IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARIAS, et al., **Plaintiffs,** **v.** **DYNCORP, et al.,** **Defendants.**	**Case No.1:01cv01908-RWR-DAR**
QUINTEROS, et al., **Plaintiffs,** **v.** **DYNCORP, et al.,** **Defendants.**	**Case No.1:07cv01042-RWR-DAR** **(Cases Consolidated for Case Management and Discovery)**

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE PLAINTIFFS' ALIEN TORT STATUTE CLAIMS BASED ON THE PLAINTIFFS' FAILURE TO IDENTIFY OR ESTABLISH ANY QUALIFYING VIOLATION OF A U.S. TREATY OR THE LAW OF NATIONS

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INTRODUCTION

The evidence shows that DynCorp, while acting jointly with the Colombian and U.S. governments in a coca eradication project, recklessly went beyond the terms of its contract and sprayed toxic herbicides without taking care to ensure that these poisons would not fall onto people's communities and farms in Ecuador. DynCorp's actions have caused massive damage, harming the health, property and/or livelihoods of literally thousands of Ecuadorians. Plaintiffs assert a single, unassailable norm as the basis for their Alien Tort Statute ("ATS") claims — that DynCorp violated the specific, universal, and obligatory norm regarding significant transboundary environmental harm. While not all cross-border harms are actionable, harms of this magnitude, when resulting from the failure of due diligence of a party acting at the behest of a state, clearly violate well-established international law norms.

As in most of its pending summary judgment motions, DynCorp attempts to frame the issues by attacking positions Plaintiffs do not take. This straw man approach has no place in a summary judgment motion. Here, DynCorp goes to great lengths to dissect each individual treaty that bears upon the issue of transboundary environmental harm, and argues that since none of these treaties are self-executing, there is no actionable ATS norm. *See* Dyncorp Defendants' Motion for Summary Judgment on the Plaintiffs' Alien Tort Statute Claims, Dkt. # 261 ("Mot.") at 23-35. But Plaintiffs do not sue under the "treaty" prong of the ATS; they do not seek to enforce any specific treaty.

Instead, as in virtually all ATS cases, Plaintiffs rely upon customary international law, which is established through multiple international law sources, including treaties, conventions, declarations, decisions of the International Court of Justice, international arbitral tribunals, other

state practice, and the scholarly opinions of experts as evidence of the international norm. Post-*Sosa* courts have uniformly applied international law sources in this manner.

On the specific issue of whether there is an actionable ATS norm in this case, DynCorp virtually ignores that this Court has already rejected DynCorp's argument that Plaintiffs have not adequately alleged a violation of international law actionable under the ATS. *Arias v. DynCorp*, 517 F. Supp. 2d 221, 227 (D.D.C. 2007). That decision was correct when made, and nothing has changed to warrant reconsideration. Indeed, as Plaintiffs demonstrate below, the voluminous international authority confirms that Plaintiffs' claims are based on a well-established norm that prohibits states and state actors from using their territory—or through a lack of due diligence, allowing their territory to be used—in such a way that produces significant transboundary environmental harm. Defendants' argument that there is no such norm is meritless. The principle is one of hornbook law, recognized not only in a wealth of international sources but also in the leading international environmental law textbooks.

Defendants also suggest that the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances somehow abrogates customary international law protections regarding transboundary harms. But to prove that, Defendants would have to show that the parties intended the Convention to waive such protections. The parties did no such thing. On the contrary, they specifically referenced and enshrined environmental protections in the text.

Nowhere in Defendants' brief do they contest that Plaintiffs have presented evidence supporting their claims. Accordingly, the Court has no occasion to assess Plaintiffs' factual showing. Nonetheless, there is abundant record evidence that DynCorp's unlawful incursions into Ecuador caused widespread environmental harm and suffering to Plaintiffs, that DynCorp

was a state actor, and that Plaintiffs' injuries resulted from the failure of DynCorp and the U.S. and Colombian governments to exercise due diligence. DynCorp's motion must be denied.

STATEMENT OF FACTS

DynCorp is a DOS contractor conducting aerial spraying in Colombia as part of Plan Colombia. Def. Statement of Facts ("SOF") ¶ 39. Defendant was acting under the color of law of the United States and Colombian governments in conducting spray operations near the Ecuadorian border. *See* Plaintiffs' Statement of Undisputed Facts ("SUMF") ¶¶ 2-3, 32-40. Indeed, Defendant has conceded this point. [redacted]; *id.* ¶ 42 ("Colombia also oversees the aerial eradication operations").

DynCorp, the U.S. government, and the Colombian government became aware, no later than 2000 and 2001, that people and property in Ecuador were being affected by Plan Colombia spray operations. *See* SUMF ¶¶ 4-6. From 2000 onward, many sectors of society and government publicly voiced their concern for severe damage the spraying was causing in Ecuador. *See* SUMF ¶ 6. Ecuadorian newspapers were filled with articles recounting the tragic consequences of the spraying; NGOs and scientists verified and criticized the harms being done; and even the United Nations expressed concern, with its health rapporteur stating that "[t]here is credible, reliable evidence that the aerial spraying of glyphosate along the Colombia-Ecuador border damages the physical health of people living in Ecuador." *Id.*

Despite the mounting criticism, nobody involved in Plan Colombia did anything to avoid causing continued harm to the residents of Ecuador. *See* SUMF ¶ ¶ 7-10. Once the complaints were first received, the U.S. and Colombian governments could have [redacted]

[redacted]. *See* SUMF ¶ 8. Instead, the U.S. and Colombia sponsored a sham "scientific" study so that they, along with DynCorp, could fraudulently tout the rigged results as "independent" evidence that the fumigation program was not causing harm in Ecuador. *See* SUMF ¶ 9.

At the same time that the U.S. and Colombian governments were ignoring credible complaints about harm in Ecuador and manipulating "science" to justify continued spraying near the border, DynCorp was failing to exercise due diligence to prevent significant transboundary environmental harm. *See* SUMF ¶ 11. For example, acting beyond the authority conferred by the United States and Colombian governments, DynCorp sprayed in Ecuador; allowed spray to drift into Ecuador from Colombia; flew into Ecuador even when not spraying; sprayed outside the established spray parameters; and sprayed in "no-spray" zones. *See* SUMF ¶¶ 12-16. In addition, DynCorp hired and retained improper persons as spray pilots; failed to properly maintain the spray planes, leading to numerous spray system failures; failed in its overall project management duties; [redacted]. *See* SUMF ¶¶ 17-22.

As a result of the lack of due diligence by DynCorp and the U.S. and Colombian governments, Defendants caused significant transboundary environmental harm, affecting the lives, health, and property of the plaintiffs. *See* SUMF ¶ 23. The damage caused was massive, and the evidence corroborating that damage is overwhelming. Thousands of Ecuadorian plaintiffs provided sworn questionnaire responses detailing their health and property damages. *See* SUMF ¶ 23(representative sample of plaintiff questionnaire responses). The twenty test plaintiffs, on whom the litigation has focused to date, have given testimony that dramatically

describes their personal injuries, emotional distress, and property damages (*See* SUMF ¶ 23, Exs.5-7):

Personal injuries:

- E. Quevedo Depo. at 52-53: Describing skin problems that began shortly after the spraying and eventually became a rash all over her body.
- S. Calero Depo. at 33:3-5: "I got sick right after the spraying. Right after the spraying I started to feel sick"
- L. Sanchez Depo. at 64:16-21: Describing headaches and itchy and burning eyes and throat.
- V. Mestanza Depo. at 46 & 68: Describing burning eyes and throat on day of spraying and itchy skin shortly afterwards.
- D. Sandoval Depo. at 44-45: Describing rash, dizziness, headache, diarrhea, and vomiting.

Emotional distress:

- E. Balcazar Decl. ¶ 3: "I was frozen with fear when I saw the planes spraying. It was a traumatic image and one I will never forget."
- E. Balcazar Decl. ¶ 5: "After the sprayings, I was not able to [sell my crops] and suffered economically. I did not have enough money to pay for my family's and my medicine and medical care due to the sprayings. I did not have enough money to feed my family, and this made me feel incompetent."
- E. Quevedo Decl. ¶ 7: "I was really sad because when I had rashes I went to school and the other children made fun of my rashes and it made me feel really bad. . . . I cried a lot then. I do not remember how many times I cried, but it was a lot."

- E. Alvarez Decl. ¶ 6: "During the time of the sprayings, I cried in the mornings, in the afternoons, and sometimes in the middle of the night. I would wake up crying. I cried when I realized that there was no money to buy food."

- B. Calero Decl. ¶ 5: "Yuli [her daughter] suffered a lot emotionally. She was very afraid of the planes, and when she saw the planes she would turn pale and cry a lot. She is still afraid of planes."

