## STATEMENT OF THE ISSUE ADDRESSED BY *AMICUS*

The district court mistakenly concluded that plaintiffs were unlikely to have stated claims for international law violations under the Alien Tort Claims Act, and therefore erred in its *forum non conveniens* analysis by refusing to give weight to the United States' interest in hearing such claims.

## INTRODUCTION

These cases involve allegations that defendant Texaco caused extraordinary environmental harms in the Ecuadorean Amazon. The *Aguinda* plaintiffs allege that, from 1972-1992, Texaco intentionally or recklessly released massive quantities of highly toxic petroleum wastes into waters plaintiffs used for bathing, fishing, drinking and cooking, and that Texaco sprayed these wastes onto local roads. Texaco's actions have allegedly harmed 30,000 people. Plaintiffs have also alleged that Texaco's actions have had devastating impacts on their ability to maintain their traditional cultures. *Aguinda* Complaint ¶¶8, 20-22, 30, 38, 50-52. The *Ashanga* plaintiffs allege that Texaco's pollution crossed the border and caused thousands of persons similar injuries in an adjoining region of Peru. *Ashanga* Complaint at ¶¶ 3, 13. All plaintiffs filed suit in part under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, asserting Texaco's actions violated international law.

The district court dismissed these actions based on *forum non conveniens*. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001). The ATCA reflects a strong U.S. policy interest in providing a forum for the adjudication of international law violations. In conducting its *forum non conveniens* analysis, the district court improperly refused to give weight to that interest. Instead, it concluded that plaintiffs would be unlikely to demonstrate that Texaco's acts are international torts actionable under the ATCA.

*Amicus* respectfully submits that conclusion was error. Environmental harms of the magnitude alleged by plaintiffs violate international law. Indeed, the Inter-American Commission on Human Rights (IACHR) has already concluded that "the companies conducting oil exploitation activities are

responsible" under international law for the very activities at bar.[1] Because Texaco's alleged acts are international torts, the court's failure to give weight to the U.S. interests in hearing this case was legal error.

## BACKGROUND

The Inter-American Commission's *Ecuador Report* documents in detail the environmental devastation plaintiffs allege. The Commission found 19 *billion* gallons of waste had been dumped without treatment and that "crude oil was systematically dumped into the forest, farmlands and various bodies of water." *Ecuador Report* at 82 n.11. As a result, the plaintiff class has suffered "significantly higher rates" of spontaneous abortion, headache, nausea, anemia, and malnutrition. *Id*. at 90 and n.36. The water they use for drinking, bathing and fishing exposes them "to levels of oil-related contaminants far in excess of internationally recognized guidelines," which "poses a significantly increased risk of . . . cancer, neurological and reproductive problems." *Id*. at 90-91. Moreover, local health providers have reported "an increase in infant mortality due to water contamination" and "a rise in birth defects, juvenile illnesses and skin infections." *Id.*

Texaco was not the only polluter contributing to the damage described by the IACHR. But as the IACHR made clear, Texaco is responsible for extensive, severe pollution that has caused serious injury to these appellants. *Id.* at 89, 91 n.42.

## SUMMARY OF ARGUMENT

The plaintiffs stated at least three international law claims actionable under the ATCA. Specifically, plaintiffs adequately alleged (1) significant cross-border environmental damage, (2) violations of the right to a minimally adequate environment, and (3) systematic racial discrimination. The district court erred in assuming, without conducting any review of the sources of customary international law, that these claims are not cognizable. As a direct result, the district court further erred by refusing to

[1] *Report on the Situation of Human Rights in Ecuador*, ("*Ecuador Report*"), Organization of American States, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.96, Doc. 10

give weight in its *forum non conveniens* analysis to the U.S. interest, expressed in the ATCA, in hearing plaintiffs international law causes of action. Accordingly, the court did not conduct a proper *forum non conveniens* inquiry.

The *Ashanga* plaintiffs alleged injuries in Peru from Texaco's actions in Ecuador. International law, as evidenced by state practice and the decisions of international tribunals, clearly forbids significant cross-border environmental damage. The *Ashanga* plaintiffs have stated ATCA claims for these harms.

