# The Dyncorp Case in Colombia

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047

Environmental Health

**Keywords**

- Plan Colombia
- DynaCorp
- Glyphosate

*Photo: Jeremy Bigwood*

## 1. Factual background

Under its 1999 'Plan Colombia', the Colombian Government under former President Andrés Pastrana developed a counter-narcotics strategy that focused on the chemical eradication of illegal coca and poppy plantations through the aerial spraying of herbicides.

Aerial fumigations under the 'Plan Colombia' officially started in the year 2000. By October that year, sprayings also began along the southern border with Ecuador, in areas that abut the northern Ecuadorian provinces of Carchi and Esmeraldas. Between January and February 2001, sprayings were particularly intense in the border area that abuts the Ecuadorian province of Sucumbíos. According to the facts, as represented in the Ecuadorian application to institute proceedings before the International Court of Justice (ICJ), fumigation operations near—and even within—Ecuadorian territory were carried out between October 2000 and January 2007.[1] In the execution of 'Plan Colombia', that country was actively supported by the United States. In particular, having been awarded a contract with the US Department of State in January 1998 in order to assist it in its counter-narcotic operations in Colombia, DynaCorp Aerospace Operations, incorporated under the state law of Delaware LLC, carried out the aerial herbicide spraying operations.

Even though the precise chemical composition of the herbicide used in the aforementioned fumigations has not been disclosed either by the Colombian authorities, or by the US Department of State or DynCorp, its main active ingredient is a non-selective, broad-spectrum herbicide, known as 'glyphosate'.

However, glyphosate is poisonous not only to plants, but also to humans and animals when directly exposed to it. As graphically illustrated in Ecuador's application before the ICJ, the product label of commonly available glyphosate-based weed-killers contains explicit warnings to avoid direct contact with eyes, ingestion and inhalation, as it may cause substantial injury. As stated in the aforementioned application,


*Provinces of Ecuador*
*http://mapsof.net/map/provinces-of-ecuador*

> "21. Recent toxicological studies also suggest that glyphosate poses very real risks. For instance, laboratory studies have found adverse effects in all standard categories of toxicology testing. These include medium-term toxicity (salivary gland lesions), long-term toxicity (inflamed stomach linings), genetic damage (in human blood cells), effects on reproduction (reduced sperm counts in rats; increased frequency of abnormal sperm in rabbits), and carcinogenicity (increased frequency of liver tumours in male rats and thyroid cancer in female rats). Although, of course, no human experiments have been conducted, studies of people exposed to glyphosate (generally farmers) indicate an association with an increased risk of miscarriages, premature birth and non-Hodgkin's lymphoma. The toxicity of glyphosate is especially severe when it is inhaled, as it would be in the case of exposure to the mist from aerial spraying."[2]

Ecuador further alleged that, as a consequence of the aerial spraying operations, severe harm was inflicted on the environment—topsoil contamination, pollution of rivers and aquifers, and poisoning of flora and fauna—and the health of individuals from the

[1] See *Letter from the Ambassador of Ecuador (appointed) to the Kingdom of the Netherlands to the Registrar of the International Court of Justice, The Hague, 31 March 2008*, Annex: Application Instituting Proceedings, at 12. Available at: <www.icj-cij.org/docket/files/138/14474.pdf> (last access: 23 January 2012).
[2] ibid, at 16.


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Source: yachana.org – A protest against the "Plan Colombia"

communities residing in the affected areas. As reflected in the plaintiffs' class-action complaint in the Aguasanta-Arias *et al.* v. DynCorp case brought before a US Court, those exposed to the herbicide clouds suffered from such health problems as heavy fevers, diarrhoea, and dermatological pathologies, and required hospitalization. In a number of cases, particularly in those affecting children, the health problems caused by exposure to the clouds led to death. Moreover, several reports from the Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples after visits paid to Ecuador and Colombia, portray a situation in which herbicide fumigations have had a severe impact on indigenous communities. For example:

