UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In re:

"AGENT ORANGE" PRODUCT LIABILITY LITIGATION

MDL 381

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04 CV 0400 (JBW)

THE VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE/DIOXIN; PHAN THI PHI PHI; NGUYEN VAN QUY and VU THI LOAN, Individually and as Parents and Natural Guardians of NGUYEN QUANG TRUNG and NGUYEN THI THUY NGA, Their Children; DUONG QUYNH HOA, Individually and as Administratrix of the Estate of Her Deceased Child, HUYNH TRUNG SON; HO KAN HAI, Individually and as Parent and Natural Guardian of NGUYEN VAN HOANG, Her Child; HO THI LE, Individually and as Administratrix of the Estate of Her Deceased Husband, HO XUAN BAT; NGUYEN MUOI; NGUYEN DINH THANH; DANG THI HONG NHUT; NGUYEN THI THU, Individually and as Parent and Natural Guardian of NGUYEN SON LINH and NGUYEN SON TRA, Her Children; VO THANH HAI, NGUYEN THI HOA, Individually and as Parents and Natural Guardians of VO THANH TUAN ANH, Their Child; LE THI VINH; NGUYEN THI NHAM; NGUYEN MINH CHAU; NGUYEN THI THOI; NGUYEN LONG VAN; TONG THI TU and NGUYEN THANG LOI; On Behalf of Themselves and Others Similarly Situated,

Plaintiffs,

- against -

THE DOW CHEMICAL COMPANY, MONSANTO COMPANY, MONSANTO CHEMICAL COMPANY, PHARMACIA CORPORATION, HERCULES INCORPORATED, OCCIDENTAL CHEMICAL CORPORATION, ULTRAMAR DIAMOND SHAMROCK CORPORATION, MAXUS ENERGY CORPORATION, THOMPSON HAYWARD CHEMICAL COMPANY, HARCROS CHEMICALS INC., UNIROYAL, INC., UNIROYAL CHEMICAL, INC., UNIROYAL CHEMICAL HOLDING COMPANY, UNIROYAL CHEMICAL

ACQUISITION CORPORATION, C.D.U. HOLDING, INC., DIAMOND SHAMROCK AGRICULTURAL CHEMICALS, INC., DIAMOND SHAMROCK CHEMICALS, DIAMOND SHAMROCK CHEMICALS COMPANY, DIAMOND SHAMROCK CORPORATION, DIAMOND SHAMROCK REFINING AND MARKETING COMPANY, OCCIDENTAL ELECTROCHEMICALS CORPORATION, DIAMOND ALKALI COMPANY, ANSUL, INCORPORATED, HOOKER CHEMICAL CORPORATION, HOOKER CHEMICAL FAR EAST CORPORATION, HOOKER CHEMICALS & PLASTICS CORP., HOFFMAN-TAFF CHEMICALS, INC., CHEMICAL LAND HOLDINGS, INC., T-H AGRICULTURE & NUTRITION COMPANY, INC., THOMPSON CHEMICAL CORPORATION, RIVERDALE CHEMICAL COMPANY, ELEMENTIS CHEMICALS INC., UNITED STATES RUBBER COMPANY, INC., SYNTEX AGRIBUSINESS INC., SYNTEX LABORATORIES, INC. and "ABC CHEMICAL COMPANIES 1-100",

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS ALL CLAIMS IN PLAINTIFFS' AMENDED CLASS ACTION COMPLAINT FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

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OTHER AUTHORITY

Plaintiffs ask this Court to rule that the United States, with the authorization of the President and the support of the Congress, committed war crimes and other grave crimes against humanity many decades ago in Vietnam when it used herbicides to reduce the risk of ambush and deprive enemy combatants of ready food stocks. They ask this Court to order unspecified but apparently massive environmental remedial action in a foreign country that is not a party to this suit, and to award personal damages to millions of Vietnamese nationals, including former Vietcong and North Vietnamese soldiers. And they seek to assess the costs of all these remedies on private vendors who allegedly "aided and abetted" the United States in an illegal military strategy by supplying the Government with the herbicides it ordered. Defendants move to dismiss this suit as a matter of law, because it is nonjusticiable, and because Plaintiffs' allegations do not remotely state any claim upon which relief can be granted.

INTRODUCTION

In 1961, upon joint recommendation of the Departments of State and Defense, and at the urging of the Republic of Vietnam ("South Vietnam" or the "RVN"), President Kennedy approved the use of herbicides in the war in Vietnam. Agent Orange, as well as other herbicides, protected U.S. and Allied forces by defoliating dense jungles to reduce enemy cover and by destroying crops to deprive enemy forces of ready food supplies. At the heart of Plaintiffs' Amended Class Action Complaint (the "Amended Complaint") is the accusation that the United States committed war crimes by using herbicides for those military purposes, and that (the United States itself being immune) the vendors who supplied the herbicides should bear the obligation of making reparations for the Government's alleged wrongdoing.

Far from launching a deliberate program of war crimes, the reality is that the Government carefully weighed the potential effects of herbicide use on the civilian population in Vietnam against military needs, principally the need to protect American and Allied troops from

ambush. Each of the Kennedy, Johnson and Nixon administrations concluded that the military benefits justified the use of herbicides. The State Department specifically considered whether the proposed defoliation program would violate international law and concluded that it would not.

Congress also examined the military's herbicide program. Both the Senate and House convened hearings and entertained floor debate, airing the concerns raised by those opposing the military use of herbicides. Yet an overwhelming majority of the Congress consistently supported the program, appropriating funds to finance it and rejecting proposed measures to curtail it. With the full and knowing support of the President and Congress, the U.S. military thus contracted with Defendants to produce specified chemicals to meet the military's requirements.

For nearly two decades after the war, the United States maintained a trade embargo against Vietnam. In 1995, however, the United States announced a "normalization of relations" with Vietnam, unblocked Vietnamese assets and reestablished ambassadorial-level relations. In that year, the two nations also entered into an agreement that extinguished and released certain claims between them. Although Vietnamese negotiators reportedly sought reparations to address alleged effects of herbicide use and to fund environmental remediation, the United States declined to make any such reparations.

Plaintiffs in this case are the Vietnam Association for Victims of Agent Orange/Dioxin ("VAVAO") and a collection of individuals purporting to represent a class of roughly four million Vietnamese nationals. Barred by sovereign immunity from suing the United States directly, Plaintiffs seek reparations indirectly by suing the U.S. Government's military contractors. They allege that Defendants aided and abetted, and engaged in a conspiracy

with, the United States to commit war crimes and to violate customary international law, as well as federal statutes. The Amended Complaint further alleges that Defendants violated federal and state common law, and the laws of Vietnam. Plaintiffs claim that Defendants are guilty of these wrongs because, according to Plaintiffs:

> Defendants were aware at the time of procurement and production that the herbicides would be sprayed widely in Vietnam pursuant to chemical warfare operations in the form of defoliation and crop destruction, but did not object to the intended use of their product. Instead they produced and supplied the herbicides knowing they would be used in herbicidal/chemical warfare, in violation of international law.

Am. Compl. ¶ 87.

Thus, three decades after the war ended, Plaintiffs ask this Court to award unspecified damages against Defendants for alleged personal injuries to millions of inhabitants in Vietnam, and to order Defendants to perform a massive environmental cleanup of lands along the Ho Chi Minh trail and other unidentified sites of combatant activities in Vietnam.

SUMMARY OF ARGUMENT

Plaintiffs' claims should be dismissed as a matter of law on the following grounds:

A. None of Plaintiffs' claims are justiciable

Plaintiffs' Amended Complaint raises the questions: (a) whether reparations, in the form of damages from third-party corporate vendors, should be made available for injuries allegedly sustained as a result of the Executive's selection and implementation of a particular war strategy; and, relatedly, (b) whether the courts can act on such claims, even though the subject of reparations normally is considered to be a matter of military and foreign policy. The answer is clear: these claims cannot proceed without judicial trespass upon powers constitutionally delegated to political branches.

The courts have no authority or competence to determine whether reparations should be made for injuries allegedly sustained in war as a result of the United States' military operations. This is most obvious where, as here, military strategy was dictated by the President with Congress's funding and support. Particularly in the face of the United States' refusal to make reparations for any resulting injuries, Plaintiffs may not seek redress collaterally in private tort litigation against the Government's military contractors.

B. Plaintiffs' federal and international claims should be dismissed for failure to state any claim upon which relief can be granted

None of the sources of law on which Plaintiffs rely creates a cause of action for suits by enemy combatants or others in a war zone seeking reparations from the United States or its contractors based on the United States' strategic wartime military decisions, and this Court should decline Plaintiffs' invitation to create such a cause of action under federal common law.

1. Neither the Torture Victim Protection Act, the War Crimes Act, nor any of the various international instruments Plaintiffs cite provides a cause of action in this instance

Plaintiffs cannot satisfy a single element established by statute for a civil claim under the Torture Victim Protection Act ("TVPA"). The War Crimes Act of 1996 ("WCA") is a *criminal* statute and creates no private cause of action for civil liability. Likewise, none of the Amended Complaint's list of treaties and United Nations resolutions provides a privately enforceable cause of action to authorize civil damages.

2. Federal common law under the Alien Tort Statute provides no cognizable claim here

In *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), the Supreme Court held that, when exercising the jurisdiction granted by the Alien Tort Statue ("ATS"), federal courts may recognize only a "very limited" set of federal common law causes of action for violations of international law. *Id.* at 2754. The Supreme Court emphasized that the federal courts should not

recognize causes of action under federal common law for "violations of any international law norm with less definite content and acceptance among civilized nations" than causes of action recognized when the ATS was enacted. *Id.* at 2765. Plaintiffs' claims do not come within the very narrow range of "sufficiently definite" norms recognized by the Supreme Court in *Sosa*. *Id.* at 2766. There was no prohibition under treaty or customary international law against the military use of herbicides during the Vietnam War, let alone a prohibition on the sale of herbicides to the Government.

Plaintiffs' claims that the United States' herbicide program constituted a war crime, genocide, or crime against humanity are outrageous. Plaintiffs do not contend that Agent Orange was directed against people with an intent to poison them. Indeed, Plaintiffs concede the purpose of the herbicide program was to protect U.S. and Allied forces from ambush and to deprive enemy combatants of ready food supplies. Plaintiffs may not recast a (previously rejected) products liability allegation as a "war crime" in an attempt to squeeze into the very limited set of universally accepted international norms actionable under the ATS.

Moreover, *Sosa* emphasized numerous prudential considerations that compel judicial caution in recognizing customary international law norms as actionable under the ATS. 124 S. Ct. at 2762-63. The Supreme Court cautioned that judges must "look for legislative guidance before exercising innovative authority over substantive law," *id.* at 2762, particularly when the claims asserted may impinge upon the "discretion of the Legislative and Executive Branches in managing foreign affairs," *id.* at 2763. That directive dooms Plaintiffs' claims.

Congress has never expressly or impliedly countenanced private claims against the United States' contractors for supplying the military with materiel for war, and recognizing such claims under federal common law would circumvent express statutory exemptions to the

United States' own tort liability. Moreover, Plaintiffs' claims in this case go to the very heart of the political branches' discretion to conduct foreign policy and to wage war. Courts should be loath to adjudicate the legality of military operations authorized and declared lawful by the President and supported by Congress. They should also be loath to authorize civil compensatory and injunctive relief against the United States' contractors for injuries allegedly sustained as a result of U.S. military operations when the United States has declined to make reparations for those alleged injuries and such relief may interfere with present or future foreign relations. Absent a plain statement from Congress unmistakably authorizing such a remedy, it is unthinkable that a court could exercise its power to create federal common law liability in these circumstances.

C. Plaintiffs' state and federal common law claims fail because the United States and, hence, its contractors owe no duty in tort to enemy combatants or other persons in combat zones

Plaintiffs' claims run afoul of the bedrock federal common law principle—codified in the "combatant activities" exception of the Federal Torts Claims Act ("FTCA"), 28 U.S.C. § 2680(j)—that the United States owes no duty in tort to enemy combatants, or even to noncombatants, in a war zone. Imposing such a duty on the Government's contractors would undermine that principle, obligating the United States to heed rules of civil conduct that can have no application in the theater of war. Plaintiffs' attempt to challenge the United States' strategic military decisions under civil negligence standards would frustrate crucial federal interests.

Plaintiffs' allegation that the U.S. military's use of herbicides violated international law does not change that result. Not only are these particular claims baseless, but a court's willingness to entertain common law claims based upon international norms against wartime suppliers for injuries suffered by enemy combatants and others in U.S. combat operations could seriously impair the Nation's ability to wage war. In an amicus brief filed

earlier this year, Plaintiffs argued that there should be no defense for contractors in these circumstances, because "the contractor has an affirmative duty to refuse to aid and abet the government in illegal conduct."[1] Similarly in this case, Plaintiffs ask the Court to adopt a rule that would discourage contractor cooperation with U.S. military initiatives and could radically increase the Government's procurement costs, whenever there is any possibility that a court years later may decide that past military decisions conflicted with principles of international law. This Court should reject that invitation.

D. It makes no sense for U.S. Courts to apply the laws of Vietnam—a former enemy—to assess the conduct of U.S. military contractors during a war with that enemy

This Court previously declined to apply Vietnamese law to similar claims for injuries allegedly arising from exposure to Agent Orange by American servicemen, calling such a suggestion "ludicrous" under the circumstances.[2] There is no reason for a different result here.

* * * * *

In sum, no amount of artful pleading can render justiciable claims that are so unsuited to judicial resolution or create a cause of action where none exists. Plaintiffs' claims should be dismissed.

STATEMENT OF FACTS

I. THE UNITED STATES USED AGENT ORANGE AND OTHER HERBICIDES IN VIETNAM TO PROTECT AMERICAN AND ALLIED TROOPS AND DEPRIVE THE ENEMY OF TACTICAL ADVANTAGES

Defendants supplied "specific phenoxy herbicides" to American armed forces for use in the Vietnam War. Am. Compl. ¶ 84. The Department of Defense established the

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[1] Brief of Amicus Curiae The Vietnam Association for Victims of Agent Orange/Dioxin in Opposition to Motion for Summary Judgment Based upon the Government Contractor Defense, *In re "Agent Orange" Prod. Liab. Litig.*, Civ. No. 98-6383 (JBW), MDL No. 381 (E.D.N.Y.) (filed Feb. 19, 2004).

[2] *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690, 707 (E.D.N.Y. 1984).

specifications for these herbicides in a series of "fixed price production, or procurement, contracts." *Id*. ¶ 85. These contracts instructed Defendants to label the contents of the herbicide containers with only "a color-coded three-inch band, in accordance with the type of herbicide (orange, purple, blue, etc.)," *id*., and the "code names" commonly used to refer to the various herbicides reflected "the color of the band around the herbicide container." *Id*. ¶ 61. Agent Orange was "the most extensively used herbicide in Vietnam." *Id*. ¶ 63.

Plaintiffs acknowledge that Agent Orange was "an effective defoliant when used in heavy concentration and was used in regions containing a wide variety of woody and broadleaf herbaceous plants, causing discoloration and dropping of leaves." *Id*. ¶ 64. The chemical formulation of Agent Orange consists of equal parts of "n-butyl esters of 2,4-D and 2,4,5-T." *Id*. ¶ 61. The contaminant TCDD, also known as dioxin, is a "by-product in the manufacture of 2,4,5-T," and therefore also is a "by-product" in the manufacture of Agent Orange. *Id*. ¶¶ 61-62; *see also id.* ¶¶ 88, 109.

"[M]ore than 95% of all herbicides" used in Vietnam were dispersed in a military operation codenamed "Operation Ranch Hand," *id*. ¶ 51, the objectives of which were "twofold: (a) to defoliate forests and mangroves to destroy the vegetative cover used by the [Vietcong and North Vietnamese] troops for concealment, and (b) to destroy crops to deprive them of food." *Id*. ¶ 52.[3] Plaintiffs concede that the Defendants' herbicides were "effective" and "especially useful" in achieving these combat objectives, *id*. ¶ 64, and, as American involvement in the war intensified, the military ordered and purchased from Defendants "as much as they were able to produce." *Id*. ¶ 86. In 1964, the "use of herbicides escalated . . . as the war escalated." *Id*. ¶ 58.

