

STATEMENT OF THE ISSUE ADDRESSED BY *AMICI*

Significant environmental harms that cross international boundaries violate international law and are actionable under the Alien Tort Claims Act, 28 U.S.C. § 1350, particularly where the harms are long-term, widespread and severe, where they violate the rights to life, security of the person and health on a mass scale and where they deprive substantial numbers of people of their means of subsistence.

BACKGROUND

This case involves allegations that defendants DynCorp, *et. al.*'s ("DynCorp") aerial spraying of toxic herbicides on the Colombian side of the Ecuador/Colombia border caused severe harm in Ecuador. According to plaintiffs' complaint, DynCorp sprayed these herbicides despite knowing that winds would carry them across the border to areas where the plaintiffs live, and despite the fact that DynCorp knew or should have known that the herbicides were highly toxic if inhaled. Complaint at ¶¶ 34-35. As a result, plaintiffs and the putative class allegedly suffered massive health problems, numerous deaths and widespread environmental damage to their subsistence agriculture. Complaint at ¶¶ 9-21, 39-40, 51, 61, 104. Plaintiffs further contend that at least ten thousand people have been adversely affected by DynCorp's actions. Complaint ¶52. In particular, plaintiffs assert that the effects on the children of the region were so severe that all 104 local schools had to close due to illnesses to the students. Complaint at ¶¶ 15, 39(c). Moreover, plaintiffs allege that many local residents have lost their means of subsistence due to the destruction of their crops and animals and the devastation of their lands. Complaint at ¶¶ 10, 15, 17, 19, 21, 40, 61, 104. Plaintiffs also allege that the environmental damage they have suffered is of a long-term or permanent nature. Complaint at ¶¶ 46, 103. According to plaintiffs, the above described injuries occurred across an extensive area. Complaint at ¶¶ 39(a), 51.

SUMMARY OF ARGUMENT

The plaintiffs have stated claims for violations of international law actionable under the Alien Tort Claims Act, 28 U.S.C. § 1350 (ATCA). International law, as evidenced by state practice and the decisions of international tribunals, clearly forbids significant cross-border environmental damage. Thus,

plaintiffs' allegation that DynCorp's actions in Colombia caused massive cross-border environmental damage in Ecuador states an ATCA claim.

That plaintiffs' claims for cross-border harms are actionable is particularly clear given the fact that they have alleged environmental harms to human health of such an extraordinary magnitude as to constitute violations of the right to a minimally adequate environment. A variety of different sources of international law establish this right, including states' repeated recognition of its existence; the universal recognition that the fundamental rights to life, security of the person and health place obligatory limits on environmental degradation; numerous international environmental treaties; states' domestic laws and constitutions; and the opinions of international law experts.

The right to a minimally adequate environment clearly prohibits the specific type of conduct alleged here. Indeed, various international human rights bodies have held likewise with respect to acts that impinge upon fundamental rights on a mass scale. International law provides sufficient criteria by which a court can evaluate plaintiffs' claims. Actions that may be expected to cause long-term, widespread and severe harm to the environment that prejudices the health or survival of a population violate customary international law. This minimum standard is obligatory, universally accepted and definable, and is therefore actionable under the ATCA.

Amici do not contend that *all* pollution that threatens human health is actionable under the ATCA. Cross-border harms must be "significant", and the "long-term, widespread and severe" standard for violations of the right to a minimally adequate environment is very narrow, and is only violated by patently egregious conduct. There can be no question, however, that international law prohibits the kind of massive, transboundary, life-threatening environmental damage alleged in this case.

To the extent plaintiffs' claims require state action, the plaintiffs have adequately alleged DynCorp acted under color of law of Colombia and the United States. Coca eradication is a governmental function, and DynCorp's authority to spray in Colombia was allegedly delegated to it by the United States and Colombian governments.

Due respect for legislative prerogatives requires this court to hear plaintiffs' claims. The ATCA expresses Congressional intent that such claims be heard. Moreover, this court would intrude upon Congressional authority with respect to international law if it were to presume Congress intended to permit a violation of international norms without a clear statement to that effect. DynCorp points to no statutory provision even suggesting it was authorized to release herbicides into Ecuador.

ARGUMENT

I. THE ATCA PERMITS CLAIMS FOR VIOLATIONS OF WELL-ESTABLISHED NORMS OF CUSTOMARY INTERNATIONAL LAW.

The Alien Tort Claims Act permits claims by aliens for torts "committed in violation of the law of nations." 28 U.S.C. § 1350. The ATCA has "a broad scope." *Kadic v. Karadzic*, 74 F.3d 377, 378 (2nd Cir. 1996). Courts interpret international law as it exists today. *Doe v. Islamic Salvation Front*, 993 F.Supp. 3, 8 (D.D.C. 1998). A claim is actionable if it alleges violations of "well-established, universally recognized norms of [customary] international law." *Kadic v. Karadzic*, 70 F.3d 232, 239 (2nd Cir. 1995).

