PROTECTION OF THE ENVIRONMENT IN INTERNATIONAL COURTS: RECENT DECISIONS OPEN NEW AVENUES FOR MASS CLAIM PROCESSES

by Clàudia Baró Huelmo

Two significant jurisprudential developments published last month have shed light on important questions relating to the protection of the environment in international law. They are of particular interest to States, businesses and civil society groups since they open up a range of possibilities when it comes to assessing environmental damages in inter-State disputes, expanding the scope of human rights obligations to extraterritorial situations, and deriving procedural rights from existing human rights instruments, among other matters.

1. THE INTER-AMERICAN COURT OF HUMAN RIGHTS: ADVISORY OPINION ON HUMAN RIGHTS AND THE ENVIRONMENT

On 7 February 2017, the Inter-American Court of Human Rights (the "IACtHR") published a landmark advisory opinion (OC-23/17 of 17 November 2017) recognizing for the first time that environmental degradation affects the effective enjoyment of human rights.

The advisory opinion was rendered in response to a request made by Colombia. It examined two main issues (1) the application of extraterritorial jurisdiction to environmental obligations and (2) the relationship between human rights and environmental harm.

With regards to the first issue, the IACtHR held that the term "jurisdiction" in Article 1.1 of the American Convention on Human Rights ("ACHR") is not limited to a State's own territory. The IACtHR had previously established that States Parties to the ACHR have an obligation to respect and guarantee the human rights of all people under their jurisdiction, even if they are not within their territory. The key requirement, which is shared with other human rights bodies, is that the victim is within the "effective control" of the State.

The novelty in the present decision lies in the re-interpretation of the standard of "effective control". The conventional understanding of the "effective control" standard applies to the victim and, implicitly, also to the source of harm. Breaking away from this double requirement, the IACtHR held that effective control over the source of environmental harm alone may be sufficient to give rise to State responsibility if there is a relation of causality between the activity in its territory or under its control and the adverse effect on the human rights of people living outside its territory.

The IACtHR confirms on this point a prior doctrinal position advocated by LALIVE Of Counsel and Cambridge Professor J. E. Viñuales[1], with potentially significant implications for international litigation, not only as regards human rights and environmental matters but also other mass claims processes. By way of illustration, indiscriminate and disproportionate sanctions affecting the population of a State could amount to a violation of the extraterritorial human rights obligations of the States taking such action under a range of international instruments and customary international law. Similarly, unabated emissions of substances causing transboundary air and water pollution or, more generally, climate change could be a violation of the extraterritorial human rights obligations of the State where the emissions occur. Given the potentially important implications of its holding, the IACtHR also explicitly remarked upon the fact that this extra-territorial obligation is an exceptional situation which must be analysed in each concrete case and applied in a restrictive manner.

In relation to the second issue, the IACtHR examined the obligations related to the protection of human rights in face of environmental harm. The IACtHR first noted that the main obligation of States in this context is to prevent significant environmental damage inside or outside their territory. In light of this objective, States must regulate, supervise and oversee the activities under its jurisdiction which could potentially cause such harm. The IACtHR also highlighted the obligation of States to act in accordance with the precautionary principle and the obligation to cooperate in good faith for the prevention of environmental harm, which include an obligation to notify other potentially affected States when they acquire knowledge that activities under their jurisdiction might have a potentially adverse environmental impact.

Finally, the IACtHR held that the right to a healthy environment comprises obligations for States to guarantee the right to information related to potential environmental issues; the right to public participation of people under its jurisdiction in environmental decision-making; and the right to access to justice in relation to the protection of the environment. This is noteworthy because, until now, these procedural obligations had not been clearly recognised under the ACHR. Moreover, the IACtHR suggested that such procedural aspects may be implicit in certain rights guaranteed by the ACHR (paragraph 211). This may potentially pre-empt the recently signed treaty on public participation in environmental matters under the aegis of the Economic Commission for Latin America and the Caribbean. In practice, this means that a range of information and participation requirements would now apply to infrastructure, mining and other economic projects in countries that are parties to the ACHR.

