05-1953-cv

United States Court of Appeals

FOR THE SECOND CIRCUIT

VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE, PHAN THI PHI PHI, NGUYEN VAN QUY, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF NGUYEN QUANG TRUNG, THUY NGUYEN THI NGA, HIS CHILDREN, DUONG QUYNH HOA, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HER DECEASED CHILD, HUYNH TRUNG SON, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, NGUYEN THANG LOI, TONG THI TU, NGUYEN LONG VAN, NGUYEN THI THOI, NGUYEN MINH CHAU, NGUYEN THI NHAM, LE THI VINH, NGUYEN THI HOA, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF VO THANH TUAN ANH, HER CHILD, VO THANH HAI, NGUYEN THI THU, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF NGUYEN SON LINH AND NGUYEN SON TRA, HER CHILDREN, DANG THI HONG NHUT,

(*caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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NGUYEN DINH THANH, NGUYEN MUOI, HO THI LE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HER DECEASED HUSBAND HO XUAN BAT, HO KAN HAI, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF NGUYEN VAN HOANG, HER CHILD, AND VU THI LOAN,

Plaintiffs-Appellants,

v.

DOW CHEMICAL COMPANY, MONSANTO COMPANY, MONSANTO CHEMICAL CO., HERCULES INC., OCCIDENTAL CHEMICAL CORPORATION, THOMPSON HAYWARD CHEMICAL CO., HARCROS CHEMICALS, INC., UNIROYAL CHEMICAL CO. INC, UNIROYAL, INC., UNIROYAL CHEMICAL HOLDING COMPANY, UNIROYAL CHEMICAL AQUISITION CORPORATION, C.D.U. HOLDING INC., DIAMOND SHAMROCK AGRICULTURAL CHEMICALS, INC., DIAMOND SHAMROCK CHEMICAL COMPANY, ALSO KNOWN AS DIAMOND SHAMROCK REFINING & MARKETING CO., ALSO KNOWN AS OCCIDENTAL ELECTRO CHEMICAL CORP., ALSO KNOWN AS MAXUS ENERGY CORP., ALSO KNOWN AS OCCIDENTAL CHEMICAL CORP., ALSO KNOWN AS DIAMOND SHAMRO, DIAMOND SHAMROCK CHEMICAL, ALSO KNOWN AS DIAMOND SHAMROCK REFINING & MARKETING CO., ALSO KNOWN AS OCCIDENTAL ELECTRO CHEMICAL CORP., ALSO KNOWN AS MAXUS ENERGY CORP., ALSO KNOWN AS OCCIDENTAL CHEMICAL CORP., ALSO KNOWN AS DIAMOND SHAMRO, DIAMOND SHAMROCK REFINING AND MARKETING COMPANY, OCCIDENTAL ELECTROCHEMICALS CORPORATION, HOOKER CHEMICAL CORPORATION, HOOKER CHEMICAL FAR EAST CORPORATION, HOOKER CHEMICALS & PLASTICS CORP., CHEMICAL LAND HOLDINGS, INC., T-H AGRICULTURE & NUTRITION CO., THOMPSON CHEMICAL CORPORATION, ALSO KNOWN AS THOMPSON CHEMICAL CORP., RIVERDALE CHEMICAL COMPANY,

Defendants-Appellees,

PHARMACIA CORP., FORMERLY KNOWN AS MONSANTO CO., ULTRAMAR DIAMOND SHAMROCK CORPORATION, MAXUS ENERGY CORP., DIAMOND ALKALI COMPANY, ANSUL INCORPORATED, AMERICAN HOME PRODUCTS CORPORATION, FORMERLY KNOWN AS AMERICAN HOME PRODUCTS, WYETH, INC., HOFFMAN-TAFF CHEMICALS, INC., ELEMENTIS CHEMICALS, INC., UNITED STATES RUBBER COMPANY, INC., SYNTEX AGRIBUSINESS, INC., ABC CHEMICAL COMPANIES 1-50, SYNTEX LABORATORIES, INC., VALERO ENERGY CORPORATION, DOING BUSINESS AS VALERO MARKETING AND SUPPLY COMPANY,

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CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants-Appellees hereby state:

1. **Monsanto Company**. Monsanto Company has no publicly owned parent corporation, and no publicly held corporation owns more than 10 percent of Monsanto's stock.

2. **Monsanto Chemical Company**. Monsanto Chemical Company, which no longer exists, is a corporate predecessor of Pharmacia Corp., which is a wholly-owned subsidiary of Pfizer Inc., a publicly held corporation.

3. **The Dow Chemical Company**. The Dow Chemical Company has no parent corporations and no publicly held company owns 10 percent or more of its stock.

4. **Occidental Chemical Corporation**. Occidental Chemical Corporation, the successor by merger to Diamond Shamrock Chemicals Company (which was known prior to September 1, 1983, as Diamond Shamrock Corporation), is an indirect, wholly-owned subsidiary of Occidental Petroleum Corporation, a publicly held company.

5. **Valero Corporation**. Valero Corporation, the successor by merger to Ultramar Diamond Shamrock Corporation, has no parent corporation. Barclays Global Investors, N.A. owns more than 10 percent of its stock.

6. **Maxus Energy Corporation**. Maxus Energy Corporation is an indirect, wholly-owned subsidiary of YPF S.A. ("YPF"). Approximately 99 percent of YPF's stock is owned by Repsol YPF S.A. ("Repsol YPF"). Repsol YPF is publicly held, and the shares of YPF stock not owned by Repsol YPF are also publicly held.

7. **Tierra Solutions, Inc.** Tierra Solutions, Inc., formerly known as Chemical Land Holdings, Inc., is an indirect, wholly-owned subsidiary of YPF S.A. ("YPF"). Approximately 99 percent of YPF's stock is owned by Repsol YPF S.A. ("Repsol YPF"). Repsol YPF is publicly held, and the shares of YPF stock not owned by Repsol YPF are also publicly held.

8. **Hercules Incorporated**. Hercules Incorporated has no parent corporations and no publicly held company owns 10 percent or more of its stock.

9. **Uniroyal, Inc.** Uniroyal, Inc. is a dissolved corporation.

10. **Uniroyal Chemical Co.; Uniroyal Chemical Holding Company and Uniroyal Chemical Acquisition Corporation.** Uniroyal Chemical Holding Company and Uniroyal Chemical Acquisition Corporation were predecessors and/or wholly owned of Uniroyal Chemical Co. Uniroyal Chemical Co. is a wholly-owned subsidiary of Chemtura Corp., a publicly held company.

11. **C.D.U. Holdings, Inc.** C.D.U. Holdings, Inc. is a dissolved corporation.

12. **Hooker Chemical Corporation; Hooker Chemical Far East Corporation; and Hooker Chemicals & Plastics Corp.** Hooker Chemical Corporation; Hooker Chemical Far East Corporation; and Hooker Chemicals & Plastics Corp. are or were predecessors and/or wholly owned of Occidental Chemical Corporation, an indirect, wholly-owned subsidiary of Occidental Petroleum Corporation, a publicly held company.

13. **TH Agriculture & Nutrition Company, Inc.; Thompson-Hayward Chemical Co.; and Harcros Chemical, Inc.** T H Agriculture & Nutrition Company, Inc. (now know as T H Agriculture & Nutrition L.L.C.) is a wholly-owned subsidiary of Philips Electronics North America Corporation, formerly known as North American Philips Corporation. Philips Electronics North America Corporation is an indirect wholly-owned subsidiary of Koninklijke Philips Electronic N.V., a publicly held corporation based in the Netherlands. Thompson-Hayward Chemical Co. was a former subsidiary of North American Philips Corp. which no longer exists. These assets of Thompson Hayward Chemical Co. were purchased by Harcros Chemical Inc., which is a completely separate entity from Philips Electronics North America Corporation.

14. **Riverdale Chemical Company.** Riverdale Chemical Company is now known as Nufarm Americas, Inc., which is a privately held company. Nufarm

Americas, Inc. is owned by Nufarm Americas Holding Co., and no publicly held corporation owns 10 percent or more of Nufarm Americas Holding Co.'s stock.

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PRELIMINARY STATEMENT

This case was brought by Vietnamese nationals who allege that they were injured by exposure to Agent Orange and other herbicides deployed by the U.S. military during the Vietnam conflict. Unable to sue the United States directly because of sovereign immunity, plaintiffs take aim at the companies that manufactured Agent Orange for the U.S. government according to the government's specifications. Their principal contention is that the U.S. military's use of Agent Orange violated international law, and that the manufacturers either aided and abetted that violation or committed an independent violation by fulfilling the military's demand. Alternatively, plaintiffs seek relief under New York tort law.

In its memorandum opinion and order, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), the district court determined that plaintiffs' action could not proceed because, among other things, use of Agent Orange during the Vietnam conflict violated no cognizable norm of international law. That determination was eminently correct. As the Executive Branch then concluded, and as state practice and scholarly commentary confirm, international law did not bar the military's use of Agent Orange and other herbicides during wartime—even were it true, as plaintiffs allege, that a contaminant in those herbicides, dioxin, had foreseeable harmful side-effects on humans.

The reasons for dismissing plaintiffs' claims extend well beyond those cited by the district court, however. International law does not apply of its own force in U.S. courts, but only insofar as universally accepted, specifically defined international-law norms have become a part of federal common law. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). As such, these claims must be consistent with federal-law policies and principles. Those policies and principles preclude plaintiffs from turning to the government's contractors for recovery based on the government's own decisions about whether and how to deploy the instruments of war. And more fundamentally, the inquiries plaintiffs ask this Court to make exceed the limits of judicial competence. Were plaintiffs' action to proceed, it would require federal courts not only to second-guess the political branches' decisions about how to wage the war, but also to circumvent determinations already made about how to make the peace, including the Executive Branch's determination not to make war reparations to Vietnam for use of Agent Orange.

The judgment of the district court should be affirmed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly ruled that plaintiffs failed to state a claim for a violation of international law cognizable in an action brought under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, in light of the restrictive standards for

recognition of such claims set forth in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

2. Whether plaintiffs' ATS claims are barred because they concern material that defendants furnished to the government pursuant to government specifications, and because they arise out of combatant activities during wartime.

3. Whether the district court erred in ruling that no statute of limitations applies to plaintiffs' ATS claims.

4. Whether plaintiffs' claims are nonjusticiable in light of the serious separation of powers concerns that would be raised by adjudication of plaintiffs' claim that the defendants aided and abetted violations of international law by the United States government during wartime and are effectively liable to citizens of a former enemy country for war reparations.

5. Whether plaintiffs' state-law tort claims are barred by the government-contractor defense.

6. Whether plaintiffs' state-law tort claims are barred because they intrude on the Constitution's exclusive vesting of foreign affairs authority in the federal government.

7. Whether the district court properly denied additional discovery to plaintiffs on claims relating to Agent White and Agent Blue.

8. Whether the district court properly ruled that plaintiffs should not be awarded injunctive relief that would require extensive remediation in Vietnam.

STATEMENT OF THE CASE

Plaintiffs in this case are a group of Vietnamese nationals who claim that they were injured by exposure to the herbicide known as Agent Orange, which was deployed by the United States military during the Vietnam conflict. Agent Orange was manufactured by the defendants for, and supplied to, the government pursuant to military specifications. Plaintiffs do not claim that they were injured by exposure to the active components of Agent Orange, but rather by exposure to dioxin, a contaminant that emerged during the manufacturing process.[1]

Plaintiffs filed their complaint on January 30, 2004; an amended complaint was filed on September 14, 2004. A34-102. Plaintiffs include (a) several citizens of Vietnam, including a former combatant in the North Vietnamese army and a former member of the Viet Cong, and (b) the Vietnamese Association for Victims

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[1] Agent Orange was a 50-50 mixture of the n-butyl esters of 2,4-dicholorophenoxyacetic acid (2,4-D) and 2,4,5-tricholorophenoxyacetic acid (2,4,5-T). Dioxin emerges during the manufacture of 2,4,5-T, which was also a component of other herbicides used by the military in Vietnam, including Agent Purple, Agent Green, and Agent Pink. Plaintiffs also allege that they were injured by exposure to two other herbicides not containing 2,4,5-T or dioxin, known as Agent Blue and Agent White. A49. Issues particular to Agent Blue and Agent White are discussed *infra* pp. 106-110. Except as otherwise noted, references to Agent Orange herein should be understood to include all herbicides used by the U.S. military in Vietnam that are referred to in the complaint (A49).

of Agent Orange (VAVAO), a non-profit organization claiming to represent the interests of other Vietnamese nationals who were allegedly exposed to Agent Orange. A63-80. Plaintiffs seek, *inter alia*, compensatory and punitive damages, and injunctive relief directing the manufacturers to provide environmental remediation of all allegedly contaminated areas in Vietnam. A100-101.

Plaintiffs' complaint raised a host of legal theories under international law, New York law, Vietnamese law, and federal common law. Under international law purportedly cognizable in federal district court through the Alien Tort Statute (ATS), 28 U.S.C. § 1350, plaintiffs claimed that the manufacturers' actions in supplying Agent Orange to the U.S. military constituted, or at least aided and abetted, war crimes, genocide, crimes against humanity, and torture. A89-92. The common-law claims alleged that defendants were liable for assault and battery, intentional and negligent infliction of emotional distress, negligence, wrongful death, product liability, and public nuisance. A93-98.[2]

Issues relevant to the manufacture of herbicides used in Vietnam had already been the subject of extensive discovery in *In re Agent Orange Product Liability*

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[2] Plaintiffs have since abandoned such international-law claims as genocide and torture, and now rely solely on international legal norms against use of poisoned weapons and the infliction of unnecessary suffering. Pl. Br. 75 n.21. Plaintiffs do not appear to press tort claims under Vietnamese and federal common law (except insofar as federal common law incorporates international law), but they continue to press tort claims under New York law. *See id.* at 102.

Litigation, MDL-381, multidistrict litigation brought by Vietnam-era veterans and their families against manufacturers and the U.S. government that had been consolidated for pretrial purposes before the same district judge.[3] The district court made the entire record in MDL-381 available to plaintiffs. The court also allowed plaintiffs focused discovery into matters particular to this case. A223-224.

On November 2, 2004, defendants filed several dispositive motions. As pertinent here, those motions argued that (a) plaintiffs' claims are nonjusticiable in light of separation-of-powers concerns; (b) plaintiffs have not stated a claim for violation of international law cognizable under the ATS pursuant to the restrictive standards for recognition of such claims set forth in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); (c) for the ATS claims, the court should borrow the ten-year statute of limitations found in the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note; (d) the ATS claims are barred by the government-contractor defense, and because they arise out of combatant activities; (e) plaintiffs' state-law claims are barred by the Constitution's exclusive vesting of authority over foreign affairs in the federal government; (f) the state-law claims are barred by the government-contractor defense; and (g) any award of injunctive relief to require

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[3] *See In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984) (fairness opinion), and 611 F. Supp. 1396 (E.D.N.Y. 1985) (approving settlement fund), *aff'd in part and rev'd in part*, 818 F.2d 179 (2d Cir. 1987).

remediation of the environment in Vietnam would be impracticable. On January 12, 2005, the United States filed a statement of interest supporting defendants' motion to dismiss the ATS claims as nonjusticiable, as insufficient to meet the *Sosa* standard, and as barred by the federal government-contractor defense.

On March 10, 2005, the district court issued an opinion and order, which was amended on March 28. *See* SPA1-132. That order either dismissed or entered summary judgment for defendants on all of plaintiffs' claims. The district court concluded that plaintiffs had not stated an ATS claim that the military's use of Agent Orange violated any international-law norm against the use of poison in warfare, much less that the manufacturers' provision of that herbicide to the military did so. SPA93-121. The district court concluded that plaintiffs' state-law claims were barred by the government-contractor defense, which it had previously found to bar similar claims brought by U.S. veterans against the manufacturers. SPA10-11, 36; *see In re "Agent Orange" Prod. Liab. Litig.*, 304 F. Supp. 2d 404 (E.D.N.Y. 2004), *appeals pending* (2d Cir.).[4] Finally, the court dismissed plaintiffs' claims for injunctive relief compelling remediation of environmental damage in Vietnam, concluding that implementing such relief would be "wholly impracticable" and "could compromise Vietnam's sovereignty." SPA36-37.

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[4] Briefs on appeal for the manufacturers in the veterans' case are being filed simultaneously with this brief.

Although the district court determined that none of plaintiffs' claims could go forward, it also rejected a number of defendants' legal arguments. For example, although the court cited rulings denying associational standing to pursue damages claims, the district court held that VAVAO had standing because it also sought injunctive relief. SPA40-42. The court rejected defendants' (and the government's) position that plaintiffs' claims are nonjusticiable. SPA52-64. The court also concluded that corporations may be liable in a civil action brought under the ATS for a violation of international law, that a claim for aiding-and-abetting liability may be made under the ATS, and that the federal government-contractor defense is unavailable in an ATS suit invoking international law. SPA42-49, 70-82. The court further concluded that plaintiffs' ATS claims were not subject to any statute of limitations. SPA49-52. And the court rejected the contention that plaintiffs' state tort claims are preempted by the federal government's exclusive power to conduct foreign relations. SPA65-66.

Final judgment dismissing all claims was entered on March 30, 2005 (SPA130-131), and a notice of appeal was filed on April 8, 2005.

STATEMENT OF FACTS

A. Executive And Congressional Authorization Of Use Of Herbicides In Vietnam

Early in the Vietnam conflict, the United States government began exploring the possibility of using herbicides to deprive enemy forces infiltrating South

Vietnam of the benefit of vegetation that provided them with cover and sustenance.[5] In late 1961, the State Department and the Department of Defense recommended to President Kennedy that the military initiate a defoliation program. A47. 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]." A1339. President Kennedy accepted that recommendation and, in November 1961, approved the launch of military herbicide operations. A47. Defoliation operations began in January 1962, and missions targeting crops that sustained enemy forces commenced in November of that year. A47.