Customary international law results from a consistent state practice followed from a sense of legal obligation. *Restatement (Third) of Foreign Relations Law of the United States*, ("Restatement"), §102(2) (1986). Recognition of a norm need only be "general." *Id*; *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2nd Cir. 1980). It need not be unanimous. *Restatement*. §102 cmt. b; *Forti v. Suarez-Mason*, 694 F.Supp. 707, 709 (N.D.Cal. 1988).

Amici rely on, and courts considering the content of customary international law have universally accepted, the following sources as evidence of custom: international and regional treaties,¹ widely accepted declarations and U.N. resolutions declaring principles as international law,² decisions of international tribunals,³ opinions of international organizations and of regional human rights bodies such

¹ *Kadic*, 70 F.3d at 241-43; *Filartiga*, 630 F.2d at 883-84.

² *Kadic*, 70 F.3d at 240-41; *Filartiga*, 630 F.2d at 882-83; *Restatement* §103(2), comment c, §102, Reporters' Note 2, §701 Reporters' Note 2.

³ *Filartiga*, 630 F.2d at 884, n.16; *Restatement*, §103(2) and comment b.

as the Inter-American Commission on Human Rights,⁴ states' universal domestic practice,⁵ and the works of leading jurists and commentators such as a U.N. Special Rapporteur and the International Law Commission.⁶ Thus, the sources cited herein are evidence of customary law.

II. PLAINTIFFS HAVE ADEQUATELY STATED CLAIMS UNDER THE ATCA FOR SIGNIFICANT TRANSBOUNDARY ENVIRONMENTAL HARMS.

Plaintiffs allege that Dyncorp's actions constituted a "[v]iolation of international law in trespassing the frontier between Colombia and Ecuador." Complaint at ¶42(j). Significant transboundary harm unquestionably violates international law. Plaintiffs' claim here is particularly strong, because the harms alleged have had such a devastating and widespread impact on the lives, health and subsistence of local people as to constitute a violation of the right to a minimally adequate environment.

A. Significant transboundary environmental harm is actionable under the ATCA.

Plaintiffs allegedly suffered harms in Ecuador from Dyncorp's acts in Colombia. Plaintiffs state claims for significant transboundary environmental torts. Pollution originating under the jurisdiction or control of one state that causes significant injury to persons in another violates international law. *Restatement*, §601. This has been clear since the 1941 *Trail Smelter Arbitration (U.S. v. Can.)*, wherein a tribunal hearing the U.S. Government's claims that a privately-owned Canadian smelter caused significant cross-border pollution recognized liability for such pollution. 3 R.I.A.A. 1905 (1941) *reprinted in* UNEP, *Compendium of Judicial Decisions on Matters Related to the Environment: International Decisions* ("Compendium") 20, 38-39 (1998).

More recently, the world community has unanimously recognized in Principle 2 of the Rio Declaration on Environment and Development (1992), and in Principle 21 of the Stockholm Declaration on the Human Environment (1972) that "[S]tates have . . . the responsibility to ensure that activities

⁴*Mojica v. Reno*, 970 F.Supp. 130, 148-49 (E.D.N.Y. 1997)(European Commission); *Forti*, 694 F.Supp. at 710-11(Inter-American Commission); *Restatement*, §701 Reporters' Note 2.

⁵*Filartiga*, 630 F.2d at 884.

within their jurisdiction or control do not cause damage to the environment of other States. . .” The International Court of Justice (ICJ) has affirmed that this obligation “is now part of the corpus of international law.” *Gabcikovo-Nagymaros Project (Hungary-Slovakia)*, Judgment of 25 September 1997, ¶53. Accordingly, the district court in *Beanal v. Freeport-McMoRan, Inc.* noted that transboundary environmental harm is actionable under customary international law. 969 F.Supp. 362, 384 (E.D.La. 1997).⁷

⁶*The Paquete Habana*, 175 U.S. 677, 700 (1900); *Restatement*, §103, Reporters Note 1.

⁷The Fifth Circuit in *Beanal*, in dismissing an environmental tort ATCA action for failure to state a claim, specifically noted that the plaintiff did not allege any transboundary environmental damage. Indeed, the court cited with approval the Rio Declaration’s transboundary harm provision, suggesting that had the plaintiff alleged such harms, they likely would have been actionable. 197 F.3d 161, 167, n.6 (5th Cir. 1999).

Although the plaintiff in *Trail Smelter* was the United States, victims of transboundary harms need not rely on their government to seek compensation for them. Instead, victims have an individual right to bring claims. *See Restatement*, § 602, cmt. b (state from which pollution originates has obligation to accord person injured in another state access to same remedies as are available to persons within originating state).⁸

Here, plaintiffs challenge actions committed within Colombia by an agent of the United States government. Thus, the acts alleged are within the “jurisdiction or control” of both states. Since those acts are further alleged to have caused massive harms in Ecuador, the plaintiffs have stated an actionable claim under the ATCA for significant transboundary environmental damage.

