



Advisory Opinion OC-23/17 on the Environment and Human Rights

Inter-American Court
of Human Rights
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OC-23 Advisory Opinion No. 23/17
ACHR American Convention on Human Rights
ESCR Economic, Social and Cultural Rights
IACHR Inter-American Commission of Human Rights
IACtHR Inter-American Court of Human Rights
OAS Organization of American States
IHRL International Human Rights Law
IAHRS Inter-American System of Human Rights

The ABC of Advisory Opinions

I. Introduction

As part of its advisory function, the IACtHR is authorized to interpret the ACHR, as well as other Inter-American treaties.

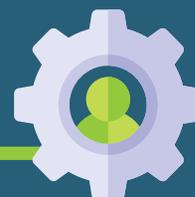
Who can request an advisory opinion?

OAS Member States, the IACHR and other organs of the OAS in their respective spheres of competence.

What is the purpose of an advisory opinion?

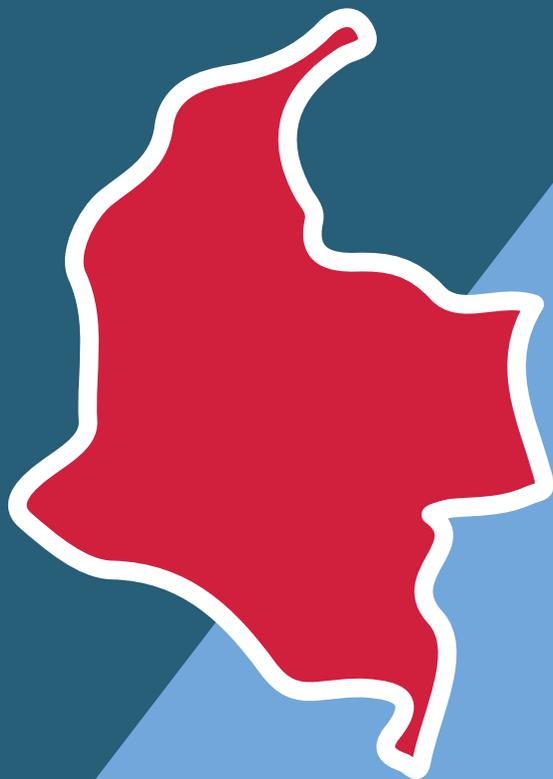
Advisory opinions clarify the content of rights and state obligations in the context of a treaty or legal issue related to the protection of human rights.

Advisory opinions are tools to interpret the ACHR and other treaties. They allow States to adapt their laws, practice and public policies to the standards of the Inter-American Human Rights System (IAHRS).



Advisory Opinion No. 23

- The advisory opinion was requested by Colombia on March 14, 2016
- Various States of the region, organs of the OAS, state agencies, organizations and individuals from civil society and academic institutions submitted written observations.



Colombia
consulted the Court
on the following issues:

- What is the scope of application of the state obligations related to environmental protection that arise from the ACHR?
- What are the environmental obligations of States that arise from the obligations to protect and guarantee the rights to life and personal integrity enshrined in the ACHR?

OC-23

II. Content

issues developed

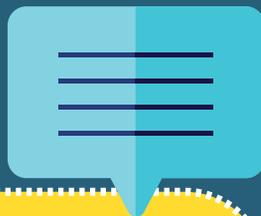
- Environmental protection and human rights
- Right to a healthy environment and other rights affected by environmental degradation
- Scope of the term “jurisdiction” under the ACHR
- Environmental obligations under the ACHR



The binding nature of the OC-23

The IACtHR has established that the protection and guarantee of human rights entails the **obligation to conduct a control of conventionality**. This is understood to be an analysis of compatibility between domestic law and ACHR-derived standards, other IAHRS treaties, and the decisions of its relevant organs.

Under this obligation, **the content of the Court’s advisory opinions must also be taken into account**, in addition to IACtHR contentious case judgements.



Advisory opinions are a mandatory reference for the control of conventionality and fulfill an important preventative function. They act as a guide for States to respect and guarantee human rights in the matters in which the Court has issued an opinion.

What is the relationship between the **Environment** and **Human Rights**?

In accordance with resolutions, declarations and other international instruments on the matter, the IACtHR highlights the indivisible and interdependent relationship between environmental protection, sustainable development, and human rights. Similarly, the Court stresses that **the adverse effects of climate change can affect the effective enjoyment of human rights.**

The right to a suitable environment is an autonomous right that carries individual and collective connotations and protects parts of the environment, such as forests, rivers, and seas as legal interests in themselves.



