IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Venancio Aguasante Arias, *et al.,* Plaintiffs,	)	
v.	)	Case No. 1:01cv01908 (RWR-DAR)
DynCorp, *et al.,* Defendants	)	
Nestor Emogenes Arroyo Quinteros, *et al.,* Plaintiffs,	)	
v.	)	Case No. 1:07cv01042 (RWR-DAR)
DynCorp, *et al.,* Defendants	)	(Cases consolidated for case management and discovery)

AMICUS CURIAE BRIEF SUBMITTED ON BEHALF OF FOURTEEN INTERNATIONAL ENVIRONMENTAL LAW PROFESSORS AND PRACTITIONERS

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I. Introduction

This amicus curiae brief is submitted on behalf of international environmental law professors and practitioners and is intended to make three points: (1) to explain that the obligation to prevent significant transboundary environmental harm is a principle of customary international law; (2) that this obligation entails a requirement of due diligence on a State in preventing transboundary harm; and (3) that the principle of *lex specialis* does not, as defendants suggest, displace the application of this customary law norm to this case.

II. The Obligation to Prevent Transboundary Environmental Harm

The obligation to prevent significant transboundary environmental harm has been elaborated in International Court of Justice decisions, arbitral decisions, Article 21 of the *Stockholm Declaration,* Article 2 of the *Rio Declaration*, and has been accepted by the vast majority of countries in specific environmental treaties. It has long been recognized as customary law by most observers and scholars in the field.

Both Defendants' brief and Defendants' Expert Witness Statement ignore the International Court of Justice's recognition of this obligation and the substantial bulk of scholarship and commentary on this issue. Defendants' arguments mistake debate over the scope and application of the norm for whether the norm exists. Although some dispute exists over whether the standard for triggering state responsibility for transboundary harm can be based on strict liability or only based on a negligence-like due diligence standard, this dispute neither undermines the existence of this customary law obligation nor prevents the norm's application in this case. There is little dispute that customary international law at least requires a state to meet its due diligence obligations to prevent significant transboundary harm, and this Court should apply the due diligence standard to Colombia's actions just as it would any fact-dependent, negligence-based standard.

A. Applying the sic utere principle to Transboundary Environmental Harm

The customary law obligation to prevent transboundary environmental harm is a fundamental part of the field of international environmental law. It has its roots in the common law principle of *sic utere tuo ut alienum non laedus* (i.e., do not use your territory to harm another). In the international law context, States are under a general obligation not to use their

territory, or to allow others to use their territory, in a way that harms the interests of another State. This obligation not to cause harm has been confirmed in several rulings by the International Court of Justice (I.C.J.), including for example in the *Corfu Channel* case, which concerned damage to British warships caused by mines placed in Albanian waters. *See Corfu Channel* (U.K. v. Alb.), Merits, 1949 I.C.J. 4, 22 (April 9).

The obligation not to cause harm to other States was extended to environmental harm as early as 1941 in the well-known *Trail Smelter Arbitration*. In that case, fumes from a Canadian smelter were damaging U.S. citizens and property. After the two countries agreed to arbitration, the U.S.-Canada International Joint Commission concluded:

> The Tribunal, therefore, finds that the above decisions, taken as a whole, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905-81 (1941) (emphasis added). Since first articulated in the *Trail Smelter Arbitration*, this principle has been frequently repeated in many international environmental contexts as reflecting customary international law.

Most notably the principle not to cause environmental harm was further elaborated as Principle 21 of the 1972 *Stockholm Declaration on the Human Environment*:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Stockholm Declaration on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev. 1, 3 (1973), U.N. Doc. A/Conf.48/14, 2, Corr. 1 (1972), *reprinted in* 11 I.L.M. 1416 (192) [hereinafter *Stockholm Declaration*]. The *Stockholm Declaration* was endorsed by the U.N. General Assembly by a vote of 112 to 0. The principle was reaffirmed twenty years later in the nearly identical Principle 2 of the *Rio Declaration on Environment and Development*. United Nations Conference on Environment and Development, Rio de Janiero, Braz., June 3-14, 1992, *Rio*

Declaration on Environment and Development, U.N.Doc. A/CONF.151/26/Rev.1 (June 14, 1992), *reprinted in* 31 I.L.M. 874 (1992) [hereinafter *Rio Declaration*]. The *Rio Declaration* was endorsed by 178 countries, including the United States.