B. DynCorp is a state actor.

DynCorp’s assertion that it cannot be held liable because it is a private corporation is mistaken. DynCorp Br. at 30-31. Individuals or corporations can be held liable for those international law violations that require a showing of state action if the plaintiff can demonstrate that the defendant acted under color of law. *E.g. Kadic*, 70 F.3d at 245; *Jama v. U.S. I.N.S.*, 22 F.Supp.2d 353, 365 (D.N.J. 1998). Courts have looked to 42 U.S.C. §1983 for guidance in determining whether a private party can be held liable as a state actor under the ATCA. *Kadic*, 70 F.3d at 245. Under §1983, a private party “acts under color of state law when he abuses the position given to him by the State,” *West v. Atkins*, 487 U.S. 42, 50 (1988), or when the party exercises a power delegated to it by the state that is traditionally reserved to the state. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974). Thus, in *Jama*, the court held that a corporation acting under contract with the U.S. government and performing governmental services was a state actor for ATCA purposes. 22 F.Supp.2d at 365.

⁸Accordingly, refusal to hear this case would violate the United States’ international obligation to afford plaintiffs access to a remedy. It would also undermine the purposes of the ATCA. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 783 (D.C. Cir. 1984)(Edwards J. concurring)(one of law’s original concerns was to ensure federal forum for aliens’ claims against U.S. citizens).

Here, the eradication of coca is a function reserved to the state. Moreover, DynCorp's authority to spray herbicides in Colombia was delegated to it by the governments of the United States and Colombia. *See* Complaint ¶¶ 2, 26, 27, 66. Indeed, DynCorp characterizes itself as a "federal contractor[]" acting in the [U.S.] government's stead." DynCorp Br. at 33. Plaintiffs sufficiently allege state action.

C. Claims for significant transboundary environmental harms do not require state action.

Although the court need not reach this issue because plaintiffs have adequately alleged state action, Plaintiffs would have stated claims even if this allegation had not been sufficient. Certain violations of international law have no state action requirement. *Kadic*, 70 F.3d at 239. Activities that cause significant harm in another state violate customary international law, even if committed by a private party. *Restatement*, §601, cmt. d; 602 cmt. b. For example, the polluter in *Trail Smelter* was a private corporation, Compendium at 21, and the World Charter for Nature specifically notes that corporations shall ensure their actions do not cause harm in other states. World Charter for Nature, ¶ 21. A 1907 opinion of the U.S. Attorney General, cited with approval by Judge Edwards in *Tel-Oren v. Libyan Arab Republic*, further demonstrates that state action is not required. 26 Op. Atty Gen. 250 (1907), *cited in Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 780 (D.C.Cir. 1984)(Edwards J. concurring). There, the Attorney General considered whether the ATCA would provide Mexican citizens with a cause of action against a U.S. irrigation company for harms resulting from the latter's diversion of water from the Rio Grande, which forms the border between the two countries. *Id.* The Attorney General concluded that it would, so long as the diversion caused an injury to "substantial rights" of Mexican citizens. *Id.* There was no suggestion that the irrigation company was a state actor. Indeed, a victim of transboundary harms has a customary right to access to remedies in the state of the responsible party on an equal footing with in-

state residents, *Restatement*, § 602(2) & comment b, even where the responsible party is a private corporation. *Restatement*, § 601, comment d.⁹

The nature of plaintiffs' claims also compels the conclusion that state action is not required. "A norm typically lacks a state action requirement if the prohibited action is of international concern regardless of whether a state participated in its commission." Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 Va.J.Int'l.L. 545, 560 (2000). The international community's concern regarding environmental damage focuses on the transboundary nature of the harm or on the injury to people and the environment, not on the status of the actor. *See e.g.* Stockholm Declaration, ¶7 (defending human environment demands "acceptance of responsibility by citizens . . . and by enterprises"). Accordingly, numerous international agreements hold non-state actors liable for environmental harms.¹⁰ Injuries like those alleged here do not require state action to violate international law.

D. The transboundary harms alleged here have had sufficiently devastating and widespread effects on local people to violate the internationally recognized human right to a minimally adequate environment.

⁹ The sources establishing that significant transboundary harm violates international law often frame the relevant norm as holding states responsible for the acts of private parties under their jurisdiction or control. *E.g.* Rio Declaration, Princ. 2; *see also Restatement*, § 601(3). However, to show that the act of a purely private party is actionable under the ATCA, plaintiffs need only demonstrate that the private party's act violated the substantive law of nations. *See Tel-Oren*, 726 F.2d at 777, 779 (Edwards J. concurring). Plaintiffs need not make the further showing that international law provides a specific right to sue the private defendant. *See Id.* at 777-82 and n. 5, *citing Filartiga*, 630 F.2d at 887. Since purely private action triggers state responsibility under international law, such action is clearly a tort "committed in violation of the laws of nations," 28 U.S.C. § 1350, irrespective of whether international law attaches liability to the state or the private party. In fact, however, as has just been noted, international law does contemplate private liability in the courts of the responsible party's state.

