Center for International Environmental Law

VERMONT LAW SCHOOL | CENTER for APPLIED HUMAN RIGHTS

January 18, 2017

Pablo Saavedra Alessandri
Secretary
Inter-American Court of Human Rights
San José, Costa Rica

Ref: *Amicus Curiae* Brief

Dear Mr. Saavedra:

The Center for International Environmental Law (CIEL) and the Vermont Law School Center for Applied Human Rights hereby present an *amicus curiae* brief to the Inter-American Court of Human Rights regarding the Republic of Colombia's request for an advisory opinion submitted on 14 March 2016 in relation to the interpretation of Articles 1(1), 4(1) and 5(1) of the American Convention on Human Rights, within the context of the possible impact of grand scale projects on the marine environment, particularly in the Greater Caribbean Region.

The Center for International Environmental Law and the Vermont Law School Center for Applied Human Rights have specialized expertise on the legal issues involved in Colombia's request for an advisory opinion from the Inter-American Court of Human Rights (hereinafter "the Inter-American Court"). Accordingly, this *amicus curiae* brief provides the Inter-American Court with useful analysis, arguments and perspectives regarding the questions placed before it.

The Center for International Environmental Law uses the power of international law to protect the environment, promote human rights, and ensure a just and sustainable society. CIEL pursues its mission through legal research and advocacy, education and training, while connecting global environmental and human rights challenges to the experiences of communities on the ground. CIEL's Human Rights and Environment Program, directed by Dr. Marcos A Orellana, focuses on the recognition and justiciability of the right to a healthy environment and on clarifying and strengthening the environmental dimensions of human rights law.

The Vermont Law School Center for Applied Human Rights, directed by Professor Stephanie Farrior, engages in research and advocacy training on cutting-edge issues in human rights law and policy. The top-ranked law school in the US for environmental law, Vermont Law School is committed to developing leaders who use the power of the law to make a difference in our communities and the world. Students and faculty work together to address crucial issues of climate change, energy, water, sustainable

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agriculture, environmental taxation, and land use, and through the Center for Applied Human Rights, issues at the intersection of human rights and the environment.

Our *amicus curiae* brief elaborates on two arguments that are key to addressing the questions posed by the Republic of Colombia to the Inter-American Court. First, we argue that a State Party to the American Convention on Human Rights has an obligation to ensure that its acts and omissions do not cause environmental harm that infringes on human rights of persons outside its territorial boundaries. Second, in cases where human rights interference results from environmental degradation, we argue that the American Convention on Human Rights must be interpreted and applied in light of relevant international environmental law. These two points help clarify the conceptual and normative frames that support a more effective Convention protection in situations involving the threat of transboundary environmental harm that impairs the human rights of individuals and groups.

We are grateful for this opportunity to submit an *amicus curiae* brief in accordance with Article 73(3) of the Rules of Procedure of the Inter-American Court. Enclosed to this cover letter is our *amicus curiae* brief and the pertinent documents that authenticate the legal existence of our organizations and their representation.

We would be grateful if all communications and notifications could be sent by the Inter-American Court to Dr. Marcos A Orellana, whose contact information is as follows:

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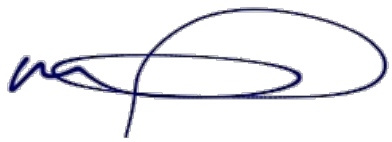
The Center for International Environmental Law and and the Vermont Law School Center for Applied Human Rights kindly request the Inter-American Court of Human Rights to consider our *amicus curiae* brief in its deliberation on the advisory opinion requested by the Republic of Colombia.

Sincerely,



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INTER-AMERICAN COURT OF HUMAN RIGHTS

BRIEF *AMICUS CURIAE*

ON THE ISSUES IN THE

REQUEST FOR AN ADVISORY OPINION

SUBMITTED BY THE REPUBLIC OF COLOMBIA

presented by

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Dated: 18 January 2017

Table of Contents

The Center for International Environmental Law (CIEL) and the Vermont Law School Center for Applied Human Rights respectfully submit this *amicus curiae* brief to the Inter-American Court of Human Rights in response to the invitation to submit comments on the issues raised in the request for an Advisory Opinion submitted by the State of Colombia on 14 March 2016.

Interest of Amici

The **Center for International Environmental Law (CIEL)** uses the power of international law to protect the environment, promote human rights, and ensure a just and sustainable society. CIEL pursues its mission through legal research and advocacy, education and training, while connecting global environmental and human rights challenges to the experiences of communities on the ground. CIEL's Human Rights and Environment Program, operating under the directorship of Dr. Marcos A Orellana, focuses on the recognition and justiciability of the right to a healthy environment and on clarifying and strengthening the environmental dimensions of human rights law.

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Introduction

1. The request for an Advisory Opinion by the State of Colombia refers specifically to the interpretation of Articles (1), 4(1) and 5(1) of the American Convention on Human Rights, in light of international environmental law. Colombia's request also identifies the "essential issue" raised before the Court and further disaggregates it in specific questions.

2. In relation to the various important issues pertaining to Colombia's request, this *amicus* brief focuses on two cross-cutting themes, namely: (1) the question of jurisdiction and extra-territorial obligations under the American Convention on Human Rights; and, (2) the question of normative dialogue between International Human Rights Law and International Environmental Law.

3. In respect of these two themes, this *amicus* brief makes the following main points:

    A. The duty of State Party to the American Convention on Human Rights to respect and protect human rights entails an obligation to exercise due diligence so that that its acts and omissions do not cause environmental harm that infringes the human rights of persons and groups outside the State's territorial boundaries. Recognizing the applicability of the American Convention to the extraterritorial human rights impacts of a State Party's acts and omissions in no way infringes the territorial integrity of another State; it simply means that a State has a duty to respect human rights and to ensure that those entities under its jurisdiction and control do not violate the human rights of persons and groups whether within or outside its territory.

    B. In cases where human rights interference results from environmental degradation, the American Convention on Human Rights must be interpreted and applied in light of relevant

international environmental norms.

4. These two points help clarify the conceptual and normative frames that support a more effective Convention protection in situations involving the threat of transboundary environmental harm that impairs the human rights of individuals and groups.

5. This *amicus* brief is based on a range of international legal sources, including judgments of the International Court of Justice, the jurisprudence of the Inter-American Court of Human Rights, decisions of other regional human rights courts and commissions, concluding observations and general comments of United Nations human rights treaty bodies, reports by UN special procedures, resolutions of human rights organs, and other relevant sources. The work of publicists who have distilled these sources into expert commentary is also referenced, including in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.[1]

6. An Advisory Opinion by the Court on the issues before it would be very timely indeed, as it would provide States and other actors with important guidance on how to effectively address human rights challenges that arise in the current-day environmental and social realities of the region. The potential for transboundary environmental and social harm is steadily increasing, due to the advent of technologies and capital that enable large-scale infrastructure and investment projects. The increase in these types of projects is resulting in violations of a range of civil, cultural, economic, political and social rights, including the right to a healthy environment, the right to life and the right to physical integrity, as well as the rights of environmental human rights defenders. The United Nations Special Rapporteur on Human Rights Defenders noted in his 2016 report to the UN General Assembly that Latin America is one of "the most hostile regions for environmental human rights defenders."[2] It is notable that in order to confront the proliferation of environmental and social conflicts and ensure the protection of human rights, a number of governments in the region have embarked on negotiations of an agreement on environmental democracy and the rights to information, participation and access to justice in Latin America and the Caribbean.[3] An Advisory Opinion by the Court on these present-day realities would provide important guidance to States on how to prevent conflict and safeguard human rights from abuse.

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[1] The Maastricht Principles are a restatement of applicable international law adopted by 40 international experts in international law and human rights, including current and former UN Special Procedures and human rights treaty body members. While the Maastricht Principles clarify the content of extraterritorial obligations of States with a focus on economic, social and cultural rights, they can also be relevant to civil and political rights. Therefore, given that issues found in the interface between human rights and the environment involve both civil and political rights as well as economic, social and cultural rights, the Maastricht Principles assist in clarifying the points of contact between international human rights and international environmental law. The ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (January 2013), *available at* http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 [hereinafter *Maastricht Principles*]; *see also* De Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, HUMAN RIGHTS QUARTERLY, Vol. 34, p. 1084 (2012) *also available at* http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=63 (accessed 05 January 2017).

[2] UN General Assembly, *Situation of human rights defenders*, 03 Aug. 2016, UN Doc. A/71/281, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/71/281(accessed 06 January 2017).

[3] *Principle 10*, Economic Commission for Latin America and the Caribbean, *available at* http://www.cepal.org/es/temas/principio-10 (accessed 06 January 2017).

I. Jurisdiction and Extra-Territorial Obligations under the American Convention on Human Rights

7. The request for an Advisory Opinion raises what is a cutting edge issue of our time, and a matter of key importance for the effectiveness of the inter-American system for the protection of human rights: the applicability of the treaty to a State Party's acts or omissions that deprive persons outside that State's territory of the full enjoyment of their human rights due to environmental harm. The States Parties to the American Convention on Human Rights have a duty to respect human rights and to exercise due diligence to protect the rights in the convention.[4] As Part I of this *amicus* brief explains, this duty encompasses an obligation to exercise due diligence to protect human rights from being impaired by extraterritorial environmental harm due to a State's acts or omissions in situations under a State's control or regulatory authority. As Judge Xue, now on the International Court of Justice, has written regarding due diligence in relation to damage caused extraterritorially: "With regard to transboundary damage, the doctrine [of due diligence] requires the conduct of 'good government,' evincing responsibility for its international obligation to exercise proper care so as not to cause such effects or to prevent others in its territory from causing such effects."[5]

8. States Parties to the American Convention on Human Rights undertake "to respect" the rights in the treaty, and "to ensure" these rights "to all persons subject to their jurisdiction" (art. 1). As the Inter-American Court of Human Rights has stated with regard to the duty to respect rights, "any exercise of public power that violates the rights recognized by the Convention is illegal."[6] The clause in the Convention regarding the obligation to respect rights contains no territorial limitation.

9. As elaborated in detail below, the term "jurisdiction" in human rights treaties setting out the obligation to ensure rights refers to territory and people over which a state has "factual control, power or authority."[7] Activities within a state's regulatory authority can have significant impact on, and therefore manifest factual control over, the enjoyment of human rights by people outside a state's territorial boundaries. This is exemplified by the potential for significant transboundary damage from activities that harm the environment.

10. The relation of the environment to the enjoyment of human rights, discussed in Part II of this *amicus* brief, is now well-established. It would be contrary to the object and purpose of the American Convention to maintain that States have responsibility to protect rights only within their national territory, but that they bear no responsibility for the trans-boundary impact on human rights of their activities that negatively affect the environment. As Professor Theodor Meron has noted, "In view of the purposes and objects of human rights treaties, there is no a priori reason to limit a state's obligation to respect human rights to its national territory."[8]

11. The existence of extraterritorial human rights obligations does not mean that these obligations are without limit, or that a State has a duty to ensure rights everywhere outside its territory; nor does fulfilling extraterritorial human rights obligations infringe the territorial integrity of other States. These obligations simply mean that a State has a duty to respect human rights and to exercise due

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[4] Regarding the due diligence obligation to respect and protect the rights in the American Convention, *see generally Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988, Inter-Am. Ct.H.R. (ser. C) No. 4 (1988), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf (accessed 07 January 2017).
[5] Xue Hanqin, *Transboundary Damage in International Law* 163 (Cambridge Univ. Press 2003).
[6] *Velasquez Rodriguez v. Honduras, supra* note 4, ¶ 169.
[7] *See* De Schutter et al., *supra* note 1, at p. 1102.
[8] Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 Am. J. Int'l L.78, 87 (1995).

diligence to ensure that those entities under its jurisdiction or control do not violate the human rights of persons and groups within or outside its territory.

12. The analysis in this part of this *amicus* brief elaborates on the recognition by international tribunals as well as United Nations and regional human rights bodies of the extraterritorial human rights obligations of States. Part II of this *amicus* brief elaborates on the substantive normative interaction between environmental law and human rights, and sets out the applicable obligations under international environmental law to be used in interpreting international human rights law.

I.1. Definition of Extraterritorial Obligations

13. Extraterritorial obligations in the context of human rights law have been defined as "the human rights obligations of Governments toward people living outside its own territory."[9] They encompass two sets of obligations: those relating to the extraterritorial effects of a State's conduct, and those emanating from obligations of international cooperation; they can be summarized as follows:

    A. Obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and

    B. Obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly though international cooperation, to realize human rights universally.[10]

14. The obligation of international cooperation set out in Article 26 of the American Convention is especially relevant in examining the impact of environmental harm on human rights:

> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

15. As the Special Rapporteur on Extreme Poverty and Human Rights stated in a 2014 report, the obligation of cooperation includes a duty to avoid conduct that would risk impairing the human rights of people outside the State's borders:

> As part of international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights everywhere, *which involves avoiding conduct that would foreseeably risk impairing the enjoyment of human rights by persons beyond their borders*, and *conducting assessments of the extraterritorial impact of laws, policies and practices*."[11]

I.2. Scope of Jurisdiction

16. Jurisdiction entails the application of state power or authority. The ability to fulfill its international

[9] Jean Ziegler, *Report of the Special Rapporteur on the Right to Food*, UN Doc. E/CN.4/2006/47, ¶ 35 (24 Jan. 2005).
[10] *Maastricht Principles, supra* note 1, at Principle 8.
[11] Magdalena Sepulveda Carmona, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, UN Doc. A/HRC/26/28, ¶ 30 (22 May 2014).

obligations generally requires a State to have effective control over a situation through regulatory, adjudicatory or enforcement means. That which is under a State's regulatory authority or its effective control may include situations outside the national territory of the State. States may also exercise authority or control over situations that have foreseeable extraterritorial effects that impair human rights. States may even be in a position to exercise decisive influence over a situation so as to prevent the impairment of human rights extraterritorially. These various types of situations are further elaborated below, including reference to the International Court of Justice, human rights courts and bodies, and special procedures of the Human Rights Council.

17. The principle that States bear extraterritorial human rights obligations, a concept that runs throughout the pronouncements of the courts, treaty bodies and United Nations special procedures noted below, is grounded in the concept of obligations *erga omnes*, that is, the understanding that protection of human rights is in the interest of the international community as a whole. This concept was expressed by the Inter-American Court of Human Rights in its Advisory Opinion 10/89, stating that the duty of States to respect certain essential human rights "is today considered to be an erga omnes obligation," that is, obligations that States have towards the international community as a whole. The Commentary to the Maastricht Principles explains that "while the beneficiaries of human rights obligations are the rights-holders who are under a state's authority and control, the legal obligations to ensure the rights in question are owed to the international community as a whole."

18. The approach suggested in Colombia's Request for an Advisory Opinion, i.e. that four conditions be met cumulatively for the Article 1 obligation to respect and ensure rights to be triggered, is an example of one situation that gives rise to a State's extraterritorial human rights obligations. The International Court of Justice, the European Court of Human Rights, UN human rights treaty bodies and the UN special procedures have all adopted a broader frame for recognizing such obligations. The principles that can be distilled from these cases and statements establish the following three situations that give rise to the State obligation to respect, protect and fulfill rights extraterritorially:

    a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;

    b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;

    c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize human rights extraterritorially, in accordance with international law.[12]

19. The subsections that follow address each of these three situations in turn. It should be noted that these situations do not give rise to state obligations without limitation. After the initial discussion of extraterritorial jurisdiction below, this *amicus* brief will next address the limits of extraterritorial jurisdiction.

i. Exercise of authority or effective control over the situation

20. Two sets of circumstances give rise to extraterritorial human rights obligations on the part of the

[12] *Maastricht Principles*, *supra* note 1, at Principle 9.

State: situations over which the State "exercises authority," and those over which the State exercises "effective control."

21. The Inter-American Commission on Human Rights took this approach when it stated that jurisdiction in relation to the American Convention on Human Rights is "linked to authority and effective control, and not merely to territorial boundaries."[13] The International Court of Justice (ICJ) also took this approach when it ruled that a State can be found responsible for extraterritorial acts if it is proved "that the State had an effective control of the operations in the course of which the alleged violations were committed."[14] As the ICJ explained in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* a State owes obligations under the International Covenant on Civil and Political Rights when the State is exercising jurisdiction extraterritorially:

> [W]hile the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.[15]

22. That opinion was one of three pronouncements in which the International Court of Justice has rejected arguments that the human rights treaties in question applied only within the national territory of a State party. In the *Armed Activities in Congo* case, the Court found State responsibility for acts outside the State's territory, including in areas outside the State's boundaries that were not under the State's effective control.[16] In addition, in indicating provisional measures in *Georgia v. Russia*, the ICJ stated that the International Convention on the Elimination of All Forms of Racial Discrimination applies, "like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory."[17] There, the Court admonished the States parties to "do all in their power to ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination against persons, groups of persons or institutions."[18]

23. The exercise of authority or effective control test has also been used by UN human rights treaty bodies in determining when States Parties owe a duty to prevent extraterritorial rights violations.

24. The Committee against Torture used the effective control test in its General Comment on the implementation of article 2, stating that States are to take effective measures to prevent acts of torture "*in all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control,* in accordance with international law."[19]

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[13] *Victor Saldaño v. Argentina*, Petition, Inter-Am. C.H.R., Report No. 38/99, OEA/Ser.L/V/II.95 doc. 7 rev. 289, ¶ 19 (1998).
[14] *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.),* Judgment, 1986 I.C.J. 14, ¶ 115 (27 June).
[15] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 179 (9 July). The Court further remarked that "the constant practice of the Human Rights Committee is consistent with this." *Id.*
[16] *Armed Activities in the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, 2005 I.C.J. 168 (19 Dec.).
[17] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation*), Provisional Measures, 2008 I.C.J. 353, ¶ 109 (15 Oct.).
[18] *Id.*
[19] UN Comm. Against Torture, *General Comment No. 2, Implementation of Article 2 by States Parties*, UN Doc. CAT/C/28/Add.5, ¶ 16 (24 Jan. 2008) [hereinafter General Comment No. 2].

25. As the Human Rights Committee stated in *López Burgos v. Uruguay*, the reference to "individuals subject to its jurisdiction" in the First Optional Protocol to the ICCPR

> is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.[20]

26. As the Committee then famously stated:

> 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.[21]

27. The Committee reaffirmed this position in its General Comment 31 on the nature of legal obligations under the Covenant, stating that States "must" ensure Covenant rights to "anyone within the *power or effective control* of that State Party, *even if not situated within the territory of the State Party*."[22]

28. The Committee on the Rights of the Child used the exercise of authority test in setting out a State's extraterritorial obligations in its General Comment on business and human rights. This General Comment provides that "home States also *have obligations . . . in the context of businesses' extraterritorial activities and operations*, provided that there is a reasonable link between the State and the conduct concerned."[23] The Committee explained that a "reasonable link" includes situations over which the State has a means of exercising regulatory authority, specifically, where "a business enterprise has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities in the State concerned."[24] The "reasonable link" approach also serves as an example of the third circumstance provided above that gives rise to extraterritorial human rights obligations: where the State exercises "decisive influence" over a situation.

29. The Committee on Economic, Social and Cultural Rights took a similar approach in its statement on the obligations of States regarding the corporate sector, which declares that:

> States Parties should also take steps *to prevent human rights contraventions abroad* by corporations which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.[25]

30. In addition, in its General Comment on the right to adequate food, the Committee on Economic, Social and Cultural Rights declared that "as part of their obligations to protect people's resource base for food, States parties should take appropriate steps to ensure that activities of the private

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[20] UN Human Rights Committee, *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52, UN Doc. Supp. No. 40 (A/36/40) at 176, ¶ 12.2 (1981).
[21] *Id.* ¶ 12.3.
[22] Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (2004) (emphasis added).
[23] UN Committee on the Rights of the Child, *General Comment No. 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights*, UN Doc. CRC/C/GC/16, ¶ 43 (17 Apr. 2013) (emphasis added).
[24] *Id.*
[25] UN Committee on Economic, Social and Cultural Rights, *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social, and Cultural Rights*, UN Doc. E/C.12/2011/1, ¶ 5 (12 July 2011) (emphasis added).

business sector and civil society are in conformity with the right to food."[26] The Committee articulated no territorial limitation on this obligation to ensure that those within its authority or control do not violate economic, social and cultural rights.

