

Before the
INTER-AMERICAN COURT OF HUMAN RIGHTS

REQUEST FOR AN ADVISORY OPINION

Submitted by the Republic of Colombia
concerning the interpretation of Articles 1(1), 4(1) and 5(1) of the
American Convention on Human Rights

WRITTEN OBSERVATIONS OF LAW

Presented by the
GEORGETOWN LAW HUMAN RIGHTS INSTITUTE*

Pursuant to Article 73(3) of the Rules of Procedure

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List of Abbreviations

ACHR	American Convention on Human Rights
EEZ	Exclusive Economic Zone
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	United Nations International Law Commission
UDHR	Universal Declaration on Human Rights
UNCLOS	United Nations Convention on the Law of the Sea

I. PREFACE

The Human Rights Institute (HRI) is the focal point of human rights at Georgetown University Law Center. HRI's mission is to promote understanding of and respect for human rights and the practice of human rights law, while promoting Georgetown Law's global leadership in the field of International Human Rights Law.

To carry out its mission, HRI works closely with the broad range of human rights faculty and staff experts at the Law Center, as well as leaders in the global human rights movements, and manages programs and projects to generate and advance the research, writing and advocacy work of students, alumni and faculty.

II. INTRODUCTION AND SUMMARY

The Republic of Colombia's (hereinafter, 'Colombia') Request for an Advisory Opinion, dated March 14th, 2016 (hereinafter, 'Request'), seeks this Court's ruling on three interrelated questions. Although not reproduced *in extenso* here, Colombia's submission may be summarized as follows:

- (i) Whether under Article 1(1) of the *American Convention on Human Rights*¹ (hereinafter, 'ACHR'), a State Party's "*jurisdiction*" may extend to certain persons – thereby enabling such persons to have a potential remedy under the ACHR against the State Party – if such persons are resident outside the State Party, but suffer a human rights violation caused by environmental damage attributable to that State Party. Colombia's Request refers, specifically, to the position where the State causing the environmental harm resulting in a human rights violation, and the State(s) where the persons reside, are both (or all) parties to the *Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region*² (hereinafter, the 'Cartagena Convention'). ["Question 1"].
- (ii) Whether measures taken by a State Party to the ACHR – causing serious damage to the marine environment, which constitutes a way of life and an essential resource for the subsistence of inhabitants of the coasts and/or islands of another State Party – are compatible with Articles 4(1) and 5(1), ACHR; in short, whether transboundary harms caused by one State Party with effects in another State Party and in the wider marine environment of the Caribbean region, may be considered as bringing about a violation of these fundamental human rights. ["Question 2"].
- (iii) Whether Articles 4(1) and 5(1), ACHR entail an obligation on a State Party to the ACHR to respect international environmental law and whether one modality for complying with

¹ Adopted in San José, Republic of Costa Rica, on 22 November 1969 and entered into force on 18 July 1978.

² Adopted in Cartagena, Republic of Colombia, on 24 March 1983 and entered into force on 11 October 1986.

such obligation is the undertaking of environmental impact assessments for proposed actions or projects that could result in significant environmental harm, in co-operation with potentially affected States. [“Question 3”].

In summary, it is hereby respectfully submitted (with more detailed reasoning set out below) that:

- (1) *Jurisdiction* in Article 1(1), ACHR should be interpreted so as to embrace the persons referred to in Colombia’s Question 1; and, indeed, should be interpreted so as to embrace, at least presumptively, persons residing outside the State Party in question who suffer a human rights violation that is genuinely caused by a transboundary environmental harm attributable to the State Party. [“Question 1”].
- (2) Measures by a State Party to the ACHR causing damage to the marine environment in the wider Caribbean region (including in the waters and coasts of another State Party) violate Articles 4(1) and 5(1), ACHR where (i) the harm is significant enough to cause an effective infringement of the respective ACHR right; (ii) there is a causal link between the action or omission and the violation, and (iii) that action or omission is attributable to the State Party to the ACHR in question. [“Question 2”].
- (3) In circumstances falling within the ambit of Colombia’s Questions 1 and 2, the obligations under Articles 4(1) and 5(1), ACHR on the State Party that is the source of the transboundary harm *do* imply and embrace an obligation to comply with international environmental law. This includes an obligation to undertake an environmental impact assessment and to engage, in good faith, in meaningful consultations and negotiations with potentially affected States, in order to prevent or minimize the environmental harm and ensure that the threatened violation of Articles 4(1) and 5(1), ACHR does not occur. [“Question 3”].

QUESTION 1

III. MEANING AND SCOPE OF ‘JURISDICTION’ IN ARTICLE 1(1) OF THE ACHR

A. KEY PREMISES AND APPROACH

It is submitted that the correct approach to determining the meaning and scope of *jurisdiction* in Article 1(1) is necessarily founded on certain fundamental premises concerning the very nature of international human rights law –in particular, the ACHR– and its relationship to the wider fabric of public international law. Of critical importance are: (a) the nature of human rights, under, *inter alia*, the ACHR, as inherent rights enjoyed equally and without discrimination by *all* persons, solely by virtue of their humanity; (b) the fact that international human rights law is part of the wider fabric of public international law, not a field that is fragmented or isolated from general

international law; (c) the close link between the enjoyment of certain fundamental human rights and protection of the environment; and (d) the evolving consensus in international human rights law on extraterritorial obligations of States. These considerations are addressed, in turn, below.

(1) Human rights as inherent rights

The notion of human rights relies on a very basic premise: fundamental rights do not depend on any condition other than human personality for their existence. Every person is endowed with dignity and, therefore, entitled to the enjoyment of human rights without condition, limitation, or exclusion.

Specifically, in the Americas, human rights are proclaimed “*on the basis of the principles of equality and non-discrimination [and] [g]iven that individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction.*”³ The principle of equality and non-discrimination, enshrined in Articles 1(1) and 24, ACHR, as well as provided for in Article II of the *American Declaration of the Rights and Duties of Man*, reinforces the notion of enjoyment of rights by all individuals without distinction, and the corresponding duty of the State exercising jurisdiction to ensure so.

(2) International human rights law as a part of the wider fabric of public international law

International human rights law is not an isolated field, but rather an integral and important part of the general structure of public international law. It is, therefore, essential that international law – while containing various specialized fields – maintains its systemic nature. For that reason, it is submitted that this Court, as an authorized interpreter of the ACHR, is under a duty to ensure, so far as possible, coherence between the ACHR and wider international law.

It is a generally accepted principle of international law that when more than one international legal norm “*bear on a single issue*” or “*govern the same situation*” they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.⁴ Article 31, Section 3, paragraph (c), of the *Vienna Convention on the Law of Treaties*⁵ enshrines this ‘*Principle of*

³ IACHR, *Coard et al. v. United States*, Case 10.951, Report N° 109/99, September 29, 1999, para. 37.

⁴ See ILC, *Yearbook of the International Law Commission*, 2006, Vol. II, Part Two, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* at 4.

⁵ Adopted in Vienna, Republic of Austria, on 23 May 1969 and entered into force on 27 January 1980.

“*Article 31: General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Systemic Integration.⁶ The principle requires the interpreter of a treaty to take into account “any relevant rules of international law applicable in the relations between the parties”.⁷ Where a treaty functions in the context of other agreements in force, systemic integration requires the interpreter to consider, *inter alia*, that States Parties when entering into treaty obligations do not intend to act inconsistently with their prior international obligations in force.

Systemic integration is not to be understood as a *rule of conflict*.⁸ Consequently, an authorized interpreter’s due consideration of other relevant rules of international law *applicable* in the relations between the States Parties – as concurrent international obligations in force – does not suggest that a conflict exists (or may arise) between the two *norms* that govern and/or are applicable to the situation *sub examine*. This situation may be straightforwardly referred to as the scenario in which a State Party’s conduct produces a transboundary harm that significantly impairs the rights of individuals. In such circumstances, ‘*norms*’ from both the realms of international human rights law and international environmental law are *applicable* and/or *govern* the same situation.

There is, thus, a *relationship of interpretation*⁹ between one norm and the other. Both norms are *valid* and *applicable* to the circumstances *sub examine*, but they are not incompatible, so as to require a choice between them¹⁰ (the normative relationship, as referred, is not of *conflict*). Nevertheless, it is undeniable that one norm – States’ substantive and procedural duties with respect to prevention of transboundary environmental harms – assists in the interpretation of the other

2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. *There shall be taken into account, together with the context:*

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. *A special meaning shall be given to a term if it is established that the parties so intended.”*

⁶ See *supra* note 4 at 17.

⁷ *Id.*

⁸ That is, a rule that intends to address the situation in which various norms govern the same circumstances, but they are incompatible, so as to require a choice between them.

⁹ A norm may assist in the interpretation of another norm for example as an application, clarification, updating, or modification of the latter. In such situation, both norms are applied in conjunction. See *supra* note 4 at 2(1).

¹⁰ A “*relationship of conflict*” is presented where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them; the basic rules concerning the resolution of normative conflicts are to be found in the *Vienna Convention on the Law of Treaties*. See *supra* note 4 at 2(2).

– States’ duties to respect, ensure and protect the right to life and to personal integrity under Articles 1(1), 4(1) and 5(1), ACHR. As a result, both norms are to be applied in conjunction.¹¹

It is the task of this Court to interpret the ACHR as the primary regional treaty in force in the realm of international human rights law within the geographic area referred to by Colombia’s Request. Other multilateral treaties of global¹² (non-regional) nature are, consequently, not subject to the Court’s interpretation on this particular occasion. It is undisputed that some of these international instruments share a common object and purpose. Their drafting processes, however, were subject to different considerations and a product of diverse social contexts. These circumstances have an impact on the extent of the scope of their provisions.