Herbicides were effective in meeting important U.S. and allied military objectives in Vietnam. As Assistant Secretary of Defense William Lemos explained, "one of the most difficult problems of military operations in South Vietnam is the inability to observe the enemy in the dense forest and jungle." A1374. After summarizing the military's herbicide operations, Admiral Lemos

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[5] Plaintiffs have not alleged, and have pointed no evidence to suggest, that the military intended to use herbicides in Vietnam either as anti-personnel weapons (*i.e.*, for their toxic effects on humans) or for the purpose of destroying the civilian food supply. Although 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," A46, that conclusory allegation does not modify plaintiffs' concession that the herbicides were targeted against plants—not people.

concluded: "The result is that our forces have been better able to accomplish their mission with significantly reduced U.S. and Vietnamese casualties." A1376. Admiral Lemos also stressed that the military had instituted policies intended to ensure that the herbicides were applied only to targets of military significance.[6] Another Assistant Secretary later explained that "the use of . . . herbicides [in Vietnam] was appropriate and had one purpose—to [s]ave the lives of Americans and our allies." A1352.

The herbicide program was nevertheless controversial—as decision-makers recognized it would be from the outset. Nonetheless, despite concerns that Communist propaganda would characterize the program as a form of germ or chemical warfare,[7] policymakers persisted in the decision to use herbicides in light

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[6] *See* A1375 (noting Defense Department policy to "carefully select[]" crop destruction targets "so as to attack only those crops known to be grown by or from the [Viet Cong] or [North Vietnamese Army]," and stating that 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").

[7] *See* A1334 (National Security Council staffer observing that, "if we are going to cope successfully with charges that we are engaged in germ warfare, we must make the [general] character of the ops as open and above board as possible"); A1336 (telegram from Assistant Secretary of State Ball, noting need to "establish a framework within which we can combat future Communist propaganda blasts for other phases of defoliant ops"); A1339 (Secretary Rusk observing that "[w]e will, of course, be the object of an intense Communist 'germ warfare' campaign which may be picked up by some neutrals").

of their substantial military benefits. They also consistently concluded that the military's use of herbicides in Vietnam was permissible under existing treaties and customary international law. Secretary of State Rusk advised President Kennedy in 1961 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." A1339. In 1969, when the United States faced a move in the United Nations General Assembly to resolve that the 1925 Geneva Protocol[8] banned at least some herbicide use in warfare, the U.S. delegation rejected that interpretation, stating that "[c]hemical herbicides . . . which were unknown in 1925, could not be included" within the scope of the prohibitions, and voted against the resolution. A1394. In 1970, when President Nixon transmitted the 1925 Geneva Protocol to the Senate for ratification, Secretary of State Rogers reiterated that "[i]t is the United States' understanding of the Protocol that it does not prohibit the use in war of . . . chemical herbicides." A1399; *see also* A1348, A1352 (statement of Assistant Secretary Amos in 1974, noting that U.S. position on this issue had not changed).[9] And in 1975, when President Ford issued Executive Order 11,850

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[8] Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571. The United States ratified the 1925 Geneva Protocol in 1975.

[9] *See also Chemical-Biological Warfare: U.S. Policies and International Effects: Hearings Before the Subcomm. On National Security Policy and Scientific*

renouncing "as a matter of national policy, first use of herbicides in war," his accompanying remarks confirmed the consistent U.S. position that "the [1925 Geneva] protocol does not cover . . . chemical herbicides." A1401.

Congress was well aware of the herbicide program, and while it denied funds for certain military initiatives in Southeast Asia of which it disapproved,[10] it never denied funding for herbicides. Rather, it affirmatively ratified herbicide use by appropriating funds specifically for herbicide procurement.[11]

In fact, attempts by 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 and Charles Goodell introduced an amendment to prohibit the expenditure of funds for any military application of anti-plant chemicals, or the transfer of anti-plant

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Developments of the House Comm. on Foreign Affairs, 91st Cong. 181 (1970) (statement of Thomas Pickering, Dep't of State) ("Neither the language of the [1925 Geneva Protocol] nor the negotiating history indicates that [it] was intended to cover antivegetation chemical agents.").

[10] *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, stating: "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.").

[11] *See* S. Rep. No. 91-1016, at 85-87 (1970) (in military appropriations bill, establishing the baseline and recommended levels of expenditures for research and development and procurement of herbicides).

chemicals for use by second countries.[12] The full Senate rejected this measure by a vote of 62-22.[13] Another amendment, more narrowly seeking to prohibit the expenditure of funds for the use of chemicals for crop destruction, was rejected by a vote of 48-33.[14] 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.[15]

Congress was likewise aware of the controversy over the legality of the United States' use of herbicides in Vietnam. Indeed, a congressional report observed that, although it was highly desirable that the United States adhere to the

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[12] *See* 116 Cong. Rec. 30,036-30,055 (1970).

[13] *See id.* at 30,054-30,055.

[14] *See id.* at 30,222-30,227.

[15] *See also id.* at 30,005 (statement of Sen. McIntyre) ("For whatever the possible side effects of our herbicide program, its primary contribution is indisputable: it has saved the lives of Americans in Vietnam."); *id.* at 30,049 (statement of Sen. Dominick) ("[I]f we are fighting a war, let us do something about protecting our boys."); *id.* (statement of Sen. Byrd) ("[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 . . . ."); *id.* (statement of Sen. Thurmond) ("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."); *id.* at 30,054 (statement of Sen. Goldwater) ("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[.]").

1925 Geneva Protocol, such adherence could be difficult to attain if it would require acceptance of the view that the use of herbicides would violate international law, a position the U.S. had consistently rejected.[16] Even after the U.S. terminated use of herbicides, the government continued to maintain that the 1925 Geneva Protocol did not prohibit the use of herbicides in war. When President Nixon submitted the Protocol to the Senate for its advice and consent, Secretary of State Rogers explained to the Senate that the United States had decided not to enter a reservation that would preserve the its ability to use herbicides, precisely because the U.S. position remained that the Protocol did not prohibit herbicide use.[17]

B. Post-War Adjustments With Vietnam

The Paris Peace Accords of January 1973 ended U.S. participation in the Vietnam War. After the fall of Saigon in 1975, the United States severed relations with Vietnam and imposed a trade embargo prohibiting most commercial transactions between U.S. nationals and Vietnamese nationals.

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[16] *See* Report of the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs, *Chemical-Biological Warfare: U.S. Policies and International Effects* 5-6, 9 (1970).

[17] *See The Geneva Protocol of 1925: Hearings Before the Sen. Comm. on Foreign Relations*, 92d Cong. 6-7 (1972).

President Clinton partially lifted the trade embargo in February 1994, and fully lifted it in March 1995. On January 28, 1995, the United States and Vietnam agreed to settle certain outstanding claims between the countries. A1406-1408. 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. A1407 (1995 Agreement art. 1(a), (b)).[18] The Agreement makes no provision for reparations or restitution to settle claims arising out of the United States' use of herbicides, including Agent Orange.

The U.S. and Vietnam continue to discuss issues arising out of the war, in the context of their current diplomatic, economic, trade, aid, and security relationships.[19] 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. *See* A1430-1446. But the United States

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[18] 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. A1407 art. 2.

[19] *See* A1410-1428 (report of Congressional Research Service, discussing the history and present status of relations between the United States and Vietnam).

never has agreed that it has either a moral or a legal duty to provide funds or assistance to remediate harms allegedly caused by Agent Orange.

C. Procurement Of Agent Orange

The facts relevant to the procurement and manufacture of Agent Orange were extensively developed in the MDL-381 litigation. Those facts are a principal focus of the appeals in the veterans' cases (especially with regard to the government-contractor defense), which are currently pending on appeal in this Court. For present purposes, an abbreviated version will suffice.[20]

The herbicidal properties of the components of Agent Orange, 2,4-dicholorophenoxyacetic acid (2,4-D) and 2,4,5-tricholorophenoxyacetic acid (2,4,5-T), were discovered in research conducted by the U.S. military during the 1940s. In the 1950s, the military conducted field tests to demonstrate the feasibility of dispensing those substances from aircraft; these dissemination trials

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[20] The facts surrounding the manufacture of Agent Orange, including the government's knowledge of the hazards associated with dioxin, are summarized in the district court's opinion in the veterans' cases, *In re "Agent Orange" Prod. Liab. Litig.*, 304 F. Supp. 2d 404, 424-431 (E.D.N.Y. 2004). They are also summarized in the Affidavit of William A. Krohley in Support of Defendants' Motion for Summary Judgment Based upon the Government Contractor Defense (Nov. 10, 2003), and accompanying exhibits, which were filed in the MDL-381 docket and will be included in the joint appendix on appeal in the veterans' cases. Defendants also adopt and incorporate by reference the statement of facts concerning the procurement and manufacture of Agent Orange and other herbicides in the manufacturers' briefs on appeal in the veterans' cases, *In re "Agent Orange" Prod. Liab. Litig.*, Nos. 05-1760, 05-1820, *et al.*

and work on aerial spray systems laid the groundwork for defoliation systems used in Vietnam. In 1961, the Advanced Research Projects Agency of the Department of Defense evaluated the feasibility of defoliating tropical vegetation in Vietnam and recommended that appropriate formulations of 2,4-D and 2,4,5-T be exploited for immediate use. In January 1962, the U.S. Air Force began the operational phase of the defoliation program in South Vietnam, using a substance code-named Agent Purple. Later in 1962, a research team concluded that a 50/50 mixture of 2,4-D and 2,4,5-T was most effective; that was the formulation that became known as Agent Orange.[21]

Formal specifications for 2,4-D and 2,4,5-T were prepared and promulgated by the military. These specifications established the design and specific characteristics of the mixture of 2,4-D and 2,4,5-T that the government wanted. The same specifications were also later used as the basis for the military's procurement of Agent Orange. The government supplied manufacturers with copies of these specifications and incorporated them into the manufacturers' Agent Orange contracts. Defendants' product met the specifications established by the military in all material respects.[22]

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[21] *See* Krohley Aff. 1-3.

[22] *See In re "Agent Orange,"* 304 F. Supp. 2d at 429-430; Krohley Aff. 3-5.

The government also strictly prescribed the markings that were to be placed on the drums of herbicides manufactured by the defendants. The names of the various "Agents" (Agent Orange, Agent Purple, etc.) refer to a three-inch color-coded band that the government required on the outside of the drums containing the relevant herbicide. Aside from that colored band, the government generally prohibited the manufacturers from including any language, markings, or identification on the drums. For example, a 1967 directive stated:

> Marking: Identification and marking shall be restricted to the following:
>
> One Orange band, 3 inches wide encircling the drum at the center line; lot number, Gross Wt., Net Wt., Cube.
>
> No other markings nor identification shall be used.

Many of defendants' contracts with the government provided simply: "Marking: Orange band 3 inch wide around the center of each drum," and "No further identification as to contents."[23]

In 1966, the government became concerned that the existing pace of production of Agent Orange was insufficient to meet its projected needs and decided instead to compel production from the manufacturers. In so doing, the government acted under the authority of the Defense Production Act of 1950

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[23] *See* Krohley Aff. 4-5; *see also In re "Agent Orange,"* 304 F. Supp. 2d at 430-431.

(DPA), 50 U.S.C. App. §§ 2061-2168 (1951 & Supp. 1983). Section 101 of the DPA authorized the President to "require that performance under contracts or orders . . . shall take priority over performance under any other contract or order, and for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders." *Id.* § 2071. The President delegated that authority to the Secretary of Commerce. 18 Fed. Reg. 6503 (1953). In March 1967, the Department of Commerce, expressly invoking Section 101 of the DPA, directed defendants "to accelerate the delivery of your existing DO rated orders for the defoliant 'Orange.'" This directive essentially commandeered all of the defendants' capacity to produce Agent Orange.[24]

D. The End Of The Herbicide Program

In June 1966, a government study on the long-term health effects of pesticides, including 2,4,5-T (known as the Bionetics Study), uncovered evidence of teratogenicity in mice. The completed Bionetics Study was delivered to the National Cancer Institute (NCI), a component of the National Institutes of Health, in September 1968, although NCI personnel had previously received progress reports concerning the possible teratogenicity of 2,4,5-T. The government

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[24] *See* Krohley Aff. 36-37, 46-48.

undertook further extensive analyses of the Bionetics Study's data in early 1969, but did not restrict the ongoing herbicide program in Vietnam. However, upon the public release of the Study in October 1969, the government restricted the use of 2,4,5-T both in the United States (on food crops and around the home) and in Vietnam, limiting its use to areas remote from human population. On April 15, 1970, the government announced a temporary ban on the use of Agent Orange in Vietnam. The ban was made permanent in December 1970, and the government ceased the herbicide program altogether in January 1971.[25]

SUMMARY OF ARGUMENT

I. The district court properly dismissed plaintiffs' ATS claims. There are several independent bases for affirmance.

A. Under *Sosa*, an international-law claim is not actionable under the ATS unless, at a minimum, it asserts a violation of "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" recognized as violations of the "law of nations" at the time the ATS was enacted. *Sosa*, 542 U.S. at 725. The international-law norms plaintiffs here invoke—the international proscription of the use of poison in war, as well as norms proscribing the infliction of unnecessary

[25] *See id.* at 48-52.

suffering—express broad, aspirational goals that are largely devoid of specific, actionable content. Moreover, to the extent that these norms are actionable, they require proof of *intentional* infliction of harm that plaintiffs do not allege and could not prove. Plaintiffs' claims, which rest on the theory that the negligent use of a defective product in war violates the law of nations, cannot satisfy the deliberately demanding standard established in *Sosa*.

Furthermore, *Sosa* requires not only that international law specifically and definitely proscribe the conduct alleged, but also that international law extend liability to the defendant being sued. *Sosa*, 542 U.S. at 732 n.20. International law does not extend liability for war crimes to non-state corporate entities, nor does it provide a basis for imposing civil aiding-and-abetting liability, particularly in a case premised on allegations of mere negligence.

Finally, under *Sosa*, federal courts have broad authority *not* to recognize otherwise actionable international-law claims where to do so would intrude on the proper spheres of the political branches of government. In this case, prudence counsels rejecting plaintiffs' claims, which ask this Court to condemn military action sanctioned by three successive presidential administrations—with the knowledge and approval of Congress—and to circumvent the Executive's diplomatic determination not to provide reparations for the conduct of the Vietnam War.

B. Because ATS claims are cognizable only as a matter of federal common law, the courts' imposition of liability must conform to federal policies, including those embodied in legislative enactments. Several of these policies provide the manufacturers with federal defenses against plaintiffs' ATS claims. First, as the Supreme Court has recognized, just as federal law forbids suing the government for making decisions about the design and deployment of the instruments of war, so does it forbid suing military contractors in the government's stead. *See Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988). This federal policy defeats plaintiffs' attempts to hold manufacturers liable for acts undertaken at the government's behest in the service of protecting this country during wartime. Similarly, plaintiffs' ATS claims are subject to a federal 10-year statute of limitations defense.

C. Plaintiffs' claims are not justiciable. Plaintiffs ask this Court to answer political questions committed to the political branches, and as to which the judicial branch has no institutional competence: how to conduct the war, and how to make the peace with Vietnam in the war's aftermath. A court ruling on these issues would undermine the political branches' pronouncements on these sensitive matters of military and foreign policy.

II. The district court correctly rejected plaintiffs' claims based on New York tort law. As an initial matter, these claims are preempted by federal law because

they impermissibly interfere with the federal foreign-affairs power—particularly the government's power to conduct post-war relations with Vietnam. Furthermore, as the court recognized, defendants have established the facts necessary to establish the federal government-contractor defense to a state tort claim. That defense is a complete bar to plaintiffs' invocation of New York law in this case.

III. The district court acted well within its discretion in denying additional discovery on plaintiffs' claims relating to the herbicides known as Agents White and Blue, neither of which contained dioxin. These claims fail for precisely the same reasons as plaintiffs' claims concerning Agent Orange: plaintiffs have not stated a cognizable ATS claim, and their state-law claims are preempted by federal law. In any event, plaintiffs all but abandoned their claims concerning Agents White and Blue, raising their complaints concerning the adequacy of discovery only at the eleventh hour of this litigation.

IV. The district court also acted well within its discretion in dismissing plaintiffs' prayer for injunctive relief, which called for environmental remediation on a massive scale on Vietnamese soil.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of a motion to dismiss and its award of summary judgment. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 241 (2d Cir. 2003) (dismissal); *June v. Town of Westfield*, 370 F.3d 255,

257 (2d Cir. 2004) (summary judgment). Denials of leave to conduct discovery and of injunctive relief are subject to review only for abuse of discretion. *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994) (discovery); *Bano v. Union Carbide Corp.*, 361 F.3d 696, 716 (2d Cir. 2004) (injunctive relief).

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR A VIOLATION OF INTERNATIONAL LAW COGNIZABLE IN AN ACTION BROUGHT UNDER THE ALIEN TORT STATUTE

In the district court, plaintiffs advanced a slew of theories to support their contention that defendants and the U.S. military violated international law by, respectively, manufacturing Agent Orange and using it in Vietnam, including the outlandish claims that these actions amounted to torture and genocide. *See supra* p. 5. The district court, after carefully analyzing each of these claims, dismissed them all, ruling that the use of herbicides in Vietnam did not violate any actionable norm of international law that might be the basis of a civil claim cognizable under the ATS. SPA98-121.

On appeal, plaintiffs have abandoned some of their more extreme positions, but their contention that the ATS provides them with a remedy for the use of herbicides in Vietnam remains untenable. Throughout their brief, plaintiffs repeatedly characterize Agent Orange as a "chemical weapon" that the U.S. military used as part of a "chemical warfare" program in Vietnam. Pl. Br. 16-19,

22-25, 27, 37-40. Their provocative label notwithstanding, plaintiffs cannot establish that the use of Agent Orange violated any international proscription against use of chemical weapons. Indeed, plaintiffs disavow any claim that use of Agent Orange violated the 1925 Geneva Protocol—the treaty that opponents of the U.S. herbicide campaign in Vietnam cited at the time as the relevant international prohibition on chemical weapons.[26] By abandoning this claim, plaintiffs tacitly acknowledge the insuperable obstacles to any showing that the U.S. violated that treaty.[27]

Instead, plaintiffs now base their ATS claim on the argument that use of Agent Orange in Vietnam violated the ancient, but highly general, rule against use of "poison" in warfare, restated in Article 23(a) of the Hague Regulations as a prohibition on use of "poison or poisoned weapons," 36 Stat. 2277, 2302 (Oct. 18, 1907, annex). *See* Pl. Br. 75-76. Plaintiffs also contend that defendants violated a prohibition on the use of "material calculated to cause unnecessary suffering"

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[26] *See* Pl. Br. 1-2, 14-15, 71 n.21.

