

THE PROTECTION OF THE ENVIRONMENT BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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ABSTRACT

The article explores recent developments in relation to the protection of the Environment in the case law of the Inter-American Court of Human Rights, especially with regard to the *Advisory Opinion 23/17* and the *Lhaka Honhat* case. Its purpose is to identify the techniques employed by the IACtHR in order to expand its reach in relation to the protection of the right to a healthy environment. I argue that, while the recent environmental case law crystallizes important progress in the protection of environmental rights in the Inter-American System, there are potential problems with the protection of the autonomous right to a healthy environment under Article 26 of the Convention. I conclude by exploring the unfolding consequences of the arguments adopted by the IACtHR in relation to its advisory function, and the criticism of the Court's approach to environmental matters received from some judges.

Keywords

Inter-American Court of Human Rights; International Environmental Law; Right to a Healthy Environment.

1. INTRODUCTION

Since the American Convention on Human Rights ('ACHR' or 'Convention') does not envisage the right to a healthy environment as a directly justiciable right, the Inter-American Court of Human Rights ('IACtHR' or 'Court') has dealt only obliquely with environmental matters in its case law.¹ Economic, social, cultural and environmental rights (ESCER) were definitely consolidated into the Inter-American System through the Protocol of San Salvador in 1999². The Protocol provides jurisdiction to the Court solely in relation to trade union

rights and the right to education (Article 19.6), thus excluding the possibility of an individual petition in relation to violations to the right to a healthy environment as enshrined in Article 11 of the Protocol.³ Traditionally, environmental issues which appeared before the IACtHR were associated either with the right to life, the right to private property or the right to have access to information.⁴ In its 2017 *Advisory Opinion 23 on the Environment and Human Rights*⁵ ('OC-23/17') the IACtHR peremptorily introduced the topic of environmental protection to its jurisprudence through the recognition of the right to the healthy environment as an independent and justiciable right.

Originally requested by Colombia in relation to large-scale infrastructure projects which created a risk of significant environmental damage to the marine environment of the Wider Caribbean Region, the OC-23/17 opinion contributed in different ways to the law of environmental protection within the Inter-American System. While the main questions formulated by Colombia tackled the interpretation of the term "jurisdiction" in Article 1.1 of the ACHR and State obligations related to the duties to respect and ensure the rights to life and personal integrity in relation to environmental damage, the IACtHR clarified several substantive and procedural obligations regarding environmental protection arising from the ACHR. Furthermore, the IACtHR advanced the possibility of protecting environment rights when it stated that the right to a healthy environment falls within the scope of Article 26 of the Convention – the 'progressive development' provision by which American States undertook the obligation to adopt measures with a view to progressively achieving "the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards". The consequence of this reasoning is that

It is the first case in which the IACtHR has recognized the possibility of the extraterritorial application of the ACHR.¹⁵ Notably, it seems to have been inspired by its European counterpart. In consonance with the ECtHR case law, the IACtHR stressed the exceptional character of the extraterritorial jurisdiction, which requires a “restrictive interpretation” in the light of the “the particular circumstances of the specific case”.¹⁶

The second main question addressed by the OC-23/17 was the clarification of what environmental obligations were connected to the protection of the right to life (Article 4) and to personal integrity (Article 5) under the ACHR. Drawing on a teleological interpretation of the question asked by Colombia, the Court took the opportunity to clarify a number of issues regarding the environmental obligations in connection with human rights in the American continent.

After reaffirming the connection between human rights and environmental protection, the Court invoked its previous statements recognizing that environmental protection is a condition for a decent life.¹⁷ However, the Court went further and recognized a set of additional obligations in relation to Articles 4 and 5 of the ACHR. Drawing heavily on the Stockholm and Rio Declarations, it identified several due diligence obligations arising from the Convention.¹⁸ In addition to recognizing an autonomous right to a healthy environment under the Convention, the Court outlined further obligations, specifying their content, scope and application under the Inter-American System.¹⁹ For instance, to protect the human right to life and personal integrity, States need to conduct environmental impact assessments when faced with risk to the environment and are under a duty to prepare a contingency plan in relation to potential environmental disasters. They also have the duty to mitigate any significant environmental damage occurring within their territory. Additionally, specifically in relation to the protection of the rights to life and to personal integrity, the Court emphasized States’ obligation to cooperate to ensure protection against significant transboundary harm, as well as individuals’ right to access to information and to public participation.²⁰

