

JANUARY 19, 2016

**Inter-American Court of Human Rights**  
**Pablo Saavedra Alessandri**  
Secretary

Dear Mr. Saavedra Alessandri:

Alejandra Gonza, director of the International Human Rights Clinic at the University of Washington writes this communication in order to submit observations to the Advisory Opinion request submitted by Colombia pursuant to Article 73.3 of the Rules of Procedure of the Inter-American Court of Human Rights. The brief was drafted by the students Adam Hayne and Michelle Sue and represent our personal opinion on the issue presented by the State of Colombia.

With distinguished considerations



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**SECTION I:  
EXTRA-TERRITORIAL OBLIGATIONS & APPLICABILITY OF A PERSON  
“SUBJECT TO” A STATE’S JURISDICTION**

Colombia requests this advisory opinion to determine if, pursuant to Article 1(1) of the Pact of San José, a person is considered “subject to the jurisdiction” of a State when the person lives in an area protected by an environmental treaty system; the treaty system establishes an area of functional jurisdiction; within said functional jurisdiction the State has an obligation to protect, reduce, and control pollution; and as a result of damage to the environment by the State, the human rights of the person are violated.

Article 1(1) of the Pact of San José establishes the obligations of States party to the Convention to respect and ensure the rights recognized within the Convention to all persons “subject to their jurisdiction.” The Pact does not provide a definition for “jurisdiction” and as such, the bounds remain to be determined regarding State responsibilities and obligations within the Pact.

In particular, jurisdiction implicates a denomination of territoriality, as the Inter-American system has readily required States to respect and ensure the rights within the Convention to all persons residing within the States’ territories. This duty is reinforced by Article 16 of the OAS Charter, which states: “The jurisdiction of States within the limits of their national territory is exercised equally over all the inhabitants, whether nationals or aliens.” It follows, therefore, that the obligations of the Convention apply equally to every person residing within States’ territories, citizen or not. Jurisdiction, however, does not end at a particular State’s territorial boundary, as the principle of extraterritorial obligations begins to develop obligations of States beyond their territorial bounds. This principle is derived through interpretation of the OAS Charter, the American Convention, notions of State authority, and emerging fields of understanding in international human rights and environmental law.

**A. Charter and Treaty Foundations of Extraterritorial Obligations**

*1. American Convention on Human Rights*

Under the American Convention, States have an obligation to protect and ensure an individual’s fundamental rights when the individual is considered “subject to” that State’s jurisdiction.<sup>1</sup> Although this “usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to *control of another state*, generally through the actions of that state’s agents abroad”<sup>2</sup> or when the acts or omissions of that State have transnational effects.<sup>3</sup> (emphasis added)

<sup>1</sup> Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, Article 1(1).

<sup>2</sup> See *Armando Alejandro Jr. et al., (Cuba)*, Report No 86/99, Case No. 11.589, Inter-American Commission on Human Rights, September 29, 1999, <https://www.cidh.oas.org/annualrep/99eng/Merits/Cuba11.589.htm>.

The notion of extraterritorial obligation (hereinafter “ETO”) arises additionally from the Pact of San José and, in particular, through Articles I, II, III, IV, XVIII, XXV, and XXVI.<sup>4</sup> These Articles establish fundamental rights guaranteed to the individual “without distinction as to race, nationality, creed, or sex” and are inherent in every individual simply by virtue of a person’s humanity. *Ibid.* Accordingly, the rights recognized through these Articles are guaranteed to every individual, regardless if that person belongs to a State party to the American Convention or not, and a State’s obligations do not end once the action occurs beyond its territorial boundaries. *Ibid.*

The drafting history of the Convention further supports the proposition of extraterritorial obligation. During the drafting period, the *travaux préparatoires* indicates that Article 1(1) originally provided that States have the duty to ensure all persons “within their territory *and subject to their jurisdiction*” the full exercise of rights without discrimination.<sup>5</sup> (emphasis added). The Inter-American Commission has noted that this omission of “within their territory” in the final draft *widens* the range of rights recognized in that States are responsible for acts and omissions that are committed *wherever they exercise jurisdiction*.<sup>6</sup> This is consistent with international bases of jurisdiction, where a State, through “the exercise of its jurisdiction over acts with an extraterritorial locus will be not only consistent with but also required by the norms which pertain.”<sup>7</sup>

Consistent with this approach, the Inter-American system recognizes a State’s obligation to protect and ensure rights beyond its territorial boundaries in two situations: (1) when the State exercises effective control and authority over another and (2) when the acts or omissions of a State have transnational effects.

#### *a. Effective Control*

Under the effective control approach, the inquiry depends not on the victim’s nationality or location, but rather whether “the State observed the *rights of a person subject to its authority and control*.” (emphasis added).<sup>8</sup> In this context, neither the territorial location of an individual nor that individual’s nationality absolve a State of its responsibility to protect his rights. Rather, when the individual’s *rights* are subject to the *authority and control* of the State, the obligation to protect and ensure is activated as established under the American Convention.

<sup>3</sup> See *Saldaño v. Argentina*. Report No. 38/99, Inter-American Commission on Human Rights, March 11, 1999, ¶s. 15-20.

<sup>4</sup> *Coard et al. v. United States*, Report No. 109/99, Case No. 10.951, Inter-American Commission on Human Rights, September 29, 1999, <https://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStates10.951.htm> ¶s 36-37.

<sup>5</sup> See *Inter-American Specialized Conference on Human Rights*, San José, Costa Rica, November 7-22, 1969, *Acts and Documents*, OEA/Ser.K/XVI/1.2, Washington D.C., 1973, p. 14.

<sup>6</sup> See *Franklin Guillermo Aisalla Molina*, (Colombia), Report No. 112/10, Inter-State Petition IP-02, Admissibility, Inter-American Commission on Human Rights, October 21, 2010, ¶ 90.

<sup>7</sup> *Coard et al.*, *supra* note 4 at ¶ 37.

<sup>8</sup> *Coard et al.*, *supra* note 1 at ¶ 37; see also Oona Hathaway et al., *Human Rights Abroad: When do Human Rights Treaty Obligations Apply Extraterritorially?*, Paper 4722, FACULTY SCHOLARSHIP SERIES. (2011), [http://digitalcommons.law.yale.edu/fss\\_papers/4722](http://digitalcommons.law.yale.edu/fss_papers/4722).

In order to establish a State's responsibility in a given situation, the determination comes down to two factors: (1) who is an "agent of the State" and (2) what types of control is required to exercise authority over an individual's rights. The Inter-American Commission has acknowledged that agents of a State may be military or civilian agents, so long as they are exercising power and authority of the State over persons outside national territory.<sup>9</sup> This distinction is important as it creates the threshold that is lower than military control of a region for the Commission to determine that an individual may be subject to a State's jurisdiction, and the Commission has determined even civilian pilots can be considered an agent of a State in exercising control over an individual.<sup>10</sup>

Regarding the type of control required, the Commission has accepted jurisdiction in instances of: military control of a region<sup>11</sup>, military attacks on another State's territory<sup>12</sup>, indefinite detention of individuals in areas such as Guantanamo Bay<sup>13</sup>, and international airspace occupation.<sup>14</sup> The Commission highlights the importance to determine whether "there is a causal nexus between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual" without "necessarily requiring the existence of a formal, structured and prolonged legal relation in terms of time".<sup>15</sup> The obligation arises during "the period of time that agents of a State interfere in the lives of persons who are on the territory of the other State" and as such, the Commission acknowledges that it is not the *type* of interference or authority controlled, but rather it is the interaction between the authority in use by the agent and the right affected. *Ibid.*

It follows, therefore, that the inquiry depends on the interaction between the use of State authority through acts or omissions of an agent and the causal connection to violation or infringement on an individual's rights. This does not require rigid requirements as far as what situation or what agent can be implicated, but rather it is a factual determination based on the acts of a State and the rights of an individual. Though this may typically arise most frequently in military action, where both State authority and violation of rights are easily determined, this is not the only form of State authority that can infringe upon an individual's rights. Indeed, State Authority can be seen in a variety of ways, including regulation, financial support, permitting<sup>16</sup>,

<sup>9</sup> *Armando Alejandro Jr. et al.*, *supra* note 2 at ¶ 25.

