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ARGUMENT IN REPLY

I. INTRODUCTION

Defendants' brief recognizes that plaintiffs' claims concern the use of a poison in war. Indeed, defendants concede, "All can agree that international law has long contained a general prohibition on the use of 'poison' during war." (Def. Br. 30). Defendants agree that these "rules are universally accepted" as well as "ancient." (Def. Br. 25, 26). Defendants also admit that, "[a]s with 'poison,' all may agree that international law prohibits infliction of 'unnecessary' or 'unjustified' suffering." (Def. Br. 49). Despite these concessions, defendants argue that plaintiffs' claims fail to satisfy the standard for claims under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), established by the United Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Defendants' argument, however, ignores the development of case law under the ATS since this Court's seminal decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which the Supreme Court largely relies upon and endorses in *Sosa*. *Filartiga* and later cases established a set of core principles that defendants ignore:

• The law of nations, defined as customary international law, is part of federal common law.

• The ATS authorizes the federal judiciary to entertain certain claims arising under customary international law.

• The kind of customary international law claims that the ATS authorizes are limited to those that are based upon universally accepted, well recognized, and specific international law norms.

• International law norms are not static, but develop and change over time as the practice of nations develops and changes.

• International law imposes liability upon individuals for violations of clearly established norms.

Sosa endorsed all of these principles. Its only innovation in the area was to tie the specificity requirement for recognition of modern international norms to three ancient norms recognized in the 18th century as part of the common law: "violation of safe conducts, infringement of the rights ambassadors, and piracy." 542 U.S. at 724. Specifically, *Sosa* held that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized." Id. at 725.

Defendants ignore *Sosa*'s comparative standard. Instead, defendants invent a standard that would require that a norm be fleshed out with the specificity of the Internal Revenue Code by *custom itself* before the federal judiciary may apply the norm as part of federal common law. Defendants claim that the federal judiciary may

not "create," "expand," or even "supplement" international law norms in the process of applying those norms to specific disputes. (Def. Br. 29). Defendants' view is inconsistent with how the common law works, and contrary to *Sosa's* core holding affirming the role of the common law. Defendants avoid comparing the specificity of the ban on poison during war, or the proscription against the use of weapons that cause unnecessary destruction and suffering, to the specificity of the 18th century paradigm norms because defendants know full well that the poison ban and the ban on infliction of harm unjustified by military necessity are defined with far greater specificity than the Blackstonian paradigms.

This is confirmed by the clear position of the United States government set forth in the Cramer memorandum of 1945 (A.1489-91), the Army Field Manual of 1956 (A.2294), and the Buzhardt memorandum of 1971 (A.1485-89). These three sources state without equivocation that the use of herbicides that have poisonous effects on enemy personnel violate international law norms. This specific, well-established rule is defined with far greater specificity than the 18th century paradigms, one of which, "piracy," was defined with no more specificity than as "robbery upon the sea." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820). Accordingly, plaintiffs' complaint sets forth claims that easily satisfy *Sosa*'s comparative standard.

The remainder of defendants' brief relies heavily upon their incorrect view of

Sosa. The Supreme Court in *Sosa* did not, as defendants wrongly claim, sweep away the well-established international legal principles imposing individual and corporate liability for violations of international law norms. Instead, those principles were endorsed in *Sosa* itself, and so the district court was correct in rejecting defendants' arguments in this regard. Similarly, nothing in *Sosa* raises the bar for justiciability, and defendants have not come close to satisfying the heavy burden established by the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962), for a federal court to decline jurisdiction based upon the political question doctrine. This case does not, as the government wrongly contends, challenge the Executive Branch's decision to launch a herbicide campaign, nor does it seek judicial review of "battlefield decisions." (U.S. Amicus Br. 21). Instead, this case concerns the narrow question of these defendants' culpable and knowing conduct in supplying a product they knew would spread poisonous dioxin throughout vast portions of Viet Nam. Finally, defendants do not cite any authority for their novel proposition that international law claims are subject to the "federal common law" government contractor defense. Nothing in international or domestic law supports the position, resoundingly rejected at Nuremberg, that private actors may escape liability for international law violations based on the claim that "the government made me do it."

We flesh out all of these arguments below. For the reasons set forth in the this

brief and in our principal brief, defendants' arguments should be rejected, and the district court's judgment dismissing plaintiffs' claims should be reversed and this case remanded for class certification and trial.

II. PLAINTIFFS' CLAIMS ARE ACTIONABLE UNDER THE ATS AS CUSTOMARY INTERNATIONAL LAW AND FEDERAL COMMON LAW.

1. Pre-*Sosa* Case Law Cited With Approval In *Sosa.*

In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), this Court established the standard for recognition of international law norms as part of federal common law enforceable under the ATS, which in all material respects was adopted unchanged by the United States Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004): to be actionable, such norms must be "well-established [and] universally recognized norms of international law." *Filartig*a, 630 F.2d at 888; *compare Sosa*, 542 U.S. at 725 (international law claims must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized"). The Supreme Court in *Sosa* characterized its own holding as "generally consistent with the reasoning of many of the courts and judges who faced the issue" before it reached the Supreme Court, including this Court's decision in *Filartiga. Sosa*, 542 U.S. at 732, *citing Filartiga*, 630 F.2d at 890; *see also* 542 U.S. at 731 ("The position we take today has been

assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga*.") The only novel element added by *Sosa* was the requirement of tying the "well-established" criterion to "the features of the 18th-century paradigms," 542 U.S. at 725, a requirement ignored by defendants in their brief in favor of their overreaching interpretation of *Sosa* as establishing an essentially unattainable standard of specificity.

Filartiga held that a foreign state official could be held liable for torture. In view of *Sosa*'s later holding that whether a court should recognize a particular international law norm depends upon a comparison between that norm and Blackstonian norms such as piracy, it is significant that this Court in *Filartiga* noted that early in the 19th century the Supreme Court had held that "the crime of piracy (on the high seas) as defined by the law of nations" was "sufficiently determinate in meaning to afford the basis for a death sentence." *Filartiga,* 630 F.2d at 880, *citing United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820). The entirety of international consensus found by the Supreme Court in *Smith* was that piracy was broadly defined as "robbery upon the sea." *Smith*, 18 U.S. (5 Wheat) at 162; *see also The Paquete Habana,* 175 U.S. 677 (1900).

This Court in *Filartiga* also noted the fundamental precept, endorsed by *Sosa*, that international law norms are not static, but instead change and develop over time

as the practice of nations evidences recognition of new norms to govern international behavior:

> [The Paquete] Habana is particularly instructive for present purposes, for it held that the traditional prohibition against seizure of an enemy's coastal fishing vessels during wartime, a standard that began as one of comity only, had ripened over the preceding century into a "settled rule of international law" by "the general assent of civilized nations." [*The Paquete Habana*, 175 U.S.] at 694[, 686]. Thus, it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.

Filartiga, 630 F.2d at 881 (some citations omitted). Finding that modern international law does indeed contain a universally recognized and well-established norm prohibiting torture, 630 F.2d at 884, this Court then determined that the federal judiciary could constitutionally enforce such international law norms pursuant to the express jurisdictional grant contained in the ATS:

> The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution. Therefore, the enactment

of the Alien Tort Statute was authorized by Article III.

630 F.2d at 886. This is so because during "the eighteenth century, it was taken for granted on both sides of the Atlantic that the law of nations forms a part of the common law." *Id., citing* 1 Blackstone, *Commentaries* 67, 263-64 (1st ed. 1765-69). This understanding that the law of nations was part of the common law continued to be expressed after the ratification of the Constitution. *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815) (Marshall, C.J.) (in the absence of Congressional enactment, the courts are "bound by the law of nations, which is a part of the law of the land"); *accord, The Paquete Habana*, 175 U.S. at 700 ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."); *see Sosa*, 542 U.S. at 729 ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.").

The District of Columbia Circuit faced the next challenge after *Filartiga's* groundbreaking holding, this time in the context of alleged terrorist acts committed by the Palestinian Liberation Organization, which the international community did not recognize as a sovereign state. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). Although the three-judge panel, based on the facts of that case, held that these particular acts would require an additional element of state action to support an

international law claim under the ATS, they wrote separate concurrences expressing widely divergent views of *Filartiga* and the scope of the ATS.

Judge Edwards's concurrence, cited with approval in *Sosa*,[1] endorsed the *Filartiga* approach. Judge Edwards categorically rejected Judge Bork's view that international law itself must recognize a private right of action enforceable in a municipal court before a U.S. court could enforce that right, writing that Judge Bork's view

> assumes that the "law of nations" could provide a specific, articulated right to sue in a form other than a treaty or executive agreement. Yet no evidence is offered to indicate that jurists or commentators have ever looked to the law of nations to determine when a wrongful deed is *actionable*. This absence of evidence is not surprising, because it is clear that "[i]nternational law itself, finally, does not require any particular reaction to violations of law . . . . Whether and how the United States wished to react to such violations are domestic questions . . . ." L. Henkin, *Foreign Affairs and the Constitution* 224 (1972) (footnote omitted).

[1] *Sosa*, 542 U.S. at 731 ("For practical purposes the point of today's disagreement has been focused since the exchange between Judge Edwards and Judge Bork in Tel-Oren").

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> [T]he law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws. Indeed, given the existing array of legal systems within the world, a consensus would be virtually impossible to reach–particularly on the technical accouterments to an action–and it is hard even to imagine that harmony ever would characterize this issue.

726 F.2d at 777-78 (some citations and internal quotations omitted). Judge Bork's view, rejected by both Judge Edwards and ultimately by the Supreme Court in *Sosa*, is indistinguishable from the defendants' argument in this case. Defendants here, like Judge Bork, contend that international law itself must resolve all issues before a particular norm may be recognized as part of the common law.

This Court addressed the ATS again in *Kadic v. Karadzic,* 70 F.3d 232 (2d Cir. 1995), which involved claimed war crimes ordered by the leader of the self-proclaimed Bosnian-Serb republic during the Bosnian civil war. The district court dismissed the case, holding that it lacked jurisdiction under the ATS to hear plaintiff's claims because the Bosnian-Serb republic was not a recognized state actor. *Doe v. Karadzic,* 866 F. Supp. 734 (S.D.N.Y. 1994), *rev'd sub nom., Kadic v. Karadzic,* 70 F.3d 232 (2d Cir. 1995). This Court reversed, stating:

> We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting

> under the auspices of a state or only as private individuals. An early example of the application of the law of nations to the acts of private individuals is the prohibition against piracy. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161, 5 L.Ed. 57 (1820); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 196-97, 5 L.Ed. 64 (1820). In *The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232, 11 L.Ed. 239 (1844), the Supreme Court observed that pirates were "*hostis humani generis*" (an enemy of all mankind) in part because they acted "without . . . any pretense of public authority." *See generally* 4 William Blackstone, *Commentaries on the Laws of England* 68 (facsimile of 1st ed. 1765-1769, Univ. of Chi. Ed., 1979). Later examples are prohibitions against the slave trade and certain war crimes.