All of the plaintiffs have stated claims for violations of the human right to a minimally adequate environment. A variety of different sources of international law establish this right, including states' repeated recognition of its existence; the universal recognition that the fundamental rights to life, security of the person and health place obligatory limits on environmental degradation; numerous international environmental treaties; states' domestic laws and constitutions; and the opinions of international law experts.

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

*Amicus* does 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 is only violated by patently egregious conduct. There can be no question, however, that international law prohibits the kind of massive, life-threatening environmental damage alleged in this case.

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rev. 1, at 94, April 24, 1997.

The international community recognizes that both transboundary environmental harms and long-term, widespread, and severe environmental damage violate international law even when caused by a private actor. Nonetheless, if these claims require state action, the plaintiffs have adequately alleged Texaco was a state actor due to its partnership with the Government of Ecuador.

Plaintiffs have also stated claims for race discrimination. International law clearly forbids discrimination by state actors, particularly where, as is alleged here, it impacts upon fundamental rights, such as the rights to life, security of the person and health. Plaintiffs allege that, in devastating indigenous peoples' lands, Texaco failed to follow its own environmental standards. This allegation is sufficient to afford plaintiffs the opportunity to prove that Texaco's policies were racially motivated.

Given that the plaintiffs have stated claims under the ATCA, the district court erred in refusing to give weight to the U.S. interest in hearing those claims.

## ARGUMENT

### THE DISTRICT COURT ERRONEOUSLY FAILED TO CONSIDER THE U.S. INTERESTS IN HEARING THIS CASE THAT ARE EXPRESSED IN THE ATCA, BECAUSE IT WRONGLY ASSUMED THAT PLAINTIFFS DID NOT STATE COGNIZABLE ATCA CLAIMS.

In *Wiwa v. Royal Dutch Petroleum Co.*, this Court reversed a *forum non conveniens* dismissal of claims brought under the ATCA, in part because the district court failed to give any weight to "the interests of the United States in furnishing a forum to litigate claims of violations of international standards of the law of human rights." 226 F.3d 88, 101 (2d Cir. 2000); *accord Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189, 1199 (S.D.N.Y. 1996). Nonetheless, the district court below erroneously held that the fact that plaintiffs bring claims under the ATCA "is of little relevance to this case." 142 F.Supp.2d at 552. The court based this conclusion in part on its assertion that plaintiffs' ATCA claims "appear[] extremely unlikely to survive a motion to dismiss." *Id.* That assumption was legal error. Plaintiffs have stated cognizable claims under the ATCA. Accordingly, the district court erred in asserting that the ATCA does

not weigh in favor of retaining jurisdiction. Given this, the court's *forum non conveniens* analysis was legally flawed.

## 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 *amicus* 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,[2] widely accepted declarations and U.N. resolutions declaring principles as international law,[3] decisions of international tribunals,[4] opinions of international organizations and of regional human rights bodies such as the Inter-American Commission on Human Rights,[5] states' universal domestic practice,[6] the works of leading jurists and commentators such as a U.N. Special Rapporteur and the International

[2] *Kadic*, 70 F.3d at 241-43; *Filartiga*, 630 F.2d at 883-84.
[3] *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.
[4] *Filartiga*, 630 F.2d at 884, n.16; *Restatement*,§103(2) and comment b.
[5] *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.
[6] *Filartiga*, 630 F.2d at 884.

Law Commission,[7] and declarations of international law experts.[8] Thus, the sources cited herein are evidence of customary law.

## II. THE *ASHANGA* PLAINTIFFS ADEQUATELY STATED CLAIMS UNDER THE ATCA FOR SIGNIFICANT TRANSBOUNDARY ENVIRONMENTAL HARM.

The district court erred in concluding that the *Ashanga* plaintiffs' ATCA claims were unlikely to survive a motion to dismiss. 142 F.Supp.2d at 552. The *Ashanga* plaintiffs, who allegedly suffered harms in Peru from Texaco's pollution in Ecuador, state claims for transboundary environmental torts. Pollution originating in one state that causes significant injury to persons in another violates international law. *Restatement,* §602(2). This has been clear since the 1941 *Trail Smelter Arbitration (U.S. v. Can.)*, wherein a tribunal hearing the U.S. Government's claims that a privately-owned Canadian smelter caused significant cross-border pollution recognized liability for such pollution. 3 R.I.A.A. 1905 (1941) *reprinted in* UNEP, Compendium of Judicial Decisions on Matters Related to the Environment: International Decisions ("Compendium") 20, 38-39 (1998).