> … it appears that the local wildlife, which provided a source of daily consumption, both for households and for recreational purposes, has died and various activities have been affected, as polluted water cannot be used. Spraying appears to be destroying subsistence crops, diminishing soil quality and reducing yields, affecting both economic activities of communities and the population's access to adequate food. In addition to the involuntary displacements caused by these activities, attention is also drawn to the lack of access to public services and the militarization of the border zone.[3]

## 2. International legal framework

Under customary international law, States do have a due diligence obligation with respect to the use of their territory and the activities carried out there by state officials and private (physical or legal) persons under their jurisdiction or control. In particular, States are obliged to take all necessary measures—according to due diligence standards—to prevent any significant transboundary harm to the territory of neighbouring states and properties therein. This international customary obligation, which stems from the broader principle *sic utere tuo ut alienum non laedas*, finds its first precedent in the field of environmental law in the 1948 Trail Smelter Arbitration Award, and has been upheld in several decisions and awards of international courts and arbitral tribunals ever since. Moreover, the very existence of this obligation of international customary law is considered to be globally recognized in its formulation according to Principle 21 of the 1972 Stockholm Declaration on the Human Environment, and Principle 2 of the Rio Declaration on Development and Environment.[4]

Independently of customary international legal rules concerning the conduct of inter-state good-neighbour relations, acts leading—as in the present case—to severe transboundary environmental harm do have the potential to significantly affect the enjoyment of basic internationally recognized human rights by individuals belonging to the communities in the affected areas. As a consequence, global and regional human rights treaties to which Ecuador and Colombia are parties are also part of the applicable international legal framework.

## 3. Action taken in the context of international institutions

### *3.1 Human rights bodies*[5]

The issue of the aerial herbicide sprayings near the border between Ecuador and Colombia also caught the attention of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen. As reflected in his report to the former UN Commission on Human Rights on the visit he paid to Colombia in early March 2004, the strategy of the Colombian Government to fight drug trafficking and

[3] UN Doc A/HRC/4/32/Add.2 (28 December 2006), par. 30.
[4] On the relevance of the *sic utere* principle in the context of the present case, see A. Pigrau Solé, 'La responsabilidad de las empresas transnacionales por daños graves al medio ambiente: explorando la vía de la *Alien Tort Claims Act*' in A. M. Badia Martí, A. Pigrau Solé and A. Olesti Rayo (eds), *Derecho internacional y comunitario ante los retos de nuestro tiempo. Homenaje a la Profesora Victoria Abellán Hinrubia. Volumen I* (Marcial Pons, Madrid 2009) 517, 559-564.
[5] A complaint was filed in 2006 by Ecuadorian citizens before the Interamerican Commission of Human Rights for the lack of enforcement of a ruling of the Constitutional Court, ordering all relevant Ministries to adopt all necessary measures to remedy the damage suffered by communities on the northern border of Ecuador, as a consequence of the aerial herbicide sprayings on the Colombian side of the border, and to prevent further damage from being caused. However, a decision on the admissibility of the complaint is still pending. Reference will be made to the mentioned complaint in the paragraph addressing action taken before national courts in Ecuador.

the war on the guerrilla groups had gradually fused into one single military strategy, in which aerial herbicide spraying was one of the preferred methods for eradicating illicit crops. According to the feedback from indigenous organizations, the consequences of the spraying operations included

> "… environmental damage to the topsoil, fauna, flora and water, the destruction of subsistence crops and direct damage to human health, including birth defects. … The indigenous peoples see the aerial spraying of coca plantations as yet another violation of their human rights and, save for a few occasions when they have given their consent, actively oppose the practice; this position again brands them as guerrilla sympathizers, as happened after the rights marches organized by certain indigenous communities to protest against the spraying. The Office of the Ombudsman has received 318 complaints concerning spraying operations in three municipalities in Putumayo in July 2002 and their effect on 6,070 families and 5,034 hectares of land."[6]

