

Environmental Law: Is an Obligation *Erga Omnes* Emerging?

by Prof. Nicholas A. Robinson

Elisabeth Haub School of Law at Pace University
Executive Governor, International Council of Environmental Law
78 North Broadway, White Plains, NY 10603
1-914-422-4244; nrobinson@law.pace.edu

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“MEDIO AMBIENTE Y DERECHOS HUMANOS”

Panelists

Mr. Andres Villegas, Colombian Ministry of Foreign Affairs

Prof. Jean-Marc Thouvenin, Secretary General, Hague Academy of International Law

Prof. Stephanie Farrier, Director, Center for Applied Human Rights, Vermont Law School

Prof. Nicholas A. Robinson, Elisabeth Haub School of Law at Pace University and ICEL

Executive Governor of the International Council of Environmental Law

As sea levels rise along coastlines, glaciers and polar ice recede, and the hydrologic cycle of the planet is less predictable with prolonged droughts and floods in many regions, the duty of States and their people to care for Earth's environment has become a common concern of mankind. On 10 May 2018, the UN General Assembly adopted Res. A/72/L.51¹ and launched a formal intergovernmental consultation about a proposed Global Pact for the Environment, with its first principle setting forth the right to a healthy environment. More than 178 national constitutions recognize the right to the environment. Since the 1992 "Earth Summit" in Rio de Janeiro, States have come to accept the obligation that all development be sustainable. Once taken for granted, norms respecting the environment are being recognized with increasing universality.

It may be asked now whether the duty of States to protect the Earth's environment is a norm *erga omnes*, like the prohibitions against slavery, genocide, aggression, slavery or torture.² When the UN General Assembly adopted the World Charter for Nature in 1982,³ it set the policy foundation for an obligation to protect the environment. Since 2009, more recent UN Resolutions on harmony with nature⁴ build on that earlier normative foundation. If not yet acknowledged to be *jus cogens*, the obligation to protect the environment is important for human civilization. The evidence in state practice is growing that the duty is at least *erga omnes*.

In this vein, an Advisory Opinion of historic import, by the Inter-American Court of Human Rights of 15 November 2017, recognizes (in paragraphs 62-63) that the right to a healthy environment is an autonomous right, that has collective scope as a universal norm owed to present and future generations, and at the same time has individual application in itself and in relation to other substantive rights, such as the right to health, life or personal integrity. The Court also recognizes the dimension of procedural rights within the right to a healthy environment, such as the rights of access to environmental information, access to participation in environmental decision-making and access to justice.

The Advisory Opinion has immediate and important consequences for the American Convention on Human Rights (Pact of San José, Costa Rica)⁵ construing state obligations for "all persons subject to their jurisdiction" in the context of the protection and guarantee of the provisions in Article 4(1) and 5(1) for the rights to life and to personal integrity. The Court deems the "Right to a healthy environment," as in Article 11 of the San Salvador Protocol Additional to the American Convention,⁶ to be subsumed within the progressive

¹ <https://undocs.org/en/A/72/L.51>.

² Since being introduced as dicta in the International Court of Justice decision in *Barcelona Traction, Light & Power Co., Ltd., (Belgium v. Spain)* (1962-700, Second Phase Judgment, ICJ Reports 1970, there is wide acceptance that some norms are binding on states beyond their reciprocal relationships based on sovereign consent.

³ UNGA Res. 37/7.

⁴ <http://www.harmonywithnatureun.org/>.

⁵ https://www.oas.org/dil/access_to_information_American_Convention_on_Human_Rights.pdf, Article 1.

⁶ "1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment." The text is at <http://www.oas.org/juridico/english/treaties/a-52.html>.

development obligations for economic, social and cultural rights protected by Article 26 of the American Convention on Human Rights. This is significant because it makes the right to the environment justiciable under the Inter-American Human Rights regime. The individual opinions of Eduardo Via Grossi and Humberto Antonio Sierra Porto dissent from this aspect of the Advisory Opinion, as they did last year in the labor right issues adjudicated in *Lagos de Campo v. Peru* (31 August 2017).

For purposes of this panel discussion, and in the interests of time, I shall not address the Advisory Opinion in its human rights aspects, but shall focus on the importance of the Advisory Opinion in terms of environmental law.

Colombia presented its request for an Advisory Opinion in the context of the obligation of states to protect the Wider Caribbean Sea, under the provisions of the Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (1983, in force 1986). This Convention is one of several regional seas agreements, facilitated by the United Nations Environment Programme. It furthers and elaborates the fundamental General Obligation set forth in Article 192 of the UN Convention on the Law of the Sea: “States have the obligation to protect and preserve the marine environment.” All States have a duty to protect the seas, wherever they may be. In turn, undertakings under UNCLOS and under the Cartagena Agreement entail cooperation with several multilateral environmental agreements, such as:

- Convention on Biological Diversity (CBD),
- Convention on Migratory Species (CMS),
- Convention on Wetlands (Ramsar),
- Convention on International Trade in Endangered Species (CITES),
- Convention on chemicals management (Stockholm),
- Convention on hazardous waste (Basel),
- MARPOL Convention on ship-generated wastes,
- Ballast Water Convention,
- London Dumping Convention,
- UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement (2015).

