Inter-American Court of Human Rights Issues Landmark Advisory Opinion on Environment and Human Rights

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This paper examines the just-released Advisory Opinion of the Inter-American Court on Environment and Human Rights, focusing on new possibilities for cross-border human rights claims arising from transboundary environmental damage, its impact on the potential growth of climate change litigation and on the regulation of multinational businesses. Simon Milnes appeared before the Court as an amicus curiae at the hearing leading to the Advisory Opinion.

The Inter-American Court's Advisory Opinion on Environment and Human Rights, released on 7 February 2018 (in Spanish only), is the latest and potentially most significant decision in a series of high profile international judicial rulings which acknowledge legal consequences for environmental harm. As recently as 2 February 2018, the International Court of Justice ordered Nicaragua to pay compensation to Costa Rica for environmental damage in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, pp. 740-741, its first ever order for compensation for environmental harm. The International Tribunal for the Law of the Sea for its part, not long ago, issued a landmark provisional measures order in *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire) (Case 23)* whereby the Tribunal prescribed provisional measures to prevent serious harm to the marine environment *inter alia* suspending all ongoing oil exploration and exploitation operations in a disputed area. To that list one could add the 2017 decision of an ICSID tribunal in *Burlington Resources, Inc. v. Republic of Ecuador* to award some US$39 million in damages in favour of Ecuador for environmental remediation costs.

Issued at the request of Colombia, and focusing on State obligations (environmental and human rights) in a transboundary context (i.e. in the context of construction and

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operation of mega-projects and activities such as petroleum exploration and exploitation, maritime transportation of hydrocarbons, port construction and maintenance, and the construction, maintenance and expansion of shipping canals, among others), the Advisory Opinion is ground-breaking in many respects. It is the first legal pronouncement of the Court focusing on State obligations relating to environmental protection under the American Convention on Human Rights (§ 46) and indeed the first legal pronouncement ever by an international human rights court, with a true focus on environmental law as a systemic whole (as distinct from isolated examples of environmental harm analogous to private law nuisance claims, e.g. *Lopez-Ostra* v. *Spain* in the European Court of Human Rights). Further, it is a landmark in the evolving jurisprudence on 'diagonal' human rights obligations (that is, obligations capable of being invoked by individual or groups against States other than their own), opening the door – albeit in a cautious and pragmatic way – to cross-border human rights claims arising from transboundary environmental impacts.

This note sketches the general issues dealt with by the Court, focusing on the wider significance of this Opinion for international law. It assesses its significance from three main angles, namely: (i) the nascent area of diagonal claims; (ii) climate change; and (iii) business and human rights.

The Advisory Opinion in its context

The Advisory Opinion responded to a Request which the Republic of Colombia submitted in March 2016 to the Inter-American Court (IACtHR), to opine on three related questions on the interpretation of the *American Convention of Human Rights*[1] ("American Convention") namely (as a précis):

I. Can a State party ("State X") to the American Convention be made the respondent to a claim by an individual living in another State ("State Y") for violations of justiciable human rights recognized in the American Convention where those violations are caused by environmental harms emanating from the first State, and in particular where the two states are parties to a treaty-based system environmental protection, such as the *Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region* ("Cartagena Convention")?

II. If so, would it be a breach of the American Convention for State X, by act or omission, to cause serious transboundary environmental damage

[1] OAS Treaty Series No. 36, 1144 UNTS 123, entered into force 18 July 1978.

that undermined the rights to life and personal integrity protected by Articles 4 and 5 of the American Convention?

III. Does the American Convention require (with the purpose of protecting the individuals in State Y whose rights are in danger of being violated) State X to comply with the norms of international environmental law, and does that include, as one necessary mode of compliance, a requirement to carry out an environmental impact assessment of proposed projects, and if so, what does that obligation generally entail?