More recently, the International Court of Justice (ICJ) held that the "obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States . . . is now part of the corpus of international law." *Gabcikovo-Nagymaros Project (Hungary-Slovakia)*, Judgment of 25 September 1997, ¶53. Similarly, the district court in *Beanal v. Freeport-McMoRan, Inc.* noted that transboundary environmental harm is actionable under customary international law. 969 F.Supp. 362, 384 (E.D.La. 1997). The court relied on the world community's recognition in the Rio Declaration on Environment and Development, Principle 2 (1992), and in the Stockholm Declaration on the Human Environment, Principle 21 (1972) that international law prohibits transboundary harm.

The district court below based its conclusion that plaintiffs' ATCA claims are unlikely to survive a motion to dismiss largely on the Fifth Circuit's opinion in *Beanal*. 142 F.Supp.2d at 552 *citing* 197 F.3d 161, 166-67 (5th Cir. 1999). *Beanal*, however, specifically noted that the plaintiff did not allege any

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

transboundary environmental damage. 197 F. 3d at 167, n.6. Moreover, it cited with approval the Rio Declaration's transboundary harm provision, suggesting that had the plaintiff alleged such harms, they likely would have been actionable. *Id.*

The district court also cited *Amlon Metals Inc. v. FMC Corp.*, 775 F.Supp. 668, 671 (S.D.N.Y. 1991). *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. The case is therefore inapposite. Moreover, to the extent *Amlon* suggests the norm prohibiting transboundary harm is not sufficiently specific to be actionable, it is simply wrong. International law unquestionably forbids transboundary harms that harm thousands of people, as is alleged here.

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

No state action requirement bars plaintiffs' cross-border environmental damage claim. First, certain violations of international law do not require state action. *Kadic*, 70 F.3d at 239. Activities that cause significant harm in another state violate customary international law, even if committed by a private party. *Restatement*, §602 cmt. b. For example, the polluter in *Trail Smelter* was a private corporation. Compendium at 21. Second, plaintiffs adequately alleged that Texaco is a state actor. Courts have looked to 42 U.S.C. §1983 for guidance in conducting an ATCA state action inquiry. *Kadic*, 70 F.3d at 245. Under §1983, a private party is a state actor where the state owns a direct financial interest in its business. *Standardbred Owners Ass'n v. Roosevelt Raceway Assocs.*, 985 F.2d 102, 105 (2d Cir. 1993). Here,

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[8] *Filartiga*, 630 F.2d at 879 n.4, 884 n.16.

Ecuador owned a stake in Texaco's oil development project. 142 F.Supp.2d at 537. Plaintiffs sufficiently allege state action.

The *Ashanga* plaintiffs clearly have stated an actionable claim under the ATCA for significant transboundary environmental damage.

## III. THE *ASHANGA* AND *AGUINDA* PLAINTIFFS ADEQUATELY STATED CLAIMS UNDER THE ATCA FOR VIOLATIONS OF THE HUMAN RIGHT TO A MINIMALLY ADEQUATE ENVIRONMENT.

The district court also erred in concluding that the plaintiffs' cases were unlikely to survive a motion to dismiss because plaintiffs state claims for violations of the human right to a minimally adequate environment. 142 F.Supp.2d at 552. Overwhelming state practice compels the conclusion that this right is a universal, obligatory and definable customary international human rights norm. That norm is narrow, but at a minimum is clearly defined to prohibit actions that may be expected to cause long-term, widespread and severe environmental damage that prejudices the health or survival of a population. Plaintiffs' allegations meet that standard.