[3] The Amended Complaint characterizes the herbicide operations as the use of "chemical warfare as a means of furthering U.S. military and foreign policy in Vietnam and Southeast Asia," *id.* ¶ 52, but that characterization does not modify Plaintiffs' concession that the herbicides were targeted against plants—not people.

From 1961 until the U.S. ceased herbicide operations in 1971, the U.S. military completed thousands of missions spraying herbicides on the Ho Chi Minh Trail and other strategic military targets. *Id*. ¶¶ 55-60.

II. THREE PRESIDENTIAL ADMINISTRATIONS APPROVED AND CONDUCTED THE HERBICIDE PROGRAM

In late 1961, the State Department and the Department of Defense recommended initiation of a "large-scale herbicidal/chemical warfare program" against the efforts of the Democratic Republic of Vietnam ("North Vietnam" or the "DRV") and the Vietcong to overthrow by military force the government of South Vietnam. *Id.* ¶ 54. In connection with that joint recommendation, Secretary of State Dean Rusk advised President Kennedy that "successful plant-killing ops in [Vietnam], carefully coordinated with and incidental to larger ops, can be of substantial assistance in the control and defeat of the [Vietcong]," and 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.*"[4] President Kennedy accepted that "joint recommendation" and, in November 1961, approved the launch of military herbicide operations. *Id*. ¶¶ 50, 54. Defoliation operations began in September 1962, and missions targeting crops that sustained enemy forces commenced in November of that year. *Id*. ¶ 55.

Herbicides were used in Vietnam because they were effective in meeting important U.S. and Allied military objectives. *Id*. ¶¶ 52, 64. As a spokesman for the Department of Defense told Congress, "the use of . . . herbicides [in Vietnam] was appropriate and had one

[4] Memorandum from Secretary of State Rusk, to President Kennedy (Nov. 24, 1961) (emphasis added) [hereinafter *Rusk Memo*], attached hereto as Exhibit 1 to the Appendix. Pursuant to Rules 201(b) and 201(d) of the Federal Rules of Evidence, Defendants request that the Court take judicial notice of this document and other public records cited herein.

purpose—to [s]ave the lives of Americans and our allies."[5] Other Executive Branch officials informed Congress that the herbicide program was "effective in enhancing the success of allied combat operations," and that their use was "helpful in protecting the American soldier and contributing to successful accomplishment of the ground combat mission."[6] The military instituted policies intended to ensure that the herbicides were applied only to targets of military significance.[7]

The herbicide program was nevertheless controversial. "[O]pposition to the herbicidal warfare program sprang up from many different quarters." *Id*. ¶ 66. But that opposition did not deter the Executive Branch's implementation of the program. Contemporaneous policy decisions, military orders, and statements by senior Executive Branch officials confirm the uniform conclusions of the Kennedy, Johnson, and Nixon Administrations that the use of these herbicides was both effective to protect American and Allied troops and permissible under existing treaties and customary international law. *E.g., id.* ¶ 76.[8] Indeed, Plaintiffs acknowledge that in 1969, when faced with a United Nations General Assembly Resolution interpreting the 1925 Geneva Protocol to ban at least some kinds of herbicide use in warfare, "[t]he United States did not accept this interpretation and voted against the resolution."

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[5] *U.S. Chemical Warfare Policy, Hearing Before the Subcomm. on Nat'l Sec. Policy and Sci. Devs. of the House Comm. on Foreign Affairs*, 93d Cong. 154 (1974) (statement of Amos Jordan, Acting Assistant Secretary for International Security Affairs, Department of Defense), attached as Ex. 2 to the Appendix.

[6] *Chemical-Biological Warfare: U.S. Policies and International Effects, Hearing Before the Subcomm. on Nat'l Sec. Policy and Sci. Devs. of the House Comm. Foreign Affairs*, 91st Cong. 223-25, 231-32 (1969) (statement of Rear Admiral William E. Lemos, Director of Policy Plans and National Security Council Affairs), attached as Ex. 3 to the Appendix.

[7] *See, e.g., id.* at 230 (noting that in order to continue to protect civilians from herbicide exposure, the Defense Department "has issued instructions to the Joint Chiefs of Staff to reemphasize the already existing policy that 2,4,5-T be utilized only in areas remote from population").

[8] *See also Rusk Memo, supra* note 4.

Id.[9] And in 1970, Secretary of State Rogers asserted that "[i]t is the United States' understanding of the [1925 Geneva] Protocol that it does not prohibit the use in war of . . . chemical herbicides."[10] Later, when President Gerald R. Ford issued Executive Order 11850 renouncing "as a matter of national policy, first use of herbicides in war," *id.* ¶ 80, his accompanying remarks confirmed the consistent U.S. position that "the [1925 Geneva] protocol does not cover . . . chemical herbicides."[11]

III. CONGRESS SUPPORTED THE HERBICIDE PROGRAM

In August 1964, the Gulf of Tonkin Resolution authorized the President "to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty."[12] Congress later approved numerous annual and supplemental appropriations to fund U.S. combat operations in Vietnam.[13] Between July 1966 and July 1973, Congress voted over one hundred times for appropriations and other measures related to continuing war efforts in Vietnam. At the same time, Congress denied funds for

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[9] *See also* Yearbook of the United Nations 28 (1969) (stating the U.S. position that "[c]hemical herbicides . . . which were unknown in 1925 [when the Geneva Protocol first was adopted], could not be included" within the scope of the prohibitions), attached as Ex. 4 to the Appendix.

[10] Message from the President of the United States Transmitting the Letter of Submittal from William P. Rogers, Secretary of State, to President Richard M. Nixon, on Ratification of the 1925 Geneva Protocol, 91st Cong. Exec. J. (Aug. 19, 1970), attached as Ex. 5 to the Appendix.

[11] President's Remarks Upon Signing the Instruments of Ratification of the Two Agreements, January 22, 1975, 11 Weekly Comp. Pres. Doc. 74 (Nov. 4, 1975), attached as Ex. 6 to the Appendix.

[12] Pub. L. No. 88-408, 78 Stat. 384 (1964).

[13] *See, e.g.*, Pub. L. No. 89-18, 79 Stat. 109 (1965) (approving a supplemental appropriation for $700 million in order to meet mounting military requirements in Vietnam, and enabling the President to expend the funds "upon determination . . . that such action is necessary in connection with military activities in south-east Asia"); Pub. L. No. 89-213, 79 Stat. 863, 872 (1965) (unanimously approving an additional $1.7 billion for "military activities in southeast Asia"); 112 Cong. Rec. 4411, 4474-75 (1966) (approving a $4.8 billion supplemental military and procurement authorization bill for military activities in Vietnam); Pub. L. No. 90-8, 81 Stat. 8 (1967) (approving $12 billion in the Armed Forces Supplemental Authorization Act for military procurement, research, and construction of facilities necessary in connection with military activities in southeast Asia); Pub. L. No. 90-96, 81 Stat. 231, 248 (1967) (approving the Department of Defense Appropriation Act of 1968, which contains a provision that "[a]ppropriations available to the Department of Defense during the current fiscal year shall be available for their stated purpose to support: (1) Vietnamese and other free world forces in Vietnam . . . .").

certain military initiatives in Southeast Asia of which it disapproved.[14] Notably, Congress never prohibited or curtailed expenditures on the herbicide program.

This was not for lack of consideration. Rather, the propriety of America's use of herbicides in Vietnam was considered extensively in both hearings and floor debate. Time and again, the Executive Branch's view prevailed. Far from terminating or limiting the use of herbicides, Congress expressly provided for herbicide procurement.[15] In fact, attempts by some members of Congress to terminate or constrain the herbicide program failed by wide margins. During the Senate debate over the Military Procurement Authorization Act of 1971, Senators Gaylord Nelson (D-WI) and Charles Goodell (R-NY), concerned about the use of herbicides in Vietnam, introduced an amendment to prohibit the expenditure of funds for any military application of anti-plant chemicals, or the transfer of anti-plant chemicals for use by second countries.[16] This measure was soundly rejected by the full Senate, 62-22.[17] Another amendment, more narrowly seeking to prohibit the expenditure of funds for anti-plant chemicals used for crop destruction, was rejected 48-33.[18] Thus, while keenly aware of arguments against the military use of herbicides in Vietnam, Congress continued to appropriate the funds necessary to sustain the program.[19]

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[14] *See, e.g.*, Pub. L. No. 91-171, 83 Stat. 469, 487 (1969) (incorporating a congressional policy statement within the Department of Defense Appropriations Act of 1969, which states as follows: "In line with the expressed intention of the President of the United States, none of the funds appropriated by this Act shall be used to finance the introduction of American ground combat troops into Laos or Thailand").

[15] *See, e.g., Report of the Senate Armed Services Comm. to Accompany H.R. 17132, Authorizing Appropriations for Fiscal Year 1971 for Military Procurement*, No. 91-1016, 85-87 (1970) (establishing the baseline and recommended levels of expenditures for research and development, and procurement of herbicides).

[16] *See* 116 Cong. Rec. 30,036-55 (1970).

[17] *See id.* at 30,054-55.

[18] *See id.* at 30,222-27.

[19] *See, e.g., id.* at 30,005 ("For whatever the possible side effects of our herbicide program, its primary contribution is indisputable: it has saved the lives of Americans in Vietnam." (statement of Senator McIntyre)); *id.* at 30,049 (Aug. 26, 1970) ("[I]f we are fighting a war, let us do something about protecting our boys." (statement of

IV. THE UNITED STATES HAS NEVER AGREED TO MAKE REPARATIONS TO VIETNAM OR ITS PEOPLE FOR INJURIES ALLEGEDLY SUFFERED FROM THE HERBICIDE PROGRAM

Operation Ranch Hand concluded in January 1971, *see* Am. Compl. ¶ 77, and in January 1973, the Paris Peace Accords effectively ended U.S. participation in the war.[20] The United States subsequently severed relations with the DRV and imposed a trade embargo that "prohibited most, if not all, types of transactions, trade, and transfers between U.S. nationals and Vietnamese nationals." *Id*. ¶ 233. In April 1991, the Bush Administration presented a "roadmap" for normalization of ties. President Clinton continued talks, and ultimately lifted the trade embargo on Vietnam "partially" in February 1994, and "fully" in March 1995. *Id*. ¶ 235.

On January 28, 1995, the United States and Vietnam agreed to settle certain outstanding claims between the countries.[21] *Id*. ¶ 236. The 1995 Agreement covers all claims against either nation arising out of "the nationalization, expropriation, or taking of, or other measure directed against, properties, rights, and interests" of the parties and their citizens during and after the war.[22]

Today, the two nations continue to engage in ongoing discussions concerning certain war issues, in the context of their current diplomatic, economic, trade, aid, and security

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Senator Dominick)); *id.* ("[S]o long as we continue to have Americans fighting in Vietnam we must give our men every protection possible[, and] the purpose [of the herbicide program] is to defoliate the jungles in order to protect our men . . . ." (statement of Senator Byrd)); *id.* ("There is absolutely no question that the use of defoliation type chemicals in Vietnam has saved the lives of many United States, South Vietnamese, and allied fighting men in South Vietnam. More important, its use will save lives in the future.") (statement of Senator Thurmond)); *id.* at 30,054 (Aug. 26, 1970) ("We must use these defoliants. It would be a tremendous and dangerous mistake for us not to do so, in order to protect our American boys . . . ." (statement of Senator Goldwater)); *id.* at 30,224 (Aug. 27, 1970) ("[T]he military effectiveness of the [herbicide] program . . . means less casualties to our American soldiers, marines, and other forces." (statement of Senator McIntyre)).

[20] *See Paris Peace Accords, Agreement on Ending the War and Restoring Peace in Vietnam* (signed and entered into force January 17, 1973).

[21] *See* 1995 Agreement Between the Gov't of the United States of America and the Gov't of the Socialist Rep. of Vietnam Concerning the Settlement of Certain Property Claims (the "1995 Agreement"), attached as Ex. 7 to the Appendix.

[22] *Id.* Ex. 2, art. 1(a), (b). Under the 1995 Agreement, Vietnam agreed to pay more than $200 million to the United States, and the United States agreed to remove blocks on Vietnamese assets. Ex. 2, art. 2.

relationships.[23] Among other things, a 2002 Memorandum of Understanding provides for scientists representing both governments to work together to determine the effects, if any, of Agent Orange on people and ecosystems, along with methods and costs of treatment and environmental remediation.[24] But the United States never has agreed that it has either a moral or a legal duty to provide funds and assistance to remediate harms allegedly caused by Agent Orange.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE NONJUSTICIABLE

Federal courts have long recognized that they have no authority to judge matters that are committed by the Constitution to the political branches, or that would interfere with the political branches' exercise of their constitutional responsibilities.[25] This fundamental separation of powers concept, often analyzed under the "political question" doctrine, "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).[26]

In *Baker v. Carr*, the Supreme Court identified six factors that indicate whether adjudication of a case would violate the separation of powers:

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[23] *See* Cong. Research Service, Report IB98033, *The Vietnam-U.S. Normalization Process* (updated Nov. 28, 2003) (discussing the history and present status of relations between the United States and Vietnam), attached as Ex. 8 to the Appendix.

[24] *See* Memorandum of Understanding Between the Nat'l Inst. of Envtl. Health Sci., U.S. Dep't of Health & Human Servs., and the Nat'l Envtl. Agency, Vietnamese Ministry of Sci., Tech. & the Env't (Mar. 10, 2002), *available at* www.niehs.nih.gov/external/usvcrp/mou31002.pdf, attached as Ex. 9 to the Appendix.

[25] *See Baker v. Carr*, 369 U.S. 186, 210-11 (1962); *Oetjen v. Cent. Leather Co*., 246 U.S. 297, 302 (1918); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 259-60 (1796).

[26] *See also Powell v. McCormack*, 395 U.S. 486, 517 (1969) (defining a "political question" as one that "is not justiciable in federal court because of the separation of powers provided by the Constitution").

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

369 U.S. 186, 217 (1962). If any factors are "inextricable from the case," dismissal is appropriate. *Id.* Here, virtually every one of these factors is present.

Applying the foregoing concepts, the Supreme Court repeatedly has cautioned the courts against adjudicating claims that would interfere with the conduct of foreign relations, committed by the Constitution to the Executive, U.S. Const. art. II, § 2, cls. 1-2, and Congress, *id.*, cl. 2; *see also id.* art. I, § 8, cls. 11, 18, or to the President's authority as Commander in Chief to direct the Nation's military affairs, *id.* art. II, § 2, cl. 1.

"The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision" *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (citations omitted).[27] The Second Circuit has repeatedly recognized that diplomatic negotiations and the conduct of foreign affair are matters left to the President's discretion, especially when they are bound up in the attempts to conclude hostilities because "'the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict, and the

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[27] *Accord First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) (citing *Oetjen*, 246 U.S. 297); *Baker v. Carr*, 369 U.S. at 211 ("[R]esolution of such issues [touching on foreign relations] frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views."); *United States v. Belmont*, 301 U.S. 324, 328 (1937) ("[T]he conduct of foreign relations was committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this political power was not subject to judicial inquiry or decision." (citing *Oetjen*)).

scope which in foreign affairs must be allowed to the President if this country is to play a responsible role in the council of the nations.'" *Holtzman v. Schlesinger*, 484 F.2d 1307, 1311-12 (2d Cir. 1973) (quoting *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973)).

This reluctance of courts to intrude upon foreign relations is particularly acute in cases like this one, seeking war reparations. Courts have defined reparations as claims for "loss or damage to which [the plaintiffs] have been subjected as a consequence of war imposed upon them."[28] There can be no doubt that the claims Plaintiffs assert in this lawsuit constitute "reparations" under this definition.

Plaintiffs seek to hold Defendants liable for compensatory and punitive damages for manufacturing and selling herbicides that the U.S. military ordered and then used during a war to protect American and Allied troops. Indeed, Plaintiffs' Amended Complaint explicitly recognizes that use of Defendants' herbicides in the war effort reflected a strategic military decision made by three successive Presidents to prevent the enemy from using vegetative cover as concealment and to destroy the enemy's food stocks. Am. Compl. ¶¶ 51, 53-54. The type of relief Plaintiffs seek—far ranging environmental remediation in Vietnam in the form of a mandatory injunction, and personal injury damages for millions of Vietnamese citizens allegedly harmed by military actions—is the kind historically addressed government-to-government through a treaty/reparations process.[29] The fact that Plaintiffs have sued private parties rather

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[28] *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 275 (D.N.J. 1999) (utilizing definition of "reparations" under the Treaty of Versailles that ended World War I); *accord Alperin v. Vatican Bank*, 242 F. Supp. 2d 686, 691 n.7 (N.D. Cal. 2003); *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659, 666-67 (N.D. Cal. 2002).

