

HUMAN RIGHTS AS A PROTECTION MECHANISM FOR THE ENVIRONMENT: IS IT POSSIBLE TO INCLUDE IACHR'S ADVISORY OPINION 23/17 IN THE ECUADORIAN LEGAL SYSTEM?

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ABSTRACT

The Inter-American Court of Human Rights, on November 15th of 2017, issued an Advisory Opinion on the environment and human rights. The relevance of this Opinion is reflected in the development made by the Court on state obligations in relation to the environment. The Court recognized the “undeniable relationship between the protection of the environment and the realization of other human rights.” In this virtue, this article seeks to scrutinize and synthesize the foundations of the Advisory Opinion. Finally, since advisory opinions are not binding nor obligatory for Ecuador (or any other state), this article develops an analysis on one possible solution (conventionality control) for the inclusion of the Advisory Opinion 23/17 in the Ecuadorian legal system.

KEYWORDS

environmental human rights; environment; protection mechanism; advisory opinion; Inter-American System; Inter-American Court of Human Rights

Derechos humanos como mecanismo de protección para del medio ambiente: ¿es posible incluir la Opinión Consultiva 23/17 de la Corte IDH en el sistema jurídico ecuatoriano?

RESUMEN

La Corte Interamericana de Derechos Humanos, el 15 de noviembre de 2017, emitió una Opinión Consultiva sobre el medio ambiente y los derechos humanos. La relevancia de este dictamen se refleja en el desarrollo realizado por el tribunal sobre las obligaciones estatales en relación con el medio ambiente. La Corte reconoció “la innegable relación entre la protección del medio ambiente y la realización de otros derechos humanos”. En esta virtud, este artículo busca examinar y sintetizar los fundamentos de la Opinión Consultiva. Finalmente, dado que las opiniones consultivas no son vinculantes ni obligatorias para Ecuador (o cualquier otro Estado), este artículo desarrolla un análisis de una posible solución (control de convencionalidad) para la inclusión de la Opinión Consultiva 23/17 en el sistema legal ecuatoriano.

PALABRAS CLAVE

derechos humanos ambientales; ambiente; mecanismo de protección; opinión consultiva; Sistema Interamericano; Corte Interamericana de Derechos Humanos

1. INTRODUCTION

The Inter-American Court of Human Rights (hereinafter the Court, IACHR, or the Inter-American Court), on February 7, 2018, made its response to a request for an advisory opinion made by the Republic of Colombia (hereinafter Colombia) on March 14, 2016. This request resulted in the Advisory Opinion 23/17, officially titled “State obligations in relation to the environment in the framework of the protection and guarantee of the rights to life and physical integrity - Interpretation and scope of Articles 4.1 and 5.1, in relation to Articles 1.1. and 2 of the American Convention on Human Rights”¹.

It should be recalled that in March of 2016, Colombia requested the Inter-American judges to clarify what was happening to the rights of the Colombian island populations in the Caribbean threatened by megaprojects promoted by other States that could have a transboundary impact on the Caribbean marine environment. As is well known, once a request for an advisory opinion has been received, it is object of notification to the other States and to the Inter-American organs (as to the general public)². The text of the Advisory Opinion 23/17 reaffirms a series of principles in environmental matters and in the matter of human rights that go far beyond of what was indicated by Colombia in its official request.

As this is the first opportunity in which the Court is requested in environmental matters, in the framework of an advisory procedure, the broad interpretation given by the Inter-American judges allows us to specify the scope of some of the provisions of the American Convention of Human Rights of 1969 (hereinafter the Convention, the American Convention, or the ACHR) and of other Inter-American instruments. In that sense, this paper will discuss some basic concepts related to the subject in question; among them, the rights of nature and the biocentric perspective of law. In addition, new trends in environmental law and its relation to human rights will be discussed. Moreover, this work will focus on the lines that follow in the consultative procedure foreseen by the Inter-American Human Rights System. Finally, since advisory opinions are not mandatory nor binding for Ecuador, a solution for the possible inclusion of the Advisory Opinion 23/17 in the Ecuadorian legal system will be outlined.

2. PRELIMINARY CONCEPTS

2.1. ADVISORY OPINION

The advisory opinions issued by the Inter-American Court of Human Rights are intended to help the State parties to comply with the treaties without submit-

¹ Inter-American Court of Human Rights. Advisory Opinion 23/17 of November 15th, 2017.

² Rules of Procedure of the Inter-American Court of Human Rights. Article 73. Approved by the Court during its LXXXV Regular Period of Sessions, held from November 16 to 28, 2009.

ting them to the formality and sanctions system that characterizes the litigation process³. But these opinions, as the Court itself admits, “do not have the same binding effect that is recognized for their judgments”⁴ in contentious matters⁵. The tendency is, however, to admit a greater importance of the Court’s advisory opinions when it comes to collaborating in the interpretation of the American Convention of Human Rights. Moreover, advisory opinions allow the Court to issue interpretations that contribute to strengthening the system of protection of human rights⁶; and although advisory opinions “do not have the binding character of a judgment in a contentious case, it has undeniable legal effects”⁷.

Admitting that an advisory opinion has legal effects involves far-reaching consequences. The first consequence is discarding the thesis that defends advisory opinions have a simple moral value⁸. The second one is that the advisory opinion can be established as an authoritative interpretation, that is, an authentic interpretation of the ACHR and other treaties on human rights. In this regard, the Inter-American Court is the organ of the Inter-American System for the Protection of Human Rights in charge of interpreting and applying the provisions of the Convention, as provided in its Article 62.3⁹. The third consequence is that the interpretation contained in an advisory opinion has effects even for those countries that have not recognized the jurisdiction of the Court since Article 64 of the ACHR provides that it is not necessary to be part of the ACHR to request an advisory opinion. The fourth consequence is that the consultative jurisprudence of the Inter-American Court of Human Rights becomes a benchmark regarding the legality of the actions of the public powers.

2.2. NATURE’S RIGHTS

In recent years, Latin American Constitutions have presented great legal transformations as a result of neo-constitutionalism¹⁰ adapted to our socio-cultural reality. In the Ecuadorian case, this conversion has been performed with a great influence of the ideology and wisdom of the ancestral peoples. Under this notion, several “new” rights and concepts have been stated in the 2008 Constitution, some of those are *sumac kausay*¹¹ and the declaration of nature as subject of rights¹².