The district court's conclusion that plaintiffs likely had not stated a claim was based on the Fifth Circuit's opinion in *Beanal*. 142 F.Supp.2d at 552. *Beanal*, however, looked only to sources of "international environmental law," 197 F.3d at 167, and thus did not purport to apply the well-established international human rights norms described herein. Moreover, the plaintiff in *Beanal* largely based his argument on, and the court only addressed, two sources of law: an international environmental law textbook and the Rio Declaration. *Id*. There are, however, literally hundreds of appropriate sources of customary international law that are relevant to this question. The district court had many these sources before it. Dinah L. Shelton Aff. I (A333-38)(Addendum Tab 1); Dinah L. Shelton Aff. II (A5698-5705)(Addendum Tab 2). Inexplicably, the district court ruled without analyzing any of them. These sources clearly establish that international law prohibits the actions Texaco allegedly committed.

### A. A Universal, Obligatory and Definable Norm of Customary International Law Prohibits The Kind of Environmental Degradation Plaintiffs Allege.

### 1. The Right to a Minimally Adequate Environment Is Universally Recognized and Obligatory.

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

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

Beginning in 1972, the community of nations has repeatedly recognized that individuals have a right to a minimally adequate environment. In that year, 114 nations, including the United States, declared in the Stockholm Declaration that humankind "has the fundamental right to . . . adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being."[9] The international community reaffirmed its recognition of the right in 1990 when the United Nations General Assembly adopted by consensus a resolution recognizing that "all individuals are entitled to live in an environment adequate for their health and well-being." G.A. Res. 45/94 (1990). Two years later, at the largest gathering of nations ever held, more than 178 nations including the United States again affirmed the right in the Rio Declaration, which unanimously acclaimed that "[h]uman beings . . . are entitled to a healthy and productive life in harmony with nature." Rio Declaration, Principle 1.

Declarations such as those at Rio and Stockholm are important sources of customary international law. *Filartiga*, 630 F.2d at 883. The recognition in these Declarations that individuals have a right to a minimally adequate environment created "an expectation of adherence." *Id.* The Rio Declaration has

subsequently been recognized as an "authoritative statement of the international community" regarding the right to a minimally adequate environment. *See Id.*[10]

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

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

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

Fundamental human rights norms clearly place obligatory limits on environmental degradation. Customary international law protects the rights to life, security of the person, and health. These rights are,

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

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

without question, universally recognized [11] and obligatory.[12] Moreover, they are universally understood to protect individuals from severe environmental degradation. Vice-President Weeramantry of the International Court of Justice states the customary law view:

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

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

An international consensus supports Judge Weeramantry's statement. For example, the 171 states attending the World Conference on Human Rights recognized that illicit dumping of toxic waste may seriously threaten the right to life.[13] States have also widely recognized that the right to health encompasses freedom from serious pollution. The International Covenant on Economic, Social and Cultural Rights (ICESCR) specifically requires states to improve "environmental hygiene" in order to protect the right. art. 12. Similarly, article 24(c) of the Convention on the Rights of the Child (1989),

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

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

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

requires states to account for the dangers of pollution in implementing right to health.[14] Moreover, international agreements regarding pollution often explicitly state they have been enacted at least in part to protect human health.[15]

A number of international human rights bodies and tribunals have concluded that human rights obligations bar serious environmental harm, even if the defendants did not purposefully threaten people's lives or health. For example, in *EHP v. Canada*, the U.N. Human Rights Committee concluded that a complaint alleging large-scale dumping of life-threatening pollution stated a *prima facie* right to life case under the International Covenant on Civil and Political Rights (ICCPR).[16] Similarly, in the *Ecuador Report*, the Inter-American Commission found that massive oil pollution, including the pollution at issue here, 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). As the IACHR affirmed in the *Ecuador Report*, international law requires that individuals "have access to judicial recourse to vindicate the rights to life, physical integrity and to live in safe environment." *Ecuador Report* at 93.

Other basic human rights further support the existence of the right to a minimally adequate environment. Customary international law recognizes the right "to be free from arbitrary interference with

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[14]On 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").

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

[16]Commun. No. 67/1980. The claim was dismissed for failure to exhaust domestic remedies. The Committee, however, only considers exhaustion if the petitioner has stated a *prima facie* case. U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Human*

family life." *Maria v. McElroy*, 68 F. Supp. 2d 206, 233-4 (E.D.N.Y. 1999). The European Court of Human Rights has twice held environmental degradation to violate this right. *Guerra v. Italy*, (116/1996/735/932); *Lopez Ostra v. Spain*, (41/1993/436/515). Similarly, the international community recognizes a right to cultural integrity. *E.g.* ICCPR art. 27; Universal Declaration, arts. 22, 27(1). International human rights bodies have repeatedly held that international law prohibits environmental degradation that decimates cultural practices,[17] as is alleged here. *Aguinda* Complaint ¶¶ 8, 20-22, 38.

