

Notre Dame, January 19<sup>th</sup> 2017

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**Secretary**

Inter-American Court of Human Rights

**Ref:** Amicus curiae -  
Advisory Opinion requested by the State of Colombia

Mr. Secretary:

In accordance to article 44 of the Rules of Procedure of this Court, I hereby submit the following legal and factual considerations as an *amicus brief* to the proceedings referenced above.

To that end, I first present a set-up of the context which justifies Colombia's advisory opinion, and the very real and possible harms to the environment of the Caribbean Sea that could occur by the construction of an interoceanic canal in Nicaragua. Afterwards, I will demonstrate how, under Inter-American human rights law, there is a due diligence obligation to prevent harms to the environment. Subsequently, I argue how, in order to establish the scope of the obligation, customary international environmental law provides adequate tools that are fully applicable to the situation in which Nicaragua finds itself. Finally, I will briefly address the jurisdictional issues that may arise with the proposed interpretation and highlight adjudication possibilities.

**I. Background: The land and maritime dispute between Colombia and Nicaragua**

In November 2012, the International Court of Justice resolved a longstanding land and maritime controversy between Colombia and

Nicaragua<sup>1</sup>. The Court determined that Colombia, and not Nicaragua, had sovereignty rights over the islands and maritime features in dispute<sup>2</sup>. Furthermore, it rejected Nicaragua's claims of an extended continental shelf<sup>3</sup> and established a new maritime boundary between the two countries<sup>4</sup>.

However, the judgement was not received with ease by the Colombian authorities. After the ruling was announced, the government of Colombia declared that the ruling by the Court was unacceptable<sup>5</sup>. Less than 10 days later, Colombia withdrew from the American Treaty on Pacific Settlement (Pact of Bogotá)<sup>6</sup>. The denunciation is part of a broader strategy<sup>7</sup> to respond to what Colombia has called "Nicaragua's expansionist ambitions"<sup>8</sup>.

Part of the political and legal strategy set forth by the state of Colombia to "reinforce and consolidate the rights of the Colombian people over the San Andrés, Providencia y Santa Catalina Archipelago"<sup>9</sup> is to exhaust "all diplomatic and legal means"<sup>10</sup> to protect the Seaflower marine biosphere reserve, which overlaps to what is now part of Nicaragua's exclusive economic zone.

In Colombia's view, the two main threats to the marine environment in the vicinity are (i) oil exploration and exploitation<sup>11</sup> and (ii)

<sup>1</sup> ICJ., *Territorial and Maritime Dispute* (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, p. 624

<sup>2</sup> *Ibidem.*, pp. 103

<sup>3</sup> *Ibidem.*, pp. 131

<sup>4</sup> *Ibidem.*, pp. 132-246

<sup>5</sup> The Economist. "Colombia and Nicaragua: Hot Waters", Nov. 29<sup>th</sup> 2012. Available at <http://www.economist.com/blogs/americasview/2012/11/colombia-and-nicaragua>

<sup>6</sup> Colombian Ministry of Foreign Affairs. *Note GACIJ No. 79357: Instrument of denunciation for the American Treaty on Pacific Settlement*. November 27<sup>th</sup>, 2012. Available (in Spanish) at [http://www.oas.org/es/sla/ddi/docs/Notificacion\\_Colombia\\_Pacto\\_Bogota\\_11-27-12.pdf](http://www.oas.org/es/sla/ddi/docs/Notificacion_Colombia_Pacto_Bogota_11-27-12.pdf)

<sup>7</sup> Colombia's Presidency Press Office. "Colombia Presents its Integral Strategy towards The Hague ruling", Sept. 9<sup>th</sup> 2013. Available (in Spanish) at [http://wsp.presidencia.gov.co/Prensa/2013/Septiembre/Paginas/20130909\\_04-Palabras-Santos-Colombia-presenta-su-Estrategia-Integral-frente-al-fallo-de-La-Haya.aspx](http://wsp.presidencia.gov.co/Prensa/2013/Septiembre/Paginas/20130909_04-Palabras-Santos-Colombia-presenta-su-Estrategia-Integral-frente-al-fallo-de-La-Haya.aspx)

<sup>8</sup> *Ibid.*; Reuters. "Colombia's Santos vows to thwart Nicaragua's 'expansionist plans'", Sept. 9<sup>th</sup> 2013. Available at <http://www.reuters.com/article/us-colombia-nicaragua-idUSBRE98902W20130910>

<sup>9</sup> Colombia's Presidency Press Office. *Supra note 7*

<sup>10</sup> Colombia's Presidency Press Office. *Supra note 7*

<sup>11</sup> Republic of Colombia. *Request for an advisory opinion concerning the interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights* (hereinafter advisory opinion request), March 2016, pp. 28. Available at [http://www.corteidh.or.cr/solicitudoc/solicitud\\_14\\_03\\_16\\_ing.pdf](http://www.corteidh.or.cr/solicitudoc/solicitud_14_03_16_ing.pdf)

construction, maintenance and expansion of shipping canals<sup>12</sup>. The latter, responds to the fact that Nicaragua has pushed forward the construction of a “grand interoceanic canal” which, *inter alia*, will require an estimated 4 billion cubic meters of earthmoving<sup>13</sup>. This, unavoidably will introduce massive sediment loads to the Caribbean Sea and will have a direct impact on the marine habitat<sup>14</sup>. Furthermore, it has been reported that Nicaragua will begin exploratory work for oil reserves in what Colombia once considered part of its maritime boundaries<sup>15</sup>.

On March 14, 2016, the State of Colombia submitted a request for an advisory opinion to the Secretariat of the Inter-American Court of Human Rights (IACtHR) requesting that the Court interpret and determine the scope of articles 1(1) (Obligation to Respect Rights)<sup>16</sup>, 4(1) (Right to Life)<sup>17</sup> and 5(1) (Right to Humane Treatment)<sup>18</sup> of the American Convention on Human Rights (ACHR), within the context of the possible impact of grand scale projects on marine environment, particularly in the Wider Caribbean Region.

## II. Impending risks of harm to the Caribbean Sea

Despite the gargantuan scale of the proposed Interoceanic Canal and the amount of economic, environmental and social interest that could be affected, opacity has been constant. Nicaragua’s authoritarian regime has gone as far as exercise outright repression against opponents to the

<sup>12</sup> *Ibidem.*, pp. 28.

<sup>13</sup> Environmental Resources Management (ERM). “Canal de Nicaragua: Environmental and Social Impact Assessment commissioned by the Hong Kong Nicaragua Canal Development Group” (executive summary). June, 2015. p. 39. Available at [http://hknd-group.com/upload/pdf/20150924/en\\_summary/Executive%20Summary%20of%20Environmental%20and%20Social%20Impact%20Assessment%20%28ESIA%29.pdf](http://hknd-group.com/upload/pdf/20150924/en_summary/Executive%20Summary%20of%20Environmental%20and%20Social%20Impact%20Assessment%20%28ESIA%29.pdf)

<sup>14</sup> *Ibid.*

<sup>15</sup> BBC. “Nicaragua to drill for oil off Caribbean coast”, August 16<sup>th</sup> 2016. Available at <http://www.bbc.com/news/world-latin-america-23721914>

<sup>16</sup> **Article 1. Obligation to Respect Rights.** - 1. *The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.*

<sup>17</sup> **Article 4. Right to Life.** - 1. *Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.*

<sup>18</sup> **Article 5. Right to Humane Treatment.** - 1. *Every person has the right to have his physical, mental, and moral integrity respected.*

project<sup>19</sup>. For this reason, the amount of public information is scarce. As an example, the full version of the Environmental Impact Assessment (EIA) commissioned by the infrastructure development firm in charge of the construction of the canal was made available more than two years after the project was approved by congress<sup>20</sup>. It also must be noted that, for the same unfavorable conditions to free speech and political participation, independent scientific assessments of the EIA are hard to come by.

The 14-volume-1,100-page-long EIA argues that with effective mitigation, the construction of the canal will have *negligible, minor, or moderate* impacts<sup>21</sup> on what it calls the “*Caribbean Sea Segment*”<sup>22</sup>, depending on the type of risk that it examines<sup>23</sup>. It is not hard to be surprised, considering the size of the project.