Colombia's Request was directed at a pressing international issue. In today's world of intensified economic development, we are indeed "*living at a time when major infrastructure projects are frequently being built and brought into operation … with effects that may exceed State boundaries*".[2] Effects on the marine environment, the focus of Colombia's Request, are one prominent example. Climate change (not a focus of the Opinion) would be another. Given the magnitude of transboundary effects and their consequences, it is clear that some human rights recognized in the major global and regional human rights treaties will be *de facto* inoperable and meaningless unless the States that are the sources of these harms bear an international responsibility that is reasonably capable of being invoked under those treaties' accountability mechanisms, such as Article 63 of the American Convention. This is the context for the evolving field of 'diagonal' human rights obligations. State practice to date has been limited and cautious, but scholarship and 'soft' law have sought to develop balanced and workable principles: key examples include the detailed reports by the UN independent expert and special rapporteur, Prof. John Knox, and, in the context of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the 2011 'Maastricht Principles'. Colombia's Request – made five years after the Maastricht Principles and by reference to *civil* rights (life and personal integrity) rather than ESC rights – signaled an important data point of state practice, as well as an occasion for considered international jurisprudence on the topic.

At the same time, there was an inescapable political 'edge' to Colombia's Request. It was made in a context where (a) proposals for Nicaragua to build, with funding from China, a canal to rival the Panama Canal had prompted widespread concerns about the likely effect of the canal itself and associated shipping on the vulnerable island-dwelling and coastal

[2] Request, § 9.

communities in the Caribbean region, and (b) the International Court of Justice ("ICJ") had decided a dispute on maritime boundaries between Colombia and Nicaragua adversely to Colombia, whereupon Colombia had withdrawn its optional clause declaration under Article 36(2) of the ICJ Statute, with the consequence that Colombia would no longer have a right of recourse to the ICJ against Nicaragua, for example in cases of environmental harm. The Request could be seen as Colombia opening up a new front in that political dispute. This would doubtless have been apparent to the IACtHR (and in any event, the Guatemalan representative at the hearing on Colombia's Request drew attention to the need to ensure that any Advisory Opinion did not undermine the ICJ's settlement of the territorial dispute). The IACtHR has deftly defused that aspect by concentrating on the issues of principle and avoiding expressing any concrete views on particular instances of pollution sources or their victims.

An indication that the Request raised issues that transcended any particular bilateral dispute is the fact that a number of other States parties to the American Convention submitted observations to the IACtHR in support of affirmative answers to questions (I)-(III), and only one State advocated for a rather restrictive approach on 'diagonal' jurisdiction.[3] This may have encouraged the IACtHR in adopting a somewhat expansive interpretation in the Advisory Opinion.

The IACtHR's response to Colombia's three questions is *broadly* in the affirmative, except that on question (I), the Court declined Colombia's invitation to base either substantive State human rights obligations or the scope of "jurisdiction" under Article 1(1) of the American Convention upon the existence or otherwise of any *other* treaty regime such as the Cartagena Convention. Some of the most salient aspects of the IACtHR's judgment include the following:

1. The Court recognises the right to a healthy environment as an autonomous right "*which protects the components of the environment such as woodlands, rivers, sea and others, as legal interests in their own right*" (§ 62), and as a fundamental right for the existence of humanity (§ 59).
2. It acknowledges the right to a healthy environment as a right with individual and collective connotations (§ 47).

[3] Namely, Panamá (which nonetheless emphasized the importance of States adhering to international environmental norms). Guatemala and Honduras favoured Colombia's position, while Bolivia (which did not submit any written observations) made oral submissions going even further, in line with the Bolivian government's strongly environmentalist and indigenous peoples-oriented stance. Argentina advocated for a more cautious and context-driven approach, but one that was open to 'diagonal' jurisdiction based on concrete facts (similar to the IACtHR's eventual ruling).