[27] As noted above (pp. 11-12), **t**he U.S. did not accede to the Protocol until after the Vietnam War ended. Moreover, plaintiffs' own expert opined that the 1925 Geneva Protocol did not provide a basis for imposing liability in this case because (a) the U.S. was not clearly bound by the Protocol (a concession that precludes satisfaction of *Sosa*'s definiteness requirement), and (b) while the Protocol "ban[ned] use of [gases] as weapons," "Agent Orange was not used as a means of directly attacking enemy troops." A1737-1738 (Fletcher).

stated in Article 23(e) of the 1907 Hague Regulations, 36 Stat. 2277, 2302 (Oct. 18, 1907, annex). Pl. Br. 85. Plaintiffs' efforts to tie their claims to a norm of international law are unavailing. Under *Sosa*, 542 U.S. at 725, an international legal norm is actionable under the ATS only if the norm is defined with a specificity comparable to those actions that were treated as common-law offenses against the law of nations when the ATS was enacted in 1789. Neither the rule against use of "poison" in war nor the prohibition against causing "unnecessary suffering" satisfies this requirement. These rules are universally accepted precisely because they are so vague as to be hortatory in nature. Furthermore, as the district court explained, the specific weapons prohibitions adopted during the 20th century—including the 1925 Geneva Protocol and the 1993 Convention on Chemical Weapons—were thought necessary for the very reason that it was far from clear that the 1907 Hague Regulations proscribed wartime use of any and all substances that are harmful to human beings. SPA102-107, SPA122.

Nor is there any basis for plaintiffs' suggestion that the rules of war prohibit preventable defects in the manufacture of war materiel. Plaintiffs' claims rest on an amalgamation of three distinct norms—Article 23(e) of the Hague Regulations, the norm of "proportionality" in war, and Article 147 of the 1949 Geneva Convention. Plaintiffs' expert conceded that these norms are not defined with the

specificity *Sosa* requires. In addition, all three require willful, intentional, or depraved conduct that plaintiffs do not and could not allege.

Finally, *Sosa* requires not only that international law specifically and definitely proscribe the conduct alleged, but also that international law extend the scope of liability to "the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 n.20. International law governing the conduct of war does not extend liability to corporate entities. Nor does international law include any universally agreed-upon standards for civil aiding-and-abetting liability. Plaintiffs' claims ultimately depend on domestic tort principles, not international law, to extend liability for the government's conduct of war to the private contractors that provided the military with supplies. But although domestic law may inform a U.S. court's decision *not* to recognize an otherwise actionable norm—where, for example, to do so would conflict with federal policy—it cannot create an actionable international-law norm where none exists. Plaintiffs' ATS claims were properly dismissed.

A. Plaintiffs' Claims Are Predicated On Misconceptions About The Nature Of An ATS Action

Because plaintiffs' claims rest on a series of misconceptions concerning the nature of an ATS action, it is first necessary to clarify the analytical framework that governs this suit. The ATS does *not* "provide aliens a private right of action to redress violations of customary international law." Pl. Br. 48. To the contrary, the

ATS itself is "a jurisdictional statute creating no new causes of action." *Sosa*, 542 U.S. at 724. Through this jurisdictional grant, Congress authorized federal courts to recognize private causes of action to enforce a narrow set of international legal norms—in other words, to "recogniz[e] a claim under the law of nations as an element of common law." *Id.* at 725.

Because of the serious consequences that could result from a federal court's creation of a new cause of action based on an asserted norm of international law, the standards for recognition of an ATS claim are purposely "demanding." 542 U.S. at 738 n.30. When the ATS was first enacted in 1789, it was "originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority." *Id.* at 729. And so today, to qualify as one of the small number of norms enforceable under the ATS, the norm must be (1) universally accepted by the civilized world and (2) "defined with a specificity comparable to the features of the 18th-century" actions that were treated as common-law offenses against the law of nations in 1789. *Id.* at 725.

Although claims brought under the ATS fall within the jurisdiction of the federal courts as a unique species of "federal common law"—and thus must be consistent with other principles and policies of federal law—*Sosa*'s universality and definiteness requirements mean that the substantive rules of decision must

reflect the collective judgments of states in the international system. Because the legal norms actionable under the ATS go no further than international consensus reflecting the voluntary agreement of states to be bound by international law, federal courts adjudicating claims under the ATS have no authority to create, expand, or supplement these substantive norms under the guise of federal common-lawmaking. Courts must therefore also consider "whether international law extends the scope of liability . . . to the perpetrator being sued." 542 U.S. at 732 n.20. If states have not agreed that a legal prohibition applies to private corporations, a court that applies the norm to such actors is making a policy decision that the international community has not made—and that the ATS does not authorize federal courts to make. In sum, the ATS does not give courts a "mandate to seek out and define new and debatable violations of the law of nations." *Id.* at 728.

The requirements of universality and specificity are not "the only principle[s] limiting the availability of relief in the federal courts for violations of customary international law." 542 U.S. at 733 n.21. The *Sosa* Court also stressed that prudential factors may counsel against a court affording relief through the ATS, including the risks of "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs" or creating "adverse foreign policy consequences." *Id.* at 727-28. Beyond these factors, the Court indicated

that courts should take careful account of "any congressional guidance" that can be gleaned from statutes or treaties. *Id.* at 731; *see also id.* at 760 (Breyer, J., concurring in part and concurring in the judgment) (courts should not enforce norms in light of a "direct or indirect command" from Congress).

B. Plaintiffs Cannot State A Claim Under The Alien Tort Statute For Violation Of The "Poison" Proscription

1. The "Poison" Proscription Provides No Basis for Plaintiffs' ATS Claims

Plaintiffs' claims for violation of the ancient proscription against military use of "poison" founder on the fundamental requirements that the Supreme Court established for ATS actions in *Sosa*. Aside from a passing reference to *Sosa*'s requirements (Pl. Br. 48), plaintiffs simply ignore them, no doubt because the poison proscription they seek to enforce cannot possibly satisfy the Court's "demanding standard of definition." *Sosa*, 542 U.S. at 738 n.30; *see also Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 254 (2d Cir. 2003) (stressing that plaintiff must identify a "clear and unambiguous" rule of customary international law to support an ATS claim).

All can agree that international law has long contained a general prohibition on the use of "poison" during war. But beyond a handful of specific, narrowly defined applications—such as plugging wells with corpses, or dipping arrows in poison (*see* Pl. Br. 77-78)—there is not now, and never has been, a consensus in

the international community as to what the poison proscription encompasses. *See* A2084 (Anderson). As discussed below, there is no consensus that the proscription applies even to chemical weapons deployed for the very purpose of killing combatants, much less to defoliants with possible unintended toxic side-effects.

The absence of any universally accepted definition of "poison" (or any universally accepted definition that would include Agent Orange within its terms) cannot be obscured by the categorical manner in which the ban on use of poison in war has sometimes been restated. For example, the prohibition on the use of "poison or poisoned weapons" in Article 23(a) of the 1907 Hague Regulations is certainly categorical, *see* 36 Stat. 2277, 2301,[28] but its scope is nevertheless undefined and has remained so for a century. As the International Court of Justice ("ICJ") has acknowledged in an authoritative interpretation of Article 23(a), that provision nowhere defines the critical term "poison," and "different interpretations exist on the issue." *Threat or Use of Nuclear Weapons*, Advisory Op. No. 95, 1996 I.C.J. 226, 55 (July 8) ("*Nuclear Weapons Advisory Opinion*"). Indeed, plaintiffs' own expert conceded that "[t]he concept of 'poison' is not defined."

[28] As plaintiffs observe (Pl. Br. 84, 86, 102), Article 23 states that it is "especially forbidden . . . [t]o employ poison or poisoned weapons."

A1727 (Fletcher). Under *Sosa*, this alone is fatal to any claim that the prohibition is enforceable under the ATS.

In an effort to compensate for the vagueness inherent in the international-law poison proscription, plaintiffs approach this case as though it were a domestic tort action, supplying their own definition of "poison" and a foreseeability standard borrowed from U.S. products liability cases. Plaintiffs accordingly devote several pages of their brief to criticizing the district court for characterizing Agent Orange as an herbicide rather than a "poison," as they have defined the term: a chemical that its manufacturers "knew would be sprayed in such a way that harm to human beings would inevitably result." Pl. Br. 53. In so doing, the plaintiffs ignore the district court's ultimate and correct ruling: that "the imprecise scope of [Article 23(a)]'s 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 fatal to any claim that the [Hague Regulations] set[] forth a sufficiently definite prohibition on military use of herbicides that could be enforced in United States courts." SPA103.

Plaintiffs' use of domestic tort principles to "fix" the imprecision in the poison proscription would only undermine the international legal regime that plaintiffs profess to champion. The international prohibition of the use of poison in war has been important *precisely because* it is imprecise; it has served as a

useful tool for those who wished to remind governments of the importance of international law, even during war. As Professor Anderson explained:

> the very existence of a widely accepted, historically-grounded ban on *any* kind of activity in war is precious, as it serves by power of example to show that behavior in war *can* be controlled even across centuries of armed conflict. But the price of the survival of a ban across so many centuries and so many technological changes is that it can only be expressed in very general germs that lack the contours specific to the technology of any particular generation of warfare.

A2085 (emphases in original).

Because the laws of war develop through consensus, and because states are reluctant to give up weapons when their survival is at stake, developing a consensus on the rules of war is a difficult and slow process. But if states can be subjected to war-crime liability based on after-the-fact interpretations of broadly worded bans, they will be even more reluctant to agree to any prohibitions at all. *See* A1285 (Anderson) ("[S]tates are less likely to embrace international law as a general matter if they believe that they will be held accountable to norms that they have not accepted."). This is one of the reasons why, during the past century, states did not rely on Article 23(a) to outlaw new chemical and biological weapons (though such weapons might, far more readily than defective products, be characterized as "poisons" in lay terms), and instead negotiated specific prohibitions for them. A2085 (Anderson); *see also* A1149-1150 (Reisman)

(explaining that, "[f]or obvious reasons, arms limitations treaties do not lend themselves to 'creative' interpretation" and noting that bacteriological weapons that "might, as a theoretical matter, have been wedged into the language of the 1899 and 1907 Conventions, had to be prohibited in an additional explicit legal instrument," namely, the 1925 Geneva Protocol).

Notably, plaintiffs cite no evidence that disinterested scholars and states clearly understood Article 23(a) to prohibit the military use of chemical defoliants. And it is indisputable that none of the U.N. resolutions challenging the U.S. herbicide campaign in Vietnam even mentioned Article 23(a).[29] Yet plaintiffs claim they are entitled to recover damages from the manufacturers of those herbicides based on alleged violations of this norm. Allowing plaintiffs' case to proceed on the basis of such a broadly worded but ill-defined prohibition would only "damage . . . the long term survival of the norm." A2085 (Anderson).

[29] To the extent that positions expressed by member states at the United Nations reflect actual state practice in international law, that evidence confirms that Article 23(a) provides no basis for a claim here. Notably, the critics of the U.S. herbicide program in Vietnam *never* mentioned Article 23(a) in their attacks on the program, and the U.N. resolutions likewise made no mention of Article 23(a), relying instead on the 1925 Geneva Protocol—the treaty that plaintiffs now disavow as a basis of liability.

a) State Practice Confirms That the "Poison" Proscription Provides No Basis for an ATS Claim

Actual state practice, which is profoundly important in discerning the content of international law, *see El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 175-176 (1999), demonstrates that the broad proscription of the use of poison in war is stated at a such a high level of generality as to be aspirational, rather than actionable, under international law. State practice has limited the application of the poison proscription to a handful of narrowly defined actions, such as poisoning wells and arrows. Beyond this, the prohibition on poison has been of little utility in resolving controversies over the use of specific weapons. Instead of relying on broadly stated norms to prohibit new weapons, the international community has proceeded by adopting specific treaties to prohibit specific weapons.

Article 23(a)'s prohibition on the use of poison has always been understood to have a very narrow meaning. Although plaintiffs (incorrectly) characterize Agent Orange as an agent of chemical warfare proscribed by the Hague Regulations, the parties to the Hague Convention did not agree that the prohibition against use of poison applied even to chemical gas weapons that were *intended* to be lethal to humans, such as shells containing chlorine or mustard gas—much less chemical defoliants that might have unintended toxic side-effects. The Germans, British, and French used lethal chemical gas extensively in World War I, less than a decade after adoption of the Hague Regulations; the United States was prepared

to do so, though the Armistice made that unnecessary. A1286 (Anderson); A1146 (Reisman). Those states, all of which had ratified the Hague Regulations, thought it necessary later to negotiate a specific treaty, the 1925 Geneva Protocol, to outlaw the use of chemical gas as a weapon. A1287 (Anderson); A1148 (Reisman).[30]

Based on this practice, a classical treatise on the international law of war and a leading writer on the subject both concluded that Article 23's poison prohibition did not apply to poison gas weapons. *See* Myres S. McDougal & Florentino P. Feliciano, *Law and Minimum Public World Order* 619 (1960, repr. 1994); Joseph Burns Kelly, *Gas Warfare in International Law*, 9 Mil. L. Rev. 1, 44 (1960). The U.S. Army field manual in force throughout the Vietnam War reflected that same

[30] Plaintiffs' claim that the 1925 Geneva Protocol codified an *existing* prohibition on use of toxic gases, Pl. Br. 87-89, ignores a wealth of evidence to the contrary. Not only did states use such gases in the First World War, but the British and Belgian officials who investigated Germany's initial use did not refer to "poison" or the Hague Regulations, and many Allied experts and public figures supported the distinction between poisoned and chemical weapons after the war. A2089 n.10 (Anderson) (citing authorities)). The views of some delegates to the 1925 convention that plaintiffs cite, Pl. Br. 88-89, are not an authoritative guide to the meaning of the Protocol, *see* A2093 n.17 (Anderson). Plaintiffs cite no evidence that the delegates thought they were re-codifying the prohibition recited in the Hague Regulations, as opposed to codifying a new, specific ban that developed as a result of the use of chemical gas during World War I.

view. *See* A1287 (Anderson).[31] Two decades after that war ended, the ICJ reached the same conclusion. *Nuclear Weapons Advisory Opinion* ¶¶ 55-56.

Moreover, the notion that Article 23(a) could have had a definite and universally accepted meaning extending even to lethal chemical weapons, much less herbicides, is fundamentally at odds with the recognized evolution of international weapons prohibitions. *See* A2804-2806 (Anderson). As the ICJ has explained, the international community has not approached the problems of nuclear, chemical, and biological weapons by adopting broadly worded prohibitions that might, as a matter of dictionary definitions, be construed to encompass them. Instead, the practice has been to have weapons "declared illegal by specific instruments." *Nuclear Weapons Advisory Opinion* ¶ 57. This pattern reflects, among other things, the fundamental reality that, "[i]n treaties that limit what one's soldiers can do on the battlefield, it is important to be sure that everyone understands precisely what the rules are, lest you send your army out unprepared for the weapons your adversary will deploy." A1149 (Reisman). It is

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[31] Remarkably, plaintiffs cite the 1940 version of the Field Manual as evidence that Article 23(a) "sets forth an absolute, specific and definite prohibition on the use of poison." Pl. Br. 95. The 1940 Army manual expressly states that the Hague Regulations are "not applicable to the use of toxic gas." U.S. Rules of Land Warfare, War Department Basic Field Manual FM 27-10 ¶ 25 (1940) (emphasis added). A poison proscription that does not cover "toxic gas" could hardly be an absolute and specific prohibition on substances that are only incidentally harmful to humans.

therefore especially noteworthy that military use of herbicides is *still* not prohibited under the Chemical Weapons Convention of 1993, "even if the (secondary) effect of such use were the killing or harming of people," Walter Krutzch & Ralf Trapp, *A Commentary on the Chemical Weapons Convention* 30 (1994). The fact that the international community has *never* specifically addressed and outlawed such military use of herbicides forecloses any claim that Article 23(a) barred such use, let alone did so in a manner sufficiently definite and specific to justify recognition of an actionable norm under *Sosa*.

b) Scholarly Commentary Confirms That the "Poison" Proscription Provides No Basis For a Claim

Scholarly commentary confirms the point. Crucially, scholars have noted over the years that the anti-poison rule has been of little relevance or utility in resolving controversies over the use of specific weapons. Writing at the height of the controversy over the U.S. herbicide program in Vietnam, Thomas and Thomas observed that:

> [t]he Hague interdiction of poison has been subject to so many differences of opinion among legal authorities in relation to chemical-biological agents that it becomes impossible to point with any certainty to its relevance as to any prohibitory effect in the chemical-biological field . . . . [D]isputes exist as to whether certain agents are poison so as to fall within this rule; whether agents would be encompassed if not in existence prior to 1907; and whether the rule was intended to apply to chemical-biological weapons in any event. This divergent thought makes these pre-conventional principles of extremely

> limited utility as legal fetters on the use of chemical-biological agents in war.

Ann Van Wynen Thomas & A.J. Thomas, Jr., *Legal Limits on the Use of Chemical and Biological Weapons* 57 (1970). For similar reasons, Frits Kalshoven, one of the most distinguished commentators on the law of war, observed in a treatise published by the International Committee of the Red Cross that Article 23(a)'s prohibition "is of mainly historical interest." Frits Kalshoven & Liesbeth Zegveld, *Constraints on the Waging of War*: *An Introduction to International Humanitarian Law* 42 (ICRC 2001).

Scholars have also confirmed the evidence of state practice, noted above, that the Hague Regulations did not clearly proscribe even use of lethal chemical gas, much less use of herbicides. A noted arms-control advocate has acknowledged that Article 23(a)'s prohibitions "do not in the opinion of many cover chemical warfare." Ingrid Detter, *The Law of War* 253 (2d ed. 2000). A German academic cited by one of plaintiffs' own experts likewise acknowledges that Article 23(a) "could not take a stand on modern weapons like 'gas weapons' because these weapons were not known at the time." A1739 (Fletcher) (citing Gerhard Werle). The work of disinterested scholars shows that the ban on use of poison could not provide a basis for plaintiffs' ATS claims.