Under the Cartagena Convention, States have agreed on three Protocols. The second is the Protocol Conserving Specially Protected Areas and Wildlife (SPA) in the Wider Caribbean Region (adopted on 18 January 1990 and entered into force on 18 June 2000). Through SPA, a Sub-Program supports States in meeting objectives of global conventions and initiatives such as the CBD, the Ramsar Wetlands, CMS, and CITES Conventions, as well as the International Coral Reef Initiative (ICRI), and the policies and programs of the World

Commission on Protected Areas of the International Union for the Conservation of nature (IUCN). States have obligations to conserve nature, as in parks and other protected areas. Failure to do so is a breach of both agreed obligations and the general duty to protect the environment. The flora and fauna and life-supporting ecosystems are within the ambit of the right to a healthy environment.

State obligations for stewardship of the natural environment in the Wider Caribbean are thus a complex matrix of duties that require cooperation across many disciplines and governmental authorities, at all levels. By its terms, the Cartagena Convention applies to an area defined (Articles 1 and 2, "Convention area") as the marine environment of the Gulf of Mexico, the Caribbean Sea and the areas of the Atlantic Ocean adjacent thereto, south of 30° north latitude and within 200 nautical miles of the Atlantic coasts of States Parties. The Cartagena Convention has 25 States Parties, twenty-two of which are members of the Organization of American States, seventeen of which are members of the American Convention on Human Rights, and nine of which also are parties to the Protocol of San Salvador. Most are Parties to the major multilateral environmental agreements referenced above.

It is a daunting task to attempt to parse the respective more detailed environmental obligations of the States within the Wider Caribbean, under all relevant treaties. The Court was prudent in deciding to address the over-arching and general dimension of State obligations to the environment. This is both appropriate and inevitable. Earth's ambient environment is an integrated natural system. Ecology and other environmental sciences describe the linkages between and among all natural systems. The challenge that environmental law struggles with is how most effectively to fashion a nested set of legal relations that mirror the systems of nature.

From the perspective of stewardship of nature, all states have independent and correlative obligations. Even if a State is not a Party to the Cartagena Convention, it has a duty to ensure that actions under its jurisdiction do not cause environmental harm in the Wider Caribbean Sea, or anywhere. Principle 21 of the Stockholm Declaration on the Human Environment restated a general principle of international law: All states have the duty not to harm the environment of another State or of the commons. These obligations are repeated in the 1992 Declaration of Rio de Janeiro on Environment and Development, and elaborated. Environmental procedural duties, such as Rio Declaration Principle 17 on the duty to conduct environmental impact assessment, have been so widely observed by States as to constitute international customary law. The International Court of Justice so observed in its ruling in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 April 2010.⁷

In 2016, the World Commission on Environmental Law of the International Union for the Conservation of Nature (IUCN) and UN Environment⁸ determined that the basic

⁷ <http://www.icj-cij.org/en/case/135/judgments>.

⁸ <https://www.un.org/ruleoflaw/thematic-areas/land-property-environment/environmental-law/>.

norms of procedural environmental rights are part of the “Environmental Rule of Law.”⁹ The Declaration of Rio on the Environmental Rule of Law provides in Principle 1 that “Obligation to Protect Nature. Each State, public or private entity, and individual has the obligation to care for and promote the well-being of nature, regardless of its worth to humans, and to place limits on its use and exploitation.”

This principle is found also in the 1982 World Charter for nature adopted by UN General Assembly (Resolution 37/7). UN Environment described the importance of the environmental rule of law thus: “Environmental rule of law is central to sustainable development. It integrates environmental needs with the essential elements of the rule of law, and provides the basis for improving environmental governance. It highlights environmental sustainability by connecting it with fundamental rights and obligations. It reflects universal moral values and ethical norms of behavior, and it provides a foundation for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and obligations, environmental governance may be arbitrary, that is, discretionary, subjective, and unpredictable.”¹⁰

Thus, when the Inter-American Court of Human Rights recognizes the substantive and procedural principles in its Advisory Opinion, in the human right context, the Court has a sound doctrinal foundation also in environmental law. The two fields, as the Court observes are intertwined. The Court recognizes the “interdependence and indivisibility between human rights, the environment and sustainable development.” When the UN General Assembly in 2015 adopted the UN Sustainable Development Goals (SDGs), it likewise concluded that each SDG was interdependent and interrelated. UNGA Resolution 70/1, “Transforming Our World: The 20230 Agenda for Sustainable Development.