Quite innovatively, the IACtHR also established that American States “must act in

accordance with the precautionary principle to protect the rights to life and to personal integrity”,²¹ which is an additional step in the long-standing debate about the recognition of the principle in international law.²² The reasoning relied on the fact that, when interpreting the Convention, the Court has to seek the “best perspective for the protection of the individual” which means that “States must act in keeping with the precautionary principle in order to protect the rights to life and to personal integrity in cases where there are plausible indications that an activity could result in severe and irreversible damage to the environment, even in the absence of scientific certainty”.²³

It is difficult to avoid the impression that the Court performed a quasi-legislative function by identifying this “list of obligations” arising from international environmental law and connecting it to Articles 4 and 5 of the ACHR. Each of the obligations abovementioned was outlined in detail in the Opinion. The Court relied on different sources in order to detail the specific content of each obligation, making little or no distinction between treaty law, judicial decisions or soft law, in spite of its observation that soft law instruments “provide guidance on the interpretation of the former, because they give greater precision to the basic content established in the treaties”.²⁴

Having established the content of the Opinion, I shall move to the analysis of two techniques employed by the Court to expand its reach on environmental rights and obligations: the expansion of the scope of the question asked by Colombia and the introduction of the autonomous right to a healthy environment under Article 26 of the Convention.

3. EXPANDING THE SCOPE OF QUESTION: CONNECTING ENVIRONMENT WITH HUMAN RIGHTS

One of the distinctive features of the advisory jurisdiction of the IACtHR is that it allows States (among other subjects) to ask for advisory opinions directly. Article 64 of the ACHR establishes that “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”. This possibility has been largely explored by States

its advisory function “cannot be restricted by contentious cases filed before the International Court of Justice”.³⁴ The desire to avoid a direct pronouncement on issues relating to a pending dispute might explain why the Court preferred to broaden the question asked. However, the outcome might still have an impact upon the pending dispute – at least in relation to environmental obligations.

(b) The second argument set forth by the Court to justify its decision to make a pronouncement on the environmental obligations under the ACHR is grounded on a functional approach. Since one of the functions of the Court is to “assist OAS Member States and organs to comply fully and effectively with their relevant international obligations, and to define and implement public policies to protect human rights”, the final pronouncement of the Court would “help strengthen the system for the protection of human rights”.³⁵ Yet, this argument is rather weak: strengthening the system for the protection of human rights does not automatically imply a competence to interpret instruments relating to international environmental law. According to the Convention, the Court’s advisory jurisdiction is limited to the ACHR and “other treaties concerning the protection of human rights in the American States”.³⁶

(c) In order to overcome this difficulty, the Court took pains to clarify the link between human rights and the environment in a long part of the opinion. The Court’s argument began with a reference to a number of international documents from different sources and organs intertwining human rights with the protection of the environment.³⁷ The IACtHR concluded that it “will rule on the State obligations with regard to the environment that are most closely related to the protection of human rights, which is the main function of this Court. Consequently, it will refer to the environmental obligations arising from the obligations to respect and to ensure human rights”.³⁸ However, by the same token, the IACtHR observed that, in order to identify State obligations, a “consequence of the interdependence and indivisibility of human rights and environmental protection is that (...) the Court may avail itself of the principles, rights and obligations of international environmental law”.³⁹

Referral to external sources is not a rare technique employed by the IACtHR. By way of example, on several occasions the Court has referred to the 1949 Four Geneva Conventions which “could be taken into consideration as elements of interpretation of the American Convention”.⁴⁰ Be that as it may, by characterizing international environmental law as “part of the international *corpus iuris*” and identifying the content and scope of the obligations therein, it is difficult to trace a line where the Court considers external rules (i.e. rules not directly provided by the Convention) “as elements of interpretation” or its own applicable law.⁴¹

The implications of the Court’s expansive approach and use of the three arguments above mentioned appear to be at least twofold. First, by redefining the question aligning it with the debates occurring on the universal level (especially with the recommendations of United Nations Human Rights Council),⁴² the Court empowered itself with the capacity to interpret a new branch of international law, namely international environmental law. The fact that some of the obligations identified by the Court rely on different sources seems to confirm this conclusion. By way of illustration, the Court extensively elaborated on the requirements for the conduct of environmental impact assessments, establishing standards referred to either in the recent case law of the ICJ, or in national legislation from American States and the United Nations Environmental Programme.⁴³ Moreover, the Court made no distinction between the authority of *obiter dicta* and the dispositive part of its advisory opinions.⁴⁴ Thus, the second conclusion is that the important pronouncements regarding international environmental obligations might well be used by the IACtHR in the future individual cases as authoritative case law.