Defendants' Expert Witness Statement rightly points out that neither the *Stockholm* nor *Rio Declarations* are themselves binding instruments of international law;[1] however, they are nonetheless *compelling evidence* of the broad consensus among States that this obligation exists under international law. *See, e.g.*, Patricia Birnie, Alan Boyle & Catherine Redgwell, International Law and the Environment 138 (3rd ed. 2009) (recognizing that Principle 2 of the Rio Declaration "is merely restating existing law"); Alan Boyle, Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited, in International Law and Sustainable Development: Past Achievements and Future Challenge 68 (Alan Boyle & David Freestone, eds., 1999) (stating that "the [Rio] Declaration is in part a restatement of existing customary international law on transboundary matters"); Hans Christian Bugge, General Principles of International Law and Environmental Protection, in Environmental Law: From International to National Law 56 (Ellen Margrethe Basse, ed., 1997) (acknowledging that "[P]rinciple 21 is today widely regarded as a principle of customary international law"); Pierre M. Dupuy, Overview of the Existing Customary Legal Regime Regarding International Pollution, in International Law and Pollution 61-67 (Daniel Barstow Magraw, ed., 1991) (noting that "This fundamental principle … is one case in which international declarations and institutional resolutions support the expression of a universal opinio juris. The duty not to cause substantial harm through transfrontier pollution … may be deemed to have been accepted in many collective statements of States…."); David Hunter, James Salzman & Durwood Zaelke, International Environmental Law & Policy 436 (4th ed. 2011) (recognizing that "Principle 21 is widely viewed as reflecting customary international law"); Phillipe Sands, Principles of International Environmental Law 241 (2003) (noting that "[a]t least since 1996, there can be no question but that Principle 21 reflects a rule of customary international law…."); David A. Wirth, The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?, 29 Ga. L. Rev. 599, 620 (1995) (noting that both Canada and the United States recognized Principle 21 as codifying existing customary international law at the time of the negotiations).

[1] Murphy Statement, at 24.

Given its widespread endorsement in both the *Stockholm* and *Rio Declarations,* the obligation to prevent significant transboundary harm can be said to reflect near universal acceptance. Indeed, this obligation has been repeated *verbatim* in several binding international treaties with near universal acceptance by states, including in Article 3 of the Convention on Biological Diversity (ratified by 193 countries), the preamble to the U.N. Framework Convention on Climate Change (ratified by 194 countries, including the United States), and the preamble to the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (ratified by 193 countries). Convention on Biological Diversity, *opened for signature* June 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993); U.N. Framework Convention on Climate Change, *opened for signature* June 3, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994); U.N. Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, *opened for signature* Oct. 14-15, 1994, 1954 U.N.T.S. 3 (entered into force Dec. 26, 1996); *see also* Convention on Environmental Impact Assessment in a Transboundary Context, *opened for signature* Feb. 25, 1991, 30 I.L.M. 800 (entered into force Sept. 10, 1997) (providing in Article 2(1) that "[t]he Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities"); U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994) (requiring in Article 194 that "States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source…"); *World Charter for Nature*, G.A. Res. 37/7, Annex (Oct. 28, 1982), *reprinted in* 22 I.L.M. 455 (1983) (providing in regards to implementation that "States and, to the extent they are able, other public authorities, international organizations, individuals, groups and corporations shall:…[e]nsure that activities within their jurisdictions or control do not cause damage to the natural systems located within other States or in the areas beyond the limits of national jurisdiction").

B. International Jurisprudence confirms that the Obligation to Prevent Significant Transboundary Environmental Harm is a part of Customary International Law

Any doubt about the status of the obligation to prevent significant transboundary

environmental harm in international environmental law was put to rest by no less an authority than the International Court of Justice, which is the most important international court and the one created by the United Nations Charter to resolve international disputes and to provide the United Nations with authoritative statements on the status and scope of international law. In 1996, the I.C.J. clearly confirmed that environmental interests were among those State interests that should not be harmed by other States. In the 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice made the following observation:

> The Court recognizes that the environment is under daily threat and that use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. *The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now a part of the corpus of international law relating to the environment.*

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, paras. 29-30 (July 8) (emphasis added) [hereinafter *Nuclear Weapons Advisory Opinion*]. The International Court of Justice reaffirmed this statement in *Gabcikovo-Nagymaros Project* (Hung. v. Slovk.), 1997 I.C.J. 7, para. 53 (Sept. 25), and again in the case *Concerning Pulp Mills on the River Uruguay* (Arg. v. Uru.), 2010 I.C.J. ---, para. 193 (Apr. 20) [hereinafter *2010 Pulp Mills case*].

This recognition of the legal obligation to "respect" the environment of other States is widely understood as an affirmation that customary international law includes the obligation articulated in the *Trail Smelter Arbitration, Stockholm Declaration* Principle 21, and *Rio Declaration* Principle 2 that one state should prevent significant transboundary environmental harm.