3 Cfr. Inter-American Court of Human Rights. Advisory Opinion 3/83. September 8th, 1983.

4 Harrison, James. “Significant International Environmental Law Cases: 2017 – 2018”. *Journal of Environmental Law*, Volume 30, Issue 3 (2018), p. 536.

5 Cfr. Inter-American Court of Human Rights. Advisory Opinion 1/82. September 24th, 1992.

6 Cfr. Inter-American Court of Human Rights. Advisory Opinion 14/94. December 9th, 1994.

7 Inter-American Court of Human Rights. Advisory Opinion 16/97, November 11th, 1997, par. 122.

8 As a matter of fact, it has such relevance that jurisprudence decisions express the interpretation and application that the Court has given to international treaties and conventions (that have relation with the matters raised in the request for advisory opinion).

9 Free translation. Article 62.3.: The Court has jurisdiction to hear any case regarding to the interpretation and application of the provisions of this Convention submitted to it, provided that the States Parties in the case have recognized or recognized such competence [...].

10 Cfr. Gargarella, Roberto. *The “New” Latin American Constitutionalism: Old Wine in New Skins*. In: von Bogdandy, Armin et al. *Transformative Constitutionalism in Latin America. The emergence of a New Jus Commune*. New York: Oxford University Press, 2017.

11 Constitution of the Republic of Ecuador. Article 71. Official Register No. 449 of October 20th, 2008.

12 *Eiusdem*. Article 14.

Norberto Bobbio expresses that the multiplication of rights arises mainly for three reasons: “a) because the number of goods considered worthy of being protected has been increasing; b) because the ownership of rights has been extended to subjects other than men and; c) because ‘man’ has been dismissed as a generic being and has seen the need to consider its specificity”¹³. Regarding the second point, the author points out that the new rights come from: “the extension of the ownership of some typical rights to subjects other than man”¹⁴. This means there is a transition from man (as the sole holder of rights) to other subjects that are not necessarily human. Hence, the emergence of new rights has a circumstantial relationship with the evolution of society, and it responds to the demands that it imposes. But it is also the result of a consolidation of social values, principles and needs. In this sense, Bobbio states that there is an emerging conception of the so-called rights of nature as a means to protect environment from the constant hazards and contamination to which it is constantly exposed (it is important to note that the need of environmental protection is also linked to human health interests).

The recognition of these new rights thus implies, on the one hand, the extension of the guardianship to new subjects and, on the other, the need for them to be ascribed to the legal systems to make possible their protection through specific guarantees. However, once these rights are recognized, the problem that arises is how to make their enforceability possible. As for that matter, it is essential that adequate and sufficient guarantees are established to allow full exercise of these rights, otherwise, they would not be more than mere declarations¹⁵.

2.3. ANTHROPOCENTRISM AND BIOCENTRISM

The anthropocentric vision refers to a functional way of valuing the diversity of processes and biological entities, where the interests of man are above the interests of nature¹⁶. From this position, the value of living beings or species is subordinated to the utility that these represent to the human being. Under this conception, the human being is conceived as an end while nature is a means. It refers to the idea that human beings are the center of the universe and that the environment must be protected by their value in maintaining or improving the quality of human life.

The expression “environment” is a distinctly anthropocentric definition since it refers to the environment that surrounds the human being. On that matter, the right to a healthy environment arises from the need to guarantee a healthy life for the human being by regulating the use of natural resources. Consequently, this

13 Free translation. Bobbio, Norberto. *El tiempo de los derechos*, Madrid: Editorial Sistema, 1989, p.115.

14 Free translation. *Ibid.*

15 There is a difference between the solemnly proclaimed rights and those effectively protected in a legal system. This implies that rights must not only be declared but must also be equipped with adequate enforcement mechanisms.

16 Cf. Boddice, Rob. *Anthropocentrism: Humans, Animals, Environments*. Boston: Tuta Sub Aegide Pallas, 2011.

vision is always based on the human being as a direct beneficiary of any protection or conservation mechanism.

On the other hand, biocentrism defends the thesis that all living beings have an inherent value¹⁷. Consequently, it proposes a respectful relationship with all forms of life. The biocentric position recognizes, then, that living beings and their environmental support have their own values. Hence, this recognition would generate rights to nature. It is necessary to point out that this recognition does not mean granting the same value to all living beings but recognizing that all living beings have their own value.

Note that this position does not imply that nature must remain intact or un-touchable. According to Gudynas, the protection of nature does not mean renouncing to development, on the contrary, there is a recognized and defended necessity to intervene in the environment to take advantage of the necessary resources to satisfy vital needs¹⁸. From this perspective, the intervention in nature is related to an austere and respectful vision, understanding that its conservation is a necessary condition for development.

3. ENVIRONMENTAL LAW: NEW TRENDS AND CONCEPTS

There are new trends, globally, in relation to environmental law. Environmental law is such a mutant and changing law, that if its study is left for four years, its principal ideas would be totally lost. In the nineties, the golden age of environmental law, the Declaration of Rio, the Rio 92 Summit, the United Nations Convention for Climate Change, the United Nations Convention for Desertification, the United Nations Convention on Biological Diversity and the Agenda 21 were held. But, from one moment to the next, environmental law fell asleep. We have spent decades with an environmental law that has not advanced much. However, in recent years, environmental law has been changing. What are those great changes that have been happening? Are we facing a revolution in environmental law? To answer these questions and solve the topic of this Article, it is necessary to raise certain relevant events in relation to the main issue of this research work, Advisory Opinion 23/17.

3.1. RELEVANT EVENTS LINKED TO NEW ENVIRONMENTAL LAW TRENDS

First, in 2017, President Emmanuel Macron of France adopted the Global Compact for the Environment (also known as the UN Global Compact) and took it,

17 Cfr. Lanza, Robert. *Biocentrism: How life and Consciousness are the Keys to Understanding the True Nature of the Universe*. Dallas: Benbella Books, 2009.