2. The "Poison" Proscription Does Not Bar Military Use of Chemicals for Defoliation Purposes, Even If That Use Allegedly Causes Secondary Harm to Humans

Plaintiffs' "poison" claim fails for a second, independently dispositive reason: plaintiffs cannot show (and indeed have never claimed) Agent Orange was *intentionally* used to harm humans. Plaintiffs rely on "the bedrock principle of [U.S.] tort law that an actor is assumed to have intended the natural and probable consequences of its actions." Pl. Br. 42; *see id*. at 63. That principle, however, is wholly inapplicable here. In this ATS action, the intent standard must come from Article 23(a), not domestic tort law. And Article 23(a) bars use of poison or poisoned weapons only for the purpose of directly killing or incapacitating the enemy; it does not apply to the use of allegedly toxic or poisonous chemicals that are designed and used for other purposes, such as defoliation, even if that use might foreseeably result in secondary harm to humans.

States, courts, and scholars have consistently recognized that international law proscribes only use of agents intended as a means of directly and immediately harming or killing an enemy. The British government has opined that Article 23(a) was "intended to apply to weapons whose primary effect was poisonous and not to those where poison was a secondary or incidental effect." A1288 (Anderson) (citing British submission to the ICJ). The U.S. government has likewise stated that Article 23(a) is particularly concerned with "projectiles that carry poison into

the body," and "was not intended to apply, and has not been applied, to weapons that are designed to injure or destroy by other means, even though they may also create toxic byproducts." *Id.* (citing U.S. submission to the ICJ). The ICJ agreed with these positions, concluding that the prohibitions of both the 1907 Hague Regulations and the 1925 Geneva Protocol "have been understood, in the practice of States, . . . as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate." *Nuclear Weapons Advisory Opinion* ¶ 55 (emphasis added).

The work of scholars is to the same effect. At the height of the Vietnam War, Thomas and Thomas wrote that Article 23(a) "relates to the use of poison to *injure or destroy* the person of the enemy," and that there could be "no serious objection" to use of "antianimal [or] antiplant agents" that deprived the enemy of property upon which they were dependent. Thomas & Thomas, *supra*, at 53 (emphasis added). The year before the ICJ issued its *Nuclear Weapons Advisory Opinion*, a leading German expert on humanitarian law explained that:

> [t]he most important point concerning all these disputes about the definition of "poisonous gases" . . . is the *intentional design of a weapon in order to inflict poisoning as a means of combat*. Only insofar as the poisoning effect *is the intended result* of the use of the substances concerned does the use of such munitions qualify as a use of "poisonous gases." If the asphyxiating or poisoning effect is merely *a side-effect* of a physical mechanism intended principally to cause totally different results . . . , then the relevant munitions does not constitute a "poisonous gas."

Stefan Oeter, *Means and Methods of Combat, in The Handbook of Humanitarian Law in Armed Conflicts* 149 (Dieter Fleck ed. 1995) (emphases added).[32] And the leading commentary on the 1993 Chemical Weapons Convention likewise states that, even under that broad modern treaty, "[h]erbicides will not be regarded as chemical weapons if used with an intent to destroy plants. That would apply even if the (secondary) effect of such use were the killing or harming of people, for example by toxic side-effects." Krutzch & Trapp, *supra*, at 30; *see also* A1147 (Reisman) ("[e]ven if herbicides could have harmful consequences for humans, such substances would not be considered poisonous under Article 23(a) if the intentional design of the material was not to inflict poisoning as a means of combat") (internal quotation marks and citation omitted).[33]

Plaintiffs ignore this evidence of state practice and scholarship. And in fact, they cite no instance in which a substance that was *not* used to kill or incapacitate an enemy was deemed a "poison" because of the secondary harms it allegedly caused. Every example in their brief, as well as those recited in their voluminous

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[32] In the proceedings below, plaintiffs sought to dismiss Dr. Oeter's work as that of a mere researcher. In fact, Dr. Oeter is a respected scholar, and his article is part of an integrated manual prepared by the Ministry of Defence of a major NATO state, Germany. *See* A2254-2255 (Reisman).

[33] As the foregoing quote makes clear, Professor Reisman did not "predicate[] his opinion on the assumption that the herbicides at issue were not harmful to human beings." Pl. Br. 44 n.9.

submission below, involved use of toxic substances as a means of directly killing or harming enemy troops or noncombatants. *See* Pl. Br. 77-78 (poisoning wells, food, and weapons, such as arrows; catapulting diseased corpses into cities under siege); *see also id*. at 79-80 (citing prohibitions on "strik[ing] with weapons [that are] … poisoned" or "kill[ing] any one by means of poison") (internal quotation marks and citations omitted); *id.* at 96 (noting war crime charges under Article 23(a) against Japanese for attacking Chinese cities "with cholera, anthrax, salmonella and the plague").

The requirement that a weapon must be intentionally designed or used to kill or harm humans to qualify as a prohibited "poison" is entirely consistent with plaintiffs' theory that the "poison" proscription is tied to prohibitions on "perfidy" and "treachery" in warfare, A1727-1731 (Fletcher), and with their recognition that the proscription is a special application of the rule banning use of weapons "calculated to cause unnecessary suffering." Pl. Br. 56. Intent is inherent in the concepts of treachery, perfidy, and calculation. One cannot be negligently treacherous or perfidious. And a weapon is only "*calculated* to cause unnecessary suffering" if it is intentionally designed or used for that purpose. Indeed, causing unintended injuries that become manifest only years, and possibly decades, after a conflict ends is not a method of combat at all. Such long-term latent side-effects, by their very nature, are not means of "achiev[ing] military objectives." A1747

(Fletcher); *see* A2253 (Reisman) (defoliants were not used in Vietnam "to clandestinely or treacherously injure an enemy"). Plaintiffs never grapple with this reality.

The foregoing evidence of state practice and scholarly commentary compelled the district court's conclusion that, "regardless of whether they have collateral harmful consequences," chemicals that are "designed and used as herbicides to kill plants . . . are not outlawed as 'poison or poisonous weapons' under even the broadest interpretation of that phrase." SPA103. There is no support in international law for plaintiffs' attempt to impose liability based on defendants' alleged failure to prevent foreseeable but unintended secondary harms from chemical agents that—as plaintiffs' expert conceded—were "not used as [a] means of directly attacking enemy troops." A1737-1738 (Fletcher).

3. The Cramer and Buzhardt Opinions Cannot Cure the Defects in Plaintiffs' Claims

Ignoring the foregoing evidence, plaintiffs attempt to create the governing international rule of law out of snippets from two U.S. military documents. According to plaintiffs, the opinions of two officials, Major General Myron C. Cramer and Defense Department General Counsel J. Fred Buzhardt, prove that the U.S. military itself believes that Article 23(a) prohibits the use in war of any substance that is harmful to humans, and that whether a substance is sufficiently

harmful to fall within this proscription is a question of fact for a jury. *See* Pl. Br. 50-56, 61, 63, 75, 84-85, 89-90, 96.

Both opinions are of limited relevance at best. Neither purported to represent the United States' official position on the scope or applicability of any international-law prohibition on use of poison—indeed, it would be impossible to interpret them as such (at least in the manner plaintiffs do), given U.S. military practices during the Vietnam conflict. But more fundamentally, even if these documents *did* represent the official U.S. position, the views of a single state do not establish a binding international-law obligation. The Cramer and Buzhart opinions cannot alter or obscure uniform state practice and scholarly commentary, both of which confirm that the poison proscription is primarily an aspirational norm rather than an actionable one.

In any event, the opinions themselves do not support plaintiffs' expansive readings. General Cramer's opinion concluded that the destruction of crops by chemicals that are not toxic to humans would not violate any applicable rule of international law. A1489-1491. Notably, that conclusion was based on the proposition, discussed above (pp. 40-44), that any prohibition against use of poison in war encompassed only substances intentionally used to harm humans—as Cramer put it, "the employment of poisonous and deleterious gases *against enemy human beings*," A1490 (emphasis added). General Cramer nowhere suggested that

the use of chemicals to destroy crops would violate international law if, many years later, those chemicals proved to be harmful to humans.

Moreover, the two central paragraphs of the Cramer opinion concern *not* Article 23(a) or the general rule against use of poison in war, but the 1925 Geneva Protocol's specific prohibitions on "poison gas"—a prohibition plaintiffs do not rely on in this case (*see supra* p. 25). *See* A1490. In fact, his analysis confirms that Article 23(a) provides no basis for any claim here. General Cramer stated that the U.S. "is not bound by any treaty which specifically excludes or restricts the use of chemicals, whether toxic or nontoxic, in time of war." A1490. Since the U.S. *was* a party to the 1907 Hague Regulations, this statement can only mean that the U.S. did not understand Article 23(a) to have any bearing on military use of chemicals that are toxic. This understanding is confirmed by Cramer's subsequent observation that, "[*e*]*ven if* Article 23(a) is held to apply to toxic chemical substances … it would not preclude the use of crop-destroying chemicals which produce substantially no noxious effects upon enemy soldiers." A1491 (emphasis added). As made clear by his use of the phrase "[e]ven if," General Cramer was engaging in a counterfactual assumption that Article 23(a) was relevant to the question of the legality of crop-destroying chemicals.

The Buzhardt opinion confirms this analysis. Buzhardt concluded that Article 23(a) did not bar "use of antiplant chemicals for defoliation or the

destruction of crops, provided that their use against crops does not cause such crops as food to be poisoned nor cause humans to be poisoned by direct contact." A1485.[34] Buzhardt made clear that the phrase "to be poisoned" did not encompass unintended harm from secondary toxic side-effects. In arguing to the contrary, plaintiffs make much of Buzhardt's citation to the 1956 Army Field Manual and its statement that Article 23(a) does not apply to chemical herbicides that are "harmless to man." A1486. But plaintiffs miss the import of this reference; Buzhardt explained that "the phrase 'harmless to man'" is used to

> draw[] attention to Article 23(e) of the Hague Regulations of 1907, wherein combatants are forbidden to employ weapons "calculated to cause unnecessary suffering." However, the provision in Hague Regulation 23(a) concerning the prohibition against using poison or poisoned weapons is a special case of this rule since it, in effect, declares that any use of a *lethal* substance *against human beings* is, per se, a use which is calculated to cause unnecessary suffering.

A1487 (emphases added). Thus, like the ICJ and numerous scholars before and after him, Buzhardt recognized that Article 23(a) does not prohibit the deployment of material that is secondarily harmful to human beings; it prohibits only the calculated use of lethal substances against human beings. Agent Orange, however,

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[34] Buzhardt analyzed Article 23(a) not because he independently considered it was relevant to use of chemical agents, but because Senator Fulbright requested such an analysis at a hearing on the applicability of the 1925 Geneva Protocol to Agent Orange. *See* A1485.

was "not used as [a] means of directly attacking enemy troops," A1737-1738 (Fletcher), and so it does not fall within Article 23(a).

C. Plaintiffs Fail To State Claims Under Article 23(e) Of The Hague Regulations, The Norm Of Proportionality, Or Article 147 Of The 1949 Geneva Convention

Plaintiffs also purport to enforce a norm that prohibits "[m]eans of [c]ausing [u]nnecessary [s]uffering [u]nrelated to [m]ilitary [n]ecessity." Pl. Br. 81. They suggest that this norm prohibits use of herbicides or material that contain "unnecessary," "preventable," "avoidable" or "[un]safe" levels of substances that prove harmful to humans. Pl. Br. 1-2, 15, 25, 33, 36, 41-42, 60-61, 63; *see id*. at 64 (levels of dioxin in Agent Orange were a "preventable manufacturing defect"). Plaintiffs are notably opaque, however, in describing the origins and contours of this norm, which turns out to be an amalgam of (1) Article 23(e)'s prohibition on the use of "arms, projectiles, or material calculated to cause unnecessary suffering," (2) the norm of "proportionality," which is the customary international legal prohibition on "wanton destruction of cities, towns or villages, or devastation not justified by military necessity,"[35] and (3) Article 147 of the 1949 Geneva Convention, which defines, as "grave breaches" of that treaty, "willfully causing

[35] This norm is codified in Article 6(b) of 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, Aug. 8, 1945, art. 6(b), 59 Stat. 1546, 1547 (the "London Charter").

great suffering or serious injury to body or health," and "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[36] None of these norms is actionable under the ATS. All three are too indefinite to satisfy *Sosa*'s specificity requirement, and each requires a mental state that plaintiffs do not allege and could not prove.

1. All Three Norms Are Too Indefinite To Be Actionable Under *Sosa*

All three norms invoked by plaintiffs fail as a basis for an ATS claim for the same fundamental reason: like the poison proscription, they reflect broad aspirational goals rather than specific, actionable obligations. As with "poison," all may agree that international law prohibits infliction of "unnecessary" or "unjustified" suffering. But what military operations are "necessary" or "justified" is very much in the eye of the beholder. Such a highly subjective and context-dependent rule, if it may even be properly called a rule, cannot meet *Sosa*'s requirements of definiteness and specificity. As plaintiffs' own expert opined:

> [N]orms that depend on modifiers such as "disproportionate" or "unnecessary" . . . invite a case-by-case balancing of competing interests. When the balancing of competing interests governs the interpretation of a norm, black-letter rules become vague and easily manipulated. They lose the definite and

[36] Geneva Convention Relative to Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3316, art. 147.

> specific content *Sosa* seems to demand for recovery under the ATS.

A1717. Professor Fletcher accordingly admitted that Geneva Article 147's prohibitions against "willfully causing great suffering or serious injury" and "extensive destruction and appropriation of property"—prohibitions that plaintiffs cite in support of their purported "norm," *see* Pl. Br. 92, 94—"are insufficiently specific and definite." A1723.

The logic underlying this concession is equally applicable to the two other norms that plaintiffs obliquely invoke. Like Article 147, Article 23(e) of the Hague Regulations uses the modifier "unnecessary," which introduces the same vagueness and imprecision that dooms enforcement under *Sosa*. In fact, leading commentators have characterized Article 23(e)'s prohibition as "too vague to produce by itself a great many practical results." Kalshoven & Zegveld, *supra*, at 41-42.

Finally, "proportionality" is the paradigm of a norm that requires the kind of "case-by-case balancing of competing interests," A1717, that precludes enforcement under the ATS. Indeed, the norm was described in precisely these terms in the Final Report to the International Criminal Tribunal for Yugoslavia ("ICTY") Prosecutor on the NATO bombing in Kosovo:

> 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 consequences. . . . 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.

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*"). As Professor Anderson explained, determining whether military action was necessary or proportional is a "difficult, open-ended, and subjective" task; because of its "inherent subjectivity and imprecision, people with different backgrounds and in different circumstances can reach different conclusions on the same facts." A1301; *see also* Kalshoven & Zegveld, *supra*, at 46 (noting the "lack of precision inherent in [the proportionality rule]"). A norm that is so "imprecis[e]," "open-ended, and subjective" 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 the specificity *Sosa* demands.

2. All Three Norms Require Mental States Plaintiffs Do Not Allege and Could Not Prove

Plaintiffs' claims under these norms fail for the independent reason that all three require conduct that is intentional, willful, or depraved. Plaintiffs are unable

to allege any such conduct by either defendants or the U.S. military. Tacitly conceding this point, plaintiffs improperly attempt to create a *mens rea* standard that was wholly unknown to the law of war during the relevant time period.

The centerpiece of plaintiffs' improper attempt to change the governing *mens rea* standard is their repeated misquotation of Article 23(e). Plaintiffs claim this norm reaches "any use of any material *of such a nature* as to cause unnecessary suffering." Pl. Br. 85 (emphasis added).[37] By using the emphasized phrase, along with their repeated references to "unnecessary," "preventable," and "avoidable" harms, plaintiffs attempt to create the impression that Article 23(e) prohibits the infliction of any harm that a jury later concludes could have been avoided through the exercise of ordinary care. Article 23(e) does no such thing. Rather, it prohibits the use of weapons and materials that are "*calculated* to cause unnecessary suffering." As defendants have previously explained, the term "calculated" makes clear that this norm prohibits the use of weapons or materials that are *deployed for the purpose* of causing unnecessary suffering. *See supra* pp.

[37] The "material of such a nature as to cause unnecessary suffering" appears not in Article 23(e), the centerpiece of plaintiffs' argument, but in Article 35 of the First Additional Protocol to the Geneva Conventions, 1125 U.N.T.S. 3 (June 8, 1977). That Protocol has no significance here. A "sweeping revision of the laws of war," the Protocol was not signed until well after the Vietnam War, and, in any event, the United States has "aggressively declined to ratify" it. A1297 (Anderson).

43-44. Moreover, plaintiffs' suggestions to the contrary ignore the import of the phrase "*unnecessary* suffering." Weapons, by their very nature, inflict suffering: they are designed (or "calculated") to kill or incapacitate, often through gruesome (though entirely legal) means. Accordingly, as Professor Anderson explained below, the concept of "unnecessary suffering" is used to capture weapons or materials that

> cause additional, and unnecessary, injury to a combatant already rendered *hors de combat* by some other means. Thus, for example, a bullet treated with an agent designed to inflame a wound is illegal because the bullet will suffice to render the combatant *hors de combat* and the inflammation is superfluous and unnecessary.

A1290. The 1956 U.S. Army Field Manual listed, as other examples of weapons that violate Article 23(e), lances with barbed heads, projectiles filled with glass, and the scoring of the surface or the filing off of the ends of the hard cases of bullets. *See* A1290 n.51. Plainly, this norm does not apply to materials that are allegedly harmful due to supposed defects in the way they are manufactured.

Nor does the proportionality norm prohibit the defective manufacture of war materiel. Rather, it is violated by "obvious intentional depravity." A1302 (Anderson). In one of the few prosecutions ever brought for violation of this norm, a Nuremberg court *acquitted* a German general who ordered the destruction of all shelter and means of existence in an area the size of Denmark, leaving 61,000 civilians to starve and freeze to death during a Scandinavian winter, in order to

protect his retreating army. A1302-1303 (Anderson). It is preposterous to suggest that, although intentional devastation of this magnitude does not violate the norm, a failure to exercise ordinary care in the manufacture of chemical defoliants does.