Therefore, the Special Rapporteur told the Colombian Government that '[e]xcept where expressly requested by an indigenous community which has been fully apprised of the implications, no aerial spraying of illicit crops should take place near indigenous settlements or sources of provisions'.[7]

The very same issue reappeared in the Special Rapporteur's report to the newly established UN Human Rights Council on his visit to Ecuador in April and May 2006, in which he addressed i.a. the serious effects on the health of communities of indigenous peoples living in the provinces located on the northern border with Colombia, where the clouds of herbicides sprayed close to the border on the Colombian side had also had severe impacts on the Ecuadorian side. This situation was described in the report as '[c]urrently, the region's most serious problem'.[8] Accordingly, he addressed a recommendation to Colombia to '… definitively halt the aerial spraying of illicit crops in the border region with Ecuador',[9] and recommended also that both governments '… appoint an independent international commission to study the effects of aerial spraying on indigenous border populations [and that][c]orresponding binding measures are also recommended, to provide compensation for the damages caused'.[10]

Also in 2006, in its concluding observations on the assessment of the third periodic report submitted by Colombia under article 44 of the Convention on the Rights of the Child, the Committee of the Rights of the Child voiced concern about the adverse impact of aerial sprayings on the health of vulnerable groups, including children. Therefore, the Committee addressed a recommendation to Colombian authorities to

> "… carry out independent, rights-based environmental and social-impact assessments of the sprayings in different regions of the country and ensure that, when affected, prior consultation is carried out with indigenous communities and that all precautions be taken to avoid harmful impact of the health of children."[11]

Finally, the former Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, also paid a visit to Ecuador (May 2007) and Colombia (September 2007) in order to examine the impact of the aerial spraying of glyphosate, combined with additional components, along the Ecuador-Colombia border, from the point of view of the enjoyment

[6] UN Doc E/CN.4/2005/88/Add.2 (10 November 2004), par. 50.
[7] ibid, par. 106.
[8] See n 3, par. 28.
[9] ibid, par. 86.
[10] ibid, par. 85.
[11] UN Doc CRC/C/COL/CO/3 (3 June 2006), par. 72-3.
[12] UN Doc A/HRC/7/11/Add.3 (4 March 2008), par. 3.


*Source: foreignpolicy.com*

of that particular human right.[12] Afterwards the Rapporteur issued a preliminary note in early March 2008, in which he briefly reported on his observations without advancing any assessment thereof. In the conclusions to the note, he announced he would '… carefully consider all information received before taking a final stance regarding the issue of aerial spraying and the right to the highest attainable standard of health and before submitting his report to the Human Rights Council on the issue'.[13] Nevertheless, because the issue was brought before the International Court of Justice by the end of that month, and Paul Hunt was succeeded by Anand Grover as Special Rapporteur a little later, (to the knowledge of the present author) no such final report has ever been submitted to the Council.

### *3.2 International Court of Justice*

After repeated aerial sprayings along the shared border, the government of Ecuador invoked state responsibility for the violation of customary and conventional international obligations to prevent significant transboundary harm to the environment by Colombia. Ecuador requested assurances from Colombia that it would cease spraying in such a way that the environment, peoples and properties within its territory were adversely affected. Ecuador also sought reparation of the damages caused. However, all efforts to settle the issue bilaterally were in vain. A commission set up in 2007 under the auspices of the Organisation of American States[14] also failed to foster an agreement between the parties.

