

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

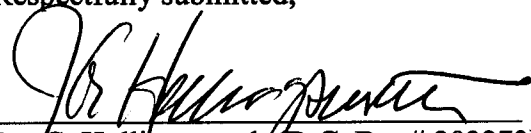
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Venacio Aguasanta Arias, et al.	)	
	)	
Plaintiffs,	)	
	)	Case Number: 1:01CV01908 (RWR)
v.	)	
	)	Judge: Richard W. Roberts
DynCorp, et al.,	)	
	)	ORAL ARGUMENT REQUESTED
Defendants.	)	
_____	)	

**DYNCORP INTERNATIONAL'S MOTION TO DISMISS  
PURSUANT TO FRCP 12(b)(1) AND 12(b)(6) OR,  
IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

Defendants DynCorp, et al. ("DynCorp International") hereby move this Court to dismiss this action pursuant to FRCP 12(b), or in the alternative, pursuant to FRCP 56. Plaintiffs' complaint challenges foreign policy and national security determinations of the executive and legislative branches and seeks to impose liability on DynCorp International for conduct expressly authorized by Congress and specifically dictated by the Department of State under the terms of DynCorp International's government contract. The proper forums for plaintiffs' complaints are in the Congress and before the Executive branch, and their attempt to drag the judiciary into these matters should be rejected.

As set forth more fully in the accompanying statement of points and authorities in support of this motion and in the sworn declaration of Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs Rand Beers -- who is responsible for all United States government policies and initiatives in support of international counter-narcotics efforts in the Andean region -- plaintiffs' claims must be dismissed on a number of grounds. First, plaintiffs' claims would entangle the Court in nonjusticiable issues regarding United States foreign and national security policy. Second, plaintiffs' federal law claims based on alleged violations of international law fail because the actions of which they complain are expressly authorized by Congress and because plaintiffs do not identify any actions that would constitute a violation of international law. Third, plaintiffs' state common law claims are preempted by the federal government's (a) exclusive authority over foreign policy and national security and (b) specific approval of the safety of the herbicide used in the drug spraying operations. Plaintiffs' complaint should be dismissed in its entirety.

Respectfully submitted,



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**DYNCORP INTERNATIONAL'S STATEMENT OF POINTS AND AUTHORITIES  
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Defendants DynCorp International, LLC, et al. ("DynCorp International") hereby move this Court to dismiss this action pursuant to FRCP 12(b), or in the alternative, pursuant to FRCP 56. Plaintiffs' complaint challenges foreign policy and national security determinations of the executive and legislative branches and seeks to impose liability on DynCorp International for conduct expressly authorized by Congress and specifically dictated by the Department of State under the terms of DynCorp International's government contract. The proper forums for plaintiffs' complaints are in the Congress and before the Executive branch, and their attempt to drag the judiciary into these matters should be rejected.

Through this action, plaintiffs, a putative class of Ecuadorans living near the Colombian border, ask this Court to block the continued implementation of U.S. support for Plan Colombia, a multi-year, multi-billion dollar initiative that began over a year ago through which the United States, seven Andean nations, and other international partners, including Spain and Great Britain, seek to foster democracy and stability in Latin America and to disrupt the flow of illegal narcotic

drugs out of the region. Plaintiffs allege that the aerial narcotics eradication operations conducted in Colombia cause adverse environmental and health effects. Within the past few weeks -- after expressly considering such allegations -- Congress appropriated \$625 million to provide additional funding to sustain and expand support for Plan Colombia through the Andean Counterdrug Initiative (which is part of the broader Andean Regional Initiative (ARI)) for FY 2002.

The matters at issue in this litigation are uniquely within the province of the legislative and executive branches of government. Plan Colombia and the ARI are the linchpin of United States foreign policy and diplomatic relations in Colombia and the rest of the Andean region. *See generally* Foreign Assistance Act of 1961, § 481(a)(1)(A), as amended by the International Narcotics Control Act of 1992, § 3, 22 U.S.C.A. § 2291(a)(1)(A) (Supp. 2001) ("International narcotics trafficking poses an unparalleled transnational threat in today's world and its suppression is among the most important foreign policy objectives of the United States."). In addition, Plan Colombia and the ARI are vital to the national security because of (1) the Andean region's role as virtually the exclusive source of cocaine entering the United States and (2) the financing provided by the region's narco-trafficking to several international terrorist organizations. *See* President Clinton's Memorandum of Justification in Connection with Waivers under section 3201(a)(4) of the Emergency Supplemental Act, 2000, as enacted in the Military Construction Appropriations Act, 2001 (2000) ("The challenges faced by Colombia are a matter of national security interest to the United States" because "[i]llegal drugs cost our society 52,000 lives and nearly \$110 billion each year" and "[t]he drug trade is also fueling the illegal armed groups involved in Colombia's internal conflict") (hereinafter "President Clinton's National Security Waiver") (attached hereto as Exhibit A).

Having failed in their efforts before Congress and being unwilling to sue the United States government directly, the Ecuadoran plaintiffs attack United States foreign and national security policy through a putative class action against the U.S. State Department's contractor that provides support for some aviation elements of U.S. support for Plan Colombia, DynCorp International. DynCorp International's contractual services for the State Department involve highly sensitive and classified information, and DynCorp International is forbidden from disclosing any information regarding its activities without prior express State Department approval. Speaking generally, the implementation of the aerial narcotics eradication operations in Colombia depends upon intelligence information, military assets, and foreign policy and national security decision-making that cannot be disclosed without posing a grave risk to vital U.S. foreign policy, diplomatic relations and national security. Moreover, as plaintiffs acknowledge in their complaint, the illicit crop spraying flights are being conducted in one of the most dangerous regions in the area, and spray planes and escort helicopters have been frequently fired upon by hostile narco-traffickers and terrorist groups. Accordingly, any disclosure of operational information could result directly in the loss of American and Colombian lives.

Plaintiffs' claims should be dismissed in their entirety for a number of reasons. First, plaintiffs' claims would entangle the Court in nonjusticiable issues regarding United States foreign and national security policy. Second, plaintiffs fail to state a claim actionable based on a violation of international law, both because the actions of which they complain are expressly authorized by Congress and because plaintiffs do not set forth any facts that would constitute a violation of international law. Third, plaintiffs' state common law claims are preempted by the federal government's (a) exclusive authority over foreign policy and national security and (b) specific approval of the safety of the herbicide used in the drug spraying operations.

## STATEMENT OF BACKGROUND FACTS

1. The aerial drug eradication operations at issue in this litigation are a key element of United States counter-narcotics policy in Colombia and the Andean region. This policy is the product of a complicated balance of U.S. national security and foreign policy objectives, has been approved at the highest levels of government, has received the direct attention of the President, the Secretary of State, and the National Security Council, among others, and has been endorsed by Congress. *See* Declaration of Rand Beers, Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs Regarding Potential Impact of *Arias* Litigation on United States National Security and Foreign Policy Interests, at ¶¶ 3-4, 62 (hereinafter "Beers Decl. at ¶ \_\_") (attached hereto as Exhibit B).

2. Any disruption in the aerial eradication of illicit drug crops in Colombia will undermine national security by depriving the United States of a key weapon in its arsenal for stemming the flow of illicit narcotics into this country and by allowing international terrorist organizations in Colombia to continue to reap huge profits from drug trafficking with which they will target U.S. interests and American lives. *See* Beers Decl. at ¶ 5; see also President Clinton's National Security Waiver.

3. The aerial drug eradication operations are also a linchpin to U.S. foreign policy objectives to foster democratic and stable governments in Colombia and other Andean nations and to further important trading relationships in the region. Further, these operations provide the foundation for numerous bilateral and multilateral commitments between and among the United States, seven Andean nations, and other international partners, including Great Britain and Spain. Beers Decl. at ¶ 6; *see also* Beers Decl. at ¶¶ 7-9; see generally 22 U.S.C.A. § 2291(a)(1)(A).

I. History of Plan Colombia and the Aerial Illicit Crop Eradication Operations at Issue in this Case.

4. The United States has been providing assistance to Colombia since the early 1970s to help the Colombian National Police and other law enforcement agencies, the military, and civilian agencies in their efforts to reduce illegal drug production and trafficking activities. The United States and Colombia have worked together in joint aerial eradication efforts since 1978. *See* Beers Decl. at ¶ 10.

5. Colombia and other Andean countries produce virtually all of the world's cocaine and have become a major supplier of heroin to the East Coast of the United States. In recent years, in part as a result of successful U.S.-host country drug eradication efforts in Bolivia and Peru, drug traffickers have moved much of their operations to Colombia's southern department's of Putumayo and Caqueta and have formed alliances with illegal armed forces in the region. *See id.*, at ¶ 11-13.

6. In response to these developments, the Colombian government, with United States support, initiated a \$7.5 billion program, called Plan Colombia, to which the United States committed over \$1 billion in assistance both in Colombia and in neighboring countries affected by the drug trade. Plan Colombia represents a dramatic expansion in U.S.-Colombia collaborative efforts in combatting narcotics trafficking and is one of the most significant Western Hemisphere foreign policy initiatives in recent years. *See id.*, at ¶¶ 14-15.

7. The centerpiece of Plan Colombia is funding for the "Push into Southern Colombia" program, the program directly at issue in this litigation. The Push into Southern Colombia program is targeted at attacking the cultivation and production of illegal narcotics in the southern departments of Putumayo and Caqueta and its success is crucial to progress in counter-narcotics operations in other regions in Colombia. *See id.*, at ¶¶ 16-18.

8. The aerial eradication component of the Push into Southern Colombia commenced in late December 2000 and, as of February 5, 2001, over 25,000 hectares of coca had been sprayed with glyphosate herbicide in Putumayo. *See id.*, at ¶ 19.

9. During these spraying operations, eight spray planes and/or escort helicopters were hit by hostile ground fire in six separate incidents. In total, during 1999 and 2000, over 100 spray planes and/or escort helicopters were hit by hostile ground fire, resulting in three fatalities. In recognition of these hostile conditions, the United States is also providing military equipment, logistical support, and training to the Colombian Army. *See id.*, at ¶¶ 20-21.

10. Since 1991, the State Department has contracted with DynCorp or various subsidiaries (currently DynCorp International, LLC) for support services for the United States' counter-narcotics aviation programs in the Andean Region. DynCorp International serves as the contractor for the State Department for certain aviation elements of Plan Colombia, and its continued successful contractual performance is considered vital to U.S. national security interests and an integral part of U.S. foreign policy objectives and diplomatic relations with Colombia and other Andean region nations. *See id.*, at ¶¶ 24-26, 28.

11. DynCorp International's contractual services for the State Department involve highly sensitive and classified information, and DynCorp International is prohibited from disclosing any information regarding its activities without prior State Department approval. *See id.*, at ¶ 27.

## II. The Importance of the Drug Eradication Efforts to the War on Drugs

12. It is estimated that illicit drugs reaching the United States cost our society 52,000 lives and \$110 billion a year. *See id.* at ¶ 29; see also President Clinton's National Security Waiver.

13. Colombia is the world's largest producer of cocaine. From 1995 to 2000, in part due to spillover effects from successful counter-narcotics efforts in Bolivia and Peru, cocaine production in Colombia increased by almost 270 percent. Currently, 74 percent of the world's coca is cultivated in Colombia. In addition, the U.S. Drug Enforcement Administration estimates that up to 75 percent of the heroin consumed on the East Coast of the United States comes from Colombia. *See Beers Decl.* at ¶ 31.

14. United States support for counter-narcotics actions in Colombia is designed to reduce illicit coca production by 20 percent (base year 1999) by the end of 2002 and 40 percent by the end of 2007, and thus to cut the supply of drugs into this country. *See id.*, at ¶¶ 32-33.

15. The impact of crop eradication can be dramatic. For example, U.S. Government studies indicate that in Bolivia and Peru every 200 hectares of coca taken out of production deprives the drug trade on average of a metric ton of refined cocaine. By this measure, the 13,853 hectares taken out of production in Bolivia and Peru in 2000 are the equivalent of keeping approximately 69 metric tons of cocaine from entering the system, with a street value of \$70 billion. To put these sums in perspective, for FY 2001, the United States Government's budget for international drug control operations was \$18.8 billion. *See id.*, at ¶ 34.

16. The executive and legislative branches have repeatedly authorized aerial eradication of illicit crops as a key element in U.S. counter-narcotics policy, because it is the most effective crop control alternative and allows for the flexibility necessary to mitigate

potential violence in the face of likely violent opposition. *See id.*, at ¶ 35; *see also* State Department report to Congress on human health and safety of herbicides used in Colombia aerial spray program, January 23, 2001, at 4 (hereinafter "2001 State Department safety report") (attached hereto as Exhibit C).

### III. The Importance of the Drug Eradication Efforts to the War Against Terrorism

17. The aerial narcotics eradication efforts in Colombia strike directly at the funding of three separate international terrorist organizations. Thus, as United States Ambassador to Colombia Anne Patterson recently stated, Plan Colombia continues to be the most effective anti-terrorist strategy the United States could design. *See Beers Decl.* at ¶ 37.

18. There are currently twenty-eight organizations that have been designated by Secretary of State Powell as "Foreign Terrorist Organizations." Three of these Foreign Terrorist Organizations are based in Colombia: the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army (ELN), and the United Self-Defense Forces of Colombia (AUC).<sup>1</sup> Each of these three terrorist groups is financed in large part by the illicit narcotics industry in Colombia and uses drug money to target U.S. interests and American lives. *See id.*, at ¶¶ 5, 38-40.

19. The FARC is widely considered to be the most dangerous international terrorist group based in this hemisphere. The FARC was established in 1964 as the military wing of the Colombian Communist Party and is Colombia's oldest, largest, and most capable and best-equipped Marxist insurgency group. *See id.*, at ¶ 41.

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<sup>1</sup> In order to be designated as a Foreign Terrorist Organization, the Secretary of State must find that the organization (1) is a foreign organization; (2) engages in terrorist activity (as defined in section 212(a)(3)(b) of the Immigration and Nationality Act, 8 U.S.C.A. § 1182(a)(3)(B)) or terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 U.S.C. § 2656f(d)(2)), or retains the capability and intent to engage in terrorist activity or terrorism; and (3) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States. *See* Immigration and Nationality Act, 8 U.S.C. A. § 1189 (1999), as amended by P.L. 107-56 (2001).