(3) The close link between the enjoyment of certain fundamental human rights and environmental protection

Because international environmental law serves objectives which promote the survival of individuals and their communities – and the habitability and viability of the surroundings and ecology in which they live – it will often be the case that international environmental law and international human rights law are closely intertwined. This is no less true of the ACHR than of any other international human rights instrument. This Court has pointed out the existing “undeniable link between the protection of the environment and the enjoyment of other human rights.”¹³ The Inter-American Commission on Human Rights (hereinafter, ‘IACHR’) has underscored the direct impact that environmental degradation can pose to the right to life, as well as to the right to security and physical integrity.¹⁴

Other regional human rights systems have also acknowledged that environmental harms can trigger a human rights violation. The European Court of Human Rights, *exempli gratia*, has concluded

¹¹ As submitted, this Court’s duty (pursuant to Article 64, ACHR, as well as Colombia’s Request) is restricted to the interpretation of the relevant clauses of the ACHR (an exercise that should be performed in light of the international environmental law norms referred to below, for the purposes of clarifying the content of the rights to life and humane treatment in the event of an occurrence of threat of a transboundary harm). Nevertheless, this does not mean or suggest that the Court is tasked to interpret the specific provisions enshrined in the previously mentioned international environmental law instruments.

¹² The term “global” is deemed as more appropriate and specific than the locution “universal”.

¹³ I/A Court H. R., Case of Luna López v. Honduras. Merits, Reparations and Costs. Judgment of October 10, 2013. Series C No. 269 at para. 123. I/A Court H.R., Case of Kawas Fernández v. Honduras. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196 at para. 148.

¹⁴ IACHR, Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources, OEA/Ser.L/V/II., Doc. 56/09, 30 December 2009 at para. 190. Also, the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (“San Salvador Protocol”), Article 11, imposes on States the duty to promote, preserve, and protect the environment. Colombia’s Request does not refer to that State duty, nonetheless, the right to a healthy environment, while not justiciable by itself, can be found to have the said “*relationship of interpretation*” to Articles 4(1) and 5(1), ACHR.

that the enjoyment of one's home can be impaired by environmental pollution, affecting the rights to private and family life.¹⁵ Furthermore, as discussed in more detail below, the United Nations Independent Expert (subsequently appointed Special Rapporteur) on human rights and the environment, Professor John Knox, has provided a systematic study, consisting of a wide-ranging Mapping Report, supported by fourteen more detailed reports on particular human rights instruments, that supports the conclusion that “*environmental degradation can and does adversely affect the enjoyment of a broad range of human rights.*”¹⁶ Rights that are threatened by environmental damage include the right to life, to mental and physical health, to adequate standards of living, to food, and to water, in addition to the right to a healthy environment in itself.¹⁷

Thus, the starting point for analysis of Colombia's Request is the context of widespread recognition in the international society of the fact that environmental harms can – and do – affect fundamental human rights, including those provided in Articles 4 and 5, ACHR.

(4) The increasingly coherent and systematic recognition of extraterritorial obligations

There are sound reasons, rooted in established human rights jurisprudence, for interpreting *jurisdiction* in Article 1(1), ACHR as including the applicability of States Parties' obligations to extraterritorial harms.

It is submitted (as set out in more detail below) that the extraterritorial dimension to a State's *jurisdiction* under the ACHR and other international human rights instruments is not an innovation. It is, rather, a necessary elaboration of the original text of the treaty in the light of (a) the ordinary meaning of its words in their context, (b) the ACHR's object and purpose, and (c) the reality of today's highly interdependent world.¹⁸ That said, it is undeniable that the last ten to fifteen years

¹⁵ López Ostra v. Spain, 16798/90, Council of Europe: European Court of Human Rights, 9 December, 1994 at para. 51.

¹⁶ Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox (Mapping Report); A/HRC/25/53; 30, December, 2013; para. 17. Professor Knox was the Independent Expert on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment when he filed the mapping report. His mandate was further extended in March 2015, but as a Special Rapporteur. For avoidance of confusion, he will be herein referred as the Independent Expert, and not as Special Rapporteur.

¹⁷ *Id.*, at paras. 18-22.

¹⁸ As a matter of principle, it is undisputed that any “*true interpretation*” of a treaty in international law will have to take into account “*all aspects of the agreement, from the words employed to the intention of the parties and the aims of the particular document*”, as “*placing undue emphasis on the text, without regard to what the parties intended; or on what the parties are believed to have intended, regardless of the text; or on the perceived object and purpose in order to make the treaty more ‘effective’, irrespective of the intentions of the parties, is unlikely to produce a satisfactory result*”. See, *inter alia*, Malcom N. Shaw, INTERNATIONAL LAW (Cambridge University), 2008 at 933; Anthony Aust, HANDBOOK OF INTERNATIONAL LAW (Cambridge University), 2005 at 89 (discussing Article 31 of the Vienna Convention on the Law of Treaties).

have seen a more *coherent* and *systematic* attempt than ever before to articulate the legal principles applicable to the field of extraterritorial human rights obligations.

The landmark in this process of articulation of extraterritorial State obligations is the *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, 2011 (hereinafter, ‘the Maastricht Principles’). The Maastricht Principles were formulated under the auspices of the International Commission of Jurists, by some forty distinguished practitioners of human rights law (including the United Nations Special Rapporteur on the right to water and sanitation and the former United Nations Special Rapporteur on the right to adequate housing). As such, they are, undoubtedly, the work of *publicists* within the meaning of Article 38, Section (d) of the *Statute of the International Court of Justice*¹⁹. Their wide and distinguished authorship gives them considerable weight as regards the interpretation of the *International Covenant on Social, Economic and Cultural Rights*²⁰ (hereinafter, ‘ICESCR’) and other human rights instruments. The Maastricht Principles are, of course, not binding in the manner of an international convention; nor do they purport to lay down any new legal norms. Rather, their purpose is to draw out and clarify States’ obligations under existing international human rights instruments. The Maastricht Principles were drafted with specific reference to the ICESCR²¹, but it is submitted that their reasoning applies identically where civil and political rights, such as the rights to life and integrity in Articles 4 and 5, ACHR, are in jeopardy, because of the relationship

¹⁹ It is widely acknowledged that Article 38 is a definitive statement of the sources of international law. The *Statute of the International Court of Justice* is an integral part of the United Nations Charter, in accordance with Article 92 of the latter international instrument, which – in turn – prevails over any other treaty.

²⁰ Adopted in New York City, United States of America, on 16 December 1966 and entered into force on 3 January 1976.

²¹ With regards to the ICESCR, it is also worth recalling the UN ESCR Committee’s General Comment No. 15 (2002) on the human right to water. As with the Maastricht Principles, General Comment No. 15 does not have the status of an international convention, but it is nonetheless an authoritative document with a distinguished authorship. Although the ICESCR contains no provisions making specific reference to water or to extraterritorial obligations, the ESCR Committee was unhesitatingly of the view that, as a matter of *lex lata*, States are under an obligation to respect the right to water in other countries, by co-operation and by refraining from taking action which would undermine the enjoyment of the human right to water in other countries: “*To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party’s jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.*” (UN ESCR Committee, General Comment No. 15 (E/C.12/2002/11), paragraph 31.) The right to water and its extraterritorial dimension should not be regarded as an innovation, as it is in fact firmly rooted in the text of the ICESCR and in its object and purpose. Given that (a) the enjoyment of economic, social and cultural rights – and indeed the enjoyment of the right to life itself – is dependent on an adequate supply of water, (b) the great majority of States including most developing countries are situated in an internationally shared drainage basin and face cross-border challenges to ensuring an adequate water supply for their population, it is simply inevitable that protection and realization of the rights listed in the ICESCR’s text requires both recognition of the right to water and a framework for international co-operation to resolve water allocation and scarcity.

of interdependence, indivisibility and non-subordination that intertwines all human rights, regardless of their classification as ‘civil and political’, or ‘economic, social or cultural’.²²

Of particular relevance to Colombia’s Request is Maastricht Principle 9, which defines the extent and jurisdictional scope of a State’s human rights obligations as follows:

“9. Scope of jurisdiction

A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following: a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law; b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory; c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law”.²³

Also of relevance is Maastricht Principle 21, which states:

“21. Indirect interference

States must refrain from any conduct which: a) impairs the ability of another State or international organisation to comply with that State’s or that international organisation’s obligations as regards economic, social and cultural rights; or b) aids, assists, directs, controls or coerces another State or international organisation to breach that State’s or that international organisation’s obligations as regards economic, social and cultural rights, where the former States do so with knowledge of the circumstances of the act”.²⁴

The contemporary world is characterized by increasingly intense international economic activity with increasingly intense transboundary effects, some of which have severe consequences on individuals’ enjoyment of fundamental human rights. In these circumstances, it is readily apparent that the rights acknowledged by States in the *Universal Declaration of Human Rights* (hereinafter, ‘UDHR’) and the *American Declaration on the Rights and Duties of Man*, as well as agreed by them in the two global Covenants (and in major regional conventions such as the ACHR), cannot

²² 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, at para 172.

²³ Emphasis supplied.