From an environmental law perspective, the Court also has a solid foundation for its interpretation that “jurisdiction” in Article 1(1) of the American Convention has extra-territorial application. This has been the case for some time with respect to the conduct of environmental impact assessment (EIA), beginning with the US National Environmental Policy Act (NEPA). EIA examines impacts that a State causes, or could cause, on humans and nature wherever situated. Similarly, in the jurisprudence of several South American States, national courts apply a rule of interpretation known as *in dubio pro natura*: “In cases of doubt, all matters before courts, administrative agencies, and other decision-makers shall be resolved in a way most likely to favor the protection and conservation of the environment, with preference to be given to alternatives that are least harmful to the environment. Actions shall not be undertaken when their potential adverse impacts on the environment are disproportionate or excessive in relation to the benefits derived therefrom.” (Principle 5, Declaration on the Environmental Rule of Law, *supra*).

⁹https://www.iucn.org/sites/dev/files/content/documents/english_world_declaration_on_the_environmental_rule_of_law_final.pdf.

¹⁰ <https://www.unenvironment.org/explore-topics/environmental-governance/what-we-do/strengthening-institutions/promoting-1>.

Within the field of environmental law, there are many “best practices” that enable governments, enterprises or persons to foresee and avert adverse environmental impacts. The Inter-American Court identified EIA, monitoring and reporting systems, the use of the precautionary principle, access to environmental information (Article 13 of the American Convention), or public participation (Article 23(1)(a) of the American Convention) as procedural rights essential to ensuring the Right to a Healthful Environment. The Court is on sound ground in citing these widely observed practices. They are, however, an illustrative, but not an exhaustive set of practices. For example, the field of environmental law has developed many such methods. For example, Environmental Management Systems (EMS) are now well accepted, as are the environmental protocols and audit systems of the International Standards Organizations (ISO, e.g. the ISO 14,000 series). The national legislation and administrative systems whereby States implement their obligations under international environmental law are well understood. See the samples in each chapter of Nicholas A. Robinson & Lal Kurukulasuriya, UNEP Training Manual on International Environmental Law (2006), available at <http://digitalcommons.pace.edu/lawfaculty/791/>.

Understanding the autonomous right to the environment is enormously enhanced because of the Inter-American Court of Justice’s Advisory Opinion. Further cases will doubtless arise to permit clarification and amplification of the substantive and procedural dimensions of the right to a healthy environment. When one State acts without foresight or precaution, it jeopardizes areas or species protected by other states, as under the Cartagena Convention’s SPAW programs. Such State actions, or omissions to act, become a breach of the obligation to protect the environment.

Prior to the Advisory Opinion, the only access to justice that was available to an aggrieved State or person or environmental entity was at the national level, in national courts. If a State acted so as to harm the environment, for example in the Caribbean, in other states lands or the waters of the Sea, the aggrieved state would need to seek mediation or negotiate a compromise for arbitration. The Advisory Opinion recognizes that threatened or alleged harm to environmental rights can properly be presented to the Inter-American Court of Human Rights. This significant development in the law will further observance and compliance of environmental substantive and procedural rights. It greatly furthers the environmental rule of law.

This right is being recognized and applied in many legal contexts. As scientific evidence makes the need to avert environmental damage more visible, the duty to protect becomes ever more clear and acknowledged. For example, environmental laws within nations are defining duties associated with the concept of property. Legal articulation of the ecological function of property states an affirmative obligation of property owners and stewards: “Any natural or legal person or group of people, in possession or control of land, water, or other resources, has the duty to maintain the essential ecological functions associated with those resources and refrain from activities that would impair such functions. Legal obligations to restore ecological conditions of land, water, or other resources are binding on all owners, occupiers, and users of a site, and liability is not terminated by the transfer of use or title to others.” Declaration on the Environmental Rule of Law, *supra*.

Obligations to observe the right to the environment are now defined in environmental agreements and statutes in all of Earth's regions. Breaches of the duties may entail the same factors that the UN International Law Commission has ably delineated in the ILC's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.¹¹ The Inter-American Court was sound in its reference to the ILC Draft Articles (Paras 175-80). Similar factors are found in how national courts apply environmental legal obligations within states. As national governments and courts assign personhood to rivers (e.g., India: Ganga and Yamuna Rivers, 2017; Colombia: Atrato River, 2016; Ecuador: Loja-Vilcamba River, 2011; New Zealand: Whanganui River, 2017), they extend their environmental rights to ecosystems that support humans and nature alike. Confirming rights on natural areas or species is often accompanied at the national level by the designation of guardians authorized to act to ensure that natural areas or species receive effective environmental protection. In the context of international law, the Advisory Opinion illustrates that the human rights context is likely to provide comparable access to justice.

When the Inter-American Court restated the questions that Colombia posed, it recognized the universality of State obligations to protect the environment. The Advisory Opinion is more comprehensive in its understanding of the right to the environment than, so far, have been rulings under Article 2 of the European Convention on Human Rights.¹² Nonetheless, the specific cases by the European Court of Human Rights may foretell comparable decisions through the Inter-American Court if Human Rights. It is to be expected that State obligations to ensure the right to the environment will be advanced in comparable case law. It is realistic – not optimistic – to project that we shall witness in coming years an obligation *erga omnes* to safeguard Earth's environment.

¹¹ http://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf

¹² http://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf