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Written Opinion by the World Commission on Environmental Law of the International Union for the Conservation of Nature

Request by the Republic of Colombia for an advisory opinion from the Inter-American Court on Human Rights concerning the interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights

January 19, 2017

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- ii. That the said treaty-based system establishes an area of functional jurisdiction, such as, for example, the one established in the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region;..... 26
- iii. That in the said area of functional jurisdiction, the States parties have the obligation to prevent, reduce and control pollution by means of a series of general and/or specific obligations, and. 26
- iv. That, as a result of damage to the environment or of the risk of environmental damage in the area protected by the convention in question that can be attributed to a State party to that convention and to the Pact of San José the human rights of the person in question have been violated or are threatened. 26

B.

List of Acronyms

AG/RES	General Assembly / Resolution (acronym in Spanish)
ABNJ	Areas beyond national jurisdiction
CARICOM	The Caribbean Community
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMS	The Convention on the Conservation of Migratory Species of Wild Animals
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
HRC	United Nations Human Rights Council
IAC	The Inter-American Convention for the Conservation of Sea Turtles
IACHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ITLOS	International Tribunal for the Law of the Sea
IUCN	The International Union for Conservation of Nature
LME	Large Marine Ecosystem
MEA	Multilateral Environmental Agreement
MPA	Marine Protected Area
OAS	

TWAP	The Transboundary Water Assessment Project
UNCED	The United Nations Conference on Environment and Development
UNCLOS	The United Nations Convention on the Law of the Sea
UNECE	The United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNGA	General Assembly of the United Nations
WCEL	The World Commission on Environmental Law of IUCN
WCR	The Wider Caribbean Region

I. Introduction

The Presidency of the Inter-American Court

interested parties to submit a written opinion in Advisory proceedings commenced by the Republic of Columbia on March 14, 2016, pursuant to Article 64, paragraph 1 of the American Convention on Human Rights

). In response to this request, the World Commission on Environmental Law
(hereinafter
is to address the environmental implications and
interpretation of Article 1, paragraph 1, Article 4,
paragraph 1, and Article 5, paragraph 1 of the Pact of San José

all

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significant, grand scale projects on the marine environment or areas protected by international environmental law, particularly in the Wider Caribbean Region.

Colo
applicab

general parameters should be taken into account when making environmental impact assessments in the Wider Caribbean Region, and what should be the minimum content of these

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As stated at the outset, the primary purpose of this written opinion by WCEL/IUCN is to provide significant, internationally recognized expert input to the deliberations of the Inter-American Court in its exercising its Advisory functions under the Convention. Naturally, the

The general principles of law.
Judicial decisions and doctrines prepared by experts.
Other sources: resolutions, decisions, principles and guidelines.

The above provisions of the Convention must be interpreted in the context of a series of relevant not limited to the following¹²:

iv. Stockholm Declaration on the Human Environment¹³

attempt to address environmental problems transcending the political borders of States. In terms of human rights, one of the most important principles in t

Principle 3
The right to development must be fulfilled

ix. The Convention on Wetlands/Ramsar Convention

The Convention on Wetlands, called the Ramsar Convention, is an intergovernmental treaty that provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources. Wetlands are among the most diverse and productive ecosystems. They provide essential services and supply all our fresh water. However, they continue to be degraded and converted to other uses. The Convention uses a broad definition of wetlands. It includes all lakes and rivers, underground aquifers, swamps and marshes, wet grasslands, peatlands, oases, estuaries, deltas and tidal flats, mangroves and other coastal areas, coral reefs, and all human-made sites such as fishponds, rice paddies, reservoirs and salt pans. Many of the ecosystems in the Wider Caribbean Region are wetland ecosystems, hence there are potential implications of development and large infrastructure projects in the Wider Caribbean Region on their integrity and their role in support of human well-being

II. Contextual Framework

A. Relevance of the Marine Environment for the Inhabitants of the Wider Caribbean Region

²⁴ This obligation includes, but is not limited to, the protection of ecosystems such as the Southwestern Colombian mangrove system, the Colombian offshore small island reef system islands, the mixes coastal West central Colombian system, and the eastern Colombian rocky platform system.²⁵

Similarly, the adoption of the SPAW Protocol reflects the importance of establishing regional co-operation to protect, restore, and improve the state of ecosystems and threatened and endangered species and their habitats in the Wider Caribbean Region.²⁶ The Protocol recognizes in which an environmental threat in one part represents a potential threat in other parts. ²⁷ Accordingly, the protection and maintenance of the environment of the Wider

to consider the concept of the Caribbean Sea as a Special Area in the context of sustainable development without prejudice to relevant national legislation and international law.⁴¹

The General Assembly of the OAS has reaffirmed this commitment and reiterated the importance of the marine environment in the Wider Caribbean Region in subsequent resolutions. For example, it has issued several important decisions to support the work of the Caribbean Sea Commission in mobilizing financial resources and capacity-building, developing technical and technological cooperation, and exchanging experiences.⁴² In Resolution 2691 (XLI-O/11), it

environment in general, to achieve their su

⁴³ It also recalled the

⁴⁴ Similarly, in Resolution AG/RES. 2779 (XLIII-O/13), the General Assembly due to the economic, social and environmental contributions of marine resources and ecosystems, in particular to islands, coastal states and those communities dependent on the sea to

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The UN General Assembly (UNGA) has also long recognized the importance and ecosystem fragility of the Wider Caribbean Region.⁴⁶ For example, in 2006, the UNGA

⁴⁷ acknowledged the challenges posed for effective environmental management in the region⁴⁸ and recommended that all relevant parties work able conservation and management of coastal and marine

⁴⁹

economic

Most of the marine pollution is found in the coastal zone, due to the concentration of human activity.⁶¹ This includes discharges, agricultural runoff, spills, as well as the construction of a wide variety of coastal infrastructure, such as water reservoirs or hydroelectric dams, canals, water supply and sanitation networks, roads, highways, railways, ports, airports, sewage plants, bridges, and many other structures that involve environmental impacts. Some of the principal negative environmental impacts and threats to the marine environment that can be derived from these large development projects are the loss and fragmentation of habitats or effects due to changes in sedimentation and nutrient patterns, elimination of riparian vegetation, etc. The resulting changes in flood cycles, tidal currents and water levels can alter trophic dynamics affecting the life cycle of plankton and generating corresponding adverse effects in the rest of the food chain.

The UN General Assembly (hereinafter UNGA) pollution caused, inter alia, by land-based sources and the continuing threat of pollution from ship-generated waste and sewage, as well as from the accidental release of hazardous and noxious

⁶² Given the challenges of managing transboundary pollution, in 2015, the UNGA resolved to develop an international legally binding instrument under the UN Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.⁶³To that end, the UNGA decided to establish a Preparatory Committee and urged Member States to include the following measures in their recommendations to the General Assembly: a. the rapid identification, designation and effective management of an ecologically representative and well-

Furthermore, in 2016, the International Union for Conservation of Nature (IUCN) at the World Conservation Congress similarly expressed concern that certain human activities are significantly reducing the marine biodiversity in areas beyond national jurisdiction (ABNJ); it further stated that there is a need of protecting them by establishing marine reserves or other types of marine protected areas (MPA).⁶⁴

The Inter American Commission on Human Rights has also specifically alerted to potential environmental risks from major infrastructure projects and, by extension, to human rights. In its third report on the situation of human rights in Colombia, the Commission stated that

similar, as well as concessions for the exploration for, or exploitation of, natural resources in ancestral territories may have particularly serious consequences for the indigenous peoples, because such projects jeopardize their territories and the respective ecosystems, and thus represent a mortal danger for their survival as peoples, especially when the

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⁶¹ United Nations Environment Programme, *Global Environment Outlook* (2012), at 112. ⁶² UNGA Res. 69/11, *Annex*, at 10 (2014). ⁶³ UNGA Res. 69/11, *Annex*, at 10 (2014). ⁶⁴ IUCN, *World Conservation Congress 2016*, at 112 (2016).

Thus, it is clear that marine and coastal ecosystems experience stress from a wide range of activities. These activities impact ecosystems cumulatively, in ways that are not always known, and with a combined impact that is always greater than that of the individual activities.