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

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

The ICJ has held that "new norms and standards have been developed, set forth in a great number of instruments during the last two decades," recognizing the "need to reconcile economic development with protection of the environment." *Gabcikovo-Nagymaros*, ¶140; *see also* Rio Declaration, Principle 4. ("environmental protection shall constitute an integral part of the development process.") In particular, development must not compromise the environmental needs of present and future generations. *E.g.* Rio Declaration, Principle 3. This principle bars "serious or irreversible" environmental damage. Stockholm Declaration ¶6; World Charter for Nature, GA Res. 37/7, Art. 11(a)(1982). Thus, it supports plaintiffs' claims.

**d. International environmental law.**

The *corpus* of international environmental law constitutes voluminous additional state practice supporting plaintiffs' claims. The world community has repeatedly recognized, in *inter alia*, the Stockholm Declaration, the Rio Declaration, and the U.N. General Assembly, that states and/or individuals have a

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*Rights and the Environment, Second Progress Report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur*, ¶78 (1993).

duty to protect their environment.[18] This recognition creates "an expectation of adherence." *Filartiga*, 630 F.2d at 883. The enormous number of environmental treaties,[19] and states' uniform prohibition of massive environmental damage in domestic law (*see infra* §III.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.

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.[20] 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 toxic wastes. Res. 1995/81 ¶ 7(d).

As has already been noted, international environmental law, particularly that pertaining to toxic emissions, is substantially concerned with protecting the human rights to life and health. Accordingly, it is

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[17]*Ilmari Lansman v. Finland*, U.N. Human Right Committee, Commun. No. 511/1992, ¶¶9.2-9.5 (1992); *Yanomami Case* at 263, 272-4; *Ecuador Report* at 103-4; Shelton Aff. I ¶¶19-20.

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

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

[20]*E.g.* Basel Convention, art. 4 (requiring that persons managing hazardous waste prevent pollution); Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Council of Europe, June 21, 1993, pmbl., arts. 2(2), 6(1) (1993)(operator of polluting facility liable for damage); Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Organization of African States, opened for signature Jan. 30, 1990, art. 4(3)(b) (1991)(imposing strict liability on generators of hazardous wastes within states);Convention on the Protection of the Environment through Criminal Law, Council of Europe, Articles 2, 3 (states must criminalize emissions that create significant risk of serious injury)(1999); Convention on the Prevention of

predicated on the same concern as the right to a minimally adequate environment. Given this, the duty to protect the environment constitutes strong 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 damage, Rio Declaration, Principle 13; World Charter for Nature, art. 23, necessarily implies an individual right to be free from at least some types of environmental degradation.

**e. The laws of war.**

The prohibition on massive, life-threatening environmental damage is so fundamental that it applies even during war. Customary international law recognizes that certain emergencies, such as war, may justify restricting some rights. *See* ICCPR, Art. 4. Given this, wartime protections usually can be considered the minimum protections international law affords.

Over 150 states, including Ecuador, are parties to the Protocol Additional (I) to the Geneva Conventions of 1949, which forbids acts that may be expected to cause massive, life-threatening environmental damage. Art. 35, 55(1)(signed by U.S., in force 7 December 1978). The U.N. Security Council indicated its acceptance of these principles as norms of customary international law in 1991 when it imposed liability on Iraq "under international law for any . . . environmental damage and the depletion of natural resources" in Kuwait. U.N. Security Council Resolution 687 (1991). Such limits on environmental destruction during wartime are obligatory. *E.g.* Rio Declaration, Principle 24 ("states shall . . . respect international law providing protection for the environment in times of armed conflict."). States' widespread recognition that combatants may not cause massive, life-threatening environmental damage during war,

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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").

even though other rights may be restricted, demonstrates that this norm is not only obligatory, but is afforded a particularly high status.[21]