²⁴ Emphasis supplied.

be protected and realized unless States are required to pay attention to the effects of their conduct upon the enjoyment of rights beyond their national territory, including through frameworks of international co-operation. To say this is not to introduce any actual innovation in the international law of human rights. It is merely to pay due attention to: (i) the existing rights and norms long ago acknowledged by States; (ii) the obligation on States to act in good faith to respect and realize those norms²⁵; and (iii) the need to make those rights effective in the circumstances that prevail in today's world.

The importance of extraterritorial obligations is also referred to in the recent and comprehensive study of the relationship of human rights law and the environment by the United Nations Independent Expert. It is notable that, in his Mapping Report, it is observed: “*There is no obvious reason why a State should not bear responsibility for actions that otherwise would violate its human rights obligations, merely because the harm was felt beyond its borders.*”²⁶ The study goes on to note that the question of extraterritorial obligations is complicated by the differing wordings of the various international human rights instruments, some of which do not contain any provisions as to their jurisdictional scope, and others (such as the ACHR) which are said to apply to persons within the *jurisdiction*, but without precisely delineating what is meant by that term.²⁷

B. INTERPRETATION OF ARTICLE 1(1), ACHR

It is submitted that the correct interpretation of Article 1(1) is that the *jurisdiction* of a State Party embraces the persons referred to in Colombia's Question 1; and should be interpreted so as to embrace, at least presumptively, persons residing outside the State Party in question who suffer a

²⁵ It is generally recognized that good faith is an all-pervasive principle of international law. It is reflected in Article 26 of the *Vienna Convention of the Law of Treaties* (supra note 5) (providing that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”), and also in Article 2(2) of the *United Nations Charter* and Article 3(c) of the *Charter of the Organization of American States*. The ICJ in the *Nuclear Tests Cases* (ICJ Reports, 1974, p. 457) declared that: “*One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral obligation*”. *Id.*, at 473, para. 49. The principle of good faith is fully applicable within the Inter-American Human Rights System. See *Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Series C No. 219, at para. 177 (affirming that “*The Court deems it timely to recall that the obligation of a State to comply with international obligations voluntarily contracted corresponds to a basic principle of law of international responsibility of States, backed by international and national jurisprudence, according to which States must comply with their conventional international obligations in good faith (pacta sunt servanda)*”).

²⁶ Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox (Mapping Report); A/HRC/25/53; 30, December, 2013; at para. 63.

²⁷ *Id.*

human rights violation that is genuinely caused by a transboundary environmental harm attributable to the State Party. This reading is supported by:

- (1) The natural and ordinary meaning of the text itself;
- (2) The object and purpose of the ACHR;
- (3) The *travaux préparatoires* of the ACHR;
- (4) Coherence with the development of international human rights law generally (especially, in the areas of extraterritorial obligations and the environment), and the wider fabric of general international law.

These are addressed, in turn, below.

(1) Text of Article 1(1), ACHR

To begin with the text of the ACHR itself, it is worth noting that the drafting of Article 1(1), ACHR differs from that of Article 2(1) of the *International Covenant on Civil and Political Rights*²⁸ (hereinafter, “ICCPR”). Article 2(1) of the ICCPR reads as follows:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁹

By contrast, Article 1(1) of the ACHR provides:

“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.”³⁰

²⁸ Adopted in New York City, United States of America, on 16 December 1966 and entered into force on 23 March 1976.

²⁹ Emphasis supplied.

³⁰ Emphasis supplied.

Evidently, Article 1(1), ACHR does not include the term “*territory*” when referring to the conventional obligations of States Parties.

It might perhaps be argued that the text of the ICCPR is more restrictive than the ACHR with regards to the notion of territoriality; an argument which would rely on reading the “*and*” in the emphasized part of the quotation above as a cumulative requirement, when it could also be read as meaning the same as “[and] *all individuals [...] subject to its jurisdiction*”. However, such a restrictive interpretation of the ICCPR has been rejected. Notwithstanding the arguably narrower textual provision, the Human Rights Committee, as authorized interpreter of the ICCPR³¹ – despite the express presence of the notion of “*territory*” – has stated:

“It would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory”.³²

There is, therefore, all the more reason not to confine the State Parties’ obligations arising from the ACHR to the “*territory*” of the respective States Parties, especially given that the threshold of *jurisdiction*, by its very nature, refers to actions or omissions by (that is, to *conduct* on the part of) a State Party with effects or consequences not limited to the “*territory*” of the same State Party, as long as individuals entitled to the rights of the ACHR are affected by or impaired from enjoying such rights.

(2) Object and purpose of the ACHR

The scheme and purpose of the ACHR is not such as would permit national boundaries to become obstacles to the effective protection of fundamental rights. On the contrary, it envisages a *regional space* subject to a *common protective regime*.

The *American Declaration on the Rights and Duties of Man* and the UDHR are both global and comprehensive in character. Human rights, as articulated in these seminal documents, are not dependent on an individual’s nationality or place of abode. Equally, the two global Covenants, while including more detailed and specific provisions on the content of their enumerated rights, remain similarly internationalist in outlook and orientation. As already noted, by Article 2(1) of the ICESCR, the States Parties expressly “*undertake*” to act on the international plane through co-

³¹ The Human Rights Committee is authorized to interpret the ICCPR per article 40 of such instrument (which allows the Committee to issue the general comments it deems appropriate) and also per article 1 of the *Optional Protocol to the International Covenant on Civil and Political Rights* (which vests faculties to hear and consider claims of violations of ICCPR rights concerning those States that have ratified such Protocol).

³² See *Lopez-Burgos v. Uruguay*, Human Rights Comm., Commentary No. 52/1979.

operation and assistance, in order to promote the realization of human rights beyond their territories.

The international instruments that provide the framework for the great regional human rights systems – *inter alia*, the ACHR, the *Convention for the Protection of Human Rights and Fundamental Freedoms*³³ and the *African Charter on Human and People’s Rights*³⁴ – were built upon the Declarations and Covenants which preceded them. Their scheme and purpose militates against permitting national boundaries to act as obstacles to the protection and realization of the rights enumerated. On the contrary, these conventions create regional spaces in which humans will enjoy the same rights, regardless of their State of nationality or residence. In a regional system where an individual’s rights do not change as she crosses a border, it would be inconsistent with the scheme of regional human rights protection for a State to be responsible for violating a given right *vis-à-vis* an individual in one location within the ‘*convention space*’, and yet for another individual nearby (but across a border) to not have a remedy under the Convention, when the very same State conduct caused a violation of the same human right.

(3) *Travaux préparatoires*

The *travaux préparatoires* of the ACHR, in fact, evidence that the American States made a conscious decision when removing a reference to “*territory*” from the draft clause, a change that was ultimately confirmed in the final version of Article 1(1), which only included the term *jurisdiction*.³⁵ The original text of the project of the ACHR read:

“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their territory 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.”³⁶

Accordingly, obligations arising from ACHR are not to be limited to each States’ territory, but extend to other States’ territory or situation under their jurisdiction. It would, thus, be untruthful to the intention of the drafters and the context of the treaty, to interpret jurisdiction as a synonym of each State’s territory.

³³ Adopted in Rome, Italian Republic, on 9 November 1950 and entered into force on 3 September 1953.

³⁴ Adopted in Nairobi, Republic of Kenya, on 27 June 1981 and entered into force on 21 October 1986.

³⁵ See *Resolution approved by the Council of the Organization of American States in session celebrated on October 2nd, 1968* (Project of Inter-American Convention on the Protection of Human Rights); Article 1.1., available at: <https://www.oas.org/es/cidh/docs/enlaces/Conferencia%20Interamericana.pdf>

³⁶ *Id.*

(4) Systemic interpretation in the case *sub examine*

The foregoing considerations are, it is submitted, what justify the interpretation of Article 1(1), ACHR, in a way that embraces an affirmative answer to Colombia's Question 1. On the basis of the important principle of systemic integration (which has been discussed *supra*), this Court's duty of interpretation finds support in the fact of its consonance with both (i) the norms of international environmental law; and (ii) the increasingly coherent and systematic recognition of the extraterritorial dimension to human rights obligations.

(i) International Environmental Law

Rules of general international law in the environmental field already impose significant restrictions on States' ability to exercise sovereignty in the exploitation of their own resources. In particular, States are subject to far-reaching international law obligations to prevent and minimize transboundary harms.

Under general international law (that is, outside of the specialized field of human rights law), it is a truism to say that a State's ability to exercise sovereignty internally is subject to limitations and qualifications which protect the rights and interests of other States, and – thus – indirectly protect individuals who live in those other States. Indeed, it has been said that the duty of any State to act within its own territory so as to protect the rights of *other States* is the very essence of sovereignty and statehood.³⁷ International law has long recognized obligations on States to prevent, and at the very least to minimize or mitigate, transboundary environmental harms. These obligations are, under general international law, owed by a State *to other States* (as opposed to individuals), but they have the effect of protecting individuals who live in those other States.

The most seminal case on this general principle is the *Corfu Channel Case* decided by the International Court of Justice (hereinafter, 'ICJ') in 1949. The case arose from an incident in which mines had been laid in Albanian territorial waters between Corfu and Albania, with Albania's knowledge (as the ICJ found). Albania had failed to warn an approaching United Kingdom fleet of ships of their presence. As a result, the United Kingdom Navy suffered material damage and loss of life. The ICJ held that Albania was internationally responsible for the harm done, holding that Albania had violated "*every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States*".³⁸ This general principle is often engaged in cases of

³⁷ "Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States [...] Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty." Island of Palmas Case, Award of Arbitrator, Max Huber, dated April 4, 1928, Reports of International Arbitration Awards, Vol. II, p. 839.

