oct. 30, 2001, 2161 UNTS 447, 38 ILM 517.

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In its written submissions, Colombia indicated that the Advisory Opinion would be of great relevance, not only for the effective fulfillment of the international human rights obligations of Caribbean states but also in “strengthening the universal conscience” (para. 21). This perspective was reflected in the Court’s statement that the questions in the request “transcend the interest of the state parties of the Cartagena Convention and are important for all the States of the planet” (para. 35). While the extent of its global influence remains to be seen, the case raised and analyzed a number of important issues for both international human rights and environmental law.

First of all, the issue of extraterritorial application of human rights treaties, and especially the effective control test, is a complex international law issue that has caused controversy and extensive academic discussion.<sup>11</sup> The Advisory Opinion is the first to link extraterritorial jurisdiction with the obligation to prevent transboundary environmental harm, an important step toward bringing environmental claims with a transboundary element before human rights tribunals. The Court, however, did not specify the criteria under which a causal link between the action or omission of the state and environmental damage can be established in practice, and whether its analysis applies to both actual and potential damage.

Another important aspect is the recognition of an autonomous right to a healthy environment under Article 26 of the American Convention. The Inter-American Court of Human Rights has often referred to the connection between a healthy environment and human rights, especially in relation to indigenous peoples’ rights.<sup>12</sup> Moreover, the European Court of Human Rights has also developed significant jurisprudence linking human rights obligations with environmental degradation.<sup>13</sup> Furthermore, there has been a series of important international decisions acknowledging the legal consequences for environmental harm, including compensation for environmental damage.<sup>14</sup> However, no previous decision by an international human rights tribunal asserted an autonomous right to a clean environment. Given that international rulings can formulate and inform the development of international law and are often followed by other international courts and tribunals,<sup>15</sup> this decision could potentially influence jurisprudence worldwide.

<sup>11</sup> See, e.g., MARKO MILANOVIĆ, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 19–53 (2011).

<sup>12</sup> See, e.g., Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Judgment, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 146 (Nov. 28, 2007).

<sup>13</sup> The ECtHR has developed extensive case law under Articles 8 (private and family life) and 2 (right to life). For more on this, see ECHR MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT (2012), available at [https://www.echr.coe.int/LibraryDocs/DH\\_DEV\\_Manual\\_Environment\\_Eng.pdf](https://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf), and Eur. Ct. H.R., Environment and the European Convention on Human Rights Factsheet (Feb. 2018), available at [https://www.echr.coe.int/Documents/FS\\_Environment\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf).

<sup>14</sup> See, for example, the February 2, 2018 International Court of Justice Judgment in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica/Nicaragua)* where the ICJ ordered compensation for environmental damage.

<sup>15</sup> See, for example, the February 1, 2011 International Tribunal for the Law of the Sea (ITLOS) *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* where the Tribunal cited the ICJ ruling of *Pulp Mills*, *supra* note 7, and more recently the April 25, 2016 ITLOS Order for Provisional Measures in the *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)* case where the Tribunal cited the December 13, 2013 ICJ Order on Provisional Measures in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica/Nicaragua, Nicaragua/Costa Rica)*.

Despite the fact that the Court declared an autonomous right to a healthy environment as fundamental for humanity, it is noteworthy that it did not embark on an assessment of state practice and *opinio juris* and did not expressly recognize the right as customary international law. This was to be expected, as it would go beyond the remit of Colombia's questions. Nevertheless, the strong affirmation by an international human rights tribunal perhaps can be a step toward the future recognition of this right as part of customary international law.

Finally, the Advisory Opinion is of major significance because it clearly links international human rights with international environmental law. The question that is yet to be answered is whether the Court's environmental law approach to human rights obligations can be sustained in practice, to confer clear positive obligations on states to protect the human rights of their people against environmental degradation, and the extent to which it can contribute to the adjudication of contentious cases in international and national courts.

The Advisory Opinion's paramount importance is captured in the loud and clear signal it gives that environmental policies can no longer be separated from human rights obligations and vice versa. As a consequence, the scope for environmental matters before human rights tribunals could be broadened considerably, both in terms of facts and applicable law.

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*European Court of Justice—reference for a preliminary ruling—bilateral investment treaties—investment arbitration—relationship between EU law and investment treaties—concept of “court or tribunal” under EU law—autonomy of EU law*

SLOWAKISCHE REPUBLIK (SLOVAK REPUBLIC) v. ACHMEA B.V. Case C-284-16. Request for a Preliminary Ruling Under Article 267 TFEU from the German Federal Court of Justice (*Bundesgerichtshof*). At <http://curia.europa.eu>. European Court of Justice (Grand Chamber), March 6, 2018.

On March 6, 2018, the Grand Chamber of the Court of Justice of the European Union (CJEU or Court) rendered its judgment in *Slowakische Republik (Slovak Republic) v. Achmea B.V.* (*Achmea* decision) in response to the German Federal Court of Justice's (*Bundesgerichtshof*) request for a preliminary ruling.<sup>1</sup> Deciding for the first time on the compatibility of the arbitration provision in bilateral investment treaties (BITs) with European Union (EU) law, the Court concluded that the investor-state arbitration clause in the Dutch-Slovak BIT was incompatible with EU law because it violated the principle of autonomy. The Court will soon respond to Belgium's request for an Opinion on the Canada-EU free trade agreement (FTA), where it will rule on the compatibility of extra-EU investment agreements with EU law.<sup>2</sup>

<sup>1</sup> This Judgment, and the Opinion of the Advocate General Wathelet delivered on September 19, 2017, are available at <http://curia.europa.eu> (search for “284/16”).

<sup>2</sup> CETA: Belgian Request for an Opinion from the European Court of Justice (Sept. 6, 2017), available at [https://diplomatie.belgium.be/en/newsroom/news/2017/minister\\_reynders\\_submits\\_request\\_opinion\\_ceta](https://diplomatie.belgium.be/en/newsroom/news/2017/minister_reynders_submits_request_opinion_ceta).