Article 147 of the 1949 Geneva Convention is an even more unlikely source of the negligence-based "norm" plaintiffs posit. Article 147's prohibition on "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" is effectively an aggravated violation of the norm of proportionality. The rule of proportionality "weigh[s] the requirements of military necessity–what might be called the 'importance of winning'—against collateral damage, particularly to civilians and civilian objects." A1300 (Anderson). To say that destructive conduct is "not justified by military necessity," therefore, is simply another way of saying that it violates the proportionality norm. Once again, there is no conceivable basis for suggesting that the manner in which defendants manufactured Agent Orange violated this norm, or that Article 147 has given rise to a duty of due care in the manufacture of war materiel.

D. There Is No Basis In International Law For Either Corporate Liability Or Civil "Aiding And Abetting" Liability

Even if any of the international norms plaintiffs have cited were actionable under the ATS or had been violated, there is no basis for imposing any liability for violations of these norms on defendants, which are (1) private corporate entities

(2) alleged to have aided and abetted the primary violation of the law of war by the U.S. government. Plaintiffs' effort to extend civil aiding-and-abetting liability for violations of the law of war—which governs the conduct of states vis-à-vis one another—to non-state actors finds scant support in international law, and certainly not the degree of universal acceptance and specificity required to support liability under the ATS.

In opining that the defendant corporations could be held liable for aiding and abetting governmental violations of the law of war, the district court noted that (1) under *domestic* law, it is settled that corporations can be held liable for their torts (SPA47), and (2) pre-*Sosa* decisions had ruled that private entities could be liable for aiding and abetting violations of international law (SPA43-44). In reaching those conclusions, however, the court failed to apply the rigorous analysis required by the Supreme Court in *Sosa* to determine whether a claim for a violation of international law will lie under the ATS.

Although domestic law may well provide a reason *not* to enforce a specific, definite, and universally accepted international norm in U.S. courts (*see infra* pp. 67-80), domestic law cannot *create* such a norm where one does not otherwise exist. A claim can proceed under the ATS only if, in the first instance, the theory of liability that forms the basis for the claim has already found universal acceptance in the international community. And *Sosa*'s requirements of specificity

and universal acceptance extend not just to identifying the nature of the violation, but also to identifying the entities that may be sued for such a violation. *Sosa* instructs that courts must consider "whether international law extends the scope of liability . . . to the perpetrator being sued." 542 U.S. at 732 n.20.

Accordingly, substantive domestic tort principles, whether settled or not, cannot provide a grounding for holding a corporation liable for violations of the law of war unless universally accepted and specific international-law principles first provide that basis. This principle dooms plaintiffs' claims because international law does not generally recognize corporate liability, nor does it recognize civil aiding-and-abetting liability, particularly for conduct such as alleged here. Accordingly, whether or not a corporation might be liable either primarily or secondarily for a domestic tort is irrelevant; unless corporations can be so liable in international law—and they cannot—plaintiffs' ATS claim cannot proceed.

1. International Law Does Not Recognize Corporate Liability

International law governing the conduct of war has never extended liability to corporate entities, let alone done so specifically and definitely. Instead, "[s]tates are the principal subjects of international law." Sir Robert Jennings & Sir Arthur Watts, 1 Oppenheim's International Law 16 (9th ed. 1992). Consistent with this

general rule, international instruments addressing what weapons may be used in war, and how they may be used, impose obligations only on states.[38]

Contrary to the district court's implication, the Nuremberg trials did not extend the proscription of these instruments (or any other international rule of war) to corporate entities. No private corporate entities were tried at Nuremberg.[39] In fact, the *I.G. Farben* case, which the district court discussed at length (SPA46-47), explicitly stated that "the corporate defendant … *cannot* be subjected to criminal penalties." *United States v. Krauch* (*I.G. Farben Case*) X Law Reports of Trials of

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[38] *See* Hague Regulations, arts. 2 & 3 (Regulations do "not apply *except between Contracting Powers,*" and a "*belligerent party* which violates the provisions of the said Regulations shall, if the case demands, be liable") (emphases added); 1925 Geneva Protocol, Dec. 1, 26 U.S.T. at 575 (the "High Contracting Parties . . . accept" the treaty's prohibitions "and agree to be bound *as between themselves*") (emphasis added); 1949 Geneva Convention, 6 U.S.T. 3316, arts. 1-3 (reciting the "undertak[ings]" of the "High Contracting Parties," which are "bound" by treaty's requirements). Even modern treaties, such as the 1993 Chemical Weapons Convention and the 1997 Ottawa Convention Banning Landmines, which deal not just with use but also production of weapons, impose obligations only on states. A1315 (Anderson).

[39] *See, e.g.*, *United States v. Flick*, 6 Tr. War Crim. 1, 1191 (1947) (noting that there was no evidence that "industry itself" was liable); *In re Tesch* (*Zyklon B Case*), 1 Tr. War Crim. 93 (1947), *reprinted in* 13 Int'l L. Rep. 250 (Br. Mil. Ct. 1946) (corporate officer tried); *United States v. Krauch*, 8 Tr. War Crim. 1168 (1952) (corporate officer tried); *see also Ex parte Quirin*, 317 U.S. 1, 27-28 (1942) (the laws of war prescribe the "rights and duties of . . . *individuals*") (emphasis added); U.K. War Office, *The Law of War on Land, Being Part III of the Manual of Military Law* 174 ¶ 624 & n.1 (1958) (war crimes can be "committed by members of the armed forces or by civilians").

War Criminals, Selected and Prepared by The United Nations War Crimes Commission 1, 52 (1949) (emphasis added). Although some "organizations" were tried at Nuremberg, they were not private juridical entities such as corporations. Rather, the allies indicted criminal organizations or groups that operated as *state* organs of terror, such as the S.S. or Gestapo.[40]

None of the post-Nuremberg treaties that created five international criminal tribunals has provided for corporate criminal responsibility. Indeed, the drafters of the 1998 Rome Statute (including the United States) expressly rejected attempts to include corporate liability because, among other things, there were "not yet universally recognized common standards for [private entity] liability." A1314 (Anderson). And a leading commentary on the U.N.'s recently propounded norms of corporate responsibility[41] acknowledges that, "as yet there does not appear to be

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[40] *See* Telford Taylor, *The Anatomy of the Nuremberg Trials* 501, at 502-03 (1992) (SS and Gestapo); *id*. at 504-08 ("Corps of Political Leaders of the Nazi Party"); *id*. at 508-516 ("Protection Squad" that included all offices and departments of the SS, including the Gestapo); *id.* at 517-22 (General Staff and High Command of the German Armed Forces); *id.* at 522-25 (Reich Cabinet and the SA); *see also United States v. Ohlendorf* (The Einsaztgrubben case) Case 9, the Military Tribunal (1948) (declaring S.S., S.D. and Gestapo to be criminal organizations); Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, arts. 9-10, 82 U.N.T.S.

[41] *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, Sub-Commision on the Promotion and Protection of Human Rights, 55th Sess. 22d mtg., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

an international consensus on the place of businesses and other nonstate actors in the international legal order," and that these new norms are merely "soft law," which is "necessary to develop the consensus for treaty drafting." David Weissbrodt & Maria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 Am. J. Int'l. L. 901, 914-915 (2003).

The evidence is thus overwhelming that the international laws of war do not apply to corporations—and certainly did not apply to them during the Vietnam War. States have extended some aspects of the laws of war to private individuals, but they have deliberately declined to extend those norms to corporations. Courts and litigants can no more ignore the failure of states to extend an international norm to corporations than they can ignore Congress's failure to apply a federal statute to such entities. *Cf.* SPA45 (district court concluding, correctly, that Congress had chosen to extend liability under the Torture Victim Protection Act only to the actions of private individuals, not corporations). Unless and until states agree otherwise, there simply is no international law of war governing corporate entities, much less a definite, specific, and universally accepted law that would support an ATS claim.[42]

[42] Given the lack of any basis in international law for corporate liability in this case, the district court's comments about the policy considerations favoring

2. International Law Does Not Recognize Aiding-And-Abetting Liability for the Norms Asserted in This Case

Plaintiffs' claims fail for an additional, independently dispositive reason: there is no definite and universal recognition of civil secondary liability for violations of these norms.

To be sure, aiding-and-abetting liability is not completely foreign to international *criminal* law. The three Blackstonian "paradigms" that the Court repeatedly cited in *Sosa* were all understood, at the time the ATS was enacted, to prohibit the aiding and abetting of these criminal offenses.[43] And as the district court noted, in the *Zyklon B* case, individuals were found guilty of supplying poison gas when "the accused knew that the gas was to be used for the purpose of killing human beings." SPA77. Similarly, the Nuremberg-era decisions canvassed by the ICTY in *Prosecutor v. Furundzija*, Case 38 I.L.M. 317 (1998), involved

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corporate liability (SPA47) are irrelevant. But it should be noted that international-law scholars have identified strong policy considerations *against* corporate liability—in particular, the possibility that such liability would undermine state responsibility for compliance with international law. *See, e.g.*, A1315-1316 (Anderson).

[43] *See* William Blackstone, *Commentaries on the Laws of England* *69 (English statutes "affirm[ed]" that the law of nations prohibited "abetting and receiving truce-breakers"); *id.* at *70-*71 (persons "soliciting" service of process on an ambassador violated law of nations); *id.* at *72 ("trading with known pirates, or . . . consulting, combining, confederating or corresponding with them" violated law of nations).

liability for knowing involvement in individual executions or mass killings at concentration camps. *Id.* at 358-361.

There is, however, no clear basis in international law for imposing civil aiding-and-abetting liability, particularly in cases alleging simple negligence rather than intentional criminality. The reasons for caution in extending aiding and abetting liability in this context are well understood in our own law. As the Supreme Court has explained, although "[a]iding and abetting is an ancient criminal law doctrine," its application in the civil context has been "at best uncertain." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994). This is in part because civil aiding-and-abetting liability carries with it significant practical concerns. The "rules for determining aiding and abetting liability are unclear," *id.* at 188—a fatal problem in areas, such as this one, that demand "certainty and predictability," *id*. (internal quotation marks and citation omitted). The need for certainty and predictability is particularly acute given the nature of plaintiffs' allegations in this case: manufacturers facing the possibility of secondary liability for government's allegedly tortious conduct in war "may find it prudent and necessary, as a business judgment," to err on the side of caution and refuse to supply the government with the materials it demands. *Id.* at 189 (internal quotation marks and citation omitted).

For all of these reasons, the district court in *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 549-51 (S.D.N.Y. 2004), held that there is no aiding-and-abetting liability in the context of ATS suits.[44] And more specifically, a manufacturer cannot be held liable for selling products to a government for wartime use, even if that use violated the laws of war. *See Corrie v. Caterpillar, Inc.*, No. C05-5192FDB, 2005 WL 3132214, at *5 (W.D. Wash. Nov. 22, 2005) (bulldozer manufacturer not liable for death and damage caused by military use).

E. Prudential Factors Further Counsel Against Recognition Of Plaintiffs' ATS Claims

In *Sosa*, the Court made clear 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." 542 U.S. at 733 n.21 (emphasis added). Recognizing that "in the great majority of cases," the decision whether to create a private right of action to enforce such norms in U.S. courts is "better left to legislative judgment," *id*. at 727, the Court instructed the lower courts *in addition* to "look for legislative guidance before exercising innovative authority over substantive law." *Id*. at 726. Further, the Court cautioned the lower courts to consider "the possible collateral consequences of making international

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[44] That ruling is currently pending on appeal in *Khulumani v. Barclay National Bank Ltd.* and *Ntzebesa v. Daimler Chrysler Corp.*, Nos. 05-2141 and 05-2326 (2d Cir. argued Jan. 24, 2005).

rules privately actionable." *Id*. at 727. The Court noted that this is especially true in two areas: (1) where enforcement of a norm is not subject to "the check imposed by prosecutorial discretion," and (2) where enforcement has "potential implications for the foreign relations of the United States." *Id.* These factors powerfully counsel against recognition of plaintiffs' ATS claims.[45]

First, as discussed above (pp. 12-13), during the relevant time period, Congress specifically appropriated funds for U.S. military use of herbicides. Indeed, in 1970, the Senate rejected amendments attempting to prohibit the use of government funds for precisely these purposes. 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 intended the Protocol to be only prospective in effect.[46] These 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.

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[45] Many of these factors also indicate that plaintiffs' claims are nonjusticiable under the "political question" doctrine, as discussed below (pp. 80-100).

[46] *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.").

courts. Use of the judiciary's extraordinary and limited law-making power to impose liability for conduct that Congress approved and thought lawful is simply untenable. *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"); *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) (holding that whether the President acted properly in blockading Confederate ports "is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted").

Second, although plaintiffs have sued only private companies, their theory of liability would require this Court to pass upon whether three successive administrations, with the knowledge and backing of Congress, violated international law when the political branches determined to go forward with the deployment of Agent Orange in Vietnam. Recognizing that "the Judiciary has neither aptitude, facilities nor responsibility" for reviewing such decisions of the political branches, *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), courts have refused to read even 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." *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988) (emphasis added).[47] If express textual authorization is necessary to establish that Congress intended a statute to authorize challenges to military decisions, the broad, jurisdiction-vesting language of the ATS cannot reasonably be interpreted to invite federal courts to use their limited federal common law-making powers to authorize such challenges on their own. *Cf. Chappell v. Wallace*, 462 U.S. 296, 304 (1983) ("Taken together, the unique disciplinary structure of the military establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers.").

Third, creation of a cause of action to compensate persons allegedly injured by the military use of herbicides prior to 1975—in effect, to provide private war

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[47] *See also, e.g.*, *Feres v. United States*, 340 U.S. 135, 146 (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); *Baldwin v. United States 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"); *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 770 (7th Cir. 1993) (rejecting 42 U.S.C. § 1983 action by National Guard personnel); *Koohi v. United States*, 976 F.2d 1328, 1336 (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].").

reparations to citizens of Vietnam—would impermissibly "imping[e] on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa*, 542 U.S. at 727. In its post-war dealings with Vietnam, the United States has taken the position that war reparations are not appropriate, and thus has not agreed to compensate Vietnam or Vietnamese nationals for "loss and damage . . . to which [they] have been subjected as a consequence of the war imposed on them." U.S. Statement at 42 (defining war reparations) (internal quotation marks and citations omitted). As the United States explained in the district court, the government's 2002 commitment to research the health and environmental effects of dioxin "reflects the full extent of the United States' willingness to engage with Vietnam on the question of chemical herbicides at this time." U.S. Statement at 40. The Untied States expressly advised the court that "[r]ecognizing a cause of action for the international law *cum* federal common law claims asserted by plaintiffs here would serve to undermine the Executive's conduct of the Nation's foreign relations with Vietnam." *Id.* at 40-41.

Finally, recognition of plaintiffs' cause of action would eliminate the "check" of prosecutorial discretion that Congress imposed by crafting the War Crimes Act, 18 U.S.C. § 2441(a), solely as a criminal prohibition. Even if plaintiffs could make a credible allegation of "war crimes," *Sosa* teaches that courts should be reluctant to fashion a private remedy where Congress vested

regulation in the hands of the Executive. 542 U.S. at 727-28. That cautionary note is particularly appropriate here, where plaintiffs claim they were injured in operations planned, designed, and executed by the U.S. military.

II. PLAINTIFFS' ATS CLAIMS ARE BARRED BY FEDERAL DEFENSES

A. Because ATS Claims Are Cognizable Only As Federal Common Law Claims, Federal Defenses Are Applicable

Plaintiffs' ATS claims face further hurdles: they are barred by defenses rooted in federal law—a government-contractor defense and a statute-of-limitations defense. Each defense raises somewhat different considerations, but the applicability of each reflects the fact that ATS claims, though rooted in international law, lie within the jurisdiction of the federal courts as a unique species of federal common law. As such, ATS claims cannot proceed if they would conflict with other principles and policies of federal law, including those reflected in the Constitution and congressional statutes.

The district court determined that these defenses were not applicable to plaintiffs' ATS claims because, in its estimation, these defenses would not be available to the manufacturers *under international law*.[48] The court's decision

[48] The court stated that "[t]he government contractor defense is one peculiar to United States law. It does not apply to violations of human rights and norms of international law." SPA75 (citation omitted). Similarly, on the statute-of-limitations issue, the court concluded that "under international law, there are no

bespeaks a fundamental confusion about the role of a federal court and the function of international law in adjudication of a claim under the ATS. The Supreme Court made clear in *Sosa* that, to the extent an international-law claim may be pursued under the ATS, such a claim will lie only to the extent that international law has been recognized as and incorporated into *federal common law*. *See Sosa*, 542 U.S. at 732 ("Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims *under federal common law* for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.") (emphasis added); *see also Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

In other areas in which the federal courts exercise a form of common law-making power, they have consistently looked to other federal policies, including those reflected in federal statutes, to define the limits of such liability. In the *Bivens* context, for example, the courts have recognized federal defenses of absolute and qualified immunity, *see Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Butz v. Economou*, 438 U.S. 478 (1978), and they have declined to exercise their

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statutes of limitations with respect to war crimes and other violations of international law." SPA51 (internal quotation marks and citation omitted).

common law-making power to fashion a damages remedy where Congress had spoken to the precise issue and had carefully designed remedies for violations of federal rights, *see Schweiker v. Chilicky*, 487 U.S. 412 (1988); *Bush v. Lucas*, 462 U.S. 367 (1983).

Similarly, in the field of maritime law, the Supreme Court has consistently found guidance in congressional enactments:

> [A] legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.

Moragne v. States Marine Lines, 398 U.S. 375, 390-91 (1970); *see also Mobil Oil Co. v. Higginbotham*, 436 U.S. 618, 624-625 (1978); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975). Indeed, the Court has stated that it "start[s] with the assumption that it is for Congress . . . to articulate the appropriate standards to be applied as a matter of federal law." *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (quotation omitted); *see also United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 738 (1979) ("in fashioning federal principles to govern areas left open by Congress, [the courts'] function is to effectuate congressional policy").[49]

[49] The Supreme Court's admonition that admiralty law should be consistent with congressional enactments is particularly relevant because, as this Court has noted, "the federal judiciary has a more expansive role to play in the development

Thus, a district court entertaining claims under the ATS does not sit as an international court of justice, rendering judgment as it believes international law, broadly conceived, authorizes. Rather, it exercises a unique, congressionally-conferred jurisdiction to recognize federal causes of action for the enforcement of certain international legal norms. A federal court must exercise this jurisdiction in a manner consistent with congressional intent, and should not assume that Congress intended courts to impose liability under these international norms where doing so would conflict with well-developed principles rooted in the Constitution or with policies reflected in federal statutes that reflect legislative judgments about the proper contours of civil liability for primary conduct. *See Sosa*, 542 U.S. at 727-28.