<sup>10</sup> See John Cerone, *The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US Activities in Iraq*, 9 AMERICAN SOCIETY OF INTERNATIONAL LAW: INSIGHTS 32 (Oct. 25, 2005), <https://www.asil.org/insights/volume/9/issue/32/application-regional-human-rights-law-beyond-regional-frontiers-inter>.

<sup>11</sup> *Coard et al.*, *supra* note 4.

<sup>12</sup> See *Franklin Guillermo Aisalla Molina*, (Colombia), Report No. 112/10, Inter-State Petition IP-02, Inter-American Commission on Human Rights, October 21, 2010.

<sup>13</sup> See *Rafael Ferrer-Mazorra et al.*, (United States), Report No. 51/01, Case No. 9903, Inter-American Commission on Human Rights, April 4, 2001; *Precautionary Measures for the Guantanamo Detainees*, 41 ILM 532 (Mar. 12, 2002).

<sup>14</sup> *Armando Alejandro Jr. et al.*, *supra* note 2.

<sup>15</sup> *Franklin Guillermo Aisalla Molina*, *supra* note 6 at ¶ 99.

<sup>16</sup> See *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, Inter-American Commission on Human Rights, OEA/Ser.L/V/II, Doc. 47/15, December 31, 2015.

or direct involvement, and other Human Rights systems have extended protections beyond military control.<sup>17</sup>

*b. Transnational Effects*

In addition to the effective control doctrine, the Inter-American Commission acknowledges that jurisdiction also extends to acts or omissions of a state that “produce effects . . . outside of that state’s own territory.”<sup>18</sup> The analysis in this framework is similar to that of the effective control doctrine, however the focus is on activities that can be attributed to a State that have a transnational effect that may impinge upon an individual’s rights, not necessarily on the State’s authority or control.<sup>19</sup>

The logical import of this framework is that the focus shifts onto an analysis of the *effects*, direct or indirect, of a State’s action and not whether or not a particular individual was subject to the authority or control of the State in regards to a particular right. The Inter-American system has not had opportunity to develop this analytical framework extensively, but has cited persuasively and often to the European Court of Human Rights and other authorities in establishing the transnational effects test.<sup>20</sup> Within the European system, the European Court of Human Rights has established that jurisdiction involves acts that “produc[e] effects outside their own territory” and the focus of an alleged violation is on whether the act can be attributed to a state party.<sup>21</sup>

<sup>17</sup> See *Ilascu and others v. Moldova and Russia*, Application No. 48787/99, European Court of Human Rights (July 8, 2004); *Loizidou v Turkey* A 310 ¶s 56-64, European Court of Human Rights (1995); *X v UK* No. 7547/76. 12 DR73, European Commission of Human Rights (1977); *Bertrand Russel Peace Foundation Ltd. v UK*, No. 7597/76, 14DR 117, European Commission of Human Rights at 124 (1978); *Mrs. W v UK*, No. 9348/81, 32 DR 190, European Commission of Human Rights (1983); *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, § 20, judgment of 14 May 2002; *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, §§ 59-61, European Court of Human Rights 2001-XII; *Assanidze v. Georgia* [GC], no. 71503/01, § 137, European Court of Human Rights 2004-II; *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310.

<sup>18</sup> See *Saldaño v. Argentina*. Report No. 38/99, Inter-American Commission on Human Rights (1998), ¶s 15-20 (supporting the assertions made in decisions of the European Court and Commission).

<sup>19</sup> See Report No. 51/96, Case No. 10.675 (United States), Merits, March 13, 1997, <http://www.cidh.org/annualrep/96eng/USA10675.htm>; see also Christina Cerna, *Out of Bounds? The Approach of the Inter-American System for the Promotion and Protection of Human Rights to the Extraterritorial Application of Human Rights Law*, CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE WORKING PAPER, (Nov. 6, 2006).

<sup>20</sup> See *Saldaño*, *supra* note 18 at ¶s 15-20 (citing to European Court H.R. *Loizidou v Turkey* A 310 ¶s 56-64 (1995); *X v UK* No. 7547/76. 12 DR73, European Commission of Human Rights (1977); *Bertrand Russel Peace Foundation Ltd.*, *supra* note 17 at 124; *Mrs. W*, *supra* note 17; see also *Drozd and Janousek v. France and Spain*, nos. 21/1991/273/344, European Court of Human Rights.

<sup>21</sup> See *Drozd and Janousek v. France and Spain*, nos. 21/1991/273/344, European Court of Human Rights (citing the Commission’s decisions on the admissibility of applications no. 1611/62, *X v. the Federal Republic of Germany*, 25 September 1965, Yearbook, vol. 8, p. 158; no. 6231/73, *Hess v. the United Kingdom*, 28 May 1975, Decisions and Reports (DR) no. 2, p. 72; nos. 6780/74 and 6950/75, *Cyprus v. Turkey*, 26 May 1975, DR 2, p. 125; nos. 7289/75 and 7349/76, *X and Y v. Switzerland*, 14 July 1977, DR 9, p. 57; no. 9348/81, *W. v. the United Kingdom*, 28 February 1983, DR 32, p. 190); see also *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, p. 35, §§ 88-91.

In addition to the jurisprudence in the European system, the Inter-American Commission established State obligations in respect to extractive activities.<sup>22</sup> In particular, States must not breach their international human right obligations “in the securing of multilateral or bilateral commercial agreements” and States must fulfill environmental norms or other norms that relate to indigenous and tribal people’s rights. *Ibid.* In these instances, enforcement “does not depend on reciprocity among states” and States have a *specific duty to prevent* environmental degradation or displacement that may stem from activities a State knows or should have known would violate these rights. *Ibid.* Included in this duty to prevent is the obligation to supervise and monitor extractive or other development activities that might affect human rights, and this “*is also applicable to the countries of origin for the actions of its companies and nationals abroad during the implementation of extractive activities.*” (emphasis added). *Ibid.*

The Commission acknowledges that the duty to supervise and control involves granting licenses, providing services directly or indirectly, labor rights, and performance and safety standards. *Ibid.* By establishing these specific obligations, the Commission acknowledges that some activities are likely to have effects that extend beyond particular territories or boundaries and has placed specific measures and obligations on States to prevent, protect, and ensure that rights are not violated in these types of activities. This is especially true when a State “know[s] or should have known about said risks” and a specific duty of prevention is applied. *Ibid.*

The notion of transnational effects has additionally been addressed as an element of customary international law that a state is “obliged to use all the means at its disposal in order 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>23</sup> (emphasis added). Thus, under the American Convention, the Inter-American system, and customary international law, States have an obligation to protect and ensure the rights of individuals that are either within their territory, subject to their authority and control, or may be affected by their activities.