Under these circumstances, in March 2008 Ecuador addressed the issue to the International Court of Justice in The Hague, asking to institute proceedings. According to its application, Ecuador claims that by aerially spraying toxic herbicides at locations at, near and over their shared border, '… Colombia has violated Ecuador's rights under *customary and conventional international law*. The harm that has occurred, and is further threatened, includes some with irreversible consequences, indicating that Colombia has failed to meet its *obligations of prevention and precaution*'. [15] Therefore, it

> … respectfully requests a judgment of the Court ordering Colombia to (a) respect the sovereignty and territorial integrity of Ecuador; (b) take all steps necessary to prevent the use of any toxic herbicides in such a way that they could be deposited onto the territory of Ecuador; (c) prohibit the use, by means of aerial dispersion, of such herbicides on or near any part of its border with Ecuador; and (d) indemnify Ecuador for any loss or damage caused by its internationally unlawful acts.[16]

At present, proceedings are in the final stage of the submission of the written pleadings by the parties. After the memorial and counter-memorial, Ecuador presented its reply, and the deadline for the submission of the final rejoinder by Colombia has recently been delayed to 1 February 2012. A decision by the ICJ on the subsequent procedure **will be adopted afterwards.**[17]

## 4. Development of the case before national judiciaries

### *4.1 Colombia*

In 2001, two lawyers—Claudia Sampedro Torres and Héctor Alfredo Suárez Mejía—sued the Colombian Ministry for the Environment (Ministerio del Medio Ambiente) and the National Narcotics Division (Dirección General de Estupefacientes) before the Administrative Court of Cundinamarca (Tribunal Administrativo de Cundinamarca), claiming that aerial

[13] ibid, par. 26.
[14] See 'At OAS, Ecuador presents complaint about Colombia's aerial spraying of herbicides along border', OAS Press Release E-005/07, 9 January 2007. Available at: <www.oas.org/en/media_center/press_release.asp?sCodigo=E-005/07> (last access: 23 January 2012).
[15] See n 1. at 26 (emphasis added).
[16] ibid, 4.
[17] ICJ, Aerial Herbicide Sprayings (Ecuador v. Colombia), Order of 19 October 2011. Available at: <www.icj-cij.org/docket/files/138/16725.pdf> (last access: 23 January 2012).

fumigations of illicit crops with glyphosate under 'Plan Colombia' had a negative impact on the enjoyment of collective rights such as the rights to health and to a healthy environment. In their brief, the lawyers alleged that direct exposure to glyphosate spray clouds had severe consequences on the health of communities living near fumigated areas (e. g. allergic reactions and respiratory diseases); further, they claimed that long-term effects, such as specific types of cancer, genetic mutations and miscarriages were probable. Being a wide-spectrum, non-selective herbicide, glyphosate destroyed not only illicit crops, but also subsistence crops, and had a huge impact on biological diversity in the fumigated areas.

On their part, the Environmental Ministry and the Narcotics Division argued that fumigations had been carried out according to strict procedural constraints in order to minimize their impact on nearby communities and the environment. They also claimed that although the glyphosate sprayings may have an impact on the environment, it duration, as vegetation in the affected held a somewhat more nuanced position: fumigations had some impact on the alleged collective rights and both agencies would have to carry out more stringent toxicological examinations and environmental impact assessments prior to fumigations, in order to minimize their deleterious consequences.

In its first instance ruling of 13 June 2003, the Administrative Court of Cundinamarca awarded most of the plaintiffs' claims and addressed to the National Narcotics Division an order of temporary suspension of the aerial fumigation operations with the combination of glyphosate, POEA and Cosmo Flux, based on the precautionary principle. According to the Court's reasoning, even though there was no scientific evidence of the alleged long-term impacts of the mix of herbicides on health and the environment, more scientific examinations had to be carried out if the possibility of reasonable risks were to be discounted. Therefore, by virtue of the precautionary principle, fumigation operations had to be temporarily suspended. The Court further addressed an order to the Ministry of Social Security and the National Institute of Health to undertake all necessary toxicity studies in order to assess the long-term effects of glyphosate, POEA and Cosmo Flux on human health. It also entrusted the National Narcotics Division with carrying out more stringent environmental impact assessments in all previously fumigated areas, in order to properly assess the long-term effects on the environment.