The International Permanent Court of Arbitration, an intergovernmental organization established in 1899 to assist states in resolving international disputes, has similarly endorsed the responsibility to prevent or mitigate transboundary environmental harm as a principle of international law. *See In the Arbitration Regarding the Iron Rhine Railway* (Belg. v. Neth), 23 R.I.A.A. 35 (Perm. Ct. Arb. 2005) [hereinafter *Iron Rhine Railway Arbitration*]. The case

concerned a dispute between Belgium and the Netherlands regarding a railway that traverses the Netherlands and is used by Belgium. Belgium's right of transit across the Netherlands was codified in the 1839 Treaty of Separation and reaffirmed and expanded in the 1973 Iron Rhine Treaty. Since 1991 the railway had been used infrequently and the Netherlands began to designate nature reserves that crossed the railway. After a 2000 Memorandum of Understanding (a study on the environmental impacts of the reactivation of the railway), Belgium and the Netherlands disagreed as to whether Belgium could legally reactivate the railway, and whether the Netherlands could impose binding environmental regulations on Belgium. In its decision the Tribunal acknowledged that the duty to prevent or mitigate environmental harm is a principle of international law:

> 59. Since the Stockholm Conference on the Environment in 1972 there has been a marked development of international law relating to the protection of the environment. Today, both international and EC law require the integration of appropriate environmental measures in the design and implementation of economic development activities.... Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, *which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm (see paragraph 222). This duty, in the opinion of the Tribunal, has now become a principle of general international law*.... In the view of the Tribunal this dictum applies equally to the Iron Rhine railway.

Iron Rhine Railway Arbitration, *supra*, at para. 56. The Tribunal found that although Belgium had a right of passage through the Netherlands, the Netherlands also had a right to impose reasonable regulations on the railway network and Belgium was obligated to share the costs of environmental protection.

> 222. … Today, in international environmental law, a growing emphasis is being put on the duty of prevention. Much of international environmental law has been formulated by reference to the impact that activities in one territory may have on the territory of another. The International Court of Justice expressed the view that "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment" (*Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, *I.C.J. Reports 1996 (I)*, p. 226 at pp. 241–242, para. 29).

> 223. Applying the principles of international environmental law, the Tribunal observes that it is faced, in the instant case, not with a situation of a transboundary effect of the economic activity in the territory of one state on the territory of another state, but with the effect of the exercise of a treaty-guaranteed right of one state in the territory of another state and a possible impact of such exercise on the territory of the latter state. The Tribunal is of the view that, by analogy, where a state exercises a right under international law within the territory of another state, considerations of environmental protection also apply. The exercise of Belgium's right of transit, as it has formulated its request, thus may well necessitate measures by the Netherlands to protect the environment to which Belgium will have to contribute as an integral element of its request. The reactivation of the Iron Rhine railway cannot be viewed in isolation from the environmental protection measures necessitated by the intended use of the railway line. These measures are to be fully integrated into the project and its costs.

Id. at paras. 222-223. Both Defendants' Brief and Defendants' Expert Witness Statement remarkably fail to mention either the International Court of Justice's or the Permanent Court of Arbitration's repeated, explicit recognition that the obligation to prevent significant transboundary environmental harm is customary international law. As one of the leading treatises on international environmental law (also cited by Defendants' Expert Witness) states:

> Judgments of international courts provide the most authoritative guidance on the state of the law at the time they are decided. While the environmental jurisprudence is not extensive, *it nevertheless affirms the existence of a legal obligation to prevent, reduce and control transboundary environmental harm … .* Equally importantly, states parties to litigation before international tribunals, including the ICJ and the International Tribunal on the Law of the Sea (ITLOS) have not sought to argue that general international law does not require them to control transboundary pollution, or to carry out EIAs, or to cooperate in the management of environmental risks. They have not challenged the standard textbook accounts of the subject or the ILC's codification of the law relating to transboundary harm.

Birnie, Boyle & Redgwell, *supra*, at 140 (citing *MOX Plant* (Provisional Measures) (No. 10) (Ir. v. U.K.), Case No. 10, Order of Dec. 3, 2001, http://www.itlos.org; *MOX Plant Arbitration* (Jurisdiction and Provisional Measures), (Perm. Ct. Arb. 2003); *Concerning Land Reclamation by Singapore in and around the straights of Johor* (Provisional Measures) (No. 12) (Malay. v. Sing.), Case No. 12, Order of Oct. 8, 2003, http://www.itlos.org; *Concerning Pulp Mills on the River Uruguay*, (Arg. v. Uru), 2006 I.C.J. 113 (July 13)).

