

COLOMBIA'S HERBICIDE SPRAYING IN THE CRUCIBLE BETWEEN INDIGENOUS RIGHTS, ENVIRONMENTAL LAW AND STATE SECURITY

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Introduction

For many years Colombia has struggled with eradicating illicit narcotic crops.¹ Spraying coca and poppy crops aerially with chemical herbicides has been one of Colombia's strategies. However, this practice has resulted in serious violations of human and environmental rights.² Because the herbicides were aerially sprayed at locations near, at and across the border with Ecuador, it has caused transboundary damage not only to people, animals and crops but also to bordering Ecuador's natural environment.³ It has also caused damage to the Colombian environment, population, and Indigenous groups.⁴ In 2008, Ecuador submitted an application instituting proceedings to the International Court of Justice (ICJ) against Colombia for international wrongful acts and compensation for its losses.⁵

Although, on September 13 of 2013, Ecuador removed the case from the ICJ, after reaching an Agreement with Colombia that

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¹ Robert Esposito, *The ICJ and the Future of Transboundary Harm Disputes: A Preliminary Analysis of the Case Concerning Aerial Herbicide Spraying (Ecuador v. Colombia)*, 2 PACE INT'L L. REV. 1, 4 (Aug. 2010).

² Aerial Herbicide Spraying (Ecuador v. Colom.), Pleading, 2008 I.C.J. 2, ¶¶ 37-38 (Mar. 31), available at <http://www.icj-cjj.org/docket/-filed/138/14474.pdf> [hereinafter Aerial Herbicide Spraying Application].

³ *Id.* at ¶ 4.

⁴ Jessica L. Rutledge, *Wait a Second – Is that Rain or Herbicide? The ICJ's Potential Analysis in Aerial Herbicide Spraying and an Epic Choice Between the Environment and Human Rights*, 48 WAKE FOREST L. REV. 1079, 1080 (2012).

⁵ Aerial Herbicide Spraying Application, *supra* note 2, at 2-4.

resolved all of its claims,⁶ this article will discuss the various international human and environmental rights violations that were raised by Ecuador's application and remain unresolved. Part II starts by providing background information on the Colombian armed conflict and the factors that led to the creation of Plan Colombia so that the nature of the existing problems and violations of international law are better understood. It also delimits the nature of the problems. Part III identifies the different claimants, and their respective arguments and perspectives. Part IV addresses the past trends in decision and conditioning factors in international and domestic law. Part V provides the possible future occurrences in light of changed and changing conditioning factors. And Part VI concludes by setting forth possible solutions to the various issues that arise from the aerial herbicide spraying by recommending the formulation of new policies that include social, economic, and environmental dimensions, starting with Colombia's most affected group, i.e. the peasants.

I. Delimitation of the Problem

In order to fully understand the problem between Ecuador and Colombia, and furthermore, understand the different violations of environmental and human rights, one needs to understand the Colombian armed conflict and the background behind the creation of Plan Colombia.

For the last century, Colombia has experienced an internal conflict, or what some call a civil war,⁷ which began with the longstanding socio-political tensions between the Conservative and Liberal parties, the traditional dominant entities in Colombian

⁶ Aerial Herbicide Spraying (Ecuador v. Colom.), Order, 2013 I.C.J. 1, 2 (Sep. 17), available at <http://www.icj-cij.org/docket/files/138/17528.pdf> [hereinafter Aerial Herbicide Spraying Order].

⁷ Joseph Weir, *The Aerial Eradication of Illicit Coca Crops in Colombia, South America: Why the United States and Colombian Governments Continue to Postulate its Efficacy in the Face of Strident Opposition and Adverse Judicial Decisions in the Colombian Courts*, 10 *DRAKE J. AGRIC. L.* 205, 208 (2005).

politics.⁸ In 1946, this conflict erupted into a widespread political upset known as the time of *La Violencia*.⁹ This “period of undeclared civil war, between the Liberals and Conservatives” would see the killing of more than 300,000 people and “caused the displacement of over two million peasants.”¹⁰ Although peace was restored by both parties, new civil and political opposition emerged via guerrilla activity as a result of the political disenchantment created by *La Violencia*.¹¹ Since *La Violencia*, many leftist guerillas and paramilitary forces emerged, creating a conflict “between leftist rebel groups, paramilitary groups, drug traffickers, the Colombia military and National Police.”¹²

These leftist guerillas and paramilitary forces emerged with the ideology of creating political polarization by fighting the prevalent political, social and economic injustices in Colombia.¹³ However, today their ideologies have “evolved into a complex internal struggle for political, social, and economic power and dominance over Colombia’s natural resources.”¹⁴ The Revolutionary Armed Forces of Colombia (FARC)¹⁵ and the National Liberation Army (ELN),¹⁶ two of the most dominant guerilla groups in the

⁸ *Id.*

⁹ *Id.*

¹⁰ Zachary P. Mugge, *Plan Colombia: The Environmental Effects and Social Costs of the United States’ Failing War on Drugs*, 15 COLO. J. INT’L ENVTL. L. & POL’Y 309, 312 (Spring 2004).

¹¹ Weir, *supra* note 7, at 208.

¹² Mugge, *supra* note 10, at 312-13.

¹³ Luz Estella Nagle, *Global Terrorism in Our Own Backyard: Colombia’s Legal War Against Illegal Armed Groups*, 15 TRANSNAT’L L. & CONTEMP. PROBS. 5, 10 (2005).

¹⁴ *Id.*

¹⁵ See generally Guy R. Knudsen, *War is Peace: How Language Begets Power and Helps to Strike International Law In U.S. Efforts To Eradicate Colombian Coca Crops Using Chemical and Biological Agents*, 6 CRITICAL STUD. J. 55, 57, 59 (Summer 2013) (describing the Revolutionary Armed Forces of Colombia (FARC) as a guerrilla movement that began operating in 1966 and is one of the left wing and largely peasant guerrilla groups that now controls forty percent of Colombian Territory).

¹⁶ See generally Weir, *supra* note 7, at 208 (describing the National Liberation Army (ELN) as a group formed in 1964 by students who were disenchanting with

country, received most of their financing from Cuba.¹⁷ However, once Cuba ended their aid to them, they were forced to identify alternative sources to finance their operations, such as kidnapping, extortion, and taxation of farmers producing narcotics.¹⁸ As a result of the Colombian government's inability to manage the rebel groups and the increasing strength of the guerrillas, the Colombian military, along with the illegal "self-defense" groups known as paramilitaries, began fighting the rebel groups to reassert control over the country.¹⁹ However, the financial incentives that the illegal drug trade offers would attract the paramilitary groups and compound the drug trade issue as with the FARC or the ELN.²⁰ These rebel groups generate hundreds of millions of dollars each year by taxing coca farmers, processing the crop into cocaine, and smuggling it into the lucrative international drug trade.²¹ Thus, Colombia's internal conflict has developed into a threat to the country's democracy and an international problem, as "Colombia is responsible for the majority of worldwide cocaine production and U.S. cocaine traffic."²²

Concerned with these issues, aware that inhibiting the drug trade would largely cut off funding to these rebel groups, and pressured by the United States government, in 2000, the Colombian Government implemented Plan Colombia, a \$7.5 billion dollar program, largely funded by the U.S. government.²³ Plan Colombia

the pro-Soviet Communist Party of Colombia (PCC) and were inspired by the Cuban Revolution).

¹⁷ Weir, *supra* note 7, at 208-09.

¹⁸ William D. Shingleton, *Understanding Colombia*, 25 FLETCHER F. WORLD AFF. 255, 256 (2001).

¹⁹ *Id.* at 256 (discussing the emergence of the FARC and ELN in Colombia).

²⁰ *Id.*; see also Weir, *supra* note 7, at 209.

²¹ Simon Romero, World, *Despite Rebel Losses, Cocaine Sustains War in Rural Colombia*, N.Y. TIMES, July 27, 2008, at A1, also available at http://www.nytimes.com/2008/07/27/world/americas/27colombia.html?pagewanted=all&_r=0.

²² Rutledge, *supra* note 4, at 1080.

²³ See generally Mugge, *supra* note 10, at 309-310 (explaining that Plan Colombia called for \$7.5 billion; \$4 billion were pledged out from Colombian resources, the remaining \$3.5 by the international community, of which the United States contributed \$1.3 billion in 2000 under the Clinton administration and \$379 million in 2002 under the Bush Administration).

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initially was "... an integrated strategy designed to combat the country's narcotics industry, stimulate its economic growth, promote the peace process, and strengthen its democracy."²⁴ A major component of Plan Colombia²⁵ was the eradication of coca and poppy crops through aerial fumigations with chemical herbicides.²⁶ Through the use of airplanes and helicopters, illegal crops were aeri ally sprayed with a powerful-spectrum herbicide.²⁷ Some of the areas that were being sprayed included southern provinces, in particular Putumayo and Nariño, along with the Ecuador-bordering provinces of Sucumbios, Carchi and Esmeraldas to the north.²⁸ Carried away by the wind, clouds of spray mist released by the aircrafts descended upon people, homes, plants and animals in Ecuador's territory.²⁹ In some instances, aircraft performing fumigation operations would cross into Ecuadorian airspace without authorization and spray within Ecuadorian territory.³⁰ These actions created transboundary harms between Colombia and Ecuador and issues with possible violations of standards of international law and human rights.³¹ The aerial spraying of herbicides is alleged to have caused "serious damage to people, to crops, to animals, and to the natural environment" on the Ecuadorian side of the frontier as well as to Colombian communities, peasants, and indigenous groups, and

²⁴ See Mugge, *supra* note 10, at 309.

²⁵ See generally Mugge, *supra* note 10, at 310 (explaining Plan Colombia also included funding for alternative development, the relocation of internally displaced persons, the protection of human rights, improved governing capacity, the reform of the judicial system, the Colombian peace process, in addition to the funding of eradication of coca in Southern Colombia, and interdiction of illicit narcotics. However, eighty percent of the U.S. disbursed funds were devoted to militaristic aspects of Plan Colombia and only twenty percent of the remaining funds were devoted to the remaining programs, which is not sufficient to effectively support the others programs that act as the linchpin to the success of Plan Colombia).

²⁶ Joanne Sum-Ping, *A New Approach to Extraterritorial Application of Environmental Statutes?: Uncovering the Effects of Plan Colombia*, 31 COLUM. J. ENVTL. L. 139, 142 (2006).

²⁷ Aerial Herbicide Spraying Application, *supra* note 2, at ¶ 3.

²⁸ *Id.* at ¶ 13.

²⁹ *Id.*

³⁰ *Id.* at ¶ 3.

³¹ *Id.* at ¶ 37-38.

“poses a grave risk of further damage over time.”³² The spraying is also alleged to have caused serious adverse health reactions, “including burning, itching eyes, skin sores, intestinal bleeding and even death.”³³ Additionally, many food crops have been destroyed and many animals became ill or died, creating problems of subsistence farming needs for the local population.³⁴ Furthermore, because there is an inherent link between indigenous peoples’ well-being and that of environmental biodiversity, the aerial fumigations have directly affected the human rights of indigenous peoples both in Ecuador and Colombia.³⁵ Thus, what began as a good faith effort to end an internal armed conflict and trade in drugs has developed into a problem of transboundary harms and arguable violations of human and environmental rights of both Ecuadorian and Colombian people.

II. *Conflicting Claims, Claimants, Identifications, Perspectives and Bases of Power*

A. *Ecuador*

The spraying of the herbicide composition³⁶ has elicited numerous allegations of adverse impacts, starting with Ecuador, who has claimed negative health effects to its population, and also damaging to animals, crops as well as the environment.³⁷ As a result, on March 28 of 2008, Ecuador instituted proceedings against Colombia in relation to the damages caused to Ecuador, its inhabitants and the environment through the aerial spraying of chemical herbicides.³⁸ In its application, Ecuador demanded to the International Court of Justice (ICJ) that Colombia’s actions be

³² See Aerial Herbicide Spraying Application, *supra* note 2, at ¶ 2.