The 2003 ruling of the Administrative Court of Cundinamarca was appealed by the National Narcotics Division before the Colombian Council of State (Consejo de Estado, Sala de lo Contencioso-Administrativo). In its ruling of 19 October 2004, the Council of State dismissed the interpretation of the precautionary principle in the first instance ruling and reversed the order of temporary suspension of the fumigation operations. However, the Council of State maintained the remaining orders of the Administrative Court of Cundinamarca. In particular, it ruled that:

"… 2. … the Ministry of the Environment, Housing and Regional Development is hereby ordered to continue its verification activities in order to ensure that the Environmental Management Plan is strictly adhered to…

3. The Ministry of Social Security should undertake studies involving groups exposed to Glyphosate, plus POEA, plus Cosmo Flux, and a control group (not exposed), to include morbidity and mortality records, with a view to determining the effect of the chemicals in question on the health and lives of Colombians in sprayed areas, especially in the area of influence of the Sierra Nevada de Santa Marta and in other areas where spraying is done, as chosen by the Ministry…, which should nevertheless include areas sprayed at different times.

4. The National Narcotics Division should verify the environmental effects of aerial fumigation with Glyphosate, plus POEA, plus Cosmo Flux, for eradicating illicit crops in the fumigated areas selected as samples, so as to provide areas fumigated at different times, and this work shall receive the

*Luis Acosta/AFP/Getty Images – A Colombian soldier walks in a field of coca plants as a plane sprays herbicide overhead.*

necessary supervision for ensuring that follow-up is carried out of the effects of fumigation. …"[18]

Nevertheless, even if the appeal decision of the Council of State actually obliges Colombian authorities to assess the long-term consequences on human health and the environment, no practical consequences seem to stem from this ruling in terms of the redressability of the damage caused to individuals by the fumigations.

In its ruling of 31 March 2005, the Council of State confirmed a first instance ruling of the Administrative Court of Caquetá, dismissing a civil action brought by a Colombian citizen—Juan Bautista Mosquera Plaza—seeking redress for damages suffered as a consequence of the aerial fumigation of an illegal coca plantation abutting his property, as well as a temporary injunction not to proceed with further sprayings of the area. Of particular relevance to the present report is the Court's reasoning, which is exclusively based on the report drawn up by officials of the National Narcotics Division after their on-site inspection for the assessment of the alleged damages. According to the report, there was no scientific evidence that either the alleged health problems suffered by the plaintiff and his familiy, or the harm to his crops and animals, which allegedly constitute his and his family's only source of subsistence, were caused by glyphosate.[19]

## *4. 2. Ecuador*

Following several events of aerial fumigations in Colombian territory, in areas close to the northern Ecuadorian province of Sucumbíos, during the second half of 2003, in February 2004, a group of women allegedly suffering genetic damages from exposure to the sprayings, supported by several NGOs, sued the Ecuadorian state for the omission of its constitutional duties by not preventing the aerial fumigation operations in Colombian territory from harming Ecuadorian territory. On 30 March that year, the Administrative District Court No. 1 (Tribunal Distrital No.1 de lo Contencioso Adminsitrativo) granted the plaintiffs' constitutional action (acción de amparo constitucional) and ordered all relevant ministries and agencies to immediately adopt all necessary action to remedy the damage already caused, and to prevent any further harm from happening. The District Court's ruling was appealed by several Ministries before the Ecuadorian Constitutional Court, which nevertheless decided on 15 March 2005—by a majority of eight votes to one—to confirm the prior ruling. This decision by the Constitutional Court meant, in the first place, that the Ministry of Foreign Affairs had to negotiate a memorandum of understanding with the Colombian Government in order to establish a 10km buffer zone in Colombian territory along the whole of the common border, in which no aerial fumigation activities could be undertaken. It further compelled the Ministry of Health to increase all existing medical infrastructure and resources in order to provide the affected communities with the necessary medical assistance; the Minstry of Agriculture to provide the affected communities with covered water reservoirs, so that they could access clean drinking water for humans and animals; and the Ministry for the Environment to assess the environmental impact of fumigations and set up recovery plans for the whole area.[20]

