

COMMENT

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

INTRODUCTION

Over the past ten years, the Colombian government has persistently been digging itself into a paradoxical hole so deep that it will be remarkable if the government can make it out on top. Despite the impressive maintenance of democracy since 1810¹ and an “excellent relationship” with the United States on several fronts,² Colombia is far from a peaceful nation. Plagued by seemingly endless civil wars and battles with violent guerilla organizations and drug cartels, the Colombian government has fought tooth-and-nail to keep its democracy in place.³ Colombian natives live in fear of left-wing terrorist rebel groups like the Fuerzas Armadas Revolucionarias de Colombia (“FARC”), the Ejército de Liberación Nacional (“ELN”), and the Autodefensas Unidas de Colombia (“AUC”).⁴ These groups kill more than three thousand innocent Colombian civilians each year, and have defiantly objected to Colombia’s negotiation efforts by repeatedly attempting to commit political assassinations and kidnap Colombian leaders.⁵

Perhaps the biggest problem with these terrorist groups is that they are standing on solid economic ground, bringing in an estimated two hundred to three hundred million dollars each year

1. *Background Note: Colombia*, U.S. DEPT OF STATE, <http://www.state.gov/r/pa/ei/bgn/35754.htm> (last visited Nov. 10, 2011).

2. *Id.*

3. MARCO PALACIOS, *BETWEEN LEGITIMACY AND VIOLENCE 1* (Richard Stoller trans., 2006) (recognizing four national civil wars in Colombia during 1876–77, 1885–86, 1895, and 1899–1902 respectively); *see also id.* at 135 (describing the time period between 1945–74 as “La Violencia,” defined as a “popular and largely peasant convulsion . . . that never really went away”); *id.* at 190–213 (explaining the rise to power of leftist guerilla groups, the violent crimes and torture inflicted by the groups, and the increasing prevalence of drug cartels connected to these groups in Colombia).

4. HARVEY F. KLINE, *SHOWING TEETH TO THE DRAGONS 2* (2009).

5. U.S. DEPT OF STATE, *A REPORT TO CONGRESS ON UNITED STATES POLICY TOWARDS COLOMBIA AND OTHER RELATED ISSUES* (2003), <http://www.state.gov/p/wha/rls/rpt/17140.htm>.

by taxing coca farmers, processing the crop into cocaine, and smuggling it into the lucrative international drug trade.⁶ Thus, what started as a “Colombian” problem has developed into an international problem, particularly as Colombia is responsible for the majority of worldwide cocaine production and U.S. cocaine traffic.⁷ Recognizing the urgency of this situation and realizing that inhibiting the drug trade would largely cut off funding to left-wing rebel groups, former President Andrés Pastrana Arango launched “Plan Colombia,” a supposed six-year program to end armed conflict by focusing on the aerial eradication of coca and poppy plantations, largely funded by the United States.⁸

However, what began as a good faith effort to bring peace and democracy to a troubled nation has developed into an epic battle of human and environmental rights. Beginning in the year 2000, aerial fumigations of a powerful herbicide mixture containing glyphosate, a chemical with unknown acute toxicity levels in humans, was sprayed across the countryside for days at a time from 6 a.m. to 4 p.m. each day.⁹ While purportedly aimed at Colombian coca and poppy plantations, the clouds of spray were picked up by the wind and carried elsewhere, landing not only on Colombian people, animals, homes, and food crops but also across the border into Ecuador and into the San Miguel River bordering the two countries.¹⁰ Ecuador admits that at times, some herbicide drift was caused by the wind.¹¹ However, Ecuador argues that all too often, Colombian planes sprayed herbicides directly on the shared national border and used Ecuadorean air space to turn around, allowing the herbicide to fall indiscriminately on Ecuadorean people, plants, and animals.¹²

Immediately following the sprayings, Ecuadorean citizens were inflicted with serious adverse health reactions, including fevers, diarrhea, intestinal bleeding, nausea, skin and eye problems, and

6. Simon Romero, *Despite Rebel Losses, Cocaine Sustains War in Rural Colombia*, N.Y. TIMES, July 27, 2008, at A1.

7. U.S. DEP'T OF STATE, *supra* note 5.

8. KLINE, *supra* note 4, at 45–48; *see also* U.S. DEP'T OF STATE, *supra* note 5 (explaining the rationale for the Colombian aid package is the United States' strong support of “combating the narcotics industry, promoting peace, reviving the economy, improving respect for human rights, and strengthening the democratic and social institutions of the country”); Luz Estella Nagle, *U.S. Mutual Assistance to Colombia: Vague Promises and Diminishing Returns*, 23 FORDHAM INT'L L.J. 1235, 1269 (2000) (noting that the United States' initial plan pledged 7.5 billion dollars to Plan Colombia).

9. Application Instituting Proceedings, *Aerial Herbicide Spraying (Ecuador v. Colom.)*, 2008 I.C.J. Pleadings 10, ¶ 13 (Mar. 31, 2008) [hereinafter *Aerial Herbicide Spraying Application*].

10. *Id.* ¶ 3.

11. *Id.*

12. *Id.*

even a few deaths.¹³ Local crops relied on by Ecuadorean people for sustenance—including yucca, plantains, rice, coffee, and hay—were destroyed.¹⁴ Despite Ecuador’s repeated attempts to negotiate with Colombia over a period of eight years, Colombia repeatedly refused to cooperate.¹⁵ Thus, in March of 2008, Ecuador submitted an Application Instituting Proceedings to the International Court of Justice (“ICJ”), demanding that Colombia’s actions be declared internationally wrongful acts, and that Colombia be ordered to compensate the Ecuadorean people and government for their losses.¹⁶ As it stands, the ICJ is thus confronted with a unique controversy where it must either challenge an international drug ring that has terrorized Colombia for decades or address human rights and environmental issues presented from a neighboring state.

As unique as the *Case Concerning Aerial Herbicide Spraying* (Ecuador vs. Colombia) (“*Aerial Herbicide Spraying*”)¹⁷ is standing on its own, it has come before the ICJ at an interesting point in the jurisprudence of International Environmental Law (“IEL”). On April 20, 2009, the ICJ delivered a landmark opinion for IEL in *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (“*Pulp Mills*”) that sets an interesting background for *Aerial Herbicide Spraying*.¹⁸ In *Pulp Mills*, Argentina argued that Uruguay breached its obligations under the 1975 Statute of the River Uruguay in connection with the planned construction and authorization of two pulp mills on the river.¹⁹ Although this claim is primarily grounded in treaty provisions binding only Argentina and Uruguay, Argentina argued—and the ICJ agreed—that the treaty incorporated customary international law standards, including general principles of cooperation, due diligence, and prevention to the extent that they represent the *opinio juris* of nations.²⁰ In the end, the ICJ refused to award reparations to Argentina for the alleged damage from Uruguay’s pulp mills.²¹ The court did, however, introduce some interesting developments to IEL in its decision. For example, the ICJ utilized the case to acknowledge separate obligations under IEL: “procedurally” based and “substantively” based obligations.²² Moreover, the court went out of its way to reemphasize that due diligence is a “corpus” of international law, and for the first time,

13. *Id.* ¶ 4.

14. *Id.*

15. *Id.* ¶ 5.

16. *Id.*

17. See *Aerial Herbicide Spraying Application*, *supra* note 9.

18. *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. 135 (Apr. 20), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

19. *Id.* ¶ 25.

20. *Id.* ¶¶ 53, 65.

21. *Id.* ¶ 265.

22. *Id.* ¶ 70 (outlining the court’s analysis by noting the separation of procedural and substantive obligations).

that an environmental impact assessment ("EIA") is required under customary international law.²³

The main purpose of this Comment is to analyze the *Aerial Herbicide Spraying* case—which is still in its preliminary stages—and how the outcome may be based on the *Pulp Mills* decision. To set the initial framework for this analysis, this Comment will track the development of the customary principles of due diligence and prevention in Part I by dividing their history into two separate "waves."²⁴ To do this, the Comment will primarily utilize and add to Dr. Jorge Viñuales' contemporary assessment of IEL. Additionally, this Comment will consider the impact of the International Law Council's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities ("Articles on Prevention") on IEL development.²⁵

Part II of this Comment will engage in a discussion of *Pulp Mills*, including precisely what the ICJ decided and what the decision actually means in the context of IEL development. Finally, drawing upon the analysis from *Pulp Mills*, Part III of this Comment will explore the potential repercussions of *Pulp Mills* for *Aerial Herbicide Spraying*. This Comment concludes that the ICJ will almost certainly find that Colombia has violated its procedural obligations to Ecuador, notably by violating the general principles of prevention and cooperation. Moreover, this Comment concludes that the ICJ will find that Colombia has violated its substantive obligations by disregarding the well-grounded principle that "states have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States."²⁶ Because Colombia specifically seeks refuge in the precautionary principle to excuse its actions, this Comment will assess the viability of this defense and ultimately conclude that Colombia has grossly misinterpreted the principle. Moreover, as

23. *Id.* ¶¶ 101, 204.

24. 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, 235 (2008) (noting that it is possible to "distinguish, for analytical purposes, two main trends or 'waves' of cases in the ICJ jurisprudence relating to IEL").

25. Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, in Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 18, 2001, U.N. Doc. A/56/10; GAOR, 53d Sess., Supp. No. 10, at 370–77 (2001) [hereinafter Articles on Prevention].

26. *Id.* art. 3, cmt. 1; see also United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, princ. 2, U.N. Doc. A/CONF.151/5/Rev.1 (Vol. 1) [hereinafter Rio Declaration], reprinted in 31 I.L.M. 874, 876; Stockholm Declaration of the United Nations Conference on the Human Environment, adopted June 16, 1972, *Report of the United Nations Conference on the Human Environment*, princ. 21, G.A. Res. 2997, U.N. GAOR, 27th Sess., 21st mtg. [hereinafter Stockholm Declaration], reprinted in 11 I.L.M. 1416, 1420.

other scholars have predicted, this Comment concurs that Colombia's best defense will be the doctrine of necessity.²⁷ However, after a brief analysis, it demonstrates that Colombia does not meet the requisite test initially set forth in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("Articles on State Responsibility") and subsequently adopted in the *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia) ("*Gabcikovo-Nagymaros*").²⁸ Thus, Colombia will most likely be held responsible for the harm inflicted upon Ecuador, despite its tragic predicament.