3. It recognises the relationship between the protection of the environment and the realisation of other human rights stating that "*environmental degradation and the adverse effects of climate change affect the effective enjoyment of human rights*" (§ 47).
4. It acknowledges an interdependence and indivisibility between human rights and the protection of the environment, giving rise to State obligations (§ 55).
5. It acknowledges that the majority of the environmental obligations rest on a duty of due diligence on the part of the State (§ 124).
6. The environmental obligations become stricter if, in addition to a human rights treaty, there is also an environmental treaty (such as the Cartagena Convention) (§ 126).
7. It identifies a connection between (a) a number of *substantive* human rights (including the right to life and right to integrity and to dignity), and indeed the right to a healthy environment, and their correlative obligations on the part of the State, such as the obligation to prevent (including the duty to regulate, supervise and inspect, to require and approve environmental impact assessments, to establish contingency plans), precaution, and cooperation (including the duty to consult and negotiate with a potentially affected State), and (b) *procedural* rights such as access to information, public participation and access to justice. The Court held in particular, that, in order to respect and guarantee rights to life and integrity, States are under a duty to:
    a. prevent significant environmental damage, both inside and outside their territory;
    b. regulate, oversee and control the activities under their jurisdiction which may give rise to significant damage to the environment, carry out studies on environmental impact when there exists the risk of significant damage to the environment, draw up a contingency plan so as to have in place safety measures and procedures for minimising the possibility of major environmental accidents, and mitigating any significant environmental damage that would have ensued, even when this may have occurred in spite of preventive actions on the part of the State;
    c. act in accordance with the precautionary principle, when faced with possible severe or

irreversible damage to the environment; even in the absence of scientific certainty;

d. co-operate, in good faith, for the protection against damage to the damage to the environment;

e. pursuant to that duty of co-operation, notify other States that may be potentially affected when they become aware that a planned activity under their jurisdiction could give rise to a risk of significant cross-border damage, and in cases of environmental emergencies, as well as consulting and negotiating, in good faith, with the States potentially affected by significant cross-border damage;

f. guarantee the right to access to information relating to possible negative impact upon the environment, enshrined in Article 13 of the American Convention;

g. guarantee the right to public participation of people under their jurisdiction, which is enshrined in Article 23(1) of the American Convention, in the making of decisions and policies that may affect the environment; and

h. guarantee access to justice, with regard to State obligations for the protection of the environment.

(§ 242).

The wider significance of the Advisory Opinion for international law

The door is open to diagonal environmental claims

The main significance of the Advisory Opinion is that it signals the possibility of 'diagonal' human rights claims in circumstances far broader than those which have been held admissible under the Inter-American system to date. So far, both the Inter-American system and the ECtHR have taken a cautious approach to extraterritorial obligations. The relatively few cases found to be admissible have involved direct exercises of violence by state agents outside a state's borders, and sometimes even that is not enough.[4] The Advisory Opinion makes clear that, in principle, the Inter-American system permits cross-border human rights claims in respect of other types of conduct, such as transboundary pollution and ecological damage. It also does not restrict such claims to damages caused by

[4] As in *Banković*, discussed below.

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a State's agents, but holds that jurisdiction extends to activities over which a State exercises "*effective control*" (as discussed in more detail below).

Questions of extraterritorial human rights obligations and (concomitantly) 'diagonal' claims under human rights accountability mechanisms, i.e. claims against a state other than the one in which the victim lived, have become an increasingly acute problem for the international human rights system. State practice to date is limited and cautious, while the issues have been the subject of searching academic treatment.[5]

In a sense, the entire field of 'diagonal' human rights obligations can be said to be defined by the clash between two propositions, each of them cogent and widely accepted. The first is the principle that a State which has undertaken to respect human rights should not be able to use national boundaries to escape responsibility for human rights violations which it actually committed. As the U.N. Human Rights Committee has said, with reference to the International Covenant on Civil and Political Rights, "*It would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory*".[6] This principle implies that human rights accountability mechanisms should respond where there is a direct causal relationship between an act attributable to a State and the violation of an individual's human rights, even though the individual was located, and the violation occurs, outside the state's borders.

The second premise, in tension with the first, is that all the major international human rights treaties were conceived primarily as applicable between a State and its own citizens: each State is responsible for establish and ensure the conditions for a dignified human life to the individuals within its boundaries. States (by their very nature and the limitations on their jurisdiction) cannot be expected to do the same for individuals living elsewhere. This principle, or at least a strong version of it, would hold that States can only be responsible for ensuring the human rights of individuals who are within its borders or, at the outermost, extends only to those who are in a territory over which the State concerned is

[5] E.g., Skogly, S. and Gibney, M., eds., *Universal Human Rights and Extraterritorial Obligations* (2010) and Langford, M., Vandenhole, W., Scheinin, M, and Van Genugten, W., eds., *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2013).

[6] *Lopez-Burgos v. Uruguay, Human Rights Comm.*, Commentary No. 52/1979.

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exercising "*effective control*" at the material time.[7]

We suspect that most international lawyers would concede at least some real validity to each proposition: neither can be *a priori* rejected. But in real cases, they quickly come into mutual conflict and one must give way to the other. The much-debated ECtHR case of *Banković v. Belgium and others*[8] is an example of the second proposition ousting the first. The ECtHR held that "jurisdiction" in Article 1 of the ECHR was to be given its "*ordinary meaning*" and that the ordinary meaning of "jurisdiction" in international law was "*primarily territorial*", with limited exceptions recognized (such as flag state jurisdiction over ships).[9] It noted that it had recognized another exception, where a state had "*effective control*" over foreign territory, such as Turkey exercised in northern Cyprus.[10] It rejected the applicants' argument that "*effective control*" (and hence jurisdiction) could be founded simply on the basis that the State had caused the impugned act itself.[11] It also held that jurisdiction could not be "*divided and tailored in accordance with the particular circumstances of the extra-territorial act in question*",[12] i.e. a State is either internationally responsible for fulfilling *all* of the ECHR rights in a particular territory, or it is not responsible at all. In practice, however, neither the requirement for "*effective control*" over territory nor the indivisibility principle has been adhered to in subsequent ECtHR case law, e.g. *Pad and others v. Turkey*.[13]

Within the Inter-American system, the Inter-American Commission has inclined towards a

[7] The ECtHR recognized "*effective control*" of territory as a basis for jurisdiction under Article 1, ECHR in *Loizidou v. Turkey*, Application No. 15318/89, Reports of Judgments and Decisions 1996-VI, at para. 52.

[8] *Vlastimir and Borka Banković, Živana Stojanović, Mirjana Stoimenovski, Dragana Joksimović and Dragan Suković against Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, Application no. 52207/9.

[9] *Banković*, paras. 59-61.

[10] *Banković*, paras. 68-71, referring to *Loizidou* (n. 7 above) and *Cyprus v. Turkey*, Application No. 25784/94 (see especially para. 80). The ECtHR concluded in *Banković* (para. 71) that: "*In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the* ***effective control of the relevant territory and its inhabitants*** *abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government*." (Emphasis supplied).

[11] *Banković*, para. 75.

[12] *Id.*

[13] For example, in *Pad and others v. Turkey*, Application No. 60167/00, the ECtHR held that Turkey had had "jurisdiction" over the applicants' relatives when they were shot and killed by a Turkish helicopter inside Iran (see especially paras. 52-55). In *Al-Skeini v. United Kingdom*, Application No. 55721/07, 7 July 2011, the ECtHR held that Iraqi men killed by UK armed forces in southeast Iraq, some in UK detention facilities and others who had been killed by UK soldiers on street patrol, were all within the UK's "*jurisdiction*" under Article 1, ECHR, notwithstanding that the UK was clearly not obliged to ensure *all* human rights to all people in Iraq.

broader approach, e.g. in *Coard*,[14] *Alejandre and others v. Cuba*[15] and *Molina (Ecuador v. Colombia)*.[16] In *Molina* the IAComHR distanced itself from the logic in *Banković* by holding that a "*formal, structured and prolonged legal relation in terms of time*" was *not* needed in order for a State to be responsible for the acts of its agents abroad.[17]