---

1 Jorge E. Viñuales, "A Human Rights Approach to Extraterritorial Environmental Protection", in N. Bhuta (ed.), The Frontiers of Human Rights: Extraterritoriality and its Challenges (Oxford University Press, 2016), pages 218-219.

Thus, this advisory opinion is likely to have significant consequences for States, businesses and civil society for a range of questions. More generally, it confirms the increasing need to take into account rapid developments in human rights and environmental law in the organisational, transactional and litigation contexts.

2. THE INTERNATIONAL COURT OF JUSTICE: COMPENSATION DUE FOR CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA

On 2 February 2018, the International Court of Justice (the "ICJ") delivered its judgment on compensation owed by the Republic of Nicaragua to the Republic of Costa Rica in relation to the case concerning Certain activities carried out by Nicaragua in the border area.

In its judgment on the merits of 16 December 2015, the Court held that Nicaragua owed compensation to Costa Rica for the environmentally damaging excavation of three caños (channels) in the northern part of Isla Portillos, and for establishing a military presence on Costa Rican territory, thus violating Costa Rica's territorial sovereignty. The ICJ gave the Parties twelve months to reach an agreement on the matter of compensation, failing which the ICJ would decide on the matter of compensation at the request of either party. Costa Rica made such a request on 16 January 2017, claiming compensation for costs and expenses incurred as the result of Nicaragua's unlawful activities and including expenses incurred to monitor or remedy the environmental damage caused.

The 2018 judgment is noteworthy because it is the first time that the ICJ renders a judgment on the assessment of environmental damage and holds that such damage and the consequent impairment or loss of the ability of the environment to provide goods and services is compensable under international law. Significantly, the ICJ recognised that the damage suffered by the environment as such (irrespective of the resulting economic damage for a party) could be compensated and that a holistic "ecosystems approach" could be used to assess such damage (although the ICJ declined to rely solely on this approach in the present case, as stated in paragraphs 84-85).

In order to award compensation, the ICJ had to determine the existence and extent of the environmental damage claimed by Costa Rica and whether there existed a direct and certain causal link between such damage and Nicaragua's activities. The Court found such a nexus with four of the six areas Costa Rica identified for compensation, but it did not set out in detail the standards it used to make such determinations.

As regards the methodology for the valuation of damages, the ICJ considered it appropriate to "approach the valuation of environmental damage from the perspective of the ecosystem as a whole, by adopting an overall assessment of the impairment or loss of environmental goods and services prior to recovery, rather than attributing values to specific categories of environmental goods and services and estimating recovery periods for each of them." (paragraph 78). Ultimately, the amount awarded to Costa Rica in direct relation with the costs and expenses incurred in preventing irreparable prejudice to the environment remained modest: USD 185,414.56, for the construction of a dyke and a series of overflights in order to assess the effectiveness of the works. The precedent, however, may prove extremely valuable.

The decision of the Court's majority was criticised by two judges from biodiversity rich countries. In his separate opinion, Judge Cançado Trindade from Brazil observed that the ICJ's reasoning may have been "far too strict, this being the first case ever in which it is called upon to pronounce on reparation for environmental damages." (paragraph 2). In his view, the ICJ lost an opportunity to address environmental damages in terms of restorative justice and equity. Judge Bhandari from India went even further in his separate opinion suggesting that "punitive damages ought to be awarded as a sufficient deterrent against future conduct which might result in environmental harm." (paragraph 16). He further noted that "[o]nly if those causing harm to the environment, are made to pay beyond the quantifiable damage can they be deterred from causing similar harm in the future." (paragraph 19).

3. OUTLOOK

Overall, the two developments reviewed confirm the increasing importance of human rights and environmental matters in international law and the possibilities they offer for international dispute settlement. Both the IACtHR and the ICJ remained cautious in their conclusions. Whereas the IACtHR admitted the extraterritorial extension of jurisdiction based on the effective control over the source of harm, it considered it to be exceptional. Similarly, whereas the ICJ admitted that harm suffered by the environment as such may be compensable and that a holistic "ecosystems approach" could be used to assess such damage, it did not follow specifically this approach in this case. But the possibilities unlocked by these two decisions may be far-reaching if applied to different factual circumstances.