## 2. Organization of American States Charter

The existence of ETOs could be understood as coming from the OAS Charter through Chapter VII, titled “Integral Development” which develops notions of cooperation and shared responsibility. Article 31 states that cooperation for integral development “is the common and joint responsibility of the Member States” and includes “economic, social, educational, cultural, scientific, and technological fields.” This is reinforced by Article 37 in that States “agree to join together in seeking a solution to urgent or critical problems that may arise whenever the economic development or stability of any Member State is seriously affected by conditions that cannot be remedied through the efforts of that State” as well as Article 48 that establishes “Member States will cooperate with one another to meet their educational needs, to promote scientific research, and to encourage technological progress for their integral development. They will *consider themselves individually and jointly bound* to preserve and enrich the cultural heritage of the American peoples.” (emphasis added).

<sup>22</sup> See *Extractive Industries*, *supra*, footnote 16.

<sup>23</sup> *Costa Rica v. Nicaragua*, General List Nos. 150 and 152, International Court of Justice, December 16, 2015, ¶ 118.

In addition to affirmative obligations of States to cooperate in the development of all Member States, Article 35 also places a negative obligation on States to “refrain from practicing policies and adopting actions or measures that have serious adverse effects on the development of other Member States.”

Further, the preamble and selected Articles within Chapters I, IV, and VII reinforce the existence of ETOs. In particular, the Charter notes in the Preamble that the mission of America is to offer man “a favorable environment for . . . development” and that contribution to progress and civilization “will increasingly require intensive continental cooperation.” Chapter I defines the purposes of the Organization to “strengthen . . . collaboration” (Article 1) and “promote, by cooperative action, . . . economic, social, and cultural development.” (Article 2(f)). The Organization further recognizes and seeks to fulfill its regional obligations derived from the Charter of the United Nations. (Article 2).

The Charter establishes duties of States, including Chapter IV, Article 16, where “the jurisdiction of States within the limits of their national territory is exercised equally over all inhabitants, whether nationals or aliens.” Similarly, Articles 11 and 18 of the same chapter establish the duty to “respect the rights enjoyed by every other State in accordance with international law” and “respect for and the faithful observance of treaties constitute standards for development of peaceful relations among States.”

Combined, the Charter creates the responsibility for States to ensure respect and protection of rights not only for every person within their national territorial bounds, but also creates an affirmative duty on States to respect rights of other States, faithfully observe treaties, and cooperate with other States to respect and promote economic, social, educational, cultural, scientific, and technological rights. In so doing, the Charter establishes the duty of a State to avoid causing serious adverse effects to other States, an inherent recognition that the duties and obligations of the State do not end at territorial boundaries, but extend to other States and particular actions that occur outside of its own national boundary can provide responsibility of a particular State.

In addition to State responsibility, Article 36 institutes that transnational enterprises and foreign private investment “shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and *to the international treaties and agreements to which said countries are parties*, and should conform to the development policies of the recipient countries.” (emphasis added). Thus, under the Charter, both States and private entities alike are required to protect and ensure rights protected by the Charter and other international agreements entered in upon by the host State. Through incorporation of this Article, both States and corporations inherit extraterritorial obligations to protect the rights of and *prevent adverse effects on other Member States*. Further, it can be envisaged that in particular instances the State will have sufficient involvement in a corporation’s activities – through permitting, financing, or otherwise supporting – that the State itself will inherit the obligations imputed to the corporation through this Article. In these instances, even when the corporation otherwise acts independently, the risk of violation or the violation of other States’ rights may give rise to State liability through extraterritorial obligations.

### 3. Maastricht Principles and UN Guiding Principles

Though the Inter-American system does not have a similar mechanism in place, the Commission has cited to the UN Guiding Principles on Business and Human Rights as persuasive for the notion that States “should ensure that they can effectively oversee the enterprises’ activities” and that this “must include the ability to supervise foreign companies.” *Ibid.* This acknowledgment opens the opportunity for the Commission to join the evolving field of human rights protections, including that of the Maastricht Principles governing ETOs in relation to Economic, Social, and Cultural rights.<sup>24</sup> These principles examine the human rights that are increasingly becoming affected by globalization and the increasing international actors. These principles also establish obligations for States to supervise and regulate corporations and implement a framework for home-States to regulate companies headquartered within their territories but acting in foreign territories. *Ibid.* This line of jurisprudence is well within the confines of the Inter-American jurisprudence, as it offers an extension of the already-established jurisdictional elements of transnational effects and State authority and control, but incorporates elements found in the Commission’s discussion of extractive activities into a general framework for State duties.

Because the Commission has acknowledged that the American Convention and other human rights treaties are “living instruments whose interpretation must consider the changes over time and present-day conditions,” the application and extension of the Maastricht Principles or other ETO obligations on States is consistent with the Commission’s jurisprudence.<sup>25</sup> Similarly, the *pro-homine* approach of the Inter-American system dictates that laws “must be interpreted in the manner most advantageous to the human being” adheres to this structure and advances the overarching goal to promote human rights and prevent violations when possible.<sup>26</sup>

#### **B. Functional Jurisdiction and Shared Responsibility**

A growing recognition of the duties of states in regards to functional jurisdiction and shared responsibility illuminates the idea that States parties to human rights treaties, charters, and other rights-protecting conventions aim to uphold and protect rights throughout the region in addition to each individual State. In so doing, a State should “in all its activity (and omissions) respect the human rights obligations it has signed up to” and work in conjunction with other

<sup>24</sup> See Olivier de Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 HUMAN RIGHTS QUARTERLY 1084, 1084-1169 (Nov. 2012), <http://muse.jhu.edu/article/489374>; see also Marcos Orellana, *Reflections on the Right to a Healthy Environment: Comments on Rebecca Bratspies’ Do We Need a Human Right to a Healthy Environment?*, 13 SANTA CLARA J. INT’L LAW 71 (April 2015)

<sup>25</sup> See *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99, Mexico, October 1, 1999, Inter-American Court of Human Rights; see also Daniel Cerqueira, *The Attribution of Extraterritorial Liability for the Acts of Private Parties in the Inter-American System: Contributions to the debate on corporations and human rights*, DUE PROCESS OF LAW FOUNDATION (Oct. 14, 2015), <https://dplfblog.com/2015/10/14/the-attribution-of-extraterritorial-liability-for-the-acts-of-private-parties-in-the-inter-american-system-contributions-to-the-debate-on-corporations-and-human-right/>.

<sup>26</sup> *What is the IACHR?*, <http://www.oas.org/en/iachr/mandate/what.asp>

States to do so.<sup>27</sup> The application of such a doctrine has varied, in some instances resulting in multiple States being held accountable for a single rights violation (either through direct causal link to a violation committed by each State or through shared responsibility of otherwise legal actions of each State that result in an individual's rights being violated)<sup>28</sup> and in other instances, requiring States to collaborate toward a regional public order of regional protections<sup>29</sup>.

The Inter-American system has taken the general approach of establishing a regional public order, in that the American Convention enshrines “a system that constitutes a genuine regional public order the preservation of which is in the interests of each and every state party.”<sup>30</sup> Inherent in this system is the intent to preserve the system for protections of human rights, and if a State “violates its obligation to ensure the human rights of the individuals under its jurisdiction it *also violates its undertaking to other states.*” *Ibid.* States additionally have an obligation to “collaborate in good faith” with other States to ensure rights protections throughout the region, recognizing the dual roles of establishing and maintaining a regional protection of individuals’ rights as well as creating the duty to collaborate with other States.<sup>31</sup>

Within the European Human Rights system, the general trend regarding shared responsibility has focused primarily on the individual contributions of a particular State in regards to the injury, in which case the system generally allows holding multiple States accountable in a particular case for a particular injury.<sup>32</sup> The European system additionally has extended the jurisprudence in some instances to holding an international organization liable for actions of State members, holding State members accountable for action taken by an international organization, and derived conduct of another state (through aid and assistance, direction and control, and coercion).<sup>33</sup> The European system suffers from a lack of clear precedent moving forward, as the system approaches the issue on a case-by-case and fact-specific analysis, however the prominence of independent State responsibility filters into each analysis and offers some framework within which to develop.