4. THE JUSTICIABILITY OF THE RIGHT TO A HEALTHY ENVIRONMENT

The IACtHR and the Inter-American Commission have their competences set to hear individual claims arising from violations of the ACHR. Article 44 of the ACHR establishes that the individuals and other entities “may lodge petitions with the Commission containing denunciations or complaints of violation of *this Convention* by a State Party”.⁴⁵ Correspondingly,

of the Court's approach, since he admitted the possibility of a violation of the ESCER but only along with other rights recognized in the Convention. For him "the Court has a conventional duty to give justice in specific cases within the limits provided for by the law of treaties".⁷⁴ His suggestion of protecting environmental rights in connection with the other rights clearly established by the ACHR seems to be similar to the position of the ECtHR in the matter.⁷⁵

The most forceful dissenting opinions point to the weaknesses in the expansive reasoning of the Court. Judge Vio Grossi opts for an argument based on the criteria of interpretation under the Vienna Convention on the Law of Treaties. In a detailed exegesis analysing the text of Article 26, as well as other documents of the Inter-American *corpus juris*, Vio Grossi reiterates his argument made with regard to OC-23/17 that traditional treaty interpretation techniques do not allow ESCER to be included as justiciable rights. For Vio Grossi, the interpretation used by the Court favours the teleological method over other methods in view of the textual indication. The Chilean judge seems to suggest that the Court's interpretation is even *contra legem* insofar as it neglects the text, allowing the justiciability of these rights, when he suggests that the Court does not "properly use the means of interpretation provided for in the Vienna Convention, [leading] a result contrary to logic and never desired or foreseen in the Convention".⁷⁶

Judge Sierra Porto advanced a strong opinion on the matter: that the IACHR did not have the competence to deal with ESCER.⁷⁷ For the Colombian judge, the Court had no express jurisdiction "neither by the American Convention nor by Article 19.6 of the Protocol ... interpreted in the light of Articles 30 and 31 of the Vienna Convention on the Law of Treaties".⁷⁸ Judge Sierra Porto supports this position from the fact that the States parties to the Protocol of San Salvador only allowed some rights to be litigated, environmental rights (*inter alia*) not being among them. It also concludes that it is problematic to refer to international "soft law" instruments for the sake of convenience.⁷⁹

The criticism present in the opinions of the three judges is telling and reveals the fracture inside the Court. However, there seems to be something absent in the judges' opinions: the

weight of the precedent established by OC-23/17. The Court expressly cites OC-23/17 in the *Lhaka Honhat* case to support the expansion of environmental rights, the right to food, water, and participation and cultural identity. The dissenting judges neglect this precedent in their dissent. They do not address the fact that the Court had already ruled on the justiciability of the right to a healthy environment in OC-23/17 and that it might be incongruous to change this position in a contentious case. The dissenting judges appeared not to be aware of the fact that it was not only in the context of litigation, but eminently through advisory jurisdiction, that the main extension of the ESCER had occurred. Such enlargement and contentious application of rights developed in an advisory sphere obviously have consequences and raise questions.

But the impact of the *Lhaka Honhat* case goes beyond the first application of Article 26 in relation to environmental rights, given that it also connects the obligations developed in the OC-23/17 with the right to a healthy environment. An interesting illustration is the fact that in this case the Court applied the duty to prevent (*'deber de prevención'*) as previously spelled out in the OC-23/17.⁸⁰ This duty to prevent is particularly mirrored in the remedies determined by the Court. Argentina was ordered to "prepare a study establishing actions to be implemented for water conservation and to avoid and remedy its contamination; guarantee permanent access to drinking water; prevent the continued loss or decrease of forest resources and seek their recovery".⁸¹ It does not therefore come as a surprise that the Court should apply the standards previously developed in relation to the protection of the environment in relation to the right to life and the right to personal integrity. However, the application of the material criteria to Article 26 confirms the quasi-legislative function of the Court's advisory opinion on environmental matters.