C. International Law Publicists, Scholars, and Academics Uniformly Recognize that the Obligation not to Cause Environmental Harm Is a Principle of Customary International Law

The International Law Commission, the International Law Association, the American Law Institute, and other legal experts groups have all concluded that customary international law includes the requirement that states have at least a due diligence obligation to prevent, reduce, or mitigate significant environmental harm of their activities in another State. The International Law Commission's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, which are applicable to transboundary environmental harms, affirms that States "shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof." *See* I.L.C. Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, Article 3, in Report of the International Law Commission on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., UN Doc. A/56/10, 146-70 (Dec. 12, 2001) [hereinafter I.L.C. Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities].

The International Law Association similarly affirmed this principle of international law: "Without prejudice to the operation of the rules relating to the reasonable and equitable utilization of shared natural resources *States are in their legitimate activities under an obligation to prevent, abate and control transfrontier pollution to such an extent that no substantial injury is caused in the territory of another State.*" International Law Association, Rules on International Law Applicable to Transfrontier Pollution, 60 I.L.A. 158 (1983) (adopted in Montreal, Can., Sept. 4, 1982) (emphasis added).

Similarly, the American Law Institute in its U.S. *Restatement* (Third) *of the Law of Foreign Relations* also recognized the international legal standard that a State is obligated to prevent, reduce, or control transboundary pollution:

> 601. State Obligations with Respect to Environment of Other States and the Common Environment
>
> 1. A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control
>
> (a) conform to generally accepted international rules and standards for the

> prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and
>
> (b) are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.
>
> 2. A state is responsible to all other states
>
> (a) for any violation of its obligations under Subsection (1)(a), and
>
> (b) for any significant injury, resulting from such violation, to the environment of areas beyond the limits of national jurisdiction.
>
> 3. A state is responsible for any significant injury, resulting from a violation of its obligations under Subsection (1), to the environment of another state or to its property, or to persons or property within that state's territory or under its jurisdiction or control.

Restatement (Third) of the Law of Foreign Relations, § 601 (1987). In its commentary to this section, the American Law Institute noted that "generally accepted international rules and standards" referenced in Article 1(a) included customary international law and cited the *Trail Smelter Arbitration,* thus confirming its view that the rule in *Trail Smelter* is part of customary international law.

The influential Experts Group on Environmental Law convened under the auspices of the United Nations World Commission on Environment and Development has concurred, finding that: "States shall … prevent or abate any transboundary environmental interference or a significant risk thereof which causes substantial harm—i.e. harm which is not minor or insignificant." U.N. Experts Group on Environment and Development, Legal Principles for Environmental Protection and Sustainable Development, June 18, 1986, U.N. Doc. WCED/86/23/Add.1, Art. 10 (1986).

Defendants' Brief and Defendants' Expert Witness Statement run counter to the vast majority of academic and scholarly writing on the issue. Most leading treatises and textbooks on international environmental law clearly recognize the obligation to prevent transboundary environmental harm as customary international law. As Professors Birnie, Boyle, and Redgwell explain in their leading treatise on international environmental law:

> Two rules enjoy significant support in state practice, judicial decisions, multilateral environmental agreements, and the work of the International Law

> Commission. They can be regarded as customary international law, or in certain aspects as general principles of law:
>
> 1. States have a duty to prevent, reduce, and control transboundary pollution and environmental harm resulting from activities within their jurisdiction or control.
>
> 2. States also have a duty to cooperate in mitigating transboundary environmental risks and emergencies, through notification, consultation, negotiation, and in appropriate cases, environmental impact assessment.

Birnie, Boyle & Redgwell, *supra*, at 137. Similarly, Phillipe Sands in his Principles of International Environmental Law concludes that "[at least since 1996], there can be no question but that Principle 21 reflects a rule of customary international law…." Sands, *supra*, at 241; *see also* Donald K. Anton, Jonathan I. Charney, Philippe Sands, Thomas J. Schoenbaum & Michael J. Young, International Environmental Law: Cases, Materials Problems 641 (2007) (asserting that "[T]he customary international law of transboundary pollution, including the state responsibility for causing environmental harm, forms the foundation on which the more sophisticated law of the global environment is built"); Hunter, Salzman & Zaelke, *supra*, at 436 (noting that "Principle 21 is widely viewed as reflecting customary international law"); Alexandre Kiss & Dinah Shelton, International Environmental Law 107 (2nd ed. 2000) (stating that "It can be argued that several other customary rules of international environmental law have emerged or are emerging in state practice. In particular, it clearly seems required that no state cause or allow its territory to be used to cause damage to the environment of other states").