18 Gudynas, Eduardo. *Los Derechos de la Naturaleza y la Naturaleza de sus Derechos*. Quito: Ministry of Justice, Human Rights and Culture, 2011, p.100.

one year later, to the General Assembly of the United Nations¹⁹. A remarkable aspect is that until the intervention of Macron, only the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of 1966, were held. This Global Compact for the Environment or UN Global Compact becomes, then, the third international instrument in the field of human rights. Also, it is a document that is relevant for driving the issue of environmental human rights.

Second, the IACHR issued a contentious judgment in *Lagos del Campo v. Peru* in November of 2017²⁰. The Court declared that an economic, social, and cultural right is of direct justiciability²¹; which, comes to break the paradigm of economic, social and cultural rights within the Inter-American Human Rights System. In addition to breaking this paradigm, this resolution (which is about a labour matter issue) uses the acronym ESCAR²² for the first time; an acronym that corresponds to Economic, Social, Cultural and Environmental Rights. As a result, a direct relationship between human rights and environmental rights is linked. This has an immense repercussion that is reflected in the Advisory Opinion that will be analyzed in this research work.

Finally, the Escazu Agreement was adopted in March of 2018. It seeks to address the innumerable environmental problems, among which are deforestation, soil degradation, water pollution and the dispossession of territories from indigenous peoples and communities²³. The Escazu Agreement is the first environmental human rights treaty in the region and marks a milestone in the design of future environmental governance. In addition, the Escazu Agreement is not limited to recognizing environmental human rights and the obligations of the States parties. Additionally, it delves into how the countries of the region could guarantee the right to a healthy environment with special attention to vulnerable people and groups (as well as the rights to access to environmental information, effective participation in environmental decision making and access to justice; which is what is called the three environmental rights of procedure or access). Furthermore, it is a document that, for the first time, explicitly contemplates and recognizes the principles of progressivity and non-regression.

3.2. ENVIRONMENTAL LAW EMERGING CONCEPTS

There are also three interesting topics related to this subject. In 2016, at the meeting of the International Union for the Conservation of Nature, a Resolution on

19 *Cf.*: Macron, Emmanuel. "Speech by Emmanuel Macron for the United Nations General Assembly". *United Nations General Assembly*. Speech completed in New York City, United States, September 25th, 2018.

20 *Cf.*: Inter-American Court of Human Rights. *Lagos del Campo v. Perú*. Judgment of August 31th, 2017. Series C No. 366

21 *Ibid.*

22 Free translation. The original acronym is DESCA, which corresponds to Derechos Económicos, Sociales, Culturales y Ambientales.

23 *Cf.*: Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (2018).

the Rule of Law in Environmental Matters was signed²⁴. The Rule of Law implies the subjection of states and individuals to the rules of environmental law. Likewise, in 2018, Brazilia signed the Declaration of Brazilia on water justice²⁵. It is a declaration emanating from the 8th World Water Forum; and, it brings an aspect of great importance: the relationship between procedural rights and water justice. There is even talk about the principle *in dubio pro aqua*.

Another issue of relevance is climate justice. Gradually, the issue of climate change is coming to the courts. At the regional level, there is a judgment of the Supreme Court of Colombia that, in addition to granting the Amazon the status of subject of rights, resolves the issue of climate change in Colombia²⁶. Hence, the issue of justiciability²⁷ and the binding²⁸ obligations of our countries regarding climate change can no longer be ignored.

4. CONTENT OF THE ADVISORY OPINION 23/17

Colombia presented a request, on March of 2016, to the Inter-American Court for an advisory opinion concerning the interpretation and scope of Article 1, Article 4, and Article 5 of the American Convention on Human Rights²⁹. The Articles in question refer, respectively, to the obligation to respect rights, the right to life, and the right to humane treatment and personal integrity. Singularly, Colombia requested the interpretation “in relation to the environment in the context of protection and guarantee of the rights to life and to personal integrity [...] [concerning] Articles 1 and 2 of said treaty”³⁰. Specifically, the consultation made by Colombia is in relation to possible repercussions on human rights that large projects, developing in the Greater Caribbean, could cause.

To understand the development of the Advisory Opinion it must be stated why the Caribbean area is important for the region. The Great Caribbean is a region of vital economic, social and cultural importance for the entire American continent³¹. The fishing and tourist activity of the region is vital for the Latin American economies. In addition, the environmental services³² provided by the Caribbean

24 *Cfr.* IUCN World Declaration on the Environmental Rule of Law (2016).

25 *Cfr.* Brazilia Declaration of Judges on Water Justice (2018).

26 Supreme Court of Justice of Colombia. Civil Appeals Chamber. *Sentence STC4360-2018*, February 12th, 2018.

27 In 2015, the Hague Court of Appeal ordered the Dutch government to reduce greenhouse gas emissions by at least 25% by 2020.

In explaining the reasons for the resolution, the court argued that the government authorities of any country have the primary obligation to take care of their citizens; thus, protecting air quality must be one of its main priorities. *Cfr.* The Hague Court of Appeal. *Urgenda Foundation v. The state of Netherlands*. Ruling of October 9th, 2018.

28 These are commitments that, at an internal level, are binding; therefore, they can be brought to justice because there is a close relationship between human rights and climate change. In addition, they are acquired commitments (for the State) that have an impact on health care and ecological balance.

29 *Cfr.* Inter-American Court of Human Rights. Request for an Advisory Opinion presented by the Republic of Colombia concerning the interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights. Costa Rica, 2016.

30 Inter-American Court of Human Rights. Official Summary issued by the Inter-American Court of Human Rights.

31 *Cfr.* Manuel, Winograd. *Environmental Indicators for Latin America and the Caribbean: Toward Land-Use Sustainability*. Venezuela: ICCA Biblioteca Venezuela, 1995.

32 *Ibid.*

ecosystems are of great importance for the mitigation and adaptation to climate change³³, especially for the Caribbean, a region of high vulnerability. Hence, any direct impact to its environmental services means a threat to the human rights of the inhabitants of the Americas, not just the inhabitants of the Greater Caribbean.