B. Plaintiffs' Claims Are Barred By A Government-Contractor Defense

1. Government Contractors May Not Be Held Liable for Furnishing Supplies to the Government in Conformity with the Government's Specifications

In *Boyle*, the Supreme Court recognized a defense to state-law tort actions against government contractors based on alleged defects in supplies furnished to the government in conformity with the government's specifications. The Court

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of maritime law than in the development of non-maritime federal common law." *Matter of Oswego Barge Corp.*, 664 F.2d 327, 335-36 (2d Cir. 1981). Thus, the necessity of hewing closely to policies in federal statutes applies *a fortiori* here.

noted that the "discretionary function" exemption to the waiver of federal sovereign immunity in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a), immunizes the government from tort suits based on, among other things, its choice of appropriate design for military equipment. As the Supreme Court held, permitting contractors to be held liable for their role in supplying the government with military equipment conforming to the government's specifications would undermine the purpose of that immunity:

> [P]ermitting "second-guessing" of [the government's] judgments . . . through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. 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 Government-ordered designs. To put the matter differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.

Boyle, 487 U.S. at 511-512 (citation omitted).

Precisely the same considerations that prompted the Supreme Court to recognize a government-contractor defense to state-law tort claims require application of the defense to ATS claims. Any tort suit brought directly against the government for its procurement, use, or approval of use of Agent Orange in Vietnam would be barred by the discretionary-function exemption, because

decisions about the design and deployment of the instruments of war are clearly a matter for the government's discretionary judgment. *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches."); *see also In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 194, 199 (2d Cir. 1987) ("*Agent Orange IV*") (same). As *Boyle* recognized, imposing liability on government contractors for producing and selling to the government exactly what the government has demanded would be seriously detrimental to government operations, and would be contrary to the congressional objectives underlying the discretionary-function exemption.

Defendants are therefore entitled to affirmance based on the *Boyle* government-contractor defense. If, as the district court held, plaintiffs' state-law claims are barred by the defense, there is no reason to believe that plaintiffs' ATS claims could survive. Given that the grounding for defense is the same in both contexts—conformity with the congressional policy expressed in the FTCA's discretionary-function exception—the defense should have the same elements in both contexts. And as discussed below (p. 105), and in detail in the briefs in the veterans' cases, there is no genuine issue of material fact that (1) the United States approved reasonably precise specifications for Agent Orange (and the other

herbicides at issue); (2) Agent Orange conformed to those specifications; and (3) all dangers in the use of Agent Orange that were known to the manufacturers were also known to the government. *Cf. Boyle*, 487 U.S. at 512. Moreover, with the exception of plaintiffs' claims based on exposure to Agent White and Agent Blue (discussed *infra* pp. 106-110), plaintiffs have not argued that they would pursue any further discovery that might bear on the government-contractor defense. Accordingly, the record on that defense is closed, and the dismissal of the ATS claims should be affirmed.

2. Government Contractors May Not Be Held Liable for Furnishing Materiel To Be Used by the Government During Wartime

Because plaintiffs' ATS claims seek damages against government contractors for supplying military equipment *in a time of war*, they are barred for a separate but related reason: They implicate, and undermine, the policies underlying the "combatant activities" exception to FTCA liability, 28 U.S.C. § 2680(j), which provides that the government shall not be liable in tort for "[a]ny claim arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war."[50]

[50] The statutory reference to "time of war" clearly embraces conflicts such as the Vietnam conflict even in the absence of a declaration of war. *See Koohi*, 976 F.2d at 1334.

Just as the discretionary-function exception at issue in *Boyle* is designed to protect, among other things, the federal interest in military procurement, the combatant-activities exception is designed to protect the federal interest in controlling military policy in times of war. It reflects Congress' will that military personnel not be required "to exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces," or "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, 1334-1335 (9th Cir. 1992).

The combatant-activities exception reflects a broader principle, established in a series of cases rejecting just-compensation claims for property damaged during military operations: that the government has no legal duty to avoid damage to person or property during war.[51] Although that principle has undeniably harsh

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[51] Although this line of cases concerns claims for property damage, their logic is equally applicable to claims for personal injuries. Indeed, the parties in that line of cases were able to pursue their claims for property damage in the courts only because those claims arose directly under the constitutional requirement of just compensation in the Takings Clause, which is "self-executing" in its requirement of compensation for property that is taken. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315-16 (1987). By contrast, a claim in tort against the United States arising out of personal injuries could lie only if Congress had provided a pertinent waiver of sovereign immunity. As explained above, the FTCA specifically precludes personal injury claims arising out of combatant activities during war, and no other waiver of sovereign immunity that might have allowed such a claim has ever existed.

consequences for those who suffer combat-related injury or damage to their property, the Supreme Court has nonetheless held firm to the view that the highest obligation of the military—as directed by the President as Commander in Chief—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. Pacific R.R.*, 120 U.S. 227, 234 (1887).[52] Even if, in hindsight, particular military actions might not seem fair or justified, "[t]he safety of the state in such cases overrides all considerations of private loss," and the costs of war must "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.").

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[52] *See also Juragua Iron Co. v. United States*, 212 U.S. 297, 306 (1909) (denying compensation to American corporation whose property in Cuba was destroyed during Spanish-American War, and stressing that such property 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 (Phil.) Inc.*, 344 U.S. 149, 155-56 (1952) (rejecting claim for property destroyed by U.S. army to prevent it falling into the hands of enemy, and stressing that the Court "has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign").

To impose tort liability on the government's contractors for supplying the instruments of war would, as the Ninth Circuit has held, "create a duty of care where the combatant activities exception is intended to ensure that none exists." *Koohi*, 976 F.2d at 1337 (dismissing claims against manufacturer of air defense system used by U.S. naval cruiser in accidental shooting of Iranian civilian aircraft during military conflicts with Iran). In so doing, it would undermine the practical concerns underlying the combatant-activities exception. 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 the 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 (footnote omitted).

Were plaintiffs' claims permitted to proceed, contractors faced with the prospect of tort liability would be impelled to question numerous strategic decisions of the American military—including its choice of weaponry and the manner in which it planned to deploy the tools of war—and might well either refuse to manufacture supplies sought by the government or demand a higher price for them. Either result would make it far more difficult and costly for the United

States military to obtain necessary services and products, and would impair our government's ability to conduct war.

Plaintiffs' primary objection to application of the government-contractor defense is that the government did not affirmatively specify that Agent Orange should contain dioxin (although the government did specify that Agent Orange should contain a herbicide known to contain dioxin as a byproduct of the manufacturing process). Even if there were any merit to plaintiffs' contention—which there is not—it is irrelevant for purposes of this case. Certainly the absence of reasonably precise specifications would defeat the particular form of the government-contractor defense specifically articulated in *Boyle*, and would therefore justify imposing liability on government contractors *in times of peace*. But it cannot justify imposing liability for contractors' conduct in times of war, when contractors must be prepared to do their part to protect the safety of the state, without fear of later being held responsible for private loss.

C. Plaintiffs' ATS Claims Are Subject To A Ten-Year Statute of Limitations

As noted above, the district court concluded, based on a review of international law, that plaintiffs' ATS claims are not subject to any statute of

limitations. Not only is this conclusion wrong as a matter of international law, [53] but the entire inquiry was itself misguided. Once again, the court misapprehended its function: a U.S. court does not look solely to what international law would provide with respect to a limitation period, but should consider how an ATS claim, as a species of federal common law, should be harmonized with policies of federal law. And one fundamental policy of federal law is that *every* federal civil cause of action is subject to a limitation period. *See Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (rejecting the proposition that a cause of action could have no limitation period as "utterly repugnant to the genius of our laws") (quoting *Adams v. Woods*, 2 Cranch (6 U.S.) 336, 342 (1805)).

In light of the strong federal policy in favor of limitation of actions, federal courts adjudicating civil claims for which Congress has provided no limitation

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[53] In determining that no statute of limitations applied, the district court relied on the opinion of plaintiffs' expert, who opined that, "[u]nder international law, there are no statutes of limitations with respect to war crimes and other violations of international law." A1539. For that proposition, Professor Paust cited (along with his own treatise) Section 404, comment a, of *Restatement (Third) of the Foreign Relations Law of the United States* (1987). Section 404 addresses the very few crimes under international law that are subject to "universal jurisdiction," including unspecified "war crimes," and states (in comment a) that "[a] universal offense is generally not subject to limitations of time." But this passage does not suggest either that (a) the kinds of violations of international law that plaintiffs have alleged would support universal jurisdiction, or (b) that a limitation period *under domestic law* would be inapplicable in a *civil* case brought under a statute such as the ATS, as opposed to a criminal prosecution for war crimes.

period have generally "borrowed" a limitation period either from state law, or, where reference to state law would be inappropriate, from the most closely analogous statute of limitations in federal law. *See DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 161-62 (1983). It would be inappropriate in cases such as this one to look to state law for a limitation period; as discussed below (pp. 101-105), state law is ousted from this field, where concerns about foreign relations are paramount.

Rather, the proper limitations period for ATS claims such as those in this case is found in the closely analogous TVPA—a proposition plaintiffs did not contest below. Thus the ATS, like the TVPA, provides plaintiffs 10 years from the date of the accrual of the cause of action arose to bring suit.[54] That 10-year period began to run when "the plaintiff ha[d] or with reasonable diligence should have discovered the critical facts of both his injury and its cause." *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998) (internal quotation marks and citation omitted). The statute of limitations thus bars any claim of injury that manifested

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[54] 28 U.S.C. § 1350 (hist. & stat. n. § 2(c)). Other than the district court in this case, every court to consider the issue has concluded that the TVPA's limitation period should be borrowed for ATS actions. *See, e.g., Jean v. Dorelien*, 431 F.3d 776, 778 (11th Cir. 2005); *Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir. 2004); *Papa v. United States*, 281 F.3d 1004, 1012-13 (9th Cir. 2002); *Manlinguez v. Joseph*, 226 F. Supp. 2d 377, 386 (E.D.N.Y. 2002); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 462 (D.N.J. 1999); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 WL 319887, at *18-*19 (S.D.N.Y. Feb. 28).

before January 30, 1994—that is, 10 years before plaintiffs filed their complaint. By that time, plaintiffs were admittedly aware that they had been exposed to Agent Orange, *see*A64-79. And owing to widespread media reports in Vietnam concerning the health effects of Agent Orange, plaintiffs whose injuries were already manifest by January 30, 1994, knew—or certainly "with reasonable diligence should have discovered"—the facts underlying their present claims. *See* A567-772 (Affidavit of Michael M. Gordon and exhibits thereto).

The district court also remarked that any statute of limitations might be subject to tolling principles. SPA51-52. Even if that might be true for some plaintiffs, defendants should be able to demonstrate that the claims of many are time-barred. Accordingly, should this Court have occasion to remand this case, it should clarify that a 10-year limitation period applies to plaintiffs' ATS claims.

III. PLAINTIFFS' ATS CLAIMS PRESENT NONJUSTICIABLE POLITICAL QUESTIONS

For all of the reasons described above, plaintiffs' ATS claims are barred by *Sosa*. But the objections to plaintiffs' claims go yet deeper: because they challenge military and diplomatic decisions made by the political branches—how to wage war, how to make the peace, and how to manage diplomatic relations with our former enemy in the aftermath of the war—based on legal theories for which there are no discernible standards, plaintiffs' claims are not justiciable at all.

This Court has already recognized that the adjudication of tort claims arising out of the government's decision to use Agent Orange during the Vietnam War raises serious separation-of-powers concerns. *See, e.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187, 191 (2d Cir. 1987) ("*Agent Orange III*"). The claims raised in this case range even further beyond the courts' authority and competence. Unlike the veterans, the plaintiffs here allege (indeed, emphasize) that the government knew of the dangers of dioxin and knew that dioxin contamination was directly related to the speed at which herbicides were manufactured, yet nevertheless demanded rapid production and used the contaminated herbicides. Plaintiffs therefore challenge, quite directly, the United States government's decision to use Agent Orange.

The separation-of-powers obstacles to such a challenge are compounded by the fact that this case is brought by *citizens of Vietnam*—a nation to which our government has not decided to pay war reparations and with whom our government is engaged in complex and delicate diplomatic negotiations. By seeking recognition of a novel federal common-law cause of action to enforce the laws of war, plaintiffs ask the judiciary to decide for itself, in effect, whether compensation should be made for injuries allegedly caused by our military's use of Agent Orange. It would have been remarkable had this Court declared in 1987 that the decision to use Agent Orange was tortiously negligent, such that damages must

be paid to American veterans. But it would be nothing short of "astounding" for this Court to declare—particularly in the face of the United States' expressed views regarding the impact of this case on U.S. foreign policy—that the decision to use Agent Orange was a war crime for which compensation must be paid to "former enemy nationals and soldiers." U.S. Statement of Interest ("U.S. Statement") at 1.

A. This Court Has Already Recognized That The Decision To Use Agent Orange Was A Political Question Beyond The Competence Of Article III Courts

In its 1987 *Agent Orange* decisions, this Court analyzed the same historical facts that underlie this case, and recognized that imposing tort liability for injuries caused by the United States' use of Agent Orange in Vietnam was beyond the constitutional authority of the courts. In affirming an order dismissing the veterans' claims based on the government-contractor defense, this Court explained that entertaining tort claims against military contractors "would inject the judicial branch into political and military decisions that are beyond its constitutional authority and institutional competence." *Agent Orange III*, 818 F.2d at 191. This Court further observed that such decisions were "allocat[ed] . . . to other branches of government" because they entail "judgments involv[ing] the nation's geopolitical goals and choices among particular tactics" that "[c]ivilian judges . . . are not competent to weigh." *Id.* The Court stressed that "balancing of the risk to

friendly personnel against potential military advantage" is "the exclusive responsibility of military professionals and their civilian superiors." *Id.* at 192.[55]

In a related opinion, on which this Court relied in *Feres v. United States*, 340 U.S. 135 (1950), to dismiss claims made by veterans directly against the United States, the Court stressed that "[t]he ultimate policy decision to use Agent Orange" was made by the Commander in Chief, acting in conjunction with the Congress. *Agent Orange IV*, 818 F.2d at 198. The Court held that, at least "[a]bsent a substantial constitutional issue, the wisdom of the decisions made by these concurrent branches of the Government should not be subject to judicial review." *Id.* Indeed, the Court found it "'difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches,'" and "'difficult to conceive of an area of governmental activity in which the courts have less competence.'" *Id.* at 199 (quoting *Gilligan*, 413 U.S. at 10). The Court similarly dismissed claims made by veterans' spouses and children, explaining that the decision to use Agent Orange was "a military decision, a political decision and the exercise of a discretionary function." *In re*

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[55] Although this Court discussed these separation-of-powers concerns in describing the underpinnings of the government-contractor defense, the two doctrines are not completely coextensive. Thus, even were this Court to conclude that the government-contractor defense does not bar plaintiffs' claims (*see supra* pp. 70-77), those claims would nonetheless raise serious justiciability concerns.

"Agent Orange" Prod. Liab. Litig., 818 F.2d 201, 202 (2d Cir. 1987) ("*Agent Orange V*").

Finally, in *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 204, 206 (2d Cir. 1987) ("*Agent Orange VI*"), which involved claims against the United States for contribution and indemnity, this Court reaffirmed the applicability of *Feres* to the "massive tort claims" raised in the Agent Orange litigation. Citing a long line of justiciability cases, this Court stressed that entertaining plaintiffs' claims would entail impermissible second-guessing of "the discretionary military and political branches of the Executive and Legislative Branches of Government" that it "would not feel qualified to" undertake. *Id.* at 207.

The district court's conclusion that this case is justiciable cannot be squared with this Court's *Agent Orange* decisions. While those decisions technically rested on distinct doctrinal grounds, their fundamental rationales are that the decision to use Agent Orange was a political and military one within the province of the Executive and Legislative Branches (*Agent Orange IV*, 818 F.2d at 198; *Agent Orange V*, 818 F.2d at 202), and that second-guessing the propriety of that decision is beyond the authority and competence of the courts (*Agent Orange III*, 818 F.2d at 191; *Agent Orange VI*, 818 F.2d at 206-07).

Plaintiffs cannot avoid the conclusion that they are challenging the United States' political and military decisions to use Agent Orange by insisting that they

challenge only the allegedly "unnecessary and avoidable" levels of dioxin in defendants' product. *See* Pl. Br. 1, 3, 15, 25, 33-36, 39. As the complaint makes clear, plaintiffs' ATS claims against the manufacturers are necessarily derivative of a primary allegation that the United States' use of Agent Orange in Vietnam violated the laws of war:[56] the international-law norms upon which plaintiffs rely bind belligerent *states*, not product manufacturers. That is why plaintiffs allege in their complaint that *the United States'* "use[]" of herbicides in Vietnam was "in violation of international law," A55, and that the *United States* committed war crimes by "deliberately and intentionally" using dioxin-laced herbicides "under color of official authority," A83. Any adjudication in plaintiffs' favor would therefore entail a judicial declaration that the United States government—including the President—had violated the international law of war by authorizing the use of Agent Orange in Vietnam. As this Court has repeatedly stated, this is not the province of the Judicial Branch. A determination at the highest level of the

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[56] Specifically, the complaint charges defendants with "conspir[ing] with, aid[ing] and abett[ing] the governments of the U.S. and the RVN to commit the various violations of international law," and with participating in a "joint venture[] with the governments of the U.S. and the RVN." A83; *see also* A91-99. Plaintiffs state in their brief that "[d]efendants' knowledge, *which the government shared*, of the unnecessarily high toxicity levels of Agent Orange is compelling evidence of a violation of the law of nations." Pl. Br. 38 (emphasis added); *see also* A83 (allegations that defendants acted under color of law, and in conspiracy and on behalf of others acting under color of law).