31. The Committee on the Elimination of Racial Discrimination has also indicated that the human rights treaty it monitors entails obligations with respect to extraterritorial conduct of those under its authority or control. In reviewing Canada, the Committee expressed concern that the State "has not yet adopted measures with regard to *transnational corporations registered in Canada whose activities negatively impact the rights of indigenous peoples outside Canada*."[27] Similarly, in reviewing Australia, the Committee encouraged "the State party to take appropriate legislative or administrative measures to prevent acts of Australian corporations *which negatively impact on the enjoyment of rights* of indigenous peoples domestically *and overseas* and to *regulate the extra-territorial activities of Australian corporations abroad."*[28]

32. The UN Special Rapporteur on the right to food has also articulated extraterritorial duties arising from a State's authority or control over a situation through regulatory authority: "The extraterritorial obligation to protect the right to food requires States to ensure that third parties subject to their jurisdiction (such as their own citizens or transnational corporations), do not violate the right to food of people living in other countries."[29]

ii. Foreseeable extraterritorial effects of State acts or omissions

33. A review of the work of international tribunals and UN human rights bodies shows that a second situation giving rise to human rights obligations on the part of a State is when a State's acts or omissions bring about foreseeable effects on the enjoyment of human rights extraterritorially.

34. The European Court of Human Rights has ruled that jurisdiction under the European Convention "may extend to acts of its authorities which produce effects outside its own territory."[30] Similarly, it declared that State responsibility may "be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction."[31]

35. That States owe obligations in such a situation is well-recognized even when the court or treaty body acknowledges that the effects are felt in territory over which the State has no actual control. The European Court of Human Rights found such an obligation, for example, when it determined that "even though the applicant had sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, had been such that the applicant should be regarded as 'within [the]

[26] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food*, UN Doc. E/C.12/1999/5, ¶ 27 (12 May 1999).
[27] UN Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee: Canada*, UN Doc. CERD/C/CAN/CO/19-20, ¶ 14 (4 Apr. 2012) (emphasis added).
[28] UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee: Australia*, UN Doc. CERD/C/AUS/CO/15-17, ¶ 13 (27 Aug. 2010) (emphasis added).
[29] Ziegler, *supra* note 9, ¶ 36.
[30] European Court of Human Rights, *Case of Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Eur. Ct. H.R., ¶ 133 (7 July 2011).
[31] European Court of Human Rights, *Ilascu and Others v. Moldova and Russia*, App. No. 48787/99, 2004-VII Eur. Ct. H.R. 179, ¶ 317 (8 July 2004).

jurisdiction' of Turkey within the meaning of Article 1 of the Convention." [32]

36. The UN Human Rights Committee has found the International Covenant on Civil and Political Rights applicable because of the extraterritorial effects of State conduct. The Committee has determined that "a State party may be responsible for extra-territorial violations" of the Covenant "if it is a link in the causal chain that would make possible violations in another jurisdiction." [33] State responsibility, however, is limited to foreseeable effects: "the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time."[34]

37. The UN Special Rapporteur on Extreme Poverty and Human Rights has also articulated the extraterritorial obligation to avoid conduct that would foreseeably risk harming human rights: "As part of international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights everywhere, which involves avoiding conduct that would foreseeably risk impairing the enjoyment of human rights by persons beyond their borders, and conducting assessments of the extraterritorial impact of laws, policies and practices."[35]

38. The UN Special Rapporteurs on the right to food have also confirmed extraterritorial human rights obligations of States. Olivier de Schutter, the immediate past UN Special Rapporteur on the right to food, affirmed this recognition of extraterritorial obligations, noting: "States have an obligation to "*ensure* that their international policies of a political and economic nature . . . do not have *negative effects* on the right to food *in other countries*.[36]

39. The current UN Special Rapporteur on the right to food, Hilal Elver, has also recognized the extraterritorial human rights obligations of states regarding the effects their conduct may have with respect to the right to food. A section of her first annual report to the UN Human Rights Council is devoted to articulating these extraterritorial obligations in the context of economic globalization.[37]

40. An effects approach was also taken by the UN Human Rights Council's Advisory Committee in its Drafting Group on the Right to Food: "States also have extraterritorial obligations concerning the right to food. . . . All countries should therefore ensure that their policies *do not contribute to human rights violations in other countries*." [38]

iii. Decisive influence

41. A third situation recognized by international tribunals and UN human rights bodies as giving rise to extraterritorial human rights obligations is when the State, acting through its executive, legislative or judicial branches, "is in a position to exercise decisive influence or to take measures to realize rights extraterritorially, in accordance with international law."[39] The reference to international law ensures

[32] European Court of Human Rights, *Andreou v. Turkey*, App. No.45653/99, Eur. Ct. H.R. (27 Jan. 2010) (emphasis added).
[33] European Court of Human Rights, *Munaf v Romania,* UN Doc. CCPR/C/96/D/1539/2006, ¶ 14.2 (2009).
[34] *Id.*
[35] Carmona, *supra* note 11, ¶ 30.
[36] Olivier De Schutter, *The Right to Food: Interim Report of the Special Rapporteur on the Right to Food to the General Assembly, transmitted by Note of the Secretary General*, UN. Doc. A/63/278, ¶ 11 (21 Oct. 2008) (emphasis added).
[37] Hilal Elver, *Report of the Special Rapporteur on the right to food,* UN Doc. A/HRC/28/65, ¶¶ 38-47 (12 Jan. 2014).
[38] *Preliminary Report to the Drafting Group of the Human Rights Council Advisory Committee on the Right to Food,* UN Doc. A/HRC/AC/2/CRP.2, ¶ 50 (19 Jan. 2009).
[39] *Maastricht Principles*, *supra* note 1, at Principle 9.

that application of this approach is limited to situations over which a State may exercise influence without infringing on the sovereignty of the territorial State.

42. The "decisive influence" approach has been applied by both courts and UN treaty bodies.The European Court of Human Rights applied the "decisive influence" standard in finding State responsibility for extraterritorial human rights violations in a case where the State had "a continuous and uninterrupted link of responsibility for the applicants' fate," and it was "of little consequence that . . . agents of the [State] ha[d] not participated directly in the events complained of in the present application."[40] The territory where the acts complained of took place were "under the effective authority, or *at the very least under the decisive influence*, of" the State.[41] Such influence can be evident through military, economic, financial and political support.[42] Even where there is an "absence of effective control over the" territory where the human rights violations take place, the Court ruled, the State still has an obligation "to take the diplomatic, economical, judicial or other measures that it is in its power to take and are in accordance with international law to secure the applicants the rights guaranteed in the Convention."[43]

43. The International Court of Justice has also applied an "influence" standard in concluding that a State bears responsibility for extraterritorial human rights violations by "those with whom the [state] maintained close links on which it could exert a certain influence."[44] In its indication of provisional measures at an earlier phase of the case, the Court said the State must "ensure" that various entities including "any organizations and persons which may be subject to its control, direction *or influence*" not commit violations. In its decision on the merits, the Court elaborated that its use of the term "influence" was "particularly revealing of the fact that the Order concerned not only the persons or entities whose conduct was attributable to the [the State], but also all those with whom the Respondent maintained close links and on which it could exert a certain influence."[45]

44. The UN Committee on Economic, Social and Cultural Rights has also applied the "influence" standard in finding that a State's obligations under the Covenant extend to all situations over which a State may exercise influence without infringing on the sovereignty of the territorial State. In its General Comment on the right to health, the Committee stated:

> To comply with their international obligations in relation to article 12, *States parties have to* respect the enjoyment of the right to health in other countries, and to *prevent third parties from violating that right in other countries*, *if they are able to influence these third parties* by way of legal or political means.[46]

45. In its General Comment on the right to water, the Committee stated:

> Steps should be taken by States parties to prevent their own citizens and companies *from*

[40] *Ilascu & Others v. Moldova and Russia*, *supra* note 31, ¶ 393.
[41] *Id.* ¶ 392.
[42] *Id.*
[43] *Id.* ¶ 331.
[44] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro),* 2007 I.C.J. 43, ¶ 435 (26 Feb.).
[45] *Id.*
[46] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4, ¶ 39 (11 Aug. 2000).

violating the right to water of individuals and communities *in other countries*. Where States parties *can take steps to influence other third parties* to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.[47]

I.3. Limits of Jurisdiction in International Human Rights Law

46. The existence of extraterritorial human rights obligations does not entail unlimited State obligation or responsibility, and it does not mean that a State has a duty to ensure rights in respect of every situation or everywhere outside its territory. It simply means that a State has a duty to respect human rights, and to ensure that those entities under its jurisdiction and control do not violate the human rights of persons within or outside its territory.

47. Recognizing State responsibility under the American Convention for the negative extraterritorial human rights impacts of acts the State undertakes or allows would not impermissibly extend jurisdiction beyond the traditional limits in international law, and would therefore not infringe on the sovereignty of other States. Extraterritorial human rights obligations do not involve an assertion of adjudicative jurisdiction by one State over the acts of another State, or an assertion of prescriptive jurisdiction by one State over the acts of another State. Similarly, extraterritorial human rights obligations are not an assertion, earlier rejected by the Inter-American Commission on Human Rights, that States parties to the Convention might have some obligation "to protect their nationals against violations committed abroad by another state."[48] Neither is it contrary to international law to hold that a State bears responsibility for the human rights impacts of its actions.

48. Instead, recognition of State responsibility for the negative extraterritorial human rights impacts of acts the State undertakes or allows recognizes, as the courts, treaty bodies and independent experts noted above have done, that the obligation to respect rights entails a duty not to deprive people of their human rights, either inside or outside the State's territory.

49. The limits of jurisdiction are recognized in the articulation *supra* of circumstances over which the State exercises authority or effective control. The effects approach described above incorporates a foreseeability test, and therefore only comes into play when the State knew or should have known that State conduct would bring about foreseeable negative effects on human rights in another territory. It has been recognized that "[b]ecause this element of foreseeability must be present, a state will not necessarily be held liable for all the consequences that result from its conduct where the proximity between that conduct and the consequences is remote."[49]

50. Having set out the circumstances in which a State owes extraterritorial human rights obligations and the limits on those obligations, this *amicus* brief now turns to the content of these human rights obligations when it comes to environmental harm.