[29] The Supreme Court has held that "claims for compensation by individuals harmed by war-related activity belong exclusively to the state of which the individual is a citizen," and "can be asserted only by their government." *Burger-Fischer*, 65 F. Supp. 2d at 273-74 (citing *Ware*, 3 U.S. 230); *see also United States v. Diekelman*, 92 U.S. 520, 524 (1876) ("[A] citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. . . . [T]he claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war."); Restatement (Third) of Foreign Relations § 902, cmt. i (1987); Louis Henkin, *Foreign Affairs and the Constitution* 262 (1972) (under international law, a claim between

than the United States does not change the reparations character of the relief they seek. Indeed, the Supreme Court explained that "it does not matter" whether the reparation claims have been made directly against the sovereign or instead its private citizens, because "[h]istorically, wartime claims against even nominally private entities have become issues in international diplomacy." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416 (2003).

The questions whether and what war reparations are due, in turn, are ones that must be resolved by the political departments, not the judicial branch.[30] Such questions are not judicial, and are decided principally with regard to the likely effect on our foreign relations and military affairs. The Executive has made that decision here, declining to make reparations for injuries allegedly caused by the military's use of Agent Orange and other herbicides in Vietnam. Plaintiffs should not be permitted to circumvent that decision through civil litigation.[31] Adjudication of Plaintiffs' claims may also, more generally, hinder this Nation's ability to speak with one voice on our current relationship with Vietnam, interfere with the President's and Congress's implementation of a strategy for future relations, and create an impermissible risk of

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private individuals of different nationality is "automatically a debt between governments, and governments have dealt with such private claims as their own, treating them as national assets and as counters in international bargaining").

[30] *See Alperin*, 242 F. Supp. 2d at 692 (Plaintiffs' World War II reparations claims committed to the political branches and thus nonjusticiable); *Zivkovich*, 242 F. Supp. 2d at 666 ("As an issue affecting United States relations with the international community, war reparations fall within the domain of political branches and are not subject to judicial review." (citing *Oetjen*, 246 U.S. at 302)); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999) ("The executive branch has always addressed claims for reparations as claims between governments. . . . Thus, it is evident that responsibility for resolving [such] claims arising out of a war is constitutionally committed to the political branches of government, not the judiciary."); *Burger-Fischer*, 65 F. Supp. 2d at 284-85 ("Major policy determinations are implicated in the determination of the size and in the allocation of reparations . . . [and] not the subject of judicial discretion.").

[31] *See The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815) ("It is not for [the nation's] Courts to interfere with the proceedings of the nation [with other countries] and to thwart its views."); *see also Bano v. Union Carbide Corp.*, 361 F.3d 696, 716-17 (2d Cir. 2004) (recognizing the "difficulty a United States court would have in controlling and overseeing the progress of remediation in India").

inconsistent and "multifarious pronouncements" on foreign relations.[32] For these reasons, courts faced with individual claims for reparations from foreign sovereigns and their subjects have consistently held them nonjusticiable.[33]

That conclusion is even more certain where, as here, plaintiffs seek reparations based on the wartime activities of the United States itself. In such circumstances, the reparations claims intrude not just on the Executive's power to conduct foreign relations, but also on the Executive's power to conduct war. The Nation's military decisions are unequivocally committed to the political branches, not the courts.[34] Indeed, the Supreme Court has recognized there are few "area[s] of governmental activity in which the courts have less competence" to act. *Gilligan*

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[32] *Zivkovich*, 242 F. Supp. 2d at 670 (noting that adjudication of World War II reparations claim would involve the court in foreign policy, which is an area where it is imperative that the nation speak as one); *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 383-84 (D.N.J. 2001) (allowing plaintiffs' World War II reparations claim to proceed "would impermissibly intrude into an area that has been exclusively managed by the Executive and Legislative branches" and result in "very real harm to our foreign relations"); *Burger-Fischer*, 65 F. Supp. 2d at 285 (judicial attempts to structure a reparations scheme for World War II victims would create an "'embarrassment of multifarious pronouncements by various departments on one question.' One need only consider the damage which would be created if foreign nations negotiating with the United States were confronted with a situation in which a solemn pact reached with the Executive Department and ratified by the Senate could be undone by a court." (citation omitted)); *cf. Garamendi*, 539 U.S. at 420-24 (holding state law compromised President's capacity to speak with "one voice" in dealing with governments to resolve claims arising out of World War II).

[33] *See, e.g.*, *Alperin*, 242 F. Supp. 2d at 690-95 (claims seeking return of funds and property stolen by Nazi puppet regime and allegedly in bank's control were nonjusticiable); *Zivkovich*, 242 F. Supp. 2d at 668-90 (claims for, *inter alia*, conversion and unjust enrichment resulting from theft of property/money during World War II were nonjusticiable); *In re Nazi Era Cases*, 129 F. Supp. 2d at 375-84 (forced labor and wrongful death claims against German corporation nonjusticiable); *Iwanowa*, 67 F. Supp. 2d at 483-89 (dismissing on political question grounds Belgian victim's claims against German subsidiary of Ford who coerced her to perform labor at a Nazi automotive plant without compensation); *Burger-Fischer*, 65 F. Supp. 2d at 282-85 (dismissing as nonjusticiable class actions brought by Nazi victims against German corporations for: looting gold they knew had been wrongfully taken from concentration camp inmates; using and profiting from unpaid slave labor; and manufacturing and profiting from the sale of Zyklon B to the Nazis, which they knew was being used to commit genocide).

[34] *See Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) ("Certainly, it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief sending our armed forces abroad or to any particular region."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (acknowledging "broad powers in military commanders engaged in day-to-day fighting in the theater of war"); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2647 (2004) (plurality opinion) ("Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.").

v. Morgan, 413 U.S. 1, 10 (1973).[35] As Justice Kennedy recently summarized, "there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress in the conduct of military affairs." *Rasul v. Bush*, 124 S. Ct. 2686, 2700 (2004) (Kennedy, J., concurring).

The Second Circuit has recognized that "the difficulty encountered by a domestic judicial tribunal in ascertaining the 'facts' of military decisions exercised thousands of miles from the forum, lies at the heart of the determination whether the question is a 'political' one." *Da Costa v. Laird*, 471 F.2d 1146, 1148 (2d Cir. 1973) ("*Da Costa II*"). The Circuit has broadly concluded that the "tactical and strategic military decisions ordered by the President in his capacity as Commander-in-Chief of the Armed Forces" constitute non-justiciable political questions. *Id.* at 1147. Indeed, the Second Circuit specifically concluded that tactical military decisions made during Vietnam are shielded from judicial scrutiny by the political question doctrine. *See Holtzman*, 484 F.2d 1307; *Da Costa II*, 471 F.2d 1146*; Da Costa v. Laird*, 448 F.2d 1368 (2d Cir. 1971) ("*Da Costa I*").

Entertaining Plaintiffs' challenge to those decisions would express a stark lack of respect for the Executive Branch and risk multifarious and inconsistent pronouncements by various departments of government. Thus, Justice Kennedy's observation in *Rasul* is equally applicable here: "[T]he existence of jurisdiction would have had a clear harmful effect on the

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[35] *See also Jones v. N.Y. State Div. of Military & Naval Affairs*, 166 F.3d 45, 51 (2d Cir. 1999) ("The Supreme Court has said that when a 'case arises in the context of Congress's authority over national defense and military affairs . . . perhaps in no other area [is] . . . Congress [accorded] greater deference.'" (citations omitted)); *Able v. United States*, 155 F.3d 628, 633 (2d Cir. 1998) ("Deference by the courts to military-related judgments by Congress and the Executive is deeply recurrent in Supreme Court caselaw and repeatedly has been the basis for rejections to a variety of challenges to Congressional and Executive decisions in the military domain."); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 204, 206 (2d Cir. 1987) ("The greater the scope of a military decision and the more far-reaching its effect, the more it assumes the aspects of a political determination, which, in and of itself, it is not subject to judicial second-guessing." (citations omitted)).

Nation's military affairs, [so] the matter was appropriately left to the Executive Branch and there was no jurisdiction for the courts . . . ." 124 S. Ct. at 2700 (Kennedy, J., concurring) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950)).[36]

In sum, Plaintiffs' suit challenges how the President, with the support of Congress, chose to prosecute the war in Vietnam, and seek reparations that our Nation has declined to make to the people of Vietnam. As Justice Jackson observed, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Adjudicating Plaintiffs' war reparations claims would call for judicial determinations that would demonstrate a "lack of the respect due coordinate branches," *Baker v. Carr*, 369 U.S. at 217, raise questions that "uniquely demand single-voiced statements of the government's views," *id.* at 211, and risk "embarrassment from multifarious pronouncements" by the United States government, *id.* It would require this Court impermissibly to second-guess the wisdom of core military and diplomatic decisions and could interfere with present sovereign-to-sovereign relations between the United States and Vietnam.[37] While Plaintiffs may disagree with the

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[36] *See also, e.g.*, *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34, 37 (2d Cir. 1985) (per curiam) (challenge to the deployment of cruise missiles raises nonjusticiable political question); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309-11 (2d Cir. 1973) (challenge to legality of military activities in Cambodia raises nonjusticiable political question); *DaCosta v. Laird*, 471 F.2d 1146, 1147 (2d Cir. 1973) (challenge to tactical and strategic military decisions made by the President in the Vietnam War raise nonjusticiable political questions); *Campbell v. Clinton*, 203 F.3d 19, 24-28 (D.C. Cir. 2000) (Silberman, J., concurring) (challenge to the President's use of military forces is a nonjusticiable political question).

[37] During a recent conference with the parties, this Court raised the potential applicability of *Kadic v. Karadzic*, 70 F.3d 232 (2d. Cir. 1995), to Plaintiffs' claims. Plaintiffs' claims, however, are fundamentally different from those found to be justiciable in *Kadic*. In that case, the Court held that claims for genocide, rape, and torture were not barred by the political question doctrine. *Id.* at 249-50. But the plaintiffs in *Kadic* did not seek reparations for the United States' conduct in war. In fact, their claims were not for reparations at all. They addressed abuses by a rogue leader of an unrecognized, self-declared foreign state against inhabitants of that state. Moreover, the State Department had expressly disclaimed any concern that rulings on the claims would interfere with American diplomatic relations. *Id.* at 250. The Second Circuit rightly distinguished cases like this one, where "judicial

United States' military and foreign policy decisions, it is difficult to conceive of a case less suited to judicial resolution. Cases which raise "questions of fact involving military and diplomatic expertise not vested in the judiciary, . . . make the issue political and thus beyond the competence of . . . this court to determine." *Holtzman*, 484 F.2d at 1310.

These conclusions do not change because Plaintiffs have sued the United States' contractors instead of suing the United States.[38] The allegedly primary wrongdoer, whom the Defendants supposedly aided and abetted and with whom they supposedly conspired, is the United States Government. Adjudication of claims so based unavoidably requires judicial inquiry into the Nation's strategic military and diplomatic decisions regardless of the identity of the Defendants. Plaintiffs' claims should be dismissed as nonjusticiable.

II. PLAINTIFFS' INTERNATIONAL AND FEDERAL LAW ALLEGATIONS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

Even if separation of powers principles did not mandate dismissal of Plaintiffs' entire complaint—and they plainly do—Plaintiffs' international and federal claims must be dismissed for failure to state a claim upon which relief can be granted. The one federal statute Plaintiffs cite that does create a private cause of action, the TVPA, 28 U.S.C. § 1350, is inapplicable. Plaintiffs also assert claims for relief under the WCA; a number of international

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resolution of a question would contradict prior decisions taken by a political branch" and "seriously interfere with important governmental interests." *Id.* at 249.

[38] *See, e.g.*, *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (political question doctrine "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government; *the identity of the litigant is immaterial to the presence of these concerns in a particular case*" (emphasis added)); *Oetjen*, 246 U.S. at 301-03 (private dispute over ownership of hides is nonjusticiable, because resolution would require the court to subject the conduct of foreign relations to judicial inquiry or decision); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1497 (C.D. Cal. 1993) (tort claims against the manufacturer of an allegedly malfunctioning missile are nonjusticiable, because claims necessarily required court to inquire into strategy decisions made by the military during war); *Zuckerbraun v. Gen. Dynamics Corp.*, 755 F. Supp. 1134, 1142 (D. Conn. 1990) (tort claims against manufacturers of ship's defense systems implicates nonjusticiable executive branch decisions, because the case "would touch on military decisions which are committed to the executive branch" and courts "'lack standards with which to judge whether reasonable care was taken to achieve tactical objectives in combat while minimizing injury and loss of life'" (quoting *Rappenecker v. United States*, 509 F. Supp. 1024, 1030 (N.D. Cal. 1980)), *aff'd on other grounds*, 935 F.2d 544 (2d Cir. 1991).

treaties, conventions, resolutions and charters; and customary international law. Am. Compl. ¶ 251. None of these purported bases for suit, however, provides Plaintiffs with a cause of action. Similarly, Plaintiffs' allegations fail to satisfy the "demanding standard," *Sosa*, 124 S. Ct. at 2769 n.30, that governs recognition of a federal common law cause of action for a violation of the "law of nations" under the ATS, 28 U.S.C. § 1350.

A. Plaintiffs Have Failed to State a Claim for Relief Under the TVPA

Although the TVPA provides a cause of action, Plaintiffs cannot state any claim for relief against Defendants under that statute. The TVPA establishes that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual." 28 U.S.C. § 1350 note § 2(a)(1). It defines "torture" as:

> any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act the individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

Id. § 1350 note § 3(b)(1).

The essence of Plaintiffs' claim—*i.e*., that the U.S. military engaged in "torture" by spraying herbicides to defoliate enemy jungle cover and destroy enemy crops—is frivolous on its face. The Court need not reach the merits of that claim, however, because, as Defendants explain below, Plaintiffs fail to allege several essential elements of a TVPA claim.

1. The TVPA Does Not Apply to Corporations

Defendants cannot violate the TVPA because, by its terms, the statute imposes liability only on human beings who inflict torture upon another human being. Throughout the

statute, the term "individual" describes both those who can violate the proscriptions of the TVPA, as well as those who can be victims of torture. Specifically, the TPVA provides that "[a]n *individual* who . . . subjects an *individual* to torture shall . . . be liable for damages to that *individual*," and it defines "torture" as "any act, directed against an *individual* . . . by which severe pain or suffering . . . is intentionally inflicted on that *individual*." 28 U.S.C. § 1350 note §§ 2(a)(1), 3(b)(1) (emphasis added). It is clear both from context and common sense that only natural persons can be the "individual" victims of acts that inflict "severe pain and suffering." *Id*. § 1350 note § 3(b)(1) Because the TVPA uses the same term "individual" to identify offenders, the definition of "individual" within the statute must refer to a human being, and thus only natural persons can violate the Act.[39] Indeed, the legislative history confirms that the statute "uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: *only individuals may be sued*." S. Rep. No. 102-249, at 7 (1991) (emphasis added).[40]

Because the TVPA imposes liability solely on human beings, it cannot apply to corporations, and Plaintiffs' claims under the TPVA must be dismissed.

2. The Alleged Acts Did Not Occur When Plaintiffs Were in the Custody or Physical Control of Defendants

Plaintiffs' TVPA claim also fails because they do not and cannot allege that the purported acts of "torture" occurred while they were in Defendants' "custody or physical

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[39] *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) (courts cannot, "[a]bsent some congressional indication to the contrary, . . . give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue"); *see also Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 381-82 (E.D. La. 1997) ("[T]he plain meaning of the term 'individual' does not ordinarily include a corporation"), *aff'd*, 197 F.3d 161, 167 (5th Cir. 1999).