³⁸ "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention

transboundary environmental harm, and the subsequent international case law has treated the principle recognized in the *Corfu Channel Case* as foundational.

In its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*³⁹ (hereinafter, '*Nuclear Weapons*'), the ICJ held that the prevention principle enunciated in the *Corfu Channel Case* applied to the environment. The ICJ referred to Principle 21 of the *Declaration of the United Nations Conference on the Human Environment*, 1972, which reads, in full:

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

The ICJ also referred to the similarly worded Principle 2 of the *Rio Declaration on Environment and Development* (hereinafter, '*Rio Declaration*')⁴⁰, which was the declaration adopted at the United Nations Conference on the Environment and Development, 1992. In spite of what their legal nature may have been at the time of adoption, the ICJ had no hesitation in concluding that the principle here expressed now represents *lex lata* in customary international law:

“27. [...] Also cited were Principle 21 of the Stockholm Declaration of 1972 and Principle 2 of the Rio Declaration of 1992 which express the common conviction of the States concerned that they have a duty "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

[...]

29. The Court recognizes that the environment is under daily threat [...] The Court also recognizes that the environment is not an abstraction but represents

of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.” *Corfu Channel Case*, Judgment of April 4th, 1949, ICJ Reports 1949 p. 4, at p. 22. (Emphasis supplied).

³⁹ ICJ Reports, 1996, p. 226.

⁴⁰ Principle 2 of the Rio Declaration reads, in full: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” (The only difference between Principle 2 of the Rio Declaration and Principle 21 of the *Declaration of the United Nations Conference on the Human Environment* is that the words “and developmental” were added in the Rio Declaration).

the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”

In the case concerning *Pulp Mills on the River Uruguay*⁴¹ (hereinafter, ‘*Pulp Mills*’), the ICJ recalled its earlier decision in the *Corfu Channel Case* and its *Nuclear Weapons Advisory Opinion*, holding:

“A State is thus 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. This Court has established that this obligation “is now part of the corpus of international law relating to the environment”.”⁴²

It can, thus, be seen that in the field of the environment, international law has given strong and meaningful recognition to the obligation on States not to permit their territory to be used so as to cause damage in other States or in areas beyond national jurisdiction.

Indeed, this principle had been recognized even prior to the ICJ’s seminal decision in the *Corfu Channel Case*. Essentially, the same reasoning formed the basis of the decision by a distinguished inter-State arbitral tribunal in the celebrated *Trail Smelter Case*⁴³ decided in 1941. The dispute arose out of damage to land and crops in the United States of America caused by emissions of sulfur from a large smelting plant just across the international border at Trail, British Columbia, Canada. The problem had been investigated by the International Joint Commission established under the *Treaty between the United States and Great Britain relating to Boundary Waters, and questions arising between the United States and Canada*⁴⁴. However, the report from this process had not satisfied the United States of America. In the interests of resolving the dispute, the two States concerned had concluded a convention establishing an arbitral procedure to consider: (a) whether Canada should compensate the United States of America; and (b) whether the operation of the smelter should be restricted or subjected to a regime of pollution control. The tribunal held, in terms which anticipated the ICJ’s reasoning in the later *Corfu Channel Case*, that:

“under the principles of international law [...] no State has the right to use or

⁴¹ *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14.

⁴² *Id.*, at p. 56 (paragraph 101).

⁴³ *Trail Smelter Case* (United States, Canada), Reports of International Arbitral Awards, Vol. III, pp.1905-82.

⁴⁴ Adopted in Washington D.C., United States of America, on 11 January 1909 and entered into force on 5 May 1910.

permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”⁴⁵

Mention should also be made of the International Law Commission (hereinafter, ‘ILC’) *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities*, 2001 (hereinafter, “Draft Articles”).⁴⁶ So far as pertinent here, the Draft Articles largely restate the norms recognized by the ICJ, as summarized *supra*. The Draft Articles provide, *inter alia*, that the “*State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof*” (Article 3). The ILC’s Commentary to the Draft Articles notes that “*sic utere tuo ut alienum non laedas*” is a “*fundamental principle*” of international law.⁴⁷ The ILC further notes that the prevention principle re-stated in Article 3 is based upon an extensive body of State practice, including in the field of marine pollution: “*Prevention of transboundary harm to the environment, persons and property has been accepted as an important principle in many multilateral treaties concerning protection of the environment, nuclear accidents, space objects, international watercourses, management of hazardous wastes and prevention of marine pollution.*”⁴⁸

Thus, a State’s freedom to exercise its sovereignty over its natural resources – by projects for resource exploitation and industrial or infrastructure development – is already subject to substantial legal qualifications, which include obligations of a substantive kind (the obligation to prevent, minimize or mitigate harm).

Commentators discussing the intersection between human rights and environmental norms often draw attention to the fact that the legal norms involved have both a substantive and a procedural

⁴⁵ *Trail Smelter Case*, Award, at p. 1965.

⁴⁶ Which Uruguay, as the respondent State in the *Pulp Mills* case, accepted contained binding norms, circumstances recorded in paragraph 103 of the Judgment. Despite the “*uncertainty surrounding their future status*”, they provide an “*authoritative statement of the scope of a State’s international legal obligation to prevent a risk of a transboundary harm*”. See James Crawford, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY* (2002) at 82.

⁴⁷ ILC Commentary, paragraph (1) to Article 3. It is surely one aspect, and an important one, of the general principle of good neighborliness which is enshrined in Article 74 of the *United Nations Charter*: “*Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good neighborliness, account being taken of the interests and well-being of the rest of the world in social, economic, and commercial matters.*” As an obligation under the *United Nations Charter*, the “*good neighborliness*” obligation has paramount force pursuant to Article 103 of the *United Nations Charter*.

⁴⁸ ILC General Commentary to the *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, paragraph (5).

aspect.⁴⁹ The prevention principle can be viewed as a *substantive* norm.⁵⁰ General international law also contains important norms as to the modalities (often termed *procedural*) by which States are to ensure that activities within their jurisdiction do not cause significant transboundary harm. In practice, substantive and procedural norms are intimately linked, reinforce one another and, in certain ways, shade into one another.⁵¹ The substantive and procedural dimensions can only be properly understood in relation to one another. The result of these structures of international legal obligations is that States' freedom to exercise sovereignty over natural resources is subject to substantial qualifications.

By way of summary, it is submitted that under general international law, in any case involving a proposed project (be it that of a State agency or a private party), which may have a significant transboundary impact, the State which is considering whether to proceed with the project is obliged to undertake two measures. First, to carry out an environmental impact assessment (to be performed in good faith and with a scope and content that is appropriate to the magnitude of the proposed project and its possible impacts). Second, to enter into meaningful dialog with potentially affected States by sharing information on the proposed project, including its environmental impact assessment, entering into good faith consultations and, if appropriate, negotiations, with the aim of preventing as well as minimizing or mitigating (if prevention is not possible) any risk of transboundary harm. The precise nature, basis and scope of these obligations is discussed in more detail in relation to Colombia's Question 3 below.

(ii) International human rights law

As regards the need to ensure that Article 1(1), ACHR is interpreted in a way that is consonant with the wider field of international human rights law, three particular features are especially relevant: (1) the purpose of the ACHR to create a '*convention space*', in which fundamental human rights are respected and enjoyed without national boundaries being an obstacle thereto; (2) the increasingly coherent and systematic recognition of extraterritorial human rights obligations; and

⁴⁹ See Section IV of Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox (Mapping Report); A/HRC/25/53; 30, December, 2013; at paras. 26-68, which draws this distinction.

⁵⁰ See, e.g., *id.*, at paragraph 62.

⁵¹ Notably, it is *because* States are obliged not to use their own resources in a manner which causes significant transboundary harm that they are obliged to consider the rights and interests of potentially affected States when deciding on projects which potentially have transboundary impact. Thus, the substantive obligation is what necessitates a certain procedural course of conduct. In turn, the requirement that States give earnest consideration to the impacts beyond their national borders gives rise to legal duties to conduct a thorough impact assessment and to engage in meaningful dialog with potentially affected states. The fruit of compliance with those *procedural* obligations is a proper appreciation of the risks of harm associated with a project. That in turn determines the position under *substantive* international law, as to whether it is legitimate to proceed with the project, and if so in what form, or with what measures in place to prevent or minimize impacts.

(3) the developing human rights jurisprudence concerning the scope of States' *jurisdiction* under the major international human rights treaties.

1) *The ACHR and the 'convention space'*

The ACHR enshrines a catalogue of substantive rights for *all individuals* of the Americas, arising from the terms of the ratification and subsequent entry into force. Subject to the relevant reservations, the catalogue of substantive rights established in the ACHR is equal for all individuals of the Western Hemisphere, as long as they are within the '*convention space*'. An *a contrario* assertion, would amount to acquiescence in discrimination on the basis of the *social condition*⁵² of national location. The intention of the Parties, as well as the object and purpose of the treaty, evidences an aim to consolidate a system of personal liberty and social justice based on respect for the essential rights of persons (which are not derived from "*being a national of*" or physically present in a certain State, but based upon "*attributes of the human personality*"⁵³). The ordinary meaning of the words employed by the provisions lead to the same conclusion: in a "*system*" of human rights, based upon the inherent nature of such prerogatives, the respect for the rights and freedoms of individuals admits no violation by means of the conduct of a State Party, on the basis of the effects being suffered by individuals outside its territory.⁵⁴

Within the general realm of international responsibility of States,⁵⁵ every international obligation of a subject of international law is matched by an international right of another subject or subjects (or even of the totality of the other subjects, *i.e.* the "*international community as a whole*").⁵⁶ Thus, a sole international obligation of a State is not precluded from being "*matched*" by the rights of two or more States (or individuals of two or more States), simultaneously.