I. THE "WAVES" OF IEL

IEL as we know it today, like most areas of international law, is a haphazard collection of treaties, customary law, and general principles that have developed over time.²⁹ At least for some facets of IEL, exactly what it constitutes is highly debatable, and more than one scholar will agree that many requirements are not conclusive enough to be customary.³⁰ Perhaps the most frustrating problem is that unless a state has explicitly signed a treaty or committed an egregious *ius cogens* violation, it is arguably not bound to many of the so-called "requirements" of IEL.³¹

27. See Robert Esposito, *The ICJ and the Future of Transboundary Harm Disputes: A Preliminary Analysis of the Case Concerning Aerial Herbicide Spraying* (Ecuador v. Colom.), PACE INT'L L. REV. ONLINE COMPANION, Aug. 2010, at 43, <http://digitalcommons.pace.edu/pilronline/15/>.

28. Gabcikovo-Nagymaros Project (Hung. v. Slovak.), Judgment, 1997 I.C.J. 7, 55 (Sept. 25), available at <http://www.icj-cij.org/docket/files/92/7375.pdf>; Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 25, U.N. Doc. A/RES/56/83/Annex (Dec. 12, 2001) [hereinafter Articles on State Responsibility].

29. PATRICIA BIRNIE ET AL., INTERNATIONAL LAW & THE ENVIRONMENT, 12–13 (3d ed. 2009).

30. See Daniel Bodansky, *Customary (and not so Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 107 (1995) (noting that "international legal scholars tend to place importance on whether a norm represents customary international law and have spilled much ink debating whether particular environmental norms have achieved this status"); John H. Knox, *Assessing the Candidates for a Global Treaty on Transboundary Environmental Impact Assessment*, 12 N.Y.U. ENVTL. L.J. 153, 153 (2003) (emphasizing that the "absence of a global treaty on environmental impact assessment (EIA) is an obvious gap in international law").

31. See Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 299 (2006) (noting that "international law has traditionally been defined as a system of equal and sovereign states whose actions are limited only by rules freely accepted as legally binding", a view that was recognized by the ICJ in 1986 when the court stated "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception" (citing *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 269 (June 27)). However, this theory is derogated by *ius cogens* violations, or rules of international law that are so imbedded that they cannot be derogated

For example, while there is a general consensus that requirements like due diligence or the general principle of prevention are customary and thus required for every state,³² very few sources actually explain the meaning of those requirements. Moreover, when they *are* in fact mentioned in a treaty or convention, they are usually stated simply as an existing international obligation, without any explanation of how to comply.³³ When one considers how broadly (or narrowly) a concept like “due diligence” or “prevention” could be interpreted, this becomes problematic. Does due diligence require only common sense preventative measures or does it demand something more? Does the principle of prevention always require a pre-action EIA? Are these requirements lessened for developing states? It is easy to see how such manipulation of meaning could work to both states’ advantage in a dispute. After all, on Monday morning, the injured state can always speculate as to what the quarterback *should* have done when fulfilling its due diligence or prevention obligations. However, the offending state has an equally powerful argument because it is nearly always questionable if a specific action would have truly changed the final score.

While the ICJ has certainly helped define general customary norms of IEL to reduce situations where such questions arise, it is important to recognize that within the ICJ there exists no *stare decisis*, and thus the court is not bound to follow its own prior opinions should it choose to abandon them.³⁴ Despite not having an obligation to abide by its own decisions, the ICJ certainly does not disregard them easily. Rather, as noted in Dr. Jorge Viñuales’ article, the ICJ tends, with few exceptions, to stick to and develop the law as stated in its prior decisions.³⁵ In Viñuales’ article, he portrays this slow but consistent development by dividing the ICJ body of decisions prior to *Pulp Mills* into what he calls the First and Second Waves of IEL.³⁶ The following two Subparts briefly define the First and Second Waves, as they will be referred to throughout the remainder of this Comment. The third Subpart will address the

by a state. See generally Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT’L L. 571 (1937), for the first article in which the theory of *ius cogens* was discussed in detail.

32. See Winfried Lang, *UN-Principles and International Environmental Law*, 1999 U.N.Y.B. 3, 160–61, available at http://www.mpil.de/shared/data/pdf/pdfmpunyblang_3.pdf.

33. See Rio Declaration, *supra* note 26, princ. 2; Stockholm Declaration, *supra* note 26, princ. 21 (providing an example of an obligation to refrain from causing harm to another state without elaboration of how a state may meet the requirement).

34. Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, T.S. No. 993 (1945) [hereinafter ICJ Statute].

35. See Viñuales, *supra* note 24, at 235.

36. *Id.*

ILC's Articles on Prevention and their import for the ICJ when expanding upon IEL concepts.

A. *The First Wave*

The First Wave began with the *Trail Smelter Arbitration* (United States v. Canada) ("*Trail Smelter*"), in which the ICJ ordered Canada to make reparations to the United States after fumes escaped from Canadian iron and ore smelters into the United States, damaging crops.³⁷ The ICJ used the occasion to recognize the legitimacy of granting reparations to states that have suffered transboundary environmental harm, emphasizing that "no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties therein."³⁸

While *Trail Smelter* represented progress in IEL by virtue of its general recognition that transboundary environmental harm constitutes true harm under ICJ jurisprudence, Viñuales points out that the contours of IEL still remained incredibly unclear.³⁹ After all, in *Trail Smelter*, the ICJ did not *explicitly* say that a state has an obligation not to allow its territory to be used for acts contrary to the *environmental* rights of other states, but rather used the phrase in reference to facts that merely *implicated* the environment.⁴⁰ This nuance should not be overlooked, as it ever so slightly distinguishes between the general responsibilities states have when they directly cause harm to other states versus the more specific responsibility on states to refrain from causing harm to another state's environment.

While the ICJ could have taken the opportunity to specifically elaborate on what it meant in *Trail Smelter* in later First Wave contentious cases, including the *Corfu Channel Case* (United Kingdom v. Albania) ("*Corfu Channel*"),⁴¹ and the *Nuclear Test Cases* (Australia v. France) (New Zealand v. France) ("*Nuclear Tests*"),⁴² Viñuales points out that these ICJ decisions were ultimately vague and ambiguous as to whether the *Trail Smelter* principle could be referenced solely in terms of environmental protection.⁴³ For example, in *Corfu Channel*, Albania was held responsible for damage caused to British warships because Albania failed to warn Great Britain about underwater mines in its waters.⁴⁴

37. *Trail Smelter Arbitration* (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (1941), available at http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf.

38. *Id.*

39. Viñuales, *supra* note 24, at 238.

40. *See id.* at 237–38, 243.

41. *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4 (Apr. 9).

42. *Nuclear Tests* (Austl. v. Fr.), Judgment, 1974 I.C.J. 253 (Dec. 20); *Nuclear Tests* (N.Z. v. Fr.), Judgment, 1974 I.C.J. 457 (Dec. 20).

43. Viñuales, *supra* note 24, at 240.

44. *Corfu Channel*, 1949 I.C.J. at 22–23.

While *Corfu Channel* was not technically about environmental issues, the ICJ used the occasion to incorporate a slightly different version of the *Trail Smelter* language by stating that it is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”⁴⁵—language that was almost immediately repeated in Principle 21 of the Stockholm Declaration.⁴⁶ However, as Viñuales explains, whatever value this reaffirmation of the *Trail Smelter* principle had at this point, it was rendered ambiguous by *Nuclear Tests*.⁴⁷ In *Nuclear Tests*, Australia’s Attorney General, as the petitioner, cited the *Trail Smelter/Corfu Channel/Stockholm* Principle 21 assertion as if it were a customary principle of IEL.⁴⁸ However, because the case was settled, the ICJ never made a full decision on the merits, and the ambiguity remained.⁴⁹

Therefore, the true value of the First Wave was not in what it actually established but rather in what it had the *potential* to establish.⁵⁰ While the ICJ clearly determined that states have an obligation not to use their territory to cause harm to other states, it never actually stated the principle *expressly* in favor of environmental protection, although it laid the groundwork to do so in the future.

B. *The Second Wave*

What the First Wave introduced, the Second Wave developed. The first case in the Second Wave that significantly contributed to IEL development was the ICJ’s Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (“*Legality of Nuclear Weapons*”).⁵¹ In this case, the ICJ was presented with the question of whether a state’s use of nuclear weapons in war or other armed conflict would constitute a breach of that state’s international obligations.⁵² The ICJ expressly acknowledged that “the general obligation of States to ensure that activities within their jurisdiction

45. *Id.* at 22.

46. Stockholm Declaration, *supra* note 26, princ. 21.

47. Viñuales, *supra* note 24, at 240.

48. *Id.* Citing to a principle or idea in pleadings to the ICJ is particularly important in all areas of international law because it tends to show the state practice and *opinio juris* required to establish the assertion as a customary norm. Thus, when parties cited to *Trail Smelter/Corfu Channel/Stockholm* Principle 21 in their materials to the court, they were implicitly recognizing the customary nature of the requirement, or at the very least, their willingness to be bound by the requirement. *See generally* BIRNIE ET AL., *supra* note 30, at 22–25, 141.

49. Viñuales, *supra* note 24, at 240.

50. *Id.* at 242–44.

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

52. *Id.* ¶ 1.

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*.”⁵³ Principally, Viñuales argues that this statement confirmed what the First Wave set the stage for—that the *Trail Smelter/Corfu Channel/Stockholm Principle 21* assertion did in fact deserve deference *specifically* as a principle of IEL in favor of per se protecting the environment for its intrinsic value and not just for preventing general harm to another state.⁵⁴ Given the fact that the ICJ has repeatedly cited this language verbatim in future decisions, including *Pulp Mills*, this point should not be underestimated.⁵⁵ Despite this progress, Viñuales expresses his concern for the majority’s choice of the word “corpus.”⁵⁶ He explains that “corpus” is not truly the same thing as a customary principle of international law, specifically because in the immediately preceding paragraphs the court referred not to widespread state practice, nor to *opinio juris*, but rather to Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration.⁵⁷ This was noted by one of the dissenting (and environmentally progressive) judges, who argued that the principle does “not depend for (its) validity on treaty provisions” but rather is part of customary international law and the “*sine qua non* for human survival.”⁵⁸

Despite the potential for ambiguity in *Nuclear Tests*, Viñuales argues that the ICJ confirmed protection of the environment per se as a customary principle of IEL in *Gabcikovo-Nagymaros*.⁵⁹ The *Gabcikovo-Nagymaros* decision was famous primarily for adopting the ILC’s four-part test for the doctrine of necessity, a potential defense for Colombia in *Aerial Herbicide Spraying* analyzed briefly in Part III of this Comment.⁶⁰ However, the ICJ made a few important comments in the decision with respect to the reaffirmation of IEL’s customary nature. First, Viñuales points out that *Gabcikovo-Nagymaros* classifies environmental interests as “essential interests” when considering whether a state has either satisfied or violated the doctrine of necessity.⁶¹ Second, in

53. *Id.* ¶ 29 (emphasis added).

54. Viñuales, *supra* note 24, at 246.

55. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 135 (Apr. 20).

56. Viñuales, *supra* note 24, at 246.

57. *Id.*

58. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 504 (July 8) (Weeramantry, J., dissenting).

59. Viñuales, *supra* note 24, at 248.

60. *Gabcikovo-Nagymaros Project (Hung. v. Slovak.)*, Judgment, 1997 I.C.J. 7, ¶¶ 51–52 (Sept. 25); see also Mari Nakamachi, *The International Court of Justice Decision Regarding the Gabcikovo-Nagymaros Project*, 9 *FORDHAM ENVTL. L. REV.* 337, 346–53 (1998).

61. Viñuales, *supra* note 24, at 248–49.

Gabcíkovo-Nagymaros, the ICJ explicitly references paragraph twenty-nine of *Nuclear Tests* when citing to “newly developed norms of environmental law,” which Viñuales interprets as definitive proof that a state’s obligation to ensure that activities in its jurisdiction do not harm the environment of other states is now customary IEL.⁶² Thus by the end of the Second Wave, the general obligation to avoid causing transboundary environmental harm was set in stone, but the specifics as to how a state might fulfill that requirement remained up for debate.

C. The International Law Commission—Too Progressive to Matter for the ICJ, or Right on Target?

The International Law Commission (“ILC”) is a respected body of experts in international law appointed by the United Nations General Assembly in 1947 for the purpose of promoting the “progressive development of international law and its codification.”⁶³ Since 1947, the ILC has worked on roughly thirty topics spanning a wide range of issues, and its works are generally regarded as good evidence of existing law, and occasionally as authoritative statements of it.⁶⁴ The primary problem with relying on anything written by the ILC is that in its works, the ILC never distinguishes between codification and progressive development.⁶⁵ Thus, it is sometimes difficult to tell whether the ILC is precisely stating the law “in fields where there already has been extensive State practice, precedent and doctrine” or if it is “preparing draft conventions on subjects . . . to which the law has not yet been sufficiently developed in the practice of States.”⁶⁶ It has been suggested, however, that this absence of a distinction is actually beneficial to tribunals like the ICJ, because it makes reliance on their works possible without requiring a preliminary inquiry into the proposition’s current status.⁶⁷

Indeed, the ICJ has repeatedly taken advantage of the fact that Article 38 of its Statute explicitly allows utilization of “the teachings of the most highly qualified publicists of the various nations” as a “subsidiary means for the determination of rules of law.”⁶⁸ The court has relied on the ILC with greater frequency over the years,⁶⁹

62. *Id.* at 249.

63. Statute of the International Law Commission, G.A. Res. 36/39, U.N. Doc. A/RES/36/39, art. 1 (Nov. 18, 1981) [hereinafter ILC Statute].

64. BIRNIE ET AL., *supra* note 29, at 29.

65. *Id.*

66. ILC Statute, *supra* note 63, art. 15.

67. BIRNIE ET AL., *supra* note 29, at 30.

68. ICJ Statute, *supra* note 34, art. 38.

69. See *Gabcíkovo-Nagymaros Project (Hung. v. Slovak.)*, Judgment, 1997 I.C.J. 7, ¶¶ 51–53 (Sept. 25) (citing directly to the ILC’s former Article 33 (current Article 25) of the Draft Articles on Responsibility of States for

something that various states have recognized by citing to ILC statements of the law when making submissions to the court.⁷⁰ Therefore, the ILC's various articles have become increasingly important, especially because they impose highly specific requirements often considered customary that serve to fill out IEL's notoriously generalized requirements.

For example, in the Articles on Prevention, the drafters begin their commentary by restating the principles pointed out by Viñuales, citing to *Legality of the Threat or Use of Nuclear Weapons* as an example of the ICJ's recognition that prevention of transboundary harm arising from hazardous activities is a corpus of international law.⁷¹ Moreover, Article 3 continues the generality with a citation to the *Trail Smelter/Corfu Channel/Stockholm Principle 21* assertion.⁷² The generality ends there, however, and the specific requirements outlined in the remainder of the Articles on Prevention are incredibly important given the ICJ's recent acceptance of several of them in *Pulp Mills* and the potential to reaffirm and expand that acceptance in *Aerial Herbicide Spraying*.

First, Article 3 sheds light on a state's substantive obligations under IEL by providing a working definition of due diligence, explaining that a state must first introduce policies and legislation to minimize the risk of transboundary harm, in addition to ensuring that the policies succeed as written and are updated as new technology becomes available to prevent environmental damage more efficiently.⁷³ Notably, the drafters explain that this standard of due diligence will be more rigorously applied as the state's activity becomes increasingly hazardous⁷⁴ and as the state's economic capability increases.⁷⁵

Second, and critical in *Pulp Mills* and potentially for *Aerial Herbicide Spraying*, Articles 4, 9, and 10 provide an overview of a state's obligation to prevent transboundary harm.⁷⁶ Article 4 demands states of origin not only to cooperate with affected states, but also to cooperate in *good faith*, an idea utilized in *Nuclear Tests* when the ICJ stated that good faith is a "basic principle" of international relations.⁷⁷ To cooperate in good faith, Articles 9 and 10 require states of origin and states likely to be affected by the

Internationally Wrongful Acts as an acceptable expression of the doctrine of necessity).

70. BIRNIE ET AL., *supra* note 29, at 141.

71. Articles on Prevention, *supra* note 25, ¶ 3.

72. *Id.* art. 3, ¶ 1.

73. *Id.* art. 3, ¶¶ 11, 14.

74. *Id.* art. 3, ¶ 18.

75. *Id.* art. 3, ¶ 13 (noting that the "economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence").

76. *Id.* arts. 4, 9, 10.

77. *Id.* art. 4, ¶ 2.

proposed activity to “enter into consultations, at the request of any of them, with a view to achieving acceptable solutions” to prevent transboundary harm based on an “equitable balance of interests.”⁷⁸ A state of origin is forbidden from engaging in mere formalities with “no real intention of reaching a solution acceptable to the other States.”⁷⁹ However, neither Articles 9 nor 10 give a state likely to be affected an absolute veto over dangerous projects not prohibited by international law, and a state of origin is allowed to proceed with a project after failed consultations so long as it takes into account the equitable balance of interests of the states likely to be affected.⁸⁰

Finally, Articles 7 and 8 of the Articles on Prevention concern the necessity of states to conduct an EIA whenever a proposed project has a risk of significant transboundary harm.⁸¹ At the time the Articles on Prevention were written, whether EIAs were a widespread enough practice to be a customary obligation was frequently debated.⁸² EIAs were not a radical idea, and are incorporated in the domestic laws of over a hundred nations as a general precaution against transboundary harm.⁸³ Substantively, Articles 7 and 8 followed this trend by requiring states to conduct EIAs prior to authorizing projects or activities with the potential to cause significant transboundary harm, and to communicate the results with potentially affected states.⁸⁴ Moreover, Article 8 forbids states from authorizing the planned activity or project until the earlier of six months or the receipt of a response from the notified state.⁸⁵

Within the commentary to Article 7, the ILC indicated that the obligation to conduct an EIA “corresponds to the basic duty contained in Article 3” or the substantive obligation of due diligence.⁸⁶ The obligations within Article 8 to notify, consult, and cooperate with potentially affected states concerning the results of the EIA is also directly aligned with the ILC’s analysis of a state’s general procedural obligations in Articles 9 and 10.⁸⁷ Thus, the ILC essentially interpreted the requirement of an EIA as a blended requirement of substantive and procedural obligations, an idea that,

78. *Id.* art. 9.

79. *Id.* art. 9, ¶ 2.

80. *Id.* arts. 9–10.

81. *Id.* arts. 7–8.

82. See John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT’L L. 291, 291 (2002) (arguing that the “story” that environmental impact assessments are customary international law is simply “not true”).

83. *Id.* at 297.

84. Articles on Prevention, *supra* note 25, arts. 7–8.

85. *Id.* art. 8.

86. *Id.* art. 7, ¶ 6.

87. *Id.* arts. 8–10.

as discussed in Part II, was utilized by the ICJ in *Pulp Mills*, and will likely be used again in *Aerial Herbicide Spraying*.⁸⁸

II. THE THIRD WAVE BEGINS—*PULP MILLS ON THE RIVER URUGUAY*

In his article, Viñuales predicted that *Pulp Mills* and *Aerial Herbicide Spraying* would provide a rich factual background for the ICJ to begin the Third Wave of IEL in which it could potentially introduce “more specific rights and obligations . . . as part of customary international law, including duties of environmental impact assessment and monitoring of any substantial projects with potential implications for the environment.”⁸⁹ In this Part, this Comment argues that the ICJ absolutely began the Third Wave in *Pulp Mills*, because for the first time, the ICJ gave teeth to international principles like prevention and due diligence that were introduced—but never explained—in the First and Second Waves. Moreover, the ICJ utilizes the specific language from the Articles on Prevention while doing so, and is thus subtly changing the work from what was once progressive development into authoritative, customary statements of IEL.