[40] Because the TVPA proscribes conduct directed against "individuals," Plaintiffs' claims fail for the additional reason that they do not allege that the herbicides Defendants sold to the American military were "directed against" or "inflicted on" individuals. 28 U.S.C. § 1350 note § 3(b)(1); *see also* S. Rep. No. 102-249, at 2. Instead, they acknowledge that the herbicides were used to defoliate vegetative cover and to destroy crops to deprive enemy troops of food. *See* Am. Compl. ¶ 52.

control." 28 U.S.C. § 1350 note § 3(b)(1). Indeed, far from alleging that they were in the "custody or physical control" of companies operating in the United States, Plaintiffs allege that their injuries arose either from direct exposure to herbicides "spray[ed]" from and "dropped by . . . U.S. aircraft," Am. Compl. ¶ 150, or indirect exposure from eating contaminated food grown in areas where the military sprayed, stored or spilled herbicides, *id*. ¶¶ 121-23, 130-31, 150, 161-62, 166-67, 180-82, 191-92, 196, 203, 208, 214, 219-20. Because Plaintiffs have failed to plead the requisite "custody or control" element of the statute, they do not state a claim under the TVPA.

3. Defendants Did Not Act Under the Authority or Color of Law of Any Foreign Government

Plaintiffs also nowhere allege that that Defendants acted "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350 note § 2(a). To the contrary, Plaintiffs state that Defendants entered into procurement contracts with the Government of the United States pursuant to the Defense Production Act of 1950, which "instructed" Defendants on how to label the herbicides. Am. Compl. ¶¶ 84-86. Whatever the RVN's involvement in spraying operations, Defendants' manufacture and sale of herbicides to the U.S. Government did not constitute an act under the "authority" or "color of law" of a foreign nation.

4. Plaintiffs Have Failed to State a Claim for "Aiding and Abetting" Liability Under the TVPA

Tacitly acknowledging that they cannot plead direct violations of the TVPA, Plaintiffs allege that Defendants "aided and abetted the governments of the U.S. and the RVN in bringing about the torture committed against the plaintiffs." *Id*. ¶ 276. This attempt to evade the requirements of the TVPA fails as a matter of law. First, Plaintiffs cannot allege violations of the TVPA by the U.S. and RVN governments, because only human beings, not governments, can violate the statute, and because Plaintiffs do not claim they were in the "custody" of these

governments when they were exposed to herbicides. In the absence of an alleged violation of the TVPA by these governments, Defendants could not have "aided and abetted" such a violation. *See, e.g.*, *Geiger v. AT&T Corp.*, 962 F. Supp. 637, 645 n.9. (E.D. Pa. 1997) (noting, in a civil context, that if the primary actor is innocent, there can be no liability for aiding and abetting that act); *see also* Restatement (Second) of Torts § 876 (2004) (defining aiding and abetting liability as liability for "harm resulting to a third person from the *tortious conduct* of another" (emphasis added)); *cf. Shuttlesworth v. City of Birmingham*, 373 U.S. 262, 265 (1963) ("It is generally recognized that there can be no conviction for aiding and abetting someone to do an innocent act."); *United States v. Ruffin*, 613 F.2d 408, 412 (2d Cir. 1979) ("It is hornbook law that a defendant charged with aiding and abetting the commission of a crime by another cannot be convicted in the absence of proof that the crime was actually committed.").

Second, even if the U.S. and RVN governments could have violated the TVPA, the statute does not create a cause of action for civil aiding and abetting liability. As the Supreme Court explained in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), "there is no general presumption that" a statute that imposes liability for primary conduct also imposes civil liability for aiding and abetting. *Id*. at 182. Instead, the authority to impose such liability must be found in the statute itself. *See id*. at 173 ("[T]he text of the statute controls" whether aiding and abetting liability is authorized); *id*. at 177 (the issue "is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute"). Like § 10(b) of the Securities Exchange Act, the statute at issue in *Central Bank of Denver*, the TVPA does not "mention aiding and abetting." *Id*. at 175 (internal quotation marks and citations omitted). And although the TVPA may reach a broad range of conduct, *see* 28 U.S.C. § 1350 note § 2(a), the legislative history of the Act

repeatedly emphasizes the narrow range of persons who are potential defendants under the law. *See, e.g.*, 137 Cong. Rec. S1369, S1378 (daily ed. Jan. 31, 1991) (statement of Sen. Specter, co-sponsor of the legislation) (TVPA would only reach those acting under actual or apparent authority of foreign nations, and that "the courthouse door would not be opened wide to suits based upon any type of violent international crime"). In such a circumstance, it is improper to imply civil aiding and abetting liability. *See Elec. Lab. Supply Co. v. Cullen*, 977 F.2d 798, 806 (3d Cir. 1992) (finding it inappropriate to imply civil aiding and abetting liability in the context of the Lanham Act, which "expressly imposes liability on only a small class of defendants for specific misconduct"); *see also Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (similar). Accordingly, Plaintiffs cannot state a claim under the TVPA against Defendants for aiding and abetting.

B. Neither the WCA Nor Any of the International Agreements or Norms Plaintiffs Cite Affords a Private Right of Action

Plaintiffs seeking relief in federal court must establish both that their "legal rights have been invaded *and* a cause of action is available." *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 595 (1983) (plurality opinion) (emphasis added); *see also Davis v. Passman*, 442 U.S. 228, 240 n.18 (1979) (a "cause of action" entitles a litigant to "invoke the power of the court" in order "to enforce the right at issue"). Insofar as Plaintiffs purport to base their claims for relief on the WCA and various international agreements and resolutions, those claims fail as a matter of law for want of the necessary cause of action.

1. The WCA Does Not Provide a Private Right of Action

Plaintiffs allege that their "causes of action arise from," among other things, the WCA. Am. Compl. ¶ 251. That statute provides:

> Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined

> under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

18 U.S.C. § 2441(a). The WCA thus defines a criminal offense that may be prosecuted by the United States. For the reasons explained below, *see infra* Section II.C, Plaintiffs' allegations could not possibly support a prosecution for "war crimes." But even if Defendants could be *criminally* prosecuted under the WCA, it does not provide Plaintiffs with a *civil* cause of action.

Supreme Court decisions foreclose any claim that a private right of action can be inferred from the WCA. The Court has consistently refused to infer such rights of action from "a bare criminal statute" that, like the WCA, contains "absolutely no indication that civil enforcement of any kind was available to anyone." *Cort v. Ash*, 422 U.S. 66, 80 (1975).[41] Because inferring private rights of action under criminal statutes would have "far-reaching consequences," *Cent. Bank of Denver, N.A.*, 511 U.S. at 191, Congress must clearly express an intent to provide such a remedy.[42] As there is no such clear evidence in the WCA or its legislative history,[43] Plaintiffs cannot rely on it as the source of a private right of action.

Even if it were possible to infer a private right of action under the WCA, that remedy could not be applied retroactively to conduct that occurred years before that Act was passed. Absent clear indication to the contrary, a statute should not be construed to have retroactive application. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). Thus, the Supreme Court has required that there be an "express command" or an "unambiguous directive"

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[41] *See also Cent. Bank of Denver, N.A.*., 511 U.S. at 190 ("We have been quite reluctant to infer a private right of action from a criminal prohibition alone . . . .").

[42] *See Vasile v. Dean Witter Reynolds Inc.*, 20 F. Supp. 2d 465, 477 (E.D.N.Y. 1998) ("It is also a general precept of criminal law that unless the statute specifically authorizes a private right of action, none exists."), *aff'd*, 205 F.3d 1327 (2d Cir. 2000).

[43] The legislative reports that accompanied the original bill and later amendments speak exclusively in terms of criminal prosecutions. For example, the House Report explained that the Act carried out "the international obligations of the United States under the Geneva Conventions [of 1949] to provide *criminal penalties* for certain war crimes." H.R. Rep. No. 104-698, at 1 (1996) (emphasis added).

for a statute to be applied retroactively. *Id*. at 263, 280. There is of course no "express command" or "unambiguous directive" that the WCA is to have retroactive effect, since the retroactive application of criminal statutes is barred by the Constitution's prohibition on *ex post facto* laws. *See* U.S. Const. art. I, § 9, cl. 3. A criminal law that applies only prospectively cannot plausibly furnish a basis for an implied civil cause of action to recover damages based on conduct that occurred twenty to thirty years before its enactment.

2. The International Instruments Plaintiffs Cite Do Not Provide Plaintiffs a Cause of Action in U.S. Courts

Plaintiffs further allege causes of action under: (1) the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (the "1925 Geneva Protocol"); (2) Article 23 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed October 18, 1907 (the "Hague Regulations"); (3) the Geneva Convention Relative to Protection of Civilian Persons in Time of War, signed at Geneva August 12, 1949 (the "1949 Geneva Convention IV"); (4) the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal at Nuremberg, signed and entered into force August 8, 1945 (the "London Charter"); (5) the United Nations Charter (the "U.N. Charter"); and (6) United Nations General Assembly Resolution No. 2603-A (1969) ("U.N. Res. No. 2603-A"). None provides Plaintiffs with a cause of action.

Of the various international documents Plaintiffs cite, the first five are treaties. It is well established that international treaties are not presumed to create privately-enforceable rights. *The Head Money Cases*, 112 U.S. 580, 598-99 (1884). Because treaties are designed to protect the sovereign interests of nations, it is generally up to the signatory states, not their

citizens, to assert claims for treaty violations.[44] Courts therefore will find a treaty to be self-executing only "if the document, as a whole, evidences an intent to provide a private right of action." *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992). The treaties Plaintiffs cite evidence no such intent.

Indeed, courts have expressly held that three of the treaties Plaintiffs cite—the Hague Regulations, the 1949 Geneva Convention IV, and the U.N. Charter—are not self-executing.[45] The 1925 Geneva Protocol and the London Charter share the non-self-executing characteristics of the foregoing treaties. Neither contains any provision that confers rights on individuals, prescribes remedies that individuals may invoke, or provides any other basis for a private right of action. *Cf. The Head Money Cases*, 112 U.S. at 598-99. The 1925 Geneva Protocol simply states that the High Contracting Parties "agree[d] to be bound *as between themselves*" to a prohibition of the use in war of asphyxiating, poisonous or other gases. Protocol for the Prohibition of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, decl. 1, 26 U.S.T. 571, 575 (June 17, 1925) ("1925 Geneva Protocol") (emphasis added).[46] Similarly, the London Charter established the International Military Tribunal for the Nuremberg trials. It nowhere purports to confer any remedies on individual

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[44] *See, e.g.*, *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259-60 (7th Cir. 1990); *United States v. Hensel*, 699 F.2d 18, 30 (1st Cir. 1983); *United States v. Postal*, 589 F.2d 862, 875-76 & n.19 (5th Cir. 1979); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975).

[45] *See Princz v. F.R.G.*, 26 F.3d 1166, 1175 (D.C. Cir. 1994) (Hague Regulations do not provide a private right of action); *Goldstar*, 967 F.2d at 969 (Hague Regulations "not self-executing"); *Iwanowa*, 67 F. Supp. 2d at 439 n.16 (noting unanimous court holdings that the Hague Regulations not self-executing); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (Geneva Convention IV does not create private rights of action); *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 154 (2d Cir. 2003) (U.N. Charter is not self-executing); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881-82 (2d Cir. 1980) (same).

[46] *Cf. Asakura v. City of Seattle*, 265 U.S. 332, 340 (1924) (treaty self-executing where it provided for privileges for "'[t]he citizens or subjects of each of the High Contracting Parties'" (citation omitted)); *Noel v. Linea Aeropostal Venezolana*, 144 F. Supp. 359, 360 (S.D.N.Y. 1956) (Warsaw Convention is self-executing).

nationals, let alone civil damages remedies. Instead, it authorized criminal prosecutions instituted by nations.

Finally, the U.N. General Assembly resolution Plaintiffs cite does not provide any right of action. The General Assembly is not a law-making body, and—with narrow, defined exceptions not relevant here—is granted only recommendatory powers by the U.N. Charter.[47] As the Second Circuit has explained, "General Assembly resolutions and declarations do not have the power to bind member States because the member States specifically denied the General Assembly that power after extensively considering the issue." *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 165 (2d Cir. 2003). Plainly, a U.N. resolution that does not create legally binding norms cannot create an enforceable cause of action.

C. Plaintiffs Have Failed to State a Claim for Relief Under Federal Common Law, Customary International Law or the ATS

Plaintiffs also allege causes of action under federal common law, customary international law, and the ATS. Am. Compl. ¶ 251. In *Sosa*, the Supreme Court held that the jurisdictional grant of the ATS authorizes federal courts to recognize federal common law causes of action for violations of a "very limited" set international legal norms. 124 S. Ct. at 2754. To state such a cause of action under the ATS, Plaintiffs must establish: (1) that they seek to enforce a norm that has attained the status of customary international law, (2) that this norm is, in turn, sufficiently "definite" and "universal" to be among the limited set of international legal norms actionable under the ATS, (3) that this "definite" and "universal" norm applies to both the alleged actor and alleged conduct, and (4) that prudential concerns, particularly foreign policy,

[47] *See* Charter of the United Nations, Art. 10*; see also The Charter of the United Nations: A Commentary* 248, 269 (Bruno Simma ed., 2d ed. 2002).

legislative guidance or other separation-of-powers considerations, do not foreclose recognition of a cause of action for the norm in question.

Specifically, the Court held that courts can recognize a federal common law cause of action for violation of an international legal norm only if the norm is accepted universally by the "civilized world" and is "defined with a specificity comparable to the features of the 18th century" actions that were treated as common law torts when the ATS was enacted in 1789—i.e., piracy, violations of safe conduct and infringement of the rights of ambassadors. *Id*. at 2761-62; *see also id.* at 2765-66. The Court stressed that these "definiteness" and "universality" standards apply not only to whether the particular conduct at issue is proscribed, but also to "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued." *Id*. at 2766 n.20.[48] A court therefore cannot recognize a cause of action against non-governmental actors, such as corporations or private individuals, in the absence of universal consensus that liability for violations of that sufficiently definite norm extends to the conduct of such defendants.

To emphasize what a "high bar" it was setting, *id*. at 2763, the Court explained that the "requirement of clear definition was not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law." *Id*. at 2766 n.21. The Court stressed that decisions about whether to create a private right of action are "better left to legislative judgment in the great majority of cases," *id*. at 2762-63, and directed courts to "look for legislative guidance before exercising innovative authority over substantive law." *Id*. at 2762. In addition, the Court observed that "the possible collateral consequences of making international rules privately actionable argue for judicial caution." *Id*. at 2763. The

[48] *See also* 124 S. Ct. at 2782 (Breyer, J., concurring) ("The norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue.").

Court noted that this is especially true in two areas: (1) where enforcement of a norm is subject to "the check imposed by prosecutorial discretion," and (2) where enforcement has "potential implications for the foreign relations of the United States." *Id*. at 2763.[49]

Thus, to establish a private right of action against Defendants for the manufacture and sale of herbicides for military use during the Vietnam War, Plaintiffs must establish one of two predicates, each of which has two critical parts: (1) that there was a definite and universally recognized international norm prohibiting military use of herbicides prior to 1975, *and* that this norm extended liability to private parties that manufactured and sold herbicides for such use, *or* (2) that, even though military use of herbicides was not *per se* illegal, the manner in which the U.S. and RVN actually used herbicides during the Vietnam War violated a binding international *and* judicially enforceable norm governing the conduct of war, and that this norm extends liability to private parties that manufactured and sold legal material that was used by military authorities in an illegal manner. Plaintiffs cannot possibly establish either predicate. Even if they could, moreover, *Sosa*'s prudential concerns would still foreclose recognition of such a cause of action. Insofar as Plaintiffs rely on international prohibitions on torture, genocide and crimes against humanity—norms that do satisfy *Sosa*'s requirements—the Amended Complaint does not allege facts remotely sufficient to state violations of these norms.

[49] The Court further suggested that, even where these factors do not preclude recognition of a cause of action, it may still be appropriate for courts to limit the availability of the remedy by imposing exhaustion requirements, or by deferring on a case-by-case basis to Executive Branch judgments that adjudication of a particular case will impair the foreign policy interests of the United States. *Id.* at 2766 n.21.

1. There is No Basis for Recognizing a Private Right of Action Against Defendants for Violation of an Alleged Prohibition on Military Use of Herbicides

a. No binding international norm prohibited military use of herbicides

Of the treaties and instruments Plaintiffs cite, only three—the Hague Regulations, the 1925 Geneva Protocol, and U.N. Res. No. 2603-A—address the types of weapons that may be used in warfare. None of these instruments, however, establishes that during the relevant time period (i.e., prior to 1975) there was a "definite" and "universal" prohibition on military use of herbicides. Such a prohibition cannot be found in the remaining treaties Plaintiffs cite, none of which purports to regulate the types of weapons that may be used in war.