In addition, a long list of legal scholarship has recognized Principle 21 of the *Stockholm Declaration*, Principle 2 of the *Rio Declaration*, and the obligation to prevent significant transboundary environmental harm as a principle of customary international law. *See, e.g.,* Jonathan I. Charney, Third State Remedies for Environmental Damage to the World's Common Spaces, in International Responsibility for Environmental Harm 149, 156–57 (Francesco Francioni & Tullio Scovazzi eds., 1991); Noah Hall, Bilateral Breakdown: U.S.-Canada Pollution Disputes, 21 Nat. Resources & Env't 18, 18 (Summer 2006) (stating that "The legal principle of responsibility for 'transboundary pollution'—pollution originating in one country that harms another country—became a cornerstone of international environmental law."); Shiloh Hernandez, Mountaintop Removal at the Crown of the Continent: International Law and Energy Development in the Transboundary Flathead River Basin, 32 Vt. L. Rev. 547, 569 (2008)

(noting that "The prevention principle-that no nation may undertake activities within its borders that will cause significant injury to another nation-is widely considered a basic tenet of customary international law."); Maria Angela Jardim de Santa Cruz Oliveira, Recognition and Enforcement of United States Money Judgments in Brazil, 19 N.Y. Int'l L. Rev. 1, 35 (2006) (commenting that "Although the Stockholm Declaration was not intended to be legally binding, Principle 21 is now generally accepted as customary international law"); Lisa M. Kaplan, International Responsibility of an Occupying Power for Environmental Harm: The Case of Estonia, 12 Transnat'l Law. 153, 190 (1999) (noting the obligation to prevent transboundary harm's prodigious acceptance within international environmental law only lends weight to its acquired force as a substantive rule of customary international law); Coalter G. Lathrop, Finding the Right Fit: One Design Element in the International Groundwater Resource Regime, 19 Duke J. Comp. & Int'l L. 413, 427 (2009) (observing that "Principle 2 of the Rio Declaration is little more than a restatement of a long-standing rule of customary international law."); Andrea Laura Mackielo, Core Rules of International Environmental Law, 16 ILSA J. Int'l & Comp. L. 257, 265 (2009) (asserting that "many states regarded the wording of Principle twenty one as reflecting customary international law. Furthermore, and still resorting to customary rules of interpretation, the obligation is endorsed by subsequent state practice when voting in favor of other resolutions as well as when drafting treaties."); Franz Xavier Perrez, The Relationship Between "Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage, 26 Envtl. L. 1187, 1202-03 (1996) (observing that Principle 21 now reflects a general rule of customary international law); Simon SC Tay, Southeast Asian Fires: The Challenge for International Environmental Law and Sustainable Development, 11 Geo. Int'l Envtl. L. Rev. 241, 266-67 (1999) (stating that Principle 21 is "said to be part of customary international law, and therefore binding on all states"); Catherine Tinker, Responsibility for Biological Diversity Conservation Under International Law, 28 Vand. J. Transnat'l L. 777, 806 (1995) (concluding that "finding both state practice and opinion juris with respect to Principle 21").

III. The duty to prevent significant transboundary environmental harm requires due diligence on the part of Colombia.

As amply demonstrated by the above discussion, the duty not to cause significant transboundary environmental harm is far from being an "aspirational goal" as the defendants claim, but is widely recognized as a binding norm of customary international law. The obligation is not absolute, however. There is both a significance threshold—the environmental harm (pollution in this case) must have more than a de minimis impact on the neighboring state—and a due diligence standard.

The due diligence standard requires an inquiry into the regulations and controls a State has in place to control the risk of transboundary environmental harm. *See* Birnie, Boyle & Redgwell, *supra*, at 147-50. As the International Law Commission has stated it:

> The standard of due diligence against which the conduct of State of origin should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. For example, activities which may be considered ultra-hazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location, special climate conditions, materials used in the activity, and whether the conditions drawn from application of these factors in a specific case are reasonable, are among the factors to be considered in determining the due diligence requirement in each instance.

I.L.C. Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, *supra*, at art. 3, para. 11.

The International Court of Justice has applied the due diligence requirement to transboundary pollution in its 2010 opinion in the Uruguay-Argentina Pulp Mill case. Although the Court was interpreting a particular bilateral agreement, its analysis of due diligence in the context of the obligation to prevent environmental harm is instructive:

> [T]he obligation to "preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures" is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party.

2010 Pulp Mills Case, *supra*, at para. 197. Thus, the International Court of Justice in the Pulp Mills case looked at the adequacy of Uruguay's regulatory system, its provisions for environmental impact assessment, and the choice of technology it allowed.