To be sure, the *Lhaka Honhat* case crystallizes an important progress in the protection of environmental rights in the Inter-American System.⁸² Nonetheless, it also reveals that there are problems with the protection of the right to a healthy environment under Article 26 of the Convention. One might only wonder whether the Court could have reached the same results referring to the rights already recognized in the ACHR. The case

NOTES

1. On this question, see R. PAVONI, *Environmental Jurisprudence of the European and Inter-American Courts of Human Rights*, in B. BOER (ED.), *Environmental Law Dimensions of Human Rights*, Oxford, 2015. From an European perspective, see T. SCOVAZZI, *L'interpretazione e l'applicazione "ambientalista" della Convenzione europea dei diritti umani, con particolare riguardo al caso "Urgenda"*, *Rivista Giuridica dell'Ambiente*, 2019, pp. 619-633.
2. Signed in 1988, the Protocol entered into force only in 1999 when eleven states have deposited their respective instruments of ratification or accession, in accordance with article XXI of the protocol.
3. Article 19.6 of the Protocol of San Salvador reads as follows: "Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights".
4. See, for instance, IACtHR, *Case of the Kaliña and Lokono Peoples v. Suriname*, Merits, Reparations and Costs, Judgment of November 25, 2015. Series C No. 309; IACtHR, *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment of June 27, 2012. Series C No. 245; and IACtHR, *Case of Salvador Chiriboga v. Ecuador*, Preliminary Objections and Merits, Judgment of May 6, 2008 Series C No. 179. On this question, J.G. GAMBOA, *Medio Ambiente frente a la Corte Interamericana de Derechos Humanos: una ventana de protección*, in A. A. CANÇADO TRINDADE & C. BARROS LEAL (EDS), *Derechos Humanos y Medio Ambiente*, Fortaleza, 2017, pp. 103-144, and T. ANTKOWIAK, *A "Dignified Life" and the Resurgence of Social Rights*, *Journal of Human Rights*, Vol. 18, 2020, pp. 1-51. The European Court on Human Rights has developed a similar case law, since the autonomous right to a healthy environment is also absent from the European Convention on Human Rights. See, in this regard, O.W. PEDERSEN, *The European Court of Human Rights and International Environmental Law*, in J.H. KNOX AND R. PEJAN (eds.) *The Human Right to a Healthy Environment*, Cambridge, 2018, pp. 97-121. The African System of Human Rights, however, envisages the right to a healthy environment as an autonomous right in Article 24 of the African Charter on Human and Peoples' Rights, which has been recently applied by the African Court on Human and Peoples' Rights in *AfCHPR, African Commission on Human and People's Rights v. Republic of Kenya*, No. 006/2012, Judgment, May 26, 2017. In this sense, see L.J. KOTZÉ, A.A. DU PLESSIS, *The African Charter on Human and Peoples' Rights and Environmental Rights Standards*, in S. Turner S et al (eds), *Environmental Rights: The Development of Standards*, Cambridge, 2019, 93-115.
5. IACtHR, *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)*, Advisory Opinion OC-23/17 of November 15, 2017. Series A, n. 23. (Hereinafter 'OC-23/17').
6. A. PAPANTONIOU, *Advisory Opinion on the Environment and Human Rights*, *American Journal of International Law*, Vol. 112, 2018, pp. 460-466; M. FERIA-TINTA, S. C. MILNES, *International Environmental Law for the 21st Century: The Constitutionalization of the Right to a Healthy Environment in the Inter-American Court of Human Rights Advisory Opinion 23*, *Anuario Colombiano de Derecho Internacional*, Vol. 12, 2019, pp. 43-84; G. VEGA-BARBOSA & L. ABOAGYE, *A Commentary on the Advisory Opinion of the Inter-American Court of Human Rights on the Environment and Human Rights*, *DPCE Online*, Vol. 34 No. 1, 2018, pp. 291-297; R. ABELLO-GALVIS & W. AREVALO-RAMIREZ, *Inter-American Court of Human Rights Advisory Opinion OC-23/17: Jurisdictional, procedural and substantive implications of human rights duties in the context of environmental protection*, *Review of European, Comparative and International Environmental Law*, Vol. 28, 2019, pp. 217-222; and D. GIANNINO, *The Ground-Breaking Advisory Opinion OC-23/17 of the Inter-American Court of Human Rights: Healthy Environment and Human Rights*, *Blog of the*