Executive Branch that a military operation is necessary to successful prosecution of a war deserves the utmost deference from the courts, not reexamination in the guise of a tort suit. As the Supreme Court stated in *The Prize Cases*, 67 U.S. (2 Black) at 670, the President alone "must determine what degree of force the crisis demands."

B. Under The Traditional *Baker v. Carr* Framework, Plaintiffs' Claims Are Nonjusticiable Political Questions

Applying the traditional framework for political question doctrine confirms that this case is nonjusticiable. In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court articulated six factors to determine whether a case presents a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found [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; or [3] 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.

Id. at 217 (bracketed numerals added).

The first three *Baker* factors speak principally to the limits of courts' constitutional authority and institutional competence, whereas the latter three speak primarily to the practical effects of the exercise of judicial authority on the functions and other prerogatives of other branches of government. The factors are disjunctive: if a single factor is implicated, the question may well be nonjusticiable. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 305-06 (2004) (holding that claims challenging political gerrymandering were nonjusticiable solely because no "judicially discernable and manageable standards" could be discerned); *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 72 (2d Cir. 2005) ("We need not examine each of the six *Baker* tests in turn, for it is clear that this case meets the fourth test[.]").

Plaintiffs' claims in this case—which invoke ill-defined principles in an effort both to condemn the Executive's conduct of war and to interfere with its diplomatic efforts in the war's aftermath—trigger each the *Baker* factors.

1. Plaintiffs' Claims Raise Questions Outside the Authority and Competence of the Judicial Branch

a) Textual Commitment to Political Branches

The first *Baker* factor asks whether the specific questions raised by a case intrude upon ground expressly reserved by the Constitution to the political branches. *See, e.g.*, *Nixon v. United States*, 506 U.S. 224, 235 (1993). Here, a central question raised by plaintiffs' claims is whether the United States' use of

Agent Orange was excessive and disproportionate to military necessity. *See supra* pp. 48-49. That question—*i.e.*, whether a particular use of weapons is necessary and proportionate in combat—is unambiguously committed to the Executive. *See* U.S. Const. art. II, § 2, cl. 1; *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) ("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."). Indeed, that conclusion was central to this Court's resolution of the prior veterans' cases. *See Agent Orange III*, 818 F.2d at 191-92 (decision to use Agent Orange, and liability for its use, were the "exclusive responsibility" of the political branches); *Agent Orange IV*, 818 F.2d at 198 ("policy decision" to use Agent Orange "should not be subject to judicial review"); *Agent Orange V*, 818 F.2d at 202 (decision was "a military decision" and "a political decision").

Similarly, the question whether the United States should compensate citizens of a former enemy nation for injuries allegedly caused by the United States military is constitutionally committed to the political branches. In effect, plaintiffs are asking this Court to create a cause of action under the ATS that would allow them to recover reparations for the injuries allegedly done by the United States to their nation and its citizens during the Vietnam War. As the United States explained below, although plaintiffs may label such relief "tort damages,"

payments to citizens of a former enemy nation for injuries they suffered from the United States' military operations "readily fall within the scope of war reparations," and only the political branches have authority to decide whether to recognize such a claim for reparations *See* U.S. Statement at 41-43; *see also Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 275 (D.N.J. 1999) (war reparations are compensation for "loss and damage to which [plaintiffs] have been subjected as a consequence of the war imposed upon them") (internal quotation marks and citation omitted). The decision whether to "[v]indicat[e] victims injured by acts and omissions of enemy corporations in wartime is . . . within the traditional subject matter of foreign policy" reserved for the political branches of government. *See American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003).

The district court concluded that the first *Baker* factor was not implicated because the "judiciary is the branch of government to which claims based on international law ha[ve] been committed." SPA57. For that conclusion, the court cited *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), and *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991). Neither of those decisions, however, suggests that *all* questions of international law inexorably fall within the purview of Article III courts, regardless of their implications for other branches of government. Neither *Kadic* nor *Klinghoffer* implicated the President's constitutional authority to decide what weapons and military strategy will best

advance the United States' interests in war, or to decide whether war reparations should paid to a former enemy nation for the United States' conduct. *See Alperin v. Vatican Bank*, 410 F.3d 532, 562 (9th Cir. 2005) ("[T]he claims in *Kadic* focused on the acts of a single individual during a localized conflict."); *Klinghoffer*, 937 F.2d at 47 (involving isolated terrorist conduct by foreign nationals).

b) Lack of Judicially Manageable Standards

The second *Baker* factor asks whether there is "a lack of judicially discoverable and manageable standards for resolving" the question at issue. 369 U.S. at 217. This factor recognizes that "[o]ne of the most obvious limitations" on judicial power is the need to act "by *standard*, by *rule*. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 278.

Both plaintiffs' "poison" claim and their "proportionality" claim implicate the second *Baker* factor. As discussed above (pp. 30-39), there has never been any agreement among participants in the international system as to the contours of the prohibition against "poison." For a claim based on that prohibition to be justiciable, it is not sufficient to observe that actors in the international system acknowledge that a prohibition exists. In addition, the prohibition must be subject

to definition and application in sufficiently concrete terms that it may meaningfully be applied by a court—as opposed to, for example, being the subject of diplomatic demarches. Plaintiffs have pointed to nothing to suggest how a domestic court of the United States would decide whether Agent Orange was a prohibited "poison" within the meaning of the Hague Regulations, in light of the complete absence of agreement in the international community on the meaning of that term.

The same difficulties preclude adjudication of the proportionality norm plaintiffs seek to enforce in this case. Even international courts find battlefield proportionality questions beyond their competence, relying on military officers and the military code of honor to enforce the proportionality norm. *See* A1301-1302 (Anderson). As Professor Anderson explained, "the terms of the prohibition" on unnecessary force "are so vague" as to be not susceptible of judicial administration. *See* A1290. The district court itself acknowledged that the proportionality norm entails "inherently subjective judgments," and is marked by a "dearth of illustrative prosecutions." SPA121.

Judges, who lack the military experience and tactical knowledge of the President's military advisors and battlefield commanders, cannot reasonably or appropriately determine whether the use of Agent Orange was "disproportionate" to a legitimate military goal or otherwise unjustified by military necessity. It is no answer to say, as the district court did, that courts routinely adjudicate cases

involving vague standards such as "comparative negligence" and "proximate cause" in ordinary civil litigation. SPA121. Were that a sufficient response, the second *Baker* factor would have no meaning whatever. Moreover, as the Court explained in *Vieth*, for a claim to be justiciable, the standards allegedly applicable to that claim must be more clear and more objectively discernable as the question moves farther from the heartland of traditional judicial functions. *See Vieth*, 541 U.S. at 286 ("[C]ourts might be justified in accepting a modest degree of unmanageability to enforce a constitutional command which . . . is clear; whereas they are not justified in inferring a judicially enforceable constitutional obligation . . . which is both dubious and severely unmanageable."). Doctrines of comparative negligence and proximate causation fall squarely within the heartland of the courts' Article III power—that is, "the power to act in the manner traditional for English and American courts." *Id.* at 278. Here, by contrast, questions of military tactics and reparations are far from the judiciary's traditional domain.

c) Requirement of a Nonjudicial Policy Decision

The third *Baker* factor focuses on "the impossibility of deciding [the issue in question] without an initial policy determination of a kind clearly for nonjudicial discretion." 369 U.S. at 217.

Whether payment should be made to citizens of a former enemy nation to redress the conduct of the United States military during war clearly is clearly an

"initial policy decision" for the political branches of government. The President frequently uses "private claims as . . . national assets, and as counters, 'chips,' in international bargaining." *Joo v. Japan*, 413 F.3d 45, 51 (D.C. Cir. 2005) (internal quotation marks and citation omitted). *Garamendi* also teaches that "the President's authority to provide for settling [private] claims in winding up international hostilities requires flexibility in wielding 'the coercive power of the national economy' as a tool of diplomacy." 539 U.S. at 424 (citation omitted). To that end, the United States cautioned the district court that recognizing plaintiffs' claims deprive the President of this flexibility: "[r]ecognizing a cause of action for the international law *cum* federal common law claims asserted by plaintiffs here would serve to undermine the Executive's conduct of the Nation's foreign relations with Vietnam." U.S. Statement at 40-41. An award of damages here would unquestionably confer upon the Vietnamese the very same benefits as an inter-sovereign agreement to pay war reparations. As such, awarding plaintiffs the damages they seek would intrude on the President's authority to conduct foreign policy, because it would deprive the Executive of leverage in its negotiations with Vietnam.

The district court suggested that adjudication of plaintiffs' claims would not intrude on the policy domains inherent in deciding whether to make war reparations because this "case does not require the refashioning of agreements by

coordinate branches of government," as the agreements between Vietnam and the United States do not include provision for reparations. SPA59; *see also* SPA64 (finding question justiciable because "[t]he Vietnam War did not result in formal reparations agreements and treaties as did some other American conflicts"). But the absence of an agreement on the part of the United States to pay reparations is hardly an invitation for the judiciary to fill the void. The President's ability to *withhold* reparations is an important part of his diplomatic arsenal. As *Garamendi* recognized, claims for redress based on wartime conduct "undercut[] the President's diplomatic discretion" and give him "'less to offer and less diplomatic leverage as a consequence.'" 539 U.S. at 423-424 (citation omitted).

2. A Judicial Recognition Of Plaintiffs' Cause of Action Would Undermine the Proper Role of the Political Branches

a) Respect Due to Political Branches

The fourth *Baker* factor looks to the "impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." 369 U.S. at 217; *see also Whiteman*, 431 F.3d at 72. This factor powerfully argues in favor of a finding of nonjusticiability, for at least three reasons.

First, the President and Congress determined that it was necessary to use Agent Orange in Vietnam to protect the lives of American and allied troops and advance America's military goals—notably, after careful consideration of the

question of the herbicide program's legality under international law. Plaintiffs are unable to point to *any* other occasion on which the federal courts have ruled that a military program authorized by the President and Congress violated public international law. Indeed, even if Congress and the President had made a deliberate decision to violate an international agreement such as the Hague Regulations, the courts would have no basis for setting aside that determination based on a free-floating authority to adjudicate international-law-based claims.[57] It is the political branches, not the judiciary, that are ultimately accountable to the international community, including other states that are treaty parties, for their compliance with treaties and customary international law. Thus, when the President and Congress make a considered conclusion that a military operation may go forward because it is *consistent with* international law, the obligation on the part of the judiciary to show due respect for the political branches counsels strongly against issuing a ruling that would directly contradict their determination.

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[57] *See Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (because of Congress's prerogatives, if a treaty and a later federal statute conflict, "the one last in date will control"); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Cir. 1986) (explaining that courts will not set aside a decision of the President based on public international law); *see also Restatement (Third) of the Foreign Relations Law of the United States* § 115, Reporters' Note 3 (noting that "[t] here is authority for the view that the President has the power, when acting within his constitutional authority, to disregard a rule of international law" and that "[s]ome courts may be disposed to treat a claim that the President was violating international law as raising a "political question' and not justiciable").

Second, as the government explained to the district court, U.S.-Vietnamese relations have been "characterized by measured and specific agreement on various issues," developed over "years of diplomatic negotiations regarding the use of chemical herbicides containing dioxin during the war." U.S. Statement at 39-40. Those negotiations resulted in an MOU that makes no provision for reparations and "reflects the *full extent* of the United States' willingness to engage with Vietnam on the question of chemical herbicides at this time." *Id.* at 40 (emphasis added). Recognizing a federal common-law cause of action for plaintiffs' claims would show a lack of respect for that decision and "serve to undermine the Executive's conduct of the Nation's foreign relations with Vietnam." *Id.* at 40-41.

Third, failing to defer to the Executive's statement that adjudicating this case would injure U.S. foreign policy—as the district court did in this case—is itself a serious error under the fourth prong of the *Baker* test. *See Whiteman*, 431 F.3d at 71-72 (relying on "the views of the United States Government, as expressed in its statements of interest" in dismissing a case based on the fourth *Baker* factor, and stressing that court's independent resolution of the claim would "express[] a lack of the respect due" the Executive Branch). The district court invited the United States to submit a statement of interest because it recognized that "this case implicated restrictions on the United States' conduct of its international relations, exercise of its military powers, and capacity to procure material for its armed

forces." SPA35. The United States advised the court that "allowing plaintiffs' claims to proceed would interfere with the United States' ongoing bilateral relationship with Vietnam, particularly as it relates to the effect of chemical herbicides used in Vietnam." U.S. Statement at 39-40. As "the considered judgment of the Executive on a particular question of foreign policy," this Statement is "entitled to deference." *Republic of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004); *see also Sosa*, 542 U.S. at 733 n.21 (calling for "a policy of case-specific deference to the political branches").

b) The Need for Adherence to Political Decision

The fifth *Baker* factor calls for a determination whether a question presents "an unusual need for unquestioning adherence to a political decision already made." 369 U.S. at 217. This factor explicitly requires courts to consider the effect that exercising jurisdiction will have on the national interest. This Court recognized almost two decades ago that for a court to "hold the chemical companies liable" for the President's and Congress's "military decision to use Agent Orange" would "create a devastating precedent so far as military procurement is concerned." *Agent Orange III*, 818 F.2d at 194; *see also In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 150 (2d Cir. 1987) ("To expose private companies generally to lawsuits for injuries arising out of the deliberately risky activities of the military would greatly impair the procurement process and

perhaps national security itself."). "Firms would take steps to avoid entering into government contracts," "[c]osts of procurement would escalate," and the military's ability to procure the munitions and services necessary for defense of the nation would be crippled. *Agent Orange III*, 818 F.2d at 191.

This Court recognized, moreover, that the effects of such a decision would not be ameliorated by the fact that the claims address products produced many decades ago for a war that has long been over. Indeed, the possibility that courts will reach back decades to find contractors liable for the military's use of their munitions only exacerbates the problem. As this Court explained, "[h]ardly any product of military usefulness is known to be absolutely risk free," *Agent Orange III*, 818 F.2d at 194, and military conflicts inevitably will continue to require the military to rely on new "advanced technology that has not been fully tested," *id.* at 191.[58] It is impossible to know what effective but controversial munitions the

[58] The Court's prediction was prescient. In Operation Desert Storm, the military relied heavily on Depleted Uranium both for armor penetrating bullets and for armored vehicles. *See* Depleted Uranium [DU], *available at* http://www.globalsecurity.org/military/systems/munitions/du.htm. In one incident, for example, "an M1A1 Abrams Main Battle Tank, its thick steel armor reinforced by a layer of DU sandwiched between two layers of steel, rebuffed a close-in attack by three of Iraq's T-72 tanks. After deflecting three hits from Iraqi tanks, the Abrams' crew dispatched the T-72s with a single DU round to each of the three Iraqi tanks." *Id.* Yet DU is also toxic. *See* Susan T. Martin, *How Harmful is Depleted Uranium?*, St. Petersburg Times, May 25, 2003, at 1A. Activists describe DU as "The Agent Orange of the 90s," *see* Military Toxics Project,

military may need going forward. Adjudication of plaintiffs' claims would threaten the nation's ability to procure new, cutting-edge munitions needed for future global conflicts.

c) Avoiding Embarrassment from Multifarious Pronouncements by Various Departments

The sixth *Baker* factor considers "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217. This factor exists to protect America's international credibility and prestige, with allies and foes alike. The district court held that "the absence of executive and legislative action obviates [any such] concern," SPA59, simply ignoring the Executive's and Congress's decisions to go forward with the herbicide program and to withhold reparations.

In its Statement of Interest, the United States warned the district court of the international ramifications of second-guessing those decisions:

> [T]he United States repeatedly proclaimed both to the public and to foreign governments—at the United

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Depleted Uranium: Agent Orange of the 90's (Nov. 24, 1999), *available at* http://www.converge.org.nz/pma/duor.htm, and have requested that the Chief Prosecutor of the International Criminal Court bring war crimes charges against nations using DU weapons. *See UK War Crimes*, Western Daily Press, Jan. 21, 2004, at 6. Had contractors been unwilling to provide DU armor and ammunition, the military's ability to defeat Iraqi armored units with minimal loss of life could have been severely compromised.

> Nations and elsewhere—that it did not believe the use of chemical herbicides in Vietnam violated international law. … This Court should not now re-examine those political decisions. To do so would … raise "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

U.S. Statement at 21-22. The district court erred by disregarding that warning. Moreover, after extensive negotiations, the United States did not elect to pay compensation for any injuries allegedly caused by Agent Orange. *Id.* "[A]llow[ing] the plaintiffs to achieve via litigation that which their government failed to achieve via diplomacy," would severely undermine the Executive's credibility in international negotiations." *Id.* at 40-41.

Plaintiffs' government, of course, remains free to negotiate with the United States for further adjustment of grievances arising out of the Vietnam conflict. But plaintiffs are not free to invoke the judicial power as an end run around those negotiations. In light of the political branches' unbroken determination to stand by their decision to use Agent Orange in the Vietnam War, the courts have no authority to intervene.

IV. PLAINITFFS' STATE-LAW CLAIMS ARE BARRED BECAUSE THEY CONFLICT WITH OVERRIDING FEDERAL PREROGATIVES

A. The Exclusive Federal Foreign Affairs Power Preempts Plaintiffs' State-Law Claims

As extraordinary as it would be for the federal courts to accept plaintiffs' invitation to second-guess the U.S. government's military and diplomatic policy, plaintiffs go a step further: they invoke New York tort law in their effort to circumvent the government's determination that war reparations are not appropriate. State law clearly provides no basis for such an interference with U.S. foreign policy.

The Constitution entrusts the federal government with "full and exclusive responsibility" for the conduct of foreign affairs. *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). Accordingly, as the Supreme Court held in *Zschernig v. Miller*, 389 U.S. 429, 441 (1968), and recently reaffirmed in *Garamendi*, 539 U.S. at 413, the Constitution itself preempts state action that interferes with the federal government's exercise of its foreign relations power.