(1) The Hague Regulations

Under Article 23 of the Hague Regulations, states are forbidden "[t]o employ poison or poisoned weapons" or "[t]o employ arms, projectiles, or material calculated to cause unnecessary suffering." Hague Regulations, art. 23(a)&(e), 36 Stat. 2277, 2301-02 (Oct. 18, 1907, annex). These proscriptions do not create or give rise to a definite and unambiguous prohibition against use of herbicides during war.

The Regulations do not define the phrase "poison or poisoned weapons," and the International Court of Justice ("ICJ") has noted that "different interpretations exist" as to what this undefined phrase means. *See* Advisory Op. No. 95, *Legality of the Threat or Use of Nuclear Weapons*, at ¶ 55 (I.C.J. July 8, 1996). State practice under the treaty indicates that the proscriptions of "poison or poisoned weapons" did not apply even to chemical gas weapons designed and intended to be lethal, such as shells containing chlorine or mustard gas. *See* Declaration of Kenneth Anderson ("Anderson Decl."), filed concurrently herewith, ¶ 39 (explaining that the Germans, British and French extensively employed such weapons in the

years immediately following adoption of the Hague Regulations); Declaration of Michael Reisman ("Reisman Decl."), filed concurrently herewith, at 30 ("State practice suggests that the 1907 Hague Convention was not intended to apply to poisonous gases"). Indeed, the belligerents in the First World War, all of whom had ratified the Hague Regulations, thought it necessary later to negotiate a special treaty, the 1925 Geneva Protocol, to outlaw lethal chemical gas weapons. Anderson Decl. ¶ 39; Reisman Decl. at 32. In 1960, a classical treatise on the international law of war and a leading writer on the subject both concluded that Article 23's prohibition on poison and poisoned weapons did not apply to poisonous gasses. *See* Joseph Burns Kelly, *Gas Warfare in International Law*, 9 Mil. L. Rev. 1, 44 (1960); Reisman Decl. at 29-30 (citing Myres S. McDougal & Florentino P. Feliciano, *Law and Minimum World Public Order* 619 (1960, repr. 1994). The U.S. Army field manual in force throughout the Vietnam War concluded that specific weapons, including chemical weapons, were to be addressed by specific treaties and not by general prohibitions such as Art. 23. Anderson Decl. ¶ 42. Inasmuch as the Regulations' ban on "poison or poisoned weapons" does not apply to chemical gas weapons designed and intended to kill humans, it plainly does not prohibit military use of herbicides designed and intended as defoliants.

Moreover, even if the terms "poison or poisoned weapons" could be construed more broadly to encompass poisonous gases, this broader definition still would not reach herbicides, regardless of whether they have harmful consequences for humans. Rather, even under a broader interpretation, this proscription would reach only those materials that were intentionally designed "to inflict poisoning as a means of combat." Stefan Oeter, *in* The Handbook of Humanitarian Law in Armed Conflicts 149 (Dieter Fleck ed., 1995). "If the asphyxiating or poisoning effect is merely a side-effect of a physical mechanism intended to

cause totally different results . . ., then the relevant munition does not constitute a 'poison gas.'" *Id.* Thus, chemicals designed and used as herbicides to kill plants, as Defendants' products were designed and used during the Vietnam War, Am. Compl. ¶ 52, could not possibly have been proscribed "poison or poisoned weapons" under even the broadest interpretation that phrase.[50]

Under *Sosa*, the imprecise scope of the Hague Regulations' prohibition on the use of "poison or poisoned weapons," and the uncertainty as to whether that prohibition even applies to lethal chemical weapons designed to kill human beings, is utterly fatal to any claim that the Regulations set forth a sufficiently definite prohibition on military use of herbicides that could be enforced in U.S. courts. By contrast, the "18th-century paradigms" the Court identified in *Sosa*, 124 S. Ct. at 2755-57, 2761-62, were offenses specified in great detail by the treatise writers of the day. Blackstone, whose treatise the Court cites, *id*. at 2756, defined piracy as, among other things: "any commander . . . betraying his trust, and running away with any ship, boat, ordnance, ammunition, or goods; or yielding them up voluntarily to a pirate; . . . or any person confining the commander of a vessel, to hinder him from fighting in the defense of his ship, or to cause a revolt on board;" or "trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose." 4 William Blackstone, Commentaries *72.[51] Unlike these "18th century paradigms," *Sosa*, 124 S. Ct. at 2761-62, the Hague Regulations' proscription of "poison or poisoned weapon" does not establish a highly specific and definite

[50] Plaintiffs do not allege that Defendants' herbicides were designed or used by the military to poison humans; nor could they, because they were not thought at the time to pose any substantial hazard in military use. *See* Defendants' Motion for Summary Judgment Based Upon the Government Contractor Defense.

[51] Although these acts were specified by English statutes, these statutes were "'made to enforce this universal law [*i.e.*, the law of nations], or to facilitate the execution of [its] decisions, [and] are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world.'" *Sosa*, 124 S. Ct. at 2760 (quoting 4 William Blackstone Commentaries *67) (second alteration in original).

prohibition on military use of herbicides, and thus cannot be the source of an actionable norm prohibiting such use.

The foregoing analysis likewise disposes of Plaintiffs' claim that herbicides are *per se* proscribed materials that are "calculated to cause unnecessary suffering." This prohibition has long been understood to apply only to weapons that cause unnecessary or superfluous injury to an already incapacitated combatant. Anderson Decl. ¶ 47 (citing, as an example, bullets treated with an agent that inflames a wound). Thus, it does not even apply to lethal weapons that cause great injury or suffering in order to achieve the military objective of incapacitating enemy troops, let alone to herbicides that even in Plaintiffs' view cause to humans beings as a side-effect of a physical mechanism intended to destroy plants. *Id.* ¶ 46. Further, as a leading treatise explains, Article 23's prohibition on weapons "calculated to cause unnecessary suffering" is:

> too vague to produce by itself a great many practical results. Apart from cases in which states expressly agree to forbid employment of a specified weapon . . ., states have not been known to lightly decide unilaterally to discard a weapon, once introduced into their arsenals, because it is considered to cause unnecessary suffering.

Frits Kalshoven & Liesbeth Zegveld, *Constraints on Waging War: An Introduction to International Humanitarian Law* 41-42 (2001) ("Kalshoven & Zegveld"). Accordingly, this norm is far too indeterminate to be actionable under *Sosa*.

In short, the Hague Regulations provide no basis for recognition of a common law cause of action to sue Defendants for manufacturing and selling herbicides for military use during the Vietnam War.[52]

[52] The fact that the Hague Regulations were not mentioned or cited in the 1969 U.N. General Assembly resolution addressing U.S. use of herbicides, *see infra* at II.C(1)(a)(2), confirms that the Regulations were not understood to set forth a definite and unambiguous prohibition on such use.

(2) The 1925 Geneva Protocol And U.N. General Assembly Resolution

Plaintiffs also rely on the 1925 Geneva Protocol, which prohibits "the use in war of all asphyxiating, poisonous or other gases, and of analogous liquids, material or devices." 26 U.S.T. at 575. Neither this proscription, nor the customary international law that developed from it, prohibited military use of herbicides at the time of the Vietnam War.[53] Even if they had, moreover, that proscription would not be sufficiently "definite" and "universal" to be among the limited set of international legal norms that are actionable under *Sosa*.

As leading scholars have written, the Geneva Protocol's prohibition on use of "asphyxiating, poisonous or other gases" and "analogous . . . material" leaves "considerable room for divergent interpretations." *Documents on the Laws of War* 155 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).[54] As of today, the 1925 Geneva Protocol has given rise to a customary international legal prohibition on first use of lethal gas weapons, such as those used in the First World War. Anderson Decl. ¶ 49. At the time of the Vietnam War, however, this prohibition merely was a rule predicated on reciprocity, not customary law, Reisman Decl. at 35, and it plainly did not encompass military use of herbicides, Anderson Decl. ¶ 49. Indeed, there is "no indication that the 1925 [Geneva] Protocol was designed to encompass herbicides." Reisman Decl. at 34. The "*travaux preparatoires* are silent on this exact point." *Id.*; *see also*

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[53] Because "international law is not retroactive," Anderson Decl. ¶ 35, it is "crucial to look at the law that was in force when the disputed actions took place," which, in this case, is during the Vietnam War, *id*. ¶¶ 35-36. *See also* Reisman Decl. at 27 (noting that, under international law, "a juridical fact must be appreciated in the light of the law contemporaneous with it") (citations and internal quotation marks omitted). Thus, any customary international legal norms that may have developed under the 1925 Geneva Protocol would be irrelevant here.

[54] *See generally* Jill M. Sheldon, Note, *Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the Use of Nuclear Weapons in All Circumstances?*, 20 Fordham Int'l L.J. 181, 220-21 (1996) (the 1925 Geneva Protocol "provoked controversy because the drafters did not *specify* the chemical, biological, or other poisonous gases subject to the protocol's prohibitions. Based on the language banning 'other' gases, some states claimed that it was unclear whether the Geneva Gas Protocol prohibited tear gas, other non-lethal gases, *or herbicides*." (footnote omitted and emphasis added)).

Anderson Decl. ¶ 54. The French text of the Protocol, which is as authentic as the English text, supports the restrictive view that the prohibition extended only to gases deployed for their asphyxiating or toxic effects on man, not herbicides that had harmful side-effects. Reisman Decl. at 34.

State practice supports this restrictive reading. The British military used herbicides chemically similar to Agent Orange in the 1950s during the Malayan Emergency, to deprive enemy guerrilla fighters of their jungle cover and to destroy their crops.[55] And of course the highest levels of the U.S. Government approved use of herbicides in Vietnam. Am. Compl. ¶¶ 50-51, 54-56. As the Second Circuit explained, "it is highly unlikely that a purported principle of customary international law in direct conflict with the recognized practices and customs of the United States and/or other prominent players in the community of States could be deemed to qualify as a *bona fide* customary international law principle." *United States v. Yousef*, 327 F.3d 56, 92 n.25 (2d Cir. 2003), *cert. denied*, 124 S. Ct. 353 & 124 S. Ct. 492 (2003); *see also* Reisman Decl. at 36 (U.S. use of herbicides during the Vietnam War "restricted the transformation of the 1925 Protocol into customary international law").[56]

Moreover, the numerous "two-pronged" reservations many nations took when they acceded to the treaty demonstrate that the Protocol's prohibitions, whatever their precise scope, were not compelled by customary international law. Reisman Decl. at 35-37. As of the time of the Vietnam War, 19 ratifying states considered themselves bound only in relation to

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[55] *See* William A. Buckingham, Jr., *The Air Force and Herbicides in Southeast Asia 1961-1971*, at 4-5 (1982); Greg Goebel, *Chemical & Biological Warfare*, ch. 2 (Nov. 1, 2004). Notably, the United States considered British precedent to establish the use of defoliants as being a legally accepted tactic of war. Secretary of State Rusk advised President Kennedy that herbicide use in Vietnam would be lawful, because "[p]recedent has been established by the British . . . in Malaya in their use of helicopters for destroying crops by chemical spraying." Rusk memo, *supra* note 4.

[56] *See also Flores*, 343 F.3d at 164 (American Convention on Human Rights could not be the source of a legally binding norm where the United States, the primary nation in the affected region, declined to ratify it).

other ratifying states, and declared that they would not be bound if an enemy state failed to respect the prohibition. *Id.* at 35-36. Thus, whatever the scope of the norm that developed from the 1925 Geneva Protocol, during the Vietnam War it applied only to first use of proscribed gases, and only as a matter of reciprocity, not international legal obligation. *Id.*

The controversial U.N. General Assembly Resolution that Plaintiffs cite, Am. Compl. ¶¶ 76, 251, confirms that, as of 1969, military use of herbicides did *not* violate any customary international law emanating from the 1925 Geneva Protocol. Although not themselves binding, *Flores*, 343 F.3d at 166-67, General Assembly resolutions may provide evidence of customary international law when they are unanimous (or nearly so) and reflective of actual state practice. Anderson Decl. ¶ 26. U.N. Res. No. 2603-A, however, was neither. Plaintiffs acknowledge that the resolution was adopted by a vote of 80-3, with thirty-six countries abstaining. Am. Compl. ¶ 76. Of the eighty nations that voted in favor of the resolution, only forty-one were even parties to the Protocol. Anderson Decl. ¶ 57. The United States, one of the world's largest military powers, voted against the resolution, as did Australia (a U.S. military ally in Vietnam), and Portugal. Equally significant, by abstaining, approximately one-third of the nations addressing the question refused to recognize the existence of a treaty or customary international legal prohibition on military use of herbicides. Abstaining states included France, the United Kingdom, Denmark, Norway, the Netherlands, and Turkey (almost all the U.S.'s leading NATO allies), as well as Japan, China, Thailand, Malaysia, Singapore, and Laos (leading Asian countries as well as jungle-covered countries that might expect to be affected by herbicides in war). Anderson Decl. ¶ 57. The fact that a third of all voting nations—including more than half of all parties to the Protocol itself—refused to recognize a prohibition on military use of herbicides demonstrates that there was no such international legal norm during

the Vietnam War. *See also* Reisman at 51 ("[I]t is clear that, although some states spoke strongly against the use of herbicides, there was no consensus.").[57]

Indeed, the 1969 resolution was simply one of a series of General Assembly resolutions addressing the issue of military use of herbicides. *Id.* "From the first to the last resolution . . ., there was a persistent call for accession to or ratification of the 1925 Geneva Protocol. Such a call would not have been necessary if there had already been a customary law prohibition of the agents at issue." *Id.*

The absence of such a norm during the Vietnam War is further underscored by the 1993 Chemical Weapons Convention, which was negotiated decades later and prohibits not only military use of chemical weapons but also the production, trade and stockpiling of such weapons. Significantly, this sweeping treaty does not prohibit use of herbicides to destroy plants, even if such chemicals have the secondary effect of harming people through toxic side effects or the denial of food. Anderson Decl. ¶ 61; Reisman Decl. at 40-41. Equally significant, after the conclusion of the Vietnam War, the 1977 Additional Protocol I to the Geneva Conventions articulated for the first time an obligation to take care in warfare "to protect the natural environment against widespread, long-term and severe damages." Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 55, 1125 U.N.T.S. 3, 16 I.L.M. 1391, 1415. The explicit recognition in the late 1970s that this was a new obligation (one which the U.S. has yet to ratify) confirms that military use of herbicides did not violate customary international law during the

[57] *See Texaco v. Libya*, 17 I.L.M. 1, 29 (1978) (General Assembly resolution adopted by a majority of states did not evidence customary international law in light of negative votes and abstentions by most developed countries with a particular interest in the issue); *see also The Laws of Armed Conflicts* 125-26 (D. Schindler & J. Toman eds., rev. 2d ed. 1981) (noting that subsequent U.N. declarations do not refer to U.N. Res. No. 2603-A, a conspicuous absence that "hints at a certain reserve" about the resolution).

Vietnam War. Anderson Decl. ¶¶ 62-63. Indeed, treatise writers remain uncertain whether, even today, customary international law prohibits military use of herbicides. *Id*. ¶ 60.

The foregoing evidence demonstrates that, prior to 1975, the 1925 Geneva Protocol did not create or give rise to an international legal prohibition on the military use of herbicides that was either sufficiently definite or sufficiently recognized by all of the nations of the civilized world to constitute an actionable norm under *Sosa*. "Instruments that could be construed to prohibit the use of herbicides commence in 1975," Reisman Decl. at 39, and "there is no agreement even today on whether use of herbicides is prohibited by international law." Anderson Decl. ¶ 60. The mere fact that some have argued otherwise, *see* Reisman Decl. at 34 (citing Wil D. Verwey, *Riot Control Agents and Herbicides in War* (1977)), does not provide a basis for deeming such a purported norm actionable under *Sosa*. The indisputable evidence is that a significant number of states—including more than half of all parties to the 1925 Geneva Protocol—refused to recognize a prohibition on military use of herbicides as of 1969, and that subsequently adopted treaties still do not clearly proscribe such use. These facts are fatal to any claim that, during the Vietnam War, the Protocol or the customary international law arising from it included a prohibition on military use of herbicides that was sufficiently clear and unambiguous to be among the "very limited" set of international legal norms actionable under *Sosa*. 124 S. Ct. at 2754.