- S. Calero Decl. ¶ 4: "I cried when I lost my crops due to the sprayings. I worked a lot to maintain my home and family and due to the sprayings I lost a lot. I cried a lot at this time."

- E. Sandoval Decl. ¶ 8: "[T]he sprayings caused other profound changes in my life. Before the sprayings I went to school. Due to the sprayings, I missed approximately 4 years of studies because I was not able to pay the tuition. I was emotionally distressed due to having lost so many years of education. The sprayings changed my personality. I was very embarrassed about not earning what I earned before the sprayings and due to not being able to help my family as I did before."

Property damages:

- S. Calero Depo. at 9:11-14: "[The authorities] took photographs of the crops and they also took photographs of me, and I told them that all of my crops were burned and I went away crying."

- E. Balcazar Depo. at 62:6-10: Describing that one-quarter of farm was "completely like burned."

- V. Mestanza Depo. at 117:12-14: "[M]y property had been burnt out completely, the crops were burnt out completely"

Experts retained by Plaintiffs have also verified the damages. *See* SUMF ¶ 23 (citing reports by Dr. Michael Wolfson and Dr. Arturo Campaña). Scientists not retained for this litigation have likewise documented and confirmed the harms from the spraying suffered by Ecuadorians living near the border with Colombia. For example, Dr. Adolfo Maldonado and his colleagues found that 100% of people living within 5 kilometers of areas sprayed were physically affected by the spraying, and the closer people lived to the spraying, the more severely they were affected. *See* SUMF ¶ 23, Ex 3 (report by Maldonado and colleagues). Similarly, a study by [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

In its 2007 opinion, the Court rejected DynCorp's challenge to Plaintiffs' ATS claim, holding, *inter alia*, that:

- "Plaintiffs have alleged sufficient facts to state a claim that defendants are operating as a 'willful participant in joint activity with the State or its agents,' are 'controlled by an agency of the state,' or are 'entwined with governmental policies.'"
- "Defendants' activity which allegedly caused plaintiffs' harm was cloaked in the authority of the U.S. State Department and the Colombian government."

See SUMF ¶¶ 32-36. Plaintiffs have now offered ample factual support for each of these findings by the Court. *See* SUMF ¶¶ 37-38. The Court also held that:

- "While Congress endorsed aerial spraying in Colombia in adopting Plan Colombia, there is no evidence of Congressional authorization of using spray in Colombia that would drift into Ecuador."
- "Defendants have not attempted to establish that, in approving Plan Colombia, Congress specifically intended to override the international agreements cited by plaintiffs."
- "Defendants have not shown how Congress, in adopting Plan Colombia, intended to endorse aerial spraying that would effect neighboring Ecuador, or to abrogate any U.S. obligations under the various international agreements and conventions that plaintiffs claim have been violated."

SUMF ¶¶ 26-30. Defendant has still not offered any factual support even suggesting that Congress authorized spraying that would drift into or otherwise affect Ecuador or that Congress intended to override any international agreements. *See* SUMF ¶¶ 30-31.

ARGUMENT

I. The *Sosa* standard.

A. Conduct that violates a norm that is specific, universally recognized, and obligatory is actionable under the ATS.

Following *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), conduct that violates specific (or definable), obligatory, and universal norms of customary international law is actionable under the ATS. This is so even if there is debate about the precise contours of the international norm at issue; if the conduct in question is clearly prohibited, any ambiguity at the margin is immaterial. And while many violations of international law can be characterized as "heinous," there is no legal requirement that conduct must be unusually vile in order to be prohibited under international law and actionable under the ATS.

In *Sosa*, the Supreme Court held that violations of international law may be actionable under the ATS when based upon norms that have "[no] less definite content and acceptance" among nations than the "historical paradigms" that were familiar when §1350 was enacted. 542 U.S. at 732. These historical paradigms were offenses against ambassadors, violations of safe conduct, and piracy, *id.* at 720, 724, but the Court also made clear that new claims may be asserted based on the "present-day law of nations," if the conduct violates a "norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms." *Id*. at 725. The Court cited, approvingly, cases discussing modern human rights norms, describing its approach as

> generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court. *See Filartiga* [*v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)] ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind"); *Tel-Oren* [*v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984)] (Edwards, J., concurring) (suggesting that the "limits of section 1350's reach" be defined by "a handful of heinous actions—each of which

> violates definable, universal and obligatory norms"); see also *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (CA9 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory").

Id. at 732.

Modern ATS jurisprudence demonstrates unequivocally that violations of international norms not mentioned in *Sosa* may give rise to ATS causes of action. As the Sixth Circuit has recognized, "[t]he ATS holds great potential to bring justice to certain serious violations of human, civil, and *environmental* rights in a federal forum." *Taveras v. Taveraz*, 477 F.3d 767, 771 (6th Cir. 2007) (emphasis added). Although the D.C. Circuit has stated that there is a "high bar to new private causes of action for violating international law," *Ali Shafi v. Palestinian Auth.*, 642 F.3d 1088, 1091 (D.C. Cir. 2011), a wide variety of norms have been found to be actionable. Thus, for example, the D.C. Circuit has recently recognized aiding and abetting liability as being "well established in customary international law." *Doe v. Exxon Mobil Corp.*, ___ F.3d ___, 2011 U.S. App. LEXIS 13934, 17 (D.C. Cir. July 8, 2011). Likewise, as Judge Bates recently observed, "many U.S. courts have recognized a customary international law norm against past state-sponsored extrajudicial killings as the basis for an ATS claim." *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 36 (D.D.C. 2010) (collecting cases). Other courts have found acts such as, for example, nonconsensual medical experimentation and genocide by looting to be actionable. *See Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009); *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, 2011 U.S. Dist. LEXIS 54293, 6-7 (N.D. Ill. May 18, 2011).

Although norms must be "universal and obligatory" to be actionable under the ATS, *Sosa*, 542 U.S. at 732, unanimous conformity with or recognition of a norm is not required. To qualify as an international norm, it is "sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule

should generally have been treated as breaches of that rule." *Nicaragua v. United States of America,* 1986 I.C.J. at 98; *accord* Restatement, §102 comment b; *Forti,* 694 F.Supp. at 709 (ATS plaintiffs need not demonstrate unanimity among nations; general recognition that specific practice is prohibited suffices).

Likewise, although a norm must be "specific" or "definable", *Sosa*, 542 U.S. at 732, conduct that is specifically prohibited will be actionable even if the precise contours of the broader norm remain unclear. For example, in *United States v. Smith*, 18 U.S. (5 Wheat) 153 (1820), which *Sosa* cited to demonstrate the level of specificity with which the law of nations defined piracy, *see Sosa*, 542 U.S. at 732, the Supreme Court expressly acknowledged the diversity of definitions of piracy, but held that despite that diversity, certain core aspects of piracy are universally recognized, for instance, that robbery or forcible depredations upon the sea constituted piracy. *Smith,* 18 U.S. at 160-62. This is likewise consistent with the *Sosa* Court's approach to the conduct at issue there: the Court focused not on whether arbitrary detention was prohibited in general, but whether such a prohibition would reach "a relatively brief detention in excess of positive authority." 542 U.S. at 737.[1]

Post-*Sosa* ATS authority is consistent with the *Smith* approach that considers whether the conduct alleged violates the international law norm at issue, rather than whether the norm has a single, universally identifiable definition. *See, e.g.*, *Taveras*, 477 F.3d at 781-82 (addressing

[1] ATS authority prior to *Sosa* likewise considered whether the conduct at issue is clearly within the norm, not whether every aspect of what might comprise the norm is fully defined and universally agreed upon. *Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D. Mass. 1995); *accord Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (holding courts must consider whether "the defendant's alleged conduct" violates international law); *Filartiga*, 630 F.2d at 880 (threshold question is whether conduct alleged violates international law); *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510, 525 (S.D.N.Y. 2002), *aff'd* 343 F.3d 140 (2d Cir. 2003)("While it is not necessary for nations to identify with specificity every factual scenario that violates a particular prohibition under international law, a rule of customary international law must nevertheless be 'sufficiently determinate' to make it clear that particular conduct is prohibited.")

viability of cross-border child abduction claim by considering whether specific conduct alleged violated international law); *Baloco v. Drummond Co.,* 640 F.3d 1338, 1344-45 (11th Cir. 2011) (finding that conduct alleged violates international law).