I.4. Obligation to Avoid Causing Harm

51. In the context of globalization, the human rights of individuals, groups, and peoples are affected by,

[47] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, UN Doc. E/C.12/2002/11, ¶ 33 (20 Jan. 2003) (emphasis added).
[48] *Victor Saldaño v. Argentina*, *supra* note 13, ¶ 23.
[49] De Schutter et al., *supra* note 1, at p. 1109.

and dependent on, the extraterritorial acts and omissions of States.[50] In effect, States have an obligation to avoid causing harms, and must at all times respect, protect and fulfil human rights, both within their territories and extraterritorially.[51]

52. The obligation to avoid causing harm provides that "States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of social, economic and cultural rights extraterritorially."[52] This obligation is engaged where the impairment of rights is a foreseeable result of State conduct, and it finds support in a number of international legal sources.[53] For example, the International Court of Justice has affirmed the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States and of areas beyond national control.[54] Further, this obligation finds support *inter alia* in Article 74 of the UN Charter, which articulates the duty of States to adhere to "the general principle of good neighbourliness, due account being taken of the interests and wellbeing of the rest of the world, in social, economic, and commercial matters."[55]

53. Key elements of this obligation include both foreseeability and uncertainty. First, the element of foreseeability introduces a limiting function on the obligation to avoid causing harm. A State would be responsible only for what it knew or should have known after applying due diligence in light of all relevant circumstances. Moreover, the element of foreseeability makes the standard for State responsibility distinct from strict liability. The International Law Commission has stated that "to have been 'unforeseen,' the event must have been neither foreseen nor of an easily foreseeable kind."[56] Second, the element of uncertainty may be addressed by reference to the precautionary principle in international environmental law. The precautionary principle has received support in numerous recent international decisions, which demonstrate a trend towards crystallizing it as customary international law.[57] Here, where there are potential threats of serious economic, social, or cultural impacts, lack of complete certainty cannot be used as justification for State conduct.

I.5. Obligation to Respect and Ensure Rights

54. As this Court has noted, under Article 1(1) of the American Convention on Human Rights, States Parties have a "fundamental duty to respect and guarantee the rights recognized in the Convention."[58] The obligation to "respect" requires States to refrain from violating rights. The obligation to "ensure" human rights "requires the government to conduct itself so as to *effectively* ensure the free and full exercise of human rights."[59] With respect to the environment, these obligations are understood as follows.

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[50] *Maastricht Principles*, *supra* note 1, Principles 1-7.
[51] *Id.* at Principle 13.
[52] *See id.* at Principle 7.
[53] *Id*.
[54] *See infra* ¶ 98.
[55] UN. Charter art. 74; Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993 (1945).
[56] *Report of the International Law Commission*, UN Doc. A/56/10, at art. 23, ¶ 2, (23 Apr.- 10 Aug. 2001).
[57] *See, e.g., Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Case No. 17, Advisory Opinion (ITLOS Seabed Disputes Chamber 1 Feb. 2011), 50 I.L.M. 458, ¶ 135 (1 Feb. 2011) (noting that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect Principle 15 of the Rio Declaration); *see also Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.)*, 2010 I.C.J. 18, ¶ 164 (20 Apr. 2010) (noting that a precautionary approach is relevant in interpreting and applying provisions of the Statute).
[58] *Velasquez Rodriguez v. Honduras, supra* note 4, ¶ 164.
[59] *Id.* ¶ 167 (emphasis added).

55. International law has evolved to recognize the connections between human rights law and the environment, and those links provide legal tools to address certain State conduct. The then Independent Expert on Human Rights and the Environment, now Special Rapporteur, elaborated on these links in his 2014 Mapping Report, where he exhaustively examined a wide range of sources of human rights law, including: treaties; pronouncements by human rights treaty bodies; declarations, resolutions and statements by international organizations and States; and decisions by regional and international courts and tribunals.[60]

56. The Mapping Report of the Special Rapporteur on Human Rights and the Environment concluded that "States have obligations to protect against environmental harm that interferes with the enjoyment of human rights."[61] It further contends that international agreements and the bodies charged with interpreting them, as well as state practice, provides a trend toward uniformity with respect to human rights obligations relating to the environment.[62] After extensive examination, the Mapping Report indicates that States have procedural and substantive human rights obligations regarding environmental harm, as well as additional obligations with respect to protecting groups that are in especially vulnerable positions, such as women, children, and indigenous peoples.[63] In light of the report of the Special Rapporteur, the Human Rights Council affirmed that human rights law sets out "certain procedural and substantive obligations on States in relation to the enjoyment of a safe, clean, healthy and sustainable environment."[64]

57. The Mapping Report identifies procedural duties of States established by human rights law, relating to information, public participation, and access to justice. Specifically, in relation to environmental protection, States are required to: (1) assess environmental impacts and make the information public; (2) facilitate public participation in environmental decision making; and, (3) provide access to legal remedies for harm.[65] Regional and international bodies and instruments have affirmed the importance of these duties under human rights and environmental law.[66]

58. In addition, the Mapping Report identifies certain substantive duties under human rights law. Among those includes an obligation to adopt legal frameworks that protect against environmental harm that interferes with the enjoyment of human rights.[67] In particular, States have a primary duty to establish a legislative and administrative framework that protects against, and responds to, infringements of the right to life and health as a result of natural disasters and dangerous activities.[68] States are also required to adopt measures against environmental hazards causing risks

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[60] John H. Knox, *Rep. of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, Human Rights Council, UN Doc. A/HRC/25/53 (30 Dec. 2013) [hereinafter *Mapping Report*] (referencing the fourteen annual reports, including an Individual Report on the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights).
[61] *Id.*
[62] *Id.* ¶¶ 26-27.
[63] *Id.* ¶¶ 29-78.
[64] Human Rights Council Res. 25/21, UN Doc. A/HRC/25/L.31 (24 Mar. 2014).
[65] *Mapping Report*, *supra* note 60, ¶ 29.
[66] *See id.* ¶¶ 42-43.
[67] *Id.* ¶ 46.
[68] *See, e.g.*, *Öneryıldız v. Turkey,* No. 48939/99, Judgment, 657 Eur. Ct. H.R. 79 (30 Nov. 2004); *Budayeva and Others v. Russia*, No. 15339/02, Judgment (Merits and Just Satisfaction), 2008-I Eur. Ct. H.R. 12 (20 Mar. 2008); *Tatar v. Romania,* No. 67021/01, Judgment (Merits and Just Satisfaction), 2009-III Eur. Ct. H.R. ¶ 88 (6 July 2009).

to the right to health, by formulating and implementing policies aimed at reducing the pollution of air, water, and soil. Further, States are obliged to respond to environmental harms affecting human rights, including from natural disasters, by assisting the victims.[69] And lastly, States must incorporate human rights considerations into environmental laws, policies, and regulations.[70] Once incorporated, they must also ensure implementation and compliance with those standards.[71]

I.6. The Role of Jurisdiction in Maintaining the Effectiveness of the Inter-American Human Rights System

59. As noted at the outset, the effectiveness Inter-American Human Rights System will be maintained only if interpretation and application of the American Convention on Human Rights keep pace with circumstances in today's world. In this regard, a most relevant feature of today's economic activity is the advent of large-scale development projects with the potential for significant trans-boundary environmental damage. This reality calls for recognizing that States owe a duty under the Convention regarding their acts and omissions that cause extraterritorial environmental harm that impairs the enjoyment of human rights of those outside the State's territory. The rules of interpretation provided in Article 29 of the American Convention support this conclusion.

60. Under Article 29, no provision –including Article 1(1) – may be interpreted as permitting any State Party "to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention."It is well established in the jurisprudence of the Inter-American Court of Human Rights that a State Party bears responsibility for the human rights impacts of environmental harm attributable to the State when that harm lies within the territory of the State Party.[72] It would lead to an anomalous result to conclude that there is State responsibility when acts attributable to the State cause the deprivation of human rights to people within the State's territorial boundaries, but not people outside those boundaries.

61. Furthermore, according to subsection (d) of Article 29, the Convention may not be interpreted as "excluding or limiting the effect of the American Declaration of the Rights and Duties of Man and other international acts of the same nature." Examples of other international acts of the same nature would include principles of customary international law. Under customary international law, States bear responsibility for harmful extraterritorial environmental impacts of their conduct. A human rights protective reading of the American Convention would not allow States to escape responsibility for the human rights impacts of the environmental harm for which these States are responsible. In this sense, the effects of State decisions may be extraterritorial, but the means of control over the entities causing the human rights harm lie fully within the jurisdiction and control of the State.

62. An interpretation of the American Convention that would allow States to engage with impunity in conduct that causes human rights violations outside their territory would frustrate the object and

[69] *Mapping Report*, *supra* note 60, ¶ 49.
[70] *Id.* ¶¶ 52-56 (citing Human Rights Council Res. 16/11, UN Doc. A/HRC/RES/16/11 (Apr. 12, 2011) (urging States to take human rights into consideration when developing their environmental policies, and affirming that human rights obligations have the potential to inform and strengthen international, regional, and national policymaking in the area of environmental protection)).
[71] *Id.*
[72] *See, e.g.,* Inter-American Court of Human Rights, *Kawas-Fernández v. Honduras*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 196 (3 Apr. 2009); *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (31 Aug. 2001; *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H. R. (ser. C) No. 185 (28 Nov. 2007).

purpose of the treaty. As this Court has stated, international legal instruments should be interpreted in light of the normative framework in force at the moment the interpretation is done,[73] and norms in the Convention should be understood "by an evolving interpretation of the international instruments for the protection of human rights."[74] The object and purpose of the American Convention, this Court has noted, is "the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and against all other contracting States."[75]

63. The object and purpose of the American Convention on Human Rights are reflected in the Preamble, which declares "that the essential rights of man are not derived from one's being a national of certain state, but are based upon attributes of the human personality and that they therefore justify international protection. . . ." The Preamble further states that "the ideal of free men enjoying freedom from fear and want *can be achieved only if conditions are created* whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights." The conditions whereby one may enjoy human rights include environmental conditions.

64. Part I of this *amicus* brief has analyzed an issue of critical importance to the advisory opinion: the issue of jurisdiction and extraterritorial obligations under the Convention. In that context this Part I has explained the definition, scope and limits of extraterritorial human rights obligations. It has also described the three situations recognized by international tribunals and UN human rights bodies over which States have extraterritorial human rights obligations, namely: exercise of authority or effective control, foreseeable effects, and decisive influence. The analysis in Part I demonstrates that a State Party to the American Convention has an obligation to exercise due diligence to ensure that its activities do not cause environmental harm that infringes the human rights of persons and groups outside its territorial boundaries.