In *Zschernig*, the Supreme Court invalidated an Oregon probate statute that prohibited inheritance by a non-resident alien unless the alien could establish, among other things, that the inheritance would not be subject to confiscation by his or her government, and that U.S. citizens would enjoy a reciprocal right of inheritance in the alien's country. Although the Oregon statute operated in an area

traditionally governed by state law, and although the Court found no direct conflict between the Oregon statute and federal statutes, treaties, or any federal interest, the Court nonetheless invalidated as an unconstitutional interference with the federal government's foreign-affairs power. The Court concluded that the law had "more than some incidental or indirect effect" on foreign relations, and therefore constituted a forbidden "intrusion by the State into the field of foreign affairs." 389 U.S. at 432, 434 (internal quotation marks and citation omitted).

In *Garamendi*, the Supreme Court invalidated California's Holocaust Victim Insurance Relief Act (HVIRA), a statute requiring any insurer doing business in the state to disclose information about its Holocaust-era policies to facilitate resolution of unpaid insurance claims. In so doing, the Supreme Court described two "contrasting" theories of the scope of foreign-affairs preemption evident in the Supreme Court's opinions in *Zschernig*: the majority's apparent view that the federal government's foreign-affairs power wholly occupies the field, and the view, identified with Justice Harlan's concurring opinion, that state action addressed to subjects within the states' "traditional competence" are preempted only if they conflict with the federal government's express foreign policy. *Garamendi*, 539 U.S. at 418-19 (citing *Zschernig*, 389 U.S. at 459 (Harlan, J., concurring in result)). The Court determined that it need not choose between the field preemption and conflict preemption theories, however, because HVIRA

posed a "sufficiently clear conflict" with federal policy to require preemption even under Justice Harlan's more restrictive view. *Garamendi*, 539 U.S. at 420. Weighing HVIRA's adverse impact on the federal government's policy of encouraging voluntary settlement of Holocaust-era insurance claims against California's weak interest in regulating in this area, the Supreme Court determined that HVIRA would have to yield. *Id.* at 420- 27.

As in *Garamendi*, this Court need not choose between competing theories of field preemption and conflict preemption, for plaintiffs' state-law claims are clearly preempted under either standard. If allowed to proceed, plaintiffs' claims not only would have a direct and significant effect on foreign relations, but would also frustrate federal policy on the subject of reparations to Vietnam.

As an initial matter, plaintiffs' claims are far from matters of the states' traditional competence. 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. "Since claims remaining in the aftermath of hostilities may be sources of friction acting as an impediment to resumption of friendly relations between the countries involved, there is a longstanding practice of the national Executive to settle them in discharging its responsibility to maintain the Nation's relationships with other countries." *Id.* at 420 (internal quotation marks and citation omitted). Notably,

this federal responsibility includes the settlement of claims of persons "injured by acts and omissions of enemy corporations in wartime." *Id.* at 421. Furthermore, the State of New York has a weak interest in providing any form of compensation to plaintiffs, who are foreign nationals and do not reside in New York, for injuries allegedly suffered abroad.[59]

On the other side of the *Garamendi* balance, allowing plaintiffs' claims to proceed clearly would have an adverse impact on the United States' Vietnam policy. In deciding to resume diplomatic relations with Vietnam, the United States considered at length the settlement of claims arising from the war, and it has consistently determined that war reparations of the sort that plaintiffs here seek are not appropriate. The conflict with federal policy is clear, and it finds no justification in any legitimate, substantial state interest.[60] Accordingly, plaintiffs'

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[59] *See, e.g., Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 14 (2d Cir. 1996) (under New York choice of law rules, court would apply the law of the state in which the plaintiff and her decedent resided, noting that the state "has an important and obvious interest in ensuring that its residents are fully and adequately compensated for tortious harm"); *Neumeier v. Kuehner*, 286 N.E.2d 454, 457 (N.Y. 1972) ("While New York may be a proper forum for actions involving its own domiciliaries, . . . it does not follow that we should apply New York law . . . where doing so does not advance any New York State interest, nor the interest of any New York State domiciliary.") (internal quotation marks and citation omitted).

[60] The district court overlooked these clear statements of federal policy when it concluded that *Garamendi* is "readily distinguishable" because it "involved a state statute that expressly conflicted with foreign policy objectives implicit in executive

state-law claims are preempted by the Constitution's exclusive assignment of foreign policy to the federal government.

B. Plaintiffs' State-Law Claims Are Barred By The Government-Contractor Defense

As the district court recognized, plaintiffs' state-law claims are also barred for the independent reason that they would significantly undermine the government's discretion to design and deploy the instruments of war. As discussed in detail in the briefs in the veterans' cases, which are incorporated by reference herein, there is no genuine issue of material fact that: (1) the United States approved reasonably precise specifications for Agent Orange and the other herbicides at issue in this case; (2) the equipment supplied by defendants conformed to those specifications; and (3) all dangers in the use of the equipment that were known to the manufacturers were also known to the government. *Cf. Boyle*, 487 U.S. at 512. Accordingly, the district court properly ruled that plaintiffs' state-law claims are barred by a federal government-contractor defense rooted in the discretionary-function exception to the FTCA. *See* SPA36.[61]

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agreements." SPA66. Just as in *Garamendi*, plaintiffs' invocation of state law "expressly conflict[s]" with U.S. policy concerning war reparations; that policy (to deny reparations) is implicit in the United States' 1995 Agreement and the 2002 Memorandum of Understanding with Vietnam.

[61] In addition, as discussed above (*see* pp. 73-77), plaintiffs' claims are barred by a government-contractor defense rooted in the combatant-activities exception to

V. THE DISTRICT COURT PROPERLY DENIED ADDITIONAL DISCOVERY ON CLAIMS BASED ON AGENTS WHITE AND BLUE

As noted above, the district court granted plaintiffs full access to the record in the MDL-381 litigation, which contains an enormous amount of material relating to the procurement and manufacture of Agent Orange and other herbicides, to simplify discovery in this case. Plaintiffs argue that this prior discovery was insufficient for them to pursue their claims based on Agent White and Agent Blue (neither of which contained dioxin), and so they were entitled to additional discovery on those claims. Because plaintiffs' claims are barred by the numerous legal obstacles discussed above—ranging from the absence of any actionable international-law norm to the preclusion of any state-law claim based on the exclusive federal foreign affairs power—any further discovery into Agent White and Agent Blue would have been useless.

In any event, plaintiffs cannot be heard now to complain that they received insufficient discovery, having all but abandoned their discovery requests regarding Agents White and Blue in the court below. In its discovery orders of March 18, 2004, the district court gave plaintiffs several months to review the MDL-381

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the FTCA. That exception, as well as a long line of federal-court precedent, make clear that there is no duty to avoid harm to persons residing in a country with whom we are at war. This federal no-duty principle preempts state law to the contrary, and extends to the government's contractors, who acted in the military effort only at the government's behest.

record and permitted plaintiffs to seek additional discovery upon a showing that the MDL-381 record was insufficient. *See* A233; *see also* A524-525 (Tr. of Aug. 16, 2004 hearing). In August 2004, plaintiffs moved to compel defendants Dow, Diamond Shamrock, Hercules, Monsanto, and T.H. Agriculture & Nutrition to produce documents beyond those contained in the MDL-381 record. A263-267. That motion, however, made no mention of Agents Blue or White. A265 (citing need for production of documents relating to "the defendants' knowledge and consideration of issues of international law and war crimes in relationship to the use of chemical weapons"; "documents regarding the use of Agent Orange in Vietnam during the period 1971-1975"; and documents generated after the close of discovery in MDL-381).

Indeed, plaintiffs never so much as attempted to make a showing of need for additional discovery on Agents Blue and White until January 18, 2005—after defendants' summary judgment motions on Agent Orange had been briefed and were scheduled for hearing the following month—when they filed a Rule 56(f) application to stay consideration of the summary judgment motions. At least with respect to Agent Blue, the Rule 56(f) application signaled plaintiffs' intent to raise wholly new discovery requests: although plaintiffs specifically alleged that Agent Blue was manufactured and supplied to the United States by defendant Ansul, Inc., *see* A1689-1691, they had never served a single discovery request on Ansul, *see*

A271-287. The district court acted properly within its broad discretion in denying this belated request for further discovery.

Furthermore, although the district court did offer plaintiffs the opportunity to raise their request for discovery on Agent White at the summary judgment hearing, *see* A2267, plaintiffs never did so, effectively abandoning the argument, *see* A2304-2541. In any event, contrary to plaintiffs' contentions (Pl. Br. 103), there had been extensive discovery on Agent White in MDL-381. In the court below, Dow Chemical Company filed interrogatory responses, deposition excerpts, and documents from the MDL-381 proceeding as examples of the voluminous discovery taken by plaintiffs in the MDL-381 proceedings, including discovery into Agent White. Brock 2/8/05 Aff. Exs. 1-8, 11-12.[62]

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[62] Plaintiffs in MDL-381 explicitly sought discovery of "any and all documents concerning … Agent White." *See* A2126. Dow produced voluminous documents in response to plaintiffs' discovery requests relating to Agent White, including (a) communications among Dow, other defendants, and the United States; (b) filings with federal agencies, registration, and product labels; (c) contracts between Dow and the United States for Agent White; (d) pre-1970 communications regarding dioxin and Agent White; and (e) the manufacturing process of Agent White and its components. A2133-2146. The government also produced a large volume documents relating to Agent White. *See, e.g.*, A2150-2217. Dow and government witnesses were questioned regarding Agent White. *See* A2218-2240. An order dismissing Agent White claims in all MDL-381 cases was not entered until May 29, 1984—after the May 7, 1984 settlement agreement in the lead class action. Brock 2/8/05 Aff. Exs. 9 and 10.

The MDL-381 record on Agent White amply supports summary judgment on the government-contractor defense for Agent White. Agent White was a mixture of the amine salts of picloram, a Dow proprietary product,[63] and 2,4-D. It did not contain 2,4,5-T, and thus did not contain dioxin. A2240. The government contracts precisely specified the composition of Agent White in the same fashion as for Agent Orange. *See* Brock Aff. Ex. 8, at Ex. I. The military's specification of Agent White embodied the same discretionary determinations by government officials as for Agent Orange: decades of research, screening and testing of thousands of candidates, and experience with military herbicides. Brock Aff. Exs. 4-7, 11-12. These discretionary determinations for Agent White, as for Agent Orange, are protected by the government contractor defense.

The second element of the government-contractor defense—compliance with specifications—is similarly met. There is no evidence that the government rejected any deliveries of Agent White. The military used more than 5 million gallons of Agent White in Vietnam, demonstrating its compliance with specifications. *See id.* at I-10.

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[63] Agent White had the same chemical composition as a domestic herbicide called Tordon 101. However, unlike Tordon 101, Agent White was not registered for domestic use and could not be sold in the United States. The military controlled directions for use in Vietnam, warnings, packaging, and markings, which were quite different from Tordon 101. Brock 2/8/05 Aff. Exs. 4, 11.

Finally, the third element—disclosure of known hazards—is straightforward. Both picloram and 2,4-D remain registered herbicides today. *See* Brock 2/8/05 Aff. Ex. 13 at 9. The MDL-381 litigation generated no evidence that Dow knew in the 1960s that hexachlorobenzene ("HCB")—identified by plaintiffs as a toxic contaminant in Agent White (Pl. Br. 103)—was present in picloram, or that either picloram or any amount in HCB that might have been present in picloram was known to pose a significant hazard at that time, or thereafter. In fact, HCB was "used from the 1940's to the late 1970's as a fungicide on grain seed such as wheat." EPA, *Proposed National Action Plan for Hexachlorobenzene*, 65 Fed. Reg. 77,026, 77,028 (Dec. 8, 2000). Given that its use as an active ingredient at enormously higher concentrations was common until the 1970s, the presence of HCB at trace levels in Agent White could not reasonably have been regarded as a significant hazard by Dow or the military during the 1960s. The military reviewed the available toxicological data for Agent White. *See* Brock 2/8/05 Aff. Ex. 11, at 19-22. In addition, it conducted its own toxicological testing of Agent White. *See* A2179-2180. The military concluded that the use of Agent White in Vietnam did not pose unacceptable hazards. *See* Brock 2/8/05 Aff. Ex. 5, at 182. Appellants do not identify any hazard known to Dow at the time but not known to the military. Accordingly, no reasonable fact-finder could have ruled in favor of plaintiffs on Agent White.

VI. THE DISTRICT COURT PROPERLY RULED THAT PLAINTIFFS SHOULD NOT BE AWARDED INJUNCTIVE RELIEF IN VIETNAM

The district court dismissed plaintiffs' prayer for injunctive relief not only because plaintiffs failed to a state a claim for relief, but also because the massive environmental remediation plaintiffs requested would be "wholly impracticable" and "compromise Vietnam's sovereignty." SPA36. The court explained that the proposed injunction would involve huge swathes of Vietnamese territory "over which the court has no jurisdiction." SPA37. That judgment was sound.

In arguing that the district court erred in dismissing their claim for injunctive relief, plaintiffs ignore the highly deferential standard of review applicable to that decision. The denial of an injunction is subject to review only for abuse of discretion. *Bano v. Union Carbide Corp.*, 361 F.3d 696, 716 (2d Cir. 2004); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982); *see also Morrison v. Work*, 266 U.S. 481, 490 (1925) ("A mandatory injunction, like a mandamus, is an extraordinary remedial process, which is granted, not as a matter of right, but in the exercise of a sound judicial discretion.").

A court may validly deny injunctive relief where supervising the injunction would be impracticable. *See, e.g.*, *Bethlehem Eng'g Exp. Co. v. Christie*, 105 F.2d 933, 935 (2d Cir. 1939) (Hand, J.); *United States v. American Cyanamid Co.*, 556 F. Supp. 361, 373 (S.D.N.Y. 1983), *aff'd in part, rev'd in part*, 719 F.2d 558 (2d

Cir. 1983). Moreover, the power to enjoin activities on foreign soil "should be exercised with great reluctance when it [would] be difficult to secure compliance . . . or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country." *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 647 (2d Cir. 1956); *see also McKusick v. City of Melbourne*, 96 F.3d 478, 488 (11th Cir. 1996) ("There is not an absolute right to an injunction in a case in which it would impair or affront the sovereign powers or dignity of a state or a foreign nation.") (internal quotation marks and citation omitted).

The injunctive relief plaintiffs seek in this case fails on both counts. The injunction plaintiffs seek is utterly impracticable, as it would require the district court to supervise remediation of more than 5.5 million acres, Pl. Br. 24, that are more than 10,000 miles away and all owned by the Socialist Republic of Vietnam. And the district court's oversight plainly would be fraught with the potential for diplomatic discord. If "great reluctance" was appropriate when considering an injunction to be enforced on Canadian soil, *Vanity Fair Mills*, 234 F.2d at 647, refusal was certainly a legitimate choice in this case.

This Court's decision in *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004), clearly establishes that the district court's decision to rule out injunctive relief was reasonable. In *Bano*, plaintiffs allegedly injured by chemicals released

in the Union Carbide India Limited disaster at Bhopal, India, filed suit, seeking, *inter alia*, remediation of the former plant site and neighboring properties. *Id.* at 705. The district court denied injunctive relief, reasoning that it could not dictate how a foreign government "should address its own environmental issues" and that it "would have no control over any remediation process ordered." *Id.* at 708. Given the "difficulty that a United States court would have in controlling and overseeing the progress of remediation in India," this Court found no abuse of discretion. *Id.* at 717.

As the district court noted, the injunctive relief plaintiffs seek here would be even more infeasible and inappropriate than in *Bano* because the area to be remediated is "far larger and [more] indeterminate." SPA37. If the court in *Bano* did not abuse its discretion in refusing to order an injunction to be performed on the soil of India, a nation with which the United States has close and friendly relations, the court here certainly acted within its discretion in refusing an injunction to be performed on the soil of a state with which our Nation has more fragile ties.

Plaintiffs place great reliance on a newspaper article quoting a Vietnamese government official expressing sympathy for plaintiffs injured by Agent Orange, and argue that this article establishes that Vietnam would welcome an American court's jurisdiction to oversee and control environmental remediation on

Vietnamese soil. *See* Pl. Br. 108-10. The district court hardly abused its discretion by failing to draw that remarkable conclusion. Even if the multiple hearsay in that article were fully credited, it would not establish what plaintiffs suggest. The strongest quoted statement—"[w]e think this is a legitimate action by the Vietnamese victims" (A2061)—does not even address the request for injunctive relief. At most, that quotation suggests that American companies should be liable to those injured by Agent Orange, but that is a far cry from acknowledging the district court's supervisory authority over the cleanup of Vietnamese lands. Moreover, this newspaper article does not even purport to state the official views of the government of Vietnam. Such an article is an impossibly slender reed upon which to hang an assertion of jurisdiction over the lands in and owned by the government of Vietnam.

Plaintiffs' suggestion that the order denying injunctive relief was premature (*see* Pl. Br. 108, 111) is equally without merit. The facts justifying the dismissal of injunctive claims—the distance of Vietnam, the size of the area claimed to be contaminated, and the failure of the Vietnamese government to intervene or formally express support for the requested relief—were all pleaded or judicially noticeable and completely uncontested. Under these circumstances, the bare suggestion that the issues will be better "ventilated" later in the proceedings, *see* Pl. Br. 108, is insufficient to warrant reversing the district court's judgment. Even

if this Court were to remand this case for a liability determination, it should affirm the district court's dismissal of the prayer for injunctive relief.[64]

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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[64] If this Court were to remand this case for further proceedings on liability, it should be noted that VAVAO has no standing to proceed. As the district court noted in its opinion, this Court has held that associations lack standing to pursue damages claims on behalf of its members. *See* SPA41 (citing, *inter alia*, *Bano*, 361 F.3d at 714). The district court's determination that VAVAO had standing to participate in this action depended critically on VAVAO's meritless claims for injunctive relief. *See* SPA42. Because, as discussed in the text, the district court properly ruled out injunctive relief, VAVAO has no standing to continue litigating this case.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and this Court's order of July 13, 2005, permitting the parties to file briefs no longer than 28,000 words, counsel for Defendants-Appellees certify that this brief contains 27,878 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief has been prepared using Microsoft Word in a proportionally spaced 14-point Times New Roman typeface.

/s/ Leondra R. Kruger
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CERTIFICATE OF SERVICE

I, Leondra R. Kruger, hereby certify that on this 6th day of February, 2006, I caused a true and correct copy of Defendants-Appellees' Brief to be delivered by Federal Express to the following:

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