Not every violation or omission with regards to environmental obligations
per se

ii. Human Rights and the Environment in the Inter-American System

The hemispheric vision in the Americas regarding the right to a healthy environment transpires from the OAS General Assembly resolutions on the matter (*see* Table 1):

Table 1

Multiple resolutions of the OAS General Assembly have referred to the human rights and environment nexus.⁸⁶ These resolutions have recognized the need to promote environmental protection and the effective enjoyment of all human rights and encouraging institutional cooperation in the area of human rights and the environment in the framework of the OAS. In 2001, the OAS General Assembly affirmed the principles enshrined in the Stockholm and Rio Declarations and resolved to study the link between the environment and human rights, recognizing the need to promote environmental protection and the effective enjoyment of all human rights.⁸⁷

rights of assembly and freedom of expression, as well as full enjoyment of economic, social, and cultural rights, could foster better environmental protection by creating conditions conducive to modification of behavior patterns that lead to environmental degradation, reduction of the environmental impact of poverty and of patterns of unsustainable

communities responsibly in environmental decisions, governments strengthen their

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The Working Group to Examine the Reports of the States Parties to the Protocol of San Salvador (the Working Group) adopted a set of indicators in June 2013, which were further adopted by the OAS Permanent Council and the General Assembly in December 2013 and in June 2014⁹⁷. These indicators are used by States Parties for the presentation of periodic reports on the rights contained in the San Salvador Protocol. The Working Group issued a second report in 2015, in which it included indicators that address the right to a healthy environment, including

is a direct relationship between the physical environment in which persons live and the rights to life, security, and physical integrity. These rights are directly affected when there are episodes or situations of deforestation, contamination of the water, pollution, or other types of environmental harm on their ancestral territories ¹⁰³

Similarly, in a report on the human rights situation in Ecuador, the Commission stated that

Accordingly,
where environmental contamination and degradation pose a persistent threat to human

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Indeed, the Commission has affirmed that both the Convention and the American Declaration of the Rights

human rights defenders in the Americas, the Commission has indicated that:

The American Declaration of the Rights and Duties of Man and the American Convention on Human Rights make no express reference to protection of the environment, the IACHR has written that a healthy environment is a necessary precondition for exercise of a number of fundamental rights, which are profoundly affected by the degradation of

American Convention reflect a priority concern with the preservation of individual health and welfare, legal interests which are protected by the interrelation between the rights to life, security of person, physical, psychological and moral integrity, and health, and thereby

- A. Pursuant to Article 1(1) of the Pact of San José, should it be considered that a person, even if he is not in the territory of a State Party, is subject to the jurisdiction of the said State in the specific case in which, accumulatively, the following four conditions are met?**
- i. That the person resides or is in an area delimited and protected by a treaty based environmental protection system to which the said State is a party;**
 - ii. That the said treaty-based system establishes an area of functional jurisdiction, such as, for example, the one established in the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region;**
 - iii. That in the said area of functional jurisdiction, the States parties have the obligation to prevent, reduce and control pollution by means of a series of general and/or specific obligations, and**
 - iv. That, as a result of damage to the environment or of the risk of environmental damage in the area protected by the convention in question that can be attributed to a State party to that convention and to the Pact of San José the human rights of the person in question have been violated or are threatened.**

Observations on the Three Questions Presented to the Court by the Republic of Colombia

In essence, Colombia seeks the Court to opine on whether, and to what extent, the rights recognized in the American Convention provide protection to the inhabitants of the coasts and islands of the Wider Caribbean Region from activities originating outside of the territory and jurisdiction of their own State of residence that have the potential to cause severe damage to the marine or coastal environment on which their rights depend.¹⁰⁷ This Request, which is important and consequential for both human rights and the environment, is broken down into three specific questions. The questions are presented in a context where the world is witnessing ever-increasing threats to human rights posed by environmental harm.¹⁰⁸ It presents the Court with questions of first impression and an opportunity to provide essential guidance to the Parties to the American Convention.¹⁰⁹

¹⁰⁷Request for an Advisory Opinion. *Supra* Note 4.