Due to the lack of proper enforcement of the Constitutional Court's ruling, the plaintiffs' addressed the issue to the Interamerican Commission of Human Rights. Their complaint was based on the alleged violation of the right to judicial protection (article 25.2, c) American Convention of Human Rights) and, as a consequence of the lack of enforcement, also on the alleged violation of the right to life (art. 4).[21] However, the admissibility of the complaint has been contested by the Ecuadorian Government, and the complainants were given the opportunity

[18] Official English translation No. 297/04 of a Colombian State Council ruling dated 19 October 2004, Bureau for International Narcotics and Law Enforcement Affairs, Washington, DC, 22 August 2006. Available at: <http://www.state.gov/g/inl/rls/rpt/aeicc/70978.htm> (last access: 29 December 2011). The ruling of the Council of State was adopted by a clear majority of its thirty one members. However, six of them wrote a dissenting opinion.

[19] Sentencia de la Sala de lo Contencioso Administrativo (Sección Cuarta) del Consejo de Estado, de 31 de marzo de 2005, Juan Bautista Mosquera-Plaza c. Consejo Nacional de Estupefacientes, Dirección Nacional de Estupefacientes y Policía Nacional, Radicación núm. 18001-23-31-000-2004-00612-01(AC).

[20] See Resolución del Tribunal Constitucional de 15 de marzo de 2005, asunto no. 0371-04-RA. Available at: <www.derechoecuador.com/index2.php?option=com_content&task=view&id=1987&pop=1&page=0#anchor1609703> (last access: 23 January 2012).

[21] See letter of 15 March 2006, addressed by the complainants to the Ambassador Santiago A. Cantón, Executive Secretary of the Interamerican Commission of Human Rights. Available at <www.inredh.org/archivos/casos/fumigaciones/fumig_peticion_cidh_06.pdf> (last access: 23 January 2012).

[22] See letter of 2 July 2009, addressed by the complainants to the Ambassador Santiago A. Cantón, Executive Secretary of the Interamerican Commission of Human Rights. Available at < www.inredh.org/archivos/casos/fumigaciones/fumig_oficio_cidh_jul09.pdf> (last access: 23 January 2012).

Olga Castano/AFP/Getty Images - a plane fumigates coca plantations deep in the forests of southern Colombia.

to reply.[22] At present, the Commission's decision on the admissibility is still pending.

## 4.3. United States

### 4.3.1. Aguasanta-Arias et al. v. Dyncorp

On 11 September 2001, a group of some 10,000 farmers affected by the aerial herbicide sprayings carried out earlier that year sought compensatory and punitive damage for the harm suffered, as well as equitable relief, by filing a class action against DynCorp before the US District Court for D.C. The plaintiffs' claims were based on the Alien Tort Claims Act (ATCA), the Torture Victim Protection Act (TVPA), the common law of the US, the statutes and common law of the District of Columbia, as well as various international agreements and conventions, including i.a. the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

In response, DynCorp presented a motion to dismiss the action pursuant to Federal Rule of Civil Procedure 12 (b) and, alternatively, for summary judgment pursuant to Rule 56. Taking into consideration that the sprayings had been commissioned by the US Department of State in the context of the so-called 'Plan Colombia' for the elimination of illegal coca plantations, DynCorp alleged that the plaintiffs' claims were entangled in non-justiciable issues concerning the foreign and national security policy of the US. It also argued that the plaintiffs' claims on the alleged violations of international law failed because they did not identify any specific actions. Finally, it also argued that the plaintiffs' claims based on state common law were preempted by the federal government's exclusive authority over foreign policy and national security.