¹⁰*E.g.* Convention on Third Party Liability in the Field of Nuclear Energy, art.3 (1960); International Convention on Civil Liability for Oil Pollution Damage, art. III; Bamako Convention, art. 4(3)(b)(1991); Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Council of Europe, pmb., arts. 2(2), 6(1) (1993); *see also Report on the Situation of Human Rights in Ecuador*, ("Ecuador Report"), Organization of American States, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, April 24, 1997 at 94 ("the companies conducting oil exploitation activities are responsible" for correcting environmental harms infringing on human rights).

That plaintiffs' claims for transboundary harm are actionable is further demonstrated by the fact that the alleged harms are not merely "significant", but rise to the level of a violation of the right to a minimally adequate environment. Overwhelming state practice compels the conclusion that the right to a minimally adequate environment is a universal, obligatory and definable customary international human rights norm. That norm is narrow, but is clearly defined to prohibit actions that may be expected to cause long-term, widespread and severe environmental damage that prejudices the health or survival of a population. Plaintiffs' allegations meet that standard.

1. The right to a minimally adequate environment is universally recognized and obligatory.

The right to be free from massive, life-threatening environmental harm is universally recognized to be a binding legal right. A variety of different types of state practice establish this right. These include the international community's repeated recognition of the right; the universal recognition that the fundamental rights to life, security of the person and health place obligatory limits on environmental degradation; numerous international environmental treaties; the laws of war; and states' domestic laws and constitutions. The opinions of international law experts confirm this right is enshrined in customary international law.

a. Explicit recognition of the right to a minimally adequate environment.

Beginning in 1972, the community of nations has repeatedly recognized that individuals have a right to a minimally adequate environment. In that year, 114 nations, including the United States, declared in the Stockholm Declaration that humankind "has the fundamental right to . . . adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being." Stockholm Declaration, Principle 1. The international community reaffirmed its recognition of the right in 1990 when the United Nations General Assembly adopted by consensus a resolution recognizing that "all individuals are entitled to live in an environment adequate for their health and well-being." G.A. Res. 45/94 (1990).

Two years later, at the largest gathering of nations ever held, more than 178 nations including the United States again affirmed the right in the Rio Declaration, which unanimously acclaimed that “[h]uman beings . . . are entitled to a healthy and productive life in harmony with nature.” Rio Declaration, Principle 1.

Declarations such as those at Rio and Stockholm are important sources of customary international law. *Filartiga*, 630 F.2d at 883. The recognition in these Declarations that individuals have a right to a minimally adequate environment created “an expectation of adherence.” *Id.* The Rio Declaration has subsequently been recognized as an “authoritative statement of the international community” regarding the right to a minimally adequate environment. *See Id.*¹¹

Other international and regional agreements also recognize the right to a minimally adequate environment. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“Aarhus Convention”) states that “every person has the right to live in an environment adequate to his or her health and well-being.” Preamble; *see also* art. 1. The Hague Declaration on the Environment recognizes “the right to live in dignity in a viable global environment.” In the Americas, the Protocol of San Salvador provides that “[e]veryone shall have the right to live in a healthy environment.” Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, art. 11 (1988). Similarly, the Banjul [African] Charter on Human and Peoples’ Rights provides that “[a]ll peoples shall have the right to a generally satisfactory environment favorable to their development.” Art. 24 (1982)(50 signatories). These documents further demonstrate that the nations of the world universally recognize the right to be free from severe environmental harms.

b. Basic human rights including the rights to life, security of the person and health.

¹¹U.N. Human Rights Commission Res. 1995/14, ¶1 (1995)(reaffirming Rio Declaration Principle 1); *see also* North American Agreement on Environmental Cooperation, Sept. 13, 1993, U.S.-Can.-Mex., pmb. (1993)(reaffirming Stockholm and Rio Declarations).

Fundamental human rights norms place obligatory limits on environmental degradation. Customary international law protects the rights to life, security of the person, and health. These rights are, without question, universally recognized¹² and obligatory.¹³ Moreover, they are universally understood to protect individuals from severe environmental degradation. Vice-President Weeramantry of the International Court of Justice states the customary law view:

The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

Gabcikovo-Nagymaros Case (Hungary-Slovakia), Judgment of Sept. 25, 1997 (Sep. Op. Vice-President Weeramantry) at 4; *see also* Aarhus Convention, Preamble, (“adequate protection of the environment is essential to . . . the enjoyment of basic human rights. . .”) Thus, the rights to life, security of the person and health form at least part of the basis of the right to be free from severe environmental harm.