65. The interrelation between human rights law and the environmental law, and the human rights obligations arising therefrom, are addressed next, in Part II.

II. Normative Dialogue between International Human Rights Law and International Environmental Law

66. Colombia's request for an advisory opinion, by its terms, "seeks to determine the substantive normative interaction between environmental law and human rights in order to establish whether, and to what extent, international human rights law should be interpreted in light of, or in connection with, certain obligations established by international environmental law."[76] Thus framed, the question before the Court calls for a general analysis of the way in which these two regimes of international law enter into normative dialogue.

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[73] Inter-American Court of Human Rights, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89 (ser. A) No. 10, ¶ 37 (14 July 1989) (citing International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, 1971 I.C.J 16.

[74] *Case of Ricardo Canese v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 178 (31 Aug. 2004).

[75] Inter-American Court of Human Rights, *The Effects of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, ¶ 29 (24 Sept. 1982).

[76] Inter-Am. Ct. H. R., *Request of advisory opinion submitted by the Republic of Colombia before the Inter-American Court of Human Rights*, ¶ 122 (14 Mar. 2016).

67. If at some point in time the question of how the environment relates to human rights law was a novel one, that is hardly the situation today. After decades of discussion on the interface between environmental protection and human rights, the consistency and synergy between a healthy environment and the existing body of international human rights law has been underscored by treaty bodies, special rapporteurs, and regional human rights courts.[77] These institutions and mechanisms have elaborated on the inter-relations between environmental issues and the rights to life, health, water, food, housing, standard of living, property, privacy, participation, information, self-determination, and culture, among other internationally recognized rights. They have looked at cross-cutting environmental issues and human rights, such as hazardous wastes, natural resources, and climate change, and they have also applied a rights-based approach to the protection of particularly vulnerable groups, including indigenous peoples, environmental defenders, and children. What has emerged from this decades-long work is the recognition that a healthy environment is indispensable for the protection of human rights. Indeed, as the Inter-American Court of Human Rights pointed out in *Case of Kawas Fernández v. Honduras*, "there is an undeniable link between the protection of the environment and the enjoyment of other human rights."

68. In regard to the question before the Court, this section of this *amicus* brief expands on the following points: (i) International environmental law supports the interpretation of the American Convention on Human Rights by virtue of the interpretative principle of systemic integration; (ii) International environmental law contains principles and norms that reinforce the effective application of the American Convention on Human Rights; and (iii) International environmental law standards can assist in the protection of the rights recognized by the American Convention on Human Rights.

II.1. The Interpretative Principle of Systemic Integration is the Key to Normative Dialogue Between International Environmental Law and the American Convention on Human Rights

69. The tool established in general international law to enable normative dialogue between legal regimes is the principle of interpretation of systemic integration. The principle of systemic integration is codified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties,[78] which expresses the principle as follows: "there shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties."[79] This principle of interpretation finds conventional reflection in Article 29 of the American Convention on Human Rights.

70. The principle of systemic integration has been conceptualized by the UN International Law Commission as the process whereby international obligations are interpreted by reference to their normative environment.[80] It has been described as the "master key" to the house of international law, since it *requires* the interpretation process to take into account any relevant rules of international law applicable in the relations between the parties.[81]

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[77] *United Nations Env't. Programme & Ctr. for Int'l Envtl Law, Compendium on Human Rights and Environment* (2014); *see also Mapping Report*, *supra* note 60.
[78] Vienna Convention on the Law of Treaties, art. 31(3)(c), 1155 UNTS. 331, 8 I.L.M. 679 (1969).
[79] *Id*. at art. 31(3)(c).
[80] *Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682, ¶ 413 (13 Apr. 2006), *available at* http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.
[81] *Id.* ¶ 420.

71. International jurisprudence contains numerous examples applying the principle of systemic integration. The International Court of Justice in the *Case Concerning Oil Platforms* confirmed the relevance of this principle, as the Court utilized the rules of international law on the use of force in its interpretation of the bilateral Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran.[82] The World Trade Organization has utilized multilateral environmental agreements (MEAs) in the interpretation process in the *Brazil-Tyres*[83] and *US-Shrimp/Turtle*[84] cases, the latter of which concerned endangered marine turtles also found in the Wider Caribbean. The investment tribunal in the case of *Philip Morris v. Uruguay* concerning public health measures applied this interpretative principle to underline the role of the police powers doctrine in relation to expropriation rules as well as the Framework Convention on Tobacco Control.[85] Similarly, the arbitral tribunal in the *Iron Rhine Railway* case confirmed the relevance of the principle of systemic integration in the particular context of international environmental law, as the following passage attests:

> It is to be recalled that Article 31, paragraph 3, subparagraph (c) of the Vienna Convention on the Law of Treaties makes reference to "any relevant rules of international law applicable in the relations between the parties." For this reason – as well as for reasons relating to its own jurisdiction – […] international environmental law has relevance to the relations between the Parties. There is considerable debate as to what, within the field of environmental law, constitutes "rules" or "principles"; what is "soft law"; and which environmental treaty law or principles have contributed to the development of customary international law. Without entering further into those controversies, the Tribunal notes that in all of these categories "environment" is broadly referred to as including air, water, land, flora and fauna, natural ecosystems and sites, human health and safety, and climate. The emerging principles, whatever their current status, make reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations.[86]

72. The result of the application of this interpretative tool is greater effectiveness and coherence between the international environmental and human rights law fields. Further, as observed by the International Law Commission, "without the principle of "systemic integration" it would be impossible to give expression and to keep alive, any sense of the common good of humankind, not reducible to the good of any particular institution or "regime."[87]

i. <u>The affinity between human rights and the environment reinforces the application of the principle of systemic integration</u>

73. Affinity between international legal regimes leads to a dialogue of better quality between them. This is because regimes that share objectives and tools can build upon their synergies in order to

[82] *Case Concerning Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 41 (6 Nov.).
[83] Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres,* ¶ 7.61, WTO Doc. WT/DS/332/R (adopted 12 June 2007).
[84] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, ¶ 129 (adopted 12 Oct. 1998).
[85] *Philip Morris Brand Sàrl (Switz.), Phillip Morris Products S.A. (Switz.) and Abal Hermanos S.A. (Uru.) v. Oriental Republic of Uru.,* ICSID Case No. ARB/10/7, ¶ 155-58 (2 July 2013).
[86] *In the Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belg. v. Neth.),* 27 Rep. Int'l Arb. Awards 66, ¶ 58 (Perm. Ct. Arb. 2005).
[87] *Report of the Study Group of the International Law Commission*, Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682, at p. 244, ¶ 480 (13 Apr. 2006).

enhance their systems of protection. In that regard, the close affinity between human rights and the environment becomes apparent when drawing out parallels in their normative and institutional dimensions.

74. A distinctive feature of multilateral environmental agreements is their potential for creation of obligations *erga omnes*, owed by all States, as a consequence of the fact that they represent the interests of the international community as a whole.[88] This distinctive feature of multilateral environmental agreements parallels the creation of obligations *erga omnes* by human rights instruments, as recognized by the Inter-American Court of Human Rights.[89]

75. Another distinctive feature of multilateral environmental agreements is their objective of protecting human health and the environment. This feature parallels the right to health and the right to a healthy environment as recognized in American Convention on Human Rights[90] and its San Salvador Protocol.[91] Yet another distinctive feature of international environmental law is its reliance on environmental impact assessment and consultations with potentially affected communities as tools to prevent environmental harm. These tools parallel the discharge of the procedural dimension of human rights obligations with respect to a clean and healthy environment. As the UN Special Rapporteur on human rights and the environment of the Human Rights Council has explained, this procedural dimension requires environmental impact assessments and consultations with potentially affected communities.[92] These parallels underline the convergence and synergies between these two normative regimes, and thus the deep relevance of environmental law in informing the interpretation of human rights treaties.

76. International human rights law and international environmental law also find synergies in the institutional plane. The creation in 2012 of a special procedure on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and suitable environment by the Human Rights Council[93] has provided an institutional platform to clarify and promote the human rights and environment nexus. The UN Environment Programme[94] and the Office of the High Commissioner for Human Rights have partnered for more than a decade in providing expert advice on technical matters relating to human rights and environment, including the right to a healthy environment. For example, these UN bodies co-organized an expert seminar in 2002, a high-level meeting in 2009, and several side events at important international policy-making forums, including the UN Conference on Sustainable Development, the UN Environment Assembly and sessions of the Human Rights Council. The UN Environment Programme and the Office of the High Commissioner have also produced high-quality publications that have contributed to clarifying the contours and

[88] *Barcelona Traction, Light, and Power Company, Ltd. (Belg. v. Spain*), 1964 I.C.J. 6 (24 July); *See United Nations Yearbook of the International Law Commission*, Vol. 1976, Vol. II, part 2, pp. 99, 1976 U.N.Y.B. Int'l L. Comm'n 99 (1976); *see also Mauricio Ragazzi, The Concept Of International Obligations Erga Omnes* (1997).

[89] *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 109-11 (17 Sept. 2003); *See generally,* A. Cançado Trindade, *Foundations of International Law: The Role and Importance of Its Basic Principles* 395 (2005).

[90] Organization of American States, American Convention on Human Rights, art. 26, 1144 UNTS 123 (22 Nov. 1969).

[91] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (A-52) art. 7(f), 10 & 11, 28 I.L.M. 156, O.A.S.T.S. No. 69 (17 Nov. 1988).

[92] *Mapping Report*, *supra* note 60.

[93] Human Rights Council Res. 19/10, UN. Doc. A/HRC/RES/19/10 (19 Apr. 2012).

[94] United Nations Env't Programme, *Human Rights and the Environment: Moving the Global Agenda Forward,* http://www.unep.org/environmentalgovernance/UNEPsWork/HumanRightsandtheEnvironment/tabid/130265/Default.aspx.

elements of the human rights and environment field.[95]

77. A final point that underscores the affinity between human rights and the environment, in addition to their normative and institutional points of convergence, is illustrated by the Paris Agreement on Climate Change. The Preamble of the Paris Agreement contains language intended to reinforce its normative dialogue with human rights law, as follows:

> Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.[96]

78. The reference to the principle of common concern of humankind once again identifies one of the foundations of both international environmental law and international human rights law. The affinity between these two regimes reinforces the application of the principle of systemic integration.

ii. The Inter-American Court has already applied systemic integration techniques in its jurisprudence

79. The Inter-American Court of Human Rights has applied the principle of systemic integration in cases involving tribal and indigenous peoples' rights as well as in cases involving humanitarian law. Specifically, the Court has relied on international legal instruments to shed light on the meaning of specific provisions found in the American Convention on Human Rights.