70 F.3d at 239. This Court pointed out that "the liability of private persons" for customary international law violations "and the availability of the Alien Tort Act to remedy such violations was early recognized by the Executive Branch in an opinion of Attorney General Bradford." *Id., citing Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). Finally, this Court found further support in the *Restatement (Third) of Foreign Relations Law of the United States* (1986) ("*Restatement (Third)*"), which states, "Individuals may be held liable for offenses against international law, such as

piracy, war crimes, and genocide." *Restatement (Third)*, pt. II, introductory note, *quoted in Kadic*, 70 F.3d at 240.

This Court examined the particular categories of offenses alleged – genocide and war crimes – and concluded that such offenses violate universally recognized and well-established norms of international law. With regard to war crimes, the Court stated,

> The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II, *see* Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, 450 Int'l Conciliation 304 (April 1949) (collecting cases), and remains today an important aspect of international law, see Jordan Paust, *After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts*, in 4 *The Vietnam War and International Law* 447 ®. Falk ed., 1976).

70 F.3d at 243; see Sosa at 732 n.20 (2004) (citing with approval *Kadic's* holding that private actors could be held liable under international law).

2. *Sosa v. Alvarez-Machain.*

In *Sosa*, plaintiff Alvarez was a physician who the U.S. Drug Enforcement Agency ("DEA") suspected was involved in the torture and murder of a U.S. DEA

agent in Mexico. The DEA hired Mexican nationals to kidnap Alvarez in Mexico and bring him back to the U.S., where he was arrested and prosecuted for his alleged involvement in the DEA agent's death. Alvarez's suit claimed that his "arbitrary detention" violated customary international law prohibiting "illegal" detentions.

The Supreme Court first faced the question of whether the ATS was jurisdictional only, as the defendant argued, or whether the statute authorized courts to hear claims based upon federal common law, which includes customary international law, as *Filartiga* and its progeny had established. Justice Souter, writing for the six-member majority, stated that "the statute is in terms only jurisdictional," but nevertheless "at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa,* 542 U.S. at 712. The Court held that "history does tend to support two propositions,"

> First, there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.

Id., at 719. It would have been "passing strange," in view of this, for "Congress to

vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to no effect whatever until the Congress should take further action." *Id.* The "second inference to be drawn from the history" is

> that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors, violations of safe conduct were probably understood to be actionable, and individual actions arising out of prize captures and piracy may well have also been contemplated.

Id. at 720 (citations omitted).

The next question was whether modern courts were prohibited from recognizing additional international law norms beyond those three examples that the historical record supported were in Congress's contemplation at the time it passed the ATS in 1789. Disagreeing with Justice Scalia's dissent, the majority held that additional causes of action could be recognized, reasoning as follows:

> We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no

> basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy. We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala* . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.

Id., at 724-25.[2]

[2] In fact, not only has Congress never "limited civil common law power by another statute," *Sosa,* 542 U.S. at 725, but legislative history surrounding the 1990 passage of the Torture Victim Protection Act, codified at 28 U.S.C. § 1350, specifically states the intent of both

Houses that the ATS "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." H.R. Rep. No. 102-367, pt. 1, at 3 (1991), *reprinted in* 1992 *U.S.C.C.A.N.* 84, 86; *see also* S. Rep. No. 102-249, at 5 (1991), *reprinted at* 1991 WL 258662 (Nov. 26, 1991).

The Supreme Court gave a number of rationales for the "judicial caution" inherent in the foregoing holding (rationales that defendants mischaracterize as *additional* limitations on the federal judiciary's authority to recognize customary international law norms as part of our common law, *see* Def. Br. at 29-30). The Court rejected Judge Scalia's view that the modern positivistic view of the nature of the common law, epitomized and given ultimate expression in Justice Brandeis's historic opinion in *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938), should prevent federal courts from recognizing any additional customary law norms beyond the three Blackstonian paradigms in the absence of further Congressional direction. The majority stated:

> For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

Sosa, 542 U.S. at 729-30 (numerous citations omitted). Analyzing the international law, including relevant treaties, the Supreme Court rejected Alvarez's claim, stating that it "is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a

federal remedy." *Id.* at 738. This minor transgression is, of course, a far cry from knowingly supplying millions of gallons of dioxin-laced herbicides to be sprayed over a large portion of Viet Nam over a period of years. *See* Beth Stephens, "Sosa v. Alvarez-Machain: 'The Door Is Still Ajar' For Human Rights Litigation In U.S. Courts," 70 *Brook. L. Rev*. 533, 554 (2004) ("The Supreme Court reversed the Ninth Circuit's decision in *Sosa* not because it objected to the standard applied, but rather because it disagreed with the application of the stringent standard to the *Sosa* facts.").

3. Defendants' Misconception Of The *Sosa* Standard.

Defendants concede that "claims brought under the ATS fall within the jurisdiction of the federal courts as a unique species of 'federal common law,'" but at the same time claim that "*Sosa*'s universality and definiteness requirements mean that the substantive rules of decision must reflect the collective judgments of states in the international system." (Def. Br. 28-29). Defendants do not cite any authority for their characterization of *Sosa*'s universality and definiteness requirements. As we have shown, *Sosa* requires no more and no less than a comparison between the Blackstonian norms of the 18th century and the modern norm that is argued to be part of customary international law. Nothing in *Sosa* suggests that all of the "substantive rules of decision" must be ironed out *by international law itself* before the norm may

be made part of the common law. Indeed, defendants' position is antithetical to *any* role of the common law, and hence to *Sosa* itself. Defendants argue that "[b]ecause the legal norms actionable under the ATS go no further than international consensus reflecting the voluntary agreement of states to be bound by international law, federal courts adjudicating claims under the ATS have no authority to create, expand, or supplement these substantive norms under the guise of federal common-lawmaking." (Def. Br. 29). Nothing in *Sosa* or in this Court's ATS jurisprudence supports this restriction on a common law court's authority to "create, expand, or supplement" the law, without which the common law itself could not exist.

Having invented a specificity standard to their liking, defendants apply it rather than *Sosa*'s comparative analysis. Completely absent from defendants' brief is any argument that 18th-century international law defined the paradigm 18th-century norms with greater specificity than contemporary international law defined the "ancient" and "universally accepted" bans on the use of poison and on the infliction of unnecessary suffering at the time of the Viet Nam war. Little wonder, for those very 18th-century paradigm norms were phrased in terms that these defendants today would surely label as "aspirational" or "hortatory" – the paradigm norm prohibiting "piracy," as we pointed out earlier, was defined with no more specificity than "robbery upon the sea." *Smith*, 18(5 Wheat.) U.S. at 162.

It is the very nature of the common law to resolve specific legal issues arising from the application of general norms, such as the question whether to recognize aiding and abetting or corporate liability in the circumstances of this case, on a case-specific basis, and thus to slowly and gradually create a body of judge-made law to govern similar disputes. It is ludicrous to suppose that *any* international law norm arising under customary international law is *ever* going to contemplate and resolve these sorts of specific problems in application without actually being applied in civil disputes. It is only through the application of the law to specific facts, the messy job faced by all common law judges sorting through the idiosyncratic facts of particular cases, that such questions may be answered. *See Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 156 (1795) (holding that a party may be held liable for aiding and abetting the international law offense of privateering). Justice Scalia in his concurrence in *Sosa* and Judge Bork in his concurrence in *Tel-Oren* would reject any role of the common law absent express Congressional direction to the federal judiciary, but *Sosa*'s 6-3 majority ruled the other way, and federal common law lives on in this area.

Defendants' position is predicated on the notion that customary international law itself could resolve all issues of how to apply international law norms to particular situations. But the international legal system is devoid of fora in which to resolve civil disputes, and so to require that customary international law resolve all such

questions *before* the common law may begin its work is asking the scant existing international legal framework to perform tasks it is neither designed nor suited to perform. As we have pointed out, Judge Edwards's concurrence in *Tel-Oren* makes this point cogently: "[G]iven the existing array of legal systems within the world, a consensus would be virtually impossible to reach – particularly on the technical accoutrements to an action – and it is hard even to imagine that harmony ever would characterize this issue." *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring).

In sum, defendants' entire argument is based on a fundamental misreading of *Sosa* and the cases that the Supreme Court endorses therein. Defendants claim, without citation or support, that *Sosa* swept all previous ATS jurisprudence away and supplanted it with a new and unattainable standard of specificity. Defendants seek the anti-common law result advocated by Justice Scalia and Judge Bork, and avoid applying the standard *Sosa* established, which requires comparing the specificity with which the bans on poison and the infliction of destruction and suffering without military necessity are defined today with the loose definitions of "piracy," "infringements on the rights of ambassadors," and "violations of safe conducts" that existed in the time of Blackstone.

4. The Application Of the Proper *Sosa* Standard Demonstrates That The Bans On Poison And Excessive Destruction Without Military Necessity Are At Least As Specific and Universally Accepted As The Three Blackstonian Norms.

Defendants' position that neither the poison ban nor the prohibition against the infliction of unnecessary suffering satisfies the *Sosa* standard is wrong for several reasons. First, defendants' theory fundamentally confuses the norms at issue, which are specifically defined even though broadly phrased, with the application of those norms to particular facts – the job of a common law court adjudicating a particular dispute. Second, the expressions of the United States in the Cramer and Buzhardt memoranda and the Army Field Manual provide irrefutable evidence of the U.S. government's contemporaneous understanding of the pertinent international law principles at the time. Third, the only relevant state practice confirms without controversy that wartime use of herbicides containing poisons harmful to man violates these norms. Fourth, scholarly commentary specifically discussing the use of herbicides in Viet Nam refutes defendants' view of the law. Finally, defendants argument as to the requisite intent element for these claims ignores the historical record as well as both domestic and international law precedent with regard to the intent element.

a. Defendants Confuse The Norms With Their Application.