Though the two systems have taken slightly different approaches, each offers its own iteration of what is already enshrined in many of the conventions within each system. On the one hand, States undertake to protect and ensure human rights that are at risk from their own actions (primarily seen through the individual responsibility framework of the European system). On the

<sup>27</sup> Maarten den Heijer, *Issue of Shared Responsibility before the European Court of Human Rights*, ACIL Research Paper No 2014-04 (SHARES Series), finalized 26 January 2012, available on SSRN

<sup>28</sup> *Ilascu and Others v Moldova and Russia*, App no 48787/99, European Court of Human Rights 8 July 2004.

<sup>29</sup> See *Goiburú v. Paraguay*, Inter-American Court of Human Rights, September 22, 2006 (Merits, Reparations and Costs); see also *Nicaragua v. Costa Rica*, Interstate Case 01/06, Report No. 11/07, March 8, 2007, Inter-American Commission on Human Rights, <https://www.cidh.oas.org/annualrep/2007eng/interstatecase.eng.htm>.

<sup>30</sup> *Nicaragua v. Costa Rica*, Interstate Case 01/06, Report No. 11/07, March 8, 2007, Inter-American Commission on Human Rights, <https://www.cidh.oas.org/annualrep/2007eng/interstatecase.eng.htm>.

<sup>31</sup> *Goiburú*, *supra* note 29 at ¶ 132.

<sup>32</sup> See den Heijer, *supra*, footnote 27 at 44 (referencing *Ilascu v. Moldova and Russia*, *supra*, footnote 28, *Treska v Albania and Italy*, no. 26937/04, ECtHR, 29 June 2006, *McElhenney v. Ireland and the United Kingdom*, no. 31253/96, ECtHR, 9 February 2000).

<sup>33</sup> See den Heijer, *supra*, footnote 27 at 33 (referencing International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) UN GAOR Supplement No. 10 (A/56/10) chp. IV.E.1.

other hand, since the creation of charter systems and international organizations, States are creating and collaborating to establish a regional protection system (the Inter-American system). Though the link has not been definitively drawn, the combination of these two approaches best matches the ultimate purposes of human rights treaties and protections – enhancing and maintaining the human rights of all individuals through establishment of individual State obligations and regional cooperative efforts to supplement individual State obligations as needed. Indeed, the duty to cooperate and collaborate is enshrined in the majority of human rights charters and is best seen as an expression of willingness to supplement individual State obligations within that particular region.

### **C. Application and Implications**

In light of the foregoing principles, Colombia's requested opinion is readily answered in the affirmative. Indeed, despite the apparent differences in the doctrinal approaches listed above, each adequately assures the extraterritorial obligations of States within the confines of environmental issues. Because a regional-based environmental treaty, like the Cartagena Convention, creates a regional functional jurisdiction, affirmative obligations, duties for States, and recognition of the protection of those within the region, both the principles of the American Convention and notions of collective/shared responsibility provide justification for holding States accountable as requested by Colombia.

Within the American Convention interpretation regarding ETOs, both the effective control doctrine and liability for transnational effects have direct implication in the current advisory opinion. As premised in the request, a State party to the Cartagena Convention undertakes to maintain, regulate, and have direct role in the particular protocols within the Convention Area or functional region. Be it through obligations in the event of an oil spill, pollution from land-based sources, or protection of specially affected areas, each State accepts and exerts its control and authority over both the region and the particular activity at issue, to which any rights affected by the control thereof is certainly the responsibility of the State and thus the State has an obligation and responsibility to protect the right extraterritorially and a person affected by such State action can fairly be said to be "subject to" that State's jurisdiction.

Similarly, inherent in the requested opinion is the attribution of the environmental damage in the territory a non-party State's territory to the breaching State. Consistent with the transnational effects doctrine, this identification of State responsibility and causation creates a nearly verbatim violation of a State's ETO to prevent transnational effects through its activities, as the infringed right takes place against a person in a territory of a non-State party to the Cartagena Convention. The determination under this doctrine, therefore, relates to a fact-based scenario in which proximate cause must be determined, so that the link between the State's actions and the rights violated are not "too attenuated." Should the connection be found direct and concise, however, the American Convention doctrine of transnational effects is exactly in line with State responsibility in the requested scenario, and a person whose rights are violated is considered to be "subject to" the State's jurisdiction.

In regards to the notions of shared jurisdiction and regional responsibility, the inquiry builds on the American Convention doctrines, but enhances human rights protections through acknowledgment that environmental damage can, and often is, a result of an interrelated and cooperative project among several States. As such, for the State who is directly responsible for the acts or whose authority ultimately leads to the violation of an individual's rights, the obligation as listed above is clearly breached and the State maintains responsibility. The shared responsibility triggers in instances where multiple States are responsible, through their individual actions, in causing the violation of the rights at issue. Though ultimately a fact-specific inquiry similar to the European system jurisprudence indicates, determination of joint responsibility or establishment of a regional protection system presents a situation in which multiple states will be responsible for the violation of a particular right. For joint responsibility, the inquiry depends on a causal link between each State and the right affected –if the State can be fairly determined to be a proximate cause of the right infringed, the State has breached its obligation regardless of whether another State similarly can be accountable for the same breach.

A regional protection-based system, on the other hand, re-emphasizes each member State's commitment to its obligations and duties to uphold and protect the rights and extend responsibility within the region within the capabilities and powers of the State. Within this doctrine, by establishment of regional treaties such as the Cartagena Convention or the American Convention, States agree to obligate themselves to uphold and protect rights within the entire region based on a willingness to collaborate and cooperate. As a result, within this regional system, the duty to collaborate and cooperate create a responsibility on every member State to uphold rights within the region, and failure to do so within the powers of each State may result in responsibility. In regards to the environmental treaty, such as the Cartagena Convention, creation of a functional Convention Area places an affirmative duty on each State within the region to uphold the rights listed therein to the best of its abilities, and failure to do so causes any person within the region whose rights become affected to be "subject to" the State's jurisdiction.

This last Doctrine provides for competing interests, but caution should be taken in developing such a theory. On the one hand, an individual's rights are protected and ensured through an increased level of accountability among the States in the region. On the other hand, States are opened to significantly more liability and responsibility. To best balance these competing interests, a regional responsibility system that takes a rights-centered approach is suggested. Under this approach, an ideal framework identifies responsibility through the viewpoint of an individual's violated rights, then identifies the States who have violated the rights, and States or parties who contributed to or failed to prevent the violation within the region, after having agreed to do so through the establishment of a convention or functional region, obtain responsibility.

There may exist a point in which environmental damage is caused by the failure of the regional protection system as a whole, whereby each individual State in the region may obtain responsibility for failure to prevent the damage in a systematic, collaborative approach. The fallback of this proposition, however, is that States may utilize the "regional protection" as justification to extend its sovereignty and assert powers into the territory of other States or individuals, under the guise of regional protection. As such, the regional responsibility and

protection system should be a backward-looking justification to hold States responsible, and not as a forward-thinking justification for States to expand or extend sovereignty.

Regardless of the doctrine, it is clear that under the American Convention and OAS Charter, an individual who is harmed by State action within an environmentally-protected region is considered “subject to that State’s jurisdiction” and the State is ultimately responsible to ensure and protect that right. This is strengthened by principles found in the European system and UN Guiding Principles, indicating a trend toward customary international law for extraterritorial obligations of a State in particular instances.