The Advisory Opinion is, indeed, a milestone at the regional level. The Court, in terms of the environment and human rights, went much further than the European Court of Human Rights. The Court incorporates International Environmental Law, as norms that regulate the Inter-American Human Rights System, directly to the Inter-American *Corpus Juris*. Prior to this advisory opinion, the issue of human rights in relation to the environment was always linked to the rights of indigenous nationalities. There is only one judgment³⁴ of the IACHR, in terms of environmental human rights, that is not related to the rights of indigenous communities.

4.1. STATE OBLIGATIONS DETERMINED BY THE INTER-AMERICAN COURT

The consultation was about possible negative environmental impacts (i.e., environmental damage) in areas beyond national jurisdiction. In this case, the IACHR concludes several aspects. In the first place, it accomplishes that there are obligations derived from the duties of respecting and guaranteeing the rights to life and personal integrity.

The Court's Advisory Opinion, moreover, establishes a series of obligations that states must meet to comply with the standards of the right to a healthy environment. Among them, are the obligation of prevention³⁵, obligation of precaution³⁶, obligation of cooperation; and, finally, procedural obligations (which are the access rights we discussed previously).

4.1.1. OBLIGATION OF PREVENTION

It is an obligation observed by several international instruments on Environmental Law. Among them, we can mention the Stockholm Declaration on Human

33 On the concept of climate change, its effects, causes and consequences, vid. Letcher, Trevor. *Climate change: observed impacts on planet Earth*. Amsterdam: Elsevier, 2016.; Wallace-Wells, David. *The Uninhabitable Earth: Life after Warming*. New York: Tim Duggan Books, 2019.; Wapner, Paul, and Elver, Hilal. *Reimagining climate change*. New York: Routledge, 2016.

34 Cfr. Inter-American Court of Human Rights. *Claude Reyes v. Chile*. Judgment of September 19th, 2006. Series C No. 151.

35 This is related to prevention principle which implies the use of mechanisms, instruments, and policies with the aim of avoiding serious damage to the environment and the health of people. This principle uses numerous management instruments to function, among which can be named: the declarations of environmental impact, environmental permits and licenses, environmental impact studies and their management plans, environmental auditing, public consultation, and, in general, other preventive instruments that aim to obtain information about the negative impacts on the environment. (Cfr. Duvic Paoli, Leslie-Ann. *The prevention principle in International Environmental Law*. New York: Cambridge University Press, 2018.)

36 This is related to precautionary principle which is applied in the absence of scientific knowledge. This principle mandates that an activity must not be authorized when there is no identification of the risks that the activity will subsequently cause once authorized. Hence, the precautionary principle is of an anticipatory nature. (Cfr. Freestone, David and Hey, Hellen. *The precautionary principle and International Law*. The Hague: Kluwer Law International, 1996.)

Environment, which includes this obligation in its Articles 2, 4 and 7³⁷. There, it talks about the duty of states to evaluate activities with a high environmental impact and the measures to be taken against them. The Court states that the obligation of prevention implies that “states have the responsibility to ensure that activities carried out within their limits of national jurisdiction or under their control do not cause damage to the environment of other States or of areas outside of their jurisdiction”³⁸.

Later, the IACHR, under the concept of due diligence, gives high priority to this obligation by saying that it involves a prompt, adequate and effective reparation. As a result of this affirmation, comes into question who should be compensated? And who should be repaired? The Court concludes that the reparation must be done both to the people, as to the victim states; regardless of whether it is a licit or illicit activity. Under this scope, the Court employs the concept of environmental objective liability³⁹. This concept, according to Lucas Bergkamp (head of the European Regulatory Practice), states that the legal guarantee to demand compensation for damages is independent from the characteristics of the actions of the responsible party⁴⁰. In addition, there must be a causal relationship between action and omission in order to speak of transboundary harm. Nonetheless, the Court says that the liability arises from significant damages; hence, it is not any type of damage that will be subject to the control or protection of the Inter-American system through Article 26 of the Convention, it is necessary that the damage is significant:

[...] many of the treaties that include an obligation to prevent environmental damage, condition this obligation to a certain degree of seriousness in the damage that may be caused. Thus, for example, the Convention on the Law of the Uses of International Water Courses for Non-Navigation Purposes, the Vienna Convention for the Protection of the Ozone Layer, the Framework Convention on the United Nations on Climate Change and the Protocol to the Antarctic Treaty on Environmental Protection establish the obligation to prevent significant damage⁴¹.

The state is required to regulate both state and private activities that may negatively affect the environment. It implies a duty of supervision, control, and sanction of any activity that is generated within the jurisdiction of a state and that may cause significant environmental damage (both within the state and beyond the national jurisdiction). Thus, it is an obligation to request and approve Environmental Impact Studies. In addition, the establishment of incontinence plans and security measures is mandatory; as well as plans to mitigate the significant damage that may occur.

37 *Cfr.* Declaration of the United Nations Conference on the Human Environment (1972).

38 Free translation. Inter-American Court of Human Rights. Advisory Opinion OC 23/17 of November 15th, 2017., par. 128.

39 *Cfr.* Bergkamp, Lucas. *Liability and Environment. Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context*. The Hague: Kluwer Law International, 2001.

40 *Ibid.*

41 Free translation. Inter-American Court of Human Rights. Advisory Opinion OC 23/17 of November 15th, 2017., par. 134.

On the Environmental Impact Assessment, the IACHR says what are the minimum standards for the preparation of this evaluation⁴². First, it must be done before carrying out the activity with environmental risk. It ought to be done by independent entities that are under the supervision of the state. In addition, it should cover the cumulative impact (that is, the impact it may have in relation to other nearby activities). In second place, there must be stakeholder participation in the environmental impact assessment⁴³. Finally, the content must be done considering: (i) the nature, (ii) the magnitude of the project, and (iii) the possibility that the impact may have on the environment and on the people⁴⁴.

4.1.2. OBLIGATION OF PRECAUTION

This obligation was stated by several declarations on human rights and environment. Specifically, the Declaration of Rio establishes that:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation⁴⁵.