Defendants' argument misses the fundamental point that what is prohibited under the ancient proscription of poison in war is the *act* of poisoning, not any particular *means* of poisoning. See The Problem of Chemical and Biological Warfare,

A Study of the Historical, Technical, Military, Legal, and Political Aspects of CBW, and Possible Disarmament Measures, Vol. III, *CBW and the Law of War* 13-14, Stockholm International Peace Research Institute (1973) (hereinafter *"SIPRI*") ("[T]here is a set of general precepts of the law of war which do not refer specifically to CBW but which nonetheless proscribe certain possible uses of these weapons irrespective of any specific CBW prohibitions. . . namely, the prohibition of poison and poisoned weapons and the prohibition of weapons of a nature to cause superfluous injury or unnecessary suffering."); *see also* Opinion of Prof. Paust (A.1554) ("Whether or not all herbicides were illegal *per se*, the destruction or poisoning of food, crops or water that noncombatants might use was prohibited *per se*. It would not matter what weapon or tactic produced that result").

Seen in this light, the error of defendants' effort to limit the poison prescription to "specific, narrowly defined applications – such as plugging wells with corpses, or dipping arrows in poison" (Def. Br. 30), becomes quite apparent. The ancient warriors who used diseased corpses against cities under siege or to poison the wells used them because they were at their disposal. Modern toxic synthetic chemicals had not yet been invented. However, defendants cannot point to any reasoned distinction between applying the poison prohibition to these medieval tactics – which defendants concede violate the poison ban – and more modern tactics such as the contamination of food

and water supplies with cholera, anthrax, salmonella, and the plague by means of dropping or spraying cultures from aircraft,[3] or, more to the point, its application to the use of aircraft to indiscriminately spray vast quantities of herbicides which would, as Cramer said, "produce poisonous effects upon enemy personnel, either from direct contact, or indirectly from ingestion of plants and vegetables which have been exposed thereto." (A.1490)

Consider the definition of piracy under the law of nations in Blackstone's time. The crime of piracy was intended to outlaw the *act* of "robbery upon the sea," not the particular *means* used to rob. No doubt the defendants in *Smith* and *Talbot* employed cutlasses and cannons to further their depredations; today's pirates use automatic weapons and missiles – yet the definition of piracy applies equally to both. That the proscriptions of piracy and poison are phrased broadly is a testament to their

[3] Japanese nationals were charged with violations of Hague Article 23 (a) before the Tokyo War Crimes Tribunal in connection with attacks on Chinese cities with biological agents during World War II. Biological and Toxin Weapons: Research, Development and Use from the Middle Ages to 1945, at 143-44 (Erhard Geissler & John Ellis van Courtland Moon eds. 1999); *SIPRI* Vol. III, 118, 141, *citing International Military Tribunal for the Far East, Trial of Japanese War Criminals, Indictment No. 1, Appendix D,* Washington, Government Printing Office, 1946, p. 96.

longevity, and evidence that they were meant to be categorical and all-encompassing, not, as the defendants claim, that they were meant to be "hortatory" and "aspirational" and not enforced.

Likewise, the prohibition of "the wanton destruction of cities, towns and villages and devastation not justified by military necessity" (the norm of proportionality) criminalizes the *act* of indiscriminately and unnecessarily targeting civilians and their property along with legitimate military objectives, not the particular *means* used to do so, whether they be conventional weapons like bombs and bullets[4] or nuclear weapons.[5]

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[4] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, art. 6(b), 59 Stat. 1546, 1547; *United States v. List*, 11 Tr. War Crim. 1230 (1950); International Criminal Tribunal for Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (June 13, 2000), ¶52 (*citing the Kupreskic Judgment).*

[5] *Shimoda v. State, reprinted in The Law of War, A Documentary History-Volume I* 1688-1702, L. Friedman, Random House, New York (1972); *Threat or Use of Nuclear Weapons, Advisory Op. No. 95,* 1996 I.C.J. 226, ¶¶ 78-87 (July 8); *Department of the Army Pamphlet,* 27-161-2, International Law, Volume II, 42-44 (1962).

b. The United States Government's View At The Time That The Use Of A Poisonous Herbicide That Was Harmful To Human Beings Flatly Contradicts The Defendants' Argument

It was clear at the time of the Viet Nam War that the ancient rule against poison and the norm of proportionality were universal and specific enough to encompass poison in herbicides. This is the significance of the Cramer and Buzhardt opinion memoranda of 1945 and 1971, respectively (A.1489-91; A.1485-89), and the 1956 U.S. Army Field Manual (A. 2294), notwithstanding defendants' efforts to explain away the clear statements of the law contained in those sources. These sources represent the United States military's collective understanding of the international laws and customs of war *at the time* concerning the application of "the general prohibition of the use of poison in war" and the norm of proportionality to the use of chemical herbicides in a defoliation and crop destruction operation. It would be difficult to imagine more relevant evidence of the "practice of nations."

Defendants' claim that Cramer's view "was based on the proposition . . . that any prohibition against use of poison in war encompassed only substances intentionally used to harm humans," (Def. Br. 45), is incorrect. The question asked of and answered by Cramer, Buzhardt, and the authors of the Field Manual was in what circumstances was herbicide use for wartime purposes legally permissible under prevailing international law norms, and the answer was that it was legal only as long

as the herbicides did not "produce poisonous effects upon enemy personnel, either from direct contact, or indirectly from ingestion of plants and vegetables which have been exposed thereto." A.1490. Far from the hyper-technical analysis of treaty language relating to poisoned and chemical weapons that defendants claim formed the basis of their opinions, these top legal officials for the U.S. military and the U.S. Department of Defense cited the norm of proportionality as well as the poison proscription. A.1489-91; 1485-89; 2294.

Defendants' further claim that the Cramer and Buzhardt opinions, at most, constitute only "the views of a single state" is equally incorrect. (Def. Br. 45). Rather, they represent the views of the U.S. government as to international law arising from *universal state practice*, and those views between the historically pivotal period between 1945 and 1971 remained unchanged.

Defendants also err by claiming that the Cramer and Buzhardt memoranda represent the views of only two lone officials. (Def. Br. 45). Indeed, in response to Senator Fulbright's inquiry, Buzhardt indicated that the Cramer memorandum had been relied upon by the United States government in its conduct of three major wars over a thirty-year period. A.1488-89. Finally, the Cramer memorandum was itself based upon thorough research of the appropriate international law sources. A.1491.

c. State Practice Confirms That States Treat These Norms As Binding.

In the face of these clear statements of the U.S. government's own contemporaneous understanding of accepted international law, defendants rely upon purported "state practice" in arguing that the very use of herbicides by the United States during war for defoliation and crop destruction purposes necessarily made it legal. Defendants go so far as to argue that it is "impossible to interpret" the Cramer and Buzhardt memoranda as correct statements of the official U.S. position on the matter "given U.S. military practices during the Vietnam conflict." (Def. Br. 45). This argument ignores the facts. The official assumption underlying Operation Ranch Hand at all times, as borne out by the statements of the United States in defending its use of herbicides, both in the United Nations and elsewhere, was that these herbicides were "harmless to man."[6] Even the contemporaneous criticism of Operation Ranch Hand was *not* based on the understanding that Agent Orange was harmful to humans, but instead was strictly based on the critics' view that the use of poison (*not* toxic to humans) to kill plants as a battlefield tactic violated the 1925 Geneva Protocol. *See*

[6] This assumption, although it was incorrect, finds expression in a myriad of sources. *See, e.g*, William A. Buckingham, Operation Ranch Hand, The Air Force and Herbicides in Southeast Asia 1961-1971, U.S. Government Printing Office, Washington D.C. (1982), at 83 (quoting U.S. Defense Department statement) ("[S]ince the chemicals employed in Vietnam were widely used commercial weed killers which were not harmful to man, animals, or the soil, it could not be said that poisons or chemical warfare agents were in use in Vietnam."); "U.S. Tells of Crop Destruction in South Vietnam," *The New York Times*, March 10, 1966, at 9 (quoting U.S. State Department statement)("The herbicides used are nontoxic and not dangerous to man or animal life. The land is not affected for future use.")(A.1512); U.S. propaganda leaflet used during the war ("The only effect of the spray is to wilt the trees and make their leaves fall

U.N.G.A. Res. 2603 A (XXIV) (1969) (declaring that the use of "[a]ny chemical agents of warfare – chemical substances, whether gaseous, liquid or solid—which might be employed because of their direct toxic effects on man, animals or plants, " was as a violation of the 1925 Geneva Protocol)

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off. It causes absolutely no harm to humans or animals, the soil or drinking water.")(A.1636)

The United States' abrupt curtailment of the use of Agent Orange in April, 1970 further demonstrates its acceptance of the Cramer-Buzhardt view of applicable customary international law. The use of Agent Orange was suspended in April, 1970 due to public concern after the results of the Bionetics study indicating toxicity and possible teratogenicity were leaked to the public in October 1969 after being kept secret for three years. (*See* Def. Br. 19-20).[7] Agent Orange was never used again, and Operation Ranch Hand was officially terminated several months later.[8] Thus, contrary to defendants' claim, the U.S. use of herbicides in Viet Nam was carried out in such a way as to at least give the public impression that they were not used with knowledge that they contained chemicals toxic to man. This official action must be viewed in tandem with the prohibition of the use of chemical herbicides with poisonous effects

[7] In October 1969, after the release of the results of the Bionetics study, the Department of Defense issued a statement that it would restrict the use of Agent Orange to "areas remote from the population." On the following day, however, it announced that as this was already its policy, there would be no change in use. When the results of the Bionetics study, which were initially disputed by the U.S. government, were confirmed by a U.S. Department of Health study, the Defense Department acted quickly to suspend the use of Agent Orange. *SIPRI*, Vol. I, 168; Buckingham at 163.

[8] Choosing their words with extraordinary care, defendants state that "it is indisputable that none of the U.N. resolutions challenging the U.S. herbicide campaign in Vietnam even mentioned Article 23(a)." (Def. Br. 34) However, the the Hague and Geneva Conventions (without specifically mentioning Article 23(a)) were cited by the U.N. in condemning Operation Ranch Hand, just after Agent Orange was publicly identified as a possible toxin and teratogen. Specifically, U.N.G.A. 2677 (XXV) (1970), adopted by the U.N. General Assembly on December 9, 1970, called upon states to observe the provisions of the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1949, in addition to the Geneva Protocol of 1925. Defendants would have this Court believe that the timing of these events was merely

on man in the very field manuals in use by the United States Armed Forces at the time of the war in Viet Nam. *Department of the Army Pamphlet,* 27-161-2, International Law, Volume II, 44 (1962), *citing United States Navy Manual, Law of Naval Warfare* (1955) ("At the same time, it does seem correct to emphasize that, to the extent that [toxic chemical agents] are used either directly upon the noncombatant population or in such circumstances as to cause unnecessary suffering, their employment must be considered unlawful"). These facts certainly do not exculpate the chemical companies who knowingly supplied the poison-contaminated herbicides, and whether the United States acted in such a way as to make it appear to the international community that Operation Ranch Hand was lawful, plaintiffs have pled and intend to prove that defendants acted with actual knowledge of the presence of dioxin and its dangers, and certainly, at this stage of the pleadings, these facts are assumed as has been alleged.[9]

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coincidental, but common sense suggests otherwise.