20. The FARC's terrorist activities include bombings, murder, kidnapping, extortion, hijacking, as well as guerilla and conventional military action against Colombian political, military, and economic targets. The FARC have murdered 13 Americans since 1980 and kidnapped over a hundred more. In March 1999, the FARC executed three U.S. Indian rights activists on Venezuelan territory after it kidnapped them in Colombia. In October 2000, the Colombian police rescued a five-year-old U.S. citizen who had been held for six months by individuals connected with the FARC. *See id.*, at ¶ 42.

21. The FARC welcomed the September 11, 2001, terrorist attacks on the United States. Afterward, Jorge Briceno, known as Mono Jojoy, a FARC commander, was reported to have ordered his group to "combat" the U.S. "until we get to their own territory." Another FARC commander, Manuel Marulanda has threatened to hit American targets in response to U.S. support for the drug war. In a recent hearing before the Senate Foreign Relations Committee, Secretary of State Powell grouped the FARC with al Qa'ida and the IRA as one of the three terrorist organizations worldwide against whom it would not be difficult to sustain an international alliance. *See id.*, at ¶¶ 43-44.

22. The ELN Marxist insurgency group was formed in 1965 and forced Colombian officials to the negotiating table in 1999 through a campaign of mass kidnappings -- each involving at least one U.S. citizen. The ELN's terrorist activities include kidnapping, bombing, extortion, and guerilla war. Like the FARC, the ELN often targets foreign employees of large corporations, especially in the petroleum industry, frequently assaults energy infrastructure, and has inflicted major damage on pipelines and the electric distribution network. *See id.*, at ¶ 45.

23. The AUC is an umbrella organization formed in April 1997 to consolidate most local and regional right-wing paramilitary groups. AUC operations vary from assassinating

suspected insurgent supporters to engaging guerilla combat units. The Colombian National Police reported that the AUC conducted 804 assassinations, 203 kidnappings, and 75 massacres with 507 victims during the first ten months of 2000. *See id.*, at ¶ 46.

24. The FARC, ELN, and AUC have publicly protested the joint U.S./Colombia aerial narcotics eradication operations and have attempted to shoot down spray planes conducting the aerial eradication operations. *See id.*, at ¶ 47.

#### IV. The Importance of the Drug Eradication Efforts to United States Foreign Policy Objectives in Colombia

25. Colombia is one of the United States' most important trading partners in the Americas, with \$4.5 billion in direct U.S. investments in sectors other than the petroleum sector. Colombia is the United States' eighth largest supplier of crude oil, with more than 330,000 barrels per day. Colombia and its neighbors Venezuela and Ecuador -- both of which function as drug transit routes out of Colombia -- together supply 20 percent of U.S. oil imports. *See id.*, at ¶ 49.

26. The continued drug financing of both leftist guerillas and right-wing paramilitary groups in Colombia has resulted in a breakdown of the most fundamental aspects of Colombian society. The Colombian human rights situation is poor, and the government has little or no presence in large sections of the country that are *de facto* controlled by drug traffickers and the illegal armed forces and terrorist groups on their payroll. *See id.*, at ¶ 50.

27. The influx of drug money into Colombia has significantly weakened and, in many instances, corrupted many of the public institutions in Colombia, including the government, the judiciary, the police, and the military. Human rights activists, members of Congress, journalists, judges, investigators, prosecutors, labor leaders and other private citizens are all subject to assassination, kidnapping, and threats. The continued military unrest in Colombia has resulted in

high unemployment, limited investment opportunities, and as many as a million internally displaced persons. *See id.*, at ¶¶ 51-52.

28. The prospects for democracy, peace, and stability in Colombia are inextricably linked to the success of Plan Colombia and the reduction of narcotics cultivation, processing, and trafficking in that country. Maintaining the momentum in this program is central to U.S. foreign policy objectives and provides the framework for continued diplomatic relations between our two countries. *See id.*, at ¶ 53.

V. The Importance of the Drug Eradication Efforts to United States Foreign Policy Objectives in the Entire Andean Region

29. The success of United States foreign policy efforts in Colombia and the defeat of drug traffickers and their terrorist supporters will also have a significant impact on the prospects for democracy, peace, and security in the other countries in the Andean region. It is because of this interrelationship that United States foreign policy is focused broadly on the Andean region as a whole. *See id.*, at ¶¶ 54-55.

30. All of Colombia's neighbors are affected to one degree or another by the drug-financed violence in Colombia. The FARC and ELN have crossed international borders for years and have periodically engaged in kidnapping, extortion, and illegal drug and arms trafficking in neighboring countries. The increasingly strong AUC has also begun to operate across international borders, raising the possibility of armed conflict spilling over into neighboring countries. *See id.*, at ¶ 56.

31. While the armed conflict in Colombia has thus far generated relatively few refugees in neighboring countries, the large numbers of internally displaced persons in Colombia demonstrate the clear potential for a significant refugee crisis if violence in Colombia continues. *See id.*, at ¶ 57.

32. The threat to regional stability is acute: Venezuela, Peru, and Ecuador all have amassed troops on their borders with Colombia to protect against narcotics traffickers and terrorist groups. Panama, which has no army, has no defense against intrusions from these armed forces. *See id.*, at ¶ 58.

33. Ecuador is the most exposed neighbor in the region because it is situated adjacent to southern Colombian areas that are guerilla strongholds and heavy drug producing areas. Fighters with Colombian paramilitary organizations have been arrested for running extortion rings in Ecuadoran border regions. There are reports that Colombians are buying ranches and farms in the Ecuadoran border region, possibly for drug cultivation, and Ecuadoran officials have uncovered and destroyed several small cocaine processing laboratories in the area. The FARC also has been accused of kidnapping people in Ecuador, although the FARC denies the allegations. *See id.*, at ¶ 59.

34. In Peru, officials have expressed concern about spillover effects of illicit drug activities from Colombia that threaten to reverse the remarkable successes in reducing coca production in Peru over the past six years. Peruvian officials have denounced Colombian plantings of coca and poppy in Peru and international trafficking of arms through Peru to FARC guerillas in Colombia. Bolivian officials have likewise expressed concerned about spillover effects reversing the successes in counter-narcotics operations in that country. *See id.*, at ¶ 60.

35. Venezuela, Panama, and Brazil, while not major illicit drug producing countries, have also served as transit and transshipment points for illicit drugs coming out of Colombia and are directly impacted by counter-narcotics operations in Colombia. *See id.*, at ¶ 61.

VI. U.S. Government Determinations Regarding the Safety of the Herbicide Spray Used in Aerial Eradication

36. Congress has directed that the President, with the assistance of the appropriate Federal agencies, monitor any use of a herbicide under chapter 8 of Part I of the Foreign Assistance Act of 1961, as amended ("FAA"), in aerial eradication to determine the impact of such use on the environment and on the health of individuals. *See* 22 U.S.C.A. §§ 2291(d)(1) & (2). (Congress appropriated funds in support of Plan Colombia for necessary expenses to carry out the activities authorized under section 481 of the FAA, which is set forth in chapter 8 of Part I of the FAA.)