Although the Inter-American Court does not really develop the implications of this obligation, it does establish, clearly, its components. The IACHR determines that states must act in accordance with the precautionary principle for the protection of the right to life and personal integrity; therefore, they should protect those rights against serious and irreversible damage to the environment even in the absence of scientific certainty. Following this provision being made by the Inter-American Court, to bring the precautionary principle into the *Corpus Juris*, we can say that the *pro homine* principle must be balanced with the principle *pro natura*.

4.1.3. OBLIGATION OF COOPERATION

In terms of human rights, the jurisdiction where the violation occurs does not limit the responsibility of the State that has acted contrary to its international obligations. In this sense, a broad concept of jurisdiction is developed, and it extends beyond the strict concept of the national territory. In terms of cooperation, for the purposes of protecting the right to life and to integrity, states must notify other states so that the necessary measures can be taken in cases of emergency.

42 *Cfr.* Inter-American Court of Human Rights. Advisory Opinion OC 23/17 of November 15th, 2017., pars. 170 – 173

43 *Cfr.* Inter-American Court of Human Rights. Advisory Opinion OC 23/17 of November 15th, 2017., pars. 166 – 168.

44 For the Inter-American Court, the traditions and cultures of the indigenous peoples that could be affected must be respected (this is the socio-environmental impact assessment). In relation to the rights of indigenous people, the Court in the Saramaka and Sarayaku cases had already been very emphatic on the issue of taking cultural aspects into account when vulnerable populations such as indigenous populations are involved. (Cfr. Inter-American Court of Human Rights. *Kichwa indigenous people of Sarayaku v. Ecuador*. Judgment of June 27th, 2012. Series C No. 245; Inter-American Court of Human Rights. *Saramaka people v. Suriname*. Judgment of June 28th, 2008. Series C No. 172.)

45 The Rio Declaration on Environment and Development (1992). Principle 15.

It should be noted that this is not a principle proposed by the Court, it is a reaffirmation of a principle that emerged during the decade of the eighties. It arose precisely because of one of the most emblematic cases of environmental damage⁴⁶: the Chernobyl nuclear accident in Ukraine, where the former Soviet Union did not notify other countries about the nuclear contamination that was occurring as a result of the accident⁴⁷.

4.1.4. PROCEDURAL OBLIGATIONS (ACCESS TO INFORMATION, PARTICIPATION IN DECISIONS, JUSTICE)

The Court calls them procedural rights. Since they are developed, in more detail in the Escazu Agreement, it is necessary to consider, at the time of interpreting the Agreement, what the Court determines about these rights. Hence, the Court's development on these obligations aim to serve as an interpretation instrument for the Escazu Agreement.

4.1.4.1. ACCESS TO INFORMATION

According to the IACHR, the information must be “accessible, effective and opportune”⁴⁸. Moreover, the individual that requests the information does not have to demonstrate a specific⁴⁹ interest since having a diffuse or “multilayer”⁵⁰ interest is enough. That is, it is not necessary to have a subjective right in order to access that information⁵¹. For complying with this obligation, the state must provide a series of mechanisms and procedures for people to request information; as well as the active collection and dissemination of information (it is an issue related to transparency and accountability). In addition, the state has to collect data and put it actively in the hands of the administered. It is not only an obligation of the citizen to request information, but the state must collect that information and make it available to citizens. The Court establishes that the right of access is not absolute because, like other rights, it admits restrictions and limitations. These restrictions must follow the following guidelines: “(i) they must be provided for in the law, (ii) they must meet an objective allowed by the American Convention, and (iii) they must be necessary and proportional to respond to a general interest”⁵².

This obligation goes hand in hand with the human right of access to information, which gives people “the opportunity to develop their potential to the fullest and

46 *Cfr.* Larsson, Marie-Louise. *The Law of Environmental Damage*. The Hague: Kluwer Law International, 1999, p. 122 – 126.

47 *Cfr.* Moser, Berthold. The IAEA Conventions on Early notification of a Nuclear Accident and on Assistance in the Case of a Nuclear Accident or Radiological Emergency. *Nuclear Law Bulletin* No. 44. France: Nuclear Energy Agency, 1989, pp. 10 – 23.

48 Free translation. Inter-American Court of Human Rights. Advisory Opinion OC 23/17 of November 15th, 2017., par. 220.

49 *Cfr.* Inter-American Court of Human Rights. Advisory Opinion OC 23/17 of November 15th, 2017., par. 219.

50 *Cfr.* Wrbka, Stefan; Van Uytsel, Steven; and Siems, Mathias. *Collective Actions. Enhancing access to justice and reconciling multilayer interests?* New York: Cambridge University Press, 2012.

51 *Ibid.*

52 Free translation. Inter-American Court of Human Rights. Advisory Opinion OC 23/17 of November 15th, 2017., par. 224.

realize the full range of their human rights”⁵³. Likewise, this right involves “the right to seek information, [...] the duty to give information, to store, organize, and make it easily available”⁵⁴.

4.1.4.2. PARTICIPATION IN DECISIONS REGARDING ENVIRONMENTAL ISSUES

The right to public participation, in environmental matters, is expressly contained in Article 23.1.a. of the Convention. States must guarantee the participation of people in political decision making that may affect the environment. This right must be ensured without discrimination, in an equitable, significant and transparent way (therefore, previously, they must have guaranteed access to relevant information). This participation must be from the early stages of the decision-making process. In addition, the public must be informed about these opportunities for participation. The IACHR says that the mechanisms⁵⁵ of participation can be public hearings, notifications, and consultations, participation in the processes of enacting laws (or supporting legislative popular initiative).

This obligation was observed in a previous judgment, *Sarayaku v. Ecuador*, made by the Court⁵⁶. The sentence addressed several important issues. One of those was in relation to indigenous people’s right to free, prior and informed consultation (in addition, of the standards for its application). Moreover, the standard regarding the need to obtain the consent of indigenous peoples had already been established by the Inter-American Court in the *Saramaka v. Suriname* judgment in which the Court said that in the case of large-scale development or investment plans that would have a greater impact within the territory, the State has the obligation, not only to consult, but also to obtain “free, prior and informed consent”⁵⁷.