On 21 May 2007, DynCorp's motion was granted in part, as the plaintiffs' claims under the TVPA were dismissed, and dismissed in part, as the plaintiffs' remaining claims survived, and summary judgement was also denied.[23]

### 4.3.2. Arroyo-Quinteros, et al. v. DynCorp

In December 2006, another group of about 1,600 affected farmers who had not been involved in the aforementioned class action, joined by the Ecuadorian provinces of Esmeraldas, Carchi and Sucumbios, also sued DynCorp before the US District Court for the Southern District of Florida on the grounds of alleged violations of the ATCA, various international treaties, and state common law doctrines of negligence, nuisance, trespass, assault, intentional infliction of emotional distress, strict liability and

[23] Venancio Aguasanta Arias, *et al.*, Plaintiffs, v. DynCorp, *et al.*, Defendants (Civil Action No. 01-1908 (RWR), US District Court for the District of Columbia, *Memorandum Opinon and Order*, 21 May 2007, at 20-1.

medical monitoring. Plaintiffs in this second action expressly limited their claims to seek remedy for the harm suffered on Ecuadorian territory, but did not intend to prevent the defendants from continuing their operations under 'Plan Colombia', as long as their effects remained within the boundaries of Colombian territory.[24]

On their part, the defendants moved to dismiss the action, or to transfer it to the District Court for the D.C., in order to consolidate it with the Aguasanta-Arias action. Eventually, the District Judge Dimitrouleas granted the motion to transfer pursuant to § 1404 (a), and ordered its transfer to the District Court for the District of Columbia. In his assessment, the judge considered that the plaintiffs certainly had very strong arguments in favour of their choice of forum. However, under the relevant case law, being foreign plaintiffs, their choice of forum was entitled to less deference than if they had been resident plaintiffs. Therefore, the convenience of the forum of District of Columbia for DynCorp was perceived as out weighting the plaintiffs' choice.[25] Forthwith, the Aguasanta-Arias' and the Arroyo-Quinteros' cases have been consolidated for case management and discovery purposes.

### *4.3.3. Further developments of the consolidated cases before the District Court for the District of Columbia*

After the consolidation of both branches of the case before the District Court for the District of Columbia, most developments concerned the constitution of the class. More recently, however, the parties have started to refine their claims and arguments concerning the merits of the case.

### *4. 3.3.1. Developments concerning the constitution of the class*

In January 2010, Judge Roberts granted a plaintiffs' and defenders' joint motion to dismiss a group of 425 plaintiffs who either had not provided sufficient information about their location at the alleged dates of their exposure to the sprayings, or had not provided sufficient information about the alleged damages. The judge also granted in part a separate move of DynCorp to dismiss additional plaintiffs who, according to the defendants, also fell within one of the two aforementioned categories. According to Judge Roberts' Memorandum Opinion,

> [b]y having failed to complete the defendants' questionnaires, the plaintiffs identified in the two dismissal categories disregarded multiple court orders and prevented the defendants from sufficiently defending their case. Thus, the parties' joint motion to dismiss will be granted in part and the defendants' motion to dismiss as revised will be granted. The claims of the plaintiffs to be dismissed will be dismissed with prejudice.[26]

Moreover, in September that year Judge Roberts also granted a motion presented by DynCorp under Federal Rule of Civil Procedure 12 (c) and dismissed the three Ecuadorian provinces as plaintiffs. In his reasoning, based on relevant case law, the judge held that the provincial plaintiffs' injuries were not sufficient to meet the conditions set out for standing under Article III of the US Constitution. He also considered that the doctrine of *parens patriae* standing was not applicable to foreign public authorities, such as the three Ecuadorian provinces.[27]

In December 2010, Judge Robinson dismissed a motion by DynCorp for sanctions against the Aguasanta-Arias and Arroyo-Quinteros plaintiffs, which