In this context, one of the most interesting features of the Advisory Opinion is the Court's handling of the concept of "*effective control*". In summing up its answer to Colombia's question (I), the IACtHR held that:

> *"As regards transboundary harms, a person is under the jurisdiction of the State of origin if there is a causal relationship between the event that occurred in its territory and the affectation of the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises* ***effective control over the activities carried out that caused the harm*** *and consequent violation of human rights."*[18]

It will be seen that, as compared to the ECHR case law,[19] a subtle but important shift has occurred: in the Advisory Opinion, as concerns transboundary environmental harms, "*effective control*" is no longer something which has to be exercised *over the territory*

[14] IACHR, Coard et al. v. United States, Report No. 109/99 Case 10.951 September 29, 1999

[15] IACHR, Armando Alejandre Jr., Carlos Costa, Mario De La Peña, and Pablo Morales v. Cuba Report No. 86/99, Case 11.589. The case concerned the concerning the shooting down by the Cuban air force over international waters of two civilian aircraft owned by the organization 'Brothers to the Rescue'. The IAComHR observed (at para. 23) that: "*Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad. In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic area, but to whether, in those specific circumstances, the state observed the rights of a person subject to its authority and control*."

[16] Report No. 112/10, Inter-State Petition IP-02**,** Admissibility, *Franklin Guillermo Aisalla Molina, Ecuador – Colombia.* The case concerned Colombia's alleged "*jurisdiction*" under Article 1(1) of the American Convention in respect of the killing of Ecuadorean citizens inside Ecuador by Colombian military during a cross-border raid.

[17] *Id*, at para. 99 ("*the following is essential for the Commission in determining jurisdiction: the exercise of authority over persons by agents of a State even if not acting within their territory, without necessarily requiring the existence of a formal, structured and prolonged legal relation in terms of time to raise the responsibility of a State for acts committed by its agents abroad. At the time of examining the scope of the American Convention's jurisdiction, it is necessary to determine whether there is a causal nexus between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual*.")

[18] Advisory Opinion, §104(h) (our translation) (emphasis supplied).

[19] In particular, *Loizidou* (n. 7 above) *Banković* (n. 8 above), and *Al-Skeini* (n. 13 above).

where the victim was, nor *over the victim* herself. Rather, what matters is whether the source state – State X – has effective control *over the activities* that caused the transboundary harm. This is significant, because the types of transboundary harm at which Colombia's Request was directed, and which it can be foreseen are sadly likely to occur with severe impacts on vulnerable people, are types of activity over which States do exercise effective control. It is hard to see how any State which decided, for example, to build a trans-isthmus canal, or license drilling in an offshore oil field, or indeed authorize any infrastructure mega-project with environmental impacts, could credibly claim that such activities were outside its effective control. It follows that the IACtHR's ruling permits cross-border human rights claims in respect of transboundary ecological damage to be pursued before the IAComHR and (subject to the procedural requirements in the American Convention) before the Court itself.

The IACtHR was nonetheless careful to emphasize in the Advisory Opinion that extraterritorial obligations are exceptional and should be restrictively construed.[20]

Climate change

The Advisory Opinion does not address climate change, but some of the Court's observations on States' duties (see above) are clearly pertinent to this ultimate example of transboundary pollution. Moreover, the Court's reasoning could be used to support an argument that a State's contribution to the accumulation of greenhouse gases in the atmosphere should result in State responsibility and accountability under the American Convention to victims living in other States, e.g. persons whose lands have become submerged or uncultivable due to rising sea levels. Any such claim would of course be politically controversial, and would also face formidable obstacles regarding proof of causation. Arguably, it might also be preempted by the access to national remedies (especially if tort lawsuits based on climate change prove to be viable[21]) or by the existence of alternative mechanisms for compensating the victims' State, such as the Warsaw International Mechanism on loss and damage under the United Nations Framework Convention on Climate Change. Moreover, the IAComHR might well decide that an investigation or contentious case on this subject would have little hope of influencing the outcome of global climate change negotiations, and so its resources would be better spent examining social, political, or even environmental, problems on which action by regional states could deliver more immediate and tangible improvements in human rights protection. Nonetheless, it is

[20] Advisory Opinion, §§ 81, 104(d).