It is also fatal to Plaintiffs' claim that their asserted norm was not "accepted by the civilized world" during the relevant time period. *Id*. at 2761. Indeed, in this regard, the refusal of the United States to ratify the 1925 Geneva Protocol until U.S. military operations in Vietnam had ceased, and the United States' insistence throughout the War that international law did not prohibit military use of herbicides, *see supra* Statement of Facts, Part II, are sufficient in

and of themselves to foreclose recognition of a federal common law cause of action to enforce such a norm.[58] In *Sosa*, the Court held that an actionable norm could not be derived from conventions to which the United States was not a party, or even from a convention that was binding on the U.S. but that the Senate had ratified on the understanding that it would not create rights enforceable in U.S. courts. *Id*. at 2767. If a Senate understanding that a binding convention is not self-executing is enough to preclude recognition of a private cause of action under the ATS, the refusal of both the political branches to adopt a treaty at all, or to recognize that a norm even exists, necessarily bars recognition of a private common law cause of action to enforce that norm.

(3) The U.N. Charter, London Charter and Geneva Convention

None of the three remaining instruments Plaintiffs cite remotely established a "definite" and "universal" prohibition on military use of herbicides prior to 1975. The U.N. Charter establishes the structure of the U.N., and cannot possibly be the source of a binding norm prohibiting military use of herbicides.[59] The 1949 Geneva Convention IV addresses a host of humanitarian concerns arising during war, such as the treatment of children, women, the sick and wounded; the protection of hospitals; evacuations of civilian populations; the treatment of refugees; the protection of relief agencies; prevention of forced labor; and the like. None of its

[58] Even if a norm is recognized as a rule of customary international law, it does not bind a state that persistently objected during its formation. *See* Restatement (Third) of Foreign Relations § 102 cmt. d (2004) ("[A] state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures."); Ian Brownlie, *Principles of Public International Law* 11 (6th ed. 2003) (same); Sir Robert Jennings & Sir Arthur Watts, 1 *Oppenheim's International Law* (9th ed. 1992) (same); *Fisheries Case (United Kingdom-Norway)*, 1951 I.C.J. 116, 131 (Dec. 18, 1951) (disputed rule "would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it . . ."). Here, the conduct and statements of the United States establish that, even if a customary norm prohibiting military use of herbicides as defoliants had existed prior to 1975, that norm would not have bound the United States. Anderson Decl. ¶ 52.

[59] *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (per curiam) (Bork, J., concurring) (Articles 1 and 2 of the U.N. Charter "contain general 'purposes and principles,' some of which state mere aspirations and none of which can sensibly be thought to have been intended to be judicially enforceable").

provisions, however, addresses the type of weapons in general that may be used in warfare, let alone military use of herbicides.[60] Indeed, at the height of the controversy over U.S. use of herbicides in Vietnam, the 1969 U.N. Resolution did not even mention the 1949 Geneva Convention IV—a telling omission that demonstrates that even those who opposed use of herbicides in Vietnam did not understand the 1949 Geneva Convention IV to prohibit that practice. Thus, the 1949 Geneva Convention IV's "very general" proscriptions, *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978), and "broad mandate[s]," *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980), cannot possibly be the source of a norm that bars military use of herbicides with "a specificity comparable to the features of the 18th century paradigms" of piracy, violations of safe conducts, and infringements of the rights of ambassadors—all of which were clearly defined offenses against the law of nations as described by leading treatise writers of the time. *See Sosa*, 124 S. Ct. at 2755-57; *see also id.* at 2761-62.

Finally, the London Charter, which provided for the establishment of an International Military Tribunal to try Nazi war criminals, is likewise not the source of any such norm. The Charter included broad mandates to treat as a war crime the "wanton destruction of cities, towns or villages, or devastation not justified by military necessity." Charter of the Military Tribunal, Aug. 8, 1945, art. 6(b), 59 Stat. 1546, 1547. Like the 1949 Geneva Convention IV, however, none of the Charter's provisions proscribed use of any particular weapons. To the contrary, the concept of "military necessity" applies only to the use of legal weapons; weapons that are per se illegal cannot be used at all and claims of military necessity cannot justify their use.

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[60] *See Flores*, 343 F.3d at 165 (a convention addressing environmental pollution could not be the source of a binding norm because it did "not attempt to set [pollution] parameters or regulate it, *let alone to proscribe it*" (emphasis added)).

In short, during the Vietnam War there was no definite and universally accepted norm prohibiting use of herbicides in war. There is thus no basis for recognizing a private right of action to enforce such a norm under the ATS.

b. Plaintiffs cannot establish that a binding international norm prohibited private corporations from manufacturing and selling herbicides for military use

Even if foregoing instruments had created a binding prohibition on the use of herbicides during war prior to 1975—and they manifestly did not—they created no universally recognized prohibition on the manufacture and sale by private parties of herbicides intended for such use. Indeed, the general rule is that international legal norms impose obligations on states, not on private actors. Anderson Decl. ¶ 88. As a leading treatise explains:

> States are the principal subjects of international law. This means that international law is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from international law are States solely and exclusively, and international law does not normally impose duties or confer rights directly upon an individual human being. . . .

Sir Robert Jennings & Sir Arthur Watts, 1 *Oppenheim's International Law* 16 (9th ed. 1992).

All three of the instruments Plaintiffs cite that actually address the weapons that may be used in war follow this general rule and impose obligations only on states. The Hague Regulations expressly state that they do "not apply *except between Contracting Powers*," Hague Regulations, art. 2, 36 Stat. at 2290 (emphasis added), and that a "*belligerent party* which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation." *Id*. art. 3 (emphasis added). The 1925 Geneva Protocol likewise provides that the "High Contracting Parties . . . accept" the prohibition on use of bacteriological methods of warfare "and agree to be bound *as between themselves*." 1925 Geneva Protocol, decl. 1, 26 U.S.T. at 575 (emphasis added). And U.N. Res. No. 2603-A only concerns the 1925 Geneva

Protocol, which of course only purports to bind States. *See* G.A. Res. 2603, U.N.G.A.O.R., 24th Sess. § A(a)-(c) (1969) (claiming that "[t]he majority of States then in existence" adhered to the Protocol, that "further States have become parties" and that "other States have declared that they will abide by its principles"). Because none of these documents applies to private actors, they cannot establish a binding international norm prohibiting private entities from making or selling herbicides for use during war prior to 1975.

Plaintiffs' allegations that Defendants acted "under color of law" and "conspired with," "aided and abetted," or were "joint venturers with" the U.S. and RVN Governments, Am. Compl. ¶¶ 242-45, cannot save their claims. To begin with, because there was no definite and universally accepted prohibition on military use of herbicides prior to 1975, Defendants cannot be liable for violations of a non-existent prohibition, whether as "state actors," co-conspirators, aiders and abettors, or joint venturers. But even if there had been such a prohibition, Plaintiffs' "secondary liability" and "color of law" allegations still would fail.

As discussed above, *Sosa* requires an ATS plaintiff to show that "*international law* extends the scope of liability" to: (1) particular conduct (2) by particular parties. 124 S. Ct. at 2766 n.20 (emphasis added). Accordingly, Plaintiffs cannot rely on domestic legal concepts such as conspiracy, aiding and abetting or "state actors" to expand either the type of conduct or "the type of perpetrator," *id*. at 2782 (Breyer, J., concurring), that a customary international legal prohibition reaches.[61] Instead, Plaintiffs must show that a definite and universally accepted norm of international law prohibits the very act of conspiring with a government to violate an

[61] *Sosa* thus definitively resolved the question, left open by the Second Circuit, of whether international law or the law of the forum state provides the substantive rules of decision in an ATS case. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 n.12 (2d Cir. 2000).

international norm, and that this independent international prohibition extends to private actors.[62] As a matter of law, Plaintiffs cannot make either showing.

First, Plaintiffs cannot establish that, prior to 1975, customary international law definitely and universally proscribed not only military use of herbicides, but also the act by private parties of "conspiring" with, "aiding and abetting," or serving as a "joint venturer with" a government to violate that proscription. None of the treaties or international resolutions Plaintiffs cite mentions the concept of liability as a conspirator, aider and abettor or joint venturer. In stark contrast to the 1993 Chemical Weapons Convention, moreover, none of the treaties in force prior to 1975 prohibited producing, trading and stockpiling weapons. Anderson Decl. ¶ 61. and even the limitations of this more recent treaty apply only to states, not corporations. *Id.* ¶ 94. Accordingly, none sets forth a definite and universally accepted prohibition on such "secondary" conduct.

Second, even if Plaintiffs could plausibly establish such a prohibition, they cannot possibly show that this prohibition extended to "the type of perpetrator[s]" they have sued, *Sosa*, 124 S. Ct. at 2782 (Breyer, J., concurring)—i.e., corporate entities. To the contrary, in the few instances in which international law imposes obligations on non-state actors, "[i]nternational law does not, in the context of international criminal law or elsewhere, impose obligations or liability on juridical actors or artificial persons such as corporations." Anderson Decl. ¶ 89. Thus, since Nuremberg, none of the five international criminal tribunals has provided for corporate criminal responsibility, including the International Criminal Court, which was created as recently as 1998; in determining the jurisdiction of the latter tribunal, the treaty drafters (including the United

[62] In fact, the 18th century norm prohibiting piracy *did* include acts of conspiracy by private parties. Piracy, Blackstone explained, included "trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in any wise consulting, combining, confederating, or corresponding with them." 4 William Blackstone Commentaries *72.

States) expressly rejected attempts to include corporate liability. *Id.* ¶¶ 91-92. At the Nuremberg trials themselves, several German businessmen and industrialists were tried as individuals (as officers and directors of companies), but "the record contains no suggestion that corporations could themselves incur criminal liability." *Id.* ¶ 91. There is thus no basis for recognizing an actionable international legal norm that prohibited corporations from manufacturing and selling herbicides for military use, or that imposed "secondary" liability (as conspirators, aiders and abetters or joint venturers) on corporations for such conduct prior to 1975.[63]

c. Separation-of-powers principles foreclose judicial recognition of a private right of action against private entities that manufactured and sold herbicides for military use

Not only have Plaintiffs failed to allege the existence of a specific and universally accepted prohibition against the manufacture and sale of herbicides for military use, separation-of-powers principles militate decisively against recognition of a private right of action to enforce such a prohibition. Both relevant "legislative guidance" and "the potential implications for the foreign relations of the United States," *Sosa*, 124 S. Ct. at 2762-63, demonstrate the impropriety of recognizing a cause of action under the ATS to create liability for the manufacture and sale of herbicides for U.S. military use.

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[63] Even if domestic conspiracy concepts applied, Plaintiffs' "conspiracy" allegations still would be legally deficient. Defendants are not alleged to have had any role in the decision to use herbicides in war, or in the actual use of the herbicides. *See Bigio v. Coca-Cola Co.*, 239 F.3d 440, 449 (2d Cir. 2000) (complaint properly dismissed where no allegation that defendant "had any role as a participant or co-conspirator in [a] confiscation of . . . property" allegedly violating international law); *cf. Wiwa v. Royal Dutch Petroleum Co.*, Civ. No. 96-8386 (KMW), 2002 U.S. Dist. LEXIS 3293, at *42-*43 (S.D.N.Y. Feb. 22, 2002) (allegations of "joint action" sufficient where plaintiffs alleged that defendants "met with Nigerian officials . . . to formulate an [illegal] campaign," "coordinated with the Nigerian military and police on intelligence matters related to the [illegal] campaign," "helped plan 'raids and terror campaigns,'" "bribed (or attempted to bribe) witnesses to give false testimony," and "paid the Nigerian military to respond violently to complaints regarding oil spills and to generally monitor and 'contain' protests against" defendants). Instead, Plaintiffs allege that Defendants knew about, and did not object to, the military's use of the herbicides, Am. Compl. ¶¶ 88-90, 112, and that Defendants conspired with one another, not with the U.S. Government, to conceal information from the government. *Id.* ¶ 117.

(1) Legislative Guidance

During the relevant time period, Congress repeatedly expressed its approval of U.S. military use of herbicides, and its actions belie any legislative belief that the manufacture or sale of those herbicides could or should give rise to liability under international norms cognizable in U.S. courts. Congress approved numerous appropriations for combat operations in Vietnam, well aware that the military expended some of those funds for the herbicide program and, in 1970, the Senate rejected amendments attempting to prohibit the use of government funds for precisely these purposes.[64] Further, in ratifying the 1925 Geneva Protocol in 1975, the Senate made clear its understanding that the United States' prior use of herbicides in Vietnam had not violated that treaty and that the United States only intended the Protocol to be prospective in effect.[65]

Sosa teaches that courts should be "reluctant" to imply a private cause of action under the ATS even when Congress has proscribed particular conduct. 124 S. Ct. at 2763. Creating a cause of action to impose liability for conduct that Congress affirmatively approved is simply unthinkable. Moreover, as noted above, *Sosa* holds that, even where the U.S. ratifies a treaty and agrees to be bound by its norms, a Senate understanding that the treaty is not self-executing precludes judicial recognition of a private right of action under the ATS to enforce those norms. Where, as here, the Senate approved a treaty on the express understanding that U.S. military use of herbicides did not violate the treaty or any customary law that developed

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[64] *See supra* Statement of Facts, Part II.

[65] *See Prohibition of Chemical and Biological Weapons: Hearing on S. Res. 48 Before the Senate Comm. on Foreign Relations*, 93d Cong. 3 (1974) (statement of Senator Humphrey) (reassuring the Executive Branch that Congress's adoption of the 1925 Geneva Protocol "would in no way reflect on our past practice with regard to chemical agents. The manner in which herbicides and riot control agents were used in Vietnam was fully in accordance with the U.S. prevailing interpretation of the protocol"), attached as Ex. 10 to the Appendix.

under it, that understanding necessarily precludes judicial recognition of a private right of action to impose liability on vendors who sold herbicides for precisely that use.

Indeed, Congress's approval of the President's decision for the military to use herbicides during the Vietnam War is entitled to a categorically preclusive effect under the ATS, because the Constitution assigns war-making responsibility to the political branches.[66] Here, both of the Nation's political branches at all relevant times disagreed with Plaintiffs' core assertion that military use of Agent Orange in Vietnam violated international law. It is inconceivable that, in conferring an extraordinary and limited judicial power to create federal law, Congress intended courts to use that power to recognize rights of action that challenge governmental decisions concerning the weapons that can be used in war. *Cf. O'Reilly DeCamara v. Brooke*, 209 U.S. 45, 52 (1908) (rejecting a damages claim under a former version of the ATS, because "it is impossible for the courts to declare an act a tort [in violation of the law of nations] . . . when the Executive, Congress, and the treaty-making power all have adopted the act").

(2) Interference with political branch management of foreign affairs

Creation of a cause of action to enforce a prohibition on military use of herbicides prior to 1975 would also impermissibly "imping[e] on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa*, 124 S. Ct. at 2763. The United States has already reached the political decision whether to make reparations to Vietnam (and thereby its citizens) for the types of injury alleged in the Amended Complaint, and its answer was "no."

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[66] *See generally Rostker v. Goldberg*, 453 U.S. 57, 66 (1981) (noting "[t]he operation of a healthy deference to legislative and executive judgments in the area of military affairs"); *Johnson*, 339 U.S. at 788; *Able v. United States*, 155 F.3d at 633 ("Deference by the courts to military-related judgments by Congress and the Executive is deeply recurrent in Supreme Court caselaw and repeatedly has been the basis for rejections to a variety of challenges to Congressional and Executive decisions in the military domain.").

Moreover, in contrast to its provision for American servicemen—*see* Pub. L. No. 102-4, 105 Stat. 11 (1991) (providing veterans with specified disability compensation benefits for diseases shown to be associated with exposure to Agent Orange)—Congress has never chosen to provide redress of harms allegedly suffered by the Vietnamese people. Permitting citizens of Vietnam without such congressional authorization to assert claims by proxy against the contractors through which the United States implemented its military herbicide program would improperly circumvent the Executive's final settlement of post-war claims.

Recognition of Plaintiffs' claims also would interfere with executive authority in a broader sense. Conducting a war requires the executive branch to address a host of "important, complicated, delicate and manifold problems," *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936), often by striking a balance between conflicting interests and objectives.[67] Three successive administrations, both Democratic and Republican, struck this balance in favor of using herbicides in Vietnam. Creating a cause of action that permits foreign nationals allegedly injured by those herbicides to recover damages from companies that supplied the herbicides to the U.S. military would inescapably require this Court to sit in judgment of U.S. foreign policy and military decisions that "are wholly confided by our Constitution to the political departments of the government." *Waterman S.S. Corp.*, 333 U.S. at 111.

Indeed, although Plaintiffs have sued only private companies, their theory of liability would require this Court to conclude that three successive administrations, with the knowledge and backing of Congress, violated international law by authorizing and conducting a herbicide program in Vietnam. Recognizing that "the Judiciary has neither the aptitude, facilities nor responsibility" for reviewing such policy decisions, *id*., courts have refused to read even

[67] *See Chi. & Southwestern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (foreign policy decisions "are delicate, complex, and involve large elements of prophecy").

facially-applicable statutes to authorize intrusions "upon the authority of the Executive in military and National Security affairs" absent evidence that "Congress *specifically* has provided otherwise." *Dep't of the Navy v. Eagan*, 484 U.S. 518, 530 (1988) (emphasis added).[68] If express textual authorization is required before a court may apply a statute that on its face would appear to authorize challenges to military decisions, Plaintiffs cannot plausibly urge this Court to create such a cause of action using its limited federal common law-making powers under the ATS—particularly since it has long been established that common law tort claims have no application to injuries suffered by enemy combatants, civilians, or even U.S. citizens located in a war zone.[69] *Sosa* makes clear that federal courts may not recognize new and extraordinary causes of action that allow the judiciary, at the behest of private litigants, to sit in judgment of such quintessentially political decisions as the choice of weapons to use in a war.

2. There Is No Basis for Recognizing Private Actions Against Corporate Vendors of Legal War Materiel Based on the Allegedly Illegal Manner in Which Military Authorities Used Such Materiel

Plaintiffs also allege that Defendants violated the "laws and customs of war" by manufacturing and selling herbicides that were then used to cause the "wanton destruction of cities, towns, villages or the natural environment, or devastation not justified by military necessity." Am. Compl. ¶ 261. Read in the light most favorable to Plaintiffs, such a claim may

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[68] *See e.g.*, *Feres v. United States*, 340 U.S. 135 (1950) (refusing, despite broad language of the Federal Tort Claims Act, to infer a congressional intent to authorize claims for injuries arising out of or in the course of activity incident to military service); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) ("[S]pecial needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad."); *Koohi v. United States*, 976 F.2d 1328, 1335 (9th Cir. 1992) ("[I]f Congress's manifest intent to maintain sovereign immunity from liability arising from the combatant activities of maritime vessels is to be given meaningful effect, the combatant activities exception must be incorporated into the [Public Vessels Act]."); *Knutson v. Wis. Air Nat'l Guard*, 995 F.2d 765, 770 (7th Cir. 1993) (rejecting § 1983 action by National Guard personnel); *Baldwin v. U.S. Army*, 223 F.3d 100, 101 (2d Cir. 2000) (declining to interpret the protections of the ADA, ADEA, and Title VII to extend to the military "because there is no indication that Congress intended to extend the remedies afforded by those statutes to uniformed members of the military").

[69] *See infra* Section III.

be understood to allege that, even if herbicides were not per se illegal weapons, Defendants can nevertheless be held liable for failing to object to the military's use of herbicides in a manner that violated the customary international norm of "proportionality," also referred to as "military necessity." This alternative claim fails for at least two distinct reasons. First, although proportionality is an established norm of international law, it is far too indefinite to be actionable under *Sosa*. Second, even if the proportionality norm were enforceable in U.S. courts, it does not apply to corporate vendors of war materiel that military authorities allegedly misused.

a. The norm of military necessity, or proportionality, is not actionable under the ATS

Defendants do not dispute that the concept of military necessity, or proportionality, is an ancient international norm governing the conduct of war. The U.S. Army's Law of Land Warfare states the norm succinctly: "loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained." U.S. Dep't of the Army, FM27-10, *The Law of Land Warfare* ¶ 41 (1956). This norm is too lacking in specificity, however, to be actionable under the ATS.

As the Final Report to the International Criminal Tribunal for Yugoslavia ("ICTY") Prosecutor on NATO bombing in the Kosovo war stated:

> The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. . . . It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.

ICTY, *Final Report to the Prosecutor by the Committee Established to Review the Nato Bombing Campaign Against the Federal Republic of Yugoslavia*, ¶ 48 (June 13, 2000) ("ICTY Final Report" or the "Report"). *See also* Anderson Decl. ¶¶ 67-68 (determining whether military

action was necessary or proportional is an "open-ended, imprecise and subjective" task; because of its "inherent subjectivity and imprecision, people with different backgrounds and in different circumstances can easily reach different but equally legitimate conclusions on exactly the same facts"); Kalshoven & Zegveld, *supra*, at 46 (noting the "lack of precision inherent in [the proportionality rule]").

A norm that is so "open-ended, imprecise and subjective," Anderson Decl. ¶ 67, that international bodies charged with its enforcement cannot say "what it means and how it is to be applied," ICTY Final Report 48, is manifestly not a norm "defined with a specificity comparable to the features of the 18th-century paradigms" of piracy, violations of safe passage and infringement of the rights of ambassadors. *Sosa*, 124 S. Ct. at 2761-62. As noted above, those "paradigms" were defined with the specificity of statutes, and precise actions were identified as violative of the norms in question.[70] By contrast, the norm of proportionality is so subjective and imprecise that judgments concerning the military necessity of an action are simply "not considered suitable for second-guessing by courts, international, military or otherwise," which explains why there apparently have been no prosecutions based on violations of the norm since the Second World War. Anderson Decl. ¶ 73. Because it is virtually impossible to identify what conduct violates the norm of military necessity, or proportionality, this norm is not one of the "very limited" set of international legal rules, *Sosa*, 124 S. Ct. at 2754, that is actionable under the ATS.

Moreover, the ICTY Final Report recommending against prosecution demonstrates that one of the principal factors militating against recognition of a private cause of action is fully applicable with respect to this norm. The Court explained in *Sosa* that courts

[70] *See supra* Section II.C(1)(a)(1) (discussing Blackstone's definitions of piracy and conspiracy with pirates).

should be especially cautious about creating a private right of action that "permit[s] enforcement [of a norm] without the check imposed by prosecutorial discretion." 124 S. Ct. at 2763. The Report reflects the fact that, when prosecutorial discretion is exercised, most alleged "proportionality" violations are not brought. The Report's recommendation against prosecution of an alleged violation based, in part, on the norm's very imprecision and subjectivity, *see* Anderson Decl. ¶ 78, confirms the impropriety of permitting such claims to proceed on a wholesale basis in civil courts, without any prosecutorial check.

In short, the criminal nature of the norm, the inherently subjective judgments necessary to determine whether it has been violated, and the dearth of prosecutions enforcing it all demonstrate that federal courts should not recognize a civil private cause of action under the ATS to enforce the norm of proportionality.

b. The norm of proportionality does not apply to corporate vendors of war materiel

Even if it were proper to treat the norm of proportionality as actionable under *Sosa*, that principle plainly does not apply to corporate vendors that sell herbicides with knowledge that military authorities will use those agents to defoliate jungle cover and destroy enemy food crops. First, by its very nature, the norm applies only to those responsible for making military decisions, for it is only those persons who can properly "weigh the requirements of military necessity—what might be called 'the importance of winning'—against collateral damages, particularly to civilians and civilian objects." Anderson Decl. ¶ 66(footnote omitted); *see also id.* ¶ 69 ("the calculation of proportionality lies in the hands of military commanders"). Whatever knowledge a vendor of war materiel may have about the intended military use of its product, the vendor lacks the military intelligence and expertise, as well as the responsibility, to determine the military benefits of that intended use and to weigh those benefits against the likely

damage caused. The vendor also lacks the ability to control how military authorities ultimately choose to deploy its products in military operations. Accordingly, the norm of proportionality cannot extend to the conduct of vendors who simply supply military decision-makers with war materiel.

Second, Defendants cannot be liable as "co-conspirators," "aiders and abettors," or "joint venturers" both because the allegations of the Amended Complaint fail to state a claim for violation of the proportionality norm by the U.S. military (and thus necessarily fail to state any claims against Defendants for "secondary" liability), and because Plaintiffs cannot establish that the proportionality norm includes such "secondary liability" concepts. The dearth of decisions applying the norm demonstrate that, absent an "extraordinary disregard for undertaking proportionality calculations *at all*," the norm is met where military commanders make a good faith attempt "to determine both sides of th[e] proportionality calculation and weigh them against each other." Anderson Decl. ¶ 69 (emphasis in original). The allegations of the Amended Complaint establish that the United States satisfied the norm by extensively examining the relevant considerations, and do not include the type of "egregious" conduct, "constituting intentional depravity," necessary to state a violation of the norm where such consultations occur. *Id.* ¶¶ 73-74. Because Plaintiffs have failed to allege facts sufficient to show that the United States violated the proportionality norm, they have necessarily failed to state a claim against Defendants for "aiding and abetting" such a violation or conspiring to do so.

Moreover, as of the time of the Vietnam War, there were so few cases even addressing the issues of aiding and abetting liability that it is doubtful such a norm of liability even existed. *Id.* ¶ 96. In the only two cases in which individuals were held criminally responsible as aiders and abettors based on their supplying product to the direct actor, moreover,

the defendants were found not only to have had knowledge of how products they supplied to the Nazi government were being used, but also to have been in a position to influence how the products were used. *Id.* ¶¶ 97-98. As just noted, here Defendants lacked the ability to control how military authorities ultimately chose to deploy their products in military operations. Indeed, given the nature of the proportionality norm—which places ultimate responsibility and virtually unreviewable discretion on military decision-makers—it is unsurprising that the few criminal prosecutions for aiding and abetting prior to the Vietnam War apparently included no claims alleging violations of the norm of proportionality.[71]

Third, as discussed above, international criminal law does not impose obligations on artificial persons such as corporations, and has instead consistently imposed such obligations on natural persons. *See supra* at Section II.C. Thus, even if there were any conceivable basis for recognizing a definite and universally accepted international norm prohibiting private parties from conspiring to violate, or aiding and abetting violations of, the norm of proportionality, such a purely hypothetical norm of secondary liability still would not extend to corporate actors.

c. Separation-of-powers principles foreclose recognition of a private right of action to enforce the norm of proportionality against corporate vendors of war materiel

Finally, separation-of-powers principles preclude courts from authorizing damages actions against vendors for injuries allegedly caused by the military's illegal use of materiel those vendors supply.

(1) Legislative guidance

Several different congressional enactments embody policies that are flatly inconsistent with recognition of a "proportionality-based" cause of action against military

[71] In all events, despite its conclusory assertions of "conspiracy" and "aiding and abetting," the Amended Complaint does not allege any facts that show that Defendants conspired with the Senior Executive officials who made the decisions to deploy herbicides in Vietnam, or aided and abetted those decisions in any way.

vendors. First, by making the commission of a war crime a federal offense under the WCA, 18 U.S.C. § 2441, Congress has chosen to make the international norm of proportionality enforceable in U.S. courts subject to "the check imposed by prosecutorial discretion." *Sosa*, 124 S. Ct. at 2763. Congress's judgment that such a check should apply to enforcement of the norm of proportionality strongly militates against recognition of a cause of action that leaves civil enforcement of this inherently imprecise and subjective norm in the hands of private litigants. (Unlike Congress, federal courts are ill-suited to the task of assessing "the possible collateral consequences of making international rules privately actionable" and deciding when it is appropriate to dispense with the constraints imposed by prosecutorial discretion. *Id*. at 2763.)

Second, recognition of a "proportionality-based" cause of action against military vendors is fundamentally inconsistent with the policies that underlie various exceptions to the waiver of sovereign immunity that Congress enacted in the Federal Tort Claims Act ("FTCA"). For example, Congress declined to extend that waiver to tort claims arising from the exercise of discretionary functions. 28 U.S.C. § 2680(a). The policies underlying this exception would be undermined if Plaintiffs could sue vendors of war materiel for the military's allegedly disproportionate use of that materiel. Vendors such as Defendants have no say in how U.S. military commanders choose to use the vendors' products. If they are exposed to civil liability based on alleged military misuse of their products, vendors will respond either by refusing to provide war materiels, or by demanding higher prices, to the obvious detriment of U.S. military efforts. Such indirect costs, the Supreme Court has held, defeat the purpose of the discretionary function exception. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-12 (1988).[72]

[72] *Boyle* involved a claim of defective equipment design, and announced a three-part test for determining the availability of the so-called government contractor defense to such claims. Although Plaintiffs allege many facts that might be germane to that test, *see e.g.*, Am. Compl. ¶¶ 84-86, 116-17, that defense is utterly irrelevant to their claims under the ATS. Plaintiffs are not prosecuting a defective design claim; indeed, there is no binding

Similarly, the combatant activities exception of the FTCA bars state tort claims against the United States "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C § 2680(j). This exception codifies a centuries-old understanding that the United States has no duty in tort to enemy combatants or to civilians in a war zone—even U.S. citizens—who are injured or whose property is destroyed, by design or by accident, during or in connection with combat. Congress codified the combatant activities exception because it "did not want our military personnel to exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces; nor did it want our soldiers, sailors, or airmen to be concerned about the possibility of tort liability when making life or death decisions in the midst of combat." *Koohi v. United States*, 976 F.2d 1328, 1334-35 (9th Cir. 1992).

Recognition of a federal common law cause of action that allows persons to sue the government's contractors for injuries resulting from the U.S. military's alleged disproportionate or unnecessary use of the contractors' products undermines this purpose. Potential liability from such actions would force contractors to question the Executive's strategic military decisions and make it more difficult and costly for the United States to obtain the services and products necessary to wage war. Federal courts should not recognize new federal common law causes of action that give rise to very the type of interference with U.S. military decisions that Congress sought to prevent through the combatant activities exception.

Further, "the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."

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international legal norm that prohibits use of defectively designed weapons or war materiel. Instead, their ATS claim is that Defendants should be held liable for the U.S. Government's misuse of herbicides in Vietnam. That claim turns on whether the U.S. use of herbicides was proportional, not whether the herbicides were properly designed or manufactured.

Sosa, 124 S. Ct. at 2754. Permitting lawsuits to proceed against the United States' contractors for injuries allegedly suffered in Vietnam at the hands of the U.S. military would frustrate the purposes of this exception. The risks associated with potential exposure to unknown foreign laws would cause contractors to shy from federal military contracts and lead them to seek higher rates or indemnification for injuries occurring overseas, indirectly imposing on the United States the precise type of liability the exception was designed to protect. This Court should not create liability under federal common law that runs so directly contrary to the purposes of Congress's express legislation.

(2) Interference with political branch management of foreign affairs

Finally, recognition of a "proportionality-based" cause of action against government vendors would "impinge[] on the discretion of the Legislative and Executive Branches in managing foreign affairs," *Sosa*, 124 S. Ct. at 2763, to an even greater degree than would the recognition of an "illegal weapon" cause of action. It would inescapably require this Court to sit in judgment of military decisions that "are wholly confided by our Constitution to the political departments of the government." *Waterman S.S. Corp.*, 333 U.S. at 111. Indeed, because of the inherently discretionary and fact-based nature of any proportionality decision, recognition of a "proportionality" cause of action would result in even more intrusive assessments of military decisions than inquiries into the military's choice of weapons. It also would make this Court the arbiter of whether the Vietnamese people should be paid reparations for injuries allegedly sustained in U.S. combat operations. *Sosa* makes clear that federal courts should not exercise their very limited lawmaking powers under the ATS to recognize new and extraordinary causes of action that so directly contravene separation-of-powers principles.

3. Plaintiffs Have Failed to State Claims for War Crimes, Crimes Against Humanity, Genocide or Torture

Perhaps recognizing that no definite and universally recognized norm of international law prohibits the manufacture and sale of herbicides for military use, or imposes liability on vendors for alleged military misuse of herbicides, Plaintiffs allege violations of a variety of other norms. Several of these claims are simply derivative of Plaintiffs' legally insufficient "illegal weapon" or "proportionality-based" claims. Those that are not derivative fail, because Plaintiffs do not and cannot allege facts sufficient to make out of any violation of those norms.