80. In the context of tribal and indigenous peoples' rights, the Court has interpreted the American Convention in light of relevant international norms. For example, in *The Case of the Mayagna (Sumo) Awas Tingi Community v. Nicaragua*, the Court relied on a number of international instruments, including ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries and the then draft UN Draft Declaration on the Rights of Indigenous Peoples,[97] to find that Article 21 of the Convention supported the Awas Tingni indigenous peoples' communal right to enjoy the lands they inhabited.[98]

81. Similarly, in the *Case of the Saramaka People v. Suriname*, the Court also turned to other international human rights instruments to inform its interpretation of the American Convention. In that case, the Court was presented with the question of whether Article 21 of the American Convention granted the Saramaka tribal people a right to the use and enjoyment of communal

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[95] *See, e.g.,* United Nations Env't Programme, *The Compendium on Human Rights and the Environment*, http://www.unep.org/delc/Portals/119/publications/UNEP-compendium-human-rights-2014.pdf; United Nations Env't Programme*, Climate Change and Human Rights*, http://www.unep.org/delc/Portals/119/JointReportOHCHRandUNEPonHumanRightsandtheEnvironment.pdf; United Nations Env't Programme*, Compendium of Good Practices on Human Rights and the Environment,* http://www.unep.org/environmentalgovernance/Portals/8/publications/human-rights-UNEP-compendium-2016.pdf.

[96] Framework Convention on Climate Change, Adoption of the Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9 (opened for signature *22* Apr. 2016).

[97] *Mayagana (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 72, ¶ 6-7 (31 Aug. 2001).

[98] *Id.* ¶ 146.

property.[99] In previous cases, the Court had relied on ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries to interpret Article 21.[100] But since Suriname had not ratified that treaty, the Court interpreted Article 21 in light of the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights.[101]

82. Moreover, in the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, the same "evolutionary interpretation" mechanism was used. By referring to ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples, the Court found Ecuador to be responsible for breaching the indigenous peoples' rights to free, prior, and informed consent pursuant to Article 21.[102] These cases involving tribal and indigenous peoples' rights illustrate the Court's ability to utilize international norms for the purpose of bringing light to, and strengthening the application of, the American Convention on Human Rights.

83. The Court has also referred to various sources of international humanitarian law as a means to illuminate the content of the American Convention. For example, in the *Case of Bámaca Velásquez v. Guatemala*, the Court was presented with a case of a forced disappearance and presumed execution of a victim.[103] In analyzing the alleged violation of Article 1(1) of the American Convention, the Court relied on Common Article 3 of the four Geneva Conventions of 1949 and Additional Protocols I and II to draw a parallel between the Geneva Conventions and the American Convention.[104] This interpretive approach ultimately led the Court to declare a violation of Article 1(1).[105]

84. International humanitarian law was also used to specify the content and scope of Article 19 of the American Convention in the case of *"Mapiripán Massacre" v. Colombia*, which concerned the kidnapping, torture, and killing of children by a Colombian illegal paramilitary group.[106] In order to conclude that Article 19 of the American Convention granted the children "a complementary right" to "special protection measures,"[107] the Court referred to Article 4(3) of Protocol II to the Geneva Conventions,[108] as well as Articles 6, 37, 38, and 39 of the Convention of the Rights of the Child.[109] The Court's interpretations of the American Convention in the aforementioned cases illustrate its well-established practice of using additional international humanitarian treaties to inform the interpretation and application of the Convention.

iii. Systemic integration does not establish jurisdiction

85. The discussions so far demonstrate how the principle of systemic integration enables and supports the normative dialogue between international environmental law and human rights law. It is equally important to highlight that, as a principle of interpretation, systemic integration does not

[99] *Id.* ¶ 77.
[100] *Id.* ¶ 93.
[101] *Id.* ¶ 214.3.
[102] *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 215 (27 June 2012).
[103] *Case of Bámaca-Velásquez v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶¶ 33-35 (25 Nov. 2000),
[104] *See id.* ¶ 208.
[105] *Id.* ¶ 213.
[106] *Case of the "Mapiripán Massacre" v. Colombia*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 75 (15 Sept. 2005).
[107] *Id.* ¶ 152.
[108] *Id.* ¶ 153.
[109] *Id.* ¶ 154.

establish a jurisdictional basis for the Inter-American Court to act. The question arose in the *Case of Las Palmeras v. Colombia*, in which Colombia raised preliminary objections "alleg[ing] the lack of competence of the Commission to apply international humanitarian law and other international treaties," particularly with respect to common Article 3 of the Geneva Conventions.[110] In its judgment, the Court upheld these objections and ruled that it lacked the competence to directly apply the Geneva Conventions.[111] However, the Court also noted that applying the Geneva Conventions, however, is not the same as utilizing them as interpretative tools.[112] Therefore, although *Las Palmeras* illustrates the limits of the Court's competence to directly apply a provision of another international instrument as a rule of decision, it also demonstrates the Court's ability to use international norms to interpret the American Convention on Human Rights.

86. Multilateral environmental agreements (MEAs) have their own, discrete mechanisms for the resolution of disputes, and a violation of an MEA does not per se establish the jurisdiction of the Inter-American Court of Human Rights. Rather, the Inter-American Court of Human Rights may exercise contentious jurisdiction under the terms of the American Convention on Human Rights, and in the exercise of its jurisdiction, the Court may avail itself of the norms found in multilateral environmental agreements in order to inform and strengthen its interpretation of human rights guarantees. Accordingly, the principle of systemic integration in treaty interpretation provides a tool to exercise jurisdiction in a way that introduces greater coherence among the various international legal fields and contributes to the effectiveness of international norms.

II.2. International Environmental Law Principles and Obligations Relevant to International Human Rights Law

87. Whereas the principle of systemic integration opens a channel for normative dialogue between the human rights and environmental regimes, the *particular content of that normative dialogue* rests on the analysis of the specific principles and obligations found in international environmental law that support the interpretation of the American Convention. These principles and obligations are established in customary international law and are therefore applicable to the interpretation of the American Convention by virtue of systemic integration techniques. The following sub-sections do not examine all relevant principles of international environmental law, but instead focus on three principles that are particularly significant to the questions placed before the Court by the request for an Advisory Opinion, namely: the duty to cooperate; the customary law obligation to prevent transboundary environmental harm; and the duty to assess environmental impacts. This analysis shows that where negative transboundary environmental impacts of an activity also impair the enjoyment of human rights of individuals and communities, the breach of international environmental principles establishes State responsibility for the impairment of human rights caused by that environmental harm.

i. <u>The duty to cooperate</u>

88. The duty to cooperate is a bedrock obligation of international environmental law. It is premised on the notion that environmental issues that transcend boundaries cannot be addressed effectively by States acting in isolation; instead, these issues require concerted action by concerned States. States therefore have set up bilateral, regional or global regimes to address specific environmental threats,

[110] *Case of Las Palmeras v. Colombia*, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 67, ¶ 34 (4 Feb. 2000).
[111] *Case of Las Palmeras v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 90, ¶ 34 (6 Dec. 2001).
[112] *Id.* ¶ 34.

all in the spirit of international cooperation.

89. The duty of cooperation finds its roots in good neighborliness principles that have emerged in customary international law. These principles have inspired Article 1.3 of the UN Charter, which establishes that one of the purposes of the United Nations is "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character."[113] The Stockholm Declaration on the Human Environment further elaborates and specifies the duty to cooperate in its Principle 24, as follows:

> International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.[114]

90. The duty to cooperate can be discharged in a number of ways, such as by providing notification and engaging in consultations in situations threatening environmental damage.[115] The duty to cooperate may require additional steps, such as taking concerted measures to control pollution or establish mechanisms to build capacity to avert environmental degradation.[116] Accordingly, a State could be found in breach of the duty to cooperate where its conduct may result in, or contribute to, transboundary environmental harm and where it fails to engage in good faith with potentially affected States. Moreover, where the transboundary environmental harm interferes with the enjoyment of the human rights of individuals and communities, the failure to uphold the duty to cooperate aggravates the human rights violations. In such a case, a supervisory human rights organ may find in the duty to cooperate established in international environmental law additional interpretative authority to clarify State responsibilities in order to guarantee the human rights of people and communities that suffer the impacts of environmental degradation.

91. In regard to global environmental threats, the duty to cooperate reflects the emergence of global public interests that express a vision of the common good of humanity. State sovereignty is therefore qualified by these global public interests that express the common concern of humankind in the integrity and viability of the planet as the common home for the multiplicity of life.

92. Moreover, in regard to potential damage to areas beyond national jurisdiction, the international community as a whole has an interest in preventing its materialization. Therefore, in situations involving regional environmental risks, such as in the Wider Caribbean, all States of the region, and all members of relevant regional arrangements, share an interest in preventing the materialization of environmental harm.

ii. <u>The customary law obligation to prevent transboundary environmental harm</u>

[113] UN Charter art. 1.3, 59 Stat. 1055.
[114] UN Conference on the Human Env't, *Declaration of the United Nations Conference on the Human Environment,* UN Doc. A/CONF.48/14/Rev.1, UN Sales No. E.73.II.A.14, at 3-5 (5-16 June 1972).
[115] *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.),* Judgment, 2009 I.C.J. Rep. 213 (13 July).
[116] *See, e.g.,* United Nations Convention on the Law of the Sea, 1833 UNTS 397 (10 Dec. 1982); Convention on the Law of the Non-Navigational Uses of International Watercourses, 36 I.L.M. 700 (21 May 1997); G.A. Res. 51/229 (21 May 1997).

93. The customary law obligation to prevent transboundary environmental harm is a fundamental principle in international environmental law. Accordingly, it can assist the interpretation of the American Convention, especially in cases where transboundary environmental harm affects the human rights of individuals or communities.