A. *The Background*

The River Uruguay is a shared river flowing through Argentina, Brazil, and Uruguay used for drinking water, fishing, tourism, and recreational activities by both states.⁹⁰ Realizing that the river needed to be protected, Argentina and Uruguay entered into a treaty called the Statute of the River Uruguay (“1975 Statute”) “in order to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay, *in strict observance of the rights and obligations arising from treaties and other international agreements* in force for each of the Parties.”⁹¹ The 1975 Statute also imposed obligations of prior notification for any project that might cause significant damage to the River Uruguay, and only if the notified country had no objections to the project would it be allowed to proceed.⁹² Moreover, to monitor the process and promote joint regulation and cooperation, the 1975 Statute established the Administrative Commission of the River Uruguay (“CARU”), a group composed of an equal number of representatives from Argentina and Uruguay.⁹³

88. See discussion *infra* Part III.

89. Viñuales, *supra* note 24, at 253.

90. Application Instituting Proceedings, *Pulp Mills on the River Uruguay* (Arg. V. Uru.), 2006 I.C.J. Pleadings 2, ¶ 5 (May 6) [hereinafter *Pulp Mills Application*], available at <http://www.icj-cij.org/docket/files/135/10779.pdf>.

91. *Id.* ¶ 6 (emphasis added).

92. *Id.* ¶ 7.

93. *Id.* ¶ 6.

The dispute between Argentina and Uruguay arose under the 1975 Statute when Uruguay unilaterally commissioned, authorized, and began constructing two pulp mills on the River Uruguay without properly notifying or consulting with Argentina.⁹⁴ Although the former president of Uruguay assured Argentinean officials that the authorization for the first pulp mill project, the Celulosa de M'Bopicia ("CMB"), would not be granted until Argentina received a sufficient EIA on the proposed mill, the official authorization to begin construction was granted on October 9, 2003, the day after the conversation took place.⁹⁵ On October 27, 2003, Uruguay "notified" the Argentinean Embassy about the CMB project by sending two "seriously deficient" documents, one of which was a "Summary Environmental Report" from the company constructing CMB that made "no mention of the potential transboundary impact and [took] no account of the obligations under the 1975 Statute."⁹⁶ Following the authorization, the CARU meetings fell into deadlock, as Argentinean delegates refused to admit that Uruguay was following the 1975 Statute and Uruguayan delegates refused to admit that they were in violation of it.⁹⁷

Thereafter, in October 2004, the Uruguayan government authorized a Finnish company to build a second pulp mill, the Orion mill, less than seven kilometers from CMB.⁹⁸ This authorization occurred just three days after a meeting of CARU in which the project was not even mentioned to Argentinean delegates, even though the mill is allegedly the "largest industrial project ever envisaged on the shared section of the River Uruguay."⁹⁹ Over the protests of, and without proper notification or consultation with Argentina, construction of both CMB and Orion began in the second half of 2005.¹⁰⁰ Although there were further attempts at negotiations after a change in government in Argentina in March 2005, the negotiations failed because the information supplied by Uruguay remained "fragmentary and inadequate" due to "inaccuracies and omissions,"¹⁰¹ particularly concerning the liquid effluent, solid waste, and gas emissions of the mills.¹⁰²

In its Application Instituting Proceedings ("Application"), Argentina indicated that due to the heavy reliance on tourism and fishing in the Argentinean cities surrounding the mills, its main

94. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 135, ¶ 25 (Apr. 20).

95. *Id.* ¶ 31.

96. Pulp Mills Application, *supra* note 90, ¶ 10.

97. *Pulp Mills*, 2010 I.C.J. ¶¶ 32–33.

98. Pulp Mills Application, *supra* note 90, ¶ 12.

99. *Id.* ¶ 13.

100. *Id.* ¶ 14.

101. *Id.* ¶ 16.

102. *Id.* ¶ 20.

concerns were the detrimental effects of the foul pulp mill odor on tourism and the risk of damage to fish stocks.¹⁰³ Moreover, Argentina expressed additional concern for alleged “noise” and “visual pollution” caused by the pulp mills.¹⁰⁴ Based on these alleged damages, Argentina not only argued that Uruguay violated the 1975 Statute binding the two states, but also contended that Uruguay violated procedural and substantive provisions of general, conventional, and customary international law as the 1975 Statute incorporated international obligations by reference.¹⁰⁵ Specifically, Argentina argued that Uruguay violated both the 1975 Statute and substantive international law when the government failed to take all necessary measures to rationally utilize the River Uruguay and prevent transboundary environmental damage in violation of the principles of prevention and due diligence. Argentina also alleged violations of the 1975 Statute and procedural international law when Uruguay failed to negotiate with Argentina, and failed to provide Argentina with timely and proper notification, in violation of the principles to inform, notify, and cooperate.¹⁰⁶ Finally, Argentina emphasized that because Uruguay’s procedural violations were inextricably linked to its substantive violations, a “breach of the former entailed a breach of the latter.”¹⁰⁷

B. *The Decision*

First, because Article 60 of the 1975 Statute stated that “[a]ny dispute concerning the interpretation or application of the . . . Statute” unable to be settled by negotiations may be submitted for decision to the ICJ, Argentina and Uruguay agreed that the ICJ had jurisdiction over the case.¹⁰⁸ However, the ICJ

103. *Id.* ¶ 15. Generally, pulp mills are factories that convert wood and other materials into fiber boards, which are then shipped to paper mills to be developed into paper. Notably, pulp mills produce a distinctive and foul odor that can be detected for miles, although the odor itself is not environmentally harmful. See Dorothy Thornton, Robert A. Kagan & Neil Gunningham, *When Social Norms and Pressures are Not Enough: Environmental Performance in the Trucking Industry*, 43 *LAW & SOC’Y REV.* 405, 407 (2009) (noting that the results of one study on pulp mills showed that mill owners went out of the way to reduce unpleasant odors, even though environmental regulations did not require it). Rather, the big problem with chemicals is water and air pollution as the production of pulp results in the “concurrent production of a large array of chemical by-products” which are often discarded into the environment. Larry E. LaFleur, *Sources of Pulping and Bleaching Derived Chemicals in Effluents*, in *ENVIRONMENTAL FATE AND EFFECTS OF PULP AND PAPER MILL EFFLUENTS* 21, 21 (Mark R. Servos et al. eds., 1996).

104. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 135 (Apr. 20).

105. *Pulp Mills Application*, *supra* note 90, ¶ 24.

106. *Id.*

107. *Pulp Mills*, 2010 I.C.J. 135 ¶ 68.

108. *Id.* ¶ 48.

interpreted Article 60's language narrowly and refused to recognize any claim that could not reasonably be interpreted as deserving relief under the 1975 Statute.¹⁰⁹ Thus, because Article 36 of the 1975 Statute only forbade the states from engaging in projects that would change the ecological balance *in the river*, the ICJ concluded that Argentina's claims of noise and visual pollution and the impact of the bad odor on tourism were all outside of its jurisdiction, since technically these damages were not limited to protection of biodiversity in and closely around the water.¹¹⁰

On the merits, the ICJ delivered its decision in the same way it was presented by Argentina in the Application—by dividing its response into the alleged procedural and substantive violations of the 1975 Statute. First, the court rejected Argentina's assertion that the procedural and substantive violations were so inextricably linked that a violation of one entailed a violation of the other.¹¹¹ While the court recognized the existence of a "functional link" between them in the respect that if a state fully complies with its procedural obligations, it is unlikely that a substantive violation will develop, the 1975 Statute and common sense do not necessarily entail this result.¹¹² For example, as was the case in *Pulp Mills*, a state can violate its procedural obligations, but if the state "subsequently abandons the implementation of its planned activity" such that the substantive violation never occurs, it cannot be found in violation of something it did not do.¹¹³

Next, the court considered the alleged procedural violations.¹¹⁴ Argentina specifically contended that Uruguay violated Articles 7 through 12 in the 1975 Statute, which generally mirror a state's customary international obligations to cooperate, notify, and inform states that might be prospectively injured from a proposed project capable of producing transboundary harm.¹¹⁵ While both parties agreed at the outset that the CNB and Orion mills were of sufficient importance such that Uruguay was obligated to generally inform CARU of the projects,¹¹⁶ they disagreed as to whether Uruguay had to inform CARU specifically about the extraction and use of the river water for industrial purposes by the Orion mill,¹¹⁷ and as to the content and timeliness of the required notification.¹¹⁸

109. *Id.* ¶ 52.

110. *Id.*

111. *Id.* ¶¶ 77–79.

112. *Id.* ¶ 79.

113. *Id.* ¶ 78.

114. *Id.* ¶¶ 80–158.

115. *Id.*

116. *Id.* ¶ 96.

117. *Id.* ¶ 97.

118. *Id.* ¶ 98.

The ICJ began by explaining that the international duties to inform, notify, and cooperate are grounded in principles of prevention and due diligence, citing to the ever-so-present notion that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" to describe those principles.¹¹⁹ As if this assertion was not quite enough to make the point, the ICJ continued to specifically say that a state is thus obliged to use *all means at its disposal* to avoid activities that take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of the state. The Court then noted that this obligation is "part of the corpus of international law relating to the environment."¹²⁰

Applying this principle, the ICJ found that Uruguay had an obligation to inform CARU in an EIA as soon as Uruguay discovered that its project might cause significant damage to Argentina.¹²¹ Moreover, Uruguay could not merely inform CARU of the potential environmental danger at its own convenience, but rather had an international obligation to inform *prior* to its authorization to begin constructing the mills.¹²² In this case, because Uruguay authorized both the CMB and Orion mills prior to giving CARU information—other than two insufficient documents pertaining to the CMB mill only¹²³—and ignored requests from CARU for additional information prior to their unilateral authorization,¹²⁴ its noncompliance with its procedural obligations under international law and Article 7 of the 1975 Statute was glaringly obvious.

Although Uruguay argued that it had no obligation under either the 1975 Statute or procedural international law to provide Argentina with an EIA, the ICJ flatly disagreed, concluding that an EIA was "necessary" to fulfill the general international requirements of notification and cooperation so that Argentina could fully assess the situation and engage in reasoned negotiations with Uruguay.¹²⁵ Specifically, under the 1975 Statute, the ICJ held that Uruguay was plainly obligated to conduct an EIA containing a detailed description of the main aspects of work and the technical data necessary to assess the project's impact.¹²⁶ Thus, Uruguay truly failed to comply with this first step since the Summary Environmental Report it sent Argentina was far from a detailed

119. *Id.* ¶ 101 (citing *Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 4, 22 (Apr. 9)).