Thus, the due diligence inquiry is a fact-specific inquiry dependent on each individual case. It is one that requires examining the potential risks from the proposed activity (aerial spraying of an herbicide in this case) with the steps taken by Colombia in controlling the transboundary impacts of that activity. In this respect, the standard of due diligence is not unlike the familiar negligence standard of domestic law that is frequently applied in US Courts.

IV. The principle of *lex specialis* does not allow displacing the customary law obligation to prevent significant transboundary environmental harm by the 1988 U.N. Convention

Dyncorp has argued that the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter "1988 Convention"), U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, 1582 U.N.T.S. 95 (entered into force Nov. 11, 1990) [hereinafter 1988 Convention], is *lex specialis* with respect to the customary law obligation not to cause significant transboundary environmental harm (i.e. the *sic utere* norm), and that therefore the norm is displaced and does not apply to this case. The doctrine of *lex specialis,* however, only allows for displacement where the subject-matter of two norms overlap in a conflict, and one of the norms is more specific than the other. Because the 1988 Convention does not address questions of responsibility or liability for transboundary environmental harm, the *lex specialis* principle does not displace the *sic utere* rule in this case.

A. *Lex Specialis* applies with respect to conflict of norms addressing the same subject-matter. *Lex specialis* does not automatically displace customary law.

Lex Specialis has been studied by the United Nations International Law Commission (ILC) for the purpose of addressing the increasing fragmentation of international law. The ILC has explained that the principle of *lex specialis derogat lege generali* is a rule of legal interpretation that permits the special law to derogate from the general law when both are regulating the same subject matter. International Law Commission, Fragmentation of

International Law: Difficulties of Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682, para. 116 (2006) [hereinafter ILC Report]. In this way, *lex specialis* is a tool to resolve normative conflicts when the special rule presents either an exception or an elaboration of the general rule. *Id.* at paras. 88,91, 102.

The ILC has further explained that the application of *lex specialis* requires a context-specific determination of what is "special" and "general." Generality and speciality are relational, and the differentiation may be in regard to the subject-matter or the number of actors whose behavior is regulated by the law. *Id.* at para. 112. The rationale of *lex specialis* is that whichever law is more to the point and regulates the matter more effectively should govern. *Id.* at para. 60. The degree of displacement is therefore determined by the degree to which the specific law addresses the subject matter more precisely and is consistent with State intentions.

Moreover, *lex specialis* does not provide an automatic hierarchy between different legal instruments. *Lex specialis* does not bluntly dictate that treaties displace customary law. *Lex specialis* may apply within a single instrument, between two different instruments, between a treaty and a non-treaty standard such as customary international law, or between two non-treaty standards. *Id.* at para. 68.

Several cases illustrate the role of *lex specialis* in resolving real conflicts between treaty law and customary international law. For example, in the case of *Amoco International Finance Corporation v. Iran*, the Iran-U.S. Claims Tribunal applied the rule of *lex specialis* and held that the Treaty of Amity between Iran and the United States supercedes customary international law on expropriation because it specifically addressed the issue of expropriation. In the instant case, by contrast, the 1988 Convention does not specifically address the issue of transboundary environmental harm. Further, the *Amoco* Tribunal also held that, "the rules of customary law may be useful in order to fill in possible *lacunae* of the Treaty, to ascertain the meaning of its undefined terms in its text or, more generally, to aid interpretation and implementation of its provision." *Amoco Int'l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep., 189, 222 (1987). Thus, even where a treaty may displace custom, the treaty provisions must be interpreted in light of relevant customary international law.

That general law ought to provide interpretative direction to the special law was recognized by the International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. *Nuclear Weapons Advisory Opinion*, *supra*, at 267. There,

the I.C.J. applied the *lex specialis* laws of armed conflict while drawing on the International Covenant on Civil and Political Rights (ICCPR) as well as norms of international environmental law. The I.C.J. reasoned that the laws applicable to armed conflict and designed to regulate the conduct of hostilities determine whether a deprivation of life has been "arbitrary", under Article 6(1) of the ICCPR. *Id.* at para. 25. Still, the Court restricted the degree of displacement to the relevant subject matter, explaining that human rights law is not entirely displaced by the laws of armed conflict but rather continues to apply within armed conflict and affect its interpretation and application. *Id.* at para. 25; *see also* ILC Report, *supra*, at para. 104. With respect to the application of norms of international environmental law, the I.C.J. did not directly apply such norms upon finding that they do not specifically prohibit the use of nuclear weapons. However, the I.C.J. recognized that norms of international environmental law brought to light "important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict." *Nuclear Weapons Advisory Opinion*, *supra*, at para. 33. Thus, neither human rights law nor international environmental law was automatically set aside by the application of the *lex specialis* laws on armed conflict; rather they each brought relevant considerations into the I.C.J.'s advisory opinion.