37. Congress has directed the President to submit an annual international narcotics control strategy report to Congress that includes information on the impact on the environment and the health of individuals of the use under chapter 8 of Part I of the FAA of herbicide for aerial eradication. Congress has further directed the President to report immediately to Congress if he determines that the herbicide is causing adverse health or environmental effects. *See* 22 U.S.C.A. §§ 2291(d)(3) & (4).

38. In addition, the statement of the managers in the Conference Report to the Emergency Supplement Act, 2000, which appropriated funds in support of Plan Colombia, directed the Secretary of State, in consultation with the heads of other relevant United States federal agencies, to report to the Committees on Appropriations regarding the effects on human health and the safety of herbicides used with funds appropriated under Title III of the Act. *See* H.R. Conf. Rep. No. 106-710, at 172 (2000) (relevant excerpts attached hereto as Exhibit D).

39. Consistent with the Conference Report accompanying the Emergency Supplemental Act, 2000, in January 2001, the State Department submitted a report to Congress on the safety of the herbicide being used in the drug spraying operations in the Colombia's

Southern Departments of Putumayo and Caqueta, which are at issue in this litigation. This report covers all of the ingredients used in the spray mixture at the time of the spraying at issue, which consisted of water, the herbicide glyphosate, and two adjuvants (COSMO FLUX-411F and COSMO-IN-D). *See* 2001 State Department safety report; Beers Decl. at ¶ 22.

40. The State Department's report was reviewed and approved by the Weed Science Laboratory of the U.S. Department of Agriculture, the office of Pesticide Programs of the EPA, and the Narcotics Affairs Section of the U.S. Embassy in Bogota. *See* 2001 State Department safety report, at 2; Beers Decl. at ¶ 22.

41. Based on this review, the State Department reported to Congress that there "are no grounds to suggest concern for human health and that there is no synergistic interaction between glyphosate and other materials." *See* 2001 State Department safety report, at 2; Beers Decl. at ¶ 23.

42. In particular, the State Department report stated that (1) "[b]ased on adequate scientific studies, glyphosate does not cause risks of concern for birth defects, mutagenic effects, neurotoxic effects, reproductive problems, or cancer," (2) there is "no difference" between glyphosate and baby shampoo in terms of "irritation potential," (3) glyphosate is "unlikely to leach through the soil to contaminate underground drinking water," and (4) glyphosate is "not persistent in fields" and fields treated with glyphosate "can be replanted immediately." *See* 2001 State Department safety report, at 5.

43. The State Department also reported that "switching to 'less effective' chemicals would risk undermining the eradication effort and increasing coca cultivation, a move that would inevitably cause greater harm and environmental damage to Colombia." *Id.*, at 4; Beers Decl. at ¶ 23.

44. Separately, the Narcotics Affairs Section of the United States Embassy in Bogota commissioned a case study of residents of a community that had reportedly suffered adverse health effects due to aerial eradication operations in Colombia. The study was conducted by Dr. Camilo Uribe, a leading toxicologist in Colombia and the director of Clinica Uribe Cualla, the national poison control center. After conducting a detailed review of the circumstances and medical records of each of the complaints reported to a health center in Colombia from July 2000 through February 2001, Dr. Uribe concluded that any relationship between the herbicide used in the eradication operations and the observed health events is unlikely. *See A Study of the Health Complaints Related to Aerial Eradication in Colombia*, dated September, 2001 (hereinafter "2001 U.S. Embassy safety study") (attached hereto as Exhibit E).

45. During the recent Congressional debates regarding funding for the Andean Counterdrug Initiative, Congress specifically considered allegations that the aerial narcotics eradication operations in Colombia were having adverse effects on human health and the environment. 147 Cong. Rec. S10940-42 (daily ed. Oct. 24, 2001) (statement of Sen. Wellstone) (relevant excerpts attached hereto as Exhibit F).

46. On December 19 and 20, 2001, the House of Representatives and the Senate passed the Conference Report accompanying H.R. 2506, the Foreign Operations, Export Financing, and Related Programs Appropriation bill for FY 2002, which appropriates \$625 million to enable the United States to sustain and expand its support for Plan Colombia through the Andean Counterdrug Initiative for FY 2002. *See H.R. Conf. Rep. No. 107-345*, at 31 (2001) (relevant excerpts attached hereto as Exhibit G).

47. In the Conference Report, Congress directed the Secretary of State to report to Congress regarding the safety of herbicide used in aerial eradication. In particular, the

Conference Report conditions use of the additional appropriated funds for procurement of chemicals used for aerial eradication on a finding by the Secretary of State, in consultation with the heads of other relevant United States federal agencies, that (a) the aerial eradication is being carried out in accordance with United States regulatory controls and (based also on consultation with the Colombian government) Colombian law, and (b) the chemicals used in the aerial eradication do not pose unreasonable risks or adverse effects to humans or the environment.<sup>2</sup> *See id.* at 14.

## ARGUMENT

### I. Plaintiffs' Claims Present Questions Relating to National Security and Foreign Policy That Are Not Justiciable.

Plaintiffs' federal and common law claims are nonjusticiable for two independently-dispositive reasons. As the United States Supreme Court has repeatedly made clear "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). Plaintiffs' claims are "intimately related" to both. First, plaintiffs' claims would undermine U.S. national security by interfering with U.S. policies to stem the flow of illegal narcotics trafficking and to combat international terrorism. Second, plaintiffs' claims necessarily implicate and intrude upon U.S. foreign policy and diplomatic relations in the Andean region.

The United States Supreme Court has stated that, "unless Congress specifically has provided otherwise, courts have traditionally been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (citing cases). "Of the legion of governmental endeavors, perhaps the most

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<sup>2</sup> In addition, funds may not be obligated or expended for use in aerial eradication unless the Secretary of State determines and certifies to Congress that procedures are available to evaluate claims of local citizens regarding alleged health problems or damage to licit agricultural crops from the aerial eradication and to provide fair compensation for meritorious claims. *See id.*, at 14-15.

clearly marked for judicial deference are provisions for national security and defense." *Tiffany v. United States*, 931 F.2d 271, 279 (4th Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992) (citing *Rostker v. Goldberg*, 453 U.S. 57, 64-67 (1981)). Decisions relating to national security are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *People's Mojahedin Organization of Iran v. United States Department of State*, 182 F.3d 17, 23 (D.C. Cir. 1999). "To the degree that the judiciary is permitted to circumscribe the national security options of our elected officials, it decreases the ability of the political branches to impose their will on another nation and at worst, it permits the imposition of the will of another nation on the United States." *Thamasson v. Perry*, 80 F.3d 915, 925 (4th Cir. 1996).

Likewise, it is well established that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative -- 'the political' -- departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918).<sup>3</sup> The Supreme Court has cautioned that decisions relating to foreign policy "are delicate, complex, and involve large elements of prophesy. They are and should be taken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). "Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or

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<sup>3</sup> See also *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 (2000) (acknowledging that "the nuances of the foreign policy of the United States ... are much more the province of the Executive Branch and Congress than of this Court") (citation omitted); *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1314 (11th Cir. 2001) ("Matters relating to the conduct of foreign relations are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference").

legislative branch; but many such questions uniquely demand single-voiced statement of the Government's views." *Baker v. Carr*, 369 U.S. 186, 211 (1962).