4.1.4.3. ACCESS TO JUSTICE

The Court says that the right of access to environmental justice is based on Articles 1, 25 and 8.1 of the American Convention. This must have repercussion in the jurisprudence of the Ecuadorian Constitutional Court, which we will explain later why. So, what is this right of access to environmental justice? It is the right we have for challenging any rule, decision, act or omission of public authorities that may contravene environmental law obligations. It is also about ensuring the full realization of procedural rights; in addition, it allows remedying any violation of environmental rights resulting from the breach of any environmental

53 Commonwealth Human Rights Initiative. *Open Sesame: Looking for the Right to Information in the Commonwealth*. New Delhi: Spectra Visual World, 2003, p. 23.

54 *Ibid.*

55 These, according to the Inter-American Court are *numerus apertus*.

56 *Cf.* Inter-American Court of Human Rights. *Kichwa indigenous people of Sarayaku v. Ecuador*. Judgment of June 27th, 2012. Series C No. 245

57 Inter-American Court of Human Rights. *Saramaka people v. Suriname*. Judgment of June 28th, 2008. Series C No. 172.

regulation. As a result, the right of access to justice guarantees the other two procedural rights and, likewise, environmental human rights, broadly.

There is an obligation, on the part of the states, to guarantee the development of the necessary measures to curb environmental problems. This duty is observed and enunciated by ratified international instruments among nations (Stockholm Declaration, Rio Declaration, Convention on Biological Diversity, Convention on Climate Change, Agenda 21, Marrakesh Agreement, Declaration on Sustainable Development, among others). Therefore, it is a responsibility that states assume for the protection of the environment; particularly, the observance of complying with the development of the necessary measures to conserve nature and reduce the risk and impact of environmental damage.

Ecuador is one of the states that has endeavored to develop a large part of the measures that are required to guarantee the protection of the environment. For instance, the Organic Code of the Environment is, together with the declaration of nature as a subject of rights, an indispensable tool when presenting an administrative claim or looking for ways to action in favor of nature. However, there are certain aspects that have not been fully covered by national legislation and, as a consequence, are outside the spectrum of effective protection. As brief examples we can mention (i) the lack of preparation and knowledge of the judges in environmental matters and (ii) the lack of effectiveness in the execution of environmental standards.

The first aspect is related to the lack of relevance given to environmental law and to the “extensive” regulations that it has. One way to solve this is to invest time and state resources for a better preparation of the Judiciary Power. Likewise, it is necessary to generate greater awareness in the judges, since it turns out that the lack of knowledge is due, many times, to the lack of interest. Also, a better communication about the imminent environmental risks that threaten, not only the life of the planet, but also the life of human beings is the main tool to combat this indifference. The second aspect has to do with the lack of clear mechanisms within the Ecuadorian legal system itself; therefore, it is difficult to distinguish which is the applicable institution or procedure for an environmental conflict. The best solution to this problem is the implementation of clear, concise and easily accessible mechanisms.

5. ENVIRONMENTAL HUMAN RIGHT (S): A PROTECTION MECHANISM FOR NATURE

The Court recognizes the synergy, interdependencies, and inseparability of the following concepts: environment, climate change, sustainable development, and human rights. These are four elements that can no longer be separated and must be a set of typical obligations to be fulfilled by a State. As it follows, the IACHR

reaches the conclusion that within Article 26 of the American Convention is the right to a healthy and balanced environment⁵⁸; likewise, says that we will find that same right in the Protocol of San Salvador in Article 11:

In the Inter-American Human Rights System, the right to an environment is expressly protected in Article 11 of the Protocol of San Salvador: 1. Everyone has the right to live in a healthy environment and to have basic public services. 2. The States Parties shall promote the protection, preservation and improvement of the environment.

Additionally, this right must also be considered included among the economic, social and cultural rights protected by Article 2684 of the American Convention, because under that norm are protected those rights that derive from economic, social and educational norms, science and culture contained in the OAS Charter, in the American Declaration on the Rights and Duties of Man [...]⁵⁹.

So, why do we talk about environmental human rights? Why in the plural and not in the singular? The human right to the environment has been seen through time, erroneously, in isolation. It has been projected and applied in such a way that it ends up violating the hardcore of other human rights. That vision is not the correct one. There are no dictatorial or arbitrary human rights. Every human right must be placed under the light of other human rights with which it must coexist and coincide. That is why we speak of environmental human rights in the plural and not in the singular. For that reason, by the application of the human right to the environment, the other rights of other populations cannot be diminished (and even less if those populations are vulnerable).

The needs of the populations must be considered; the right to the environment is one of the people. It is a right that coexists with other important human rights: “the right to life, the right to health, the right to drinkable water, the right to personal integrity, the right to sanitation, the right to food, the right to housing, the right to participation in cultural life, the right to property, the right to not be forcibly displaced and the right to peace”⁶⁰. Also, there are three procedural rights that coexist with environmental human rights. In the Escazu Agreement, they are known as access rights (right of access to information, right to effective participation in environmental decision-making, and access to environmental justice).

This approach to environmental human rights must contemplate the most vulnerable populations. That is, according to the IACHR, “[i]ndigenous communities, children, people living in extreme poverty, minorities, the disabled, women,

58 Furthermore, the IACHR establishes several international instruments where the right to a healthy and balanced environment can be found. Some of those instruments are the American Declaration of Indigenous Peoples, the African Charter on Human Rights, the Arab Charter on Human Rights, and the Declaration of Human Rights of Association of Southeast Asian Nations.

59 Free translation. Inter-American Court of Human Rights. Advisory Opinion OC 23/17 of November 15th, 2017., pars. 56 – 57.

60 *Cfr.* Inter-American Court of Human Rights. Advisory Opinion OC 23/17 of November 15th, 2017.

communities that depend for their survival on environmental resources, communities that due to their geographical location are in danger of being affected in case of environmental damage”⁶¹, among others.

The IACHR understands that the right to the environment has an individual connotation -as a subjective right- and a collective connotation -as an intergenerational diffuse interest-. Correspondingly says that within the Inter-American system, the right to the environment is protected not only because of its usefulness to the human being; but, additionally, because of the importance for other living organisms. It develops, therefore, two approaches: (i) an anthropocentric approach, by mentioning the environment as useful for the human being; and (ii) a biocentric approach, by giving relevance to the biological roles of the organisms that make up the environment. Moreover, the Court informs the trend, global and regional, of recognizing rights to nature⁶².