## **SECTION II: OBLIGATIONS TO PROTECT THE ENVIRONMENT & CONDUCT ENVIRONMENTAL IMPACT ASSESSMENTS**

The Republic of Columbia has requested an advisory opinion regarding the interpretation and application of the Pact of San José and OAS Charter in light of the present environmental risks to the marine environment posed by the construction and operation of major new infrastructure projects in the Wider Caribbean Region.

Under Article 4(1) and 5(1) of the Pact of San José, party States have an obligation to respect and ensure the right to life and right to integrity, which require the right to a healthy environment for the full exercise and enjoyment of the enshrined rights in the treaty. The Pact of San José and OAS Charter together require party States and transnational enterprises and investments to ensure the protection of the environment. Accordingly, conducting an environmental impact assessment (or environmental & social impact assessments) is one of the specific measures that is used to ensure compliance with the Pact of San José and OAS Charter. An environmental impact assessment is a regulatory mechanism to determine and evaluate the adverse impacts of a proposed project on the environment and wellbeing of the surrounding communities. Party states’ obligations under the Pact of San José and OAS Charter indicate a duty to conduct environmental impact assessments in the planning stage of proposals to ensure the project is feasible and takes into account the risks and alternatives.

This Section will begin with a review of the interpretation criteria the Court would employ in its understanding of the Pact of San José and OAS Charter before reviewing the current situation in the Republic of Columbia and Wider Caribbean Region, which has given rise to this advisory opinion request. Then, this Section will discuss Articles 4(1) and 5(1) of the Pact of San José in connection to the environment and present an argument that environmental impact assessments are necessary under the Pact of San José and OAS Charter to ensure the safety, health, and future of the environment.

### **A. Interpretation Criteria**

The Inter-American Court is required to interpret the Pact of San José and OAS Charter (and any other treaties under its jurisdiction) in accordance with both treaty-based and customary international law. In its advisory function, the Court will provide judicial interpretation of Article

4(1) and Article 5(1) of the Pact and any other provisions and treaties relating to the protection of human rights and relevant to the marine environment of the Wider Caribbean Region.

Article 31 of the Vienna Convention on the Law of Treaties provides the general rules of interpretation for treaties and customary law and is a guiding instrument for the interpretation criteria the Court will use in its advisory opinion. Article 31 of the Vienna Convention requires the Court interpret a treaty in accordance with the ordinary meaning, context, and history of the treaty.<sup>34</sup> The Pact of San José itself provides specific standards of interpretation the Court will utilize in interpreting and applying its provisions. In particular, Article 29 expressly requires the *pro persona* principle, which mandates that no provision of the Pact may be interpreted as restricting the exercise or enjoyment of the rights and freedoms provided therein and accepted by party States.<sup>35</sup>

## **B. Current Status of the Marine Environment in the Wider Caribbean Region**

Part of the Republic of Columbia's population inhabits islands that form part of the Archipelago of San Andres, Providencia, and Santa Catalina, and depends on the marine environment for its life and wellbeing. In particular, the island inhabitants depend on the marine environment of the Wider Caribbean Region for its economic, social, and cultural survival and continual development.

The Wider Caribbean Region consists of the marine environment “of the Gulf of Mexico, the Caribbean Sea and the areas of the Atlantic Ocean adjacent thereto, south of 30 degree north latitude and within 200 nautical miles of the Atlantic coasts of the States referred to in Article 25 of the Convention.”<sup>36</sup> The Wider Caribbean Region is considered the heart of Atlantic biodiversity and provides the resources necessary to sustain the way of life for the coastal populations surrounding it.<sup>37</sup>

The living resources of the Wider Caribbean Region are the main source of sustenance and economic survival for the inhabitants of the coastal islands. Fishing plays a crucial role to the food and economic security of the Caribbean Region. Not only do the fish bring a vital source of animal protein and minerals to the diet of the region, particularly to the most vulnerable and poor communities of the region, but it also constitutes a significant source of trade to the region.<sup>38</sup>

<sup>34</sup> Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331.

<sup>35</sup> Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, Article 29, which states “No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein.”

<sup>36</sup> Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, “Cartagena Convention,” Mar. 24, 1983, 1506 U.N.T.S 157, Article 2(1).

<sup>37</sup> See A.E., S. Keel et al., BIODIVERSITY CONSERVATION ASSESSMENT OF THE INSULAR CARIBBEAN USING THE CARIBBEAN DECISION SUPPORT SYSTEM, The Nature Conservancy (2007).

<sup>38</sup> Inter-Am. Ct. H.R., Request for advisory opinion concerning the interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights, Mar. 2016, ¶ 22.

The corals, mangroves, and seagrass beds of the Wider Caribbean Region form one large interdependent marine ecosystem. Therefore, degradation of one type of habitat can have severe impact on the health of the other habitats. For example, damage to seagrass beds can speed up erosion of beaches, reducing the appeal to tourist resorts and thereby threatening the economic stability of islands largely dependent on tourism for its income.<sup>39</sup> Already, a large percentage of the marine habitats of the Wider Caribbean Region have been lost, while another significant portion show signs of damage and are at risk of irreparable damage.<sup>40</sup>

In light of the interconnected fragility of the ecosystem and marine life of the Wider Caribbean Region, further environmental damage could be severe, irreparable, and have a domino effect upon the surround marine life and habitats. The Republic of Columbia is concerned for its people and the future of the Wider Caribbean Region. In particular, the following activities are of great concern and pose significant risks to the health of the marine environment and its surrounding coastal inhabitants: petroleum exploration and exploitation, maritime transportation of hydrocarbons, port construction and maintenance, and the construction, maintenance and expansion of shipping canals.<sup>41</sup>

### **C. Article 4(1): Right to Life in Relation to the Environment**

Article 4(1) of the Pact of San José mandates: “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.” Though the right to life under Article 4(1) does not provide an explicit provision protecting the right to life in relation to the environment, the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights have both recognized the intrinsic and intertwined relationship of the right to life and the environment.

In 1997, the Commission recognized the connection between the right to life and the environment: “The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one’s physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are infringed.”<sup>42</sup> In effect, the right to a healthy environment functions as a prerequisite to the enjoyment and exercise of the right to life. Understanding the relevance of a healthy environment to the enjoyment and exercise of the right to life, the Commission clarified that States have the obligation to take any reasonable measures to prevent cases of “serious environmental pollution” that could threaten the life and health of individuals.<sup>43</sup>

<sup>39</sup> *Id.* at ¶ 33-34.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at ¶ 28.

<sup>42</sup> Inter-Am. Comm’n H.R., *Rep. of the situation of human rights in Ecuador*, OEA/Ser.L/V/11.96 Doc. 10 rev. 1, Chapter VIII, § 2 (Apr. 24. 1997).

<sup>43</sup> Inter-Am. Comm’n H.R., *Rep. of the situation of human rights in Ecuador*, OEA/Ser.L/V/11.96 Doc. 10 rev. 1, Chapter VIII, § 2 (Apr. 24. 1997).

As recent as 2012, the Commission affirmed the necessity of a healthy environment to the right to life when it found the Republic of Panama violated the right to life when its dam, which was constructed in the mid-1970s, flooded the ancestral territory of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano.<sup>44</sup> In its report, the Commission declared the following:

*“There is a direct relationship between the physical environment in which persons live and the rights to life, security, and physical integrity. . . . The IACHR considers that the States have the duty to adopt measures to prevent harm to the environment in indigenous and tribal territories and to adopt the measures necessary to protect the habitat of the indigenous communities . . . In adopting these measures, as the IACHR has pointed out, the states should place “special emphasis on protecting the forests and waters, which are fundamental for their health and survival as communities.”<sup>45</sup>*

The coastal inhabitants of the Wider Caribbean Region are analogous to and consist of indigenous communities, which are heavily dependent upon their natural resources for not only their survival, but also their cultural heritage that is deeply entwined with the land and sea.<sup>46</sup> Accordingly, it is crucial that surrounding party States protect and ensure the right to life under Article 4(1) by taking measures to prevent further environmental harm to their marine environment and protect the coastal islands and its inhabitants.