³³ *Id.* at ¶ 4.

³⁴ *Id.* at ¶ 15.

³⁵ Esposito, *supra* note 1, at 16-17.

³⁶ See generally Esposito, *supra* note 1, at 4 (explaining that the exact composition of the herbicide being used for the aerial fumigations is unknown).

³⁷ Aerial Herbicide Spraying Application, *supra* note 2, at ¶ 2.

³⁸ Rutledge, *supra* note 4, at 1081.

declared internationally wrongful acts, and that Colombia be ordered to compensate the Ecuadorian people and its government for their losses.³⁹ Ecuador claimed that Colombia was violating its rights under customary and conventional international law as well as international environmental law.⁴⁰ Ecuador also claimed that Colombia's failed ability to meet its preventative and precautionary obligations under international law has had irreversible consequences and has further threatened Ecuadorian territory.⁴¹ Ecuador further points out that Colombia ignored its own expert's warnings by using a glyphosate formulation for the sprayings, when the Instituto Nacional de Salud (INS)⁴² concluded that the use of the herbicide formulation containing glyphosate was "not recommended" and that there was "little known" as it relates to its acute toxicity.⁴³

The chemical composition of the herbicide utilized for the aerial fumigations has been the subject of wide debate and has triggered many complaints.⁴⁴ The precise chemical composition of the herbicide used is unknown; however, the Colombian government has reported that the primary "active" ingredient is glyphosate,⁴⁵ a pesticide that is commonly used in agriculture, as well as forestry

³⁹ See Aerial Herbicide Spraying Application, *supra* note 2, at ¶ 37-38.

⁴⁰ *Id.* at ¶ 37.

⁴¹ *Id.*

⁴² Instituto Nacional de Salud (INS) [National Health Institute] is Colombia's National Health Institute.

⁴³ Rutledge, *supra* note 4, at 1102.

⁴⁴ Esposito, *supra* note 1, at 4-5.

⁴⁵ See generally Esposito, *supra* note 1, at 12 (explaining glyphosate is an isopropylamine salt used widely as a weed killer); See also Aerial Herbicide Spraying Application, 2008 I.C.J. at ¶ 22 (explaining that glyphosate is rarely used alone, and that common surfactants used with glyphosate, and reportedly included in the mix employed in Colombia, are polyethoxylated tallowamine ("POEA") and Cosmoflux 411F. It has been proven that POEA by itself causes eye burns, skin redness and blistering, nausea and diarrhea, making the combination of glyphosate and POEA more toxic than if either was administered alone. Cosmoflux 411F is used to penetrate the waxy surface coating of plant leaves and is a surfactant manufactured in Colombia for which Colombia refuses to disclose its chemical composition and for which combination with glyphosate has not been subject to evaluation for safety to humans or animals).

and homeowner uses.⁴⁶ Glyphosate works by inhibiting the enzymes that are part of a plant's shikimate pathway, which results in preventing the production of essential amino acids in any plant species, inhibiting plant growth.⁴⁷ Glyphosate is said to be preferred over other herbicides as it allegedly causes "minimal toxicity to humans and animals, which do not possess the shikimate pathway."⁴⁸

Nonetheless, Ecuador has reported that the sprayings have caused serious health reactions in its population including headaches, "fever, diarrhea, intestinal bleeding, nausea and a variety of skin and eye problems," and even two reported deaths.⁴⁹ In addition to the adverse health effects, the aerial spraying has negatively affected the area's vegetation, including the devastation of local agricultural crops like yucca, corn, rice, plantains, coca, coffee, and fruits.⁵⁰ In fewer than 15 days from spraying, short-cycle crops vanished in some communities and in the following years of spraying some "banana varieties, maize, fruit trees and aromatic herbs have disappeared, or their yield has considerably diminished."⁵¹ Similarly, animals have been affected; poultry and fish deaths have been reported, along with illnesses to various animals in the region including dogs, horses and cows.⁵²

Ecuador further claims that because Ecuador's northern border area possesses unique characteristics and has been designated one of the worlds "megadiverse" countries, the aerial fumigations are a further threat to its natural environment.⁵³ Moreover, the Awá people, an Ecuadorian indigenous group from the area, have been particularly affected as the spraying has destroyed farming crops and

⁴⁶ Esposito, *supra* note 1, at 12-13.

⁴⁷ Aerial Herbicide Spraying Application, *supra* note 2, at ¶ 19.

⁴⁸ *Id.* at ¶ 20.

⁴⁹ *Id.* at ¶ 14.

⁵⁰ *Id.* at ¶ 15.

⁵¹ *Id.* at ¶ 26.

⁵² See generally Aerial Herbicide Spraying Application, *supra* note 2, at ¶ 10, 15-16, 18, 26 (explaining the negative effects on the health and food security of border population by polluting water sources and the aquatic life. There have also been complaints concerning large traces in many rivers, including the Mira river in the province of Esmeraldas, who use the river for domestic purposes).

⁵³ *Id.* at ¶ 25-26.

other foods used to survive, diminishing soil quality and reducing yield.⁵⁴ The spraying has affected economic activities of the communities, their rights to adequate food and health, and their deep connection to the land.⁵⁵ The Awá community has complained that “their rights are being violated and that they are being subject to other abuses” as most of their community has been displaced.⁵⁶ “[T]he local wildlife, which provided a source of daily consumption, both for household uses and for recreational purposes, has died and various activities have been affected,” as the water of the Awá community is polluted and cannot be used as a result of the spraying.⁵⁷

B. Indigenous Peoples

Along with the Awá people, various indigenous groups from Colombia have claimed negative effects from the aerial fumigations. The Organization of Indigenous Peoples of the Colombian Amazons (OPIAC),⁵⁸ has claimed the aerial fumigations violate their rights

⁵⁴ *Id.* at ¶ 24.18, 24

⁵⁵ *Id.* at ¶ 35-36.

⁵⁶ U.N. Human Rights Council: Addendum to the Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Mission to Ecuador, ¶ 30 U.N. Doc. A/HRC/4/32/Add.2 (Dec. 28, 2006), available at <http://www.refworld.org/docid/45fe9c472.html> [hereinafter Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples]. See generally Nagle, *supra* note 13, at 61 (explaining that on September 2001, a group of more than 10,000 Ecuadorians, mostly indigenous, brought an action seeking “millions of dollars in compensation and an immediate halt to spraying” under the Alien Tort Claims Act against DynCorp, a Virginia-based contractor, which responsible for conducting the aerial sprayings in the border with Ecuador.).

⁵⁷ *Id.* at ¶ 30.

⁵⁸ See generally *Organizaciones Indigenas* [Indigenous Organizations], TERRITORIO INDIGENA Y GOBERNANZA [Indigenous Territory and Governance], http://www.territorioindigenaygobernanza.com/col_09.html. (last visited Feb. 1, 2014) (explaining that the OPIAC is an indigenous organization from the Colombian Amazons comprised by 56 Indigenous groups from Colombia that seeks to ensure the management, control, administration, development, and strengthening of the ancestral indigenous territory and rights as a source of life for

and territorial autonomy.⁵⁹ It is depriving them of “their rights to a clean and healthy environment, health, life, sustenance, property, inviolability of the home and family, and access to information.”⁶⁰ The effects of the aerial fumigations are also detrimental to the survival of the indigenous groups’ cultures, as many groups have been forced to leave their ancestral homes or have had to alter their traditional subsistence lifestyles.⁶¹ There have been thousands of reports regarding serious health issues as well as on food crops and livestock destruction. Moreover, reports also indicate “contamination of surface water, damage to surrounding wilderness areas, and deforestation resulting from the need of peasants to clear forests and plant food crops on uncontaminated lands.”⁶² For centuries, many indigenous communities have used coca for nutritional, medicinal, and spiritual purposes,⁶³ and the aerial fumigations have infringed upon their rights as indigenous peoples to use coca as part of their culture.⁶⁴ “Damage to food crops and livestock from aerial spraying

humanity by articulating processes with the state and national and international NGO’s).

⁵⁹ Betsy Marsh, *Indigenous Voices in Washington, D.C.*, CULTURAL SURVIVOR (May 5, 2010), available at <http://www.culturalsurvival.org/our-publications/csq/article/indigenous-voices-washington-dc>.

⁶⁰ EarthJustice, *Aerial Herbicide Spraying Violates Human Rights of Peasants and Indigenous Communities in Colombia and Ecuador*, PRESS ROOM (Jan. 15, 2002), <http://earthjustice.org/news/press/2002/aerial-herbicide-spraying-violates-human-rights-of-peasants-and-indigenous-communities-in-colombia-and-ecuador>

⁶¹ Judith Walcott, *Spraying Crops, Eradicating People*, CULTURAL SURVIVOR (May 5, 2010) available at <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/spraying-crops-eradicating-people>.

⁶² EarthJustice, *supra* note 60; see also Mugge, *supra* note 10, at 328 (explaining how the fumigations have also harmed the Colombian community and environment in general poisoning “many of the water sources in the targeted areas, killing many species of animals, and destroying much of the natural vegetation.” Some sources have reported spraying over open water bodies, including drinking water, water sources, ponds, streams, and rivers, which jeopardize the quality of drinking water and kill many aquatic species).

⁶³ See generally Sarah Peterson, *People and Ecosystems in Colombia: Causalities of the Drug War*, 6 INDEPENDENT REV. 427, 430 (Winter 2002) (discussing regional environmental and social concerns).

⁶⁴ See generally, Convention on Biological Diversity, Art. 8(j), June 5, 1992, 1760 U.N.T.S. 79 (explaining the precautionary principle and compliance).

can also result in serious malnutrition [as] the food production cycle is closely intertwined with indigenous cosmological and ritual practices.”⁶⁵ Furthermore, the indigenous groups claim that the manner in which Plan Colombia and the aerial fumigations have been implemented violates Colombia's Environmental Management Plan and their right to free, prior and informed consultation regarding actions on their lands under the Colombian Constitution.⁶⁶

C. Colombia

Nonetheless, despite the many complaints as to the negative effects of aerial fumigations, from local communities, peasants, and Indigenous Groups, Colombia contends that Plan Colombia and its use of aerial herbicide spraying is the most effective method for protecting its neighboring countries like Ecuador from the effects of drug trafficking and armed conflicts, and is also a necessary practice in order to prevent the continued growth and metastasizing of the problem to Ecuador.⁶⁷ Colombia further insists that the operations of aerial fumigations will not be abandoned and are an irreplaceable instrument for solving the “Colombian [armed] conflict and alleviating the danger that it presents to other countries, in particular neighbors.”⁶⁸ The Colombian government has even stated that the aerial fumigations are in conformity with principles of precaution and preservation of human health and the environment established in the 1992 Rio Declaration on Environment and Development, “which allows states experiencing threats of serious or irreversible damage to use cost-effective measures to prevent environmental degradation regardless of a lack of full scientific certainty about those

⁶⁵ Weir, *supra* note 7, at 234.

⁶⁶ *Estrategias de Desarrollo Alternativo en Colombia: La Necesidad de Acciones Más Allá de las Fumigaciones a Cultivos Ilícitos* [Alternative Developing Strategies in Colombia: The Need to Move Beyond Illicit Crop Spraying], AIDA 1, 6-7 (August 22, 2006), http://www.aida-americas.org/sites/default/files/ref Documents/AIDAINFORME%20DESARROLLO%20ALTERNATIVO%2006-08_1.pdf.

⁶⁷ Aerial Herbicide Spraying Application, *supra* note 2, at ¶ 29.

⁶⁸ *Id.* at ¶ 30.

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measures.”⁶⁹ Under the Rio Declaration, Colombia’s aerial fumigations are a legitimate method in fighting against illicit crops, and have been carried out in a manner compatible with the Declaration’s procedures.⁷⁰ The Colombian Dirección Nacional de Estupeficientes (DINE)⁷¹ affirms that they are careful with the environment, accurate, and do not spray sources of water or farmers homes.⁷² Furthermore, as to the numerous health complaints, Colombian officials blame supporters of Colombian insurgent groups, such as the FARC, for the increase in health complaints within the southern provinces of Colombia.⁷³ Colombian officials affirm that insurgent groups create false complaints in an effort to protect the areas they use for coca cultivation from future fumigations.⁷⁴ Colombia also maintains that most of the claims of harm to its citizens for sprayings have been ruled out because once flight records are checked it has been established “that spraying did not take place near the site of the claimed harm.”⁷⁵ As to the environmental effects of the aerial fumigations, the Colombian government has indicated that “illicit crop growers are more responsible for the environmental damages than the fumigation program,” since data suggests that for every hectare of coca that is planted, three hectares of forest must be eradicated.⁷⁶ Meaning, 30%

⁶⁹ Rutledge, *supra* note 4, at 1103.

⁷⁰ Aerial Herbicide Spraying Application, *supra* note 3, at ¶ 30.

⁷¹ La Dirección Nacional de Estupeficientes (DINE) is Colombia’s National Narcotics Management Organization.

⁷² Movimiento Mundial para la Salud de los Pueblos [Global Movement for the Health of Rural Communities], *Plan Colombia Guerra Química Contra los Pueblos* [Plan Colombia a Chemical War Against Rural Communities] (May 5, 2007), <http://www.phmovement.org/files/Guerra%20quimica%20contra%20los%20pueblos.pdf> [hereinafter *Plan Colombia a Chemical War Against Rural Communities*]

⁷³ Laurel Sherret, *Futility in Action; Coca Fumigation in Colombia*, 35 J. OF DRUG ISSUES 151, 448 (2005).

⁷⁴ *Id.*

⁷⁵ Sheridan Pauker, *Spraying First and Asking Questions Later: Congressional Efforts to Mitigate the Harmful Environmental, Health, and Economic Impacts of U.S. Sponsored Coca Fumigation in Colombia*, 30 *ECOLOGY L.Q.* 661, 674 (2003).

⁷⁶ Weir, *supra* note 7, at 240.

of Colombia's annual deforestation is attributed to the planting of coca.⁷⁷ Thus, Colombia states that although the aerial fumigations cause local impacts, the deforestation from coca growers causes greater impacts, on the global climate and diversity because it occurs at higher elevations, which can negatively impact freshwater. Also, the burning technique used by cultivators after the deforestation has negative effects on the environment.⁷⁸

III. Past Trends in Decision and Conditioning Factors

The herbicide spraying at issue in the case of *Ecuador v. Colombia* has to be seen in the context of national and international pressures placed on Colombia to eradicate illicit drugs. Since the beginning of the twentieth century the U.S. has waged a "war on drugs."⁷⁹ From the time when President Richard Nixon first declared a war on drugs, there has been an orientation towards anti-narcotics operations in Colombia.⁸⁰ Since the late 1970s the U.S. government has provided financial and military support to the Colombia government. In 2000, the focus on militaristic enforcement to combat the Drug War continued by the U.S. providing financial support to a program initiated by former Colombian President Andres Pastrana, called Plan Colombia.⁸¹ Out of the \$7.5 billion needed to fund the program, under the Emergency Supplemental Act (2000), the U.S. Government subsidized nearly \$1.1 billion in training and equipping new Colombian army counternarcotic battalions, as well as purchasing supplies for coca eradication.⁸² The U.S. foreign aid to Colombia reflects a theory that destroying illicit crops will reduce drug availability, which will then drive up U.S. street prices, that

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Knudsen, *supra* note 15, at 56.

⁸⁰ John Barry, *From Drug War to Dirty War: Plan Colombia and the U.S. Role in Human Rights Violations in Colombia*, 12 *TRANSNAT'L L. & CONTEMP. PROBS.* 161, 172-173 (Spring 2002).

⁸¹ Ambassador Luis Alberto Moreno, *Plan Colombia and Human Rights*, 8 *No. 1 HUM. RTS. BRIEF* 9, 11 (Fall 2000).

⁸² Esposito, *supra* note 1, at 8-10.

higher prices will discourage consumption, thus resulting in a decrease of American drug users, a theory that has failed to be effective.⁸³ This may show the U.S. Government's emphasis on the military aspect of Plan Colombia and its participation largely being one of a military offensive aimed at debilitating Colombia's powerful rebel groups and aerially fumigating the abundant coca and poppy crops.⁸⁴ "In 2002, the Bush administration pledged an additional \$379 million to Colombia as part of its \$645 million Andean Counterdrug Initiative, enacted in 2001, to sustain and expand the counternarcotic programs begun under Plan Colombia."⁸⁵ Economic aid for Plan Colombia has been conditioned on the willingness of the government to conduct aerial fumigation of "chemical (and possibly biological) herbicidal agents to extensive forest acreage and peasant farmlands to eradicate coca crops."⁸⁶ Financial aid has played a significant and controversial role in Colombia over the past decade in regards to influencing its domestic counter-narcotics policy.⁸⁷

However, Colombia's counter-narcotics policy has come at a cost, not only financially but also legally, to the extent that it gave rise to a dispute with the neighboring country of Ecuador in the ICJ. Nonetheless, on September 9, 2013, Ecuador and Colombia reached an agreement that fully and finally resolved all of Ecuador's claims against Colombia, in the case concerning Colombia's aerial spraying of toxic herbicides at locations near, at and across its border with Ecuador.⁸⁸ The agreement establishes, *inter alia*, a financial

⁸³ Counternarcotics Strategy in Latin America, 109th Cong., 130 (2006) (testimony of Ms. Joy Olson, Executive Director, Washington Office on Latin America), available at http://commdocs.house.gov/committees/intlrel/hfa26780.000/hfa26780_of.htm.

⁸⁴ Garry Leech, *Plan Colombia: A closer look* (July 1, 2000), <http://garryleech.com/2000/07/01/plan-colombia-a-closer-look/>.

⁸⁵ Mugge, *supra* note 10, at 310.

⁸⁶ Military Construction Appropriations Act of 2001, Pub. L. No. 106-246, 114 Stat. 511; see Nina M. Serafino, Congressional Research Service, *Colombia: Plan Colombia Legislation and Assistance*, available at <http://www.fas.org/asmf/resources/govern/crs-RL30541.pdf>; see also Knudsen, *supra* note 15, at 58.

⁸⁷ Esposito, *supra* note 1, at 12.

⁸⁸ Aerial Herbicide Spraying Order, *supra* note 6.

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contribution of fifteen million dollars for damages caused to the Ecuadorian population by the aerial fumigation, which will promote social and economic development in the affected border areas.⁸⁹ Additionally, an exclusion zone of ten kilometers, in which Colombia will not conduct aerial sprayings, was established along with the creation of a joint commission that will ensure that spraying operations outside that zone have not caused herbicides to drift into Ecuador and, so long as they have not, provides a mechanism for the gradual reduction in the width of said zone.⁹⁰ The issues not addressed by the ICJ due to the settlement are still highly relevant and at the cutting edge of international law. These issues, which mostly relate to the legal nature of the war on drugs, biodiversity, international environmental law, and the rights of indigenous peoples, will be discussed in this next section, starting with international law and then Colombian domestic law.

A. Past Trends in Decision – International

1. The War on Drugs

In line with the U.S. war on drugs, a drug control regime has been developed at the international level. International drug controls are largely administered by the United Nations (U.N.) and are based on three conventions: The Single Convention on Narcotic Drugs as amended by the Protocol (1972),⁹¹ the Convention on Psychotropic

⁸⁹ Agencia Publica de Noticias del Ecuador y Suramerica Andes [Public News Agency of Ecuador and South-American Andes], *Pago Que Colombia Hara a Ecuador Por Fumigaciones en la Frontera Servira para el Desarrollo de las Zonas Afectadas* [Payment that Colombia will make to Ecuador for Spraying its Borders will be used for the Development of the Affected Areas], AGENCIA DE NOTICIAS ANDES (Sept. 13, 2013, 04:31:42 PM), <http://www.andes.info.ec/es/actualidad/pago-colombia-hara-ecuador-fumigaciones-frontera-servira-desarrollo-zonas-afectadas.html>.

⁹⁰ *Id.*

⁹¹ Single Convention on Narcotic Drugs, 1961, amended by the Protocol Amending the Single Convention on Narcotic Drugs, Aug. 8, 1975, 976 U.N.T.S. 105.

Substances,⁹² and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁹³ These systems provide a legal framework for international drug control and define the measures that State parties have to maintain within their jurisdiction as well as rules for relations with each other.⁹⁴ The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 U.N. Drug Convention) “is the most comprehensive multinational agreement controlling international drug trafficking.”⁹⁵ Its purpose is to “promote cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension.”⁹⁶ Article 14(2) of the 1988 U.N. Drug Convention acknowledges that the measures taken to prevent the illicit cultivation of plants “shall respect fundamental human rights . . . and the protection of the environment.”⁹⁷ The Convention does not openly state appropriate methods of eradication nor does it state that aerial herbicide spraying is prohibited, but it does state that the measures that state parties adopt for drug control need to take into account human rights, meaning some measures might be problematic.⁹⁸ Aerial spraying affects coca plants, other crops nearby, including licit crops, and it even has long-term effects that make it impossible to grow other crops for years after spraying. Thus, the effectiveness of the spraying might be evaluated against

⁹² Convention on Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 175.

⁹³ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, Dec. 19, 1988, 28 I.L.M. 497 [hereinafter Convention Against Illicit Traffic in Narcotic Drugs].

⁹⁴ Daniel Heilmann, *The International Control of Illegal Drugs and the U.N. Treaty Regime: Preventing or Causing Human Rights Violations*, 19 CARDOZO J. INT’L & COMP. L. 237, 240 (Spring 2011).

⁹⁵ Sharon A. Gardner, *A Global Initiative to Deter Drug Trafficking: Will Internationalizing the Drug War Work?*, 7 TEMP. INT’L & COMP. L. J. 287, 293 (1993).

⁹⁶ Jimmy Gurulé, *The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances - A Ten Year Perspective: Is International Cooperation Merely Illusory?*, 22 FORDHAM INT’L L.J. 74, 78 (1998).

⁹⁷ Convention Against Illicit Traffic in Narcotic Drugs, *supra* note 93, at Art. 14(2).

⁹⁸ Heilmann, *supra* note 94, at 274.

the associated risks its use creates.⁹⁹

2. *International Environmental Law*

Aerial spraying might also violate human rights standards set forth in Article 11 of the International Convention on Economic, Social and Cultural Rights (CESCR), which provides for “the right of everyone to an adequate standard of living for himself and his family . . . including adequate food, clothing, and housing,” and to the continuous improvement of living conditions.¹⁰⁰ Similarly, Article 12 of the CESCR provides for a right to the “highest attainable standard of health,” which might be affected because aerial spraying with herbicides has an adverse impact on the health conditions of the people living and farming in the sprayed areas.¹⁰¹ A variety of human rights might be affected by measures aimed at controlling drug production. A fair evaluation of all the legitimate concerns will be key in balancing the conflicting interests, as “human rights may well be affected by a measure with a legitimate aim that is guided by the principle of proportionality (i.e. is necessary and the least intrusive method to meet the goal).”¹⁰² Thus, assessing the legality of a drug control measure must take into account all possible factors.

Because Colombian and Ecuadorian territories are considered biologically extremely diverse areas, conservation of the natural environment is of paramount importance. Biological diversity conservation is, as recognized by The United Nations Convention on Biological Diversity (UNCBD), something that concerns all humankind.¹⁰³ It is noted that the stability of ecosystems and their

⁹⁹ *Id.* at 274-75.

¹⁰⁰ See Asbjørn Eide, *The Right to an Adequate Standard of Living Including the Right to Food*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 89 (Asbjørn Eide, Catarina Krause, & Allan Rosas eds., 1995) (explaining the right to an adequate standard of living and basic necessities).

¹⁰¹ See KATARINA TOMAŠEVSKI, *Health Rights*, *supra* note 100, at 125.

¹⁰² Heilmann, *supra* note 94, at 276.

¹⁰³ See generally, Convention on Biological Diversity, *supra* note 64, at Art. 8(j).

ability to continue to provide vital goods and services to humans is threatened whenever biodiversity is also threatened as evident in some antidrug projects.¹⁰⁴ Biodiversity also has intrinsic value for people as most cultures and societies identify in some way with the natural environment in which they exist, specifically indigenous groups. The UNCBD recognized the intimate and traditional dependence and relationship that indigenous groups and local communities have with biological resources.¹⁰⁵ Environmental protection, then, is closely related to the preservation of local and indigenous cultures.

In the context of International Environmental Law (IEL), “like most areas of international law, [there] is a haphazard collection of treaties, customary law, and general principles that have developed over time.”¹⁰⁶ However, because many of the requirements of IEL are not clear enough to be considered customary law “unless a state has explicitly signed a treaty or committed an egregious *jus cogens*”¹⁰⁷ violation, [states are] arguably not bound to many of the ... requirements.”¹⁰⁸ These concepts of IEL have been developed through a series of cases, starting with the *Trail Smelter Arbitration* (United States v. Canada) in which the ICJ ordered Canada to make reparations to the United States after fumes escaped from Canadian iron ore smelters into the United States, damaging crops.¹⁰⁹ In this case, the ICJ recognized that the transboundary environmental harms constituted a true harm under the ICJ jurisprudence, stating that “no State has the right to use or permit the

¹⁰⁴ Peterson, *supra* note 63, at 429.

¹⁰⁵ Convention on Biological Diversity, *supra* note 64, at Art. 8(j).

¹⁰⁶ Rutledge, *supra* note 4, at 1083.

¹⁰⁷ See Vienna Convention on the Law of Treaties, Art. 53, May 23, 1969, 1155 U.N.T.S. 331. (defining *jus cogens* as a preemptory norm of general international law. “A preemptory norm of general international is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” *Id.*).

¹⁰⁸ Rutledge, *supra* note 4, at 1083.

¹⁰⁹ *Trail Smelter Arbitration* (United States, Canada), 3 R.I.A.A. 1905, 1965-66 (1941), available at http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf [hereinafter *Trail Smelter Arbitration*].

use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties . . . therein.”¹¹⁰ In later cases like the *Corfu Channel Case* (United Kingdom v. Albania) and the *Nuclear Test Cases* (Australia v. France and New Zealand v. France) the ICJ decisions were in line with the *Trail Smelter Arbitration*. In the *Corfu Channel Case*, Albania was held responsible for damages caused to British warships because Albania failed to warn Great Britain about underwater mines in its waters.¹¹¹ Although this case was not specifically about environmental issues, the ICJ states that it is “every State’s obligation to not allow knowingly its territory to be used for acts contrary to the rights of other States.”¹¹² In the *Nuclear Tests Case*, although the *Trail Smelter Arbitration* was cited as if it were customary law, because the case was declared “moot,” the ICJ never issued a full decision on the merits, and ambiguity remained as to whether the principles stated could be referenced solely in terms of environmental law.¹¹³

The next case in which the ICJ developed the concepts of IEL was the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. This case was about whether a state’s use of nuclear weapons in war or other armed conflict would constitute a breach of that state’s international obligations.¹¹⁴ In this case, the ICJ acknowledged that “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.”¹¹⁵ This case is an example of the ICJ’s recognition that prevention of transboundary harm arising from hazardous activities is required by customary international law. However, it was

¹¹⁰ *Id.*

¹¹¹ *Corfu Channel Case*, Judgment, 1949 I.C.J. 4, 22, 36 (Apr. 9).

¹¹² *Id.* at 22.

¹¹³ Jorge E. Viñuales, *The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment*, 32 *FORDHAM INT’L L. J.* 232, 240 (2008).

¹¹⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 227-28 (July 8).

¹¹⁵ *Id.* at 241-42.

not until *Gabčíkovo-Nagymaros* that the ICJ confirmed protection of the environment *per se* as a customary principle of IEL by stating that states have an obligation to ensure that activities in their jurisdiction would not harm the environments of other states under customary IEL.¹¹⁶ This case also adopts a four-part test for the doctrine of necessity and classifies environmental interests as “essential interest” when considering whether a state has either satisfied or violated the doctrine of necessity.¹¹⁷

On April 20, 2009, the ICJ delivered a landmark decision for IEL in *Pulp Mills on the River Uruguay* (Argentina v. Uruguay). In this case, Argentina was claiming, among other things, that two pulp mills on the banks of the River Uruguay facing the Argentine town of Gualeguaych caused damage to the environment of the River Uruguay and its surrounding areas, affecting a large part of the local population.¹¹⁸ The pulp mills created “significant risks of pollution to the river, deterioration of biodiversity, harmful effects on health and damage to fisheries resources.”¹¹⁹ It also created “extremely serious consequences for tourism and other economic interests.”¹²⁰ Although this case was grounded in treaty provisions that existed between the parties, the court gives teeth to international principles, such as prevention and due diligence, holding that states are obliged to use all means at their disposal to avoid activities that take place in their territories, or in any area under its jurisdiction, that can cause significant damage to the environment of the state.¹²¹ The court further noted that this obligation is “part of the corpus of international law relating to the environment.”¹²² In defining due diligence, the court explained that it entails “not only the adoption of

¹¹⁶ *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, 1997 I.C.J. 7, 40-41 (Sept. 25). [hereinafter *Gabčíkovo-Nagymaros*].

¹¹⁷ *Id.* at 40.

¹¹⁸ *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Provisional Measures, Order, 2006 I.C.J. 113, 113-14 (July 13), available at <http://www.icj-cij.org/docket/files/135/11235.pdf>. [hereinafter *Pulp Mills*]

¹¹⁹ *Vañuales*, *supra* note 113, at 234.

¹²⁰ *Id.*

¹²¹ *Pulp Mills*, *supra* note 118, at 132.

¹²² *Id.*

appropriate rules and measures, but also a certain level of vigilance in their enforcement . . . such as the monitoring of activities.”¹²³ Nonetheless, the Court emphasized that while there are certain procedural duties to inform, notify, and collaborate as well as substantive duties like due diligence and prevention which “complement one another perfectly,” they should still be examined separately.¹²⁴ The analysis the Court used in this case is reminiscent of the one found in the International Law Commission’s 2001 Draft Articles on Prevention of Transboundary Harms from Hazardous Activities.¹²⁵ The Draft Articles on Prevention represent nearly three decades of decisions focusing specifically on transboundary environmental harm and embrace the *sic utere*¹²⁶ principle that “the State of origin shall take all appropriate measures to prevent significant transboundary harms or at any event minimize the risk thereof.”¹²⁷ “Significant means something more than detectable but need not be at the level of serious or substantial.”¹²⁸

3. *The Rights of Indigenous Peoples*

At an international level, it was a specialized agency of the United Nations, the International Labor Organization (ILO) that was the first to address indigenous peoples’ concerns about the preservation of their culture and traditional lands.¹²⁹ After several

¹²³ Rutledge, *supra* note 4, at 1097.

¹²⁴ *Id.* at 1098.

¹²⁵ Report of the Int’l Law Comm’n, *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities*, Apr. 23-June 1, July 2-Aug 18, 2001, U.N. Doc. A/56/10, 372-74 (2001). [Hereinafter Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities].

¹²⁶ See OXFORD DICTIONARY (defining the *sic utere* doctrine, which embodies the Latin maxim of *sic utere tuo, ut alienum non laedas*, which means “use your own property in such as manner as not to injure that of another.”).

¹²⁷ Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, *supra* note 125, at 372.

¹²⁸ *Id.* at 381; see also Esposito, *supra* note 1, at 35.

¹²⁹ Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 100 (1999) (explaining that there was an earlier ILO Convention, No. 107, Concerning

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attempts, the first agreement to support their cultures was adopted in 1989, as ILO Convention No. 169 Concerning Indigenous and Tribal People in Independent Countries. The Convention focused on the right of indigenous peoples' to live and develop their own distinct communities, and it recognizes their rights from controlling their legal status, lands and internal structures as well as that of developing their environmental security.¹³⁰ The Convention also provided indigenous peoples with rights to ownership and possession of the environment they occupy or use. Among the Latin American countries that ratified the Convention were Mexico, Bolivia, and Panama, in addition to Colombia.¹³¹

Colombia is also subject to the jurisdiction of the Inter-American Court of Human Rights, which in a far-reaching interpretation of Article 21 of the Inter-American Convention on Human Rights, in the *Awás Tingni* case, recognized collective rights of indigenous peoples to their traditional lands.¹³² Also, the 1997 Proposed American Declaration on the Rights of Indigenous Peoples¹³³ provides protection to indigenous peoples as well as similarly situated communities.¹³⁴ The Declaration states that indigenous peoples, as well as similarly situated communities (i.e.

the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Protections in Independent Countries, which placed little value on indigenous cultures as such, focusing on the integration and assimilation of indigenous peoples).

¹³⁰ International Labor Organization (ILO) Indigenous and Tribal Peoples Convention (No. 169), Art. 2-6, June 27, 1989, 28 I.L.M. 1328 [hereinafter ILO Convention No. 169]

¹³¹ Wiessner, *supra* note 129, at 100.

¹³² *Mayagna (Sumo) Awás Tingni Community v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 148-149 (Aug. 31, 2001).

¹³³ Inter-American C.H.R., *Proposed American Declaration on the Rights of Indigenous Peoples*, 1333d sess., OEA/Ser/L/V/II.95, Doc. 6 (Feb. 26, 1997), available at <http://www.cidh.oas.org/Indigenas/Indigenas.en.01/Preamble.htm> [hereinafter OAS Draft Declaration]

¹³⁴ Article 1(1) of the Proposed Declaration states that “[t]his declaration applies to indigenous peoples as well as peoples whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.” *Id.*

rural communities, peasants), have rights to the lands they have traditionally occupied and used.¹³⁵ Also, in 2007, the Inter-American Court of Human Rights, in the case of *Saramaka People v. Suriname*, concluded that the Declaration applied to indigenous peoples as well as similarly situated communities.¹³⁶ In this landmark decision, the court concluded that the members of the Saramaka people make up a tribal community that is not an indigenous community, but that share similar characteristics with indigenous peoples, “whose social, cultural, and economic characteristics are different from other sections of the national community, particularly because of their special relationship with ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs, and/or traditions.”¹³⁷ Just like indigenous peoples, the Saramakas are therefore subject to special measures that ensure the full exercise of their rights. The court also concluded that under article 21 of the Inter-American Convention on Human Rights, the Saramaka People have a right to enjoy property they have traditionally used and occupied.¹³⁸ Therefore, the Saramakas, as well as other similarly situated communities, should be treated as equivalent to indigenous peoples in international law, with respect to their entitlement to their traditional lands. This right can be applied to the indigenous peoples in Colombia and Ecuador, as well as rural communities, i.e. peasants, by analogy.

Furthermore, the 2007 U.N. Declaration of the Rights of indigenous peoples under Article 7 protects indigenous peoples’ “life, physical and mental integrity, liberty and security of person.”¹³⁹ In addition, the Declaration provides that the survival of the traditional culture should be equally protected, as all activities that

¹³⁵ *Id.* at Art. 21.

¹³⁶ *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

¹³⁷ *Id.* at ¶ 84.

¹³⁸ *Id.* at ¶ 95.

¹³⁹ United Nations Declaration on the Rights of Indigenous Peoples, Art. 7, GA Res. 61/295, 13 September 2007. [Hereinafter United Nations Declaration on the Rights of Indigenous Peoples].

might affect their lands or resources are, if unconsented, in violation of indigenous rights.¹⁴⁰ Article 29 specifically links the environment to the human rights of indigenous peoples stating that “[i]ndigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.”¹⁴¹ The provision also points out that states are required to employ effective measures to safeguard against storage or disposal of any hazardous materials being carried out on indigenous peoples’ lands or territories without their free, prior or informed consent.¹⁴² Furthermore, the Article requires states to “take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.”¹⁴³

More importantly, the International Law Association (ILA) Resolution No. 5/2012 on the Rights of Indigenous Peoples¹⁴⁴ recognizes “for the first time, collective rights of indigenous peoples under customary international law (III).”¹⁴⁵ The U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) in itself, as a U.N. General Assembly resolution, is not legally binding *per se*. It is simply an instrument for which there is an “expectation of maximum compliance by States and other relevant actors.”¹⁴⁶ However, key provisions of the resolution may become binding if the provisions are

¹⁴⁰ *Id.* at Art. 8.

¹⁴¹ *Id.* at Art. 29.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Rights of Indigenous Peoples, Res. No. 5/2012, 75th Biennial Meeting of the International Law Association, Sofia, adopted August 30, 2012, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> [hereinafter ILA Res. No. 5/2012].

¹⁴⁵ Siegfried Wiessner, *The State and Indigenous Peoples: The Historic Significance of ILA Resolution No. 5/2012*, in *DER STAAT IM RECHT. FESTSCHRIFT FÜR ECKART KLEIN ZUM 70. GEBURTSTAG 1357, 1358* (M. Breuer et al. eds, Duncker & Humblot, Berlin, 2013).

¹⁴⁶ ILA Res. No. 5/2012, *supra* note 144, Conclusion No. 3.

a reflection of customary international law to the extent that state practice and *opinio juris* support it.¹⁴⁷ In 2006, an ILA committee of 30 experts was set up to study and determine to what extent, if any, customary international law would include distinct rights of indigenous peoples.¹⁴⁸ The findings on state practice and *opinio juris* as to indigenous peoples' rights supported the committees' determination that customary international law included rights for indigenous peoples.¹⁴⁹ This committee concluded in their report and Resolution No. 5/2012 on the Rights of Indigenous Peoples, that indigenous peoples have collective rights to their traditional lands, culture and self-government.¹⁵⁰ This resolution was unanimously adopted at the 75th Biennial Meeting of the International Law Association in Sofia.¹⁵¹ An ILA Resolution is evidence of international law under Article 38(1)(d) of the statute of the ICJ as stated, *e.g.*, in the 1987 *Third Restatement of Foreign Relations Law of the United States*.¹⁵² This particularly applies to its findings under customary international law.

Resolution No. 5/2012 provides assistance in order to interpret, apply and implement indigenous peoples' rights and it also identifies collective rights of indigenous peoples under customary international law.¹⁵³ Indigenous peoples' collective rights, which are essential to their "happiness and full self-realization as individuals," are based not only on their political or economic interest but on "their existential need to survive and flourish as a culture."¹⁵⁴ Indigenous peoples' rights under customary law include the rights to

¹⁴⁷ *Id.*

¹⁴⁸ Wiessner, *supra* note 146, at 1361-63.

¹⁴⁹ *Id.* at 1362.

¹⁵⁰ *Id.* at 1363.

¹⁵¹ ILA Res. No. 5/2012, *supra* note 144.

¹⁵² *Id.*; *see also* AMERICAN LAW INSTITUTE, *THIRD RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 103 Reporters' Notes No. 1 (1987).

¹⁵³ ILA Res. No. 5/2012, *supra* note 144, at Conclusion No. 10; Wiessner, *supra* note 145, at 1367.

¹⁵⁴ ILA Res. No. 5/2012, *supra* note 144, at Conclusion No. 3-5; *see also* Wiessner, *supra* note 145, at 1359.

their cultural integrity, autonomy, and their traditional lands.¹⁵⁵ The right to cultural integrity entitles indigenous peoples to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life.¹⁵⁶ It also entitles them to a right to demarcate, own, develop, control, “and use the lands they have traditionally owned or otherwise occupied and used.”¹⁵⁷ This right to their lands under customary international law places an obligation in states to “recognize, respect, safeguard, promote, and fulfill the rights of indigenous peoples to their traditional lands, territories and resources.”¹⁵⁸ This right recognizes the inseparable spiritual link indigenous peoples have with their traditional lands and natural resources as well as the important role they play in the preservation of these lands.¹⁵⁹ In addition, the Resolution provides that under customary law indigenous peoples have a right to autonomy or self-government which includes “the right to be consulted with respect to any project that may affect them and the related right that projects significantly impacting their rights and ways of life are not carried out without their prior, free and informed consent.”¹⁶⁰

B. Past Trends in Decision - Domestic

In Colombia, “indigenous communities” have rights under the constitution.¹⁶¹ The 1991 Constitution and Law 21, of 1991, which ratified ILO Convention No. 169 “Concerning Indigenous and Tribal Peoples in Independent Countries” incorporated indigenous peoples’ rights into domestic law.¹⁶² The 1991 Constitution

¹⁵⁵ ILA Res. No. 5/2012, *supra* note 144, at Conclusion No. 7.

¹⁵⁶ *Id.* at Conclusion No. 6-7.

¹⁵⁷ Wiessner, *supra* note 145, at 1362 n. 25.

¹⁵⁸ ILA Res. No. 5/2012, *supra* note 144, at Conclusion No. 7.

¹⁵⁹ Wiessner, *supra* note 145, at 1366.

¹⁶⁰ ILA Res. No. 5/2012, *supra* note 144, at Conclusion No. 5.

¹⁶¹ CONSTITUCIÓN POLITICA DE COLOMBIA [C.P.] [Colombia’s Political Constitution] Art. 330, *available at* http://www.procuraduria.gov.co/guiamp/media/file/Macroproceso%20Disciplinario/Constitucion_Politica_de_Colombia.htm.

¹⁶² Inter-Am. Comm’n H.R., Second Report on the Situation of Human Rights

recognizes and protects the ethnic and cultural diversity of the Colombian nation, and the obligation of the State to protect cultural assets.¹⁶³ It also recognizes that the languages and dialects of the ethnic groups are also official languages within their territories,¹⁶⁴ and that education in these territories is to be bilingual and must be directed to preserve and develop indigenous cultural identity.¹⁶⁵ Article 63 of the Constitution also provides that communal lands of ethnic groups and reservations lands cannot be taken away or attached.¹⁶⁶ The Constitution also provides for important rights to political participation and autonomy, as exercised nationally and through local self-government.¹⁶⁷ Indigenous peoples have autonomy to govern their territories according to their customs, including indigenous courts applying traditional customary standards; they may have their own authorities to govern and administer their own resources, levy taxes, and have a share of the national revenues.¹⁶⁸ Nationally, indigenous peoples are represented by at least two legislators in the senate and have up to five seats in the lower chamber of the National Congress.¹⁶⁹ Their collective rights are also recognized, in particular, collectively owned and inalienable *resguardos*.¹⁷⁰ Furthermore, indigenous peoples have human rights protection through the “*acción de tutela*,” which is a right to bring action for the protection of their constitutional rights.¹⁷¹

Although Colombian law excludes coca plant cultivation under their Criminal Code (Código Penal), there are some exceptions, including that of entitling some indigenous communities to legitimately grow coca.¹⁷² Indigenous peoples are allowed to

in Colombia, ch. XI (1), Rep. on its 83rd Sess., Oct. 14, 1993, U.N. Doc. OEA/Ser.L/V/II.84, doc. 39 (1993).

¹⁶³ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], *supra* note 161, at Art. 7-8.

¹⁶⁴ *Id.* at Art. 10.

¹⁶⁵ *Id.* at Art. 10, 68.

¹⁶⁶ *Id.* at Art. 63.

¹⁶⁷ *Id.* at Art. 246, 286, 321, 329.

¹⁶⁸ *Id.* at Art. 286-87, 330.

¹⁶⁹ *Id.* at Art. 171, 176.

¹⁷⁰ *Id.* at Art. 329.

¹⁷¹ Wiessner, *supra* note 129, at 80.

¹⁷² See generally Morgane Landel, *Are Aerial Fumigations in the Context of*

cultivate illegal substances under their constitutional rights to govern their territories according to their customs. Nonetheless, the Colombian Government remains entitled to regulate the cultivation and consumption of crops according to the traditional usages and practices of indigenous communities.¹⁷³

Colombia has recognized the right to regulate and protect indigenous peoples' practices to the extent that when it ratified the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances it made certain reservations. When Colombia ratified the Convention with reservations, it made a formal declaration that the criminalization of coca cultivation needed to be "harmonized with a policy of alternative development, taking into account the right of the indigenous communities."¹⁷⁴ To this extent, Colombia recognizes that there is a difference between the coca leaf and cocaine, and that indigenous peoples use coca leaves in ways that do not have negative effects.¹⁷⁵ Thus, the means employed by the government to fight drug trafficking should be sensitive to the cultural identity of indigenous peoples that the constitution protects. Furthermore, in 2003 the Constitutional Court reiterated that indigenous communities had the right to maintain coca plantations

the War in Colombia a Violation of the Rules of International Humanitarian Law?, 19 *TRANSNAT'L L. & CONTEMP. PROBS.* 491, 497 (2010) (explaining how some indigenous communities, mainly in Southern Colombia, are entitled to grow coca legally, giving them certain rights, distinct from the general population and linked to their particular heritage).

¹⁷³ Ley 30 (Law 30), Jan. 31, 1986, (Colom.) Art. 7, *available at* <https://dne.gov.co/index.php?idcategoria=1443#>:

El Consejo Nacional de Estupefacientes reglamentará los cultivos de plantas de las cuales se produzcan sustancias estupefacientes y el consumo de éstas, por parte de las poblaciones indígenas, de acuerdo con los usos y prácticas derivadas de su tradición y cultura.

¹⁷⁴ See U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Colombia Declarations, ¶ 2, Dec. 20, 1988, 1582 U.N.T.S. 165, *available at* <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20VI/VI-19.en.pdf>.

¹⁷⁵ Corte Constitucional [C.C.] [Constitutional Court], Abril 12, 1994, Sentencia No. C-176/94, Gaceta de la Corte Constitucional [G.C.C.] (p. 5) (Colom.), *available at* <http://www.corteconstitucional.gov.co/relatoria/1994/C-176-94.htm>.

because coca is a sacred plant for some indigenous populations; it is important for their livelihood as well as for cultural and medicinal purposes.¹⁷⁶ Thus, the right of indigenous peoples to cultivate coca on their own land has significant implications for the country's armed conflict and Plan Colombia.

Similarly, on May 13, 2003, after the Organización de Pueblos Indígenas de la Amazonía Colombiana (OPIAC) petitioned Colombia's Constitutional Court to halt the sprayings, the Court ruled that the government had to warn indigenous peoples before the commencement of spraying in their territories.¹⁷⁷ While the halt of the spraying was denied, the Court did call for a three-month period to test the future of the aerial fumigations with Colombian authorities.¹⁷⁸ Just two months later, fumigation opponents won a legal battle when a decision by the Cundinamarca Court ordered the immediate suspension of the aerial eradication program in all of Colombia's territory.¹⁷⁹ The Court ordered the halt of the fumigations because the Colombian Government had failed to conduct the necessary studies to show that the spraying was not harmful to the environment or the community.¹⁸⁰ The aim of the Cundinamarca Court with this decision "was not to halt the anti-drug spraying [program], but rather to ensure that [the aerial fumigation] activities did not threaten people's rights or the environment."¹⁸¹ Nonetheless, this decision was seen as an affirmation that the sprayings possessed adverse human health and environmental effects and was outright disobeyed by the then-Colombian President, Alvaro

¹⁷⁶ Corte Constitucional [C.C.] [Constitutional Court], Mayo 13, 2003, Sentencia No. SU.383/03, Gaceta de la Corte Constitucional [G.C.C.] (p. 96) (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2003/SU383-03.htm>.

¹⁷⁷ *Id.* at 96.

¹⁷⁸ *Id.* at 97.

¹⁷⁹ JOHN WALSH, GIMENA SANCHEZ-GARZOLI, & YAMILE SALINAS ABDALA, OFICINA EN WASHINGTON PARA ASUNTOS LATINOAMERICANOS (WOLA), LA ASPERSIÓN AÉREA DE CULTIVOS DE USO ILÍCITO EN COLOMBIA – UNA ESTRATEGIA FALLIDA 62 (Forma Grafica Editores S.A., 2008).

¹⁸⁰ *Id.*

¹⁸¹ Weir, *supra* note 7, at 238.

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Uribe Velez.¹⁸² The President cited the country's commitments to the international community as one of the reasons for refusing to cease the spraying of illicit crops.¹⁸³ The Court's ruling was supposed to protect collective human rights to health and enjoyment of the environment and the suspension was supposed to be sustained until the Environmental Management Plan, imposed by the Ministry of Environment, was enforced.¹⁸⁴ The Colombian Government justified its position by arguing that it couldn't halt a practice that would leave the country vulnerable to its insurgent groups.¹⁸⁵

Additionally, the Colombian Constitution provides protections for the environment, making it a "duty of the state to protect the diversity and integrity of the environment, to conserve areas of special ecological importance, and to foster education for the achievement of these ends."¹⁸⁶ Colombia, in line with the Rio Declaration of 1992, adopted in its Constitution the general principle that "every person has the right to enjoy a healthy environment."¹⁸⁷ Under this rule, where there is "danger of serious or irreversible damage, the lack of absolute scientific certainty shall not be invoked as a reason for postponing the adoption of effective measures to prevent the effects on renewable natural resources and degradation of the environmental system."¹⁸⁸ According to the jurisprudence of the Colombian Constitutional Court, the policies of eradication of illicit crops are not allowed to result in activities that could harm the environment, given that the duty to protect its diversity and integrity falls upon the State along with the duty to prevent and control factors that deteriorate the environment.¹⁸⁹

¹⁸² *Id.* at 239.

¹⁸³ Yadira Ferrer, *Colombia: Uribe Defies Court on Drug Crop Fumigation*, INTERPRESS SERVICE (July 16, 2013), <http://business.highbeam.com/409433/article-1G1-105498503/colombia-uribe-defies-court-drug-crop-fumigation>

¹⁸⁴ WALSH, SANCHEZ-GARZOLI, & SALINAS ABDALA, *supra* note 179, at 62.

¹⁸⁵ Landel, *supra* note 172, at 501.

¹⁸⁶ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], *supra* note 161, at Art. 79.

¹⁸⁷ *Id.*

¹⁸⁸ WALSH, SANCHEZ-GARZOLI, & SALINAS ABDALA, *supra* note 179, at 71 (author's translation).

¹⁸⁹ Luz E. Nagle, *Placing Blame Where Blame is Due: The Culpability of Illegal Armed Groups and Narcotraffickers in Colombia's Environmental and*

*IV. Future Decisions in Light of Changed and Changing
Conditioning Factors*

Many have criticized the use of aerial herbicide spraying as part of Plan Colombia not only for its failure to reduce coca cultivation but also for the profound social, economic and environmental costs it has imposed on the country.¹⁹⁰

At an international level, had Ecuador and Colombia not reached an extrajudicial agreement¹⁹¹ for the proceedings instituted by Ecuador against Colombia in the ICJ regarding *Aerial Herbicide Spraying*, the Court would have been presented with the opportunity to decide, for the first time, the conflicting issues of a country's war against drugs versus the violation of human rights and international law.¹⁹² The case presented a very challenging and rich set of facts for the Court to clarify the contents and enforceability of a number of customary norms of IEL and international indigenous law. Moreover, the context in which the dispute arose, namely Colombia's fight against illicit crop growing and trafficking, and the important implications of this fight not only for Colombia but for many other states as well, suggests that the Court might have been required to elaborate on the balancing between different norms of international law.¹⁹³ *Aerial Herbicide Spraying* would have also provided the court with the opportunity to further analyze transboundary harms, international law procedural and substantive violations, as well as the doctrine of self-defense and necessity.¹⁹⁴

If a similar case were to reach the Court in the near future, in the worst-case scenario, it can be expected that Colombia be found in violation of its procedural duties to inform because it failed to

Human Rights Catastrophes, 29 WM. & MARY ENVTL. L. & POL'Y REV. 1, 53 (2004).

¹⁹⁰ Weir, *supra* note 7, at 239.

¹⁹¹ Aerial Herbicide Spraying Order, *supra* note 6, at 2.

¹⁹² Rutledge, *supra* note 4, at 1081.

¹⁹³ See generally Michael Akehurst, *The Hierarchy of the Sources in International Law*, 47 BRIT. Y.B. INT'L L. 273 (1974-75) (on the hierarchy of the sources and norms of international law).

¹⁹⁴ Rutledge, *supra* note 4, at 1103-05.

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reference the spraying to Ecuador before the use of herbicide on its border was authorized.¹⁹⁵ Furthermore, Colombia blatantly ignored Ecuador's concerns, and instead of recognizing Ecuador's concerns as a problem, Colombia argued that the aerial spraying was impeding drug production and thus, protecting the Ecuadorean people.¹⁹⁶ Colombia also failed to draft an Environmental Impact Assessment as required by IEL; evidence even indicates that Colombia used the herbicide against its own expert's warnings.¹⁹⁷ All these actions constitute violations of environmental procedures on the part of Colombia. The ICJ's analysis in prior cases indicates a functional link that compliance with procedural violations will increase the likelihood that a state complies with its substantive obligations.¹⁹⁸ The intention is exemplified by *Aerial Herbicide Spraying*, as it encompasses Colombia and its procedural failure to cooperate which implicates a severe substantive harm as a result given that it failed to share information on the herbicide composition and it failed to allow Ecuador to run tests of the chemical composition.¹⁹⁹ Because this procedural failure to cooperate has largely caused the extreme substantive harm inflicted upon Ecuador, the ICJ would have probably found Colombia to be in violation of both procedural and substantive rights. A violation of procedural international law is even more probable than not, given that Colombia has not used "all the means at its disposal to avoid activities" in its territory that cause significant harm to the environment of Ecuador.²⁰⁰ The imprecision of the aerial fumigations, including the possibility of off-site drift, the non-selective nature of the chemical herbicide spray used by Colombia, and the close proximity to Ecuador's border all weigh heavily in Ecuador's favor when considering the risk of significant transboundary harm. A reasonable person could foresee how such a massive and inherently inaccurate fumigation activity so near to an international border could necessarily involve a degree of risk.

¹⁹⁵ *Id.* at 1103-1104.

¹⁹⁶ *Aerial Herbicide Spraying Application*, *supra* note 5, at ¶¶ 28-30.

¹⁹⁷ *Id.* at ¶¶ 10-12.

¹⁹⁸ Rutledge, *supra* note 4, at 1098.

¹⁹⁹ *Id.* at 1104.

²⁰⁰ *Id.* at 1104-05.

Moreover, such a large-scale fumigation campaign is also likely to have significant impact on the environment, especially considering the unparalleled ecological diversity of the Amazonian region at issue. Thus, it is likely to foresee how the aerial sprayings are actions that constitute a risk of causing significant transboundary harm.

Colombia's substantive harm inflicted on Ecuador is undeniable given the evidence of specific impacts in several of the communities in the border. It would also have been "unlikely that Colombia [could have] avoid[ed] restoring Ecuador for the obviously inflicted substantive harm."²⁰¹ Evidence that might support Colombia's knowledge of the harm inflicted to Ecuador and the possibility of having to restore the inflicted damages is the extrajudicial agreement the two parties reached on September 9, 2013, which resolved all of Ecuador's Claims against Colombia and provided for \$15 million dollars in compensation for damages.²⁰²

As to the principle of due diligence, the ICJ provided a newly defined definition in *Pulp Mills*, which requires the adoption of appropriate rules and measures and a certain level of vigilance and monitoring to ensure their enforcement.²⁰³ In the case of Colombia, the ICJ could have had to factor in that Colombia was adopting rules and monitoring enforcement, albeit to combat drug trafficking and not to prevent environmental harm. Nonetheless, because the ICJ could follow its recent precedent in *Pulp Mills*, despite not being bound to do so, the Court could defer to the Draft Articles on Prevention and hold that the standard of due diligence shall be what is appropriate and proportional to the degree of risk of transboundary harm in the particular instance,²⁰⁴ or create an increasingly stronger

²⁰¹ *Id.* at 1105.

²⁰² Claudia Morales, *El Acuerdo con Ecuador se Hizo a Espaldas del País*, [The Agreement with Ecuador was Made Behind the Backs of the Country] SEMANA (Oct. 13, 2013), www.semana.com/nacion/articulo/el-acuerdo-con-ecuador-se-hizo-espaldas-del-pais-laura-gil/360252-3 (Interview with Laura Gil, an international columnist who questions the agreement between Colombia and Ecuador for the aerial herbicide spraying and reveals details of the agreement).

²⁰³ *Pulp Mills*, *supra* note 118, at ¶101.

²⁰⁴ Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, *supra* note 125, at Art. 3.

link between procedural and substantive obligations, by holding that due diligence necessarily requires “cooperation.”²⁰⁵ This possible decision could also have resulted in Colombia having violated its due diligence obligations.

The ICJ had not been presented with a case like this before, one in which it had to choose between the greater of two evils, the violation of human and environmental rights or drug trafficking. A factor that might have influenced the Court’s decision, if it had to decide the case, is the failure of Plan Colombia’s aerial spraying program to meaningfully inhibit terrorist groups and the drug trade. There has been a difference in figures as to the results of the aerial spraying program. Between August of 2002 and August of 2007, 758 thousand hectares were sprayed, and nonetheless, the achieved results fluctuate depending on their source.²⁰⁶ Data from the U.S. Government report that the greatest impact from spraying was achieved between 2002 and 2003, in which the reduction was twenty percent, almost the same amount that it increased between 2004 and 2005.²⁰⁷ However, despite the difference in figures, the lack of efficiency of the program has been evidenced since 2004, the year in which 136 thousand hectares were sprayed and only six thousand hectares on which narcotic plants were grown were eliminated.²⁰⁸ Data from the United Nations Office on Drugs and Crime (UNODC)²⁰⁹ indicate that as of December 2006 there was only a nine percent reduction since 2005.²¹⁰ The ineffectiveness of the program is also evidenced by the government’s inability to demobilize peasant paramilitary groups, which are responsible for a surge in the production of cocaine.²¹¹ Migration of coca cultivation

²⁰⁵ *Id.* at Art. 4.

²⁰⁶ WALSH, SANCHEZ-GARZOLI, & SALINAS ABDALA, *supra* note 179, at 47.

²⁰⁷ *Id.* at 41.

²⁰⁸ *Id.* at 47-48.

²⁰⁹ UNODC is the United Nations Office on Drugs and Crime, *available at* <https://www.unodc.org/unodc/en/about-unodc/index.html?ref=menutop> (UNODC was established in 1997 through a merger between the United Nations Drug Control Programme and the Center for International Crime Prevention to fight against illicit drugs and International Crime).

²¹⁰ WALSH, SANCHEZ-GARZOLI, & SALINAS ABDALA, *supra* note 179, at 41.

