

TABLE OF CONTENTS

Table of Authorities.....	iii
Statement of Interest of <i>Amici Curiae</i>	x
Qualifications of <i>Amici Curiae</i>	x
Statement of the Issue Addressed by <i>Amici</i>	1
Introduction.....	1
Summary of Argument.....	2
Argument.....	4
I. The ATCA permits claims for violations of well-established norms of customary international law.....	4
II. The plaintiffs adequately stated claims under the ATCA for violations of fundamental human rights.....	6
A. Universal, obligatory and definable norms of customary international law prohibit the kind of environmental degradation plaintiffs allege.....	6
1. The rights to life, security of the person and health are obligatory and are universally recognized to prohibit massive environmental degradation causing widespread harm to human health.....	7
a. Basic human rights including the rights to life, security of the person and health.....	8
b. The laws of war.....	12
c. Explicit recognition of the right to a minimally adequate environment.....	13
d. International recognition that development must sustainably account for people’s environmental needs.....	15
e. International environmental law.....	16
f. State domestic practice.....	18
g. Opinion of leading international law experts.....	19
2. The rights to life and health are sufficiently determinate to demonstrate that international law prohibits the acts plaintiffs allege.....	21
B. <i>Beanal</i> is inapposite to the claims at bar.....	23
C. Because international human rights law limits how states may act within their sphere of sovereignty, the district court erred in concluding that pollution within one nation’s	

borders cannot violate international law.....	25
D. Peru's environmental policy supports plaintiffs' claims.....	29
CONCLUSION.....	30

TABLE OF AUTHORITIES

CASES

<i>Aguinda v. Texaco, Inc.</i> , 303 F.3d 470, 480, n.3 (2 nd Cir. 2002).....	25
<i>Aguinda v. Texaco, Inc.</i> , 142 F. Supp. 2d 534 (S.D.N.Y. 2001).....	24, 25
<i>Amlon Metals, Inc. v. FMC Corp.</i> , 775 F. Supp. 668 (S.D.N.Y. 1991).....	24, 25
<i>Beanal v. Freeport-McMoRan</i> , 197 F.3d 161 (5 th Cir. 1999).....	23, 24, 25, 30
<i>Doe I v. Unocal Corp.</i> , ___F.3d ___, 2002 U.S. App. LEXIS 19263 *29 (9 th Cir. 2002).....	12
<i>Estate of Cabello v. Fernandez-Larios</i> , 157 F.Supp.2d 1345 (S.D.Fla. 2001).....	10
<i>Filartiga v. Pena-Irala</i> , 630 F.2d 876 (2 nd Cir. 1980).....	<i>passim</i>
<i>Flores et. al. v. Southern Peru Copper Corp.</i> , 2002 U.S. Dist. LEXIS 13013 (S.D.N.Y. 2002).....	<i>passim</i>
<i>Forti v. Suarez-Mason</i> , 694 F.Supp. 707 (N.D.Cal. 1988).....	5, 22
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<i>Xuncax v. Gramajo</i> , 886 F. Supp. 162 (D.Mass. 1995).....	21, 22

STATUTES

Alien Tort Claims Act, 28 U.S.C. § 1350.....	<i>passim</i>
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Convention on Biological Diversity (1992).....	19
Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Council of Europe, June 21, 1993, 32 I.L.M. 1228-33 (1993).....	17
Convention on the Prevention of Marine Pollution By Dumping Of Wastes And Other Matter, Dec. 29, 1972, art. 1, 1046 U.N.T.S. 120, 26 U.S.T. 2403, T.I.A.S. No. 8165, 11 I.L.M. 1294 (1973).....	17
Convention on the Protection of the Environment through Criminal Law, ETS No. 172, 4 November 1998, 38 I.L.M. 259 (1999).....	17
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International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 1975 U.N.T.S. 4, 9 I.L.M. 45 (1970) (entered into force June 19, 1975).....	17
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MISCELLANEOUS	
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STATEMENT OF INTEREST OF *AMICI CURIAE*

This case presents an important question of international law regarding the scope of international human rights law's protection of individuals from environmental harm. *Amici curiae* are nine scholars of international law, international human rights law and/or international environmental law. Each has published and lectured extensively on these topics. This brief sets forth their considered views on the central issue raised in this case.

All parties have consented to allow *amici* to file this brief, pursuant to FRAP 29(a).

QUALIFICATIONS OF *AMICI CURIAE*

S. James Anaya is the Samuel M. Fegtly Professor of Law at the University of Arizona James E. Rogers College of Law. Professor Anaya teaches and writes in the areas of international law and organizations, human rights, and issues concerning indigenous peoples. He has written three books on international law, including Indigenous Peoples in International Law (Oxford Univ. Press, 1996). He has published numerous other book chapters and articles, including in journals at Harvard, Yale, and Arizona, and in the *American Journal of International Law*. He was on the law faculty at the University of Iowa from 1988 to 1999, and he has been a visiting professor at Harvard Law School, the University of Toronto, and the University of Tulsa. He has been a consultant for numerous organizations and government agencies in several countries on matters of human rights and indigenous peoples, and he has represented indigenous groups from many parts of North and Central America before courts and international organizations. In 1995, he co-authored a major study for the Royal Commission on Aboriginal Peoples of Canada, and has also conducted a study for the Secretary General of the Organization of American States (OAS) relative to a dispute over oil development on indigenous lands in Colombia. He successfully litigated a landmark indigenous land rights case before the Inter-American Court of Human Rights. He has given numerous speeches and presentations worldwide at universities, academic and professional conferences, and meetings convened by non-governmental organizations, governments, and international institutions. Professor Anaya is on the Executive Council of the American Society of International Law.