#### **D. Article 5(1): Right to Integrity in Relation to the Environment**

Article 5(1) of the Pact of San José mandates: “Every person has the right to have his physical, mental, and moral integrity respected.” The right to personal integrity is closely related to the right to life in that it seeks to protect basic tenets of human life: the physical, mental and moral integrities of human life. The right to integrity focuses more on the overall wellbeing and enjoyment of one’s life, rather than the survival of life, capturing the rights and necessities that provide meaning to life, such as health, emotional and intellectual wellbeing, and freedom to live life according to one’s convictions. The right to integrity is therefore often connected to many fundamental rights such as the right to life, health, property, and security.

The Commission has referred to the right to integrity as the foundation to the fundamental rights enshrined in international law and customs. In its report on human rights in Ecuador, the Commission stated:

“Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness,

<sup>44</sup> *Kuna of Madungandí and Emberá of Bayano Indigenous Peoples and Their Members v. Panama*, Case 12.354, Inter-Am. Comm’n H.R., Report No. 125/12 (2010). See also *Yanomami v. Brazil*, Case 7615, Inter-Am. Comm’n H.R., Resolution No. 12/85 (Mar. 5, 1985), which found Brazil violated the right to life under Article 4(1) by constructing a highway and permitting mining in the Yanomami territory, which led to the spread of contagious diseases, armed conflict, death, environmental destruction, and displacement of the Yanomamis.

<sup>45</sup> *Id.* (emphasis added).

<sup>46</sup> Inter-Am. Ct. H.R., *supra* note 38 at ¶ 17. See also Section II(C) of this written comment.

impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.”<sup>47</sup>

Though it is an underlying principle to many fundamental rights, the right to integrity is itself a critical right: “the protection of natural resources and environmental integrity was ‘necessary to ensure certain basic rights, such as to life, dignity, personal integrity, health, property, privacy and information.’”<sup>48</sup> The right to integrity is connected to the environment because of the resources, security, and life it provides to its inhabitants. In particular, for indigenous and vulnerable communities, environmental security is critical to survival as it is often the main source of food and economic stability.<sup>49</sup>

### **E. State Obligation to Perform Environmental Impact Assessments**

Party States are obligated to prevent further environmental harm both in its territory and in the territory of its neighbors.<sup>50</sup> This obligation stems from party States’ duty to protect the right to life and right to integrity, both of which require a healthy environment, under the Pact of San José. To fulfill its obligations, States have the duty to protect the environment through measures designed to prevent harm to the environment and protect and preserve the environment.

It is now a “principle of general international law” that States must integrate “appropriate environmental measures in the design and implementation of economic development activities [...] where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm.”<sup>51</sup> As mentioned in Section I, party States have a duty to protect the environment under the Pact of San José (and other relevant treaties) not only in its own jurisdiction, but also across its borders, wherever it may be at risk. The OAS Charter further affirms the commitment by party States to collaborate together and unify in protecting fundamental rights, including the health of the environment.<sup>52</sup>

#### *a. The Origins of the Environmental Impact Assessment*

The international community has imposed specific measures, specifically environmental impact assessments (hereinafter “EIA”), which States must complete to fulfill their treaty obligations to the environment. In 2015, the International Court of Justice determined that “to fulfill its obligation to exercise due diligence in preventing significant trans-boundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, *ascertain if there is a risk of significant*

<sup>47</sup> Inter-Am. Comm’n H.R., *supra* note 42.

<sup>48</sup> Inter-Am. Comm’n H.R., *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American human rights system*, OEA/Ser.L/V/II, Doc. 56/09 (Dec. 30, 2009), ¶ 194.

<sup>49</sup> Inter-Am. Ct. H.R., *supra* note 38 at ¶ 17. *See also* Section II(C) of this written comment.

<sup>50</sup> *See* Section I of this written comment, regarding extra-territorial obligations.

<sup>51</sup> Award in the Arbitration regarding the *Iron Rhine* (“Ijzeren Rijn”) between the Kingdom of Belgium and the Kingdom of the Netherlands, decision of May 24, 2005, UN Reports of International Arbitral Awards, Vol. XXVII, ¶ 59.

<sup>52</sup> *See* Section I(A)(2) of this written comment, regarding the OAS Charter & extra-territorial obligations.

*trans-boundary harm which would trigger the requirement to carry out an environmental impact assessment.”*<sup>53</sup>

The framework and concept of environmental impact assessments first emerged as a regulatory tool under the National Environmental Policy Act (NEPA) in the United States of America.<sup>54</sup> Within a couple years, countries across the world adopted the tool; today, over 150 countries have domestic EIA legislation.<sup>55</sup> The use of EIAs is so widely recognized and enforced that it is considered a “fundamental principle of international law.”<sup>56</sup> The EIA is designed to achieve two goals: (1) ensure that possible impacts – both environmental and social/cultural – of a proposed project are identified and analyzed before a decision or approval is made and (2) inform the public about the proposal and to invite public input and participation on the project’s future.<sup>57</sup>

Though an EIA is not explicitly required until after a risk of significant trans-boundary environmental harm has been recognized, it is most effective at an early stage, where the extent, nature, and location of the proposed project can be best assessed for its impact on the environment.<sup>58</sup> Furthermore, the obligations under the Pact of San José and OAS Charter provide strong support and evidence that EIAs are required in the actual assessment of the risks of trans-boundary harm.

#### *b. Obligations under the OAS Charter*

As discussed above, the rights enshrined in the Pact of San José require party States to protect the environment, both in its jurisdiction and extra-territorially. The OAS Charter further supports these obligations. Under Article 45(a) of the OAS Charter, the member States “agree to dedicate every effort to the application of the following principles” that “[a]ll human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security.” This Article reaffirms and broadens the protected rights recognized in the Pact of San José; specifically, the right to “well-being” and to “liberty, dignity, equality of opportunity, and economic security” closely align with Articles 4 and 5 of the Pact of San José.<sup>59</sup> Accordingly, under the OAS Charter, party States must protect and ensure a healthy environment to sufficiently fulfill its obligations under Article 45(a).

<sup>53</sup> *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, 2015 I.C.J., ¶ 104 (Dec. 16) (emphasis added).

<sup>54</sup> Carmen Gonzalez, *Environmental Impact Assessment in Post-Colonial Societies: Reflections on the Proposed Expansion of the Panama Canal*, 4.2 TENN. J. L. & POL’Y 303 (2009), <http://digitalcommons.law.seattleu.edu/faculty/155>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Organization of American States, Charter of the Organisation of American States, art. 45(a), Apr. 30, 1948, 119 U.N.T.S. 3.