Thus, several cases have expressly found that claims may proceed where the specific conduct violates international law, notwithstanding ambiguities regarding the precise contours of the norm. For example, *Almog v. Arab Bank, PLC*, 471 F.Supp. 2d 257, 280-81 (E.D.N.Y. 2007), considered whether certain acts of terrorism are actionable under the ATS. The court correctly noted that "there is no need to resolve any definitional disputes as to the scope of the word 'terrorism"'; instead "the pertinent issue here is only whether the acts as alleged by plaintiffs violate a norm of international law, however labeled." *Id.* at 280. Likewise, in *Presbyterian Church of Sudan v Talisman Energy*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005), the court found that "disagreement . . . regarding the fringes of international legal norms . . . does not, however, impugn the core principles that form the foundation of customary international legal norms—principles about which there is no disagreement." *Id.* at 340-41. *Abdullahi* similarly clarified that any "uncertainty [that] may exist at the margin is irrelevant" with respect to uniformity and specificity in defining the international law norm prohibiting nonconsensual medical experimentation on human subjects. 562 F.3d at 185. The court noted that "fringe disagreement exists over certain aspects of informed consent," but that such disagreements "do not disturb the specificity of the basic norm at issue or the unanimity of world opinion against medical experimentation on human subjects without their consent." *Id*. at 185 n. 15.

Defendants incorrectly suggest the post-*Sosa* standard for a cognizable norm under the ATS requires "heinous" conduct. Mot. at 23, 37-38. But neither *Sosa* nor D.C. Circuit case law requires conduct to be "heinous" in order to constitute an actionable violation. In *Doe v. Exxon*

Mobil Corp., for example, the D.C. Circuit found that aiding and abetting violates international law without examining whether the specific acts of aiding and abetting must be considered "heinous." 2011 U.S. App. LEXIS 13934, 79-80. Likewise in *Abdullahi*, the Second Circuit accepted that nonconsensual medical experimentation was actionable, without any finding that the acts at issue were "heinous." 562 F. 3d at 184-85. None of the cases Defendants cite suggest that violations of definable, universal and obligatory international law norms are not actionable unless they also meet some additional "heinousness" test.[2]

The concept of "heinousness," although mentioned by courts on occasion to describe the kind of acts that typically warrant international condemnation, is not a standard itself. Thus, the Second Circuit, responding to a plaintiff's argument that conduct was sufficiently "egregious" to rise to the level of an actionable norm, specifically recognized that the term "shockingly egregious" had been used in a prior case "descriptively, not prescriptively, merely to indicate that because universal acceptance is a prerequisite to a rule becoming binding as customary international law, only rules prohibiting acts that are 'shockingly egregious' are likely to attain that status." *Flores*, 414 F.3d at 253 (internal quotation omitted). International law contains no principle suggesting that only "heinous" acts can violate well-established and defined international law norms. And since application of this vague concept would turn on the "consciences and sensibilities of individual judges", *id.*, it is far too subjective to provide a legal standard for judging the actionability of an ATS claim.

[2] In each of these cases, the court dismissed the ATS claims on the grounds that the specific facts alleged did not constitute violations of customary international law, without regard to whether the act was "heinous." *Saleh v. Titan Corp.*, 580 F.3d 1, 15 (D.C. Cir. 2009); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 119 (2d Cir. 2008); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1023 (7th Cir. 2011).

In short, *Sosa* requires only that a plaintiff demonstrate consensus that the specific conduct alleged violates customary international law, even if some ambiguity remains regarding other aspects of the norm; it does not require that the farthest reaches of the norm be defined with absolute clarity. Defendants do not even attempt to undertake this analysis. Nowhere in their brief do they argue, based on the evidence in this case, that the specific conduct at issue does not violate international law. Instead they assert generally that there is no actionable norm at all. Given Defendants' failure to contest that the specific facts at issue violate international law, Plaintiffs need only show that *some* conduct is actionable.

B. Courts have consistently recognized a variety of sources as evidence of customary international law.

Defendants devote more than a quarter of their brief to arguing that Plaintiffs cannot bring a claim under the treaty prong of the ATS. Mot. at 23-35. Plaintiffs, however, are proceeding not under the treaty prong, but rather under the "law of nations" prong—that is, pursuant to norms of customary international law. The sources Plaintiffs cite are of types that have long been recognized as evidence of the content of international law, and have formed the basis for most if not all ATS claims that courts have accepted.

In considering whether an actionable norm exists under the ATS, courts look to the traditional evidence of customary international law. *Sosa*, 542 U.S. at 733 (finding that ATS claims "must . . . look[] to those sources we have long, albeit cautiously, recognized"). These sources of law, the Court explained, are "*the customs and usages of civilized nations.*" *Id*. at 734 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasis added)). Thus, for example, U.N. Resolutions, decisions of international tribunals, and widely-ratified treaties all provide cumulative evidence of the "customs and usages of civilized nations."

Evidence of customary international law is drawn from the sources listed in Article 38 of the Statute of the International Court of Justice (ICJ), which identifies treaties, "international custom," the "general principles of law recognized by civilized nations," "judicial decisions," and scholarly writings as "competent proof of the content of customary international law." *Abdullahi*, 562 F.3d at 175 (internal citations omitted). Similarly, the Restatement (Third) of the Foreign Relations Law of the United States ("Restatement") notes that "substantial weight" is given to the opinions of "international judicial and arbitral tribunals" and "national judicial tribunals," the "writings of scholars," and "pronouncements by states" concerning international law. Restatement § 103.[3]

Treaties: All treaties "provide some evidence of the custom and practice of nations," although their ratification or execution status is relevant to the "evidentiary value" a given treaty should be afforded. *Flores*, 414 F.3d at 256-57. Thus widely ratified treaties may be primary evidence even if they are not self-executing, *see, e.g.*, *Abdullahi*, 562 F.3d at 176; *Kadic v. Karadzic,* 70 F.3d 232, 242–43 (2d Cir. 1995) (relying in part on non-self-executing Genocide Convention); *In re Estate of Marcos Human Rights Litig*., 25 F.3d 1467, 1475 (9th Cir. 1994) (relying on non-self-executing Torture Convention), or if the U.S. is not a party. *See, e.g.*, *Khulumani*, 504 F.3d at 276 n.9 (Katzmann, J., concurring) (relying in part on Rome Statute of

[3] Defendants object that the Restatement is not an authoritative source of customary international law. However, the Restatement constitutes the opinion of the American Law Institute as to the content of international law. Restatement, Introduction at 3. As such, it is the kind of writing by highly qualified scholars that courts properly regard as evidence of customary international law. *Restatement* § 103, Reporters Note 1. The decision in *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991), ignored the Supreme Court's instruction that the opinions of distinguished commentators are evidence of the content of customary international law, *The Paquete Habana*, 175 U.S. at 700, and in any case was superseded by *Sosa*, in which the Supreme Court relied on the Restatement for the content of the norm against arbitrary detention. 542 U.S. at 756-57. Similarly, treatises may also be considered, and the writings of the International Law Commission may be particularly authoritative. *Restatement* § 103, Reporters Note 1.

the International Criminal Court for definition of aiding and abetting); *Abdullahi*, 562 F.3d at 183 (European regional treaty was evidence of customary international law); *see also Roper v. Simmons*, 543 U.S. 551, 576 (2005) (relying on unratified treaty as evidence of state practice). These evidentiary sources are important not for the extent to which they directly bind the United States, nor need they expressly authorize private rights of action. *Abdullahi*, 562 F.3d at 176-77. Rather, under *Sosa*, courts must examine them for the degree to which the norms they embody are accepted "in the world community" and "whether States universally abide by the norm out of a sense of mutual concern." *Id.* A treaty's ratification by the U.S. or self-executing nature does not dispose of this inquiry. *Id*.

Non-binding declarations and U.N. documents: International declarations, though non-binding, "create[] an expectation of adherence" and are evidence of custom to the extent that expectation is justified by state practice. *Filartiga*, 630 F.2d at 883. For example, *Abdullahi* discerned the content of customary international law in the declaration of an international association, when that instrument had been incorporated into many countries' laws. 562 F.2d at 181-82; *see also Kadic,* 70 F.3d at 241 (citing General Assembly resolutions).

International courts: The rulings of international courts and tribunals may be indicative of customary international law. *Exxon*, 2011 U.S. App. 13934 at **60-61 (applying decisions of ad hoc international criminal tribunals because "[i]mportant sources [of customary international law] are the international tribunals mandated by their charter to apply only customary international law."); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 610 (U.S. 2006) (relying on Nuremburg Tribunal for contents of laws of war); *First Nat'l City Bank (FNCB) v. Banco Para El Comercio*, 462 U.S. 611, 629 n.20 (1983) (relying on ICJ decision); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (relying on Nuremburg precedent

for content of ATS norm); *see also Doe v. Liu Qi,* 349 F. Supp. 2d, 1258, 1322 (N.D. Cal. 2004) (citing U.N. Human Rights Commission and regional human rights cases).

II. Plaintiffs have presented cognizable claims under the ATS for significant transboundary environmental harms.

As an initial matter, this Court has already found that Plaintiffs have adequately alleged a violation of international law actionable under the ATS. *Arias,* 517 F. Supp. 2d at 227. DynCorp fails to address this decisive fact, mentioning only that the decision was on a motion to dismiss but failing to show how the *legal* standard under Sosa was met then but not now. *See* Mot. at 3. Not only was this Court clearly correct in finding Plaintiffs had stated a claim under the ATS, but the accumulated and voluminous international authority discussed herein demonstrates that DynCorp's second effort to raise the issue must fail as well.

DynCorp twists Plaintiffs' argument beyond recognition when it asserts that Plaintiffs "claim that the internationally-authorized, Congressionally-approved, and extensively-investigated near-border coca eradication" violates international law. Mot. at 22-23. Plaintiffs do not challenge the legality of Plan Colombia and need not do so. As this Court has already found, "there is no evidence" that Congress authorized using spray in Colombia that would drift into Ecuador or that it intended to abrogate any international obligation that plaintiffs claim have been violated. *Arias,* 517 F. Supp. 2d at 227. That remains true on this record.

A. A universal and obligatory international norm is violated when States, or State actors, fail to prevent activities within their jurisdiction or control from causing significant transboundary environmental harm.

Plaintiffs state claims for significant transboundary environmental harms. A state's failure to prevent pollution originating under its jurisdiction or control from causing significant

injury to persons in another state is a violation of international law. *Restatement (Third) of Foreign Relations Law,* §601. This obligation has its roots in ancient principles such as equitable utilization, the right of territorial integrity, and the principle of *sic utere tuo ut alienum non laedas* (use your own so as not to injure another). Kiss and Shelton, International Environmental Law, 180-82 (3d Ed. 2004).

The specific obligation to prevent transboundary environmental harm is a binding norm of customary international law. This has been clear at least since the 1941 decision in *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, and enjoined further harmful pollution. 3 R.I.A.A. 1905, 1965-66 (1941), *reprinted in* UNEP, Compendium of Judicial Decisions on Matters Related to the Environment: International Decisions ("Compendium") 20, 38-39 (1998). Specifically, the tribunal found that

> [u]nder the principles of international law,… 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 or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Id. at 1965.[4] This principle has been repeatedly reaffirmed by near-universally adopted international declarations and treaties, the International Court of Justice, international arbitral tribunals, and other state practice. It is now a hornbook principle of customary international law.

For example, the norm requiring the prevention of transboundary environmental harm has been recognized and codified in a variety of multilateral declarations and treaties. In its most direct treatment of the issue, the world community affirmed in Principle 2 of the Rio Declaration on Environment and Development (1992), and Principle 21 of the Stockholm Declaration on the

[4] The Tribunal relied in part on "international decisions" and "a great number" of pronouncements by leading authorities dating back at least as far as 1928, and also noted that this international law principle accorded with the law of the United States. *Id.* at 1963-65.

Human Environment (1972) that "[S]tates have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States. . ." Both the Rio and Stockholm Declarations were unanimously adopted at the conferences at which they were proposed—the Rio Declaration by 178 nations, including the United States, and the Stockholm Declaration by 113 nations, again including the United States. Hunter *et. al*, International Environmental Law and Policy, 173, 187 (2d Ed. 2002). Indeed, at the Stockholm Conference, the United States stated that it regarded Principle 21 as a codification of customary international law. *See* David A. Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 GA. L. REV. 599, 620 (1995).

Thus, in *Beanal v. Freeport-McMoRan, Inc.*, the district court noted that this principle is "the cornerstone of international environmental law," and cited with approval the conclusion that it is "sufficiently substantive at this time to be capable of establishing the basis of an international cause of action; that is to say, to give rise to an international customary legal obligation the violation of which would give rise to a legal remedy." 969 F.Supp. 362, 384 (E.D.La. 1997) (quoting *Principles of International Environmental Law I: Frameworks, Standards and Implementation* 183 (Phillipe Sands ed., 1995)).

DynCorp can hardly argue otherwise—their own expert, before being hired by DynCorp, has called the norm reflected in Principles 2 and 21 "[a] centerpiece of international environmental law," and noted in reference to intergovernmental litigation that "[l]iability could [] arise from [this] general principle of international law." Sean Murphy, *Prospective Liability Regimes For The Transboundary Movement Of Hazardous Wastes*, 88 Am. J. Int'l L. 24, 42-43 (January 1994).

Multilateral treaties have reiterated this international law obligation. For example, the UN Convention on the Law of the Sea, which has 162 State Parties, requires that:

> States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

U.N. Convention on the Law of the Sea, Dec. 10, 1982, art. 194(2), 21 I.L.M. 1261 (entered into force Nov. 16, 1994) (status available at: http://treaties.un.org/pages/ParticipationStatus.aspx). Similarly, 193 State Parties affirmed in the Convention on Biological Diversity that "States have…the responsibility to ensure that activities within their jurisdiction do not cause damage to the environment of other States…" Convention on Biological Diversity, June 5, 1992, art. 3, 31 I.L.M. 822 (1992) (entered into force Dec. 29, 1993) (signed by the United States on June 4, 1993; status available at: http://treaties.un.org/pages/ParticipationStatus.aspx). This same responsibility was acknowledged by 195 State Parties, including the United States, in the 1992 U.N. Framework Convention on Climate Change as a component of the principles of international law. 31 I.L.M. 851 (1992) (entered into force Mar. 21, 1994) (status available at: http://treaties.un.org/pages/ParticipationStatus.aspx).

Likewise, the International Court of Justice (ICJ), recognizing that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn," has affirmed that the obligation "of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control *is now part of the corpus of international law*." *Gabcikovo-Nagymaros Project (Hungary-Slovakia)*, Judgment of 25 September 1997, ¶53 (quoting Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 241-42, ¶29) (emphasis

added); *accord* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Judgment of Apr. 9) (affirming based on "general and well-recognized principles…every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States").

International arbitral tribunals have reached the same conclusion subsequent to the 1941 decision in *Trail Smelter.* Thus in *Gut Dam Claims (Can. v. U.S.)*, the Tribunal found Canada liable for damage to U.S. property caused by rising water levels resulting from a dam the country built between the U.S. Les Galops Island and Adams Isle of Canada. 8 I.L.M. 118 (1969); *accord Lac Lanoux Arbitration (Spain v. Fr.)*, 12 R.I.A.A. 281, 314-17 (1957) (reaffirming *Corfu Channel* principle in finding that while "France [the upstream state] is entitled to exercise her rights; she cannot ignore the Spanish interests. Spain [the downstream state] is entitled to demand that her rights be respected and that her interests be taken into consideration."). Many scholars, including at least one cited by Defendants, have acknowledged that arbitral tribunal cases have been foundational in the development of the customary international law norm requiring the prevention of transboundary environmental harm.[5]

Other state practice has conformed to the requirements of this international law norm. Plaintiffs are aware of no State which claims the right to use its territory, or allow its territory to be used, in a way which produces significant transboundary environmental harm. Rather, nations have collectively "emphasized" that "States must not produce significant harmful effects

[5] *See, e.g.*, David Hunter *et. al.*, International Environmental Law and Policy, 419-422 (2d ed. 2002); Philippe Sands, Principles of International Environmental Law, 242 (2d Ed. 2003); Kiss and Shelton, International Environmental Law, 185-86 (3d Ed. 2004); Owen McIntyre, The Role of Customary Rules and Principles of Environmental Law in the Protection of Shared and International Freshwater Resources, 46 Nat. Resources J. 157, 169-70 (Winter 2006); Bradford Mank, *Can Plaintiffs Use Multinational Environmental Treaties as Customary International Law to Sue Under the Alien Tort Statute?,* 2007 Utah L. Rev. 1085, 1149-50 ("the Trail Smelter decision's principle that States are liable for their transboundary pollution is now recognized as customary international law.").

in zones situated outside their national jurisdiction." UN General Assembly Resolution 2995 (XXVII), Co-operation between States in the field of the environment (Dec. 15, 1972); *accord* UN General Assembly Resolution 3281 (XXIX), Charter of Economic Rights and Duties of States, A/RES/29/3281, Article 30 (December 12, 1974) ("All states have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states.") This obligation has become the basis for bilateral agreements between States to cooperate in the prevention of transboundary environmental harms.[6]

This norm of international law has led to the widespread practice amongst states of requiring environmental impact assessments (EIA) when the risk of significant transboundary harm is present, as an essential first step in prevention. *See Case Concerning Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), Judgment of April 20, 2010, pp. 60-61, Para. 204. Indeed, the ICJ found that the practice of requiring an EIA when a proposed activity may have significant adverse transboundary impact "has gained so much acceptance among states that it now may be considered a requirement under general [customary] international law." *Id.*[7] The codification of this practice in the 1991 Convention on Environmental Impact Assessment in a

[6] *See, e.g.*, Agreement Between the Government of the United States of America and the Government of Canada on Air Quality, Mar. 13, 1991, U.S.-Can., T.I.A.S. No. 11,783, Preamble, available at: http://www.epa.gov/airmarkets/progsregs/usca/index.htm (reaffirming its obligations under Stockholm Principle 21 and noting the Trail Smelter case with approval).