In the circumstances *sub examine*, it is clear that the international obligation to guarantee the catalogue of rights in the ACHR can be, concurrently, matched with human rights of individuals of two or more States, as a result of a transboundary harm or the threat thereof. There is no reason why a State Party to the ACHR should be permitted not to undertake to respect the rights and

⁵² In the terms of Article 1(1), ACHR: "*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*".

⁵³ As referred in, *inter alia*, the second preambulatory phrase of the ACHR: "*Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states*". (Emphasis supplied).

⁵⁴ See, *inter alia*, the third preambulatory phrase of the ACHR in conjunction with *supra* notes 69 and 70.

⁵⁵ See, ILC, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two (as corrected), *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries* (31-143).

⁵⁶ *Id* at 35.

freedoms recognized in that treaty to persons not physically present in its territory, but within the ‘*convention space*’, who suffer violations of their human rights by a conduct of such State Party. If a State Party other than the one where the individuals are physically present is, in reality, in a position to make decisions which will determine whether the individuals will retain the “*free and full exercise*” of the catalogue of substantive rights and freedoms of the ACHR – or will suffer a violation of those rights – then, the human rights of such individuals are to be, undisputedly, *matched* with the international obligations of that State Party. The consolidation of a system of essential, inherent, human rights is not possible if a State Party is permitted to breach ACHR’s rights of individuals physically present in another State Party (evidently, outside its territory).

In this regard, it is also noteworthy that Article 62, ACHR contains the rules governing the recognition of jurisdiction of this Court, which may be recognized “*unconditionally*” or subject to specific restrictions.⁵⁷ Some of these restrictions include limitations *ratione temporis* or *ratione materiae*. Others refer to, *inter alia*, conditions on reciprocity. Article 62, ACHR, then presents a question with regards to restrictions to the jurisdiction *ratione loci*. An analysis of the Declarations⁵⁸ submitted by States Parties, pursuant to Article 62, ACHR, evidences that none of them has made any reservation *ratione loci*.⁵⁹ As already mentioned, when adopting the wording of Article 1(1), States Parties agreed to circumscribe their obligations under ACHR not – solely – to their territory, but to their jurisdiction. Consequently, they granted this Court competence to solve any dispute that falls within a State Party’s jurisdiction (especially if victims reside or are within the ‘*convention space*’).

2) *Extraterritorial Obligations*

As set out in more detail in Section III.A(4) *supra*, there are strong grounds, rooted in the established human rights jurisprudence, for considering extraterritorial obligations to be a necessary component of the regime constituted by the major global and regional human rights instruments. That said, the last two decades have seen an increasingly coherent and systematic attempt to articulate such obligations. It is submitted that Article 1(1) has to be read in a way that is consonant with the principle that a State’s human rights obligations do not stop at its national frontiers. Indeed, as the Human Rights Committee has noted, it would be “*unconscionable*” to interpret the ICCPR such that a State could commit, in relation to victims beyond its borders, a human rights violation which would be clearly forbidden by the ICCPR if done to victims within the State’s borders. This reasoning applies with equal force to the ACHR.

⁵⁷ Amongst others, on the condition of reciprocity, for a specified period or for specific cases, as provided in Article 62(2), ACHR.

⁵⁸ Available at the official electronic portal of the Depositary, O.A.S. –Department of International Law of the Secretariat for Legal Affairs–, *American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32)*, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm

⁵⁹ *Id.*

3) *The developing jurisprudence on “jurisdiction” beyond a State’s borders*

The submissions developed above are also consistent with the general thrust of the developing human rights jurisprudence concerning the scope of *jurisdiction* in cases involving an extraterritorial dimension. Colombia’s Request is not the first occasion on which an international court has had to consider how a State’s *jurisdiction*, for the purposes of a human rights treaty, may extend beyond its national territory.

Of the cases which have so far raised issues of this kind, it would seem that the majority have involved an *occupation* of foreign territory or some other type of executive action (use of the State’s coercive power) outside of its borders. For that reason, the situation of occupation could now be considered to be a traditional paradigm of *jurisdiction*, being *justiciable* when actions or omissions of a State Party cause effects outside its territory in breach or violation of human rights of individuals (persons conventionally entitled to protection).

Both international adjudicative and non-adjudicative mechanisms have had the opportunity to address these circumstances, stating that there is jurisdiction when a State Party performs a – lawful or unlawful – action that entails “*some physical domain*” within the borders of another State.⁶⁰ Thus, not only have they applied a non-territorial approach, but they have found that even circumstances falling short of full occupation may amount to jurisdiction over individuals other than those physically present in the territory of the State Party.⁶¹

The threshold has been, on occasions, presented as circumstances where there is “*de facto control*” of *the situation* by a State Party *vis-à-vis* another State Party’s territory.⁶² The threshold of *jurisdiction*, thus, is not to be understood as conducts amounting to “*occupation*”, but rather as situations where the conduct of a State Party produces effects that violate the human rights of individuals entitled to the same conventional standards of protection, even if not physically present in the territory of that State Party.

Accordingly, the IACHR has considered that although a State’s jurisdiction commonly refers to its territory, it may also refer to a conduct with an extraterritorial effect to a person located in one State’s territory but under the control of another State, in which case such person’s nationality or

⁶⁰ See, *inter alia*, Beth Van Schaack *The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INT’L L. STUD. 20 (2014) at 38.

⁶¹ See, *inter alia*, Issa v. Turkey, Eur. Ct. H.R. (2004); Medvedyev v. France, Eur. Ct. H.R. (2010); Al-Skeini v. United Kingdom, Eur. Ct. H.R. (2011). See also Franklin Guillermo Aisalla Molina, Ecuador – Colombia, Inter-State Petition IP-02, Inter-Am. Comm’n. H.R., Report No. 112/10, OEA/Ser.L/V/II.140 Doc. 10 (2010).

⁶² *Id.*

geographic position lack relevance.⁶³ Those cases are usually, but not always, caused through the aggrieving State's agents acting abroad.⁶⁴

If a State Party to the ACHR were to deploy its own personnel across the border – and those personnel caused environmental harm which engaged the international responsibility of the State – its conduct would be likely to be considered as within the scope of its *jurisdiction* for the purposes of Article 1(1), ACHR (or any comparable human rights convention). Where a State, in violation of its international law obligations, causes significant transboundary harm through pollution from its own facilities, it is likewise internationally responsible,⁶⁵ and there is no reason, in principle, why such conduct should be treated differently from harm caused by the State's own agents acting outside its boundaries. In each case, the essence of the wrong done by the State is the sending of an instrumentality of harm into areas beyond its national boundaries.

In this regard, it is particularly significant that in the seminal *Trail Smelter Case* (quoted above), the tribunal approached the question of awarding damages for the harm done by transboundary pollution caused by Canada by way of analogy with damages for “*trespass*” and “*nuisance*” in the United States of America's domestic law.⁶⁶ The tort of trespass involves the defendant unjustifiably invading the land of the plaintiff (either by trespassing in person or by causing some instrumentality to invade the plaintiff's land).⁶⁷ The serious sulfur pollution emanating from the smelter was considered, in effect, as an act of State trespass by Canada onto the United States of America's sovereign territory. As such, it is justifiable to consider that the reasoning in cases of States' extraterritorial invasion and presence should apply equally to situations of State trespass.

C. CONCLUSION ON QUESTION 1

Every State Party to the ACHR undertakes to respect the rights and freedoms recognized therein, as well as to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms without any discrimination for, *inter alia*, national origin, social origin or any other social condition.⁶⁸ These obligations arise in the context of a common intention to consolidate a system of inherent or essential rights in the Western Hemisphere, in recognition of their nature

⁶³ IACHR, *Coard et al. v. United States*, Case 10.951, Report N° 109/99, September 29, 1999, para. 37.

⁶⁴ *Id.*

⁶⁵ See, *inter alia*, the *Trail Smelter Case*; see also the *Sandoz Incident Case*, where Switzerland accepted that it was liable to compensate Germany for a serious case of transboundary pollution.

⁶⁶ *Trail Smelter Case*, Award, p. 22.

⁶⁷ Similarly, nuisance is a tort consisting of unreasonable interference with the use of land by the plaintiff, and usually involves the invasion of the plaintiff's land by some instrumentality, *i.e.* smoke, noise, water pollution.