Furthermore, the effectiveness of human rights is intrinsically linked to the guarantee of a healthy environment. This indisputable relationship demonstrates the interdependence of human rights and has been internationally recognized by all international and regional human rights bodies; as well as by most of the Constitutions in the world, including those of Latin America and the Caribbean. The link between environmental conditions and human well-being has been legally recognized in various international instruments. The protection of the environment is a determining factor for the full enjoyment of human rights and its degradation is often also a cause of the violation of these rights⁶³. In this regard, the Rio Declaration on Environment and Development (adopted at the 1992 United Nations Conference) proposed an instrumental approach to the link between environment and human rights⁶⁴. At the regional level, the right to a healthy environment was recognized in Article 11 of the Protocol of San Salvador, together with the obligation of the States to protect, preserve and improve the environment.

Finally, the human right to a healthy environment usefully completes the rights of nature. Nature and healthy environment are inseparable, as suggested in principle 1 of the Rio Declaration on Environment and Development that praises “human beings have the right to a healthy and productive life in harmony with nature”⁶⁵. Likewise, the right to life has been interpreted by numerous regional human rights courts, considering that it includes the right to dignified living conditions. The

61 Free translation. Inter-American Court of Human Rights. Advisory Opinion OC 23/17 of November 15th, 2017., par. 67.

62 It is a trend that has two facets, constitutional and jurisprudential. In relation to the constitutional aspect, at a regional level, it has been seen that both Ecuador and Bolivia have recognized nature’s rights. Specifically, the state of Ecuador recognizes in Article 396 of the Constitution the following rights: conservation, protection, preservation, and restoration. On the other hand, regarding the jurisprudential aspect, two precedent cases in Colombia have recognized nature’s rights (Atrato River and Amazon).

63 Cfr. Knox, John. *UN Report of the independent expert on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment*. New York: United Nations General Assembly, 2012.

64 Cfr. Rio Declaration on Environment and Development (1992). Principle 1.

65 *Ibid.*

right to life has also been interpreted in a way that implies obligations for States regarding preventive measures to prevent the violation of the right to life.

6. ADVISORY OPINION 23/17 IN THE ECUADORIAN LEGAL SYSTEM

After the exploration that we have done on the development that the Court makes in relation to the state environmental obligations, it is worth asking if this Advisory Opinion violates our Constitution or not and whether Ecuador is obliged to comply with the opinion of the IACHR.

The Court's pronouncements must not violate sovereignty and reserved domain of each state. Article 64.1 and 64.2 of the IACHR empowers a state party to request an opinion from the IACHR on the interpretation of the convention, as well as the compatibility of the domestic laws of the requesting state with international treaties⁶⁶:

Article 64.1. The states members of the Organization may consult the Court regarding the interpretation of this Convention or other treaties concerning the protection of human rights in the American states⁶⁷.

Article 64.2. The Court, at the request of a member state of the Organization, may give opinions on the compatibility between any of its domestic laws and the international instruments⁶⁸.

In the legal framework of the IACHR, advisory opinions have the objective of interpreting or analyzing the compatibility of a standard with international instruments⁶⁹; "despite having no binding⁷⁰ force, [...] advisory opinions [...] carry great legal weight and moral authority. They are often an instrument of preventive diplomacy and help to keep the peace"⁷¹. Advisory opinions, for that matter, are not mandatory; that being the main difference with the judgments. The reason they are not binding is that there are no parties in them⁷²; hence, it would be unfair that a decision of the Court was mandatory for those who have not appeared before it, nor have they been sued or interpellated. It is not, either, a guideline on how to legislate⁷³. According to Article 2 of the Statute of the IACHR, the Court has juris-

66 Some examples are: Advisory Opinion 18/03 requested by the United Mexican States, regarding the Juridical Condition and Rights of Undocumented Migrants; or Advisory Opinion 6/86, relative to the word "Laws" of Article 30 of the ACHR, requested by the Oriental Republic of Uruguay.

67 Free translation. American Convention on Human Rights (1969). Article 64.

68 *Eiusdem*.

69 Cfr. Giorgetti, Chiara. *The Rules, Practice, and Jurisprudence of International Courts and Tribunals*. Boston: Martinus Nijhoff Publishers, 2012.

70 An example of the non-obligatory nature of advisory opinions is Advisory Opinion 83/03, requested by Guatemala, which deals with the abolition of death penalty. The IACHR stated that the application of the death penalty is not compatible with Guatemalan legislation since this country had previously signed the ACHR (which expressly prohibits it). However, Guatemalan legislation maintains vestiges of this kind of sanctions.

71 International Court of Justice. *Advisory Jurisdiction*. <https://www.icj-cij.org/en/advisory-jurisdiction> (access on: 24/July/2018).

72 Cfr. Giorgetti, Chiara. *The Rules, Practice, and Jurisprudence of International Courts and Tribunals*. *Op. Cit.*

73 *Ibid.*

dictional and advisory powers⁷⁴. The second competence (consultative) is exercised, when this body issues this type of non-binding opinions, unlike the judgments.

In this context, does Ecuador have to comply with the Advisory Opinion 23/17? To answer, it is necessary to contemplate the Constitution. In Article 417, it is praised that international treaties will be subject to the provisions of the Constitution (but it also mentions that the application of human rights international treaties must be done under the *pro homine*, no restriction of rights, and direct applicability principles)⁷⁵. Article 425, following the same line of logic, establishes the hierarchy of laws in our country⁷⁶. As stated by these articles, the supreme rule position is occupied by the Constitution followed by international treaties. Moreover, Ecuador recognized the competence and jurisdiction of the IACHR on 1984 by means of Decree No. 2768 of July 24, 1984. However, the obligation to comply with the pronouncements of the IACHR lies in relation to judgments, but not opinions⁷⁷. Thus, Ecuador may reserve its aim to comply with and ratify the advisory opinion; specially because advisory opinions are not international treaties nor binding judgments. As for that matter, Advisory Opinion 23/17 is not binding on Ecuador. It arises, then, a problem on the applicability of the Advisory Opinion. As this is an instrument full of precedents (and statements) of great relevance, it is necessary to fix solutions that guide its inclusion.