An international consensus supports Judge Weeramantry’s statement. For example, the 171 states attending the World Conference on Human Rights recognized that illicit dumping of toxic waste may seriously threaten the right to life.¹⁴ States have also widely recognized that the right to health

¹²*E.g. Life:* Universal Declaration of Human Rights, art. 3 (1948); International Covenant on Civil and Political Rights (ICCPR), art. 6 (entered into force, 1976)(138 ratifications, including U.S.); *Estate of Cabello v. Fernandez-Larios*, 157 F.Supp.2d 1345, 1359 (S.D.Fla. 2001)(art. 6 of ICCPR actionable under ATCA); **Security of the person:** *Alvarez-Machain v. United States*, 266 F.3d 1045, 1051 (9th Cir. 2001)(security of the person actionable under ATCA); Universal Declaration, art. 3; ICCPR art. 9; **Health:** Universal Declaration, art. 25; International Covenant on Economic, Social and Cultural Rights, art. 12, (entered into force Jan. 3, 1976)(135 parties); American Declaration on the Rights and Duties of Man, art. XI (1948); African Charter, art. 16; Protocol of San Salvador, art. 10.

¹³*E.g.* ICCPR, art. 4.2, 6; *Ecuador Report* at 91-93.

¹⁴U.N. World Conference on Human Rights, Vienna Declaration and Programme of Action, ¶11 (1993). The U.N. Human Rights Commission has reiterated that conclusion. Resolution 1995/81, Preamble and art. 1 (1997).

encompasses freedom from serious pollution. The International Covenant on Economic, Social and Cultural Rights (ICESCR) specifically requires states to improve “environmental hygiene” in order to protect the right. art. 12. Similarly, article 24(c) of the Convention on the Rights of the Child (1989), requires states to account for the dangers of pollution in implementing the right to health.¹⁵ Moreover, international agreements regarding pollution often explicitly state they have been enacted at least in part to protect human health.¹⁶

A number of international human rights bodies and tribunals have concluded that human rights obligations bar serious environmental harm, even if the defendants did not purposefully threaten people’s lives or health. For example, in *EHP v. Canada*, the U.N. Human Rights Committee concluded that a complaint alleging large-scale dumping of life-threatening pollution stated a *prima facie* right to life case under the International Covenant on Civil and Political Rights (ICCPR).¹⁷ Similarly, in the *Ecuador Report*, the Inter-American Commission found that massive oil pollution violated local people’s rights to life, security of the person and health. *Ecuador Report*, at 88, 91-94. In the *Yanomami Case*, the Inter-American Commission concluded that harm arising from highway construction, settlement and mining violated these same rights. Case No. 7615 (Brazil), Res. 12/85, 1985 Inter-Am. Y.B. on Human Rights

¹⁵On the customary status of the rights codified in the Convention, see *Sadeghi v. INS*, 40 F.3d 1139, 1147 (10th Cir. 1994)(Kane, J. dissenting)(166 nations have ratified Convention and it “has attained the status of customary international law”).

¹⁶*E.g.* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Preamble, (1989)(148 nations party; United States has signed); Montreal Protocol on Substances that Deplete the Ozone Layer, Preamble (1987)(112 parties, including United States); additional sources cited in U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Human Rights and the Environment, Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur*, ¶183, n.99 (1994)(“Ksentini Report”).

¹⁷Commun. No. 67/1980. The claim was dismissed for failure to exhaust domestic remedies. The Committee, however, only considers exhaustion if the petitioner has stated a *prima facie* case. U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Human Rights and the Environment, Second Progress Report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur*, ¶78 (1993).

264, 272-76, 278 (March 5, 1985).¹⁸ As the IACHR affirmed in the *Ecuador Report*, international law requires that individuals “have access to judicial recourse to vindicate the rights to life, physical integrity and to live in safe environment.” *Ecuador Report* at 93.

Other basic human rights further support the existence of the right to a minimally adequate environment. Customary international law recognizes the right “to be free from arbitrary interference with family life.” *Maria v. McElroy*, 68 F. Supp. 2d 206, 233-4 (E.D.N.Y. 1999). The European Court of Human Rights has twice held environmental degradation to violate this right. *Guerra v. Italy*, (116/1996/735/932); *Lopez Ostra v. Spain*, (41/1993/436/515). Similarly, the international community recognizes a right to cultural integrity. *E.g.* ICCPR art. 27; Universal Declaration, arts. 22, 27(1). International human rights bodies have repeatedly held that international law prohibits environmental degradation that decimates cultural practices,¹⁹ as is alleged here. Complaint ¶¶ 40, 61.

In sum, the fact that fundamental human rights norms prohibit massive environmental degradation further demonstrates that the right to a minimally adequate environment is a universally recognized, binding norm of customary international law.

c. International recognition that development must account for people’s environmental needs.

The ICJ has held that “new norms and standards have been developed, set forth in a great number of instruments during the last two decades,” recognizing the “need to reconcile economic development with protection of the environment.” *Gabcikovo-Nagymaros*, ¶140; *see also* Rio Declaration, Principle 4. (“environmental protection shall constitute an integral part of the development process.”); *Ksentini Report*,

¹⁸Other state practice confirms that purpose to harm is not required in order to violate the right to life. Under the practice established by military prosecutions for mistreatment of war prisoners and civilians, international law’s prohibition of “murder” precludes creating conditions likely to result in death in circumstances the common law considers manslaughter. *See* M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 290-91 (1992).