David Hunter is Adjunct Professor of Law at The American University's Washington College of Law, where he teaches International Environmental Law and Comparative Environmental Law. Prof. Hunter has served as Executive Director of the Center for International Environmental Law. He is co-author of the treatise International Environmental Law and Policy (2d ed. 2001). He has served as an environmental consultant to the Czech and Slovak environmental ministries as well as several NGOs in Central Europe. Prof. Hunter's research covers a broad

range of global environment and development issues, including: multinational corporate responsibilities under international law, ozone depletion, and the role of international financial institutions.

Alexandre Kiss is Director of Research Emeritus at the French National Center for Scientific Research and Professor of Law at the University Robert Schuman (Strasbourg), Santa Clara University (California), and Erasmus University (Rotterdam). Professor Kiss has taught courses and presented at conferences in most European countries, the United States, Canada, Mexico, Brazil, Venezuela, Morocco, Tunisia, Benin, Thailand, Japan, India, etc. He has been a consultant with international organisations concerned with environmental protection (UNEP, WMO, OCDE, Council of Europe, IUCN). He has served as director of expert commissions preparing reports for the United Nations Environment Programme, the European Commission, the Council of Europe, and other international institutions. He is President of the European Council on Environmental Law, former Secretary General (1980-1991) and Vice-President (1991-2002) of the International Institute of Human Rights, President of "AEnvironnement sans frontière" and other non-governmental organizations, and member of the board of diverse scientific associations and bodies. He has served as an expert with the French Ministry for Environment. He represented the Hungarian Government at the International Court of Justice in the *Gabcikovo-Nagymaros Project Case*. He has authored ten books on international law, including five on international environmental law. E.g. International Environmental Law (2nd edition 2000); Manual of European Environmental Law (2nd edition 1997); Traité de droit européen de l'environnement, Ed. (1995); Droit international de l'environnement, Ed. (2ème édition 2000), Survey of Current Developments in International Environmental Law, (1976). He has written approximately 280 articles on environmental law published in twelve languages. Professor Kiss has been awarded Officer of the Légion d'honneur, Austrian Distinguished Merit Cross, Member of the Hungarian Academy of Sciences, Doctor Honoris Causa of the University of Leuven, and the Elisabeth Haub Prize for Environmental Law.

Ved Nanda is Thompson G. Marsh Professor of Law and Director, International Legal Studies Program at the University of Denver College of Law. Professor Nanda has authored, co-authored or edited approximately 20 books on international law, international environmental law, international criminal law and human rights, including Litigation of International Disputes in U.S. Courts (1999), International Environmental Law and Policy (Transnational 1995), and Human Rights and Third World Development (1985)(co-editor). He is also author or co-author of approximately 150 book chapters and articles on these topics. He is President of the World Jurist Association, Counselor and Honorary Vice President of the American Society of International Law, and Member of

the Executive Committee of the International Law Association, U.S. Branch. He is on the Editorial Board of the American Journal of Comparative Law and on the Editorial Advisory Board of Transnational Publishers. He is Director of the American Society of Comparative Law. Professor Nanda serves on the Advisory Council of the U.S. Institute of Human Rights.

Naomi Roht-Arriaza is Professor of Law at the University of California, Hastings College of Law. Professor Roht-Arriaza teaches international human rights and international environmental law. She previously held the Riesenfeld Fellowship in International Law at Berkeley. She is the author of Impunity and Human Rights in International Law and Practice (Oxford, 1995) and of more than a dozen publications in legal and international relations journals on international criminal law, the relationship of human rights and the environment, and corporate accountability issues. She was a non-governmental organization delegate to the 1998 Rome Conference on the Establishment of an International Criminal Court. She is an editor of the Yearbook of International Environmental Law, and consults with foundations and non-governmental groups on human rights and environment issues. She is a member of the U.S. National Advisory Committee on the North American Agreement on Environmental Cooperation. Professor Roht-Arriaza is on the Executive Council of the American Society of International Law and a member of the International Law Association.