⁶⁸ See *supra* note 52.

as “*attributes of human personality*”, hence, not dependent on nationality or physical presence, amongst others.⁶⁹

For the reasons set out above, it is submitted that *jurisdiction* within the meaning of Article 1(1), ACHR exists, at least presumptively, with respect to persons living on the territory of another State if and insofar as that State Party’s conduct threatens to cause transboundary harms severe enough to prevent the full enjoyment and realization of a right recognized under the ACHR, including the rights to life and integrity encompassed in Articles 4 and 5, ACHR. This conclusion is supported by:

- (a) The text of Article 1(1), ACHR: [III.B(1) *supra*].
- (b) The object and purpose of the ACHR; the ordinary meaning of the words employed by its provisions; and the intention of its signatories are to be understood in the light of the entitlement to *all persons* of the same conventional catalogue of rights, within the unique “*convention space*” [III.B(2) and III.B(4)(ii)(1) *supra*].
- (c) The *travaux préparatoires* of the ACHR⁷⁰, which evidence a deliberate removal of the words “*within their territory*” in Article 1(1) [III.B(3) *supra*].
- (d) The general authorization of the regime on international responsibility (that permits an international obligation to be *matched* with the rights of *two or more* States or individuals of that State) [III.B(3) *supra*].
- (e) The duty of the Court, as authorized interpreter of the ACHR, to guarantee that States Parties are not permitted to perpetrate violations to the ACHR suffered on the territory of another State Party, which could not be perpetrated in its own territory [III.B(1) *supra*].
- (f) An analysis of the Declarations submitted by States Parties, pursuant to Article 62 of the ACHR, which evidences that none of them has made any reservation *ratione loci* [III.B(4)(ii)(1) *supra*].

No considerations preclude this Court from exercising its jurisdiction in a case against a State Party, when a transboundary harm affecting the right to life of individuals physically present in another State Party, occurs or threatens to occur.

⁶⁹ See, *inter alia*, *supra* note 3.

⁷⁰ See *supra* note 35.

D. SUPPLEMENTAL OBSERVATIONS

(1) Relevance of the Cartagena Convention

For the reasons set out above, it is submitted that even without the existence of the Cartagena Convention, *jurisdiction* in Article 1(1), ACHR would fall to be interpreted such that persons outside a particular State Party would be subject to its jurisdiction – in circumstances where their ACHR rights were seriously threatened by a transboundary environmental harm emanating from that State. It follows that it is not submitted that the answer to Question 1 is dependent on the existence of the Cartagena Convention, or on any particular provision therein.

Nonetheless, it is submitted that the Cartagena Convention has relevance in certain specific respects. First, Article 4(1) confirms that prevailing international law standards of environmental protection apply with full force to any proposals under consideration in any State Party which could affect environmental quality in the “*Convention Area*” (as defined in Article 2(1), *i.e.* the wider Caribbean Sea). Second, general international law obligations of prevention (addressed *supra*) apply with *heightened* sensitivity to the “*Convention Area*”, because the States Parties are agreed as to its “*vulnerability to pollution*” and its “*special hydrographical and ecological characteristics*”.⁷¹

(2) Obligations and jurisdiction under the ACHR of the State Party in which victims of a transboundary harm reside

For avoidance of doubt, in a scenario in which a State Party was regarded as having jurisdiction over persons in the sense set out above (and/or in the sense contemplated by Question 1 in Colombia’s Request) a State Party to the ACHR in which those persons were resident (or otherwise located) would *also* have jurisdiction over them and would be responsible under the ACHR to respect and protect their human rights to its utmost ability.

QUESTION 2

IV. THE CIRCUMSTANCES UNDER WHICH A STATE PARTY’S ACTS OR OMISSIONS THAT CAUSE SERIOUS DAMAGE TO THE MARINE ENVIRONMENT WILL AMOUNT TO VIOLATION OF THE ACHR

Colombia asks this Court to assess, through its advisory competence, if a State can violate human rights protected by the ACHR of persons that inhabit another State in the context of a transboundary, marine, environmental harm. As was concluded in regards to Question 1, it is considered that it is possible for an individual who is outside of a State to be subject to that State’s jurisdiction under Article 1(1), ACHR where an environmental harm attributable to that State

⁷¹ See the fourth preambulatory phrase of the Cartagena Convention.

occurred. Now, Question 2 asks the Court to determine if such a harm would be compatible with Article 4(1), 5(1), or any other conventional provision. This Court stated, in its first contentious case, that any violation of a right protected by the ACHR necessarily implies the violation of Article 1(1) as well, since it is Article 1(1) that prohibits the violation of the rights enshrined in the ACHR.⁷² At the same time, it is Article 1(1) that charges States with the duty to respect and ensure “to all persons subject to their jurisdiction” their rights under the ACHR. Therefore, if a State has jurisdiction under Article 1(1) then – even if such jurisdiction relates to persons residing in another State’s territory – the inevitable corollary is that obligations under other ACHR clauses, *inter alia*, those in Articles 4 and 5, also arise. There is no compelling motive to excuse a State from its responsibility for conduct that affects human rights of individuals just because they reside beyond its borders.⁷³ Actions and omissions undertaken by States under such conditions as those of Question 2 can, under certain circumstances, be incompatible with the rights protected by the ACHR.

It is submitted that the circumstances in which a State Party’s conduct will be incompatible with the rights protected under the ACHR are: (1) a right protected by the ACHR is effectively infringed; (2) there is a causal link between actions or omissions taken by a State Party to the ACHR and the right violated; (3) that action or omission is attributable to the State Party in question.

(1) Effective infringement of an ACHR right

In general, environmental damage can impede the enjoyment of human rights, as discussed *supra*.⁷⁴ The text of the ACHR itself and the jurisprudence of the Inter-American Court of Human Rights (hereinafter, ‘IACtHR’) are the primary standards we must turn to in order to determine if a right under the ACHR has been infringed. Those standards set within the IACtHR’s jurisprudence are to be observed by all organs of a State Party to the ACHR, through the exercise of the conventionality control, considering the IACtHR is an authorized interpreter of the ACHR.⁷⁵

Under the ACHR, environmental protection is engaged not as a separate right that is protected *per se*, nor as justiciable under the “*right to progressive development*” contained in Article 26, ACHR (which to date has not been construed so as to protect individuals from infringement of an

⁷² I/A Court H.R., Case of Velásquez Rodríguez v. Honduras. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7. at para. 162 and 169.

⁷³ Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox (Mapping Report); A/HRC/25/53; 30, December, 2013; para. 63.

⁷⁴ One particular aspect which deserves emphasis is the especially harmful effects that environmental harms may have when habitants’ livelihood depend on the environment’s sustainability. See IACHR, Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources, OEA/Ser.L/V/II., Doc. 56/09, 30 December 2009 <http://www.oas.org/en/iachr/indigenous/docs/pdf/ancestrallands.pdf>; at para. 192.

⁷⁵ I/A Court H.R., Case Gelman v. Uruguay. Merits and Reparations. Judgment of February 24, 2011 Series C No. 221 at para. 193. See also Constitutional Court of the Republic of Colombia; Case C-500/14; July 16, 2014; at para. 8.3.2.2.

economic, social or cultural right, whether in the environmental arena or otherwise).⁷⁶ An environmental harm does not *automatically* infringe the ACHR. Rather, an infringement occurs when environmental damage *actually* affects a person's rights acknowledged by the ACHR, in coherence with its authentic interpretation.⁷⁷ This requires negative effect on the sphere of protection of rights, not merely a general deterioration of the environment.⁷⁸

Circumstances that have been considered relevant to evidence if a damage meets the threshold required to qualify as a human rights violation are the intensity of a nuisance, its physical or mental effects, the general context of the environment, and the fact that the detriment complained of surpassed the environmental hazards inherent to life in today's world.⁷⁹ On the other hand, it is not relevant if the action or omission complied with the State Party's domestic law.⁸⁰ Question 2 does not require a determination on whether a marine environmental harm constitutes a breach of an international environmental law obligation. It should suffice to say that, for the purposes of Question 2, it is only relevant to analyze if the act or omission claiming to violate rights under the ACHR is also noncomplying with international environmental law – if compliance with the former was a necessary means to respect human rights under the ACHR.

(2) Causal link between actions or omissions of a State Party and the infringement of the ACHR right

An evident causal link must be demonstrated between the damage or risk to the environment and the right infringed. Furthermore, the relationship must be such that if that if the environmental harm or damage had not occurred, the violation of the right would have been prevented. It is not enough to speculate; the violation must clearly and necessarily derive from the environmental harm or damage. If there is evidence that the environmental harm has potential negative effects in human beings, it is not enough to presume that it actually had a noxious effect to the alleged victim.⁸¹ The link must be *clearly* evidenced.

However, this does not mean that the harm to the alleged victim cannot be proved by indirect means. A strong combination of “*of indirect evidence and presumptions*” may present a situation

⁷⁶ Although the Protocol of San Salvador recognizes the right to a Healthy Environment, this right is not justiciable. See Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 16 November 1999; arts. 11 and 19.6.

⁷⁷ See, *mutatis mutandis*, Fadeyeva v. Russia, 55723/00, Council of Europe: European Court of Human Rights, 9 June, 2005 at para. 68.

⁷⁸ *Kyrtatos v. Greece*, 41666/98, Council of Europe: European Court of Human Rights, 22 May, 2003 at para. 52.

⁷⁹ *Id.*, at para. 69: “*environmental hazards inherent to life in every modern city*”.

⁸⁰ *Fadeyeva v. Russia*; *supra*; at para. 96.

⁸¹ *Fadeyeva v. Russia*; *supra*; at para. 87.

where a person's rights have been violated as a result of environmental harms.⁸² The standard of proof⁸³ is not heightened or especially burdensome in such cases.

(3) Attribution of action or omission to a State Party

The exercise of public power resulting in a violation of a right under the ACHR is unlawful.⁸⁴ A failure of a State agent to respect or ensure human rights is attributable to that State, whose responsibility is engaged by such agent's acts or omissions.⁸⁵ However, State responsibility can also be engaged by private party acts or omissions.