¹⁰⁸ See Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, U.N. Doc. A/HRC/25/53 (30 Dec. 2013) (that

degradation can and does adversely affect the enjoyment of a broad range of h). *See generally* Section

The crux of the first question is concerned with whether the American Convention entails extraterritorial obligations for a State when interpreted in light of international environmental protection obligations. If this question is answered affirmatively by the Court, it would seem to raise a concomitant need to consider the content of international law relating to the protection of the environment in a transboundary setting. As explained in Part III.A below, international environmental law imposes a clear duty on States to prevent transboundary environmental harm. If that duty is violated and this violation further results in the breach of rights protected by the

The phrase in the chapeau of the question, in the abstract, could possibly generate concern owing to its potentially sweeping reach. It should not be unsettling. We suggest that there is an alternative, and narrower, reading of the first question

ts recognized by the Convention; ii) through a breach of international environmental law, including the Cartagena Convention¹¹⁴, which confers a functional jurisdiction on State Parties outside their territory; and iii) that applies to the area in which those people whose rights have been violated reside and to which that State is also a party.

In order to address this question thus framed, WCEL/IUCN believes the Court should consider the following points in its deliberations. First, human rights are not dependent on location. Second, general international law imposes on all States an obligation to ensure that activities under their jurisdiction and control do not cause environmental harm to other States or beyond their national jurisdiction. Third, the Cartagena Convention imposes specific obligations on the States Parties to prevent transboundary environmental harm, consistent with general international law.

Parties to the American Convention need careful consideration.

1. The Scope of the State Obligation to Respect and Ensure Human Rights

First, Human rights are not dependent on location as the Inter-American Commission on Human Rights has stated: "Human rights are for all human beings and are not based on their citizenship or location."¹¹⁵

In considering whether the human rights obligations to respect and ensure established by Article 1(1) extend to the area in question, it is also important to recall

Obligation

avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the

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States.¹²⁷ Early normative scepticism that has surrounded the obligation¹²⁸ no longer has a place in legal analysis.

b. Duty to Cooperate in Mitigating Risks of Transboundary Environmental Harm

In addition to the aforementioned, as concerns the exercise of sovereignty on shared resources – that is, resources that are not entirely within the jurisdiction of a State – the principal concept is the obligation of using the resource in an equitable and harmonious manner under the prism of the principle of good neighborly relations. This obligation is mainly related to cooperation based on a notification and previous consultation system, but also considering the maxim of not causing harm to third parties.

The importance of cooperation to transboundary environmental protection, including marine protection and preservation, has been recognized by the international tribunals on multiple occasions.¹²⁹ As the ICJ has stated in the *Pulp Mills* –operating . . . the States concerned can manage the risks

Detailed procedural obligations relating to notification, consultation, and risk assessment in cases of transboundary environmental risk have been specified in several international treaties, including the Cartagena Convention, discussed below and in Section III.C.

3. The Requirements of the Cartagena Convention

an Advisory Opinion in this case centers on

those persons who inhabit the coasts and islands of the Wider Caribbean Region in light of the obligations assumed by the States of the region when ratifying the [Cartagena Convention] in ¹³¹ The Cartagena Convention, together with its three subsequent protocols on oil spills, protected areas, and land-most comprehensive Regionals Seas Programs.

The preamble to the Cartagena Convention recites that the State parties recognize their responsibilities for t coordinate their efforts in order to preserve the environment in the development process.¹³² As already noted in Section II above, the main obligations created by the Cartagena Convention with respect to pollution are: pollution from ships (Article 5); dumping (Article 6); land-based pollution of the marine environment (Article 7); sea-bed exploitation (Article 8); and air-borne pollution (Article 9). In addition, the Convention creates obligations concerning the development of specially protected areas (Article 10), the development of contingency plans (Article 11), the development of technical standards and an environmental impact assessment consultative process for major developments (Article 12), sharing of scientific information (Article 13), development of appropriate laws and the coordination of law (Article 14), and institutional development (Article 15).¹³³

The general obligations imposed by Article 4 contextualize the customary duty to prevent harm discussed above in the context of the Wider Caribbean Region:

conformity with international law and in accordance with this Convention and those of its protocols in force to which they are parties to prevent, reduce and control pollution of the

(*Fr. v. Spain*), 24 I.L.R. 101, 128 (Perm. Ct. Arb. 1957).. ¹³¹ Request for Advisory Opinion, para. 95. ¹³² See Cartagena Convention, Preamble. Cf. Benedict Sheehy, *International Marine Environment Law: A Case*); *Lake Lanoux Arbitration*

¹³¹ Request for Advisory Opinion, para. 95.