Furthermore, under Article 35 of the OAS Charter, the “Member States should refrain from practicing policies and adopting actions or measures that have serious adverse effects on the development of other Member States.” Party States must refrain from taking action that is or will be seriously adverse to the development of other member States, meaning if there is substantial risk of environmental harm such that it can severely and detrimentally impact another State, the acting State must refrain from such activity.<sup>60</sup> Precisely because the environmental harm is unknown until it is too late, it is critical that party States proactively engage in assessing the risks to prevent environmental harm (and consequently, harm to individuals) that can adversely impact another State. An EIA is a suitable and proper requirement to fulfill party State’s obligations, as it is a preemptive tool used to assess and understand the environmental risks associated with a proposed course of action. In completing an EIA early on, the party State will be able to identify the environmental risks early so that resources are not wasted on a project that is identified as too risky to continue and neighboring States are assured of the accuracy and reliability of the assessment as EIAs are carried out in accordance with specific standards. Aware of the necessity of EIAs, many countries have incorporated EIAs into its legal framework, including many countries in Latin America.<sup>61</sup>

The OAS Charter does not only apply to party States, however. The obligations under the OAS Charter extend to “transnational enterprises and foreign private investment” as well.<sup>62</sup> Under Article 36 of the OAS Charter, transnational enterprises and foreign private investments “shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and to the international treaties and agreements to which said countries are parties, and should conform to the development policies of the recipient countries.”<sup>63</sup> This Article ensures that the rights ensured by the States are also ensured by foreign businesses that could otherwise escape jurisdiction and responsibility. Similar to party States, these enterprises and businesses must assess the environmental risks before undertaking a trans-boundary project, including conducting an EIA.

### *c. Procedures & Elements of an Environmental Impact Assessment*

The Inter-American Court of Human Rights has specified that an EIA be “carried out in accordance with the relevant international standards and best practice,” which should include:

- (1) Potential national and trans-boundary impacts of the respective project;
- (2) Evaluation of possible alternative, when possible, and;
- (3) Evaluation of potential measures of prevention and/or mitigation of environmental damage in the protected region.<sup>64</sup>

<sup>60</sup> Organization of American States, Charter of the Organisation of American States, art. 35, Apr. 30, 1948, 119 U.N.T.S. 3.

<sup>61</sup> See Acerbi Marcelo, Environmental Impact Assessment Systems in Latin America and the Caribbean.

<sup>62</sup> Organization of American States, Charter of the Organisation of American States, art. 36, Apr. 30, 1948, 119 U.N.T.S. 3.

<sup>63</sup> *Id.*

<sup>64</sup> Case of the *Saramaka People v. Suriname*, Interpretation of the judgment on preliminary objections, merits, reparations and costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 41 (Aug. 12, 2008).

The Court has also required the EIA be made by “independent and technically capable entities, under the State’s supervision” to ensure the objective, impartial, and accurate assessment of the environment.<sup>65</sup> As mentioned, the EIA is intended to prevent environmental harm before such harm can even be instigated. The measure is preventative and preemptive in its nature and is therefore most effective when States comply and complete such an assessment before undertaking a large project.

Though the precise elements of an EIA can depend on the country, there is a common process that most countries follow in conducting EIAs.<sup>66</sup> First, the project is screened, meaning there is an initial review of the project to determine its scope and potential environmental impact; second, the project is scoped for the most significant potential impacts (and their alternatives) that must be addressed; third, the alternatives to the proposal are reviewed for their thoroughness, ensuring the country/company has properly considered alternatives by including locations, scale, processes, layouts, operating conditions, and a “no action” option in the event the project and its alternatives are all unfeasible; fourth, the EIA must include a description and development action of the proposal, including the purpose and rationale for the project, stages of development, processes, and operations; fifth, it must include an environmental baseline, which looks at the present and future status of the environment if the proposal does not happen and if it does, taking into account natural and man-made consequences; sixth, it must include all expected impacts of the project; seventh, it must identify and explain the expected impacts by comparing the state of the environment with the proposal taking place and without; eighth, it must make an evaluation and assessment of the significance of each impact to prioritize and identify the most concerning impacts; ninth, it must include mitigation procedures such avoidance, reduction, remedies, and compensation for the significant adverse impacts; tenth, it must allow public consultation and participation to ensure the public is adequately aware and involved in the proposal; eleventh, it must provide an Environmental Impact Statement, which is a detailed report and plan for the management and monitoring of the impacts both during and after implementation; twelfth, it must go through the review and decision-making process, and if the proposal is authorized to proceed, it must participate in post-decision reporting and auditing, which look to record and review the project as it progresses, comparing actual outcomes with predicted outcomes and assessing the effectiveness of the mitigation procedures.<sup>67</sup> Ideally, the EIA will also include positive environmental impacts that can be predicted and countries/enterprises should strive to structure their projects to best suit and even enhance the state and protection of the environment.

The International Finance Corporation (“IFC”) has also published guidelines and standards for all investments and advisor clients whose projects go through IFC’s initial credit review process after January 1, 2012 to counter the adverse impacts a project can have on the environment.<sup>68</sup> In addition, the World Bank published its Environmental, Health & Safety

<sup>65</sup> *Id.*

<sup>66</sup> John Glasson et al., INTRODUCTION TO ENVIRONMENTAL IMPACT ASSESSMENT, 5 (4<sup>th</sup> ed. 2012). *See also* EUROPEAN COMMISSION, GUIDANCE ON EIA: EIS REVIEW (2001), <http://ec.europa.eu/environment/archives/eia/eia-guidelines/g-review-full-text.pdf>.

<sup>67</sup> *Id.*

<sup>68</sup> *See* INTERNATIONAL FINANCE CORPORATION, PERFORMANCE STANDARDS ON ENVIRONMENTAL & SOCIAL SUSTAINABILITY (2012). *See also* INTERNATIONAL FINANCE CORPORATION, GUIDANCE NOTES: PERFORMANCE STANDARDS ON ENVIRONMENTAL & SOCIAL SUSTAINABILITY (2012).

guidelines (hereinafter “EHS Guidelines”), which are periodically updated.<sup>69</sup> The EHS Guidelines contain performance levels and measures that are acceptable to the IFC; when a country’s regulations differ from the EHS Guidelines, projects will be required to conform to the more stringent standards to satisfy the IFC.<sup>70</sup> Recently, Mongolia voluntarily adopted IFC standards for mining projects, creating management plans for protected areas adjacent to the mine sites.<sup>71</sup> In its Executive Summary of its Environmental and Social Impacts Assessment, the HKND Group, which is funding the Nicaragua Canal, also indicates various IFC Performance Standards and EHS Guidelines it has used and considered in determining the risks and adverse impacts the canal will have on the environment.<sup>72</sup> Though, unlike with the Nicaragua Canal, which began construction before the completion of its ESIA, these assessments and guidelines should be analyzed in the planning stage, before any work has commenced.<sup>73</sup> This is particularly relevant given the recent panel review that determined the ESIA did not meet the international standards it used as essential information was lacking and there was inadequate assessment of the natural hazards of the project, resulting a recommendation to suspend the project until an appropriate ESIA was completed.<sup>74</sup> As mentioned, these various regulations and guidelines are most effective when they are completed in the preliminary stages of a project.

*d. Additional Requirements for Projects Impacting Indigenous Communities*

In the key case where the Inter-American Court of Human Rights identified the procedures and steps States had to take to sufficiently conduct an EIA, the Court addressed the specific requirements necessary when a proposed project impacts indigenous and tribal peoples. Specifically, the Court identified that the State must fulfill the following requirements:

- (1) It must ensure the effective participation of the indigenous community, in accordance with their customs and traditions, with regard to any development, investment, exploration or extraction plans implemented within their territory;
- (2) It must ensure that the indigenous community receives a reasonable benefit from the project implemented within their territory;

<sup>69</sup> See WORLD BANK, ENVIRONMENTAL, HEALTH & SAFETY GUIDELINES, [www.ifc.org/ehsguidelines](http://www.ifc.org/ehsguidelines).

<sup>70</sup> *Id.*

<sup>71</sup> See THE BIODIVERSITY CONSULTANCY LTD AND FAUNA & FLORA INTERNATIONAL, BIODIVERSITY OFFSETS STRATEGY FOR THE OYU TOLGOI PROJECT (2012).