Environmental degradation affects all human rights, because their full enjoyment depends on a propitious environment.

Key rights related to the environment

Substantive Rights

Rights that may be directly affected by damage to the environment.



Right to life



Right to housing



Right not to be
forcefully displaced



Right to participate
in cultural life



Right to food



Right to water



Right to personal
integrity



Right to health



Right to property



Procedural Rights

Rights that serve as instruments to guarantee substantive rights and ensure State compliance with environmental obligations:



Freedom of expression



Freedom of association



Access to information



Right to an effective
remedy



Right to participate in
decision - making

Vulnerable groups suffer the effects of environmental degradation with greater intensity

Certain groups suffer more intensely from violations of the right to a healthy environment in comparison to the rest of the population. This is due to their particular situations of vulnerability, and/or geographic, economic, and other circumstances affecting them. Groups vulnerable to environmental degradation include:



Indigenous people

Indigenous communities often have a special spiritual and cultural relationship with their territories



Children

Environmental damage can heighten risks to their health and undermine their support structures



Women

Women are particularly at risk because of assigned gender roles and their often unequal position in society



Communities dependant on natural resources

Communities that depend on natural resources for their economy or survival, including small island dwelling and coastal communities

Groups or individuals historically vulnerable to discrimination

including:

Those who live in poverty



Persons with disabilities

States have an obligation to take into account how environmental degradation can differentially impact various communities. This is required so they can fulfill their environmental obligations in a way that respects and guarantees the principle of equality before the law as well as the prohibition of discrimination.



III. Jurisdiction

Scope of **state** environmental **obligations** arising from the **ACHR**

State Parties to the ACHR have an obligation to respect and guarantee the rights outlined in the instrument to all persons subject to their jurisdiction.

The exercise of jurisdiction by a State could entail its responsibility for any conduct attributable to it, which violates its obligations derived from the Convention.



What is the scope of the term “jurisdiction” in the IACtHR?

The Inter-American Court of Human Rights reaffirmed that the concept of **jurisdiction is not limited to territory.**

As such, the obligations of States are not restricted to the geographic space corresponding to their territory, and could therefore extend to extraterritorial conduct.

How can the exercise of jurisdiction be determined for extraterritorial conduct?

The Court determined that the exercise of jurisdiction outside of a State's territory is exceptional, and should be restrictively analyzed by following the factual and juridical circumstances of the respective case.

In regards to conduct committed outside of the State's territory (extraterritorial conduct) or with implications outside of the State's territory, a person is subject to the "jurisdiction" of the State in situations when the State exercises authority or effective control over that person, even if the conduct occurred outside of the territory of the State in question.



Transboundary environmental damage

- States have an obligation to avoid transboundary environmental damage, which could affect the human rights of persons outside the territory.
- In order to comply with this obligation, States must adopt all necessary measures to prevent that activities carried out in their territory or under their control affect the rights of people inside or outside their territory.

In case of transboundary harm, a State could be liable for damages caused to persons outside of its territory as a result of non-compliance with its international environmental obligations within its territory or under its control or authority. Should this occur, the Court declared that the persons affected by the State's failure to comply with its environmental obligations vis-à-vis activities carried out in its territory were under the jurisdiction of the State of origin for the purposes of said specific international responsibility.

IV. State environmental obligations

OC-23 delineates States' human rights obligations in the context of environmental protection, and indicates the implications of each obligation.

Environmental content of the right to life and the right to personal integrity

The right to life requires conditions that guarantee a dignified life and the personal integrity of individuals. In order to achieve this, States must adopt positive measures to guarantee the quality of and access to water, food and health, among other minimum conditions related to the existence of a healthy environment.

OC-23 refers to States' environmental obligations in order to protect the right to life and the right to personal integrity, as these are the rights referred to by Colombia when it requested the advisory opinion. However, **the environmental obligations described in OC-23 could also be applied to other vulnerable rights** affected by environmental degradation, such as the rights to health, water, food, property, etc.

Obligations to respect and guarantee the right to life and the right to personal integrity against possible environmental damage

Respect:

the obligation to abstain (i) from any practice or activity that denies or restricts access, under equal conditions, to the preconditions for a dignified life, and (ii) from illicitly contaminating the environment.



Guarantee:

prevention, regulation, supervision and monitoring, as well as the implementation of positive measures for individuals to be able to exercise their rights to a dignified life and to the preservation of their integrity.



State obligations in the face of possible environmental damage

In order to respect and guarantee rights in the context of environmental protection, States must comply with the following obligations:



I. Obligation of prevention

1. The duty to regulate
2. The obligation to supervise and monitor
3. The obligation to require and approve environmental impact studies
4. The duty to establish a contingency plan
5. The duty to mitigate



II. Precautionary Principle



III. The obligation to cooperate

1. The duty to notify
2. The duty to consult and to negotiate



IV. Procedural obligations

1. Access to information
2. Public participation
3. Access to justice

Due Diligence

The majority of the obligations related to the environment are based on the principle of due diligence (understood as an obligation of behaviour rather than of result).



I. Obligation of prevention

Type of damage to prevent:

significant environmental damage



Scope of application:

inside or outside a State's territory in circumstances that could be considered under the jurisdiction of that State.

Significant Damage

The Court defined significant environmental damage as “any damage to the environment that may entail a violation of the rights to life or personal integrity, according to the content and scope of said rights [...]. The existence of significant damage in these terms is something that should be determined in each specific case, with attention to the particular circumstances thereof.”

1. The duty to regulate

Activities that may cause significant damage to the environment should be regulated, taking into account the existing level of risk.



Requirements to regulate environmental impact studies

- What proposed activities and impacts should be examined?
- What should be the procedure to conduct an environmental impact study?
- What are the responsibilities and duties of the project proponents, of the competent authorities, and of the bodies or organs that make the decisions?
- How will the environmental impact study be used to approve the proposed activities?
- What measures should be adopted in case the procedure established to carry out the environmental impact study or to implement the terms and conditions to approve the proposed activity is not followed?



I. Obligation of prevention

2. The obligation to supervise and to monitor

States must develop and implement adequate and independent monitoring and accountability mechanisms, which include both preventive measures and those necessary to investigate, punish and repair possible abuses, through appropriate policies, regulatory activities and access to justice. The greater the risk, the more intense the supervision and monitoring should be by the State.



3. The obligation to require and approve environmental impact studies

States must require an environmental impact study when there is a risk of significant damage to the environment, regardless of whether the activity or project is to be carried out by the State or by private individuals.

Requirements for conducting an environmental impact study

- The study must be conducted prior to the activity being carried out or before granting the necessary permits;
- It must be conducted by independent entities under State supervision;
- It should cover the cumulative impact generated by already existing projects and any impacts generated by projects that could be proposed;
- It should include the participation of indigenous communities if the project could impact their territories;
- The content of the study must be specified through legislation or be determined within the project's authorization process, taking into account the nature and magnitude of the project and the possibilities of its impact on the environment.





I. Obligation of prevention

4. The duty to establish a contingency plan

States must have a contingency plan to respond to emergencies or environmental disasters. It must include security measures and procedures to minimize consequences of such disasters.

The State primarily responsible for the contingency plan is the State in whose territory the activity or project is carried out. However, where appropriate, the plan should be carried out in cooperation with other potentially affected States and relevant international organizations.



5. The duty to mitigate

The State must mitigate significant environmental damage, even when it has occurred despite preventive measures.

To do this, States must ensure that:

- Appropriate measures are taken to mitigate the damage;
- These measures are adopted immediately, even if the source of the contamination is unknown, and
- The best available technology and science is employed.

Mitigating actions could include:

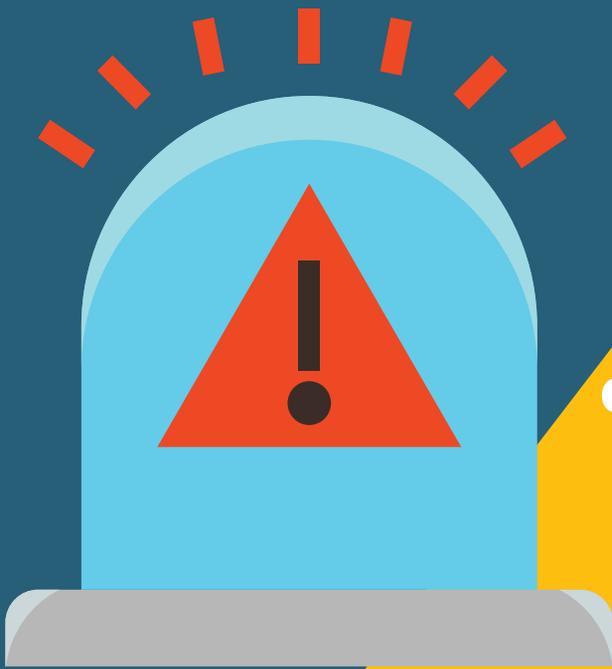
- Cleaning and restoration;
- Containing the geographical extension of the damage in order to prevent, if possible, contaminating other States;
- Collecting all the necessary information about the incident and danger of existing damage;
- Notifying other States that may be affected (by the State of origin) in cases of emergencies for activities that may cause significant damage to the environment of another State;
- Once notified, affected or potentially affected States must take all possible measures to mitigate and, if possible, eliminate the consequences of the damage, and
- In case of an emergency, the State must also inform the people who may be affected.