¹³² See Cartagena Convention, Preamble. Cf. Benedict Sheehy, *International Marine Environment Law: A Case*

Additional terms related to State-to-State relations are set out in Article 11(2), which
danger of being polluted or has been polluted, it shall immediately notify other States likely to be
affected by such pollution, as well as the competent international organizations. Furthermore, it
shall inform, as soon as feasible, such other States and competent international organizations of
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The arrangements for liability and compensation for damage resulting from pollution of
in Article 14. To date no liability
protocol has been negotiated.

In sum, the Cartagena Convention represents a longstanding, region-wide commitment to
protect the marine environment of the Wider Caribbean Region so that its fragile life-sustaining
ecology is available for the health and livelihoods of current and future generations. The
Cartagena Convention is an exceptionally well-founded international environmental treaty that
serves as a companion instrument to be applied in conjunction with the American Convention
and its protection of the human rights of those who live in the Wider Caribbean Region. Specific
provisions relating to the implementation of the Cartagena Convention and the duty contained
therein to prevent transboundary harm are discussed in more detail in Section III.C below.

***4. The obligation to respect and ensure human rights in the context of environmental
harm beyond jurisdiction and control***

abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.¹³⁹

In *Armando Alejandro Jr. et al. v. Cuba*, MiG-29 military aircraft belonging to the Cuban Air Force downed two unarmed civilian light airplanes belonging to the organization the Rescue in international airspace. The Petitioners alleged various breaches of the American Declaration. In finding the case admissible, the Commission observed:

The fact that the events took place outside Cuban jurisdiction does not limit the Commission's competence *ratione loci*, because, as previously stated, when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues--in this case the rights enshrined in the American Declaration. The Commission finds conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the "Brothers to the Rescue" organization under their authority. Consequently, the Commission is competent *ratione loci* to apply the American Convention extraterritorially to the Cuban State in connection with the events that took place in international airspace on February 24, 1996.¹⁴⁰

A final example of the extraterritorial application of human rights in the Inter-American system is provided by *Saldaño v. Argentina*.¹⁴¹ In that case, the petitioner alleged the Argentine Republic had breached the American Declaration and the American Convention on Human Rights to the detriment of Victor Saldaño, her son. Saldaño, an Argentine citizen, was sentenced to death by the courts of the U.S. and remained imprisoned in Texas. The petitioner argued that the failure of the Argentina exercise diplomatic protection under Articles 44 and 45 of the American Convention against the U.S. renders it responsible for violations of the Declaration and Convention. Before proceeding to the merits, the Commission had to determine whether Saldaño was subject to the jurisdiction of the Argentine State as required by Article 1(1) of the Convention.¹⁴² The Commission held he was and stated that:

(1) is [not] limited to or merely

may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside its territory. This position finds support in the decisions of European Court and Commission of Human Rights

¹³⁹ IACHR, *Coard, et al. v. United States*

show effective control over their person in the sense of the Commission cases. Accordingly, the linkage between environmental damage and human rights requires a different conception of

We suggest this conception of jurisdiction is evident through an approach that focuses on as in Article 1(1) of the American Convention. A duty to respect rights within the territory of a State Party to the Convention clearly is only fully discharged if individuals are protected by the State, not only from violations of its instrumentalities and agents, but also against violations committed by private persons or entities over which it has jurisdiction or control. The important point here is that the duty to respect applies in connection with actions of its agents and private actors over which the State has control. There is no logical reason why obligation to ensure should not also include a duty to secure the human rights of people outside its territory from emanating from its agents and third parties over which it exercises jurisdiction or control.

This approach is consistent with the international law principles and case law cited herein. Moreover, it finds support from a number of eminent publicists. For a general view of human rights, Marko Milanovic advocates a focus on the duty to secure rights as the touchstone for a obligation to respect rights. His model is built around the obligation to respect rights. For Milanovic, human rights obligations to respect are ordinarily owed extraterritorial application when a State has control over the agent, actors, or activities violating the rights of individuals beyond jurisdiction. The effect is that the obligation to same is not true about the obligation to ensure. In have applied in the Aerial Herbicide Spraying case he Milanovic observes:

respect their right to health and food, which the herbicide spraying would in principle be capable of violating. However, Columbia would not have the obligation (other than possibly as reparation for its prior wrongful act) to actually provide food or health care