In his declaration attached hereto as Exhibit B, Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs Rand Beers -- who is responsible for all United States government policies and initiatives in support of international counter-narcotics efforts in the Andean region -- explains in detail why the issues raised in this litigation are not suitable for judicial resolution:

"United States counternarcotics policy in Colombia and the Andean Region is the product of a complicated balancing of U.S. national security and foreign policy objectives that cannot be addressed in any private litigation. This policy has been approved at the highest levels of the government and has received the direct attention of the President, the Secretary of State, and the National Security Council, among others, and has been endorsed by Congress. The decisions reached in implementing this policy are beyond judicial expertise, and any pronouncements by this court in the context of a private litigation could have foreign policy and national security consequences that the court cannot predict and for which the court cannot account."

Beers Decl. at ¶ 4.

Mr. Beers states that "the *Arias* litigation poses a grave risk to U.S. national security and foreign policy objectives." *Id.* at ¶ 3. In particular, Mr. Beers states that disruption of the aerial illicit crop eradication operations at issue in this case would: (1) "undermine national security by depriving the United States of a key weapon in its arsenal for stemming the flow of illicit narcotics into this country and by allowing international terrorist organizations in Colombia to continue to reap huge profits from drug trafficking with which they will target U.S. interests and American lives," (2) interfere with "a linchpin to U.S. foreign policy objectives to foster democratic and stable governments in Colombia and other Andean nations and to further important trading relationships in the region," and (3) undercut "the foundation for numerous bilateral and multilateral commitments between and among the United States, seven Andean

nations, and other international partners, including Great Britain and Spain." *Id.* at ¶¶ 5-6; *see also id.*, at ¶¶ 28, 62. Mr. Beers further explains that the continued pendency of this litigation "will undermine U.S. foreign policy and national security objectives around the world by sending the message that the United States does not speak with one voice and cannot stand by its international commitments" and "threatens breaches in operational security of the aerial eradication efforts that would not only jeopardize the success of the drug eradication efforts but would pose a grave risk to the lives of [American] pilots involved in spraying operations." *Id.* at ¶ 7-8; *see also id.*, at ¶ 20 (noting that over 100 spray planes and/or escort helicopters were hit by hostile ground fire in 1999 and 2000, resulting in three fatalities).

Although not every case touching upon foreign relations or upon national security must be dismissed as nonjusticiable, dismissal is plainly required here. The Supreme Court has instructed that, before allowing a plaintiff to proceed with such a case, a trial court should consider each of the following six factors:

- (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department";
- (2) "a lack of judicially discoverable and manageable standards for resolving it";
- (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion";
- (4) "the impossibility of a court undertaking independent resolution without expressing lack of respect due coordinate branches of government";
- (5) "an unusual need for unquestioning adherence to a political decision already made"; and
- (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

*Baker*, 369 U.S. at 217. If *any one* of these six factors "is inextricable from the case at bar," then dismissal for non-justiciability on the grounds of a political question's presence "is appropriate."

*Id.* In this case, *all six* of these factors support dismissal.

First, the national security and foreign policy issues implicated in this action are plainly matters reserved to the executive and legislative branches under Articles I and II of the Constitution. Decisions pertaining to national security "are entrusted to the political branches." *Industria Panificadora, S.A. v. United States*, 763 F. Supp. 1154, 1159 (D.D.C. 1991), *aff'd on other grounds*, 957 F.2d 886 (D.C. Cir. 1992). Likewise, "[a]s courts are unschooled in 'the delicacies of diplomatic negotiation and the inevitable bargaining for the best solution of an international conflict,' the Constitution entrusts resolution of sensitive foreign policy issues to the political branches of government." *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (citing cases). Moreover, the judiciary has at best only a limited interest in the matters at issue in this case. The Court is not being asked to protect the legal rights of U.S. citizens or any persons living in this country, but rather is being asked to hear a challenge by foreign nationals against U.S. foreign policy and national security determinations. U.S. courts have properly been more reluctant to reach out to adjudicate claims implicating foreign policy or national security where brought by foreign nationals.<sup>4</sup> *See also* Beers Decl. at ¶ 9 (noting that the putative class "is drawn from a region adjacent to one largely controlled by drug traffickers and international terrorists," raising the possibility that plaintiffs may have been "intimidated or co-opted by these hostile forces").

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<sup>4</sup> *Contrast Ramirez v. Weinberger*, 745 F.2d 1500, 1514 (D.C. Cir. 1984) (claim brought by U.S. citizen for alleged seizure of property during military operations abroad initially held justiciable), *vacated and remanded*, 471 U.S. 1113 (1985), *case dismissed*, 788 F.2d 762 (D.C. Cir. 1986), *with Eminent v. Johnson*, 361 F.2d 73 (D.C. Cir. 1966) (claim brought by nonresident alien for alleged damage to property during military operation abroad held nonjusticiable).

Second, there are no judicially discoverable and manageable standards for resolving the questions raised by this suit. In order to determine whether the State Department and its contractor, DynCorp International, conducted aerial narcotics eradication operations in a negligent or improper manner, this court would have to review foreign policy determinations reached by the U.S. State Department in consultation with the Colombian government regarding where and how such operations should be conducted in light of the countries' joint and respective national interests. *See Beers Decl.* at ¶¶ 16, 26, 35, 36. Moreover, the Court would be required to determine how spray flights should be reasonably conducted to achieve U.S.-Colombia objectives of drug eradication while avoiding hostile ground fire from the drug traffickers and terrorist organizations in the region. *See id.*, at ¶¶ 20, 21, 25, 36, 47. The State Department explained some of the factors implicated in this determination in its 2001 safety report to Congress:

"It would be nearly impossible -- tactically and financially -- to match the pace and breadth of expansion [of coca cultivation in Colombia] by dispatching teams to eradicate the coca fields manually. It would be equally as difficult to protect these workers, or their security forces, from the certain and deadly violence that would escalate as they encountered hostile coca growers, insurgents and paramilitary forces protecting illicit fields. Herbicide application by airplane is the most cost-effective way of coping with the magnitude of the problem and ensuring that eradication operations do not turn violent. Spray programs can more quickly and easily adjust their operations to mitigate potential violence in the face of a likely confrontation with hostile growers and their defenders than can eradication teams on the ground."

2001 State Department safety report, at 4. As the Supreme Court stated in a related context, "it is difficult to conceive of an area of [discretionary] governmental activity in which the courts have less competence." *Giligan v. Morgan*, 413 U.S. 1, 10 (1973) (holding issues of National Guard training and weaponry are essentially the exercise of discretionary professional military judgments within the constitutionally vested responsibility of the legislative and executive branches, and outside the court's competence).<sup>5</sup> Court review here will also be significantly complicated by the fact that much of the information underpinning U.S. counter-narcotics policy in Colombia and the Andean Region is highly sensitive and classified. *See Chicago and S. Airlines, Inc.*, 333 U.S. at 111 ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences."); *see also* Beers Decl. at ¶ 27.

Third, resolution of this case would require an initial policy determination of a kind appropriately reserved for the executive and legislative branches, namely whether the aerial narcotics eradication program in Southern Colombia is appropriate. This issue has been extensively debated by the last two Congresses and the last two Administrations, and the considered determination of both of the political branches of government has been that these operations are essential to U.S. national security and foreign policy. *See* Beers Decl. at ¶¶ 4, 10,

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<sup>5</sup> *See also, e.g., Atkepe*, 105 F.3d at 1404 (court has no manageable standards to determine whether Navy conducted missile firing drill in a negligent manner); *Tiffany*, 931 F.2d at 279 ("Myriad possibilities for mischievous judicial inquiry abound: whether planes should have been sent at all; the proper number of planes the routes they flew; the angles of the intercepts; the correct distance from the target; the proper reaction to weather conditions; the quality of on-board radar system; the compatibility of communications systems."); *Zuckerbraun v. General Dynamics*, 755 F. Supp. 1134, 1142 (D. Conn. 1990) ("courts lack standards with which to judge whether reasonable care was taken to achieve tactical goals in combat while minimizing injury and loss of life"), *aff'd on other grounds*, 935 F.2d 544 (2d Cir. 1991); *Nejad v. United States*, 724 F. Supp. 753, 755 (C.D. Cal. 1989) (same).

14-18, 35. This decision is "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Chicago & S. Air Lines, Inc.*, 333 U.S. at 111. As the Supreme Court recently explained: "We have, after all, not only recognized the limitations of our own capacity to determine precisely when foreign nations will be offended by particular acts, but consistently acknowledged that the nuances of the foreign policy of the United States are much more the province of the Executive Branch and Congress than of this Court." *Crosby*, 530 U.S. at 386; *see also, e.g., Joo v. Japan*, 172 F. Supp.2d 52 (D.D.C. 2001) (holding claim for war crimes brought by Korean "comfort women" against Japan nonjusticiable because post-WWII claims settlement regime had been exclusively constructed by the political branches, and it was not the place of the courts to resolve these claims); *In re Nazi Era cases Against German Defendants Litig.*, 129 F. Supp.2d 370, 377-78 (D.N.J. 2001) (holding claims of WWII slave laborers brought against private companies nonjusticiable); *Burger-Fischer v. DeGussa AG*, 65 F. Supp.2d 248 (D.N.J. 1999) (same); *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424 (D.N.J. 1999) (same).

Fourth, adjudicating this case would express a lack of respect for the political branches. The aerial narcotics eradication program has received direct attention and approval from the highest levels of the last two Administrations, has received continued support in Congress, and has played an integral role in U.S. foreign relations with countries in the Andean region. *See* Beers Decl. at ¶¶ 4, 35. Congress recently appropriated \$625 million to provide additional counter-narcotics funding to sustain and expand U.S. support for Plan Colombia after extensive debate regarding the very allegations raised by plaintiffs in their complaint. *See* SOBF ¶¶ 45-48, *supra*. The determination to proceed with these operations is squarely within the discretionary authority and expertise of the political branches, and is the product of a complicated balancing of

U.S. foreign policy and national security interests that cannot and will not be addressed in any private litigation. *See Atkepe*, 105 F.3d at 1404.

Fifth, there is an unusual need here for adherence to the discretionary decisions reached by the executive and legislative branches. Because the Andean region is the source of virtually all cocaine entering the United States and because of the close link between illegal narcotics trafficking in Colombia and international terrorism, any disruption of the aerial eradication operations in Colombia will have a myriad of adverse national security consequences and will create a legal precedent that could seriously undermine United States national security efforts in other parts of the world. *See Beers Decl.*, at ¶¶ 6-7, 29-47. Further, the aerial narcotics eradication operations are at the center of a multi-billion dollar, multi-year foreign policy initiative involving seven Andean nations, and other international partners around the world, including Spain and the United Kingdom. *See Beers Decl.* at ¶¶ 6, 14-18. In reliance on commitments made by the United States, Colombia has expended significant resources in connection with the drug spraying campaign, and its police and military forces are undergoing training by DynCorp International and U.S. military personnel that will allow these forces to assume complete control over the program in the coming years. *See id.*, at ¶¶ 14-16, 21, 36.

Sixth, adjudicating this case would give rise to the potential of embarrassment from multifarious pronouncements regarding U.S. foreign policy and antiterrorism policy in the Andean region. The United States government has repeatedly expressed its commitment to supporting counter-narcotics efforts in the Andean Region, and Congress has just recently appropriated hundreds of millions of additional dollars in support of those efforts. Any action other than an immediate dismissal by this Court would severely undercut the United States' credibility in the Andean region, and would significantly complicate efforts by the United States

to build international coalitions on a variety of issues crucial to the national security. *See Beers Decl.* at ¶ 7.

This case implicates each one of the six separately sufficient grounds for non-justiciability under *Baker*. Plaintiffs' claims are not proper for judicial review and should be dismissed.

## II. Plaintiffs Fail to State a Claim Under Federal Law.

Plaintiffs' federal law claims under the Alien Torts Claims Act ("ATCA") and the Torture Victims Protection Act of 1991 ("TVPA") fail for the additional reason that the Complaint fails to state a claim under those two statutes. *See ATCA and TVPA, 28 U.S.C.A. § 1350 (2000).* Plaintiffs base their ATCA and TVPA claims on unsubstantiated allegations that DynCorp International's activities under its contract with the State Department constitute torture in violation of "the law of nations, customary international law, and worldwide industry standards and practices." *See Complaint* ¶¶ 63 & 67. These claims must be dismissed because: (1) DynCorp International's alleged violation of international law was directly authorized by Congress; (2) plaintiffs fail to allege concrete facts showing conduct that would satisfy any international law definition of torture; and (3) even assuming, *arguendo*, that plaintiffs' had alleged such facts, the ATCA and TVPA do not reach the conduct of private corporations.

### A. Congress Authorized the Aerial Eradication Operations Plaintiffs Allege to be in Violation of International Law.

In order to establish a claim under the ATCA, plaintiffs must show that DynCorp International violated the "law of nations," *i.e.*, international law. 28 U.S.C.A. § 1350; *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164-65 (5th Cir. 1999). Similarly, plaintiffs' claim under the TVPA must be premised on an alleged violation of international law regarding torture. *See 28 U.S.C.A. § 1350, note; see also Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1195

(S.D.N.Y. 1996) ("The Torture Act was promulgated to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights") (citation omitted). But plaintiffs cannot make any such showing here, because it is undisputed that DynCorp International's allegedly unlawful conduct is expressly authorized by Congress. See 22 U.S.C.A. § 2291; see also Complaint ¶ 27 (alleging that "the monetary compensation to the DynCorp Defendants for the extermination of cocaine plants and/or heroin poppies from the Colombian rain forest comes directly from funds approved by Congress for such purposes").

It is well established that "no enactment of Congress can be challenged on the ground that it violates customary international law." *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988). Thus, while statutes "inconsistent with principles of customary international law may well lead to international law violations ... within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency." *Id.*, 859 F.2d at 938. "[S]o far as concerned domestic law, the rule was laid down that subsequently enacted statutes would preempt existing principles of customary international law -- just as they displaced prior inconsistent treaties." *Id.*, 859 F.2d at 939; see also, e.g., *Breard v. Greene*, 523 U.S. 371, 376 (1998) ("an Act of Congress ... is on a full parity with a treaty, and ... when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null"); *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1451 (9th Cir. 1995) ("international law is displaced by 'a properly enacted statute, provided it be constitutional, even if that statute violates international law'") (quoting *Alvarez-Mendez v. Stock*, 941 F.2d 956, 963 (9th Cir. 1991); *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983) ("[I]n enacting statutes,

Congress is not bound by international law. ... If it chooses to do so, it may legislate with respect to conduct outside the United States, in excess of the limits posed by international law.").

Congress has repeatedly authorized the aerial eradication operations that plaintiffs contend violate international law for over 20 years, under chapter 8 of Part I of the Foreign Assistance Act of 1961, as amended, 22 U.S.C.A. § 2291. *See* 22 U.S.C.A. § 2291, historical and statutory notes, 1978 Amendment (adding provision to statute regarding the use of herbicides for aerial eradication); *see also* Beers Decl. at ¶ 10 (noting that the United States and Colombia "have worked together in joint aerial eradication efforts since 1978"). During the past 20 years, Congress has given careful scrutiny to any alleged health and environmental impacts of these spraying operations, and each year, Congress has made an informed decision to reauthorize and fund the aerial eradication efforts as a central part of the U.S. international narcotics control policy. *See* 22 U.S.C.A. § 2291, historical and statutory notes, 1981 Amendment (adding predecessor to current annual reporting requirement); *see also* 22 U.S.C.A. § 2291(d)(3); Beers Decl. at ¶¶ 22-23, 35, 62; SOBF ¶¶ 36-48, *supra*. Congress has clearly spoken to the legality of these operations.

Moreover, while the approval of the U.S. Congress is sufficient by itself to defeat their international law claim, plaintiffs' attempt to craft an international law violation here also runs directly counter to the considered judgment of the international community. In sharp contrast to plaintiffs' claims, international law specifically endorses efforts to eradicate illicit narcotics. Article 14 of the United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances of 1988 (attached hereto as Exhibit H), to which 162 nations are signatories, directs that "[e]ach Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy,

coca bush and cannabis plants" and that "Parties may co-operate to increase the effectiveness of eradication efforts." Moreover, the aerial narcotics eradication operations here at issue are a key component of Plan Colombia, which has been endorsed and supported by the Andean nations and by other international partners, including Spain and Great Britain. *See* Beers Decl. at ¶ 6. The only quasi-governmental forces that have opposed these operations are the international terrorist organizations in Colombia that are partners in the illegal narcotics industry. *See* Beers Decl. at ¶ 39, 43, 47.

B. Plaintiffs Fail to Allege Facts Showing Any Act of Intentional Misconduct by DynCorp International that Could Constitute a Violation of International Law under the ATCA or the TVPA.

Plaintiffs also fail to substantiate their inflammatory allegations with any concrete facts that would support a claim that DynCorp International engaged in any intentional misconduct in violation of international law. Plaintiffs face a heavy burden in alleging a violation of international law actionable under the ATCA. The ATCA "applies only to shockingly egregious violations of universally recognized principles of international law." *Beanal*, 197 F.3d at 167 (dismissing environmental tort claim brought under ATCA and TVPA for failure to state a claim). Thus, "[i]t is only where the nations of the world have demonstrated that the wrong is of mutual and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation in the meaning of the [ATCA]." *Id.*

Plaintiffs attempt to meet this heavy burden by alleging that DynCorp International's involvement in the aerial narcotics eradication operations constitutes torture, as that term is

defined in various international conventions. *See* Complaint ¶¶ 50 & 65.<sup>6</sup> But plaintiffs fail to allege any facts that would support such a claim. Under international law, torture is defined as:

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

*See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article I).<sup>7</sup> Accordingly, plaintiffs must allege facts showing, *inter alia*, that DynCorp International acted: (1) at the instigation of a public official, (2) with the intent to inflict severe pain or suffering, and (3) for purposes of obtaining information, punishment, intimidation, or discrimination.

Plaintiffs here fail to allege facts to substantiate any of the elements of torture. At the most basic level, plaintiffs' claims fail because plaintiffs concede that their alleged harm was not due to any intentional conduct taken against them. To the contrary, plaintiffs allege that the herbicide that they contend caused them harm was intended for targets in Colombia but "shifted with the wind." *See* Complaint ¶¶ 9, 11, 13, 16, 18, 20. Plaintiffs also do not allege any facts showing that DynCorp International believed, let alone intended, that the herbicide would cause adverse health and environmental effects. Again to the contrary, plaintiffs cite in their complaint to the "position of the United States government, as expressed by Assistant Secretary of State

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<sup>6</sup> Plaintiffs also allege that DynCorp International's conduct constitutes "Crimes Against Humanity," *see* Complaint ¶ 60, but this allegation appears to be identical in substance to their allegation that DynCorp International engaged in torture.

<sup>7</sup> The definition of torture in the TPVA and in the other international agreements cited in the *Arias* complaint are substantially similar.

Rand Beers" that the herbicide used by DynCorp International "has toxicity similar to common salt." Complaint ¶ 36.

Further, plaintiffs fail to allege any facts showing state sponsorship of an alleged intentional infliction of severe pain and suffering. Instead, plaintiffs offer unsubstantiated and non-specific allegations of a mysterious conspiracy involving various U.S. oil companies and oil ventures in Ecuador with no identified connection to DynCorp International or U.S. counter-narcotics policies in the region. *See* Complaint ¶¶ 29-32. Notably, plaintiffs' counsel in this litigation have separately been engaged for the past eight years in litigation against these same U.S. oil companies for unrelated environmental torts allegedly committed against an overlapping putative class of Ecuadoran plaintiffs. That litigation was recently dismissed on *forum non conveniens* grounds, and it appears from plaintiffs' allegations here that plaintiffs' counsel are trying to use this lawsuit as a means to open a new front in that prior, otherwise unrelated, litigation. *See Aguinda v. Texaco, Inc.*, 142 F. Supp.2d 534 (S.D.N.Y. 2001).

Simply put, plaintiffs' claims are devoid even of allegations sufficient to constitute torture under international law, let alone facts that would put DynCorp International on notice as to any specific conduct that would support such allegations.

C. Neither the ATCA nor the TVPA Provides a Cause of Action Against a Private Corporation.

Plaintiffs' ATCA and TVPA claims against DynCorp International fail for the additional reason that neither of these statutes creates a cause of action for alleged private acts of torture. In his oft-cited concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984), Judge Edwards declined to read the ATCA "to cover torture by non-state actors, absent guidance from the Supreme Court on the statute's usage of the term 'law of nations.'" Likewise, the Second Circuit held in *Kadic v. Karadzic*, 70 F.3d 232, 239, 243 (2d Cir. 1995), that while

"certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of the state or only as private individuals," torture is "proscribed by international law only when committed by state officials or under color of law." *See also Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (following *Kadic*).