II. Precautionary principle

A *pro persona* interpretation of the American Convention leads States to act in accordance with the precautionary principle, in the face of possible negative effects on the right to life and the right to personal integrity.



What does the precautionary principle entail with respect to possible environmental damage?

- That States must act when there are plausible indicators that an activity could cause serious and irreversible damage to the environment, **even in the absence of scientific certainty;**
- That States adopt effective measures to prevent possible serious or irreversible damage.



III. Obligation of cooperation

This obligation is of an interstate nature. It consists of the obligation to cooperate, in good faith, to protect against environmental damage.



This obligation includes:



1. The duty to notify

States must notify other States potentially affected by significant damage originating in their jurisdiction.

- The *duty arises* when a State becomes aware that an activity planned to be executed in its jurisdiction could generate a risk of significant transboundary damage (either before the environmental impact study or as a result of it);
- The *duty covers* significant damages arising from activities planned by the State or by private persons with state authorization, as well as cases of environmental emergencies;
- The *duty must be carried out* in a timely manner, prior to the development of the planned activity, and without delay in case of environmental emergencies;
- The *notification must be accompanied* by all pertinent information.



2. The duty to consult and to negotiate

States should consult and negotiate with States potentially affected by significant transboundary harm.

- The purpose of this obligation is to prevent and mitigate transboundary damage;
- The duty must be conducted in a timely manner and in good faith:
 - It should not be a merely formal procedure, but should involve the mutual will of States to seriously discuss current and potential environmental risks;
 - During the consultation and negotiation phase, States must refrain from authorizing or executing the activities in question.
- This does not imply that the activities require the prior consent of other potentially affected States;
- If the parties do not reach an agreement, they must resort to mechanisms for the peaceful resolution of disputes, whether through diplomatic or judicial means.



IV. Procedural obligations

1. Access to information related to possible environmental impacts

States have the obligation to respect and guarantee access to information related to possible environmental impacts.



This obligation:

Must be guaranteed:

- To all people subject to the jurisdiction of the State;
- In an accessible, effective and timely manner;
- Without the applicant having to demonstrate a specific interest.

Entails:

- The provision of mechanisms and procedures for individuals to request information;
- The collection and active dissemination of information by the State.

This obligation is not absolute, because it admits restrictions as long as:

- They are previously established by law;
- They respond to a specific objective permitted by the ACHR;
- They are necessary and proportional to respond to a general interest in a democratic society.



IV. Procedural obligations

2. Public participation in decision-making and policies that may affect the environment

States have an obligation to guarantee participation in decision-making and policy-making processes that may affect the environment, without discrimination, in an equitable, significant and transparent manner. To fulfill this obligation, States must guarantee access to relevant information.

States must guarantee opportunities for effective participation from the early stages of the decision-making process and inform the public about opportunities for participation.



Under the general obligation not to discriminate, States must guarantee access to justice for persons affected by transboundary harm originating in their territory, and must do so without discrimination based on nationality, residence or place of origin of the harm.

3. Access to justice related to environmental protection

States have an obligation to guarantee access to justice with regards to obligations aimed at the protection of the environment.

To do this, they must guarantee individuals access to judicial remedies, substantiated in accordance with the rules of due process to:

- (i) challenge any rule, decision, act or omission of the authorities that contravene environmental law obligations;
- (ii) ensure the full realization of the other procedural rights; and
- (iii) remedy any violation of their rights, as a consequence of non-compliance with environmental law obligations.

Advisory Opinion OC-23/17 on the Environment and Human Rights



The full version of the OC-23, in its original language, can be found in the following web page:

http://corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf