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Jon M. Van Dyke is Professor of Law at the William S. Richardson School of Law, University of Hawai'i at

Manoa. Professor Van Dyke has been teaching International Law since 1971, first at the Hastings College of the Law, University of California, San Francisco, California, and since 1976 in his current position. He teaches Public International Law, International Human Rights Law and International Ocean Law. He has served for three years on the Executive Council of the American Society of International Law. He has been a member of the Working Group established by LAWASIA to prepare a Model Human Rights Charter for the Pacific Island nations, and has served as a consultant on issues related to international law to the governments of Turkey and Nauru and to the South Pacific Regional Environmental Programme, the Association of Pacific Island Legislatures, and the Permanent Commission for the South Pacific. He is the author, co-author, or editor of eight books, and numerous articles, including articles on international human rights. He is co-author of a casebook entitled International Law and Litigation in the U.S., (with Jordan Paust and Joan Fitzpatrick, 2000). Professor Van Dyke has successfully argued numerous appeals to the U.S. Court of Appeals for the Ninth Circuit on issues related to international human rights. *See, e.g., Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994); *Hilao v. Estate of Ferdinand Marcos (Marcos Estate III)*, 103 F.3d 767 (9th Cir. 1996).

Richard J. Wilson is Director of International Human Rights Law Clinic at the Washington College of Law at American University. Professor Wilson is a co-director of the Center for Human Rights and Humanitarian Law, a member of the Board of Litigation Directors for Rights International: Center for International Human Rights Law, and a former member of the Board of Editors for the American Journal of Comparative Law. He also teaches at the Human Rights Academy at Washington College of Law and at the Oxford University Human Rights Law program. In 1998, he was Legal Advisor to the Consulate of the Republic of Colombia. From 1995-1996, he was a consultant to the United Nations Mission for Verification of Human Rights in Guatemala. He is the co-author of several treatises, including The Rights International Companion to Criminal Law & Procedure (1999) and International Human Rights Law and Practice: Cases, Treaties and Materials (1997). He has published also articles in several law reviews, including those at American, Fordham, Miami and Whittier. Professor Wilson has extensive experience in human rights litigation, having participated in several cases before the Inter-American Court of Human Rights.

Durwood Zaelke is the founder and Co-Director of the Research Program on International and Comparative Environmental Law at American University Washington College of Law, where he serves as an Adjunct Professor of Law and Scholar-in-Residence, teaching International Environmental Law, Human Rights and the Environment, International Environmental Dispute Resolution, International Environmental Institutions, and International Air Pollution Law. He was Visiting Lecturer in Law at Yale Law School in 1999, where he taught International Environmental Law and Policy. He has recently been appointed to teach at Johns Hopkins University Graduate School and as a Brenn Scholar at the Brenn School of Environmental Science and Management at University of California, Santa Barbara, where he also co-directs the program on governance for sustainable development. He was appointed by President Clinton to serve on the White House Trade and Environment Policy Advisory Committee, and to serve on the U.S. delegation to the Seattle Ministerial meeting of the World Trade Organization. He continues to serve on TEPAC under President Bush. He is the President and founder of the Center for International Environmental Law. He is co-author of the treatise International Environmental Law and Policy (2d ed. 2001), co-editor of Freedom for the Seas: A New Look at Ocean Governance (Island Press 1993) and Trade and the Environment: Law, Economics, and Policy (Island Press 1995) and co-author of a variety of articles concerning international environmental law. He has taught in the University of Nairobi/Widener summer program in Kenya and the Duke Law School/Free University of Brussels program in Brussels. Prof Zaelke has also served as a special Litigation Attorney with the U.S. Department of Justice in the Environment and Natural Resources Division.

STATEMENT OF THE ISSUE ADDRESSED BY *AMICI*

International law specifically prohibits acts causing long-term, widespread and severe environmental degradation that prejudices the health or survival of a population. Accordingly, the district court erred in concluding that international law lacks a determinate standard specifically prohibiting the kind of massive pollution plaintiffs allege, and its dismissal of plaintiffs' Alien Tort Claims Act claims therefore must be reversed.

INTRODUCTION

Plaintiffs allege that for the past forty years, defendant Southern Peru Copper Corporation ("SPCC") has knowingly caused loss of life in, and severe injury to the health of the people of Ilo, Peru. Defendant has allegedly inflicted these injuries through an ongoing practice of polluting the environment on an extraordinary scale. According to the Amended Complaint, the harms are easily traceable to defendants' actions.

Plaintiffs filed suit under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, asserting SPCC's actions violate plaintiffs' fundamental customary international law rights to life, health and sustainable development. The district court dismissed, concluding that plaintiffs relied only on general principles of human rights law, and therefore failed to demonstrate that the international community prohibits the particular conduct at issue. *Flores v. Southern Peru Copper Corp.*, 2002 U.S. Dist. LEXIS 13013 **24, 27, 41 (S.D.N.Y. 2002). *Amici* respectfully submit that international law does specifically prohibit such conduct, and that the court's holding that plaintiffs failed to state cognizable ATCA claims therefore must be reversed.

SUMMARY OF ARGUMENT

The plaintiffs have stated actionable ATCA claims for violations of their fundamental human rights to life, health and sustainable development through massive environmental degradation. The district court erred in concluding that these norms are not sufficiently determinate to be cognizable. International law provides sufficient criteria by which a court can determine whether defendant's conduct has caused sufficient damage to constitute a violation, and clearly precludes the specific type of conduct alleged here.

Actions causing long-term, widespread and severe harm to the environment that prejudices the health or

survival of a population are specifically barred by customary international law. This minimum standard is universally accepted and is obligatory even during wartime, when other norms become inapplicable. Since this norm is sufficiently determinate to establish that SPCC's alleged acts are universally considered international torts, it is therefore actionable under the ATCA.

A variety of different bodies of international law establish that plaintiffs' claims are based upon universal, obligatory and definable norms. These include states' universal recognition that the fundamental rights to life, security of the person and health place obligatory limits on environmental degradation; that environmental degradation of the scale alleged here is prohibited even during wartime; and that persons have a right to a minimally adequate environment. Plaintiffs' claims find additional support in numerous international environmental treaties, states' domestic laws and constitutions, and the opinions of international law experts. Indeed, every international human rights body to have considered the issue has held that environmental destruction that impinges upon fundamental rights on a mass scale violates international law.

Amici do not contend that *all* pollution that threatens human health is actionable under the ATCA. The "long-term, widespread and severe" standard is very narrow, and the term "prejudices the health or survival of a population" requires substantial effects on a large number of people. Moreover, the norm requires that the defendant acted even though the challenged action "may be expected" to cause such harm. Thus, this norm is only violated by patently egregious conduct. There can be no question, however, that international law prohibits the massive environmental damage causing death and widespread and serious harm to human health that is alleged here.

The district court further erred in concluding that pollution within one nation's borders can never violate international law. Plaintiffs' claims are based upon obligatory human rights norms. While nations have wide latitude in balancing environmental protection and development, they have no discretion to violate basic human rights through environmental degradation, any more than they have discretion to do so through other means. In any event, plaintiffs' claims cannot interfere with Peru's sovereignty, because the district court itself concluded that Peruvian law would entitle these plaintiffs to a remedy if they prove their allegations.

In sum, the plaintiffs have stated claims under the ATCA, and the district court's holding to the contrary must be reversed.

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. 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).

Plaintiffs and *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 as the Inter-American Commission on Human Rights,⁴ states’ uniform domestic practice,⁵ the works of leading jurists and commentators,⁶ and declarations of international law experts.⁷ Thus, the sources cited herein are evidence of

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.

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.

⁶ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

⁷ *Filartiga*, 630 F.2d at 879 n.4, 884 n.16.

customary law. These sources are submitted in the accompanying Addendum to Brief of *Amici Curiae* International Law Scholars in Support of Plaintiffs-Appellants and Urging Reversal.

II. THE PLAINTIFFS ADEQUATELY STATED CLAIMS UNDER THE ATCA FOR VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS.

A. Universal, Obligatory and Definable Norms of Customary International Law Prohibit The Kind of Environmental Degradation Plaintiffs Allege.

The district court erred in concluding that plaintiffs relied on international norms that are insufficiently specific to be actionable under the ATCA. Overwhelming state practice compels the conclusion that the basic human rights norms upon which plaintiffs rely are universal, obligatory and definable norms of customary international law. These norms are narrow, but are 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. *See* §II.A.2 *infra*. Plaintiffs' allegations meet that standard.

The district court itself recognized that plaintiffs relied on "conventions and declarations which have been approved by many nations and which therefore provide strong evidence of the content of customary international law." *Flores*, 2002 U.S. Dist. LEXIS 13013 at *23-24. The court further recognized that "[t]hese documents speak in terms of rights." *Id.* Section II.A.1 demonstrates that the norms prohibiting massive pollution causing widespread injury are universal and obligatory. Section II.A.2 demonstrates that the court erred in concluding that international law does not specifically identify prohibited conduct.

1. The Rights To Life, Security of the Person and Health are Obligatory and Are Universally Recognized to Prohibit Massive Environmental Degradation Causing Widespread Harm to Human Health.

The international human rights to life, security of the person and health are universally recognized to contain a binding prohibition on massive environmental damage causing death and widespread injury. A variety of other types of state practice further establishes this fact. These include obligatory limits on environmental degradation in the laws of war; the international community's repeated recognition of the right to a minimally adequate environment and of the right to sustainable development; numerous international environmental treaties; and states' domestic laws and constitutions. The opinions of international law experts confirm this prohibition is enshrined in customary international law.

Although not all of the sources cited in this section set forth specific standards, they all support plaintiffs' claims because they demonstrate that the rights at issue are *universally recognized* and *obligatory*. The sources described in §II.A.2 establish the requisite specificity.

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

Customary international law protects the rights to life, security of the person, and health. These rights are, without question, universally recognized⁸ and obligatory.⁹ Moreover, they are universally understood to place obligatory limits on environmental degradation. Judge Weeramantry, then Vice-President 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

⁸*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); **Security of the person:** Universal Declaration, art. 3; ICCPR art. 9; American Declaration on the Rights and Duties of Man, art. I (1948); **Health:** Universal Declaration, art. 25; International Covenant on Economic, Social and Cultural Rights, art. 12, (in force Jan. 3, 1976)(135 parties); American Declaration, art. XI; Banjul [African] Charter on Human and Peoples' Rights, art. 16 (1982)(50 signatories); Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, art. 10 (1988).

⁹*E.g.* ICCPR, art. 4.2, 6; *Report on the Situation of Human Rights in Ecuador*, (“*Ecuador Report*”), Inter-American Commission on Human Rights, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, at 91-93, April 24, 1997.

Weeramantry) at 4; *see also* Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“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 massive and severe environmental harm.

An international consensus supports Judge Weeramantry’s conclusion. For example, the 171 states attending the United Nations’ World Conference on Human Rights recognized that illicit dumping of toxic waste may seriously threaten the right to life.¹⁰ States have also widely recognized that the right to health encompasses freedom from serious pollution. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) specifically requires states to improve “environmental hygiene” in order to protect the right. 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 right to health.¹¹

Every international human rights body that has considered the issue has affirmed 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 Article 6 of the International Covenant on Civil and Political Rights (ICCPR).¹² The ICCPR has been ratified by 138 nations, including the U.S. Accordingly, Article 6 “is a customary international law, which violations may be remedied by

¹⁰Vienna 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).

¹¹On 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”).

¹²Commun. No. 67/1980. The claim was dismissed for failure to exhaust domestic remedies. The Committee 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).

suits filed under the ATCA.” *Estate of Cabello v. Fernandez-Larios*, 157 F.Supp.2d 1345, 1359 (S.D.Fla. 2001); *see also Ralk v. Lincoln County, Ga.*, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000)(a plaintiff “could bring a claim under the Alien Tort Claims Act for violations of the ICCPR.”).

Similarly, 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 264, 272-76, 278 (March 5, 1985). In May of 2002, the African Commission on Human and Peoples’ Rights concluded that widespread pollution associated with oil development that caused serious health problems violated the rights to life and health. 155/96 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria*, (“*SERAC Case*”) ¶¶ 50, 54, 67, ACHPR/COMM/A044/ 27th May 2002.¹³

In sum, universally recognized customary international law norms prohibit violating fundamental human rights through massive environmental degradation. Given this, international law requires that individuals “have access to judicial recourse to vindicate the rights to life, physical integrity and to live in a safe environment.” *Ecuador Report* at 93.

b. The laws of war.

¹³Similarly, the European Court of Human Rights has twice held that severe pollution that injures people’s health violates the right to be free from arbitrary interference with family life. *Guerra v. Italy*, ¶¶ 57, 60 (116/1996/735/932); *Lopez Ostra v. Spain*, ¶¶ 8, 58 (41/1993/436/515). Customary international law recognizes this right. *Maria v. McElroy*, 68 F. Supp. 2d 206, 233-4 (E.D.N.Y. 1999).

The prohibition on massive environmental damage causing widespread injury 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.”) Thus, the Ninth Circuit recently relied on the fact that a given act was barred during war as evidence that the act violated a *jus cogens* international norm applicable during peacetime. *Doe I v. Unocal Corp.*, ___F.3d ___, 2002 U.S. App. LEXIS 19263 *29 (9th Cir. 2002). Proving that a norm is *jus cogens* is a stricter standard than plaintiffs need show to establish a cause of action under the ATCA. *Id.* at *29, n. 14, 15.¹⁴

Over 150 states are parties to the Protocol Additional (I) to the Geneva Conventions of 1949, which forbids acts that may be expected to cause long-term widespread and severe environmental damage that prejudices the health or survival of a population. Art. 35, 55(1)(signed by U.S., in force 7 December 1978). The U.N. Security Council indicated its acceptance of the principle that customary international law limits wartime environmental harms when 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 on Environment and Development (“Rio Declaration”), 31 I.L.M. 874 Principle 24 (1992)(“states shall . . . respect international law providing protection for the environment in times of armed conflict.”). States’ universal recognition that combatants may not cause massive, life-threatening environmental damage, even though other rights may be restricted during war, demonstrates that this norm is not only obligatory, but is afforded a particularly high status.

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

¹⁴Indeed, the laws of war provide guidance in ascertaining the content of crimes against humanity. M. Cherif Bassiouni, *Crimes Against Humanity in International Law* 330 (2nd Rev. Ed.1999). Crimes against humanity are prohibited in peacetime.

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.”¹⁵ 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, 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.* Given that Principle 1 of the Rio Declaration has been universally and repeatedly reaffirmed, it is an “authoritative statement of the international community.” *See Id.*¹⁶

¹⁵United Nations Conference on the Human Environment, Stockholm Declaration on the Human Environment, Principle 1 (1972).

¹⁶The above quoted language of Principle 1 was reaffirmed verbatim by 179 nations at the 1994 U.N. Conference on Population and Development, Programme of Action, U.N. Doc. A/CONF.171/13 (1994), princ. 2.; by 186 nations in the 1995 Copenhagen Declaration, U.N. Doc A/CONF.166/7/Annex (1995) ¶8; by 171 nations at the 1996 Second Conference on Human Settlements (Habitat II), Habitat Agenda, ch. I, pmbl. ¶2, and by the U.N. Human Rights Commission,

Res. 1995/14, ¶1 (1995).

Other international and regional agreements also recognize the right to a minimally adequate environment. The 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, Article 11 of the Additional Protocol to the American Convention on Human Rights provides that “[e]veryone shall have the right to live in a healthy environment.” 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. The African Commission found this right to be violated by massive oil pollution with serious health effects. *SERAC Case*. ¶¶ 50, 54.

These documents further demonstrate that the nations of the world universally recognize the right to be free from severe environmental harms.

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

The International Court of Justice 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.”). In particular, development must not compromise the environmental needs of present and future generations. *E.g.* Rio Declaration, Principle 3. This sustainable development 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.

e. 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.¹⁷ This recognition creates “an expectation of adherence.” *Filartiga*, 630 F.2d at 883. The large

¹⁷*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

number of environmental treaties,¹⁸ and states' uniform prohibition of massive environmental damage in domestic law (*see infra* §II.A.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.

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”).

¹⁸States have adopted some 350 multilateral treaties, 1,000 bilateral treaties, and a multitude of declarations, resolutions and other documents to protect the environment. 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*, ¶24 (1994) (“*Ksentini Report*”).

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 toxic wastes.¹⁹ The U.N. 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 such wastes. Res. 1995/81 ¶ 7(d).

International environmental law pertaining to pollution is substantially concerned with protecting the human rights to life and health. Indeed, international agreements regarding toxic emissions often explicitly state they have been enacted at least in part to protect human health.²⁰ Given this, the duty to protect the environment constitutes strong additional evidence for the existence of a corresponding international legal right to freedom from at least some forms of environmental degradation. Indeed, states’ recognition of an obligation to provide means of redress to victims of environmental damage²¹ necessarily assumes that this individual right exists.

¹⁹*E.g.* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, art. 4 (1989)(148 nations party; United States has signed)(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, pmb., arts. 2(2), 6(1) (1993)(operator of polluting facility liable for damage); 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 on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Organization of African States, 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”).

²⁰*E.g.* Basel Convention, Preamble; Montreal Protocol on Substances that Deplete the Ozone Layer, Preamble (1987)(112 parties, including United States); additional sources cited in *Ksentini Report*, ¶183, n.99.

²¹*See e.g.* Rio Declaration, Principle 13; World Charter for Nature, art. 23; North American Agreement on Environmental Cooperation, Arts. 3, 6 (1993)(U.S.,

f. State domestic practice.

Canada and Mexico)(parties “shall ensure” that their laws provide for “high levels of environmental protection”; individuals shall have private remedies for violations of such law, including the right to sue another person for damages.)

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 rights 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 injury. 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.²²

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”). Moreover, as noted above, states have undertaken a duty to protect their environments. §II.A.1.e. and n.17. Thus, states have repeatedly accepted international obligations to enact laws protecting their own environment and to provide means of redress to victims of environmental degradation.²³

g. Opinion of leading international law experts.

Leading expert opinion is also relevant in determining the content of customary law. *The Paquete Habana*, 175 U.S. at 700. Such opinion confirms that customary law prohibits violations of the rights to life and health through destruction of the environment. For example, in 1994 a U.N. Special Rapporteur, in consultation with seventeen other internationally respected experts, completed an exhaustive study of the relevant international law and

²²*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).

²³ *E.g.* §II.A.1.e. and n.21 *supra*; Convention on Biological Diversity, arts. 6-10 (1992)(182 parties)(mandating states protect biodiversity within their borders).

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.” *Ksentini Report*, ¶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). As the *Restatement* notes, the views of the ILC have been considered especially authoritative. §103, Reporters Note 1.

In sum, the extensive sources cited by *amici*, the Special Rapporteur and plaintiffs-appellants and their experts confirm that the nations of the world have universally recognized that obligatory rights to life and health encompass a right to be free from massive environment degradation causing widespread injury.

2. The Rights To Life and Health are Sufficiently Determinate to Demonstrate that International Law Prohibits The Acts Plaintiffs Allege.

The District Court erred in concluding that international law lacks determinate standards that demonstrate the acts at issue are prohibited. *Flores*, 2002 U.S. Dist. LEXIS 13013 at *41. 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, as detailed above, 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. Jurisdiction for violations of this standard therefore lies under the ATCA.

The district court noted that “it is not necessary for nations to identify with specificity every factual scenario that violates a particular prohibition” for a norm to be “definable” or “specific” for ATCA purposes. *Flores*, 2002 U.S. Dist. LEXIS 13013 at * 41; *accord Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D.Mass. 1995). Rather, the norm need only be sufficiently determinate to demonstrate international recognition that the specific conduct alleged violates international law. *Id.*; *Xuncax*, 886 F. Supp. at 187; *Forti*, 694 F.Supp. at 709. Plaintiffs have alleged environmental degradation that is widespread, severe, and long-term; that prejudices the health and

survival of the population of Ilo; and that was engaged in pursuant to a systematic policy of deliberate indifference to human life and health. Even applying the wartime standard, the strictest definition of the rights at issue, international law provides determinate criteria that clearly prohibit environmental abuses of this magnitude.

Sources such as the *Ecuador Report*, the *Yanomami Case* and *EHP v. Canada* further demonstrate that environmental damage that violates the rights to life, security of the person and health on the scale alleged here is prohibited by international law. For example, in *EHP*, plaintiffs' allegation that pollution threatened the lives or health of 10,000 people stated a *prima facie* case for violations of the right to life. ¶ 1.2. Here, the Amended Complaint, construed liberally as it must be at this stage of the proceedings, suggests that 100,000 people have been harmed or placed at great risk by SPCC's actions. Am. Cmplt. ¶17. *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 international law prohibits the massive environmental damage causing death and widespread injury that plaintiffs alleged. *See Filartiga*, 630 F.2d at 884.

The "Protocol Additional (I)" standard is very narrow, and requires substantial effects on a large number of people and conscious disregard of those effects by the defendant. Thus, it is only violated by patently egregious conduct. There can be no question, however, that international law is sufficiently determinate to demonstrate universal recognition that SPCC's alleged acts violate international human rights. Accordingly, the district court erred in dismissing plaintiffs' ATCA claims.

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

The district court's conclusion that plaintiffs had not stated a claim was based in part on the Fifth Circuit's opinion in *Beanal v. Freeport-McMoRan*, 197 F.3d 161 (5th Cir. 1999). *Flores*, 2002 U.S. Dist. LEXIS 13013 at *18-23. *Beanal*, however, is inapposite, because it looked only to sources of "international environmental law." 197 F.3d at 167. It did not purport to apply the well-established international human rights norms upon which plaintiffs rely. Indeed, the district court conceded that no prior U.S. case considered whether human rights norms can be violated through massive environmental degradation. *Flores*, 2002 U.S. Dist. LEXIS 13013 at *7-8. Nonetheless, the district court found it irrelevant that *Beanal* did not apply international human rights law, because in its view, "the labels plaintiffs affix to their claims cannot be determinative." *Flores*, 2002 U.S. Dist. LEXIS 13013 at *22. That conclusion was an error of law. The fact that the Fifth Circuit held that one body of international law does not provide a cause of action cannot possibly suggest that plaintiffs lack claims under a

separate body of law, particularly one the Fifth Circuit did not even address.

Moreover, 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. 197 F.3d at 167. Plaintiffs and *amici* however, rely upon dozens of relevant sources of customary international law. As detailed above, these sources clearly establish that international law prohibits the specific actions SPCC allegedly committed.

The district court also cited *Amlon Metals Inc. v. FMC Corp.*, 775 F.Supp. 668, 671 (S.D.N.Y. 1991) and *Aguinda v. Texaco, Inc.*, 142 F.Supp. 2d 534 (S.D.N.Y. 2001). *Flores*, 2002 U.S. Dist. LEXIS 13013 at *8-14. Both are inapposite. *Amlon* involved only the international environmental law question of whether a cause of action existed for the transboundary shipment of toxic waste. It did not involve human rights claims. 775 F.Supp. at 671. Moreover, since the purchaser placed the shipment in steel drums after realizing it was contaminated, there apparently was no damage to the environment or human health. *Id.* at 670.

The *Aguinda* court's statement that plaintiffs' claim for violations of "evolving environmental norms . . . appears extremely unlikely to survive a motion to dismiss" was based entirely on *Beanal* and *Amlon*, not on any independent review of international law. 142 F. Supp. 2d at 552. Moreover, *Aguinda* was dismissed solely on *forum non conveniens* grounds. The court did not dismiss for failure to state a claim. In affirming dismissal, this Court expressly noted it was unnecessary to decide whether plaintiffs stated an ATCA cause of action. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 480, n.3 (2nd Cir. 2002). Thus, the district court's statement in *Aguinda* was *dicta*.

C. Because International Human Rights Law Limits How States May Act Within Their Sphere of Sovereignty, the District Court Erred in Concluding That Pollution Within One Nation's Borders Cannot Violate International Law.

The district court held that "[i]f anything, nations generally agree that the appropriate balance between economic development and environmental protection is a matter that may be determined by each nation with respect to the land within its borders." *Flores*, 2002 U.S. Dist. LEXIS 13013 at *30. While states' sovereignty over their resources does mean they have wide latitude in balancing development and environmental protection, the court ignored the fact that plaintiffs' claims are based upon obligatory international human rights norms. Human rights by their nature limit what states can do within their sphere of sovereignty. *See Filartiga*, 630 F.2d at 885 (international law confers fundamental rights upon all people *vis-a-vis* their governments). States may not in pursuit of development violate or allow others to violate basic human rights through massive pollution, just as they

may not commit genocide or torture to achieve that goal. Nations simply lack the discretion to violate international human rights law. *Letelier v. Republic of Chile*, 488 F.Supp. 665, 673 (D.D.C. 1980). Thus, these matters are not purely domestic. *Filartiga*, 630 F.2d at 888.