¹⁹*Ilmari Lansman v. Finland*, U.N. Human Right Committee, Commun. No. 511/1992, ¶¶9.2-9.5 (1992); *Yanomami Case* at 263, 272-4; *Ecuador Report* at 103-4; *see also* Herz, *supra*, 40 Va.J.Int’l.L. at 621-632 (demonstrating that environmental harms that decimate cultural practices are actionable under the ATCA.)

¶167 (international community has regularly reiterated that states must use their resources in the interest of their people). In particular, development must not compromise the environmental needs of present and future generations. *E.g.* Rio Declaration, Principle 3. This principle bars “serious or irreversible” environmental damage. Stockholm Declaration ¶6; World Charter for Nature, GA Res. 37/7, Art. 11(a)(1982). Thus, it supports plaintiffs’ claims.

d. International environmental law.

The *corpus* of international environmental law constitutes voluminous additional state practice supporting plaintiffs’ claims. The world community has repeatedly recognized, in *inter alia*, the Stockholm Declaration, the Rio Declaration, and the U.N. General Assembly, that states and/or individuals have a duty to protect their environment.²⁰ This recognition creates “an expectation of adherence.” *Filartiga*, 630 F.2d at 883. The enormous number of environmental treaties,²¹ and states’ uniform prohibition of massive environmental damage in domestic law (*see infra* § II.D.1.f.), demonstrate that states have met this expectation through a consistent practice of legally binding themselves and their citizens to obligations prohibiting environmental destruction.

In particular, numerous international agreements specifically establish obligations not to cause serious harm to the environment or human life or health through the discharge of toxins.²² The U.N.

²⁰*E.g.* Rio Declaration, Principle 13 (states shall develop national laws regarding liability and compensation for victims of environmental damage); Stockholm Declaration, preamble Par. 2 (protection of environment is duty of all governments); World Charter for Nature, art. 1, 24 (each person has duty to conserve the environment), art. 14 (conservation principles in Charter “shall be reflected in the law and practice of each state, as well as at the international level”); Charter of Economic Rights and Duties of States, art. 30, G.A. Res. 3281 (1975)(protection of environment is responsibility of all states); Hague Declaration, (recognizing “fundamental duty to preserve the ecosystem”).

²¹States have adopted some 350 multilateral treaties, 1,000 bilateral treaties, and a multitude of declarations, resolutions and other documents to protect the environment. *Ksentini Report*, ¶24.

²²*E.g.* Basel Convention, art. 4 (requiring that persons managing hazardous waste prevent pollution); Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Council of Europe, June 21, 1993, pmbl., arts. 2(2), 6(1) (1993)(operator of polluting facility liable for damage); Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa,

Human Rights Commission considers these obligations sufficiently well established in international law that it annually identifies the transnational corporations engaged in the “heinous act” of illicitly dumping toxic wastes. Res. 1995/81 ¶ 7(d).

As has already been noted, international environmental law, particularly that pertaining to toxic emissions, is substantially concerned with protecting the human rights to life and health. Accordingly, it is predicated on the same concern as the right to a minimally adequate environment. Given this, the duty to protect the environment constitutes strong additional evidence of the existence of a corresponding international legal right to freedom from at least some forms of environmental degradation. States’ recognition of an obligation to provide means of redress to victims of environmental damage, Rio Declaration, Principle 13; World Charter for Nature, art. 23, further demonstrates that individuals have this right.

e. The laws of war.

The prohibition on massive, life-threatening environmental damage is so fundamental that it applies even during war. Customary international law recognizes that certain emergencies, such as war, may justify restricting some rights. See ICCPR, Art. 4. Accordingly, wartime protections usually can be considered the minimum protections international law affords. *Corfu Channel Case (U.K. v. Alb.)*, 1949 I.C.J. Rep. 4, 22-23 (“elementary considerations of humanity [are] more exacting in peace than in war.”)

Over 150 states, including Ecuador, are parties to the Protocol Additional (I) to the Geneva Conventions of 1949, which forbids acts that may be expected to cause massive, life-threatening environmental damage. Art. 35, 55(1)(signed by U.S., in force 7 December 1978). The U.N. Security Council indicated its acceptance of these principles as norms of customary international law in 1991 when

Organization of African States, opened for signature Jan. 30, 1990, art. 4(3)(b) (1991)(imposing strict liability on generators of hazardous wastes within states); Convention on the Protection of the Environment through Criminal Law, Council of Europe, Articles 2, 3 (states must criminalize emissions that create significant risk of serious injury)(1999); Convention on the Prevention of Marine Pollution By Dumping Of Wastes And Other Matter, art. 1 (1973)(entered into force Aug. 30, 1975)(limiting introduction of matter “liable to create hazards to human health”).

it imposed liability on Iraq “under international law for any . . . environmental damage and the depletion of natural resources” in Kuwait. U.N. Security Council Resolution 687 (1991). Such limits on environmental destruction during wartime are obligatory. *E.g.* Rio Declaration, Principle 24 (“states shall . . . respect international law providing protection for the environment in times of armed conflict.”). States’ widespread recognition that combatants may not cause massive, life-threatening environmental damage during war, even though other rights may be restricted, demonstrates that this norm is not only obligatory, but is afforded a particularly high status.²³

f. State domestic practice.