[7] Specific examples of this state practice include: the Council of European Communities' final directive on environmental assessment, requiring EIAs for potential effects in other member states, see Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 28 O.J. EUR. COMM. (No. L 175) 40 (1985); the 1977 U.S. Executive Order requiring that EIAs be filed in compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370a (1988), for "all major Federal actions significantly affecting" the "natural and physical" environment beyond U.S. territory, Exec. Order No. 12,114, 3 C.F.R. 356 (1979); and the Canadian requirement of including in the EIA an assessment of the "external" environmental consequences of proposed activities, see § 4(1)(a), Environmental Assessment and Review Process Guidelines Order, Registration SOR/84-467, June 22, 1983, 118(2) Can. Gaz. 2794, 2795 (1984). For additional examples of state practice in applying EIA requirements to transboundary impacts, *see* Birnie *et. al*., 168-69.

Transboundary Context, Espoo, Fin., Feb. 25, 1991, 1989 U.N.T.S. 310 (1997), 30 I.L.M. 800 (1991) (entered into force Sept. 10, 1997) (45 State Parties; signed by the United States on February 26, 1991) ("Espoo Convention") confirms that the state practice is performed out of a sense of international legal obligation. Indeed, when called before international tribunals to answer for harms caused to neighboring states, nations have not argued that international law does not require them to prevent transboundary pollution, but instead have challenged the claim that the preventative actions they had taken were inadequate under the international law requirements. *See* Birnie *et. al.*, International Law and the Environment, 140 (3d Ed. 2009).

The state practice of providing reparation for significant transboundary environmental harms confirms the existence of the norm. When a state violates its duty of prevention under international law, that state is "subject to general interstate remedies to prevent, reduce, or terminate the activity threatening or causing the violation, and to pay reparation for injury caused." *Restatement (Third) of Foreign Relations Law,* §602. This was precisely what the tribunal found in *Trail Smelter* when it ordered indemnity and remedial measures, 3 R.I.A.A. 1905, 1966, and is the same obligation applied by the other arbitral decisions. While debate over whether strict liability or only fault-based liability applies has stalled the development of a uniform model of liability under international law for all transboundary pollution, *see infra* Part II.C., it is beyond dispute that liability for significant transboundary environmental harms is warranted whenever the state itself fails to regulate and/or control potentially harmful activities to the standard of due diligence required by international law (as discussed *infra* in Part II.B.). Birnie *et. al.*, at 216-17. This is sufficient for liability here.

Assessing many of the above sources, leading international environmental law textbooks, as well as a broad collection of scholars have affirmed the existence of the international law

norm requiring the prevention of transboundary environmental harm. *See, e.g.*, David Hunter *et. al.*, International Environmental Law and Policy, 419-422 (2d ed. 2002); Phillipe Sands, Principles of International Environmental Law, 241 (2d Ed. 2003); Birnie *et. al.*, International Law and the Environment at 137; Kiss & Shelton, International Environmental Law, 188 (3d Ed. 2004).[8] In sum, "*[i]t is beyond serious argument* that states are required by international law to regulate and control activities within their territory or subject to their jurisdiction or control that pose a significant risk of global or transboundary pollution or environmental harm." Birnie *et. al.*, 143 (emphasis added).

B. The norm is definable: a state or state actor violates international law when it fails to exercise due diligence and the transboundary environmental harm is significant.

Plaintiffs do not contend that every transboundary environmental harm violates international law. Rather than an absolute duty to prevent any transboundary environmental harm, international law requires States to prevent only such harms that are "significant." Moreover, Plaintiffs do not assert strict liability for such harms, nor do they assert liability for purely private conduct where the state is without fault. International law, however, has clearly

[8] *See also*, P.M. Dupuy, "Overview of The Existing Customary Legal Regime Regarding International Pollution," International Law and Pollution, 61-67, 80-82 (D. Magraw ed. 1991), *reprinted in* Weiss, *et. al.*, International Environmental Law and Policy, 332-37, (1998) (finding the obligation to prevent transfrontier pollution to be a "well-established rule" on the basis of a broad comparison of treaty law, international resolutions, and regional practice); 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, 257 (December, 2008), Stathis N. Palassis, *Beyond the Global Summits: Reflecting on the Environmental Principles of Sustainable Development*, 22 Colo. J. Int'l Envtl. L. & Pol'y 41, 62 (Winter 2011), Jon M. Van Dyke, *Liability and Compensation for Harm Caused by Nuclear Activities*, 35 Denv. J. Int'l L. & Pol'y 13, 13-19 (Winter 2006); Owen McIntyre, *The Role of Customary Rules and Principles of Environmental Law in the Protection of Shared and International Freshwater Resources*, 46 Nat. Resources J. 157, 169-70 (Winter 2006).

been violated where, as here, a state actor fails to exercise due diligence to prevent significant cross-border injuries.

As the Restatement, the ICJ, the International Law Commission, and the UN General Assembly have all found, the international norm at issue requires "significant" transboundary harm.[9] This "significance" threshold "excludes minor incidents causing minimal damage." Restatement (Third) §601, comment c. The International Law Commission, drawing on a survey of national and international invocations of the term "significant" as a legal threshold governing transboundary environmental effects, concluded that the term requires that the harm "lead to a real detrimental effect" capable of measurement by "factual and objective standards" on matters such as "human health, industry, property, environment or agriculture in other States." ILC Draft Articles, Commentary to Art. 2, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf.[10] The Espoo Convention, in requiring an environmental impact assessment where proposed activities are likely to cause "significant adverse transboundary impact," further clarified the meaning of

[9] Restatement (Third) §601(1)(b); *Gabcikovo-Nagymaros Project (Hungary-Slovakia)*, Judgment of 25 September 1997, ¶53; International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities* [hereinafter ILC Draft Articles], U.N. Doc. A/56/10, Article 1 (2001); UN General Assembly Resolution 2995 (XXVII), Co-operation between States in the field of the environment (Dec. 15, 1972). Similarly, the *Trail Smelter* tribunal found liability in part due to the "serious consequence" of the case, 3 R.I.A.A. 1938, 1965, and the *Lanoux Arbitration* tribunal applied the prohibition against transboundary harm in light of the affected state's serious ("gravement") injury. Award of Nov. 16, 1957, 12 R. Int'l Arb. Awards 281, 308.

[10] Similarly, the U.N. Environmental Program's Working Group of Experts on Liability and Compensation for Environmental Damage defined "environmental damage" as "a change that has measurable adverse impact on the quality of a particular environment or any of its components, including its use and non-use values, and its ability to support and sustain an acceptable quality of life and viable ecological balance." See UNEP Training Manual on International Environmental Law, 52, available at: http://www.gov.mu/scourt/unep/UNEP%20Training%20Manual%20on%20International%20Environmental%20Law.pdf.

"significant" in international law by identifying a list of activities that inherently carry the risk of such significant adverse impact[11], and a list of factors to consider for all other activities.[12] Regardless of where the outer limits of the threshold may lie, the *Sosa* standard is met in this case. The devastating and widespread impact on the lives, health, subsistence and property of thousands of Ecuadorans, including the 20 test Plaintiffs, meets any significance standard. *See* SUMF ¶ 23.

The same is true with respect to the standard of care. The specific international law duty of prevention of transboundary environmental harm requires states, or state actors, to exercise due diligence in order to prevent significant damage to the environment of other states. *See, e.g.*, *Argentina v. Uruguay*, Para. 101 (finding that "the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a state in its territory."); *see also*, ILC Draft Articles, Commentary to Art. 3 (surveying international conventions and reports of international conferences and organizations and finding that "[t]he obligation . . . to take preventative or minimization measures is one of due diligence"). The International Court of Justice has affirmed that this duty has become part of international environmental law, as "vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage." *Id.* at Para. 101, 185 (quoting *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140).

[11] Included in this list, *inter alia*, is the "Deforestation of large areas." Espoo convention, Appendix I.

[12] Relevant criteria "to assist in the determination of the environmental significance" of the proposed activity include: the size of the activity, the location for the activity considering particularly any special environmental sensitivity or importance or proximity to population, and the possibility of particularly complex or adverse effects on humans or valued species. Espoo Convention, Appendix III.