²¹¹ Simon Romero, *Despite Rebel Losses, Cocaine Sustains War in Rural*

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was forced to other parts of the country by Plan Colombia and it has forced farmers to develop creative strategies to protect their illicit crops.²¹² Because after thirteen years of Plan Colombia, rebel groups and drug trafficking are still thriving, and because there simply has to be another option to combat drug trafficking besides aerial spraying, the ICJ is likely to choose environmental and human rights protection over combating drug trafficking and could find Colombia in violation of not only international treaty law but also customary international law.

As illustrated in Principle 15 of the Rio Declaration, the precautionary principle is based on policy makers' ability to rely on the best available scientific data when developing effective regulatory policies.²¹³ Sometimes, however, exact scientific data are unavailable; in these cases, the principle allows states to act regardless of any scientific uncertainty, but it requires that the state err "on the side of excess environmental protection."²¹⁴ This principle can be appropriately cited, e.g., after a disaster "when a state needs to react quickly by choosing to use a method that has not undergone extensive scientific testing because the danger of allowing the disaster to [worsen] is outweighed by the potential danger of the method to combat it."²¹⁵ But this principle does not authorize ignoring the obvious, and a state with unclean hands cannot count on it for protection. Colombia would not be justified by saying that coca production, the drug trade, and guerrilla activity constitute a "threat of serious irreversible damage" that they have chosen to combat by aeri ally spraying an unrevealed and untested herbicide over extended periods of time.²¹⁶ Instead, the precautionary principle is to be used by states when neither time nor scientific evaluation allows the risk

Colombia, N.Y. TIMES, July 27, 2008, at A1.

²¹² *Id.* at A8.

²¹³ United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Principle 15 (Aug. 12, 1992) [hereinafter *Rio Declaration on Environment and Development*].

²¹⁴ Rutledge, *supra* note 4, at 1108.

²¹⁵ *Id.*

²¹⁶ *Rio Declaration on Environment and Development*, *supra* note 213, at Principle 15.

to be determined with sufficient certainty, which is certainly not the case of Colombia. Colombia's problems have not suddenly surfaced. On the contrary, they have persisted for years, and Colombia has had over thirteen years to run the requisite tests on the herbicide and determine its ramifications. Instead, Colombia has either chosen not to test the herbicide or is hiding the results from the international community and is even withholding a complete list of the herbicide's chemical ingredients so that other states cannot test it.²¹⁷ Thus, while Colombia's problems are pressing and necessitate immediate government action, the precautionary principle does not provide a state with a justification to combat a longstanding problem with an untested solution over an extended period of time simply because the state feels that is the "most effective method" to achieve its goals.

Nonetheless, Colombia's best argument would be that it is justified in its use of aerial spraying as part of the doctrine of necessity. Colombia's defense under the doctrine of necessity would be that drug trade and guerrilla activity create a situation of necessity that demanded a response and excused its procedural and substantive internationally wrongful acts. The doctrine of necessity, which was expressly adopted by the ICJ in *Gabčíkovo-Nagymaros*²¹⁸ and appears in Article 25 of the International Law Commission's Articles on State Responsibility, established that a state may be precluded from committing an international wrongful act if the act was (1) the only way for the state to safeguard an essential interest against a grave and imminent peril, and (2) the act does not seriously impair an essential interest of the state or states toward which the obligation exists, or of the international community as a whole.²¹⁹

In analyzing each prong, under the first prong, the action a state chooses to safeguard as an essential interest must be the "only way" and the "only means" available to the state.²²⁰ Under this prong, Colombia would have had a hard time justifying that the use of aerial spraying is the only means available to combat the drug

²¹⁷ Aerial Herbicide Spraying Application, *supra* note 2, at ¶ 31.

²¹⁸ *Gabčíkovo-Nagymaros*, *supra* note 116, at 49-52.

²¹⁹ Articles on State Responsibility for International Wrongful Acts, G.A. Res. 56/83, Art. 25, U.N. Doc. A/RES/56/83/Annex (Dec. 12, 2001).

²²⁰ *Id.* at Art. 25.

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trade, as there are other alternatives available, such as manual eradication. Under the second prong, Colombia would have had a better chance of success in saying that a strong and pressing interest exists in “preserving the very existence of the state and ensuring safety of a civilian population.”²²¹ Moreover, under the third prong, these interests were subject to grave peril due to the violence that drug-funded guerilla groups have inflicted for years on the country. However, under the fourth prong, Ecuador’s environmental and human rights interests, and Colombia’s rights to preserve its government and ensure the safety of its civilian population, will have to be weighed against each other. This would require Colombia to prove that its interest in protecting its people conclusively outweighs Ecuador’s interest in ensuring the quality of its environment and its people’s health and safety, particularly as aerial spraying is not the only means to combat drug trafficking.²²² These two issues are of equal importance, but nonetheless aerial spraying is causing health problems not only to Ecuadorean people and the environment but also to Colombian citizens, indigenous groups, and the environment. It seems hard to see that Colombia could demonstrate that its interest outweighs Ecuador’s. Thus, the ICJ could either have concluded that Colombia failed to show the requisite necessity to excuse its international wrongful acts or it could have stated that Colombia was justified under the doctrine of necessity but nonetheless could have ordered Colombia to discontinue the aerial fumigations and require them to find new alternative solutions to combat drug trafficking.

Some conditioning factors affecting the solution of Colombia’s conflict include the “relaunch”²²³ of the National

²²¹ Rutledge, *supra* note 4, at 1110.

²²² See Viñuales, *supra* note 113, at 245-51 (explaining that part of the ICJ second wave of cases in the field of international environmental law was the declaration in *Gabčíkovo-Nagymaros* that environmental interests are in fact essential interests that can be protected in and of themselves under the doctrine of necessity).

²²³ See International Narcotics Control Strategy Report, *Drug and Chemical Control Country Reports*, 1 INCSR 2011, 194, 195 (March 2011), available at <http://www.state.gov/documents/organization/156575.pdf> (explaining that the Colombia Government initially launched the National Consolidation Plan (PNC) in 2009 in an attempt to “address the complexity and inter-connections of security,

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Consolidation Plan (PNC)²²⁴ as the National Plan for Territorial Consolidation (PNCT) in 2011, by President Juan Manuel Santos,²²⁵ the implementation of the 2011 Victims' and Land Restitution Law and the initiation of peace treaty negotiations with the Fuerzas Armadas Revolucionarias de Colombia (FARC) for the termination of the armed conflict and the establishment of lasting peace.²²⁶ If the PNCT is fully implemented, it can be expected that Colombia's development plan and its target zones become engines of Colombia's overall economic growth. With a more comprehensive presence of the government in former conflict and rural areas, greater results can be achieved from manual coca eradication, and more alternatives could be offered to those currently engaged in the drug trade. The Victims and Land Restitution Law is a project which, for the first time, includes and recognizes the victims of the armed conflict. This law recognizes victims and also seeks to promote social change by attempting to restore lands to those who were violently dispossessed.²²⁷ The success of the program will depend on the state's ability to provide assistance to victims and its ability to ensure that it becomes a rights-based program of empowerment in practice. Additionally, if the peace negotiations with the FARC are successful, then the guerrillas will be demobilized, and the country would have to approach a post-conflict strategy. Manual eradication programs

counternarcotic programs and economic development of the country." The goal of the "relaunch" of the program was "to establish a more comprehensive government presence in former conflict and rural areas, deter coca replanting after eradication, improve interdiction along Colombia's Pacific coastline, and provide alternative livelihood for those currently engaged in the drug trade").

²²⁴ *Id.* (explaining that the initial focus of the PNC program was to increase the state's capacity to provide security for communities; "achieving lasting eradication; transferring security responsibilities from the national military to the police; and providing a wide range of social and economic services." The program was coordinated by Regional Coordination Centers staffed by civilian, police, and military personnel).

²²⁵ See International Narcotics Control Strategy Report, *Drug and Chemical Control Country Reports*, 1 INCSR 2013, 127 (March 2013), available at <http://www.state.gov/documents/organization/204265.pdf>.

²²⁶ H.R. Council, Rep. of the U.N. High Comm'r for H.R. on the Situation of H.R. in Colom., 22^d Sess., ¶ 1, U.N. Doc. A/HRC/22/17/Add.3 (Jan. 7, 2013).

²²⁷ *Id.* at ¶ 13, 18.

would become more effective as there will be no risk of attacks from the guerrillas and the Government will be able to establish more presence in rural areas that have remained ignored because of the armed conflict. Moreover, a successful negotiation could also allow for the support of the FARC with eradication programs in abandoned rural areas.

V. Recommendations

Colombia is entrenched in a history of violence and is a nation in the thrall of a paradox. The main purpose of Plan Colombia was to curb illicit crop cultivation, but Plan Colombia and its aerial fumigations with herbicides have failed to achieve this goal. Instead, they have caused grave injury to the country, its citizens, and neighboring countries. Yet, the country continues to conduct aerial fumigations with herbicides.²²⁸ All the countries that produce coca leaves, including Afghanistan, have rejected the practice of aerial fumigations with herbicides against illicit crops.²²⁹ The only government that allows and accepts this policy worldwide is the Colombian Government – besides the historical antecedent in Vietnam, where the U.S. used, as part of its war strategy, the so-called “Agent Orange” as a weapon.²³⁰ The crisis of this political strategy, which has proven to be ineffective despite the huge financial investment it has received, has been evidenced within the Colombian government when it requested the President of the Colombian Advisory Commission for Drugs, Daniel Mejía Londoño, to withhold publication of the report on the investigations on the effects of aerial fumigations with herbicides because of the

²²⁸ International Narcotics Control Strategy Report, *supra* note 224.

²²⁹ Movimiento Mundial Para la Salud de los Pueblos [Global Movement for People's Health] *Plan Colombia, Guerra Química Contra los Pueblos* [Plan Colombia, Chemical Warfare Against the People] 2, 3, available at <https://ia600407.us.archive.org/19/items/PlanColombiaGuerraQuimicaContraLosPueblos/plancolombia.pdf>.

²³⁰ *Id.* (explaining that in the Vietnam war the U.S. massacred more than five million people and the aftermaths of the “Agent Orange” have left more than one million birth deformities and civilians that continue to die due to its effects).

consequences this could bring to the lawsuit with Ecuador pending before the ICJ.²³¹ This request created commotion within the Commission, to the extent that Mejia resigned from his position. The report shows that aerial fumigations have “very little impact” on reducing illicit crops in the country and reveal that for every hectare sprayed the reduction of coca crops falls between twelve percent and fifteen percent, which is why it is necessary to spray more than nine times the same hectare for effective reduction.²³² Moreover, some reports indicate that after the fields are sprayed, drug farmers simply move their fields elsewhere in Colombia or to neighboring countries like Peru and Bolivia,²³³ creating what is “[k]nown as the balloon effect [which] results in the destruction of [more] virgin rainforest to create new coca fields and irreversibly damages delicate ecosystems”²³⁴ – showing how sprayings have not necessarily eliminated illegal crop fields but instead have caused the displacement of illicit crops to other areas of the country and to other countries.

The problem of illicit crops and violations of international and domestic law are interconnected with the problems in rural areas of land tenure, economic policies, and widespread violence, among other things. The problems of coca cultivation have social, economic and environmental dimensions that should be addressed in the formulation of pertinent policies. The focus of the current policies needs to be shifted because the current approach has not resulted in the desired cessation of the production and consumption of illegal drugs, but, on the contrary, has had unintended consequences. Therefore, the strategies to combat drugs must be reviewed from a structural point of view in order to be able to adopt solutions that are systematic and sustainable, and that include proper environmental,

²³¹ Daniel Mejia, *Crisis en Comisión Asesora de Política sobre Drogas?*, SEMANA, available at <http://www.semana.com/nacion/articulo/renuncia-presidente-de-comision-asesora-de-drogas-daniel-mejia-londono/360638-3>

²³² *Id.*

²³³ GABRIEL MARCELLA, CHARLES E. WILHELM, ALVARO VALENCIA TOVAR, RICARDO ARIAS CALDERÓN & CHRIS MARQUIS, *Plan Colombia: Some Differing Perspectives* 1, 4 (June 2001), available at http://www.sptimes.com/news/031401/worldandnation/Colombia_governors_d.shtml.