The potential impacts are broken down into the elements of the environment that could potentially be affected by the canal. For the scope and purposes of this document, I will briefly mention a few of the potential effects on the marine biodiversity of the Caribbean Sea.

The EIA finds that several incidences could result in the decrease of plankton populations. Some of the risks involve “high levels of turbidity by suspended solids”<sup>24</sup>, the degradation of seawater<sup>25</sup>, discharge of sewage<sup>26</sup>, accidental discharges of hydrocarbons or hazardous substances<sup>27</sup> and the presence of *invasive species* originating from ballast water<sup>28</sup>. Despite this, the EIA deems the significance of the impact to be

<sup>19</sup> Amnesty International. *Urgent action: Nicaraguan Human Rights Defender Harassed*. December 6<sup>th</sup> 2016. Available at

<https://www.amnesty.org/download/Documents/AMR4352772016ENGLISH.pdf>

<sup>20</sup> BBC. “*Nicaragua Congress approves ocean-to-ocean canal plan*”, June 13<sup>th</sup> 2013. Available at <http://www.bbc.com/news/world-latin-america-22899744>

<sup>21</sup> Environmental Resources Management (ERM). “*Canal de Nicaragua: Environmental and Social Impact Assessment commissioned by the Hong Kong Nicaragua Canal Development Group*”, Volume 1. November, 2015. p. 4.2-8. Available at <http://hknd-group.com/upload/pdf/20150924/en/Volume%201%20Chapters%201-5.pdf>

<sup>22</sup> Environmental Resources Management (ERM). “*Canal de Nicaragua: Environmental and Social Impact Assessment commissioned by the Hong Kong Nicaragua Canal Development Group*”, Volume 3. November, 2015. p. 7.2-34. Available at <http://hknd-group.com/upload/pdf/20150924/en/Volume%203%20Chapters%206-7.pdf>

<sup>23</sup> For the scope and purposes of this brief, I will only focus on the biodiversity chapter of the EIA.

<sup>24</sup> Environmental Resources Management (ERM). *Supra note 22*. p. 7.2-38

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibidem.*, p. 7.2-39

*negligible*<sup>29</sup> provided contingency plans and measures are correctly implemented.

Furthermore, the EIA asserts that the dredging process could result in the “decreased abundance” of marine vegetation<sup>30</sup>, the “crushing” and/or “burying” of seabed fauna and the destruction of its habitat<sup>31</sup>. Again, the EIA categorizes the possible impact to biodiversity as *negligible* given the fact that the “majority of species present [...] are particular threatened or categorized as vulnerable, and do not have significant ecological or economic importance.”<sup>32</sup> Regarding the seabed habitat loss, it considers that the impact is of *medium* magnitude, but it argues that the residual impact “is expected to be *minor*”<sup>33</sup>. Similar risks are pointed out for coral population<sup>34</sup>, and equally similar arguments are drawn to dismiss the possible impacts as *small*<sup>35</sup>. dismissals of are drawn.

However, as the government of Colombia submitted, the Caribbean Sea is a single interdependent ecosystem<sup>36</sup> and harms that occur in any of its habitats will result in irreparable damages to the Caribbean as a whole<sup>37</sup>.

To support this assertion, the Government of Colombia submitted to the IACtHR that the health of the Caribbean ecosystem depends on the quality of its waters, corals, mangroves, and marine vegetation<sup>38</sup>. Each of these elements has a distinct role in the lives of the peoples of the coastal states.