The due diligence requirement obligates a State to do what is "necessary" and "practicable under the circumstances" to ensure that the activities within its "jurisdiction or control" do not cause significant transboundary injury. Restatement (Third) of Foreign Relations Law, Section 601(1). Thus, the Espoo Convention requires States to "take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities." Espoo Convention, art. 2(1).[13] The Rio Declaration provides more specific guidance on the means of exercising this level of due diligence; States agreed to cooperate to avoid the transfer to neighboring States of any substance harmful to human health, to adopt "polluter-pays" principles in their national law to ensure vigilant conduct, to require EIAs whenever there is the likelihood of a significant adverse impact, to notify immediately other States of any emergency which threatens their environment, and to both inform and consult other States with regard to any activity which may have a significant transboundary environmental effect. Rio Declaration, Principles 14, 16-19.[14] The International Court of Justice, drawing upon international law standards, found that "due diligence"

[13] *See also*, U.N. Convention on the Law of the Sea, art. 194 (requiring States to take "all measures consistent with this Convention that are necessary to prevent, reduce, and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal…"); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, March 22, 1989, 28 I.L.M. 649, art. 2(8) (entered into force May 5, 1992) (178 State Parties, signed by the United States on March 22, 1990) (requiring the "environmentally sound management of hazardous wastes and other wastes" defined as "taking all practicable steps…to protect human health and the environment from the adverse effects which may result from such wastes…").

[14] These principles, found in a variety of international conventions and agreements, were taken up again and codified in the ILC's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities. ILC Draft Articles, Principles 7-13. These Draft Articles have been described as "essentially codify[ing] existing obligations of environmental impact assessment, notification, consultation, monitoring, prevention, and diligent control of activities likely to cause transboundary harm. These articles are securely based in existing precedents…[and] offer an authoritative exposition of the existing law." Birnie *et. al.*, 141.

> entails *not only* the adoption of appropriate rules and measures, but also *a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators*, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party.

Argentina v. Uruguay, Para. 197 (emphasis added). At least one body has suggested that due diligence is "proportional to the degree of hazard involved"; the "higher the degree of inadmissible harm, the greater would be the duty of care required to prevent it." ILC Draft Articles, Commentary to Article 3, Para. 18. When a state or state actor fails to meet this due diligence requirement, and it leads to significant transboundary environmental harm, they have violated the duty of prevention under international law. Even if there were any ambiguity at the margins regarding what due diligence requires, there is no serious argument on these facts as ***nothing*** was done to prevent the harm or even warn the thousands of innocent victims. See SUMF at ¶¶ 7-11.

C. DynCorp's attempt to deny the existence of the international law norm prohibiting transboundary environmental harm fails because none of its authority supports its position.

Defendants pretend that cases addressing the question of whether *intra*-state environmental harm is actionable under the ATS somehow preclude the utterly distinct claim that transboundary harm is actionable. Mot. at 39-40. In fact, the decisions cited by DynCorp make clear that they did *not* find transboundary harm to be outside the scope of the ATS since it is an entirely different issue, requiring different treatment.[15]

For example, the district court in *Beanal* rejected a claim challenging *intra*-national environmental harm, but as noted above, recognized that transboundary environmental harm is

[15] Transboundary pollution implicates territorial sovereignty—one of the most basic and foundational principles of international law. *See* Franz Xaver Perrez, *The Relationship Between "Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage*, 26 Envtl. L. 1187 (Winter 1996).

actionable under customary international law. 969 F.Supp. at 384. In affirming dismissal, the Fifth Circuit cited with approval the Rio Declaration's transboundary harm provision, and specifically relied on the fact that the plaintiff did not allege any transboundary environmental damage. *Beanal v. Freeport-McMoran, Inc.* 197 F.3d 161, 167 n.6. (5th Cir 1999). Likewise, in *Flores*, another ATS case involving intra-national environmental harm, the Second Circuit stated: "[b]ecause plaintiffs do not allege that defendants' conduct had an effect outside the borders of Peru, we need not consider the customary international law status of *transnational* pollution." 414 F.3d at 255 n.29 (emphasis in original) (citing Restatement (Third) Section 602(2)).

Defendant's reliance on *In re Agent Orange Prod. Liab. Litig.* 373 F. Supp. 2d 7 (E.D.N.Y. 2005), Mot. at 39-40, a case dealing with the deliberate military use of an herbicide as part of operations during the Vietnam War, is equally unavailing. There, the district court cited favorably the Restatement's conclusion that the obligation to prevent transboundary environmental harm is "rooted in customary international law," 373 F. Supp. 2d at 128 (quoting Restatement (Third) of Foreign Relations Law, introductory note to pt. VI, at 99-103), but concluded that this international law obligation was not directly applicable to the special wartime context and the "use of the herbicides *to protect and prosecute military activity*." *Id.* at 129 (emphasis added). Indeed, the court focused instead on international humanitarian law, and found it particularly relevant that "[t]reaties limiting environmental damage in warfare were not in effect during the period of 1961-1975." *Id.* [16]

[16] Defendant's reliance on *Amlon Metals Inc. v. FMC Corp.*, 775 F.Supp. 668, 671 (S.D.N.Y. 1991) is also unavailing. Mot. at 40, n.35. *Amlon* involved a shipment of tainted copper residue to an English buyer. Given that the purchaser placed the residue in steel drums after realizing it was contaminated, *Id*. at 670, there apparently was no damage to the environment. Moreover, to the extent *Amlon* suggested that Principle 21 of the Stockholm Declaration was not sufficiently

Defendants also erroneously claim that the norm requiring the prevention of transboundary environmental harm is not specific, universal and obligatory. Mot. at 40. As "evidence" for this conclusion, Defendants cite unsuccessful efforts of the International Law Commission ("ILC") to define *liability rules*, and misleadingly quote the U.S. government out of context. *Id.* Defendants conflate the efforts of the ILC to present a series of draft articles on the state responsibility to *prevent* transboundary environmental harm, and the ILC's separate efforts to progress international law by presenting proposals for a uniform system of *loss allocation and compensation* for all environmental harms—even those caused by no breach of state responsibility. It was only the latter goal which proved so difficult for the ILC and provoked the response of the United States selectively quoted by the Defendants. The United States was not objecting to the imposition of liability in situations in which it breaches its obligation to prevent transboundary harm, but rather to the aspirational goal of imposing a uniform international system of strict liability "in instances where harm results from an act or omission that involves *no violation of an international law duty*." International Law Commission, *Comments and Observations Received from Governments*, U.N. Doc. A/CN.4/562, at 6-7 (2006) (emphasis in original). The efforts of the ILC merely to codify the principles of state responsibility to prevent transboundary environmental harms (which define when international law has been violated)—adopted in 2001 in the ILC's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities—were securely based in existing precedent and obligations of customary international law. Birnie *et. al.*, at141. The United States specifically addressed this distinction

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specific to be actionable, it is inapposite. Plaintiffs here rely on a host of other sources that give more specific content to the norm. *See supra* Part II.A. Further, as noted above, the relevant inquiry is whether the specific conduct at issue violates international law. *See supra* Part I.A. Whether the norm is specific enough to apply to other conduct, causing far less if any harm, is irrelevant. The *Amlon* court simply did not and could not conduct the inquiry required here.

in its critique of the proposal for a strict liability regime, raising its objection only after "Recalling that the draft principles [on liability] are distinct from and without prejudice to the work of the Commission on the topic of State responsibility." International Law Commission, *Comments and Observations Received from Governments*, U.N. Doc. A/CN.4/562, at 6 (2006). As detailed above, States, including the United States, have consistently recognized the customary international law obligation of prevention as a component of their state practice, despite Defendants' unsupported assertions to the contrary. Mot. at 41 n.36.

Defendants generally challenge Plaintiffs' reliance on the *Restatement*. Mot. at 41-42. As noted above, the argument is meritless because the Restatement is the work of highly qualified scholars describing the content of the law. *See supra* Part I.B. Regardless, the *Restatement* is merely one piece of evidence among many that Plaintiffs have cited in demonstrating the norm. Defendants also argue that the language of Section 601 of the Restatement is too "qualified" to meet the *Sosa* standard. But the "qualifications" Defendants cite *limit* the scope of the norm—they refer to the "due diligence" and "significance" inquiries. Regardless Plaintiffs have cited a host of sources that give sufficient content to those inquiries to determine that the conduct at issue here violates international law. *See supra* Part II.B.

Defendants further suggest that Comment (d) to § 601 of the Restatement counsels *against* finding a violation of international law on the facts of this case. Mot. at 42. Their argument is meritless. The Comment notes that "a state is responsible under this section for environmental harm proximately caused by activity under its own jurisdiction, not for activity by another state." Restatement, § 601, Comment (d). As an illustration, the Comment states, in the language Defendants selectively quote to suggest that the United States and by implication its contractors cannot be held liable, that "a state is not responsible under this section merely

because it *encourages activities in another state*, such as plant eradication programs, that inflict environmental injury in that state or in a third state." *Id*. (emphasis added). But the example is inapposite. Plaintiffs have presented substantial evidence that Defendants, acting under the authority of the Colombian state, caused significant transboundary environmental harms through its actions arising in Colombia. Moreover, the United States was intimately involved. This is not a case in which liability is predicated merely on one State "encouraging" such activity in another. This is a case about the Colombia's use of its own territory—facts at the heart of Section 601.