[9] Similarly, in their continuing effort to make the controlling international norms appear

as confused and controversial as possible, defendants make an erroneous statement regarding the language of Hague Article 23(e) in their brief. (See Def. Br. 52, n.37) Although the English version of the provision prohibits the employment of "arms, projectiles or material calculated to cause unnecessary suffering," the authentic French language is correctly translated as "arms, projectiles or material of a nature to cause superfluous injury." See Paust Opinion at A.1555; *SIPRI* Vol. III 97. Defendants' argument that the non-authentic English version would imply a more stringent standard for scienter thus falls flat. And for the record, defendants' guess that plaintiffs were quoting Article 35 of the First Additional Protocol to the Geneva Conventions is incorrect – plaintiffs were citing to the authentic version of Article 23(e).

Defendants mistakenly point to the actions of President Kennedy in authorizing the use of Agent Orange in an attempt to establish a state practice on the part of the United States to use contaminated herbicides in war. (Def. Br. 9) They specifically rely on a Memorandum from Secretary of State Rusk to President Kennedy on November 25, 1961. (A 1334-39)("Rusk Memo"). The Rusk Memo states that the "use of defoliant does not violate any rule of international law concerning the conduct of chemical warfare and is an accepted tactic of war." (A 1339). Although they cite the Rusk Memo, the defendants fail to point out that the opinion contained in the Ruck Memo was based on the understanding that the herbicides which were going to be used "are not harmful to humans, animals, or the soil," (A 1336), are "harmless to personnel and animals," *(id.,* and at A 1335), and that the "chemical agents involved are the same kind that are used by farmers against weeds." (A 1334)

Even though President Kennedy was apparently kept in the dark on the true nature of the herbicides which he approved for use in Viet Nam, he was still greatly concerned about how their use would appear to the rest of the world. As the following passage suggests, President Kennedy, who had every reason to believe that the herbicides he was approving were harmless to human beings, was acutely aware of the customary proscription of poison and was concerned about the possibility that the United States might run afoul of that rule:

> PRESIDENT KENNEDY: What can we do about keeping it [Operation Ranch Hand] from becoming an American enterprise which would be surfaced [revealed to be involved] with poisoning food?
>
> McNAMARA: I think we'll be charged with that.
>
> TAYLOR: We can't avoid it.
>
> McNAMARA: We can do quite a bit to avoid it.

The Presidential Recordings, John F. Kennedy, The Great Crises, Volume Two, September-October 21, 1962, N. Naftali, P. Zelikow, W.W. Norton & Co., New York (2001) at 166. Imagine President Kennedy's response if he were given the information that was already known to defendants – that the herbicides to be used by United States forces would contain dioxin, one of the most toxic substances known to man? It is this distinction that defendants fail (or refuse) to understand.

In any event, it is evident that the central questions of state practice and the government's knowledge are factual ones that could not properly be decided by the district court on a motion to dismiss under Rule 12(b)(6). Additionally, defendants' arguments really boil down to the fallacy that a breach of an international law norm is evidence that the norm does not exist, similar to their erroneous argument that the German use of mustard gas in "canisters" is somehow evidence that international law did not prohibit that particular use of poison. That people commit murder does not

make murder legal. Similarly, the breach by a country of a customary international law norm, that the ones at issue in this case, does not mean the norm does not exist.

d. Scholarly Commentary Establishes The Existence And Specificity of These Norms.

There are several important scholarly works which have analyzed the legality under international law of Operation Ranch Hand. *See, e.g.* R.R. Baxter and T. Buergenthal, "Legal Aspects of the Geneva Protocol of 1925," 64 *Am. J. Int'l L.* 853, 858 (1970); J.N. Moore, "Ratification of the Geneva Protocol on Gas and Bacteriological Warfare: A Legal and Political Analysis," 58 *Va. L. Rev.* 419, 450 (1972); Wil D. Verwey, *Riot Control Agents and Herbicides in War* 214 (A.W. Sijthoff, Netherlands 1977); SIPRI, Vol. III, supra; Henri Meyrowitz, "The Law of War in the Vietnamese Conflict," *reprinted in The Vietnam War and International Law* (Falk, R., Princeton University Press 1969); Richard A. Falk, "Environmental Warfare and Ecocide," *reprinted in The Vietnam War and International Law*, Vol. 4 (Falk, R., Princeton University Press 1976).

However, the defendants neither cite nor discuss these scholarly works. The reason is obvious. These works conclude that the use of Agent Orange, given the presence of dioxin, violated the customary proscription of poison and the norm of proportionality. *See, e.g., SIPRI,* Vol. III at 136 ("Until the use of chemical weapons

in Viet-Nam began, the beliefs of states and their practice over half a century, and particularly the practice of the United States itself, had shown beyond any possible doubt that the customary rule prohibited the use of all chemical and biological weapons in war . . . . In that context the use of irritant-agent weapons and herbicides in Viet-Nam appears as a violation of international customary law."); see also J.N. Moore, 58 *Va. L. Rev.* at 465-66 ("For example, it would be illegal . . . to use herbicides against crops for their poisonous effect on belligerents expected to consume the crops, or to destroy crops which were known to be or reasonably should have been known to be intended for civilian use."); *id.*, at 507 ("[M]assive use of chemical herbicides may have such an indiscriminate impact on noncombatants and their progeny as to warrant *per se* prohibition."); Verwey at 94 ("(3) What is known of the toxic potentials of [Agent Orange herbicides] at present is more than sufficient to characterize them as toxic and dangerous compounds, in particular in the case of exposure to higher dosages. (4) Even the most narrow definition of the term "toxic" (in the sense of being lethal or causing serious damage to health) would forbid to characterize these agents as "nontoxic." (5) Therefore, the usual description of anti-plantagents in official American statements is deceptive and incorrect."); *id.*, at 222 ("Thus, reference to their indirect and direct toxic effects in war makes it difficult to conclude otherwise than that anti-plant agents are within the terms of [Hague] art. 23

(a); by which the United States was bound during the Vietnam War."); and *id.*, at 295 ("The way of using riot control agents and the way of employing herbicides as practiced in Vietnam has inflicted immensely more suffering and has caused immensely more casualties among civilians – infants, children, the sick and the old-aged primarily among them – than among the armed forces; in the words of Nobel prize winner Linus Pauling: 'The primary victims of the Vietnam War are not the combatants, but the civilians. If one destroys the rice crops by chemical agents, or if one uses gas, the civil populations, the women, the sick, the children and the aged will die, be it from intoxication or from hunger.'").

Defendants, on the other hand, rely heavily upon positions stated in briefs submitted to the International Court of Justice (ICJ) on the issue of the legality of nuclear weapons and in a committee report to the prosecutor before the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), yet they ignore the actual Advisory Opinion and judgments of those tribunals. For instance, although the ICJ's Nuclear Weapons Advisory Opinion declines to apply Article 23 (a) to nuclear weapons because it does not define them as poisons, it held that the use of nuclear weapons most likely would violate the norm of proportionality, notwithstanding that nuclear weapons are not specifically banned by any treaty, because of their

indiscriminate effects upon civilians.[10]

Likewise, the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, cites to one of the judgments of the ICTY (at ¶ 52) which addressed the issue of proportionality with respect to attacks on the Muslim civilian population. That judgment, also known as *The Kupreskic Judgment,* had this to say:

> In the case of attacks on military objectives causing damage to civilians, international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness. This principle already referred to by the United Kingdom in 1938 with regard to the Spanish Civil War, has always been applied in conjunction with the principle of proportionality, whereby any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack. In addition, attacks, even when they are

[10] "Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict (at the heart of which is the overriding consideration of humanity) make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above [blast, heat and radiation would kill and destroy in a necessarily indiscriminate manner] the use of such weapons in fact seems scarcely reconcilable with respect for such requirements." *Threat or Use of Nuclear Weapons, Advisory Op. No. 95,* 1996 I.C.J. 226, ¶ 95 (July 8 1996).

> directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians. . .
>
> * * *
>
> [R]egard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul per se of the loose prescriptions of Articles 57 and 58 [of the First Additional Geneva Protocol of 1977] (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardize excessively the lives and assets of civilians, contrary to the demands of humanity.

The Kupreskic Judgment (Case No. IT-95-16-T 14 Jan 2000), ¶¶ 524, 526. The above-stated principle that repeated violations which result in a cumulative, indiscriminate, and disproportionate effect on civilians can constitute a clear violation of the norm of proportionality has particular relevance here.

In fact, the only expert that defendants could cite for the proposition that "even if herbicides could have harmful consequences for humans, such substances would not be considered poisonous under Article 23 (a) if the intentional design of the material was not to inflict poisoning as a means of combat" was their own expert, Professor Reisman. (Def. Br. 42) Defendants make no effort to harmonize their expert's

statement with the U.S. Army Field Manual provisions and the opinions of Cramer and Buzhardt, which are in direct contradiction. Moreover, defendants could not cite to any source for the proposition that the extensive use of poisonous herbicides does not violate the norm of proportionality.

e. Defendants Cannot Avoid Liability On The Theory That The Intent Of The United States Military Was Merely To Defoliate And Not To Poison Crops Or The Water Supply In Vietnam

In an attempt to avoid the significance of the Cramer and Buzhardt opinions and the Army Field Manual provision on the use of poisoned herbicides, defendants set forth the novel view that if the United States military merely intended to defoliate and not to poison crops and the water supply, then the conduct of the defendants in supplying the military a herbicide laced with poison was legal under international law. (Def. Br. 42). Defendants' argument mischaracterizes plaintiffs' position regarding the requisite intent for violations of the poison proscription and the norm of proportionality. Contrary to defendants' claim, plaintiffs do not rely *solely* upon "the bedrock principle of [U.S.] tort law that an actor is assumed to have intended the natural and probable consequences of its actions," Def. Br. 40, although that well-established principle is a central feature of the common law that the federal courts apply under *Sosa*. The standard of liability for their culpable conduct is provided by

international *as well as* domestic law.[11]

[11] *See, e.g., United States. v. Ruffin,* 613 F.2d 408, 421 (2d Cir. 1979) ("[I]t is the known and familiar principle of criminal jurisprudence, that he who commands, or procures a crime to be done, if it be done, is guilty of the crime, and the act is his act. This is so true, that even the agent may be innocent, when the procurer or Principal may be convicted of guilt, as in the case of infants or idiots employed to administer poison."); *Ford v. United States,* 273 U.S. 593, 623-24 (1927) (in a case involving defendants smuggling liquor into the U.S. on a British ship captured in U.S. waters during prohibition, "[t]he general rule of the law is, that what one does through another's agency is to be regarded as done by himself. . . the principal of common law, 'Qui facit per alium, facit per se,' is of universal application, both in criminal and civil cases.") (citations omitted); *United States v. Wooten*, 1 C.M.A. 358, 362 n. 1 (1952), 1952 WL 1840 (May 2, 1952) ("[O]ne who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act"); *Maxey v. United States*, 30 App. D.C. 63 (D.C. Cir. 1907), 1907 WL 19856 at * 6 (App. D.C. June 4, 1907) ("one may be convicted as a principal, though acting in the commission of the crime through an innocent agent."); *United States v. Gardiner,* 2 Hay. & Haz. 89 (D.C. Cir. 1853), 25 F.Cas 1245 (1853); *United States v. Gooding,* 25 U.S. 460, 469 (1827) (prosecution of ship owner who outfitted his ship for use in slave trade); *United States v. Burr*, 25 F.Cas 55, 183(CC Va. 1807) (prosecution of Aaron Burr involving charges with respect to treason and insurrection).

There is admittedly no mental state mentioned in the Hague Convention or in any of the other official formulations of the ban on poison in warfare.[12] However, there is no warrant for the view that poison presupposes a specific intent to poison. Any other standard of intent would conflict with the specific and obligatory language contained in the Cramer and Buzhardt opinions and the Army Field Manual. These primary sources of state practice reflect a clear prohibition on the use of poisonous herbicides, even while assuming that the intent of the operation was to defoliate and destroy crops rather than to intentionally poison the people who would ultimately consume those crops as food and drink the water in defoliated areas. Rather than confront this explicit evidence of state practice, defendants cite to "disinterested scholars" who opine that Article 23 (a) of the Hague Regulations was not meant to

[12] Although it was enacted after the Viet Nam War ended, the experience with the Rome Statute is instructive. In the Rome Statute, when no subjective state is mentioned in the code provision, the assumption is that knowledge or intention is required. See Rome Statute Art. 30(1). Knowledge and intention are defined broadly to include "*awareness that . . a consequence will occur in the ordinary course of events."* Rome Statute Art. 30(3)(Emphasis supplied). The best construction of the prohibition against the use of poison, therefore, is that if defendants were aware that "in the ordinary course of events" the herbicide they supplied to the U.S. Government would have some injurious effects on those exposed to it, then he or she acts with knowledge and

apply to direct chemical warfare as a means of combat that only destroyed enemy property and that the 1993 Chemical Weapons Convention does not consider herbicides to be chemical weapons if they are used with an intent to destroy plants, even if the secondary effect was the killing or harming of people. (Def. Br. 41, 42).

However, the views of these "disinterested scholars" run afoul of the clearly articulated state practice contained in the Cramer and Buzhardt opinions and in the Field Manual. The rationale behind Cramer and Buzhardt's legal opinions was succinctly stated in a lengthy scholarly work devoted solely to the issue of whether the use of contaminated herbicides in the Viet Nam War violated international law:

> Since the purpose of [Hague] art. 23(a) was not to prevent the destruction of food or water but the intoxication of persons through food or water, the question whether the latter occurs intentional[ly] or not loses much of its relevance . . . In view of the highly toxic effects of modern anti-plant agents, and in view of their massive employment for war purposes which is bound to cause casualties, the prohibition of food poisoning incorporated in art. 23(a) would miss its *purpose* if these agents were not covered by it; which is the case if one would take into consideration not the *effect* but the *intention* of the use of specific chemicals . . . Any other view would not only contradict common legal practice, but would render humanitarian law a blueprint deprived of practical value.

Verwey, at 221-22 (emphases in original) .

Defendants' arguments that herbicides are magically exempted from the rule

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commits the war crime of "employing poison."

against poisons because of the intent of the users to poison only plants should fare no better than the arguments of the defendants in the *Zyklon-B Case*. In that case, the defendants attempted to avoid liability by arguing that the poison they supplied was a pesticide which they were told would be used to delouse prisoners. However, the tribunal decided that they should have known that the vast quantities of prussic acid that they shipped to the concentration camps were far more than was required for delousing purposes, and two of the defendants were sentenced to death because of this knowledge. *In re Tesch*, 1 Tr. War Crim. 93, 101-02 (1947).

Consider also the comment of the United States military tribunal at Nuremberg with respect to German use of chemical weapons during World War I and the subsequent attempt to use semantics to defeat the spirit of the poison proscription:

> This brings to mind the German practices in the First World War in the use of poison gas. By the Hague Convention of 1907 [sic] . . . it was agreed that the signatories would not use "projectiles," the sole object of which is diffusing of noxious gas. The Germans sought to justify their use of gas by the insistence that in view of the explicit stipulation that "projectiles" are prohibited, the use of gas from "cylinders" was legal and this notwithstanding the effect upon the victim was much worse.

United States v. Krupp, 9 Tr. War Crim. 1327 (1950), *reprinted in The Law of War, A Documentary History-Volume I* 1352, L. Friedman, Random House, New York (1972).

It is therefore clear that under international law, as well as domestic tort law,

knowledge of the effects and consequences of the use of toxic chemicals, regardless of the stated intent of the overall operation, and regardless of the characterization of the chemicals themselves, is sufficient to impose liability on the defendants for violations of the poison proscription. Professor Paust writes that this would be so even if the agent who committed the underlying act was in fact innocent. "An example would be where a law violator uses an innocent agent (e.g., the postal service) to send poisoned chocolates through the mails." (A. 1535)

In sum, at the time of the Viet Nam War, the international law norms that these defendants violated were developed to a far greater degree of specificity than the Blackstonian norm against "piracy," defined with no more precision than "robbery upon the sea." *Smith,* 18 U.S. at 162. U.S. official statements and state practice established, with extraordinary specificity, that the use of herbicides in war containing agents harmful to humans constituted a violation of not only the poison ban, but also the ban on employing tactics resulting in unnecessary suffering and wanton destruction unrelated to military necessity. These specifically enunciated and long-established principles of international law far exceed any specificity demanded by *Sosa.*

III. NON-STATE ACTORS CAN BE SUED UNDER THE ATS FOR VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW

1. There is Aiding and Abetting Liability Under the ATS

Defendants also seek affirmance based on their claim, which the district court rejected, that international law norms do not recognize liability for non-state actors. It is difficult to understand how defendants can urge this theory in view of defendants' admission that the "three Blackstonian 'paradigms' that the Court repeatedly cited in *Sosa* were all understood, at the time the ATS was enacted, to prohibit the aiding and abetting of these criminal offenses." (Def. Br. 60). Defendants go to great lengths to distinguish *criminal* liability under an aiding and abetting theory, which defendants freely concede is well-established both now and in the 18th century, from *civil* liability, which defendants claim is not a feature of international law. Defendants, however, utterly fail to address the overwhelming weight of authority, including cases decided by this Court, establishing that private actors may be held liable for violations of international law. *Kadic* 70 F.3d at 239; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 321 (S.D.N.Y. 2003) ("ATCA suits [may] proceed based on theories of conspiracy and aiding and abetting"); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (private corporations could be held liable for "joint action" with state actors); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 127-28 (E.D.N.Y. 2000) (ATS suit could

proceed where plaintiffs alleged a French bank had been complicit with the Nazi regime); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999) (**"**No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law."); *see also Burnett v. Al Bar Inv. & Dev. Corp.*, 292 F. Supp. 2d 9 (D.D.C. 2003); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1090-95 (S.D.Fla. 1997); *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996) (affirming district court's jury instruction allowing foreign leader to be held liable upon finding that he "directed, ordered, conspired with, or aided the military in torture, summary execution, and 'disappearance'").

Sosa did *not* alter the legal landscape in the manner envisioned by the chemical companies, and indeed on the very issue of private actor liability the Second Circuit's 1995 decision in *Kadic* was cited approvingly in *Sosa* itself. *Sosa* 542 U.S. at 732, n.20. Moreover, the liability of private actors, as aiders and abettors, for violations of international law was understood at the time the ATS was enacted. A 1795 opinion issued by Attorney General Bradford specifically states that individuals would be liable under the ATS for "committing, aiding, or abetting" violations of the laws of war.[13] *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795).

[13] *Sosa* cites the Bradford Opinion for the proposition that the ATS was intended "to

provide jurisdiction over what must have amounted to common law causes of action." *Sosa*, 542 U.S. at 721. In Kadic, the Court specifically relied upon the Bradford Opinion in reaching the conclusion that private actors could be held liable under the ATS. *Kadic*, 70 F.3d at 239.

Six years after the passage of the ATS, the Supreme Court in *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 156 (1795), found that Talbot, a French citizen, who had assisted Ballard, a U.S. citizen, in unlawfully capturing a Dutch ship had acted in contravention with the law of nations and was liable for the value of the captured assets. The post-World War II tribunals provide further support. In *United States v. Friederich Flick*, a civilian industrialist was convicted because he knew of the criminal activities of the SS and nevertheless contributed money that was vital to its financial existence even though he did not condone SS atrocities. 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1, 1216-1223)(1949). Similarly, in *In re Tesch (Zyklon B Case)*, 13 Int'l L. Rep. 250 (Br. Mil. Ct. 1946), industrialists were convicted for sending poison gas to a concentration camp, knowing it would be used to murder innocent civilians.

Contrary to defendants' argument that norms of aiding and abetting liability do not satisfy *Sosa*'s specificity requirement, international law clearly and specifically acknowledges aiding and abetting liability. Courts applying such liability under the ATS have correctly held that under international law, the *actus reas* of aiding and abetting consists of "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime," and that the *mens rea* required is the knowledge that these acts assist the commission of the offence; the accomplice

need not share the principal's wrongful intent. *Presbyterian Church of the Sudan*, 244 F. Supp. at 323-24; *accord Prosecutor v. Furundzija,* Case No. IT-95-17/1/T, judgment, ¶¶ 192-249 (ICTY Trial Chamber, Dec. 10, 1998), *reprinted at* 38 I.L.M. 317 (1999)). Critically, the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia was based on an exhaustive analysis of the jurisprudence of the post-World War II tribunals. See, e.g., *Furundzija* IT-95-17/1**,** ¶¶ 195-97, 200-25, 236-49. Clearly, customary international law provides a "specific, universal and obligatory" norm against aiding and abetting that was well-established long before the Viet Nam War, and certainly established with far greater specificity than the three Blackstonian norms with which *Sosa* mandates comparison.[14]

[14] While aiding and abetting liability is certainly established with the specificity required

by *Sosa*, we are constrained to point out that, contrary to defendants' arguments, nothing in *Sosa* requires that civil aiding and abetting *liability* be established with specificity by international law itself. Instead, as we have pointed out, *Sosa*'s specificity requirement applies only to the question of whether the underlying abuse is an actionable violation of international law. Defendants' reliance upon footnote 20 of *Sosa* for the proposition that civil liability for aiding and abetting liability is doubtful under international law, or that such liability must be first established by international law itself, is based on a crucial omission from their quotation from that footnote. Defendants claim that *Sosa* says that "courts must consider 'whether international law extends the scope of liability . . . to the perpetrator being sued.'" (Def. Br. 56 (*quoting Sosa*, 542 U.S. at 732 n.20)). Omitted is the key language from this quotation: "A related consideration is whether international law extends the scope of liability *for a violation of a given norm* to the perpetrator being sued." 542 U.S. at 732, n.20 (portion omitted from defendants' brief in italics). This language refers to the international law norms for which state action is still required for a *violation* of impose international law, such as torture. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). It does *not*, as defendants improperly argue, indicate any lack of consensus about private actor liability under international law *in general*, nor does it suggest that international law must decide the question of civil *liability* for aiding and abetting in the first instance.

Aiding and abetting is recognized generally under federal common law. *See Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983) ("Aiding-abetting focuses on whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct."); see also Beth Stephens, "Corporate Liability: Enforcing Human Rights through Domestic Litigation," 24 *Hastings Int'l & Comp. L. Rev.* 401, 408-09 (2001); *see also* Stephens and Ratner, *International Human Rights Litigation in U.S. Courts* 120-22 (Transnational Publishers 1996). United States tort law, like international law, requires only that one *knowingly* provide substantial assistance to a person committing a tort. *Restatement (Second) of Torts* § 876(b)(1977). Thus, whether the court looks to federal common law tort principles or international law, aiding and abetting is actionable.

Aiding and abetting liability holds a defendant accountable for its own acts; it is not vicarious liability. Because international law prohibits aiding and abetting human rights violations, such complicity is itself a "tort . . . committed in violation of the laws of nations." 28 U.S.C. § 1350. Thus, the plain words of the statute compel recognition of aiding and abetting liability. Further evidence of the appropriate statutory construction may be found in Congress's codification of it in the 1992 Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note. The Senate noted

that the TVPA covered "lawsuits against persons who ordered, abetted, or assisted in the torture." S. Rep. No 1, 249 102nd Cong., 1st Sess. (1991).

Defendants' reliance upon *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164 (1994), is misplaced. The Court in *Central Bank* rejected aiding-and-abetting liability as a matter of statutory construction in the context of the Securities Exchange Act. *Central Bank* was based on the text of Section 10(b) of the Act, which prohibited the use of any "manipulative or deceptive device or contrivance" in connection with a securities transaction. Because aiders and abettors did not themselves use any manipulative or deceptive device or contrivance, the Court found no liability. 511 U.S. at 175. The Court specifically held that this language in Section 10(b) "resolves the case," 511 U.S. at 177, and expressly limited its holding to the securities context**.** Id. at 182. Courts have correctly rejected the argument that *Central Bank* precluded aiding-and-abetting liability in the context of ATS claims, based on the text of the ATS, and the existence of other ATS cases specifically upholding such liability. *Presbyterian Church of the Sudan,* 244 F. Supp. 2d at 320-21.

In *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002), the Government argued and the Seventh Circuit held that *Central Bank* is inapplicable to 18 U.S.C. § 2333(a), which permits U.S. nationals "injured . . . by reason of an act of

international terrorism" to sue for damages. In rejecting the defendant's argument that aiding and abetting should not give rise to liability under this federal statute, the court reasoned that, in enacting § 2333(a), Congress intended "to import general tort law principles, and those principles include aiding and abetting liability." 291 F.3d at 1019. The ATS is indistinguishable in this regard from § 2333(a), since it also creates a common law tort claim and thereby authorizes federal courts to apply common law liability rules.

In the face of all of this authority, defendants rely upon precisely two district court cases holding that there is no aiding and abetting liability under the ATS. One of those cases, *In re: South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), is on appeal to this Court and we are confident this Court will reverse the district court in that case for the reasons stated herein, including, among other things, the simple fact that it is contrary to this Court's precedent in *Kadic*, cited approvingly in *Sosa*. The other case, *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005), is the only other voice in the wilderness, and the reasoning in that case is purely *dicta* since the plaintiffs there were "not aliens, and therefore, cannot assert federal claims" under the ATS, which only gives rights to aliens. *Id.*, at 1026. The overwhelming federal and international law, including precedent from this Circuit, rejects defendants' arguments.

2. Defendants' Status As Corporations Does Not Immunize Them From Liability.

Defendants argue that the district court erred in holding that their corporate status does not render them immune from international law claims, and urges this Court to affirm the district court on this alternative ground as well. The United States Supreme Court has specifically held that international law allows courts to pierce the corporate veil in certain circumstances. *First Nat'l City Bank (FNCB) v. Banco Para El Comercio,* 462 U.S. 611, 628-30 (1983). If, as defendants contend, corporations are *per se* immune from international law liability, the ruling in *FNCB* would have been unnecessary. In *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989), the Supreme Court noted that the ATS "by its terms does not distinguish among classes of defendants." *Sosa* itself acknowledged that corporations can be sued under the ATS, assuming that international law "extends the scope of liability for a violation of a particular norm" to "a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 n.20, *citing Kadic,* 70 F.3d at 239-41.

The Second Circuit has considered numerous cases where plaintiffs sued a corporation under the ATCA for alleged breaches of international law. *Jota v.*

Texaco, Inc., 157 F.3d 153 (2d Cir. 1998) (vacating the district court's dismissal, on the grounds of *forum non conveniens*, international comity and failure to join an indispensable party, and remanding); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (reversing dismissal on *forum non conveniens* grounds and finding personal jurisdiction over the defendant corporations); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000) (affirming dismissal of the ATS claim because the defendant corporation did not "act under color of law" simply by purchasing property from the government); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (dismissed based on *forum non conveniens*). In each of these cases, the Second Circuit acknowledged that corporations are potentially liable for violations of the law of nations that ordinarily entail individual responsibility. *See also Carmichael v. United Techs. Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988) (assuming explicitly that the ATS provided subject matter jurisdiction for a claim against a corporation); *Presbyterian Church of the Sudan*, 256 F. Supp. 2d at 311-19 (exhaustive review of the various precedents in federal common law and before international tribunals supporting corporate liability for violating international law); *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004) (denial of summary judgment based on holding that a corporation could be held liable for a violation of an international legal norm); Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal

Responsibility," 111 *Yale L.J.* 443 (2001) and *International Council on Human Rights Policy, Beyond Voluntarism: Human Rights and The Developing International Legal Obligations of Companies* (2002), available at http://www.ichrp.org/ac/excerpts/41.pdf.

The district court in this case, after an exhaustive analysis of international law precedents, properly analyzed the issue using the ancient common law tools of reason and judgment, consistent with *Sosa*'s recognition of the appropriate role of the common law in ATS jurisprudence. Judge Weinstein wrote:

> Limiting civil liability to individuals while exonerating the corporation directing the individual's action through its complex operations and changing personnel makes little sense in today's world. Cf. 1 *Restatement (Third) of The Foreign Relations Law of the United States* § 421(2)(e) (stating, generally, that a state's exercise of jurisdiction to adjudicate with respect to a "corporation or comparable judicial person" is reasonable if it "is organized pursuant to the law of the state"). Our vital private activities are conducted primarily under corporate auspices, only corporations have the wherewithal to respond to massive toxic tort suits, and changing personnel means that those individuals who acted on behalf of the corporation and for its profit are often gone or deceased

before they or the corporation can be brought to justice.

373 F. Supp. 2d at 58.

IV. FEDERAL COMMON LAW AND STATUTORY DEFENSES ARE INAPPLICABLE TO PLAINTIFFS' INTERNATIONAL LAW CLAIMS.

Defendants are adamant, as we have seen, that courts cannot "create," "expand," or even "supplement" international law norms through the application of the common law. (Def. Br. 29). Apparently defendants are only adamant about that when the subject under discussion is the elements of plaintiffs' *claims*. As to their *defenses*, however, defendants' aversion to the flexibility offered by the common law evaporates. Shamelessly invoking federal common law, defendants contend that the government contractor defense, as established in *Boyle v. United Techs. Corp.,* 487 U.S. 500 (1988), applies to defeat plaintiffs' international law claims.[15] Defendants also argue that federal statutory defenses contained in statutes *other than* the ATS apply to defeat plaintiffs' ATS claims. Defendants' creativity is misplaced.

1. The Government Contractor Defense Is Inapplicable.

[15] In this regard, defendants also claim that the district court erred by refusing to apply a federal common law statute of limitations. For the reasons set forth in Judge Weinstein's opinion, no statute of limitations is applicable, and even if it were, such issues as accrual and tolling would have to be developed factually upon remand. (SPA. 49-52).

The Supreme Court in *Boyle* held that the government contractor defense, as a matter of federal common law, barred *state* law suits against government contractors in cases where the government would be immune from suit under the Federal Torts Claim Act (FTCA), in other words, where the contract was made pursuant to the performance of a discretionary government function. 487 U.S. at 512-14. The court found the defense warranted by the uniquely federal interest in government procurement and a "significant conflict" between federal policy and state law. *Boyle*, 478 U.S. at 507, 512 ("State law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced.").

The government contractor defense, however, relies on the legality of the underlying governmental act for its immunity, and where the government's conduct violates the law, which it has no discretion to do, the government's immunity does not exist. Defendant manufacturers, therefore, are not entitled to receive an extension of the shield of immunity from the government, as it has none to give. See, *e.g.*, *In re Agent Orange Prod. Liab. Litig.*, 373 F.Supp.2d 7, 77 (E.D.N.Y. 2005) ("The government contractor defense is one peculiar to United States law . . . . It does not apply to violations of human rights and norms of international law.") (citing *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988) (limiting defense to claims for design

defects); *Zyklon B Case (Trial of Bruno Tesch and Two Others*, 1-5 Law Reports of Trials Of War Criminals 3; *United States v. Flick*, 6 Trials of War Criminals 1187, 1198, 1202 (discussing necessity); *United States v. Krupp,* 9 Trials Of War Criminals 1327, 1437-39 (same)).

Indeed, the government contractor defense is wholly inapplicable to international law claims. Defendants and their *amici* cite to no case law to suggest otherwise. Individual civil liability under international law has been recognized since the ATS was enacted in 1789. For instance, in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), a unanimous Supreme Court held a captain in the United States Navy liable for damages to a ship owner for the illegal seizure of the latter's vessel during wartime. The Court held that the President's orders authorizing the seizure of the ship did not immunize the captain from a lawsuit for civil damages where the President's instructions went beyond his statutory authority:

> A commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution. There is no public policy or interest in enabling the government to engage in an unlawful act.

Little, 6 U.S. (2 Cranch) at 170.

In *The Amiable Nancy*, 1 F. Cas. 765 (C.C. N.Y. 1817), the New York Circuit Court decided that the owners of a privateer who were acting on behalf of the government and protected by the securities prescribed by law were nonetheless liable under maritime trespass to victims of its piracy because the piracy was attributed as a crime. The Supreme Court affirmed, 16 U.S. 546 (1818), stating that the owners of the privateer acting on behalf of the government were liable even if they were "innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it to the slightest degree." *Id.*, at 559.

Defendants' argument that the government contractor defense should apply here is really just a restatement of the "government made [me] do it" defense rejected at Nuremberg. In the *Zyklon B case*, the defendants were charged with a war crime for violating "the laws and usages of war [by] supply[ing] poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas was to be so used.'" *In re Tesch*, 1 Tr. War Crim. at 93. In finding two of the defendants guilty, the court determined the decision was "a clear example of the application of the rule that the provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authorities, but to anybody who is in a position to assist in their violation." *Id.* at 103.

This principle was at the core of the Nuremberg Military Tribunals. For example, in *United States v. Flick,* 6 Trials Of War Criminals 1187, a case involving the use of slave labor by a large privately owned corporate consortium responding to the Nazi's requests, the court held:

> International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender in *propria persona.* The application of international law to individuals is no novelty. (*See The Nuremberg Trial and Aggressive War* by Sheldon Glueck, ch. V, pp. 60-67, incl., and cases there cited.) There is no justification for a limitation of responsibility to public officials.

Id. at 1191-92 (footnote omitted).

There is no principle of international or U.S. law that contradicts these principles established at Nuremberg. Defendants do not cite to any law that supports their claim that international actors may commit international law torts with impunity, much less their claim that private actors such as defendants are shielded from the non-existent privilege of the sovereign to violate international law. Accordingly, defendants' assertion that *Boyle* bars plaintiffs' international law claims is without merit.

2. Statutory Defenses.

Even less persuasive is defendants' claim that the statutory "combatant

activities" exception to government liability contained in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(j), bars plaintiffs' claims. Plaintiffs' claim are brought under the ATS, not the FTCA; the FTCA's exemptions do not facially apply. Defendants cite to *Koohi v. United States,* 976 F.2d 1328 (9th Cir. 1992), for the proposition that the policies underlying § 2680(j)'s combatant activities exception supports what amounts to an expansion of *Boyle*, which arose in the state law context, to suits against defense contractors under federal law, specifically, the Public Vessels Act, 46 U.S.C. App. § 781 et seq. The precedential value of the *Koohi* decision, which is the only court to ever extend *Boyle* in this manner, is questionable at best. *See Fisher v. Halliburton*, 390 F. Supp. 2d 610 (S.D. Tex. 2005) (declining to apply *Koohi*); *Ibrahim v. Titan Corp.,* 391 F. Supp. 2d 10 (D.D.C. 2005) (same). In any event, nothing in *Koohi* supports the application of any immunity-based doctrine, whether based on *Boyle* or on some more novel theory, to lawsuits brought under the ATS for violations of international law.

V. THIS CASE IS JUSTICIABLE AND NOT PRECLUDED BY THE POLITICAL QUESTION DOCTRINE.

1. The Political Question Doctrine Is Rarely Applied And Almost Never In The Context Of Foreign Affairs.

In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court wrote that "it is error to suppose that every case or controversy which touches foreign relations lies beyond

judicial cognizance." *Id.*, at 211 (holding that the political question doctrine did not bar the federal courts from considering an equal protection challenge to a state's voting apportionment structure). Instead, the Court imposed a requirement that courts conduct "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.* The Baker Court intended that the political question doctrine should be *strictly* reserved for only those clear instances in which adjudication would inappropriately cause the judiciary to "interfere[] in the business of the other branches of Government." *United States v. Munoz-Flores,* 495 U.S. 385, 394 (1990).

The *Baker* Court developed six elements, "probably listed in descending order of both importance and certainty," *Vieth v. Jubelirer,* 541 U.S. 267, 278 (2004), that provide the analytical framework for courts when determining whether a given claim presents a nonjusticiable political question:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial

> discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. "Unless one or more of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Id.*

Defendants fail to satisfy this standard as to all elements. This is made apparent when comparing the nature of this case to other cases the Supreme Court has ruled justiciable. For instance, the Court has held that federal courts maintain the authority to review Executive conduct even during a time of *active military combat*. *See, e.g., Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In cases involving electoral claims surrounding the 2000 presidential election, the Supreme Court found the political question doctrine so unavailing as to not even mention it. *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000) (regarding manual recounts); *Bush v. Gore*, 531 U.S. 98 (2000) (regarding the certification of statewide results).

Indeed, since *Baker*, the Court has dismissed only a handful of cases on the ground that they involved a nonjusticiable political question. *Nixon v. United States*, 506 U.S. 224 (1993); *Gilligan v. Morgan*, 413 U.S. 1 (1973); *see also Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality holding); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality holding). On the other hand, the Supreme Court has expressly rejected the application of the doctrine in more than a dozen cases. *See, e.g., United States Dep't of Commerce v. Montana*, 503 U.S. 442, 458-59 (1992) (reapportionment); *United States v. Munoz-Flores*, 495 U.S. 385, 387 (1990) (legislative enactment); *Quinn v. Millsap*, 491 U.S. 95, 102 (1989) (state constitutional provision); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986) (foreign relations); *Davis v. Bandemer*, 478 U.S. 109, 122-23 (1986) (gerrymandering); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 250 (1985) (Indian affairs); *Uhler v. AFL-CIO*, 468 U.S. 1310, 1312 (1984) (ratification of constitutional amendment); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 254 n.25 (1984) (congressional action regarding the Warsaw convention); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 941-43 (1983) (one-house veto); *Elrod v. Burns*, 427 U.S. 347, 352 (1976) (politically motivated discharge of public employees); *United States v. Nixon*, 418 U.S. 683, 697 (1974) (intra-branch dispute); *Powell v. McCormack*, 395 U.S. 486, 549 (1969) (congressional exclusion of

member); *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964) (reapportionment).

2. Defendants Fail To Satisfy Any Of The Baker Elements

This Court has declared the first *Baker* factor – "a textually demonstrable constitutional commitment of the issue to a coordinate political department" – to be the "dominant consideration in any political question inquiry." *Lamont v. Woods*, 948 F.2d 825, 831 (2d Cir. 1991), *citing Baker*, 369 U.S. at 217. This is because, as the Court explained, the "nonjusticiability of political questions is primarily a function of the constitutional separation of powers among the three branches of the federal government." Id. And while the Constitution entrusts the conduct of foreign affairs to the Executive and Congress, that does *not* mean that foreign affairs cases are to be avoided by the federal courts, to whom Article III commits the judicial power of the United States. *Olegario v. United States*, 629 F.2d 204, 217 (2d Cir. 1980). The Supreme Court in Baker itself rejected the view that "every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211; *accord Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986). Thus, with regard to ATS cases, whether a court should defer to the political branches is a "case-by-case inquiry." *See Baker*, 369 U.S. at 210-11.

The Constitution commits foreign relations to the executive and legislative branches, thus permitting them to determine what "may be done in the exercise of this

political power." *See id.* at 211 & n.31. Pursuant to this constitutional mandate, the First Congress enacted the ATS, and the President signed it into law, as part of the first Judiciary Act. See Judiciary Act of 1789, 1 Cong. Ch. 20 § 9(b), I Stat. 73; 28 U.S.C. § 1350. The very purpose of the ATS is to allow the courts to determine questions of violations of the law of nations, including what constitutes that law. See, *e.g., Filartiga*, 630 F.2d at 885 ("[A]s part of an articulated scheme of federal control over external affairs, Congress provided, in the first Judiciary Act, for federal jurisdiction over suits by aliens where principles of international law are in issue. The constitutional basis for the Alien Tort Statute is the law of nations.") (citation omitted); *Sosa*, 542 U.S. at 731("The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga* . . . Congress, however, has not only expressed no disagreement with our view of the proper exercise of judicial power, but has responded . . . by enacting legislation supplementing the judicial determination in some detail.") (citation omitted).

We have established that the law of nations has been considered part of the common law of the United States for at least 200 years, and as the district court in this case accurately determined, the "defendants' position does not square with" that "well-accepted principle." *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 64 (E.D.N.Y. 2005). As Chief Justice Marshall wrote in *Marbury v. Madison*, "It is

emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803); *see also* U.S. Const. art. III § 2. This duty extends to cases implicating foreign affairs. *See W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 408-10 (1990) (finding there is no general "principle[] of abstention" that allows courts to dismiss a case simply because it implicates U.S. foreign policy); *see also Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) ("The fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question."); Louis Henkin, *Foreign Affairs and the U.S. Constitution* 146 (2d ed. 1996) ("There is, then, no Supreme Court precedent for extraordinary abstention from judicial review in foreign affairs cases.").[16]

Any decision of a United States court on matters relating to Agent Orange will

[16] It is worth noting that the U.S government's position in this case is directly opposite from the position it took in *Filartiga* itself. There, the United States submitted a brief stating that as long as civil lawsuits under the ATS are based upon norms as to which there is widespread international consensus, "there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage our nation's commitment to the protection of human rights." 19 I.L.M. 585, 604.

doubtless engender strong feelings. As this Court has explained, however, the capacity to stir emotions does not render an issue nonjusticiable. *See Klinghoffer,* 937 F.2d at 49; *see also Baker*, 369 U.S. at 217 (political question doctrine "is one of 'political questions', not one of 'political cases'"); *Sharon v. Time,* 599 F. Supp. 538, 552 (S.D.N.Y. 1984) ("Judicial abstention on political grounds has similarly been found inappropriate when individual rights in domestic affairs are at stake, even where the litigation touches upon sensitive foreign affairs concerns, or deals with a subject allocated in the main by the Constitution to another branch."); *Biton v. Palestinian Interim Self-Gov't Auth.*,310 F. Supp. 2d 172, 184 (D.D.C. 2004) (emphasizing that the highly politicized backdrop of a case is insufficient to render a claim nonjusticiable); *Ibrahim,* 391 F. Supp. 2d 10 (refusing to apply political question doctrine to bar suits brought by victims of torture in American detention centers in Iraq).