7. CONVENTIONALITY CONTROL: SOLUTION FOR THE INCLUSION OF ADVISORY OPINION 23/17 IN ECUADORIAN LEGAL SYSTEM

The conventionality control can be defined as the search for coherence between the domestic legislation of a country and the international treaties or agreements that it has ratified⁷⁸. In terms of the IACHR, it means that there must be a “dialogue between domestic courts and the Inter-American Court, especially of judicial dialogue on human rights questions”⁷⁹. That is, the control of conventionality is a procedure of congruence of national and international standards; it is carried out through processes of interpretation of international treaties and conventions, as well as the internal laws of a country⁸⁰. Moreover, it establishes the purpose of observing that there is no contradiction between national and international law; and judges must comply with the provisions of international regulations and international court decisions, as they are the ones that are capable of best fulfilling the *pro homine* principle⁸¹.

74 Statute of The Inter-American Court of Human Rights. Article 2. Resolution No. 448 adopted by the General Assembly of the OAS, October 1979.

75 Constitution of the Republic of Ecuador. Article 417. Official Register No. 449 of October 20th, 2008.

76 *Eiusdem*. Article 425.

77 As in the cases of Suárez Peralta v. Ecuador (2013), or Albán Cornejo v. Ecuador (2007), and in others in which Ecuador has been convicted.

78 Cfr. Soley, Ximena et al. *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune*. New York: Oxford University Press, 2017.

79 *Id.*, ps. 248 – 253.

80 *Ibid.*

81 *Ibid.*

According to the Inter-American Court, “advisory opinions are intended to help states and organs comply with and apply treaties [...] without subjecting them to the formality and system of sanctions that characterize litigation”⁸². In 2006, after the case of *Almonacid Arellano vs. Chile* the principle of conventionality control was born; the IACHR resolved the following:

The Court is aware that judges and domestic courts are subject to the rule of law and, therefore, are obliged to apply the provisions in force in the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State apparatus, are also subject to it, which obliges them to ensure that the effects of the provisions of the Convention are not diminished by the application of laws contrary to its object and purpose, and that from the beginning lack legal effects. In other words, the Judiciary must exercise a kind of ‘**conventionality control**’ between the domestic legal norms that apply in specific cases and the American Convention on Human Rights. In this task, **the Judicial Power must consider not only the treaty, but also the interpretation** that the Inter-American Court, the ultimate interpreter of the American Convention, has made of it⁸³ [emphasis added].

So, the Court dictates that the rules of the commission are binding; and, also, the interpretations that the Inter-American Court does about them. For that matter, the norms that make up the Inter-American Human Rights System are not, nor are they interpreted, in isolation. Rather, they should be read under the *Corpus Juris* of Inter-American Human Rights that establishes that the norms must be read in consonance with the interpretations that the Inter-American Court of Human Rights has given. In the present case, the Advisory Opinion states an interpretation of Article 1, Article 4, and Article 5 of the American Convention on Human Rights of which Ecuador is signatory state. Subsequently, Ecuador is obliged to comply with the rules of the mentioned Articles in line with the interpretation that the Court has made of them.

Briefly, in the case *Almonacid v. Chile*, the Court determined that the standard of conventionality control linked all states. Since then, the Court has progressively interpreted the concept of conventionality control. It has even extended the notion’s interpretation to advisory opinions; thus, the Court, in Advisory Opinion 16/99, clarified that the opinions are not binding only to the states that consult; in fact, they are mandatory to all the Inter-American states⁸⁴.

8. CONCLUSION

Throughout this article, the new trends in environmental law have been discussed. Among them, the legal relevance to the environment that is being provided in the courts, the configuration of the right to a healthy environment as

82 Inter-American Court of Human Rights. Advisory Opinion 3/83. September 8th, 1983.

83 Inter-American Court of Human Rights. *Almonacid Arellano v. Chile*. Judgment of September 26th, 2006. Series C No. 154.

84 *Cfr.* Inter-American Court of Human Rights. Advisory Opinion 16/99. October 1st, 1999.

part of economic, social and cultural rights, the new international treaties that seek to update environmental protection, among others. Also, the elements of Advisory Opinion 23/17 and the legal concepts developed by the Inter-American Court have been scrutinized.

From this whole journey it can be concluded that Advisory Opinion 23/17 is, certainly, an advance in the field of human rights because it highlights that there is a relationship between protection of the environment and the protection of the rights of the people. Likewise, it points out that the right to a healthy environment is an autonomous right in itself; therefore, it is enforceable against any competent authority. In principle, human rights are a protection that must be guaranteed to people so that their liberties and safeguards are guaranteed.

Within the generations of human rights, there are the economic, social and cultural rights that are understood as intrinsic to man by the mere fact of being a man. Consequently, what these rights seek is to guarantee an anthropocentric interest (since the protection of human beings is sought above all else). On the other hand, the right to a healthy environment involves much more than the protection of the person's rights. This right implies the protection of nature through the protection of human rights. That is, its purposes are related with the environment that surrounds the human being.

Because of the high contamination and constant loss of biodiversity, it is imperative to safeguard the state of nature; because without it, it would be impossible to be in full enjoyment of human rights. For this reason, it is said that it is a biocentric right because its objective is the protection of the human being and the environment that surrounds it. In addition, it is a right that changes the perspective of human rights because it has a relationship with other rights, such as health, life, free development, freedom, integrity (among others) that are affected by environmental problems.

Moreover, the Advisory Opinion 23/17 is an instrument of high relevance for the protection of human rights. In addition, it is part of the new trends that have been developed in environmental law. Likewise, it places a new perspective on the environment and its protection through the so-called "environmental human rights". Its inclusion in the Ecuadorian legal system will depend on the control of conventionality. As seen, the Advisory Opinion does not materially contravene the Constitution of Ecuador. In fact, it is directly binding if the control of conventionality is applied. Indeed, it must be considered that the conventionality control is a standard that obliges the Ecuadorian State to adapt its regime to the provisions of the American Convention on Human Rights and to the interpretations that the IACHR has made of the Convention.