Defendants' claim that "the international community has not sought to restrict or prohibit" significant transborder pollution, Mot. at 41, is specious, as the above discussion makes clear. *See supra* Parts II.A and B. Defendants predicate this argument on the assertion that countries that have sustained damages have not always pressed international claims.[17] That is a non-sequitur—a failure to seek damages or the absence of a comprehensive international liability mechanism hardly refutes the existence of an international law norm requiring the *prevention* of significant transboundary environmental harms. Indeed, international law has left it primarily to national *fora* to provide remedies for such harms.[18]

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[17] In particular, Defendants claim that no State sought a judicial remedy against the U.S.S.R. with respect to Chernobyl. This ignores developments in international law subsequent to the Chernobyl disaster that confirm the existence of liability. In particular, both the Russian Federation and Ukraine have ratified or acceded to the Vienna Convention on Civil Liability for Nuclear Damage, 1063 UNTS 265 (May 21, 1963; entered into force Nov. 12, 1977) (status available at: http://www.iaea.org/Publications/Documents/Conventions/liability_status.pdf), thus committing themselves to a strict liability regime to remedy the transboundary effects of nuclear incidents like Chernobyl.

[18] National law is "the medium through which states will usually implement their international obligations." Birnie *et. al.* at 270. A state responsible for transboundary pollution has an obligation to afford the victims access to its tribunals on an equal footing with its own citizens, and victims must exhaust any such remedies before the state of which they are nationals can bring an international claim on their behalf. *Restatement*, § 602 (2) and cmt. b. Thus, national law is "the principal source of legal remedies for individual claimants and enables effect

More importantly, Defendants' position that, for there to be ATS liability, international law must have already established the means of its own enforcement was definitively rejected by the D.C. Circuit, *Doe v. ExxonMobil Corp.*, 2011 U.S. App. LEXIS 13934 (D.C. Cir. July 8, 2011), just weeks before DynCorp filed its brief. As the D.C. Circuit recognized, in general "[t]here is no right to sue under the law of nations; no right to sue natural persons, juridical entities, or states." *ExxonMobil Corp.*, 2011 U.S. App. LEXIS 13934, at 89. Instead, customary international law merely "provides rules for determining whether international disapprobation attaches to certain types of *conduct*." *Id.* at 90 (emphasis added). Thus, the only international law question in an ATS case is whether "the conduct at issue fits a norm qualifying under *Sosa*" such that the court has jurisdiction. *Id.* at 89. The ATS does not require that *remedies* must be found in international law—since the law of nations "creates no civil remedies and no private right of action . . . federal courts must determine the nature of any remedy in lawsuits alleging violations of the law of nations by reference to federal common law rather than customary international law." *Id.* at 87. The principle that international law itself need not provide a right to sue was recognized by Judge Edwards in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring), and approved by the Supreme Court in *Sosa*,; Judge Bork's contrary view was expressly rejected. 542 U.S. at 724, 731. In short, DynCorp's argument fails

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to be given to the notion of individual or corporate responsibility in international environmental law." Birnie *et. al.* at 270. Moreover, it is "an alternative to reliance on interstate claims, in contrast to which the main advantages are that individual claimants gain control over the proceedings and liability is placed directly on the polluter or enterprise causing environmental damage. The role of international law in this context is to remove obstacles to transboundary litigation. . ." *Id.* "More generally, making national remedies available is consistent with the view that there are significant advantages in avoiding resort to interstate remedies for the resolution of transboundary environmental disputes wherever possible."

because it "overlooks the key distinction between norms of conduct and remedies." *ExxonMobil Corp.*, 2011 U.S. App. LEXIS 13934 at 112.

Defendants admit that the *Trail Smelter* and *Gut Dams* cases "are frequently cited for the proposition that there is an international norm against transboundary environmental harms." Mot. at 42. Nonetheless, they brashly contend that the consensus view of these cases is wrong, because in each case the U.S. and Canada had already agreed to liability and all that was at issue was compensation. It is DynCorp, not the great weight of opinion, that is mistaken. The fact that liability was conceded is evidence of both state practice and *opinio juris*. Moreover the decisions themselves directly rely on and articulate general principles of international law, and have been correctly interpreted to have done so.

Defendants also claim that it is "noteworthy" that the parties in *Trail Smelter* and *Gut Dam* were states. Mot. at 42-43. But as has just been noted, the ATS does not require that international law provide plaintiffs a right to sue, the only question is whether the conduct at issue violates international law. *ExxonMobil Corp.*, 2011 U.S. App. LEXIS 13934 *87, 89-90; *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring). Regardless, under international law, 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).[19]

[19]Accordingly, 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 ATS. *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).

D. Defendants' *lex specialis* argument fails.

Contrary to DynCorp's claim, Mot. at 38-39, the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 165 [hereinafter "1988 U.N. Convention"] in no way alters the international law obligations of Colombia and the United States to respect the territorial sovereignty, human rights, and environment of Ecuador and its citizens. Defendants' argument that the 1988 U.N. Convention is *lex specialis* distorts both the *lex specialis* principle and the Treaty upon which they rely.

The principle of *lex specialis* states that a more specific law should take precedence over more general law. *See* Int'l Law Comm'n U.N. Gen. Assembly, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶¶ 88, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi) [hereinafter ILC Study], available at http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/CN.4/L.682&Lang=E. In the most authoritative discussion of the topic, the International Law Commission discussed two ways in which the principle operates. First are situations in which the special rule can be viewed not as conflicting with the general rule, but rather as a particular application of it. *Id.* at ¶ 88. In this scenario, application of the specific rule would not be inconsistent with the general rule.

Second are situations in which the specific rule is a modification, or overruling, of the general rule. *Id*. In these situations, however, the special rule only takes precedence if a harmonious interpretation of the two rules is impossible. *Id.* at ¶¶ 75, 88-89. Importantly, however, even in this situation, the more general rule provides interpretive direction to the special rule. *Id.* at ¶¶ 85, 100, 102, 120. Thus, the terms of any treaty that may potentially be more specific on any given issue must be read in the context of the more general principles of

customary international law, and interpreted as consistent with those principles unless there was a clear intention to modify the general rule. *See id.* at ¶¶ 75, 88-89; *see also, Argentina v. Uruguay*, ¶¶ 65-66, 204 (interpreting specific treaty at issue in light of "relevant rules of international law applicable in the relations between the Parties," including "rules of general [customary] international law."

Defendants are thus wrong to assert that—merely by virtue of the specific character of the 1988 U.N. Convention in relation to efforts to combat the illicit trade in drugs and the fact this lawsuit stems from an aerial eradication campaign—the terms of the 1988 U.N. Convention automatically "displace any general international norm with respect to human rights or the environment that might otherwise be argued to apply." Mot. at 38. Rather, a proper analysis requires an examination of the *specific terms* of 1988 U.N. Convention, read in light of existing international law, to determine first if they present any more specific treatment of the issue of transboundary pollution than exists in international law, and only if so, whether they were intended in any way to deviate from those customary international law principles.

Defendants' argument fails at each step. The terms of the 1988 U.N. Convention are not more specific than customary international law on the issue of transboundary environmental harm. Moreover, far from modifying customary international law with respect to such harm, the Convention *incorporates* the very protections for the environment and territorial sovereignty that Defendants claim is displaced.

Defendants point to no provision of the 1988 U.N. Convention that is more specific with respect to transboundary environmental harm than those recognized in customary international law. Rather, Defendants cite only two provisions: in the first, the parties committed to "tak[ing] appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic . .

. substances"; in the second, the parties agreed to cooperate in eradication programs in their respective territories when they have common frontiers. Mot. at 26, 42 (citing 1988 U.N. Convention, Art. 14). This article also notes that states should "respect human rights" and "take due account of . . . the environment." *Id.* Far from being more "specific" than customary international law with regard to the international legal obligation of States to prevent transboundary environmental harm, the provisions do not address the threshold of transboundary environmental harm that is impermissible, nor do they address the required standard of due diligence. Accordingly, the doctrine of *lex specialis* is inapplicable.

But even if Defendants could overcome that hurdle, there is no serious argument that the Convention was intended to displace customary international law protections regarding cross-border harms. According to the Defendants, the 1988 U.N. Convention's terms specifically redefine fundamental principles of international law and create a completely independent legal order when it comes to aerial eradication operations. Defendants would have the Court believe that by signing on to the 1988 U.N. Convention, Ecuador abandoned the protections for its citizens derived from principles of territorial sovereignty and international human rights and environmental law, and gave the US and Colombian Governments the authority to do whatever they deemed appropriate for the eradication of coca along the Colombia-Ecuador border, including the authority to rain toxins down on Ecuador's sovereign territory. Such a fanciful interpretation defies the text of the Convention, general principles of international law and common sense.