The domestic practice of nations is also indicative of customary international law. *Filartiga*, 630 F.2d at 884. State domestic practice is uniform in protecting the right to be free from severe environmental harm. Virtually all, if not all, nations have legal provisions safeguarding their citizens from at least some types of environmental harm. Indeed, at least ninety-nine have enshrined such provisions in their constitutions. Earthjustice Legal Defense Fund, *Issue Paper: Human Rights and the Environment*, 13-15 (1999). Moreover, numerous domestic courts have found environmental damage infringes upon basic human rights.²⁴ These laws and decisions do not reflect purely domestic interests. The environment is clearly of universal concern. Stockholm Declaration, ¶6 (environmental protection is “imperative goal for mankind”). States have repeatedly accepted international obligations to enact laws protecting their own environment and to provide means of redress to victims of environmental degradation.²⁵

g. The opinion of leading international law experts.

²³For example, the laws of war provide guidance in ascertaining the content of crimes against humanity. Bassiouni, *supra* at 20. Crimes against humanity are prohibited in peacetime.

²⁴*E.g.*, *Ksentini Report* at 92-93 (describing Costa Rican and Philippine Supreme Court cases); Neil A.F. Popovic, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 Colum. Human Rights L. Rev. 487, 515 (Spring 1996)(describing Indian and Pakistani Supreme Court cases).

²⁵ *E.g.* Section II.D.1.d. *supra*; Convention on Biological Diversity, arts. 6-10 (1992)(182 parties)(mandating states protect biodiversity within their borders).

Leading expert opinion is also relevant in determining the content of customary law. *Paquete Habana*, 175 U.S. at 700. Such opinion confirms that customary law recognizes the right to a minimally adequate environment. For example, in 1994 a U.N. Special Rapporteur, in consultation with seventeen other internationally respected experts, completed her exhaustive study of the relevant international law and state practice. She concluded that under customary international law, “[a]ll persons have the right to freedom from pollution, environmental degradation and activities that . . . threaten life [and] health . . .” *Ksentini Report* at 75, Annex 1 Principle 5. The Special Rapporteur also specifically noted the “universal acceptance of the environmental rights recognized at the national, regional and international levels.” *Id.* ¶240. Accordingly, “corporations . . . may be criminally or civilly responsible under international law for causing serious environmental hazards posing grave risks to life.” *Id.* ¶175. Similarly, the U.N.’s International Law Commission concluded over 20 years ago that gravely endangering the human environment violates “particularly essential rules of general international law” and is an international crime. Report of the ILC on the work of its 28th Sess. Chapter III, ¶¶33-34, 67 (1976).

In sum, the extensive sources cited by *amici* and the Special Rapporteur confirm that the nations of the world have universally recognized an obligatory right to a minimally adequate environment.

2. The right to a minimally adequate environment is definable.

Massive environmental degradation causing widespread and serious health effects and engaged in pursuant to a policy of deliberate indifference to human life and health violates definable international law norms. “Definable” or “specific” for ATCA purposes does not mean that every aspect of what might comprise a norm must be universally agreed upon before a cause of action is cognizable. *Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D.Mass. 1995). Rather, there need only be international recognition that the specific conduct alleged violates international law. *Id.*; *Forti*, 694 F.Supp. at 709. International law clearly prohibits environmental abuses of the magnitude plaintiffs allege, even under the strictest definition of the right.

Even during war, international law bans acts that “may be expected to cause [widespread, long-term and severe damage] to the natural environment and thereby to prejudice the health or survival of the population.” Protocol Additional (I) to the Geneva Conventions of 1949, art. 55(1). Since rights applicable in war are the minimum that international law provides, it is universally recognized that, in peacetime, international law prohibits at least those same acts. Moreover, the basic human rights Covenants state that “[i]n no case may a people be deprived of its own means of subsistence,” ICCPR art. 1, 47; ICESCR, art. 1, 25. Sources such as the *Ecuador Report*, the *Yanomami Case* and *EHP v. Canada* demonstrate that environmental damage that violates the rights to life, security of the person and health on a mass scale is prohibited by international law.²⁶ *Amici* are aware of no State that claims the legal right to permit actions that may be expected to cause these kinds of harms. The absence of such claims is additional evidence that these standards are universally recognized. *Filartiga*, 630 F.2d at 884. Jurisdiction for violations of the above mentioned standards lies under the ATCA.