International law claims for torts are simply torts. There is nothing inherently political in their nature. Their adjudication is as straightforward as it would be were the violations alleged under state law instead of the law of nations. This is why courts regularly decide questions pertaining to foreign relations that have political overtones – often the actual claim being litigated is one where the court is asked to perform its traditional role of construing the meaning of federal law. *See Klinghoffer,* 937 F.2d at

49 ("Here, we are faced with an ordinary tort suit, alleging that the defendants breached a duty of care owed to the plaintiffs or their decedents. The department to whom this issue has been 'constitutionally committed' is none other than our own – the Judiciary. This factor alone, then, strongly suggests that the political question doctrine does not apply."); Erwin Chemerinsky, *Federal Jurisdiction* 149 (3d ed. 1999) ("[D]eference need not mean abdication. Many foreign policy questions do not involve matters of expertise, but instead pose interpretive questions like those constantly resolved by the courts.").

In *Japan Whaling Ass'n v. Am. Cetacean Soc'y,* 478 U.S. 221 (1986), the Supreme Court explained that "courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts." *Id*. at 230. The Court declared that "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id*.; *See, e.g., Dames & Moore v. Reagan*, 453 U.S. 654 (1981) (determining the constitutionality of the Executive agreement settling claims arising out of the crisis with Iran); *Regan v. Wald,* 468 U.S. 222 (1984) (adjudicating challenge to ban on travel to Cuba); *Republic of Philippines v. Marcos,* 806 F.2d 344, 356 (2d Cir. 1986) (finding suit against former head of state

justiciable; "there is nothing more unmanageable about this case than about any other case involving theft, misappropriation, corporate veils, and constructive trusts.").

In the words of this Court, "universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion." *Kadic*, 70 F.3d at 249. "Moreover, the existence of judicially discoverable and manageable standards further undermines the claim that such suits relate to matters that are constitutionally committed to another branch." *Id.* This case, involving a tort claim under the ATS, is similarly manageable. Defendants' dire warnings that this case implicates "questions of military tactics and reparations," Def. Br. 92, are without basis. Far from involving an area without judicially discoverable and manageable standards, this is at bottom a straightforward tort suit, precisely the sort of case that the courts have been routinely deciding for hundreds of years.

Plaintiffs' tort claims do not require an initial policy determination of a kind clearly for nonjudicial discretion, as defendants claim. Defendants mischaracterize the issue by arguing "[w]hether payment should be made to citizens of a former enemy nation to redress the conduct of the United States military during war clearly is clearly an 'initial policy decision' for the political branches of government." (Def. Br. 92-

93). However, this case is not about a foreign government seeking reparations from the United States government; it is about holding *chemical companies* accountable to individual foreign nationals for violations of well-established customary international law.

The final three *Baker* factors are not germane to this litigation. As this Court determined, "[t]he fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Kadic*, 70 F.3d at 249. The lone Memorandum of Understanding cited to by defendants, which fails to make mention of reparations, does not rise to this level. (Def. Br. 96). Defendants and the government have failed to identify any prior decisions by any coordinate branch of government with which a federal court could possibly interfere by holding these chemical companies liable for their conduct in knowingly supplying poisonous herbicides to the U.S. military.

3. Plaintiffs' Claims Are Manifestly Not Barred By The Political Question Doctrine In Light Of The Supreme Court's Recent Decisions In *Rasul* And *Hamdi*.

In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court held that an ATS claim against the U.S. government challenging acts taken in prosecuting the war

against al Qaeda and the Taliban regime was justiciable. *Rasul* involved executive authority to legally detain foreign nationals as "enemy combatants" without trial, a matter intimately connected to military operations. The petitioners challenged the legality and conditions of their confinement. Despite the intense political nature of the case and the potential impact on the Executive's authority, the Supreme Court fulfilled its constitutional obligation to adjudicate the claims presented, including petitioners' ATS claims, noting that the "fact that petitioners . . . [were] being held in military custody is immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims." *Id.* at 485.

Similarly, in *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), the plurality opinion held that in assessing whether a U.S. citizen captured during military operations in Afghanistan against al Qaeda and the Taliban was properly deemed by the Executive to be an enemy combatant, "it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here." *Id.* at 535 (citing *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions")). In so holding, the Court rejected precisely the justiciability argument that defendants make here:

> [W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances . . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. *Mistretta v. United States*, 488 U.S. 361, 380, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty"); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426, 54 S.Ct. 231, 78 L.Ed. 413 (1934) (The war power "is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties").

Hamdi, 542 U.S. at 535-536.

The Supreme Court's holding that federal courts have authority to entertain the claims in *Rasul* and *Hamdi* disposes of defendants' and the government's claims that court review of conduct in Viet Nam thirty years ago would "interfere" with foreign policy and that the claims at bar are inherently non-justiciable. *See also Dellums v. Bush*, 752 F. Supp. 1141, 1146 (D.D.C. 1990) (rejecting the argument that the political question doctrine barred a suit challenging the constitutional authority of the Bush administration to launch the Gulf War without congressional authorization: "While the Constitution grants to the political branches, and in particular to the Executive, responsibility for conducting the nation's foreign affairs, it does not follow that the judicial power is excluded from the resolution of cases merely because they may touch

upon such affairs."); *Ungar v. Palestinian Liberation Org.*, 402 F.3d 274, 281 (1st Cir. 2005), *cert. denied* 126 S.Ct. 715 (2005) (holding defendants failed to show, in case brought by heirs of a U.S. citizen killed in Israel by terrorists under the Anti-Terrorism Act against the PLO, that the case involved nonjusticiable political questions); *Gherebi v Bush*, 374 F.3d 727 (9th Cir. 2004) (upholding the jurisdiction of U.S. federal courts on a Guantanamo detainee's habeas corpus petition, maintaining that the executive has no power to indefinitely detain foreigners in territory under the "complete jurisdiction and control" of the United States, even in times of "national emergency").

4. Defendants' Argument Is Predicated On Inapplicable Cases.

Defendants' reliance on such facially inapplicable cases as *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) and *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999), further highlights the weakness of their position. In *Garamendi*, insurance companies and a trade association of insurance companies brought an action to enjoin the Insurance Commissioner of the State of California from enforcing a California statute requiring disclosure of information about Holocaust-era insurance policies. The Supreme Court determined that the Holocaust Victim Insurance Relief Act impermissibly interfered with the President's conduct of foreign affairs and was thus preempted. As the district court determined in the present case, however:

Garamendi is readily distinguishable, as defendants themselves concede,

> because it involved a state statute that expressly conflicted with foreign policy objectives implicit in executive agreements. Much like the district courts in the post-Nazi-era cases . . . , the Supreme Court in *Garamendi* went to great lengths to discuss the various post-war treaties and reparation agreements, including discussion of the Foundation. It concluded that "the express federal policy [encouraging European governments and companies to voluntarily set up settlement funds in preference to litigation or coercive sanctions] and the clear conflict raised by the state statute are alone enough to require state law to yield." Id. at 425, 123 S.Ct. 2374. As in other post-Nazi-era litigation, the conflict with executive agreements was determinative in *Garamendi.*

In re Agent Orange Prod. Liab. Litig., 373 F. Supp. at 80.

Burger-Fischer is likewise irrelevant. There, the plaintiffs brought class actions against German corporations to recover compensation for forced labor under the Nazi regime and damages for oppressive living and working conditions. The court determined that the extensive post-World War II treaties and reparations were designed to deal with compensation, and thus private resolution of the issue was effectively prohibited. The court found that, "[i]n effect, plaintiffs are inviting this court to try its hand at refashioning the reparations agreements which the United States and other

World War II combatants . . . forged in the crucible of a devastated post-war Europe and in the crucible of the Cold War." *Burger-Fischer*, 65 F. Supp. 2d at 282. However, "[i]n contrast to *Burger-Fischer*, the instant case does not require the refashioning of agreements by coordinate branches of government. It requires only the interpretation of international law." *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d at 71.

The district court further noted:

> A significant distinguishing feature of the Vietnam War is the absence of Executive and Legislative decisions regarding reparations following termination of hostilities, in stark contrast to the large number of such decisions following World War II. Because the extensive post-World War II treaties and agreements are in no way akin to the coordinate branches' relative silence following Vietnam, the potential for impermissibly intruding into foreign relations posed by the former is not present in the latter.

Id. at 77-78.

Similarly, the United States' reliance on the language of *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005) in its *amicus* brief is misleading. *See generally* U.S. Amicus Br. 13-22. In *Schneider*, which involved a "policy-based decision of the executive to use covert action to prevent [the Allende] government from taking power," 412 F.3d at 197, former National Security Advisor Henry Kissinger and the United States itself were sued for the alleged murder and torture of a leftist Chilean general in 1970. In contrast, here the government is not a party. The government is not being

blamed for the damage to the plaintiffs. Rather, what is at issue is the decision by chemical companies to include a poison in the defoliation agent they provided the government. In *Schneider,* the court was not even able to probe to what degree the political question doctrine might not apply to activities deemed outside the scope of executive power because the plaintiffs' dealt with the issue so "halfheartedly" as to not fully develop the issue for review. 412 F.3d at 198, 199. Thus, it is apparent that Schneider has no application, and the government's position, like that of the defendants, is unsupported.

CONCLUSION

As we fully set out in our initial brief, the district court engaged in improper fact finding in improperly dismissing the plaintiffs' complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The defendants fair no better when it comes to a discussion of the impact of *Sosa* and this Court's decisions interpreting the ATS. For all the above stated reasons, and because equal justice demands that these Vietnamese plaintiffs who have been harmed by their exposure to the poison of dioxin which was contained in the herbicides sprayed over their land should be compensated for their injuries, this Court must reverse the decision of the district court granting the defendants motion to dismiss and allow the plaintiffs' international law claims to go forward. Likewise, this Court should reverse the grant of summary judgment as to the plaintiffs'

state law claims against the defendants.

Dated: New York, New York
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CERTIFICATION
PURSUANT TO F.R.A.P. 32(a)(7)(B) & (C)

Pursuant to Fed. R. App. P. 32(a)(7)(C) I hereby certify that the foregoing Reply Brief for Plaintiffs-Appellants contains 18,373 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the foregoing Brief is set entirely in 14-point Times New Roman typeface.

Dated: New York, New York
March 22, 2006

_____
Jonathan C. Moore, Esq.