Any possibility that the 1988 UN Convention might be given *lex specialis* effect over norms of customary international law relating to territorial sovereignty is completely disposed of by the provisions of the Convention that specifically define its scope. Article 2 states:

> 2. The Parties shall carry out their obligations under this Convention in a manner *consistent with* the principles of sovereign equality and *territorial integrity* of States and that of non-intervention in the domestic affairs of other States.
>
> 3. A Party *shall not undertake in the territory of another Party* the exercise of jurisdiction and performance of functions *which are exclusively reserved for the authorities of that other Party by its domestic law*."

1988 U.N. Convention, Article 2 (emphasis added). Thus, Article 2 specifically reemphasizes existing norms of territorial sovereignty and integrity, and instructs States to interpret all the terms of the Convention as consistent with those principles. While Defendants assert that these provisions "provide no specific guidance on the issues before this Court," in fact these articles provide all the guidance the Court needs in rejecting Defendants' *lex specialis* argument. Article 2 affirms that the treaty was not intended to displace any norm of international law that is grounded in principles of territorial sovereignty, but rather was intended to operate alongside those norms and be interpreted consistent with them.

Nothing in the rest of the text of the 1988 U.N. Convention in any way undermines the protection afforded to territorial integrity of each State Party. Principal among the obligations of territorial sovereignty, as recognized in Article 2, is a duty of nonintervention in the sovereign realm of other States. *See* Franz Xaver Perrez, The *Relationship Between"Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage*, 26 Envtl. L. 1187, 1189 (1996). Any deviation from this fundamental duty would have to be made explicit in the Convention, and Defendants have pointed to no provision where such a profound deviation is articulated. Nor can they. Such a provision would have radically restructured the nature of international relations and would have quickly been rejected by the State Parties.

DynCorp's effort to construct such a provision out of the Convention's references to the agreement to "co-operate" is unavailing. Indeed, in the most relevant provision relating to

cooperation—that dealing with eradication programs along common frontiers—the State Parties agreed to cooperate "in their *respective* areas along those frontiers." 1988 U.N. Convention, Article 14(3)(c) (emphasis added). Far from restructuring principles of territorial sovereignty, this Article reaffirms the State Parties' commitment to it. The same can be said of Defendants' reliance on a statement from Colombia's reservations to the Convention. According to Defendants, in signing the Convention, Colombia reserved the right to assess for itself the ecological impacts *in Ecuador* of its eradication efforts. Mot. at 27, 30. The statement, when not taken out of context and misinterpreted by Defendants, suggests no such thing:

> It is the view of Colombia that treatment under the Convention of the cultivation of the coca leaf as a criminal offence must be harmonized with a policy of alternative development, taking into account the rights of the indigenous communities involved and the protection of the environment. In this connection it is the view of Colombia that the discriminatory, inequitable and restrictive treatment accorded its agricultural export products on international markets does nothing to contribute to the control of illicit crops, but, rather, is a cause of social and environmental degradation in the areas affected. Further, Colombia reserves the right to make an independent evaluation of the ecological impact of drug control policies, since those that have a negative impact on ecosystems contravene the Constitution.

Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances *Declarations and Reservations, Colombia*, decl. 2, *available at* <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en>. Thus, this reservation reflects Colombia's concern about having its domestic policies dictated to it by non-Colombians unconcerned about the plight of Colombia's citizens and its domestic law protecting the environment. This is a far cry from an attempt by Colombia to declare itself the sole arbiter of the transboundary environmental impacts of its activities, notwithstanding other principles of international law, as Defendants argue.

At the very least, such a creative reading could not be said to have been "tacitly accepted" by Ecuador. Mot. at 27. Indeed, Ecuador has initiated proceedings against Colombia

before the International Court of Justice for violations of international law stemming from Colombia's aerial spray operations. See *Aerial Herbicide Spraying (Ecuador v. Colombia)*, Application Instituting Proceedings, available at: http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=ee&case=138&code=ecol&p3=0. Regardless, the principle of *lex specialis* applies when there is a clear intent to modify the general rule. Defendants provide no authority for the proposition that fundamental norms can be displaced by mere silence in the face of a reservation to a Convention. There is simply no ground for interpreting the Convention as providing Colombia with the authority to, at its whim, spray toxins onto Ecuadorian territory and thus breach its obligations to respect Ecuador's sovereignty.

If there were any doubt as to the treaty's intent not to displace existing international law obligations, the treaty reiterates this point specifically with respect to the possible human rights and environmental consequences of plant eradication. Article 14(2) explicitly states that the measures adopted to prevent illicit cultivation of narcotic plants "*shall* respect fundamental human rights and *shall* take due account of . . . the protection of the environment." 1988 U.N. Convention, Article 14(2) (emphasis added). These mandatory obligations limit the means by which a State may seek to eradicate illicit plants.[20] And since they conform to the international norm regarding transboundary harm, they thus refute any suggestion that the parties intended to abrogate that norm.

[20] Rather than merely a counter-balance to drug control measures as Defendants argue, Mot. at 29, the human rights and environmental protections of international law are incorporated into the drug control regime itself and help define what measures are "appropriate." *See* Daniel Heilmann, *The International Control of Illegal Drugs and The U.N. Treaty Regime: Preventing or Causing Human Rights Violations?*, 19 Cardozo J. Int'l & Comp. L. 237, 273 (Spring 2011) (arguing that the 1988 U.N. Convention "must be construed in conformity with human rights obligations and human rights obligations may take precedence if a balancing of interests does not lead to reconciliation of clashing norms.").

Indeed, any measure that violates fundamental human rights or international environmental law could hardly be said to be "appropriate." This understanding was reiterated in the Declaration of Cartagena, T.I.A.S. 124111, signed in on February 1, 1990 by the President of the United States and the President of the Republic of Colombia, which, in pertinent part, states that "[g]iven that the Parties act within a framework of respect for human rights, they reaffirm that nothing would do more to undermine the war on drugs than disregard for human rights by participants in the effort," Section B (preamble), adding that "Eradication programs must safeguard human health and preserve the ecosystem." Section B, subdivision 5.

III. Plaintiffs have presented sufficient evidence to raise a genuine issue of material fact as to DynCorp's liability with respect to the ATS claim.

The movant "bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the [record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S.317, 323 (1986). Where as here defendant fails to meet that burden, summary judgment "must be denied", even if the plaintiff files no opposition. *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 950 (9th Cir. 1993). As noted above, Defendants argue only that there is no actionable norm. Nowhere in their brief do they contend that Plaintiffs' evidence is insufficient to show that the U.S. and Colombia and their agent DynCorp failed to exercise due diligence, and that this led to massive cross-border environmental harms. Thus, this Court must assume these facts are true. Because, as Plaintiffs have shown, international law clearly does prohibit the specific conduct at issue here, Defendants' motion must be denied, without reference to the factual record.

Nonetheless, this record is thick with evidence supporting each element of the Plaintiffs' claim. There is no dispute that Defendants caused significant transboundary environmental harm.

The evidence shows that DynCorp's spraying in Colombia has harmed the health, property and livelihoods of thousands of Ecuadorians. SUMF ¶ 23.

Likewise, Defendants have conceded they were acting under color of the authority of the Colombian and U.S. governments. SOF ¶¶ 39,[redacted],42. There is no other possible explanation as to why DynCorp was spraying herbicides in the first place. Indeed, when addressing Defendants' motion to dismiss, this Court found that Plaintiffs had alleged sufficient facts to show that "Defendants are operating as a 'willful participant in joint activity with the State or its agents,' are 'controlled by an agency of the state,' or are 'entwined with governmental policies,'" such that Defendants' activity "was cloaked in the authority of the U.S. State Department and the Colombian government." *Arias*, 517 F. Supp. 2d at 228 (internal citations omitted). Plaintiffs have now identified and or produced evidence of all the facts this Court relied upon in reaching this conclusion. SUMF ¶¶ 38,40.

Likewise, there can be no dispute that Defendants, as well as the United States and Colombia, failed to exercise due diligence to prevent significant transboundary environmental harm. DynCorp and the U.S. and Colombian governments knew at least from 2000 and 2001 that the spraying was harming people and property in Ecuador. SUMF ¶¶ 4,5,11. DynCorp also sprayed in and allowed spray to drift into Ecuador—which resulted from, among other things, the fact that DynCorp sprayed outside the established spray parameters, sprayed in "no-spray" zones, hired improper persons as pilots, failed to properly maintain planes and [redacted]. *See* SUMF ¶¶ 8, 11-22.

Plaintiffs have presented more than sufficient evidence to support their claim.

CONCLUSION

For the foregoing reasons, Defendants Motion should be denied in its entirety.

Respectfully submitted,

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