120. *Id.* ¶ 101 (emphasis added) (citing *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8)).

121. *Id.* ¶¶ 105–06, 111.

122. *Id.* ¶ 105.

123. *Id.* ¶¶ 106–07.

124. *Id.* ¶ 106.

125. *Id.* ¶ 119.

126. *Id.* ¶ 80.

description of the pulp mill projects.¹²⁷ Regardless of the insufficiency of the initial report, Uruguay was supposed to give Argentina 180 days to initially respond to its proposed project under the 1975 Statute,¹²⁸ and only if Argentina had no objections would Uruguay be allowed to proceed.¹²⁹ Therefore, because Argentina objected to the insufficiency of the environmental document it received and sent Uruguay an outline of its concerns and recommendations,¹³⁰ Uruguay was obligated to reserve an additional 180 days to negotiate a compromised solution.¹³¹ Because Uruguay neither completed a proper EIA and delivered it to Argentina prior to authorization so that the parties could engage in this process, nor allotted Argentina the response time and negotiation time it was entitled to under the 1975 Statute with respect to the insufficient Summary Environmental Report, the court held that Uruguay "breached its procedural obligations to inform, notify and negotiate."¹³²

Finally, the ICJ considered Argentina's alleged substantive violations of both general international law and Articles 1, 27, 35, 36, and 41 of the 1975 Statute.¹³³ The court declined to hold Uruguay responsible for causing any substantive harm.¹³⁴ Practically speaking, this was because Argentina had yet to point to any substantive harm other than the noise, smell, and odor of the mills, all of which were previously determined not to be covered by the 1975 Statute since it was not literally pollution "in" the river, and was thus outside of the ICJ's jurisdiction.¹³⁵ Because Argentina likely recognized the absence of these specific protections in the 1975 Statute, it tried to work around it by arguing that under Article 1, Uruguay violated the object and purpose of the treaty to engage in "optimum and rational utilization" of the river when it caused the alleged specific harms.¹³⁶ However, the court concluded that "optimum and rational utilization" was a reference not to specific rights or obligations but rather to a "balance between economic development and environmental protection that is the essence of sustainable development."¹³⁷ Thus, at least substantively speaking, even though it halted the projects, Uruguay was entirely within its rights to research the construction of the pulp mills in the

127. *See id.* ¶ 33.

128. *Id.* ¶ 80.

129. *Id.*

130. *See id.* ¶ 33.

131. *Id.* ¶ 80.

132. *Id.* ¶ 158.

133. *Id.* ¶ 169.

134. *Id.* ¶ 265.

135. *See id.* ¶¶ 263-64.

136. *Id.* ¶ 170.

137. *Id.* ¶ 177.

first place to further its economic development so long as it proceeded sustainably.

The court spent the majority of the remaining decision on the alleged substantive violations, considering whether or not Uruguay was in violation of Article 41 of the 1975 Statute.¹³⁸ Article 41 binds Argentina and Uruguay to protect, preserve, and prevent pollution in the River Uruguay's aquatic environment and instructs the states to do this by adopting rules in accordance with "applicable international agreements."¹³⁹ The ICJ immediately interpreted Article 41 as an expression of the customary international obligation to act with "due diligence."¹⁴⁰ While the ICJ could have stopped with this assertion, the court went on to define the general due diligence principle, explaining that it entails "not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement . . . such as the monitoring of activities."¹⁴¹

The ICJ then explained that EIA preparation is one specific requirement within this definition of due diligence, concluding that "due diligence, and the duty of vigilance and prevention which it implies would not be considered to have been exercised" in a situation like Uruguay's in the absence of an EIA on the project's anticipated effects.¹⁴² Thus, the ICJ essentially elevated EIA preparation to a customary IEL obligation—noting in language that will almost certainly be repeated in future contentious cases—that the EIA "has gained so much acceptance among States that it may now be considered a requirement under general international law" anytime there "is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context."¹⁴³ In the next paragraph, the ICJ admittedly narrowed this new requirement's breadth by declining to elaborate on the content or scope of a sufficient EIA.¹⁴⁴ Instead, the Court merely acknowledged that neither the 1975 Statute nor general international law define the contents of an EIA, and while some conventions like the Espoo Convention do in fact outline specific requirements, neither Argentina or Uruguay are parties to it.¹⁴⁵

After engaging in an extensive analysis of whether Uruguay violated the due diligence obligation by virtue of the location of the mills,¹⁴⁶ the mills' effluent discharges into the water,¹⁴⁷ and the

138. *Id.* ¶¶ 190–266.

139. *Id.* ¶ 190.

140. *Id.* ¶ 197.

141. *Id.*

142. *Id.* ¶ 204.

143. *Id.*

144. *Id.* ¶ 205.

145. *Id.*

146. *Id.* ¶¶ 207–14.

mills' effect on biodiversity in and around the river,¹⁴⁸ the court still ultimately concluded that Argentina failed to provide conclusive evidence that Uruguay had not acted with the requisite degree of due diligence, even though Uruguay admittedly did not prepare an EIA prior to authorization.¹⁴⁹ Regardless of the procedural hiccups, the ICJ pointed out that there was no conclusive proof that the mills either had "deleterious effects" on the river or had upset the "ecological balance of the river," and consequently refused to hold Uruguay responsible for any alleged damage to Argentina.¹⁵⁰

C. *What Pulp Mills Means*

Pulp Mills is loaded with developments that could have reverberating effects for not only *Aerial Herbicide Spraying*, but also future ICJ cases generally. First, the ICJ's discussion of substantive and procedural international law was a unique development in terms of the organization of IEL. For example, for the first time the court clarified that while procedural duties to inform, notify, and cooperate and substantive duties like due diligence and prevention "complement one another perfectly," they should be analyzed separately.¹⁵¹ This analysis is reminiscent of that found in the Articles on Prevention, which separated its analysis of substantive international obligations in Article 3 from those of a procedural nature in Articles 9 and 10.¹⁵²

Moreover, because the court let Uruguay off the hook without paying damages,¹⁵³ it demonstrated that damages are going to be unrecoverable in the future without present violations of substantive international law, even where blatant procedural violations exist. However, while violation of procedural obligations alone will not qualify an injured state for damages, under the ICJ's new analysis, a state's *compliance* with procedural obligations will significantly increase the odds that they have substantively complied.¹⁵⁴ Practically (and cynically) speaking, this hierarchy makes compliance with procedural obligations wise, but somewhat less important. In reality, a state likely will not have to answer for its failure to cooperate with other states—beyond a slap on the wrist—if that state does not also inflict substantive harm. On a brighter note, the division, for the first time, clarified how the ICJ will enforce specific areas of IEL, which is the first indicator that the

147. *Id.* ¶¶ 229–59.

148. *Id.* ¶¶ 260–62.

149. *Id.* ¶ 265.

150. *Id.*

151. *Id.* ¶ 77.

152. Articles on Prevention, *supra* note 25, arts. 3, 9–10.

153. *Pulp Mills*, 2010 I.C.J. ¶ 276.

154. Owen McIntyre, *The Proceduralisation and Growing Maturity of International Water Law*, 22 J. ENVTL. L. 475, 489 (2010).

ICJ is fulfilling Viñuales' predictions and moving full force into the Third Wave.¹⁵⁵

Second, the ICJ made two notable developments during its discussion of Uruguay's procedural violations of international law. First, while the ICJ could have grounded its analysis of Uruguay's failures to inform, notify, and cooperate under the 1975 Statute and left it at that, the court instead went out of the way to talk about prevention and due diligence, a move that essentially functioned to "add content to what might have been an otherwise straightforward assessment of Uruguay's obligations under conventional law."¹⁵⁶ Furthermore, not only did the court just mention the principles of due diligence and prevention, it actually strengthened those principles by imposing a new requirement on states to use *all the means at their disposal* to avoid causing transboundary harm.¹⁵⁷ The ICJ then stated that this *strengthened* obligation is the one recognized as a corpus of international law, not the weaker principle defined in the First and Second Waves that states are simply obligated to refrain from using their territory to harm other states.¹⁵⁸ Although this language may seem like a slight nuance, it could have big consequences in future decisions. In the right case, the difference between the "obligation to refrain from" and the obligation to "use all the means at their disposal" could be the difference as to whether a state is held responsible for transboundary environmental damage or a state is off the hook.

Next, and as discussed in more detail below in the substantive analysis, there is no question that the most exciting development in *Pulp Mills* for the international community is the court's discussion of EIAs in its analysis of both procedural and substantive international obligations. During the procedural portion of the EIA discussion, the court outlined both the timeline and the process under the 1975 Statute to create EIAs and communicate the results with neighboring states.¹⁵⁹ Despite this focus on the 1975 Statute, the discussion is notable because the court accepted a procedure that is exceptionally similar to Article 8 of the Articles on Prevention. Both the 1975 Statute—as it is discussed in *Pulp Mills*—and the Articles on Prevention require provision of EIA results to a potentially affected state prior to action, a waiting period after the results are communicated before any action can be taken, and upon objection of the state, a set time period for

155. Viñuales, *supra* note 24, at 257 (predicting that the Third Wave would further expound on the enforceability of IEL).

156. Djurdja Lazic, *Introductory Note to the International Court of Justice: Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 49 I.L.M. 1118, 1120 (2010).

157. *Pulp Mills*, 2010 I.C.J. ¶ 101.

158. *Id.*

159. *Id.* ¶ 80.

negotiations to reach a mutually acceptable method to proceed.¹⁶⁰ At this point, it is likely that the 1975 Statute and Article 8 EIA process is too technically specific to be adopted as a requirement of general international law in the Third Wave. However, the court's indication that this process is acceptable, if followed, gives states a guideline as to how they might proceed and perhaps opens up the possibility that the ICJ might consider adopting a specific process similar to this one in future contentious cases.