Coral reefs, for instance, could provide up to 6% of global fisheries if properly managed<sup>39</sup>; ergo, they are a vital food source for the Caribbean. They also serve as protection from storms and beach erosion<sup>40</sup>. Marine vegetation for its part, reduces the energy of waves, stabilize sediments,

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibidem.*, p. 7.2-40

<sup>31</sup> *Ibidem.*, p. 7.2-42

<sup>32</sup> *Ibidem.*, p. 7.2-43

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibidem.*, p. 7.2-45

<sup>35</sup> *Ibidem.*, p. 7.2-47

<sup>36</sup> Advisory opinion request. *Supra* note 11, pp. 33

<sup>37</sup> *Ibidem.*, pp. 34

<sup>38</sup> *Ibidem.*, pp. 29

<sup>39</sup> Agard and Croper. “Caribbean Sea Ecosystem Assessment: A sub-global component of the Millennium Ecosystem Assessment”, Caribbean Marine Studies, Special Edition, 2007. p. 13. Available at <http://www.cep.unep.org/publications-and-resources/databases/document-database/other/caribbean-sea-assessment-report-2007.pdf/view>

<sup>40</sup> *Ibidem.*, p. 14

but more importantly, provides a crucial nursery habitat for a wide range of organisms, and at the same time, grants food for a wide range of fish species, including “many commercial species of fish, crustaceans, and mollusks”<sup>41</sup>.

Bearing this in mind, Colombia reminds the IACtHR that the very existence of many of the coastal States in the Caribbean -and its peoples- depend, to an extent, on the marine biodiversity of the Caribbean<sup>42</sup>. It goes further, pointing out that “the well-being of the 116 million people living within 100 km of the sea is highly dependent on the services [the Caribbean Sea] provides as an ecosystem”<sup>43</sup>.

The Inter-American Human Rights legal protection framework and the applicable International Environmental Law provide substantive answers to Colombia’s questions before the IACtHR.

### **III. Inter-American Human Rights Law requires the protection of the marine environment**

It is difficult, if not impossible to contest that “there is an undeniable link between the protection of the environment and the enjoyment of [...] human rights”<sup>44</sup>, a “*sine qua non*” for numerous human rights such as the right to health and the right to life itself<sup>45</sup>.

For its part, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (hereinafter “Protocol of San Salvador”) establishes a binding obligation for the contracting parties to “promote the protection, preservation, and improvement of the environment”<sup>46</sup>, recognizing that “everyone shall have the right to live in a healthy environment”<sup>47</sup>. However, the IACtHR

<sup>41</sup> *Ibidem.*, p. 13

<sup>42</sup> Advisory opinion request. *Supra* note 11, pp. 17

<sup>43</sup> Agard and Croper. *Supra* note 39. p. xiv

<sup>44</sup> I/A Court H.R., *Case of Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, pp. 148.

<sup>45</sup> ICJ., *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 7. Separate opinion of Vice-president Weeramantry

<sup>46</sup> “Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights ‘Protocol of San Salvador’”, San Salvador, El Salvador, November 17<sup>th</sup> 1988. OAS Treaty Series, No. 69. Article 11(2). Available at <http://www.oas.org/juridico/english/treaties/a-52.html>

<sup>47</sup> *Ibidem.*, article 11(1)

has no jurisdiction for these specific provisions<sup>48</sup>. Notwithstanding, the Inter-American jurisprudence contains some answers for the protection of the right to enjoy a healthy environment, for it has broadly developed and interpreted the right to life and the right to physical integrity.

The IACtHR has recognized that the right to life has a broader meaning than not to be deprived of it arbitrarily<sup>49</sup>. It also comprises the right “not to be prevented from having access to the conditions that guarantee a dignified existence”<sup>50</sup>. These conditions, according to the IACtHR, imply a positive obligation<sup>51</sup> from the State to protect and ensure minimum living conditions that are compatible with the dignity of the human person, or at the very least, not to create conditions that might hinder it<sup>52</sup>. The IACtHR has considered that these conditions include access to quality water, adequate food, health and education<sup>53</sup>.

Concordantly, the IACtHR has also interpreted that the right to physical integrity as “essential for the enjoyment of human life”<sup>54</sup>, going further to assert that is “directly and immediately linked to health care”<sup>55</sup>. Moreover, article 10 of the Protocol of San Salvador recognizes the right to the “enjoyment of the highest level of physical, mental and social well-being”.

As mentioned, under the American Convention on Human Rights, States have the obligation to ensure these rights, which entails the duty to “organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights”<sup>56</sup>. This means, *inter alia*, that States have a legal mandate under international law to prevent<sup>57</sup> human rights violations. This, of course, is

<sup>48</sup> *Ibidem.*, article 19(6)

<sup>49</sup> I/A Court H.R., *Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63, pp. 144

<sup>50</sup> *Ibid.*

<sup>51</sup> I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, pp. 162.

<sup>52</sup> *Ibid.*

<sup>53</sup> I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community. v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, pp. 194 - 217

<sup>54</sup> I/A Court H.R., *Case of Albán Cornejo et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of November 22, 2007. Series C No. 171, pp. 117.

<sup>55</sup> I/A Court H. R., *Case of Gonzales Lluy et al. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 01, 2015. Series C No. 298, pp. 171.

<sup>56</sup> I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, pp. 166

<sup>57</sup> I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, pp. 123 - 124

not a result-oriented obligation, but one that entails due diligence on the performing party.

By the protection, conservation and improvement of the environment, a State fulfills its international obligation to respect and ensure the rights to a dignified life and physical integrity. It follows, *a contrario sensu*, that by failing to prevent harms to the environment, a State is allowing fundamental rights to be violated. Depending on the situation, a State may face international responsibility for not performing its international obligations.

In the case at hand, by preventing damages to the marine environment of the Caribbean Sea, any coastal State would be performing its obligation to *ensure* that any person that depends directly or indirectly on the natural resources of the Caribbean Sea has access to the elemental conditions for a dignified life and the enjoyment of health. As noted above, the Caribbean Sea is a single ecosystem that does not correspond to maritime boundaries. In other words, if a catastrophe ensues in the territorial waters of any coastal State (including Nicaragua), or an important harm to the environment occurs in its exclusive economic zone, it will invariably impact directly or indirectly all other coastal States. It will cause harm beyond its own borders.

As mentioned, States may face international responsibility if they fail to fulfill their *erga omnes* obligations to respect and ensure human rights, provided that authorities knew or should have known of the existence of a situation of real and immediate risk to a right<sup>58</sup>. On this subject, the IACtHR has been of the opinion that the scope of the positive obligations is “to be determined based on the specific needs for protection of the subjects of law”<sup>59</sup>.

In this regard, international environmental law is paramount for establishing the scope of State’s obligations towards the environment<sup>60</sup> under the ACHR. Indeed, the International Tribunal for the Law of the Sea (ITLOS), when examining the *Pulp mills* decision, asserted that:

<sup>58</sup> I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community. v. Paraguay*. *Supra* note 53, pp. 188.

<sup>59</sup> I/A Court H. R., *Case of Gonzales Lluy et al. v. Ecuador*. *Supra* note 55, pp. 168.

<sup>60</sup> ICJ., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, pp. 29

“The Court’s reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court’s references to ‘shared resources’ may also apply to resources that are the common heritage of mankind. Thus, in light of the customary rule mentioned by the ICJ, it may be considered that environmental impact assessments should be included in the system of consultations and prior notifications set out in article 142 of the Convention with respect to ‘resource deposits in the Area which lie across limits of national jurisdiction’”<sup>61</sup>

Considering the above mentioned, it is clear that customary international law regarding the environment is the ideal method to establish the content of the due diligence obligation to ensure and prevent human rights violations in this context. Notwithstanding, the IACtHR has also pointed out that “the nature *erga omnes* of the treaty-based guarantee obligations of the States does not imply their unlimited responsibility for all acts or deeds of individuals”<sup>62</sup>. In other words, “it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction”<sup>63</sup>.

This means that Nicaragua, or any coastal state for that matter, would not necessarily be internationally liable for the actions of private corporations within their jurisdiction. However, as mentioned, customary international law already contains rules to determine if an action or omission of a State concerning the environment is lawful or not.

#### **IV. Applicable international environmental law**

As it has been demonstrated, Nicaragua’s actions or omissions could result in a contravention to the *sic utere tuo, ut non alienum laedas* rule. It is unlawful for a State to “use or permit the use of its territory in such a manner as to cause injury [...] to the territory of another”<sup>64</sup> However, is also clear that customary international law provides with a framework to prevent such harm from ever happening.