[24] Nestor Ermogenes Arroyo-Quinteros, et al., Plaintiff, v. DynCorp, et al., Defendants, Case No. 06-31760-CIV-DIMITROULEAS/SNOW, US District Court for Southern District of Florida, *Order granting defendants' motion to dismiss or transfer pursuant to the First-Filed Rule, or, in the alternative, to transfer pursuant to 28 USC § 1404 (a)*, 22 May 2007, at 3.
[25] ibid, at 8-14.
[26] Venancio Aguasanta-Arias, et al. Plaintiffs, v. DynCorp Aerospace Operations, LLC, et al., Defendants, Civil Action No. 01-1908 (RWR), consolidated with Civil Action No. 07-1042 (RWR) for case management and discovery purposes, US District Court for the District of Columbia, *Memorandum Opinion*, 12 January 2010, at 10-1
[27] Venancio Aguasanta-Arias, et al. Plaintiffs, v. DynCorp Aerospace Operations, LLC, et al., Defendants, Civil Action No. 01-1908 (RWR), consolidated with Civil Action No. 07-1042 (RWR) for case management and discovery purposes, US District Court for the District of Columbia, *Memorandum Opinion*, 15 September 2010.

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was based on alleged violations of discovery orders. In particular, the defendant had found inconsistencies in the responses to questionnaires addressed to twenty test plaintiffs, which were held to be 'repeated departs from earlier sworn questionnaire responses', thereby resulting in violations of the District Court's discovery orders. The defendant alleged that the inconsistencies in the twenty test plaintiffs' responses made it impossible to have any confidence in the accuracy of the other remaining 2,000 individual plaintiffs (sic). The plaintiffs, on the other hand, characterized the existing discrepancies as 'minor testimonial inconsistencies' and held that it should be up to a jury to determine their relevance to the case. For her part, the Judge considered that the defendant had failed to demonstrate its claims and denied the motion.[28]

## *4. 3.3.2. Developments concerning the merits of the case*

On 21 November 2011, Judge Roberts granted the motion for leave to file a brief on behalf of fourteen international environmental law professors and practitioners as *amici curiae*.[29] The main thesis put forward in the *amicus* brief is that—contrary to what the defendants had argued in their brief—the obligation to prevent transboundary environmental harm is indeed an existing obligation under applicable customary international law. Moreover, the *amicus* brief upholds—against the defendants' plea—that the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances does not displace the customary obligation to prevent transboundary environmental harm by virtue of the principle of *lex specialis derogat lege generali*. In the first place, so their argument goes, the application of the *lex specialis* rule requires that both norms address the very same subject matter, whereas subject matters regulated in the 1988 Convention and the obligation to prevent transboundary environmental harm are completely divergent. Further, the *amicus* brief maintains that the *lex specialis* rule does not automatically displace customary law in favour of treaty law.

The 2011 *amicus* brief develops and reinforces the argument already upheld in the *amicus curiae* brief submitted in March 2002 by Prof. Richard J. Wilson and J. Martin Wagner (Earthjustice) in support of the plaintiffs' claims in the Aguasanta-Arias action. In this brief, *amici* sustained that transboundary environmental harm is to be prevented by states—irrespective of its causation by public or private actors—particularly when damage inflicted to the environment is 'significant', due to its 'long-term, widespread and severe' effects on the enjoyment of basic human rights, such as the rights to life, food, water and health of individuals belonging to the communities established in the areas affected. Moreover, it argues that claims for violations of well-established norms of customary international law are indeed actionable under ATCA, and that DynCorp is to be considered a 'state actor' acting under colour of law, having regard of the fact that DynCorp's authority to spray herbicides in Colombia was delegated to it by the governments of the US and Colombia itself.

[28] Venancio Aguasanta-Arias, et al. Plaintiffs, v. DynCorp Aerospace Operations, LLC, et al., Defendants, Civil Action No. 01-1908 (RWR), consolidated with Civil Action No. 07-1042 (RWR) for case management and discovery purposes, US District Court for the District of Columbia, *Memorandum Opinion and Order*, 10 December 2010.

[29] Venancio Aguasanta-Arias, et al. Plaintiffs, v. DynCorp Aerospace Operations, LLC, et al., Defendants, Civil Action No. 01-1908 (RWR), consolidated with Civil Action No. 07-1042 (RWR) for case management and discovery purposes, US District Court for the District of Columbia, *Memorandum Order*, 21 November 2011.

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