**f. State domestic practice.**

The domestic practice of nations is also indicative of customary international law. *Filartiga*, 630 F.2d at 884. State domestic practice is uniform in protecting the right to be free from severe environmental harm. Virtually all, if not all, nations have legal provisions safeguarding their citizens from at least some types of environmental harm. Indeed, at least ninety-nine have enshrined such provisions in their constitutions. Earthjustice Legal Defense Fund, *Issue Paper: Human Rights and the Environment*, 13-15 (1999). Moreover, numerous domestic courts have found environmental damage infringes upon basic human rights.[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"). 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. *Paquete Habana*, 175 U.S. at 700. Such opinion confirms that customary law recognizes the right to a minimally adequate environment. For example, in 1994 a U.N. Special Rapporteur, in consultation with seventeen other internationally respected experts, completed her exhaustive study of the relevant international law and state practice. She concluded that under customary international law, "[a]ll persons have the right to freedom from pollution, environmental degradation and activities that . . .threaten life [and] health . . ." *Ksentini Report* at 75, Annex 1 Principle 5. The Special Rapporteur also specifically noted the "universal

[21]For example, 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.

[22]*E.g.*, *Ksentini Report* at 92-93 (describing Costa Rican and Philippine Supreme Court cases); Shelton Aff. II. ¶19 (describing Indian and Pakistani Supreme Court cases).

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). Moreover, Professors Shelton and Alexandre Kiss (A5796) are themselves leading experts whose affidavits further demonstrate that the right to a minimally adequate environment is customary international law.

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

**2. The Right to a Minimally Adequate Environment Is Definable.**

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

Even during war, international law bans acts that "may be expected to cause [widespread, long-term and severe damage] to the natural environment and thereby to prejudice the health or survival of the population." Protocol Additional (I) to the Geneva Conventions of 1949, art. 55(1). Since rights applicable

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[23] *E.g.* Section III.A.1.d *supra*; Convention on Biological Diversity, arts. 6-10 (1992)(182 parties)(mandating states protect biodiversity within their borders).

in war are the minimum that international law provides, it is universally recognized that, in peacetime, international law prohibits at least those same acts. Moreover, the basic human rights Covenants, after noting that *peoples* hold sovereignty over their resources, state that "[i]n no case may a people be deprived of its own means of subsistence," ICCPR art. 1, 47; ICESCR, art. 1, 25. Sources such as the *Ecuador Report,* the *Yanomami Case* and *EHP v. Canada* demonstrate that environmental damage that violates the rights to life, security of the person and health on a mass scale is prohibited by international law. *Amicus* is aware of no State that claims the legal right to permit actions that may be expected to cause these kinds of harms. The absence of such claims is additional evidence that these standards are universally recognized. *Filartiga*, 630 F.2d at 884. Jurisdiction for violations of the above mentioned standards lies under the ATCA.

Plaintiffs alleged that Texaco's widespread environmental contamination has, over the course of almost 30 years, injured or exposed to significant health risks over 30,000 people and has ruined their livelihoods. Thus, plaintiffs have alleged environmental degradation that is widespread, severe, and long-term; that prejudices their health and survival; that violates or severely threatens their rights to life, security of the person, and health on a mass scale; and that deprives them of their means of subsistence. Such devastation is clearly prohibited by international law.

Indeed, the Inter-American Commission has already concluded that the acts at issue here violate international law. *Ecuador Report* at 92-94. Similarly, the *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. At least three times as many people have allegedly been harmed here. The district court erred in assuming plaintiffs had not stated a claim.

### B. No State Action Requirement Bars Plaintiffs' Claims.

As noted above, plaintiffs have adequately alleged that Texaco is a state actor due to the Ecuadorean Government's financial stake in the enterprise. In any event, claims for massive environmental damage prejudicing the health or survival of a population do not require state action. The international

community's concern regarding environmental damage focuses on the injury to people and the environment, not on the status of the actor. *See* Stockholm Declaration, ¶7 (defending human environment demands "acceptance of responsibility by citizens . . . and by enterprises"). Numerous international agreements hold non-state actors liable for environmental harms.[24] Harms like those alleged here do not require state action to violate international law.

In sum, the Inter-American Commission correctly concluded in addressing the facts at bar that "the companies conducting oil exploitation activities are responsible" for correcting environmental harms infringing on human rights. *Ecuador Report* at 94.

### C. The District Court Erred in Asserting That Ecuador's Environmental Policy Weighs Against Hearing Plaintiffs' Claims.

In concluding that the U.S. interest in this case is "modest indeed", the district court relied on its assertion that the Ecuadorean Government consciously chose to favor oil exploitation over environmental protection. 142 F.Supp.2d at 551. This was legal error, for two reasons. First, Ecuador made no such choice. Acts in violation of a state's own law are not sovereign acts. *In re Estate of Ferdinand Marcos Human Rights Litigation*, 25 F.3d 1467, 1470 (9th Cir. 1994). The district court held that the actions at issue are torts under Ecuadorean law. 142 F.Supp.2d at 539-40. Moreover, a Commission of the National Congress, in a resolution in support of this very lawsuit, specifically recognized that the Ecuadorean Constitutional right to live in an environment free from pollution "had been subject to grave violation." *Ecuador Report* at 89, n.33. Ecuador is also a signatory to many of the treaties that establish plaintiffs' claims under international law. *Id.* at 87. Since Ecuadorean law prohibits the acts at issue, the district court erred in assuming those acts were official policy.

Second, even if Ecuador had consciously decided to permit the abuses plaintiffs suffered, that fact would be irrelevant. Plaintiffs' right to be free from massive, life-threatening pollution is an obligatory

[24] *E.g.* Convention on Third Party Liability in the Field of Nuclear Energy, art.3 (1960); International Convention on Civil Liability for Oil Pollution Damage, art. III; Bamako

human right. Because international human rights norms limit states' sovereignty, no matters are purely domestic. *Filartiga*, 630 F.2d at 888. 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). Indeed, international human rights bodies have explicitly recognized that human rights norms limit a state's freedom to permit environmental degradation.[25] Thus, if Ecuador had chosen to inflict grievous environmental harms on 30,000 of its own citizens, that choice would not lessen the U.S. interest in this case any more than Nigeria's "decision" to execute Ken Saro-Wiwa lessened the U.S. interest in *Wiwa*. 226 F.3d 88. The district court's reliance on Ecuador's purported environmental policy was error.

The court further erred in relying on the *Beanal* court's concern that applying U.S. standards would "displace environmental policies of other governments." 142 F.Supp.2d at 552-3, *quoting* 197 F.3d at 167. That concern is inapplicable here, because plaintiffs' ATCA claims are defined by international law, not by looking to U.S. environmental standards. Moreover, since the harms plaintiffs allegedly suffered are torts under Ecuadorean law, liability is consistent with Ecuador's environmental policy.

## IV. PLAINTIFFS HAVE STATED CLAIMS UNDER THE ATCA FOR RACE DISCRIMINATION.

Plaintiffs have stated a claim for systematic race discrimination, which is clearly prohibited by international law. *See Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2nd Cir. 2000). Indeed, every major human rights treaty prohibits state-sponsored discrimination that impinges upon fundamental rights, including the rights to life and personal security.[26] Plaintiffs have alleged that Texaco, in conjunction with the government of Ecuador, devastated indigenous peoples' lands through practices that deviated from Texaco's own environmental standards. *Aguinda* Complaint ¶43. As noted above, this devastation

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Convention, art. 4(3)(b)(1991); Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Council of Europe, pmbl., arts. 2(2), 6(1) (1993).

[25] *E.g. Ilmari Lansman*, ¶9.4; *Ecuador Report* at 89, 94. Moreover, the international community has regularly reiterated that development must account for people's environmental needs, *see* §III.A.1.c, and that states must use their resources in the interest of their people. *Ksentini Report*, ¶167.

threatens plaintiffs' fundamental rights to life, security of the person and health. If, as the evidence may demonstrate, Texaco violated its own standards at least in part because of a low regard for the indigenous people of the Amazon, it committed actionable race discrimination.

[26] *E.g.* International Convention on the Elimination of All Forms of Race Discrimination, art. 1(1)(1966); ICCPR, art. 2(1); Universal Declaration, art. 2; ICESCR, art. 2(2).

## CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this Court reverse the decision of the district court dismissing these cases on *forum non conveniens* grounds.

Respectfully Submitted,

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