Third, during the ICJ's analysis of substantive international law, the Court made two additional developments worth noting. First—and perhaps a runner-up to the EIA in important progressions for IEL within *Pulp Mills*—the ICJ included a definition of a state's due diligence obligation, explaining that states must both enact appropriate regulations and ensure their subsequent enforcement.¹⁶¹ Notably, this is not just any definition, but is *exactly* the definition provided in Article 3 of the Articles on Prevention.¹⁶² This definitional provision is important because it finally provides some guidance for the due diligence concept, taking a step toward relieving IEL of the generality of the concept and its capability for manipulation that plagued the First and Second Waves. As Viñuales predicted, IEL has moved beyond the obvious conclusion that to exercise due diligence, states should avoid using their territory to cause transboundary harm to other states, and has instead provided two concrete requirements to guide states and the IEL community.¹⁶³ The definition is also notable because although the ICJ does not expressly cite to the ILC in its opinion, the Articles on Prevention are clearly referenced. This demonstrates the ICJ's willingness to look to the ILC for guidance and adopt its language as authoritative statements of customary law, which significantly increases the importance of the articles that are not customary law.

Next, as Viñuales predicted would happen in the Third Wave, the ICJ sweepingly labeled EIAs as a customary requirement of due diligence.¹⁶⁴ Despite the force of this statement, its actual value in future cases may be negligible based on the limiting statements that followed and the ultimate decision in *Pulp Mills*. As mentioned above, immediately after declaring that EIAs are customary norms of IEL, the Court followed with the observation that “general international law [does not] specify the scope and content,” and that it will be within each state's prerogative to determine either through its “domestic legislation or in the authorization process for the project the specific content of the [EIA] required in each case.”¹⁶⁵

160. *Id.*; Articles on Prevention, *supra* note 25, art. 8.

161. *Pulp Mills*, 2010 I.C.J. ¶ 101.

162. Articles on Prevention, *supra* note 25, art. 3.

163. Viñuales, *supra* note 24, at 253.

164. *Pulp Mills*, 2010 I.C.J. ¶ 204.

165. *Id.* ¶ 205.

Thus, the current substantive requirement to perform an EIA is realistically only a shell. While the recognition that EIAs are an obligation is a step in the right direction, providing clarity as to what due diligence entails, the important part remains unclear; if there is no requirement that a state's EIA be sufficiently reliable, then what exactly is the point? The state can exercise its discretion to complete an inadequate EIA just to facially satisfy the requirement. Thus, the ICJ has seemingly replaced the formerly manipulable obligation of due diligence with a narrower, but still manipulable obligation to create an EIA, because both the injured state and the offending state are able to Monday morning quarterback as to the sufficiency of an EIA in question.

This interpretation is reinforced by the outcome in *Pulp Mills*. In *Pulp Mills*, Uruguay failed to deliver a timely EIA to Argentina.¹⁶⁶ While Uruguay did deliver the "Environmental Summary Report" for the CMB mill, the report was completed by the economically involved company in charge of the mill's construction, and was deemed insufficient by Argentinean representatives in CARU.¹⁶⁷ Despite this failure, the ICJ found that Uruguay had satisfied its due diligence obligations.¹⁶⁸ Thus, if Uruguay can avoid liability with an inadequate EIA for the CMB mill and no EIA for the Orion mill—in the very case where the EIA requirement was first promulgated—it is a safe conclusion that at least for now, the ICJ is not going to vigorously enforce this customary requirement for the purpose of awarding damages.

III. THE THIRD WAVE CONTINUED? THE POTENTIAL REPERCUSSIONS FOR AERIAL HERBICIDE SPRAYING AFTER PULP MILLS

A. *The Case Against Colombia*

Ecuador's Application to the ICJ begins by acknowledging that the majority of the world's coca and a large amount of the world's opium poppy comes from Colombia.¹⁶⁹ Despite this reality, Ecuador emphatically argues that combating the problem by aerially spraying toxic herbicides at, near, and over the border of Ecuador is not the answer, and is a violation of Ecuador's rights under "customary and conventional international law."¹⁷⁰

First, Ecuador points out that Colombia ignored its own experts' warnings by aerially spraying a compound containing glyphosate

166. *Id.* ¶ 106.

167. *Id.*; see also *Pulp Mills Application*, *supra* note 90, ¶ 10 (indicating that the Summary Environmental Report was provided by ENCE, the construction company in charge of the CMB mill).

168. *Pulp Mills*, 2010 I.C.J. ¶ 265.

169. *Aerial Herbicide Spraying Application*, *supra* note 9, ¶ 9.

170. *Id.* ¶ 37.

over illegal drug crops.¹⁷¹ According to Ecuador, as early as 1984, the Instituto Nacional de Salud (“INS”), Columbia’s national health institute, convened solely to consider whether aerial spraying would be a safe option to combat drug production.¹⁷² Far from approving its use, the INS concluded that glyphosate was “not recommended” and the acute toxicity “little known.”¹⁷³ Additionally, in the areas of the world where glyphosate is utilized as a commercial weed killer, Ecuador notes that it is accompanied by severe warnings that it should only be applied by protected handlers and that users must “AVOID DRIFT” because of its potential to cause substantial harm not only to desirable plants and crops but also to humans if it is inhaled or if it comes in contact with the eyes.¹⁷⁴ Thus, from the very beginning, Ecuador alleges that Colombia was aware of the potential harm, but chose to unilaterally authorize the dispersion of herbicides containing glyphosate both on and over the Ecuadorean border.

In addition, Ecuador claims that Colombia has refused to disclose the herbicide’s exact chemical composition.¹⁷⁵ While the Ecuadorean government did learn from various press releases that the primary active ingredient is glyphosate, this is insufficient knowledge to form an opinion about the herbicide’s consequences, as glyphosate is notoriously more dangerous in combination with specific chemicals.¹⁷⁶ Moreover, Ecuador notes that it is particularly concerned because the compound Colombia is *rumored* to be using contains a chemical called Cosmoflux 411F, which is manufactured solely in Colombia and has never been extensively studied, presumably because Colombia refuses to release the “proprietary” chemical composition.¹⁷⁷ Because testing on glyphosate combination compounds have traditionally been conducted in temperate climates, Ecuador points out that its tropical climate is at even higher risk, especially since the area maintains a “mega-diverse” biodiversity classification.¹⁷⁸

Ecuador first contacted the Colombian government on July 24, 2000, to express its concern about the impact of the herbicide

171. *Id.* ¶¶ 10–12.

172. *Id.* ¶ 10.

173. *Id.*

174. *Id.* ¶ 20.

175. *Id.* ¶ 19.

176. *Id.* ¶ 22.

177. *Id.* ¶ 23.

178. *Id.* ¶ 25 (noting that Ecuador was named by the World Conservation Monitoring Centre of the United Nations Environment Programme as “mega-diverse” and is one of seventeen countries worldwide to boast the title); *see also id.* (explaining that Ecuador has the world’s highest biological diversity per area unit, meaning that on average, there are more species per square kilometer in Ecuador than anywhere else in the world).

combination on Ecuador's people and environment.¹⁷⁹ However, Ecuador explains that "from the start, Colombia has been . . . clear that it has no interest in addressing Ecuador's concerns."¹⁸⁰ Colombia declined to give information to Ecuador upon its request, responding that, regardless of what Ecuador thinks, the aerial spraying is actually *protecting* them because "Plan Colombia is, precisely, the most effective method for protecting the fraternal country of Ecuador from the perverse effects of narco-trafficking and armed conflict."¹⁸¹ Moreover, Colombia refused Ecuador's requests to observe a ten kilometer no-spray zone away from Ecuador's border in both July 2001 and September 2003, and upon receiving requests from Ecuador to negotiate a solution in April 2002, replied that it would not abandon an "irreplaceable instrument for solving the Colombian conflict and alleviating the danger that it presents to other countries."¹⁸² Far from admitting that it was potentially in violation of international law, Colombia instead claimed protection under the precautionary principle, 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 measures.¹⁸³

Although Colombia appeared willing to cooperate on a few occasions, the situation never meaningfully changed. For example, although Colombia agreed both in late 2003 and in early 2007 to set up joint scientific and technical commissions with Ecuador to examine the effects of aerial spraying in Colombia, these commissions quickly fell into deadlock and disbanded each time.¹⁸⁴ Although Colombia finally agreed to a ten kilometer no-spray zone in December 2005, it resumed spraying directly on the border in December 2006.¹⁸⁵ At this point, Ecuador submitted the Application to the ICJ, specifically alleging that Colombia failed to abide by its international obligations of prevention and precaution through its actions.¹⁸⁶

B. Aerial Herbicide Spraying *after* Pulp Mills: *The ICJ's Potential Analysis*

Aerial Herbicide Spraying provides a perfect opportunity for the ICJ to utilize the two-step analysis process established in *Pulp Mills* for both procedural and substantive violations of international law. It is likely that the procedural analysis in *Aerial Herbicide Spraying*

179. Aerial Herbicide Spraying Application, *supra* note 9, ¶ 28.

180. *Id.*

181. *Id.* ¶ 29.

182. *Id.* ¶ 30.

183. Rio Declaration, *supra* note 26, princ. 15.

184. Aerial Herbicide Spraying Application, *supra* note 9, ¶¶ 31, 33.

185. *Id.* ¶ 32.

186. *Id.* ¶ 38.

will ultimately be very similar to *Pulp Mills* because in both cases the procedural violations are quite egregious. Just as Uruguay violated its procedural duties to inform, notify, and consult Argentina by failing to communicate the dangers of the pulp mill projects prior to authorization, Colombia did not even mention aerial spraying to Ecuador prior to authorizing herbicide use on its border. Moreover, Colombia blatantly ignored Ecuador's concerns. Instead of recognizing Plan Colombia as a problem, Colombia argued that it was *protecting* the Ecuadorean people by inhibiting drug production.¹⁸⁷ Finally, just as Uruguay failed to draft and communicate an acceptable EIA to facilitate cooperation and negotiation between the states, there is no evidence that Colombia internally developed anything resembling an EIA; to the contrary, evidence indicates that it used the herbicide against its own experts' warnings.¹⁸⁸ In the unlikely event that Colombia did perform an EIA, it has yet to communicate it with Ecuador, even though it has been ten years since the spraying commenced. As seen in *Pulp Mills*, this constitutes a procedural violation in and of itself.