When fulfilling their obligations under the ACHR, States must take measures to ensure that not only State agents, but also private individuals or bodies respect fundamental rights.⁸⁶ State responsibility is engaged by private party acts when a violation has occurred with the support or acquiescence of the public officials, or when the State has failed to take measures to prevent or to punish the responsible parties.⁸⁷ To hold a State liable for its failure for private party acts, it is necessary to first allow the State in question to redress it by its own means, according to its national legislation and under its domestic procedures.⁸⁸

An environmental harm can be *attributable* to a State when its agents have caused it directly or when its responsibility is engaged by support or acquiescence of its agents or failure to prevent or punish responsible parties after the State has had a chance to redress the issue under its own national mechanisms.

QUESTION 3

V. THE DUTY TO COMPLY WITH INTERNATIONAL ENVIRONMENTAL LAW OBLIGATIONS AND MODALITIES OF COMPLIANCE

Question 3 has two aspects: *first*, it is asked whether, as a general matter, Articles 4(1) and 5(1), ACHR are to be interpreted such that they infer an obligation on States Parties to respect the norms

⁸² *Id.*, at para. 88.

⁸³ The Inter-American Court has stated that as an International Human Rights Tribunal, it has ample leeway in weighing evidence, and it is not subject to the formalities that apply in domestic courts. I/A Court H.R., Case of Cantos v. Argentina. Merits, Reparations and Costs. Judgment of November 28, 2002. Series C No. 97 at para. 27.

⁸⁴ I/A Court H.R., Case of Velásquez Rodríguez v. Honduras. *Supra*, n. 73 at para. 169.

⁸⁵ I/A Court H.R., Case of the "Mapiripán Massacre" v. Colombia. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134 at para. 110.

⁸⁶ *Id.*, at 112.

⁸⁷ I/A Court H.R., Case of Velásquez Rodríguez v. Honduras. *supra* at para. 173.

⁸⁸ I/A Court H.R., Case of the "Mapiripán Massacre" v. Colombia. *supra* at para. 113.

of international environmental law that seek to prevent occurrence of a harm that would be liable to result in an infringement of the rights protected by Articles 4(1) and 5(1); *secondly*, and more specifically, it is asked whether one of the ways of complying with the posited obligation is to undertake environmental impact assessments and to co-operate with the States that could be affected.

A. DUTY TO COMPLY WITH INTERNATIONAL ENVIRONMENTAL LAW OBLIGATIONS

It follows from the conclusion set out under Question 2 above that a State Party to the ACHR is under a substantive obligation not to cause an infringement of Articles 4(1) or 5(1) through the mechanism of a transboundary environmental harm. Practically speaking, the only means by which these fundamental human rights can be protected from violation by threatened environmental harms is through compliance with the obligations arising under international environmental law, in particular the prevention principle discussed in some detail above. This necessarily means that States Parties to the ACHR are obliged, as a matter of interpretation of the substantive provisions in the ACHR, to comply with their duties under general international law (including environmental norms) *insofar as that is necessary to ensure that a violation of Article 4(1) or 5(1), ACHR does not occur*.

B. MODALITIES FOR COMPLIANCE

As regards the second, more specific, aspect of Question 3, it is submitted that the obligation on a State Party to the ACHR not to cause a violation of Article 4(1) or 5(1) does entail a duty to comply with its obligations under general international law to (1) conduct a proper environmental impact assessment, and (2) co-operate in good faith with potentially affected States, including by engaging in meaningful dialog, information-sharing, consultation and (insofar as necessary) negotiations, with the aim of preventing any transboundary environmental harm (and, at a minimum, so as to ensure that no violation of a right protected under the ACHR occurs). It follows that neither environmental impact assessment nor international co-operation can be described as just “*one of the ways*” of complying with the general obligation referred to under the first part of Question 3. Rather, these are virtually certain to be *indispensable* as modalities for implementation of this aspect of a State Party’s obligations under the ACHR.

The following sections discuss, in turn, the international law obligations relating to Environmental impact assessment and international co-operation generally, and why these are necessarily implicated in a State Party’s ACHR obligations.

(1) Obligation to carry out an environmental impact assessment

It is now well established that a State which is considering a proposed project which may cause a transboundary impact is obliged under international law to carry out an environmental impact assessment prior to proceeding with the project.

In *Pulp Mills*⁸⁹, Argentina and Uruguay were parties to the “*Statute of the River Uruguay*”.⁹⁰ Article 41 of the referred treaty provided: “*Without prejudice to the functions assigned to the Commission in this respect, the parties undertake: (a) to protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and [adopting appropriate] measures in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies; (b) not to reduce in their respective legal systems: 1) the technical requirements in force for preventing water pollution, and 2) the severity of the penalties established for violations; [...]*”. The ICJ held that: “*It is the opinion of the Court that in order for the Parties properly to comply with their obligations under Article 41 (a) and (b) of the 1975 Statute, they must, for the purposes of protecting and preserving the aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment.*”⁹¹ The ICJ explained its basis for reading this requirement for an environmental impact assessment into Article 41 by reference to the principle that treaties may be drafted in sufficiently broad terms that they require to be interpreted in light of international law and practice as it has evolved since the treaty.⁹² In this sense, the ICJ held, when the “Statute” came to be interpreted and applied in 2010:

“the obligation to protect and preserve [...] has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.”⁹³

It is, therefore, a rule of general customary international law that a State must carry out an environmental impact assessment in cases involving a proposed “*industrial activity*” which “*may have a significant transboundary impact*”.

It will be noted from the quotation above that the ICJ referred to a “*shared resource*”, but did not confine its ruling to cases involving risk of harm to a “*shared resource*”. Nonetheless, even if the

⁸⁹ See *supra* note 42.

⁹⁰ Adopted in Salto, Oriental Republic of Uruguay, on 26 February 1975 and entered into force on 18 September 1976.

⁹¹ *Pulp Mills*, at paragraph 204.

⁹² This principle is clearly explained in *Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, ICJ Reports, 2009, p. 213, at paragraphs 67-71.

⁹³ *Pulp Mills*, at paragraph 204. (Emphasis supplied).

rule were so limited, it is submitted that as between parties to the Cartagena Convention the Caribbean Sea is surely to be regarded as a “*shared resource*”: the Sea borders all of them; its waters (including any pollution emitted by one State) circulate in territorial waters, contiguous zones and EEZs of all regional states; and the living resources of the Caribbean Sea (such as fish) migrate freely within it, such that fish whose breeding cycles occur in waters where one regional State exercises jurisdiction will be found as adults in waters belonging to other States, or in waters upon which persons living in other States are dependent for their food and their way of life. Moreover, the Cartagena Convention effectively defines the marine environment of the Wider Caribbean Region as a shared resource, in particular through its definition of the “*Convention Area*” in Article 2(1) and the States Parties’ mutual obligations with respect to the “*Convention Area*” under Articles 4 to 9. It follows that the requirement for an advance environmental impact assessment under customary international law (as recognized by the ICJ in *Pulp Mills*) is unquestionably applicable to developments with a potential adverse effect on the Wider Caribbean Region.

The ICJ made clear that the environmental impact assessment must be performed in advance of proceeding with the project.⁹⁴ This is, perhaps, a statement of the obvious: if the environmental impact assessment were not conducted in advance, it could not serve its function of identifying risks, alternatives to the proposed project, and possible modifications or other measures to prevent or minimize environmental harm, including transboundary harm.

The obligations arising under general international law are reinforced by the Cartagena Convention. The referred treaty contains express obligations in Article 12 regarding the nature and scope of the planning and of the environmental impact assessment that is required.⁹⁵ The Cartagena Convention does not lay down detailed procedural requirements, but – nonetheless – includes obligations which have (so to speak) real ‘bite’, in that the State Parties “*undertake to develop technical and other guidelines to assist the planning of their major development projects in such a way as to prevent or minimise harmful impacts on the Convention area*”, and require a State Party’s environmental impact assessment to be sufficient to achieve the result that “*appropriate measures may be taken to prevent any substantial pollution of, or significant and harmful changes to, the Convention area*”.

Question 3 further invites the Court to state what “*general parameters*” should be taken into account when making environmental impact assessments, and what should be their “*minimum content*”. It is submitted that the question of what general parameters and minimum content are required by international law is a reasonably straightforward one. In the absence of an international

⁹⁴ Paragraph 205.

⁹⁵ Article 12 doubtless formed part of the widespread and consistent State practice to which the ICJ referred in *Pulp Mills* as having already crystallized into a binding norm in general international law: see above.

convention applicable to the international juridical relations of Colombia with any other State Party to the ACHR imposing more specific requirements,⁹⁶ the main requirement – which ought to be sufficient to prevent a human rights violation – is that an environmental impact assessment must be carried out *in good faith*. This necessarily requires that the environmental impact assessment be an honest and careful attempt to understand the potential impacts, the possible alternatives and the means by which adverse environmental impacts may be mitigated. As such, it must be of sufficient scope to comprehend all the impacts that could reasonable be foreseen. This means that the scope and content required by international law is liable to vary depending on the nature and scale of the particular project or group of projects that is contemplated. Furthermore, the obligation of good faith inevitably requires that the environmental impact assessment be properly resourced. Any exercise which smacked of tokenism, formalism or (so to speak) ‘sweeping under the rug’ could not be compatible with the obligation of good faith.