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as well as actual impact in stem rights violations and protecting the integrity of the human rights system as a whole.¹⁴⁷ Moreover, it is consistent with the discussion below concerning Trail

[H]uman rights law could have extra-territorial application if a state's *failure to control activities within its territory* affects life, health, private life or property in neighbouring countries. If states are responsible for their failure to control soldiers and judges abroad, a fortiori they should likewise be held responsible for a failure to control transboundary pollution and environmental harm emanating from industrial activities inside their own territory. As the UN Human Rights Committee observed in *Delia Saldias de Lopez v. Uruguay*

As detailed above, there is an established nexus in international law between protection of the environment and protection of human rights: environmental degradation can jeopardize the fulfilment of a number of human rights, including the rights to health, property, and life, giving

In the light of this jurisprudence and the principles set out in Section II above, in the event that the acts or omissions of one State Party to the American Convention (whether through its state agents or private parties) in its territory cause serious damage to the marine environment of the Wider Caribbean Region and consequently to the rights of its inhabitants protected by the American Convention, such acts or omissions would be in conflict under the American Convention and would give rise to international responsibility under the Convention.¹⁵⁸ This includes not only the rights set out in Articles 4(1) and 5(1), read with Article 1(1), of the Convention, but also other rights that may be affected by environmental degradation, depending on the facts, such as the right to property (Article 21) and the rights of the child (Article 19).¹⁵⁹ The relevant principles of general international law as they relate to the American Convention are discussed in more detail in Section III.C below.

¹⁵⁸ See also IACHR, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 Apr. 1997, Chap. VI right take certain positive measures to safeguard life and physical integrity. Severe environmental pollution may pose a threat to human life and health, and in the appropriate case give rise to an obligation on the part of a state to take reasonable measures to prevent such risk, or the necessary measures to

¹⁵⁹ See, e.g., IACHR, *Community of San Mateo de Huanchor v. Peru*, 14 Oct. 2004, Report No. 69/04 (Admissibility), ¶ 66; IACHR, *The Situation of Human Rights in Cuba—Seventh Report*, Doc. OEA/Ser.L/V/II.61, Doc. 29 rev. 1, 4 Oct. 1983.

- C. Should we interpret and to what extent the norms that establish the obligation to respect and ensure the rights and freedoms set out in Articles 4(1) and 5(1) of the Pact in the sense that they infer the obligation of the States Parties to the Pact to respect the norms of international environmental law that seek to prevent any environmental damage which could restrict or preclude the effective enjoyment of the rights to life and to personal integrity, and that one of the ways of complying with that obligation is by making environmental impact assessments in an area protected by international law, and by cooperation with the States that could be affected? If applicable, what general parameters should be taken into account when making environmental impact assessments in the Wider Caribbean Region, and what should be the minim**

take certain positive measures *ex ante* to identify

- d) Principles articulated in non-binding instruments, such as UN General Assembly Resolutions, relating to the Wider Caribbean Region.

(A list of the relevant sources is appended as Appendix II)

In sum, the obligation to respect and ensure rights under the American Convention entails a concomitant duty to prevent any environmental harm that could significantly affect or restrict the effective enjoyment of human rights, such as the rights to life, health, or property, and to take affirmative steps to fulfill this obligation.

apply in a transboundary setting

exchange of data and other scientific information, relating to the purposes of the Convention.¹⁸⁹ The duty to cooperate under the Cartagena Convention extends to any potential liability or compensation for damage resulting from pollution in the Wider Caribbean Region.¹⁹⁰

Second, the Parties to the Cartagena Convention agreed to include an environmental impact assessment process for major development projects.¹⁹¹ This is a key procedural obligation designed to ensure the effectiveness. Under Article 12(1), the States Parties

on the Wider Caribbean Region.¹⁹² Article 12(2), furthermore, requires each State Party potential effects of such projects on the marine environment, particularly in coastal areas, so that appropriate measures may be taken to prevent any substantial pollution of, or significant and

¹⁹³ The Convention also requires States

appropriate, [to] invite other Co

harm requires that State to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State. If that is the case, the State concerned must conduct an environmental impact assessment. The obligation in question rests on the State pursuing the activity.

Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.²⁰³

The duty to assess the existence of a risk of significant transboundary harm prior to the on the basis of an objective evaluation of all the relevant circumstances.²⁰⁴ One of the ways in which a State can ascertain whether the proposed activity carries a risk of significant transboundary harm is by conducting a preliminary assessment of the risk posed by an activity.²⁰⁵ In deciding whether an EIA, or a preliminary risk assessment, is required in a given case, resort can be had to the precautionary principle.²⁰⁶

The corollary principle under international law is that of cooperation with the potentially affected States: If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to

²⁰⁷

International law does not stipulate the content of an EIA. Instead, that determination

²⁰⁸

However,

²⁰⁹ In *Gabcikovo-Nagymaros*, where it was alleged that an EIA had not been carried out prior to the construction of a

²⁰³

hydroelectric project, the International Court of Justice further stated that States must integrate latest scientific knowledge in their analysis:

Owing to new scientific insights and to a growing awareness of the risks for mankind for present and future generations of pursuit of such interventions [in the environment] at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.²¹⁰

In so holding, the Court observed that, and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of

²¹¹

Accordingly, a failure to institute an EIA in appropriate circumstances, or to continue monitoring a project that may have transboundary effects, in line with the latest available standards, may give rise to international responsibility. Additionally, where appropriate, the content of an EIA may be determined by reference to applicable treaties or procedural human rights (*see* Section III.C below).

It should be noted that the EIA requirement under international law does not give the potentially affected States veto power over the proposed activities; rather, it gives them the right to be notified, informed, and consulted, and the possibility of being engaged in joint assessment and monitoring efforts. However, should a State initiating an activity fail to take due account of the EIA findings, or proceed with a project that ultimately results in transboundary environmental harm, it does so at its own risk and may incur international responsibility as a result.²¹²

4. TEIA Practice under Other International Instruments

The obligation to conduct an EIA/TEIA is a common feature of a number of regional conventions and international instruments, and not merely the Cartagena Convention.²¹³ While the practice from other regional contexts may not be binding on the Parties to the American Convention, it guidance on how the general duty to conduct an EIA under international law can be operationalized. Of particular interest in this regard is the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (hereinafter , which is in force, *inter alia*, in the European Community and Canada.²¹⁴

²¹⁰ ICJ, *Gab ikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports (1997), 25 Sept. 1997, at p. 78.

²¹¹ ICJ, *Gab ikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports (1997), 25 Sept. 1997, at p. 78.

²¹² ICJ, *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 20 Apr. 2010, I.C.J. Reports 2010 (I), ¶¶ 154, 157 (finding that Uruguay did not

²¹³ *See, e.g.*, United Nations Convention on the Law of the Sea (UNCLOS), 10 Dec. 1982, 21 ILM 1261, art. 206, entered into force 16 Nov. 1984 harmful changes to the marine environment and [to]

²¹⁴ 1991 Convention on Environmental Impact Assessment in a Transboundary Context, 1989 U.N.T.S. 309 (entered into force on 10 Sept. 1997) Impact Assessment in a Transboundary Context, Kiev, 2003 (entered into force on 11 July 2010).

The Espoo Convention requires States Parties to take, either individually or jointly, all appropriate and effective measures to prevent, reduce and control significant adverse

²¹⁵ The relevant parameters and content of this obligation are discussed below in Section III.C.(iii)(b). Amidst concerns about transboundary environmental impacts, including health impacts, of activities within domestic jurisdiction, Parties to the Espoo Convention signed an additional Protocol on Strategic Impact Assessment in Kiev, in 2003

²¹⁶ The Kiev Protocol furthers the objectives of the Espoo Convention by ensuring that individual Parties integrate environmental assessment into their plans and programs at the earliest stages, thus helping to lay down the groundwork for sustainable development.²¹⁷ This includes plans and programs that are prepared

c)

by the proposed activity and its alternatives,
impacts.²²⁸

- e) *Consultation*. consultations with affected Parties concerning, *inter alia*, the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact.²²⁹
- f) *Post-Project Analysis*. The Parties are required to conduct post-project analysis in some circumstances and conduct surveillance of the activity.²³⁰

These duties are reaffirmed and elaborated in the Kiev Protocol, which makes further reference to the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justi

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and emphasizes the importance of public participation in strategic EIAs.²³²

IV. Appendix List

A. Appendix I Signatures and ratifications by countries of the Wider Caribbean Region of International/Regional Treaties and Multilateral Environmental