The procedural analyses in the two ICJ cases could differ if the ICJ chooses to further develop its functional link analysis between procedural and substantive international obligations. As discussed in Part II, the ICJ's functional link analysis logically implies that compliance with procedural violations will increase the likelihood that a state complies with its substantive obligations.¹⁸⁹ However, *Aerial Herbicide Spraying* demonstrates the opposite proposition, as it involves severe substantive harm *directly resulting* from Colombia's *procedural failure* to cooperate. For example, because knowledge of the herbicide's composition is in the sole possession of Colombia, the only way that Ecuador can conduct scientific tests on the compound—protecting its people and environment—is if Colombia cooperates and shares the information. Not only is Colombia hoarding the chemical composition citing its "proprietary" nature, effectively disallowing Ecuador from running the tests that the Colombian government refuses to do, Colombia also refuses to respect a small ten kilometer no-spray zone on the Ecuadorean border.¹⁹⁰ Because this procedural failure to cooperate has largely caused the extreme substantive harm inflicted upon Ecuador, the ICJ should find Ecuador's procedural case stronger than Argentina's. If nothing else, it is clear that Colombia has not used "all the means at its disposal to avoid activities" in its territory causing significant harm to the environment of other states, and

187. *Id.* ¶ 29.

188. *Id.* ¶¶ 10–12.

189. McIntyre, *supra* note 154, at 489.

190. *Aerial Herbicide Spraying Application*, *supra* note 9, ¶¶ 23, 29–30.

thus a judgment that it has violated procedural international law is nearly certain.¹⁹¹

While the procedural analysis in *Pulp Mills* may be similar to *Aerial Herbicide Spraying*, the two cases are ultimately very different because whereas the substantive harm to Argentina was deemed undetectable, the substantive harm inflicted on Ecuador is undeniable. In *Pulp Mills*, Argentina lost the case because it was essentially inconclusive whether the mills were actually causing effluent discharge increases in the River Uruguay or harming biodiversity in and around the river. Here, Ecuador is able to cite to specific impacts in several named communities over specific time periods spanning from 2000 to 2007, in addition to citing to several paragraphs' worth of generalized adverse effects across the entire northern border.¹⁹² Thus, unlike Uruguay—which avoided paying damages because it committed procedural, but not substantive violations—it is unlikely that Colombia can avoid restoring Ecuador for the obviously inflicted substantive harm.

The analysis in *Aerial Herbicide Spraying* could also prove to be interesting because of the potential for discussion on the newly defined due diligence principle. If solely focusing on the environmental risk and harm inflicted by the aerial use of herbicides, it seems clear that even if the definition of due diligence remains limited to both the adoption of appropriate rules and measures and a certain level of vigilance and monitoring to ensure their enforcement as provided in *Pulp Mills*—Colombia has failed to meet it. This leads to two further considerations: (1) the possibility that the ICJ could make this definition weaker or stronger at its discretion, and (2) the fact that the ICJ will have to factor in that Colombia *is* adopting rules and monitoring enforcement, albeit to combat drug trafficking and not environmental harm. As to the first consideration, while the ICJ could follow its recent precedent in *Pulp Mills*, there is no guarantee given the lack of stare decisis.¹⁹³ As demonstrated by *Viñuales*, however, the ICJ not only tends to follow precedent despite not being bound to do so, but also tends to build upon it during each respective IEL wave.¹⁹⁴ Thus, if the ICJ chooses to follow the Third Wave theme that it seemingly began in *Pulp Mills*, it is likely that the ICJ will again defer to the Articles on Prevention and expand due diligence requirements. This would be the perfect set of facts to 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,”¹⁹⁵ or to create an

191. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 135, ¶ 101 (Apr. 20).

192. *Id.* ¶¶ 14–15, 17, 18.

193. ICJ Statute, *supra* note 34, art. 36.

194. *See generally* *Viñuales*, *supra* note 24.

195. Articles on Prevention, *supra* note 25, art. 3, ¶ 11.

increasingly intertwined functional link between procedural and substantive obligations by holding that due diligence necessarily requires “cooperation.”¹⁹⁶ Neither of these additions will change the likely overall result that Colombia has violated its due diligence obligations, but will be valuable additions to the overall scheme of due diligence requirements. Given that the ICJ went out of its way to “add content to what would have otherwise been a straightforward application” of law in *Pulp Mills*, it is not so farfetched that it would choose to do so again in *Aerial Herbicide Spraying*, even if it is not essential to the disposition of the case.¹⁹⁷

As to the second consideration, the ICJ has not been presented with a case quite like this one in which it has to choose between the greater of two evils, environmental degradation or drug trafficking. Perhaps the Court’s answer will lie in the failure of Plan Colombia’s aerial spraying program to meaningfully inhibit terrorist groups and the drug trade. After Plan Colombia’s initial jumpstart from a 1.3 billion American aid package, critics argued that nothing in Colombia has changed, and is in fact almost worse.¹⁹⁸ The left-wing terrorist groups Plan Colombia was enacted to destroy are as strong as ever, and according to the governor of one Colombian province “are like malaria, evolving to resist eradication and killing with efficiency,” and while they “may have lost their chance for victory,” they have not lost “their ability to cause suffering.”¹⁹⁹ Additionally, it is debatable whether aerial spraying has slowed the flow of cocaine from Colombia at all.²⁰⁰ For example, in 2007, the United Nations reported that coca cultivation was up twenty-seven percent in 2007,²⁰¹ allowing Colombia to remain “by far the world’s largest cocaine producer and the supplier of 90 percent of the cocaine consumed in the United States” as of 2008.²⁰² Critics also point to the fact that the “price, purity, and availability of cocaine in the United States has remained unchanged,” and thus the billions of dollars that the United States has spent to “attack the drug problem

196. *Id.* art. 4.

197. Lazic, *supra* note 156, at 1120.

198. U.S. DEP’T OF STATE, *supra* note 5; see also Juan Forero, *In the War on Coca, Colombian Growers Simply Move Along*, N.Y. TIMES, Mar. 17, 2001, at A1.

199. Romero, *supra* note 6, at A1.

200. See STAFF OF SENATE CAUCUS ON INT’L NARCOTICS CONTROL, ONSITE STAFF EVALUATION OF U.S. COUNTER-NARCOTICS ACTIVITIES IN BRAZIL, ARGENTINA, CHILE, AND COLOMBIA, S. DOC. NO. 105–41, at 16 (1995) (noting that the program lacks “serious overall coordination” and has “sparse resources” while its policies generate environmental protests); see also KLINE, *supra* note 4, at 45 (noting that although the Minister of Defense Juan Manuel Santos reported in July 2006 that the situation was improving, “the army had not defeated FARC and had not captured any of the major leaders”).

201. U.N. OFFICE ON DRUGS AND CRIME, COCA CULTIVATION IN THE ANDEAN REGION: A SURVEY OF BOLIVIA, COLOMBIA, AND PERU 7 (2008), available at http://www.unodc.org/documents/crop-monitoring/Andean_report_2008.pdf.

202. Romero, *supra* note 6, at A1.

at the source” is money down the drain.²⁰³ Of course, as there are always two sides to every story, not everyone agrees.²⁰⁴ But because rebel groups and drug trafficking are still thriving eleven years after the introduction of Plan Colombia, 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 drug trafficking, at least for this day in court.

Lastly, because EIAs are now considered a substantive and a procedural requirement under general international law, the ICJ will almost certainly address them, and perhaps use *Aerial Herbicide Spraying* as an opportunity to clarify certain statements made in *Pulp Mills*. As discussed in Part II, although the ICJ officially labeled EIA preparation as a customary requirement in *Pulp Mills*, the actual value of the requirement may be negligible as it did not define either the scope or contents, explaining that it was each state’s prerogative to determine the content according to domestic laws, and approved Uruguay’s EIA despite its utter inadequacy.²⁰⁵ On the facts of *Aerial Herbicide Spraying*, the ICJ is presented with a second chance to provide a bottom floor as to an EIA’s minimum requirements. Like Uruguay, Colombia does not appear to have created an adequate EIA, if it created one at all. For example, according to Ecuador, Colombia held a meeting of its INS prior to authorizing Plan Colombia in which its own experts recommended against the use of aerial herbicides.²⁰⁶ Presumably the experts present prepared domestic studies to come to that conclusion, even though the results were not shared with Ecuador. Thus, acknowledging that Colombia’s failure to communicate any research with Ecuador is a procedural and not a substantive violation, will this clearly deficient research be sufficient to meet the substantive EIA requirement set forth in *Pulp Mills*? As the law stands now, the answer could truly go either way—after all, if one “seriously deficient” document in *Pulp Mills* was enough to satisfy the substantive part of the EIA requirement, that is not all that different than the present case. While it may not contribute a great deal overall to IEL to hold that the environmental document potentially prepared by Colombia in the context of *Aerial Herbicide*

203. Bill Marx, *Plan Fails to Curb Flow of Colombian Drugs*, BUFF. NEWS, Nov. 25, 2003, at B11.

204. Some contend that because three hectares must be cleared for every acre of coca planted, the coca farmers are actually causing more environmental damage than the herbicide due to excessive deforestation, implying that spraying the herbicide is actually the more environmentally friendly option. See 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, 240 (2005).

205. See *supra* Part II.

206. *Aerial Herbicide Spraying Application*, *supra* note 9, ¶¶ 10–12.

Spraying was insufficient, the import of such a holding comes from the value that it could have for increasingly specific Fourth Wave cases down the road. Clearly, most states would draft at least something and share it with their neighboring states. Setting a bottom line now is the first step toward setting a stricter, more specific bottom line down the road such that one day the EIA requirement will be more than a shell and possess some teeth of its own.

C. *Colombia's Citation to the Precautionary Principle*

In defense of its actions, Colombia has cited the precautionary principle in diplomatic exchanges with the Ecuadorean government.²⁰⁷ The precautionary principle, as exemplified in Principle 15 of the Rio Declaration, gives the following instruction: "In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."²⁰⁸ While the precautionary principle is oft used and is certainly justified in appropriate circumstances, Colombia's attempt to ground its actions in the principle in this case constitutes a misinterpretation of the principle and its purpose.