Plaintiffs allege that DynCorp’s spraying harmed at least ten thousand people by causing extensive health problems, numerous deaths, long-term or permanent environmental damage over a huge area and the destruction of many residents’ subsistence agriculture. Complaint ¶¶ 9-21, 39-40, 46, 51-52, 61, 103-104. Thus, plaintiffs have alleged environmental degradation that is widespread, severe, and long-term; that prejudices their health and survival; that violates or severely threatens their rights to life, security of the person, and health on a mass scale; and that deprives them of their means of subsistence. Such devastation is clearly prohibited by international law.

E. *Beanal* is inapposite to the claims at bar.

Defendants cannot be heard to suggest that the Fifth Circuit’s opinion in *Beanal* counsels against hearing plaintiffs claims. In dismissing an environmental tort ATCA action for failure to state a claim, the

²⁶In the *Ecuador Report*, the Inter-American Commission concluded that acts causing harm on a scale like that alleged here violate international law. *Ecuador Report* at 77-83, 92-94. Similarly, the *EHP* plaintiffs’ allegation that pollution threatened the lives or health of ten thousand people stated a *prima facie* case for violations of the right to life. ¶1.2.

Fifth Circuit specifically relied on the fact that the plaintiff did not allege any transboundary environmental damage. 197 F.3d at 167, n.6. Moreover, *Beanal* looked only to sources of “international environmental law,” *id.* at 167, and thus did not purport to apply the well-established international human rights norms described herein. Indeed, the plaintiff in *Beanal* largely based his argument on, and the court only addressed, two documents: an international environmental law textbook and the Rio Declaration. *Id. Amici* however, rely upon dozens of relevant sources of customary international law. These sources clearly establish that international law prohibits the actions DynCorp allegedly committed.²⁷

The *Beanal* court’s concern that applying U.S. standards would “displace environmental policies of other governments” is inapplicable here. 197 F.3d at 167. The standards cited herein are those of international, not U.S., law. In any event, defendants have not suggested that it is the policy of Ecuador to allow massive pollution originating in Colombia. Indeed, the Ecuadorean Constitution provides the right to live in an environment free from pollution, *Ecuador Report* at 87, 89 n.33, Ecuador is a signatory to many of the treaties that establish plaintiffs’ claims, *Id.* at 87, and another district court has concluded that Ecuadorean law provides a cause of action for persons injured in their persons or property by intentional wrongdoing or negligence. *Aguinta v. Texaco, Inc.*, 142 F.Supp.2d 534, 540 (2001). Thus, liability is consistent with Ecuadorean law and environmental policy.

III. Separation of powers concerns require this court to hear plaintiffs’ claims.

Much of DynCorp’s brief is devoted to suggesting that plaintiffs’ claims would intrude upon powers constitutionally delegated to Congress or the Executive. DynCorp Br. at 16-25. In fact, the opposite is true; the failure to hear this case would improperly usurp Legislative authority. DynCorp asks this court to ignore Congress’ clear intent, expressed in the ATCA, to “furnish[] a forum to litigate claims of

²⁷*Beanal* wrongly concluded that the Rio Declaration does not support the existence of a cause of action because it does not set forth specific standards. 197 F.3d at 167. The Rio Declaration, however, demonstrates that the right at issue is *universally recognized*. Other sources described in §II.D.2. establish the requisite specificity.

violations of international standards of the law of human rights,” and to consider violations of international law as violations of U.S. law. *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 101, 104 (2d Cir. 2000).

Moreover, Defendant bases this request on its suggestion that Congress has authorized it to act in violation of international law. Courts, however, have long recognized that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . .”*Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The *Charming Betsy* canon is animated by separation of powers concerns. It requires courts to defer to the Legislature’s role in formulating foreign policy by acknowledging Congress’ prerogative to decide whether or not to violate international law. Accordingly, courts will not question the commitment of the Legislative branch to international law unless such intent is clearly manifest in federal law. *See Chew Heong v. United States*, 112 U.S. 536, 539-40 (1884). Indeed, the Supreme Court has noted, in deciding the analogous question of how to interpret a statute that might conflict with a treaty, that a court “would be wanting in proper respect for the intelligence and patriotism of a co_ordinate department of the government” if it did not assume that legislators were mindful that violating international law would damage the United States’ international reputation. *Id.*

Here, DynCorp fails to point to any statutory provision that authorizes it to spray herbicides in Ecuador or that is clearly intended to supercede the international law ban on causing significant transboundary environmental harms. The conflict between DynCorp’s position and the *Charming Betsy* canon further demonstrates that defendant’s argument is inconsistent with an appropriate regard for the separation of powers.

In sum, proper respect for Congress’ authority requires this court to apply the clear mandate of the ATCA, and to assume that absent a statute that expressly indicates an intent to abrogate international law, Congress does not authorize international law violations.

CONCLUSION

For the foregoing reasons, *amici* respectfully submits that the plaintiffs have stated claims for violations of the international law norm forbidding significant transboundary environmental harms actionable under the ATCA.

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