Indeed, international human rights bodies have explicitly recognized that human rights norms limit a state's freedom to permit environmental degradation. The U.N. Human Rights Committee made precisely this point in *Ilmari Lansman v. Finland*, U.N. Human Right Committee, Commun. No. 511/1992, ¶9.4 (1992). Likewise, the Inter-American Commission found that although "the state has the freedom to exploit its natural resources," international law prohibits degrading the environment in a manner that violates human rights. *Ecuador Report* at 89, 92, 94. The European Court of Human Rights and the African Commission have reached the same conclusion. *SERAC Case*, ¶54 (although Nigeria "has the right to produce oil," resulting environmental devastation violated basic human rights); *Lopez Ostra*, ¶58, (finding rights violation despite town's economic interest in the source of pollution). Thus, plaintiffs' claims would be actionable even if Peru had chosen to allow SPCC to inflict grievous harms on the people of Ilo with impunity, which as detailed below, it did not.

Other sources confirm that intrastate environmental degradation that causes great harm to people is of international, not merely domestic, concern. The international community has regularly reiterated that development must account for people's environmental needs, *see* §II.A.1.d., that states must use their resources in the interest of their people, *Ksentini Report*, ¶167; *e.g.* African Charter, Art. 21, and that states must provide means of redress to victims of environmental harms. *E.g.* Rio Declaration, Principle 13. Moreover, the basic human rights Covenants note that *peoples* hold sovereignty over their resources, and 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.

In addition, many of defendant's relevant decisions were allegedly made in the U.S. Am. Cmplt. ¶4. This further demonstrates not only the international character of the torts at issue, but also that this case is of particular concern to U.S. courts, over and above the fact that it is brought pursuant to a federal statute.

The district court primarily relied upon the Rio Declaration for its assertion that intrastate pollution cannot violate international law. *Flores*, 2002 U.S. Dist. LEXIS 13013 at *30. The Rio Declaration, however, says no such thing. As noted above, Principle 1 explicitly recognizes that human beings "are entitled to a healthy and productive life in harmony with nature." The court conceded that this provision reiterates "human rights principles" that are enshrined in other international law documents. *Flores*, 2002 U.S. Dist. LEXIS 13013 at *30. Nonetheless,

it concluded that Principle 2's recognition of states' sovereign right to exploit their natural resources pursuant to their own environmental policies means that environmental damage, no matter how injurious to affected people, is a matter of purely domestic concern. *Id.* at *30-31, 38.

The court's interpretation of the Declaration is wrong. Principle 2 allows states latitude to exploit their own *resources*, not to exploit their own *people*. Thus, it does not nullify Principle 1, nor does it assert that the entire *corpus* of international human rights law is inapplicable to people harmed by environmental degradation. The district court's interpretation also conflicts with Principle 13, which declares that states shall develop national laws regarding liability and compensation for victims of environmental damage.

Because this case is based upon obligatory international human rights norms, *Torres v. Southern Peru Copper Corp.*, which the district court cited, is inapposite. *Flores*, 2002 U.S. Dist. LEXIS 13013 at *15-16, *citing* 965 F. Supp. 899 (S.D.Tex. 1996), *aff'd*, 113 F.3d 540 (5th Cir. 1997). *Torres* dismissed on comity grounds claims by different plaintiffs arising out of SPCC's actions in Ilo, in part because of the court's concern that adjudication would interfere with Peru's sovereign right to control its own environment. 965 F. Supp. at 909. The *Torres* plaintiffs, however, alleged only violations of Texas law. 965 F. Supp. 895, 898 (S.D.Tex. 1995). Thus, the court did not consider whether, let alone hold that applying international human rights norms, to which Peru is obviously bound, would interfere with Peru's sovereignty.

In sum, none of the sources the court relied upon remotely suggest that a state's freedom to decide how to use its natural resources allows it to violate fundamental human rights.

D. Peru's Environmental Policy Supports Plaintiffs' Claims.

The court's reliance on the principle of state sovereignty over natural resources is also fundamentally inconsistent with its own conclusions regarding the content of Peruvian law. A state exercises its sovereignty through its laws. *See In re Estate of Ferdinand Marcos Human Rights Litigation*, 25 F.3d 1467, 1470 (9th Cir. 1994)(official's acts in violation of state's law are not sovereign acts). The district court expressly concluded that SPCC's actions, if proven true, would violate Peruvian law and entitle these plaintiffs to a remedy. *Flores*, 2002 U.S. Dist. LEXIS 13013 at *63-68. Since Peruvian law requires polluters to pay their victims, liability is fully consistent with Peru's environmental policy and the exercise of its sovereignty over natural resources.

The *Beanal* court's concern that applying U.S. standards would "displace environmental policies of other governments" is not implicated here for the same reason. 197 F.3d at 167. Moreover, that concern is also

inapplicable because the question of jurisdiction is governed by well established international law norms that apply in Peru, not by looking to U.S. environmental standards.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the district court's dismissal for failure to allege an actionable violation of international law.

Respectfully Submitted,

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