In this regard, guidance can be found in the ICJ’s consideration of this issue in *Pulp Mills* (where, as here, no binding international convention existed defining the specifics of what an environmental impact assessment had to include). The ICJ held that:

“it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project.”⁹⁷

Where an obligation to conduct an environmental impact assessment in a certain way exists under international law (including any such requirement applicable as a matter of the true interpretation of the Cartagena Convention) such obligation displaces any lesser standards under domestic law.

⁹⁶ For completeness (but perhaps at the risk of over-complicating), we would note that States which are parties to the *Convention on Environmental Impact Assessment in a Transboundary Context*, 1991 (usually referred to as the “Espoo Convention”, hereinafter the ‘Convention’) are also bound by further more precise rules set out in that Convention as regards the scope of the impact assessment required. The only Member State of the Organization of American States which is a party to the Convention is Canada, while the United States of America is, solely, a signatory. Consequently, Convention is not itself a source of rights or obligations as between Colombia and any other State. Similarly, in *Pulp Mills*, the Convention was not applicable as between Argentina and Uruguay, although Argentina sought to pray it in aid of its arguments on the required scope and content of an environmental impact assessment (an argument which made no headway).

⁹⁷ *Pulp Mills*, paragraph 205.

(2) Obligation to co-operate in good faith

The obligation to co-operate derives from, *inter alia*, the general principle of good neighborliness, which is enshrined in Article 74 of the *United Nations Charter*⁹⁸:

“Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good neighborliness, account being taken of the interests and well-being of the rest of the world in social, economic, and commercial matters”.

As an obligation under the *United Nations Charter*, the “good neighborliness” obligation has paramount force pursuant to Article 103.

Moreover, numerous more specific sources attest to the existence of an obligation to co-operate in good faith in order to protect and preserve the environment (including the marine environment). Notably, in *Pulp Mills* the treaty under consideration contained a consultation and co-operation regime which the ICJ held was “*perfectly in keeping with the requirements of international law on the subject*”, and continued by observing that the ICJ had occasion to draw attention to the characteristics of the obligation to negotiate and to the conduct which this imposes on the States concerned: “[the Parties] *are under an obligation so to conduct themselves that the negotiations are meaningful.*”⁹⁹ In *Pulp Mills*, Uruguay conceded that the Draft Articles reflected binding norms.¹⁰⁰ Key provisions in the Draft Articles are:

- (a) Article 4, which provides that “*States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof*”;
- (b) Article 9, headed “*Consultations on preventive measures*”, which provides that “*1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof. The States concerned shall agree, at the commencement of such consultations, on a reasonable time frame for the consultations. 2. The States concerned shall seek solutions based on an equitable balance of*

⁹⁸ Adopted in San Francisco, United States of America, on 26 June 1945 and in force since 24 October 1945.

⁹⁹ The ICJ’s citation for this proposition is its earlier decision in the North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, ICJ Reports 1969, p. 47, para. 85).

¹⁰⁰ *Pulp Mills*, paragraph 152. The ICJ did not express any doubt as to the validity of the concession that the ILC’s Draft Articles “*reflected*” general international law. *Id.*

interests in the light of article 10 [...]”.

- (c) Article 10, which sets out a list of considerations which the States concerned “*shall*” take into account in order to find an equitable balance of interests.

It is further notable that a very similar duty to take into account the interests of potentially affected States, and to co-operate in the “*protection and development*” of natural resources is reflected in the *Convention on the Law of the Non-Navigational Uses of International Watercourses*¹⁰¹ (which is regarded as mostly consisting of codification of existing international law). A host of international conventions include express obligations on States Parties to co-operate towards achieving the objectives of the relevant convention and so as to protect natural resources that are recognized as being of international concern.¹⁰²

With specific regard to protection of the marine environment, the *United Nations Convention on the Law of the Sea*¹⁰³ (hereinafter, ‘UNCLOS’) contains the following provisions:

- (a) Article 192, “States have the obligation to protect and preserve the marine environment”.
- (b) Article 193, “States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.”
- (c) Article 197, “States shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures [...] for the protection and preservation of the marine environment.”

¹⁰¹ Adopted in New York City, United States of America, on 21 May 1997 and in force since 17 August 2014.

¹⁰² Some significant examples are the *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, adopted in Ramsar, Islamic Republic of Iran, on 2 February 1971 and entered into force on 21 December 1975, at Article 5; the *Convention Concerning the Protection of the World Cultural Heritage and Natural Heritage*, adopted in Paris, French Republic in 16 November 1972 and entered into force on 17 December 1975, at Article 6; the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter*, adopted in London, United Kingdom of Great Britain and Northern Ireland, on 13 November 1972 and entered into force on 30 August 1975, at Articles VIII-IX; the *Convention on Long Range Transboundary Air Pollution*, adopted in Geneva, Swiss Confederation, on 13 November 1979 and entered into force on 16 March 1983, at Articles 4 to 7; the *Convention for the Protection of the Ozone Layer*, adopted at Vienna, Republic of Austria on 22 March 1985 and entered into force on 22 September 1988, at Articles 2 to 5; the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, adopted in Basel, Swiss Confederation on 22 March 1989 and entered into force in 5 May 1992, at Article 10; and the *Convention on Biological Diversity*, adopted in Rio de Janeiro, Federative Republic of Brazil on 5 June 1992 and entered into force on 29 December 1993, at Article 5.

¹⁰³ Adopted in Montego Bay, Jamaica, on 10 December 1982 and entered into force on 16 November 1994.

(Emphasis supplied).

These provisions in UNCLOS reflect, as statements of general principle, numerous multilateral agreements negotiated since the nineteen fifties, including the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter*¹⁰⁴, the *International Convention for the Prevention of Pollution from Ships*¹⁰⁵ and various regional treaties regulating sources of marine pollution. A leading work of environmental law scholarship concludes that the wide acceptance of these treaties and general consensus in the negotiations towards UNCLOS suggest that its articles on the marine environment are supported by a strong measure of *opinio juris* and represent an agreed codification of existing principles which have become part of customary international law.¹⁰⁶ The Cartagena Convention is an example of an agreement which builds on, and furthers the purposes of, the general obligations in Article 192 and the obligation in Article 197 to co-operate. It can thus be seen that the ICJ's comments in *Pulp Mills* about the requirements of international law regarding co-operation, information sharing and paying reasonable regard of one another's interests rest on a solid body of State practice.

The rationale for the express legal obligations of international co-operation referred to in the preceding paragraph and for the development of a general principle in customary international law (reflected in UNCLOS) requiring co-operation to protect natural resources of international concern including the marine environment, is not hard to discern. Modern economic development has the ability to rapidly degrade the environment, which, as the ICJ noted in *Nuclear Weapons*, “*is not an abstraction but represents the living space, the quality of life and the very health of human beings*” both those alive today and “*generations unborn*”.¹⁰⁷ The risks posed by the intensity of impacts from economic development in today's highly interdependent world are such that neither the natural resources of international concern nor the human rights of persons protected under global and regional human rights instruments can effectively be protected without a significant degree of international co-operation among States. The withholding of such co-operation and abstaining from good faith efforts at co-operative resolution of threats to the environment will, in many cases, lead – directly and inevitably – to infringement of fundamental human rights.

¹⁰⁴ Adopted in London, United Kingdom of Great Britain and Northern Ireland, on 13 November 1972 and entered into force on 30 August 1975.

¹⁰⁵ Adopted in London, United Kingdom of Great Britain and Northern Ireland, on 2 November 1973 and entered into force (as amended) on 2 October 1983.

¹⁰⁶ Patricia Birnie, Alan Boyle and Catherine Redgwell, *INTERNATIONAL LAW & THE ENVIRONMENT*, Third Ed., Oxford, 2009; at p. 386.

¹⁰⁷ ICJ Reports, 1996, p. 226, at para. 29.

VI. CONCLUSION

For the reasons discussed above, it is submitted that an answer from this Court to the questions in Colombia's Request should include a statement, as a matter of interpretation of the ACHR, that:

- (1) A State Party to the ACHR has *jurisdiction* within the meaning of Article 1(1), ACHR, at least presumptively, with respect to persons living on the territory of another State if and insofar as that State Party's conduct threatens to cause transboundary harms severe enough to prevent the full enjoyment and realization of a right recognized under the ACHR, including the rights to life and integrity encompassed in Articles 4 and 5, ACHR.
- (2) A State Party's conduct will be incompatible with the rights protected under the ACHR where:
 - (i) a right protected by the ACHR is effectively infringed; (ii) there is a causal link between actions or omissions taken by that State Party to the ACHR and the infringement of the right; and (iii) that action or omission is attributable to the State Party in question.
- (3) States Parties to the ACHR are obliged, as a matter of interpretation of the substantive provisions in the ACHR, to comply with their duties under general international law (including environmental norms) insofar as that is necessary to ensure that a violation of Article 4(1) or 5(1), ACHR does not occur. The modalities for complying with such obligation include carrying out an environmental impact assessment and international co-operation. Moreover, where a State Party is considering proceeding with (or permitting private parties to proceed with) a project which entails a risk of causing transboundary environmental harm which may threaten the enjoyment of rights protected under Article 4(1) or 5(1), ACHR, it is likely to be an *indispensable* modality, so as to avoid a violation of the ACHR, to (i) carry out an environmental impact assessment (in good faith, of adequate scope and resourcing), and (ii) enter in good faith into meaningful dialog with potentially affected States by sharing information on the proposed project, including its environmental impact assessment, consultations and, if appropriate, negotiations, so as to reach an equitable resolution which ensures that a violation of protected human rights is prevented.

Respectfully submitted,



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