²³⁴ Sum-Ping, *supra* note 26, at 143.

cultural, social, political and economic considerations.

This type of comprehensive and systematic strategy needs to go beyond the strategies implemented to eradicate illicit crops, as simply eliminating aerial fumigations will probably only worsen the internal conflict. The policy of eradicating coca in Colombia needs to be the result of a consultation process with affected communities and democratically elected leaders. Strengthening the social fabric should be a priority, and any actions undermining this process should be rejected. Thus, the new policy formulation needs to work in conjunction with other programs and organs of the Colombian Government in order to achieve effective and long-lasting results. The new governmental strategy needs to start focusing on the internal determinants of the problem, which are the peasants, and needs to develop crop-substitution programs for peasants that provide economically viable alternatives to coca production as well as provide them with land restitution. A central issue of the civil war in Colombia has been land tenure and the inequality of the distribution of wealth and its natural resources.²³⁵ Despite changes in the Country's land tenure system through Agrarian reform laws, Colombia's land tenure system still faces many obstacles.²³⁶ These reforms still fail to meet expanding social needs and "the inequitable concentration of rural property."²³⁷ Many peasants have no other way to support themselves than by growing coca crops, and the ones that have fled coca-growing regions constitute "a vast exodus of poor, uneducated people looking for money to feed themselves in an economy [with high] unemployment" and no opportunities for them.²³⁸ "The [peasants'] resort to growing drug plants is an effect of economic illness" from unjust distribution of the benefits of Colombia's natural resources and the barriers to production for these

²³⁵ Dale Adams, *Colombia's Land Tenure System: Antecedents and Problems*, 42 LAND ECONOMICS 43, 43-47 (1966).

²³⁶ *Id.* at 43.

²³⁷ *Id.* at 47.

²³⁸ T. Christian Miller, *Major Cocaine Source Wanes; The U.S.-Backed Effort to Eradicate Colombian Coca Plants is Working, Killing 38% of the Crop. Farmers and Guerrillas are feeling the Pinch*, L.A. TIMES, June 8, 2003, at A1, available at <http://articles.latimes.com/print/2003/jun/08/world/fg-coca8>.

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groups.²³⁹ Although some funding for alternative crop programs exists, these programs have not been comprehensive and have only been made to last a few years.²⁴⁰ The current voluntary crop eradication and substitution program is limited to providing each participant with resources valued at \$1,000 and allows them only one year to eradicate their existing crops as well as to produce alternative crops.²⁴¹ This small amount is unattractive to current peasants and coca growers, and many participants have not even received the financial aid because funding for these programs has been tied up.²⁴² Moreover, alternative crops yield significant profits inside two years of planting. Thus, the current incentives to switch to alternative crops has not been sufficient to encourage coca producers to change their practices in significant numbers, in addition to the present ecological, geographical, and economic barriers.²⁴³

That is why the new proposed strategy needs to come with a fundamental political reform that has an infrastructure to assure long-term success and needs to include economic development and land reform. Otherwise, peasants will have no other choice but to resume growing drug crops. There is a need for land reform, and the drug trade has simply inflicted the reverse, as it has prompted a greater concentration of land tenure, reducing “access to productive land, [which] has reduced the per-capita income in rural Colombia.”²⁴⁴ An awareness of the difference in economic incentive needs to be recognized and countered with educational and training programs that inform peasants as to the long-lasting ecological effects that coca cultivation and aerial fumigation can have on their lands. Peasants need to be made aware that in the future growing coca might also become unfeasible as these practices have dire effects on the land and inhibit land productivity. The educational programs also need to focus on providing training to farmers on the feasibility of growing

²³⁹ Fred E. Foldvary, *The Foreign Economic Effect of the U.S. War on Drugs*, 91 OR. L. REV. 1129, 1138 (2013).

²⁴⁰ Miller, *supra* note 238, at A1.

²⁴¹ Peterson, *supra* note 63, at 437.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Foldvary, *supra* note 239, at 1138.

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alternative crops. Yes, in the short-run, coca growers might have greater economic incentives, as the profits of coca cultivation are approximately double the profits of the next best legal crop,²⁴⁵ but in the long run, crop substitution along with manual eradication will provide for longer-lasting economic results. Data show that one peasant can “manually pull up one hectare of coca bushes in ten days, presenting a much more cost effective option than aerially [spraying] the same land, as well as an option with a much higher success rate” and less dire effects.²⁴⁶ Peasants need to be made aware of these facts and this information can be provided to them through educational and crop substitution training programs.

The alternative crop programs, subsidized by the Government, also need to offer peasants the resources to replant their land with legal crops and provide them with opportunities to invest in alternate business ventures in exchange for voluntarily eradicating their coca crops. “With better economic opportunities, the [peasants] . . . could grow wholesome food crops rather than drugs, [as] Colombia has much to offer: gems, flowers, fruits, oil, coffee and many other products.”²⁴⁷ With the Free Trade Agreement recently signed between Colombia and the U.S., the government can support and create opportunities for peasants to export products. Nonetheless, incentives need to be sufficient and long lasting so that peasants do not resume growing drug crops. The incentives should be provided in exchange for the support of peasants with manual eradication. Manual eradication is a more effective method because it completely kills the plant,²⁴⁸ but manual eradication also requires the physical presence of the government through military support rather than anonymous flying, so that guerrillas do not coerce farmers. Manual eradication by peasants alone, without productive assistance and food safety can produce disastrous results for the stability and success of the program. Thus, the alternative crop and manual eradication program needs to be supported with the government's

²⁴⁵ Peterson, *supra* note 63, at 437.

²⁴⁶ Mugge, *supra* note 10, at 338.

²⁴⁷ Foldvary, *supra* note 239, at 1138.

²⁴⁸ WALSH, SANCHEZ-GARZOLI, & SALINAS ABDALA, *supra* note 179, at 48, 50.

physical presence and military support. Governmental physical presence is also important so peasants can regain trust in their government, since the aerial fumigations have resulted in a growing mistrust from peasants who see the government as an enemy who harms them.

An important component for the development of alternative crop programs and their success is the just distribution of the benefits of Colombia's natural resources and the elimination of legal barriers to production. Peasants have been victims of a profound land tenure crisis, which has been exacerbated by the armed conflict.²⁴⁹ There has not been a redistribution of land that helps alleviate the inequality in the distribution of lands. An agrarian reform that guarantees lands to peasants is needed for the development of a successful alternative crop program. In order to do so, the government will need to be consistent with its public policies, allocate enough financial resources to buy the lands, provide technical and logistical support, and offer opportunities for the development of successful agricultural businesses that are friendly to the environment.

Moreover, a possible solution for peasants is to seek political recognition in order to protect their lands, just like indigenous groups have done. In 1991, the Colombian Constitution recognized the collective rights of indigenous peoples, giving them the legal tools to exercise rights to protect their territories.²⁵⁰ These same rights were not given to peasants, despite them being a distinct social group and one in fragile conditions, also dependent, in many ways like indigenous peoples, on their land for their survival. The *Saramaka* decision of the Inter-American Court of Human Rights²⁵¹ could provide a strong argument for a cautious extension of indigenous land rights by analogy. The lack of recognition of peasants' lands has resulted in the absence of specific public policies that further assist the needs of this group, as well as in difficulties for them to gain rights to political participation and representation in decisions that

²⁴⁹ *Id.* at 23.

²⁵⁰ *See supra* note 161, 167.

²⁵¹ *See supra* note 136–138.

concern and affect them. Peasants' lands are necessary for the survival of their communities. Peasants are a distinct self-identified group that has been afflicted by the government and as such should be entitled to rights under the Colombian Constitution, similar to those of indigenous peoples. For years, peasants have claimed these rights and an agrarian reform that provides them with lands that can allow them to grow alternative legal crops, such as basic foods. It is time for the Colombia Government to undertake this agrarian reform. However, peasants distrust the Colombian Government as in the past, it has failed to fulfill its promises.²⁵² In order to overcome this distrust and have their voices heard, non-governmental organizations should serve as a liaison between peasants and the government. The government also needs to work on building trust with peasants so that peasants communicate their needs and problems and become involved in offering solutions to the agrarian reform.²⁵³ In the past, there have been attempts by the Colombian Government to pass an agrarian reform, but it has failed to achieve these goals because of the governmental absence and its technical and logistical inability, as well as because of the pressure that the private agricultural sector exerts on the government, given that any type of agrarian reform that seeks to benefit society as a whole will diminish the economic benefits of the dominant private sector.²⁵⁴ This problem was exacerbated with the economic opening of the agricultural sector under the Free Trade Agreement with the U.S. Thus, the agrarian reform needs to be a consistent rural policy that addresses the country's needs by restituting peasants' lands, guaranteeing them security, creating a policy of food production for peasants to benefit from, developing an institutional framework for rural development and researching food production alternatives. But throughout this process the inclusion of peasants and the community as a whole will be important as well as the government's ability to translate words into actions.

²⁵² *Pacto Agrario: A Vencer la Desconfianza* [Agricultural Reform: To Overcome Distrust], SEMANA (Sept. 14, 2013), <http://www.semana.com/Imprimir.aspx?idItem=357596>

²⁵³ *Id.*

²⁵⁴ WALSH, SANCHEZ-GARZOLI, & SALINAS ABDALA, *supra* note 179, at 23.

Furthermore, it cannot be expected that a problem that has been embedded with a country for centuries will be resolved from one day to another. Coca production is engrained in society, and for any of the proposed programs to work and be successful the Colombian Government, as well as the American Government, must be patient and provide the funding and technical assistance necessary to promote the successful implementation of the programs. The long-term success in any strategy implemented by the Colombian Government requires an integrated, broad-based approach. Government-led security, economic development, alternative crop programs, manual eradication, educational programs, agrarian reform, drug demand programs, and even peace negotiations with guerrillas groups, all need to work in coordination. Programs that improve the rule of law and economic prosperity can lead communities to choose democratic values, licit economic activity and support for state institutions, which in turn promotes more permanent eradication results. The process for solving Colombia's problems is a long and protracted one. Colombia has made great advances in combating the drug trade, but this process is not irreversible and continued financial support is needed. The problem of illicit drugs is an international one, and it will need active collaboration with the Colombian community and other nations. To lock in the gains made over the past decade, the Colombian Government needs to devote additional resources to these new strategies. Formal peace negotiations with the FARC, Colombia's largest guerrilla group, announced in October 2012, include illicit narcotics as one of five agenda items.²⁵⁵ These negotiations will have wide-ranging political and security implications for Colombia if they are successful in demobilizing the guerrilla groups, and they offer an excellent opportunity to contribute to the elimination of aerial fumigations as the main reason for these hazardous activities would disappear and security throughout the country's rural areas will be

²⁵⁵ *Negociaciones Gobierno-FARC: Llegó la Hora* [Government-FARC Negotiations: The Time Has Come], SEMANA (Oct. 11, 2012), <http://www.semana.com/nacion/articulo/negociaciones-gobierno-farc-llego-hora/267664-3>; see also *Colombia Peace Talks: FARC points to 'Modest Progress'*, BBC NEWS (Oct. 4, 2012), <http://www.bbc.com/news/world-latin-america-24392192>.

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sufficiently assured to make aerial fumigations unnecessary.

Aerial fumigations cannot continue to be the key content of the Colombian Government's strategy against illicit drugs. There are alternatives that will require much investment of thought and time, but will result in greater benefits and enhanced well-being for Colombia's society as a whole.