[21] As to which, see *Lluiya v. RWE* in the German courts.

striking that the Court's ruling is that States *can* (depending on the precise circumstances and a sufficient causal link) be accountable for the emission of pollutants from activities in their territory which cause transboundary ecological harm. Whereas in 2005, the IAComHR decided against accepting a petition by Inuit peoples that climate change was violating their American Convention rights, in the light of the Advisory Opinion the arguments of the Inuit (and other vulnerable groups for whom climate change has become an existential threat to their lands, livelihoods and cultures) benefit from enhanced weight of principle and authority.

The Business and Human Rights debate

The Advisory Opinion also helps to draw attention to an under-emphasized aspect of current debates over regulating multinational corporations to protect human rights. These debates have tended to focus on the responsibility of States to protect persons within their own territory (Principle 1 of the 2011 UN Guiding Principles on Business and Human Rights), and the question whether States can, should, or must regulate corporations domiciled in their territory in respect of their overseas operations (referred to in Principle 2, with the current *lex lata* apparently being that States *can* but *need not* so regulate[22]). The Advisory Opinion certainly did not set out to address such matters, nor could it be read as any kind of obvious victory for those who contend that States are obliged to regulate extraterritorially. However, it nonetheless helpfully serves to draw attention to a third dimension which does not feature prominently in the UN Guiding Principles: namely, that States may *already* be obliged under existing international human rights instruments to regulate *domestic* activities in order to protect the human rights of persons overseas. This is likely to be especially necessary in cases where the State where the impacts on human rights are felt is not realistically in a position to block the adverse transboundary impacts of the domestic activity, either through lack of capacity or because the inherent nature of the consequences flowing from the activities makes it impracticable for other States to protect their citizens from them. In the latter category could be included cases of environmental harm, such as cross-border pollution, accidents involving hazardous substances and unsustainable fishing; but also non-environmental harms such as

[22] The U.N. Human Rights Council by its Resolution 26/9 of 26 June 2014 decided to establish an open-ended working group with a mandate to elaborate a binding treaty to regulate the activities of transnational corporations. The resolution was supported only by States in the global South, making it unlikely that any treaty text adopted would be acceptable to States in the North. The fact that this stalemate is likely to continue makes it important to consider whether under *existing* international legal instruments such as human rights treaties, States may already be obliged to regulate domestically with a view to controlling overseas impacts, as suggested above.

(potentially) deaths in one State that are traceable to another State's toleration of the activities of extremist groups or of terrorist financing. Moreover, and with particular reference to "Business and Human Rights" debates, it is at least arguable that a State may be obliged to regulate *domestically* in order to require multinationals domiciled in its territory to adopt, at the headquarters level, policies and frameworks aimed at ensuring that subsidiaries, subcontractors or supply chain partners in the global South do not infringe human rights in their places of operation. The reasoning in the Advisory Opinion would be supportive of such arguments, at a general level – with the caveat that the IACtHR has succeeded in drawing a careful balance between recognizing the fundamental nature of the right to a healthy environment as a necessary condition for enjoyment of human rights generally, and continuing to treat extraterritorial obligations and claims as "*exceptional*" (whatever exactly that may mean).[23] The door to new scenarios for human rights claims is open but – one could say – 'diagonally.

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[23] § 104(d). One may query whether to describe extraterritorial obligations as "*exceptional*" is to say anything more than the truism that the great majority of interactions which affect individuals' human rights occur between individuals and their own States, and that in the great majority of cases, an individual's own State is either the only State able to protect and fulfil her human rights, or at least best placed to do so, such that instances of cross-border claims are likely always to remain only a small minority of the total.

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