Even in respect of relations between treaties that govern a similar subject matter, the application of *lex specialis* does not necessarily exclude the more general law. This was confirmed by the arbitral tribunal constituted under the United Nations Convention on the Law of the Sea (UNCLOS), in a dispute between Australia and New Zealand against Japan concerning the conservation and management of southern bluefin tuna (SBT). Japan argued that, "the *lex specialis* of the 1993 Convention [for the Conservation of Southern Bluefin Tuna (CCSBT)] and its institutional expression have subsumed, discharged and eclipsed any provisions of UNCLOS." *S. Bluefin Tuna* (Austl. & N.Z. v. Japan), Award on Jurisdiction & Admissibility, 23 R.I.A.A. 1, para. 38 (Arbitral Tribunal under U.N. Convention on the Law of the Sea, 2000); *see also id.* at para. 51. The tribunal rejected Japan's argument, stating that, "[t]he current range of international legal obligations benefits from a process of accretion and cumulation; in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the parties to the implementing convention." *Id.* at para. 52. The Tribunal also recognized that in some respects

UNCLOS extends beyond the reach of the CCSBT. *Id.* It therefore concluded that the dispute arises under both the *lex specialis* of CCSBT and the general law of UNCLOS.

These cases illustrate that *lex specialis* only displaces another legal norm where there is a clear conflict of norms addressing the same subject-matter. In the instant case, however, the 1988 Convention does not specifically address questions of State responsibility or liability for transboundary harm. Accordingly, there is no conflict of norms calling for the application of the *lex specialis* principle.

B. The 1988 Convention does not address issues of State responsibility or liability for transboundary harm and only contains general obligations to cooperate

The 1988 Convention primarily addresses cooperation regarding illicit production and trafficking of narcotic drugs and does not establish liability standards applicable to State eradication operations that result in transboundary impacts. The absence of legal standards concerning State responsibility for transboundary harm means that the 1998 Convention does not address the subject-matter covered by the *sic utere* rule of custom governing State responsibility for transboundary environmental harm.

The 1988 Convention was negotiated as a response to concerns over increasing illicit production of and trafficking in narcotic drugs. Its purpose is "to promote cooperation among Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension." 1988 Convention, *supra*, at art. 2.

This emphasis on States' obligation to cooperate is reflected throughout the Convention. In the Preamble, States "recogniz[ed] that eradication of illicit traffic is a collective responsibility of all States and that, to that end, coordinated action within the framework of international co-operation is necessary." *Id.* at pmbl. Accordingly, various provisions of the Convention oblige each party to cooperate through its domestic laws. Article 5 (Confiscation), Article 6 (Extradition), Article 7 (Mutual Legal Assistance), Article 9 (Other forms of Co-operation and Trading), Article 10 (International Co-operation and Assistance for Transit States), Article 12 (Substances Frequently Used in the Illicit Manufacture of Narcotic Drugs or Psychotropic Substances), Article 14 (Measures to Eradicate Illicit Cultivation of Narcotic Plants and to Eliminate Demand for Narcotic Drugs and Psychotropic Substance), Article 17 (Illicit Traffic by

Sea), and Article 19 (The Use of the Mails) call for strengthening cooperation among states. *Id.* at arts. 5, 6, 7, 9, 10, 12, 14, 17, 19.

No single provision in the 1988 Convention regulates transboundary environmental liability resulting from a State's eradication operations. The content of the Convention reflects its primary focus: "a comprehensive, effective and operative international convention that is directed *specifically* against illicit traffic and that considers the various aspects of the problem as a whole (emphasis added)." *Id.* at pmbl. The use of the word "specifically" to qualify the focus of the 1988 Convention on illicit traffic makes abundantly clear that the 1988 Convention was adopted to specifically address illicit traffic of narcotics, and not environmental liability.

For example, Article 14 of the Convention establishes the Parties' obligations with respect to eradication operations, but the provision does not address the issue of liability for activities which result in transboundary impacts. The pertinent provisions provide:

> 2. Each State shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances…cultivated illicitly in its territory: The measures adopted shall respect fundamental human rights and shall take due account of…the protection of the environment.…
> 3(c). Whenever they have common frontiers, the Parties shall seek to cooperate in eradication programs in their respective areas along those frontiers.