In alleging that Defendants participated in war crimes, Plaintiffs simply paraphrase the language of the Hague Regulations, the 1925 Geneva Protocol, and the 1969 U.N. General Assembly Resolution. They allege war crimes based on "employment of poison or poisoned weapons or other weapons calculated to cause superfluous injury or unnecessary suffering" (the Hague Regulations), "wanton destruction of cities, towns, villages or the natural environment, or devastation not justified by military necessity" (the London Charter), and "the use of any biological or chemical agents of warfare, whether gaseous, liquid or solid, which might be employed because of their direct toxic effects on people, animals or plants" (U.N. Res. No. 2603-A). Am. Compl. ¶ 261. As Defendants have shown, none of these treaties or the customary international law developed under them provides a basis for recognition of a new federal common law cause of action. Plaintiffs cannot establish a basis for recognition of such a cause of action simply by affixing the label "war crimes" to these same legally insufficient allegations.

Similarly, in alleging that Defendants participated in torture "in violation of the AT[S]," *id*. ¶ 275, Plaintiffs simply paraphrase the language of the TVPA. *See id*. ¶¶ 273-74. As

Defendants have shown, however, Plaintiffs have failed to state a claim under the TVPA. That failure is equally fatal to any claim for torture under the ATS. And, insofar as Plaintiffs predicate their claim of crimes against humanity on alleged acts of torture, *see id.* ¶ 269, that claim fails for the same reason.

Finally, Plaintiffs predicate claims of crimes against humanity on alleged acts of "willful killing . . . committed as part of a widespread or systematic attack against any civilian population or persecutions on political, racial or religious grounds," *id.*, and claims of genocide on alleged acts "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such." *Id.* ¶ 265. Despite these conclusory allegations, the balance of the Amended Complaint fails to allege any facts to sustain the inflammatory claim that U.S. military use of herbicides in Vietnam constituted a "crime against humanity" or "genocide." Plaintiffs' boilerplate invocation of the language of the Convention on Genocide, *id.* ¶ 265, does not overcome this basic pleading defect. *See Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002); *see also Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996). Instead, the Amended Complaint recites that Defendants manufactured and sold herbicides to the U.S. Government, and that those herbicides were sprayed throughout the Vietnam War to defoliate jungles and destroy enemy food crops in a manner that, while engendering international controversy and domestic debate, did not violate any relevant customary international legal prohibition. These same facts cannot state a claim for the heinous offenses of crimes against humanity and genocide.

III. PLAINTIFFS' ATS AND STATE LAW ALLEGATIONS FAIL BECAUSE, AS A MATTER OF SETTLED FEDERAL LAW, THE UNITED STATES (AND HENCE ITS CONTRACTORS) OWE NO DUTY TO ENEMY COMBATANTS OR CIVILIANS IN THE WAR ZONE

Plaintiffs do not allege that the United States used herbicides in Vietnam with the intention to poison people or destroy civilian crops, much less that Defendants sold the herbicides for any such use. Plaintiffs instead claim that the herbicides ordered by the United States were not suitable for their intended use—to kill plants—because they contained dioxin, which (according to Plaintiffs) had unintended side effects on enemy combatants and civilians in the war zone. Plaintiffs' attempt to hold U.S. Government contractors liable for those alleged injuries under civil tort law standards of care should fail—whether asserted under state or federal law—because in the conduct of war, the United States (and hence, as shown below, its contractors) has no tort duty to enemy combatants or civilians in the war zone.

That principle derives of necessity from the fact that the President, "[a]s commander-in-chief, . . . is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming v. Page*, 50 U.S. 603, 615 (1850). His obligation in war is to do "[w]hatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence." *United States v. Pac. R.R.*, 120 U.S. 227, 234 (1887). Whether in hindsight particular military actions seem fair or not, "[t]he safety of the state in such cases overrides all considerations of private loss." *Id.*

For that reason, the Supreme Court has recognized for more than a century that no civil liability attaches to personal injuries sustained or property damages arising from combatant activities during war. To the contrary, the Court has made clear that "[t]he destruction or injury

of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, ha[s] to be borne by the sufferers alone as one of its consequences." *Id.*; *see also Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1494 (C.D. Cal. 1993) ("Where a deliberate choice has been made to tolerate tragedy for some higher purpose, civilian state law standards cannot be applied to those who suffer the tragedies contemplated in war."). Indeed, the United States has no civil liability *even to U.S. citizens* who are injured or whose property is destroyed, by design or by accident, during or in connection with combat.[73]

Congress codified this principle in the combatant activities exception to the FTCA, 28 U.S.C. § 2680(j), which provides an explicit exception for "[a]ny claim arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war." Through the combatant activities exception, Congress fully embraced the principle that "no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action." *Koohi*, 976 F.3d at 1337. As the Court of Appeals explained in *Koohi*, "it simply does not matter for purposes of the 'time of war' exception whether the military makes or executes its decisions carefully or negligently, properly or improperly. It is the nature of the act and not the manner of its performance that counts." *Id.* at 1335.[74] Congress's codification of the historic principle disavowing any duty to combatants or civilians in a war zone precludes a court's recognition of such a duty, under the ATS, pursuant to federal common law.

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[73] *See, e.g., Juragua Iron Co v. United States.*, 212 U.S. 297, 306 (1909) (noting that the property of an American citizen in enemy territory was "subject under the laws of war to be destroyed whenever, in the conduct of military operations, its destruction was necessary for the safety of our troops or to weaken the power of the enemy"); *United States v. Caltex (Phillipines) Inc.*, 344 U.S. 149, 155-56 (1952) ("This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign.").

[74] *See also Koohi*, 976 F.2d at 1337 (dismissing negligence claims against the United States and government contractors by heirs of victims killed when a civilian airline was shot down by the U.S. military, because claims against United States were barred by sovereign immunity and claims against the contractors were preempted through the immunity provided by the FTCA's combatant activities exception); *Bentzlin*, 833 F. Supp. at 1493-94 (dismissing negligence and strict liability claims against government contractors for allegedly defective manufacture of missiles because, *inter alia*, the claims were preempted through the immunity provided by the FTCA's combatant activities exception).

It should make no difference, for these purposes that, here, Plaintiffs have sued the Government's contractors rather than the Government itself. Imposition of tort duties on government contractors to enemy combatants and civilians in a combat zone would require contractors to question the strategic decisions of the American military and make it far more difficult and costly for the United States to obtain the services and products necessary to wage war. *See id.* at 1337; *cf. Boyle*, 487 U.S. 500, 511-12 (1988) ("The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs."). Imposing such negligence or other tort duties on the government's contractors would cause the very problems the combatant activities exception is intended to avoid. As the *Bentzlin* court explained:

> In war, the benefit of producing weapons and transporting them as quickly as possible to arm American soldiers far outweighs the risks of defective workmanship; soldiers' lives may be lost as the result of delays in delivery of weapons. Exposing government contractors to tort liability, even for manufacturing defects, would place undue pressure on manufacturers to act too cautiously, even when the national interest would be better served by expedient production than defect-free weapons.

833 F. Supp. at 1493 (footnotes omitted). Simply put, a decision to impose on the U.S. Government's contractors a duty of care to enemy combatants or other persons in a war zone would impair the President's ability to conduct war—the precise result the "no duty" principle and combatant activities exception were specifically designed to prevent.[75] Plaintiffs' state and federal common law claims should be dismissed.[76]

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[75] Plaintiffs' claims for injuries to South Vietnamese servicemen are even more clearly barred because, as Plaintiffs make clear in their Amended Complaint, South Vietnam requested and played a substantial in administering the herbicide program. Am. Compl. ¶¶ 51, 53, 56; *see generally Sosa*, 124 S. Ct. at 2763 ("It is one thing for American courts to enforce constitutional limit on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign

IV. PLAINTIFFS' STATE LAW CLAIMS ARE PREEMPTED BECAUSE THEY WOULD FRUSTRATE THE EXECUTIVE'S CONDUCT OF FOREIGN AFFAIRS

There is no reason to believe that New York would apply its laws to permit Plaintiffs to challenge the discretion of the United States to conduct its military and foreign affairs. No claims more squarely could implicate purely federal interests, or fall more plainly outside the realm of New York tort law. Indeed, any such claim would be preempted.

As an initial matter of state law, New York courts have consistently rejected as nonjusticiable even challenges to military decisions of the Governor of New York.[77] New York courts also consistently have rejected attempts to apply the State's law where it would impermissibly interfere with foreign relations. *N.Y. Times Co. v. City of N.Y. Comm'n on Human Rights*, 361 N.E.2d 963, 968 (N.Y. 1977) (holding that "[e]ven long-standing State regulation of traditional fields of law . . . must fall by the wayside if enforcement of State regulations would 'impair the effective exercise of the Nation's foreign policy.'" (citation omitted)).

But even if New York construed its generic tort principles to apply to Plaintiffs' claims, that application would be preempted. As demonstrated in Defendants' Motion for Summary Judgment Based Upon the Government Contractor Defense, Plaintiffs' claims are defeated as a matter of undisputed material fact by the government contractor defense recognized

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governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.").

[76] That some of the injuries alleged in this case may have resulted years after exposure does not compel a different result. *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948) (holding that "the act of supplying ammunition to fighting vessels in a combat activity during war is undoubtedly a 'combatant activity'"); *see also In re Consol. United States Atmospheric Testing Litig.*, 616 F. Supp. 759, 779-80 (N.D. Cal. 1985) (invoking the combatant activities exception to dismiss claims based on alleged radiation exposure during World War II), *aff'd sub nom. Konizeski v. Livermore* Labs, 820 F.2d 982 (9th Cir. 1987).

[77] *See, e.g.*, *Goldstein v. New York*, 24 N.E.2d 97, 99-100 (N.Y. 1939) (holding that members of the state militia were not "employees" for purposes of the state's workers' compensation law); *Kolomick v. N.Y. Air Nat'l Guard*, 642 N.Y.S.2d 915, 920 (App. Div. 1996) (O'Brien, J., concurring) (State militia does not constitute an "employer" under New York's Human Rights law "absent a clear expression by the Legislature to bring the military within the provisions of the statute").

by the Supreme Court in *Boyle*, 487 U.S. at 512. They are also preempted as a matter of law: allowing state tort law to assess the lawfulness of the United States' military herbicide program would trespass improperly upon the political branches' discretion to decide whether to make reparations to Vietnam for harms allegedly suffered from the U.S. military's use of herbicides, and risk harmful interference with current and future diplomatic relations between the two nations.

The Supreme Court has long held that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942); s*ee also Belmont*, 301 U.S. at 331 ("[I]n respect of our foreign relations generally, state lines disappear."). Accordingly, federal law preempts state law claims that interfere with the Executive Branch's exercise of foreign relations. *Garamendi*, 539 U.S. at 413. "[A]ny state law that involves the state in the actual conduct of foreign affairs is unconstitutional." *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 913 (3d Cir. 1990) (citing *Pink*, 315 U.S. at 233). This principle holds equally true whether the claims at issue arise from a state statute that expressly conflicts with foreign affairs, *see, e.g.*, *Garamendi*, 539 U.S. at 419-20, or instead a generic state law that interferes as-applied in the particular case, *see, e.g.*, *Zschernig v. Miller*, 389 U.S. 429, 441 (1968).[78]

The Supreme Court in *Garamendi* articulated a two-part balancing test for determining when a conflict between state law and the federal government's exclusive power to direct foreign relations warrants preemption. 539 U.S. at 419-20 & n.11. On the one hand, the Court considered "the strength of the state interest, judged by standards of traditional practice."

[78] *See also Pink*, 315 U.S. at 240 (Frankfurter, J., concurring) (explaining that during the period of U.S.-Russian negotiations to normalize relations, a court giving "comfort to the Russian views" on expropriation would "have interfered with the conduct of our foreign relations by the Executive, even if it had purported to [decide the case] under the guise of enforcing state law in a matter of local policy").

Id. at 420. On the other hand, the Court considered the degree of potential interference with foreign relations. *Id.*; *cf. Boyle*, 487 U.S. at 507 (finding that within an area of "uniquely federal interest," the "conflict with federal policy need not be as sharp as that which must exist for ordinary preemption"). Plaintiffs' claims here fail both prongs, because they have nothing to do with traditional state regulation and would have more than an "incidental or indirect effect" on the Nation's foreign affairs.

With respect to the first prong of the *Garamendi* test, Plaintiffs' claims in this case are far from matters of traditional state interest or control. To the contrary, as the Supreme Court recognized in *Garamendi*, "the subject of reparations" has been a principal object of federal diplomacy throughout our history, and not a province of the states. 539 U.S. at 404, 416. That has been true regardless whether the reparations are sought from governmental or private parties, because any insistence on a "sharp line between public and private acts . . . in defining the legitimate scope of the Executive's international negotiations would hamstring the President in settling international controversies." *Id.* at 416 (noting that "untangling government policy from private initiative during war time is often so hard that diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments").

As to the second prong, adjudicating Plaintiffs' state tort law claims could have serious impacts on the continuing and future diplomacy between the United States and Vietnam. In *Garamendi*, the Court emphasized that "claims remaining in the aftermath of hostilities may be 'sources of friction' acting as an 'impediment to resumption of friendly relations.'" *Id.* at 420 (citation omitted). The Court recognized the need to preempt state laws that "undercut[] the President's diplomatic discretion" and give him "'less to offer and less economic and diplomatic

leverage as a consequence.'" *Id.* at 423-24 (citation omitted). Here, the Executive Branch never has agreed to make reparations for alleged injuries to Vietnamese nationals from the United States' use of herbicides in the Vietnam War. Allowing the Vietnamese to circumvent the United States' sovereign immunity, litigate in this collateral action whether the United States committed war crimes in Vietnam, and recover reparations by proxy from the United States' contractors could complicate and interfere with our country's ongoing relations with Vietnam and, more generally, other foreign nations.

V. PLAINTIFFS' VIETNAMESE LAW ALLEGATIONS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

Plaintiffs purport also to hold the United States' contractors liable under the laws of Vietnam, though they fail to point to any cause of action provided by Vietnamese common or statutory law authorizing this type of action. Plaintiffs' failure to identify a Vietnamese source of law is unsurprising, because Vietnam "does not recognize the right of citizens to bring tort suits." *Hoang Van Tu v. Koster*, 364 F.3d 1196, 1198 (10th Cir.), *cert. denied*, 73 U.S.L.W. 3211 (U.S. 2004).[79]

Even if Plaintiffs could point to some source of Vietnamese tort law, however, the Government should resist its application.[80] Although Vietnam may have an interest in seeing its citizens compensated for alleged injuries arising from the United States' use of herbicides in the war, that interest must be addressed through the diplomatic process. Applying Vietnamese civil law in U.S. courts to impose liability on contractors for their implementation of the United

[79] *See also, e.g.*, John Gillespie, *Private Commercial Rights in Vietnam: A Comparative Analysis*, 30 Stan. J. Int'l. L. 325, 347 (1994) ("No tortious right exists [under Vietnamese law] to protect property or person.").

[80] To the extent that "laws of Vietnam" refers to the laws of the former South Vietnam (perhaps the only Vietnamese law that recognized private torts), that nation no longer exists and can have no interest in applying its laws. *See In re Air Crash Disaster Near Saigon*, 476 F. Supp. 521, 528 (D.D.C. 1979).

States' strategic military decisions would be perverse, and would endanger core national security and foreign policy interests.

This Court previously declined to apply Vietnamese law to similar claims for injuries allegedly arising from exposure to Agent Orange by American servicemen. The Court explained that, although the traditional *lex loci* approach might look to the laws of Vietnam as the place of the alleged wrong,

> [t]hat rationale does not apply here: the jurisdiction where most of the use of herbicides took place, South Vietnam, no longer exists . . . . North Vietnam, the jurisdiction that has replaced South Vietnam and Cambodia, was at war with the United States and it was in the prosecution of the war that the exposure to Agent Orange took place. *It would be ludicrous to allow North Vietnam (or France or the Soviet Union, whose laws undoubtedly have a strong influence on Vietnamese jurisprudence) to determine the law of this case*.

In re "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 707 (E.D.N.Y. 1984) (emphasis added and citation omitted). There is no reason for a different result here.

CONCLUSION

Plaintiffs' claims in this suit are nonjusticiable and state no claim upon which relief can be granted. Defendants therefore request the Court to grant this Motion to Dismiss, dismissing Plaintiffs' claims in their entirety.

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