<sup>61</sup> ITLOS., *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, pp. 148

<sup>62</sup> I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia*. Interpretation of the Judgment of Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 159, pp. 123

<sup>63</sup> ITLOS., *Responsibilities and obligations of States with respect to activities in the Area*. *Supra note 61*, pp. 112

<sup>64</sup> United Nations., *Trail Smelter Arbitration*, Reports of International Arbitral Awards, volume III p. 1905-1982

There is little or no argument to be made against the duty that States have, to take appropriate measures to prevent potential transboundary harm and to identify such risks to the environment<sup>65</sup>. This obligation encounters its direct equivalent in the due diligence duty to ensure human rights and reasonably prevent violations to them.

The standard of due diligence must be appropriate and proportional to the risk of transboundary harm<sup>66</sup>. However, the precise content of this obligation “may not be easily be described”<sup>67</sup>; for it is a variable concept. It may change over time, if new technologies and scientific knowledge is attained by the obligated party<sup>68</sup>. Regardless, a State has a duty “to use all the means at its disposal to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State”<sup>69</sup>. This due diligence obligation requires, among other things, “to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State”<sup>70</sup>.

This Court must be cognizant that within the EIA commissioned by the company in charge of the construction of the interoceanic canal, there are no specific references to the possibility of transboundary risk in neither the Pacific nor Caribbean segments of the canal. Beyond a brief allusion towards the San Juan river, which is a shared resource with Costa Rica, there are no considerations of transboundary risk. However, it must be reminded that the EIA relies heavily on the capacity of the mitigation plan to undermine the possibility of harm to the environment. This does not mean that the risk of harm is inexistent, and there is no certainty that the mitigation plan proposed by the evaluating company will be in fact, implemented.

<sup>65</sup> United Nations. *Report of the International Law Commission (53 Session)*. GAOR A/56/10, 2001, p. 146: *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, arts. 3 and 7

<sup>66</sup> United Nations. *Report of the International Law Commission (53 Session)*. GAOR A/56/10, 2001, p. 153, pp. 11.

<sup>67</sup> ITLOS., *Responsibilities and obligations of States with respect to activities in the Area*. *Supra note 61.*, pp. 177

<sup>68</sup> *Ibid.*

<sup>69</sup> ICJ., *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, pp. 101

<sup>70</sup> ICJ., *Cases concerning Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua) and Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, December 16 2015, pp. 104

The Court must also note that recently, the Permanent Court of Arbitration required an independent EIA to be performed in the *South China Sea Arbitration*<sup>71</sup>, following the concerns set forth by Judges Al-Khasawneh and Simma in their dissenting opinion in the *Pulp Mills* case<sup>72</sup> regarding the methodological challenges to interpret the scientific data.

Regardless, it is clear that the uncertainty of risk, must translate into effective and adequate prevention of environmental harm. Under Rio Principles 15<sup>73</sup> and 19<sup>74</sup>, Nicaragua has a duty to cooperate with its neighbors to protect common spaces and common heritage. By providing timely notification and consult with them in good faith, a wider discussion on the possible impacts of the canal and the contents of the EIA will be allowed.

Pursuant to the precautionary principle, Nicaragua must not only assert the risks within its own borders, but the risks that a project of the magnitude of the Canal poses to the vicinity. Otherwise, as it has been established above, the State would be liable.

## **V. Jurisdiction concerns and Inter-American adjudication**

It would follow from the above-mentioned conclusion that a State could be liable for *transboundary human rights violation* if no due diligence were to be performed. However, the proposed interpretation of the obligation to ensure would, in principle, find its limits in article 1(1) of the ACHR, which requires States to “respect the rights and freedoms recognized herein and to ensure to all persons subject *to their jurisdiction*” (emphasis added). Yet, if we were to apply a narrow interpretation of the provision, it would also follow that no State would be liable for such *transboundary human rights violation*. Therefore, the main objective of the ACHR will

<sup>71</sup> PCJ. *The South China Sea Arbitration* (The Republic of Philippines v. The People's Republic of China). PCA Case No 2013-19. Arbitral Award, 12 July 2016.

<sup>72</sup> ICJ., *Pulp Mills on the River Uruguay* (Argentina v. Uruguay). *Supra note 69*, Joint Dissenting Opinion of Judges Al-Khasawneh And Simma.