Id. at art. 14(2), 14(3)(c). It is plain from the text of Article 14(2) that the State is under a duty to respect fundamental human rights and to take due account of the protection of the environment. Similarly, it is plain under Article 14(3)(c) that States shall seek to cooperate along common frontiers. From this plain reading, it follows that Article 14 of the 1988 Convention is both consistent with and reinforces the customary international obligation to prevent significant transboundary harm.

The absence of provisions addressing liability for transboundary harm is further noticeable when contrasted with the individual criminal liability provisions that are present. The 1988 Convention provides sanctions, penalties, or extraditions for those who commit drug trafficking offenses, yet there is no mention of State liability for failure to respect human rights or protect the environment. *Id.* at art. 3 (Offenses and Sanctions). Accordingly, the *sic utere* rule is not displaced by the 1988 Convention and thus it continues to govern the legal consequences of transboundary environmental harm resulting from fumigations.

C. *Travaux* of the 1988 Convention does not support a *lex specialis* displacement

The *travaux* of the 1988 Convention further confirms that the 1988 Convention does not displace the *sic utere* rule. While States recognized the importance of human rights and environmental protection and incorporated such considerations in Article 14, analyzed above, U.N. Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Committee II, E/CONF.82/C.2/L/29 (The proposal was submitted to the Committee of the Whole II by the Bahamas, Bolivia, Colombia, Costa Rica, Cuba, Guatemala, India, Jamaica, Mexico, Panama, Paraguay, and Peru.), the *travaux* contains no evidence that States discussed issues of transboundary impact caused by their eradication operations. For example, representatives from the Union of Soviet Socialist Republics (USSR) stated, "eradication of plants should take account of the need not to damage the environment" and "the need for crop-eradication programmes should not be allowed to outweigh a legitimate concern to conserve areas vulnerable to desertification and consequent loss of habitat." *Id.* at para. 20. Colombia agreed with the views expressed by the USSR. *Id.* at para. 24. Yet, States did not discuss or negotiate standards for State responsibility regarding transboundary environmental harm, and their general statement that the environment needs to be respected is completely consistent with the *sic utere* norm.

If States intended to exclude the application of *sic utere*, they would have provided a clear legal standard in the 1988 Convention addressing transboundary impacts or at least discussed those issues during the negotiations leading to the 1988 Convention. Because the *travaux* contains no discernible State intent to exclude the application of *sic utere*, the 1988 Convention does not displace its application. Rather, the *sic utere* rule continues to be the relevant norm establishing a State's obligation to prevent transboundary environmental harm that may result from fumigations in a boundary region.

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Respectfully Submitted by

David Hunter
Professor of Law
Director, International Legal Studies Program,
Director, Program on International and Comparative Environmental Law
American University Washington College of Law
4801 Massachusetts Avenue, NW
Washington, DC 20016
Tel: 202-274-4415
Email: dhunter@wcl.american.edu
DC Bar Member No. 413016

William J. Snape, III
Environmental Law Fellow, American University Washington College of Law
Senior Counsel, Center for Biological Diversity

On behalf of:

John Bonine
Bernard B. Kliks Professor
University of Oregon School of Law

Carl Bruch
Adjunct Professor
Johns Hopkins University

Dr. Wil Burns
Associate Director, Master of Science, Energy Policy and Climate Program,
Johns Hopkins University

Victor B. Flatt
Thomas F. & Elizabeth Taft Distinguished Professor of Environmental Law,
Director, Center for Law, Environment, Adaptation, and Resources (CLEAR),
University of North Carolina School of Law
Distinguished Scholar of Carbon Trading and Carbon Markets, Global Energy Management Institute, University of Houston's Bauer College of Business

Svitlana Kravchenko
Professor
Director, LL.M. Program in Environmental and Natural Resources Law
University of Oregon School of Law

Erika Lennon
Program Coordinator, Program on International and Comparative Environmental Law,
American University Washington College of Law

W. Carroll Muffett
President and CEO,
Center for International Environmental Law
Adjunct Professor, American University Washington College of Law

Marcos Orellana
Senior Attorney and Director, Human Rights and Environment Program
Center for International Environmental Law
Adjunct Professor, American University Washington College of Law

John Pendergrass
Professorial Lecturer in Law,
The George Washington University Law School

Jacob Werksman
Adjunct Professor of Law, New York University School of Law
Adjunct Professor, Georgetown University Law Center

Chris Wold
Professor of Law
Director, International Environmental Law Project
Lewis & Clark Law School

Durwood Zaelke
Director, Institute for Governance and Sustainable Development
Adjunct Professor, American University Washington College of Law