94. The obligation to prevent transboundary harm has its roots in the common law principle of *sic utere tuo ut alienum non laedus* (i.e., do not use your territory to harm another). In the international law context, States are under a general obligation not to use their territory, or to allow others to use their territory, in a way that harms the interests of another State. This obligation not to cause harm has been confirmed in several rulings by the International Court of Justice, including, for example, in the *Corfu Channel* case, which concerned damage to British warships caused by mines placed in Albanian waters.[117] The obligation not to cause harm to other States was extended to environmental harm as early as 1941 in the well-known *Trail Smelter* Arbitration. In that case, fumes from a Canadian smelter were crossing the border and damaging U.S. citizens and property. After the two countries agreed to arbitration, the U.S.-Canada International Joint Commission concluded:

> The Tribunal, therefore, finds that . . . under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[118]

95. Since first articulated in the *Trail Smelter* Arbitration, this principle has been frequently repeated in many international environmental contexts as reflecting customary international law. Most notably the principle not to cause environmental harm was further elaborated as Principle 21 of the 1972 Stockholm Declaration on the Human Environment:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[119]

96. The UN General Assembly endorsed the Stockholm Declaration by a vote of 112 to 0. The principle was reaffirmed twenty years later in the nearly identical Principle 2 of the Rio Declaration on Environment and Development.[120] One hundred seventy-eight (178) countries endorsed the Rio Declaration, including all members of the Organization of American States.[121]

97. The Stockholm and the Rio Declarations are compelling evidence of the broad consensus among

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[117] *See Corfu Channel (U.K. v. Alb.),* Judgment, 1949 I.C.J. 4, 22 (9 Apr.).
[118] *Trail Smelter Arbitration (U.S. v. Can.)*, 3 R.I.A.A. 1905 (1941) (emphasis added).
[119] United Nations Conference on the Human Environment, Stockholm, Swed., 5-16 June 1972, *Stockholm Declaration on the Human Environment*, UN Doc. A/CONF.48/14/Rev. 1, 3 (1973), UN Doc. A/Conf.48/14, 2, Corr. 1 (1972), *reprinted in* 11 I.L.M. 1416 (1972) [hereinafter *Stockholm Declaration*].
[120] United Nations Conference on Environment and Development, Rio de Janiero, Braz., 3-14 June 1992, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26/Rev.1 (14 June 1992), *reprinted in* 31 I.L.M. 874 (1992).
[121] G.A. Res. 46/168, United Nations Conference on Environment and Development (19 Dec. 1991) (Resolution adopted through consensus by the UN General Assembly).

States that the obligation to prevent transboundary harm exists under international law.[122] Given its widespread endorsement by consensus in both the Stockholm and Rio Declarations, the obligation to prevent significant transboundary harm can be said to reflect universal acceptance. Moreover, this obligation has been repeated verbatim in several binding international treaties with near universal membership by states, including in Article 3 of the Convention on Biological Diversity (ratified by 193 countries) and the preamble to the UN Framework Convention on Climate Change (ratified by 194 countries).[123]

98. Any doubt about the status of the obligation to prevent significant transboundary environmental harm in international environmental law was put to rest by the International Court of Justice (ICJ). In 1996, the ICJ made it clear that environmental interests are among those State interests that should not be harmed by other States. In the 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice made the following observation:

> The Court recognizes that the environment is under daily threat and that . . . the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now a part of the corpus of international law relating to the environment.[124]

99. As amply demonstrated by the above discussion, the duty not to cause significant transboundary environmental harm is widely recognized as a binding norm of customary international law. The obligation is not absolute, however. There is both a significance threshold and a due diligence standard. The threshold requires that environmental harm must have more than a *de minimis* impact on the neighboring state. The due diligence standard requires an inquiry into the regulations and controls a State has in place to control the risk of transboundary environmental harm. As the International Law Commission has stated:

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[122] *See, e.g.*, Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment* 138 (3rd ed. 2009) (recognizing that Principle 2 of the Rio Declaration "is merely restating existing law"); Alan Boyle, *Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited*, *in International Law and Sustainable Development: Past Achievements and Future Challenge* 68 (Alan Boyle & David Freestone, eds., 1999) (stating that "the [Rio] Declaration is in part a restatement of existing customary international law on transboundary matters"); Hans Christian Bugge, *General Principles of International Law and Environmental Protection*, *in Environmental Law: From International to National Law* 56 (Ellen Margrethe Basse, ed., 1997) (acknowledging that "[P]rinciple 21 is today widely regarded as a principle of customary international law"); Pierre M. Dupuy, *Overview of the Existing Customary Legal Regime Regarding International Pollution*, *in International Law and Pollution* 61-67 (Daniel Barstow Magraw, ed., 1991) (noting that "This fundamental principle … is one case in which international declarations and institutional resolutions support the expression of a universal *opinio juris*. The duty not to cause substantial harm through transfrontier pollution … may be deemed to have been accepted in many collective statements of States…."); David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law & Policy* 436 (4th ed. 2011) (recognizing that "Principle 21 is widely viewed as reflecting customary international law"); Phillipe Sands, *Principles of International Environmental Law* 241 (2003) (noting that "[a]t least since 1996, there can be no question but that Principle 21 reflects a rule of customary international law….").

[123] Convention on Biological Diversity, opened for signature 5 June 1992, 1760 U.N.T.S. 79 (entered into force 29 Dec. 1993); UN Framework Convention on Climate Change, opened for signature 3 June 1992, 1771 U.N.T.S. 107 (entered into force 21 Mar. 1994).

[124] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 29-30 (8 July) (emphasis added) [hereinafter *Nuclear Weapons Advisory Opinion*]. The International Court of Justice reaffirmed this statement in *Gabcikovo-Nagymaros Project (Hung. v. Slovk.)*, 1997 I.C.J. 7, ¶ 53 (25 Sept.), and again in *Case Concerning Pulp Mills on the River Uruguay*, *supra* note 57.

> The standard of due diligence against which the conduct of State of origin should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. For example, activities that may be considered ultra-hazardous require a much higher standard of care in designing policies and a much higher degree of vigor on the part of the State to enforce them. Issues such as the size of the operation; its location, special climate conditions, materials used in the activity, and whether the conditions drawn from application of these factors in a specific case are reasonable, are among the factors to be considered in determining the due diligence requirement in each instance.[125]

100. The International Court of Justice applied the due diligence requirement to transboundary pollution in its 2010 judgment in the Uruguay-Argentina *Pulp Mills* case. Although the Court was interpreting a particular bilateral agreement, its analysis of due diligence in the context of the obligation to prevent environmental harm is instructive:

> [T]he obligation to "preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures" is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party.[126]

101. The International Court of Justice in the *Pulp Mills* case looked at the adequacy of Uruguay's regulatory system, its provisions for environmental impact assessment, and the choice of technology it allowed. Thus, the due diligence inquiry is a fact-specific inquiry dependent on each individual case. It is one that requires examining the potential risks from the proposed activity relative to the steps taken to control the transboundary impacts of that activity.

iii. Duty to assess environmental impacts

102. Environmental Impact Assessment (EIA) is the process for assessing the anticipated environmental effects of proposed developments or projects. EIA practices can foster public engagement and democratic processes, produce valuable information, enable communities to safeguard their rights, enhance transboundary cooperation, and ultimately improve the environmental and social impacts of development. EIA is used to make decisions more transparent, to mitigate negative environmental impacts of projects, and to integrate environmental considerations into development planning.

103. Many international instruments,[127] international institutions[128] and most countries now require

[125] *See* I.L.C. Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, art. 3, in *Report of the International Law Commission on the Work of its Fifty-third Session*, UN Doc. A/56/10, 146-70, ¶ 11 (12 Dec. 2001).
[126] *Case Concerning Pulp Mills on the River Uruguay*, *supra* note 57, ¶ 197.
[127] A number of treaties include specific requirements for EIAs, including: Convention on Environmental Impact Assessment in a Transboundary Context, 1989 U.N.T.S. 309 (25 Feb. 1991); Convention on the Conservation of Migratory Species, 1651 U.N.T.S. 33 (23 June 1979); United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 3 (10 Dec. 1982); Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol), 30 I.L.M. 1455 (4 Oct. 1991); Convention on Biological Diversity, 1760 U.N.T.S. 79 (5 June 1992); Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), 2161 U.N.T.S. 447 (28 June 1998).

EIAs. The UN Environment Programme has been a catalyst for the adoption and strengthening of EIAs in domestic and international law.[129] In light of this practice, in 2010 in the *Pulp Mills* case the International Court of Justice confirmed that States have a duty under customary international law to perform an environmental impact assessment when a proposed activity may have a significant adverse impact in a transboundary context, stating as follows:

> In this sense, the obligation to protect and preserve [the aquatic environment], under Article 41 *(a)* of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States **that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context**, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.[130]

104. In 2015 in the case of *Certain Activities Carried Out by Nicaragua in the Border Area*, the International Court of Justice enlarged its earlier pronouncement on the duty to assess environmental impacts, as follows:

> Although the Court's statement in the *Pulp Mills* case refers to industrial activities, the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context.[131]

105. In *Pulp Mills*, however, the International Court of Justice left to each State the task of defining the requisite scope and content of an EIA, including whether the process will include consultation with affected communities.[132] Observers have criticized this element of the Court's decision on the ground that it could have been better informed by developments in international human rights law.[133] In particular, procedural human rights obligations in respect of a clean, healthy and safe environment require the disclosure of information and meaningful public participation in the decision-making processes.[134] In that regard, the International Law Commission has elaborated on the State's obligation to undertake an EIA before authorizing any project with significant transboundary environmental impacts, including the obligation of the State to provide relevant information to members of the public likely to be affected by a proposed activity.[135]

106. Excerpts of the International Law Commission's commentary on this obligation are illustrative. It states that "the requirement of authorization…obliges a State to ascertain whether activities with a

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[128] *See e.g., World Bank, Operational Directive on Environmental Assessment* 4.01 (1999).
[129] *See e.g., United Nations Environmental Programme, Goals and Principles of Environmental Impact Assessments* (1987).
[130] *Case Concerning Pulp Mills on the River Uruguay*, *supra* note 57, ¶ 204 (emphasis added).
[131] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua),* Judgment, 2015 I.C.J. Rep. 150/152, ¶ 104 (16 Dec. 2015).
[132] *Case Concerning Pulp Mills on the River Uruguay*, supra note 57, ¶ 21.
[133] *See* Marcos A. Orellana, *Proceedings of the One Hundred Ninth Annual Meeting of the American Society of International Law* 195 (2015).
[134] *Mapping Report*, *supra* note 60, ¶¶ 29-78.
[135] Int'l Law Comm'n, Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, *Rep. of the Int'l Law Commission on the Work of its Fifty-Third Session*, UN Doc. A/CN.4/516 (11 May 2001).