<sup>73</sup> *In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*

<sup>74</sup> *States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.*

have been frustrated<sup>75</sup>. In other words, if, hypothetically, members of the Raizal people<sup>76</sup> perish by actions or omissions that take place in Nicaragua's jurisdiction, the latter would be internationally liable. Again, a restrictive interpretation of article 1(1) does not offer an answer to this situation.

The Court must also note that it has been recognized that the obligations derived from customary international law concerning the protection and preservation of the marine environment "apply to all States [...] in all maritime areas, both inside the national jurisdiction of States and beyond it"<sup>77</sup>. This rationale, is all but incompatible with the object and purpose of the ACHR. Also, it makes the notion of "functional jurisdiction" and the cumulative conditions proposed by Colombia in the first question presented to the Court<sup>78</sup> irrelevant to determine the scope of the due diligence obligation.

Under the aforementioned premise, any individual could very well request precautionary measures before the Inter-American Commission on Human Rights if there is impending risk of irreparable harm if any coastal State of the Caribbean is failing to prevent harm to the environment. In the concrete situation, the State of Colombia could

<sup>75</sup> *Mutatis mutandi*: House of Lords. *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex parte Pinochet*. 24 march 1999. Cited in O'Connell et. Al. *The International Legal System: Cases and Materials*. Foundation Press, 2015. P. 383

<sup>76</sup> The Raizal people are a Colombian ethnic community that inhabits the San Andrés, Providencia y Santa Catalina islands. See Colombian Ministry of Culture. *Raizales, descendants of Europeans and Africans*. (in Spanish) Available at <http://www.mincultura.gov.co/areas/poblaciones/comunidades-negras-afrocolombianas-raizales-y-palenqueras/Documents/Caracterizaci%C3%B3n%20comunidad%20Raizal.pdf>

<sup>77</sup> PCJ. *The South China Sea Arbitration* (The Republic of Philippines v. The People's Republic of China). *Supra note 71*. pp. 940.

<sup>78</sup> "I. Pursuant to Article 1(1) of the Pact of San José, should it be considered that a person, even if he is not in the territory of a State Party, is subject to the jurisdiction of that State in the specific case in which the following four conditions are met cumulatively?

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

request provisional measures before the IACtHR if Nicaragua fails to perform with its due diligence prevention duties.

Furthermore, in case harm *does* occur, the individual complaints mechanism of the Inter-American System would allow legally binding environmental reparations and guarantees of non-repetition to be attained through adjudication.

As this Court is aware, of course, such scenarios will have to meet the legal requirements set forth by the ACHR. However, the fact of the matter is that a decision of this Court, restating the current customary international law and developing the current legal standards would enable the consolidation of a legally-binding prevention mechanism that could be triggered through the precautionary or provisional measures system and an environmental redress could be acquired through an already existent institution.

## **VI. Conclusions**

The IACtHR has an important opportunity to establish a path towards an improved protection of the environment, not only in the Americas, but throughout the global community. The Caribbean Sea has a set of characteristics that are ideal to think about the protection of the environment beyond national borders. Ecosystems and biospheres are not bound by borders, and their protection should respond to that reality.

It is clear that the Nicaragua Canal, if constructed, will bring important constrains to the Caribbean Sea. What is not clear is the scope of its possible impact, and under international law, Nicaragua has a set of obligations not only to itself, but to the international community and its neighbors. Its undeniable that Nicaragua has a right to pursue development projects within its sovereign territory, but this right must be enjoyed respecting its international obligations towards the environment and human rights.

The alternatives for individuals or neighboring states for the peaceful settlement of disputes, if exercised, will result in a more robust international protection of the environment that, if all, would reinforce the legitimacy of the global legal system. Fragmentation of international law is not a risk. Quite the contrary, the advisory opinion presents an

opportunity to consolidate the global trends regarding the protection of the marine environment.

For all of the above, I respectfully request the Court to take into consideration the legal and factual contributions of this brief for the opinion that will be emitted.

Sincerely,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the left.

Alfredo Ortega Franco