<sup>72</sup> See HKND GROUP, *Canal de Nicaragua: Environmental and Social Impacts Assessment Executive Summary* (2015), [http://hknd-group.com/upload/pdf/20150924/en\\_summary/Executive%20Summary%20of%20Environmental%20and%20Social%20Impact%20Assessment%20\(ESIA\).pdf](http://hknd-group.com/upload/pdf/20150924/en_summary/Executive%20Summary%20of%20Environmental%20and%20Social%20Impact%20Assessment%20(ESIA).pdf).

<sup>73</sup> See Chris Kraul, *Nicaragua Canal: A Giant Project with Huge Environmental Costs*, YALE ENVIRONMENT 360 (MAY 5, 2015), [http://e360.yale.edu/feature/nicaragua\\_canal\\_a\\_giant\\_project\\_with\\_huge\\_environmental\\_costs/2871/](http://e360.yale.edu/feature/nicaragua_canal_a_giant_project_with_huge_environmental_costs/2871/).

<sup>74</sup> See Jorge A. Huete-Pérez et al., *Critical Uncertainties and Gaps in the Environmental- and Social-Impact Assessment of the Proposed Interoceanic Canal through Nicaragua*, BIOSCIENCE (June 2, 2016), <http://bioscience.oxfordjournals.org/content/early/2016/06/01/biosci.biw064.full.pdf>.

- (3) It must ensure that no concession will be granted within the indigenous community's territory until independent and technically-qualified entities, under the State's supervision, have conducted a prior social<sup>75</sup> and environmental impact assessment.<sup>76</sup>

In identifying the above three guarantees to indigenous and tribal peoples, the Court recognized the particular vulnerability indigenous communities face when their rights are at risk.<sup>77</sup> These guarantees are intended to preserve and protect the indigenous community's culture and connection with its territory, which, in turn, ensures their survival.<sup>78</sup>

Therefore, the EIAs should be of a "social and environmental character" that "must go further than the strictly environmental impact studies normally required in order to evaluate and mitigate the possible negative impacts upon the natural environment."<sup>79</sup> The Court imposes the additional requirement that the EIA include consideration of "the direct or indirect impact[s] upon the ways of life of the indigenous peoples who depend on those territories and the resources present therein for their subsistence."<sup>80</sup>

## F. Case Study of the Panama Canal

The Panama Canal presents an interesting and relevant case study as it has a history of environmental struggles that continues to today. Much like with the early construction of the Nicaragua Canal, the recent expansion of the Panama Canal began before a proper EIA was conducted.<sup>81</sup> At the time of its original construction, the Panama Canal was a highly coveted infrastructure to the international community, as it would provide a more efficient route of travel for ships. Since its original completion in the early 1900s, the Panama Canal has saved billions

<sup>75</sup> Because indigenous communities have unique relationships and cultures that are often deeply entrenched in their land, social impact assessments and/or cultural impact assessments are necessary to evaluate the risks posed to indigenous communities' livelihoods, and thus their survival, to make an effective and comprehensive evaluation. See Akwé: Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place On, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities, <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf>.

<sup>76</sup> *Kalina and Lokono Peoples v. Suriname*, Case 198-07, Inter-Am. Ct. H.R., Report No. 76/07, OEA/Ser.L/V/II.130, Doc. 22, rev. 1 (2007) at ¶ 201.

<sup>77</sup> See *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 245, (June 27, 2012), which focuses on the right to consultation and participation by impacted indigenous communities. See also Derek Inman, *From the Global to the Local: The Development of Indigenous Peoples' Land Rights Internationally and in Southeast Asia*, ASIAN JOURNAL OF INTERNATIONAL LAW, 6 (2016), at 46-88.

<sup>78</sup> *Kalina and Lokono Peoples v. Suriname*, Case 198-07, Inter-Am. Ct. H.R., Report No. 76/07, OEA/Ser.L/V/II.130, Doc. 22, rev. 1 (2007) at ¶ 201.

<sup>79</sup> INTER-AM. COMM'N H.R., *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities* (2016), ¶ 214, <http://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf>.

<sup>80</sup> *Id.*

<sup>81</sup> See Matthew Parker, *Changing Course*, THE GUARDIAN (Feb. 28, 2007), <https://www.theguardian.com/environment/2007/feb/28/water.conservationandendangeredspecies>.

of US dollars in shipping costs.<sup>82</sup> However, such savings have had a steep price on the surrounding ecosystems:

“Mountains were moved, the land bridge between the north and south American continents was severed, and more than 150 square miles of jungle was submerged under a new manmade lake. To defeat deadly mosquitoes, hundreds of square miles of what we would now call ‘vital wetlands’ were drained and filled, and vast areas poisoned or smothered in thousands of gallons of crude oil.”<sup>83</sup>

Though there are various safeguards of regulations and standards imposed on States and companies, projects can and do succeed in becoming a reality despite their predicted and actual adverse impacts on the environment. The Panama Canal (and many other large infrastructure projects) serves as a reminder of why these regulations and requirements are necessary and why particular care and consideration must be given to the environment and indigenous communities as there is no method to return the environment to the way it once was before a project began or return the lives of those who are displaced and endangered because of the project.

### **G. General Recommendations**

Based on the foregoing, it is recommended that party States neighboring and inhabiting the coastal islands of the Wider Caribbean Region complete a preliminary assessment of the risks posed by its various projects in and impacting the Wider Caribbean Region. It is recommended that party States voluntarily complete an environmental impact assessment to determine the practicality and feasibility of its project(s) in light of the potential harm to the marine environment, which is so crucial to the right to life and right to integrity of the coastal inhabitants. It is further recommended that States include the coastal communities in its discussions, dispersing information regarding the projects and providing transparency in the foreseeable effects and risks of the projects. Lastly, it is recommended States work together to ensure their respective projects pose reduced risks of extra-territorial harm, and States are encouraged to plan and structure their projects with particular emphasis and aspirations to support and better the environment.

## **SECTION III: CONCLUSION**

Existing principles within the American Convention provide for extra-territorial obligations of States party to the treaties to respect and ensure the rights recognized therein regardless of jurisdiction when the States exercise authority or control over a particular individual or whose actions provide transnational effects that cause violations of another individual’s rights. These obligations extend regardless of the territorial boundaries an individual currently resides in. Further, under the OAS Charter and environmental treaties such as the

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* See also Hector M. Guzman et al., *Historical Decline in Coral Reef Growth after the Panama Canal*, AMBIO, Vol. 37, No. 5 (2008), at 342-346. See also Stanley Heckadon Moreno, *Impact of Development on the Panama Canal Environment*, JOURNAL OF INTER-AMERICAN STUDIES AND WORLD AFFAIRS, Vol. 35, No. 3, at 129-149.

Cartagena Convention, collective and shared responsibilities are established through regional areas and shared jurisdictions, enhancing the obligations of particular State parties. This principle has been established within the UN human rights protection systems, and is in line with jurisprudence of the Inter-American system recognizing the priority of individual's rights over procedural rigidity. As such, when a State action causes harm in an environmentally-protected region, the environment and individuals are "subject to that State's jurisdiction" and the State is obligated to respond, mitigate, ensure, and protect that right.

Under the American Convention and OAS Charter, States have an obligation to protect and ensure an environment that permits and promotes the full exercise of the right to life and right to integrity that is guaranteed to each person across jurisdictions. Environmental impact assessments are required regulatory mechanisms that States and/or transnational enterprises and investments must conduct before undertaking a substantial project that poses risks of adverse impact to the environment. An EIA is essential in the planning stages to reduce harm to the environment and conserve resources. When indigenous communities are likely to be impacted, particular consideration to the culture and needs of the indigenous communities is required to ensure their health and survival, which is often dependent on the health of their environment.