possible risk of significant transboundary harm are taking place in its territory or otherwise under its jurisdiction or control and implies that the State should take the measures indicated in these articles. It also requires the State to take a responsible and active role in regulating such activities."[136] The commentary goes on to say that the public must be given the opportunity for consultation, and that "public participation in the review of a draft document or environmental impact assessment would be useful in obtaining information regarding concerns related to the proposed action."[137] This public participation should be facilitated by providing the public with necessary information on the proposed policy, plan or programme under consideration.[138]

107. EIA is not only an obligation established in international environmental law in relation to transboundary environmental impacts. Regional human rights bodies have also highlighted the significance of EIAs in cases where environmental degradation and human rights violations entwine. For example, the African Commission on Human and Peoples Rights has observed that an EIA is an element of the duties of the State in respect of the right to a healthy environment.[139] Similarly, where complex environmental decisions involving the balancing of competing public interests result in the interference of protected rights, the European Court of Human Rights, in order to determine whether a fair balance of proportionality has been struck, has scrutinized the decision-making process, including the realization of an EIA.[140]

108. The Inter-American Court of Human Rights has also noted that a prior and independent social and environmental impact assessment is an indispensable safeguard intended to preserve, protect and guarantee the special relationship of indigenous and tribal peoples have with their territory.[141] This pronouncement by the Court on the role of EIA in situations not involving transboundary harm confirms the relevance of environmental law in the interpretation and application of the American Convention on Human Rights, as much as it opens opportunities for further normative dialogue between human rights and the environment.

109. In the wake of the utilization of EIAs in the human rights arena, the use of Social Impact Assessments and Human Rights Impact Assessments have also acquired visibility. For example, the Guiding Principles on Business and Human Rights articulate due diligence responsibilities of businesses, including assessing actual and potential human rights impacts.[142] In that regard, the incorporation of social elements to EIAs enables an examination of all social and cultural consequences to human populations of proposed projects, policies, or programs that alter the ways in which people live, work, play, relate to one another, and organize as members of society.

110. In light of the foregoing analysis, the following conclusions can inform the Court's Advisory Opinion:

> The failure by a State to conduct an adequate EIA for an activity in its territory or under its jurisdiction and control that has a significant adverse transboundary effect constitutes a breach

[136] *Id.* ¶ 157.
[137] *Id.* ¶ 166.
[138] *Id.*
[139] *Soc. & Econ. Rights Action Ctr. v. Nigeria,* Communication 155/96, African Commission on Human and People's Rights [Afr. Comm'n H.P.H.], ¶ 53 (27 May 2002), *available at* https://www.escr-net.org/docs/i/404115.
[140] *See Case of Hatton and Others v. The United Kingdom*, Judgment, 2003 Eur. Ct. H.R. 338, ¶¶ 99, 104 (2003); *Affaire Flamenbaum et Autres c. France*, Judgment (Merits and Satisfactions), 2012-X Eur. Ct. H.R. 1, ¶¶ 155-57 (2012).
[141] *Saramaka People v. Suriname*, *supra* note 72, ¶ 129.
[142] *See* United Nations Office of the High Commissioner for Human Rights*, Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Principles 17-21, UN Doc. HR/PUB/11/04 (2011).

of the international environmental law duty to assess environmental impacts. Where the negative environmental impact of the activity also impairs the enjoyment of human rights of individuals and communities, the breach of the duty to assess environmental impacts establishes State responsibility for the impairment of human rights caused by that environmental harm.

II.3. Role of International Environmental Law Standards in the Implementation of Human Rights Law

111. International environmental law standards can also assist human rights bodies in the implementation of human rights law by providing specific benchmarks of legality or indicators of progress. For example, participation in a multilateral environmental agreement could provide evidence of the discharge of the duty to cooperate established in human rights law with respect to the right to health or a healthy environment. Similarly, standards contained in a multilateral environmental agreement can assist in determining the normative content of protected human rights. Furthermore, ratification and compliance with the terms of a multilateral environmental agreement can provide an indicator of the progressive realization of the right to a healthy environment.

i. Utilizing environmental standards to determine the normative content of the right to life

112. The Inter-American Court of Human Rights has elaborated on the normative content of the right to life in the *Kámok Kásek* case. In this case, the Court examined various dimensions relevant to a dignified life and utilized international standards in order to determine whether the members of the Kámok Kásek indigenous community were enjoying this right. Specifically, the Court scrutinized observance of the right to life in regard to the community's enjoyment of the rights to water, food, health and education. International standards from the World Health Organization were utilized in regard to water.[143] International standards from the UN Committee on Economic, Social and Cultural Rights were utilized in regard to food.[144] And international standards from the San Salvador Protocol, ILO Convention 169 and the UN Committee on Economic, Social and Cultural Rights were utilized in regard to education.[145]

113. It stands to logic that if international standards are used to determine the normative content of a dignified life in respect of water, food and education, then international environmental standards can be utilized to determine the normative content of a dignified life in respect of the environment. In other words, where environmental degradation threatens the enjoyment of the right to life, the Court may look at multilateral environmental agreements for standards that can assist it in determining the normative content of this right. In such a situation, the determination of whether a State is (or is not) observing its international obligations in respect of the right to life can be made in light of the standards found in international environmental law.

ii. The right to a healthy environment in comparative constitutional law in the Americas

[143] *Case of the Kámok Kásek Indigenous Community v. Paraguay*, Inter-Am Ct. of H.R. Ser. C No. 214, ¶ 195 (24 Aug. 2010).
[144] *Id.* ¶ 200.
[145] *Id.* ¶ 211.

114. Perhaps the most important legal development since the UN Conference on the Human Environment held in 1972 is that many States amended their national constitutions—the framing of the basic social contract and the values enabling society—to incorporate environmental considerations in them. These references to the environment in national constitutions were often formulated as a duty of the State for environmental protection or as an individual or collective right enforceable in court.[146] Back in 1994, the Special Rapporteur on human rights and environment of the Sub-Commission on the Prevention of Discrimination identified over 60 constitutions having environmental rights.[147] In 2011, the Office of the United Nations High Commissioner for Human Rights prepared a detailed analytical study on human rights and environment that identified about 140 constitutions with environmental rights written into them.[148]

115. The fact that more than 140 States have incorporated environmental rights in their national constitutions is legally significant in the evolving interpretation of the American Convention on Human Rights. This development has not gone unnoticed by the Inter-American Court of Human Rights. For example, in the case of *Kawas Fernandez v. Honduras*, the Court considered the constitutional recognition of the right to a healthy environment in a number of countries in the region as legally significant to the interpretation of the right of freedom of expression in order to protect environmental human rights defenders.[149]

iii. Utilizing multilateral environmental agreements as indicators of implementation of the right to a healthy environment

116. State Parties to the Protocol of San Salvador undertake to take the necessary measures to progressively achieve the full realization of the right to a healthy environment:

> Article 12 Right to a Healthy Environment
>
> 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
>
> 2. The States Parties shall promote the protection, preservation, and improvement of the environment. [150]

117. States Parties also undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for this right.[151] The OAS General Assembly adopted indicators to measure the progressive realization of the right to a healthy environment in 2014.[152]

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[146] Fatma Zohra Ksentini (Special Rapporteur), *Review of Further Developments in Fields in Which the Sub-Commission Has Been Concerned: Human Rights and the Environment*, UN Doc. E/CN.4/Sub.2/1994/9, annex III (6 July 1994).
[147] *Id.* ¶ 241
[148] OHCHR, *Analytical Study on the Relationship between Human Rights and the Environment,* A/HRC/19/34, at 7 (2011); *see also*, David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* 47 (2012).
[149] *Kawas-Fernández v. Honduras*, *supra* note 72, ¶ 148.
[150] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (A-52) arts. 1 and 11, 28 I.L.M. 156, O.A.S.T.S. No. 69 (17 Nov. 1988).
[151] *Id.* at art. 19.
[152] Organization of American States, *Adoption of the Follow-up Mechanism for Implementation of the Protocol of San Salvador*, AG/RES. 2823 (XLIV-O/14) (4 June 2014); *see also*, Organization of American States, *Progress Indicators for Measuring Rights under the Protocol of San Salvador*, 1, OAS Official Records (2015).

118. The progress indicators regarding the right to a healthy environment are divided into three categories – structural, processes, and results – which run across various cross-cutting principles. "[R]atification and entry into force of multilateral agreements on the environment" appears as the very first of the structural indicators developed under the first cross-cutting principle, "reception of the right,"[153] thereby demonstrating how integral these environmental agreements are to the protection of human rights. The progress indicators then identify a non-exhaustive list of multilateral environmental agreements (MEAs) for this indicator.[154] The utilization of MEAs to signal the progressive realization of the right to a healthy environment in human rights law is indicative of the normative value of the adequate implementation of MEAs. The utilization of MEAs thus underscores the actual and potential roles of international environmental standards in the application of human rights law.

Conclusions

119. The judgments of the International Court of Justice, the jurisprudence of the Inter-American Court of Human Rights and other regional human rights courts and commissions, the concluding observations and general comments of United Nations human rights treaty bodies, reports by UN special procedures, resolutions of human rights organs, and additional relevant sources, all lead to the following conclusion: that the duty of a State Party to the American Convention on Human Rights to respect and protect human rights entails an obligation to exercise due diligence so that that its acts and omissions do not cause environmental harm that infringes the human rights of persons and groups outside the State's territorial boundaries. Recognizing the applicability of the American Convention to the extraterritorial human rights impacts of a State Party's acts and omissions does not infringe the territorial integrity of another State; it simply means that a State has a duty to respect human rights and to ensure that those entities under its jurisdiction and control do not violate the human rights of persons and groups whether within or outside its territory.

120. The analysis in this brief also demonstrates that in cases where human rights interference results from environmental degradation, the American Convention on Human Rights must be interpreted and applied in light of relevant international environmental norms.

[153] The second structural indicator includes when the right to a healthy environment is "enshrined" in State's constitution. The third structural indicator is demonstrated when there is "an environmental institutional framework at all levels of government."
[154] *See Progress Indicators for Measuring Rights under the Protocol of San Salvador, supra* note 152, at 101.