The precautionary principle is best understood in light of its rationale. The rationale's premise is that policy makers generally rely on the best available scientific data when developing effective regulatory policies.²⁰⁹ However, because scientific uncertainty is rampant, and because laws still need to be made, the precautionary principle allows states to act notwithstanding scientific uncertainty, but only while erring on the "side of excess environmental protection."²¹⁰ Thus, the precautionary principle is appropriately cited in the aftermath of a disaster when a state quickly reacts by choosing a method that has not undergone extensive scientific testing because the danger of allowing the disaster to fester is outweighed by the potential danger of the method to combat it.²¹¹ To illuminate this point, consider an oil spill. Common sense tells us that oil spills are disasters that need immediate attention. If a state reacts to an oil spill by using a chemical dispersant that has not been extensively tested, but has perhaps been used by other states in similar situations or does not contain ingredients known to be toxic, the state would be justified under the precautionary

207. *Id.* ¶ 30.

208. Rio Declaration, *supra* note 26, princ. 15.

209. See Owen McIntyre & Thomas Mosedale, *The Precautionary Principle as a Norm of Customary International Law*, 9 J. ENVTL. L. 222 (1997).

210. *Id.*

211. See *id.*

principle to use it.²¹² However, common sense also tells us that if the same state used a chemical dispersant with known toxic components, this is simply foolhardy behavior and the state will not be shielded by the precautionary principle. The precautionary principle does not authorize ignoring the obvious, and a state with unclean hands cannot count on it for protection.

In this case, Colombia is essentially arguing that coca production, the drug trade, and guerilla activity constitute a “threat of serious or irreversible damage” that Colombia has chosen to combat by aerially spraying an unrevealed and untested herbicide over extended periods of time.²¹³ Quite frankly, the precautionary principle was not intended to function in this type of situation. The precautionary principle can be utilized by states when neither time nor scientific evaluation “allow the risk to be determined with sufficient certainty,” this is not the case in Colombia.²¹⁴ While Colombia admittedly has a serious problem, it is not one that has suddenly descended on the government. Rather it has plagued the country for decades.²¹⁵ Far from being a case where scientific evaluation does not allow the risk to be determined with sufficient certainty, Colombia has had ten years from the commencement of Plan Colombia to run the requisite tests on the herbicide to determine its ramifications. However, Colombia has either chosen not to test the herbicide or is hiding the results from the international community. Furthermore, Colombia is purposefully withholding a complete list of the herbicide’s chemical ingredients such that no other state can test it.²¹⁶ Thus, while coca production and guerilla terrorism are disasters that necessitate immediate government action, the precautionary principle does not provide a state with the justification to combat a longstanding problem with an untested solution over an extended period of time simply because the state feels that it is the “most effective method” to achieve its goals. This is particularly so when it is primarily the state’s own unclean hands that have caused the scientific uncertainty to exist.²¹⁷

212. *Id.* at 224–25; see, e.g., Mark Guarino, *EPA Scolds BP in Gulf Oil Spill: Dispersant is Toxic, Change It*, CHRISTIAN SCI. MONITOR, May 20, 2010, <http://www.csmonitor.com/USA/2010/0520/EPA-scolds-BP-in-Gulf-oil-spill-dispersant-is-too-toxic-change-it>; *Oil Spill Dispersant (COREXIT ®EC9500A and EC9527A) Information for Health Professionals*, CTRS. FOR DISEASE CONTROL AND PREVENTION, (Sept. 14, 2011, 11:41 AM), http://www.bt.cdc.gov/gulfoilspill2010/dispersants_hcp_info.asp.

213. Rio Declaration, *supra* note 26, princ. 15. See Aerial Herbicide Spraying Application, *supra* note 9, ¶ 30.

214. BIRNIE ET AL., *supra* note 29, at 156 (emphasis added).

215. See *supra* text accompanying note 3.

216. See *supra* notes 175–78 and accompanying text.

217. Aerial Herbicide Spraying Application, *supra* note 9, ¶ 29.

D. *Doctrine of Necessity Defense*

In *Aerial Herbicide Spraying*, the best defense that Colombia will have is that the drug trade and guerilla activity created a situation of necessity that demanded a response and excused their procedural and substantive internationally wrongful acts. However, this Comment concurs with other scholars who have predicted that this defense will be an unsuccessful last resort.²¹⁸

In *Gabcikovo-Nagymaros*, the ICJ expressly adopted the doctrine of necessity as it appears today in Article 25 of the ILC's Articles on State Responsibility.²¹⁹ Under Article 25, in the event that a state commits an internationally wrongful act, the wrongfulness of it may be precluded if the act was (1) the only way for the state to safeguard, (2) an essential interest, (3) against a grave and imminent peril, and (4) 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.²²⁰ Although the Court accepted this four-part test, it also noted that the "ground for precluding wrongfulness can only be accepted on an exceptional basis," and that the "state concerned is not the sole judge of whether those conditions have been met."²²¹

Colombia can likely produce a strong argument for the second and third prongs of the test. According to Article 25, in the second prong, possible interests worth protecting include "preserving the very existence of the State"²²² and "ensuring the safety of a civilian population,"²²³ both of which are pressing Colombian interests in the present situation. Moreover, under the third prong, both of these essential interests are subject to grave peril due to the violent, narcotic-funded guerilla groups like FARC and ELN that have terrorized the country for years.²²⁴ While it could be argued that these interests are not facing *imminent* peril as Colombia has been fighting these groups for decades, it is truly irrelevant what the Court decides on this issue. Colombia absolutely cannot meet the first prong of the doctrine, and likely cannot meet the fourth prong either.

Under the first prong, the chosen action to safeguard the named essential interest must be the "only way" and the only means available to the state.²²⁵ This requirement is not taken lightly, and

218. See Esposito, *supra* note 27, at 52.

219. Compare *Gabcikovo-Nagymaros Project* (Hung. v. Slovak.), Judgment, 1997 I.C.J. 7, ¶ 53 (Sept. 25), with Articles on State Responsibility, *supra* note 29, art. 25.

220. Articles on State Responsibility, *supra* note 28, art. 25.

221. *Gabcikovo-Nagymaros*, 1997 I.C.J. ¶ 51.

222. *Id.* ¶ 14.

223. *Id.*

224. U.S. DEP'T OF STATE, *supra* note 5.

225. Articles on State Responsibility, *supra* note 28, at art. 25, ¶ 15.

the plea for necessity “is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient.”²²⁶ One does not have to speculate very long to come up with other routes that Colombia could have chosen to combat the drug trade rather than aerially spraying toxic herbicides over coca and poppy plantations. Indeed, former Latin American presidents noted in a 2009 interview that we must “acknowledge the disastrous consequences of current policies” to combat drugs and utilize other options, including education to decrease drug consumption, and aggressive combat against organizational crime.²²⁷ While all of these options may have admittedly been more difficult to implement than spraying herbicides out of planes, there is no denying that they were lawful alternative methods to combat drug production in Colombia and its effects. These methods are advocated by other heads of state in Latin America that are dealing with equally destructive drug cartels in their respective states.²²⁸

Furthermore, under the fourth prong of the doctrine, the ICJ will again be presented head on with an opportunity to weigh Ecuador’s environmental and human rights interests against Colombia’s rights to preserve its government and ensure the safety of its civilian population. To win on this argument, the ILC states in Article 25 that the interest deemed superior must outweigh all other considerations, and “not merely from the point of view of the acting State, but on a reasonable assessment of the competing interests.”²²⁹ Thus from the outset, Colombia will have a very high burden to demonstrate 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 surely not the only means to combat drug trafficking.²³⁰ Because these two issues are arguably of equal importance, and because aerial spraying is causing health problems not only to Ecuadorean people and the environment, but presumably to Colombian citizens as well, it seems impossible that Colombia could demonstrate its interests outweigh Ecuador’s. Thus, the ICJ will almost certainly conclude that Colombia failed to show the requisite state of necessity to excuse its commission of internationally wrongful acts, and will hold Colombia responsible for its procedural and substantive internationally wrongful acts.

226. *Id.*

227. Fernando Henrique Cardoso, César Gaviria & Ernesto Zedillo, *The War on Drugs is a Failure*, WALL ST. J., Feb. 23, 2009, at A15.

228. *Id.*

229. Articles on State Responsibility, *supra* note 28, at art. 25, ¶ 17.

230. See Viñuales, *supra* note 24, at 248–49 (explaining that part of the Second Wave’s value was the declaration in *Gabcíkovo-Nagymaros* that environmental interests are in fact essential interests that can be protected in and of themselves under the doctrine of necessity).

CONCLUSION

In his book *Showing Teeth to the Dragons*, Harvey Kline notes that Colombia's culture of violence is the "most intractable problem" within Colombia's borders.²³¹ He then repeats a query asked by others who have studied Colombia before him—what would it take to "convince Colombians that violence [is] not the way to solve problems after . . . an entire generation of people . . . saw violence as normal?"—a proposition that Kline believes is just as true in today's world as it was when the question was first posed in 1962.²³² It is undeniable that Colombia's predicament is tragic. Indeed, each day that Colombia survives, scholars have likened the state to a "sick person who just got out of intensive care, happy because he did not die, but who is still far from leaving the hospital and may relapse at any moment if he does not take measures to build on his successes."²³³ However, at the end of the day, *Aerial Herbicide Spraying* is not about the problems that Colombia cannot seem to fix. Rather, it comes down to a simple choice—the drug trade and suffering people, or the environment and suffering people?

Based on the ICJ's trend throughout the First, Second, and now the Third Wave, I believe the answer is clear. The environment is going to prevail. The ICJ's increasing specificity throughout all Waves, its newfound willingness to follow ILC recommendations, and its decision in *Pulp Mills* all point toward a favorable result for Ecuador. However, the value of *Aerial Herbicide Spraying* extends beyond its arrival at a correct result. In combination with *Pulp Mills*, *Aerial Herbicide Spraying* exemplifies a new direction for the ICJ—a direction towards clarity, specificity, and a world in which states cannot Monday morning quarterback their way out of international obligations quite as easily as they have in the past. Viñuales' Third Wave has arrived, and one can only hope that the waves will keep on coming.

Jessica L. Rutledge*

231. KLINE, *supra* note 4, at 193.

232. *Id.*

233. *Id.* at 199.

* J.D. Candidate, May 2012, Wake Forest University School of Law. The author thanks Dale & Suzanne Rutledge and Austin Watson for their constant encouragement and patience, and Katie Heath for her inspiration and many hours of help with this piece.