The TPVA also requires state action. By its plain language, the Torture Victim Protection Act renders liable only those individuals who have committed torture "under actual or apparent authority, or color of law, of any foreign nation." *See Kadic*, 70 F.3d at 245. The legislative history of the TPVA confirms that this statutory language "was intended to 'make clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim,' and that the statute 'does not attempt to deal with torture or killing by purely private groups.'" *Id.*, 70 F.3d at 245 (quoting H.R.Rep. No. 102-367, at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87); *see also Islamic Salvation Front*, 993 F. Supp. at 9 (same). Plaintiffs' claim under the TVPA fails for the additional reason that the statute only applies to "individuals" and thus does not provide a cause of action against a corporations even for state-sponsored terrorism. *See Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 381-82 (E.D. La. 1997) (concluding that the term "individuals" in TVPA does not include corporations), *aff'd on other grounds*, 197 F.3d 161 (5th Cir. 1999).

### III. Plaintiffs' State Tort Law Claims Are Preempted.

Plaintiffs also ask this court to find that DynCorp International's conduct in support of U.S. counter-narcotics operations in Colombia violate various doctrines of state common law. Even if these claims were justiciable and assuming for purposes of this pleading that state common law principles are relevant to alleged harms in Ecuador, plaintiffs' state tort law claims fail because they are preempted by federal law on two separate grounds. First, state regulation of

national security or foreign policy concerns through state tort law runs afoul of the Supremacy Clause of the United States Constitution. Second, plaintiffs' state tort law claims rely on allegations that the herbicide used in the aerial narcotics eradication efforts is harmful to human health and the environment, a premise that has been specifically rejected by the federal government.

A. Plaintiffs May Not Rely on State Tort Law to Regulate U.S. National Security and Foreign Policy Determinations.

The Supreme Court has cautioned that "the delicacy of issues which [a]re posed [in matters involving foreign policy] raise[] grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system. In that field, 'any concurrent state power that may exist is restricted to the narrowest of limits.'" *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941)). The Supreme Court's rulings in *Hines* and its progeny "mean that when Congress legislates in an area of foreign relations, there is a strong presumption that it was intended to preempt the field, in particular where the federal legislation does not touch on a traditional area of state concern." *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 76 (1st Cir. 1999), *aff'd sub nom.*, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). The fact that foreign policy and national security are areas "of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 508 (1988); *see also* Lawrence H. Tribe, *American Constitutional Law* § 4-5 at 656 (3d ed. 2000) ("all state action, whether or not consistent with current foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void as an unconstitutional infringement on an exclusively federal sphere of responsibility").

Plaintiffs' requests for injunctive and damages relief would plainly have the effect of regulating U.S. foreign policy and national security determinations. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) ("state regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay [state law tort] compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy") (citation omitted). Through their state common law tort claims, plaintiffs seek to block further aerial illicit crop eradication operations in Southern Colombia that the federal government has determined are essential to U.S. foreign relations with the Andean nations and necessary to protect Americans from the twin threats of illegal narcotics trafficking and international terrorism. *See Beers Decl., passim*. These federal determinations leave no room for state-based tort law intrusion, and plaintiffs' common law claims are accordingly preempted.

Plaintiffs' tactical decision to sue the United States' government contractor, DynCorp International, rather than the United States directly does not alter this analysis. The Supreme Court has explained that regardless whether a case "involves an independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee ... there is obviously implicated the same interest in getting the Government's work done." *Boyle*, 487 U.S. at 505. Accordingly, if the "authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability for the contractor for executing its will." *Id.*, 487 U.S. at 506. Courts have repeatedly held that where the federal government is immune from liability under state law, that immunity extends to federal contractors acting in the government's stead. *See Brown v. Nationsbank Corp.*, 188 F.3d 579, 589 (5th Cir. 1999) ("If the private defendants acted

in good faith by reasonably relying upon the authority of government agents, their actions are shielded from state law action"); *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1447-48 (4th Cir. 1996) ("If absolute immunity protects a particular governmental function, no matter how many times or to what level that function is delegated, it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions."); *Koohi v. United States*, 976 F.2d 1328, 1336 (9th Cir. 1992) ("the Supreme Court has recognized that the exceptions to the Federal Torts Claims Act may preempt common law tort actions against defense contractors under certain circumstances."); *see also* Beers Decl. at ¶¶ 24-28.

B. The Federal Government's Determination Regarding the Safety of the Aerial Eradication Operations in Colombia Preempts Plaintiffs' State Tort Law Allegations to the Contrary.

Plaintiffs' state common law tort claims are also impliedly preempted because they conflict with the federal government's specific direction as to the herbicide used in the aerial narcotics eradication operations in Colombia and the federal government's determination that this herbicide is safe to humans, livestock, and the environment. The Supreme Court has explained that state common law tort claims are impliedly preempted, even where Congress has not evidenced an intent to occupy a given field, "to the extent [they] actually conflict[] with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (citations omitted). Where a private plaintiff's arguments "would permit common-law [tort] actions that 'actually conflict' with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution,

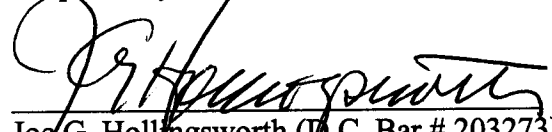
through the operation of ordinary pre-emption principles, seeks to protect.” *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 872 (2000) (holding that implied preemption required where "state law could impose legal duties that would conflict directly with federal regulatory mandates, say, by premising liability upon the presence of the very windshield retention requirements that federal law requires").

There can be no question that plaintiffs' common law claims here would make it "impossible to comply with both federal and state law" and stand as an "obstacle to the accomplishment of the full purposes and objectives of Congress." Pursuant to their contract, the State Department selected, approved, and supplied DynCorp International with the very herbicide (glyphosate) and adjuvants that plaintiffs would have this court determine under state tort law caused alleged adverse health and environmental effects. *See* Beers Decl. at ¶ 26. Congress specifically directed and authorized the President to monitor and report back to Congress as to the health and environmental effects of the spraying operations. *See* 22 U.S.C.A. § 2291(d); H.R. Conf. Rep. No. 106-710, at 172 (2000). The State Department (to whom the President delegated his authority) specifically studied the herbicide spray used in the operations at issue in Southern Colombia and determined that there are "no grounds to suggest concern for human health." 2001 State Department safety report, at 2; *see also* Beers Decl. at ¶¶ 22-23. Further, the State Department determined that "herbicide application by airplane is the most cost-effective way of coping with the magnitude of the problem and ensuring that the eradication operations do not turn violent" and that "switching to 'less effective' chemicals would risk undermining the eradication effort and increasing coca cultivation, a move that would inevitably cause greater health and environmental damage to Colombia." 2001 State Department safety report, at 4.

## CONCLUSION

The Ecuadoran plaintiffs' attempt to invoke the jurisdiction of this U.S. court to challenge U.S. foreign policy and national security determinations in the Andean region is wholly improper. As explained by Assistant Secretary of State Beers, the continued prosecution of this litigation would pose grave risks to the prospects of peace and security in Colombia and its neighboring countries, would undermine the war against terrorism, and would cripple U.S. efforts to stem the flow of illicit narcotics into this country. Plaintiffs' claims are nonjusticiable, and their invocation of international law and state tort law is directly contrary to the expressed intent of Congress. Plaintiffs' complaint should be dismissed in its entirety.

Respectfully submitted,



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